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THE HIGH COURT OF MADHYA PRADESH 1
Writ Appeal No. 745/2021
Prosecutrix vs.The State of MP and Ors.

Gwalior, Dated :27/08/2021

Heard through hybrid system of physical/virtual hearing.

Shri DP Singh, learned counsel for appellant.

Shri MPS Raghuvanshi, learned Additional Advocate General
for respondents/ State.

ORDER

CONTEXT

This intra-Court appeal u/S 2(1) of Madhya Pradesh Uchcha Nyayalaya (Khand Nyay Peeth Ko Appeal) Adhiniyam, 2005 has been filed assailing the order dated 10/08/2021 passed by learned Single Judge in Writ Petition No.14658/2021, whereby the writ petition filed by appellant/petitioner seeking permission to terminate her pregnancy with a direction to respondent No.2 therein to follow the procedure of termination of pregnancy, has been rejected.

FACTS

(2) Brief facts for adjudication of the present appeal are that on 27/07/2021 appellant/prosecutrix lodged a written complaint before Police Station Madhoganj, District Gwalior with the allegation that she is aged about 19 years. She had friendship with her neighbour accused Rocky Shakya for the last five years and they were liking each other and on talking terms. On the false pretext of marriage, the accused was having physical relationship with her for the last four-

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five years and he used to commit sexual intercourse with her as a result of which, after few days on 26/07/2021 on medical check up, she was found pregnant. When the prosecutrix narrated this fact to the accused, then accused refused to marry her. The accused also threatened her if she lodges an FIR, then she along with her family would be killed. On her report, Crime No.317/2021 for offence u/Ss.376, 376(2)(n), 506 of IPC and u/S. 5/6 of Protection of Children from Sexual Offences Act has been registered against the accused and the matter was investigated. During investigation, the appellant/prosecutrix filed the writ petition to the effect that she wants to terminate her pregnancy and respondent No.2 be directed to follow the procedure of termination of pregnancy but by the impugned order, her prayer was rejected by learned Single Judge on the ground that appellant/prosecutrix herself involved in a consensual sex with full knowledge about the consequences of such act and the allegations made in the FIR do not *prima facie* make out a case of consent obtained by misrepresentation of fact, therefore, medical termination of pregnancy cannot be permitted. Hence, this appeal.

(3) During the course of hearing of present appeal, on 23/08/2021, this Court after perusing Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 [in short " the 1971 Act"], vide order dated 23/08/2021 called for latest health status report of the prosecutrix

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from two registered Medical Practitioners as to whether termination of pregnancy of the appellant can be acceded to or not. Pursuant to the order passed by this Court on 23/08/2021, two Gynecologists of District Hospital, Gwalior and PG Medical Officer, District Hospital Gwalior examined the prosecutrix and conducted required medical tests and found that the pregnancy of the prosecutrix of 16 weeks and 6 days and her hemoglobin levels are at 7.8 gms and the termination of pregnancy can be acceded to after the hemoglobin levels are normal and after due consent of the prosecutrix. Copy of the report dated 25/08/2021 along with medical reports have been filed by the State in compliance of order dated 23/08/2021.

(4) In the present matter, the appellant/prosecutrix has been subjected to illicit sexual intercourse by the accused on the false pretext of marriage which will adversely affect the social and mental status of an unmarried girl like the appellant/prosecutrix and her family cannot survive/sustain with dignity in the society peacefully. The appellant/prosecutrix has not married till now and therefore, she wants to terminate her pregnancy.

FINDINGS

(5) The reason assigned by learned Single Judge for rejecting the petition was the sexual intercourse *prima facie* appeared, from the prosecution story, to be consensual. The prosecution case is of rape

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against the prosecutrix aged 19 years, who alleged that though she entered into sexual relationship with the accused with consent but the said consent was based on the promise extended by the accused to marry her in the future. The said promise, as per prosecution story, was broken by the accused. Whether the promise was false from the very beginning or it was a case of breach of promise, is a fact to be established by adducing of evidence, which stage is yet to come. Thus, the learned Single Judge ought not to have presumed presence of element of consent as a dissuading factor.

(6) The 1971 Act provides for termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. One of the objects behind the 1971 Act is to prevent indiscriminate and unwarranted termination of pregnancies *inter alia* for curing one of the social maladies of female foeticide. However, Section 3 of 1971 Act permits termination of pregnancy by registered medical practitioner on satisfaction of certain conditions enumerated therein. For ready reference and convenience, Section 3 of the 1971 Act is reproduced *in toto*:-

"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

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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 twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of 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 such physical or mental abnormalities as to be seriously handicapped.

Explanation 1—Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.—Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken to 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."

(7) Pertinently, Section 3 overrides the provision of IPC and, thus grants immunity from penal provision to medical practitioners who terminate pregnancy after following the due process prescribed in the said provision and subject to fulfilment of conditions mandated therein.

(8) Sub-section(2) of Section 3 of the 1971 Act permits the medical practitioner to terminate pregnancy falling into two categories. First, when the pregnancy does not exceed 12 weeks subject, of course, to the satisfaction of sub-section (4) of Section 3 which prohibits termination of pregnancy of a minor woman or a mentally unwell woman without consent of her guardian and further prohibits termination of pregnancy of any other woman of 18 or above years without her consent. Second category of cases where the registered medical practitioner can terminate the pregnancy are those where pregnancy exceeds 12 weeks but does not exceed 20 weeks subject to fulfilment of following conditions:-

(i) When two registered medical practitioners are of the opinion, formed in good faith, that 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;

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or,

(ii) There is a substantial risk that if the child is allowed to be born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(9) The expression "grave injury to her mental health" found in Section 3(2)(b)(i) has been explained in Explanation 1 to include the anguish caused to pregnant woman who has become pregnant after being subjected to rape.

(10) Testing the factual matrix attending the instant case on the anvil of provision of Section 3 of the 1971 Act, it is amply clear that the prosecutrix has alleged that she was subjected to rape and the pregnancy arises from the said incident of rape and since the period of pregnancy is below 20 weeks and she admittedly is subjected to grave injury to her physical and mental health due to said rape, this Court cannot stand in the way of the prosecutrix in getting her pregnancy aborted/ terminated.

(11) This Court hastens to add that the Scheme of the 1971 Act is such that it allows triggering of Section 3 provision *inter alia* in cases where rape is alleged. It is not necessary that the allegation is proved before Section 3 can be invoked.

(12) Consequently, since the prosecutrix satisfies the requirements of Section 3(2)(b)(i), this Court permits termination of pregnancy

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subject to prosecutrix consenting for termination in writing.

(13) Consequently, the present writ appeal stands **allowed** in the following terms:-

(i) That, the impugned order of learned Single Judge passed on 10/08/2021 in Writ Petition 14658/2021 is set aside.

(ii) If consent is expressly accorded by the prosecutrix and physical parameters of the prosecutrix are normal and conducive to termination of pregnancy, then the doctor concerned is permitted to terminate the pregnancy before the foetus is 20 weeks' old.

(Sheel Nagu)
Judge

(Deepak Kumar Agarwal)
Judge

MKB

**MAHENDRA
KUMAR BARIK**
Digitally signed by MAHENDRA KUMAR BARIK
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