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

**CRIMINAL APPEAL NO.35 OF 2006**

The State of Maharashtra … Appellant
Vs.
Anwar Salim Sayyad & Ors. … Respondents

Ms. S. S. Kaushik APP for the Appellant-State.
Mr. Lokesh Zade i/b Rohan Nahar for Respondent Nos.2, 4 to 7.
Mr. U. B. Nighot for Respondent No.3.

**CORAM : S. M. MODAK, J.**

**DATED : 29TH NOVEMBER 2022.**

**P.C:-**

1. Heard Ms. S.S. Kaushik learned APP for the Appellant-State and learned counsel Mr. Lokesh Zade for Respondent Nos.2, 4 to 7 and learned Advocate Mr. U. B. Nighot for Respondent No.3.

2. The Appeal was admitted on 15th December 2005, against eight accused/Respondent Nos.1 to 8. However, on 15th June 2022, this Court directed the Appellant to take necessary steps to serve Respondents-accused Nos.1 and 8 within a period of four weeks, failing which, it is observed that the Appeal will stand dismissed. Unfortunately, no steps were taken and that's how the Appeal stood dismissed against Respondent No.1 and 8.

3. The Special Judge under the Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred as "MCOC Act") acquitted all

eight accused as per the judgment dated 9th June 2005, for the offences punishable under section 3(1)(i), 3(1)(ii), 3(2) and 3(4) of MCOC Act. The correctness of said decision is challenged by way of this Appeal. The Special Judge acquitted all accused persons for the reason that there is failure of prosecution to prove that accused persons were the members of organised crime syndicate headed by absconding accused – Sham Manohar Shishupal. One more reason for acquittal is that confession recorded under section 18 of the MCOC Act for accused nos.1 and 2 was recorded by keeping certain lacuna in it.

4. Learned APP has taken me through reasons given in the impugned judgment and evidence of 17 witnesses examined on behalf of the prosecution. It is material to note that except the offence under section 3 of the MCOC Act, they were not charge-sheeted for any other offence under the Indian Penal Code or any other Penal law. It is important to note that the Act came into force in 1999 and the charge-sheet was filed in year 2001 and the judgment came to be passed in year 2005. At that time implementation of this Act was at nascent stage and all machinery including the Court, were not fully aware about correct meaning of the terminologies used in the MCOC Act.

5. This Court as well as Hon'ble Supreme Court in various judgments, have explained those terminologies and now law is almost settled. When implementation of the Act is at nascent stage, the law enforcing agencies are always in dilemma i.e. to say whether to adopt this mode or whether to adopt that mode. Ultimately, they are

expected to adopt particular mode. Even though the first informant, has taken lot of pains in collecting all the crime details against eight accused persons and sent proposal for approval, it seems that when the stage of proving a case before the Special Judge has come, the prosecution could not convert that material into legally admissible evidence.

6. It is also for the reason of certain procedural lacuna. There is no reason to believe that they were deliberate but they have occurred due to interpretation of provisions of the Act as appealed to their conscious but finally it was not accepted by the Constitutional Courts. The Constitutional Courts interprets law after hearing both sides. So even though learned APP strenuously argued the matter, it has not appealed to conscious of this Court also so as to interfere in the findings of the trial Court. I will given reasons for arriving at that conclusion hereinafter.

7. When evidence of the first informant is perused, this Court finds that the first informant has lodged the FIR on 29th May 2001 at Mancha Police Station. He lodged FIR after obtaining approval from Special I.G., Kolhapur on 03/05/2001. After taking charge of the Manchar police station, he realised that absconding accused Sham Manohar Shishupal is running organised crime syndicate and there are various offences registered against members at different police stations. The first informant had given details of the offences registered at various police stations in Pune and Mumbai against all eight accused persons. If we read his evidence, we may find that he has sent proposal on background of various offences registered at

different police stations.

8. The sum and substance of Junnar FIR is that 5 to 6 persons robbed PW 5 Chintaman Kale on 20th December 1998. Those persons came to petrol pump under pretext of filling petrol in fiat car. With the help of revolver they robbed and removed cash from the drawer of Rs.20,000/- to Rs.25,000/-. In turn, he lodged complaint with Junnar police station and it is registered as C.R.No.68 of 1998 for the offence punishable under sections 394 and 395 of the Indian Penal Code.

9. In addition to that there is an offence registered at Shikrapur police station being C.R. No.1 of 2001 under sections 395 and 397 of the Indian Penal Code. The patrolling party members and 7-8 villagers in intervening night on 8th January 2001 and 9th January 2001 were chasing certain dacoits. Those dacoits threw stones and even tried to run away with help of country made revolver. Certain persons were injured. Two persons by name Uday Kumar Gujar and Dnyaneshwar Garud were caught at the spot and one of them found possessing Rs.7,15,000/-. Apart from them there were five more persons caught at the spot.

## Approval

10. That's why PW 1 gave proposal for obtaining approval under MCOC Act. It is PW 11 Special Inspector General, Kolhapur Range, Pune Rural Area, received papers from Manchar police station through proper channel and he gave approval on 3rd May 2001. It is at

Exhibit 150 (though it is approval, he referred it as sanction). On that basis the first informant API Bhaskar Pawar registered an offence on 29th May 2001 with Manchar police station under section 3(1), 3(4) of MCOC Act against in all eight persons.

## Investigation

11. The papers further disclose that initial investigation was conducted by Sub-Divisional Police Officer, Haveli, Pune, PW 17. Accused No.1 Anwar Sayyed Ali and accused No.2 Ajit Shishupal expressed desire to give confession and that is how he completed formalities and their confessions were recorded. PW 12 Additional S.P. Pune Rural Area recorded their confession on 16th July 2001. Accused Nos.1 and 2 were produced before him on 16th July 2001 and on 17th July 2001. These confessions were tendered in evidence at Exhibit 73 and 74. During investigation PW 17 also collected documents in respect of previous offence and the charge sheets.

## Sanction

12. Further investigation was carried out by PW 15 Sub-Divisional Police Officer, Khed, Vijaykumar Magar. Inspite of his best efforts he could not arrest absconding accused. He has made correspondence for grant of sanction. It was issued on 18th December 2001 and then he filed charge sheet before the Special Court. (page 266). Before the Court, prosecution has examined PW 13 Additional Director General of Police Shri Omprakash Bali in order to prove grant of sanction.

## Other Witnesses

13. In addition to that certain other witnesses including

PW 3 Prakash Thorat,

PW 4 Suresh Abhang

were examined in order to prove previous incident and filing of complaints. Apart from them they have also examined certain police officers who have carried out investigation in related offences including

PW 6 ASI Sakharam Bamble,

PW 7 Police Head Constable Khanderao Nalawade

PW 8 PI Rahulkukar Yeole.

PW 14 PSI Dhananjay Godse.

## About Judgment

14. As stated above, the Special Judge has acquitted all accused for all offences charged. It is material to see whether the findings of the Special Judge are erroneous so far as satisfying requirements of ingredients of offence of organized crime as defined under section 3 of the MCOC Act. Section 3 of the MCOC Act consists of five sub-sections which deals with separate offences. In this case accused were charged for 3(1), 3(2), 3(4) of MCOC Act. All these offences are independent offences. <u>Section 3(1) is in two parts:</u>

(a) If organized crime has resulted into death then there is different punishment provided for that offence under section 3(1)(i)

(b) whereas in any other case other than death, then there is separate punishment provided under section 3(1)(ii) of the said

Act.

15. Section 2 lay down what is meaning of different terminologies.

Continuous unlawful activity

16. For an act to become organized crime, it must be "continuing unlawful activity". It means unlawful activity is being continued. There are certain pre-requisites, such activity can be carried out individually or collectively. It also lays down how such activity is carried out. It may be by use of violence or other means. What is objective of such activity is also laid down. It may be for pecuniary benefits or other advantage. So when unlawful activities is continued with all these pre-requisites, it becomes organised crime.

17. The preamble states about purpose of drafting this enactment. It is for purpose of prevention and control of organised crime. There is also meaning given of phrase "continuing unlawful activity" under section 2(d) of the said Act. There are certain pre-requisites. They are :-

(a) It must have resulted in cognizable offence.

(b) Punishment must be more than three years.

(c) It must be undertaken by single member or by all members of organised crime syndicate.

(d) They ought to have been more than two charge-sheets within a period of 10 years of which Courts have taken cognizance.

Organised crime Vs. Ordinary crime

18. It shows that the offence of organised crime is different from offence under Penal law. When unlawful activities are continued with aforesaid pre-requisites, it becomes the offence of organized crime. So for an act to fall under the provisions of the MCOC Act, there must be continuance of unlawful activity. So the question is whether there can be offence simplicitor under the MCOC Act that is to say without with any offence under the Indian Penal Code or under any other Penal law. The answer will be in negative. One can gather intention of the legislature, when one reads the provision of section 3(1) of the said Act, two separate punishments are provided depending upon consequences of the act of organized crime.

19. So the act of organized crime and the acts which are punishable under Penal law, they are co-related to each other. In this case, even though there were earlier offences registered at different police stations in Pune District and Mumbai District, in the FIR registered by P.W.1, the offence under section 3 of MCOC Act is not connected to any of those previous offences. This Court feels that this is lacuna in the prosecution.

20. The learned Single Judge of this Court at the Aurangabad Bench of this Court has dealt with this issue in case of ***Darasing @ Maruti Vakilya Bhosale and Others vs. The State of Maharashtra in Criminal Appeal No.901 of 2018.*** That was an Appeal against conviction. The Appellants were convicted simplicitor for the offence punishable under section 3 of the MCOC Act. It was set aside. It was held that the

Appellants were tried only for the offence under the MCOC Act without any substantiate crime. The observations are perfectly applicable to the facts of this Appeal.

21. It is true that in above referred judgment, the learned Single Judge has also referred to earlier judgments. It is true that above said interpretation is given after the impugned judgment is delivered but at the same time it is true that the officers who were at the helm of affairs were expected to consider the provisions of Act as per their literal meaning. If higher officials could have considered the provisions of the Act, they ought not to have plainly registered the offence under the provisions of the MCOC Act but they could have also applied the provisions of other Penal law.

22. It is matter of record that there were previous offences registered under the Indian Penal Code but it has not happened. Even it has come in evidence that in some of the previous offences, the accused persons are acquitted. Learned APP is right in her submission that the accused were convicted or acquitted in previous offence is not material but what is material is that the Court has taken cognizance within ten preceding years for cognizable offence punishable with three years or more imprisonment.

<u>Member of organised crime syndicate</u>

23. After scrutinising evidence, the trial Court has concluded that previous evidence of which the charge-sheet is filed were not committed by the members of organized crime syndicate. It is

important to note that it is not requirement of law that in every offence all accused are involved. There may be few of accused involved or combination of them, what is material is the accused have committed that particular offence as the member of organized crime syndicate or by person acting on behalf of organized crime syndicate.

24. Though the evidence has been adduced on the point of previous charge-sheets, unfortunately, the prosecution could not adduce evidence on the point that these offences were committed by organized crime syndicate. This lacuna also remained as the head of syndicate Sham Manohar Shishupal has not been arrested. There can be evidence on the point of organized crime syndicate by establishing connecting link in between these two offences. There is one more instance adduced on behalf of the prosecution.

Confession

25. It is in respect of confession given by accused Nos.1 and 2. They were recorded by P.W.12 Prakash Muktyal. The learned Special Judge has disbelieved that evidence on the point of not adhering to certain formalities. I have gone through this confession at Exhibits 73 and 74. It is true that confession under section 18 of the MCOC Act falls at higher pedestal than confession under the Evidence Act. If proper procedure is followed, such confession can be used against maker of the confession.

26. It is true that one cannot have control what the accused should say in the confession. The accused may confess about committing any

offence by himself or by any other person. In this case the accused are not tried for any other offence under the Indian Penal Code or other Penal law. So if the maker of confession will admit about committing the offence under the Indian Penal Code. Will it be confession falling under preview of section 18 of the MCOC Act because the person who has committed offence under the Indian Penal Code or under other Penal law is tried for offence under the MCOC Act. It is not so. There are serious repercussion that this confession will fall under section 18 of the MCOC Act. So far reasons given by learned trial Judge and also for above discussion, the evidence on the point of confession cannot be relied upon. The said discussion find place in paragraphs 22 to 24.

27. So for the above discussion, I do not think that the findings of trial Court are erroneous. The prosecution has invoked the provisions of the MCOC Act on the basis of their understanding of law but there are certain lacuna, as stated above. So I do not find any merit in this Appeal and Appeal is dismissed.

**(S. M. MODAK, J.)**