

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

CRIMINAL APPEAL NO. 1169 OF 2023

Vijay alias Vijya Bibhishan Kale	 Appellant
Versus	
The State of Maharashtra	 Respondent

.....
WITH

CRIMINAL APPEAL NO. 49 OF 2024

Uddesh Bibhishan Kale	 Appellant
Versus	
The State of Maharashtra	 Respondent

.....
WITH

INTERIM APPLICATION NO. 4519 OF 2023

IN

CRIMINAL APPEAL NO. 49 OF 2024

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Mr. Nikhil D. Patil, Advocate (appointed) for the Appellant in Appeal No.1169 of 2023.
Mr. Shravan Giri for Appellant in Appeal No.49 of 2024.
Smt. M. R. Tidke, APP for the Respondent-State.

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CORAM : SARANG V. KOTWAL, J.
DATE : 23 SEPTEMBER 2024

ORAL JUDGMENT :

1. Both these Appeals are disposed of by this common judgment because they arise out of the same impugned Judgment

and order.

2. The Appellant Vijay was the original accused No.1 and the Appellant Uddesh was the original accused No.3 in Special Case (MCOCA) No.9/2014 on the file of the Special Judge, under MCOC Act, Pune.

3. Before proceeding further, it is necessary to record brief history which is peculiar to this particular case. The Appellants had also faced one more case of similar nature vide the MCOC Case No. 6 of 2014 before the Special Judge, under MCOC Act, Pune. The Appellants were convicted in that MCOC Case No.6 of 2014 for the offences punishable under sections 394 and 397 r/w. 34 of the I.P.C. and under section 3(1)(ii) of the MCOCA. For the offence punishable U/s. 397 of the I.P.C. they were sentenced to suffer R.I. for 7 years each and no fine was imposed. For the offence punishable U/s.3(1)(ii) of the MCOCA they were sentenced to suffer R.I. for 7 years each and to pay a fine of Rs.5,00,000/- each and in default to suffer R.I. for three years. For the offence punishable U/s.394 of the I.P.C. they were sentenced to suffer R.I. for 7 years and to pay a fine of Rs.1000/- each and in

default to suffer S.I. for three months.

4. The Appellants had preferred Criminal Appeal No.1605 of 2019. In that Appeal, a submission was made that the 'in default' sentence in that particular case be reduced and importantly, one statement was made on their behalf on affidavit that the Appellants were accepting the conviction imposed vide the Judgment and order dated 17.06.2021 in Special Case (MCOCA) No.9 of 2014 for the offence U/s.3(1)(ii) of the MCOC Act and would not challenge the conviction. On the basis of this statement, this Court (Coram: Prakash D. Naik, J.) vide the Judgment dated 26.04.2022 partly allowed the Appeal and passed the following order:

“iii. The sentence of simple imprisonment of three months for the conviction under Section 394 of Indian Penal Code in default, payment of fine of Rs.1,000/- passed by the Additional Sessions Judge and Additional Special Judge, MCOC Act, Pune in MCOC Case No.6 of 2014 is reduced to simple imprisonment for a period of one month.

iv. The sentence of imprisonment of three years in default, payment of fine of Rs.5,00,000/- (Five Lakhs only) for the conviction under Section 3(1)(ii) of MCOC Act is reduced to rigorous imprisonment of one year.”

5. This order was passed in respect of MCOC Case No.6 of 2014 before the Special Judge under MCOC Act, Pune. This order was passed on 26.04.2022. After that order was passed, a Criminal Appeal of the Accused No.2 in Special Case (MCOCA) No.9 of 2014 vide the Criminal Appeal No.395 of 2022 was decided by this Court vide the Judgment and order dated 29.09.2022. He was acquitted. After the acquittal of the Accused No.2, the present Appellants who were the original Accused Nos.1 and 3 in Special Case (MCOCA) No.9 of 2014 before the same learned Judge preferred these two appeals. Considering the affidavit filed by them, they had undertaken not to challenge that conviction in Appeal, but in spite of that, they preferred the present Appeals. The Criminal Appeal No.1169 of 2023 filed by the original Accused No.1 in Special Case (MCOCA) No.9 of 2014 was admitted by another bench of this Court (Coram: Nitin B. Suryawanshi, J.) vide the order dated 16.10.2023. Whereas, Criminal Appeal No.49 of 2024 preferred by the original Accused No.3 in the same case was admitted by another bench of this Court (Coram: Kishore C. Sant, J.) vide the order dated 10.01.2024.

When both these appeals were admitted vide the orders passed by the other benches of this Court, the order dated 26.04.2022 in Criminal Appeal No.1605 of 2019 was already passed. In spite of that order, both these Appeals were entertained and were admitted. Since both these appeals are statutory appeals and they are already admitted by two different benches of this Court, I have heard the learned counsel for the Appellants in both these appeals and I am proceeding to decide both these appeals. However, it cannot be overlooked that the Appellants had made solemn statement on affidavit before this Court which was a factor in getting the sentence reduced in another Appeal. The Respondent-State of Maharashtra is at liberty to take appropriate steps in accordance with the law against both these Appellants for committing breach of the statement made on affidavit before this Court in Criminal Appeal No.1605 of 2019.

6. Coming back to the present case, the Appellants are the original Accused Nos.1 and 3 in Special Case (MCOCA) No.9 of 2014 on the file of Special Judge under MCOC Act, Pune. There were four accused. At the conclusion of the trial, the accused No.4

was acquitted. Both the Appellants and the accused No.2 were convicted and sentenced by the judgment and order dated 17.6.2021 as follows :

- i) for commission of offence punishable under Section 395 of IPC, they were sentenced to suffer RI for ten years each and to pay fine of Rs.50,000/- each and in default of payment of fine to suffer SI for six months.
- ii) for commission of offence punishable under Section 3(1) of the Maharashtra Control of Organized Crimes Act, 1999 (MCOC Act), they were sentenced to suffer RI for seven years each and to pay fine of Rs.5,00,000/- each and in default of payment of fine to suffer SI for one year each.
- iii) they were also convicted for the offence punishable under Section 3(4) of MCOC Act and were sentenced to suffer RI for seven years each and to pay fine of Rs.5,00,000/- and in default of payment of fine to suffer SI for one year each.
- iv) All the substantive sentences were directed to run concurrently. The sentences of accused Nos.1 to 3 were directed to run concurrently with the sentence passed in

MCOCA Case No.6/2014 imposed on them vide judgment and order dated 3.5.2019 passed by the Additional Judge, MCOCA Court, Pune as per Section 427 of Cr.P.C.

- v) All of them were acquitted from the offence punishable under Section 3(2) of the MCOC Act.
- vi) They were granted benefit of set-off under Section 428 of Cr.P.C.

7. Heard Shri. Nikhil Patil, learned appointed counsel for the Appellant in Criminal Appeal No.1169 of 2023, Shri. Shravan Giri, learned counsel for the Appellant in Criminal Appeal No.49 of 2024 and Smt. Tidke, learned APP for the State.

8. The prosecution case is that several truck drivers, owners and cleaners had parked their trucks behind a petrol pump in an open parking space. Those trucks were transporting steel. In the night between 26th and 27th February, 2014, about seven to eight persons entered these trucks carrying knives and sticks. They took away cash amount and ornaments from the truck drivers and cleaners. One of the truck owners lodged the FIR at Loni Kalbhor police station, Pune vide C.R. No.68/2014. The accused, including

the present appellants, were arrested on 29.3.2014. The Test identification parades were held on 31.7.2014 and 6.8.2014. The statements of the witnesses were recorded. At the instance of the Appellant Vijay, some cash amount and some ornaments including two gold *badam* shaped pendants were recovered. At the conclusion of the investigation, the charge-sheet was filed.

9. During the course of investigation, it was found that the offence was committed as a continuing unlawful activity by an organized crime syndicate. Therefore, approval under Section 23(1) of the MCOC Act was given. The investigation was carried out and after obtaining sanction under Section 23(2) of the MCOC Act, the charge-sheet was filed. The accused were tried before the MCOCA Court.

10. During the trial, the prosecution examined eleven witnesses including seven victims, one pancha and various police officers. The approval under Section 23(1) of the MCOC Act was produced at Exhibit-91/2 and the sanction under Section 23(2) was produced on record at Exhibit-92/3.

11. PW-1 Kumar Gugwad was the first informant. He has deposed that he was owner of the truck bearing No.MH-09-BC-5265. On 26.2.2014, he and his driver Balappa Gugwad loaded the steel goods at Hospet, Karnataka and they came to Loni at around 10.00 p.m.. They parked their truck in an open space behind the petrol pump adjacent to godown of Kalyani Steel Company. About 20 to 25 trucks were also parked there. Both of them had their dinner and they slept in the truck. In the morning hours at around 3.00 a.m. on 27.2.2014, seven to eight persons armed with wooden sticks came there. Those persons woke-up the complainant and his companion and told them to hand over their money. The first informant handed over Rs.5,000/- and a gold ornament. They also robbed cash and golden ornaments from other trucks. Then they ran away. PW-1 the first informant has deposed that some of them were having black complexion and some of them were having fair complexion. They were in the age-group of 24-25 years. PW-1 and others then narrated the incident to a watchman. He informed the police telephonically. The police came at the spot. They carried out the spot panchnama. PW-1's

statement was recorded and it was treated as an F.I.R. The F.I.R. is produced on record at Exhibit-49. On 31.7.2014, he went to Yerwada Central Prison for identification of the accused. In that parade, he identified two accused. He was unable to tell whether those two persons were present in the court or not. The note of the learned Judge mentions that PW-1 did not identify any of the four accused present in the Court. PW-1 explained that since several days had passed after the incident and the identification parade, he was not able to identify any accused. During investigation, the police showed him his gold ornament, which he identified.

In the cross-examination, he has stated that at the time of dacoity he did not shout as they were threatened. More importantly, he admitted that there was darkness at the place of incident.

The F.I.R. is produced at Exhibit-49. The F.I.R. gives many details of trucks, their drivers, cleaners and details of amount and ornaments which were robbed. However, these details are not mentioned by him in his deposition. Therefore, the

use of those details in the F.I.R. is very limited. It was registered at 6.00 a.m. on 27.2.2014 at Loni Kalbhor police station vide C.R. No.68/2014.

12. PW-2 Ravi Kuti was a driver on truck bearing No.MH-17-AQ-4005. His truck was also parked in the same parking area. He has also described the incident in the same manner. He has deposed that about four to five persons armed with sticks and knives approached him and took away Rs.8,000/- and a cell phone. He identified all the four accused in the Court as the same persons who had committed the offence.

In the cross-examination, however, he admitted that there was darkness when the incident took place. But, he was volunteered to state that there was light in the parking area. At the time of incident, he himself was in the cabin of the truck. He denied the suggestion that there was darkness in the cabin. He has given an important admission in his cross-examination as he has admitted that he had seen the accused persons out of the Court hall.

13. PW-3 Raosaheb Shejar was a driver on the trailer bearing No.MH-06-K-4879. He has also described the same incident. Four unknown persons entered his cabin by pointing knives and wooden sticks. They robbed him of cash of Rs.5,500/-, gold ornament and wrist watch. After that, they went to another trailer and robbed the other drivers and then fled away. All the drivers then went to Loni Kalbhor police station and one of them gave report. In July, 2014, he was called to Yerwada police station. He has deposed that in the identification parade he identified four accused. PW-3 identified all the four accused before the Court.

In the cross-examination, he denied that there was darkness at the time of incident. According to him, the focus of the light at the petrol pump was in his cabin. There were four offenders.

14. PW-4 Laxman Karande was a cleaner on the trailer bearing No MH-06-K-4879. He was present with PW-3 and, therefore, he has narrated the incident in exactly the same manner as is described by PW-3. However, there is a slight discrepancy in the timing. He has deposed that the incident had taken place at

around 3.00 a.m.; whereas PW-3 has deposed that it had taken place at 2.30 a.m.. He has deposed that after five to six months, he was called at Yerwada Jail and he has identified four accused in that parade. He also identified four accused in the Court.

In the cross-examination, he admitted that when he came to the Court accused were sitting in the veranda. He also admitted that when he came to the Court, he had met the police officers.

15. PW-5 Sitaram Raut was the driver of the truck bearing No.MH-13-AX-3757. He has also described the incident. Around Rs.8,000/- kept by him in his clothes were missing. The others were also robbed and assaulted. There were seven to eight persons armed with wooden logs. He has admitted that he had not seen those persons. He did not identify any of the accused in the Court. He also admitted that there was darkness in his cabin, but, he denied that there was darkness outside the cabin.

16. PW-7 Ganesh Shinde was a driver on the truck bearing No.MH-43-G-6059. He was also one of the victims. One of the

accused gave a blow of knife on his right shoulder. His phone was taken away. He could not identify any of the accused.

17. PW-8 Radhari Yadav was a driver on the trailer bearing No.MH-06-AQ-1580. He has deposed that one of the dacoits entered in his cabin. They assaulted him with knife and took away around Rs.10,000/-. He did not identify any of the accused in the Court. He admitted that there was darkness at the time of incident.

18. PW-6 Sudam Gavade was a panch witness for search of the house of accused Kale. His evidence is not very clear. It could be house of the present appellant but nothing was recovered and this evidence is not incriminating. About rest of his evidence, he was declared hostile in respect of search of houses of other accused.

19. PW-9 Milind Mohite, Additional Superintendent of Police Baramati, District-Pune, had conducted the investigation between February to July, 2014. He was empowered to conduct the investigation. He could not tell whether there was darkness at the spot because he had visited the spot during day time. He

admitted that the accused were arrested on suspicion.

20. PW-10 Ashok Bharate, Deputy Commissioner of Police had conducted the investigation after 14.7.2014. He had caused to conduct test identification parade. He obtained two charge-sheets in the past crimes committed by the accused. Those charge-sheets were produced on record at Exhibit-113. The test identification parade memos regarding two parades dated 31.7.2014 and 6.8.2014 are produced on record at Exhibit-108 and 112.

21. PW-11 PI. Anil Gopal had supervised recovery of a knife, two gold ornaments and Rs.9,770/- at the instance of accused No.1-Appellant Vijay from a heap of broken-tiles near Indapur from a shed in the land belonging to one Ismail Shaikh.

22. Learned trial Judge believed the prosecution witnesses who had either identified the accused at the test identification parade or in the Court; and based on their evidence convicted the appellants and others. He also believed the evidence of recovery of property from Accused No.1 Vijay. He also took into account the

record produced by the police officers in the form of charge-sheets to conclude that the present offence was part of continuing unlawful activity of an organized crime syndicate and, therefore, also convicted and sentenced the appellant and others under the provisions of the MCOC Act.

23. Learned counsel for the appellants submitted that, there was darkness in the area and inside the cabin and, therefore, it was not possible for the victims to have identified the offenders. The Accused No.2 is acquitted by this Court in Criminal Appeal No.395 of 2022. The evidence of identification stands on the same footing, as far as the present Appellants and the acquitted Accused No.2 i.e. Bazigar Kale is concerned. They submitted that, if the evidence of identification is left aside, then there is hardly any evidence against the present appellants.

24. Learned counsel for the Appellant Vijay Kale, in addition, submitted that, though there is recovery at the instance of the Appellant Vijay, it was from a place belonging to one Shaikh. That person is not examined and there is no evidence led by the prosecution in that behalf. That place was accessible to everybody.

He submitted that the panchas to that recovery were not examined. The police officer PW-11 has stated that, after recovery, those articles were sealed with *lakh* seal and the labels with panchas' signatures were pasted. But when they were shown to PW-1 and PW-3, at that time there was no mention of removing of those seals and labels. This is an important discrepancy which vitiates the identification of those ornaments by PW-1 and PW-3.

25. Learned APP, on the other hand, submitted that the evidence of identification is sufficient against the Appellants. There is a difference, as far as, accused No.2 and both these appellants are concerned. PW-1 Kumar had identified the Appellants Vijay and Uddesh in the test identification parade. He had not identified the accused No.2. Therefore, there is difference, as far as, identification by PW-1 in the parade is concerned. She submitted that, PW-3 had identified all the accused Nos.1, 2 and 3. This is a strong circumstance against the appellants. She submitted that, PW-1 and PW-3 have identified the ornaments recovered at the instance of the Appellant Vijay. She, therefore, submitted that the prosecution has proved its case. Considering the previous charge-

sheet and the cognizance taken, even the offence under the MCOCA is proved.

26. I have considered these submissions. It is necessary to see whether the Appellants can be convicted for commission of offences under the I.P.C. Then question would arise about their involvement in the MCOCA offences. The important witnesses, as far as identification is concerned, are PW-1, 2, 3, 4, 5, 7 and 8 who are the victims in the incident. PW-1 the first informant had identified both the appellants at the test identification parade, but in his substantive evidence before the Court he did not identify either of the Appellants. Therefore, his evidence as far as identity of the offenders is concerned is not helpful to the prosecution case, in the absence of substantive evidence in respect of the identity of the offenders.

27. PW-2 Ravi Kuti had identified the Appellants in the Court, but he was not asked to identify the suspects in any test identification parade. Therefore, he was deposing for the first time in the court in respect of the identity of the offenders. Importantly, he has admitted that, he had seen the accused outside the Court

hall. This admission is important. In this case, the prosecution has not eliminated the possibility that the accused were shown to the witnesses thereby influencing their depositions before the Court in respect of identification of the accused. Therefore, in this case, reasonable doubt is created regarding identification by PW-2 of the present appellants. He has also admitted that there was darkness when the incident had occurred; though, he has stated that there was light in the parking area. The incident had taken place in the cabin, therefore, his evidence suffers from a reasonable doubt.

28. PW-5 Sitaram Raut deposed that he had not seen those persons and he had not identified the appellants in the Court. Therefore, his evidence also does not support the prosecution.

29. PW-7 Ganesh Shinde also did not identify the accused in the Court.

30. Similarly, PW-8 Ramdhari Yadav also has not identified the accused in the Court. He has admitted that there was darkness at the time of incident.

31. Therefore, the evidence worth considering as far as

identification is concerned is only of PW-3 Raosaheb and PW-4 Laxman. Both of them have identified the appellants in the Court. PW-3 Raosaheb has deposed that in the month of July, he was called at Yerwada police station for test identification parade. Whereas, the test identification parade was held in Yerwada Central Prison and not at Yerwada police station. Therefore, there was substance in the submission made on behalf of the appellants that the appellants were shown to this witness in the police station itself. The prosecution has not explained this discrepancy. Hence, even in his evidence sufficient doubt is created.

32. PW-4 Laxman Karande had identified the Appellant Vijay and accused No.2 Bajigar, but he did not identify the Appellant Uddesh at the test identification parade. But he identified both the appellants in the Court. Thus, his identification, as far as, Appellant Uddesh is concerned is extremely doubtful. Even in respect of the appellant Vijay, his evidence is not fully reliable. He has admitted that, when he came to the Court he met the police officers. He also admitted that when he came to the Court the accused persons were sitting outside the court hall. Thus, there

was a reasonable possibility that he was shown the accused before his deposition. Therefore, his evidence becomes doubtful as far as identification of the accused including the appellants is concerned. The test identification parade itself was held on 31.07.2014 and 6.8.2014. Though the appellants were arrested on 29.3.2014, no explanation is offered as to why the investigating agency waited till 6.8.2014 to conduct the test identification parade.

33. Thus, this discussion shows that the evidence of identification of both the appellants is doubtful and reasonable doubt is created in that behalf, the benefit of which must go to the Appellants.

34. The only other circumstance which remains against the Appellant Vijay is about the recovery of the ornaments and cash amount. In this behalf, the prosecution has not examined the pancha witnesses in whose presence the Appellant had given memorandum statement leading to the recovery. Similarly, the prosecution has also not examined the pancha witnesses in whose presence those gold pendants were allegedly identified by PW-1 and PW-3. The only evidence in that behalf is that of the Police

Officer-PW-11. In this respect, it is significant to note that PW-11 has stated that, after the recovery was effected, the ornaments were kept in sealed condition. *Lakh* seal was applied and labels of the signatures of the panchas were affixed. This was done on 31.03.2014. Thereafter, PW-1 and PW-3 were asked to identify the stolen ornaments on 01.08.2014 and on 05.08.2014 respectively. There is no explanation as to why there was so much delay. Apart from that, the most important aspect in this case is that, when both these witnesses were made to identify the ornaments, two separate panchanamas were conducted which were produced on record at Exhibit-109 and 110. In both these panchanamas, there is no reference that the seal on the packets in which the ornaments were kept were removed in the presence of panchas and that they were resealed with labels of signatures of the panchas. This is an important aspect, because the prosecution has not led evidence to show that those ornaments were kept in safe custody; ruling out all the possibilities of tampering before they were shown to the witnesses. In this view of the matter, identification of those two gold pendants by PW-1 and PW-3 loses its evidentiary value.

Consequently, the recovery at the instance of the Appellant Vijay also cannot be connected with the present offence. In this view of the matter, there is no other evidence against both the appellants. Therefore, the prosecution has failed to prove its case beyond reasonable doubt, as far as, commission of offences under the I.P.C. are concerned. Consequently, the Appellants cannot be convicted for commission of offences under MCOCA, as well, because unlawful activity which was the subject matter of the C.R.No.68 of 2014 of Loni Kalbhor police station was not proved against the appellants. Hence, it cannot be termed as 'continuing unlawful activity' undertaken by the Appellants as members of an organized crime syndicate. In this view of the matter, even their conviction under MCOCA will have to be set aside.

35. Hence, the following order :

O R D E R

- i. Both the Appeals are allowed.
- ii. The Judgment and order dated 17.6.2021 passed by the Special Judge, under MCOC Act, Pune in Special Case (MCOCA)

No.9/2014, convicting and sentencing the Appellants, is set aside.

- iii. The Appellants are acquitted.
- iv. The Appellant Vijay alias Vijya Bibhishan Kale is on bail.
- v. The Appellant Uddesh Bibhishan Kale is in custody, he be released forthwith if not required in any other case. Before being released, he shall execute P.R. Bond in the sum of Rs.30000/- to ensure his presence in case Appeal against acquittal is preferred.
- vi. The Appellant Vijay Kale shall execute similar P. R. bond for Rs.30000/- within a period of one month from today.
- vii. Both the Appeals are disposed of.
- viii. With disposal of the Appeals, the companion application is also disposed of.

(SARANG V. KOTWAL, J.)