

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

CRIMINAL APPEAL NO.636 OF 2017

Ganesh @ Ganya Devidas Shinde
Adult,
R/at : Room No.228, Bhadarwada,
Shivaji Nagar, behind Cinemax theater,
Sion, Mumbai – 400 022
(At present at Talaja Central Jail) Appellant

versus

The State of Maharashtra
(At the instance of P. I. Sion Police Station,
Mumbai) Respondent

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- Ms. Saili Dhuru i/b. Kuldeep S. Patil, Advocate for Appellant.
- Mr. P. H. Gaikwad, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.
DATE : 04th OCTOBER, 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 22/12/2016 passed by the Special Judge under MCOC Act, 1999 in MCOC Special Case No.6 of 2012. The Appellant was convicted for commission of offence punishable u/s 307 of the Indian Penal Code and was sentenced to suffer rigorous

imprisonment for 10 years and to pay a fine of Rs.10,000/- and in default to suffer simple imprisonment for one year. The Appellant was acquitted from the charges of commission of offence punishable u/s 387, 323, 365, 504 (ii) and 506(ii) r/w 34 of the Indian Penal Code and also from the charges u/s 3 r/w 25 of the Arms Act and u/s 3(1)(ii), 3(2) and 3(4) of Maharashtra Control of Organized Crime Act, 1999.

2. The Appellant was granted set off u/s 428 of Cr.P.C. Besides the Appellant, there was one more accused Bajrang @ Ganesh @ Takya Ganya Dhondiram Nichite, who was accused No.2 in this case. He was acquitted from all these charges.
3. Heard Ms. Saili Dhuru, learned counsel for the Appellant and Mr. P. H. Gaikwad, learned APP for the State.
4. To protect the identity of the prosecution witnesses for the reasons of their security and safety, they are described as their status of prosecution witnesses before the trial Court.

The prosecution case is about the incident dated 14/09/2011. The Appellant came at the gate of Vishwabharati building with two others as passengers of a taxi. One of them was the accused No.2 and the other was one Vijay Shivgan who had lodged the FIR in this case. The prosecution case is that the Appellant asked the driver to stop the taxi near P.W.5. He had some talk with P.W.5 regarding payment of some amount. The Appellant then fired a bullet at the abdomen of P.W.5. He also fired in the air and then asked the taxi driver to drive the taxi away. The injured lay on the ground. He was taken to Sion Hospital by his brother P.W.4. The police were informed. They came at the spot and conducted inspection. Vijay Shivgan who was in the taxi was left at some place. He came to the spot and gave details of the incident to the police. The offence was registered vide C.R.No.294/2011 at Sion Police station. The Appellant was arrested on 18/09/2011. A weapon and some cartridges were recovered from his house at his instance. By a separate disclosure statement, another weapon and other bullets

were recovered from a place which he had taken on rent. In the meantime, the injured P.W.5 was shifted to Lilavati Hospital, where he underwent surgery. The bullet, which remained in his body, was removed. The firearm recovered at the instance of the Appellant and the bullet recovered from the body of P.W.5, were sent for ballistic examination. They found to match with each other.

5. During course of investigation it was found that this offence was committed as continuing unlawful activity by an organized crime syndicate and therefore approval u/s 23(1) of Maharashtra Control of Organized Crime Act, 1999 (for short 'MCOCA') was granted to apply provisions of MCOCA and to investigate under that Act. The investigation was carried out by the appointed police officer. After the investigation was carried out, sanction u/s 23(2) of MCOCA was obtained and the charge-sheet was filed. The cognizance was taken by the Special Court under MCOCA.

6. During trial, the prosecution examined 18 witnesses. There were three more eyewitnesses besides the injured witness. The prosecution examined Doctors at both the hospitals. The Panchas were examined to prove recoveries. The police constable, who had carried weapons and articles to FSL, was examined. The police authorities granting approval u/s 23(1) and sanction 23 (2) of MCOCA were examined. Besides them, the Investigating Officers were examined. The defence of the Appellant was of total denial. In addition, he explained in his written statement recorded u/s 313 of Cr.P.C. as under;

‘He was working with a builder as a watchman. In 2005, the place where he was residing, was in demand and many builders were interested in developing that land. One of them started acquiring the pieces of land from the residents. There was difference between two communities of residents. Thus started enmity between two groups. The prosecution witnesses in this case had lodged false case against them in the past. Even the present case was false and he was falsely implicated. The injured himself had criminal antecedents. No bullet was

recovered from his body. The recovery was false and therefore he should be acquitted.'

7. Learned Judge considered the evidence of the prosecution, Appellant's defence and the arguments advanced on behalf of them. He acquitted the Appellant from all the charges except that u/s 307 of the Indian Penal Code. According to learned Judge, the sanction under the Arms Act was given after the Court had taken cognizance and therefore he did not convict the Appellant under the Arms Act. As far as MCOCA is concerned, the learned trial Judge observed that though investigating agency produced past charge-sheets, no orders showing cognizance having been taken by the competent Court were produced. Therefore the main requirement for applying MCOCA was not satisfied and hence the Appellant was acquitted from those charges under MCOCA. He also observed that the other offences were not proved due to lack of evidence in that behalf. He mainly relied on the evidence of the injured witness and the eyewitness, as well as the recovery evidence and the FSL report to reach his conclusion of the guilt of the Appellant.

8. In this case, the first informant Vijay Shivgan was not examined during the trial because he had expired before he could be examined. Therefore the FIR was brought on record through the police officer who had recorded it. The main evidence in this case is that of the injured.

9. P.W.5 is the injured himself. He has deposed as under:

The incident took place on 14/09/2011. At that time he was standing near a tea stall with his brother and a friend. It was around 07.30 a.m. to 08.00 a.m. One taxi came there. The Appellant was seated at the front passenger seat. There were two others on the back seat. One of them was accused No.2. The Appellant called him and questioned about the money. P.W.5 refused to pay any money. The Appellant took out a pistol and fired at him. The bullet hit him on his right side of abdomen. He fell down. Because of that he suffered fracture to his leg. His brother carried him to Sion Hospital and after two days he was shifted to Lilavati Hospital. He was there till 20/09/2011. His

statement was recorded by the police on 24/09/2011. The police seized his clothes. He further deposed that the Appellant was demanding extortion money from him. One month prior to the incident he had received a phone call from the Appellant. He had demanded Rs.1 lakh. The Appellant asked him to take that amount from the builder who was developing that plot. P.W.5 identified the Appellant through video conferencing in the Court during trial. According to P.W.5 the Appellant fired at him because he refused to pay him extortion amount. He identified the pistol which was taken on record at Article 3. He identified his own clothes which were articles 1 and 2. He was operated in Lilawati Hospital. A bullet was removed from his abdomen. Because of fracture he was unable to walk and bend his legs.

In the cross-examination he admitted that a case u/s 307 of IPC was pending against him and his brother in the Sessions Court, Mumbai, since 2011. He was also detained. Though in the examination in chief he had also deposed that he had paid Rs.5,000/- to the Appellant as extortion amount, this

fact was not reflected in his police statement and he could not explain this omission, though he had said so before the police. He admitted that in the past, some member of the other gang had fired at him. He has stated that the pistol at Article 3 was not shown to him by the police during investigation. The pistol produced in the Court was of iron and was having wooden handle. He denied the suggestion that he was deposing falsely.

10. PW.4 was PW.5's brother who was with him at the time of incident. He has described the incident in the same manner as is described by PW.5. After PW.5 fell down at the spot, he took him to Sion hospital and then informed his family members from the hospital. After some time the police came in the hospital. They asked him to show the spot. PW.4 then showed the spot to the police. The police recorded his statement and also prepared Panchanama. He identified the Appellant through video conference. According to him, both the accused used to collect extortion amount from the residents of the locality. He identified the pistol- Article 3, which was shown to him in the

Court. According to him PW.5 was admitted in Sion Hospital for about 4 to 5 days.

In the cross-examination he deposed that he did not call the police. Police were present in the hospital. After reaching Sion hospital, immediately PW.5 was operated. PW.4's statement was recorded and even signature was obtained on it. The police enquired with the tea stall owner and others at the spot and took down their names and addresses. According to him, the police had recorded their statements.

11. PW.6 was an eyewitness to the incident. According to him, the police recorded his statement on 03/12/2011. The police were calling him for recording his statement but because of fear of the Appellant he gave his statement only on 03/12/2011. He further deposed that he had gone to school of his son to drop him. While returning he stopped near the tea stall. PW.4 and PW.5 were already present there. PW.6 then had tea. In the meantime the taxi came there. He then described the

incident as was described by P.W.4 and P.W.5. The injured P.W.5 was taken to hospital by P.W.4. This witness had identified the Appellant through video conference.

In the cross-examination he admitted that P.W.4 and P.W.5 were his relatives and he was having good relations with their families. According to him, there was no quarrel between the injured and the Appellant. He denied the suggestion that the Appellant was supervising site of one of the builders. He admitted that there was one case filed against him u/s 307 of the IPC in respect of redevelopment in the area. He denied the suggestion that the Appellant was helping the residents of the locality and therefore P.W.4, P.W.5 and P.W.6 implicated the Appellant falsely in this case.

12. P.W.8 was one more eyewitness. He was having a handcart for selling Vadapav near Cinemax theater. It was near the spot of the incident. He was present there. He has deposed that after the taxi came at the spot, the Appellant fired at P.W.5

and came towards his handcart. He also fired in air. According to this witness, the bullet hit P.W.5 on his leg. The police made enquiries with this witness at Sion police station and recorded his statement. He identified Appellant who was present in the Court. He identified the accused No.2 as the person who was sitting on the back seat. Most of the cross-examination of this witness is in the form of suggestions, which he denied.

13. P.W.7 is not an eyewitness. But he knew the Appellant. He has deposed that the Appellant had demanded Rs.1 lakh as extortion money from P.W.7's brother. Because of that, his brother had filed a complaint against the Appellant at Sion police station. That case was still pending at the time of his deposition. The Appellant was arrested in that connection and after he was released, his mother came to this witness and told him that the Appellant would kill him. The Appellant's sister had also threatened this witness similarly. The Appellant himself had called him on 2 to 3 occasions and had demanded extortion money. He has further deposed that one Satish Naik was

abducted by the Appellant for demand of Rs.5 lakhs as extortion. This witness's brother-in-law was Vijay Shivgan, who was the first informant in this case. He identified both the accused in the Court.

In the cross-examination he admitted that he lodged his own FIR in the year 2011 against the Appellant for demand of extortion money. He could not assign the omission from his police statement that the Appellant had demanded extortion money from him though according to him he had stated so before the police. It was not reflected in his police statement. He admitted that he had adopted the Appellant's cousin's son. He denied that there was family dispute between himself and the Appellant and because of that he was deposing against him.

14. The other evidence is in the form of evidence of Panchas. P.W.2 was called at Sion police station on 21/09/2011. The Appellant in his presence expressed willingness to show the articles which he had kept in his house. The memorandum

statement was recorded. It is produced on record at Ex.51. After that, the Appellant along with the Panchas and the police officers went to his house. He produced one pistol from one pot. He also produced two more articles, but PW.2 could not give details of those articles. The Panchanama was written. It is produced on record at Ex.52. The pistol is marked as Article 3 before the Court. The Panchanama shows that besides the pistol which was made of steel and wooden handle, one 9 mm empty and one round were also seized.

15. PW.3 was another Pancha. He has deposed that he was called by the Crime Branch Unit 4. The Appellant in his presence showed willingness to produce a firearm and cartridges. This witness could not explain what was written down. The Appellant took them on 3rd floor of a building. That room was taken on rental basis. The Appellant called the owner. He opened the lock. He took them to the mezzanine floor. There was one water tank. A bag was kept there. In that bag, one countrymade pistol, cartridges, some amount and one mobile

phone wrapped with one handkerchief were kept. The pistol was shown to him and he identified it. It was marked as Article 4. This witness also identified the Appellant. His cross-examination did not add anything favourable to the defence. The Panchanama Ex.58 shows that the country-made pistol was having wooden handle and it was described as having break frame. The live cartridge was showing letters as 8MM KF. There were 9 red coloured 6 bore live cartridges of the company Foxwood Special. The Panchanama shows that this recovery was made from a rented room in a building in Nalasopara.

16. P.W.10 was present at the time of this recovery from that room in Nalasopara. He had arranged for taking that room on rent. He has corroborated the recovery from that room. He denied the suggestion that since he was involved in one case he was helping police by deposing falsely.

17. P.W.11 police constable Arun Deshmukh was attached to Sion police station. On 26/02/2011 P.I. Randive handed over

four sealed packets along with one forwarding letter to be handed over to CFSL, Kalina. He then carried those four packets to CFSL, Kalina and obtained receipt. The forwarding letter is produced on record at Ex.76. It was in respect of earth from the spot, clothes of the injured and articles and weapons recovered from the Appellant's house.

18. There was another carrier of articles. He was P.W.1 P.C. Karadbhaje. On 21/01/2012 he carried two sealed packets to CFSL, Kalina. The forwarding letter regarding this request is produced by him on record at Ex.46. This letter mentions country made pistol having break frame with wooden handle, one live cartridge and 9 red coloured live cartridges recovered from rented room at Nalasopara. Those articles were sent on 21/01/2012.

19. P.W.13 Dr. Sudatta Waghmare was attached to Sion hospital. P.W.5 was brought to Sion hospital on 14/09/2011. He was having a gun shot injury on the right side on his abdomen.

P.W.13 operated on P.W.5. Then relatives of P.W.5 removed him from Sion hospital against medical advice. The injury was fresh and grievous in nature. The injury was sufficient to cause death. Accordingly the medical case papers were prepared. He was discharged on 15/09/2011 from their hospital. The medical papers were produced on record at Ex.81. The history was given by the patient that he was shot by a known person.

In the cross-examination he has deposed that, in a gun shot injury, there is possibility of entry and exit wound. There was no exit wound in the case of P.W.5. He admitted that he did not find bullet in the body of P.W.5. However in further answer in the cross-examination he deposed that he had not obtained X-ray of P.W.5.

20. P.W.12 Dr. Dattaprasanna Kulkarni was a surgeon attached to Lilawati Hospital. He has deposed that P.W.5 was brought to that hospital on 15/09/2011 in the afternoon. The patient gave history of gun shot on the previous day. There was

one entry wound on the right lower side of abdomen. There was a mid-line scar of recent surgery. P.W.12 also found that there was a palpable bullet in the back. There was no exit wound. The injury was grievous in nature. The injury was sufficient to cause death. He performed surgery and removed bullet from P.W.5's body. The bullet was handed over to police officers. It was kept in a transparent container. P.W.5 was discharged after 9 days from 15/09/2011. P.W.5 had injury on small intestine which Doctor at Sion Hospital had repaired. The injury was caused by a bullet. He identified the container which was used to keep that bullet.

In the cross-examination he admitted that when he was admitted to Lilawati Hospital, he was conscious and was in a position to speak. In the history, the name of the assailant was not mentioned. According him even in Sion hospital the bullet could have been removed from P.W.5's body. There was pus formation around the bullet in the body.

21. P.W.9 HC Babulal Sonawane was examined for implementation of the order passed by Deputy Commissioner of Police u/s 37 of Bombay Police Act prohibiting possession of deadly weapons. That order was in force from 23/08/2011 to 21/09/2011.
22. P.W.14 Vinit Agarwal, Additional Commissioner of Police had granted approval u/s 23(1) of MCOCA to apply provisions of the said Act.
23. P.W.17 retired DGP Arup Patnaik had accorded sanction u/s 23(2) of MCOCA. However his evidence has lost its significance because the Appellant is acquitted from the charges under the provisions of MCOCA and there is no challenge to that acquittal by the State of Maharashtra.
24. P.W.15 PI Sanjay Nikam was part of the investigation. On 30/09/2011 the Appellant expressed his willingness to show the rented premises at Nalasopara, where he had concealed the

country made pistol and cartridges. This witness has deposed about the recovery of the country-made pistol, one cartridge of 8 mm and nine 6 bore cartridges. This witness had investigated C.R.No.74/11 of Crime Branch and during that investigation recovery pertaining to this offence was effected.

25. P.W.16 PI Vinod Randive was attached to Sion police station. At about 08.25 a.m. on 14/09/2011 they received a telephone call from an unknown person about the firing at Sion Koliwada. He rushed to the spot. He saw some blood stains at the spot. He was told that injured was shifted to Sion Hospital. The brother of the injured narrated him the incident. Then P.W.16 went to Sion hospital to make enquiries. He then returned to the spot with the brother of the injured. In the meantime the informant Vijay Shivgan had arrived at the spot. He also narrated about the incident. He was in the same taxi. The Appellant had made him sit in the taxi under threats. They then went to the spot where the incident took place. He then described the incident of firing on the injured. Then the

Appellant told taxi driver to take him away from the spot. The taxi was taken towards Sion Depot. There the informant was asked to get down. Then he went to the spot and met the police officers and gave his FIR. It is taken on record at Ex.91.

26. This witness then seized clothes of the injured. He arrested the Appellant on 18/09/2011. On 21/09/2011 recovery of pistol and other article was effected from the house of the Appellant at his instance. On 24/09/2011 he went to Lilawati hospital and recorded the statement of the injured. According to him the injured was not in a position to speak till 24/09/2011 and therefore his statement was not recorded earlier. Muddemal Articles were sent by him to FSL on 26/09/2011 under the letter Ex.76. After that, MCOCA provisions were applied. The investigation was handed over to ACP Rupvate.

27. P.W.18 ACP Rupvate had conducted the investigation after application of MCOCA provisions. He conducted the investigation from 21/09/2011 onwards. He recorded the

statement of witnesses, carried out the investigation and filed the charge-sheet. He collected other charge-sheets against the Appellant. He produced those charge-sheets on record at Ex.105 to 117. He admitted in the cross-examination that he did not produce any evidence showing that accused Nos.1 and 2 were in contact with each other prior to and after the incident.

28. The C.A. reports are produced on record at Ex.94, 95 and 96. The case number of FSL is mentioned as BL-706/11, BL-699/11 and BL-51/12. The report is dated 08/02/2012. On 27/09/2011 one single barrel breech loading country-made handgun, one intact KF 8 MM rifle cartridge, one KF 8 MM rifle empty with indentation on the cap, along with the clothes and earth were received by FSL. The analysis shows that the handgun was in working order and the empty was fired from the same handgun. The cartridge also could be used for the same handgun.

29. On 21/01/2012 following articles were received;

One single barrel breech loading country-made handgun, nine refilled 12 bore shotgun cartridges and one intact KF 8 MM rifle cartridge. The 8 mm rifle cartridge was successfully test fired by the country-made handgun. The FSL also received the bullet recovered from the body of the injured. It was received on 29/09/2011 under MLC BL-706/11. The analysis showed that it was a fired 8 MM rifle bullet having brushing marks.

30. Ex.94 is an important FSL report dated 08/02/2012, which shows that the bullet recovered from the body of the injured which was sent under MLC No.BL-706/11 was fired from the handgun Ex.1 of MLC No.BL-699/11 i.e. from the country-made handgun recovered from the house of the Appellant.

31. Learned counsel for the Appellant submitted that he is falsely implicated. The witnesses have admitted that there was dispute between different builders. The Appellant belonged to one group and the witness belonged to the other and therefore

there was enmity. The FIR is a result of enmity and the Appellant is falsely implicated. He has not fired at the injured P.W.5. The evidence also shows that P.W.5 and this witness had criminal antecedents and they had many other enemies. She submitted that possibility cannot be ruled out that some other person had committed this offence. All the witnesses are interested witnesses and no independent witness is examined except perhaps P.W.8. But P.W.8 has not given proper answers. According to him, the bullet was fired on the leg of the injured, which is not the fact and therefore that witness could not be the real eyewitness in this case. There is delay in recording statement of the P.W.5. The Medical Officer has admitted that the injured was in a position to speak and yet his statement was recorded belatedly after about 10 days. Similarly, P.W.6 has also admitted that his statement was recorded in the month of December, though he has tried to explain that he was under fear. Learned counsel therefore submitted that this delay shows that there was a concoction of false story to implicate the Appellant. The Panchas for the recovery were not aware of what was

written in the Panchanama. They had merely signed the Panchanama. Therefore their evidence should be excluded from consideration. P.W.4 was at the spot and was at the hospital also. The police made enquiries with him in the first point of time at the spot. His statement should have been treated as the FIR and not the statement which was given by Vijay Shivgan. She submitted that the role of Vijay Shivgan is also doubtful because he was in the same taxi and he had no reason to come back to the spot. She submitted that the recovery of bullet is also doubtful because it is not possible to believe that the Doctor in the Sion hospital could not find the bullet in the body, but the surgeon in Lilavati Hospital could recover it when P.W.5 was admitted to Lilavati hospital. She submitted that sufficient doubt is created about the prosecution case and therefore the Appellant deserves to be acquitted.

32. Learned APP on the other hand submitted that the evidence of the witnesses is consistent and there is no reason to disbelieve them. The injured would not leave the actual assailant

and instead make allegations against the Appellant. This would be unnatural. He submitted that the offence is serious and the Appellant has long list of antecedents against him.

33. I have considered these submissions in the light of the evidence and defence discussed above. The most important evidence in this case is that of the injured himself. He and his brother P.W.4 have categorically given name of the present Appellant as the assailant. They were knowing him and there was previous enmity and there was no scope to disbelieve that it could a case of mistaken identity, or that it was a case of a false implication. The incident had taken place in broad day light. The Appellant had demanded extortion amount and when P.W.5 refused, he fired his gun P.W.5. It was witnessed by his brother and other witnesses. The evidence of P.W.5's brother i.e. P.W.4 is sufficiently believable. He had taken the P.W.5 to Sion hospital immediately and had narrated the incident to the police. There is no substance in the submission that his statement should have been treated as the FIR, because there is no variance in the

version of P.W.4 and the FIR lodged by Vijay Shivgan. In any case, the consistent prosecution case is that the Appellant had fired at P.W.5. Besides P.W.4 and P.W.5; P.W.6 and P.W.8 have also supported the prosecution case. Though it is argued that P.W.6's statement was recorded after three months, he himself has explained that he was under fear and therefore he was reluctant to give his statement. In the case of this nature this conduct cannot be said to be unnatural. At the time of deposition before the Court he has supported the prosecution case. As far as P.W.8 is concerned, though he has stated that the bullet was fired at the leg of the victim, this discrepancy need not go to the root of the matter, because according to P.W.5 himself because of the bullet injury he fell down and due to that he had suffered fracture to his leg. When he was carried to the hospital, there was injury to his leg as well. All these witnesses are the natural witnesses and in particular there cannot be any doubt about the presence of P.W.4 at the spot as he has taken P.W.5 to the hospital. Apart from that, there is other clinching evidence against the Appellant in the form of recovery of weapons. In this

case two fire arms were recovered; one from his own house and the other was from his rented room in Nalasopara. All the articles were sent for FSL examination and the C.A. report shows that the bullet recovered from the body of the injured P.W.5 matched the characteristics showing that it was fired from fire arm recovered at the instance of the present Appellant from his house. Therefore there is no force in the submission that the recovery of the weapon is false or recovery of the bullet from the body of P.W.5 is false. There is no reason for P.W.12, who is a surgeon attached to Lilavati Hospital, to create false evidence. Though, the bullet was not seen by the Doctor at Sion hospital, that does not mean that the bullet was not inside the body. The patient was in Sion hospital for a short duration, during which time, the primary focus was to save his life and the surgery was performed to repair the small intestine. After that he was shifted to Lilavati Hospital. Doctor at Sion hospital i.e. P.W.13 had admitted that no 'X' ray was taken. Therefore before proper investigation the patient was shifted to another hospital and therefore it cannot be said that since bullet was not recovered in

Sion hospital, there was no bullet inside body of the P.W.5. The evidence of P.W.12 is clear enough to show that the bullet was actually recovered from the body of the injured P.W.5. The same bullet matched with the firearm recovered at the instance of the Appellant.

34. All these circumstances and direct evidence show that the prosecution has proved its case beyond reasonable time. In the backdrop of this strong evidence against the Appellant, his weak explanation cannot destroy the prosecution evidence. In fact, his explanation also shows reason for their enmity and motive for him to commit this offence. Learned trial Judge has considered this evidence in its proper perspectives. Considering the manner of commission of offence, there is no scope to reduce the sentence. Therefore there is no reason to take a different view than that taken by the trial judge. I do not find any merit in the Appeal. The Appeal is dismissed.

(SARANG V. KOTWAL, J.)