

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**Criminal Appeal No. 1262 of 2013
with
Criminal Application Nos. 131 and 298 OF 2018**

Vilas Dagdu Shinde
Age:62
R/o. Shivaji Nagar, Room No.163,
Sion, Koliwada, Sion (E).

....Appellant/
Org.Accused No.5

Versus

The State of Maharashtra
At the instance of Sion Police Station
C.R. No.286/2011

...Respondent

**with
Criminal Appeal No. 1283 of 2013**

Abhijit Bharat Babar
Age 24 years
r/o. Mahatma Phule Nagar,
in front of Anil Decorators
IIT Market, Powai,
Mumbai 76.

....Appellant/
Org.Accused No.3

Versus

The State of Maharashtra
(at the instance of DCB CID
C.R. No.74/2011)
Sion Police Station
C.R. No.286/2011

....Respondent

with
Criminal Appeal No. 498 of 2014
with
Criminal Application Nos. 297 AND 1520 OF 2018
and
Interim Application No.855 OF 2020

1. Ganesh Devidas Shinde alias Ganya
r/o.Room No.116, Akash Society,
Behind Roopam Theater, Sion,
Mumbai.
2. Shri Ganesh Dhondiram Nichite alias
Bajrang alias Taklya Ganya
r/o. Shaufan Chowki, Near Khandoba
Temple, Katwadi pada, Zopadpatti,
Ghatkopar (W), Mumbai.

....Appellants/
Org.Accused No.1
& 2

Versus

The State of Maharashtra
(at the instancace of DCB, CID
C.R. No.74/2011)
Sion Police Station
C.R. No.286/2011

....Respondent

with
Criminal Appeal No. 543 of 2014

Mangesh Mohan Chavan
r/o. Room No.12, Chawl No.12,

Shivshakti Chawl Maharashtra Nagar,
Mankhurd, Mumbai 88.

....Appellant/
Org.Accused No.4

Versus

The State of Maharashtra
(at the instance of DCB, CID
C.R. No.74/2011)
Sion Police Station
C.R. NO.286/2011

....Respondent

Mr. Aniket Vagal, advocate for the appellant in criminal appeal
No.1262 of 2013.

Mr. Kuldeep S. Patil, advocate for the appellants in criminal appeal
Nos. 498 and 543 of 2014.

Ms. Apeksha Vora, advocate for the appellant in criminal appeal No.
1283 of 2013.

Mrs. M. M. Deshmukh, APP for the State.

**CORAM : PRASANNA B. VARALE
& S.M. MODAK, JJ.**

Reserved On : 12th February 2021.

Pronounced On : 23rd April 2021

JUDGMENT (PER S.M. MODAK,J)

These appeals arise from a judgment of conviction
delivered by Special Court MCOC Greater Mumbai in MCOC Spl.

Case No.20 of 2011 on 31.10.2013. The case pertains to an era when life of Mumbai was faced with many extortion cases. It has affected all sorts of businessmen including industrialists, builders, etc. In the case before us, the entrepreneur dealing with travel business was the scapegoat of the extortionist.

2. The victim/first informant/PW No.12 was having a travel business office at Sion Koliwada, Antop Hill, Mumbai. His business name was "Sangeeta Travels". There are offices having similar business and other business in and around his office. The first informant was terrorized by showing chopper and he was abducted by Ganesh Shinde - accused No.1. He was accompanied by Ganesh Nichite - accused No.2. They were accompanied by one unknown person whose identity is subsequently disclosed as accused No.4 - Mangesh Chavan.

3. Accused Nos.1 & 2 were known to first informant earlier. They were selling movie tickets illegally. The abductors used the Innova car of the first informant. PW No. 11 drew the Innova car as dominated by the abductors. The apparent reason for abduction was extracting huge amount of Rs.5 lakh from the victim. But trial court felt it otherwise. If the ransom could not have been paid the abductors might have committed his murder. They took the victim to Powai. Their companion joined them during journey. He was accused No.3 Abhijit.

4. The first informant made all attempts to arrange for the ransom amount. He was successful. Accused No.5 Vilas Shinde collected the ransom amount from the office of first informant PW No.12. Office staff of first informant/PW No.1 delivered the amount. The abductors set free the first informant. This happened on 03.9.2011 .

5. The victim was traumatized due to this incident. He did nothing till 3.9.2011. He alongwith his wife dared to visit Sion Police Station on 3.9.2011 at 21.15 hrs. for their help. PW No.18 PSI Devkate listened them and recorded his complaint as an offence under Sections 363,364(A),386, 506(II),34 IPC.

6. Crime Branch Unit No.4, Mumbai investigated the matter and arrested in all 6 accused persons. PW No.19 API Nikam revealed involvement of crime syndicate headed by Ganesh - accused No.1. He sought approval to proceed under the provisions of MCOC Act. As a result PW No.20-ACP Kale carried out further investigation. Sanction was obtained from PW No. 13 – Arup Patnaik.

7. All accused faced trial for the offences punishable under Sections 364,323,386,392, r/w Section 34, 120(B) of IPC and under section 3(1)(ii), 3(4) of Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as MCOC Act) under section 4 read with S. 25 of the Arms Act. Their defence is of denial. Twenty witnesses

deposed in favour of the prosecution. Whereas 2 witnesses deposed in support of theory of raising money by pledging ornaments. Accused No. 1 wants to claim source of Rs. 15,000/- which was seized during investigation being part of extorted money. According to accused No.1 this amount was raised after pledging the ornaments by his sister Mrs Laxmi Malve to Jeweller Mr Chandresekhar Mehta. It does not find favour with the trial Court.

8. Trial Court acquitted accused No.6 Ravi from all charges whereas --

Accused Nos.1 to 5

were convicted for the offences punishable under Sections 364, 386 r/w Section 120 B of IPC

and

under Section 3(1)(ii) and Section 3(4) of the MCOC Act, 1999.

Accused Nos.1 and 2

were convicted for the offence punishable under Section 4 read with section 25 of the Arms Act

whereas accused no.1

was convicted for the offence under Section 323 of IPC only.

Accused Nos.1 to 6 were acquitted for the offence punishable under Section 392 r/w. Section 120B of IPC.

9. Accused Nos.1 to 5 are before this Court as appellants. We

have heard learned advocate Shri Kuldeep Patil (in appeal No.498 and 543/2014) and Shri Aniket Wagal (in Appeal No.1262/2013) and Smt. Apeksha Vora (in Appeal No.1283/2013). Learned APP Smt. Deshmukh argued for State.

10. Out of 20 witnesses, topic wise witnesses are as follows:-

a) **On the point of abduction**

i) PW 9 Changayya Naidu, Sweeper

ii) PW 11 Suresh, driver

iii) PW 12 Satish Nayak

b) **On the point of arrangement of ransom amount**

PW-2 (name hidden)

PW-3 (name hidden)

PW-4 (name hidden)

PW-5 (name hidden)

PW-1 (on the point of handing over amount to accused no.5)

c) **On the point of various panchnama**

PW-6 Vyankatesh Kalidas Devendra

PW-14 Prakash Mahadev Patil

PW-15 Shivenkumar Tiwar

PW-16 David Rmugam Devendra

d) **On the point of proving call details**

PW-7 Varunkumar Subholchandra Banarjee.

PW-10 Yogesh Shrikrishana Rajapurkar

- e) **On the point of initial investigation**
PW-18 Ramchandra Dasharath Devkate
PW-19 Sanjay Bhikaji Nikam
- f) **On the point of investigation after invocation of MCOC Act**
PW-13 Arup Mohan Patnayak.
PW-20 Digambar Dhondopant Kale
- g) **Others**
PW-8 Deepak Narayan Jadhav –Tahsildar.
PW-17 Dr. Prashant Vinayak Ghuge—M.O.

11. **The summary of points raised during their arguments is as follows:-**

- a) The evidence of 3 so called eye witnesses PW Nos.9,11 and 12 is not reliable and trustworthy.
- b) Inaction on the part of PW Nos. 11 and 12 from 3.9.2011 (after the incident) till lodging of FIR on 4.9.2011 is surprising and sufficient enough to disbelieve them.
- c) So called explanation given by PW No.9 about approaching Matunga Police Station is not supported by any evidence and is false.

- d) There is no consistency in between PW No.12 victim, PW No.11 driver on one hand, PW Nos.2,3,4,5 (on the point of raising ransom amount and giving it) on second hand and PW 1 Basarvaj (office staff) on the third hand.
- e) Huge amount of Rs.5 lakhs was alleged to be paid as ransom whereas meagre amount of Rs. 64,429/- was seized.
- f) There is no evidence to connect the currency notes comprising ransom amount and currency notes recovered.
- g) There are defects in parade and identification evidence is weak.

12. Regarding invocation and compliance of the provisions of MCOC Act, their points of argument are summarized as follows:-

- a) the alleged activity headed by accused No.1 Ganesh does not fall within the definition of continuous unlawful activity.
- b) there are no 2 chargesheets filed against accused Nos. 2 to 5.
- c) there is no evidence to suggest that concerned Courts have taken cognizance in 2 referred charge-sheets.

d) sanction is defective and there is non-application of mind by the authority.

13. Alternatively there is submission about reduction in sentence as sentence is too harsh.

14. As against this, learned APP supported the judgment. She justified the judgment by canvassing following points:-

a) there is no delay in approaching police by victim. The time spent was natural considering the trauma sustained.

b) the evidence of PW No.9,11 & 12 is reliable. Inconsistencies, if any, are natural inconsistencies and that is minor aspect.

c) the evidence of PW Nos.2 to 6 on one hand & PW Nos.1,9,11 and 12 corroborates each other.

d) the story put forth by defence about custody of cash is rejected by the trial Court.

e) recovery of chopper and cash attributes knowledge on the point of concerned accused persons.

f) the identification parade was followed correctly.

g) provisions of MCOC Act were rightly invoked and were complied scrupulously.

15. Apart from above points, there is one more point raised by learned advocate Smt. Vora while arguing on behalf of appellant in appeal No.1283/2013. This point does not relate to her client accused No.3. She had opted to take up this point. According to her, role attributed to accused No.3 Abhijit in the charge 3rdly under section 386 r/w 120B of IPC is wrong. As per prosecution story in fact accused no.4 Mangesh joined accused nos.1,2 since beginning and later on accused No.3 joined. Whereas while framing that charge, the trial Court has interchanged in between accused Nos.3 and 4.

16. According to her, it has caused prejudice to accused in general and to accused Nos.3 and 4 in particular. Learned APP though fairly admitted the mistake in that head of charge, there is no prejudice to any of the accused person. She emphasized on participating in the trial without protest by any of the accused persons. She relied upon two judgments. Hence, following points arise for our determination:-

POINTS

1.	Whether due to defect in charge – is their any prejudice caused to any of	<u>No</u> <u>page No. 15 to 19</u>
----	---	---------------------------------------

	the accused?	
2.	Whether the offence under Sections 364,386 r/w. 120B of IPC is proved against accused nos.1 to 5?	Offence under Section 364, 386 r/w Section 34 of the IPC proved against Accused Nos. 1 to 5. <u>page no. 20 to 59</u>
3.	Whether offence under section 323 of IPC is proved against accused no.1?	<u>Yes</u> <u>page no. 20 to 59</u>
4.	Whether offences under Section 4 r/w.25 of the Arms Act is proved against accused no.1, 2.	<u>No.</u> <u>page no. 20 to 59</u>
5.	Whether the accused no. 1 to 5 have committed an offence of organized crime under section 3(1)(ii) of MCOC Act ?	<u>Yes</u> <u>page no. 60 to 73</u>
6.	Whether the accused no. 1 to 5 being members of organized crime syndicate have committed an offence under section 3(4) of MCOC Act ?	<u>No</u> <u>page no. 74 to 76</u>
7.	Whether the approval and sanction has granted properly ?	<u>Yes</u> <u>page no. 60 to 73</u>
8.	Whether sentence imposed by the trial Court is excessive?	<u>Yes</u> <u>page no. 77 to 79</u>

9.	Whether interference in the judgment of the trial Court is called for?	<u>Partly</u> <u>page no. 77 to 79</u>
10.	What order?	<u>As per final order</u>

GENERAL OBSERVATIONS ABOUT THE JUDGMENT

17. With the assistance of learned advocate, we have perused the judgment but what we find is that even though offence under Section 364 A of IPC is mentioned in the charge-sheet, the trial Court has framed the charge under Section 364 of IPC. In both these sections kidnapping/abduction is common. The purpose is different. When for committing murder the act is committed, offence falls under Section 364 whereas when the purpose of kidnapping is for ransom etc. that falls under Section 364 A of IPC. Chargesheet says that the victim was abducted for pressurizing him to part away the ransom amount of Rs.5 lacs. Whereas in the charge firstly the trial Court has framed the charge under Section 364 read with Section 34 of IPC by describing the ingredients of Section 364 of IPC that is to say for committing murder or putting in danger of murder. Nothing from the record is pointed out that why there is a deviation from Section 364 A of IPC to Section 364 of IPC. So chargesheet was filed under section 364-A of IPC whereas trial court framed charge under section 364 of IPC prosecution kept mum and adduced evidence as if charge is framed under section 364-A of IPC.

Some time it happens that intention to kill and intention to extract ransom are closely connected. So it is difficult to find out the real intention. Fact remains that the witnesses were examined and accused have participated in the trial. So we have to scrutinize the evidence with a view to find that whether offence under section 364 of IPC is disclosed ? We have also to ascertain what is to be done of the evidence adduced on the point of payment of ransom ? And whether it is feasible to frame charge under section 364-A IPC at this stage ?

So also we find that the evidence on the point of hatching a criminal conspiracy falls short to prove the offence under Section 120B of IPC though the trial Court has convicted accused Nos. 1 to 5 by taking recourse to Section 120B of IPC. We will give the reasons for that herein after.

18. There is some commonness in between Section 386 and Section 364 of IPC. So also offence under Section 386 is converted to Section 392 of IPC when robbery is committed.

19. It is pertinent to note that though the trial Court has convicted accused Nos.1 to 5 for the offence punishable under Section 386 of the IPC, on the same evidence they were acquitted for the offence punishable under Section 392 of the IPC. Under Section 390 of the IPC, extortion becomes robbery when the victim is put to the fear of instant death or hurt or wrongful restraint and induces to deliver the property; whereas putting the victim to fear of death or grievous

hurt while committing extortion is also the ingredient of Section 386 of the IPC. The robbery defined under Section 390 of the IPC is made punishable under Section 392 of the IPC. The scope of Section 390 is wider than the Section 386 of IPC. So also, extortion becomes in Section 390 of IPC when the fear is instant whereas it is not so in Section 386 of IPC.

POINT NO.1

SHOWING WRONG INVOLVEMENT TO A3 AND A 4.

20. We have read the summary of allegations given in the chargesheet. Prosecution has alleged that accused No.4 Mangesh Chavan accompanied accused Nos.1 & 2 since beginning whereas it is the accused No.3 who joined lateron. Whereas in the charge framed by the Special Court and more specifically under the head thirdly the following role is alleged --

“Accused Nos. 1 to 3 abducted the victim and accused No.4 joined subsequently.”

21. So it is clear that prosecution has not alleged the role to accused Nos.3 and 4 in the manner referred to in the charge-sheet. Question does not rest there. This Court has to ascertain what is its effect on the right of the accused to fair trial? Fair trial includes all opportunities to defend the material evidence against him. So it implies

right to know correct material/evidence against him. If prosecuting agency places wrong evidence/forgets to produce proper evidence (claims to rely on it afterwards) it does not amount to conducting fair trial. Similar duty is cast upon the trial Judge to ensure that trial is conducted fairly.

22. There are guidelines given in the statute about manner of framing charge. That find place in section 211 to section 224 of Cr.P.C. (Chapter XVII, Part A). Section 212 of Cr.P.C. talks about particulars to be included in the charge. Whereas Section 223 of Cr.P.C. talks about the persons who can be charged together. This procedure is required to be followed by every Judge who frames the charge. Cr.P.C. also provide guidelines about effect of irregularities in trial. Chapter XXXV incorporate those provisions. Error in framing of charge is not specifically provided as an irregularity under Section 460 and under Section 461 of Cr.P.C. Error in the framing of charge is separately considered in section 464 of Cr.P.C.

23. If we read the provisions of Section 464 of Criminal Procedure Code, we can find that findings, sentence or order of the Court is not treated as invalid merely on the ground of an error or omission in the charge. This is the general principle. There is one exception. If there is failure of justice then there are two contingencies. If there is omission to frame a charge, that omitted charge can be framed and, thereafter, trial can be conducted. If there is an error in the

charge, then also new trial has to be conducted.

24. Sub-section(2) to Section 465 of Cr.P.C. further puts a restriction on giving benefit to the accused in case of error, omission in any proceedings. The said sub-section is couched in a wider sense. Not only in case of error, omission in the charge but if such lacuna is there in any proceedings, further course of action can be resorted to. There is a one rider “*while deciding the issue of failure of justice*” the Court has to ascertain whether there was an opportunity available to the accused to take an objection and whether that opportunity has been exhausted. In other words, if opportunity is available and if it is not exhausted, one of the factor for deciding ‘*a failure of justice*’ is not available to the accused. According to learned Additional Public Prosecutor even though there is a defect in charge 3rdly (while describing the role attributed to accused nos.3 & 4) there is no failure of justice caused to those two accused and also to other accused persons.

25. In the judgment of “*Mala Singh & ors. V/s State of Haryana reported in (2019) 5 SCC 127*”, the issue before Hon’ble Supreme Court was “whether the Court can convict the accused for the offence punishable under Section 302 by resorting to provisions of Section 34 of IPC” (when there is no charge by referring to Section 34 but there was a charge by applying the provisions of Section 149 of IPC). Hon’ble Supreme Court has reiterated the interpretation given in earlier judgments including the judgment in case of *Laxman Singh v/s.*

***State*¹**. It is true that there is a difference between the wordings and ingredients of Section 149 and Section 34 of IPC. Considering the facts of that case, Hon'ble Supreme Court was pleased to convict the appellants Nos.2 and 3 for the offences punishable under Section 324 of IPC for their individual acts (instead of punishing them under Section 302 read with Section 34 of IPC). The principles laid down therein will certainly be useful to us.

26. Whereas in the case of ***K.Prema S.Rao and anr. v/s Yadla Shriniwas Rao*** reported in (2003) 1 SCC 217 the accused was tried for the offences punishable under Section 498A, 304 B of IPC. There was conviction under Section 498A of IPC. The High Court of Andhra Pradesh convicted the accused under Section 306 of IPC instead of Section 304B of IPC. There is also discussion by considering the provisions of Section 221, 215 of the Code of Criminal Procedure. On facts the conviction under Section 306 of IPC was upheld "even though there was no charge under that Section". Whereas in a case before us charge 3rdly was not framed for a wrong section of the IPC but there was an error in describing the role attributed to the accused Nos. 3 and 4. Now the Court has to satisfy himself as to whether there was failure of justice.

27. When considered by keeping in mind the above test, we can find that either accused Nos.3 and 4 or any of the accused have not

¹ AIR 1952 SC 167

faced with the difficulty of facing a trial consisting of all together new case because the prosecution have examined witnesses on the point of involvement of accused Nos.3 and 4 about the act of kidnapping and extortion. Concerned witnesses have described the role given to accused Nos. 3 & 4 as per original chargesheet. The concerned witnesses are PW No.9 Changayya (sweeper) PW No.11 – driver Suresh and PW No.12 – first informant Satish Naik. They have not deposed as per the role described to accused Nos. 3 and 4 in the charge but they have deposed as per the role attributed to them as per chargesheet. These two accused persons have also participated in the trial.

28. There is one more reason for rejecting the grievance of failure of justice. Because from the trial Court record nothing was pointed out to us that objection was taken. Learned Advocate Smt. Vora made an attempt by submitting before us that accused No.4 was not represented at the time of framing of a charge on 20.05.2013 and in fact he filed the Vakalatnama on 17.6.2013 through Advocate R.V.Tiwari. She may be right insofar as these factual aspects are concerned but it nowhere take us to the possibility of failure of justice. So for the above discussion there is no merit in granting any of the reliefs as contemplated in Section 464 and 465 of the Code of Criminal Procedure. **We answer this issue in the negative.**

POINTS NOS.2, 3 & 4 :-

29. The judgment of the trial Court is challenged mainly on the ground of :-

- (i) inconsistency in between the evidence of prosecution witnesses,
- (ii) delay on the part of first informant to approach the police and
- (iii) the conduct of the first informant, his driver in not protesting the act of abduction and the act of threat given to them throughout the journey from the office at Sion circle till the time first informant was dropped at Kanjurmarg signal.

30. It is pertinent to note that police have applied stringent provisions of MCOC Act. They have invoked the provisions of said Act when the incident of abduction had taken place. Police have verified the record of the leader of the syndicate i.e. accused No.1 Ganesh. Whether the provisions of MCOC Act were invoked rightly or wrongly will be decided later on. But when such is a situation, the evidence cannot be appreciated by the Court in a manner in which evidence is appreciated in a criminal trial involving offences under Indian Penal Code plainly. So the objection about not protesting the act of abduction immediately, the act of not approaching the police immediately cannot be appreciated in a normal way. This is so because the wrong doers are not the persons coming into conflict with law for the first time but they are professional criminals. After appreciating the evidence of relevant witnesses, it will be decided whether yardstick for appreciation of evidence different from normal yardstick will be applicable or not.

31. If we read the evidence of PW No.9 (office boy), PW No.11 (driver) and PW 12 (victim), the following facts emerge :-

(a) PW No. 9 came to the office as usual on 03/09/2011 at 7.00 a.m. Accused No.1, accused No.2 Taklya and one more boy came there. Accused No.1 inquired with him about the owner. All of them stood outside the office.

(b) PW No.12 the victim, came to office at about 8.00 a.m. Changayya (PW No. 9) was sitting. Accused No.1 followed the victim.

(c) PW No. 11 (driver) came to the office with Innova car. He heard exchange of words in between his owner Satish Nayak and accused No.1 Ganesh Shinde.

(d) Accused No.1 asked Satish Nayak (PW No. 12) about owner of the Innova car. He threatened the owner.

(e) When the owner shown reluctance to come out of the office, the accused No.1 threatened him by taking out a chopper.

(f) Accused No.1 compelled the owner PW No. 12 to sit in the Innova car.

(g) Again accused No.1 forced owner to occupy the car by brandishing the chopper.

(h) In the car, PW No. 11 was driving and accused No.2 and another boy were sitting on the front side whereas the victim was sitting behind the driver and the accused No.1 was sitting near to him.

32. From the above, it is clear that on more than one occasion, the accused No.1 has created terror in the mind of the owner so that he will act as per his directions. This can only be the intention if the chopper is shown. It is pertinent to note that the owner was knowing the accused Nos.1 and 2 earlier to the incident for the reason that accused No.1 was selling movie tickets near the theater at Sion and accused No.2 used to roam along with accused No.1. When we have tried to understand the psychology of the victim – PW No.12, it is true that one cannot understand it by peeping into his mind. It can be understood by looking at conduct. How he has reacted, behaved. It includes acts as well as omissions. That is to say that what victim - PW No.12 could have done and what he has not done. All this exercise gains importance in view of the fact that there was emphasis on behalf of the appellants on the overall conduct of the victim during this episode.

33. If we could guess the probable conduct of the victim (when he was forced to sit in the car) we may say that he could have refused to sit by action, he could have shouted for help or he could have phone called any one or he could have asked two of his colleagues PW No.9 and PW No.11 to do something etc. But the victim has not resorted to any of such action. Instead he had chosen to sit in the car. On deeper scrutiny of the evidence, we find that victim had chosen to sit in the car probably due to the fact that he was knowing accused Nos. 1 and 2 earlier. He was knowing who are the persons forcing him to accompany them. If the abductors were unknown to him, then the reaction of the victim could have been different. Unless Court will understand the psychology of the witness prevailing at the time of incident, it will not be proper to appreciate the evidence in the context of defence objections.

34. After witnessing the incident adjoining shopkeepers have gathered at the spot. PW No.11 and 12 both were cross-examined on the point of situation prevailing at the spot. The road in front of the office of PW No.12 is normally used by passerby. No police patrolling is there in that area. Several vehicles are not being parked in that area. Even there is no police at Sion circle. There are other offices of tourist company at the spot. So also cinema theater is situated opposite the office. There are 3 roads near the spot. In such surrounding also, in the morning, there was no rush of people.

35. The spot panchnama at Exhibit 106 was carried out by PW No.18 on 4.9.2011. The panchnama covers the place of office, then towards Powai. From the above it can very well be said that the office of PW No.12 is surrounded by offices, cinema theaters etc. It is but natural there would be movement of public at the spot. The incident took place at 8.00 a.m. so there may not be much movement of the public near the spot.

36. So no doubt it is true that spot is surrounded by shops. Some of the shopkeepers were knowing and some of them are not knowing the victim and his colleagues. Then "why they have not protested or not reacted" is the question which will certainly crop up in the mind. We got a answer from the facts stated by PW No.12. Accused No.1 threatened them to go and that is why persons got scared and they went away. It is the normal tendency in the era of globalization. It is usual phenomena to keep yourself away from the surroundings.

37. We have perused the cross examination of the three witnesses on this aspect. We do not find any substance so as to suggest other possibility. Moving a person from one place to another place by using force is defined as abduction under Section 362 of IPC. There are aggravated forms of abduction. It depends upon the purpose for which the victim is abducted. If committing murder is the object, then it is punishable under section 364 of IPC. Whereas section 364A will be applicable if the object is extracting ransom.

38. For this purpose evidence of PW No.9 - Changayya is not relevant. We can gather it from the evidence of PW No.12 victim and PW No.11 driver. Following facts emerge from their evidence:

EVENTS POST SITTING IN THE CAR

(a) Accused No.1 instructed the driver Sachin to drive the vehicle towards Sion circle and to stop at Chunnabati/Chembur (Chunnabati or Chembur does not make much difference).

(b) Accused No.1 made a demand of Rs.5 lakhs when the car reached near Sion circle and when expressed about inability, accused No.1 assaulted the victim – PW No.12. Driver was told to take the car to Powai. Accused No.1 snatched mobile handset of the driver -PW No.11 and that of victim – PW No.12 and demand of Rs.5 lakhs was made (it is but natural that the driver cannot pay full attention to the conversation because he has to concentrate on driving). The driver was asked to drive the car towards Powai. The driver stopped the car near Chunabhatti. There also the victim was beaten by accused No.1. The boy had boarded the car and he sat near the victim.

(c) Accused No.1 asked the driver to take the car to secluded place and on the way accused No.1 snatched the mobile handset of both

PW No.11 and 12 (there may be a variance exactly at which place their mobile handsets were snatched but fact remains both have stated about taking away their mobiles).

(d) Again accused No.1 assaulted the victim by making a demand of Rs.5 lakhs. On expressing inability, accused No.1 returned the mobile handset to the victim. The victim called Madhav Nayak (who is supposed to be PW No.3). The said witness expressed difficulty. Accused No.1 was alert enough to take back the mobile handset from the victim and switch it off. Victim called Madhav Nayak on two occasions whereas PW No.11 has only referred to calling Madhav Nayak on 2nd occasion. This omission is not material omission.

(e) Accused No.1 instructed his companions by saying “*Yala zara garam karun ana*” (whereas in the evidence of the driver it has come that accused No.1 instructed accused No. 2 and two other boys to assault the victim).

(f) Both the witnesses said that the victim was taken near wall after passing through a small lane. They thrashed him near the wall. It seems that out of compulsion victim told the three persons to inform accused No.1 that he will arrange for the amount and he requested them not to kill him. The victim was brought back again. Both have said that mobile handset of the victim was given

back and victim called Shankar Ana (who is supposed to be PW No.5) and requested him to arrange for Rs.5 lacs. The conversation was in Tulu language (as per PW No.11).

(g) On that accused No.1 slapped the victim and threatened him not to speak in a Tulu language. Then conversation was made in Hindi language.

(h) Shankar Ana expressed his inability then accused no.1 took the mobile from the victim and he talked with the witness.

(i) PW No.12 have reiterated about the conversation, accused No.1 made with Shankar Ana. There accused No.1 tried to give justification for demand of the amount and it was in respect of some motor vehicle transaction.

(j) Again the victim called Madhav Nayak – PW No.3 and Madhav Nayak told the victim to enquire with his friend Rajesh Keny (he is supposed to be PW No.4).

(k) Then victim called Rajesh Keny. He too expressed difficulty. Victim reiterated the urgency. Rajesh Keny assured him to make arrangement. Witness Rajesh Keny was instructed to pay the amount to witness Madhav Anna.

(l) Witness Rajesh Keny handed over the amount to PW No.3 Madhav Anna (naturally PW No.11 and 12 are not the witness to this incident). Witnesses Madhav Anna informed the victim about receipt of the amount. Accused No.1 returned the mobile to the victim and instructed him to verify about arrangement of the amount.

(m) The victim enquired with Madhav Anna and victim told accused No.1 that amount has been sent to victim's office.

(n) Accused No.1 instructed one Ravi (accused No.6) from the mobile of the victim and accused No.1 instructed Ravi to collect the amount from Sangeeta Travels. The victim told Basavraj (who is supposed to be PW No.1) to hand over the amount to one Ravi or uncle of Ganya.

(o) After sometime victim received a call from Basavraj and Basavraj got a confirmation from the witness about arrival of uncle of accused No.1 in the office and payment of the amount. Victim asked Basavraj to give the amount. Accused No.1 received a missed call and accused No.1 got confirmation from the caller about the receipt of the amount and then he returned the key of the car to the driver. All these details were not said by the driver.

(p) Then accused No.1 told victim not to lodge police complaint

otherwise victim will be killed.

(q) The boy who boarded the car near Jhopadpati was dropped at Jhopadpati. Accused No.1 has described him as “Abhijeet” (A-3). Then the car was taken towards Kanjurmarg signal and victim was dropped near his house. The accused No.1 handed over the mobile handsets to PW No.11 and 12 and then again victim was threatened not to lodge the complaint. All the abductors got down near a traffic signal. Driver went towards office as he was to go to Shirdi (as the car was hired for going to Shirdi).

COMMENTS:-

39. If we peruse above narrated events, we can find that accused No.1 made demand of Rs.5 lakhs on more than one occasion. The accused No.1 has made his intention clear in forcing victim to sit in the car and took him towards Sion Circle/Chunabhatti and back to Kanjurmarg Circle. It is only for the purpose of pressurizing the victim by putting him in such a vexed position. If we peruse the chronology of events very minutely, we may find pivotal role of accused No.1.

- (a) first he took the victim.
- (b) all instructions are given by him to driver/PW-11.
- (c) he demanded amount of Rs.5 lakhs and he granted liberty to PW No.12 to make arrangement of money.

- (d) whenever required he gave mobile to victim and when purpose is over, took back his mobile.
- (e) when realized that, victim is not succumbing to the demand, he put more pressure on victim by instructing his companions to take victim to nearby place and make the victim understand the consequences of not fulfilling the demand.

40. We understand that incident of abducting and purpose/motive of abducting are interconnected and mixed with each other. At the start of act of abduction the purpose of abduction may not be known. As the incident progresses, the intention becomes clear. It has also happened in some cases that if the demand for ransom is not fulfilled, the abductors have killed the victim. It is not the case herein. We will ascertain whether intention to commit murder can be find out ?

41. We have read the cross examination of PW No.11 and PW No.12. We find there is cross examination on the point of earlier quarrel of PW No.12 with accused No.1, lodging of complaint by complainant Changayya, situation at the spot, TI parade, earlier identification in the police station and certain omissions. But what we find the incidents have not been seriously challenged. In fact there is no challenge. Even cross examination in respect of certain issues mentioned above is not in detail.

OMISSIONS

42. Omissions do play important role in appreciation of evidence. If they are on material aspect, it affects the reliability of the witnesses. To verify this aspect we have seen the evidence of PW No.11, 12, evidence of PW No. 18 (who recorded the complaint) and the FIR (at Exhibit 86) also.

43. We can comment on the omissions in the evidence of PW No.11 driver only if they are proved through the police officer who recorded his statement. The attention of the witness is drawn towards certain improvements which he has made while giving evidence “*accused No.1 instructed the witness to remain in the vehicle*” is one of such improvement. “*Satish Nayak – PW No.12 asked accused No.1 as to where (place) victim was being taken*” is another omission. “*While the victim talked to his wife on phone, the speaker was on*” is another omission. “*Other companions of accused No.1 took the victim near the wall and came after 10-15 minutes*” is also omission. On this background, the evidence of Police officer need to be seen. We have got the evidence of PW-18 and PW-19. PW-18 does not say that he has recorded the statement of any witnesses, whereas PW-19 did say so. Defence has not put those omissions to PW-19. Hence, no comment can be made on those omissions either in favour of the prosecution or in favour of the accused.

44. Let us see omissions in the evidence of PW. N0. 12. It has transpired that the reference of Sion circle, Chunabhatti, Powai has come. There may not be specific reference of Chembur. It is in the context of car being taken towards Chembur on the say of Accused No.1. It is not material omission. Rajesh Keny (PW No.4) is one of the person who was asked to arrange for money. When asked by PW No.12, Rajesh Keny expressed difficulty to arrange for money. This was the omission (difficulty to arrange for money) pointed out to PW-12. We have read FIR Exhibit 86. Request made to witness Rajesh to arrange for money is there but difficulty expressed by witness does not find place. It is also not material omission.

45. Third omission is about "confirmation of receipt of Rs.5 lakhs by witness Madhav Anna" What is there in FIR is "witness Rajesh Keny gave money to witness Madhav Nayak and Madhav Nayak gave it to Basavraj in the office" So confirmation about receipt of money by witness Madhav Anna is not there in the F.I.R. What we find material portion about request to Madhav Anna is there. So improvement about 'confirmation portion' may occur in the evidence due to lapse of time.

46. Lastly, the omission is in respect of request made to wife and brother-in-law to arrange for Rs.5 lakhs. It is correct that there are numbers of incidents into entire episode about demand, difficulty of witness to arrange. So such minor variations do occur. We have to see overall impact of details given by the witness. So omissions are not of

such a kind which will persuade us to disbelieve PW No.12.

47. Even PW No.11 and 12 were cross-examined on the point of earlier dispute of PW No.12 with accused No.1. PW No.12 admits about a quarrel in between both of them. That took place before September 2011. However, he has denied happening of repeated quarrels in between both of them. He has never asked family members of accused No.1 not to pass in front of his office. PW No.11 is not aware about such quarrel. Even PW No.18 was aware about un-cordial relationship in between PW No.12 and accused No.1.

DELAY IN LODGING A FIR

48. PW No.18 is the officer of Sion Police station who recorded the FIR of PW No.12 on 3.9.2011. He registered the offence under Section 363, 364A, 386, 506(2) read with Section 34 of IPC. He admits that there was a delay of 10 hours in lodging a FIR. He has not enquired with PW No.12 about any earlier report lodged about this incident. There is emphasis on not placing on record the complaint lodged by PW No.9 - Changayya on 3.9.2011 with Matunga Police Station. It is true that same is not pointed out to us during arguments. PW-9 was thoroughly cross-examined on this aspect. On reading his evidence we can certainly find that he did visit the police station and his statement seems to have been recorded at that time. However, about compliance of the procedure (that is to say reading the complaint,

obtaining the signature) is concerned, he could not recollect those facts. His conduct of approaching the police immediately after the incident is a natural conduct. There is no reason to disbelieve him on this aspect. If it is so why complaint has not been produced before the trial Court. The time of his visit is 6.00 p.m. and he was there for two hours. It is also true that the prosecution has not given any explanation for not producing his complaint before the trial Court. "The Police wants to embellish the facts and wants to distort the facts" is the reason suggested for such non-production. Whether police want to exaggerate the story in order to book the accused No.1 in a serious crime? As explanation has not been given for this non-production it has handicapped the Court from making any comments. On the basis of this available record Court can only say that PW No.9 - Changayya did visit Matunga Police Station on 3.9.2011 and police must have recorded his complaint but it seems to be a lack of decision making on the part of the concerned police personnel. That is to say to record it in either manner and then to take some action. Except this we do not find any probable reason for non-production. We do not find any other reason for non-production. We say so because there are testimonies of more than five witnesses who say that either money has been demanded, could not be arranged, was arranged and delivered. So we are not inclined to accept the said objection so as to discard the evidence of PW No.11 and 12. PW No.11 driver has not felt it necessary to go to police station after all returned back from Powai whereas he went to Shirdi for dropping the passengers. Probably he must be waiting for the action to be taken by his master

PW No.12. He had chosen to take the car as a part of his previous commitment. So with certain defects and lacunae as mentioned above, we do not find that there is any reason to disbelieve PW No.11 and 12 on the point of happening of the incident as narrated above. Just because PW No.12 is having some previous quarrel it does not mean that PW No.12 will concoct the incident and will file all together false FIR. There is no delay. The incident took place at 8 am in the morning and complaint was lodged at 9 pm. It is normal period for the victim to come out of the trauma and then to take decision to lodge complaint. It is particularly because he was threatened not to lodge the complaint.

EVIDENCE ON THE POINT OF ARRANGING MONEY AND DELIVERY

49. On this point apart from the victim PW No.12 the prosecution has examined inasmuch as five witnesses. Some of them have expressed inability to arrange for the money and some of them have participated in the arrangement and delivery of the money. The trial Court has convicted accused No.5 for the offences punishable under Sections 386 read with Section 120B of IPC and under Section 364 of IPC and also for the offence under MCOC Act. The role of accused No.5 starts from the stage of visiting the office of PW No.12. The entire transaction of abduction, extracting ransom and delivery of the amount, different accused have played different roles. Ultimately, it is a chain of events. One may not involve in all the acts but if it is a

chain of events ultimately resulting into accomplishment of goal.

50. Prior to the visit to the office of PW No.12 there are different incidents that have happened. For that purpose, the evidence of PW No.12 on one hand and evidence of PW No.1 to 5 on the other hand are relevant. On reading their evidence, we can see as to how the events have taken place.---

(a) For making arrangements PW No.12 made phone calls to PW No.3 (Mahdav Nayak), PW No.4-Rajesh Keny and PW No.5 Shankar Anna. Out of that PW No.5 expressed inability to arrange for the amount.

(b) PW No.12 instructed PW No.4 to deliver the amount to PW No.3 Madhav. Accordingly, he delivered the amount of Rs.5 lakhs consisting of currency notes of Rs.1000/- denomination.

(c) After discussion with PW No.12, PW No.3 Madhav called the wife of PW No.12 and she had come to the office of PW No.3.

(d) PW No.2 Johnny was told about the incident of kidnapping by PW No.3 Madhav. Wife of PW No.12 was also present there and she was crying. When PW No.4 Rajesh came there along with the amount, this witness PW No.2 was present there. The amount was brought in white colour bag. Witness Johnny was asked to deliver the

bag in the office of PW No.12 at Sangeeta Travels. PW No.1 Basavraj used to work in the travel company of PW No.12. As usual he reached the office on 3.9.2011. He was told by PW No.9 - Changayya about the incident of kidnapping of PW No.12 by accused Nos. 1 and 2.

(e) PW No.1 received a call on the landline that either Madhav Anna or Johny would come with the amount and witness was instructed to keep it there. PW No.12 also instructed him that either Ravi or Vilas would come to office and amount be given to them.

(f) The amount of Rs.5 lakhs was delivered in the office to accused No.5. It is the witness No.2 Johny who has delivered white colour plastic bag to PW No.1. Prior to that accused No.5 arranged a conversation in between witness No.1 and PW No.12. Employer instructed the witness to handover the money.

51. In this manner an amount of Rs.5.00 lakhs is delivered to accused No.5. It is also very well true that this entire amount is not seized but only an amount of Rs. 64,420/-is seized. Certain questions were asked to PW No.1 about his collection for PW No.12. It is true that in order to show his relation as an employee there is no document. It is also true that on his own he has not met police on 3.9.2011. Even he has kept mum. After the incident of handing over the amount, the office was open. PW No.1 was knowing accused No.5 two years prior

to the incident. Witness knows residence of accused no. 5 near their office. Even witness knows the relationship between accused no. 1 and no. 5 as nephew and uncle.

52. PW No.2 Johny has got a role of just handing over the amount in the office of PW No.12. Except one improvement, his evidence was not seriously challenged. PW No.3 Madhav has got a major role. It is in his office, PW No.4 Rajesh delivered the amount to PW No.2 Johny. This witness used to give cars on hire to PW No.12. It is but natural that a person in need will demand the amount from person who is known to him. He had sent the bundles. The mobile used by him also belongs to PW No.12. He had given explanation as the witness was not having address proof, mobile was obtained in the name of PW No.12. Just like other witnesses, even he has not lodged the complaint on his own. There are certain omissions in his evidence. PW No.12 Satish Nayak informed him about kidnapping by accused No.1 and others. This witness informed about the incident to wife of PW No.12 and then she came to his office. These are the two omissions. But the officer who recorded the statement is not examined.

53. PW No.4-Rajesh is the person who has arranged for the money. This witness has not shown this amount in the income-tax returns. Satish Nayak has also returned the amount to the witness. There is no document in respect of both the transactions. He has not withdrawn the amount from the Bank. His net monthly salary was

Rs.20,000-22,000. These questions were put in order to challenge the financial capability of witness to raise that amount. He has raised it from his family income.

54. Question arises why four witnesses (other than PW No.1 because he is employee of PW No.12) will give false evidence so as to help PW No.12. It is true that they are in the same business but for giving evidence in the Court you need to have that courage. You can give evidence only when the incident had taken place or when someone wants to favour any person. We do not think that 2nd possibility will be there. It is for the reason that it is difficult for a person to arrange for four witnesses to come and depose in his favour. It is true that there is no documentary evidence about this 5 lakhss but considering the circumstances in which the amount was required, it will also be difficult to prepare a document of the amount.

55. It is pertinent to note that after delivery of the amount PW No.12 was released. So from the above evidence it is clear that prosecution has proved delivery of the ransom amount of Rs.5 lakhs.

CONCLUSION:-

56. From the above conclusion it is clear that PW No.12 was forced to sit in a car and was taken to Powai. Chopper was used by the accused No.1. A demand of Rs.5 lakhs was made by accused No.1. It

was also fulfilled so the ingredients of the offence under Section 386 and 364-A of IPC are fulfilled.

IDENTIFICATION OF ACCUSED NOS.1 TO 5

57. It is the accused Nos.2,3 and 4 only who have accompanied the accused No.1. For that purpose their identification in the parade is important. For that purpose the evidence of Tehsildar Deepak Jadhav – PW No.8 is relevant. PW No.8 conducted the test identification parade on 30.9.2011 at Arthur road jail. From the evidence and documents created by him at that time, it reveals that following accused were identified:-

Prosecution Witness No.	Name of witness	Accused identified
PW 12	Satish Nayak	Accused No.3 Abhijit & Accused No.4 Mangesh
PW 1	Basavraj	Vilas W. Shinde Accused No.5
(not examined)	Jagdish Kudwa	Accused No.5 Vilas
PW 11	Sachin Bagade	Accused No.3 Abhijeet
PW 11	Sachin Bagade	Accused No.4 Mangesh

58. The evidence of concerned investigating officer PW No.19 Shri Nikam and evidence of the concerned identifying witnesses need to be considered. PW No.19 admits that accused No. 3 Abhijeet &

No.4 Mangesh were not named in the FIR. He also admits that name of accused No.6 Ravi Shinde is not there in the FIR (it is not concerned because he is acquitted accused). Accused No.5 Vilas is the uncle of Accused No.1 Ganesh (as told by PW No.18 (Para No.20). Whereas accused No.1 Ganesh and Accused No.2 were identified by PW No.12 and other witnesses in the police station (para 10 of his evidence). This identification will neither damage the prosecution case nor will help the accused in any manner. The reason is the Complainant-PW No.12 and some of the witnesses were knowing both the accused earlier to the incident. This fact has not been disputed.

59. PW No.12 was called in the jail for the parade 20-25 days after the incident. He has explained the events that took place inside the jail. He has identified accused No.3 Abhijeet and No.4 Mangesh whereas he has identified accused Nos.1 and 2 in the police station. He has explained how he knows accused No.1 Ganya (being in the black marketing of cinema tickets) and accused No.2 also in the same business. He met the Tahsildar inside the jail in between 11 to 11.30 a.m. This timing tallies more or less with the timing mentioned in the identification memorandum. From his cross-examination it cannot be inferred that the process of identification is affected by any of the external factors like presence of police.

60. Even PW No.11 was knowing accused No.1 Ganesh 4-5 years earlier to the incident. He has said about identifying accused

No.3 Abhijit and No.4 Mangesh. Even he has explained who was the boy who boarded the car near Powai Jhopadpatti, it was accused No.3 Abhijeet. Whereas accused No.4 Mangesh alighted from the car along with accused No.1-Ganesh. He has said about identifying accused No.3 Abhijit and No.4 Mangesh, 4 to 5 years earlier to the incident., Even he has explained who the boy who boarded the car near Powai jhopadpatti. It was accused No.3 Abhijit. Whereas accused No.4 Mangesh alighted from the car along with accused No.1 Ganesh at Kanjurmarg. There is nothing in the cross-examination which challenges identification of accused Nos. 3 and 4.

61. Whereas PW No.1 Basavraj is the witness who had occasion to see only that accused who has collected the ransom money. Even though he was knowing accused No.1 earlier to the incident, he was not knowing accused No.5 Vilas. He was not shown any photograph by the police earlier. Even no attempt was made to identify any of the accused on the basis of voice identification. During evidence before the Court he has correctly said about identifying accused No.5 Vilas as the person to whom he had handed over the amount.

62. PW No.8 was thoroughly cross-examined on the point of the identification as well as on the point of complying with the procedure. While conducting the parade he has taken the seal from the godown keeper. He has not done that. He has not mentioned the

names and the ages of the dummies in the memorandum panchnama. Though he has not taken a rough note, 6 charts were prepared by him in the room only. The judicial room inside the jail and parade room are different. He is not aware about the guidelines comprised in the High Court criminal manual about conducting the parade. His chief examination is in detail. We do not find that there are substantial lacunae in the procedure adopted by him.

63. From the above discussion it is clear that it is the accused No.5 Vilas who had gone to the office of PW No.12 for collecting the amount and he did collect the amount from PW No.1. Witness was knowing accused no. 5 earlier to the incident. As such identification in the parade is not essential. whereas it is also clear from the evidence of PW No.11 and 12 that accused Nos. 3 and 4 were the persons rightly identified by those two witnesses. The evidence of PW No.11 about identifying accused No.3 Abhijit as the person who boarded the car at Powai is consistent with the prosecution story. Only variance he has made is about alighting from the car. It was not accused No.3 Abhijit (as per the prosecution case) but it was accused No.4 Mangesh. This variance is not of that extent which creates doubt about the involvement of accused Nos. 3 and 4 as the associates of Accused Nos. 1 & 2. Witness No.12 was knowing Accused Nos. 1 and 2 earlier to the incident. There was no need for identification even at the police station. Trial Court has commented on this evidence in para 64 – 68 of the judgment. We agree to those findings.

RECOVERY/SEIZURE:-

64. The concerned officer is PW No.19-API Nikam attached to Crime Branch. He deposed that following articles/cash is seized during investigation from following accused:-

Date	Name of the accused	Type of articles seized	Exhibit No.
13.9.2011	Accused No.4 Mangesh	Rs.5000/- cash, mobile simcard of vodafone company No.9819498871. (during personal search)	Exhibit 72
13.9.2011	Accused No.5 Vilas	Nothing seized during personal search	Panchnama of Shri Chavan (Retired)
14.9.2011	Accused No.3 Abhijit	Arrested by Unit V and handed over the witness.	
16.9.2011	Accused No.5 Vilas	Memorandum, Rs.4750/- cash	Exhibit 111
19.9.2011	Accused No.3 Abhijit	Rs.7550/-	Exhibit 112 and 113
27.9.2011	Accused No.1 & 2 Ganesh & Ganesh	Transferred from Thane jail	
30.9.2011	Accused No.1 Ganesh	Cash of Rs.25000/-, country made pistol, cartridges, reliance mobile and idea sim card.	Exhibit 92. (as per Section 27 Panchanama.
9.10.2011	Accused No.2 Ganya	Chopper and cash Rs.13,750/-	Exhibit 95

FOLLOWING ARE THE PANCHAS EXAMINED

Name of prosecution witness	Name of accused	Nature of panchnamas	Exhibit No.
PW No.6 – Vyankatesh kalidas Devendra	Accused No.4 Mangesh	Stated about seizure of cash of Rs.4500/- to Rs.5000/- and mobile but refused to identify that it was from accused No.4 Mangesh	Exhibit 71
PW No.14 – Prakash Mahadev Patil	Accused No.1 Ganesh Shinde	Siezed Rs.25,000/- cash, countrymade pistol cartridges seized.	Exhibit 91 and 92
PW No.15 – Shivenkumar Tiwar	Accused No.2 Sanjay	Seizure of chopper and cash of Rs.13,750/-	Exhibit 95 and 96
PW No.16 – David Rmugam Devendra	Accused No.5 Vilas	Cash of Rs.8370/-	Exhibit 98

Even though cash amount is seized as mentioned above, it is difficult to believe that the cash amount consist of the same currency notes which were handed over to accused No.5 Vilas by PW No.1 and it is the same currency notes which were collected by witness Rajesh Keny (PW No.4) and handed over to PW. No. 2 and in turn he delivered it to PW No. 1. Though it has come in the evidence that the ransom amount consist of currency notes of Rs.500/-/Rs. 1,000/- denomination, we do not think that only that description is sufficient to connect it to the

seized cash amount. Trial Court has believed that part of evidence which relates discovery of cash amount at the instance of accused. We declined to consider recovery of cash amount as the amount given as a ransom. Hence we have not commented on the evidence of relevant panch and seizure police officer. So far as recovery of revolver and cartridges is concerned, it is no one's case that they were used in either way in commission of the offence. Trial Court observed that they were not produced because there were no the muddemal in this case. (Para 61). Admittedly charge-sheet is not filed against Accused 1 for the offence punishable under Section 3 read with S.25 of Arms Act before the trial Court

65. Accused No.1 has taken bold defence and he tried to explain that an amount of Rs. 15,000/- was paid to police officer Shri Ture by his sister Mrs Laxmi Malve. She gave evidence in favour of her brother. Accused No.1 also examined Jeweler Shri Chandrashekhar Mehta. He did admit about dealings with Smt Laxmi Malve. But witness has forgotten about pledging of Mangalustra by witness Smt Malve. Trial Court disbelieved explanation for payment of Rs. 15,000/- to Police Shri Ture (Para 7 & 7a). We agree to this conclusion. It is nowhere case of defence that this amount was utilized and shown as recovered at the instance of all. In fact witnesses Smt Malve has said that it was given so as not to arrest her and her husband.

66. So far as recovery of chopper is concerned, it has come in

the evidence of PW No.11, 12 and 9 that accused No.1 threatened PW No.12 by showing a chopper whereas chopper is seized not from accused No.1 but from accused No.2. It need not be a necessity that the weapon used ought to be seized from the person who has used it. There is sufficient evidence of the eye witness to believe that PW No.12 was terrorized by use of chopper on more than one occasion.

67. Trial Court convicted Accused 1 and Accused 2 accused for the offence under Section 4 read with Section 25 of the Arms Act. Trial Court believed evidence on the point of seizure of chopper at the instance of accused no. 2 (Para-59). We do not find any reasoning for convicting Accused 1 and Accused 2 for this offence.

68. Probably possession of chopper on 03/09/2011 by Accused 1 and Accused 2 (date of offence) and accused 1 and by accused 2 on 09/10/2011 (date of seizure) must have weighed the mind of the trial Court. We disagree with this finding. First of all the police have not mentioned Section 4 read with Section 25 of the Arms Act in the charge-sheet what they have mentioned is recovery of chopper from Accused 2 and hence under Section 37 of the Bombay Police Act. However, the trial Court has not framed the charge under Bombay Police Act but under Arms Act. No doubt trial Court can do it but by giving reasons and on the basis of materials.

69. Secondly while convicting the accused No.1 and 2 under

Section 4 read with Section 25 of the Arms Act, the trial Court overlooked the provisions of Section 4 of the Arms Act. Possession of certain arms is prohibited only when notification is issued. No one has pointed out any notification barring possession of certain arms. Hence the conviction is bad-in-law and need to be set aside.

70. Thirdly what is adduced in evidence through PW 19 is the notification published in the gazette at Exhibit 119 and extract of station diary entry at Exhibit No. 119. It is the notification issue under Section 37 of Bombay Police Act and entry suggest its publication contemplated under Section 167 of the Bombay Police Act. In fact trial Court has over looked this evidence. For above reasons we have no alternative to set aside conviction of Accused 1 and Accused 2 under Section 4 read with 25 of Arms Act. **We answer point no. 4 in the negative**

EVIDENCE ON THE POINT OF ASSAULT.

71. There is charge only against accused No.1 for the offence under Section 323 of the Indian Penal Code, whereas trial Court observed that accused Nos. 1 to 4 have assaulted PW-12 (Para-58). However, trial Court convicted only accused No.1. In this background, let us see the evidence. For this offence, simple hurt is sufficient. There need not be any injury. PW No.17 Dr. Ghuge attached to Sion hospital is the concerned Medical Officer who has examined PW No.12 on

04.09.2011. There was no external injury. Witness has complained of low backache. X-ray of chest is advised. The register and certificate issued by him is duly proved through him at Exhibit 102 and 103. In the register brought by him date is not mentioned before patient Satish Nayak. It is true to say that the victim PW No.12 was assaulted by accused No.1 Ganesh after sitting in the car and was thrashed near the wall by companions of accused No.1. Though it is proved by the prosecution that accused Nos.2 to 4 were his companions where all have thrashed him or any of them is not clear. Who has thrashed him is not clear. So we have to accept only the involvement of accused No.1 in that assault. Trial Court has not invoked Section 34 of the Indian Penal Code. We do not want to convict accused Nos.2 to 4 for the offence punishable under Section 323 of the Indian Penal Code.

EVIDENCE ON THE POINT OF CALL DETAILS REPORT (CDR)

72. Learned advocate Ms. Apeksha Vora relied upon judgment in the case of *Babubhai Bhimabhai Bokhiria v/s. State of Gujarat*² it is on the point of evidenciary value of Call Details Report particularly when content of conversation is not brought on record (para-21). This was a judgment delivered wherein order issued under Section 319 of the Criminal Procedure Code was challenged. It was set aside by the Hon'ble Supreme Court. One of the material relied upon was conversation between original accused and newly added accused. It was

² (2014) 5 SCC 568

not accepted for the reason that contents of conversation was not there. (para 21). In an issue before us full fledged trial has been completed and trial Court has dealt with the complicity of each of the accused depending upon the evidence adduced and role played by each of the appellant. It is true that in this case also there are C.DR's and not contents of conversation. So except interaction we can not draw any inference about actual words of communication.

73. It is true that on the basis of call details report, one may understand amongst whom there is a conversation. That is to say the mobile number of caller and mobile number of called party. CDR does not suggest what type of conversation took place. No doubt evidence by way of CDR is corroborative piece of evidence. This evidence is generated through use of computers and data connectivity. It is also true that there are various parameters to be followed before accepting the evidence of CDR. It is a kind of electronic evidence falling within category of documentary evidence. Generally, Nodal Officers appointed by service providers used to give evidence before the Court. The CDR generated by their computer system has to be supported by a certificate contemplated under Section 64B of the Evidence Act. Two Nodal Officers PW No.7 and PW No.10 were examined. The details are as follows:

Prosecution witness No. &	Subscriber Cell No.	Documents
--	--------------------------------	------------------

name		
PW No.10 - Yogesh S. Rajapurkar (Airtel company)	Satish Anand Nayak – PW No.12 9892369469	Exhibit 80 collective exhibit is given.
PW No.7 Varunkumar S. Banarjee MTS Company	Laxmi Dhondiram Nichite (mother of accused no.2) 8433471719	Exhibit 75 collective exhibit is given. Authority letter, subscriber details

It is true that during the evidence of eye witnesses, it has come in evidence that the mobile handset of PW No.11 and 12 were snatched and were again handed over to them after temporary use after calling is over. It is also true that mobile handset is seized from the personal search of accused No.4 Mangesh and as per the Memorandum of Statement of accused No.1 Ganesh. It is also true that there is telephonic communication in between PW No.10 on one hand and PW No.1 to 5 on the other hand (about arrangement of money) but the Call Details Report of PW No.2 to 5 are not tendered in evidence so it will be difficult to ascertain as to whether mobile numbers of PW No.2 to 5 are appearing in CDR of PW No.12 produced by PW No.10.

74. It is also true that even though the subscriber of the mobile phone is one person, it can be used authorisedly or un-authorisedly by possessor of that mobile phone. So when CDRs are produced in evidence, it will always be difficult to show that the caller/receiver of such mobile handset will always be the subscriber. The relationship in between subscriber Laxmi Dhondiram Nichite (of MTS company) and

accused No.2 is not disputed. From the evidence of PW No.7 we can certainly infer that said Laxmi is the owner of mobile number 8433471719. At the sametime, we can also infer that Cell No. 9892369469 of Airtel Company belongs to PW No.12.

75. So we have to see from the CDR produced by PW No.7 and those produced by PW No.10 that whether it corroborates the conversation in between PW No.12 on one hand and P.W.1 to 5 on the otherhand .

76. From the evidence of PW Nos. 1 to 5, following details of telephone numbers is revealed:-

Witness	Telephone No.	evidence
PW-1	24026236 landline no. in the Office of PW-12	(Para-3)
PW-3	9833611655	(Para-6)
PW-5	9822299365	(Para-6)

In order to ascertain whether these numbers reflect in the CDR of PW-12 (Exhibit No.80) we can see above numbers (on Page 295). It shows conversion took place on 3/9/2011 in between possessors of these numbers. Trial Court has appreciated this evidence and given findings to that effect (Para-43). We agree to the same. We are not

considering the finding about conversion in between Accused 2 and Accused 6 (Para 42). Because accused No.6 is acquitted and there is no appeal by the State Government.

CONCLUSION

77. On the basis of above discussion there is a reason to believe that accused No.1 compelled PW No.12 to sit in the car and PW No.12 was forced to move from his office in the car (which he could not have done but for the terror). We can also believe that accused Nos.2 and 4 have accompanied accused No.1 since beginning. We can also believe that accused No.3 also joined in their plan by boarding the car and assisted accused Nos.1, 2 and 4. We can also believe that accused No.1 with the help of accused Nos.2 to 4 have compelled the PW No.12 to part away the money of Rs.5 lakhs. Because he was sure that unless and until the money is parted away, it will be difficult for him to get his release. The money is certainly towards ransom. We can also believe that the accused who has accepted Rs.5 lakhs from PW No.1 is none other than accused No.5. Merely because Rs.5 lakhs in total were not recovered, it does not mean that Rs.5/- lakhs was not parted away. So accused No.5 has also helped other accused in accomplishing their task.

78. The trial Court has convicted accused Nos.1 to 5 for the offence under Section 386 read with 120 B of IPC and convicted all of them for the offence simplicitor under Section 364 of IPC. The

conclusion of the trial Court about guilt of these accused cannot be faulted. But so far as applicability of Section 120 B of IPC is concerned, we differ with the findings of the trial Court. There has to be some concrete evidence about hatching of criminal conspiracy. It may be in the form of some meeting, telephonic interaction, exchange of documents, any third person hearing the conversation and so on. We do not find such evidence adduced on behalf of the prosecution. What is adduced in evidence is about involvement of accused Nos.1 to 5 and their participation on the date of incident. Merely on that basis one cannot infer about hatching of criminal conspiracy.

79. So what we feel is that the accused Nos.1 to 5 need to be held guilty for the offence of 386 of IPC on the basis of application of section 34 (common intention) of the Indian Penal Code. There is also a charge framed by applying s. 34 of IPC. So question of prejudice will not arise. The reason is from the conduct of each of the accused Nos. 1 to 5 we can infer that their common intention was to kidnap PW No.12 and that too for the purpose of extracting ransom amount from him. It is no doubt true that every accused has played not a similar but different role. It is but natural. Accused No.3 who has boarded the car at a subsequent stage, it does not mean that he was not having the intention to kidnap and extract ransom amount. He has not explained why he has boarded the car and continued even at the time when PW No.12 was thrashed towards the wall. So by invocation of section 34 of the IPC, he is equally liable for the offence. At the same time, accused

No.5 by performing his part of accepting the ransom amount has shared the common intention of kidnapping and extracting the ransom amount. So accused Nos.1 to 5 are liable for commission of the offence under section 386 read with 34 of the IPC. Already trial Court has framed the charge for the offence under Section 386 read with 34 of the Indian Penal Code. Even trial Court has opined about sharing a common intention (Para 53).

80. We do not understand while holding the accused Nos.1 to 5 guilty for the offence of Section 364 IPC why the trial court has not invoked the principle of constructive liability (either in the form of section 120 B or in the form of section 34 of IPC). We do not find application of any of the section of constructive liability. They have been convicted simpliciter for the offence under section 364 of the IPC. The trial Court has said about sharing of common intention. But while holding them guilty accidentally forgotten to refer to Section 34 of the Indian Penal Code. When the trial court is satisfied about ‘*sharing of intention by the accused no. 1 to 5*’ we do not think that omission to mention section 34 of IPC will lead to any illegality. We are fortified in our view on the basis of observation of Hon’ble Supreme Court in case of **Narinder Singh V/s State of Punjab**³.

81. Question remains when the prosecution has adduced bulky evidence on the point of ‘*demand and fulfillment of ransom*’ trial court

³ (2000) 4 SCC 603

has not expressed any comment on the motive for abduction. We do agree that some time both the motives (that is for committing murder or for extracting ransom) intermingled with each other. Some time there is demand of ransom and murder too when the demand is not fulfilled. Some time there is only abduction for the purpose of murder. And some time abduction is only for the purpose of extracting ransom. It is also true that actual commission of murder is not essential of section 364 of IPC. What the section says '*abduction is there with the intention of committing murder*'.

It will be relevant to consider the observation of the trial court in that behalf. While commenting on quantum of sentence, trial Court observed

“ Accused 1 perhaps would have killed him, had his demand of ransom not fulfilled”.

This is the possibility expressed by the trial court. There is a thin line in between creating terror by showing weapon for extracting ransom and abducting for committing murder and then demanding ransom.

82. When we personally have perused the evidence from this view point, we find certain references in the evidence PW. No. 12/victim throwing some light on what could have been the intention of abductors. They are as follows –

- a) on first refusal to sit in the car, accused Ganesh Shinde threatened me by taking out a chopper from his pocket (para no.

3).

- b) Ganesh Shinde also brandished the chopper to me and forced me to sit in the car (para no. 3).
- c) Ganya Shinde asked his companions by saying “yala jara garam karun aana” (para no. 5).
- d) when the victim was thrashed near the wall by the companions of accused no.1, he asked them to inform Ganya Shinde that victim will arrange for the amount. Victim also asked them not to kill him (para no. 5).
- e) while on return, Ganya Shinde asked victim not to lodge the complaint otherwise he would kill me (para no 5).

83. If we consider all these events and utterances, we can very well say that the accused no. 1 by his conduct and utterances have sufficiently indicated that he might kill the victim is his demand is fulfilled. In that sense of the matter we agree with the trial court. Though the trial court has not enumerated the above events, they are part of evidence. So we agree with the finding of the trial court about commission of offence under section 364 of IPC.

84. We do agree that the charge can be altered at any stage prior to pronouncing the judgment. The appellate court is having the same power as that of trial court. It is true that the prosecution has also adduced evidence on the point of ransom. But in this case we are not inclined to alter charge under section 364-A of IPC now. It is for the

reason knowingly prosecution took part in the trial when charge was framed only under section 364 IPC and not under section 364-A IPC. It was not shown to us from the record that at any time the prosecution requested the court about this fact. Even before this court this prayer is not made on behalf of the prosecution. What we feel is that now right is created in favour of the accused to go on with the matter as per the record as it stands.

85. There is one more reason for this view. Offence under section 364-A IPC is more serious than offence under section 364 IPC. There is death penalty as a maximum punishment for earlier offence whereas maximum punishment for later offence is life imprisonment. So even if some of the ingredients of both the sections are similar, in certain respects there is a difference.

86. So there cannot be a conviction under section 364-A of IPC unless there is a charge. Some what similar question arose before Hon'ble Supreme Court in case of Anil Alias Raju Namdev Patil V/s Administration of Daman and Diu.⁴ There was charge for the offences under section 364, 302, 201 read with 34 of IPC. Whereas the appellant was convicted under section 364-A of IPC. It was argued that in fact evidence was adduced on the point of demand of ransom and hence no prejudice is caused. However Hon'ble Supreme Court refused to maintain conviction under section 364-A of IPC and instead

⁴ (2006) 13 SCC 36

convicted under section 364 IPC. In para no. 55 there is discussion on difference in between these two sections.

87. In case before us charge is framed under section 364 IPC. And evidence is adduced on the point of ransom. But there is no conviction under section 364-A of IPC. So what we can gather is that unless there is charge framed under section 364-A of IPC, we cannot deal with the case. We are also not inclined to remand the matter back to the trial court for framing of charge and conduct of the trial for that offence. The reason is since 2012 the case is pending and 9 years have elapsed. If that option is exercised, it will take few more years to complete the trial. We think it will violate the principles of speedy trial. Hence we have preferred not to adopt that line of action. These observations are on the basis of facts of this case and we do not want to pay down any law.

88. So we feel that offence is proved against accused no. 1 to 5 under section 386, 364 read with section 34 of IPC.

89. So also we do not find any reason to disagree with the trial Court about holding accused No.1 guilty for the offence punishable under Section 323 of IPC.

Hence, **we answer Point Nos. 2 and 3 in the affirmative.**

POINT NOS.5 AND 7.**INVOCATION OF MCOC ACT :-**

90. The appellants No.1 to 5 were convicted for the offence punishable under Section 3(1)(ii) and under Section 3(4) of the MCOC Act. The findings of the trial court are challenged mainly on following grounds –

- a) The ingredients of Section 2 and 3 of the said Act are not fulfilled.
- b) Evidence on the point of previous charge sheets does not fit in to the requisites of the section 2(d) of the said Act.
- c) The approval and sanction has been granted mechanically.

INGREDIENTS OF ORGANIZED CRIME

91. The basic ingredient for application of this Act is committing organized crime. Section 3(1)(ii) of the said Act is applicable when organized crime results into an offence which is other than murder. In this case as offence under section 386 and 364 read with S. 34 of IPC are committed, provisions of section 3(1)(ii) of the said Act are attracted.

92. The intention for enacting this Act is to prevent and control the organized crime. The provisions of the said Act are stringent in

nature. So emphasis of the court is to insist on strict compliance of the provisions of the Act. Substantive provisions and procedural provisions need to be strictly complied with.

SUBSTANTIVE PROVISIONS

93. On reading the provisions of Section 2 and 3 of the said Act, we can summarise the following ingredients –

- a) Commission of an organized crime by organized crime syndicate,
- b) organized crime is continuing unlawful activity carried out --
 - i. by use of violence/threat/coercion etc.
 - ii. object must be to gain pecuniary benefit/ undue economic advantage etc.
- c) activity becomes continuing unlawful activity when–
 - i. such activity is prohibited by law,
 - ii. activity must disclose cognizable offence having punishment of 3 years or more,
 - iii. undertaken in respect of which more than one chargesheets have been filed,
 - iv. within preceding 10 years,
 - v. competent court has taken cognizance.

94. In nutshell, this Act takes into account previous unlawful

activities and also present unlawful activities. Only when connection is established in between these two activities, it is said that an organized crime is committed. It means earlier there were two chargesheets of requisite parameters and when third activity is committed on behalf of organized crime syndicate, then the provisions of this Act is attracted.

FACTS OF THIS CASE

95. If we consider them in the light of evidence before us, we can very well say that the accused Nos.1 to 5 have certainly used the violence and also threatened the PW No.12 to part away the money. Even the victim was threatened to be killed. Compelling the Complainant to sit in the car by showing a chopper cannot certainly be said to be a voluntary act. The victim need not always protest to the said act by physical act as it has come in evidence that the act of abduction is for getting the ransom amount and it is certainly for gaining pecuniary benefits. And for pressurizing the victim to fulfill the demand there were threats of killing.

96. No doubt it is true that in previous chargesheets at Exhibit 116 and 117, accused Nos.2 to 5 have not been named as accused persons. They are only against accused No.1. The law is now well settled. There is no need to have a previous chargesheet against other accused persons. It is sufficient if previous chargesheets are against the

one person who is chargesheeted under the said act. So the requirement is satisfied. We agree with the trial Court. This is the interpretation given by Division Bench of this Court in the case of **Govind Sakharam Ubey v/s. State of Maharashtra**⁵ as rightly relied upon by learned APP.

97. The observations in case of **Gopal Pandey** are on the basis of facts of that case. The trial Court has discharged the accused under the provisions of MCOC Act and directed him to be tried as per the ordinary law. The order of discharge was challenged before Division Bench of this Court. While perusing the materials about previous charge-sheets, the Division Bench of this Court agreed with the trial Court observations. The activity denoted in previous chargehseets was held not with object of gaining pecuniary benefit or undue advantage. In that case first chargesheet involved an offence of assault. Whereas second chargesheet was robbery but it has happened on account of some minor incident. And third chargesheet relates to assault on account heated exchange of words. Ultimately, it depends upon facts of each case. These are not the facts before us.

PREVIOUS CHARGESHEETS

98. PW. No. 19 API Nikam collected copies of chargesheets and they were tendered in evidence. When we have perused the charge sheets at Exhibit 116 and 117, the following facts emerges:-

⁵ Criminal Appeal No.18/2009

(a) Exhibit 116 is the chargesheet filed by Sion police station in respect of an offence punishable under Section 363,384,324,506(2) read with 34 of the IPC. It is the certified copy having the seal of Metropolitan Magistrate, Mumbai which is accompanied by copy of FIR filed by one Kuldeep Singh. It also bears the signature of Senior Police Inspector, Sion Police Station dated 08.12.2009. It is filed against accused No.1 and his associates.

(b) Exhibit 117 is the certified copy of a chargesheet filed by Sion Police station for the offences punishable under Section 363,386,387,323 read with Section 34 of the IPC. Certified copy is issued by the Court of Metropolitan Magistrate, Mumbai. It bears the signature of Sr. Police Inspector dated 1.12.2008. It is filed against the accused No.1 and his associates. The Court Case No. is 111/PW/09.

99. It is true that the word taking cognizance is used in MCOC Act at 2 places. One is while explaining the meaning of “continuing unlawful activity in Section 2(i) (d) of the said Act. Taking cognizance by the concerned Court is one of the pre-requisite for invocation of MCOC Act. Secondly, the word taking cognizance has been used in Section 23 of the said Act. Unless the previous sanction is obtained, Special Court cannot take cognizance as contemplated under Section 23(2) of the said Act. It is true that though the phrase has been used

the phrase taking cognizance is not defined under the said Act. So we have to consider the meaning given in Section 190 of the Criminal Procedure Code. It lays down the 3 manners in which the Magistrate can take cognizance. However, the word taking cognizance is not defined there also. We have to understand its meaning by referring to the interpretation given by the Courts. In a case of **Madan Ram K. Ganwani v/s. State of Maharashtra**⁶ delivered by Nagpur Bench of this Court, the phrase “taking cognizance” has been interpreted in the context of the provisions of this Act. This Court has dealt with the appeal against conviction involving the provisions of this Act. The issue raised was whether there is a need to examine the witnesses in proof of the past crime (in respect of which previous charge-sheet has been relied upon). It has been answered in the negative. (Para-52) When there is a proof of filing of two chargesheets, it was held sufficient if copies of those two chargesheets were filed (there is no need to carry out investigation about the offences involved in those charge sheets) (Para -115). This Court has excluded the crime in respect of which cognizance was not shown to have been taken (para-17).

100. While giving judgment Nagpur Bench has referred to the observations of the Hon’ble Supreme Court in case of **S.K.Sinha, Chief Enforcement Officer v/s. Videocon Internarnational Ltd.**⁷. That was a case involving the interpretation of Foreign Exchange Management Act. There was an argument to the effect taking cognizance means

⁶ Criminal Appeal No.308/2002

⁷ 2008(2) SCC 492

issuing process. It has been held that “issuance of process cannot be equated with taking cognizance when used with reference to Court or Judge”. Cognizance connotes to take notice judicially. Issuing a process is sequel to taking cognizance.

101. Recently Hon’ble Supreme Court had occasion to interpret the phrase taking of cognizance in the context of the said Act. It is in case of *Prasad Purohit v/s. State of Maharashtra*⁸. The previous chargesheets must have been filed within preceding 10 years period. In that case there was a bomb blast at Malegaon and the previous chargesheets filed in respect of Parbani bomb blast and Jalna bomb blast were relied upon. In those two earlier incidents there was original chargesheet as well as supplementary chargesheet. Point raised was whether the period is to be computed from the date of first chargesheet or supplementary chargesheet. The accused calculated the period from the date of supplementary chargesheet and accordingly contended that the provisions of the said Act cannot be invoked when the 3rd incident at Malegaon took place. Even though there was no time gap of 10 years from the date of earlier supplementary chargesheets, the objection was turned down. It was held that Court takes cognizance of an offence and not of an offender. Mean to say it is to be presumed that the Court has taken cognizance when the original chargesheets were filed in respect of earlier two bomb blasts. Once a report is filed under Section 190 (1)(b) of the Code of Criminal Procedure by the Police, it is held

⁸ 2015(7) SCC 440

that requirement of the taking cognizance gets fulfilled at that very moment.

102. So if we consider the interpretation mentioned above to the facts before us, we hold that requirement of taking cognizance in two previous chargesheets is fulfilled. It is true that once the chargesheet is filed in the format prescribed by Section 173 of the Code of Criminal Procedure, concerned Court used to pass different orders. It depends upon the situation prevailing at that time. If the accused is in jail, he needs to be produced and hence production warrant is issued whereas if the accused is not in jail, the order of issuing process against the accused mentioning the sections of the Act is generally passed. There is a practice followed in trial Courts to give the Court case number to that chargesheet. It depends upon the gravity of the offence.

103. It is true that report under Section 173 is submitted only when involvement of the accused is disclosed. From Exhibit 116 it is not clear whether chargesheet is given Court Case number. But the fact remains and it is a certified copy issued by the concerned Court of Metropolitan Magistrate. Court Case number remained to be mentioned on Exhibit 116 by the concerned Court staff. Whereas at Exhibit 117 we can find the Court Case number. It is also true that in both these exhibits, order passed by the Metropolitan Magistrate is not shown to us. Does it mean to say that we should opine that requirement of taking cognizance has not been fulfilled. The answer is

‘No’. It is also true that as the consequences of the said Act are drastic, the adherence to the procedure also needs to be strict. There is one more angle to this. We can find the certified copy of two chargesheets. We can also notice the seal of the Court of Metropolitan Magistrate. Unless and until the case is numbered (after taking cognizance only) certified copy can not be issued. It may also happen that the order of taking cognizance might have been passed on a separate paper by the concerned Metropolitan Magistrate but what we find is that police have not obtained the certified copy of that order or else the concerned staff of the Metropolitan Magistrate, the Court has not issued any certified copy. We find it as an error of understanding. We do not find it as a lacuna so as to disagree about fulfillment of requirement of two chargesheets. The objection taken in that behalf is turned down.

GRANT OF APPROVAL AND SANCTION

104. The law on all these issues is well settled. It is very well true that if basic ingredients are fulfilled, there need to be a grant of approval by the competent police officer as contemplated under Section 23(1)(a) of the MCOC Act. So also Special Court can take cognizance only on grant of sanction by competent police officer as contemplated in Section 23(ii) of the said Act.

105. There is an emphasis on behalf of the appellants about wrong invocation of the provisions of the said Act and not fulfilling the

requirements of the said Act. There is also challenge to the grant of approval and sanction by competent police officers, particularly without application of the mind. For that purpose, the conviction under the said Act is challenged.

106. Learned Advocate Shri Kuldeep Patil has strenuously argued about the non-adherence to the provisions of Section 23 (1)(a) and 23(2) of the said Act. According to him the approval authority Shri Himanshu Roy, Joint CP and the sanctioning authority PW No.13 Arun Patnaik, Commissioner of Police were not been given all the concerned materials and that is why it cannot be said that they have applied the mind properly. According to him there were also several defects in the wordings of the approval at Exhibit 118 and the sanction at Exhibit 88 dt.1.12.2011. In support of his contentions he relied upon the following judgments:-

1) *CBI v/s. Ashok Kumar Aggarwal*⁹

2) *State of Maharashtra v/s. Jagan Gagan Singh Nepali*¹⁰

3) *Dinesh Kumar v/s. The Chairman, Airport Authority of India*¹¹

107. Whereas learned advocate Ms. Vora relied upon the judgment in the case of *State of Maharashtra v/s. Gopal Sadhusharan & ors.*¹² (it is on the point of not mentioning the details of the previous

⁹ 2014(14) Vol. Supreme Court Cases 295

¹⁰ 2011 ALL MR (Cr.) 2961

¹¹ 2012 (1) SCC 532

¹² 2018 ALL MR (Cr.) 4235

chargesheets in the sanction order).

108. These issues were also raised before the trial Court. On going through the evidence of the sanctioning authority PW No.13 Arun Patnaik and on going through the evidence of PW No.19- API Nikam, the trial Court opined that PW No.13 has applied the mind properly (para-73 and para-76). So also PW No.19 has deposed about grant of approval dt.24.10.2011 by joint Commissioner of Police, Mumbai and then investigation was transferred to ACP, Digambar Kale.

109. In case of Ashok Kumar Aggarwal, Hon'ble Supreme Court has commented on the duties of the sanctioning authority, error omission in the procedure and the sanction, what prejudice is caused to the accused. In that case there is a question about interpretation of Section 19 of Prevention of Corruption Act. It is true that there is emphasis on placing the entire material before the sanctioning authority and perusing entire material by the authority in order to arrive at the decision whether to grant sanction or not? Even if there is any defect in this procedure and in the sanction order, the Court has to ascertain itself is there any failure of justice. In Para No.19 it has been observed that :-

“the prejudice has to be in relation to investigation or trial and not matters falling beyond their scope.”

110. The case of Dinesh Kumar was also the case arising out of

Prevention of Corruption Act. The Court has drawn a distinction in between absence of sanction and invalidity of sanction. Non-placing of the material, bias of the sanctioning authority, sanction granted by incompetent authority are some of the grounds falling under the caption invalidity of the sanction (para-10). Whereas in case of Jagan Nepali the issue involved pertains to the interpretation of the words “other advantage” appearing in section 2(d) of the said Act. Whether it has to be read ‘ejusdem generous’ with the words ‘pecuniary benefits’. The issue is settled. It has been finally held that the term other advantage cannot be read as ejusdem generous with other words (para 42).

111. Even though judgments relied upon by learned advocate Shri Kuldeep Patil pertain to interpretation of Prevention of Corruption Act, there cannot be any dispute about the proposition that the approval and sanctioning authority under MCOC Act are supposed to act cautiously and not blindly. Certainly, they have to peruse the material placed before them and then have to satisfy themselves about the ingredients of the offence under MCOC Act. There need not be detail reasoning and opinion about perusal of the materials and the conclusion arrived at. It is very well true that Court has to assess the documentary evidence and the oral evidence and then to arrive at a conclusion about application of the mind by the concerned authorities.

112. The joint Commissioner of Police granted the approval on

24.10.2011 for invocation of the MCOC Act against the accused Nos. 1 to 7 whereas the incident in question took place on 3.9.2011. So the proposal for grant of approval was submitted only when this 3rd incident took place. At that time, the investigation was with PW No.19-API Shri Nikam. During investigation it was revealed that accused No.1 has formed the organized crime syndicate and hence he submitted the proposal on 14.10.2011 (in his evidence date has come as 14/8/2011. it seems as typing mistake. Because in the approval Exh.118 date has come as 14/10/2011). He got himself satisfied when he obtained copies of two chargesheets (Exhibit 116 and 117) from the Competent Court. The sanctioning authority PW No.13 who is Commissioner of Police Shri Arun Patnaik is examined. His role started once a proposal came before him through ACP Kale – PW No.20 for grant of sanction. PW No.13 was cross-examined on the point of certain lacunas in the sanction relating to taking cognizance.

113. He admits that in the sanction order there is no reference about the Courts who have taken cognizance in earlier two charge sheets. “As the investigating Officer has not brought to his notice and that is why sanction order is silent” and this suggestion is denied by him. It is true that as consequences of MCOC Act are severe, legislatures have taken care in prescribing higher police officers who are expected to deal with the issues under MCOC Act. Only the rank of ACP Officer can investigate. Whereas approval and sanction can be granted only by the officer from the rank of Dy. Inspector General of

Police and Additional Director General of Police respectively.

114. There is grievance of invalidity of sanction and not about absence of sanction. We have perused the evidence of PW No.19 Shri Nikam, PW No.20 ACP Kale and PW No.13 Shri Patnaik and supporting the documents in the form of approval and sanction. We agree to the conclusion drawn by the trial Court about application of mind by the concerned authorities. It is sufficient enough to make a reference that there are previous charge-sheets. If the details of the charge-sheet are mentioned in the approval and sanction, it will be an additional material. However, conversely it cannot be said that approval and sanction are defective for not referring the details. From their evidence it is clear that the officers have discussed with the authorities by visiting their office. It suggests that the concerned authorities were apprised of the materials and then they took the decision. We do not think that the ratio laid down in above referred judgments will be useful to the accused persons. We reject the grievances made in that behalf.

For above discussion we answer Point Nos. 5 and 7 in the affirmative

POINT NO. 6

115. Section 3 of MCOC Act lays down punishment for the

offence of organized crime as well as for an offence of being member of organized crime syndicate. So if person becomes member of organized crime syndicate he is liable for punishment even though he has not committed organized crime. Now question arises a person who has committed an organized crime whether automatically he becomes member of the syndicate ?

If we peruse the definition clause we may find that there are two important parameters. One is organized crime syndicate and second is organized crime. When group of two or more persons indulge into an act of an organized crime, group becomes organized crime syndicate (section 2 (1)(f)). Now whether an offence of organized crime can be committed by an individual. There are two facets. One is a person who is actually committed the offence. And second is whether he commits the offence individually on his own or on behalf of some one else. As per MCOC Act some one else is described as syndicate. So even if an individual commits organized crime, he can be dealt with as per this Act only when he commits the act on behalf of the syndicate.

On minute perusal of the definition of 'organised crime' (S.2(1)(e)) the continuing unlawful activity becomes an organized crime only when it is committed on behalf of the syndicate. The activity may be committed individually or jointly. So also the activity can be committed by member of the syndicate himself or the syndicate may hire any person to commit the activity on behalf of the syndicate. It means a member as well as a non-member can come within the clutches of this Act, if the activity is committed on behalf of the syndicate. In

other words, for prosecuting a person under the Said Act, he need not be a member of the syndicate. It is sufficient if he commits the act on behalf of the syndicate.

It is true that the Act does not recognize the term 'head of the syndicate'. it is the term developed on the basis of experience. For commission of crime someone has to take initiative. And others follow him. In this case it is the accused no.1 who is described as head of the syndicate. It is correct. Because, he is charge sheeted in earlier two cases and they are also of extortion.

116. The word 'member' of the syndicate is not defined under the Said Act. Organized Crime Syndicate is a group formed not for committing lawful activities but for unlawful activities. So, just like we find evidence about membership of lawful organization, it is difficult to find evidence about membership of the syndicate. The word 'member' is defined under Unlawful Activities Act. It is not defined under this Act. If we go by ordinary meaning by merely participating in activities of lawful or unlawful organization, you cannot call him as a member of that organization. You need to show consistent participation/attendance in the activities of the organization. The trial Court has convicted Accused no. 1 to 5 for the offence punishable u/s 3(4) of the Said Act. But, we find no reasoning for coming to that conclusion. We can only say that Accused no. 1 has formed a syndicate and Accused no. 2 to 5 by playing different roles have participated in the activity. So we

are inclined to set aside the conviction for that offence.

There is one more angle to this issue. S. 3(1) and S. 3(4) are different offences. A person can be prosecuted once he becomes member of the syndicate. S. 3(4) nowhere says that a member should commit organized crime before they can be prosecuted u/s 3(4) of the Said Act. It may happen that a syndicate has been formed and it is having several members and organized crime is committed but few members have not participated in the crime. In such eventuality, such non-participating members still can be prosecuted u/s 3(4) of the Said Act.

117. Hence we disagree with the trial court. We answer that point in the negative.

CONCLUSION

118. Accused No.1 is the main accused in previous two charge sheets at Exhibit 116 and 117. Their evidence also discloses that he has taken lead in abducting PW No.12. Earlier charge sheets also pertain to the kidnapping and demanding ransom. On this background when the 3rd incident took place on 3.9.2011, the investigating agency is right in invoking the provisions of MCOC Act. It is nothing but continuing the unlawful activity undertaken by accused No.1 being head of the syndicate. Accused Nos. 2 to 5 may not be involved in the incidents depicted in earlier two charge sheets. It is sufficient compliance of the

Act if they have helped, assisted or abetted accused No.1 in committing the 3rd incident which is an offence. So the trial Court was right in coming to conclusion that offence under Section 3(1) (ii) of MCOC Act has been committed by each of accused Nos. 1 to 5. Accused Nos. 2 to 5 have performed their role and accordingly assisted accused No.1 in fulfilling his design. Accused Nos.2 to 5 have played different roles but certainly it has helped in accomplishing the goal. We find no reason to interfere in the finding of the trial Court.

POINT NO. 8 & 9

EXTENT OF SENTENCE:-

119. There is an argument that the trial Court has not shown any leniency and has imposed maximum sentence. There is an argument that the role of the accused Nos. 2 to 5 need to be considered. There is an argument that age of accused No.5 need to be considered and his one leg has been amputated. There is a maximum punishment of life and imprisonment may extend to 10 years for the offence punishable under section 364 of the IPC whereas there is 10 years imprisonment for the offence under section 386 of IPC. Whereas the trial Court has imposed life imprisonment for the offence under Section 364 of IPC and rigorous imprisonment for 10 years for offence under Section 386 of the Indian Penal Code. Whereas there is a maximum punishment of life imprisonment for the offence punishable under Section 3(1)(ii) of the MCOC Act.

120. What we feel is that the accused Nos.2 to 5 need not be dealt with on a line similar to accused No.1. Though we feel that life imprisonment to accused No.1 for the offence punishable under Section 364 of IPC and punishment up to 10 years for the offence punishable under Section 386 of the IPC will meet the ends of the justice. So also for the offence punishable under Section 3(1) (ii), life imprisonment will only be the appropriate sentence for accused No.1. Fine of Rs.5.00 lakhs was imposed on accused No.1 for the offence under MCOC Act but we feel that our hands are tied because there is a minimum fine prescribed under MCOC Act. Whereas learned advocate Shri Wagal relied upon judgment in case of Ganesh Vinay Bhosale v/s. State of Maharashtra¹³ on the point of criterion to be considered while deciding the period of sentence to be undergone if the fine amount is not paid. However, certainly we can reduce the sentence in default of the fine as done by this Court in case of *Ganesh Vinay Bhosale* as referred above. We reduce it to three years for offence under MCOC Act if the fine is not paid.

121. We feel that for offence under section 364 of IPC and under section 3(1)(ii) of MCOC Act accused Nos. 2 to 5 the sentence undergone by them will meet the ends of justice. They are behind bar right from their date of arrest since 2011. So we reduce their sentence from the life imprisonment imposed by the trial Court to the sentence

¹³ Criminal Appeal no. 559 of 2010 and other Appeals

already undergone by them. Because section 364 of IPC and section 3(1)(ii) of MCOC Act give the option. we maintain the sentence for offence under section 386 of IPC. We also reduce the imprisonment in case of default to pay the amount of fine to 3 years sentence. We also feel that order to pay compensation of Rs. 6 lakh to the complainant need to be set aside This amount is to be paid from the amount of fine. We were told that fine under MCOC Act is not paid. So it is difficult to pay compensation to victim. Even we feel that the quantum is excessive. The provisions of Section 357 of Cr.P.C. is not incorporated to put the victim in the same position as he stands earlier. We are aware that victim has not appeared. Even though it is true that even if default sentence is served, the liability to pay compensation amount still remain. But we do not want to keep the accused Nos.2 to 5 under that liability when they have already spent precious 10 years of their life. Otherwise also we have maintained life sentence for accused No.1. So no purpose will be served by maintaining that order. We intend to set it aside. Hence, **we answer the point accordingly.**

ORDER

1. The appeals are partly allowed.
2. The conviction and sentence of accused Nos. 1 to 5 are modified as follows -
 - a) Instead of convicting the accused under Sections 386, 364

read with section 120 B of IPC, they are convicted for the offence under Sections 364, 386 read with section 34 of the IPC.

- b) Conviction of accused no.1 under section 323 of IPC is maintained.
 - c) The sentence of accused no.1 for all the offences is maintained.
 - d) The sentence of accused nos. 2 to 5 for the offence under Section 364 of IPC is altered from life imprisonment to period already undergone.
 - e) The conviction and sentence of accused nos. 2 to 5 is maintained for the offence under section 386 of IPC.
 - f) The sentence of fine is maintained and the default sentence to run consecutively.
3. The conviction of accused nos. 1 to 5 for offence under section 3(1)(ii) of MCOC is maintained.
- (a) The substantive sentence of accused no.1 for offence under section 3(1)(ii) of MCOC is maintained.

(b) The substantive sentence of accused no.2 to 5 is altered from life imprisonment to period already undergone by them.

(c) The default sentence due to non payment of fine of Rs. 5,00,000/- is reduced to three years RI instead of four years for accused nos. 1 to 5.

4. The conviction of accused nos.1 to 5 for the offence punishable under section 3(1)(4) of MCOC is set side.

(a) Fine paid if any be returned to them individually.

5. The order to pay compensation of Rs. 6 lakh to the complainant from the fine amount is set aside.

6. The conviction of accused nos. 1 and 2 for the offence punishable under Section 4 read with section 25 of the Arms Act is set aside.

(a) Fine paid if any be returned to them.

7. Except with above variation, the order of conviction and sentence is maintained.

8. All pending applications are disposed of.
9. All appeals are disposed of in the light above directions.

(S.M.MODAK, J.) (PRASANNA B. VARALE, J.)

L.S. Panjwani, P.S.