

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.543 OF 2017
AND
CRIMINAL APPEAL NO.544 OF 2017

CRIMINAL APPEAL NO.543 OF 2017

Mohd. Sanu @ Mustfa S/o. Jamil Khan Pathan,
Aged about 25 years,
R/o. Tipu Sultan Chowk, Nagpur.
(Presently at Central Prison, Nagpur). **APPELLANT**

----- **VERSUS** -----

The State of Maharashtra,
Through A. C. P. Sadar, Division,
(P. S. Gittikhadan), Nagpur. **RESPONDENT**

AND

CRIMINAL APPEAL NO.544 OF 2017

Manjur S/o. Jamil Khan Pathan,
Aged about 27 years,
R/o. WandeVinagar, Nagpur,
Nagpur.
(Presently at Central Prison, Nagpur). **APPELLANT**

----- **VERSUS** -----

The State of Maharashtra,
Through A. C. P. Sadar, Division,
(P. S. Gittikhadan), Nagpur. **RESPONDENT**

Mr. Gajanan D. Kale, Advocate for the Appellant in Cr.Appeal No.543/17.
Mr. S. Raisuddin, Advocate for the Appellant in Cr.Appeal No.544/17.
Mr. V. A. Thakare, A.P.P for the Respondent/State in both Appeals.

CORAM : V. M. DESHPANDE AND
AMIT B. BORKAR, JJ.

DATE : 07.09.2021.

JUDGMENT : [PER: AMIT B. BORKAR, J.]

1. Two persons namely Mohd. Sanu @ Mustfa S/o. Jamil Khan Pathan and Manjur S/o. Jamil Khan Pathan were tried by the learned Special Judge, designated under M.C.O.C. Act & Additional Sessions Judge-5, Nagpur in Special Criminal M.C.O.C. Case No.4/2014 for the offences punishable under Sections 394, 411, 413, 201 and 120-B of the Indian Penal Code and under Sections 3(1)(ii) and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 (in short "M.C.O.C. Act"). Vide judgment and order dated 30.05.2016, the learned Special Judge designated under M.C.O.C.Act and Additional Sessions Judge-5, Nagpur found them of guilty for the said offences and except under Section 120-B of the Indian Penal Code and sentenced each to undergo rigorous imprisonment for 10 years and to pay fine of Rs.2000/- each for the offence punishable under Section 394 of the Indian Penal Code and to suffer rigorous imprisonment for 10 years and fine of Rs.5,00,000/- each for the offence punishable under Section 3(1)(ii) of the M.C.O.C. Act. They were further sentenced to suffer rigorous imprisonment for 10 years for the offence punishable under Section 3(4) of the M.C.O.C. Act and fine of Rs.5,00,000/- each and in default to suffer rigorous imprisonment for 1 year.

2. Aggrieved by the said judgment and order, Mohd. Sanu @ Mustfa S/o. Jamil Khan Pathan, filed Criminal Appeal No.543/2017 and Manjur S/o. Jamil Khan Pathan filed Criminal Appeal No.544/2017 in this Court. Since both these appeals arise out of common factual matrix and the impugned judgment, we are disposing them of by one judgment.

3. Briefly stated the prosecution case runs as under :-

The informant Shobhadevi Sarangi was residing in Friends Colony, Gittikhadan, Nagpur along with her son Maheshprasad Sarangi (PW-1). Around 5.45 a.m. to 6.00 a.m. on 02.09.2013 while informant Shobhadevi was plucking flowers in front of her house, three persons came there riding on Pulser Motorcycle. Out of them accused Nos. 1 and 2 came over her and accused No.1 snatched her gold chain weighing 7 to 8 Tolas. After seeing gold bangles in her hand, accused No.1 fell her down and started cutting the bangles with cutter. Informant Shobhadevi raised shouts due to sudden assault on her. Her son Maheshprasad (PW-1) came out of their house after hearing shouts of Shobhadevi. He caught hold of accused No.1 Manjur Khan who was cutting the gold bangles of his mother and fell him down. The accused No.1 tried to inflict injury on the face of Maheshprasad (PW-1) with cutter and threatened to kill him. Accused No.2 – Mohd. Sanu lifted

a stone lying on the spot and hit on the head of Maheshprasad (PW-1), due to which Maheshprasad had received bleeding injury. Accused No.2 also hit the stone on informant - Shobhadevi, due to which she received injury on her head and ear. Thereafter, all three persons fled away riding on their Pulser Motorcycle. Harish Bangde (PW-2) on hearing the noise of informant and Maheshprasad (PW-1), neighbour of informant came at the spot and carried Shobhadevi and Maheshprasad (PW-1) to the hospital of Dr. Balsubramanian (PW-7). Some persons from the locality had given information of incident to the police. P.S.I. Pradip Patil (PW-13) came to the hospital of Dr. Balsubramanian and took report of Shobhadevi. Dr. Balsubramanian (PW-7) had provided medical aid to informant - Shobhadevi and Maheshprasad (PW-1) and Dr. Vinay Saoji (PW-8) treated both. Pravin Patil (PW-13) prepared spot panchnama in presence of Harish Bangde (PW-2) and other panchas. He seized one wallet and Chappal found on the spot of incident. Accused Nos. 1 and 3 were already arrested by Crime Branch in Crime No.235/2013 of Pachpaoli Police Station. Accused No.3 - Mohd. Tanvir had already given his confessional statement and from which it was transpired that accused persons had committed present offence. P. I. Sunil Bonde (PW-14) carried out the investigation. He arrested accused Nos.1 and 3; collected crime record of accused; sent proposal to Shrikant Tarwade (PW-9), Additional Commissioner of Police, North Region, Nagpur for

invoking the provisions of Section 3 of the M.C.O.C. Act and accordingly, Shrikant Tarwade (PW-9) granted approval vide Exh.86 and handed over further investigation to A.C.P. Pratap Dharamshi (PW-11). Sanu Pathan - Accused No.2 was already arrested in some other crime. A.C.P. Dharamshi (PW-11) obtained his custody in the present crime. Accused No.2 made confessional statement in police custody in respect of stolen property and expressed his willingness to show the shop of jewelers to whom the gold chain was sold and accordingly memorandum panchanama (Exh.111) was prepared. He showed the shop owned by accused No.4- Surendra Banabakode. At the pointing out of accused No.2, recovery of one cutter and clothes of accused were seized under recovery panchanama (Exh.66) in presence of panchas including Ballu Shahu (PW-6). Shobha Banabakode (PW-13) wife of accused No.4 brought ingot weighing 50 grams which was prepared by melting the stolen golden chain, which was seized in presence of panchas and accused No.4 was arrested. The confessional statement of accused No.4 was recorded after complying the necessary requirements under Section 18 of the M.C.O.C. Act.

4. Test identification of accused persons was held at Central Jail, Nagpur on 18.02.2014. Maheshprasad (PW-1) identified accused Nos. 1 and 2. The statement of witnesses were

recorded. A.C.P Dharamshi (PW-11) submitted charge-sheet after completion of investigation.

5. Charges for the offences under Sections 394, 411, 413, 201 and 120-B of the Indian Penal Code and under Sections 3(1)(ii) and 3(4) of the M.C.O.C. Act were framed against the accused persons to which the accused pleaded not guilty and claimed to be tried.

6. Before the Special Judge, the prosecution examined in all 14 witnesses out of them Maheshprasad (PW-1) is an eye witness. In defence, accused No.2 examined 3 witnesses.

7. The learned Special Judge believed the evidence including evidence of eye witness Maheshprasad (PW-1). He convicted and sentenced appellants in the manner stated in paragraph No.1 of this judgment. He, however, acquitted accused Nos.1 and 2 for the offence punishable under Section 120-B of the Indian Penal Code and accused Nos. 3 to 5 of all offences.

8. We have heard Mr. Gajanan D. Kale, the learned Counsel in Criminal Appeal No.543/2017. Mr. S. Raisuddin, the learned Counsel who appeared for the appellant in Criminal Appeal No.544/2017, adopted argument of Mr. Gajanan D. Kale, learned

Counsel and Mr. V. A. Thakare, learned Additional Public Prosecutor for the respondent/State.

9. We have also perused the depositions of prosecution witnesses; the material exhibits tendered by the prosecution; statements of appellants recorded under Section 313 of the Code of Criminal Procedure and the impugned judgment.

10. After giving anxious consideration to the matter, we are of the view that these appeals deserve to be dismissed. In our view, the appellants have been rightly convicted for the offence under Section 394 read with Section 34 of the Indian Penal Code and Sections 3(1)(ii) and 3(4) of the M.C.O.C. Act.

11. The evidence which clinches the involvement of the appellants in the instant crime is that of Maheshprasad (PW-1) eye witness. In paragraph No.2 of his deposition, Maheshprasad son of Shobhadevi stated that incident took place on 02.09.2013 at around 5.45 a.m. to 6.00 a.m. His mother Shobhadevi used to wake up early in the morning and was plucking flowers in front of their house as usual. He was inside the house, when he heard the shouts of his mother and therefore he rushed towards her mother. When he saw his mother lying on the road and one person was standing near his mother and cutting her golden bangles. On seeing him,

two persons tried to run away, however, he caught hold of one of them, who was cutting the golden bangles of his mother. After catching hold of him, he fell him down. The said person tried to inflict injury on his face with cutter, however, the cutter went brushing his face. The said person threatened him saying “Saale mai tumko goli mardunga”. The other persons lifted the stone lying on the spot and hit on the back of head of Maheshprasad (PW-1), due to which he received bleeding head injury. As he was hit with stone, the person to whom he had caught hold of gave push to him and got himself rescued. The other persons also hit his mother with stone on her head and ear. With the results, she received bleeding injuries on her head and ear. All three persons fled away on the Pulser Motorcycle of black colour. Maheshprasad (PW-1) identified the accused Nos.1 and 2 sitting before the Court.

12. We have gone through the statement of Maheshprasad (PW-1) and we find that it inspires confidence. The manner of incident as described by him is corroborated by prompt First Information Report of the incident wherein the mother of Maheshprasad (PW-1) had given details of the incident. It is pertinent to note that the incident occurred between 5.45 to 6.00 a.m. and the First Information Report was lodged within 15 minutes at 6.15 a.m. The manner of assault on Shobhadevi and

Maheshprasad (PW-1) is also corroborated by nature of injuries received by Shobhadevi and Maheshprasad (PW-1).

13. Dr. Balsubramanian (PW-7) corroborated evidence of Maheshprasad (PW-1) by stating that he examined Shobhadevi in between 6.00 a.m. to 6.15 a.m. on the date of incident and on examination, he found abrasion with contusion in the left temporal area of the scalp and left pinna of the ear. There was an abrasion on the left knee joint. He gave her first aid and referred her to Gate Well Hospital for neurosurgeon's opinion and further treatment and management. Dr. Balsubramanian (PW-7) further stated that he examined Maheshprasad (PW-1) between 6.15 a.m. and 6.30 a.m. and on examination, he found lacerated wound with dirt contamination on the occipital scalp. There was abrasion over the right foot and there was an evidence of left nostril bleeding. He cleaned the wound and bandaging was done. He was handed over to Police Constable Dnyaneshwar and referred to Gate Well Hospital for further treatment and accordingly he issued Medico Legal Certificate (Exh.76). The evidence of Dr. Balsubramanian (PW-7) lends assurance to the assault on Maheshprasad (PW-1) and his mother Shobhadevi before 6.00 a.m. on 02.09.2013.

14. Corroboration to the evidence of Maheshprasad (PW-1) is also forthcoming from the evidence of Dr. Vinay Saoji (PW-8)

attached with Gate Well Hospital and Research Institute, Dhantoli Nagpur. Who stated that on her examination, he found following injuries :

- i. Lacerated wound over left temporoparietal skull of size 1½ inches, cruciate in pattern. Edges were contused, apparently there was no fracture to skull bone.
- ii. Lacerated wound over back side of left external pinna near helical rim of size 2 inches and deep up to the cartilage.
- iii There was small punctate wound/bruises over left external pinna.

15. According to Dr. Vinay Saoji (PW-8) on general examination he found Shobhadevi to be conscious and well oriented but was frightened. He issued injury certificate (Exh.71). Dr. Saoji further stated that he examined Maheshprasad (PW-1) and on examination he found following injuries :

- i. Multiple abrasions over both knees, both great toes, left elbow and left arm.
- ii. Lacerated wound over scalp with wiener scratch without any fracture of the skull. There were foreign bodies like stone pieces in the wound.

16. Dr. Vinay Saoji (PW-8) after examination of Maheshprasad (PW-1) issued injury certificate (Exh.79). Thus, the medical evidence corroborates evidence of Maheshprasad (PW-1).

17. Evidence of Maheshprasad (PW-1) also finds assurance from the recovery of clothes and cutter at the instance of accused No.2. Memorandum panchanama (Exh.65) was prepared on the basis of confessional statement made by the accused No.2. One T-shirt and cutter was recovered at the instance of the accused No.2 under recovery panchanama (Exh.66) over the loft of the bathroom in the house of accused No.2, ahead of Ita Bhatti near Nala. The recovery has been proved by both the panch witnesses whose evidence has not been shaken in cross-examination. The recovery of orange colour T-shirt and cutter at the instance of accused No.2 lends further assurance to the version of Maheshprasad (PW-1) that he was wearing orange colour T-shirt at the time of incident.

18. The recovery of orange T-shirt and cutter at the instance of accused No.2 establishes identity of accused Nos. 1 and 2 beyond doubt. Maheshprasad (PW-1) has identified accused Nos. 1 and 2 not only before the Court, but also in test identification parade. Nothing has been brought on record to create doubt about the identity of accused Nos. 1 and 2 and their involvement in the commission of offence. Maheshprasad (PW-1) has fairly conceded before the Court that he has not identified accused No.3, which shows that Maheshprasad (PW-1) is trustworthy witness.

19. Criminal Courts decide cases and question of acceptance of evidence of witnesses on sound common sense and when they found witnesses to be wholly independent, they endeavour to fathom the reason as to why their evidence should not be accepted. Ordinarily it is a safe and sound rule of appreciation of evidence to accept the testimony of a witness provided its in consequence with probabilities. It is better, if it is corroborated by inbuilt guaranties, which ensure the truthfulness of prosecution case, such as prompt First Information Report, recoveries at the instance of accused and presence of injured eye witness etc. As seen above, these guaranties are forthcoming in the instant case. Weighed on the said yardstick, the evidence of Maheshprasad (PW-1) inspires confidence and we accordingly accept it.

20. For the said reasons, in our view, the learned Special Judge acted correctly, in accepting the involvement of the appellants established in the instant case.

21. One of the question which remains is, whether the learned Special Judge is justified in convicting the appellants under Section 394 of the Indian Penal Code. We have reflected over the said question, and our question, and our answer is, the learned Special Judge was right in convicting the appellants under Section 394 of the Indian Penal Code.

22. Robbery is defined under Section 390 of the Indian Penal Code which indicates as to when theft becomes robbery. Section 394 of the Indian Penal Code is an aggravated form of robbery, which is defined as under :

“394. Voluntarily causing hurt in committing robbery
— If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine”.

23. Perusal of Section would show that an act would fall into its mischief, if the prosecutions establishes that 1] the accused, or some one jointly concerned with him, committed or attempted to commit robbery; 2] that the accused, or such other person, voluntarily caused hurt in doing so. Perusal of the text of Section would show that not only the person who actually causes the hurt, but an associate of his or her would equally liable for mischief contemplated by the Section. The liability under Section 394 of the Indian Penal Code is both individuals and vicarious. In the instant case, the evidence is that there was active association between the appellants and both the accused have actively participated in committed robbery and therefore, in our view, both the appellants are liable under Section 394 of the Indian Penal Code, as they have

voluntarily caused hurt to the informant Shobhadevi and Maheshprasad (PW-1).

24. The next question which remains is whether the learned Special Judge was justified in convicting the appellants for the offences under Sections 3(1)(ii) and 3(4) of the M.C.O.C. Act. Sections 3(1)(ii) and 3(4) of the M.C.O.C. Act reads as under :

“3. *Punishment for organised crime.*

(1) Whoever commits an offence of organised crime shall,—

(i);

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

3. *Punishment for organised crime.*

(1)

(2)

(3)

(4) Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.”

25. The Full Bench of this Court in the case of ***State of Maharashtra Vs. Jagan Gagansingh Nepali @ Jagya and another*** reported in ***2011 (5) Mh.L.J. 386*** in paragraph Nos.10 and 11

interpreted ingredients of Sections 2(1)(d), 2(1)(e), 2(1)(f),
Section 3 and Section 23 of the said Act, which read as under :

“10. For appreciating the controversy, it would be necessary to refer to certain provisions of M.C.O.C.A. namely, sections 2(1)(d), 2(1)(e), 2(1)(f), section 3 and section 23, which read as under :

2. Definitions - (1) In this Act, unless the context otherwise requires- (a) – (c)

(d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court have taken cognizance of such offence;

(e) "organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as member of an organized 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 objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;

(f) "organised crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime;....."

3. Punishment for organised crime. - (1) Whoever commits an offence of organised crime shall, -

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organized crime or any act preparatory to organized crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(3) Whoever harbours or conceals or attempts to harbour or conceal, any member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(4) Any person who is a member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(5) Whoever holds any property derived or obtained from commission of an organised crime or which has been acquired through the organized crime syndicate funds shall be punishable with a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs.”

“11. *Power to transfer cases to regular Courts. - Where, after taking cognizance of an offence, a Special Court is of the opinion that the offence is not triable by it, it shall notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.*

23. *Cognizance of, and investigation into, an offence – (1) Notwithstanding anything contained in the Code, -*

(a) no information about the commission of an offence of organized crime under this Act, shall be recorded by a police office without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police;

(b) no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police.

(2) No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police.”

26. The case of the prosecution is that the accused No.1 is a leader of organised crime syndicate and there are 20 cases registered against the accused No.1 for the offences punishable with imprisonment of three years or more and the Courts have taken cognizance of those offences. In so far as the accused No.2 is concerned, there were 34 cases registered against the accused No.2 for the offences punishable with imprisonment for three years or more and the Courts have taken cognizance of it. As regards accused No.3 also, there were five crimes punishable with imprisonment for three years or more were registered against him of which the Courts have taken cognizance. Most of the offences alleged against accused Nos.1 to 3 are offences committed for pecuniary gain including the present offence. P. I. Sunil Bonde (PW-14) sent proposal for addition of an offence under Section 3 of the M.C.O.C. Act against the accused persons to Shrikant Tarwade (PW-9). Shrikant Tarwade (PW-9) after going through the material placed before him by P. I. Sunil Bonde (PW-14), granted approval for invoking the provisions of the said Sections. Additional Director General of Police Kaushalkumar Pathak (PW-5) stated that he had gone through all the case papers in relation to the sanction of

prosecution of accused and after he was satisfied with the material, he had granted sanction to the prosecution.

27. Though the learned Advocate for the appellants submitted before the Court that the evidence on record shows that the charge-sheets of the offences allegedly committed by the accused persons for which sanction was granted by Shrikant Tarwade (PW-9) were not placed before competent authority while grant of sanction. Perusal of order dated 30.10.2013 (Exh.86) indicates Shrikant Tarwade (PW-9) has gone through the charge-sheets filed against the accused persons. The relevant part of the sanction order dated 30.10.2013 reads as under :

“After going through the papers, on the basis of record of evidence, record of above accused persons, charge-sheets filed against them, cognizance taken by the court, and their ultimate intention to gain pecuniary benefit behind committing such offences, preventive actions taken against them, I am fully satisfied that there is enough material and prima facie evidence to proceed against the above mentioned accused persons under the provisions of Maharashtra Control of Organised Crime Act, 1999”.

28. In addition to recording of satisfaction about charge-sheets being part of the record before competent authority, Shrikant Tarwade (PW-9) has specifically denied suggestion that he had not gone through the copies of charge-sheets. He has specifically stated in his cross-examination as under :

“It is not true to say that I had not gone through the copies of the charge-sheets. Those copies were produced before me approximately 3 to 4 days prior to passing of the approval order. Those copies of charge sheets were along with the proposal Exh.85.”

29. Therefore, we are satisfied that the sanction for prosecution of appellants for the offences under Sections 3(1)(ii) and 3(4) of the M.C.O.C. Act was valid. The material on record cumulatively show that the ingredients of offences under Section 3(1)(ii) and 3(4) of the M.C.O.C. Act are satisfied. The prosecution has established that the appellants are the members of organised crime syndicate and have attempted to commit robbery of gold bangles and therefore, we hold that the learned Special Judge has rightly convicted and sentenced the appellants for offences under Sections 3(1)(ii) and 3(4) of the M.C.O.C. Act.

30. In the results, we pass following order :

- i. The judgment and order convicting the appellants for the offences punishable under Section 394 read with Section 34 of the Indian Penal Code and Sections 3(1)(ii) and 3(4) of the M.C.O.C. Act is confirmed.
- ii. The appellants shall be entitled to claim set off for the imprisonment already undergone by them.

- iii. The appeals are dismissed accordingly. Pending application(s), if any, stand(s) disposed of.

JUDGE

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