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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 1089 of 2021

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ASHWINBHAI @ RAJ RANCHHODBHAI POYALA
Versus
STATE OF GUJARAT

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Appearance:
MR M S PADALIYA, ADVOCATE for the Appellant
MR HARDIK SONI, APP for the Respondent

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CORAM:HONOURABLE MR. JUSTICE PARESH UPADHYAY

Date : 01/10/2021

CAV JUDGMENT

1. This appeal is directed against the judgment and order passed by the Special Judge (POCSO) and 3rd Additional Sessions Judge, Junagadh, dated 15.07.2021 in Special (POCSO) Case No.31 of 2019. The appellant is convicted under Section 376 of the Indian Penal Code and Sections 4, 6, 8 and 12 of the Protection of the Children from Sexual Offences Act, 2012 and ordered to undergo sentence of rigorous imprisonment for ten years and fine of Rs.5,000/- was also imposed and in default thereof, to undergo further simple imprisonment.

2. The Appeal was already admitted by this Court while suspending the sentence of the appellant vide order dated 09.08.2021.

3. Heard learned advocate for the appellant and learned Additional Public Prosecutor for the State.

4. Learned advocate for the appellant has submitted that, the appellant and the so-called victim are husband and wife and they have two children from this relationship. It is submitted that, the conviction is unsustainable and the same be quashed and set aside.

5. Learned Additional Public Prosecutor for the State has submitted that, the Sessions Court has rightly arrived at the conclusion by convicting the appellant for the offence committed by the appellant. It is submitted that no interference be made by this Court.

6. Having heard learned advocates for the respective parties and having considered the material on record, this Court finds as under.

6.1 It is an admitted position that the appellant and victim are in relationship.

6.2 It is not in dispute that the victim, on her own, had walked out of home with the appellant.

6.3 The appellant and the victim stayed together since then at the house of the appellant, as husband and wife.

6.4 Out of their relationship, she has given birth to two children, one on 29.06.2019 and second on 22.01.2021.

6.5 Neither the mother nor the father of these two children disown their birth nor paternity.

6.6 The victim has deposed (in camera) at Exh.20 that she has left her parental home on her own and she started to live together with the appellant at appellant's house. Further she has stated that, the appellant has kept physical relation with her consent.

6.7 The complaint is registered on 20.05.2018 with the Mangrol Police Station, Junagadh.

6.8 The appellant is arrested by the police on 09.01.2019. The case was tried before the Special Judge (POCSO), Junagadh and the Trial Court vide judgment dated 15.07.2021 convicted the appellant as noted above.

7. The glaring aspect of the matter is that, there is evidence Exh.76, which - because of legal requirement needs to be called as evidence of "the victim", who stated that, she on her own, because of her wish had walked out of home and she started living with the present appellant and with that relation she has given birth to two children, one on 29.06.2019 and second on 22.01.2021. Neither the mother nor the father of these two children disown their birth nor paternity and still the father is convicted inter alia under Section 376 of the Indian Penal Code and is ordered to undergo RI for 10 years. The Sessions Court is also conscious of this fact, since even in the operative part of the judgment in para:4, it is noted that since these two persons are staying as husband and wife, any compensation / assistance received from any of the Government(s) need to be refunded. It is under these circumstances, this Court finds that the conviction recorded by the Sessions Court needs to be set aside. Standing at the place

of law enforcement agencies, in the peculiar facts of the case, this can be termed as an offence under the Prohibition of Child Marriage Act, which is observed more in breach than in compliance, more particularly in the lower strata of society. Non-interference by this Court would reduce the lady and two children without shelter of husband / father, which in no way would be in furtherance of justice.

8. For the reasons recorded above, the following order is passed.

8.1 This appeal is allowed.

8.2 The judgment and order of the Special Judge (POCSO) and 3rd Additional Sessions Judge, Junagadh, dated 15.07.2021 in Special (POCSO) Case No.31 of 2019 is quashed and set aside.

सत्यमेव जयते (PARESH UPADHYAY, J)

M.H. DAVE/1

**THE HIGH COURT
OF GUJARAT**

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