

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Dist.: MUMBAI

CRIMINAL APPEAL NO. 476 OF 2006

1. Allan John Waters]
Age 53, 24, Cador Drive,]
Portchester, Fareham Hants,]
P.O. 169 EP, United Kingdom]

2. Duncan Alexander Grant]
Age 60, Great South Sea Street,]
Portsmouth, Fareham Hants,]
P.O. 53 BY, United Kingdom]

(Both presently lodged at Nagpur Prison)]

...Appellants
(Ori. Accused No. 2 & 3)

Versus

1. State of Maharashtra]
(Colaba Police Station [C.R.No. 312/2001](#))

2. Maharukh Adenwalla]
R. No. 4/D 1st Floor]
Ismail Building]
381 Dr. D.N. Road]
Mumbai 400 001]

...Respondents

WITH

CRIMINAL APPEAL NO. 603 OF 2006

The State of Maharashtra]

...Appellant
(Ori. Complainant)

Versus

1. William Michael D'souza]	
Age 45 years]	
R/o. Tihur Taluka Murud-Janjira]	
District Raigad]	
2. Allan John Waters]	
Age 53,]	
R/o. Cadour Drive,]	
Portchester, Fareham Hants,]	
P.O. 169 EP, United Kingdom]	
3. Duncan Alexander Grant]	
Age 50 years,]	
R/o. Great South Sea Street,]	
Portsmouth, Fareham Hants,]	
P.O. 53 BY, United Kingdom]	
		...Respondents (Ori. Accused Nos. 1 to 3)

AND

CRIMINAL APPEAL NO. 681 OF 2006

William Michael D'souza]	
Age 45 years]	
R/o. Tihur Taluka Murud-Janjira]	
District Raigad]	
(Presently lodged at Nagpur Prison)]	
		...Appellant (Ori. Accused No. 1)

Versus

State of Maharashtra]	
(Colaba Police Station C.R.No. 312/2001)...Respondents		

IN ALL MATTERS:

[Mr. Taraq Sayed](#) with [Mr. S.V. Kotwal](#) and [Mr. S.S. Bhandari](#) for the Appellants in Criminal Appeal No. 476 of 2006

[Mr. Vijay Nahar](#), Special Public Prosecutor, for the State with [Ms. Maharukh Adenwalla](#) and [Mr. Y. Chaudhary](#) for the Respondents

in Criminal Appeal No. 476 of 2006

Mr. D.S. Mhaispurkar, Additional Public Prosecutor, for the State
in Criminal Appeals No. 476 and 603 of 2006.

CORAM: BILAL NAZKI and
S.A. BOBDE, JJ.

Date of reserving the judgment: 28-2-2008
Date of pronouncing: 23-7-2008

JUDGMENT (Per Bilal Nazki, J.):-

Appeals No. 476 and 681 of 2006 are filed by the accused persons against their convictions, whereas Appeal No. 603 of 2006 is filed by the State for enhancement of the sentence of the accused persons.

2. There were three accused. Two of them faced trial. They were tried for offences under Sections 372, 373, 377, 323 read with Sections 109 and 120-B of the Indian Penal Code. They were also tried under Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000. These cases were filed against the accused persons in unusual circumstances. A Criminal Writ Petition was *suo motu* entertained by the High Court, being Writ Petition No. 585 of 1985. Ms. Maharukh Adenwalla was appointed *amicus curiae* in this Writ

Petition and also in another Criminal Writ Petition. She had also been appointed *amicus curiae* in Criminal Writ Petition No. 1107 of 1996 by this Court.

3. It appears that in the year 1985, a girl had been brought from Gujarat to Mumbai as a maid servant. A news item appeared that this girl was being sexually exploited. The High Court took notice of the matter, and a Writ Petition was entertained, being Writ Petition No. 585 of 1985.

4. In the year 1986, a petition was brought, complaining about the plight of children at various children homes in Maharashtra. This Criminal Writ Petition came to be registered as Writ Petition No. 1107 of 1996. In the same petition, the High Court appointed a Committee, which was named as “the Maharashtra State Monitoring Committee on Juvenile Justice”. Hon'ble Mr. Justice Hosbet Suresh (Retd.) was the Chairman of the Committee. Dr Asha Bajpai and Mrs. Kalindi Muzumdar were its Members. This Committee received complaints from organisations like Saathi Online and C.R.Y. about the mismanagement of Anchorage Shelters, and in the background, the

Committee sought permission of the High Court to visit various Anchorage Shelters, and on the basis of their visits, a report was submitted to the Bombay High Court. The Committee also visited the Anchorage Shelters at Colaba and Cuffe Parade, and ultimately submitted reports before the High Court. These reports were also brought before the trial Court as Exhibits 39 and 40.

5. One Ms. Meher Pestonji telephoned Advocate Ms. Maharukh Adenwalla, informed her that some children residing in shelter homes were sexually exploited by those who were running the same. Ms. Maharukh, on receiving this information, met - at the residence of Meher Pestonji - the boys, who allegedly were sexually assaulted, and ascertained the "truth of Pestonji's allegations". Ms. Maharukh then informed the members of the Maharashtra State Monitoring Committee. The Committee decided that the matter be communicated to the High Court in Criminal Writ Petition No. 585 of 1985. On 18th October, 2001, an affidavit was filed by Ms. Maharukh Adenwalla (Exhibit 30). On 19th October, 2001, the High Court passed an order for the protection of children at Anchorage Shelter Homes. On 21st October, 2001, one Shridhar Nayak telephoned Advocate Adenwalla, and informed her that the order of the Bombay High Court, giving protection to the children,

was being misinterpreted by the police, and, therefore, certain clarifications should be sought from the High Court. The High Court passed an order on 22nd October, 2001.

6. With this background, the Child Line India Foundation filed a complaint with the Cuffe Parade Police Station, and while lodging the complaint, Advocate M. Adenwalla was also present in the police station. In spite of the fact that a complaint had been lodged with the Cuffe Parade Police Station, the police station did not take cognizance of the offence, under the impression that the matter was *sub judice*, and was pending before the High Court. Since the matter was not being looked into by the police, Ms. Maharukh Adenwalla recorded statement of some of the victims of the said child-abuse herself.

7. On 25th October, 2001, the statement of Sonu Thakur was recorded (Exhibit 33). On 26th October, 2001, statement of one Rasul Mohd. Shaikh was recorded (Exhibit 35). On 27th October, 2001, supplementary statements of the boys, whose statements had already been recorded by Ms. Adenwalla, were recorded.

8. After recording these statements, Ms. Maharukh Adenwalla

informed the Members of the Maharashtra State Monitoring Committee, and on 28th October, 2001, Dr. Kalindi Muzumdar and Dr. Asha Bajpai met these boys at the office of India Centre for Human Rights and Law, and endorsed that the statements previously recorded by Ms. Maharukh were correctly recorded. Then the Committee informed the High Court, and also complained that in spite of a complaint having been made at Cuffe Parade Police Station, the police were not pursuing the matter. The High Court, on 7th November, 2001, passed an order, and directed the Police Authorities to take action on the basis of the complaint lodged by the Childline India Foundation. On 11th November, 2001, the Joint Commissioner of Police (Crimes) wrote a letter to the concerned police station to pursue the complaint (Exhibit 52). On 12th November, 2001, Colaba Police Station recorded the statement of one Sonu Raju Thakur. On 13th November, 2001, statement of one Sunil Kadam was recorded by Murud Police station, as the said boy was in the Shelter Home at Murud. On 15th November, 2001, police registered an offence at Colaba Police Station by treating the statement of Sonu Raju Thakur as formal First Information Report, [C.R. No. 312 of 2001](#). After the said offence was registered on 15th November, 2001, the investigation started, and during the course of investigation, some additional statements were recorded. On 20th November, 2001, statement of

Advocate Ms. Maharukh Adenwalla was recorded. Some statements were also got recorded under Section 164 of the Code of Criminal Procedure. These are the background facts in which the case, C.R. No. 312 of 2001, was registered.

9. It was one of the assertions of the learned counsel for the appellants-accused that whatever happened before registering C.R. No.312 of 2001 could not be treated as evidence for the basis of convicting the accused persons. Neither the information, which was collected by Ms. Maharukh, nor the information that was endorsed by a Special Committee, could be treated as evidence, as, at best, this was a hearsay evidence. We will deal with this argument at the appropriate time during the course of this judgment. But the fact of the matter is that [C.R.No. 312 of 2001](#) was registered on 15th November, 2001.

10. Thereafter, the investigation started, and prosecution was launched. Charges were framed. The first charge was under Section 377 of the Indian Penal Code against all the three accused. They were alleged to have entered into a conspiracy and were continuing with criminal conspiracy to obtain possession and charge of young boys under the age of 18 years with intent to use them for

unlawful and immoral purpose at three different places. The second charge was against accused Nos. 2 and 3 to have used a young boy, Sonu Raju Thakur, who was under the age of 18 years for unlawful and immoral purpose, and an offence was committed under Section 373 of the Indian Penal Code. The third charge was also under Section 373. In all, 38 charges were framed, and the charges were mainly under Sections 372, 373, 377, 323 read with Sections 109 and 120-B of the Indian Penal Code and also under Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000. The accused pleaded not guilty, and claimed to be tried.

11. Accused No. 1, William Michael D'souza, was convicted of offence under Section 377 read with Section 109 of I.P.C., and sentenced to suffer rigorous imprisonment for three years. He was also fined Rs.5,000/-, and in default, rigorous imprisonment for one year. He was also convicted under Section 120-B, but was not given any separate sentence. He was also convicted for offence punishable under Section 323 and sentenced to suffer rigorous imprisonment for three months. In default, he has to undergo further imprisonment for 15 days. He is also convicted for offence under Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000, and was sentenced

to suffer rigorous imprisonment for one month. He is also fined Rs.500/- on this count, and in default, he has to undergo rigorous imprisonment for one week.

12. Accused No. 2, Allan John Waters, was also convicted for offence under Section 377 of the Indian Penal Code, and sentenced to suffer rigorous imprisonment for 6 years. He was also convicted for offence under Section 120-B read with Section 377, but no separate sentence was imposed. He was also convicted for offence under Section 373, and sentenced to suffer rigorous imprisonment for three years. Accused No. 3, Duncan Alexander Grant, was convicted for offence under Section 377 and sentenced to suffer rigorous imprisonment for 6 years. He is also convicted for offence under Section 377 read with Section 109 and sentenced to suffer rigorous imprisonment for 6 years. He was also convicted for offence under Section 373 read with Section 109 and sentenced to suffer rigorous imprisonment for three years. He was also convicted under Section 372, and sentenced to suffer rigorous imprisonment for three years. Accused No. 3 was further convicted under Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000, and sentenced to suffer rigorous imprisonment for three months. Compensation was also

ordered to be paid from accused No. 2 and accused No. 3. Substantive sentences were to run concurrently.

13. Two main facets of the case have been argued by the learned counsel appearing for the appellants-accused before us. One of the contentions was that the whole case was built on testimony of P.W. 2, and according to the learned counsel for the appellants-accused, on the basis of such evidence which was at best hearsay evidence, the conviction cannot be sustained, and the second contention of the learned counsel for the appellants-accused was that even if the statements made by the witnesses during trial were to be believed in the manner in which the prosecution wants this Court to believe them, even then, an offence under Section 377 of the Indian Penal Code is not made out.

The learned counsel for the appellants-accused submits that the whole story was built up by the prosecution on the basis of the statements recorded even before registration of case by Ms. Maharukh Adenwalla, who also appeared in Court as a witness as P.W. 2. She had no knowledge of her own, and whatever she stated even before the Court was the knowledge she acquired through some of the alleged victims. Therefore, the testimony of P.W. 2 is not at all admissible in evidence, and, as a matter of fact, it should not be looked

into.

14. On the other hand, the learned Special Public Prosecutor appearing in the case submits that there is sufficient evidence recorded by the trial Court, which would show that the trial Court was right in convicting the accused persons. He submits that if the evidence is believed by the Court, then there would be no confusion whether an offence under Section 377 was made out or not. The first submission raised by the learned counsel for the appellants-accused will have to be considered in the light of the evidence that is produced. It may also be noted that there is no serious contest by the learned Special Public Prosecutor about the contention of the learned counsel for the appellants-accused that P.W.2's evidence was a hearsay evidence. But he only submits that in view of the statements of the victims, whose statements had been recorded by P.W. 2 prior to investigation, these statements assume a corroborative character. In the light of these statements, let us examine the statements of the witnesses.

15. The prosecution, in all, examined 7 witnesses. After the examination of the accused persons under Section 313 of the Code of Criminal Procedure, they also examined two witnesses.

16. P.W. 1, Sunil Suresh Kadam, stated in his statement that he was 20 years' old when the statement was recorded on 20th April, 2005. At the time of making the statement, he was living with his mother in Aeroli. He did not know where his father was residing. He did not know whether he was alive. He had one younger brother and one elder sister. The sister was married. He was an illiterate person. From the age of 12 to 13 years, he started earning for himself by doing some work. He had no shelter, and he used to sleep on foot-path. From year 2000, he started residing with his mother. He was in contact with his brother and sister.

17. It may be noted that when this statement was recorded on 20th April, 2005, after the portion of the statement was recorded in examination-in-chief, which has been referred to hereinabove, the learned Special Public Prosecutor sought an adjournment on the ground that he had yet to study the case, and the adjournment was granted till 27th April, 2005, and the examination-in-chief continued on 27th April, 2005.

18. The witness stated that his father was a shoe-shiner. He was addicted to alcohol, and on this account, there used to be quarrels regularly in his house. He studied up to 2nd or 3rd standard. He was not able to specify the day, date and the year. Up to the age of 8 years, he was residing along with his family, and thereafter, he left the house. His father sold his house. When he left the place, all the members of the family scattered. After leaving the home, he used to work to maintain himself. He used to stay on the pavements near Dhanraj Mahal, which is situate near Gateway of India. He stayed on pavements for about a year. He made friendship with many boys like him, who were also staying on the pavements. He was unable to state the names of those friends. He knew accused No. 1. He also knew Duncan Grant and Allan Waters. Some of his friends told him that Duncan had opened one

shelter home. He was asked to stay in the said shelter home along with other boys. Four to five years before, he went to said shelter home. The name of the home was 'Anchorage Shelter Home.' The home was situated at Colaba. He did not know the name of the building in which this shelter home was situated. However, it was situated on 3rd floor. Duncan used to run the home. The witness knew Allan Waters because he was a friend of Duncan Grant. He had met Allan Waters at the shelter home. He knew that Allan Waters was a resident of London. After every two months, Allan Waters used to come to the shelter home. Allan Waters used to help Duncan in running the shelter home. Accused No. 1 was the General Secretary of the shelter home. He also knew one Ganesh as he also used to work in the said shelter home. It consisted of one big room. There was attached toilet to the said room. There was also one terrace attached to the said room. Forty to fifty boys were staying in the said shelter home. The boys were between the range of 8 to 20 years. There was another shelter home situated at Murud in Alibag District and one at Cuffe Parade. Accused Nos. 3 and 4 were also identified by him. From Gateway of India, there was a launch service to go to Murud. When he shifted to the shelter home, he started working in a motor garage to assist a mechanic. Duncan Grant introduced him to the said garage. He worked for about two months in

the garage, and thereafter, he got admitted himself in a school run by Y.W.C.A. For about a year, he studied in the said school. Thereafter, he started working in the shelter home at Colaba, like preparing tea, etc. The children in the home used to sleep on the floor. They were served good food. Duncan Grant and Allan Waters used to sleep in the shelter home. They both used to sleep on cots. There were two cots in the shelter home. The shelter home also used to provide them cloths. They also used to get pocket money and occasionally gifts from the shelter home. The friends of Duncan Grant regularly used to come to shelter home. Allan Waters used to give them gifts. Duncan Grant's friends were also from London. He stayed in the shelter home up to the year 2001 till the case was filed. He also stayed at the shelter home in Murud on 20 to 25 occasions. William used to look after the management of the shelter home at Murud. Duncan had sex with the witness on many occasions. He used to tell him to hold his penis and also he used to hold the penis of the witness. This act must have taken place on 20 to 25 occasions. This happened at Murud as well as at Colaba. Allan Waters also had sex with him on many occasions. He also used to tell him to hold his penis and he also would hold the penis of the witness. Allan Waters also had sex with him at Colaba Shelter Home and also at Murud. Allan must have had sex with him 10 to 15

times. Duncan Grant and Allan Waters had similar relationship with other boys. Accused Duncan and Allan Waters used to ask for fellatio with the other boys. They both used to do fellatio with the other boys and not the other way round. He had seen this happening with his own eyes. He had seen it with respect to boys named Babu, Kiran, Sai and Dhanraj. He knew Sonu Thakur, Rasul Sheikh, Gopal Srivastava and Kranti Londhe. With these boys also, the accused had sex. These boys also used to stay in the shelter home during the relevant period. When it happened for the first time with him, he was aged about 14 to 15 years. Prior to that, he had no knowledge of sex. When he had it for the first time, he did not like it. Although he did not like it, he stayed in the shelter home because of compulsion. He made a complaint to William about the conduct of Duncan Grant and Allan Waters. Accused No. 1 William used to beat all of them on flimsy grounds. He used to do caning. However, he never had sex with either him or with other boys. When he had made a complaint about Allan and Duncan, he told him not to divulge the said fact to anybody. A police officer from Murud Police Station interrogated him at Murud Shelter Home. 10 to 12 police persons had come to the shelter home. On the day when he was examined by police, he had an injury on his right hand, as William had bitten him. He had taken treatment with respect to the said

injury. With respect to this incident of biting by William, a case had been filed against William. This witness was examined as a witness in the Court, but he did not support the prosecution case at the time of the trial. He did not support the prosecution, because he was frightened. Some boys had threatened him. Since the case was filed, he saw William in the Court, but he never met him. He had no conversation with him. On the date of giving evidence, he was working as a cook, and was working as a waiter also, and was staying at the place where he was cooking.

19. In cross-examination, the witness stated that besides Hindi, he could partly understand Marathi and so also English. His statement was recorded in English. He did not remember the date and year of recording his statement. He could not read and write English. Therefore, he had not read his statement. His statement was read over to him in English, and the same was explained to him in Hindi. The police had recorded his statement correctly. Duncan Grant was from London. The witness stayed for about 4 to 5 years in the shelter home either at Colaba or Murud. Duncan Grant mainly used to stay at the shelter home and Allan Waters regularly used to come. In three shelter homes, around 100 – 150 boys used to stay. At Murud, there

were about 60 to 70 boys and at Colaba, around 30 to 40 boys used to stay, whereas at Cuffe Parade, around 20 to 30 boys used to stay. He did not know whether a person named Ganesh, who was working in the shelter home, was dead or alive. When he had experience of sex for the first time, he made a complaint to Ganesh, who was then working in the shelter home. However, Ganesh did not believe him. He had also complained to William. Besides William and Ganesh, he did not divulge the said fact to any other person. He did not remember as to when he started residing at the shelter home. Ganesh was the Manager, and left the shelter a year or two before the witness left the home. After Ganesh, William became the Manager, but immediately after he started residing at the shelter home, the instances with respect to sex started taking place. During his stay of 4 – 5 years at the home, these instances kept happening regularly. When Murud Police Station officer recorded his statement, he was residing at the shelter home at Murud. When he was examined before the Magistrate's Court with regard to the incident of biting, he had told the Magistrate that he received the injury by way of an accident. He had not made any complaint before any authority about the threats given to him by William and others. He had not stated the said fact before the police in any statement recorded. It was true that as per the directions of the High Court, the statements of

various boys staying in different shelter homes were recorded. He said all the things which he had told on 19th December, 2005 to the police when his statement was recorded. He could not recollect the time gap between two sexual encounters. Accused Duncan Grant and Allan Waters used to have sex with him individually and they did not do it together with him. He was not able to state as to when the last act of sex with him by either accused took place prior to recording of the statement by Murud Police.

Then a question was put to him - Was the last act on the part of accused Nos. 2 and 3 performed with him soon before recording the statement by the police or long before? This question was not allowed by the Court, as the Court thought that this question had already been answered.

The witness stated that it was a fact that whenever they used to commit mistakes, William used to beat them. It did not happen that because he had said on the loudspeaker "Kaun Sharif Hai Kaun Achchha Hai", and, therefore, he was beaten by William. It was not true to suggest that he had lodged a false complaint against William with

respect to the biting incident. The accused used to do the sexual acts during night hours in privacy. He did not remember whether his supplementary statement was recorded by police. He had stated to the police that approximately after every two months, Allan Waters used to come to shelter home. Allan Waters used to help Duncan in running the shelter home. But he could not assign any reason as to why police did not record this statement in his statement. He had also told the police that he worked for about two years in the garage. That day, he wrongly made a statement that he worked for about two months in the garage. In fact, he had worked for two years. He also accepted that he was studying in a school for about 3 – 4 years i.e., YWCA. He had made a mistake while stating that he took education for only one year. He stated in his statement in examination-in-chief that the friends of Duncan Grant regularly used to come to shelter home. Allan Waters used to give the children gifts. The friends of Duncan Grant were also from London. He had also stated this to the police, but he did not know why the police had not recorded this portion of the statement. He had also stated to the police that he had stayed at Murud on 20 to 25 occasions. There is no reference to Murud Shelter Home in his statement to the police, and he could not understand it, although he had stated it to the police.

Another omission from the statement to the police, which was admitted by the witness, was that Allan Waters had sex with him and also Allan Waters had sex with him on about 10 to 15 occasions. He said that he had told it to the police, but police did not record that information.

Another omission, which was accepted, was that accused Duncan Grant and Allan Waters used to ask for fellatio with other boys. Duncan Grant and Allan Waters used to do fellatio with the other boys and not the other way round. He had seen this happening with his own eyes. He had seen this with respect to other boys named Babu, Kiran, Sai and Dhanraj. He knew Sonu Thakur, Rasul Sheikh, Gopal Srivastava, Kranti Londhe. Along with the above-mentioned boys also the same thing had happened and he had witnessed it. Although he told this to the police, but did not give any reason why it was not recorded. According to him, he also told the police, “when I had it for the first time I did not like it. Even though I did not like it I stayed in the shelter home because it was my compulsion.” Again, he did not know why said statement was missing from his police statement. Again, there was an omission, “When I made a complaint to William (about Duncan

and Allan), he told me not to divulge the said fact to anybody failing which he would beat me.” Again, he could not tell as to why said portion was missing from the police statement. It was not true to suggest that Shridhar Nayak and Allan Denning with the help of these boys wanted to take control of shelter home and to drive accused Nos. 2 and 3 out of the shelter home. He also denied the suggestion that Shridhar Nayak and Allan Denning forced or induced them to give a statement against Duncan Grant and Allan Waters. He also denied the suggestion that he had given a false evidence against the accused at the instance of Shridhar Nayak and Allan Denning. He also accepted that, therefore, no medical examination was conducted.

20. Analysing the testimony of this witness, the learned counsel for the accused submits that if the portions, which are missing from his statement made to the police are taken out of his testimony, there remains nothing which can indict the accused persons. Most of the allegations which relate to sexual abuse, which was narrated in the Court by this witness, had not been made at the first instance before the police, and clearly, this was a case where the witness tried to improve upon his statement made to the police. He also contends that he had seen some fight going on with respect to the

management of the home between the accused persons and one Shridhar Nayak and Allan Denning, and this witness was being used for that purpose by Shridhar Nayak and Allan Denning. The learned counsel also submits that when he fought the case against one of the accused for cross-examining injury by biting, he did not support the case during the trial, and, as a matter of fact, it would appear that that case was also filed on instigation by someone, but during the trial, this witness did not support the prosecution. As such, this witness is highly unreliable. He, even in examination-in-chief, made false statements, which is manifestly clear from the examination. He made false statements with regard to his education and his stay at YWCA for about four years. He was not even aware of the approximate time when the last sexual act took place.

21. P.Ws. 2 and 3 would be dealt with after the testimony of P.W. 4.

22. P.W. 4, Kranti Abraham Londhe, another witness, is allegedly a victim of the sexual brutality of the accused persons. This witness was of 18 years, according to him, when he was examined in the Court. He lost his father when he was a child, and after that, he stayed with his

mother, two sisters and a brother. Even during the lifetime of his father, the family was residing on a foot-path near Gateway of India. While they had a house at Jogeshwari, he and his mother used to stay on the pavements near Gateway of India. But then, he stated that the house at Jogeshwari belonged to his elder sister, who was married. His brother was working as a guide, and he was elder to him by many years. Madhu Londhe was his elder brother. He was a rickshaw driver and residing at Goregaon. His another brother, who was working as a guide, was Jagdish who had died. His mother died 10 or 11 years before. When his mother died, he was about 11 years old. He never attended a school. When his mother died, he went to reside at the residence of his elder sister Sanguni at Jogeshwari. For three to four months, he stayed with his sister. Thereafter, he again came back to the pavements near Gateway of India. He used to work as a guide to earn his livelihood. He used to earn around Rs.200/- to Rs.300/- per day as a guide. He knew the accused, and he identified them. He knew William since his childhood. He knew William because William used to come to Gateway of India to work. William used to work as a pimp. William was also known as 'Natwar'. He knew Duncan, since the witness used to stay near Gateway of India along with his mother. He also knew accused Duncan, because he used to come near

Gateway of India, used to collect the boys there and used to talk to them. Duncan used to come to Gateway of India sometimes on bicycle and sometimes on foot. He had conversation with Duncan, and he used to offer him accommodation at Anchorage. The said Anchorage was situate at Colaba. He did not know as to why Duncan was offering him accommodation at Anchorage. When there was offer to stay at Anchorage, he went to stay there. He went to stay at Anchorage after he lost his mother. He was not able to tell, however, when did he go to Anchorage. On the date of giving evidence, he stayed near Gateway of India on the pavements. He could not state as to why and how long he stayed at Anchorage. When he started residing at Anchorage, he met William. William was working as Manager at Anchorage. He did not know the name of the building in which Anchorage was situate. He did not also know the name of the road on which the said building was situate. The said Anchorage was situate on 3rd floor. Thirty to 40 boys used to stay in Anchorage when he was staying there. All the boys were from the age group of 10 to 12 years. After he went to stay at Anchorage, he also met Allan Waters in Anchorage itself. Allan Waters and Duncan used to stay at Anchorage. They used to call Duncan as 'Father'. Anchorage consists of one big room with attached bathroom and a terrace. They were provided food and clothing at Anchorage.

Duncan used to distribute pocket money on every Sunday amongst the boys. Allan Waters used to come from London during his stay at the shelter. Allan Waters came to stay at Anchorage on many occasions. The witness went to stay at Anchorage because he was starving. When he left his sister's house, and started living near Gateway of India on pavements, on many occasions, he had no earnings, and, therefore, he went to stay at Anchorage. He knew Sunil Kadam (P.W.1), Sonu Thakur, Rasul Sheikh and Gopal Srivastava, as they also used to stay at Anchorage. He also knew Pravin, who also stayed at Anchorage. When the witness was staying at Anchorage, he used to work with a garage. Pravin introduced him to the said place. He used to work between 9 a.m. and 6 p.m., and he used to get Rs.10/- or Rs.20/- a day. William used to beat them with a cane during his stay at Anchorage for no reason. He knew where Navy Nagar was situate. It was near R.C. Church. There was one cinema theatre named Defence Theatre near R.C. Church. He had seen movies in the theatre on 4 or 5 occasions. This was during the period he was living at Anchorage. Duncan had permitted him to watch movies. During his stay at Anchorage, he used to work in the garage all along. Duncan used to beat him during his stay at Anchorage. Duncan used to remove all his cloths, and after the witness became naked, he used to beat him. Duncan also used to hold

the head of the witness between his thighs and then used to ask the monitor to beat him by a stick either 6 times at a time or 12 times at a time. In spite of pleading with him not to beat him, they used to beat him. The same treatment was given to the other boys residing in the Anchorage by Duncan. Allan Waters used to have sex with the boys. Allan used to have fellatio with him and the other boys. Allan used to take the penis of the witness in his mouth. He might have done this act with him 30 to 40 times. When he was in Anchorage, Duncan also did the same with him. Duncan did this with him on many occasions. When this was done for the first time with him, he felt bad. He then told the facts to William. Thereafter, William beat him. He was beaten because he told William about the acts done by Duncan and Allan. Anchorage was run by Duncan. Allan and Duncan are friends. Besides Allan and Duncan, many foreigners used to come there. He knew Shridhar Nayak and Allan Denning. Shridhar and Allan Denning used to come there. He did not know any lawyer named Gregory D'Souza, who was also a Notary. He did not know a lawyer named Ajay Kumar Tripathi. Accused William met the witness on many occasions after the case was lodged. He met him last, two months before. He knew Ganesh who was working in Anchorage as a monitor. He was from Tamil Nadu, and he had returned to his native place. Even after the

witness stopped staying in the Anchorage, Ganesh met him. William used to tell him to speak before the Court that Allan and Duncan are good people. Ganesh also used to tell him to say the same thing. Allan and Duncan used to have sex with him sometimes in the bathroom and sometimes on the cot. When these persons used to have sex with him on the cot, the other boys would also be in the room, but they would be sleeping. On two to three occasions, he had also gone to Murud Anchorage. After the case was lodged, he left the Anchorage. On many occasions, Colaba Police interrogated him, and recorded his statements. Police took him to Nagpada Hospital for Ossification Test.

23. In cross-examination by the learned counsel for the accused, he stated that it was not true to suggest that he was addicted to drug when he went and started residing at Anchorage. He also denied that he was beaten because of his drug addiction. On the date of giving evidence, he was not addicted to drugs. He could not even say approximately as to how many years, he stayed around Gateway of India on the pavements. He had never seen police carrying out raids around Gateway of India for arrest of drug addicts. He had seen the officials of Special Juvenile Protection Unit picking up boys. He was never picked up by the unit. He had never stated on how many times

police recorded his statements, but volunteered to say that his statement was recorded on many occasions. The above statements were recorded in the police station. His statement was recorded by one police personnel on more than one occasion. The police used to ask him questions, and he used to answer them. All statements were recorded in the same fashion. When his statement was recorded for the first time, the other boys from the Anchorage were also present in the police station with whom similar instances had taken place. Other boys also stated same version to the police about the incidents. Even in his presence, the other boys also narrated the incidents. He was asked questions in Hindi, and he answered the same in Hindi. Whatever he stated was reduced to writing, but he was not able to say in which language, his answers were recorded. His statements were read over to him in Hindi.

The boys, who were present along with him when his statement was recorded, included Sonu Thakur, Sunil Kadam, Rasul Sheikh and Gopal Srivastava. He was unable to state either the year or the month in which his statement was recorded for the first time. His statement was not recorded by the people according to the directions of the High Court. He did not know whether as per the directions of the High Court, the statements of other boys were also recorded or not. He did not remember as to whether when his first

statement was recorded, he was staying at Anchorage or outside. Rs.20 to Rs.30/- were not sufficient for survival of a boy living on the pavements. Then there are improvements from the statement made to the police, which were pointed out by the learned counsel for the accused. He had not stated the fact to the police at the time of recording his statement that, "I know accused William since my childhood. I know William because he used to come at Gateway of India to work. William used to work as a pimp." "I know accused Duncan because he used to come near Gateway of India and used to collect the boys there and used to talk to the boys. Duncan used to come near Gateway of India sometimes on bicycle and sometimes on foot." These two statements, he submitted, he had not made to the police, because no questions were put to him which could have received these answers. Then the following, "William used to beat us by a cane when I was staying at Anchorage for no reason". He could not give any reason why police did not incorporate this in his statement, although he had stated this before the police. He also did not state facts to the police at the time of recording his statement, the contents of which are marked "A" (Statement of the witness recorded on 15th December, 2001.) He could not say why the police did not incorporate such a statement in his statement. Same was his assertion about the admission recorded at

“B”. He also said that he could not give any reason as to why the police did not record his statement with respect to Duncan, as he stated in his examination-in-chief, “Duncan used to remove all the clothes and by making me naked he used to beat me. Duncan used to hold my head between his thighs and then used to ask the monitor to beat me by a stick either 6 times at a time or 12 times at a time. In spite of my telling them not to beat me, they used to beat me. The same was the treatment given to the other boys residing in the Anchorage by Duncan.” He could not assign any reason why the said statement was missing in his police statement. He did not tell the police, “He might have done this act with me on 30 to 40 occasions”. He could not assign any reason why the police did not incorporate this in his statement. Regarding portions “C” and “D” also, he stated that he could not assign any reason why the police incorporated the same in his police statement, even though he had not stated so. He did not lodge a complaint against either William or Ganesh that they were asking him to depose before the Court that Allan and Duncan were good people. Police recorded his supplementary statements on both the occasions when Allan and Duncan were extradited and brought to Mumbai. He had stated to the police at the time of recording of his supplementary statements that William and Ganesh were asking him to depose wrongly before the

Court; but he could not say any reason as to why it was missing from his supplementary statement. He denied the suggestion that when the statement was recorded on directions of High Court, he had stated that he had no grievance against any of the accused. He was not aware whether Shridhar Nayak and Allan Denning used to come to the shelter to take possession thereof and to run it themselves. He denied the suggestion that he was induced by Shridhar Nayak and Allan Denning to make allegations against Duncan Grant and Allan Waters as Shridhar Nayak and Allan Denning wanted to chase them out of the shelter home. He also denied the suggestion that he was tutored to give false evidence against the accused. It was not true to state that neither Allan Waters nor Duncan Grant ever sexually abused him.

24. P.Ws. 5 and 6 are the police officers who conducted investigations.

P.W. No.5, Ramakant Dagdu Dhole, stated that he was attached to Colaba Police Station since March, 1999. On 12th November, 2001, Advocate Adenwalla brought one Sonu Raju Thakur to the police station. He recorded the statement of said Thakur. On 11th November, 2001, police station had received a letter from the Joint

Commissioner of Police (Crimes). Along with the letter, he had also received copy of an order of the High Court and copy of a complaint made by the Child Line. These documents were exhibited as Exhibit 52 (Colly.). However, the defence took objection for exhibiting these documents, as copies thereof had not been provided to them. After recording the statement of Thakur, he was asked to come again on the next day, so that his age could be verified. Said Thakur did not appear, and the witness tried to locate him at his given address, but he could not find him at the given address. He again contacted Advocate Adenwalla (P.W. 2), and requested her to bring Thakur. Thereafter, on 15th November, 2001, P.W. 2 brought Thakur to police station. She also brought one Rasool Shaikh. He was told that Rasool Shaikh had also a complaint. Therefore, he interrogated Rasool also, and found that he was a minor. The witness sent Thakur and Rasool to Police Hospital for age verification. Orally, he was told by doctors that both of them were minors. Thereafter, he registered a case, being C.R. No. 312 of 2001, under Section 372 of **I.P.C.** and under Sections 23 and 25 of the Juvenile Justice Act against Duncan Grant, Allan Waters and William D'souza. Thereafter, he went to the Anchorage, situate at Colabawala Building. He could not trace any of the accused at that point of time. He identified the affirmer of **F.I.R.** He identified his signature on it.

He also stated that the F.I.R. bears the thumb impression of Thakur. The F.I.R. was exhibited as Exhibit 53. He visited the Anchorage on 17th November, 2001 and again on 18th November, 2001, and came to know that Duncan Grant and Allan waters had left India and reached London. He could not also trace William. He recorded the statements of Thakur and Rasool. He also recorded the statements of Sainath Kale and Raja Bhumiraj. Both of them, according to him, were minors. He again recorded the statement of Rasool after his age was verified. He also recorded the statement of Advocate Adenwalla on 20th November, 2001. He also recorded the statement of Ganesh Rajnagan, who was working as Supervisor at the Anchorage in Colabawala Building. On 23^d November, 2001, Arvind Gawade and William, accused No. 1, came to police station. Therefore, their statements were also recorded. He also received report about the age verification of Sonu Thakur and Rasool Shaikh on 24th November, 2001. He also recorded statement of Gaurishankar Gupta, who was working as driver of William. The witness also recorded statement of one Gopal Srivastav. On the very same day, he received statement of Sunil Kadam by post, as the said statement was recorded at Murud Police Station by Police Inspector Chaudhari. He identified the covering letter written by Inspector Chaudhari, and the same was exhibited as Exhibit 54, subject

to the objection of the defence, which objected on the ground that the statement was produced at a belated stage, and was not provided to the accused along with the charge-sheet. He again tried to locate Sunil Kadam. He could not trace him. From 28th November, 2001 to 5th December, 2001, he was on leave, and during his absence, the investigation was handed over to Police Inspector Rane. On 6th December, 2001, he resumed duty, and took charge of investigation. Rane told him that in his absence, he had moved an application before the Chief Metropolitan Magistrate, seeking permission to record statements of some of the witnesses under Section 164 of Cr.P.C. He produced the witnesses on 7th December, 2001 before the learned Magistrate and statement under Section 164 of Sonu Thakur was recorded on that day and the statement of Srivastav was recorded on 11th December, 2001. On the 11th, he himself also recorded the supplementary statements of Sonu Thakur and Gopal Srivastav, as desired by the witnesses. On 12th December, 2001, he arrested accused William. On 15th December, 2001, he recorded statement of Kranti Londhe. At that point of time, he was a minor. He also recorded supplementary statements of some of the witnesses on 17th December, 2001. Kranti was also sent to the police hospital for age verification on 18th December, 2001, and the witness received the report that he was a

minor. Exhibit 49 was the report. In consultation with the prosecutor, on 28th December, 2001, he included Sections 377 read with Section 34 of I.P.C. also with the other offences. After completing the investigation, the charge-sheet was filed on 3rd January, 2002. He moved the 37th Metropolitan Magistrate's Court seeking non-bailable warrants against accused Duncan Grant and Allan Waters. On 21st February, 2002, non-bailable warrants were issued against both the accused. He handed over the same to the Crime Branch so as to prepare the papers for initiating extradition proceedings against both the accused. On 5th April, 2002, he was transferred from Colaba Police Station to SB-I CID.

25. This witness was put to a long cross-examination, but all that was stated in cross-examination need not be discussed and reproduced. What is required to be noted is that this witness accepted that on 12th November, 2001 when Advocate Adenwalla came to police station, he did not feel it necessary to record her statement, and for the first time, he thought it necessary to record her statement on 20th November, 2001. He did not remember whether Advocate Adenwalla had told him that she had already lodged a report at Cuffe Parade Police Station, and that the said complaint be called from that police station. When he took cognizance of the offence under C.R. No. 312 of

2001, he knew that a complaint had been filed at Cuffe Parade Police station, but he did not feel it necessary to call for that complaint. Even till the filing of the charge-sheet, he did not feel it necessary to call for that complaint.

He came to know that Adenwalla had recorded the detailed statement of Kranti Londhe before coming to police station. However, he did not confront Kranti with respect to that statement. He had not seen the said statement recorded by Advocate Adenwalla. He was not able to say as to what had been told by Kranti Londhe before him was also told by him to Advocate Adenwalla. When he recorded the statement of Adenwalla, he did not request her to produce the statements recorded by her.

When he registered the case, he was not aware about the report filed by the Committee before the High Court. During investigation also, he did not try to collect the copy of report. He investigated the case with respect to offence which had taken place within his jurisdiction. He did not investigate any matter which might have taken place outside the jurisdiction of Colaba Police Station. He also stated in his cross-examination that during the course of investigation, he never visited the shelter homes situated at Cuffe Parade or Murud. He also stated that it was correct to suggest that he had recorded the statements only of boys who had been brought to police station by Adenwalla. He, however, stated that he had visited

the shelter home to find the witness, but he could not locate any eyewitness.

26. The learned counsel for the accused-appellants submits that in all, this witness stated that he recorded the statements of 9 witnesses, viz., Raju, Rasool, Kale, Bhumiraj, Gaurishankar Gupta, Rajnagan, Gopal Srivastav, Kranti Londhe and Advocate Adenwalla. Only Advocate Adenwalla and Kranti Londhe were produced before the Court. The other witness whose testimony has been discussed hereinabove, viz., Sunil Kadam, who was produced before the Court, was not even interrogated by the Investigating Officer. His statement was received by the Investigating Officer from Cuffe Parade Police Station, where his statement had been recorded in connection with another complaint. It is not even known whether any F.I.R. was registered by the Cuffe Parade Police Station. The learned counsel for the accused-appellants further submits that in the absence of any statement having been recorded by this Investigating Officer of Sunil Kadam and any statement having been provided to the defence before trial or before the appeals in the Court, the accused's right got prejudiced, as it was not known to the accused as to what type of the case they would have to face. Therefore, it is submitted that Sunil Kadam's testimony should not be taken into consideration at all for

coming to the conclusions about the guilt or innocence of the accused. It is also pointed out that the Police Inspector, on the basis of the statements recorded of Raju and Rasool, added offences under Section 377 of I.P.C. much later at the instance and advice of the Prosecutor.

27. It is further submitted by the learned counsel for the accused-appellants that it did not appear that the case was investigated by the police, but it was investigated by Advocate Adenwalla. Nothing seemed to have been done by the Investigating Officer, as he himself has stated that he recorded the statements of only those persons as witnesses who were brought to him by Adenwalla. He knew that 40 – 50 persons were staying in the home at a time. Some of them had left the home, and new boys had joined the home. Therefore, there were hundreds who stayed in the home at different times; but the Investigating Officer did not make any effort to locate those persons who had stayed in the home at various points of time. At the time of registration of the case, even according to the prosecution, 40 – 50 boys were staying in the home, but none of the inmates were tried to be approached by the Investigating Officer, and he relied only on the testimony of those who were brought by Adenwalla. The learned counsel for the accused-appellants submits that though the defence has

no reason to question the *bona fides* of P.W.2, Adenwalla, but, all the same, it becomes suspicious as to why the investigation was taken over by P.W. 2, i.e., Adenwalla.

28. P.W.6, Jaywant Pandurang Shelar, was working as Police Inspector in Colaba Police Station from 7th January, 2003. When he joined the police station, the charge-sheet in C.R. No. 312 of 2001 had already been filed, and Allan Waters and Duncan Grant were joined as absconding accused. William had been released on bail. The witness has merely testified to the extradition of accused Allan Waters and Duncan Grant. He brought the accused Allan Waters to India, and thereafter, he recorded supplementary statements of witnesses Kranti Londhe, Rasool Shaikh, Sunil Kadam, Gopal Srivastav and Bably Thakur. After recording supplementary statements, he filed the supplementary charge-sheet. On 22nd April, 2005, he sought permission of the Court to carry out further investigation, and permission was granted. He recorded the statement of Kalindi Muzumdar. He also recorded the supplementary statement of Sonu Thakur. This witness produced xerox copies of two cheques issued by accused William. He included them into the investigation papers. One Smt. Bimla Khas is the

payee of both the cheques. His investigation revealed that Bimal Khas was a friend of Sonu Thakur's mother. His investigation revealed that these cheques were never submitted in the bank for collection. This witness filed a supplementary charge-sheet after recording statements of various witnesses. None of the witnesses are produced in the Court, and, therefore, it would not be necessary for this Court again to go into the cross-examination.

29. P.W.7, Mr. Veersingh Pandharinath Taware, is the Magistrate who recorded the statement of the witnesses under Section 164 of Cr.P.C. A request was made to him on 20th August, 2003 to record the statements of four witnesses, viz., Gopal Nipen Srivastav, Kranti Abraham Londhe, Rasool Mohammed Shaikh and Sunil Suresh Kadam.

30. The statements of P.Ws. 2 and 3 are not important, as both of them did not have any personal knowledge, and whatever they stated was in the form of hearsay.

The background of P.W.2, Mrs. Maharukh Parvez Adenwalla, was that she was a practising advocate, and as a social activist, she used to work with respect to protection of child rights, rights of slum

dwellers. She had interest in woman rights and other social issues. She was also providing legal assistance in cases of child abuse, and was working with the India Centre for Human Rights and Law. In this organisation, she was heading the Child Rights Unit. On 19th August, 1995, the Bombay High Court appointed her as *amicus curiae* in *Suo Motu* Writ Petition No. 585 of 1985. This case pertained to a girl from Gujarat, who had come to Bombay for working for her livelihood, and had started working as a domestic servant. When she was 14 years' old, she was kidnapped and raped. Therefore, the High Court wanted to go into the questions relating to the rights of street children and problems faced by them, and the action being taken by agencies of the State. The witness also stated about the other Writ Petition, which related to the social issues with which she was associated. In Criminal Writ Petition No. 1107 of 1996, the Bombay High Court constituted a Committee to look into the functioning of children's homes in Maharashtra. This Committee was called "The Maharashtra State Monitoring Committee on Juvenile Justice". The Chairman was Hon'ble Mr. Justice H. Suresh, a former Judge of the Bombay High Court. The members included Mrs. Kalindi Muzumdar. The Committee wrote a letter to the learned Chief Justice of this Court seeking permission to

visit three children's institutions in Mumbai, including Anchorage Shelter. The Bombay High Court granted the permission. The witness was an *amicus curiae* in the matter. The Committee visited the Anchorage Shelters at Colaba and Cuffe Parade on 18th August, 200, and submitted the report to the High Court. The information gathered by this witness was on the basis of information given to her by Mrs. Meher Pestonji, who was her friend and who was a freelance journalist. Mrs. Meher, on telephone, told her that some boys from anchorage shelters had visited her and spoken to her about physical and sexual abuses taking place there. Whatever happened thereafter was either at the instance of Mrs. Meher or the witness. They got hold of certain boys, and recorded their statements. Therefore, it is submitted by the learned counsel for the accused-appellants that these statements, which were recorded by this witness or Mrs. Meher, have no evidentiary value.

31. The defence had also suggested that Shridhar Nayak and Allan Dening were interested in running the institution, as the institution was receiving substantial monetary aid from abroad. In this context, the learned counsel for the accused-appellants refers to the statement

made by this witness in her cross-examination when she stated that when she recorded the statements of the boys, she was not aware that the Anchorage was receiving huge funds from abroad, but presently, she was aware of it. She also stated, "on 27th October 2001, Amrish Deshpande was present. It is correct to say that the statements of four victim children were recorded at Rippen Guest House at Bombay Central. I don't remember whether the boys were placed in room No. 101 on the first floor of the guest house. One Allan Dening had booked two rooms in Rippen Guest House. However, I do not remember the room numbers. I don't remember whether both the rooms were on first floor. It is true with Allan Dening, there was another person called Shridhar Nayak. I think Allan Dening is also British citizen. Shridhar Nayak and Allan Dening used to visit anchorage shelter. It is true on 20/10/2001 for the first time I came into contact with Shridhar Nayak, when he telephoned to me. He informed me that the children of the anchorage were not allowed to go to the school because of the High Court's order. Therefore, he was very angry with me. I asked him how was he concerned. Then he told me that he knew some of the boys of anchorage shelter and when they did not come to school that day, he made inquiry and came to know that because of High Court's order, the children were not sent to the school."

The witness also stated:-

“14. It would not be correct to say that both Allan Dening and Shridhar Nayak extended their assistance to me for the accessibility of the victim children and for recording their statements. I met Sonu Thakur, Rasul Shaikh and one other boy at Rippen Guest House on 25/10/2001. On 25th October 2001, I met Gopal Shrivastav at Rippen Guest House. Statement of Sonu was recorded on 25/10/2001. Statement of Rasul Shaikh was recorded on 26/10/2001 although he was present on 25/10/2001. I did not feel it necessary to mention at what place the statements were recorded. I did not feel it necessary to mention duration of the statement, time of commencement and time of its conclusion. I don't remember who took thumb impression of Sonu Thakur on his statement. I am not aware thumb impression of female is taken of right hand and thumb impression of male is taken of left hand. I am aware that if a statement of illiterate person is to be recorded, then after recording his statement, it should be read over and explained to him in the language known to him. Approximately at about 11.00 a.m., the statement of Sonu Thakur was recorded. Sonu Thakur was randomly picked up to record his statement. It took about an hour to record his statement. The statement reflected some serious facts. Thereafter, we recorded the statement of one of the boys whose name I don't remember. I don't remember whether he made serious allegations against Allan Dening. Nobody has made any allegation against Allan Dening. I think on 25th of October, 2001, I recorded the statement of Ravi Jadhav. Ravi Jadhav's statement was recorded in between 12.00 to 1.00 p.m. We did not record statement of Rasul Shaikh on that day. Rasul chose to remain in Rippen Guest House, when we left. The rooms in Rippen Guest House were booked by Allan Dening. We told Rasul Shaikh to make himself available to record his statement on the following day. I do not know who brought other boys on the next day at Rippen Guest House.”

Then, she also stated:-

“When we were recording the statements of boys at Rippen Guest House, Allan Dening and Shridhar Nayak were not in the same room, but they were in the adjoining premises.”

32. P.W.3, Kalindi Suresh Muzumdar, was a Member of the Committee appointed by the High Court, and submitted the report which, according to the learned counsel for the accused-appellants, has no evidentiary value, because it is based on hearsay evidence.

33. We have already analyzed the testimony of P.Ws. 1 and 4, who are the alleged victims, and their testimony assumes much importance. If their testimony is found to be reliable, then the testimony of other witnesses could be relevant for corroborative purposes. While analyzing the testimony of P.Ws 1 to 4, we have already pointed out the discrepancy in their testimony. P.W.1, who did not appear to be a novice, had stated that although one of the accused had sexual relation with him, but he stayed in the home for 4 to 5 years. He was not confined, and during this period, he would go to work. He had even attended the school, and also was doing a job with the garage, but at no point of time during all these years, he complained to anybody, which seems to be unnatural. He studied in the school, which was run by YWCA, for about four years. He also worked in the garage for two

months. The defence also tried to put the defence that somebody else was interested in taking control of the home, and in that context, it may be important to note that when he had an injury on his hand, a case had been registered with the police, and during trial, he had not supported the case of the prosecution, although before the Police, he had maintained that William had bit him, and the case ended in acquittal.

34. In his examination-in-chief, P.W.1 had stated that he had stayed in school for about a year, but in his cross-examination, he accepted that he was in school for 3 to 4 years. Then there are omissions which we have already pointed out while mentioning the statement of P.W.1; and if these omissions are taken out of his statement, then, perhaps, there may not be any evidence to convict the accused on his testimony.

35. Similarly, P.W.4 does not seem to be reliable for the reasons given while analyzing his statement and also for the reasons presently being recorded. As per his own statement, he was working as a guide for tourists, but still, he did not know the name of the building in which he was staying with the accused persons for a long period of time. He did not even remember the name of the road on which the building was

situate. He did not even remember how long he had been staying at the Anchorage. He also stated that Allan used to take the penis of the witness in his mouth, and Allan might have done this act with him 30 - 40 times. Allan also did the same thing with him, but in spite of this, he did not complain to anybody for years together. Therefore, we do not think that the testimony of this witness can also be relied upon for the reasons mentioned above and for other reasons which may be summarised as follows:-

(1) In all, police had examined 9 witnesses who, according to them, were victims. Only two of them were produced, i.e., P.Ws.1 and 4, and even one of them is a witness whose statement was never recorded by the police during the investigation of the present case. His statement had been recorded prior to registration of case in another case by the Cuffe Parade Police Station. Raju, Rasool, Kale, Bhumiraj, Gaurishankar Gupta and Gopal Shrivastav, who, according to the prosecution, were the victims, were not even produced in the Court.

(2) Even during investigation, it appears that the police did not have direct access to these witnesses. These witnesses were brought before the police by P.W.3, and the Investigating Officer had admitted that he could not locate the witnesses and only after approaching

P.W.3, P.W. 3 produced the witnesses before him.

(3) The statements of witnesses were recorded in a guest house, where rooms were booked by Allan Dening about whom the defence has taken the plea that he was interested in taking the control of the Anchorage along with Shridhar Nayak. The latter was also present when statements were recorded. These facts were accepted by P.W.3, and it appears that the real investigation was being conducted by P.W.2 and not by the investigating agency.

(4) It has come in evidence that the Anchorage was situated in a room, which had a terrace and a bathroom. It has also come in evidence that at a time there were 40 – 50 inmates along with the accused. According to the prosecution story, the accused used to sleep on a cot, whereas the children used to sleep on the floor. It becomes highly improbable that in the presence of 40 – 50 children, the accused would have used some of the children sexually, without the knowledge of others. P.Ws. 1 and 4 have stated in their statements that the other inmates of the Anchorage would be sleeping when the accused had sex with the witnesses. This becomes highly improbable because, according to these witnesses, the sexual encounters between the

accused and these witnesses were not occasional, but were continuous. At least anyone of the inmates could be expected to complain or to inform anybody, because all the inmates were leaving the Anchorage in the morning for their work and returning in the evening.

(5) P.Ws. 1 and 4 are the witnesses, who are projected as victims. Both of them were living for number of years in the Anchorage. As we have pointed out earlier, they did not complain to anybody, except P.W.2., after a long time the alleged practice of using them for sexual purposes has been initiated. In the circumstances, when P.Ws. 1 and 4, who had always the liberty of leaving the home at their will, their conduct of not reporting for number of years to anybody becomes suspicious. In this connection, we may rely on a judgment of the Supreme Court in *Gowrishankara Swamigalu v. State of Karnataka and Anr.*, reported in 2008(4) SCALE 389, which was a case under Section 377 of the Code of Criminal Procedure, and the report about the alleged offence was made much after the incident. Paragraph 10 is quoted below:-

“Delay in lodging of a First Information Report although by itself may not be a ground to disbelieve the entire

prosecution case, but each case must be judged on its own facts. If the story of P.W.1 is to be accepted at its face value, the court may not take serious notice of delay in lodging the First Information Report. But, for the said purpose, the entire facts and circumstances of this case must be taken note of. The offence was said to have been repeated for seven days at about the same time. It is wholly unlikely that a student of a school of the Mutt, where compulsory prayer has to be offered on a clean cloth and as apart from two pairs of lungi and two pairs of school uniforms he did not have anything else, had been putting on the same lungi at least for about seven days while visiting the appellant at his call.”

(6) At the first instance, police registered a case under Section 372 of I.P.C., which was changed to one under Section 377, on the instructions of the Public Prosecutor.

36. In the light of the conclusions arrived at by us hereinabove, we are of the view that the prosecution has not been able to prove the guilt of the accused beyond shadow of doubt. The testimony of P.Ws. 1 and 4 is unreliable. Being unreliable cannot form the basis for conviction of the accused.

37. The learned Special Public Prosecutor has relied on *Alamgir v. State (NCT, Delhi)*, AIR 2003 S.C. 282. This judgment needs some

mention, as it was held in this judgment that if a portion of the statement is not found in the statement under Section 161 Cr.P.C., it should not be rejected on that ground alone, if the testimony of the witness is found otherwise credit-worthy. As we have held, P.Ws. 1 and 4's testimony is not credit-worthy. Therefore, this judgment will not help the prosecution. To the same effect is the judgments of the Supreme Court in *Chandrasekhar Sureshchandra Bhatt & Ors. v. State of Maharashtra*, (2000) 10 S.C.C. 582 and *Shyam Sunder v. State of Chhattisgarh*, (2002) 8 S.C.C. 39.

38. The learned Special Public Prosecutor has further drawn our attention to the judgments of the Supreme Court in the cases of *Dharmendrasinh alias Mansing Ratansinh v. State of Gujarat*, (2002) 4 S.C.C. 679, and *State of Punjab v. Gurmit Singh & Ors.*, (1996) 2 S.C.C. 384, to submit that evidence of a victim of sexual assault even in an offence under Section 377 would be relied upon without even corroboration. There is no dispute with this principle. Since this Court has found the testimony of the alleged victims to be unreliable, therefore, the question of corroboration would not arise.

39. Now, coming to another submission of the learned counsel for the accused-appellants that even if the testimony of P.Ws.1 and 4 was believed, even then, an offence under Section 377 was not made out. In view of our finding that the prosecution has not been able to prove the case against the accused-appellants, it might not have been necessary to decide this question, but since it has been argued at length, and it is felt that in the present social structure, complaints in the nature of the present one are becoming too frequent, this Court thinks it necessary to decide this question as well. What was stated by P.Ws.1 and 4 as regards the actual conduct of the accused was that the accused used to take the penis of the witness into his mouth or hand; and one of the witnesses even stated that the accused also made the witness to take his penis in his hand.

40. Now, the question is: Do these allegations constitute an offence under Section 377 of I.P.C.?

Section 377 reads as under:-

“Unnatural offences.--Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

The main ingredients of this offence are:-

- (1) carnal intercourse
- (2) against the order of nature;

and the Explanation adds that penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. Therefore, if Section 377 is read with its Explanation, it would be clear that there should be carnal intercourse against the order of nature with any man, woman or animal, and the offence would not be completed unless there is penetration, because carnal intercourse, without penetration, would not be an offence under Section 377. In our view, carnal intercourse with penetration would mean that this offence can be committed by a man against a man or a woman or an animal if he penetrates an orifice of the victim's body.

41. The following terms need to be understood in the context of ingredients of Section 377 of I.P.C.:-

'Intercourse', 'carnal' and 'penetration'.

In *Butterworth' Medical Dictionary, 2nd Edition*, 'intercourse' is defined as "Coitus, Carnal Intercourse, Sexual Intercourse, Coitus". 'Coitus' is defined as "Sexual union Coitus, Incompletus Coitus".

The Oxford English Dictionary, Volume VII, 1978 Edition, defines 'penetrate' as "to place within, enter within, pierce, to make or find its (or one's) way into the interior of, or right through (something): usually implying force or effort; to pass into or through; to gain entrance or access within (with implication of difficulty of access)." 'Penetrating' means "that pierces, or makes its way into or through something; spec. having the quality of permeating the bodily system." 'Penetration' means "the action, or an act, of penetrating or piercing; the passage of anything into or through a body."

'Carnal' is defined in *The Winston's Simplified Advanced Dictionary, 1983 Edition,* as "pertaining to the body and its appetites; sensual; fleshly."

If the meaning assigned to 'carnal', 'intercourse', and 'penetration' is taken into consideration, then any insertion of the male organ by a person into another person's or animal's body, with an aim of satisfying the sexual lust, would be an offence under Section 377 of [I.P.C.](#)

42. The earliest judgment, which has been shown to us, is a judgment in *Government v. Bapoji Bhatt*, reported in Mysore Law Reports 1884, Vol. VII, 280. While analysing Section 377 of I.P.C., the Court held, “ 'Carnal' of course means fleshly; 'intercourse' in the Latin *intercursus*, signifies literally, a running between; legally the word is used to mean connection. *Rape* in section 375 is defined, as sensual intercourse (or connection) with a woman, under certain specified circumstances. The intercourse here referred to, is intercourse in the order of nature between man and woman. The intercourse referred to in section 377, is carnal connexion between man and man, or man and woman, against the order of nature, or between man or woman and any animal.” The Court was of the view that Section 377 was drafted on the lines of English law at the relevant time related to Sodomy, and it also noted that Section 377 of I.P.C. was, word for word, the same as the form of indictment prescribed by English law for cases of Sodomy. Then the learned Judges held that the term 'penetration' in the Explanation to Section 377 would show clearly that the ingredients of an offence under Section 377 were precisely the same as the offence of sodomy under the English law; and the Court noted that in England, to constitute an offence of sodomy, the act must be in the part where

sodomy is usually committed. Therefore, the Court was of the view that the act should be committed in the part where it is usually committed to constitute an offence under Section 377. That Court's judgment also notes that in England, where a man forced open a child's mouth and put in his private part and completed his lust, that act did not constitute the offence of Sodomy. The law, at that point of time, was settled by an English judgment in *Rex v. Samuel Jacobs*, (1817) Russ & Ry. 331 C C R.

43. Then, there are other judgments, but those judgments appear to have not been followed later by the High Courts in India; and no judgment of the Supreme Court has been shown to us on this question. There are, however, subsequent judgments of Indian High Courts in which the interpretation placed by the Mysore judgment was not agreed to.

44. In this connection, reference can be made to *State of Kerala v. Kundumkara Govindan & Anr.*, 1969 Cri.L.J. 818. This was a case where insertion of penis into the orifice created by hands was considered to constitute an offence under Section 377 of I.P.C.

45. In *Brother John Antony v. The State*, 1992 Cri.L.J. 1352, and *Lohana Vasantlal Devchand & Ors. v. The State*, AIR 1968 Gujarat 252,

oral intercourse was held to be an offence under Section 377. A similar view is taken in *Calvin Francis v. State of Orissa*, VI-1992 (2) Crimes 455.

46. Again, there is a judgment from Lahore High Court, *Khandu v. Emperor*, reported in AIR 1934 Lahore 261, wherein it was held that sexual intercourse per nose with a bullock is an unnatural offence within the meaning of Section 377.

47. A brief resume of above-mentioned judgments would be necessary before we drew our conclusions. In paragraph 18 of Kerala Judgment 1969, Court held: "Even if I am to hold that there was no penetration into the vagina and the sexual acts were committed only between the thighs, I do not think that the respondents can escape conviction under S. 377 of the Penal Code." The counsel for the accused and the Special Public Prosecutor had contended before the Court that sexual act between the thighs was not intercourse; and this argument was based on a submission that for intercourse there must be encirclement of the male organ by the organ visited. Then the Court analyzed in paragraph 19 the meaning of 'intercourse'. Then it also went into the meaning of 'penetration', as given in various dictionaries, and then tried to analyze Section 377.

48. The Kerala High Court went into the circumstances stated in English law. Penetration through the mouth would not amount to the offence of sodomy, but did not discuss the judgments of the English Courts, because it found bound by a Full Bench Judgment of Travancore High Court, *Sirkar v. Gula Mythien Pillai Chaithu Mahomathu*, 1908 T.L.R Vol. XIV Appendix 43; and it was

observed, "My view on the question is also that the words of S. 377 are simple and wide enough to include any carnal intercourse against the order of nature within its ambit. Committing intercourse between the thighs of another is carnal intercourse against the order of nature." With respects, we are not finding ourselves in agreement with this view, and we feel ourselves in agreement with the view of the law laid down in *Rex v. Samuel Jacobs*, in 1817.

49. There is another judgment of a Single Judge of Bombay High Court in *Ashok Wasudeorao Arvikar v. State of Maharashtra*, 2005 ALL MR (Cri) 1010, where the Court relied on the judgment of the Orissa High Court in *Calvin Francis v. State of Orissa*, VI-1992 (2) Crimes 455.

50. Since the Single Judge of Bombay High Court has relied on the Orissa judgment, therefore, it will be necessary to have a look at the Orissa judgment, *Calvin Francis v. State of Orissa*, VI-1992 (2) Crimes 455. In this judgment, pages 368-370 of *Corpus Juris Secundum*, Vol. 81, were reproduced. This was a case in which it was alleged that the accused had inserted his genital organ inside the mouth of a 6 years' old

girl. The Court approved the opinion given in *Corpus Juris Secundum*, Vol. 81, pages 368-370, and extracted the following:-

“Words used in statutory definitions of the crime of Sodomy have been frequently construed as more comprehensive and as not depending on, or limited by the common law definition of the crime, at least as not dependent on the narrower definition of sodomy afforded by some of the common law authorities and are generally interpreted to include within their provisions all acts of unnatural copulation, whether with mankind or beast. Other authorities, however, have taken a contrary view, holding that the words used in the statute are limited by the common law definition of the crime where the words of the statute themselves are not explicit as to what shall be included.

It is competent for the legislature to declare that the doing of certain acts shall constitute the crime against nature even though they would not have constituted that crime at common law, and the statutory crime against nature is not necessarily limited to the common law crime of sodomy, but in imposing a punishment for the common law crime it is not necessary for the legislature to specify in the statute the particular acts which shall constitute the crime.

Under statutes providing that whoever has carnal copulation with a beast, or in any opening of the body, except sexual parts, with another being, shall be guilty of sodomy, it has been held that the act of cunnilingus is not a crime, but that taking the male sex organ into the mouth is sodomy. On the other hand, under such a statute it has been held that the crime of sodomy cannot be committed unless the sexual organ of accused is involved, but there is also authority to the contrary. Under a statute defining sodomy as the carnal knowledge and connection against the order of nature by man with man, or in the same unnatural manner with woman, it has been held that the crime cannot be committed by woman with woman.

A statute providing that any person who shall commit any act or practice of sexual perversity, is either with mankind or beast, on conviction shall be punished, is not limited to instances involving carnal copulation, but is restricted to cases involving the sex organ of at least one of the parties. The term 'sexual perversity' does not refer to every physical contact by a male with the body of the female with intent to cause sexual satisfaction to the actor, but the condemnation of the statute is limited to unnatural conduct performed for the purpose of accomplishing abnormal sexual satisfaction for the actor. Under a statute providing that any person participating in the act or copulating the mouth of one person with the sexual organ of another is guilty of the offence; a person is guilty of violating the statute when he has placed his mouth on the genital organ of another, and the offence may be committed by two persons of opposite sex.”

Then the Court held that though there was no definition of sodomy, but Section 377 of [I.P.C.](#) was comprehensive enough to engulf any act, like the act which was alleged against the accused in the case before the Court.

51. The learned Special Public Prosecutor, however, relied on a judgment of the Supreme Court in a petition relating to marital dispute in which Section 10 of the Indian Divorce Act was challenged. It was only a passing reference. After taking out the meaning of 'sodomy' from the Black's Law Dictionary and reproducing Section 377 of the Indian Penal Code, the Supreme Court stated: “It can, therefore, be stated that a woman can also be guilty of sodomy, so will be the decision in the case

of the offence of bestiality.” This observation was made in the context of testing the validity of Section 10 of the Indian Divorce Act.

52. In the case of *Brother John Antony v. The State*, referred to above, and decided by the Madras High Court, in paragraph 15, the Court observed, “In understanding the phraseology, 'carnal intercourse', the Explanation appended to the section (377) assumes signal importance. According to the Explanation, penetration is sufficient to constitute the carnal intercourse necessary to the offence described in the section. For the offence to be committed under the section, apart from the other three ingredients referred to earlier, the ingredient of penetration, however minimal it may be, is necessary.” Then the Court went on to analyze the definitions of 'penetration'. It came to a conclusion, “Therefore, to decide whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs, the thighs are kept together and tight.”

53. There are similar judgments of foreign Courts, in which carnal

intercourse has been held to be against the order of nature, and, therefore, an offence under Section 377 of the Singapore Penal Code. Section 377 of the Singapore Penal Code is identical to Section 377 of the Indian Penal Code. The judgment is reported in *Public Prosecutor v. K Wan K Wong Weng*, [1997] 1 SLR 697. Paragraph 26 thereof reads as under:-

“As we have noted earlier, s 377 of the Penal Code is an all-embracing provision covering all 'unnatural offences'. Undoubtedly it covers the offences of sodomy and bestiality and not only these as the section uses the general words of 'carnal intercourse against the order of nature'. Because the section purports to cover more than one offence it must follow that different criteria and different principles must be applicable to each individual instance of carnal intercourse against the order of nature we may encounter. There can be no single or uniform standard for all instances of carnal intercourse against the order of nature under the section. A very young boy or a very young girl may not know the nature of the 'unnatural act' whether it is per anus or per os to be in a position to consent and obviously consent cannot be an ingredient to the offence under s 377. So also with animals. The position could well be different where a man and a woman are concerned.”

54. There is consistent view in this country, and it appears that the opinion of the English Courts has not been followed in this country, and any type of intercourse, which is against the order of nature, and where there is penetration, whether in a natural orifice or a created

orifice within the human body of another, would constitute an offence under Section 377. Here, we would also point out that such an act is an offence under Section 377 where consent is immaterial. There are lots of changes taking place in social milieu, and lots of people are having different sexual preferences, which are even not considered to be unnatural. Therefore, it is high time that the provision of law, which is made more than a century before, is looked at again.

55. For the reasons given above, we find that the prosecution has not been able to prove the guilt of the accused, and the accused are acquitted of the offences they were charged with. Criminal Appeals No. 476 and 681 of 2006 are allowed. Since we have allowed the appeals of the accused, therefore, the appeal filed by the State, viz., Criminal Appeal No. 603 of 2006, is dismissed.

BILAL NAZKI, J.

S.A. BOBDE, J.

56. After the judgment was pronounced, a request was made for

grant of leave to appeal before the Supreme Court by the prosecution. We do not think that the case involves any substantial question of law of general importance, which needs to be decided by the Supreme Court, as the main question of law relates to the interpretation of Section 377 of the Code of Criminal Procedure.

57. Another request is made for staying the operation of the judgment, and for that, Ms. M. Adenwalla has moved an application. It be listed tomorrow, the 24th, in the Court for appropriate hearing.

BILAL NAZKI, J.

S.A. BOBDE, J.