

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

+ **CRIMINAL APPEAL NO. 208 OF 2003**

% **Reserved on :** 20th April, 2010.
Date of Decision 20th July, 2010.

RAKESH Appellant.
Through Mr. R.P.S.Sirohi, Mr.Girish Yadav,
advocates.

VERSUS

STATE OF NCT OF DELHI Respondent.
Through Ms. Fizani Hussain, advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

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

SANJIV KHANNA, J.:

The appellant-Rakesh, by the impugned judgment dated 26th March, 2006 passed by the learned Additional Sessions Judge has been convicted under Sections 398 and 458 of the Indian Penal Code (hereinafter referred to as the IPC, for short). By the impugned Order on sentence dated 27th March, 2006, appellant-Rakesh has been directed to undergo rigorous imprisonment for seven years for the offence under Section 398 IPC, rigorous imprisonment for five years and fine of Rs.2500/- for the offence under Section 458 IPC and in default of payment of fine, to undergo rigorous imprisonment for one month. The appellant-Rakesh has been also sentenced to rigorous imprisonment of three years and fine of Rs.2500/- for the offence under Section 25 of the Arms Act,

1959 and in default of payment of fine to undergo rigorous imprisonment for one month.

2. On merits, in view of the statements of the eye-witnesses, Ms. Raj Bala (PW-1), Mr. Manphool Singh (PW-3) and Mr. Lal Chand (PW-4), the appeal on the question of conviction merits dismissal. The said persons are eye-witnesses and victims to the incident on 31st January, 1992 when the accused was caught red handed in the house no.82-A, Rajinder Park, Nangloi, Delhi. The prosecution case is built on the evidence of the three eye-witnesses which is in unison on all the material aspects. Ms. Raj Bala (PW-1) had stated that she got up at night when she heard her *dewar* saying “*mujhe maat maaro, sab kuch bata doonga*” (please do not beat me I shall tell everything). Thereupon she woke up her husband-Manphool Singh (PW-3) and both of them came from their room to the gallery. They saw three persons who initially started beating Mr. Manphool Singh (PW-3) but then ran away after opening the door. One person was standing outside the house near the main gate. Thereafter, both of them went to the room of Ms. Raja Bala’s *dewar*, Mr. Lal Chand (PW-4), and saw one person pointing a pistol at him. They over-powered the said person who was identified by them in the court as the appellant-Rakesh. The witnesses also raised noise/alarm and in the meanwhile people from the neighbourhood got collected. The accused was arrested there and then and handed over to the police along with the pistol and two cartridges. There is nothing in the cross-examination to discredit the statement of the three eye-witnesses. The appellant-Rakesh had produced one witness – Mr. Krishan Kumar (DW-1). The said witness claimed that on the evening of 30.01.92 when he had gone to the house of the appellant to recover money from him, he found the appellant with an injury on his head. He had stated that the appellant-Rakesh had a milk diary and was of a good moral character. In the cross-examination he had stated that he had to recover Rs.1000/- from the appellant-Rakesh. Mr. Krishan Kumar (DW-1) has been rightly disbelieved by the learned Trial Court. The appellant was nabbed and apprehended in the middle of the night and given a beating by persons from the neighbourhood who had gathered at the spot. Thereafter

he was arrested by the police. There is no cause and reason for the three eye-witnesses to falsely and wrongly implicate the appellant-Rakesh.

3. Learned counsel for the appellant has submitted that the other accused, namely, Mr. Riyazuddin, Mr. Dinesh, Mr. Ram Naresh and Mr. Rajpal have been acquitted and on parity, the appellant-Rakesh, should be acquitted. The aforesaid four persons were not caught at the spot but were subsequently arrested on the basis of the statement given by the appellant-Rakesh. Learned Trial Court has acquitted them for want of evidence, as test identification parade (TIP) was not held to enable the eye-witnesses to identify them. Acquittal of the said accused stands altogether on a different footing and in view of the statement of Ms. Raj Bala (PW-1), Mr. Manphool Singh (PW-3) and Mr. Lal Chand (PW-4) there is no merit in the said contention.

4. It was submitted that the conviction of the appellant-Rakesh under Section 25 of the Arms Act and under Section 398 IPC is not justified and cannot be sustained. Learned counsel for the appellant has referred to the ballistic report (Exhb.PW-9/A). It was submitted that the pistol which was a country made fire arm of .12 bore was not in a working condition when it was examined on 6th March, 1992 by SI Dayanand (PW-9). He has also drawn my attention to the statement of SI Dayanand (PW-9) who has stated in his report (Ex.PW-9/A) that he had test fired the country made pistol but the cartridge could not be fired and the country made pistol was not in a working condition. The said witness had stated that the country made pistol was designed as a fire-arm and two cartridges which were recovered were live cartridges.

5. The term “fire arm” as defined in Section 2(e) of the Arms Act means:

“(e) “firearms” means arms of any description designed or adapted to discharge a projectile or projectiles of any kind by the action of any explosive or other forms of energy, and includes,—

(i) artillery, hand-grenades, riot-pistols or weapons of any kind designed or adapted for the discharge of any noxious liquid, gas or other such thing,

- (ii) accessories for any such firearm designed or adapted to diminish the noise or flash caused by the firing thereof,
- (iii) parts of, and machinery for manufacturing, firearms, and
- (iv) carriages, platforms and appliances for mounting, transporting and serving artillery;”

6. The definition of the term “fire arm” includes, cartridges. As per the statement of S.I. Dayanand (PW-9) the cartridges recovered from the appellant-Rakesh were live cartridges. Even otherwise for the purpose of Section 2(e) of the Arms Act, pistol or weapon or arm though not working is still a fire-arm if it can be used with some repairs. A fire-arm which is defective or unworkable is a fire-arm within the meaning of Section 2(e) of the Arms Act if it has not lost its specific character and has not ceased to be a fire-arm. Otherwise, a person can keep a defective firearm which can be repaired and then used. A defective fire-arm which can be used after repairs and has not lost character as a firearm is a “fire-arm” within the meaning of Section 2(e) of the Arms Act. (Refer, ***Karm Din versus The Crown*** AIR 1923 Lahore 617, ***Swami Dayal versus State*** AIR 1953 All. 353 (FB); ***The Public Prosecutor vs Kandikatta Nagabhushanam alias Bhushanam*** AIR 1943 Mad. 661, ***State of U.P. versus Dhanwan*** AIR 1965 Allh. 260. Relevant extracts from the two decisions of Allahabad High Court have been quoted in the impugned judgment by the learned Additional Sessions Judge). In ***Queen-Empress vs Jayarami Reddi*** (1898) ILR 21 Mad 360 the Full Bench opined:-

“1. We think there is no doubt that the revolver in the case is a fire-arm within the meaning of the Act. The question is not so much whether the particular weapon is serviceable as a fire-arm, but whether it has lost its specific character and has so ceased to be a fire-arm. In referring to the serviceable character of the arm we think the decision in ***The Queen v. Siddappa*** I.L.R. 6 Mad. 60 was not correct and that the proper test was lost sight of. Whether in any particular case the instrument is a fire-arm or not, is a question of fact to be determined according to circumstances. We answer the question in affirmative.”

7. The next question which arises is whether the conviction of the appellant can be sustained under Section 398 IPC as the weapon in question was not in working order and can be regarded as a “deadly weapon” within the meaning of the said Section. To decide this issue it is relevant to examine the relevant provisions of the IPC, which read:-

“378. Theft.—Whoever, intending to take dishonestly any movable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

390. Robbery.—In all robbery there is either theft or extortion.

When theft is robbery.—Theft is “robbery” if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.—Extortion is “robbery” if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

392. Punishment for robbery.—Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

393. Attempt to commit robbery.—Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

397. Robbery or dacoity, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

398. Attempt to commit robbery or dacoity when armed with deadly weapon.—If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.”

8. “Theft” as defined in Section 378 IPC requires that the accused should remove the movable property from the possession of another person. Actual removal of the movable property from the possession of one person to the other as explained in the said Section is necessary. Till the property is removed, no offence is committed, even if the offender had the intention to dishonestly take the property out of the possession of a person without his consent. (See, *K.N. Mehra versus State of Rajasthan* AIR 1957 SC 369, *Ramratan versus State of Bihar* AIR 1965 SC 926) Till removal takes place, actual theft is not committed and it may amount to an attempt.

9. Robbery as defined in section 390 IPC is an aggravated form of theft or extortion. Theft is robbery if the accused in order to commit a theft or while committing the theft or carrying away or attempting to carry away the stolen property voluntarily causes or attempts to cause death or hurt to any person and puts the other person in wrongful restraint, fear of instant death or instant hurt or of instant wrongful restraint.

10. Sections 392 and 393, IPC prescribe punishment in case of robbery and attempted robbery respectively. Under Section 392 IPC an accused can be punished with upto 10 years of rigorous imprisonment and fine and upto 14 years of rigorous imprisonment when robbery is committed on highway between sunset and sunrise. The punishment prescribed is stringent. For a case to fall under Section 392 IPC in case of theft amounting to robbery, actual theft as defined in Section 378 IPC should be committed. For Section 392 IPC to apply, the prosecution has to establish that during the course of commission of the offence of theft the offender had caused or had intended to cause threat of death or hurt or to wrongful restrain (***Malkhan Singh vs State of Haryana*** 1994 SCC (Crl) 1422). Section 393 IPC applies when an accused attempts to commit robbery but the same is not actually committed. Under Section 393 IPC, the maximum punishment prescribed is 7 years rigorous imprisonment with fine. Again, the punishment prescribed is stringent. However, no minimum punishment has been prescribed in Sections 392 and 393 IPC.

11. Sections 397 and 398 IPC are not substantive sections but prescribe a minimum sentence for the offence of robbery or dacoity or attempt to commit robbery or dacoity once the aggravating circumstances stated in

the said Sections are satisfied. Section 397 applies when offence of dacoity/ robbery has actually been committed. Section 378 IPC on the other hand, has no application when robbery or dacoity has been completed /concluded but applies to cases of attempt to commit robbery or dacoity. The expression “offender uses any deadly weapon” used in Section 397 IPC was examined by the Supreme Court in ***Phool Kumar versus Delhi Administration*** AIR 1975 SC 905 = 1975 (1) SCC 797 and it was observed as under:-

“6. Section 398 uses the expression “armed with any deadly weapon” and the minimum punishment provided therein is also seven years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of seven years under Section 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under Section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections viz. “uses” in Section 397 and “is armed” in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery.

7. If the deadly weapon is actually used by the offender in the commission of the robbery such as

in causing grievous hurt, death or the like then it is clearly used. In the cases of *Chandra Nath v. Emperor*; *Nagar Singh v. Emperor* and *Inder Singh v. Emperor*⁴ some overt act such as brandishing the weapon against another person in order to overawe him or displaying the deadly weapon to frighten his victim have been held to attract the provisions of Section 397 of the Penal Code. J.C. Shah and Vyas, JJ. of the Bombay High Court have said in the case of *Govind Dipaji More v. State* that if the knife

“was used for the purpose of producing such an impression upon the mind of a person that he would be compelled to part with his property, that would amount to ‘using’ the weapon within the meaning of Section 397.”

12. As is apparent from the above quote, the Supreme Court while interpreting Section 397 IPC took notice of the language of Section 398 IPC wherein the words used are “the offender is armed with any deadly weapon”. The Supreme Court has observed that for the purpose of Section 397 IPC actual use of the deadly weapon is not required, even brandishing and showing the deadly weapon so as to instill fear and threat in the mind of the victim so that he does not resist, fearing danger, is sufficient. The Supreme Court has reiterated this view and has further observed in **Ashfaq vs State (Govt. of NCT of Delhi)** AIR 2004 SC 1253:

“Thus, what is essential to satisfy the word “Uses” for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.”

13. However, the question raised by the appellant in the present case is different. For sentencing a person under Section 398 IPC the offender at

the time should be armed with deadly weapon when he attempted robbery or dacoity. A person is said to have a deadly weapon with him when he carries the weapon at the time when he attempted robbery or dacoity. For the purpose of Section 398 IPC, mere possession of the deadly weapon is sufficient and it is not necessary that the victim should know or be aware of possession of the weapon by the attacker. The term “deadly weapon” therefore has to be interpreted keeping in mind the language of the aforesaid Section and has to be interpreted keeping in mind the object and purpose of the section and to effectuate the same.

14. The term “deadly weapon” has been defined in Black’s Law Dictionary, 6th edition at page 398 to mean;

“any fire arm or other weapon, device, instrument, material or substance”, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.”

Such weapons or instruments are made and designed for offensive or defensive purposes or for destruction of life or inflation of injury, one which, from the manner used, is calculated or likely to produce death or serious bodily injury”.

15. In ***Balak Ram versus State***, 1983 Crl.LJ 1438, a single Judge of this Court has observed as under :-

“What is a deadly weapon is not defined in Code, It must, I think, therefore, be a weapon which is used was likely to cause death. In *Lakshmi-ammal v. Saniappa Gounder*, AIR 1968 Mad 310 : (1968 Cri LJ 1084), weapons like knife, hammer, crowbar and spades were held undoubtedly to be deadly weapons, but in *Mir Bayyan Khan v. Emperor*, AIR 1935 Pesh 65(2) : (36 Cri LJ 933), it was said that a crow-bar or

spade may well be a deadly weapon if used as a weapon of offence, but not if used for destroying a bridge (that is I think, for peaceful purposes). Knives are weapons available in various sizes and may just cause little hurt or may be the deadliest. They are not deadly weapons per se such as would ordinarily result in death by their use. What would make a knife deadly is its design or the manner of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved and prosecution should prove that the knife used by the accused was a deadly one.”

16. Whether a toy gun can be regarded as a deadly weapon was examined by a Division Bench of the Bombay High Court in ***Babulal Jairam Maurya and another versus State of Maharashtra*** 1993 Crl.LJ 281 wherein it was observed:

“This brings us to the last contention of Mr. Jadhav that assuming the prosecution case to be true, appellant-Michael could not have been convicted under S.397 I.P.C. Learned counsel says that S. 397 predicates the use of a deadly weapon. The weapon used must have a deadly potential. A toy pistol can never be said to be a deadly weapon whatever the impression it seeks on the frightened victims. In other words, a fake pistol though used as a deadly weapon and assumed to be one by the victims is not a deadly weapon as contemplated by S. 397, I.P.C. A toy pistol continues to be a toy pistol whatever be its impact on the frightened victims. The learned Public Prosecutor disputes this contention saying that a weapon becomes deadly when it is used as such a weapon and has that effect upon the victims. The language of Sections 397 and 398 which deal with “deadly weapons” indicates the correctness of Mr. Jadhav’s submission. The weapon used has to be a deadly weapon and not assumed or mistaken to be a deadly weapon. Michael was using a toy pistol and that is the end of the matter so far as the applicability of S.397 I.P.C. is concerned. He merited a conviction only under S.392 I.P.C. As to the sentence, the Penal Code prescribes for a minimum of seven years vis-à-vis appellant Babulal. So far as Michael is concerned, three years

R.I. would be more than adequate for the offence brought home to him.”

17. The purpose of using a deadly weapon at the time of committing robbery, dacoity or attempting one, is obviously to overawe and instill a sense of fear in the victim. However, when the so called weapon is in a non working condition, used merely as a camouflage, whether such weapon could fall within the definition of ‘deadly weapon’ is a matter of debate. It can be urged that the victim who is put in fear of life or grave injury, lest he parts with his belongings, has no way of knowing that the weapon being pointed at him is not in working condition or is fake. The victim in such situation will not resist the offence thinking that his/her life is in danger. The fear for life/hurt created in the mind of the victim is a direct result of the act of the accused.

18. However for the purpose of Section 398 IPC, this argument does not merit acceptance. As noticed above even carrying a “deadly weapon” at the time of offence attracts Section 398 IPC and the actual use or brandishing is not required. Definition of the terms “robbery” or “dacoity” and the difference between “commission” and “attempt to commit robbery and dacoity” and from the stringent punishments prescribed in Sections 392 and 393 IPC, it appears that the intention of the Legislature is to punish the offender with the minimum prescribed sentence under Section 398 IPC by taking into consideration the intent of the offender. Section 398 IPC applies when at the time of the attempted robbery or dacoity the accused has caused or threatened the victim of bodily harm and injury etc. and at that time the accused was in possession of a deadly weapon. The word ‘deadly’ qualifies and is descriptive of the term “weapon”. If the accused is

not carrying a “weapon” or carrying a “weapon” which is not in a working condition and cannot cause any grievous bodily harm or injury, it would not qualify and cannot be regarded as a “deadly weapon”. The effect thereof is that the legislative mandate of minimum punishment under Section 398 IPC is not applicable in such cases. Punishment, howsoever, prescribed under Section 393 IPC is applicable and also stringent enough and can extend upto 7 years. (The question whether the said reasoning will equally apply to Section 397 IPC is left open and not decided.)

19. Keeping in view the aforesaid reasoning the Appeal is partly allowed and it is held that the accused cannot be sentenced under Section 398 IPC as he was not carrying with him a deadly weapon. Therefore, the minimum punishment of seven years as prescribed under Section 398 IPC will not apply. The appellant/accused is convicted under Section 393 IPC.

20. The last question relates to the quantum of punishment. As noticed above, the appellant-Rakesh has been sentenced to undergo rigorous imprisonment of seven years under Section 398 IPC. I have examined the nominal roll dated 29th January, 2007 of the appellant-Rakesh. He has already undergone rigorous imprisonment of more than four years six days as on 29th January, 2007 and had earned remission of one year, one month and twenty nine days leaving a balance unexpired sentence of one year, nine months and twenty five days. The appellant-Rakesh was granted bail vide Order dated 5th February, 2007 on furnishing personal bond of Rs.25,000/- with one surety of the like amount. The nominal roll further shows that there is nothing adverse on

record in respect of his jail conduct and there is no other pending case the appellant-Rakesh. Keeping in view the aforesaid facts, the sentence awarded to the accused/appellant under Section 393 IPC is restricted to the period already undergone. The appellant-Rakesh however will pay fine of Rs.2500/- for the offence under Section 393 IPC and in default thereof undergo rigorous imprisonment of one month. Conviction and sentence under Section 25 of the Arms Act and Section 458 IPC are sustained. The appeal is disposed of.

(SANJIV KHANNA)
JUDGE

JULY 20, 2010.
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