

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

CRIMINAL APPEAL NO. 534 OF 2006

1. Baba alias Kamalakar Kisan Bodake,
Age: 30 years, Residing at Mangal
Society Chawl No.2, Room No.3,
Alandi Road, Behind Sopras Chowky,
Pune.
2. Eknath alias Pappu Macchindra Gaikwad,
Age: 28 years, Occ. : Business,
residing at Tadiwala Road,
Pune.
3. Somnath Bhagwan Shinde,
Age : 29 years, Occ.: Business,
Residing at S.No.1, Gavli Aali,
Mudhwa,
Pune.

... Appellants

V/s.

State of Maharashtra,

... Respondent

Mr. Niranjan Mundargi a/w Ms. Keral Mehta a/w Mr. R.B. Paranjpe, Mr.
Virendra A. Khamkar, Ms. Ashwini Shinde for the Appellant Nos.1 and 3.

Mr. A.H.H. Ponda, Senior Counsel i/b. Mr. Shailesh Kharat for the
Appellant No.2.

Ms. P.P. Shinde, APP for the Respondent - State.

**CORAM : SMT. SADHANA S. JADHAV &
N.R. BORKAR, JJ.**

RESERVED ON : 21st JANUARY, 2021

PRONOUNCED ON : 8th APRIL, 2021

JUDGMENT : (PER SMT. SADHANA S. JADHAV, J.)

1 The appellants herein are convicted for the offence punishable under section 3(1)(i) of the Maharashtra Control of Organised Crime Act, 1999 (for short 'MCOCA Act') and sentenced to suffer imprisonment for life and to pay fine of Rs. One Lakh i.d. to suffer R.I. for 6 months, by the Special Judge(MCOCA) Pune in Special MCOCA Case No. 1 of 2004 vide Judgment and Order dated 28/4/2006. Hence, this Appeal.

2 Such of the facts necessary for the decision of this appeal are as follows:

(i) On 9th March, 2003 one Dadu Shinde lodged a report at Sahakar Nagar Police Station alleging therein that on 5th March, 2003 at about 9 a.m. police had informed him that his brother Sham Shinde has been attacked by some unknown persons and is admitted in Sassoon Hospital. When he reached hospital, he learned about the death of his brother Sham Shinde. He lodged a report on the basis of which Crime No. 228 of 2003 was lodged against unknown persons. In the course of investigation, the accused Parshuram P. Jadhav, Sunil B. Gorad, Rajesh Bandu Gaikwad, Pravin Bharat Bhalshankar and Baba

@ Kamalakar Bodake were arrested. The investigating agency, upon taking into consideration the criminal antecedents of the accused persons had formed an opinion that the accused deserve to be prosecuted under the provisions of MCOC Act as well. However, P.W. 3 Marotirao Deshmukh, Additional Commissioner of Police was of the opinion that instead of adding Section 3 in Crime No. 228 of 2003, an independent offence under the provisions of MCOC Act be filed. Accordingly, a proposal for sanction was forwarded to P.W. 7 Dhananjay Jadhav, Commissioner of Police, Pune. Crime No. 3206 of 2003 was registered against the accused under section 3 of MCOC Act. Crime No. 3206 of 2003 was investigated by P.W. 6 Jaysingh Jadhav, ACP, Zone-II, Pune and charge-sheet was filed by P.W. 9 Bharati Bhimrao Kurhade.

3 P.W. 2 Bajirao Bhikaji Jagtap was attached to Sahakar Nagar Police Station as Crime P.I. He was entrusted with the investigation of Crime No. 228 of 2003. In the course of investigation, he had arrested 5 accused. On 31st October, 2003, he had submitted detail report to Additional S.P. Crime for application of provisions of MCOC Act to the said crime as he learnt that there were 6 crimes

registered against the said 5 accused persons at different police stations. He had submitted the charge-sheet in Crime No. 228 of 2003 in December, 2003.

4 PW. 4 Anis Suleman Kazi was attached to Sahakar Nagar Police Station as Senior P.I. On 31st October, 2003, he had received a report sent by PW. 2 Bajirao Jagtap, P.I. Crime of Sahakar Nagar Police Station in the form of proposal for application of provisions of MCOC Act in Crime No. 228 of 2003, which had been registered for offence punishable under section 302 of the Indian Penal Code. PW. 4 had forwarded the said report to the Additional Commissioner of Police alongwith his opinion. The said report is at Exh. 45.

5 In the said report, it was shown that 6 cases were registered against Baba @ Kamalakar Bodake at Faraskhana, Deccan, Samarth and Swargate Police Station. On perusal of the report at Exh. 45, it is clearly seen that the words “and his associates” is subsequently added. The report further shows that despite having taken preventive measures, the accused continued to indulge into criminal activities.

6 PW. 4 has feigned ignorance as to whether there was an inward and outward number on Exh. 46, which is the recommendation of Sr. PI. of Sahakar Nagar Police Station. On perusal of the same, it is clear that there is no inward outward number and Sr. PI. had only expressed his opinion that as per report of PI. Bajirao Jagtap, it would be a fit case to add the provisions of section 3 of MCOC Act 1999 to Crime No. 228 of 2003.

7 The opinion was received by PW. 5 Jaysingh Jadhav, who was officiating as ACP, Zone II. PW. 5 has verified the offences registered against accused at different police station and therefore, recommended that section 3 of MCOC Act be added in Crime No. 228 of 2003. His report is at Exh. 48. Exh. 48 is dated 14/11/2003. It was clearly opined that on 17/5/2003 he had received an application that Baba Bodake had threatened the witnesses and therefore, he was arrested in Crime No. 228 of 2003. However, it is admitted in the cross-examination also that there was no incriminating evidence against Baba Bodake, so as to arrest him in Crime No. 228 of 2003. According to him, in the course of investigation, on verification, he was satisfied that there were several offences registered against Baba

Bodake and therefore, he and his allies deserve to be prosecuted under the provisions of MCOC Act. It is also admitted in the cross-examination that when he forwarded the report to the Commissioner of Police, no offence was registered against him in the recent past.

8 PW.8 Mr. Ashok Ganesh Dhivare was working as Additional C.P. Crime, Pune. After studying the proposal and perusing the papers, he had arrived at a conclusion that instead of adding the provisions of MCOC Act to Crime No. 228 of 2003, separate crime should be registered at Deccan Police Station under MCOC Act. Accordingly, he had passed an order. Sanction order at Exh. 23 is dated 12/12/2003. It is candidly admitted in the cross-examination that after perusing the papers of Crime No. 228 of 2003, he was satisfied that there was no sufficient material to apply provisions of MCOC Act to Crime No. 228 of 2003 registered at Sahakar Nagar Police Station. He has denied to have sanctioned the prosecution under MCOC Act as preventive measures.

9 PW. 1 Ranjit Abhinkar had received the order passed by PW. 8 Shri Dhivare. After collection of evidence, he found that the

accused were members of organised crime syndicate and then he lodged complaint against 3 accused under section 3 of MCOC Act. The complaint is at Exh. 24. Investigation was handed over to PSO. On the basis of his complaint, Crime No. 3206 of 2003 was registered against the accused for offence punishable under section 3(1)(i) and 3(2) of MCOC Act. It is admitted in the cross-examination that before receiving the sanction order, he had not enquired about the accused and even at that time, except one offence, all other crimes were pending before the court. Accused Nos. 1 and 2 were in jail for more than a quarter of the year preceding filing of the complaint on the basis of which Crime No. 3206 of 2003 was registered. It is also admitted that it was specifically mentioned in the complaint that since some offences are registered against the accused, they need to be prosecuted under MCOC Act as a preventive measures. It is also admitted that there was no material against the Appellant in Crime No. 228 of 2003. The material has surfaced only after 4 days of registration of Crime No. 228 of 2003.

10 On 2/4/2004 P.W. 9 Bharati Bhimrao Kurhade had taken over the investigation in Crime No. 3206 of 2003. Since the

investigation was already completed, she filed the charge-sheet and reported the matter to Additional C.P. for giving sanction to file charge-sheet.

11 On 12/4/2004 P.W. 7 Dhananjay Jadhav received a proposal for sanction for prosecution of the accused persons under MCOC Act. According to him, he has scrutinised all the papers and then accorded sanction on 16th April, 2004. The said sanction order is at Exh. 53. In the cross-examination, he has admitted that the Court had taken cognizance against accused in more than two cases. That is one of the reason for his satisfaction to accord sanction to prosecute the accused under the provisions of MCOC Act. The order reads as follows :

“During the course of investigation it was transpired that accused No. 1 Baba @ Kamalakar Kisan Bodake had formed crime syndicate to commit offences. This Crime syndicate has committed 9 offences, jointly and singly and created a terror in the minds of people in Pune City and has obtained illegal pecuniary benefits for the syndicate. It is also evident from the papers of investigation of this offence that all accused mentioned above have committed offences of Extortion, Murder, grievous hurt, possessing illegal weapon, Kidnapping for the purpose of

Murder etc. all offences against human body and property, with the sole intention to obtain pecuniary benefits.”

12 It is pertinent to note that the name of the police stations, where offences were committed is not mentioned, neither the details of the offences are mentioned.

13 In the present case, the question that arises for determination before this Court is as to whether there could have been an independent prosecution of the accused under section 3 of the MCOC Act.

14 The special act was enacted in the year 1999. The intention of the legislation was to curb the organised crime activities or activities of an organised crime syndicate. The prosecution has to prima facie establish that there is an organised crime syndicate and has to be further satisfied that there is existence of continued unlawful activities and the prosecution has to establish that the offences were committed with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or any other person or promoting insurgency. Unless the above ingredients are satisfied, the

provisions of MCOC Act are not applicable. The records of Crime No. 228 of 2003 as well as substantive evidence of PW. 3, PW. 8, PW. 7 clearly indicates that there was no material on record to prosecute the accused under the provisions of MCOC Act in Crime No. 228 of 2003, which was prima facie an offence under section 302 read with section 34 of the Indian Penal Code. Moreover, witnesses have admitted that accused Bodake was arrested in Crime No. 228 of 2003 only on the basis of an application filed by the complainant alleging therein that he has been threatened by Bodake. In the present case, sanction order also does not show that all the 3 accused were shown as an accused in Crime No. 228 of 2003.

15 The Hon'ble Supreme Court in the case of **State of Maharashtra v/s. Shiva @ Shivaji Ramaji Sonawane**¹ has observed as follows :

“The filing of charge-sheets or taking of the cognizance ... by itself cannot constitute an offence punishable under Section 3 of the MCOCA. That is because the involvement of respondents in previous offences was just about one requirement but by no means the only requirement which the prosecution has to satisfy to secure a conviction under MCOCA. What was equally, if not,

¹ 2015 All MR (CRI) 3310.

more important was the commission of an offence by the respondents that would constitute “continuing unlawful activity”. So long as that requirement failed, as was the position in the instant case, there was no question of convicting the respondents under Section 3 of the MCOCA. That reasoning does not, in our opinion, suffer from any infirmity. The very fact that more than one charge sheets had been filed against the respondents alleging offences punishable with more than three years imprisonment is not enough. As rightly pointed out by the High Court commission of offences prior to the enactment of MCOCA does not by itself constitute an offence under MCOCA. Registration of cases, filing of charge sheets and taking of cognizance by the competent court in relation to the offence alleged to have been committed by the respondents in the past is but one of the requirements for invocation of Section 3 of the MCOCA. Continuation of unlawful activities is the second and equally important requirement that ought to be satisfied.”

In the present case, there is no material to show that Sham Shinde was eliminated by the present appellants, neither there is material to show that Sham Shinde was eliminated for the purpose of monetary gain or any other advantage. There is a failure on the part of the prosecution even to show that the present appellants were all members of an organised crime or an organised crime syndicate. In fact, there is

no material to show that they were actively involved in Crime No. 228 of 2003. Sanction for prosecution under the provisions of MCOC Act appears to have been accorded hastily.

16 In **Jaysingh s/o. Asharfilal Yadav v/s. State of Maharashtra & anr.**², it was observed thus :

“There is lot of difference between the act or activity itself being termed or called as an offence under a statute and such act or activity being taken into consideration as one of the requisites for taking action under the statute. The former situation has to satisfy the mandate of [Article 20\(1\)](#) of the Constitution; however, in case of latter situation, it stands on totally different footing. Undoubtedly, for the purpose of organised crime there has to be a continuing unlawful activity.”

17 In the present case, none of the witnesses have stated before the Court that there was a continuing unlawful activity either by one of the accused or the organisation. Most of the cases were pending and one of the cases had resulted into acquittal. PW. 1 has admitted that by no stretch of imagination, MCOC Act could be applied in Crime No. 228 of 2003. In any case, **the provisions of MCOC Act cannot be used as a preventive measures.** The sanctioned order lacks

² 2003 All MR CRI 1506.

material particulars and all that is tried to be brought on record is that the accused herein are criminals. That merely stating that the accused and his associates are running criminal syndicate with a view to gain pecuniary benefits is not enough, there has to be cogent and convincing material to support the application of the MCOC Act in a given case.

18 There is no substantive evidence on record to show that Sham Shinde was murdered by the accused for pecuniary advantage or gaining undue economic or other advantage for himself or any other person. In the given circumstances, the appellants could not have been independently charged for an offence under the provisions of the MCOC Act. The prosecution witnesses have only stated before the Court their “opinion” to prosecute the accused under the provisions of the MCOC Act without any foundation. There are lacunae in the sanction order.

19 The definition of “Organised Crime” in MCOC Act reads as follows :

“2(e) "organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an

organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person or promoting insurgency;”

20 In the present case, there is no reference to any unlawful activities with objective of gaining pecuniary benefits or gaining undue economic or other advantage. Therefore, there is no effective application of section 2(e) of the MCOC Act while according sanction. The very fact that the prosecution had failed to establish that the appellants were the members of a crime syndicate or an organisation indulging into criminal activities for the purpose of gaining pecuniary benefits or any other advantage goes to the root of the matter. Hence, if there is no organised crime, there is no organised crime syndicate. At this stage, it would be relevant to take note of the fact that the accused Baba @ Kamalakar Bodke has been acquitted in Sessions Case No. 107 of 2004 i.e. in Crime No. 228 of 2003 by Judgment and Order dated 23rd March, 2005 passed by the 2nd Adhoc Addl. Dist. Judge, Pune.

21 In view of the above discussion and the Judgments of the

Apex Court in the case of **State of Maharashtra v/s. Shiva @ Shivaji** (cited supra), the appeal has to succeed.

22 Hence, following order is passed :-

ORDER

- (i) The appeal is allowed.
- (ii) The conviction and sentence passed against the appellants vide Judgment and Order dated 28/4/2006 by the Special Judge(under MCOC Act) Pune in Special MCOC Case No. 1 of 2004 is quashed and set aside.
- (iii) The appellants are acquitted of all the charges.
- (iv) Their bail bonds stand cancelled.
- (v) Fine, if paid, be refunded.
- (vi) The appeal is disposed of on above terms.

(N.R. BORKAR, J)

(SMT. SADHANA S. JADHAV, J)