rrpillai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 767 OF 2023

Mahesh Pankaj Soni
Age : 35 years, Occ : Business
R/at : Shankar Dhara Society
Room No. 301, Bhagat Singh Road,
Vile Parle, Mumbai-400 056 ...Appellant

Versus

The State of Maharashtra
(at the instance of Kalachowky
Police Station in C.R. No. 70 of 2019
registered with Kalachowky Police Station) ...Respondent

Mr. Sandeep Karnik a/w. Mr. Rohan Bhosale for the Appellant.
Ms. P. P. Shinde, APP for the State.

CORAM: REVATI MOHITE DERE &
GAURI GODSE, JJ.
RESERVED ON: 16th OCTOBER 2023
PRONOUNCED ON: 15th DECEMBER 2023

JUDGMENT (Per : Gauri Godse, J.)

1. Admit. Learned APP waives notice on behalf of the respondent. By consent, taken up for final disposal.

2. By this Appeal, the Appellant (original accused no. 7) has challenged the judgment and order dated 19th May 2023 passed by the Special Judge, City Civil and Sessions Court, Mumbai, below his Discharge Application (Exhibit No. 125) filed by him. By the impugned judgment and order, the said application filed by the appellant for discharge from the case came to be rejected.

3. The appellant, along with other co-accused, has been charge-sheeted for the offences punishable under Sections 395, 397, 412, 341, 201 and 120B of the Indian Penal Code; under Section 37(1)(a) read with 135 of the Maharashtra Police Act; under Sections 4 and 25 of the Indian Arms Act; and under Sections 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 ('MCOC Act').

4. The case of the prosecution is that on 6th April 2019, around 21:50 hours, accused nos. 1 to 5 attacked the complainant, assaulted him with an iron chopper and robbed from his possession 1800 grams of gold ornaments worth Rs. 55,80,000/-. Further, the case of the prosecution is that the

complainant started shouting for help and in the meantime, one unknown person tried to snatch the complainant's bag full of gold ornaments, and other unknown persons started assaulting the complainant with a sharp chopper. One of the unknown persons snatched away the complainant's bag, and when the people around there tried to help the complainant, one of the unknown persons threatened the people not to help the complainant. Thus, by assaulting the complainant, the unknown persons snatched the bag containing gold ornaments from the complainant and fled from the spot of the incident.

5. On investigation, statements of various witnesses were recorded, and CCTV footage was also collected. In view of the call details record revealed from the investigation, three accused were arrested on 12th April 2019. Subsequently, on 20th April 2019 and 23rd April 2019, the other two co-accused were arrested. The appellant and his father-Pankaj Soni were arrested on 26th April 2019.

6. It is the case of the prosecution that the main accused Ayub Alimuddin Shaikh @ Ayub Chikna formed an Organised Crime Syndicate with other co-accused, and in the preceding years, they have singly and/or jointly committed offences of dacoity, assault, theft and robbery by using criminal force and cases are registered against them on behalf of such Organised Crime Syndicate.

7. So far as the appellant is concerned, the prosecution's case is that the appellant is an active member of the Organised Crime Syndicate. The allegation against the appellant is that he is also involved in another cognizable offence registered vide CR No. 246 of 2016 for the offences punishable under sections 420, 406 read with section 34 of the Indian Penal Code.

8. It is the case of the prosecution that in the present case, during the course of investigation, it was revealed that the stolen gold ornaments were purchased by the appellant and his father, Pankaj Soni - co-accused, from the second wife of the main accused no. 1 at a low price, knowing fully well that the ornaments are stolen ornaments. Further, the allegation of the

prosecution is that the appellant and his father melted the gold ornaments involved in the crime in a gold melting machine with the intention of destroying their identity. During the investigation, the said gold melting machine was seized at the behest of the appellant. It is alleged by the prosecution that, as per the available CDR, the appellant was in touch with accused no. 8 i.e. the wife of accused no. 1.

9. Based on the prior approval, sanction was accorded under the MCOC Act on 6th July 2019. After investigation, chargesheet was filed in the Court of competent jurisdiction. The appellant was released on bail pursuant to an order dated 20th January 2021 passed by this court.

10. Learned counsel submitted that the grounds raised on behalf of the appellant seeking discharge from the case are twofold. Firstly, there was no material produced by the prosecution that the appellant was a member of the Organised Crime Syndicate, and thus, the appellant does not fall under the purview of Section 2(d) read with Section 2(e) of the MCOC Act.

It is submitted that the appellant admittedly has no common antecedent with the gang leader - Ayub Chikna, who has 39 cases registered against him. So far, the antecedent of the appellant is concerned, it is submitted there is only one offence registered against the appellant for the alleged offences punishable under sections 406 and 420 of the Indian Penal Code and that it is an individual and independent case, having no commonality with the present offence in question.

11. Secondly, the submission on behalf of the appellant is that the only material against him is based on two circumstances i.e. recovery of a gold melting machine and call records between the appellant and the wife of accused no. 1 (The wife of accused no. 1 is original accused no. 8).

12. Learned counsel for the appellant submitted that so far as the call records are concerned, there are allegedly a total of six calls, out of which four calls were made in February 2019, one in March 2019, and the last call was made on 7th April 2019. It is the appellant's case that his father used the mobile, although the

SIM card stood in the appellant's name. It is contended that the appellant and his father, also an accused, have a jewellery shop by the name ‘Riddhi Siddhi Jewellers’, and thus, there is nothing unusual about the appellant having a gold melting machine in his shop. Learned counsel thus submitted that the circumstances relied upon by the prosecution do not reveal the complicity of the appellant in the alleged crime, and as such, there are no sufficient grounds to proceed against the appellant.

13. Learned counsel for the appellant relied upon the decision of this court dated 4th May 2022, passed in Criminal Appeal No. 198 of 2022, preferred by co-accused Maruti Navnath Sonawane. By the said decision, this court allowed the appeal preferred by the said co-accused and discharged him from the case, which arose out of FIR registered vide CR No. 70 of 2019.

14. Learned counsel for the appellant submitted that the allegation against the said co-accused i.e. Maruti Sonawane, was that he was doing recce at the complainant's place and was following the complainant and informing about the complainant's

activities to the gang leader. Learned counsel for the appellant submitted that the appellant stands on a far better footing than the said co-accused-Maruti Sonawane in as much as the allegations against the present appellant are only twofold i.e. recovery of the gold melting machine at his instance and the CDR showing six calls between the appellant and the wife of the gang leader (original accused no.8). He submitted that there is no record showing that the appellant had made any calls to the wife (original accused no.8) of the gang leader or to the gang leader (accused no.1) nor is there any material to show that the appellant had knowledge about the activities of accused no. 8. Thus, the learned counsel for the appellant submitted that considering the aforesaid, the appellant is entitled to be discharged from the entire proceeding arising out of FIR No. 70 of 2019.

15. Learned APP opposed the appeal and submitted that there is sufficient material brought on record to show that the appellant is a member of the Organised Crime Syndicate. She submitted that the appellant and his father purchased the gold ornaments at

a low price, knowing that the same were involved in a crime. The learned APP further submitted that recovery of a gold melting machine, at the instance of the appellant shows that the gold ornaments involved in the said crime were melted in the said machine with an intention to destroy its identity, and thus, there is involvement of the appellant in the alleged crime. She further submitted that the gold involved in the crime was sold to the appellant and his father, who is arraigned as accused no 6 - Pankaj Chhaganlal Soni, by the wife of the gang leader i.e. Sangita Nair (original accused no. 8). Thus, the learned APP submitted that the appellant and his father were actively involved in the crime by purchasing the gold ornaments, melting them in the gold melting machine and converting the said ornaments into gold bars.

16. Learned APP submitted that the CDR shows that the appellant was in contact with the accused no. 8 – Sangita Nair, wife of accused no. 1. The learned APP submitted the appellant is involved in similar offences as registered against the gang leader and therefore it cannot be said that there is no commonality found in the offences against the organised crime syndicate.

17. Learned APP also submitted that the appellant has one antecedent, and that, after proper investigation, the appellant has been charge-sheeted for the said offences, based on material available against the appellant. Learned APP thus submitted that no fault can be found in the reasons recorded by the learned Special Judge for rejecting the appellant’s application for discharge.

18. We have considered the submissions made by both the parties. We have perused the record. On perusal of the charge sheet, it reveals that the stolen ornaments were not seized from the appellant's jewellery shop, and instead, only two gold bars weighing 1175 grams were seized at the instance of appellant’s father i.e. Pankaj Soni (original accused no.6) and not from the appellant. Admittedly, it is not the prosecution case that the appellant was involved in the actual incident of assault which took place on 6^{th} April 2019 at 9.30 pm.

19. It is the prosecution case, that the accused persons (not the appellant) robbed 1800 grams of gold ornaments from the

complainant and thereafter fled the spot. It is further the prosecution's case, that accused no. 8 – Sangita Nair sold the stolen gold to the appellant and his father. During the course of investigation, the appellant and his father also came to be arrested.

20. It is not pointed out by the prosecution that in the CCTV footage relied upon by the prosecution, accused no. 8- Sangita Nair is seen visiting the appellant's shop for selling the gold involved in the crime. According to the prosecution, the gold melting machine recovered at the instance of the appellant, was used for melting the gold. The appellant and his father – Pankaj Soni (original accused no. 6) are jewellers and are running a jewellery shop. Thus, mere recovery of the gold melting machine, by itself, cannot be said to be incriminating. Admittedly, no gold which was allegedly sold, which was converted into gold bars has been recovered from the appellant. The same has been recovered from the appellant's father- Pankaj Soni (original accused no.6). So far as CDRs are concerned, Sangita Nair (original accused no. 8), is alleged to have called the appellant on six occasions; out of

six calls, four calls were made in February 2019, one in March 2019 and the last call was made on 7th April 2019. The appellant and his father are admittedly running a jewellery shop. Thus, merely because the wife of the gang leader had called the appellant; the same cannot, by itself, be said to be incriminating. It is not the prosecution case, that the appellant had called accused no. 1 or accused no. 8 or any of the other accused, at any point in time. Similarly, finding of a gold melting machine by itself cannot be stated to be incriminating since, admittedly the appellant runs a jewellery shop with his father.

21. The learned APP does not dispute that there is no statement recorded of any of the accused under section 18 of the MCOC Act in the present crime, pointing to the appellant's complicity in the crime. Nothing is shown on record to indicate that the appellant is a member of the alleged Organised Crime Syndicate.

22. As far as the allegation that the appellant and his father purchased stolen jewellery and melted the same with an intention to destroy its identity, there is no material to support the same,

qua the appellant. In support of the allegation against the appellant, the two circumstances relied upon by the prosecution are not sufficient to show the appellant's involvement in the alleged crime. As noted above, recovery of the gold melting machine from the appellant's shop at the instance of the appellant cannot be a circumstance to implicate the appellant, in as much as it is not unusual that there was a gold melting machine in the appellant's shop, as he is a jeweller. So far as the CDR is concerned, the appellant being a jeweller, it is equally not unusual to receive calls from various people. More so, it is not the case of the prosecution that the appellant had made any call to any of the accused.

23. No evidence or any cogent material is pointed out to show that the appellant is in any way associated with the organised crime syndicate. The other FIR registered against the appellant is characterised by individuality, and there is no commonality between the said crime and the present crime. It is not the case of the prosecution that the appellant is arraigned as an accused in any of the cases registered against the accused no. 1, who is

alleged to be the gang leader or with any other co-accused.

24. The learned counsel for the appellant has relied upon the decision dated 4th May 2022 of this court in Criminal Appeal No. 198 of 2022 granting discharge to accused no. 3-Maruti Sonawane in the same crime. Though the role attributed to the said co-accused is not similar to that of the appellant, the learned counsel for the appellant has relied upon the observations in the said decision regarding the applicability of the MCOC Act when there are no common offences registered against the said co-accused along with the gang leader. The allegation against the said co-accused – Maruti Sonawane, was that he recced the area to watch the movements of the complainant and provided information to the other co-accused in exchange for money and that the available CDR showed his presence at the spot. The prosecution had relied on the CDR to show that the said co-accused – Maruti Sonawane, was in contact with accused no. 8-Sangeeta Nair i.e. the wife of the gang leader (accused no. 1 – Mohammad Ayub Alimuddin Shaikh @ Ayub Chikana). However, this Court after minutely examining the material on record, held

that there was no commonality between the earlier cases registered and the present crime; that the said co-accused was not arraigned as an accused in the cases registered against the gang leader, and thus his indictment does not fall within the purview of the definition carved out under section 2(d) read with (e) of the MCOC Act. This Court further held that in the absence of material evidence, the charge of the prosecution showing prima facie involvement of the said co-accused was highly unreliable, as he was also not seen in the CCTV footage, present at the spot and that there was no CDR obtained of his number to show that he was in constant contact with the wife of the gang leader, as alleged by the prosecution. Hence, this Court held that there was complete non-application of mind while granting sanction to prosecute him-Maruti Sonawane under the MCOC Act.

25. In the present case, the material relied upon by the prosecution does not indicate the appellant's involvement in the crime. Thus, the view taken by this Court in the aforesaid decision is also applicable to the appellant. In our opinion, the material relied upon by the prosecution is not sufficient to show

his involvement in the crime. The prosecution has failed to place on record any reliable material to establish the appellant's involvement in the crime. We do not see any justifiable reason recorded while granting sanction under section 23 of the MCOC Act, to prosecute the appellant.

26. Thus, in our opinion, there are no sufficient grounds for proceeding against the appellant, considering the material on record. Hence, for the reasons recorded above, the appellant deserves to be discharged from the proceedings. Appeal is therefore allowed in terms of prayer clause (a), which reads as under:

> *"(a) This Hon'ble Court may be pleased to quash and set aside the order dated 19.05.2023 passed by the Special MCOCA Court in Discharge Application at Exhibit No. 125 in Special Case No. 14 of 2019 qua the Appellant on such terms and conditions as this Hon'ble Court may deem fit and proper in the circumstances of the case and accordingly Discharge the Applicant from the offences under section 307, 395, 397, 412, 341, 201, 120B of IPC, section 37(1)(a) read with 135*

of Maharashtra Police Act, section 4 read with 25 of Indian Arms Act and section 3(1)(ii), 3(2), 3(4), M.C.O.C Act."

All parties to act on authenticated copy of this order.

GAURI GODSE, J. **REVATI MOHITE DERE, J.**