

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 853 OF 2019
WITH
INTERIM APPLICATION NO. 2881 OF 2021
WITH
INTERIM APPLICATION NO. 2936 OF 2021
IN
CRIMINAL APPEAL NO. 853 OF 2019**

Hussain Mustak Choudhari ..Appellant
Versus
State of Maharashtra ..Respondent

**WITH
CRIMINAL APPEAL NO. 1539 OF 2018**

Mohd. Hanif Ahmed Shaikh ..Appellant
Versus
State of Maharashtra & Anr. ..Respondents

Mr. Aniket Vagal for Appellants in both Appeals.
Mr. Amit A. Palkar, APP for State/Respondent.

**CORAM : SMT. SADHANA S. JADHAV &
SARANG V. KOTWAL, JJ.**

**RESERVED ON : 1st MARCH 2022.
PRONOUNCED ON : 4th MARCH 2022.**

JUDGMENT: (*Per Sarang V. Kotwal, J.*)

1. Both these Appeals are decided by this common Judgment because they arise from the same case and in both these

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appeals the same Judgment and Order is challenged.

2. In this Judgment, both the Appellants are referred to by their original status in the trial court.

3. The Appellant Husain Mustak Choudhary in Criminal Appeal No.853 of 2019 was the Accused No.1 and Appellant Mohd. Hanif Ahmad Shaikh in Criminal Appeal No. 1539 of 2018 was the Accuse No.2 in POCSO Special Case No. 363 of 2014. At the conclusion of the trial the learned Judge of designated court under The Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO'), for Greater Bombay, vide her Judgment and order dated 29/09/2017 convicted both the appellants. The Accused No.1 was convicted for the offences punishable under sections 363, 376(2)(n) and 506 of the Indian Penal Code, 1860 (for short 'IPC'), as well as, under section 6 of the POCSO. He was sentenced to suffer rigorous imprisonment for 20 (twenty) years and to pay a fine of Rs.50,000/- and in default of payment of fine to undergo R.I. for further six months.

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4. The accused No.2 was convicted for commission of offences punishable under sections 354, 376(2)(f) and 506(II) of IPC, as well as, under section 6 of the POCSO. He was sentenced to suffer life imprisonment and to pay a fine of Rs.50000/- and in default of payment of fine to undergo R.I. for further six months. Out of the fine amount, Rs.80,000/- were directed to be paid to the victim. The District Legal Aid Services Authority was recommended to pay adequate compensation to the victim as per amended Section 357-A, Sub Clause (1) of Cr.P.C. The benefit of set off under section 428 of the Cr.p.c. was extended to both the accused.

5. Heard Shri. Aniket Vagal, learned counsel for both the accused and Shri. Amit Palkar, learned APP for the State.

6. The prosecution case has unfolded through the evidence of the victim and that of her mother. In short, the prosecution case was that, in October 2013 the victim who was around 15 years of age; left her house. The accused No.1 saw her crying. She was alone. He took her with him to his house. She stayed there for about seven months. In the meantime, he had sexual intercourse

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with her on multiple occasions, because of which, she became pregnant. She then contacted her mother and came back home. Then she lodged her complaint. At the time of lodging of her F.I.R. she also made allegations against the Accused No.2 who was her father. According to her, when she was residing with her parents, the Accused No.2 took advantage of her vulnerable position and committed rape on a few occasions. When the investigation was carried out, both the accused were arrested, the charge-sheet was filed. They faced the trial.

7. The prosecution examined 11 witnesses in support of its case. PW-1 was mother of the victim, PW-5 is victim herself, PW-6 Dr. Amruta Jain, PW-7 Dr. Nikita Bhot, PW-8 Dr. Minal Sarmalkar, PW-10 is Dr. Rajesh Dhere were the Medical Officers conducting medical procedures. PW-9 API Wagh was the Investigating officer and PW-11 was the School teacher who produced school record showing date of birth of the victim as 15/08/1998. PW-2 Riyaz Shaikh was a panch for spot panchanama. PW-3 Mahendra Kamble was a panch for another spot panchanama.

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8. The accused No.1 examined his mother as the defence witness. The defence of the accused No.1 was of total denial. The accused No.2 took up a specific defence in his statement recorded under section 313 of the Cr.p.c. that the victim was holding grudge against him as he used to scold her for not studying. She was in love with a boy named Yasin and accused No.2 was opposing that. On these two counts he was falsely implicated by his daughter.

9. After considering the evidence on record and the arguments, learned Judge was pleased to convict and sentence both the accused, as mentioned earlier.

10. PW-1 was the mother of the victim and wife of the accused No.2. She deposed that, she was residing with the accused No.2, their two sons and daughter who is the victim in this case. The victim was 16 years of age at the time of incident. She was studying in 9th standard in a B.M.C. school. PW-1 has deposed that the accused No.2 used to get angry with the victim regarding her studies. The victim left home when PW-1 was not at home. They searched for her and then lodged a report regarding her missing

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from her house. The report was lodged at Nehru Nagar police station. After about 7 months, the victim made a phone call to her and expressed her desire to meet her. She also had a talk with the accused no.2 on phone. PW-1 and Accused No.2 requested her to come back. On the next day the victim came home. She told PW-1 that, she had married accused No.1, but later on, PW-1 came to know that the Accused No.1 had not married the victim. Her daughter gave details of her whereabouts. She told the PW-1 that, when she left the house, she slept in one rickshaw for a night and on the next day she met accused No.1. He took her to his house. He used to reside with his children and mother. His wife had left him. PW-1 has stated that the Accused No.1 was not allowing the victim to go out of the house as she was below 18 years of age. He used to commit rape on her in his house. The victim became pregnant. She told the PW-1 that the accused No.1 had forcible sexual relations with her, but did not marry her. PW-1 made further inquiries with her as to why she had left their house. At that time, the victim told her that, even accused No.2, who was her father, had committed

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rape on her. The victim told the PW-1 that, in the night when the victim used to sleep, the accused No.2 used to commit rape on her. PW-1 confronted accused No.2, but he denied everything. PW-1 has further stated that the Accused No.2 informed the police that victim had returned home. After that, police came there and took the victim to the police station, where her statement was recorded. In that statement, she made allegations against both the accused. PW-1's statement was also recorded and was treated as an F.I.R. The F.I.R. is produced on record at Exh.18. PW-1 has further deposed that the victim was not willing to give birth to a child and, therefore, her pregnancy was terminated in the hospital.

In the cross-examination, she admitted that, she did not know the date of birth of the victim. The victim came back home on 17/05/2014. On that day the victim, PW-1 and accused No.2 had gone to the police station. At that time, the victim had not told about the incident to the police. Even PW-1 had not made any complaint against either of the accused. After 2-3 days they again went to the police station. PW-1 denied the suggestion that victim

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was having an affair with one Yasin and also with accused No.1. She denied the suggestion that accused No.1 had married the victim. In her cross-examination by accused no.2, PW-1 admitted that the accused No.2 used to tell the victim to study sincerely. The victim used to get angry and used to go to her friend Yasin's house. The victim used to return within 2-3 hours or even on the next day after visiting Yasin's house. PW-1 also admitted that, on 2-3 occasions the victim had run away from the house. She also admitted that the victim had never told her about the accused No.2.

11. PW-5 was the victim herself. Her evidence is important. She has deposed that, in the year 2013 she left her house. She met accused No.1 at Kurla. She had slept in one auto rickshaw. The accused No.1 was owner of that rickshaw. He took the victim to his house at Andheri (E). He was residing with his mother, two sisters and three children. His wife had left him. He introduced the victim to all his family members. She was 16 years of age at that time. The accused No.1 kept physical relations with her. She was not willing,

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as she had told him that she did not want to keep physical relations without marriage. According to her, accused No.1 forcibly kept physical relations. She stayed there for 7 months. The accused No.1 did not allow her to go back to her house. She became pregnant. She informed the PW-1 about her pregnancy. She returned home. Accused No.1 himself dropped her at Kurla (W). She has further stated that her maternal uncle was residing next to her house. Some times, PW-1 used to visit the victim's maternal uncle. She has narrated about the accused No.1's alleged indecent behaviour with her. On one day, she had toothache. The accused No.2 gave her tobacco to apply to that tooth. After that she felt giddiness and the accused No.2 committed rape on her. He committed rape on her on 2-3 occasions when she was alone in the house. It is her case that, because of this, she left the house without telling her mother i.e. PW-1. It is her case that, she used to tell PW-1 about accused No.2's indecent behaviour, but the PW-1 never believed her. She has narrated about her visit to the hospital and her termination of pregnancy, as well as, recording of her statement under section 164

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of Cr.p.c.

During cross-examination she admitted that, Yasin was her friend. She also admitted that, she had informed her family members that she wanted to marry Yasin, but they were opposing that. When she left home, she had called Yasin, but he did not help her. She stated that, because of the act committed by her father, she had left the house. According to her, accused No.1 told her that, he would support her and, therefore, she went with him. She has admitted that the accused No.1 was residing in a crowded locality and there was Oshivara police station near his house. During her stay, she used to go out with the family members of the accused No.1. She was happy with his family, but was not happy with the accused No.1. She never told his family members about the acts of the accused No.1. According to her, she had called PW-1 on two to four occasions when she was staying with the accused No.1, but on every such occasions the accused No.1 used to be with her. She has deposed that, because of threats given by accused No.1 she used to tell her mother that she was happy. She has also admitted that,

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during day time the accused No.1 used to go out to ply his rickshaw. She has admitted that, during day time, she also used to go out of house, but she did not ask for anybody's help. When she went back to her house the accused No.2 himself had called the police. In the cross-examination conducted on behalf of the Accused No.1, she admitted that, there were important omissions in her police statement, particularly, in respect of accused No.2 giving her tobacco. She denied the suggestion that, since the accused No.2 opposed her marriage with Yasin, she has falsely implicated him.

12. PW-4 Mohd. Jafar Mohd. Hanif Kazi is brother of PW-1. He did not support the prosecution case and was declared hostile.

13. Apart from this evidence, there is evidence of Medical Officers, as mentioned earlier. PW-6 Dr. Amrita Jain had examined the victim on 22/05/2014. She gave her report at Exh.36. She has stated that the victim had given history of sexual assault committed by the accused No.2 in February 2013.

14. PW-7 Dr. Nikita Bhot has stated that, the victim gave

history of penetrative sexual assault committed by the accused No.2 in July 2013.

15. PW-8 Dr. Minal Sarmalkar had examined the victim on 27/06/2014. This witness was attached to Sion hospital, where the victim's ossification test was done. The victim's age according to medical examination was 16 years +/- 6 months. On 01/07/2014 this witness terminated pregnancy of the victim and the samples for DNA testing were sent. The DNA report which is produced at Exh.42 showed that accused No.1 was father of the foetus.

16. PW-10 Dr. Rajesh Dhere has also deposed that the DNA report at Exh.52 showed that accused No.1 was the biological father of the foetus.

17. PW-11 Mrs. Khan Shainaz Iqbal Ahmed was in-charge of BMC school where the victim was studying. She has produced school record i.e. School Leaving Certificate showing date of birth of the victim as 15/08/1998.

18. PW-9 A.P.I. Sachin Wagh had conducted the investigation.

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He has deposed about various panchanamas carried out by him, arrest of the accused and recording of statements of the witnesses. He has proved various contradictions and omissions. He deposed that, his investigation did not reveal that accused No.1 had performed marriage with the victim.

19. The defence witness examined on behalf of the accused No.1 was his mother. She has deposed that, on 26/10/2013 the victim came to her house with accused No.1. Both of them had informed this witness that they had performed marriage, but no *nikahnama* was shown to her. At that time, the victim had informed her that her age was 20 years, she was an orphan and came from Pune. The victim used to go out of the house to bring things from the shop.

20. Shri. Vagal, learned counsel for the accused submitted that, there is no cogent evidence regarding age of the victim. Therefore, prosecution has failed to prove that she was below 18 years of age during the period of incident. The school record was based on the information given by the parents who themselves

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were not aware about exact age of the victim. He relied on the observations of Division bench of this court in the case of *Balasaheb v. The State of Maharashtra*¹. He submitted that error in case of age based on ossification test may be +/- 3 years according to medical jurisprudence. He, therefore, submitted that, since the ossification test of the victim in this case showed that she was 16 years of age; taking into account the possible range of more than 3 years, would mean that she could be 19 years of age and, therefore, offence under the POCSO, as well as, under IPC is not proved against the accused No.1. He submitted that the victim had stayed with the accused No.1 for seven months. She was residing happily with his family and, therefore, the prosecution has failed to prove that, sexual intercourse committed by the accused No.1 was without her consent. Thus, according to Shri. Vagal the victim was above 18 years of age. She was willingly residing with the accused No.1 and had consensual relations with him. Therefore, no offence is made out against the accused No.1.

21. Shri. Vagal further submitted that the evidence against

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the accused No.2 is false. No particulars in respect of approximate date of offence is mentioned. In the medical history different dates are mentioned. Even she had not mentioned to her mother about the alleged acts of the Accused No.2. She could have complained to her maternal uncle who was residing at the next door. On the other hand, there is sufficient reason for her to implicate the accused No.2 falsely, because he was scolding her regarding her studies and he was opposing her friendship with Yasin. The allegations against accused No.2 are made after much delay as an afterthought. The accused No.2 had taken a specific defence to that effect in his statement recorded U/s.313 of Cr.p.c. It was the accused No.2 who had called the police after the victim had returned home. This conduct shows that he had not committed any offence. Shri. Vagal submitted that, in any case, in the background of this case the sentence awarded is too harsh.

22. On the other hand, learned APP Shri. Palkar submitted that, victim's statements are consistent. There is no reason to disbelieve her story. There is presumption U/s.29 of the POCSO.

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The victim was below 18 years of age during that period. It is proved through medical examination and school record. The DNA profile has conclusively established that the accused No.1 is the father of foetus and hence, it is proved that he had established physical relations with the victim.

23. We have considered these submissions. So far as accused No.2 is concerned, the evidence against him is weak and contradictory. The victim had not told about his acts to her mother or maternal uncle till she returned home. There was a background for her to hold grudge against accused No.2. The accused No.2 used to scold her regarding her studies and he was opposing her friendship with Yasin. These facts have come on record. The victim has not given any details regarding date or month of the incident connected with the accused No.2. At different places she has mentioned different months for offence allegedly committed by the accused No.2. There are important omissions in respect of the incident. Her case was that the accused No.2 had given her tobacco to apply on her tooth because of which she felt giddiness and

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thereafter the accused No.2 committed rape on her. This fact of giving tobacco because of which she felt giddiness was not told by her to the police. This is an important aspect because taking advantage of that situation the accused No.2 had allegedly committed raper on her.

24. There is inordinate and unexplained delay in making allegations against the accused No.2 by PW-5. Even after she had returned home, according to her, on that very day they had gone to the police station, but she had not complained about accused No.2. After that, she had stayed at her house for 2-3 days and then for the first time she came up with the allegations against accused No.2. Prior to her leaving house in October 2013 she never told her mother or maternal uncle, though she could have complained about the same. The conduct of the accused No.2 to call the police after the victim had returned home also contributes to the theory of his innocence. There is no other corroborative piece of evidence against the accused No.2. Therefore, story of the victim against accused No.2 appears to be doubtful. In this view, the defence has

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successfully rebutted the presumption U/s.29 of the POCSO, based on the evidence of prosecution witnesses themselves. Based on this discussion, the accused No.2 deserves to be given benefit of doubt and hence, deserves to be acquitted.

25. So far as, accused No.1 is concerned, there is no denying fact that he had physical relations with the victim. This is proved not only through evidence of PW-5, but more importantly, through the medical evidence. The DNA report shows that accused No.1 was biological father of foetus of the victim. Therefore, it is conclusively proved that the accused No.1 had physical relations with the victim. The next question would be whether that relation was with consent or whether that consent would be material. In this context, it does appear that the victim had stayed with accused No.1 for 7 months. In the meantime, she could go out of the house as per the evidence on record. She was taking part in the festivities. She was happily residing with other family members of accused No.1. There was a police station near her locality and yet on none of these occasions the PW-5 victim had made any complaint or

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grievance against the accused No.1. However, in this case the consent will not matter because prosecution has proved that the victim was below 18 years of age. Though, Shri. Vagal has relied on the case of *Balasaheb (supra)*, the medical evidence is not the only piece of evidence in this case, but the prosecution has brought on record school record which shows victim's date of birth as 16/05/1998. Thus, she was definitely below 18 years of age when accused No.1 had established physical relations with her. In this view of the matter, consent of the victim is not important. The offences charged against accused No.1 are proved. Therefore, he cannot be acquitted. However, in the background of the case, the evidence of PW-5 and other circumstances can be taken into account to consider the quantum of sentence awarded to the accused No.1. The evidence shows that, when the victim had left her house, she had willingly gone to reside with the accused No.1. She was residing with his mother, two sisters and three children. As mentioned earlier, the victim was staying there as a family member and was taking part in their activities. She was not confined to the

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house and there was no force involved. This will not give any benefit to accused No.1 for acquittal. But, these factors can be taken into consideration in awarding sentence. Therefore, we are inclined to accept the submission of Shri. Vagal that sentence awarded to the accused No.1 is quite harsh. In this background, it would be sufficient if the minimum sentence is imposed on the accused No.1. Therefore, though we are upholding conviction of accused No.1, we are setting aside the sentence imposed on him and instead, we are imposing lesser sentence. Though, Shri. Palkar has submitted that the sentence should not be interfered with, we are satisfied that, in the facts of these circumstances, minimum sentence will serve the ends of justice.

26. Hence, the following order:

ORDER

- (i) Criminal Appeal No. 1539 of 2018 preferred by Accused No.2 Mohd. Hanif Ahmed Shaikh is allowed.
- (ii) Appellant Mohd. Hanif Ahmed Shaikh in

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Criminal Appeal No. 1539 of 2018 is acquitted of all the charges. He is on bail, his bail bond shall stand cancelled.

- (iii) Criminal Appeal No. 853 of 2019 preferred by accused No.1 Hussain Mustak Choudhari is partly allowed. His conviction Under sections 366, 376(2)(n) and 506 of IPC, as well as, under section 6 of POCSO is maintained.
- (iv) Appellant Hussain Mustak Choudhari in Criminal Appeal No. 853 of 2019 is sentenced to suffer Rigorous Imprisonment for 10 (Ten) years instead of 20 (Twenty) years and to pay a fine of Rs.80,000/- (Rupees Eighty Thousand only) instead of Rs.50,000/-. In default of payment of fine, he shall suffer further simple imprisonment for six months.
- (v) Fine, if paid, be given to the victim/Respondent No.2.
- (vi) The District Legal Service Authority is recommended to pay compensation to the victim as per Section 357A of the Cr. P. C.

in accordance with the Government schemes. At that time, they shall take into account whether the compensation out of the fine amount is actually paid to the victim or not.

- (vii) Set off under section 428 of Cr. P. C. be given to the Accused No.1.
- (viii) With this order, both these Appeals are disposed of.
- (ix) With disposal of these Appeals, both the Interim Applications do not survive and are disposed of accordingly.

(SARANG V. KOTWAL, J.)

(SMT. SADHANA S. JADHAV, J.)