

(2010) 06 BOM CK 0148
In the Bombay High Court
Case No : Criminal Appeal No. 203 of 2009

Subhash Sahebrao Datkar	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 25-06-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 354, 376, 452, 453

Citation : (2011) CriLJ 736 : (2011) 8 RCR(Criminal) 577

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : N.S. Bhat, for the Appellant; C.N. Adgokar, Assistant Public Prosecutor, for the Respondent

Judgement

A.H. Joshi, J.—Heard learned Adv. Mr. N.S. Bhat (appointed) for the Appellant and learned APP Mr. C.N. Adgokar for the Respondent. Perused the record.

2. Appellant was charged for offences punishable under Sections 452, 354 and 376 of Indian Penal Code for entering the house of PW 1 - Smt. Kalabai Ramroop Upadhyia in the night, outraging her modesty and attempt to rape.

3. Charge of commission of offence is based on testimony of PW 1 - Smt. Kalabai R. Upadhyia. Testimonies of other witnesses are insignificant.

4. According to version of PW 1 - Kalabai:

(a) The accused entered her house by opening the chain.

(b) He sat on her person and attempted to rape, though could not complete his act.

5. The version of PW 1 - Kalabai reads as follows:

2. The incident took place about 2 1/2 years back. On that night, at about 10 p.m. after dinner, I slept in inner room i.e., kitchen and my two sons slept in the outer Courtyard of house. I closed the door of the house. On that night at about

2 a.m. a person by name Subhash Datkar, to whom I know, entered in the house by opening the door of my house-by removing the chain of the door. He sat on my chest and pressed my breasts. He gagged my mouth by one hand. He then tried to remove my underwear. I raised hue and cry.

3. ... If I would not have resisted, accused would have committed rape on me.

(Quoted from page Nos. 21 and 22 of the appeal paper-book. Underlining is done to highlight important and relevant portion).

6. PW 4 - Yogesh Upadhay does not reveal anything as to how the accused broke open the door, rather confirms that when he entered the house, door was open and he has seen the accused sitting on the chest of PW 1 -Kalabai.

7. Defence tried to impeach the testimony of PW 1 -Kalabai, suggesting that she was doing business of illicit liquor and due to enmity, PW 1 - Kalabai had lodged a false complaint against the accused. Beyond two suggestions to PW 1 - Kalabai and other witnesses, the defence could not elicit anything important. In the result, the testimony of PW 1 - Kalabai. has remained unshattered.

8. The Appellant was convicted for offences under Sections 452 and 354 of Indian Penal Code and acquitted of the charge u/s 376 of Indian Penal Code.

9. The conviction in relation to offence u/s 354, Indian Penal Code, is seen to be unassailable.

10. The point pressed with emphasis challenging the conviction for offence u/s 452, Indian Penal Code, is that while trespass is apparently proved, "preparation to commit an offence", such as causing hurt and any equipments for breaking open the door etc., is not proved. It is urged that "preparation" is the genesis of offence u/s 452 of Indian Penal Code.

11. All that PW 1 - Kalabai has said is that "Subhash Datkar entered in the house by opening the door of my house by removing the chain of the door."

No details have come on record as to what PW 1 -Kalabai meant by "removing the chain." It is not suggested, muchless proved, that any devices or equipments, such as hex saw ,player, puller, hammer or any other house breaking device was used, found or discovered.

12. What seems to be most imminent is that the accused had simply unlatched the chain by pushing the fingers, palm or even the arm inside the door or in some other fashion, but certainly without any device or equipment.

13. In absence of it being proved that any device as a metal rod, crow bar or even a stick was used by the accused due to which it could be described as "preparation for commission of offence," it appears to be impossible to hold that there exists adequate material even to frame the charge for offence u/s 452 of Indian Penal Code.

14. A bare trespass in absence of preparation for commission of offence u/s 452

of Indian Penal Code stands on a lower pedestal. The offence u/s 452 of Indian Penal Code, i.e., house breaking with preparation to commit offence is a graver offence, bare house trespass without preparation is certainly of less gravity.

15. The description of offence emerging from the witnesses apparently falls in the bracket of lesser offence and no particulars classifying the offence in the bracket of offence u/s 452 are coming forward. It is, therefore, hard to believe that the offence u/s 452, in absence of positive evidence of preparation, was committed by the accused.

16. As a necessary corollary, the offence, subject-matter, would fall within the compass of Section 453 of Indian Penal Code.

17. In the result, appeal is partly allowed and the conviction and sentence ordered, to the accused-Appellant for offence u/s 452 of Indian Penal Code is altered to the lesser charge of Section 453 of Indian Penal Code.

18. Considering that the sentence provided for the offence u/s 453 of Indian Penal Code being up to only two years, and the sentence for offence u/s 453, Indian Penal Code, being already undergone the accused is entitled to be released forth with.

19. The Appellant-accused be released forthwith unless required in any other offence.