
(2014) 03 BOM CK 0159
In the Bombay High Court
Case No : Criminal Appeal No. 12 of 2014

Farman Imran Shah @ Karu

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

Arms Act, 1959 — Section 3 3(25) 4(25)
Criminal Procedure Code, 1973 (CrPC) — Section 190 227 228
Maharashtra Control of Organised Crime Act, 1999 — Section 12 23 23(1)(a) 23(2) 3(1)(i)
Penal Code, 1860 (IPC) — Section 120(b) 143 147 148 149
Prevention of Corruption Act, 1988 — Section 19

Citation : (2014) ALLMR(Cri) 1571 : (2014) 3 BomCR(Cri) 144

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

Bench : Division Bench

Advocate : J. Shekhar and Mr. Harsh Hiroo, Mr. Gurshahani instructed by J. Shekhar and Co, for the Appellant; S.D. Shinde, Addl. P.P., for the Respondent

Final Decision : Dismissed

Judgement

A.S. Gadkari, J.—This Appeal has been preferred by the Appellant u/s 12 of the Maharashtra Control of Organized Crime Act, 1999 ("MCOC Act" for brevity) thereby challenging the order passed by the Learned Special Judge, Pune under the MCOC Act, below Exhibit 4 in MCOCA Special Case No. 7 of 2012, thereby rejecting his application preferred u/s 227 of the Code of Criminal Procedure for discharge. The Appellant questions the Correctness of the said order dated 4 March 2013 passed below Exhibit 4 in Special case No. 7 of 2012. The Appellant has challenged the said order mainly on two grounds i.e. (i) that there is no material at all on record for framing a charge against him and (ii) there is a total non application of mind of the Competent authorities while granting prior approval as Contemplated u/s 23(1)(a) and sanction as Contemplated u/s 23(2) of the MCOC Act. It appears from the record that the Complainant Smt. Parvin Anwar Shaikh has lodged a First Information Report at Kondhwa Police Station on

14 March 2012 stating that on 13 March 2012 at about 10.30 p.m. when she was proceeding with her husband in a Santro car, accused Matin Rafique Shaikh and Nadir Munir Sayyed obstructed their way on a motorcycle on which the said accused persons were riding and at that time other accused persons immediately came thereon and encircled their car. One of the accused persons hurled a stone on the glass at the driver's side, the other persons also damaged the car and the accused persons opened the door of the car, pulled out her husband and severely assaulted him. The Complainant has further stated that because of the said incident, she was frightened and started screaming. That when she was shouting for the help, some of her relatives and her son came there and they took the husband of the Complainant i.e. Anwar Shaikh to Hospital wherein the said Anwar Shaikh succumbed to the injuries while undergoing medical treatment. It further appears from the record that initially an offence under Sections 143, 147, 148, 149, 302, 341 and 427 of the Indian Penal Code read with Sections 3(25) of the Indian Arms Act was registered bearing CR. No. 40 of 2012 dated 14 February 2012. It also appears from the record that during the Course of investigation it was revealed that the said crime was Committed by the Organized Crime Syndicate of Mohasin @ Guddu Anwar Shaikh and his associates. It further appears from the record that on 22 May 2012 Deputy Inspector General of Police and Additional Commissioner of Police, Southern region, Pune city granted prior approval on the basis of the report submitted by the Senior Police Inspector, Kondhwa Police Station for invoking the provisions of the MCOC Act to be applied to CR No. 40 of 2012 originally registered at Kondhwa Police Station and the investigation of the said crime after invoking the provisions of the MCOC Act, was handed over to Mr. V.T. Pawar, Assistant Police Commissioner, Wanvadi Division. That after Completion of the investigation, the Competent authority i.e. the Additional Director General of Police and the Commissioner of Police, Pune city accorded sanction as Contemplated u/s 23(2) of the MCOC Act by his order dated 27 August 2012. That the Appellant is arraigned as an accused No. 12 in the said sanction order dated 27 August 2012 and Mohasin @ Guddu Anwar Shaikh has been named as the head of the crime syndicate as accused No. 1. The said sanction has been accorded against 13 persons and two absconding accused persons. It further appears from the documents annexed to the present Appeal that a charge-sheet has been filed on 3 September 2012 before the Special Court under the MCOC Act under Sections 302, 341, 427, 120(b), 143, 147, 148, 149 of the Indian Penal Code and under Sections 3, 4(25) of the Indian Arms Act and u/s 3(1)(i), 3(1)(ii), 3(2), 3(4) of the MCOC Act.

2. The present Appellant who has been arraigned as accused No. 12 as per the sanction order, had filed the application u/s 227 of the Code of Criminal Procedure for his discharge from the present case, below Exhibit 4 in MCOCA Special Case No. 7 of 2012 on the grounds as stated herein above i.e. that there was no material at all for framing the charge against him and that the Competent authorities as Contemplated u/s 23 of the MCOC Act failed to apply their mind

while initially granting prior approval and subsequently according sanction in the present case.

3. Before we proceed to deal with the Contentions raised by learned Counsel for the Appellant Mr. J. Shekhar and the learned Additional Public Prosecutor, it would be useful to refer to the judgments of the Hon"ble Supreme Court and our High Court in respect of the scope of the enquiry to be Conducted by the Court u/s 227 of the Code of Criminal Procedure at the time of framing of charge.

4. A useful reference can be made to the judgment of the Hon"ble Supreme Court in the case of Union of India (UOI) Vs. Prafulla Kumar Samal and Another, . It is necessary and useful to refer to paragraph 10 of the said judgment which reads as under:

10. Thus, on a Consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while Considering the question of framing the charges u/s 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction u/s 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to Consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and Cons of the matter and weigh the evidence as if he was Conducting a trial.

5. A useful reference can also be made to a judgment of the Division Bench of this Court in the case of Govind Sakhambari v. State of Maharashtra reported in 2009 ALL M.R. (Cri.) 1903 wherein at paragraph 25 the Division Bench of this Court has held thus:

25. The principles laid down by the Supreme Court in the above cases need to be summarized. It is settled law that at the stage of Section 227 of the Code, the

Court has power to sift the materials Collected by the prosecution to find out whether there is prima facie case against the accused or not. The Court has to be satisfied that there is ground for presuming that the accused has Committed the offence or that there is no sufficient ground for proceeding against him. The Court's enquiry must not be directed to find out whether the case will end in Conviction. However, though roving enquiry is not permissible, the Court can Consider whether the material Collected by the prosecution if accepted as it is without being subjected to cross-examination gives rise to strong and grave suspicion for presuming that the accused has Committed the offence and that un rebutted material will lead to a Conviction. If at the stage of Section 227 or Section 228, the scales as to the guilt or innocence of the accused are even then the Court must proceed to frame a charge. There is no question of giving benefit of doubt to the accused and discharge the accused at that stage because the scales are even. That can be done only at the Conclusion of trial. If there is a strong suspicion which leads the Court to think that there is a ground for presuming that the accused has Committed an offence, then the Court will proceed to frame the charge. But if two views are possible and the Court is satisfied that the evidence gives rise to some suspicion but not grave suspicion against the accused, the Court will be within its right to discharge the accused. Suspicion has to be strong and grave suspicion leading the Court to presume that the accused has Committed an offence. While basic infirmities and broad probabilities can be Considered, the Court cannot make a roving enquiry into the pros and Cons of the matter and weigh the evidence as if it is Conducting a trial. Probative value of the material cannot be gone into at that stage.

6. It is necessary to mention here that while enumerating the settled position of law as Contemplated u/s 227 of the Criminal Procedure Code, the Division Bench of this Court in the aforesaid judgment, after taking into Consideration the legal propositions laid down by the Hon''ble Supreme Court in the case of Dilawar Balu Kurane Vs. State of Maharashtra, , State of Bihar v. Ramesh Singh- AIR 1977 SC 2010, State of Maharashtra Vs. Priya Sharan Maharaj and Others, , Union of India v. Prafulla Kumar Samal- AIR 1979 SC 766, Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others, , Niranjan Singh Karam Singh Punjabi v. Jitendra Bijja- AIR 1990 SC 1962 and State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., , has culled out the aforesaid principles as mentioned in paragraph 25 in the case of Govind Ubhe (supra). A further reference may also usefully be made to the judgment of the Hon''ble Supreme Court in the case of State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., wherein the Supreme Court has held that if there is a ground for presuming that the accused has Committed the offence, it can be said that a prima facie case has been made out against the accused. It has been further held that even if the Court finds that the accused might have Committed the offence, it can frame the charges. The Supreme Court in the said case has clarified that at the stage of framing of charge, probative value of the materials on record cannot be gone into. In that background we propose to deal with the

material which has been produced and relied upon by the prosecution against the Appellant.

7. It is the Contention of learned Counsel for the Appellant that the Complainant has not named the Appellant in the First Information Report and the Complainant in her supplementary statement has named him with a specific role. Therefore it is Contended that adding his name subsequently by the Complainant is an after thought. In this background we have scrutinized the First Information Report given by the Complainant and we find that it is true that the name of the Appellant does not figure in the First Information Report. The First Information Report is dated 14 March 2012. However, it is pertinent to note here that in her supplementary statement dated 16 March 2012 the Complainant has specifically stated that the Appellant pulled out the deceased i.e. Anwar Shaikh, the husband of the Complainant, from the car and inflicted blows with sickle on him.

8. At this juncture, we may observe that it cannot be expected from a witness who was hovering under the impact/shock of a ghastly incident, to give each and every minute details when he or she is suffering from the said trauma. It is only after the witness Comes out of the trauma which he/she has suffered, it is possible for him/her to recapitulate the details of the incident and to give a detailed account of the incident. It is the settled position of law that FIR is not an encyclopedia of all the facts pertaining to a crime and therefore non-appearance of the name of one of the accused persons at the time of lodging of FIR does not vitiate the same, neither an inference can be drawn out of the said omission that the said accused person had not participated at all in the crime. We, therefore, do not find that the appearance of the name in the supplementary statement is an after thought at the instance of the Complainant.

9. This takes us to scrutinize the material in the form of statements of witnesses available on record which describes the role played by the Appellant in Commission of the present crime. The witness at page No. 238 of the Compilation (identity Concealed) has stated that on 13 March 2012 at about 10.30 p.m., he was following car of deceased Anwar Shaikh and his wife i.e. the Complainant, who were passing through Knodhwa. At that time speed of the santro car was lowered down because of the speed breaker which was in front of Parmar Pawan. At the said time all of a sudden, two motorcycles from both the sides of the said car overtook it, when he observed that accused Matin Shaikh and Nadir Sayyed obstructed/halted the said car by putting their motorcycles in front of it. He has further stated that accused Anwar Shaikh, Rafiqe Shaikh, Imran Chikki, Atul Pawar, Tausif Shaikh, Zuber Shaikh, Mohasin Shaikh, Shanawaz Shaikh, Alim Jamadar, Farman Shah (i.e. the present Appellant), Afzal Sayyed, Munir Sayyed and Khalid Sundke encircled the said car. The said persons were holding sickles and choppers in their hand. Accused Nadir Shaikh was having a pistol in his hand. That Tausif Shaikh hurled a stone on the said car. That accused Nadir fired at the direction of deceased Anwar Shaikh. He has further stated that the present Appellant i.e. Farman Shah along with other

accused persons pulled out Anwar Shaikh from the car and the present Appellant along with Mohasin Shaikh, Imran Shaikh, Shahnawaz Shaikh, Atul Pawar, Khalid Sundke, Afzal Sayyed, Zuber Shaikh, Matin Shaikh, Tausif Shaikh, Rafique Shaikh and Munir Sayyed gave blows of sickle and chopper on deceased Anwar Shaikh. He has stated that accused Nadir fired a bullet from his pistol and accused Alim lifted a stone lying near the electric pole and hurled it on the head of deceased Anwar Shaikh.

10. The witnesses whose statements are recorded at pages 240, 242, 496 and 501 of the Compilation (identity of the witnesses is Concealed) have stated about the fact of incident dated 13 March 2012, wherein deceased Anwar Shaikh was brutally murdered by the Appellant along with other persons, in the same or similar manner as has been stated by the witness at page 238. The other four witnesses i.e. witnesses at page Nos. 240, 242, 498 and 501 have also in detail described the role played by the Appellant in Commission of the aforesaid crime.

11. Thus, the witness at page Nos. 238, 240, 242, 498 and 501 have in detail stated about the active role played by the Appellant while Committing the crime. From the material which is in the form of statements of the various witnesses on record, prima facie, it is very clear that the Appellant in Commission of the present crime has played a vital role i.e. to say that he had taken active part in pulling out the deceased from the car and thereafter inflicting blows with sickle on him. Thus, in our Considered opinion, there is a strong prima facie case against the Appellant to frame a charge as Contemplated u/s 228 of the Code of Criminal Procedure, under Sections 302, 341, 427, 120(b), 143, 147, 148, 149 of the Indian Penal Code and under Sections 3, 4(25) of the Indian Arms Act and u/s 3(1)(i), 3(1)(ii), 3(2), 3(4) of the MCOC Act.

12. Learned Counsel for the Appellant has placed reliance on a catena of judgments in support of his Contentions, which are:

- i] State of Bihar and Another Vs. P.P. Sharma, IAS and Another, .
- ii] Dilawar Balu Kurane Vs. State of Maharashtra, .
- iii] Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra, .
- iv] Amit Kapoor Vs. Ramesh Chander and Another, .
- v] Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra and Another, .
- vi] Sherbahadur Akram Khan v. State of Maharashtra - (2007) (1) Bom. C.R. (Cri.) 26.
- vii] State of Maharashtra v. Rahul Ramchandra Taru - Criminal Appeal No. 239 of 2011.
- viii] State of Maharashtra v. Jagan Gagansingh Nepali @ Jagya - Criminal Appeal No. 20 of 2011.

13. The aforesaid judgments relied upon by the learned Counsel for the Appellant

can be classified into two broad categories i.e. scope of Section 227 of the Code of Criminal Procedure and the aspect of application of mind by the Competent authority while granting prior approval and according sanction u/s 23 of the MCOC Act.

14. The learned Additional Public Prosecutor on the other hand has placed reliance upon the judgments in case of Govind Sakharan Ubhe v. State of Maharashtra reported in 2009 ALL M.R. (Cri.) 1903 and in case of Anil Sadashiv Nanduskar v. State of Maharashtra reported in 2008(3) Mah LJ. (Cri.) 650 [2008(12) L.J. SOFT 156].

15. The Division Bench of this Court in the case of Govind Ubhe (supra) after taking into Consideration the law laid down by the Hon"ble Supreme Court in the cases of Dilawar Balu Kurane Vs. State of Maharashtra, and Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra - 2005 ALL MR (Cri.) 1538 so also in the case of Union of India (UOI) Vs. Prafulla Kumar Samal and Another, has formulated the scope of Section 227 of the Code of Criminal Procedure in its paragraph 25, as has been stated herein above.

16. This takes us to the second limb of the argument advanced by learned Counsel for the Appellant. It is Contended by learned Counsel for the Appellant that the authorities while issuing prior approval and subsequently granting sanction as Contemplated under Sections 23(1)(a) and 23(2) respectively of the MCOC Act, have not applied its mind properly. That the sanction in the present case ought not to have been granted at all. It was further Contended that the application of the provisions of the MCOC Act to the present case is unwarranted. Learned Counsel appearing for the Appellant in support of its Contention has relied on the authorities reported in case of State of Bihar and Another Vs. P.P. Sharma, IAS and Another, and in case of Sherbahadur Akram Khan v. State of Maharashtra reported in (2007) (1) Bom. C.R. (Cri.) 26. At this juncture, a useful reference can be made to a judgment delivered by the Division Bench of this Court in case of Anil Nanduskar v. State of Maharashtra - 2008(12) LJ SOFT 156.

17. The Division Bench of this Court in the case of Anil Nanduskar v. State of Maharashtra - 2008(12) LJ SOFT 156, after taking into Consideration the law laid down by the Hon"ble Supreme Court in case of State of Bihar and Another Vs. P.P. Sharma, IAS and Another, and after Considering the judgment of the Division Bench of this Court in case of Sherbahadur Akram Khan v. State of Maharashtra reported in (2007) (1) Bom. C.R. (Cri.) 26, has in paragraphs 13 and 24 observed thus:

13. The settled law by a catena of decisions of the Apex Court is to the effect that it is desirable that every order whether the approval or sanction it should speak for itself, i.e. ex-facie it should disclose Consideration of the materials placed before it and application of mind thereto. However, failure to reproduce or refer those recitals in the resolution or order itself would not render the order of approval or sanction to be invalid unless the prosecution fails to establish by

leading evidence that all the materials necessary for the grant of approval or sanction were placed before the Concerned authority for due application of mind by such authority before the grant of approval and or sanction. It apparently discloses that question of validity of approval or sanction cannot be decided unless the prosecution is afforded opportunity to lead evidence in that regard. Undoubtedly, an accused desiring to raise objection regarding the defects in such approval or sanction, or grant, he can raise such objection; however, for Conclusive decision on the said point the accused has to wait till the trial is Complete and on that ground he cannot insist for discharge unless the objection relates to inherent lack of jurisdiction to the Concerned authority to grant sanction or approval and such issue can be decided on undisputed facts. The law being well settled to the effect that the prosecution in a case where sanction or the approval order does not ex-facie show Consideration of all the materials and/ or application of mind, is entitled to establish the same by leading necessary evidence regarding production of materials before the Concerned authority, the question of discharge of accused merely on the basis of such objection being raised cannot arise. The decision on the point of defect, if any, in the order of approval or sanction will have to be at the Conclusion of the trial."

...

24. The Contention that the order of approval or order of sanction should disclose Consideration of material qua each of the accused sought to be prosecuted is devoid of substance. That is not the import of section 23 of MCOC Act. Section 23(1)(a) as well as section 23(2) with reference to approval and sanction speaks of Commission of offence and Cognizance of the offence. In fact the law on this aspect is also well settled and reiterated by the Apex Court in Dilawar Singh's case (supra) itself. It was held therein that, Court takes Cognizance of offence and not of an offender when a Magistrate takes Cognizance of an offence, u/s 190 Cr.P.C. Undoubtedly, it was also held that it was necessary for the Sanctioning Authority to take note of the persons against whom the sanction is sought to be granted. However, those were the requirement u/s 19 of the Prevention of Corruption Act. The said section specifically requires sanction with reference to a particular person. That is not the case u/s 23 either in relation to the approval or in relation to the sanction. As already seen above section 23(1) (a) of MCOC Act speaks of approval for recording of information about Commission of offence of organized crime under MCOC Act, whereas sanction is for initiating proceeding for the offence under MCOC Act. The sanction order or the approval order on the face of it need not speak of the individual role of each of the accused. Being so, Contention that the order of approval or sanction should reveal Consideration of the overt acts or otherwise of each of the accused while granting approval or sanction is totally devoid of substance. Of Course, the involvement in organized crime of each of the persons sought to be prosecuted should necessarily be Considered by the Concerned authority before the grant of approval or sanction, but need not be specifically stated in the order and the Consideration thereof can be established in the Course of trial.

18. We have perused the prior approval granted by the Competent authority u/s 23(1)(a) of the MCOC Act which is at page 60 of the Compilation, so also the order according sanction u/s 23(2) of the MCOC Act which is at page No. 26 of the Compilation. We have noticed that the Competent authority has recorded its subjective satisfaction while granting prior approval and according sanction in the present matter. We therefore hereby, while following the ratio laid down in the case of Anil Nanduskar (supra), hold that the prosecution has to be afforded an opportunity to lead evidence with regard to the subjective satisfaction recorded by the Competent authority by leading evidence at the time of trial. As has been held in the case of Anil Nanduskar (supra), undoubtedly, an accused desiring to raise objection regarding the defects in such approval or sanction, or grant, the accused can raise such objection, however, for Conclusive decision on the said point the accused has to wait till the trial is Complete and on that ground he cannot insist for discharge unless the objection relates to inherent lack of jurisdiction of the Concerned authority to grant approval or sanction and such an issue can be decided only on the undisputed facts on record. As has been held by us in the foregoing paragraphs, we are satisfied that the Concerned authorities have recorded their subjective satisfaction while initially granting prior approval and subsequently according sanction u/s 23 of the MCOC Act in the present case and therefore the Contention of the Appellant is incorrect in that behalf. After scrutinizing the entire material made available to us in the present Appeal, we are of the firm opinion that the impugned order dated 4 March 2013 passed by the Learned Special Judge, Pune under the MCOC Act, below Exhibit 4 in MCOCA Special Case No. 7 of 2012, does not suffer from any legal infirmity and no interference is called for with the same. Thus, the present Appeal being sans of any merit is accordingly dismissed with no order as to Costs.