

REPORTABLE

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

+ CRIMINAL APPEAL NOS. 779 & 789 OF 2009

% Reserved on : 28th September, 2010.
Date of Decision: 19th October, 2010.

SUBHASH @ BIRJU Appellant in 779/2009.
VIKRAM @ VICKY Appellant in 789/2009.
Through Mr. Rajat Srivastava, advocate.

VERSUS

STATE OF NCT OF DELHI Respondent
Through Mr.Arvind Kumar Gupta, APP.

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.:

1. The appellants Vikram @ Vicky and Subhash @ Birju by the impugned judgment dated 8th September, 2009 stand convicted under Sections 394/34 and 397/34 Indian Penal Code, 1860 (IPC for short). By the order on sentence dated 9th September, 2009, both appellants have been sentenced to rigorous imprisonment of 7 years and fine of Rs. 3,000/- each and in default of payment of fine suffer simple imprisonment of 3 month for the offence under Section 394/34 IPC and rigorous imprisonment of 7 years for the offence under Section 397/34 IPC.

2. As per the prosecution case the two appellants along with Santosh, (a juvenile and therefore facing trial before Juvenile Justice Board) and Ameena @ Meena had committed robbery by using a

knives, a deadly weapon at house No.6/4, 1st Floor, West Patel Nagar, Delhi(hereinafter referred to as property/house, for short) on 2nd May, 2005 at 3 about P.M. They had injured Jitender Nath Sachdeva, who was stabbed.

3. At the outset it may be observed that in the impugned judgment dated 8th September, 2009 it has been noticed that Jitender Nath Sachdeva was not examined in the court. It is stated that he had expired and therefore could not be produced as a witness.

4. As far as robbery or attempt to commit robbery is concerned, there is ample evidence in the form of Statement of Const. Pradeep Kumar (PW-1) who has stated that on 2nd May, 2005 on receipt of DD no. 34B, he along with ASI Sant Lal (PW-14) had reached house and saw that the household articles were scattered. The injured had been taken to DDU hospital in a PCR. HC Rajender Singh (PW-10) had stated that on 2nd May, 2005 he was posted in PCR (West Zone) and was on duty at PCR – 13. At about 3.13 p.m., after receiving a call he reached the property where he found Jitender Nath Sachdeva in an injured condition. We also have the statements of ASI Sant Lal (PW-14) and SI Jitender Tiwari (PW-15). SI Jitender Tiwari (PW-15) has stated that he had gone to the property but Jitender Nath Sachdeva had been shifted to DDU Hospital in a PCR. Subsequently, he recorded the statement of Jitender Nath Sachdeva (Exhb.PW-14/B) and prepared a rukka (Exhb.PW-14/C). He had also gone to the scene of the crime and inspected the same. He had taken the blood stained shirt and vest of the injured-Jitender Nath Sachdeva into his possession (vide Exhb. PW-14/D). SI Jitender Tiwari (PW-15) has stated that he had prepared the site plan (Exhb.PW-15/A). We have the statement of Rajni (PW-13) the maid, who was present in the

house with Jitender Nath Sachdeva on 2nd May, 2005. Her statement has been examined in detail in the subsequent portion of the judgment.

5. The next question which arises for consideration is whether the two appellants were involved and parties to the said crime. Statement of Jitender Nath Sachdeva (Exhb.PW-14/B) is the basis of the FIR. In this statement, Jitender Nath Sachdeva has stated that he has two maid servants, one Elina, who prepares food in the morning and in the evening and the second Rajni who stays in the house. At about 3.00 p.m. on 2nd May, 2005 somebody knocked at the door and when Rajni asked, the person replied that he was a courier. Rajni opened the door and three boys came into the house. One of the boys caught hold of Rajni and another boy came inside his room after him. The third boy started looking for money and articles in the house. All three of them had knives in their hands. The boy who came inside his room was about 5'5" tall, strong built and having oval face and between 25-28 years of age. He spoke in a bihari accent. The boy showed him knife and kept it on the stomach and then on the neck and asked him to handover the cash and the key of the almirah. He put his finger inside his mouth and caught hold of his hands behind his back. He gave him fist blows and pushed him. Jitender Nath Sachdeva hit the door and teetered. The boy went to another room. Jitender Nath Sachdeva closed the door of his room and came to the window and started shouting that robbers had come inside the house and they required help. The three boys after hearing Jitender Nath Sachdeva shout ran away. Jitender Nath Sachdeva telephoned number 100 and PCR came and he was taken to the hospital. Jitender Nath Sachdeva could recognize the three boys. With regard to the

stolen articles he had stated that he would verify and thereafter would make a statement about the missing articles.

6. Jitender Nath Sachdeva had made a subsequent statement under Section 161 of the Code that ₹.2000/- and two wrist watches were stolen. However, he did not appear in the witness box and his statement was not recorded in the court. We, however, have the statement of Rajni (PW-13) who has stated that she was a maid servant who was working in the house of Jitender Nath Sachdeva on 2nd May, 2005. She has stated that articles were stolen but no description and details of the articles have been stated by her.

7. The prosecution case heavily relies upon the statement of Rajni (PW-13) who was the maid servant. In her statement Rajni (PW-13) has stated that she was present in the house along with Jitender Nath Sachdeva on 2nd May, 2005 when at about 3.00 p.m., somebody knocked on the door and on an enquiry stated that he was a courier. She opened the door and three boys entered the house. One of the boys caught hold of her and threatened her with a knife which he was carrying. Another boy entered the room of Jitender Nath Sachdeva and had beaten him up. The boy who had beaten Jitender Nath Sachdeva had a knife. The third boy checked/searched for goods in the house and in the almirah. Rajni (PW-13) identified both the appellants in the court as the persons who had come to the house on the said date. She identified Vikram (appellant in Crl. A. No. 789/2009) as the boy who had caught hold of her and threatened her with a knife.

8. Rajni (PW-13) was cross-examined by learned counsel appearing for Vikram and was not cross-examined by the learned counsel for Subhash. Learned counsel for Subhash had subsequently

moved an application under section 311 of the Code for cross-examination of Rajni (PW-13) but the said application was dismissed vide Order dated 28th February, 2009. The court recorded that Rajni (PW-13) was the only material witness whose presence was procured after much difficulty and she cannot be recalled. It was noted that the appellant-Subhash was on bail whereas the other accused was in judicial custody and the application under Section 311 of the Code was filed only to delay the trial. Court also noted that the appellant-Subhash had not made request for adjournment on the ground that his counsel was not available, when Rajni (PW-13) was examined.

9. Learned counsel for the appellant drew my attention to the statement made by Rajni (PW-13) in the cross-examination that Pankaj Sachdeva-elder brother of Jitender Nath Sachdeva, had taken him to the hospital and she cannot say whether the police had accompanied them or not. It is submitted that her statement is not reliable and trustworthy. She was not a willing witness and had appeared in the court after repeated attempts. It is submitted that Rajni (PW-13) was tutored and her evidence is not reliable specially in view of her statement that she cannot tell the age of the boy who has caught hold of her and two other boys or the height of the boys even by approximation.

10. Statement of Rajni (PW-13) was recorded on 17th January, 2009 nearly four years after the date of the incident. She is a maid servant and might not have been able to recollect minute details as to what had happened. The presence of Rajni (PW-13) at the spot cannot be doubted in view of the FIR as where she is mentioned. However, identification of the appellants by Rajni (Pw-13) is somewhat a suspect and debatable in view of her ambiguous statement in the

court as she had not given any description of the culprits, their height, age etc. in her statement under section 161 of the Code. It will not be safe to convict the appellants solely on the basis of identification by Rajni (Pw-13) in the Court, without corroboration and some other evidence.

11. As far as the appellant-Vikram is concerned, his presence in the house on 2nd May, 2005 is established in view of the chance finger prints which were lifted and photographed and the identification with the palm prints of the appellant-Vikram. HC Ram Niwas (PW-12) had stated that he had taken four photographs of chance finger prints and had sent them to the finger prints experts. Similarly, Ins. Devender Singh (PW-7) has stated that under his supervision, the crime team has taken photographs and lifted four chance finger prints. He has prepared the report (Exhb. PW-7/A). HC Vijay Singh (PW-8) had stated that on instruction from the Investigating Officer-Ins. Devender Singh (PW-7) he took four chance finger prints from the spot and the Investigating Officer has given the report (Exhb. PW-7/A). The finger print report was proved by SI Jitender Tiwari (PW-15) and is marked Exhb. PW-15/B. The chance finger prints- Q1 was found identical to left palm portion S1 of the appellant-Vikram. Chance finger print Q3 and Q4 were found identical to left palm portion S2 of the palm impression of the appellant-Vikram. Thus involvement and presence of the appellant-Vikram at the situs i.e. the property, is established. It is not the case of the appellant-Vikram that he used to visit the said property and therefore his finger prints were present there.

12. Rajni (PW-13) has identified the appellant-Vikram as the person who had caught hold of her and threatened her with a knife.

She had identified the appellant-Subhash but did not state his actual role, though she has stated that one of the boys went into the room of Jitender Nath Sachdeva and had beaten him up and the third boy was checking goods in the house. She did not specifically state whether the appellant-Subhash is the one who had injured Jitender Nath Sachdeva. Rajni (PW-13), in her statement under Section 161 of the Code, has stated that the boy who caught me, had threatened me with knife but she had not given any description of the boys. As noticed above in the cross-examination Rajni (PW-13) had stated that she cannot tell the age of the two boys and tell their height even by approximation.

13. Learned APP has submitted that the appellant-Subhash had refused to participate in the test identification parade (TIP for short) as per the statement of Anil Kumar Sisodia (PW-5), ARC, Tis Hazari, Delhi and this is sufficient to establish his involvement and presence at the spot. The TIP proceeding is in respect of the appellant-Vikram and the appellant-Subhash have been proved as Exhb.PW-5/A and 5/B respectively. Both the appellants had refused to join the TIP on 18th May, 2005 and had made a statement that their photographs were taken and shown to the witnesses. The application for conducting TIP shows that both Jitender Nath Sachdeva and Rajni (PW-13) had been called for TIP. The appellant-Subhash had reiterated the aforesaid statement under Section 313 of the Code and had stated that on 9th May, 2005 at about 9.00 a.m. one old man aged 75 years along with a lady come to the police station and he was shown to them and were informed that they were the robbers who had entered their house. Later on, the said lady turned up before the court and had made a statement as a witness.

14. Failure to participate in the TIP is a factor against the appellant-Subhash. However, statements of the other witnesses create doubt about the involvement and presence of the appellant-Subhash.

15. Const. Mohan Kumar (PW-4) has stated that on the basis of secret information the Investigating Officer had arrested both the boys/appellants from the rock garden vide arrest memo Exhb. PW-4/A and 4/B. From the appellant-Vikram, a wrist watch was recovered and seized (Exhb.PW-4/E) and then sealed. But he could not identify the wrist watch. He, in the later part of the statement, had stated that there was one more boy with the two appellants. Learned APP was allowed to cross-examine the said witness. In the cross-examination Const. Mohan Kumar (PW-4) has stated that two wrist watches were recovered from the appellant-Vikram on the basis of his statement from a jhuggi near the Railway Line, Kathputli Colony, Delhi. He has stated that from the appellant Subhash, a wrist watch which he was wearing and a purse were recovered.

16. Const. Mukhtiar Khan(PW-9) has stated that on 8th May, 2005, on information provided by the informer and on pointing of the informer, they had arrested two boys sitting in the Guru Teg Bahadur Park at Kirti Nagar, namely, Vikram and Santosh (a juvenile). The two of them made disclosure statements and have disclosed involvement of Subhash, Ram Ratan and Ameena. However, subsequently, in his examination-in-chief he has stated that in fact three persons were arrested from the Guru Teg Bahadur Park at Kirti Nagar and the third person was Subhash and from the appellant-Subhash, one wrist watch and one leather purse were recovered from his jhuggi and then on pointing out by the appellant-Vikram, a lady

namely Ameena @ Meena was arrested. He has stated that from the accused-Vikram two wrist watches were recovered. However, the said case property i.e the wrist watches and the leather purse were produced in the court and it was found that they were not sealed. In the cross-examination, Const. Mukhtiar Khan(PW-9) has stated as under:-

“..... It is correct that in my statement which was recorded by the IO, the fact regarding accused Subhash is not stated. It is wrong to suggest that I was not present at Kirti Nagar Park when accused Subhash was arrested. Nothing was recovered during the personal search of accused Subhash.....”

17. ASI Sant Lal (PW-14) has stated that on 8th May, 2005 on the basis of an information given by a secret informer, they had raided Guru Teg Bahadur Park at Kirti Nagar and had arrested Vikram, Subhash, Santosh, Ameena (whose names were learnt on enquiry). He has stated that on the basis of disclosure statement made by appellant-Subhash they had taken possession of one leather purse with a visiting card and one wrist watch which were seized vide Exhb.PW-9/E. The leather purse and the wrist watch were produced in unsealed condition and shown to the said witnesses.

18. SI Jitender Tiwari (PW-15) has stated that he along with others had reached the Guru Teg Bahadur Park at Kirti Nagar on 8th May, 2005 and had apprehended three boys and one girl, namely Vikram, Subhash, Santosh and Ameena. He has further stated that from the appellant-Subhash they had recovered one leather purse with visiting card of daughter-in-law of the victim and wrist watch and these were seized by seizure memo Exhb.PW-9/E. However, he has admitted

that he did not get TIP of the recovered articles conducted and receipt of the purchase of the wrist watch was not produced by the victim.

19. Learned counsel for the appellant-Subhash has pointed out that the victim-Jitender Nath Sachdeva in his subsequent statement under Section 161 of the Code had not stated that any purse was stolen. Therefore the so called recovery of the purse from the appellant-Subhash is planted. With regard to the recovery of the wrist watch it is submitted that as per the victim-Jitender Nath Sachdeva, two wrist watches were stolen and Jitender Nath Sachdeva had also produced a receipt dated 12th April, 2005 of Arora Electronics (Exhb. PW-15/D) for purchase of two lancer quartz watches. It is stated that these two lancer quartz watches were recovered on the disclosure statement made by the appellant-Vikram. Thus, the alleged recovery of one wrist watch from the appellant-Subhash is also planted by the police. It is submitted that the appellant-Subhash has been falsely implicated as the police required arrest and prosecution of 3 males in view of the FIR. My attention is also drawn to the disclosure statement of Ameena (Exhb. PW-14/G). She has stated that she used to work on the first floor of the house no. 6/4, West Patel Nagar, New Delhi of Mr. Pankaj Sachdeva. She had got married with the appellant-Vikram against the wishes of her father. In March, 2005 she left work in the said property and thereafter the employer had kept another maid. She went twice to the property/ premises but was not allowed to enter. She informed her husband-Vikram that during day time only one small maid and their old father were in the house. She had informed that during day time couriers come to deliver mail and the maid opens the door to receive the mail, while the old man keeps lying in the back room. On the basis of this information,

Vikram, Subhash, Santosh and Ram Ratan had decided to commit robbery in the said house. Thereafter at about 4.30 p.m. they met and informed her that they had beaten up the old man and robbed him of two wrist watches and ₹ 3000/- which were distributed. As noted above, Jitender Nath Sachdeva in his statement (Exhb.PW-14/B) had mentioned that they have two maid servants Rajni and Alina. It is submitted that Alina is Ameena the co-accused, who has been acquitted. The said contentions/defence was not clearly and specifically raised in the cross examination. Some of the evidence/material referred to is not admissible.

20. When the chargesheet was filed before the Metropolitan Magistrate, a detailed order dated 26th July, 2005 was passed and five questions were asked. Question no.2 related to the disclosure statement of the accused persons regarding involvement of Ram Ratan who had actively participated in the robbery. In another detailed order dated 14th October, 2005, the Metropolitan Magistrate has noted that Ram Ratan could not be traced out but in the police report or the chargesheet no reference was made to him. This was depreciated and it was observed that the police should disclose names of each and every accused in the commission of the offence, even if the accused had not been arrested/apprehended. The police was asked to file a supplementary chargesheet with regard to Ram Ratan. Supplementary chargesheet was filed with respect to Ram Ratan but no steps for investigation, trace out and arrest were taken. As per the prosecution version, three persons were present in the house. If we include Ram Rattan, then there are four persons. As noticed above, the finger prints of the appellant-Subhash do not tally with the chance finger prints. The so-called recoveries from the appellant-Subhash are

clearly planted. About his arrest, there are different and contradictory statements of the police officers. Doubts have arisen with regard to the involvement of the appellant-Subhash in the episode or his exact role, inspite of statement of Rajni (Pw-13). In these circumstances, I am inclined to give benefit of doubt to the appellant-Subhash, about his involvement in the offence.

21. Learned counsel for the appellant-Vikram has submitted that actual robbery has not been proved and established and it is a case of attempted robbery. He has drawn my attention to the findings of the learned trial court in para 43 of the impugned judgment dated 8th September, 2009 which reads:-

“The stolen articles were produced in the court in unsealed condition although ASI Sant Lal and LO/SI Jeetender Tiwari deposed that the stolen articles had been sealed in a pullanda. The TIP of case property was also not got conducted neither any independent witness was joined at the time of recovery of the stolen articles from the house of accused Vikram @ Vicky and accused Subhash. Moreover the receipt of stolen articles Ex.PW15/C given by complainant to the IO could not be proved by complainant as he had expired.”

22. As noticed earlier, Jitender Nath Sachdeva had stated in his statement (Exhb. PW-14/B) which form the basis of the FIR that he shall verify and give details of the stolen property. Jitender Nath Sachdeva had expired and did not appear in the witness box. Trial court has disbelieved and has not relied upon the purchase receipt of lancer quartz watches (Exhb.PW-15/D). This receipt was filed after direction of the Metropolitan Magistrate. There is no other evidence available on record to prove that the recovered articles were the stolen articles. TIP of the stolen articles was not done. Rajni (PW-13) has stated that articles were stolen but has not given specific details of

the articles that were stolen. Jitender Nath Sachdeva in his statement on basis of which FIR was registered had stated that he had closed the door and had shouted from the window and thereafter the three boys ran away. In these circumstances, giving benefit of doubt it is held that it is a case of attempted robbery and not actual completed robbery.

23. However, there is evidence on record that Jitender Nath Sachdeva was injured in the incident. This is established and proved by the testimony of Dr. Uday Kumar Singh (PW-2). He has opined that injury no.2 suffered by Jitender Nath Sachdeva was caused by a sharp object and injury nos. 2, 3 and 4 were caused by a blunt object. He has given the same opinion in the MLC (Exhb.PW-2/A and 2/B). He has stated that the injury no.1 could have been caused by knife or a sharp edged object though in the cross-examination he has stated that it was possible that the said injury could have been caused by a person falling on a sharp-edged weapon. No such suggestion was given in the cross examination of Pw13 Rajni. No such weapon was recovered from the site.

24. Section 394 IPC reads:-

“394. Voluntarily causing hurt in committing robbery.—If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

Section 394 IPC applies when a person goes out to commit robbery and the following three requirements are satisfied :

- (a) The accused have committed or attempted to commit or was concerned with commission of robbery
- (b) That in doing so, the accused or some other person had caused harm
- (c) The hurt was caused voluntarily.

Section 394 IPC supposes that the person who goes out to commit robbery must be presumed to be aware that in execution of their purpose, they are or some of them may be required to use force. They cannot therefore plead surprise if someone out of them uses force in prosecution of their common purpose. They are, therefore, vicariously and independently held liable for the same offence irrespective of who was the actual assailant and had caused hurt. For Section 394 IPC to apply, enquiry need not be directed to the identification of the person who had caused actual injury. This is not necessary. In ***Aslam versus state of Rajasthan*** (2008) 9 SCC 227 it has been held :-

“10. Section 394 prescribes punishment for voluntarily causing hurt in committing or attempting to commit robbery. The offence under this section is more serious offence than one under Section 392. Section 394 postulates and contemplates the causing of harm during commission of robbery or in attempting to commit robbery when such causing of hurt is hardly necessary to facilitate the commission of robbery. Section 394 applies to cases where during the course of robbery voluntary hurt is caused. Section 394 classifies two distinct class of persons. Firstly, those who actually cause hurt and secondly, those who do not actually cause hurt but are “jointly concerned” in the commission of offence of robbery. The second class of persons may not be concerned in the causing of hurt, but they become liable independently of the knowledge of its likelihood or a reasonable belief in its probability.”

25. Learned counsel for the appellant has relied on ***Raju versus State*** 2010 (2) JCC 833. In the said case, the court on the basis of the evidence on record came to the conclusion that the appellant Vikram or his accomplices had not caused voluntary hurt to the victim. The victim got hurt because of his own conduct. This is not so in the present case. There is no evidence in the present case to establish that the victim got hurt because of his own conduct. The victim was a 70 year old man and as per the statement of Rajni (PW-13), he was beaten up and shown a knife. The appellant-Vikram has therefore been rightly convicted under Section 394, IPC.

26. However, in view of the finding that it is a case of attempted robbery, conviction under Section 397 has to be converted into Section 398 IPC. It is not possible to accept the contention that the appellant Vikram had not used the knife. As per the statement of Rajni (PW-13), the appellant-Vikram had shown her the knife. For conviction under Section 398 IPC it is not necessary to show that the appellant Vikram had caused injury to Jitender Nath Sachdeva. In ***Phool Kumar vs Delhi Administration*** AIR 1975 SC 905 it has been held:

“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* 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.”

In that case also the evidence against the appellant was that he carried a knife in his hand when he went to the shop of the victim. In our opinion this is the correct view of the law and the restricted meaning given to the word “uses” in the case of *Chand Singh* is not correct.”

27. On the question of quantum of sentence, I do not see any reason to interfere. The minimum sentence under Section 398 IPC cannot be less than seven years. Offence under Section 394 IPC is

punishable with imprisonment for life or with rigorous imprisonment for a term which may extent to ten years and also fine. The sentence awarded by the learned trial court to the appellant is accordingly maintained though conviction under Section 397 IPC has been converted into Section 398 IPC.

28. Accordingly, the appeal filed by the appellant-Subhash is allowed and appeal filed by the appellant-Vikram is disposed of, and his conviction under Section 394 IPC is maintained but he has been sentenced under Section 398 IPC instead of Section 397 IPC.

Appeals are disposed.

(SANJIV KHANNA)
JUDGE

OCTOBER 19, 2010.
P