

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 373 of 2006

Rajesh Sonkar

-Vs-

The State of West Bengal

For the Appellant : Mr. Soham Banerjee

For the State : Mr. Avishek Sinha

Judgment on : 25.03.2026

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of conviction dated 28.02.2006 passed by the Learned Additional Sessions Judge, 9th Fast Track Court, Bichar Bhawan, Calcutta in Sessions Trial No.1(1) of 2003 arising out of Sessions Case No.112 of 2002, convicting the appellant under Sections 393/398 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.500/- in default to suffer rigorous imprisonment for 1 month more.
2. The prosecution case precisely stated Smt. Rita Gupta i.e. the complainant was the owner of one shop under the name and style of "R.S. Saree" at 8, Madan Chatterjee Lane. On 31.08.2001 at about 12:30 p.m., when the *de facto* complainant was working in her shop, 3/4 male persons entered the same. One of them armed with a revolver directed the complainant to open

the cash box. Smt. Rita Gupta followed his instruction and opened the cash box. The said miscreant stooped over the cash box to see inside it and Smt. Rita Gupta caught the arm of the same. A scuffle ensued and the revolver fell down on the floor of the shop from the hand of the said miscreant. In the meantime, other miscreants managed to flee from the said shop after picking the revolver from the ground. Smt. Rita Gupta raised a clamour which attracted two on duty police constables who managed to apprehend one of the miscreants from outside the gate of the shop. Smt. Rita Gupta intimated the matter over telephone to Jorasanko P.S. a Police personnel of Jorasanko P.S. reached the spot. The de-facto complainant submitted a written complaint to the police.

3. On the basis of the said complaint, the police registered Jorasanko P.S. Case No.291 dated 31.08.2001 under Sections 393/398 of the Indian Penal Code read with Sections 25(1B)(a)/27 of the Arms Act against the appellant.
4. On completion of investigation, the police submitted charge-sheet under Sections 393/398 of the Indian Penal Code read with Sections 25(1B)(a)/27 of the Arms Act against the appellant, who pleaded not guilty and claimed to be tried.
5. In order to prove its case, the prosecution examined as many as 6 witnesses and exhibited certain documents.
6. The Learned *Amicus Curiae* assisting the Court on behalf of the appellant submitted the following points of arguments: –

- i. Morphosis of the version of the *de facto* complainant:-

The written complaint said nothing about the presence of any other employees in the shop. The written complaint did not contain

the story that the appellant threw his pistol outside the gate of the shop. Thereafter, some other miscreant collected it and fled from the scene. The written complaint claimed that the de-facto complainant alone detained the appellant. However, in her deposition as PW-1, the de-facto complainant claimed that she had three employees present in the shop at that time, and they were pushed into the chamber by the miscreants. It was further claimed that the pistol of the appellant fell to the ground and the other two miscreants took it and fled the scene. Thereafter she raised alarm and the employees came out from the chamber and with their help she detained the appellant.

It was true that a written complaint was not an encyclopedia and it may not contain all the information. However in the instant case, the very essence of the written complaint was widened by perfecting the version of the de-facto complainant (PW-1), at a later stage to cover up the weak plot of the prosecution which was primarily manufactured.

ii. Lack of independent witnesses:-

The present case suffered from a serious lack of independent witnesses. The place of occurrence was a densely populated area with numerous shops. The time of incident was admittedly during broad day light, at 12:30 p.m. It was also admitted by PW-1 herself, there was a tailoring shop at the right of her shop. No independent witnesses were examined in that case.

iii. Biased investigation:-

The present case suffered from grave illegal investigation. It can be seen from the L.C.R., that the handwriting of the body of the written

complaint was different from the handwriting of the signature thereof which implied the body of the written complaint was written by someone else. The PW-1 had reaffirmed in her deposition that the complaint was written by a police officer. Again she said in her cross-examination that the complaint was written by a police officer who came from Jorasankno Police Station. PW-6, the Investigating Officer, had admitted he received the information over phone, made a G.D. entry regarding the same and then reached the P.O.

Therefore PW-6 was the scribe and informant, who also acted as the investigating officer in the present case. It was also pertinent to mention PW-6 admitted that there was no endorsement in the Formal F.I.R., directing him to investigate the said case.

Therefore it was extremely important to dissect the case with careful circumspect to ensure there was no biased or illegal investigation. There seemed to be unreasonable hurry to charge the accused persons since

- a) the Investigating Officer did not inform the Officer-in-Charge of the Police Station about the disclosure of the cognizable offence before his departure from the Police Station.
- b) the exact time of receiving written complaint and recording the statement of PW-1 could not be ascertained by the Investigating Officer.
- c) no investigation was done regarding the presence of two constables in plain clothes at the scene.

- d) the deposition of the Investigating Officer reveals that PW-4 and PW-5 have laid down certain information for the first time before the Court during their deposition.
- e) no money or valuable article was seized by PW-6 which the appellant tried to rob.
- f) the Investigating Officer reached the place of occurrence, received the written complaint from PW-1 and arrested the accused persons. Before he was endorsed with the investigation he recorded statements of the witnesses and thereby initiated investigation.

Therefore, the investigation was biased and as such a conviction based upon such investigation could not sustain.

iv. Suppression of another complaint and FIR:-

Conviction could not be based upon picking only the favourable parts of a particular deposition. Evidence should be believed as a whole or disregarded as a whole. There is no scope of pick and choose. The deposition of PW-1 that the appellant tried to rob her on the point of a pistol if believed then it must be believed that the written complaint was prepared after 2 p.m., at Jorasanko Police Station, written by a police officer on her dictation, and identified the same as Exbt.-1. On the other hand, as pointed out above, PW-6, Investigating Officer, categorically mentioned PW-1 did not go to the Police Station that day. PW-6 further stated PW-1 had handed over the written complaint to him at the place of occurrence at around 12:45 p.m.

It established the existence of another written complaint, other than the Exbt.-1. Pertinently Exbt.-1 contained different handwritings in body and signature, and no scribe was mentioned thereof.

- v. No ingredient of section 398 of the Indian Penal Code:-

The alleged pistol was never recovered. Such non-recovery makes the conviction bad in law and throws doubt on the prosecution story.

7. The Learned Advocate for the State submitted as follows: –

- i. Firstly the essentials of Sections 393/398 of the Indian Penal Code were elucidated:-
 - a) the accused must have the clear intention or *mens rea* to carry out the act of robbery.
 - b) there must have been an overt act or physical act or *actus reus* in order to demonstrate that the intention was carried out, even if the attempt failed due to circumstances beyond the offender's control.
 - c) there must have been a failure in the completion of the commission of the robbery.
 - d) the accused must be armed with any deadly weapon at the time of the incident, though usage was not necessary.
- ii. F.I.R., usually forms the skeleton of a matter. The defence contended that there are multiple F.I.Rs following which, there had been a defective foundation of the case. However, in reality the Investigating Officer (PW-6) received a phonecall about the threat of robbery from PW-1 and recorded the same as G.D. Entry No.3840 dated 31.8.2001 (Exbt.-3). Thereafter, *de facto* complainant handed over a written

complaint to PW-6 at the place of occurrence who treated the same as the F.I.R. Subsequently PW-6 (Investigating Officer) recorded the same at P.S. vide G.D. Entry no.3848 (Exbt.-4) dated 31.08.2001 (being Jorasanko P.S. Case No.291 dated 31.8.2001 under Sections 393/398 of the Indian Penal Code and 25(1B)(a)/27 Arms Act). The formal FIR was written and signed by PW 6 and was marked as Exbt.-2. That clarified the air of confusion pertaining to the registration of F.I.R.

- iii. Corroboration of the witnesses confirming the presence of the Appellant at the place of occurrence:-

The factum of the incident as stated in the evidence readily corroborates the written complaint. It clarified the presence of the appellant at the Place of Occurrence was divulged at the earliest opportunity. Appellant was apprehended by the de-facto complainant herself when he was trying to take out the cash from the latter's cash box which was witnessed by PW-2, PW-3. So, there was no doubt pertaining to the presence of the appellant at the place of occurrence on the concerned day.

- iv. Account of the Eye Witnesses:-

The present case was broadly on the accounts of the eye witnesses. Besides being the de-facto complainant PW-1 also remained as an eye witness to the event whose account had been again corroborated by PW-2 and PW-3, the other employees of the shop.

PW-1, PW-2 and PW-3 all of them deposed on the same line wherein the present appellant was stated to be one of the miscreants

who entered the place of occurrence and allegedly threatened PW-1 to open the cash box showing a pistol. PW-1 caught hold of him as he was trying to take the cash out of the box whereby he was apprehended along with another. That was corroborated by all the eye witnesses maintaining the credibility of the information.

v. Non recovery of the deadly weapon:-

The appellant argued that non seizure of the deadly weapon made the conviction under Section 398 of the Indian Penal Code bad in law. However, the essential element to guarantee the conviction under Section 398 of the Indian Penal Code was not the recovery of the weapon but the credible testimony of the consistent eye witnesses that there was an attempt of robbery using deadly weapon. As such in the present case all the independent eye witnesses and the de-facto complainant gave a similar picture of the incident wherein the appellant was armed with a revolver while attempting to rob. As such the same was enough to guarantee a conviction under Section 398 of the Indian Penal Code.

vi. Presence of Independent Eyewitnesses:-

The defence contended absence of Independent witnesses caused an inherent prejudice to the appellant. Though PW-2 and PW-3 clearly mentioned they were mere employees at de-facto complainant's shop who gave credible accounts of the incident without any exaggeration and had no vested interest in the said incident. It was quite obvious and evident that the owner and the employee will be natural

witnesses to the incident which has occurred within the four corners of the shop. Thus it automatically invalidated the plea of the defence.

vii. Intention:-

Since the inception of the incident, DC mentioned that she was being threatened by some people demanding money, upon such information plain clothed police personnel's were posted near the place of occurrence. Thereby it indicates that the appellant along with others had a premediated plan to rob the de-facto Complainant and so they repeatedly called her with a mala-fide intention in order to extort her. The *mens rea* was strengthened by the *actus reus* wherein they carried the firearm as an aid to achieve their intention of robbing the de-facto complainant.

viii. Post Occurrence witness:-

PW-4 and PW-5 were the plain clothed police personnel's who were posted near the place of occurrence, heard some hue and cry and apprehended a person at the entrance of the shop. Ongoing inside both of them saw the appellant being held by the de-facto complainant. That inherently sheds better light on the incident wherein the appellant was witnessed within the clutches of the de-facto complainant at the place of occurrence.

ix. Test Identification Parade irrelevant:-

In terms of the present case, the appellant was apprehended by the de-facto complainant herself at the Place of occurrence and was handed over to the police. So, the aspect of Test Identification Parade was irrelevant and was not conducted.

The present case remains as a pre mediated arrangement of the appellant and other miscreants who threatened the de-facto complainant with a malicious motive of committing robbery and subsequently being armed with deadly weapon attacked her at her shop. The de-facto restrained the appellant and the incident was witnessed by the other employees who gave effective corroborative evidence. The appellant was apprehended from the place of occurrence itself which the police personnel's witnessed as the post occurrence witness. The Trial Court has relied on the said facts as no legal infirmities had cropped up. Thus, the conviction given under Section 393 read with Section 398 of the Indian Penal Code should be inherently upheld to meet the ends of law and to avoid gross miscarriage of justice.

8. A circumspection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-1 deposed the incident took place on 31.08.2001 at about 12:30 p.m., when she was engaged in her shop with business, suddenly 3/4 male persons entered the shop and one of them with a revolver in his hand directed the complainant to open the cash box. PW-1 followed his instruction and opened the cash box. The said miscreant bent down over the cash box to see inside it. PW-1 caught hold of the arm of the said miscreant. A scuffle ensued and the revolver fell down on the floor of the shop from the hand of the said miscreant. In the meantime, other miscreants managed to flee from the said shop with the revolver. PW-1 raised hue and cry which attracted two on duty

- police constables. They also managed to apprehend one of the miscreants from outside the gate of the shop. PW-1 intimated the matter over telephone to Jorasanko P.S. A police officer of Jorasanko Police Station rushed to the spot with available force. Thereafter, PW-1 lodged complaint at Jorasanko P.S. and police took the miscreant whom PW-1 caught hold of. The complaint which PW-1 lodged with Jorasanko P.S. was marked as Exbt.-1.
- ii. PW-1 in her cross-examination stated that her complaint was written by police at about 02:00/02:30 p.m., on 31.08.2001. From her shop, the P.S. was ten minutes walking distance. Police arrived at her shop at about 12:45 p.m. Police took photograph of her cash box, which was marked as "X" series for identification. She could not state, the number of photographs taken by the police. No photograph of Pistol was taken by police in her shop. She could not state, the name of the police person who came to her shop. She did not attend any T.I. Parade. Police seized certain letter heads and cash memos from her shop.
- iii. PW-2 reiterated the evidence of PW-1 in entirety corroborating the same.
- iv. PW-3 deposed he worked at M/s. R.S. Saree at 8, Madan Chatterjee Lane, Calcutta. PW-1 was the owner of the shop. His duty hours start from 10:30 a.m., to 07:30 p.m. On 31.08.2001 at about 12:00 to 12:30 p.m., 4 persons entered into the shop. PW-3 concurred to the evidence of PW-1 and PW-2 further deposing the person who was

caught by PW-1 inside the shop was caught by the police. Another person namely Ajoy Sonkar fled from the shop with the revolver.

- v. PW-4 deposed he was posted at Jorasanko P.S. in the year 2001. On 31.08.2001 he was on duty at 8, Madan Chatterjee Street. When they reached near 8, Madan Chatterjee Street, he heard certain noise and commotion which led him to the shop named R.S. Saree. They saw a exiting the shop. Out of suspicion, they caught that man and took him inside the shop and saw PW-1 had also caught one person. PW-1 then informed Jorasanko P.S. and they guarded those two persons till the Police officer came from the P.S. PW-1 lodged complaint on the spot to the Police. On interrogation, they came to know the person whom they caught was Vijay Jaiswal and the name of the person who was caught by PW-1 was Rajesh Sonkar.
- vi. PW-4 in his cross-examination stated to have told the I.O. to have caught the Vijay Jaiswal out of suspicion. He also stated the I.O. the name of the person who was caught by PW-1 was the appellant. He did not personally lodge any G.D. at the P.S.
- vii. PW-5 deposed to be a constable no.6797. On 31.08.2001 he was posted at Jorasanko P.S. At about 12:30 p.m. they heard certain noise. They saw a man to escape and resisted him. They saw 4/5 persons present at the shop of PW-1. They found PW-1 to have restricted one person and informed Joransanko P.S. Police officer came and took those two persons who were apprehended. His statement was recorded by the police.

- viii. PW-6 deposed he was posted in Jorasanko P.S. as S.I. of Police in the year 2001. In connection with Jorasanko P.S. Case No.291 dated 31.08.2001, he initiated investigation of the case under the instruction of the O.C., Jorasanko P.S.

On 31.08.2001 at about 12:35 p.m., he received an information over telephone from PW-1 that certain dacoits had entered into her shop under the name and style of "R.S. Saree" situated at 8, Madan Chatterjee Lane, Calcutta – 7 within the jurisdiction of Jorasanko P.S. He immediately left the P.S. with force to work out the said information after recording a G.D. vide entry no.3840 dated 31.08.2001. On reaching the said shop, he found 2 persons were detained inside the said shop by the workers of the said shop. He interrogated PW-1, the owner of the said shop who told him that on self-same day, when they were busy in dealing with the customers, 3 unknown young men came and asked her to open the cash box at the point of revolver. Accordingly, she opened the cash box. When the said miscreants bent down to see the cash box, PW-1 caught hold of his hand. Then, the said miscreants threw away the revolver towards the gate of the shop and his two associates fled with the said revolver. PW-1 raised hue and cry which attracted two plain clothed police constables. They apprehended another person who was watching the incident from outside the gate of the said shop. She also submitted a written complaint to him, which was marked as Exbt.-1. He treated the complaint as F.I.R. He also recorded the statement of the employees of the said shop, namely, Chandan Singh, Nanda Singh,

Suraj Mallick and the constables namely Santosh Shaw and Chandeswar Rai. He also arranged for taking photograph of the said shop by one photographer, namely Pintu Gupta of Sarbamangala Studio situated just opposite the said shop. He also arrested the said two persons from the spot namely Rajesh Sonkar and Vijay Jaiswal.

Then he returned to the P.S. with the appellant and Vijay Jaiswal. He recorded entire incident in the G.D. vide Entry No. 848 dated 31.8.2001. Then he registered Jorrananko P.S. Case No.291 dated 31.8.2001 under Sections 393/398 I.P.C and 25 (18) (a) /27 of the Arms Act against the appellant and Vijay Jaiswal. By filling in the formal F.I.R., was marked as Exbt.-2.

The appellant and Vijay Jaiswal were caught red handed from the P.O. During investigation he could ascertain two other persons were also involved in the incident. He came to know the name of one of such accused as Ajay Sonkar. He had submitted charge-sheet against him showing him absconder. He could not trace out the identity of the remaining accused. GD Entry no.3840 dated 31.8.2001 was marked Exbt.-3. GD Entry no.3848 dated 31.8.2001 was marked Exbt.-4.

On completion of investigation, he submitted charge-sheet against the abovenamed persons on 08.01.2002 under Sections 393/398 of the Indian Penal Code.

- ix. PW-6 in his cross-examination stated on 31.8.2001 he left P.S. after getting information of an offence. He did not inform about the disclosure of cognizable offence to the O.C. at the time of his departure. He personally did not record the said information of

cognizable offence in the Police Station before his departure. He returned to his Police Station at about 3:10 PM from the place of occurrence. There was no endorsement by the O.C. in the formal F.I.R., directing him to investigate the case. He arrested the accused, recorded statement of the witnesses and took all actions during investigation of the case. Before returning to the P.S. at about 3:10 p.m., he recorded the statement of Chandan Singh, Nanda Singh, Suraj Mali, Constable Chandeswar Rai and Constable Santosh Shaw.

Specific time of recording of statement of Chandan Singh, Ananda Singh, Suraj Mali, Constable Chandeswar Rai and Constable Santosh Shaw had not been mentioned in the C.D. There was no note in the C.D. that he requisitioned of certain officers from the Police Station to record the statement of the witnesses. The statement of PW-1 was not recorded at Jorasanko P.S. He did not interrogate and record the statement of husband of PW-1 in that case. PW-1 did not come to Jorasanko P.S. on 31.8.2001. Specific time of receipt of written complaint from PW-1 had not been mentioned in his report. There was nothing in the C.D. that they got smell of Nitro-Glycerine or Kerosene or Gun powder in the hands of any of the arrested persons. Immediately after reaching the alleged P.O. or he did not formally arrest the accused persons. The other officers who accompanied him also did not arrest them. He arrested them at 01:30 p.m. There was no note in the C.D. that the accused or detained persons were arrested as per order of the O.C. or Additional O.C. of the P.S. He did not seize any money on 31.08.2001 from the said shop. There was no

note in the C.D. that he searched out the arrested persons. Incriminating article or weapon or theft property was not found from their possession.

9. The Hon'ble High Court at Bombay, in the case of **SHAHAJI RAMANNA NAIR vs. STATE OF MAHARASHTRA**¹, has made the following observations:-

“10. Sections 393 and 398 of IPC reads as follows:

“Section 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.”

“Section 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.”

11. From the language of both the above sections it becomes clear that for the offence of attempt to commit robbery the maximum punishment prescribed by law is rigorous imprisonment for seven years with fine. However the discretion is left to the Court to quantify the actual sentence to be awarded. However, if at the time of attempting to commit robbery the offender is armed with any deadly weapon, the offence becomes more serious or aggravated and therefore section 398 provides that in such circumstances the imprisonment with which, the offender shall be punishable, shall not be less than seven years. If at the time of committing robbery the offender is not armed with any deadly weapon the court may award sentence of imprisonment for a term upto seven years and if he was armed with deadly weapon the

¹2007 SCC OnLine Bom 486

sentence of imprisonment shall not be less than seven years. In such circumstances the maximum sentence of rigorous imprisonment seven years has to be awarded. It is well set tied that section 398 IPC does not create any offence but merely regulates the punishments already provided for robbery or dacoity. One cannot be convicted and sentenced separately under section 393 and section 398 of IPC. The learned trial Court has committed, error in passing separate order of conviction and sentence under sections 393 and 398 of IPC. In such cases if it is proved that the accused was armed with deadly weapon at the time of attempt to commit robbery, he may be convicted under sections 393 r/w. 398 IPC.”

10. The incident is stated to have occurred on 31.08 .2001 at about 12:30 PM at a shop under the name and style of “R.S. Saree” situated at 8, Madan Chatterjee Street within the jurisdiction of Jorasanko Police Station. PW-1, the proprietor of the said establishment had deposed while she was engaged in her business, 3 to 4 young men entered the shop. One amongst them, armed with a revolver, directed her to open the cash box. Acting under such intimidation, she complied and opened the same. At such juncture, when the said ascendant went down to inspect the contents of the cash box, PW-1, demonstrating presence of mind, restrained him by securing his arm. A scuffle ensued during which the revolver fell onto the floor.
11. It is on evidence that the other associates taking advantage of the situation retrieved the revolver and withdrew from the premises. PW-1, immediately raised an alarm, which drew the attention of two police constable who were on duty in the vicinity. They apprehended one individual outside the shop, PW-1 had already restrained another within the premises of the shop. Information was promptly conveyed to Jorasanko Police Station and police

personal arrived at the location. The apprehended individuals were taken into custody and PW-1 lodged the complaint which was treated as the First Information Report and marked as Exhibit-1.

12. The version of PW-1 claimed substantial corroboration in the testimony of PW-2 and PW-3, both of whom were present at the shop at the relevant time. PW-2, recounted three boys to have entered the shop, one of whom was gripping a pistol and demanded that the cash box be opened. He had further deposed upon PW-1 restraining the assailant, the weapon fell to the ground, and was subsequently removed by one of the associate perpetrator. The police were informed and the applicant was apprehended at the scene.
13. PW-4 and employee of the shop recounted four persons entered the premises, one of whom brandished a revolver and demanded money. His evidence regarding the scuffle, the fall of the revolver and the departure of certain assailant with the weapon is consistent with the version of PW-1, PW-2 and PW-3. He had further stated two persons were apprehended, one inside the shop and another outside, and the appellant was among those apprehended. The identity of apprehended persons had been disclosed as Rajesh Sonkar and Vijay Jaiswal.
14. The presence of police personnel in proximity to the place of occurrence had been established through the evidence of PW-5, a constable attached to Police Station. He deposed at about 12:30 p.m. on the relevant date, upon hearing commotion, they proceeded to the location and found one individual to have been restrained by PW-1, while another was apprehended by them

outside the shop. Both were subsequently taken into custody and brought to the police station.

15. PW-6, Investigating Officer deposed upon receiving telephonic information at about 12:35 p.m., he recorded a general diary entry and proceeded to the place of occurrence. Upon arrival, he found two individuals detained by the staff of the shop. He examined PW-1 and recorded her statement. The written complete complaint submitted by her was treated as the FIR. He also recorded statements of the employees and the police personnel present. Photographs of the place of occurrence were arranged through the photographer. The accused persons namely Rajesh Sonkar and Vijay Jaiswal were arrested from the location. Upon completion of investigation, charge-sheet was submitted on 08.01.2003 under Section 393 and 398 of the Indian Penal Code.
16. Certain omissions and procedural irregularities have been elicited during cross examination. PW-1 stated that her complaint was written by the police at about 2 to 2:30 p.m., though the police had reached earlier. She stated to have not participated in any Test Identification Parade. PW-3 admitted he did not produce any document to establish his employment in the shop and had not participated in any identification proceeding. The investigating officer acknowledge of no formal written direction to have been received from the Officer-In-Charge authorising him to undertake the investigation and that certain particulars, including the exact time of recording statements and seizure of articles were not reflected in the case diary. It had also come on record that incriminating article or weapon was not recovered from the possession of the accused persons.

17. These aspects, though indicative of lapses, do not undermine the central narrative of the prosecution case. The occurrence took place in broad daylight within a commercial establishment and the immediate constraint and apprehension of the accused persons at the scene lends assurance to the probity of the prosecution case. The identity of the applicant is not dependent upon subsequent identification, but is found upon his apprehension during the course of the occurrence itself.
18. The ingredients of Section 393 of the Indian Penal Code require proof of an attempt to commit robbery. The evidence proved that the accused persons entered the shop, one of them, armed with a revolver approached PW-1 to open the cash box, thereby intimidating her with the evident intention of committing theft. The act effectuated advanced beyond preparation and proceeded to the stage of execution.
19. Section 393 I.P.C. is attracted where at the time of an attempt to commit robbery, the offender is armed with a deadly weapon. The consistent evidence of PW-1, PW-2, PW-3 and PW-4 established that one of the miscreants was armed with a revolver which was used to terrorize PW-1. The presence of such a weapon during the commission of the offence, satisfied the requirement of Section 398 I.P.C. Section 393 I.P.C. contemplates an attempt to commit robbery. Such attempt must be proceeded by act which has moved beyond preparation and has entered the realm of execution accompanied either by (i) an attempt to commit theft, (ii) the use of tactics of instant violence or fright thereof as envisaged in Section 390 and 391 of the Indian Penal Code. Section 398 of the Indian Penal Code further required

that at the time of committing such attempt, the offender was armed with a deadly weapon. The emphasis is not merely on the presence of weapon, but on its deliberate usage in the course of the attempted offence.

20. PW-1 deposed on 31.08.2001 at about 12:30 p.m., when she was attending to her business at R.S. Saree, 3 to 4 persons entered the shop and one amongst them, displaying a revolver, directed her to open the cash box. The direction to open the cash box, coupled with the flaunt of a firearm was not an unequivocal act; it manifested an unambiguous intention to dishonestly remove property. The element of fear of instant harm is inherent in the brandishing of a revolver, and as such no further overt act of threat is required to be articulated in words.

21. PW-1 had further deposed upon opening the cash box, when the perpetrator went forward to its contents, she restrained him by securing his arm, leading to a scuffle during which the revolver fell. The sequence demonstrated the accused was not only prepared for the offence, but had proceeded to the stage of execution of the same, having compelled the victim to open the receptacle containing money, and having positioned himself to access the same. The interruption of the act by the resistance offered by PW-1 does not dilute the character of the attempt. The testimony of PW-2, PW-3 and PW-4 proffered assurance to this version. The witnesses have consistently stated that one of the miscreants was armed with pistol/revolver and demanded unlocking of the cash box. Their evidence establishes that the presence of the weapon have not been incidental, but formed an integral part of the act of coercion and compulsion employed to facilitate the intended theft.

22. The requirement under Section 398 of the Indian Penal Code that the offender be armed with deadly weapon at the time of attempt stands satisfied. A revolver is, by its very nature, a deadly weapon. The evidence does not suggest that the weapon has been illusory or incapable of usage. On the contrary, its exposure was sufficient to compel compliance. The subsequent loss of possession of the weapon during the scuffle or its non-recovery thereafter does not be tracked from the fact that the offender was not armed with the same at the relevant time.
23. The apprehension of the appellant at the place of occurrence assumes considerable significance. PW-1 restrained one individual within the shop while another was apprehended by police personnel in the immediate proximity. PW-5, a constable on duty, had confirmed that hearing commotion at about 12:30 PM, they proceeded to the shop and found one person already confined and another being secured outside. The immediacy of the apprehension eliminate the possibility of mistaken identity.
24. PW-6, the Investigating Officer deposed upon receiving information at about 12:35 p.m., he recorded a General Diary Entry and proceeded to the place of occurrence where he found two persons detained by the shop staff. The promptitude in the sequence from the occurrence to apprehension to registration of the case, provides continuity and credibility to the prosecution version.
25. The omissions elicited in cross-examination, namely absence of a Test Identification Parade, non-recovery of the weapon and certain deficiencies in the case diary require circumspection. However, when the accused is

apprehended at the place of occurrence itself, identification in Court is a formal affirmation of what was already been evident and detected at the time of arrest. The necessity of such a procedure arises primarily where the identity of the accused is in doubt or where the witnesses have only a fleeting or uncertain opportunity of observation. In the present case, the appellant was apprehended at the place of operation in temporal proximity to the incident-one within the shop premises and another immediately-under circumstances which form part of the same transaction. The witnesses had sufficient opportunity to observe the miscreants during the occurrence and their identification in Court was not a case of subsequent recognition, but a continuation of the initial identification at the scene. In such circumstances, the holding of a test identification parade would have been a matter of prudence rather than necessity and its absence did not impair the evidentiary value of the identification.

26. The absence of recovery of the weapon, though a lapse, is not decisive when the consistent ocular testimony established its purpose of usage. The procedural irregularities in investigation do not, in the present facts, create a reasonable doubt as to the occurrence of the participation of the accused.
27. What emerged therefore, sequentially were (i) the accused person entered the shop; (ii) one of them, armed with a revolver, compelled the opening of the box; (iii) the act progressed to the stage of accessing the contents of the cashbox and (iv) the attempt was interrupted by resistance and immediate apprehension. These facts satisfied the legal requirements of an attempt to commit robbery.

28. The presence and display of the revolver at the time of such attempt defined such act to comprise the ambit of Section 398 of the Indian Penal Code.
29. The investigative lapses, including no recovery of the weapon and certain omissions in documentations, do not create a reasonable doubt when there exist in the context of direct and consistent, unembellished, unbiased eyewitness testimony, and the circumstances of apprehension at the place of occurrence.
30. The prosecution, therefore, succeeded in establishing beyond reasonable doubt that the accused persons attempted to commit robbery and armed with a deadly weapon at the time of such attempt.
31. The ingredients of Sections 393 and 398 of the Indian Penal Code, having been proved the conviction of the appellant under the said provisions is accordingly affirmed.
32. The incident related to the year 2001 and there has been a lapse of more than 25 years. Accordingly, the sentence is reduced to the extent of imprisonment suffered by the appellant.
33. Accordingly, the instant criminal appeal being CRA 373 of 2006 is dismissed.
34. There is no order as to costs.
35. Case Diary, if any, be returned forthwith.
36. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

37. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)