

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

**INTERIM APPLICATION NO. 553 OF 2022
IN
CRIMINAL APPEAL NO. 1605 OF 2019**

- 1) Vijay @ Vijya Bibhisan Kale
2) Uddesh @ Updesh Bibhishan Kale ..Applicants/Appellants

Versus

State of Maharashtra ..Respondent

Shri. Vikas B. Shivarkar, Advocate for the Applicants/Appellants.
Ms. P.N. Dabholkar, APP for the Respondent - State.

CORAM : PRAKASH D. NAIK, J.
Date : 26th APRIL, 2022.

JUDGMENT:-

1. The applicants were convicted by Judgment and order dated 3rd May, 2019 passed by Additional Sessions Judge and Additional Special Judge, MCOC Act, Pune in MCOC Case No.6 of 2014 for offences under Sections 394 and 397 r/w 34 of Indian Penal Code (for short "IPC"). They were directed to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1,000/- for the offence punishable under Section 394 of IPC and in default of payment of fine, both were directed to suffer simple imprisonment of

three months. For conviction under Section 397 of IPC, the applicants were directed to suffer rigorous imprisonment for period of seven years, no fine was imposed. The applicants were also convicted for the offence punishable under Section 3(1)(ii) of Maharashtra Control of Organized Crime Act, 1999 (for short “MCOC Act”) and directed to suffer rigorous imprisonment for the period of seven years and pay a fine of Rs.5,00,000/- (Five Lakhs only) each. In default of payment of fine each of them were directed to suffer rigorous imprisonment for three years. The applicants were acquitted of the offence punishable under Section 3(2) of MCOC Act. The substantive sentence of imprisonment was directed to run concurrently. The applicants were in custody from 04.02.2014 and it was directed that they are entitled for set off under Section 428 of Cr.PC.

2. By preferring this application the applicants have prayed that the sentence of simple imprisonment for a period of three months imposed upon the applicants in default of payment of fine of Rs.1,000/- (One thousand only) for conviction under Section 394 of IPC may be reduced to period of one month. The sentence of

imprisonment for a period of three years imposed upon the applicants in default of payment of fine of Rs.5,00,000/- (Five lakhs only) for conviction under Section 3(1)(ii) of MCOC Act, may be reduced to period of one year.

3. The applicants were also tried in another case viz. MCOC Case No.9 of 2014 before the Special Judge, MCOC Court, Pune. Vide Judgment and order dated 17th June, 2021 the learned Special Judge under MCOC Act, Pune convicted the applicants for the offence punishable under Section 395 of IPC and sentenced them to suffer imprisonment for a period of ten years each and pay fine of Rs.50,000/-(Fifty Thousand only) each and in default to suffer simple imprisonment for six months. The applicants were also convicted for the offence punishable under Section 3(1) of MCOC Act and sentenced to suffer rigorous imprisonment for a period of seven years and to pay fine of Rs.5,00,000/-(Five Lakhs only) each and in default to suffer imprisonment for one year. They were further convicted for the offence punishable under Section 3(4) of MCOC Act and sentenced to suffer rigorous imprisonment for a period of seven years each and to pay fine of Rs.5,00,000/-(Five Lakhs only)

and in default to suffer simple imprisonment of one year. All the substantive sentences were directed to run concurrently. It was further directed that the sentence of imprisonment awarded in this case was directed to run concurrently with sentences of imprisonment passed in MCOC Case No.6 of 2014 passed by learned Additional Judge, MCOC Court, Pune vide Judgment and order dated 3rd May, 2019 in accordance with section 427 of Cr.P.C.

4. The applicants have not challenged the Judgment and order dated 17th June, 2021 passed by Special Judge under MCOC Act, Pune in Special Case No.9 of 2014, before this court.

5. Learned Advocate for the applicants submitted that the applicants have undergone the entire substantive sentence of imprisonment. The applicants are in custody for more than eight years. The sentence of imprisonment for default in payment of fine be reduced to one month and one year respectively on each count as stated above. On instructions it is submitted that the applicants are not challenging the Judgment and order dated 17th June, 2021 passed by Special Judge MCOC Act, Pune convicting them. Learned Advocate relied upon the decision of the Supreme Court in the case

of Sharad Hiru Kolambe V/s State of Maharashtra and Others (2018)
18 SCC 718.

6. The applicants have filed affidavit stating that, the applicants are accepting conviction imposed vide Judgment and order dated 17th June, 2021 in MCOC Special Case No.9 of 2014 for offence under Section 3(1)(ii) of MCOC Act and would not challenge the conviction.

7. The applicants are seeking reduction of sentence of simple imprisonment imposed by the trial Court in MCOC Special Case No.6 of 2014 for the conviction under Section 394 of IPC in default of payment of fine and reduction of sentence of rigorous for three years for the offence under Section imposed in case of default of payment of fine for conviction under Section 3(1)(ii) of MCOC Act. It is contended that, the payment of sentence of three months in default of fine of Rs.1,000/- (One thousand only) be reduced to one month imprisonment and the sentence of three years in default of payment of fine of Rs.5,00,000/- (Five Lakhs only) be reduced to one year.

8. Learned APP submitted that no leniency should be shown to the applicants as they are convicted under the provisions of MCOC Act. The decisions relied upon by the learned Advocate for the applicants /appellants are not applicable in the present case. The apex Court has also taken note of financial status of accused and relied upon the report which depicted the financial constraints of the accused therein. The applicants are also convicted in another case under the provisions of MCOC Act. He relied upon the decisions in the case of Shahejadjkhan Mahebubkhan Pathan V/s State of Gujrat (2013) 1 SCC 570.

9. Learned APP submitted report dated 18th April, 2022 forwarded by Superintendent Jail, Yerwada prisoner wherein it is mentioned that the applicants have undergone the sentence of 8 years, 10 months, 27 days by calculating all the benefits as on 31st March, 2022. The report is taken on record.

10. The applicants have preferred Criminal Appeal No.1605 of 2019 challenging Judgment and order dated 3rd May, 2019 passed by Special Judge under MCOC Act in MCOC Case No.6 of 2014

convicting the applicants for the aforesaid offences. It is evident that applicants are convicted under Section 3(1)(ii) of MCOC Act. The fine amount imposed upon the applicants is Rs.1,000/- (One Thousand only) and Rs.5,00,000/-(Five Lakhs only). No fine was imposed for the conviction under Section 397 of IPC. The sentence imposed for non-payment of fine is three months and three years respectively on each count. The sentence of imprisonment in default of payment of fine cannot be directed to run concurrently. However, there is no impediment in reducing the sentence of imprisonment imposed in default of payment of fine. The applicants are in custody from the date of arrest. They have undergone the imprisonment of eight years.

11. In the case of Sharad Hiru Kolambe, it was observed that concurrent running of default sentence inter-se or with substantive sentence is not permissible. If permitted it would defeat objective of imposition of fine, especially when certain minimum quantum of fine is prescribed and or mandatory imposition of fine is contemplated. The Court however maintained the quantum of fine and reduced the sentence of imprisonment imposed in default of payment of fine.

The factual matrix of said decision would indicate that the accused were convicted for offence under Section 364 of IPC r/w Section 34 of IPC and sentenced to suffer imprisonment and pay fine of Rs.1,000/-(One Thousand only) and in default of payment of fine to suffer imprisonment for three months. The accused were also convicted for other offences and sentenced to suffer imprisonment and imposed fine amount and in default of payment of fine, to suffer imprisonment. The convict therein were also convicted under Sections 3(1)(ii) and 3(2) of MCOC Act with fine of Rs.5,00,000/- (Five Lakhs only) and in default of payment of fine to suffer imprisonment was period of three years. The accused were also convicted under Section 3 (4) of MCOC Act and sentenced to suffer imprisonment of ten years and fine of Rs.5,00,000/-(Five Lakhs only) and in default of payment of fine, they were directed to suffer imprisonment for three years. The sentence in default of payment of fine was reduced.

12. The punishment of fine provided for the conviction under Section 3(1)(ii) of MCOC Act is Rs.5,00,000/-(Five Lakhs only). Thus, the fine amount cannot be reduced. However, there is no

restriction in reducing the sentence in default of payment of fine. On facts and circumstances of each case the Court may exercise the discretion. The Court may reduce the sentence of imprisonment in default of payment of fine.

13. Learned Advocate for the applicants have submitted that they are in custody for more than eight years. They could not deposit fine amount on account of financial constraints. Since last eight years they have not earned income. Their family is suffering from financial constraints. The applicants are also convicted in another case. However, substantive sentences of imprisonment in both cases are directed to run concurrently. The applicants have undertaken that they would not prefer appeal challenging the conviction in the other case.

14. In the case of Shahejadjkhan (supra), it is observed that the terms of imprisonment in default of payment of fine is not sentenced. It is a penalty which a person incurred on account of non-payment of fine. When default sentences is imposed, the person is required to undergo imprisonment if he is unable to pay the fine

amount or refuses to pay such amount. It is the duty of the Court to consider the nature of offence, circumstances in which committed, the position of the offender and other relevant considerations such as peculiar circumstances of the accused persons as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine.

15. Considering the factual matrix of this matter lenient view could be taken for reduction of sentence of imprisonment in default of payment of fine imposed by the trial Court. Hence, the following order.

ORDER

- i. Interim Application No.553 of 2022 is allowed and disposed off.
- ii. Criminal Appeal No.1605 of 2019 is partly allowed and disposed off.
- iii. The sentence of simple imprisonment of three months for the conviction under Section 394 of Indian Penal Code in default, payment of fine of Rs.1,000/- passed by the Additional Sessions Judge and Additional Special Judge, MCOC Act, Pune in MCOC Case No.6 of 2014 is reduced to simple imprisonment for a period of one month.

- iv. The sentence of imprisonment of three years in default, payment of fine of Rs.5,00,000/- (Five Lakhs only) for the conviction under Section 3(1)(ii) of MCOC Act is reduced to rigorous imprisonment of one year.
- v. The applicants shall abide by affidavit / undertaking dated 13th April, 2022.
- vi. If applicants have undergone substantive sentence of imprisonment and reduced sentence of imprisonment in default of payment of fine, they shall be released forthwith, unless required in any other case.

(PRAKASH D. NAIK, J.)