
(2009) 03 BOM CK 0088

Bombay High Court (Goa Bench)

Case No: Criminal Appeal No. 17 of 2007

Mr. Werner Wulf Ingo

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision: March 16, 2009

Acts Referred:

Penal Code, 1860 (IPC) " Section 120B, 361, 363, 367, 377

Citation: (2009) 03 BOM CK 0088

Hon'ble Judges: N.A. Britto, J

Bench: Single Bench

Advocate: M. Amonkar, for the Appellant; C.A. Ferreira, Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

N.A. Britto, J.

The Orphanage known as ""Gurukul Orphamily"" run by Dr. Freddy A. Peats at Fatorda, Margao, in a two bedroom flat,

came to be raided on 13th March, 1991, pursuant to a complaint of the same date, filed by S. R.Vardaraj/PW7. The investigations carried out into

the affairs of the said Orphanage, inter alia, gave rise to Sessions Case No. 24/1992 in which the accused the said Freddy Peats was sentenced to

undergo life imprisonment, which sentence was confirmed by a Division Bench of this Court by Judgment dated 2-4-1998 in Criminal Appeal No.

4 of 1996.

2. The case of the accused is one of denial simpliciter. The accused stated that he was falsely implicated in the case.

3. In support of the charge, the prosecution examined 15 witnesses. The accused examined none as according to him, he was unable to procure

defence witnesses on account of lack of communication. The accused declined to have any lawyer appear for him and further chose to conduct his

own case. These facts are recorded by the learned trial Court in para 7 of the Judgment.

4. Further investigations carried out by C.B.I. as regards the affairs of the said orphanage in the light of directions given by this Court in Writ

Petition No. 170 of 1995, gave rise to Sessions Case Nos. 12 of 1999 and 53 of 2000. The first case pertained to the said accused Freddy Peats

and the second case pertained to accused E. C. Macbride @ Ovens in which they were convicted. Both filed appeals before this Court i.e.

Criminal Appeal No. 44 of 2002 was filed by the said Freddy Peats and Criminal Appeal No. 38 of 2003 was filed by the said E. C. Macbride

and both the said appeals were disposed of by a learned Single Judge of this Court on 14-8-2003.

5. The appellant herein was accused No. 2 in the said Sessions Case Nos. 12 of 1999 and 53 of 2000. The appellant who was absconding was

extradited on or about 5-8-2005 and was remanded to judicial custody on the same date and his case was committed to the Court of Sessions by

Order dated 2-9-2005 of the learned C.J.M., Margao. The accused was charged with the allegation that between December, 1987 to January,

1990 at Fatorda, Margao, the accused entered into a conspiracy with Freddy Peats, Raymond A. Warlay, Nills Oscar Johnson to take Edward

da Costa and Vithoba Patil from his lawful guardianship and without his consent and subject them to unnatural lust, carnal intercourse with them,

against the order of nature and therefore committed offences punishable under Sections 363, 367, 377 r/w 120-B I.P.C. 6. In the present appeal

the appellant(herein after accused, for short) challenges his conviction and sentence imposed upon him by the learned Sessions Judge, Margao by

Judgment/Order dated 3/7th March, 2007 in Sessions Case No. 23/2005.

4. At the hearing of the present appeal, Shri M. Amonkar, learned Counsel appearing on behalf of the accused, has referred to the evidence of

only three witnesses, as according to the learned Counsel, the entire case of the prosecution rests on the evidence given by them. The said

witnesses are Marvin/PW1 and his brother Edward @ Vijay/PW6 and Vitoba/PW8. Learned Counsel has further submitted that the accused

ought to have been acquitted for the offence of kidnapping as there is no evidence in that regard. He further submits that there are contradictions in

the evidence of the witness Vitoba/PW8 on vital points of the case of the prosecution and as such the evidence that the accused committed

unnatural offences could not have been accepted by the learned trial Court. Learned Counsel on behalf of the accused concedes that the said

contradictions were not proved by the defence but submits that that was because the accused was conducting his own case. Learned Counsel

further submits that there was no material evidence produced by the prosecution to corroborate the evidence given by the witnesses.

5. Shri C. A. Ferreira, learned Public Prosecutor, on the other hand, submits that the offence of kidnapping is complete when a minor is taken or

enticed from the guardianship and assuming for a moment that the said Freddy Peats was the guardian of the boys, and not their mother whose

permission was also not taken, the fact remains that Edward/PW6 was being taken without the consent of the said Freddy Peats and/or the mother

of the said Edward. Referring to Section 367 I.P.C., learned Public Prosecutor, submits, that the essence of the offence under the said Section is

kidnapping or abducting in order that such person be subjected to unnatural lust of any person. Shri Ferreira further submits that the accused has

not given any explanation as to why he took the said minor boys to the hotels and stayed with them and in case nothing had happened at the said

hotels it would be a fairy tale to be believed. Learned Public Prosecutor further submits that it is the accused who out of choice and not for any

other reason, chose to defend his own case and therefore cannot take benefit of the fact that the contradiction remained without being proved. Shri

Ferreira has placed reliance on the decisions reported in The State Vs. Sulekh Chand, , S. Varadarajan Vs. State of Madras, and State of

Haryana Vs. Raja Ram, .

6. The learned trial Court on the basis of the evidence of Edward/PW6 @ Vijay D"Costa and Vithoba Patil/PW8 has come to the conclusion that

both of them were taken from the orphanage without the consent of their lawful guardian, as alleged by the prosecution. True, Marwin

D"Costa/PW1 has stated that the foreigners were choosing the boys to be taken out from the orphanage and for that permission of Mr. Freddy

Peats was taken whenever the said boys were taken out some time or for a couple of days. He has also stated that his brother was being taken out

by the present accused with the permission of the said Freddy Peats. However, the evidence of Edward/PW6 shows that he used to go along with

the accused on his own as he was knowing the accused and was not taking permission of the said Freddy Peats for going out with the accused. He

further stated that the said Freddy Peats was not allowing him to go out with the accused and he went out with the accused and stayed in Hotel

Rayan during the night time. Likewise, Vithoba Patil/PW8 also stated that he had gone out with the foreigners while he was in the orphanage at the

instance of the foreigners and had stayed with them during the night time and was taken by the accused on two occasions to Hotel Metropole

where he had stayed with the accused during night time. The evidence of the aforesaid two witnesses clearly shows that the said two boys, namely

Edward/PW6 as well as Vithoba/PW8 were being taken without the permission of the said Freddy Peats assuming for a moment that the said

boys were kept under his guardianship. In The State Vs. Sulekh Chand, it has been stated that the offence of kidnapping u/s 363 consists solely of

taking a minor from the keeping of her lawful guardian, and no intention needs to be established. Section 366 applies whether the offence is

kidnapping or abduction, and the additional ingredient being required that such kidnapping or abduction is with the object of marriage or seduction.

In *S. Varadarajan Vs. State of Madras*, the Apex Court has stated that even where the minor girl is kept by her father at the house of her relative,

she still continues to be in the lawful guardianship of the former. It is further held that taking or enticing away a minor out of the keeping of a lawful

guardian is an essential ingredient of the offence of kidnapping. In that case the Apex Court noted that although the said Savitri was left by S.

Natrajan, she still continued to be in the lawful keeping of the former. In *State of Haryana Vs. Raja Ram*, the Apex Court with reference to the

expression ""takes or entices any minor...out of the keeping of the lawful guardian of such minor"" observed that the object of the Section was to

protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or

custody of their minor wards and the gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this Section, out of

the keeping of the lawful guardian without the consent of such guardian. The said Edward/PW6 was about 9 to 10 years of age at the time when

he was taken out by the accused whilst Vithoba/PW8 was 8 to 9 years of age and therefore below the prescribed age by Section 361 I.P.C. It is

nobody's case that permission to take the said boys out of the orphanage was taken either from their parents who had kept them with the said

Freddy Peats or Freddy Peats himself and therefore the offence of Section 361/363 was completed and therefore the contention of the accused

that there was no evidence to convict the accused u/s 363 needs to be rejected. Section 367 I.P.C. deals with kidnapping or abduction of a

person in order that such person may be subjected, or may be so disposed of as to be put in danger being subject to grievous hurt or slavery or to

the natural lust of any person, etc. and Section 377 I.P.C. deals with unnatural offences i.e. having carnal intercourse with any men or women or

animal.

7. Reverting to the facts of the case, it may be stated that Marwin/PW1 stated that he had two more brothers by name Edward/PW6 and Daniel

and all three of them were first sent to the Colva Orphanage of the said Freddy Peats and thereafter shifted to Fatorda. According to him at

Fatorda there were about 20 boys including himself and the age group varied from 1 year to 22 years and the said orphanage was managed by the

said Freddy Peats. He stated that some children were occupying one bedroom and some were occupying another bedroom along with the

accused. The said Freddy Peats used to be naked during the night time. He stated that the said Freddy Peats used to engage them in some petty

work for which they were paid. Some foreigners used to visit the orphanage and the said Freddy Peats used to take the photographs of the boys

from the orphanage in naked condition. According to him, the accused also used to visit the orphanage and the foreigners took the boys out for

some time or for a couple of days and stayed with them. Referring to accused Neil Johnson he stated that he was taken by him with the permission

of said Freddy Peats and he was taken to a hotel at Colva and stayed with him for about a month or two or so and the said foreigners were giving

them clothes and money and only Freddy Peats made him to sleep with him naked and also to masturbate and that the other boys whilst they were

discussing to solve their problems he used to say that they were abused by different foreigners in the hotels. He further stated that the accused in

this case was fond of his brother Edward @ Vijay and his brother was being taken out by the accused with the permission of Freddy Peats and

they used to stay out of the orphanage in a hotel. He also stated that the accused Neil Johnson had told him that he would take him abroad in case

he desired. He further stated that after they were taken back from the orphanage the accused visited them at Mapusa at their residence and

desired to help his brother and wanted to take him to Australia. He also stated that accused had sent money to them through the Bank and that

was after the said Freddy Peats was arrested. In cross-examination he stated that the accused had come with one more friend by name Owen who

used to speak to Freddy Peats. In further cross-examination he stated that Freddy Peats used to close the flat at 10.00 p.m. and that any visitor

who came thereafter had to sleep on the terrace of the building and some orphan boys used to sleep on the terrace. He admitted that he slept on

the terrace on many occasions. He conceded that his relations with Edward was not very close and though he was his brother. In further cross-

examination he stated that the accused came for the last time in Goa in the year 1993 and he and his brother went to the airport at Dabolim. He

stated that his mother was aware that the trial was going on in the Court against foreigners regarding child abuse. He further stated that CBI

Officers were visiting their place for the purpose of identification of foreigners involved in the case. He also stated that they informed the accused

about the pendency of the Criminal Case and advised the accused to go back to Australia.

8. Alex Faleiro/PW2, inter alia, stated that Freddy Peats used to sleep naked in the room and that the accused in this case also used to come to

the said orphanage and used to talk to Freddy Peats, and he was in the orphanage till Freddy Peats was arrested.

9. Helen Ticlo/PW5 stated that he owned hotel "Viliana" situated at Mapusa and further stated that they get local as well as foreign customers. He

produced the register pertaining to the period from 15-3-1992 to 31-3-1994 and stated that against entry at serial No. 1062 dated 21-3-1993 the

name of the present accused, an Australian national, was recorded. He also stated that he had seen small boys with the accused in the restaurant

and further stated that the accused used to visit the said restaurant during his stay in the hotel. Further he stated that he did not know whether the

accused had taken the said boys to his room No. 207.

9. Edward @ Vijay D"Costa/PW6 also stated that Marwin/PW1 was his elder brother and Daniel was his younger brother and as his father was

drinking and his financial condition was poor in the year 1983 his elder brother was sent to the orphanage of Freddy Peats and subsequently they

too were put in the said orphanage. He stated that the orphanage at Fatorda was a two bedroom flat and Freddy Peats was moving naked in the

flat and that Freddy Peats was residing in the room at night time along with some boys of the orphanage. He stated that the boys who used to be

taken inside the room used to tell them that Freddy Peats was doing silly things with them i.e. abusing them sexually and those boys were in the age

group of 7 to 8 years. He stated that many foreigners were visiting the said orphanage and that the said foreigners used to send some parcels such

as clothes and toys to them through the said Freddy Peats and some foreigners were taking the boys from the orphanage outside the orphanage

with permission of Freddy Peats and some times the boys used to remain outside the orphanage along with the said foreigners during night time. He

stated that he knew hotel "Rayan" at Margao and also hotel "Viliana" at Mapusa which belonged to Ticlo/PW5. He stated the names of the

foreigners who used to visit the orphanage such as Neil Johnson, Raymond, Owen including the accused. He stated that he used to come outside

the orphanage along with the accused on his own as he was knowing him but was not taking permission of Freddy Peats for going out with the

accused and that he went to Hotel Rayan 5 or 6 times and stayed in the said hotel once in the night time. However, he stated that on that night

nothing happened. He stated that in the year 1993 when they were in Goa their financial condition was very bad and at that point of time the

accused helped them financially, and accordingly the accused provided them with financial help. He admitted having visited hotel Viliana at Mapusa

but stated that he did not stay in the said hotel. This witness was cross-examined by the prosecution and in the cross-examination he admitted that

Freddy Peats had taken his nude photographs when he was small and had also injected something in his testicles by giving him Rs. 5/-. He also

stated that when he was young he had gone with the accused and at that time he was about 9 to 10 years of age. He stated that it was the mother

who was acting as his guardian and once he had told his mother that he would be going out with the accused as he was helping her. He admitted

that an amount of Rs. 50,000/- was sent by the accused to him through Overseas Bank out of which he withdrew Rs. 25,000/-. In further cross-

examination he denied having stated before the Australian Consulate at Dubai that the accused had taken him to hotel Rayan with the consent and

knowledge of Freddy Peats for sexual abuse and used to sodomize him on numerous periods from 1987 to 1990. He also admitted that the

accused had paid him a lot of money and he was indebted to him. He denied that he had deposed falsely and in favour of the accused had obliged

them by sending money. As regards Vithoba/PW8 he stated that he did not know whether he was friendly with the accused or whether

Vithoba/PW8 had gone out with the accused at any time. Edward/PW6, inter alia, denied having stated to the Police that the accused used to

make him naked and also become himself naked and fondle different parts of his body including his genitalia and that the accused used to lubricate

and penetrate his penis in his anus, etc.

10. Vithoba/PW8 stated that he was about 8 to 9 years of age when he went in the orphanage of Freddy Peats in the year 1988. He stated that in

the orphanage there were boys who were of 4 years old and 10 to 12 years and he was sent there because of the poverty. He stated that normally

Freddy Peats used to move in the flat in naked condition and wear clothes only in case when visitors came and during night time Freddy Peats

used to take 3 to 4 boys in his bedroom and used to ask them to masturbate and Freddy Peats used to give preference only to some selected

boys, namely Franky, Joaquim, Peres, Marwin, Vijay and some others whose names he did not remember. He stated that Freddy Peats used to

take photographs of the boys in naked condition. He stated that some foreigners used to visit Freddy Peats and their names were Neil from

Sweden, Raymond from Thailand, Yogi from Germany, Oven from New Zealand, Ingo from Australia and one Domnic Savit from France. He

identified the accused before the Court as the said Ingo and further stated that the said foreigners used to select the boys whom they liked from the

orphanage and were taking them outside the orphanage and bringing them back after one or two days and those boys on their return used to tell

them that they were being sexually abused by them by making them to masturbate, etc. He stated that he had gone with the foreigners while he was

in the said orphanage and mostly he was taken to some hotels at Colva and also to Margao and he stayed with those foreigners during night time

and they made him to masturbate. He stated that he was taken by the accused near Metropole Hotel while he was staying in the said orphanage

and on both the occasions he stayed with the accused at night time and on the next day morning the accused dropped him in the orphanage. He

stated that on the first occasion the accused asked him to masturbate him and also tried to have anal intercourse with him and on the second

occasion the accused asked him only to masturbate and as per the request the accused paid him Rs. 20/- or Rs. 25/-. He stated that the other

boys named Marwin and Edward also used to tell them that the accused did the same thing as was done to him and the said Marwin and Edward

had gone with him several times, and, apart from the accused, he had gone out of the orphanage with other foreigners and stayed with them during

night time and he was paid. He stated that Oven used to like him more and had promised him to take him to New Zealand. He further stated that

several photographs of orphan boys in naked condition were attached by the Police at the time of the raid. In cross-examination he stated that he

had met the accused for the first time in the year 1989 in a Hotel near Metropole theatre at Margao where he had gone alongwith Edward @

Vijay/PW6. He stated that he knew the accused from the year 1989 and further stated that Edward @ Vijay/PW6 was close to the accused. He

stated that he did not have intimate relations with the accused. He stated that he did not know why the accused gave him money when he did not

pay a single paisa to Vijay @ Edward. He stated that he had spent lot of time with Domnic Sabir who had sexual relations with him and the said

Oven had also sexual relations with him. In further cross-examination he stated that he did not remember whether he had stated before the CBI

that the accused Ingo had taken him near Metropole Hotel. The witness was confronted with his statement recorded by the CBI where no such

statement was made by him. By way of explanation he stated that he had not so stated because he was not asked about it. In further cross-

examination he stated that he did not remember whether he had stated before the CBI that the accused tried to have anal intercourse with him. The

witness was confronted with his statement before the CBI wherein no such statement was recorded. In further cross-examination he stated that he

did not remember whether he had stated before the CBI on the second occasion the accused asked him to masturbate him before the CBI where

no such statement was made. In further cross-examination he stated that he did not remember whether the penis of the accused was circumcised.

He was asked as to how he did not remember that the penis of the accused was circumcised or not when he had given all other details and he

answered by stating that he remembered the main points and minute details have been forgotten by him over the passage of time. In further cross-

examination he admitted that his relations with the accused was of friendship and sexual intimacy but he did not have any complaints against the

accused as of now since he did not have contact with him. He further stated that he was introduced to the accused, taken to him and the accused

had subjected him to sexual abuse which he described on oath against him. He denied the suggestion that he did not know the accused at all.

11. The learned trial Court referring to certain improvements made by Vithoba/PW8 observed that the same were not proved as contradictions

through the Investigating Officer, and, in my view no fault can be found with the said finding. If at all the accused was not represented by an

Advocate it was by his own choice and therefore no grievance can be made on that score by submitting that the contradictions could not be

proved because the accused was not represented by the lawyer in the course of cross-examination. The learned trial Court from the overall view

of the evidence produced by the prosecution has come to the conclusion that the prosecution had proved its case beyond reasonable doubt against

the accused. The overall evidence led by the prosecution clearly suggests that the minor boys taken by the accused for the purpose of sexually

abusing them and that is the whole tenor of the case of the prosecution and particularly of Vithoba/PW8. In case, the two brothers, namely

Marwin/PW1 and Edward/PW6 have not supported the case of the prosecution wholly it is because they have received money from the accused

which they have admitted and to prove the same the prosecution had otherwise examined several other witnesses. The overall evidence produced

by the prosecution clearly shows that minor boys were taken by these foreigners from the said orphanage only for abusing them sexually and there

is no other explanation as to why these boys were taken by the said foreigners to stay with them in the hotels and in the night. It is quite probable

that Vithoba/PW8 on account of his young age was not in a position to give all details as regards his sexual abuse which he narrated before the trial

Court and there is no reason why he should falsely implicate the accused. The evidence of Vithoba/PW8 has a ring of truth and is otherwise

convincing and based on the same the accused has been rightly convicted by the learned trial Court. Even otherwise, as stated by the Apex Court

in Esher Singh Vs. State of Andhra Pradesh, even if some statements are made for the first time in Court and not during investigation, it has to be

seen as to what extent they diluted the testimony to bring home the accusations. A mere elaboration cannot be termed as a mere discrepancy.

When the basic features are stated, unless the elaboration is of such nature that it creates a different contour or colour of the evidence, the same

cannot be said to totally changed the complexion of the case. In my view, the improvements made, by Patil/PW8 before the Court do not change

the complexion of his version at all. If other foreigners by name Domnic Shabir and Owen had sexual relations with Patil/PW8, as stated by him,

there is no reason to disbelieve his statements, when he stated that the accused also had such relations with him, as narrated by him in details.

12. In the light of the above, I find there is no merit in this appeal and consequently the same is hereby dismissed.