

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**APPLICATION FOR LEAVE TO APPEAL BY STATE
NO.64 OF 2018**

The State of Maharashtra,
Through: P.I. Partur, Taluka-Partur,
District-Jalna.

**...APPLICANT
(Orig. Respondent)**

VERSUS

- 1) Shahu Laxman Pawar,
Age-28 years, R/o-Walurnaka,
Pardhi Wada, Selu, Taluka-Selu,
District-Parbhani,
- 2) Uddhav Pandurang Katare,
Age-51 years, R/o-Rajiv Gandhi
Nagar, Selu, District-Parbhani,
- 3) Bhagwan Shyamrao Kale,
Age-24 years, R/o-Sakla Plot,
Parbhani,
- 4) Ganesh Raosaheb Kale,
Age-24 years, R/o-Pawde Hadgaon,
Taluka-Selu, District-Parbhani,
- 5) Mahurabai Bhagwan Kale,
Age-30 years, R/o-Sakla Plot,
Parbhani,
- 6) Hiranman Shamrao Kale,
Age-40 years, R/o-Sakla Plot,
Parbhani.

**...RESPONDENTS
(Orig. Accused)**

...
Mr.R.V. Dasalkar A.P.P for Applicant.
...

**CORAM: SMT. VIBHA KANKANWADI AND
Y.G. KHOBRAGADE, JJ.**

DATE : 24th MARCH, 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Application has been filed by the prosecution to seek leave under Section 378(1)(b) of the Code of Criminal Procedure to file criminal appeal challenging the Judgment and order dated 10th October 2017 passed by the learned Special Judge under the Maharashtra Control of Organized Crime Act, 1999 and the National Investigation Act, 2008, Aurangabad in Special Case (MCOC) No. 11 of 2012, thereby acquitting the respondents from the offences punishable under Sections 395, 397 of the Indian Penal Code and Sections 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999 (for short "the MCOC Act") read with Sections 3 and 4 punishable under Sections 25 of the Arms Act.

2. Heard learned APP at the stage of admission and with his able assistance, we have gone through the material which was before the learned Special Judge.

3. In short, the prosecution story is that informant Saleemkhan Abbaskhan Pathan had gone to Selu on his motorcycle on 28th December 2011 and he was returning to his village Satona around 12.00 in the midnight. He was carrying amount of Rs.20,000/- and a Mobile. Around 12.30 to 12.45 a.m. informant reached near Yoga-yog Hotel on Selu road and when he turned towards Satona, he noticed that a person was standing on the road giving signal to him to stop. Informant stopped his motorcycle but suddenly the said person caught hold of the neck of the informant and started pressing it. The said person threatened the informant that he should not shout otherwise he would be killed. In the meantime the associates of the said person came from the nearby bushes at the spot and all of them had dragged him near a Neem tree. Informant was made to fall on the ground at that place and three persons out of them sat on the person of the informant and started beating him. Others were taking search of his person and took out the cash from his pocket of the pant and also the Mobile. However, at that time a tractor arrived and in the headlight of the said tractor, the informant says that he had seen the faces of those persons. Those persons then fled away. In the First Information

Report (for short "FIR") it is stated that on the alarm raised by the tractor driver, some villagers came there, and out of them one informed the said fact to the police. Police Inspector of Partur Police Station came to the spot and with the help of the villagers, the Police started to trace those persons. It is then stated that two persons had fallen in the ditch and they were nabbed by the Police and villagers. Those persons then told that other associates have ran away. It is the further prosecution story that the Police and the villagers had searched the area and noticed that one Commander Jeep bearing No. MH-17-C-3309 was parked by the side of the road. In the light of the torch, the Police and the villagers had taken search of the offenders in the cotton crop and found that one lady and a person had concealed themselves and thereafter they started running when they saw the Police and villagers. After a distance they were caught. Thus, in all four persons were caught by the Police and the villagers and from those persons the names of the accused persons who ran away, were gathered. Thereafter the informant lodged the report, on the basis of which the offence vide Crime No.169 of 2011 was registered for the offence punishable under Sections 395 and 397 of the Indian Penal Code.

4. During the course of investigation, the panchnama was prepared as well as seizure of the Jeep was made wherein some iron rods, sword and knife were found. Those articles came to be seized. It was then realized by the Investigating Officer that the accused are the habitual offenders and are indulging in continuous unlawful activities by forming an organized crime syndicate for pecuniary gain. Therefore, the Investigating Officer sent the proposal to the Inspector General, Aurangabad seeking permission to invoke the offences under the MCOC Act. The permission came to be granted and thereby those Sections came to be added and investigation was then handed over to Dy. S.P. Mr. Sandipan Kambale. During the course of further investigation, documents relating to the immovable property standing in the name of the accused persons were collected, so also the charge-sheets those were filed against the accused, preceding ten years from the date of the offence lodged, in different Courts. After the completion of the investigation, charge-sheet was filed with the Court of Special Judge.

5. After framing the charge, trial was conducted. The prosecution has examined in all five witnesses to bring home the guilt of the accused. After considering the evidence on record

and hearing both the sides, the learned Special Judge has acquitted all the accused persons from all the charges. Hence present Application.

6. At the outset, it is to be noted that though PW-6 Sandipan Kamble, the Investigating Officer has been examined, but in this case the prosecution has not examined the Inspector General, Aurangabad who had granted sanction / approval under Section 23(1)(a) and 23(2) of the MCOC Act. However, it appears that the defence has not disputed the said approval and therefore, the prosecution has not examined the Inspector General, Aurangabad and Additional D.G., Mumbai. Still the question arises, as to whether the said authorities had applied their mind before granting approval. When the offences under the MCOC Act have been invoked, it was the bounden duty of the prosecution that it should prove that 'continuing unlawful activity', as defined under Section 2(1)(d) of the MCOC Act, was done by the accused persons and such continuing unlawful activity was evident by more than one charge-sheet. If those charge-sheets would not have been perused by the concerned authorities, it cannot be said that the said approval was granted with application of mind. Further, the proof was required that

there was organized crime and there was also organized crime syndicate as defined under Section 2(1)(e) and 2(1)(f) of the MCOC Act. Apart from that, it ought to have been proved by the prosecution that the offence in which the accused persons came to be arrested i.e. present FIR, in that case the offences under Sections 395 and 397 of the Indian Penal Code were proved beyond reasonable doubt. In other words, even if it is accepted for the sake of arguments that there was proper sanction / approval under the MCOC Act, yet unless it would have been proved beyond reasonable doubt that the accused persons have committed present crime, there would not have been a conviction under the MCOC Act. This point has been rightly considered by the learned Special Judge.

7. Coming to the evidence in respect of present offence, the prosecution has examined PW-1 Saleemkhan, the informant and PW-4 Gajanan Akat, the tractor driver. PW-1 Saleemkhan has reiterated the contents of his FIR in his examination-in-chief. From the cross-examination of this witness, it can be seen that the incident had taken place at night time, that too around 12.30 a.m., then unless there would have been sufficient arrangement for the light, he could not have identified those persons. He says

that in the focus of the tractor headlight he had seen the accused persons. He has stated that the tractor driver had given a phone call to the informant's brother. How tractor driver was knowing the Mobile number of the brother of the informant is a question and then he says that in the meantime villagers came and saw that some of the accused persons have hidden themselves in the cotton crop. He has also stated that the Police had nabbed certain assailants from the cotton crop. The same sequence of events has not been told by PW-4 Gajanan. He has stated that when he came to the spot, he saw that 5 to 6 persons were assaulting Saleemkhan and after his tractor arrived at the spot, those persons fled away. He then says that witness Saleemkhan had given phone call to the villagers and the villagers came to the spot immediately. This is contrary, because PW-1 Saleemkhan does not say that he has given phone call to the villagers. None of the villagers have been examined in this case who were present at the time of arrest of two persons. In fact, none of the Police persons from the said patrolling party has been examined in this case.

8. Further, it is to be noted that PW-4 Gajanan turned hostile and failed to identify the accused persons before the Court as

the same persons who had assaulted PW-1. PW-3 Ahmad Jilani Qureshi is the panch witness to the arrest panchnama, seizure panchnama etc. However, the most important fact is that, he says that he was called at 6.30 a.m. and then panchnama Exhibit-90, 91 to 95, 96, 97, 98 and 99 got executed. PW-6 Sandipan Kambale is not the Police Officer amongst those Police Officers who had gone to the spot. However, PW-5, the then Police Inspector Ganesh Jawadwad of Partur Police Station was examined and then he says that when he went in the vicinity of village Satona, he met the informant and got information from him. He says that he had also searched for the accused persons, arrested accused No.1 by drawing panchnama Exhibit-83. He seized the Jeep in which one sword, five iron rods and one knife was found. The panchnama Exhibit-90 and 96 were drawn by him. There is material variance between the testimony of PW-1, PW-3 and PW-4. Establishment of the identity of the accused was the important factor, however, no pains were taken to have identification parade.

9. At the cost of repetition, it is to be noted that testimony of PW-1 Saleemkhan and PW-4 Gajanan is not corroborating with each other as regards the calling of the villagers and taking

search of the area whereupon certain accused persons were apprehended at that moment, as PW-4 Gajanan failed to identify those persons. PW-5 Ganesh, the then Police Inspector has not stated that he had gone to the spot while on patrolling duty, rather he says that he received information that some thieves looted amount from one Saleem Abbas and therefore he went to village Satona. He says that he met the informant, got information from him and along with the villagers he had tried to trace the accused. He does not say anything about the presence of PW-4 Gajanan. PW-5 Ganesh further says that during search, accused Shivaji Pawar and Ganesh Kale were found but he has not given where they were found and in what condition. He then says that they found Commander Jeep and also arrested accused Mathura Kale and Uddhav Kale. He has also not stated who had ran away with the amount looted. It is hard to believe that the accused persons would leave the four wheeler vehicle and flee by running. Who was the owner of that Jeep from where it is alleged that the sword, iron rods etc. were seized, has also not been explained. Therefore, taking into consideration the evidence that was led, the learned Special Judge was justified in arriving at a conclusion that the prosecution had failed to prove the present offence and therefore, the question of considering

the offence under the MCOC Act does not arise and the accused have been rightly acquitted from all the charges. No case is made out for grant of leave to appeal and the application deserves to be rejected.

10. Accordingly, the Application stands rejected.

[Y.G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/MAR23