

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

**CRIMINAL APPEAL NO. 852 OF 2022
WITH
INTERIM APPLICATION NO. 2801 OF 2022**

1. Bittu @ Manpreet Sukhdevsing Mahi
2. Dilip Indrajitsing Chauhan ..Appellants
Versus
The State of Maharashtra ..Respondent

**WITH
CRIMINAL APPEAL NO. 994 OF 2022
WITH
INTERIM APPLICATION NO. 2955 OF 2022**

Amar @ Rinku Kulvantsing Chauhan ..Appellant
Versus
The State of Maharashtra ..Respondent

Mr. Ashraf Ali Akhtar Shaikh a/w. Rui Danawala a/w. Ibrahim Shaikh for Appellants in Cri. Appeal No.852 of 2022.

Mr. Shailesh Kharat for Appellant in Cri. Appeal No. 994 of 2022.

Mr. S. R. Agarkar, APP for State/Respondent.

**CORAM : SARANG V. KOTWAL, J.
DATE : 2nd DECEMBER 2022**

JUDGMENT :

1. The Appellants have challenged the Judgment and order dated 05/07/2022 passed by learned Special Judge, Under MCOC

Act, Pune in MCOCA Special Case No.13 of 2016. The Appellant Amar Chauhan in Criminal Appeal No.994 of 2022 was the accused No.1 and the Appellants Bittu Mahi and Dilip Chauhan in Criminal Appeal No.852 of 2022 were the accused Nos.2 and 3 respectively in MCOCA Special Case No.13 of 2016. For the sake of convenience, all the Appellants are referred to by their original status as accused before the trial Court. At the conclusion of the trial, all the accused/appellants were convicted and sentenced as under:

- i) All the accused were convicted for commission of offence punishable under section 392 of the I.P.C. and were sentenced to suffer R.I. for 7 years each and to pay a fine of Rs.15,000/- each and in default of payment of fine to suffer S.I. for 6 months each.
- ii) All the accused were convicted for commission of offence punishable under section 452 of the I.P.C. and were sentenced to suffer R.I. for 3 years each

and to pay a fine of Rs.5,000/- each and in default of payment of fine to suffer S.I. for 1 month each.

iii) All the accused were convicted for commission of offence punishable under section 506 of the I.P.C. and were sentenced to suffer R.I. for 3 years each and to pay a fine of Rs.5,000/- each and in default of payment of fine to suffer S.I. for 1 month each.

iv) All the accused were convicted for commission of offence punishable under section 3(1)(ii) of the MCOC Act and were sentenced to suffer R.I. for 7 years each and to pay a fine of Rs.5,00,000/- each and in default of payment of fine to suffer S.I. for 1 year each.

v) All the accused were convicted for commission of offence punishable under section 3(4) of the MCOC Act and were sentenced to suffer R.I. for 7

years each and to pay a fine of Rs.5,00,000/- each and in default of payment of fine to suffer S.I. for 1 year each.

vi) All the substantive sentences were directed to run concurrently.

2. The prosecution case is that, PW-1 Amit Agarwal was having Pharmaceutical shop. The incident had occurred on 20/10/2015 at about 11.45p.m. It is alleged that, PW-1 was knowing all the accused. They entered his shop. At that time, PW-1's father was also present in the shop. The accused No.1 was having a *Koyta*. He threatened PW-1 and removed money from his person and also from the cash counter. After that, the accused went away by closing the shutter. They threatened PW-1 and his father. They told him not to open the shutter for some time till the accused had left. After some time, PW-1 opened the shutter and then lodged his F.I.R. The investigation was carried out. All the accused were arrested. During investigation, *Koyta* was recovered at the instance of accused No.1 from his room. The statements of

various witnesses were recorded. During investigation it was found that the offence was committed as a part of continuing unlawful activity of an organized crime syndicate headed by accused No.1. Therefore, proposal was sent for applying provisions of The Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as 'MCOCA' for short). Approval U/s.23(1) of MCOCA was granted. Thereafter the investigation was taken over by the officer authorized to conduct the investigation under MCOCA. At the conclusion of the investigation, sanction was obtained from the sanctioning authority U/s.23(2) of the MCOCA. The charge-sheet was filed before the special court. According to the prosecution case, there were more than one charge-sheets filed against the organized crime syndicate in respect of the offences which were punishable with three or more years. Therefore, cognizance was taken by the competent Court.

3. Learned Special Judge took cognizance of the case and trial was conducted before him. During trial, the prosecution examined 13 witnesses including the first informant/PW-1, neighbouring shop owners, pancha witnesses, two other witnesses

who were victims in other offences and the police officers who had conducted the investigation at different stages. At the conclusion of the trial, learned Special Judge believed the evidence led by the prosecution and convicted and sentenced all the accused/appellants as mentioned earlier.

4. Heard Mr. Ashraf Ali Akhtar Shaikh, learned counsel for the Appellant in Criminal Appeal No.852 of 2022, Mr. Shailesh Kharat, learned counsel for the Appellant in Criminal Appeal No.994 of 2022 and Mr. Agarkar, learned APP for the State.

5. The prosecution case is described by PW-1 in his evidence. PW-1 Amit Agarwal has deposed that, in the year 2015 he was running a shop by the name Mittal Medical and General Stores at Nehru tower, Nehru Nagar. On 20/10/2015, at about 11.45p.m. he and his father were in the shop. When they were about to close the shop, accused No.1 came there. He demanded money saying that he wanted to go to Goa. PW-1 and his father refused. Then, he removed a scythe hidden near his back and started abusing PW-1's father. Accused Nos.2 and 3 also came

there. They also started abusing. PW-1 and his father got frightened. Accused No.1 removed Rs.56000/- from the cash counter. He removed Rs.12000/- from PW-1's pocket. They closed the shutter of the shop and told PW-1 not to come outside for the next 10 minutes. After 15 minutes, PW-1 and his father came out of the shop. They were frightened and, therefore, did not go to the police station immediately. On the next day i.e. on 21/10/2015 they went to the police station and gave their F.I.R. The F.I.R. is produced on record at Exhibit 52. The offence was registered vide C.R.No.572 of 2015 at Pimpri police station. He identified the accused before the Court. He has described that, he had 20 currency notes of Rs.500/- and 20 notes of Rs.100/- in his pocket, out of the amount of Rs.12000/-. It was taken away. In the counter there were 13 notes of Rs.1000/-, 73 notes of Rs.500/- and 65 notes of Rs.100/- out of the amount of Rs.56000/-. It was taken away. He identified scythe in the court. His father had passed away on 25/08/2017 before PW-1's evidence was recorded in this case.

In the cross-examination, he admitted that, there were shops on both sides of their shop. There were shops in front of

their shop, as well. There were residential houses in the locality. He admitted that, he knew the accused No.1 since his childhood; they were in Priyadarshani school. He admitted that, their families knew each other and that the accused No.1 used to visit their house. He denied the suggestion that the accused No.1 used to visit his house to chat with PW-1's sister. The accused No.1 used to ring the door bell as he wanted to meet PW-1's sister. He had told PW-1 and his father about the same. PW-1 and accused No.1 belonged to different castes. PW-1's parents tried to tell accused No.1 not to act in that manner to harass them. They had told the accused No.1 that, there was no possibility of marriage with PW-1's sister as they belonged to different castes. He gave one more admission in his cross-examination that he admitted that the accused Nos.2 and 3 did not enter the shop. He admitted that, at the time of incident, all other shops in the area were closed. When came out of the shop, he did not seek help from any local residents. He also admitted that, in the past accused No.1 had kept following his sister. On 2 or 3 occasions they had given report to the police. The F.I.R. is produced on record at Exhibit 52.

6. PW-2 Muniyandi Swami Tevhar was having a Chicken Center by the name Bismilla Chicken Center near PW-1's shop. He has deposed that, on 19/10/2015, all the three accused had come to his shop and had taken away Rs.4000/- and Rs.2700/- from his two employees. On 20/11/2015 (though, in further part of his deposition he has described the incident dated 19/10/2015. Therefore, this appears to be a typographical error and learned advocates for the Appellants have not raised any serious issue about this date) at around 11/30p.m. all the three accused came to his shop. PW-2 saw that the accused were taking away a scythe from his shop. It was in the hand of accused No.1. His employees told him that the accused had taken away that scythe from his shop. He came out to see and saw that the accused had entered PW-1's shop. He heard noise from there. Therefore, he went there. He saw all the three accused coming out of that shop. He then made inquiries with PW-1. At that time, PW-1 told him about the incident. He identified scythe produced in the Court.

In the cross-examination, he admitted that, he had not made any complaint regarding the incident dated 19/10/2015. On

20/10/2015, he had gone to PW-1's shop at 11.45p.m. After that, he had gone to his native place. His statement was recorded by the police on 04/12/2015. He denied the suggestion that, he was deposing against the accused because there used to be frequent quarrels between him and their families because of nature of his business.

7. PW-3 Siddharth Mhaske was a pancha in whose presence accused No.1 has shown his willingness to produce the weapon scythe. He has deposed that on 03/11/2015 police called him to the police station. He identified the accused No.1 through the video conferencing in the Court. He has deposed that the accused No.1 had given his memorandum statement. It is produced on record at Exhibit 66. After that the accused No.1 led them to a house near PW-1's shop. That house was of the accused No.1 himself. They went to the terrace and from a room he removed one *Koyta* and cash amount of Rs.2000/-. Those were seized. The panchanama was conducted. It was exhibited at Exhibit 67. The letters 'BC' were inscribed on that *Koyta*.

In the cross-examination, he admitted that, he is called frequently to Pimpri police station to act as a pancha. He also admitted that, there was over-writing in the panchanama (Exhibit 67) mentioning that the alphabets 'BC' were over-written.

The allegations are that, more than Rs.68000/- were stolen, but only recovery of Rs.2000/- is shown.

8. PW-4 Vikas Manjalkar was a hostile witness. He did not support the prosecution case that the accused had extorted money from him. He denied his contrary statement before the police.

9. PW-5 Javed Ali Sayyad was a similar hostile witness who had denied paying extortion money to the accused. He also denied his contrary statement before the police.

10. PW-6 Shakil Mohammad Golandaj was another shop owner. He was having Chicken Center by the name Sayyad Chicken Center. He has deposed that on 20/10/2015 at 11.45p.m. he had seen all the accused shouting near PW-1's shop. He did not see any of the accused having any weapon. At that time, owners of Mittal Medical shop were present there. According to him, the

accused were residing in the same locality and they were causing harassment to the residents and used to extort money from the local residents. This witness is not declared hostile.

In the cross-examination, he admitted that, except for that incident the accused had not harassed anybody.

11. PW-7 Prakash Sawant and PW-8 Sagar Lalde were examined in respect of totally different incidents where somebody had robbed them.

The prosecution wanted to rely on their evidence to show the antecedents of the appellants. However, the truthfulness or otherwise of these particular incidents was not the subject matter before the trial Court and it was not possible to record the finding regarding truthfulness of their version. Therefore, evidence of PW-7 and 8 will have to be ignored completely. They had not even deposed as to what was the crime number registered based on the offence committed against them.

12. PW-9 Saidul Shaikh was running the business in Bismilla Chicken Center connected with PW-2. He has not supported the

prosecution case. He denied his contrary statement made before the police.

13. PW-10 Saifal Mujawar was the police officer attached to Pimpri police station. He was supervising the investigation initially. During investigation, he found that the accused were committing cognizable offences and it was necessary to curb their activities. It was necessary to apply provisions of MCOCA against them. Therefore, he had forwarded a proposal for applying the provisions of MCOCA against the accused. He submitted the proposal on 06/11/2015. That proposal is produced on record at Exhibit 92. The proposal was accepted and approval U/s.23 of MCOCA was granted vide order dated 10/11/2015 by the competent authority. After that, Section 3(1)(2) and Section 3(4) of MCOCA were applied. He admitted that, at the time of sending proposal, many of the offences were still under investigation against the accused No.1. He also admitted that, in all these offences the accused were never together.

14. PW-11 P.S.I. Pandurang Kadam had investigated

C.R.No.572 of 2015. He had conducted the spot panchanama. Accused No.1 was already arrested in C.R.No.579 of 2015. He was taken in custody in the present offence. He had supervised the recovery panchanamas at Exhibi 66 and 67.

Significantly, at the time of recording of his deposition, he identified accused No.3 as the accused who had given memorandum statement and who had produced a knife. This, obviously is against the prosecution case. This witness has not identified accused No.1 who, according to the prosecution, had produced the weapon.

In the cross-examination, he admitted that, at the time of effecting recovery there was no lock to the room from where the weapon was produced.

15. PW-12 Mohan Vidhate, A.C.P Pimpari Division had conducted the investigation after application of MCOCA. He proved the contradictory statements of various witnesses who had turned hostile. He has deposed that, accused No.3 had shown willingness to give confession. Therefore, this witness arranged to

record his confession. He collected the information regarding pending offences and charge-sheets against the accused. He submitted an application for grant of sanction to this offence U/s.23(2) of the MCOCA. He produced the sanction U/s.23(2) of the MCOCA at Exhibit 114.

16. PW-13 Tushar Doshi, D.C.P. Zone-1, Pune had recorded the confessional statement of accused No.3 U/s.18 of MCOCA. On 05/01/2016, accused No.3 was produced before him. Then he satisfied himself that there was no pressure on the accused No.3 for giving confession. This witness then gave accused No.3, 24 hours to contemplate about giving confession. On 06/01/2016, at 8.25p.m. accused No.3 was produced before him. He was given understanding that it was not binding on him to give confession, but the accused No.3 still wanted to give confession and then his confession was recorded. It is produced on record at Exhibit 122. After that, he directed the officers to produce him before the Chief Judicial Magistrate, Pune. He forwarded the confessional statement in a sealed envelope to the Court. After verification from the Chief Judicial Magistrate, accused No.3 was again produced

before this witness.

In the cross-examination, he admitted that, he had not told the accused No.3 as to in whose custody he would be kept on 05/01/2015. He denied the suggestion that, accused No.3 knew only Punjabi and not Marathi. The confessional statement of the accused No.3 is produced on record at Exhibit 122. The prosecution produced noting of the Chief Judicial Magistrate, Pune at Exhibit 124.

This, in short, is the prosecution evidence.

17. The accused No.1 has taken a specific defence in his examination U/s.313 of the Cr.p.c. In answer to question No.37 he has stated that, he was having love affair with PW-1's sister and they were to get married. He used to go to PW-1's house to meet PW-1's sister. PW-1 and his parents had told the accused No.1 that, since they belonged to different castes, marriage was not possible. Since he used to talk with PW-1's sister, he had given complaints to the police in the past on 2-3 occasions. PW-1's sister and accused No.1 had decided to elope and get married. Because of this, PW-1

had lodged this false complaint against accused No.1.

18. Defence of accused Nos.2 and 3 is of simple complete denial.

19. Learned counsel for the Appellant No.1 submitted that the sanctioning authority is not examined and, therefore, there is nothing to show that the sanction was granted after due application of mind.

20. Learned counsel for all the appellants submitted that the main offence itself is not proved. There are important contradictions between the evidence of the prosecution witnesses and in particular between the evidence of PW-1, PW-2 and PW-6. Their story is not consistent. The recovery is not beyond doubt. The accused No.1 has taken a specific defence which is probable. PW-1 has not deposed about the grudge which he was holding against the accused No.1. Therefore, looking at the evidence, it cannot be said that the prosecution has proved its case beyond reasonable doubt.

21. Learned APP opposed these submissions. Learned APP

submitted that, provisions of MCOCA are properly applied. The previous charge-sheets along with orders showing taking of cognizance are produced on record. Learned APP also relied on the confessional statement of the accused No.3 which was admissible U/s.18 of the MCOCA. He submitted that, there was no reason to doubt this confession and it can be used not only against the main accused but also against co-accused under the provision of Section 30 of the Indian Evidence Act.

22. I have considered these submissions. As far as application of MCOCA is concerned, the question would arise if the prosecution crosses first hurdle of proving the main incident against the accused, which had taken place, according to the prosecution case, on 20/10/2015. In that connection, it is difficult to hold that the prosecution has proved its case beyond reasonable doubt. PW-1 has suppressed in his examination in chief, as well as, in the F.I.R. lodged by him about the troubled relationship between the families of PW-1 and accused No.1. His evidence is not consistent in the examination in chief and in the cross-examination. In his examination in chief, he has deposed that, first

accused No.1 entered their shop. He was joined by other two accused. All of them abused and threatened. However, in the cross-examination he admitted that, accused Nos.2 and 3 did not enter his shop. This particular fact is important, because from that context even confession of accused No.3 will have to be tested. The prosecution has tried to support his deposition by examining PW-2 who was having a Chicken Center in that locality. PW-1 has deposed in his cross-examination that, at the time of incident all the neighboring shops were closed, but PW-2 has deposed that, his shop was open and he had seen the accused coming out of PW-1's shop. In fact, PW-2's evidence is that accused first entered his shop, picked up a scythe and then went to the shop of PW-1. These two depositions of PW-1 and PW-2 are contrary. PW-2 has deposed that, immediately he had gone to the shop of PW-1 and had inquired with the PW-1 and that PW-1 had told him about the incident. However, PW-1 has not deposed anything to that effect.

23. PW-6 was another neighboring shop owner. He has deposed that, at about 11.45p.m. on 20/10/2015 all the three accused were near the shop of PW-1 and they were shouting and

after that they left the place. He had not seen any weapon with any of the accused. This version is again contrary to the version of PW-1 and PW-2. PW-6 is not declared hostile. His story is totally contrary to the evidence of PW-1. He has not deposed about accused Nos.1 to 3 shouting. As far as PW-2 is concerned, his statement was recorded by police much belatedly on 04/12/2015. No acceptable explanation is offered except of saying that he had gone to his native place immediately after the incident. PW-2 had also not lodged any complaint regarding the incident dated 19/10/2020 when the accused had allegedly removed some money from his employees. Therefore, as rightly submitted by learned counsel for the appellants, there is inconsistency in the evidence of PW-1, PW-2 and PW-6 and it is difficult to find out truth from their evidence. PW-1 does not appear to be a truthful witness on many aspects. He accepted the strained relations involving his sister only in the cross-examination. Except PW-1 no other witness has spoken about presence of his father in the shop.

24. In this connection itself, the confessional statement Exhibit 122 which is allegedly given by accused No.3 will have to

be tested. If that statement is perused, as far as, main incident is concerned, it is described in a similar language as is mentioned in the F.I.R. He has deposed that, accused Nos.1 and 2 had entered the shop and accused No.3 himself had waited near the counter. In the narration, he has given incriminating role to the accused Nos.1 and 2. According to that confessional statement, the accused No.1 had picked up that scythe from Bismilla Chicken shop. After that they went to PW-1's shop, but accused No.3 himself had waited near the counter and only accused Nos.1 and 2 had entered the shop. He has further mentioned that, accused Nos.1 and 2 had started abusing and then accused No.1 had removed money. Then all of them went outside the shop. He has deliberately given much lesser role to himself. Even on other aspect as to who exactly entered the shop also, there is contradiction between his confession and deposition of PW-1, PW-2 and PW-6. In the examination under section 313 of the Cr.p.c. he has denied giving that confession. PW-13 Tushar Doshi, D.C.P. Zone-1, Pune has deposed that, after the accused No.3 was produced before him on 05/01/2016, he sent back the officers of Pimpri police station and

handed over the custody of accused No.3 to API Katkar attached to Faraskhana police station. The accused No.3 was given 24 hours to contemplate whether he wanted to give confession. PW-13 has further deposed that the accused No.3 was kept in Vishrambaug police station and he was again produced on 06/01/2016 by Shri. Katkar attached to Faraskhana police station. This period of 24 hour is important. It is necessary to verify that, any undue influence is not exerted by the investigating agency. In this case, the offence was investigated by Pimpri police station and, therefore, his custody was not handed over to Pimpri police station on 05/01/2016. This period of 24 hours is crucial and the prosecution needed to establish that there was no possibility of exerting any undue coercion on the said accused. However, the evidence in this case is to the contrary. The accused No.3 was handed over in the custody of Faraskhana police station. Then there is no evidence as to why he was kept in Vishrambaug police station. Nobody from the Vishrambaug police station is examined in that behalf. A.P.I. Katkar is not examined and, therefore, the prosecution has not proved that there was no possibility of

exerting any pressure or influence on the said accused during that crucial period of 24 hours. The cumulative effect of all these factors makes the confession a very weak piece of evidence.

25. The only other circumstance against the accused No.1 is about recovery of *Koyta*. The memorandum statement does not show authorship of concealment or the place where the weapon was concealed and from where it was to be recovered. The police witness has admitted that said room was not locked and, therefore, it was accessible to anybody else. It was not in exclusive possession of the accused No.1. The pancha has admitted that, he was a habitual pancha and he used to be frequently called to police station to act as a pancha in many cases. All these factors cumulatively affect the recovery at the instance of accused No.1. Therefore, that circumstance is not incriminating against the accused No.1.

26. There is no other circumstance in respect of the incident dated 20/10/2015 against any of the accused. As mentioned earlier, the important evidence of PW-1 does not inspire

confidence. In this view of the matter, the prosecution has not proved its case beyond reasonable doubt. In this view of the matter, application of MCOCA because of the past history of more than one charge-sheet and the cognizance having been taken by the competent court of those past charge-sheets loses its importance. If the main offence for which he is tried is not proved then it cannot be a continuing unlawful activity. Only because he has other antecedents, that by itself is not sufficient to prove charges under MCOCA. Consequently all the charges against the appellant including the charges under MCOCA must fail.

27. With the result, following order is passed:

O R D E R

- i) Both the Appeals are allowed.
- ii) The Judgment and order dated 05/07/2022 passed by learned Special Judge under The Maharashtra Control of Organized Crime Act, 1999, Pune in M.C.O.C. Special Case No.13 of 2016 is set aside.

- iii) The Appellants are acquitted of all the Charges.
- iv) The Appellants be released forthwith, if not required in any other case.
- v) Both the Appeals are disposed of.
- vi) With disposal of both Appeals, connected Interim Applications are also disposed of.

(SARANG V. KOTWAL, J.)