

(2016) 05 BOM CK 0065
In the Bombay High Court
Case No : Criminal Appeal No. 393 of 2009

Majhar Nashir Shaikh

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-05-2016

Acts Referred:

Maharashtra Control of Organised Crime Act, 1999 — Section 3(1)
Penal Code, 1860 (IPC) — Section 364A, 397

Citation : (2016) 2 AIRBomRCri 473 : (2017) ALLMRCri 109 : (2016) 3 BomCR(Cri) 45 : (2017) 1 MhLJCrI 436

Hon'ble Judges : Smt. V.K. Tahilramani and Smt. Anuja Prabhudessai, JJ.

Bench : Division Bench

Advocate : Mr. Khan Abdul Wahab with Naima Shaikh, Advocates. in Appeal 393 of 2009, Mr. Aniket Vagal, Advocate. in Cri. Appeal No. 414 of 2009, 440 of 2009 and 968 of 2009, for the Appellant; Smt. V.R. Bhosale, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

Smt. Anuja Prabhudessai, J.—The appellants - Original accused nos. 4, 3, 1 and 2 (herein after referred to as Accused no.4, Accused No.3, Accused No.1 and Accused No.2 respectively) were tried for the offences under Section 364A, 365, 397 of IPC and under Section 3(1)(ii), 3(2), 3(3), 3(4) of the Maharashtra Control of Organized Crime Act, 1999, (in short MCOC Act) in MCOC Case No. 15 of 2005. By judgment and order dated 17.2.2009 the Spl. Judge convicted the accused and sentenced them to life imprisonment and to pay fine of Rs. 25,000/- in default rigorous imprisonment for three years in respect of the offence under Section 364A. The accused are sentenced to undergo rigorous imprisonment for 7 years and fine Rs. 10,000/- in default to undergo rigorous imprisonment for one year for each of the offences under Section 365 and 397 of IPC. The accused nos. 1 to 3 are also convicted for the offence under Section 3(1)(ii) whereas the accused no.4 is convicted for offence under Section 3(4) of MCOC Act and have been sentenced to undergo rigorous imprisonment for five years and fine of Rs.5 lakhs each and in default to undergo rigorous

imprisonment for three years. The appellants-accused by these appeals have assailed the legality and validity of their conviction and sentence.

2. Briefly stated the prosecution case as unfolded before the trial court is as under:

PW2 Pradip Solanki, the brother-in-law of the first informant PW1 Manoj Rana, was a model and acted in TV serials. He came across one advertisement of Omkar Tele films, Mumbai, published in Times of India dated 29th September, 2004 calling for the portfolio of young and dynamic boys and girls between the age group of 16 to 25 years for audition of mega tele serials. PW2 Pradip sent his bio-data as required in the said advertisement. PW2 received a phone call from one Aryan Shah informing him that he was selected. PW2 was called for audition at Mumbai on 21st October, 2004. PW2 was told that he would be received by their person at the airport.

3. PW3 Prashant Rana, brother of the first informant decided to accompany Pradip. On 21st October, 2004 PW2 and PW3 proceeded to Mumbai by Deccan Airways. They reached Mumbai at 11.00 a.m. The absconding accused Raju and the Rajesh (A1), Sartaj (A3), and Majhar (A4), received them at the airport. They took PW2 Pradip and PW3 Prashant towards Gujarat by a grey coloured Maruti Esteem Car bearing No. GJ 15 C 2962. PW3 was told that he could not accompany PW2 and he was dropped at Hotel Gulfam.

4. PW2 Pradip was told that he was being taken for audition. The accused no.2 also joined them. PW2 was taken to a house which was owned by the mother of Ramesh(A2). The accused were armed with weapons. One of the accused pointed a revolver at PW2. They took PW2 inside the house, tied his hands and legs, and detained him in one of the rooms of the said house. Later in the evening, the accused brought PW3 to the said room. He too was tied and detained in the said room in the same manner.

5. According to the prosecution on the same night at about 11.30 p.m. PW1 received a phone call from the absconding accused Raju who told him that PW2 and PW3 were abducted. He demanded ransom of Rs.1 crore for their release and told PW1 that the details of the payment as well as of the place of payment would be given on the next day. On 22.10.2004 PW1 Manoj as well as PW5 Pawan, brother of PW2 Pradip received several such ransom calls for release of PW2 and PW3. On 23.10.2004 PW1 Manoj came to Mumbai and lodged a FIR Ex.18 at Airport Police Station, Mumbai. Pursuant to the said FIR PW13 PI Hareshwar Pimple registered Crime No.32 of 2004 for offences under Section 406, 363, 368, 387 r/w.34 IPC.

6. The accused were also involved in Crime No. 64 of 2004 under Section 365, 384, 342 and Section 302 of IPC registered at Umargaon Police Station, Gujarat. Acting on a tip off, on 25.10.2004 at about 3 am PW21 Arun Bagwe and other police personnel of Umargaon Police Station raided the house and rescued the victims. The accused were nabbed on the spot and were arrested. The fire arms,

weapons and other incriminating material found in the said house was seized. One of the accused Sanjay Chaudhary was subsequently killed in an encounter.

7. PW13 Hareshwar Pimple, PI Airport Police Station, Mumbai, who was investigating the crime No.32 of 2004 took custody of the accused from Gujarat Police Station under transfer warrant. The investigation revealed that the accused were involved in several crimes of similar nature committed by or on behalf of an organised crime syndicate headed by the absconding accused Aryan Shah @ Bunty Pandey. PW22 therefore submitted a report to the Commissioner of Police for application of provisions of MCOC Act. Prior approval was received vide Exh. 64 and further investigation was conducted by PW23 Vinayak Kadam, the Assistant Commissioner of Police. Upon obtaining sanction Exh. 65 from the Commissioner of Police, Brihan Mumbai, charge sheet was filed before the Special Court, Mumbai under sections 3(1)(ii), 3(2), 3(3), 3(4) of MCOC Act against Rajesh Dodi, Ajar Mumtaz Khan @ Raju, Ramesh Shankar Kharwa, Sartajkhan Mumtazkhan Pathan and Mazhar Nasir Shaikh @ Mohsin.

8. The prosecution, in support of its case examined 23 witnesses. The statements of the accused were recorded under Section 313 Cr.P.C. The defence of the accused was of total denial. The learned Special Judge held the accused guilty and convicted and sentenced the accused as stated above, relying mainly on the testimony of the victims- PW2 and PW3, the family members who had received the calls-PW1, PW5 and PW6 and the police officers- PW21, PW22 and PW23. Being aggrieved by the said conviction and sentence, the accused have preferred these appeals.

9. Shri Khan, the learned counsel for the accused has submitted that no identification parade was held and that the witnesses had identified the accused for the first time after a period of about four years from the date of the incident. He therefore claims that the prosecution has not established the identity of the accused.

10. The main thrust of the argument of learned counsel for the accused is that in the absence of any evidence to show that there was threat to the life or body of the kidnapped person in the event of ransom money not being paid, Section 364-A IPC would not be attracted.

11. He has further submitted that the prosecution has not examined material witnesses, particularly the police officer from Gujarat who had allegedly recovered the weapons, arrested the accused and rescued the victims. The Learned Counsel urges that there are glaring discrepancies in the case of the prosecution and the evidence casts serious doubt on the credibility of the witnesses. The learned Counsel for the accused further submitted that the learned trial Judge has wrongly held the accused guilty and the provisions of MCOC Act have been wrongly invoked. The learned Counsel for the accused therefore contends that the accused are entitled for acquittal.

12. Smt. Bhosale, the learned APP has submitted that the order of conviction and

sentence recorded by the learned Special Judge needs no interference. Refuting the contention that the identity of the accused has not been established, the Learned APP has submitted that PW2 and PW3 have identified the accused. The learned APP has further submitted that the unimpeachable testimony of PW2 and PW3, which is duly corroborated by PW1, PW5 and PW6 amply proves that the accused herein were involved in abducting them for ransom. She contends that the testimony of PW2 and PW3 proves that the accused were armed with weapons and had detained and threatened them. She therefore contends that the prosecution has proved the involvement of the accused beyond reasonable doubt.

13. Section 364-A IPC, which is an aggravated form of kidnapping and abduction, was inserted through the Amending Act 42 of 1993 and the same reads as under:

364A. Kidnapping for ransom, etc.-Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or 2[any foreign State or international inter-governmental organisation or any other person] to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.

14. A plain reading of this section indicates that to establish offence under section 364A IPC the prosecution has to establish the following essential ingredients of section 364 A IPC:

- (1) That the accused kidnapped or abducted a person;
- (2) kept him in detention after such kidnapping or abduction;
- (3) The kidnapping or abduction was for ransom.
- (4) The accused threatened to cause death or hurt to a kidnapped or abducted person, or
- (5) The conduct of the accused was sufficient to raise a reasonable apprehension in the mind of the kidnapped or abducted person that death or hurt may be caused to such person.

15. In the instant case, the evidence of PW2 reveals that he is a resident of Delhi. He was a model and had acted in TV serials. He had come across an advertisement published by Omkar Tele-films, Mumbai, in "Times of India" calling for bio-data of those working as models and in TV serials for audition of mega tele serials. PW2 sent his bio-data by e-mail as well as by courier. Some days later he received a phone call from one lady, who identified herself as Lily. She confirmed receipt of his bio-data and informed him that he was selected for audition. Some days later, he once again received a phone call from one person, who identified himself as Aryan Shah. He told him to come to Mumbai by flight.

PW2 was told that his person at the Mumbai Airport would receive him.

16. On 21.10.2004 PW2 Pradip and PW3 Prashant, brother of his sister's husband came to Mumbai by Deccan flight. PW2 has deposed that he had sent his flight details to Aryan Shah. They were received at the airport by one person who identified himself as Raju. PW2 has deposed that the accused no.4 had called Aryan Shah and upon taking telephonic instructions from him, the accused no.4 had told him that PW3 Prashant could not accompany him for audition and they suggested that Prashant should stay in a hotel. Thereafter the accused took them towards Gujarat by an Esteem Car. He has deposed that the said vehicle was driven by the accused no.3 Sartaj. The deceased accused Sanjay was seated besides the drivers' seat and the absconding accused Raju and the accused no. 4 Majhar sat along with them on the rear seat.

17. PW2 has deposed that PW3 Prashant was dropped at Gulfam Hotel while he was taken to some other location under the pretext of being taken for audition. PW2 has deposed that after travelling for some while, the driver took the vehicle towards a forest area. When they got down from the car he noticed that the accused were armed with weapons. One of the accused pointed a gun at him. They took him inside the said house, tied his hands and legs and detained him in one of the rooms of the said house. About four hours later, PW3 Prashant was also brought in the same room and he too was tied and detained in the said room. They were told that they were abducted. PW2 has deposed that the accused had recorded a message in his voice as "Baba meri baat maan jao, yeh jo mangte hai inhe de do, warna yeh log mujhe maar dalenge" and thus asked his father to meet their demands.

18. PW2 has deposed that accused no. 2 Ramesh was also present in the said room along with the other accused. He has further stated that all the four accused were armed with weapons. PW2 has deposed that the accused had threatened them by firearms and other weapons. He has deposed that the accused used to guard them in turns. PW2 has denied the suggestion that he had not come to Mumbai and that the accused had not taken him to Gujarat and detained him in a room. PW2 has deposed that about 2-3 days after the detention, during late night hours, the police entered the room and rescued them and took the accused to the police station.

19. The testimony of PW2 is corroborated by PW3 in all material aspects. He has deposed that on 21.10.2004 he had accompanied PW2 to Mumbai. Raju, Majhar, Sartaj, and Sanjay received them at Mumbai Airport. They took them to the parking area wherein one grey colour Esteem car was parked. The accused took them to Gujarat. PW3 has deposed that he was told that he could not accompany PW2 for auditioning. The accused dropped him at Hotel Gulfam and they proceeded further. He has deposed that he had tried to call Pradip but was unable to contact him as his phone was switched off. At around 8 to 8.30 p.m the accused Sartaj and Sanjay came to the hotel. They told him that Pradip was busy in audition and asked him to accompany them. He has stated that he travelled

along with them by the same car and after travelling some distance for about 3-4 hours when they reached towards a forest area, he was made to get down and was taken to one room. They tied his hands and legs and brought him in the same room where Pradip was also tied. They blindfolded them and recorded a message in their voice as "Hame bachalo, yeh jo mangte hai, inhe de do". He has deposed that accused Sartaj and Sanjay were constantly visiting the said room and Raju and Ramesh were keeping watch on them and they had guns and other weapons with them. He has deposed that they were confined in the said room till they were rescued by the police in the early morning hours on 25.10.2004. He has stated that the police apprehended all the five accused from the said house.

20. PW1 Manoj, is the brother-in-law of PW2 Pradip. This witness has deposed that PW2 had submitted his bio-data in response to the advertisement published by Omkar Tele-films. He has further stated that PW2 was called for audition and that his brother Prashant had accompanied PW2 to Mumbai on 21.10.2004. On the same date at around 10 p.m. he had called PW2 Pradip on his cell phone. PW2 Pradip had told him that PW3 Prashant was not allowed to join him for audition and he was dropped in a hotel. He has stated that later he received a phone call from Prashant informing him that Pradip had not returned. Prashant once again called him at 7 p.m. and told him that the absconding accused Raju who had received them at the airport had come to the hotel to take him to the place of audition. Thereafter he did not receive any call either from PW2 or PW3. PW1 has deposed that at about 11.30 p.m. he received a call from one person who identified himself as Raju. He told him that PW2 and PW3 were abducted and demanded Rs.1 crore for their release. The said caller told him to keep the money ready. On 22.10.2004, the said person phoned again questioning him whether he had arranged the money. PW1 told him that he could not arrange such a huge amount in such a short time and requested him to give some more time. He requested the caller to allow him to talk to PW2 and PW3.

21. PW1 has stated that on the same date during the afternoon hours Pawan, brother of PW2 had received phone call on his landline. Pawan had spoken to Pradip and Prashant and they had informed him that they were beaten up. PW2 and PW3 requested to release them by paying the ransom money. PW2 has deposed that he booked the tickets on the same night and he came to Mumbai. On arriving at Mumbai Airport he lodged the FIR (Exh. 18) with the Airport Police Station, Mumbai. He has deposed that thereafter he was informed by one lady ACP that Pradip and Prashant were traced at Surat. He along with his friend and the police personnel went to Surat. He has deposed that by the time they reached Surat, Pradip and Prashant were already rescued and were present at Umargaon Police Station, Surat. He has stated that after completing all the formalities, the police at Umargaon Police Station handed over the custody of Pradip and Prashant to him.

22. PW5 Pawan is the brother of PW2 Pradeep. This witness had also deposed that pursuant to the advertisement of Omkar Tele-films published in Times of

India, Pradip had given his bio-data. He has deposed that Pradip and Prashant had gone from Delhi to Mumbai on 21.10.2004. PW5 has deposed that on the same day at about 11 p.m. he received a phone call and that the caller had identified himself as Raju. He was told that his children were in his custody and he asked him to arrange for money. The said person called him again on the next morning and asked him whether he had made the arrangement and had further told him that he would allow him to talk to his children only after arranging the money. The said person had called him several times to enquire whether he had arranged the ransom amount, and when he requested the said caller to permit him to talk to his brother, he could hear the recorded message in Pradip's voice repeatedly saying that they have been caught and to meet their demands or else they would kill them. He has stated that he received several calls during this period asking him to arrange for the ransom amount. He was told that in the event anything goes wrong while collecting the money, the children would be killed. He has stated that on the next date Pradip and Prashant returned home.

23. PW6 Rachana Solanki is the wife of PW5 Pawan Solanki. She has deposed that her brother-in-law had accompanied Pradip to Mumbai on 21.10.2004. She has stated that she had phoned Pradip just to verify whether he had reached Mumbai. Pradip had told her that some persons had come to the airport to receive them. She had once again called him at about 5.30 p.m. and he had told her that he was travelling and had told her that he would call her back. Thereafter she did not receive any call from Pradip. She has stated that on 22.10.2004, after she had learnt about abduction, she had received a call from the abductor. She had identified herself as the mother of Prashant. The abductor had told her that Prashant was in his custody and that she should pay them Rs. 1 crore as ransom amount. She told the abductor that she was poor and was unable to arrange the money. She has further deposed that she had told him that she would like to talk to her son and thereafter the abductor had given the phone to Prashant. She has deposed that Prashant had told her to meet the demands of the abductor. She has further deposed that the abductor had told her that her son would not be released unless the money was paid, she was further told not to report the matter to the police. She has stated that subsequently the police had rescued Pradip and Prashant.

24. The prosecution has also examined PW14 Anand Laxman, the Security Manager at Santa Cruz Airport, he has produced the passenger list of flight no. DN-603 on Delhi Mumbai Sector dated 21.10.2004, as well as the tickets of Air Deccan, dated 21.10.2004 from Delhi to Mumbai, issued in the name of Pradip Solanki and Prashant Rana at Exh. 37 colly.

25. PW21 Arun Bagle, PI attached to Umargaon Police Station, Gujarat, has deposed that he was investigating Crime No. 64 of 2004 under Section 302, 384, 342 of IPC. He has deposed that the accused in the said crime had abducted one person and thereafter committed his murder and thrown the body in a dam. He has stated that in the course of investigation of the said case he had arrested the

accused Majhar Shaikh and others. He has stated that one of the accused had died in an encounter.

26. The Investigating Officer, PW22 Ajit Surve has deposed that Umargaon Police while investigating crime no.66 of 2004 arrested the accused. Some arms and ammunition were seized from their possession. One of the accused person Sanjay Chaudhary was killed in an encounter. He has deposed that the four accused who were involved in crime No. 32 of 2004 were brought to Mumbai by the Airport Police under transfer warrant. PW22 has deposed that he had gone to Umargaon Police Station at Gujarat. He had learnt that the belongings of the victims were recovered from the deceased accused Sanjay Chaudhary and Sartaj. He had learnt that the accused were also involved in several other crimes registered at Mazalpur Police Station, Surat Police Station etc. He has further deposed that the accused Majhar and the deceased accused Sanjay Chaudhary were also involved in Crime No. 315 of 2004 relating to counterfeit currency notes and the said accused Majhar was arrested. PW22 has deposed that the vehicle used for abducting the victims as well as some belongings of the victims were recovered by Umargaon Police.

27. The sequence of events as brought on record through the evidence of the aforementioned witnesses clearly indicates that an advertisement was published in Times of India by "Omkar Telefilm"s" calling for the resume of the aspirant models to act in a TV serial. PW2 being a model sent his bio-data. He was telephonically informed that he was selected and he was called to Mumbai under the pretext of auditioning. The testimony of PW2 and PW3 as well as the documents at Exh. 37 colly amply prove that PW2 and PW3 had travelled from Delhi to Mumbai by Air Deccan, which had departed Delhi at 8.55 am and reached Mumbai at about 11 am. They were received at the airport by the accused nos. 1, 3 and 4 and the absconding accused Raju. The testimony of PW2 and PW3 further reveals that these four accused had taken them to Gujarat by Esteem car. PW3 was dropped at Gulfam hotel whereas PW2 was taken to a house in a forest area. The accused had tied his hands and legs and had detained him in the said house. Subsequently, PW3 was also brought to the said house and he too was detained in the said house in the similar manner. It is therefore apparent that PW2 was called to Mumbai with an intention of abducting him for ransom and upon reaching Mumbai, the accused had abducted PW2 as well as PW3 and detained them in a room located in forest area. It is thus evident that the intention from inception was to abduct PW2 for ransom.

28. The evidence of PW1, PW4 and PW6 reveals that they had received phone calls demanding one crore as ransom money for release of the victims. The evidence of these witnesses prove that the caller had played the recorded audio message of PW2 and PW3 requesting them to meet the demands of the abductors and further informing that they would be killed in the event the demands were not met. It may be mentioned that the audio cassettes containing record of conversation in which demand for ransom was raised as well as

prerecorded requests for release were seized by the police. The learned judge has not relied upon this evidence. Having examined the law and legal position in Ram Singh & ors. Col. Ram Singh AIR 1986 SC 3, we are of considered view that the pre-conditions essential for tape recordings to be admissible as evidence, have not been satisfied. Hence, the tape recordings of the conversations cannot be relied upon. However, this does not disturb or affect the statement made by PW-1 PW5 and PW6 regarding the ransom calls, which were received. Furthermore the evidence of the victims- PW2 and PW3 reveals that the accused had recorded their voice messages requesting to meet the demands of the abductors failing which they would be killed. The evidence of PW1 and PW4 indicates that when they had asked the caller/abductor to allow them to talk to the victims, the caller had played the pre-recorded request. This fact establishes beyond reasonable doubt that the demand calls were made by the accused. The facts on record therefore prove that the victims were abducted for ransom.

29. The evidence of PW2 and PW3 further proves that the accused were armed with guns and other weapons. The testimony of the victims also proves that the accused had threatened them at the point of gun and other weapons. The evidence of PW2 and PW3 reveals that the accused were continuously keeping a guard over them. The aforesaid conduct, in our view was sufficient to raise a reasonable apprehension in the minds of the victim that the accused would cause them hurt in the event the ransom amount was not paid. The fact that PW3 had told PW6 that the abductors were not good to them and had asked her to meet their demands is a clear indication of the fact both the victims in fact apprehended that the accused would cause them hurt in the event their demands were not met.

30. As regards identification of an accused, the legal position has been summarised by the Hon"ble Supreme Court in Dana Yadav @ Dahu and ors v. State of Bihar, (2002) 7 SCC 295 inter alia as under:

"37...(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.

(d) xx xx xx xx xx xx xx xx xx xx

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above."

31. In the instant case, it is not in dispute that no identification parade was held in the course of investigation and that the victims - PW2 and PW3 had identified the accused in the court. However this by itself cannot be a ground to doubt the testimony of the victims as regards the identity of the accused. It has to be borne in mind that the victims had travelled with the accused nos. 1, 3 and 4 from Mumbai to Gujarat. The evidence of the victims further reveals that the accused no.2 and the other accused were guarding them in turns while they were detained in the said room. The victims thus had sufficient time and opportunity to see these accused while they travelled from Mumbai to Gujarat as well as while they were confined in the room at Gujarat. Hence they would not have difficulty in identifying them at a later date.

32. It is also pertinent to note that the evidence of PW17 Kanubhai Gaikwad, the then Sarpanch of Village Nagwas Gujarat, reveals that the house wherein the victims were detained belonged to the mother of the accused no.2. The evidence of PW21 Arun Bagle and the victims also reveals that in the course of investigation in crime number 64 of 2004, the said house was raided and the accused were apprehended from the said house wherein the victims were held captive. These facts sufficiently prove the complicity of the accused in the said crime. In the light of the aforementioned fact situation, holding or non-holding of a Test Identification Parade loses its significance.

33. The prosecution has thus established that the accused had abducted PW2 and PW3 for ransom. They had detained PW2 and PW3 in a room. The accused were armed with weapons. They had threatened PW2 and PW3 and had kept guard over them till they were rescued by Gujarat Police. The accused had therefore by their conduct caused a reasonable apprehension in the minds of the victims that they would be put to death or hurt. Thus, the prosecution has proved all the three ingredients of Section 364A of IPC.

34. The accused are also held guilty of offence under section 397 IPC. The testimony of PW2 indicates that he had carried with him cash of Rs. 5000/- to 6000/- in addition to 450 to 500 US dollars and 200-250 Canadian dollars. His testimony does not indicate that the accused had taken away the said cash in Indian currency as well as US and Canadian dollars from his possession. The evidence of PW3 also does not indicate that the accused had committed theft of his belongings. The prosecution has also not adduced any evidence to prove that

the cash or any other valuables were recovered from possession of the accused. As stated earlier PW2 and PW3 were abducted and detained for ransom. There is no evidence to indicate that the accused had committed theft or that they had threatened or detained PW2 and PW3 with an intention of committing theft. In the absence of such evidence, conviction under Section 397 cannot be sustained.

35. It is the case of the prosecution that during the course of investigation, it was revealed that the crime was committed by the accused as members of or on behalf of organised crime syndicate headed by the absconding accused Aryan Shah @ Buntay Pandey. The investigating officer, PW22 therefore submitted a proposal through the Assistant Commissioner of Police, for approval under Section 23(1)(a) of MCOC Act. PW23 Vinayak Kadam, the then Assistant Commissioner of Police, being satisfied about the applicability of the provisions under MCOC Act, forwarded the proposal for approval. Upon receipt of the approval at Exh. 64, PW23 took over further investigation. The confessional statements of the accused no.1 Rajesh, accused no.2 Ramesh and accused no. 3 Sartaj, at Exh. 50, 55 and 56 came to be recorded. PW23 made a proposal to the Commissioner of Police for grant of sanction under Section 23(2) of MCOC Act. On receipt of the sanction at Exh. 65 he filed a charge sheet against the aforesaid accused before the MCOC Court.

36. The learned judge has not relied upon the confessional statements of the accused nos. 1, 2 and 3 recorded by PW18, 19 and 20. Nonetheless, the learned trial Judge has relied upon the testimony of PW21, PW22 and PW23 to hold the accused nos. 1, 2 and 3 guilty of an offence of "organised crime", and the accused no. 4 guilty of being a member of an "organised crime syndicate".

37. The Learned Counsel for the accused has contended that there is no material on record to suggest that the accused are members of the organised crime syndicate of Aryan Shah as there is no "continuing unlawful activity" as contemplated under Section 2(d) of the MCOC Act connecting them with the said crime syndicate.

38. The terms "organised crime" and "organised crime syndicate" are defined under sections 2 (e) and 2 (f) of the MCOC Act as under:

2(e) "Organised Crime " means any continuing unlawful activity by an individual singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or for any other person or promoting insurgency;

2(f) "Organised Crime Syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime;

39. A plain reading of section 2 (e) would indicate that to prove the offence of

"organised crime", among other requirements, the prosecution is required to establish that the accused had indulged in continuing unlawful activity, which as defined under section 2(d) of the MCOC Act reads as under:

2(d). "Continuing unlawful activity" means an activity prohibited by law for time being in force, which is a cognisable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence.

40. A conjoint reading of these definitions clearly indicates that in order to prove an offence of "organised crime" or of being member of "organised crime syndicate", amongst other requirements, the prosecution is required to prove that more than one charge sheets have been filed in competent court within the preceding period of ten years in respect of such offences, and that the court has taken cognizance of such offence.

41. In the instant case, the evidence of PW21, reveals that during the course of investigation of crime No.64 of 2004 under Section 302, 365, 384 and 342 of IPC, registered at Vapi Police Station, Gujarat he had arrested the accused Majhar Shaikh while the co-accused Sanjay Choudhari was killed in an encounter. He had filed a charge sheet against Majhar and the other accused in Crime No. 64 of 2004. He has produced a copy of the charge sheet at Exh.58. He has further deposed that the four other accused viz. Chhotu Dhodi, Vinod Bhupendra Vora, Prakash Dubey and Bunty Narayan Pandey were wanted in the said crime. He has stated that the modus operandi of the accused was to kidnap persons for ransom at the instance of Bunty Pandey and Vora.

42. The evidence of PW22 indicates that during the course of investigation of the present crime, it was revealed that the accused were involved in Crime No.I-315 of 2004 registered at Umargaon police station relating to fake currency notes. He has further deposed that the accused were also involved in Crime No.64 of 2004 registered at Vapi police station and Crime No. 66 of 2004 registered at Surat City Police Station. He has produced certified copies of the charge-sheet in C.R. No.II-171/04 dated 25.10.2004 and charge sheet in respect of C.R.No. I-315/04 dated 8.11.2004 at Exh.62 colly.

43. PW22 has deposed that the absconding accused Bunty Pandey was heading the organised crime syndicate and was facing prosecution at Haldwani, Uttaranchal, Gujrat and at Bombay. He has deposed that the investigations revealed that these four accused along with the absconding accused Raju were the active members of the said organised crime syndicate headed by Aryan Shah @ Bunty Pandey.

44. It is pertinent to note that the prosecution has placed on record only three chargesheets viz.(i) Charge sheet filed before JMFC Pardi in respect of crime No.

64/04 under Section 364A, 342, 384, 302, 201, 120B of IPC. (ii) Charge sheet filed before JMFC, Umargaon in respect of crime no.II-171/04 for offences under Sections 25(1B)(a) and 29 of Arms Act. and (iii) Charge sheet filed before JMFC Umargaon, in respect of Crime No.I-315/04 489A, 489B and 489C r/w. 120B of IPC.

45. It is to be noted that the FIR in the present case was registered on 23.10.2004, Though the FIR No. I-64/04 was registered on 18.2.2004 i.e. prior to registration of the FIR in the present case, the charge sheet in respect of the said crime was filed on 10.02.2005 i.e. after registration of the present crime and the cognizance of the same was also taken on the same date i.e.10.02.2005.

46. The FIR No.II-171/04 was registered on 25.10.2004. The charge sheet in respect of the said crime was filed in the year 2005 and the cognizance of the offence was taken on 10.1.2005. The FIR No.I-315/04 was registered on 08.11.2004. The charge sheet in respect of the said crime was filed on 30.1.2005 and the cognizance was taken on 1.2.2005. The said crime was registered after registration of the present crime. It is also to be noted that the said crime relates to the weapons, which were seized by the Gujarat Police at the time of the arrest of the accused and the same forms part of the same transaction.

47. It may be mentioned that the definition of continuing unlawful activity presupposes filing of more than one chargesheets in the preceding 10 years and taking of cognizance of offence by the court. In the instant case the FIR nos. II-171/04 and the FIR no.I-315/04 were registered subsequent to the registration of the FIR in the present case. Furthermore, all these chargesheets at Exh. 58 and 62 colly were filed subsequent to registration of the crime in the present case. Though the witnesses have referred to several other crimes allegedly registered against the accused, for the reasons not known, the prosecution has not produced any charge sheet filed against the accused and in respect of which cognizance was taken by the competent court prior to registration of the crime in the present case. The prosecution has therefore failed to establish that at least two chargesheets had been filed against the accused before the competent court and that the court had taken cognizance of such offence. The prosecution has therefore failed to establish one of the essential requirements of "continuing unlawful activity". Consequently, the prosecution has failed to establish that the accused had indulged in continuing unlawful activity. This being the case, the accused cannot be held guilty for offences under the provisions of MCOC Act.

48. Under the circumstances and in view of discussion supra the appeals are partly allowed. The conviction and sentence imposed on the appellants for offences under Sec 364A and 366 is confirmed. The conviction and sentence under Section 397 IPC and 3(1)(ii) and 3(4) of MCOC Act is hereby set aside and quashed.