

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: DECEMBER 18, 2009
PRONOUNCED ON: DECEMBER 21, 2009

+ CRL.A. 406/2006 & CRL.A. 591/2006

CRL.A. 406/2006

SANJAY Appellant
! Through: Ms.Anita Abraham, Adv.

versus

\$ THE STATE OF NCT DELHI Respondent
^ Through: Mr. Amit Sharma, APP.

And

+ CRL.A. 591/2006

VICKY Appellant
! Through: Mr. R.S. Gupta, Adv.
versus

\$ STATE Respondent
^ Through: Mr. Amit Sharma, APP.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

- | | | |
|----|---|-----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: V.K. JAIN, J.

1. These are two appeals against a common judgment dated 13th December, 2005 and Order on Sentence dated 17th

December, 2005, whereby the appellants were convicted under section 393 & 394 of IPC read with section 34 thereof and the appellant Sanjay was additionally convicted under section 398/393 of IPC and both of them were sentenced for varying periods. The appellant Sanjay was sentenced to undergo RI for 4 years each and to pay fine of Rs.2,000/- each or to undergo SI for 6 months each in default under section 393/34 and 394/34 of IPC. He was separately sentenced to undergo RI for 7 years under section 398 of IPC. The appellant Vicky was sentenced to undergo RI for 4 years each and to pay fine of Rs.2000/- each or to undergo SI for 6 months each in default under section 393/34 and section 394/34 of IPC. The sentences were directed to run concurrently.

2. The case of the prosecution in brief is that on 23rd October, 2004, at about 5.15 P.M. the complainant Ajay Kumar was going to New Delhi Railway Station on foot. When he reached CF Road, two young boys caught hold of him and asked him to hand over his mobile phone to them. The complainant, however, did not oblige them, whereupon they threatened him with dire consequences and gave fists and slap blows to him and one of them attacked him with a blade. Injuries from blade were

caused on his cheeks as well as on the left side of his chest. Two policemen who were going on a motorcycle reached there on hearing the alarm raised by the complainant and apprehended the culprits after a short chase. The case of the prosecution is that the appellant Sanjay is the person who had used the blade for causing the injuries to the complainant, whereas the appellant Vicky is the other person who had accompanied Sanjay and had held the complainant when injuries were caused to him by Sanjay.

3. The complainant came in the witness box as PW 1 and stated that on 23.10.2004, when he reached CF Road at about 5.15 P.M. the appellants suddenly came there and asked him to hand over his mobile to them. When he held on to his mobile they started beating him and one of them caused injuries to him on his face as well as on his chest, with a blade. The other person was holding him at that time. When he raised alarm, police officials, who are passing from there on a motor cycle, overpowered the appellants and arrested them. He identified the appellants as the persons involved in the incident.

4. PW5 Constable Naveen has stated that on 23.10.2004 he, while on patrol, reached police picket at CF Road where Constable Daya Nand and Rohtash Kumar were found sitting and

he joined them. On hearing commotion from the side of Connaught Place, they reached near the public lavatories where they saw the appellants Sanjay and Vicky having caught hold of Ajay Kumar. On seeing the police they left him and starting fleeing away. They, however, managed to apprehend both the appellants. At that time Sanjay was holding a surgical blade with some blood stains. Both the appellants were handed over to the Investigating Officer along with the surgical blade recovered from Sanjay.

5. PW 8 ASI S.P. Singh is the Investigating Officer of the case who went to the spot, arrested the appellants and seized the blade produced by Constable Navin.

6. In their statement under section 313 the appellants denied the allegations against them. The appellant Sanjay stated that he was picked up from Rohini about 15 days before he was implicated in this case as he was previously involved in a theft case. The appellant claimed that he was picked up from his house at Sadar Bazar at about 3.00 A.M.

7. The appellant Vicky examined his wife Rekha, as DW1. She stated that her husband was taken from her house at 3.00 A.M. but later on he was not released.

8. I see no reason to disbelieve the testimony of the complainant Ajay Kumar. There is no enmity or ill-will between him and either of the appellants and, therefore, he had no reason to depose falsely against either of them. The testimony of Ajay Kumar finds corroboration from the statement of PW5 Constable Navin who chased the appellants and apprehended them with the help of Constable Daya Nand and Constable Rohtas Kumar. The recovery of blade from the possession of the appellant Sanjay is yet another corroboration of the testimony of the complainant. During the course of arguments, no material discrepancy in the testimony of the complainant has been pointed out and no reason could be assigned by the learned counsel for the appellants to disbelieve this witness.

9. The testimony of the complainant shows that both the appellants shared a common intention to commit robbery of mobile phone from his person and in fact both of them made attempt to forcibly take the mobile phone which the complainant was carrying in his pocket. Therefore, both of them are guilty of the offence punishable under section 393 of IPC.

10. The complainant was held by the appellant Vicky when injuries using a blade, were caused to him by the appellant

Sanjay. It is, thus, obvious that both of them shared a common intention to cause hurt to the complainant in attempting to commit robbery. Hence, both of them are also liable to be punished under section 394 IPC read with section 34 thereof.

11. As regards applicability of section 398 of IPC which by itself does not create an offence but only makes attempt to commit robbery punishable with a minimum imprisonment of 7 years in case the offender was armed with a deadly weapon at the time of attempting to commit robbery, in order to succeed, the prosecution was required to prove that the appellant Sanjay was armed with a deadly weapon. The term 'deadly weapon' has not been defined anywhere in IPC but would ordinarily mean an instrument which, if used as a weapon of offence, is likely to cause death.

12. The Investigating Officer has not prepared any sketch of the surgical blade alleged to have been recovered from the possession of the appellant Sanjay. The seizure memo of the blade does not show what its size or shape was. Though the police officials have described the instrument recovered from the possession of the appellant as a surgical blade, none of the witness has given any description of the blade which has been

referred by them as a surgical blade. The trial court has also not made any observation as regards the size, shape or design of the blade produced during trial. Unless size and shape etc. of the blade recovered from the appellant is given or a sketch is prepared from which these particulars may be ascertained, or a photograph of the weapon is produced, it is not possible for this court to ascertain whether the blade recovered from the possession of the appellant was actually a surgical blade or not and whether it was a deadly weapon or not. There is no evidence or opinion on record to show that the blade recovered from the appellant was such, as would ordinarily result in death by its use. What would make a blade deadly is its size, design and shape etc. and a weapon cannot be said to be a deadly weapon merely because the witnesses described it as a surgical blade. This is more so when neither any sketch or photograph is produced nor any particulars of the instrument are given during evidence and the trial court also does not make a note as regards the size, shape and design etc. of the blade produced before it.

13. The MLC of the complainant has not been proved during trial, though it is available on record. If this document is taken into consideration it would show that the wounds caused to the

complainant were simple and only skin deep. Had the blade used by the appellant been a deadly weapon, ordinarily the wounds would have been deeper and would have resulted in serious injuries being caused to the complainant. It has been alleged in the FIR that when the boy who was holding the complainant asked the other boy to cause injury with force, the boy using the blade forcibly moved the blade on the left side of the chest of the complainant, thereby causing injury to him. Had the instrument used by the appellant Sanjay been a deadly weapon, it would have caused deep and serious injuries to the complainant when it was used with force on the left side of his chest. Therefore, the nature of the injuries sustained by the complainant indicates that the blade used by him was not a deadly weapon. In any case, in the facts and circumstances of the case, there is a reasonable doubt as to whether the blade used by the appellant Sanjay was a deadly weapon or not and benefit of doubt will have to go to the appellant - Sanjay.

14. For the reasons given in the preceding paragraphs, the conviction of both the appellants is maintained only under section 393 and 394 of IPC read with section 34 thereof without applying the provision contained in Section 398 of IPC. The appellant

Vicky is sentenced to undergo RI for 3 years and to pay fine of Rs.1,000/- or to undergo SI for 15 days in default under section 393/34 of IPC. Similar sentence is awarded to him under section 394 of IPC read with section 34 thereof. The appellant Sanjay is sentenced to undergo RI for 3 years and to pay fine of Rs.1,000/- or to undergo SI for 15 days in default under section 393 of IPC read with section 34 thereof. He is sentenced to undergo RI for 5 years and to pay fine of Rs.1000/- or to undergo SI for 15 days in default under section 394 of IPC read with section 34 thereof. The sentences shall run concurrently. One copy of this order be sent to the appellant Sanjay, who is in Jail, through the concerned Jail Superintendent.

15. Trial court record be sent back along with a copy of this judgment. The appellant Vicky is directed to surrender forthwith to undergo the remaining part of the sentence imposed upon him.

V.K. JAIN, J

**DECEMBER 21, 2009
RS**