

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

CRIMINAL APPEAL NO.395 OF 2022

Bazigar alias Birya Waghmanya Kale	 Appellant
Versus	
The State of Maharashtra	 Respondent

**.....
WITH
INTERIM APPLICATION NO.932 OF 2022
IN
CRIMINAL APPEAL NO.395 OF 2022**

.....
Mr. Rupesh Bobade, Advocate (appointed) for the Appellant.
Mr. P.H. Gaikwad, APP, for the Respondent-State.
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CORAM : SARANG V. KOTWAL, J.

DATE : 29th SEPTEMBER, 2022

ORAL JUDGMENT :

1. The appellant was the original accused No.2 in MCOC Special Case No.9/2014 on the file of the Special Judge, MCOCA Court, Pune. There were four accused. At the conclusion of the trial, out of four accused, accused No.4 was acquitted, and accused Nos.1, 2 & 3 were convicted and sentenced by the judgment and order dated 17.6.2021 as follows :

- i) for commission of offence punishable under Section 395 of IPC, they were sentenced to suffer RI for ten years each and to pay fine of Rs.50,000/- each and in default of payment of fine to suffer SI for six months.
- ii) for commission of offence punishable under Section 3(1) of the Maharashtra Control of Organized Crimes Act, 1999 (MCOC Act), they were sentenced to suffer RI for seven years each and to pay fine of Rs.5,00,000/- each and in default of payment of fine to suffer SI for one year each.
- iii) they were also convicted for the offence punishable under Section 3(4) of MCOC Act and were sentenced to suffer RI for seven years each and to pay fine of Rs.5,00,000/- and in default of payment of fine to suffer SI for one year each.
- iv) All the substantive sentences were directed to run concurrently. The sentences of accused Nos.1 to 3 were directed to run concurrently with the sentence passed in MCOCA Case No.6/2014 imposed on them vide judgment and order dated 3.5.2019 passed by the Additional Judge, MCOCA Court, Pune as per Section 427 of Cr.P.C.
- v) All of them were acquitted from the offence punishable

under Section 3(2) of the MCOC Act.

- vi) They were granted benefit of set-off under Section 428 of Cr.P.C.

2. Heard Shri Rupesh Bobade, learned appointed counsel for the appellant and Shri P.H. Gaikwad, learned APP for the State.

3. The prosecution case is that several truck drivers, owners and cleaners had parked their trucks behind a petrol pump in an open parking space. Those trucks were transporting steel. In the night between 26th and 27th February, 2014 about seven to eight persons entered these trucks carrying knives and sticks. They took away cash amount and ornaments from the truck drivers and cleaners. One of the truck owners lodged the FIR at Loni Kalbhor police station, Pune vide C.R. No.68/2014. The accused, including the present appellant, were arrested on 29.3.2014. Test identification parades were held on 31.7.2014 and 6.8.2014. Statements of witnesses were recorded. At the instance of accused No.1 some cash amount and some ornaments were recovered. At the conclusion of the investigation, charge-sheet was filed.

4. During the course of investigation, it was found that the offence was committed as a continuing unlawful activity by an organized crime syndicate. Therefore, approval under Section 23(1) of the MCOC Act was given. The investigation was carried out and after obtaining sanction under Section 23(2) of the MCOC Act, the charge-sheet was filed. The accused were tried before the MCOCA Court.

5. During trial, the prosecution examined eleven witnesses including seven victims, one pancha and various police officers. The approval under Section 23(1) of the MCOC Act was produced at Exhibit-91/2 and the sanction under Section 23(2) was produced on record at Exhibit-92/3.

6. PW-1 Kumar Gugwad was the first informant. He has deposed that he was owner of the truck bearing No.MH-09-BC-5265. On 26.2.2014, he and his driver Balappa Gugwad loaded the steel goods at Hospet, Karnataka and they came to Loni at around 10.00 p.m.. They parked their truck in an open space behind the petrol pump adjacent to godown of Kalyani Steel Company. About 20 to 25 trucks were also parked there. Both of them had their

dinner and they slept in the truck. In the morning hours at around 3.00 a.m. on 27.2.2014, seven to eight persons armed with wooden sticks came there. Those persons woke-up the complainant and his companion and told them to hand over their money. The first informant handed over Rs.5,000/- and a gold ornament. They also robbed cash and golden ornaments from other trucks. Then they ran away. PW-1 the first informant has deposed that some of them were having black complexion and some of them were having fair complexion. They were in the age-group of 24-25 years. PW-1 and others then narrated the incident to a watchman. He informed the police telephonically. The police came at the spot. They carried out spot panchnama. PW-1's statement was recorded and it was treated as FIR. The FIR is produced on record at Exhibit-49. On 31.7.2014, he went to Yerwada Central Prison for identification of the accused. In that parade, he identified two accused. He was unable to tell whether those two persons were present or not in the Court. The note of the learned Judge mentions that PW-1 did not identify any of the four accused present in the Court. PW-1 explained that since several days had passed after the incident and the identification

parade, he was not able to identify any accused. During investigation, the police showed him his gold ornament, which he identified.

In the cross-examination, he stated that at the time of dacoity he did not shout as they were threatened. More importantly he admitted that there was darkness at the place of incident.

The FIR is produced at Exhibit-49. The FIR gives many details of trucks, their drivers, cleaners and details of amount and ornaments which were robbed. However, these details are not mentioned by him in his deposition. Therefore, the use of those details in the FIR is very limited. It was registered at 6.00 a.m. on 27.2.2014 at Loni Kalbhor police station vide C.R. No.68/2014.

7. PW-2 Ravi Kuti was a driver on truck bearing No.MH-17-AQ-4005. His truck was also parked in the same parking area. He has also described the incident in the same manner. He has deposed that about four to five persons armed with sticks and knives approached him and took away Rs.8,000/- and a cell

phone. He identified all the four accused in the Court as the same persons who had committed the offence.

In the cross-examination, however, he admitted that there was darkness when the incident took place, but, he volunteered to state that there was light in the parking area. At the time of incident, he himself was in the cabin of the truck. He denied the suggestion that there was darkness in the cabin. He has given an important admission in his cross-examination as he has admitted that he had seen the accused persons out of the Court hall.

8. PW-3 Raosaheb Shejar was a driver on the trailer bearing No.MH-06-K-4879. He has also described the same incident. Four unknown persons entered his cabin by pointing knives and wooden sticks. They robbed him of cash of Rs.5,500/-, gold ornament and wrist watch. After that, they went to another trailer and robbed the other drivers and then fled away. All the drivers then went to Loni Kalbhor police station and one of them gave report. In July, 2014, he was called to Yerwada police station. He has deposed that in the identification parade he

identified four accused. PW-3 identified all the four accused before the Court.

In the cross-examination, he denied that there was darkness at the time of incident. According to him, the focus of the the light at the petrol pump was in his cabin. There were four offenders.

9. PW-4 Laxman Karande was a cleaner on the trailer bearing No MH-06-K-4879. He was present with PW-3 and, therefore, he has narrated the incident in exactly the same manner as is described by PW-3. However, there is a slight discrepancy in the timing. He has deposed that the incident had taken place at around 3.00 a.m.; whereas PW-3 has deposed that it had taken place at 2.30 a.m.. He has deposed that after five to six months, he was called at Yerwada Jail and he has identified four accused in that parade. He also identified four accused in the Court.

In the cross-examination, he admitted that when he came to the Court accused were sitting in the veranda.

10. PW-5 Sitaram Raut was the driver of the truck bearing No.MH-13-AX-3757. He has also described the incident. Around

Rs.8,000/- kept by him in his clothes were missing. The others were also robbed and assaulted. There were seven to eight persons armed with wooden logs. He has admitted that he had not seen those persons. He did not identify any of the accused in the Court. He also admitted that there was darkness in his cabin, but, he denied that there was darkness outside the cabin.

11. PW-7 Ganesh Shinde was a driver on the truck bearing No.MH-43-G-6059. He was also one of the victims. One of the accused gave blow of knife on his right shoulder. His phone was taken away. He could not identify any of the accused.

12. PW-8 Radhari Yadav was a driver on the trailer bearing No.MH-06-AQ-1580. He has deposed that one of the dacoits entered in his cabin. They assaulted him with knife and took away around Rs.10,000/-. He did not identify any of the accused in the Court. He admitted that there was darkness at the time of incident.

13. PW-6 Sudam Gavade was a panch witness for search of the house of accused Kale. His evidence is not very clear. It could be house of the present appellant but nothing was recovered

and this evidence is not incriminating. About rest of his evidence, he was declared hostile in respect of search of houses of other accused.

14. PW-9 Additional Superintendent of Police Baramati, District-Pune Milind Mohite had conducted the investigation between February to July, 2014. He was empowered to conduct the investigation. He could not tell whether there was darkness at the spot because he had visited the spot during day time. He admitted that the accused were arrested on suspicion.

15. PW-10 Deputy Commissioner of Police Ashok Bharate had conducted the investigation after 14.7.2014. He had caused to conduct test identification parade. He obtained two charge-sheets in the past crimes committed by the accused. Those charge-sheets were produced on record at Exhibit-113. The test identification parade memos regarding two parades dated 31.7.2014 and 6.8.2014 are produced on record at Exhibit-108 and 112.

16. PW-11 PI Anil Gopal had supervised recovery of a knife, two gold ornaments and Rs.9,770/- at the instance of

accused No.1 from a heap of broken-tiles near Indapur at the instance of accused No.1.

17. Learned trial Judge then believed the prosecution witnesses who had either identified the accused at the test identification parade or in the Court; and based on their evidence convicted the appellant and others. He also took into account the record produced by the police officers in the form of charge-sheets to conclude that the present offence was part of continuing unlawful activity of an organized crime syndicate and, therefore, also convicted and sentenced the appellant and others under the provisions of the MCOC Act.

18. Learned counsel for the appellant submitted that admittedly it was a night time and the victims were sleeping. It was not possible for them to observe the features. Their depositions are inconsistent on material aspect. There was delay in holding the test identification parade. The features of the offenders is not mentioned in the FIR or even in the police statements of any of the witnesses. There was no recovery at the instance of the appellant. Since the evidence was vague, the

appellant could not be convicted for the main offence under Section 395 of IPC. Consequently, he cannot be held guilty for commission of offences under the provisions of MCOC Act.

19. Learned APP, on the other hand, submitted that all the victims have consistently deposed against the appellant. Though some of the witnesses have not identified him in the Court; after a gap of many months it was not unnatural. He referred to the evidence of PWs-3 & 4, who had identified the appellant in the test identification parade as well as before the Court. He placed reliance on their evidence specifically to contend that the prosecution has proved its case beyond reasonable doubt.

20. He further submitted that once it is held that the appellant was guilty of that offence, the past history in the form of charge-sheet shows that it was continuing illegal activity by an organized crime syndicate and, therefore, the offences under the MCOC Act are also made out.

21. I have considered these submissions. First of all, it will have to be seen whether the appellant can be held guilty of commission of offence under Section 395 of IPC in respect of the

incident which had taken place between the night of 26th & 27th February, 2014. In this connection, the evidence against him is of the victims, however, the only incriminating circumstance against him as per their depositions is in respect of his identity. There is no recovery at his instance. Therefore, the entire case is based on the appreciation of the evidence from the point of view as to whether identity of the appellant, as one of the offenders, is established by the prosecution beyond reasonable doubt. As discussed earlier, the prosecution has examined PWs-1, 2, 3, 4, 5, 7 & 8 as the victims of the incident. Analysis of their evidence show following significant features.

- i. PW-1 the first informant is an important witness. He has not identified the appellant at the test identification parade. He has also not identified the appellant in the Court. Therefore, his evidence does not help the prosecution in showing the appellant's connection with the offence.
- ii. PW-2 has identified the appellant and others in the Court. However, he was not asked to attend the test identification parade and, therefore, he has not identified any of the

accused in any test identification parade. He was deposing for the first time before the Court in respect of identity of the offenders. Significantly, he had admitted that he had seen the accused outside the Court hall. This admission is important. The prosecution has to take all precautions to eliminate the possibility that the witnesses are shown to the appellant thereby influencing their depositions before the Court in respect of identification of the accused. This raises doubt about this identification of the accused including the appellant in the Court. He has also admitted that there was darkness when the incident had occurred, though he has stated that there was light in the parking. The incident had taken place in his cabin. All these raises reasonable doubt regarding his evidence. Therefore, even his evidence does not help the prosecution.

- iii. PW-5 deposed that he had not seen those persons and he had not identified the accused in the Court. Therefore, his evidence also does not support the prosecution.
- iv. PW-7 also did not identify the accused in the Court.

- v. PW-8 also has not identified the accused in the Court. He has admitted that there was darkness at the time of incident.

22. Thus, the evidence of these witnesses is worthless to prove case against the appellant. Therefore, the only witnesses material for the prosecution are PW-3 and PW-4. Both of them have identified the accused in the Court. PW-3 has deposed that in the month of July, he was called at Yerwada police station for test identification parade. This is important. The test identification parade was held in Yerwada Central Prison and not at Yerwada police station. The prosecution has not got this discrepancy explained through any re-examination. Therefore, his evidence is not beyond reasonable doubt.

PW-4 had also identified the accused including the appellant in the Court. He has also identified the accused No.2 in the test identification parade, but, he gave two important admissions – first he admitted that when he came to the Court he met the police officers and he also admitted that when he came to the Court the accused persons were sitting outside the Court hall.

Thus, there was a reasonable possibility that he was shown the accused before his depositions. Therefore, his evidence becomes doubtful as far as identification of the accused including the appellant is concerned. The test identification parade itself was held on 6.8.2014. No explanation is offered as to why, though the appellant was arrested on 29.3.2014, the investigating agency waited till 6.8.2014 to conduct the test identification parade. Absolutely no explanation is offered.

23. The effect of this discussion cumulatively shows that the prosecution has failed to prove its case beyond reasonable doubt against the appellant. Consequently, since the appellant cannot be held guilty of the incident which is subject matter of C.R. No.68/2014 of Loni Kalbhor police station which had taken place between the night of 26th and 27th February, 2014, there is no question of invoking the provisions of MCOC Act against him connecting this particular incident with the past activity of any organized crime syndicate. Therefore, consequently the conviction and sentence recorded under the MCOC Act also will have to be set aside. Hence, the following order :

:: O R D E R ::

- i. The appeal is allowed.
- ii. The judgment and order dated 17.6.2021 passed by the Special Judge, MCOCA Court, Pune in MCOC Special Case No.9/2014 is set aside. The appellant is acquitted from all the charges which he faced in the said trial. He be released from jail forthwith, if not required in any other case.
- iii. The appeal is disposed of accordingly. With disposal of the appeal, nothing survives in the application. It is also disposed of.

(SARANG V. KOTWAL, J.)

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