

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE V.G.ARUN

MONDAY, THE 12TH DAY OF DECEMBER 2022 / 21ST AGRAHAYANA, 1944

WP(C) NO. 39671 OF 2022

PETITIONER/S:

X

BY ADV G.VIDYA

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY THE SECRETARY, DEPARTMENT OF WOMEN &
CHILDREN, SECRETARIAT, THIRUVANANTHAPURAM, PIN - 695
001.
- 2 SUPERINTENDENT
GOVERNMENT MEDICAL COLLEGE KANNUR, PARIYARAM, KANNUR,
PIN - 670 503.
- 3 STATION HOUSE OFFICER,
MATTANNORE POLICE STATION, MATTANNORE, KANNUR CITY,
PIN- 670 702.
- 4 CHILD WELFARE COMMITTEE
REPRESENTED BY THE CHAIRPERSON, KANNUR -670 503.

OTHER PRESENT:

GP AMMINIKUTTY K

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
12.12.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 12th day of December, 2022

The petitioner's daughter, a 17 year old mentally challenged girl is pregnant by 26 weeks. The pregnancy is alleged to be the result of rape committed on the innocent girl by a neighbour. Neither the victim nor the petitioner were aware about the pregnancy until the girl was examined by a Gynecologist recently. By that time, the fetus had crossed the gestational age of 24 weeks, thereby making it impossible to medically terminate the pregnancy without an order in that regard from the constitutional court. Hence this writ petition.

2. Learned counsel for the petitioner submitted that the incident has resulted in a crime being registered against the perpetrator for the offences under the Indian Penal Code and the Protection Of Children from Sexual Offences Act, 2012.

3. It is submitted that the child is in utter shock on being informed about the pregnancy and is under extreme physical and mental stress. She has been pleading to get the pregnancy terminated. In view of the restriction contained under the Medical Termination of Pregnancy Act, no hospital is prepared to conduct the surgery without an order from this Court.

4. When the writ petition came up for admission on 07.12.2022, the Superintendent, Government Medical College, Kannur was directed to constitute a Medical Board for examining the victim girl and submitting its opinion. Accordingly, the Medical Board has submitted its opinion, the relevant portion of which reads as under;

"... Following directions by Hon'ble High Court of Kerala, the Medical Board consisting of above faculties which was convened has reached at the following conclusions;

1. Patient is 17 years of age as per CWC reference. She is unmarried, gestational age of the fetus as per latest Ultrasound scanning report (06/12/2022) is 25 weeks 5 days. Clinical examination showed Anaemia (Hb-9.3) with normal BP and other vitals.

2. She was further evaluated by HOD, Psychiatry and Physical Medicine and Rehabilitation.

3. There is no locomotor physical disability.

4. There is a possibility that the baby may be born alive.

The Medical board felt that the available methods of MTP are effective only upto 20 weeks of gestation. Beyond 20 weeks, pregnancy is to be induced as per induction of normal pregnancy. In view of the gestational age of 26 weeks, in addition to the usual risks like haemorrhage, sepsis, risk of blood transfusion etc, due to the present gestational age, there is a possibility that the uterus may not respond to the usual methods of medical induction. In that situation we may have to resort to surgical methods (hysterectomy) which involves anaesthesia and surgical risks.

Based on the available ultrasound there is no physical abnormality in the foetus. As per national neonatology forum guidelines, the viability is 28 weeks of pregnancy. As per NRP guidelines India and AAP, resuscitation is considered after completion of 24 weeks of pregnancy. If the baby is born alive, we will have to considered resuscitation.

Psychological evaluation of the survivor showed mild intellectual disability with moderate disability. As per this evaluation, patient has intellectual disability with IQ 51. Continuation of pregnancy can seriously affect her mental health. She is likely to develop depression and

psychosis.

Medical Board has arrived at the conclusion that termination of pregnancy shall be considered."

5. Heard Adv. G. Vidya learned Counsel for the petitioner, and Adv. K. Amminikutty, the learned Government Pleader.

6. The law on medical termination of pregnancy is governed by the Medical Termination of Pregnancy Act, 1971. Section 3 being contextually relevant is extracted hereunder;

"3. When pregnancies may be terminated by registered medical practitioners.—(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—

(a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are, of the opinion, formed in good faith, that—

(i) the continuance of the pregnancy would involve a

risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

Explanation 1.—For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.—For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(2-A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act.

(2-B) The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

(2-C) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act.

(2-D) The Medical Board shall consist of the following, namely-

(a) a Gynaecologist;

(b) a Paediatrician;

(c) a Radiologist or Sonologist; and

(d) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.]

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

A careful scrutiny of Section 3, with particular reference to sub-section (2) and Explanation I thereunder shows that medical termination of pregnancy can be permitted up to 24 weeks, if continuance of the pregnancy involves risk to the life of the pregnant woman or grave injury to her physical or mental health. Going by Explanation II, the anguish caused by the pregnancy shall be presumed

to constitute a grave injury to the mental health of the pregnant woman if the pregnancy is alleged to have been caused by rape. It is pertinent to note that under Rule 3B of the Medical Termination of Pregnancy Rules, 2003 specific categories of women are to be considered eligible for termination of pregnancy as per Clause (b) of sub-section (2) of Section 3 of the Act. These category of women includes survivors of sexual assault or rape, or incest, as also minors. In the case at hand, the victim is a rape survivor and a minor.

7. A woman's right to make reproductive choice is recognised as part of her personal liberty under Article 21, subject of course to reasonable restrictions. The Division Bench has considered this aspect in **ABC v. Union of India [2020 (4) KLT 279]**, while granting permission for medical termination to a minor girl whose pregnancy had progressed to the 24th week. A similar view was taken by this Court in W.P.(C) No.23092 of 2022, wherein the pregnancy had crossed 30 weeks. In **X v Union of India and others [(2020) 19 SCC 806]**, the Apex Court after considering

the trauma and agony of the minor girl and the Medical Board's report allowed the pregnancy to be medically terminated. In the case at hand, the Medical Board, after considering all aspects, has opined that continuation of pregnancy can seriously affect the mental health of the victim and she is likely to develop depression and psychosis. In view of the Medical Board's opinion and considering the mental status of the victim, I am inclined to allow the prayer for medical termination of the pregnancy.

Considering that each day's delay will add to the victim's agony, and being of opinion that the above directions would ensure that the baby, if born alive, is not abandoned at birth, the following directions are issued;

(i) The petitioner is permitted to get the victim girl's pregnancy terminated at a Government Hospital.

(ii) On production of this order, the Superintendent of the hospital shall take immediate measures for constituting a medical team for conducting the procedure.

(iii) The petitioner shall file an appropriate undertaking, authorising to conduct the surgery at her risk.

(iv) If the baby is alive at birth, the hospital shall ensure that the baby is offered the best medical treatment available, so that it develops into a healthy child;

(v) If the petitioner is not willing to assume the responsibility of the baby, the State and its agencies shall assume full responsibility and offer medical support and facilities to the child, keeping in mind the best interests of the child and the statutory provisions in the Juvenile Justice (Care and Protection of Children) Act, 2015.

Writ petition is disposed of accordingly.

Sd/-
V.G.ARUN
JUDGE

APPENDIX OF WP(C) 39671/2022

PETITIONER EXHIBITS

- Exhibit P1 THE TRUE COPY OF FIR NO. 1091/2022, DATED
22.11.2022 OF MATTANNORE POLICE STATION
- Exhibit P2 THE TRUE COPY REPORT/REFERENCE CARD ISSUED BY
THE 2ND RESPONDENT DATED 29.11.2022
- Exhibit P3 THE TRUE COPY OF OBSTETRIC ULTRASONOGRAPHY
REPORT DATED 05.12.2022