(2014) 01 BOM CK 0210

In the Bombay High Court

Case No : Criminal Appeal Nos. 97 of 2005 and 984 of 2007

Arpan Jaru Bhosle APPELLANT

Vs

The State of Maharashtra RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:

Maharashtra Control of Organised Crime Act, 1999 — Section 3(1)(i), 3(1)(ii), 3(4), 4
Penal Code, 1860 (IPC) — Section 395, 396, 399, 420

Citation : (2014) ALLMR(Cri) 1603 : (2015) 1 BomCR(Cri) 205

Hon'ble Judges : P.V. Hardas, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Rohini Dandekar, Appointed Advocate in Criminal Appeal No. 97/2005, Advocate for the Appellant; Rohini Dandekar, Appointed Advocate in Criminal Appeal No. 984/2007 and Mr. F.R. Shaikh, A.P.P. for the State, Advocate for the Respondent

Judgement

P.V. Hardas, J.—Criminal appeal No. 97 of 2005 has been filed by the Appellant/ Original Accused No. 6, who stands convicted for an offence punishable u/s 3(1)(i) and also u/s 3(4) of the Maharashtra Control of Organized Crime Act, 1999 (for short M.C.O.C. Act) and sentenced to imprisonment for life and to pay fine of Rs. 1,00,000/-, in default to undergo further R.I. for one year with no separate sentence being awarded for conviction u/s 3(4) of the M.C.O.C. Act by the Special Judge under the M.C.O.C. Act, Pune, by Judgment dated 10.9.2004 in M.C.O.C. Special Case No. 3 of 2002, by this Appeal challenges his conviction and sentence. Alongwith the Appellant, Original Accused No. 2 Kakdya @ Vithoba Bhosale has also been convicted for an offence punishable under Sections 3(1)(ii) and also u/s 3(4) of the M.C.O.C. Act and u/s 3(1)(ii) of the M.C.O.C. Act and is sentenced to R.I. for five years and to pay fine of Rs. 5,00,000/- in default of which to undergo further R.I. for one year with no separate sentence being awarded for conviction u/s 3(4) of the M.C.O.C. Act. Original Accused No. 2, however, has not filed any Appeal. Criminal Appeal No. 984 of 2007 has been filed by the State, questioning the acquittal of Original Accused Nos. 1,3 to 5 and

7 to 17.

2. Facts in brief as are necessary for the decision of this Appeal may briefly be stated thus.

(i) P.W.-1 PI Rashid Shaikh, who was attached to the Narayangaon Police Station from 4.1.2001 to 29.9.2001 took up the investigation of Crime No. 1 of 2001 u/s 399 of the Indian Penal Code. Crime No. 1 of 2001 was in respect of preparation to commit dacoity which had taken place within the jurisdiction of the Narayangaon Police Station. In all 6 accused had been involved in that case. A charge-sheet against the accused came to be filed in the said case, which is at Exhibit 53. During the investigation of the said case, it occurred to P.W.-1 PI Rashid Shaikh that there was an organized crime syndicate of the accused and they had indulged in many such offences and accused Adik Kale was a leader of that gang. According to him, several offences had been registered in the jurisdiction of Narayangaon Police Station, particularly, Crime No. 141 of 2000, Crime No. 194 of 2000. Crime No. 170 of 2000 in the jurisdiction of the Manchar Police Station, Crime No. 58 of 1999, Crime No. 109 of 2000 and Crime No. 113 of 2000 and Crime No. 114 of 2000 had been registered within the jurisdiction of the Otur Police Station Crime No. 69 of 2000 and in the jurisdiction of the Shirgaon Police Station, Crime No. 168 of 2000 had been registered. In the jurisdiction of the Chakan Police Station, Crime No. 59 of 1999 and in the jurisdiction of the Daund Police Station, Crime No. 19 of 2000 had been registered. Within the jurisdiction of the Parner Police Station, Crime No. 162 of 1999 and Crime No. 149 of 2000 had been registered. In the jurisdiction of the Shrigonda Police Station, Crime No. 157 of 1989 and Crime No. 158 of 1989 had been registered. Crime No. 166 of 1989 had been registered u/s 420 of the Indian Penal Code.

(ii) P.W.-1 PI Rashid Shaikh, therefore, came to the conclusion that the provisions of the M.C.O.C. Act were applicable and submitted a report to the Special I.G Kolhapur Range for according prior approval. The said report is at Exhibit 54. It is pertinent to observe, at this stage, that apart from referring to the charge-sheet submitted in Crime No. 1 of 2001 at Exhibit 52, P.W.-1 PI Rashid Shaikh has not referred to the submission of the charge-sheet in the other offences. Thus, the prosecution at the very threshold had failed in producing evidence which would indicate that all the accused or some of the accused were being tried together in various cases and that atleast one charge-sheet had been filed against the accused acting either singly or jointly or on behalf of the organized crime syndicate along with the head of syndicate or the said offences have been committed on behalf of the said syndicate or at the instance or under the direction of the head of the said syndicate.

(iii) On 3.5.2001, I.G. of Kolhapur Range i.e. P.W.-15 Ramrao Bhausaheb Pawar accorded prior approval to register the case under the provisions of the M.C.O.C. Act on 3.5.2001. The order of prior approval is at Exhibit 107. On 2.6.2001, P.W.-1 PI Rashid Shaikh accordingly lodged the complaint with the Narayangaon

Police Station at Exhibit 55. On the basis of his complaint, an offence vide Crime No. 58 of 2001 was registered u/s 3(1)(i) and Section 4 of the M.C.O.C. Act. Further investigation was thereafter entrusted to P.W.-13 Dashrath Narsu Kusale, who was then the Deputy Superintendent of Police at Khed.

(iv) On being entrusted with the investigation, he recorded the statements of witnesses in Crime No. 1 of 2001 and on 19.10.2001, recorded the statements of Rahit Khan and others. Accused Adik Kale was absconding and was arrested by the Narayangaon Police Station on 13.11.2001. On 17.11.2001, the accused was transferred in the crime under the M.C.O.C. Act. On 17.11.2001, search of the house of accused Adik Bhosale was carried out in the presence of panchas. Statements of witnesses were recorded. Thereafter, statement of Hasan Musa Shaikh and others were recorded in Manchar Police Station Crime No. 114 of 2000. Statements of other complainants in respective crimes were recorded. A panchnama was drawn in respect of the property of accused Dagadu Naklya Bhosale at Exhibit 85 in the presence of the panch witnesses. Statements of the Gramsevak and others were recorded and copy of the application was obtained at Exhibit 86. The report of the Gramsevak is at Exhibit 87. 7/12 extract was obtained from Talathi at Exhibits 88 to 100. Statements of other witnesses in respect of the purchase of property by accused Naklya Bhosale in the name of his wife were recorded. During the investigation, P.W.-13 Dashrath Kusale came to the conclusion that there was prima-facie evidence against all the accused for submitting chargesheet in the offence under the M.C.O.C. Act and accordingly sent his report to the I.G. of Kolhapur Range for grant of sanction. Another supplementary report was also submitted to the Additional Director General of Police for sanction. The copy of the said letter is at Exhibit 101.

(v) P.W.-14 Omprakash Bali, Director General of Police, upon perusal of the relevant reports, accorded the sanction at Exhibit 105. P.W.-1 PI Rashid Shaikh, who had investigated Crime No. 141 of 2000, Crime No. 163 of 2000, Crime No. 180 of 2000 and Crime No. 169 of 2000 had filed the charge-sheets and the certified copies of the charge-sheets are at Exhibits 56, 57 and 58 which were relied upon by the prosecution for submitting final report in C.R. No. 58 of 2001 under the provisions of M.C.O.C. Act.

(vi) The Trial fudge, accordingly, framed charge against the accused vide Exhibit 25. The accused denied their guilt and claimed to be tried. Prosecution in respect of its case examined 15 witnesses. The defence of the Appellants and the accused was of denial. The Trial Court, upon appreciation of the evidence, convicted and sentenced the Appellants (Original Accused No. 6 and Original Accused No. 2), while acquitting the other accused.

3. At this juncture, we may state that the provisions of the M.C.O.C. Act were not applied during the investigation of the offences which had been registered against the accused. Nor were the provisions of the M.C.O.C. Act applied in respect of the C.R. No. 1 of 2001 which was pending investigation. There is no reference in the evidence as to what had happened to the pending criminal trials

whether they were pending and the outcome of the said trials. If at all the Respondents came to the conclusion that the accused were members of the gang or were members of the organized crime syndicate and had committed the offence either singly or jointly or acting as members of the organized crime syndicate, the relevant provisions of the M.C.O.C. Act could have been invoked and applied during the investigation of those crimes or in the pending trials.

4. What is intriguing in this case is that the original accused No. 1, who was alleged to be the head of the organized crime syndicate, has been acquitted from all charges. It appears from the record that there is no evidence to hold that the original accused No. 1 was the head of the organized crime syndicate and that either at his direction or under his instructions the present appellant i.e. Accused No. 6 committed various crimes for which more than one chargesheets have been filed before the competent court within the preceding period of 10 years, and that the Court has taken cognizance of such offence.

5. It is surprising to note that the prosecution has examined various witnesses who are the complainants in respective cases, which have been relied upon by the prosecution in support of their case for attracting the provisions of M.C.O.C. Act.

It is the settled position of law that the singular unlawful activity would attract the provisions of ordinary law and if it is the continuing one, and to wit, third offence of specified type which fulfills the requirement of the provisions of M.C.O.C. Act, it becomes organized crime to be registered as an offence under the M.C.O.C. Act. In such situation there were two options are available to the prosecution/Investigating Agency, that is, either they can separately record the information about the commission of an offence of organized crime after successive unlawful activity of the specified type have been committed, for and on behalf of the organized syndicate, which has been done in the present case, or invoke the provisions of the said enactment to the unlawful activity already reported which is the successive in point of time that is to say the provisions of M.C.O.C. Act can be invoked or applied to an existing CR/FIR. Reliance is placed on an unreported judgment of the learned Single Judge of this Court in Criminal Application No. 3978 of 2004 in case of Anil U. Gote v. The State of Maharashtra dated 3.11.2004 which lays down the correct position of law pertaining to the invocation/applicability of the provisions of M.C.O.C. Act.

6. It is pertinent to note in the present case that once the prosecution fails to establish any link or nexus between the head of the organized crime syndicate i.e. between Adik Kale and the present appellant, the present appellant cannot simply be sentenced or convicted under the provision of M.C.O.C. Act particularly in view of the fact that the prosecution has utterly failed to establish that the present appellant has either singly or jointly along with the head of the organized crime syndicate i.e. Adik Kale or at this instance or at his direction have indulged into any criminal activity in the past for which more than two chargesheets have been filed to attract the provisions of M.C.O.C. Act. There is even no

corroborative or any other evidence to that effect.

7. The appellant has been convicted under the provisions of Section 3(1)(i) of M.C.O.C. Act which postulates that the said offence has resulted into the death of person for which the punishment is death or imprisonment for life. Here in the present case, it appears from the record that the prosecution has relied upon the judgment dated 10.4.2002 passed in Sessions Case No. 139 of 2001 wherein the appellant was one of the accused and was convicted u/s 396 of IPC and he was sentenced to suffer imprisonment and to pay fine. It further appears from the record that in the said Sessions Case No. 139 of 2001 the incident had taken place on 19.11.2000 wherein a person by name Sambhaji was killed during the incident of dacoity and the appellant was convicted for the said offence as stated above. It further appears from the record that the appellant Arpan Bhosale was also convicted for committing an offence u/s 395 in Sessions Case No. 297 of 2001 which was decided on 30.4.2004 by the 4th Ad hoc Additional Sessions Judge, Pune and was sentenced to suffer RI for 3 years. It is to be noted here that on the basis of the conviction of the appellant in Sessions Case No. 139 of 2001 u/s 396 of IPC, the said conviction of the appellant has been taken as a base for sentencing the appellant in C.R. No. 58 of 2001 u/s 3(1)(i) of M.C.O.C. Act.

8. It is pertinent to note here that though the prosecution has initially identified the original accused No. 1 Adik Kale as head of the organized crime syndicate. It further appears that the Trial Court, after coming to the conclusion that there is no evidence against the said accused for convicting under the provisions of M.C.O.C. Act, the prosecution has thereafter foisted on the present appellant the criteria of two charge-sheets thereby seeking his conviction.

9. In view of the peculiar facts of the present case, the finding of the Trial Court that the appellant has committed the offence u/s 3(4) of the M.C.O.C. Act cannot be sustained.

10. In respect of the present Appellant, the Trial Court at paragraph 38 came to the conclusion that the Appellant had been convicted in Sessions Case No. 139 of 2001 u/s 396 of the Indian Penal Code and had been sentenced to imprisonment for life and also to pay fine. The present Appellant was also convicted in Sessions Case No. 297 of 2001 which was decided on 30.4.2004 by the 4th Ad-hoc Additional Sessions Judge and the Appellant was sentenced for offence punishable u/s 395 of the Indian Penal Code. The Trial Judge, therefore, came to the conclusion that since the Appellant had been convicted in the two Sessions Cases, adverted to above, pertaining to the period 2000-2001, the prosecution had established that the Appellant was indulging in unlawful criminal activities as member of the organized crime syndicate and was involved in the offences which were cognizable and punishable with imprisonment for three years or more and therefore, came to the conclusion that the prosecution had established the charge u/s 3(1)(i) of M.C.O.C. Act as well as u/s 3(4) of the M.C.O.C. Act.

11. In respect of Accused No. 2 Kakdya, the Trial Court observed that Accused No. 2 Kakdya had been convicted by the Competent Court for offence punishable u/s 395 of the Indian Penal Code in Sessions Case No. 297 of 2001 which was decided on 30.4.2004. Since the other cases were pending against the Accused No. 2 Kakdya, the Trial Court concluded that the prosecution had proved the offence against the Accused No. 2 for offence punishable u/s 3(1)(ii) and 3(4) of the M.C.O.C. Act as well as against the Appellant for offence punishable u/s 3(1)(i) and 3(4) of the M.C.O.C. Act. In respect of the other accused, the Trial Court came to be conclusion that there was no cogent, legal and reliable evidence to indicate that they were also indulging in unlawful criminal activities during the period and therefore, acquitted the other accused including the leader of the gang or the organized crime syndicate i.e. accused Adik Kale.

12. In respect of the Appellant, the Appellant was tried and was convicted. In respect of Accused No. 2, he was convicted in one criminal case while others were pending. Perusal of the entire evidence discloses that there is absolutely no material against the Appellant as well as Original Accused No. 2, particularly in view of acquittal of the leader of the gang or leader of the organized crime syndicate that the Appellant and Original Accused No. 2 were members of the organized crime syndicate and that they had committed the offence either singly or jointly or with other persons of the organized crime syndicate as members of the organized crime syndicate. If the aforesaid evidence is wanting, according to us, the conviction of the Appellant as well as Original Accused No. 2 is wholly unsustainable in law. There is no material at all on record to infer that the Appellant and Original Accused No. 2 were members of the organized crime syndicate and that they had acted either singly or jointly or on behalf of the organized crime syndicate as members of the organized crime syndicate. As pointed out by us above, conviction of the Appellant simplicitor in two sessions cases or the conviction of Accused No. 2 in one sessions case by itself cannot lead or cannot be sufficient to infer that the Appellant and Original Accused No. 2 were members of the organized crime syndicate allegedly headed by Adinath @ Adik Kale.

13. For the reasons stated by us above, according to us, the conviction of the Appellant is wholly unjustified. Similarly, we have come to the conclusion that the conviction of Original Accused No. 2 is also unjustified. Accused No. 2 however has not preferred any Appeal. Even a non-appealing accused can be given the benefit of acquittal of the co-accused if there is no evidence justifying his conviction. A reference at this stage may usefully be made to the Judgment of the Supreme Court in Bijoy Singh and Another Vs. State of Bihar, . The Supreme Court in the said Judgment at paragraph 12 has observed that on evaluation of the case if the court reaches the conclusion that no conviction of any accused is possible, the benefit of that decision must be extended to the co-accused, similarly situated, though he has not challenged the order by way of an Appeal. Similarly, the Supreme Court, in Gurucharan Kumar and Another Vs. State of Rajasthan, has held that a benefit of the Judgment could be extended to the non-

appealing accused.

14. In the light of the findings recorded by us in this Appeal, the Appeal against Acquittal filed by the State, questioning the acquittal of the other accused therefore is also without any merit and deserves to be dismissed.

15. Accordingly, we allow Criminal Appeal No. 97 of 2005 filed by the Appellant/ Original Accused No. 6 and quash and set aside his conviction and acquit him of the offence with which he was charged and convicted. Fine if paid by the Appellant/Original Accused No. 6 be refunded to him. Since the Appellant/ Original Accused No. 6 is in Jail, he be released forthwith, if not required in any other case.

We extend the benefit of this Judgment to Original Accused No. 2 - Kakdya @ Vithoba Bhosale and accordingly, acquit him of the offence with which he was charged and convicted. Fine if paid by Original Accused No. 2 be refunded to him. If the Original Accused No. 2 is in Jail, he be released forthwith if not required in any other case.

We find no merits in Criminal Appeal No. 984 of 2007 filed by the Appellant - State, questioning the acquittal of the accused and the same is dismissed maintaining the acquittal of the accused.

Fees payable to the learned Counsel appointed for the Appellant in Criminal Appeal No. 97 of 2005 and for Respondents/Accused in Criminal Appeal No. 984 of 2007 quantified at Rs. 5000/- in each Appeal.