IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.364 OF 2018

Vakilya @ Vilas s/o Baburao Shinde
age 36 years, Occu. Labour,
R/o Pithori, Tq. Ambad
District Jalna … APPELLANT

<u>VERSUS</u>

The State of Maharashtra
through the Sub-Divisional Police Officer
Bhokardan, Tq. Bhokardan, Dist. Jalna
(Copy to be served on Public
Prosecutor, Bombay High Court,
Bench at Aurangabad) … RESPONDENT

....
Shri N.S. Ghanekar, Advocate for appellant
Shri S.P. Sonpawale, A.P.P. for respondent
....

CORAM : R. G. AVACHAT, J.

DATE : 8th FEBRUARY, 2022

<u>J U D G M E N T</u> :

This is an appeal against conviction. The appellant along with other accused Dipak Pawar were convicted for the offences punishable under Sections 392/395 read with Section 397 of the Indian Penal Code and under Sections 3(1)((ii), 3(2), 3(4) of the Maharashtra Control of Organized Crime Act and, therefore, sentenced to different terms as shown in the chart below :-

Sections	Sentences	Fine	Default sentence
392/ 395 r/w 397 IPC	R.I. for 10 years	5000/-	R.I. 6 months
3(1)(ii) of MCOC Act	R.I. for 10 years	5,00,000/-	R.I. for 1 year
3(2) of MCOC Act	R.I. for 10 years	5,00,000/-	R.I. for 1 year
3(4) of MCOC Act	R.I. for 10 years	5,00,000/-	R.I. for 1 year

The substantive sentences have been directed to run concurrently.

2. Facts giving rise to the present appeal are as follows :-

P.W.1 Dattatraya (informant) was resident of village Warkheda, Taluka Jafrabad in district Jalna. He would run a fair price shop and Agro-Service Centre. The informant had been to Jafrabad for his personal work. He returned home in the evening. He along with his family members went to sleep in his house by 9.00 p.m. In the midnight by 1.00 a.m. on 24/2/2012, he received a stick blow on his head. He woke up to find 6 persons around him. They were sporting half pants and banians. They were of black complexion. They were speaking in Hindi. All of them were armed with sticks.

One of them asked the informant to give key of almirah. The informant refused to give. Again the informant was assaulted on his forehead. On hearing his shouts, his wife, brother, son and mother as well got up. They came to his room. The culprits assaulted them as well. One of the culprits robbed the informant's wife of her gold necklace. They broke open almirah, took cash of Rs.4,00,000/- and two gold coins and then escaped. The informant, therefore, approached the concerned police station and lodged the First Informant Report (F.I.R.) Exh.49.

3. Crime vide C.R. No.8/2012 came to be registered for offences punishable under Sections 395 and 397 of the Indian Penal Code. During investigation of some other crime, accused therein (Vijay Jadhav) disclosed to have had committed dacoity at the house of the informant. On his interrogation, names of his associates were revealed. The appellant and and two others were apprehended. The informant and his family members were medically examined. Scene of offence panchanama was drawn. Statements of the persons acquainted with the facts and circumstances of the case were recorded. During investigation, it was revealed that, it was an offence of organized crime committed by the

appellant and his associates as members of the organized crime syndicate headed by the appellant himself. Provisions of the Maharashtra Control of Organized Crime Act (MCOC Act), therefore, came to be invoked. Necessary approval therefor was granted by Special Inspector General of Police, Aurangabad. The investigation was, therefore, made by the officer of the rank of Deputy Superintendent of Police. On investigation, all police papers were placed before the Additional Director General of Police, Mumbai for obtaining his sanction for prosecution under the MCOC Act. He accordingly granted sanction. The charge sheet then came to be filed showing 4 of the 7 accused persons to have been absconding.

4. One of the 3 accused persons, against whom the charge sheet was filed (Shakalya @ Ashok Pawar) died. The Special Court framed the charge against the appellant and co-accused Dipak Pawar. Both of them pleaded not guilty. Their defence was of false implication.

5. The prosecution examined 11 witnesses and tendered in evidence certain documents. On appreciation of the evidence, learned Special Judge convicted both of them as stated as above. Both of them, therefore, preferred two

separate appeals. It is, however, reported that, the convict Dipak Pawar passed away pending the appeal. The appeal filed by Dipak Pawar, therefore, stood abated.

6. Heard. Learned counsel for the appellant would submit that, although 11 witnesses were examined by the prosecution, the case is based on the evidence of only 4 witnesses namely the informant and his family members, P.W.1 Dattatraya, P.W.2 Ganesh, P.W.3 Pratap and P.W.4 Uttam. The appellant came to be arrested based on inadmissible statement given by one of the accused during investigation of some other crime. None of the witnesses have identified the appellant in test identification parade. Nothing has been recovered from him. His identification before the Court was after about five years of the alleged crime. The informant and his family members had not given description of the culprits in the F.I.R. and the police statements. Based on such identification of the appellant before the Court, the Special Judge ought not to have convicted the appellant. The learned counsel, therefore, urged for allowing the appeal.

7. Learned A.P.P. would, on the other hand, submit

that, it was an organized crime committed by the members of the organized crime syndicate headed by the appellant. There are more than 10 crimes registered against the appellant and even the competent Courts have taken cognizance thereof before commission of the crime in question. The appellant had fled from the custody of the police. His conduct is criminal. The informant and his family members have identified him before the Court. One of the co-accused, in his statement to the police, has disclosed involvement of the appellant in the crime. The said statement is admissible under Section 18 of the MCOC Act. The learned A.P.P. read out the definition of organized crime to ultimately urge for dismissal of the appeal.

8. Considered the submissions advanced. Perused the evidence relied on. Gone through the impugned judgment.

It was a dacoity committed by 6 – 7 persons at the residence of the informant by 1.00 a.m. on 24/2/2012. As has been rightly submitted by learned counsel for the appellant that although the prosecution examined 11 witnesses, the relevant evidence would be that of the informant and his family members only. Admittedly, on arrest of the appellant, nothing has been recovered from him so as to connect him with the crime.

9. True it is that the appellant has criminal antecedents. Number of crimes were registered against him and charge sheets filed therein. The competent Court/s have also taken cognizance of those offences. The investigating officer was, therefore, justified in invoking the provisions of the MCOC Act.

For better appreciation, the terms "organized crime" and "continuing unlawful activity" defined in Section 2 of the MCOC Act, are reproduced below:

> "Sec. 2(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, under-taken 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 has taken cognizance of such offence;
>
> (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 other person or promoting insurgency."

10. For conviction of the appellant for the offence of organized crime and the related offence under the MCOC Act, his involvement in the present crime, that is one which is under consideration, has to be proved then and then only, there would be his conviction for the offences under the MCOC Act. In short, if the prosecution fails to bring home the charge of the crime under consideration, the factum of filing of number of charge sheets against the appellant for requisite offences enabling the prosecution to invoke the provisions of MCOC Act would be irrelevant. It is, therefore, necessary to first find whether the appellant has committed the present crime and if yes, whether it is his continued unlawful activity to constitute organized crime. Let us, therefore, advert to the evidence.

11. P.W.1 Dattatraya, the informant gave his evidence consistent with the F.I.R. (Exh.48) lodged by him. It is in his evidence that he was a businessman. On the given day (24/2/2012), he had returned from Jafrabad in the evening.

He took dinner along with the family members. All of them went to sleep little past 9.00 p.m. At the dead of night (1.00 a.m.), he suffered an assault on his head with a stick. He realised that, there were 6 persons around him. All of them were armed with sticks. They were clad in half pants and banians. They were speaking in Hindi. One of them asked the informant to give key of almirah. He refused. He was, therefore, again assaulted. On hearing his shouts, his son, wife, brother woke up and came to the room in which the informant was. All of them were also assaulted. One of the culprits robbed the informant's wife of her gold necklace. The culprits broke open the almirah. They took Rs.4,00,000/- cash and two gold coins. All of them then left the house. The informant then approached Jafrabad Police Station and lodged the F.I.R. (Exh.48). The informant and his family members were referred for medical screening.

12. The informant claimed to have had participated in the test identification parade. He claimed to have identified the appellant therein. He also identified the appellant before the Court as one of the dacoits.

13. The memorandum of test identification parade is

at Exh.53. The informant admitted in his cross-examination that he had been to the police station 8 – 10 times post crime in question. He had seen the appellant in police station when he was apprehended. He made a cleanbreast that he identified the appellant in the test identification parade since police had shown him before.

14. P.W.2 Ganesh, brother of the informant testified that, he heard a sound of opening of the door of the house by one person in the midnight. He, therefore, came out of his room to find the informant to have been surrounded by 4 – 5 dacoits in his room. The dacoits started beating them up with sticks. He sustained left hand injury. The dacoits were sporting underpants and banians. They locked them in one room. The almirah was broken open. It is further in his evidence that he had participated in the test identification parade held in Harsool Jail. He, however, could not identify any of the accused in the test identification parade. The witness was categorical to state that the persons who committed the dacoity at their residence were present before the Court.

In the cross-examination, the witness testified to have had not given features/ description of the culprits to police.

15. P.W.3 Pratap and P.W.6 Kalsalya are the son and wife of the informant respectively. Both of them gave evidence on the lines of the evidence of the informant. Both these witnesses have, however, not participated in the test identification parade. Both of them identified the appellant before the trial Court as one of the culprits. They have, however, admitted to have not given features of any of the culprits.

16. There is no any other evidence to connect the appellant with the crime in question. Now the evidence of the witnesses referred to hereinabove needs to be marshaled and appreciated. Admittedly, the informant had seen the appellant in the police station while he was arrested. Although he had referred to the memorandum of test identification parade (Exh.53), the close reading of the said memorandum would suggest that he identified co-accused Shakalya @ Ashok Lala Pawar and not the appellant herein. From the said memorandum, it appears that, the same was not held for identification of the appellant herein. P.W.2

Ganesh, P.W.3 Pratap and P.W.5 Vikram had not participated in the test identification parade. The evidence of these witnesses was recorded in December 2017 i.e. after about five years of the crime in question. None of these witnesses had given features/ description of the culprits in the F.I.R. and their statements before the police. Two of witnesses have even testified that the culprits had covered their heads with the piece of clothes/ scarfs. As such, identification of the appellant first time before the Court, that too after a gap of little over five years leads me to conclude that it would not be safe to rely on for convicting the appellant for the offence for which the minimum sentence is of ten years imprisonment. The learned Judge of the Special Court ought not to have relied on such kind of evidence particularly when there is no other evidence against the appellant.

17. This Court is, therefore, not at one with the judgment of conviction and the resultant order of sentence. The appeal thus succeeds. Hence the order :

O R D E R

(i) The Criminal Appeal is allowed.

(ii) The impugned order of conviction and sentence passed by the Special Judge (MCOC Act, 1999), Additional Sessions Judge, Aurangabad in Special Case (MCOC) No.1/2013, dated 25/4/2018 is set aside. The appellant is acquitted of the offences punishable under Sections 392/395 read with Section 397 of the Indian Penal Code and Sections 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999. The appellant be set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to him.

(R. G. AVACHAT)
JUDGE

fmp/-