
(1985) 09 MP CK 0009

In the Madhya Pradesh High Court

Case No : Criminal Petition No. 206 of 1984

Botlal Bhimraj Dhakad

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 05-09-1985

Acts Referred:

Penal Code, 1860 (IPC) — Section 448, 457

Citation : (1985) MPLJ 584

Hon'ble Judges : V.D. Gyani, J

Bench : Single Bench

Advocate : D.D. Vyas, for the Appellant; Surjeetsingh, Government Advocate for State, for the Respondent

Final Decision : Allowed

Judgement

V.D. Gyani, J.

The petitioner was charge-sheeted before the Judicial Magistrate, 1st Class, Jawad for an offence u/s 457, Indian Penal Code. The prosecution case is that the petitioner committed lurking house trespass by night in order to commit theft in the house of Gopal s/o Kajodji and he was convicted by the trial Court and sentenced to suffer rigorous imprisonment for one year, while two other accused Prakash and Ghanshyam have been acquitted. On appeal the sentence has been reduced to six months rigorous imprisonment by the Additional Sessions Judge, Neemuch. He has come in revision before this Court against that judgment.

Apart from other grounds, the petitioner has urged that he was of 19 years age at the time of commission of the offence and should have been given the benefit of Probation of Offenders Act. The appellate Court wrongly rejected his prayer for being released on probation, for which he had placed sufficient material on record.

In order to bring home the charge the prosecution is required to prove that the accused committed lurking house trespass, that the same was committed after

sun-set and before sun-rise and the same was committed. In order to commit an offence, in the instant case, the petitioner is charged to have committed theft.

Learned counsel for the petitioner contends that the prosecution has failed to bring home the charge to the accused. His submission is that the witnesses are interested and at the same time inimical towards the accused. Going through the statements of Gopal (P.W. 1), and Shyamabai (P.W. 2) who are husband and wife, it is clear that there is enmity. However, that would not be sufficient to reject their testimony as a whole, which calls for closure scrutiny of their statements.

The first question which arises for consideration is whether the accused committed lurking house trespass by night? Gopal in his statement says that he had seen the petitioner climbing. However, he thought that he should not shout till he actually entered the house and he did shout CHOR AAA GAYA. The petitioner immediately got down and ran away. Shyamabai (P.W. 2) in her examination-in-chief merely says that her husband had seen someone coming up. The same intruder unbolted the door after coming down. Gopal (P.W. 1) does not say so. Both these witnesses do not say a word with regard to commission of any offence by the accused-petitioner. The other witness, Mangilal (P.W. 3) says that he saw the petitioner and the complainant Gopal quarrelling. The other two witnesses, Geetabai (P. W. 8) and Nathu (P.W. 9) have turned hostile.

The charge against the petitioner is that he committed lurking house trespass by night with an intention to commit theft. But, there is absolutely no evidence to suggest that the petitioner intended to commit theft. The appellate Court has sought support from the testimony of Mangilal (P.W. 3), Bansilal (P.W. 5) and Bhawanilal (P.W. 6). Mangilal (P.W. 3) does not say that he saw the accused-petitioner climbing or entering the house of Gopal. All that he says is that both of them were seen quarrelling. The same is the case with Bansilal (P.W. 5). He had also seen the petitioner and Gopal quarrelling, although it has come in his statement that Gopal told him that the petitioner had entered his house. But this fact is again missing from Gopal's statement before the Court. Similar is the statement of Bhawanilal (P.W. 6). None of these witnesses claimed to have seen the petitioner committing lurking house-trespass by night.

Ordinarily, this Court in its revisional jurisdiction does not reappraise evidence, but when there is miscarriage of justice, as in this case, the same is required to be done.

Both the Courts below have missed the essential ingredients of the offence charged. The fact that house-trespass is committed by night, by itself does not make it an offence of lurking house-trespass, which postulates taking of precaution to conceal such house-trespass. The trial Court as well as the Additional Sessions Judge have failed to advert to this very essential ingredient of the offence of lurking house-trespass. There is an iota of evidence to suggest that the accused had taken any precaution to conceal himself while committing

the offence. In order to constitute a lurking house-trespass the accused must take some active means to conceal his presence from someone who has a right to exclude him. A lurking house-trespass by night must have been committed in order to the committing any offence, punishable with imprisonment. There must be an intention on the part of the accused to commit an offence, punishable with imprisonment and this being an essential ingredient of the offence charged, there ought to have been an express finding on this point, which is regrettably missing from the judgment of both the Courts below. In this case, the accused is charged with the intent of committing "theft" but there is no finding to that effect. The complainant in his statement pleads ignorance about the intent. Thus, the offence charged is not at all made out. Both the Courts below have omitted to consider these essential ingredients of the offence.

Now, coming to the question, what offence can the petitioner be said to have committed, even if the charge levelled against him fails. In order that a person may be found guilty of an offence of house-trespass, he must be found to have actually entered into or upon the property and that too with intent to intimidate, insult or annoy. As stated above, the evidence in this case is extremely conflicting and shaky. The prosecution witnesses speak about grappling or quarrelling between the petitioner and the complainant, who is not consistent in his statement and not corroborated by any independent reliable evidence. It is significant to note here that the trial Court has observed that Gopal (P.W. 1) and Shyamabai (P.W. 2) are interested witnesses, as such need corroboration. In absence of such corroboration from independent reliable quarter, even offence u/s 448, Indian Penal Code cannot be held to have been made out against the accused-petitioner. On this total evidence it is not possible to conclude that the prosecution has established the charge. The Courts below have palpably erred in interpreting section 457, Indian Penal Code.

But before parting with the case, there is yet another important aspect of the matter, which also requires to be dealt with. The petitioner had submitted his School Certificate for determination of his age, so as to avail of the benefit of Probation, but the learned Additional Sessions Judge very perfunctorily dealt with the same in a very slipshod manner. This is not the way to deal with a very benevolent provision of law of "Probation". The approach hardly commends the learned Additional Sessions Judge, who without making any endeavour to verify the age as given in the Certificate, rejected the same. If the law of Probation is to be given its fullest meaningful effect, as it ought to be, it is necessary that a sincere attempt be made in determining the age and if necessary even evidence can and should be recorded. A mistyped figure in the appeal-memo should be taken for granted as the age of the appellant and the School Leaving Certificate be rejected for want of proper evidence. An endeavour should be made to ascertain the age, whenever the question is raised, because it is not mere privilege of a benefit to the accused-petitioner, but a duty cast on the Court and this Court is constrained to observe that the learned Additional Sessions Judge has failed in his duty.

It is to be realised that the Magistrates and the appellate Courts have to play a pivotal role in implementing intelligently and compassionately with all its comprehension the law of Probation, which has cast and created new responsibilities and new areas of decision making. "Probation" has become a part of the main-stream of our legal system. It is an integral part of administering justice to the offenders. Orthodoxy and ignorance no doubt die hard, but it is expected of every Court to be alive to this new law while dealing with the criminals.

This revision petition succeeds and is accordingly allowed. The judgment and order of his conviction and sentence is set aside and the petitioner is acquitted of the offence charged. His bail-bonds are cancelled.