

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

**CRIMINAL APPEAL NO.437 OF 2017
IN
MCOCA SPL. CASE NO.18 OF 2012**

**WITH
CRIMINAL APPLICATION NO.1054 OF 2019**

Anwar Elahi Fazal Elahi Khan @
Khan @ Khansab
Age 50 years,
Village : Khalapur, Kanjihoose Lane,
Post : Kotewali, Dist.: Muzzaffar Nagar,
State – Uttar Pradesh
(at present lodged in Arthur Road
prison)

.... Appellant/
Applicant/
Orig. Accused

versus

The State of Maharashtra
(at the instance of DCB CID in
C.R. No.68/09 & Dahisar Police
Station, C. R. No.151/09)

.... Respondent
(Orig. Complainant)

.....

- Ms. Megha A. Gowalani (Appointed Advocate) for Appellant.
- Smt. J. S. Lohokare, APP for the State/Respondent.

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**CORAM : SARANG V. KOTWAL, J.
DATE : 07th SEPTEMBER, 2022**

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 24/02/2017 passed in MCOC Special Case No.18 of 2012 by Special Judge Under the Maharashtra Control of Organized Crime Act, 1999 (for short 'MCOCA'), Greater Mumbai.
2. The Appellant was convicted and sentenced as follows :
 - (i) He was convicted for the offence punishable u/s 397 r/w 392 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for eight years and to pay a fine of Rs.5,000/-, in default of payment of fine to suffer rigorous imprisonment for six months.
 - (ii) The Appellant was acquitted from the charges of commission of offence punishable u/s 400 r/w 34 of the Indian Penal Code, section 3 r/w 25, 27 of the Arms Act and sections 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999.

3. The prosecution case is that PW.1 Suresh Dhakan was a Jeweller by profession. He was going to Kalbadevi from his workshop at Dahisar. He was carrying 42 bangles with him which he had made as per the order placed by a Jeweller in Kalbadevi. He reached the sub-way at Dahisar Railway station. Suddenly two persons came there and fired at him. He suffered injuries on his shoulder and abdomen. Those two persons snatched away his bag which contained those bangles. They ran away from the spot. He fell at the spot. The police officers reached there. He was taken to hospital where two bullets inside his stomach were removed surgically. The third bullet was removed after a month by an Orthopedic surgeon. On the day of incident i.e. on 25/04/2009 the police recorded his statement in the hospital. Based on that statement, FIR was lodged. The investigation was carried out. During investigation it was revealed that it was an act which fell within the meaning of continuing unlawful activity as defined under MCOC. Therefore the approval under section 23(1) of the MCOCA was granted. The investigation proceeded. Statement of witnesses were

recorded. Some of the accused were arrested. Recovery was effected from them. The Appellant was absconding. Before his arrest, sanction was accorded in respect of other accused who faced the trial, vide MCOC Special Case No.7 of 2009. The Appellant was arrested in the year 2011. Subsequently sanction u/s 23(2) of MCOCA was granted against him. He faced the trial vide MCOC Special Case No.18 of 2012.

4. During trial the prosecution examined 21 witnesses in the form of the injured informant, two persons who were present at the railway station, Station Master, person who assisted the police in recovering CCTV footage at the spot, different Panchas, SEM who conducted the Test Identification Parade, sanctioning authority and other police officers. The specific defence of the Appellant was that he was falsely implicated and he was shown to the first informant prior to the Test Identification Parade, and therefore he was identified. After recording the evidence and the statement of the Appellant u/s 313 of Cr.P.C. the learned Judge passed his judgment and order.

He relied on the identification of the Appellant. Learned Judge observed that though there were allegations that the offence under MCOCA was committed; the two charge-sheets were produced on record in respect of the co-accused gang leader and he was acquitted from the MCOC case. Therefore the charges under MCOCA could not stand against the present Appellant. Hence he was acquitted from those charges and was convicted only u/s 397 r/w 392 of IPC and was sentenced as mentioned earlier.

5. The prosecution depends on the evidence of the victim Suresh Dhakan. He was examined as P.W.1. His examination-in-chief in earlier MCOC Special Case No.7 of 2009 was also taken on record in the MCOC Special Case No.18 of 2012, which is the subject matter of this Appeal. He has deposed that he was a Jeweller by profession. His manufacturing unit was at Dahisar. He had 15 employees. On 24/04/2009 a Jeweller from Kalbadevi had placed order for 41 bangles. He had given one bangle as a sample. He had also given 809 gms of gold for

making bangles. PW.1 had accordingly made those bangles and he was carrying those bangles with him at around 04.15 p.m. He entered sub-way at Dahisar (E). He was taking steps towards platform Nos.2 and 3. Suddenly two persons came from backside. One of them snatched the bag. He resisted. The person who snatched the bag, fired two shots at him. He sustained bullet injuries on his abdomen. The other person also tried to snatch the bag. Again PW.1 resisted. That person also fired one shot on his left shoulder. Both of them succeeded in snatching the bag. They went away. PW.1 fell at the spot. The railway police came there. He was taken to Bhagwati Hospital and then he was removed to Nanavati hospital. The incident took place at 04.20 p.m. The police came at Nanavati hospital. They recorded his statement. It was treated as FIR. It was placed on record at Ex.30. The police had enquired with him in the hospital at around 07.00 to 08.00 p.m. He was hospitalized for 17 days. He was operated upon. On 26/06/2009 he attended Test Identification Parade at Arthur Road Jail. He identified one person by the name Aftab Javed Siddiqui @ Asif, who had fired

one shot on his shoulder. P.W.1 had also identified the same accused before the Court in the previous trial. In July 2009 he identified 33 bangles which were recovered at the instance of the other accused. In the present case he identified the FIR lodged by him. It was produced on record at Ex.23. He identified the Appellant who was present in the Court at the time of recording of P.W.1's deposition in this case. P.W.1 was called to Arthur road jail on 21/07/2012 for attending test identification parade. It was held by Nayab Tahasildar Mr. Jadhav. P.W.1 had identified the Appellant at that parade as the person who had fired two shots at him, causing injuries on the left abdomen and below his waist.

In the cross-examination he answered that the Appellant was not of dark complexion. He deposed that the co-accused Aftab had fired on his shoulder. The age of the dummies mentioned in the test identification parade was between 67 to 46. He denied the suggestion that on 18/07/2012 the Appellant was brought to the Court and the Police Officers had shown him

the Appellant outside the Court. He denied the suggestion that the police officers told him that he had to identify the same Appellant during test identification parade. He also denied the suggestion that in jail also the Appellant's photograph was shown to him. He denied the suggestion that the police officers had shown him the accused outside the Court and therefore he identified him in the Court during his deposition.

6. There are two more witnesses who were present around Dahisar railway station. They are P.W.15 Manoj Prabhudas Dhakan and P.W.16 Manohar Babaji Jadhav. P.W.15 Manoj Dhakan has deposed that in the year 2009 he was in the business of manufacturing gold ornaments. On 25/04/2009 he was going towards Zaveri Bazar at about 04.00 p.m. to 04.15 p.m. from Dahisar. He knew P.W.1. Around that time he saw the other accused Vinod Jagda and two persons boarding a Rikshaw. After that P.W.15 entered Dahisar sub-way. He came to know that there was an incident of firing and that P.W.1's bag was stolen. P.W.15 then went to Bhagwati Hospital to meet P.W.1. He told the

police about the accused Vinod and others going away from the station. He was knowing Vinod Jagda as he was his relative. He identified three accused in test identification parade. He identified Vinod Jagda, Khairul Kadri and one Rikshawala. As far as the present Appellant is concerned P.W.15's evidence does not throw any light on his involvement.

7. P.W.16 Mahohar Babaji Jadhav was another witness who was present around the area of Dahisar sub-way. At 03.30 p.m. he had seen two persons running away with revolvers in their hands. One of them was holding a handbag. They went away on a motorcycle. However, his evidence also does not support the prosecution case as he was not asked to identify the Appellant in the Court. He was not asked to identify the Appellant in test identification parade.

8. P.W.3 Mahesh Mahadev Powale was a CCTV Service Engineer. He was called by the police to Dahisar Railway station on 25/04/2009 to verify the CCTV camera recording. He saw

the CCTV footage which had recorded the scuffle between three persons. Two persons snatched a bag from the third person. On the next day again he was called to copy the CCTV footage on a pendrive. Accordingly he made such copy. The Pendrive was marked as Article 16. Learned trial judge has ignored his evidence because certificate u/s 65-A of the Evidence Act was not produced. Even otherwise his evidence does not describe anything further and it is not helpful in establishing the identity of the assailants.

9. In this connection the prosecution has also examined P.W.9 Manibhai Karsandas Darji, who acted as a Pancha when the CCTV coverage was copied on a Pendrive.
10. P.W.11 PI. Madhukar Bhingardive was the responsible police officer who was present when this CCTV footage was copied on Pendrive. This particular piece of evidence is not really relevant because the prosecution has not established the Appellant's connection with the CCTV footage.

11. Similarly P.W.4 Anil Jadhav was also examined in the same connection. He was a Station Master at Dahisar Railway Station and had helped the police officers in copying the CCTV footage.
12. P.W.6 Shiv Shankar Soni was a Pancha Witness in whose presence two bullets were seized and sealed by the police. Those bullets were produced by the doctor attached to Nanavati hospital.
13. P.W.7 HC Deepak Kamble was the police officer in whose presence those two bullets were seized.
14. P.W.10 PI Budhan Sawant was the police officer who had recorded the FIR and he had collected the clothes of P.W.1.
15. P.W.12 Manoj Kapil Shah was the first police officer who had heard the shouts of the informant and he had gone to spot.

16. PW.14 A.PI. Pandharinath Krishna Ghorpade had also gone to the spot. He had seen the blood stains at the spot. One of the persons who was present there had shown him the spot. He had carried out the Spot Panchanama. He prepared sketch map of the spot. Doctor from Nanavati hospital produced two bullets and PW.14 had seized those bullets.
17. PW.17 PI. Milind Khetle had conducted some part of investigation. He had arrested the accused Nos.1 to 5 in May 2009. He effected recovery at the instance of some of the co-accused. After application of MCOC he handed over the investigation to ACP.
18. PW.18 Jalindhar Khandagale had investigated this offence after the offence was numbered as C.R. No.68 of 2009 at Dahisar Crime Branch. He had produced two charge-sheets at Ex.63 and 64, based on which MCOC provisions were applied. In his cross-examination he has admitted that in those two charge-sheets, the Appellant's name was not mentioned.

19. P.W.8 Dr. Satyapal Singh had granted sanction u/s 23(2) of MCOCA.

There is no serious challenge to that sanction and in any case since the Appellant is acquitted from the MCOCA charges, this evidence is not material.

20. P.W.21 ACP Praful Chandrakant Bhosale was the Investigating Officer. He sought custody of the Appellant on 06/07/2012. He had deposed that on 21/07/2010 Nayab Tahasildar Jadhav conducted the test identification parade in the Arthur Road Jail. On completion of the investigation he submitted proposal for obtaining sanction. In the cross-examination he admitted that the Appellant was not of dark complexion.

21. P.W.5 Dr. Deepak Dattatray Vyas is an important witness. He has deposed about the injuries suffered by P.W.1. He

has deposed that there were injuries on left shoulder, left lumbar region and left side of left para umbilical region. He removed two bullets during operation. Third bullet was removed after one month by an Orthopedic surgeon. The victim was admitted to ICU. He had produced the bullets which were seized by the police.

22. P.W.2 Deepak Narayan Jadhav is another important witness in this case. He was a Nayab Tahasildar. On 18/07/2012 he received a requisition letter to conduct test identification parade. He conducted it on 21/07/2012. He made enquiries with two Panchas brought by the police. After being satisfied he allowed them to act as Panchas. He had described the procedure which was followed during test identification parade. Six dummy persons similar to the personality of the accused persons were brought. They were made to stand in one row. The Appellant was given choice to stand at any place. After that, one of the Panchas brought P.W.1 to the parade room. P.W.2 asked him whether the photograph of the Appellant or the Appellant

himself was shown to him by anyone. P.W.1 had replied in negative. Thereafter P.W.2 asked him to identify the suspect. He identified the Appellant. The Appellant gave his name as Khan Saheb. P.W.2 then prepared the memorandum Panchanama. It is produced on record at Ex.29.

23. In the cross-examination he stated that he did not ask the Appellant whether he was kept in veil when he was in the lockup. He admitted that the ages of the dummies were not similar. He also admitted that P.W.1 had not told P.W.2 that Appellant had fired on his stomach and waist.

This in short is the prosecution evidence.

24. Heard Ms. Megha A. Goyalani, learned counsel for the Appellant and Smt. J. S. Lohokare, learned APP for the State.

25. Learned counsel for the Appellant submitted that the description in the FIR is different from the actual description of

the Appellant. He is described as dark complexioned person in the FIR who had fired on the abdomen and waist. However, the witness had admitted that the Appellant did not have dark complexion. She submitted that the test identification parade was held after about 3 years and therefore P.W.1's deposition cannot be relied upon to convict the Appellant. According to her there were many infirmities in the procedure conducting the test identification parade. The age of the dummies varied too much. There was no other incriminating piece of evidence against the Appellant in the form of recovery etc. She submitted that therefore based on this weak evidence, the Appellant could not have been convicted.

26. Learned APP on the other hand submitted that the evidence of P.W.1 and P.W.2 itself is sufficient to prove the guilt of the Appellant. The Appellant was absconding for three years and therefore he cannot get advantage of his own wrong. The Appellant was also identified in the Court.

27. I have considered these submissions. It is true that except for identification evidence there is no other evidence against the Appellant. There is no recovery of any weapon or any gold which was stolen from the victim. The bullets recovered from the body of the victim are also not connected to the Appellant as there was no recovery of revolver at his instance. He is acquitted from the charges of commission of offence u/s MCOCA and learned Judge has given sufficient reasons for such acquittal. Therefore the only question remains about his identity and his connection with the crime.

28. In this case, the Appellant was absconding for a long period. However, when he was arrested in 2012, the Investigating Officer immediately arranged to conduct the test identification parade and it was accordingly conducted on 21/07/2012. P.W.2 has given details of the procedure which he had followed. He has deposed that the dummies were of similar description to that of the Appellant. That evidence has not been shaken. Since the dummies were similar looking no fault can be

found in selection of the dummies. There were six dummies placed in one row. The Appellant was permitted to stand at any place he wished. The witness including the victim P.W.1 has specifically deposed that neither the Appellant nor his photograph was shown to P.W.1 prior to conducting the test identification parade. Therefore the identification of the Appellant in the parade assumes importance. Even the Appellant's case is that he was shown prior to the parade. That also means that the parade was actually held and the P.W.1 was able to identify him in the parade. There is nothing on record to substantiate the defence of the Appellant that P.W.1 was shown the Appellant by the police before the test identification parade was held.

29. Apart from that, the victim i.e. P.W.1 has also identified the Appellant in the Court. He has deposed that the person who had fired on him on 25/04/2009 was present in the Court and was sitting in the dock. The victim-P.W.1 had sufficient opportunity to observe the Appellant at the time of incident

because he had struggled with the assailants, when they tried to snatch the bag from him. At first they were not successful, but after firing shots on him, they could remove the bag from him. It was time of around 03.30 p.m. to 04.30 p.m. Therefore there was sufficient light around, where the incident had taken place. The incident was serious. P.W.1 had sufficient opportunity to observe the features of the assailants. Though there was some description mentioned in the FIR, it must be taken into account that the P.W.1 had suffered three bullet injuries and was in serious condition and therefore some minor discrepancy was bound to be there in his FIR. That however will not help the Appellant in the background of the strong evidence of identification of the Appellant by P.W.1 not only in the test identification parade but also in the Court.

30. In view of this discussion, since the prosecution has led sufficiently reliable evidence, in the form of identification of the Appellant, the prosecution is successful in proving the case against the Appellant beyond reasonable doubt. Learned trial

Judge has considered these aspects properly. Therefore I do not find it necessary to interfere with the impugned judgment and order. Resultantly, the Appeal is dismissed.

31. With disposal of this Appeal, the connected Application in this Appeal is also disposed of.

(SARANG V. KOTWAL, J.)