

IN THE HIGH COURT OF JAMMU & KASHMIR AND  
LADAKHAT SRINAGAR

WP(C) N.527/2023  
CM No.1259/2023

MS. X (MINOR) ...PETITIONER(S)

Through: Mr. Musavir Mir, Advocate.

Vs.

UT OF J&K & OTHERS ...RESPONDENT(S)

Through: Ms. Asifa Padroo, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

(JUDGMENT)(ORAL)  
16.03.2023

1) Present case is a sad and sordid tale of a victim girl who has been made pregnant at the tender age of 11 years, though in the petition it is claimed that she is aged only 09 years.

2) The victim girl has approached this Court through her father seeking a direction upon respondents No.1 and 2 to constitute a Medical Board for her examination so that a call is taken as regards the termination of her pregnancy without wasting any further time.

3) As per the case of the prosecution, which is discernible from a perusal of the Case Diary produced by learned counsel for the respondents, on 27.02.2023, the father of the victim lodged a report with the police alleging therein that his daughter, aged about 11 years

studying in 4<sup>th</sup> class, has become pregnant because someone has committed rape upon her. It was further reported by the father of the victim that because his daughter was minor, as such, the person who sexually assaulted her was extending death threats to her in case she disclosed the matter to anybody. On the basis of this report, FIR No.12/2023 for offences under Sections 363, 376, 506 IPC and 4 of POCSO Act came to be registered and investigation was set into motion. During the course of investigation, the accused, who is also a juvenile, was identified and arrested whereas the victim was subjected to medical examination. The opinion of the doctor is reproduced as under:

“As per the history given by the patient herself and her mother, thorough examination and available investigations, it is hereby opined that sexual contact been made and patient is currently 30 weeks pregnant with a single line **intrauterine** fetus.”

4) From the afore-quoted medical report, it is clear that the petitioner is currently carrying pregnancy of 30 weeks pregnant. The question that arises for consideration is as to whether at this advanced stage of pregnancy, the law permits termination of the same.

5) In the above context, it would be apt to refer to the provisions contained in Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the Act of 1971). It reads as under

**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.

6) From a perusal of the aforesaid provision, it is clear that the pregnancy of a woman, where the length of pregnancy does not exceed 20 weeks, may be terminated by a registered medical practitioner if he is of the opinion that 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. It can also be done by the medical practitioner if there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. The statute further provides that in case length of pregnancy exceeds 20 weeks but does not exceed 24 weeks, such opinion has to be formed by not less than two registered medical practitioners.

7) In the above context, Rule 3-B of the Medical Termination of Pregnancy Rules, 2003, is also required to be noticed. It reads as under:

**3-B. Women eligible for termination of pregnancy up to twenty-four weeks.—**The following categories of women shall be considered eligible for termination of pregnancy

under clause (b) of sub-section (2) Section 3 of the Act, for a period of up to twenty-four weeks, namely—

- (a) survivors of sexual assault or rape or incest;
- (b) minors;
- (c) change of marital status during the ongoing pregnancy (widowhood and divorce);
- (d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)];
- (e) mentally ill women including mental retardation;
- (f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and
- (g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government.

8) From a perusal of the aforesaid Rule, it is clear that survivors of sexual assault or rape or incest as also the minors are eligible for termination of pregnancy upto 24 weeks. In addition to this, Explanation-2 to Section 3 of the Act of 1971 provides that when pregnancy occurs because of rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

9) From a conjoint reading of the all the aforesaid provisions, it is clear that a minor or a survivor of rape is eligible for termination of pregnancy upto 24 weeks. However, in the instant case, the victim carries a pregnancy of about 30 weeks. Therefore, the question that arises for consideration is as to whether legally it is permissible to allow the victim in the instant case to terminate her pregnancy.

10) If we have a look at the Explanation-1 to Section 3 of the Act of 1971 as amended vide Amendment Act of 2021, it provides that 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. The expression used in the Explanation is “any woman”, meaning thereby that even an unmarried woman has a choice to terminate her pregnancy if the same has occurred due to failure of device or method used for the purpose of restricting the number of children or preventing pregnancy. In other words, a woman has been given a right to terminate her unwanted pregnancy.

11) The Supreme Court has, while deliberating upon the right to reproductive autonomy to a woman in the case of **X vs. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and another**, 2022 SCC Online SC 1321, observed as under

***“1. The right to reproductive autonomy***

*99. The ambit of reproductive rights is not restricted to the right of women to have or not have children. It also includes the constellation of freedoms and entitlements that enable a woman to decide freely on all matters relating to her sexual and reproductive health. Reproductive rights include the right to access education and information about contraception and sexual health, the right to decide whether and what type of contraceptives to use, the right to choose whether and when to have children, the right to choose the number of children, the right to access safe and legal abortions, and the right to reproductive healthcare. Women must also have the autonomy to make decisions concerning these rights, free from coercion or violence.*

100. Zakiya Luna has, in a 2020 publication, argued that reproduction is both biological and political.<sup>90</sup> According to Luna, it is biological since physical bodies reproduce, and it is political since the decision on whether to reproduce or not is not solely a private matter. This decision is intimately linked to wider political, social, and economic structures. A woman's role and status in family, and society generally, is often tied to childbearing and ensuring the continuation of successive generations.

101. To this, we may add that a woman is often enmeshed in complex notions of family, community, religion, and caste. Such external societal factors affect the way a woman exercises autonomy and control over her body, particularly in matters relating to reproductive decisions. Societal factors often find reinforcement by way of legal barriers restricting a woman's right to access abortion. The decision to have or not to have an abortion is borne out of complicated life circumstances, which only the woman can choose on her own terms without external interference or influence. Reproductive autonomy requires that every pregnant woman has the intrinsic right to choose to undergo or not to undergo abortion without any consent or authorization from a third party.

102. The right to reproductive autonomy is closely linked with the right to bodily autonomy. As the term itself suggests, bodily autonomy is the right to take decisions about one's body. The consequences of an unwanted pregnancy on a woman's body as well as her mind cannot be understated. The foetus relies on the pregnant woman's body for sustenance and nourishment until it is born. The biological process of pregnancy transforms the woman's body to permit this. The woman may experience swelling, body ache, contractions, morning sickness, and restricted mobility, to name a few of a host of side effects. Further, complications may arise which pose a risk to the life of the woman. A mere description of the side effects of a pregnancy cannot possibly do justice to the visceral image of forcing a woman to continue with an unwanted pregnancy. Therefore, the decision to carry the pregnancy to its full term or terminate it is firmly rooted in the right to bodily autonomy and decisional autonomy of the pregnant woman.

103. In *K S Puttaswamy v. Union of India*, a nine-judge bench of this Court recognized the right to privacy as a constitutionally protected right under Article 21 of the Constitution. In *Puttaswamy (supra)*, this Court held that the right to privacy enables individuals to retain and

*exercise autonomy over the body and mind. The autonomy of the individual was defined as “the ability to make decision on vital matters of concern to life. The judgement delivered on behalf of four judges described the right to privacy in the following terms:*

*“297. ... Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt.”*

*104. Importantly, Puttaswamy (supra) also deals with facets of reproductive autonomy. Chelameshwar, J. held that a “woman’s freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.” This Court recognized the right to bodily integrity as an important facet of the right to privacy. Puttaswamy (supra) considered Suchita Srivastava v. Chandigarh Administration to reiterate that the statutory right of a woman to undergo termination of pregnancy under the MTP Act is relatable to the constitutional right to make reproductive choices under Article 21 of the Constitution.*

*105. In Suchita Srivastava (supra) this Court explicitly recognized the concept of reproductive autonomy. In this case, the victim, an orphaned woman of around 19 years, with mental retardation, became pregnant as a result of a rape that took place while she was an inmate at a government-run welfare institution. After the discovery of her pregnancy, the Chandigarh Administration approached the High Court of Punjab and Haryana seeking approval for the termination of her*



*pregnancy. The High Court constituted an expert body to conduct an enquiry into the facts. The expert body recorded that the victim had expressed her willingness to bear the child and accordingly recommended the continuation of the pregnancy. However, the High Court directed the termination of the pregnancy on the ground that the victim was mentally incapable of making an informed decision on her own.*

*106. A three-judge Bench of this Court disagreed with the High Court's decision. In a judgment authored by K G Balakrishnan, C.J., this Court emphasized that the consent of the pregnant woman is an essential requirement to proceed with the termination of a pregnancy under the MTP Act. It was held that the state administration cannot claim guardianship of the woman as she was a major. It was further held that the woman only had "mild mental retardation" and was therefore competent to give her consent in terms of Section 3(4)(a) of the MTP Act. This Court concluded that the state must respect the reproductive rights of women with "mental retardation" with regard to decisions about terminating their pregnancy. In the process, this Court recognized that a woman's right to reproductive autonomy is a dimension of Article 21 of the Constitution:*

*"22. There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been*

*fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.”*

*107. Suchita Srivastava (supra) rightly recognised that the right of women to make reproductive choices is a dimension of personal liberty under Article 21. It held that reproductive rights include a woman’s entitlement to carry the pregnancy to full term, give birth, and raise children. More importantly, it also recognised that the right to reproductive choice also includes the right not to procreate. In doing so, it situated the reproductive rights of women within the core of constitutional rights.*

*108. Decisional autonomy is an integral part of the right to privacy. Decisional autonomy is the ability to make decisions in respect of intimate relations.<sup>96</sup> In Puttaswamy (supra) this Court held that personal aspects of life such as family, marriage, procreation, and sexual orientation are all intrinsic to the dignity of the individual. The right to privacy safeguards and respects the decisional autonomy of the individual to exercise intimate personal choices and control over the vital aspects of their body and life. In Common Cause v. Union of India, <sup>98</sup> this Court observed that right to privacy protects decisional autonomy in matters related to bodily integrity:*

*“441. The right to privacy resides in the right to liberty and in the respect of autonomy. The right to privacy protects autonomy in making decisions related to the intimate domain of death as well as bodily integrity. Few moments could be of as much importance as the intimate and private decisions that we are faced regarding death. Continuing treatment against the wishes of a patient is not only a violation of the principle of informed consent, but also of bodily privacy and bodily integrity that have been recognised as a facet of privacy by this Court.”*

*109. The right to decisional autonomy also means that women may choose the course of their lives. Besides physical consequences, unwanted pregnancies which women are forced to carry to term may have cascading effects for the rest of her life by interrupting her education, her career, or affecting her mental wellbeing.*

*110. In High Court on its Own Motion (supra), an under-trial prisoner requisitioned for obtaining permission to terminate her 4-month pregnancy to a judge of the City*

*Civil & Sessions Court visiting the prison. The woman stated that it would be too difficult for her to maintain another child in addition to her five-month old child, who was suffering from various malaises such as epilepsy, hernia and other illnesses. In such circumstances, the woman stated that it was difficult for her to maintain and take care of another child. The judge forwarded a letter to the High Court of Bombay along with the woman's requisition for information and further action, which was converted into a suo moto PIL. The High Court referred to the relevant provisions of the MTP Act to observe that mental health can deteriorate if the pregnancy is forced or unwanted:*

*"14. A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health."*

*111. A woman can become pregnant by choice irrespective of her marital status. In case the pregnancy is wanted, it is equally shared by both the partners. However, in case of an unwanted or incidental pregnancy, the burden invariably falls on the pregnant woman affecting her mental and physical health. Article 21 of the Constitution recognizes and protects the right of a woman to undergo termination of pregnancy if her mental or physical health is at stake. Importantly, it is the woman alone who has the right over her body and is the ultimate decisionmaker on the question of whether she wants to undergo an abortion."*

12) In the same judgment, the Supreme Court, while deliberating upon the right to dignity of a women, observed that if women with unwanted pregnancies are forced to carry their pregnancies to term, the

state would be stripping them of the right to determine the immediate and long term path their lives would take. The Court went on to observe that depriving women of autonomy not only over their bodies but also over their lives would be affront to their dignity. The Court concluded that right to dignity would be under attack if women are forced to continue with unwanted pregnancies.

13) From the foregoing enunciation of law on the subject, by the Supreme Court, it is clear that a woman, whether married or unmarried, has a right to get rid of her unwanted pregnancy. It is on the basis of this principle that various High Courts of the Country and also the Supreme Court have allowed the termination of pregnancy of more than 24 weeks, though the Statute does not provide for the same.

14) The Supreme Court in the case of **Meera Santosh Pal v. Union of India**, (2017) 3 SCC 462, granted permission for medical termination of pregnancy when the pregnancy had crossed 24 weeks. Again, in the case of **A v. Union of India**, (2018) 14 SCC 75, the Supreme Court permitted termination of pregnancy in a case where the gestational age was 25/26 weeks. In **Sarmishtha Chakraborty v. Union of India**, (2018) 13 SCC 399, the Supreme Court permitted termination of pregnancy when the gestational age was 26 weeks.

15) Similarly, the High Court of Delhi in the case of **Minor R through mother vs. State NCT of Delhi and another**, 2023 SCC Online Del. 383, permitted termination of pregnancy exceeding 24 weeks. The High Court of Madhya Pradesh in the case of **A Minor Girls vs. State**

of **Madhya Pradesh and another**, 2022 SCC Online MP 1416, permitted termination of pregnancy of 25 weeks. The High Court of Bombay in the case of **Rescue Foundation and another vs. State of Maharashtra and others**, 2021 SCC Online Bom 1384, permitted termination of pregnancy of 26 weeks.

16) From the foregoing analysis of the precedents on the subject, it is clear that the Constitutional Courts, on account of the fact that they are vested with wider powers, have permitted termination of pregnancy beyond 24 weeks in appropriate and deserving cases. Thus, while exercising the powers under Article 226 of the Constitution, this Court has got wider powers than what is prescribed under Section 3(2) of the Act of 1971, which permits termination of pregnancy only when the length of pregnancy does not exceed a maximum period of 24 weeks.

17) Having held that this Court does have power to permit termination of pregnancy of a victim of rape who carries fetus of more than 24 weeks, the next question that is required to be determined is as to whether the circumstances of the instant case warrant grant of such permission.

18) As already noted, the victim in the present case is aged only 11 years and she has been sexually molested at this tender age. She is studying only in the 4<sup>th</sup> class and is expecting a great future ahead of her. If permission to terminate the pregnancy is not granted to the victim, who has, admittedly, expressed her desire to terminate the pregnancy, it will have serious consequences not only on her physical

health but also upon mental health of the victim because she will have to live with the trauma and stigma of unwanted procreation throughout her life. This will not be in her interest and would also not be in the interests of the child that may be born. In these circumstances, if permission is not granted to the victim to terminate her pregnancy, she would be exposed to a miserable future. It is not in dispute that the father of the victim has also expressed his desire that the pregnancy of the victim needs to be terminated and for this reason, he has approached this Court by way of the instant petition.

19) While this Court is of the opinion that the victim should be permitted to terminate her pregnancy, it is also to be taken into account that she is at the advanced stage of pregnancy. Whether termination of pregnancy of the victim at this stage would be medically feasible or whether it would involve any danger to her life, are the issues which have to be gone into by the experts in the relevant field, whereafter they have to take a decision as to whether or not the pregnancy of the victim should be terminated.

20) Accordingly, the petition is **disposed** of with the following directions:

(I) The Principal, Government Medical College, Srinagar,  
shall constitute a Medical Board of the following:

1. a Gynecologist;
2. a Pediatrician;
3. a Radiologist or Sonologist;
4. a Psychiatrist; and

5. any other expert that may be deemed necessary by the Principal;

The needful shall be done by the Principal, Government Medical College, Srinagar, immediately upon receipt of this order, whereafter the victim shall make herself available before the Medical Board at 11.00 am on 21.03.2023 for the purpose of her medical examination.

- (II) In case the Medical Board is of the opinion that termination of pregnancy of the minor victim can be undertaken without risk to her life, the Principal, Government Medical College, Srinagar, shall ensure that termination of pregnancy of the minor victim is undertaken by competent doctors in accordance with the provisions of the Medical Termination of Pregnancy Act and rules framed thereunder and all other regulations and guidelines prescribed for the purpose.
- (III) Prior to undertaking termination of pregnancy of the victim, her fresh consent as also fresh consent of her father shall be obtained by the concerned doctors.
- (IV) The doctors concerned shall preserve the foetus for the purposes of DNA identification etc. with reference to the criminal case which has been registered against the accused.
- (V) The Government of Union Territory of Jammu and Kashmir shall bear all necessary expenses for termination of pregnancy of the victim.

- (VI) If the child is born alive despite the attempts of medical termination of pregnancy, the doctors shall ensure that all necessary care is given to the child.
- (VII) The Principal, Government Medical College, Srinagar, shall furnish report in the above context before the Registrar Judicial of this Court within ten days from today, whereafter the Registrar Judicial shall list the matter before the Court on 31<sup>st</sup> March, 2023 for reporting compliance.

21) A copy of this order be sent to Principal, Government Medical College, Srinagar, for information and compliance.

(SANJAY DHAR)  
JUDGE

Srinagar  
16.03.2023  
"Bhat Altaf, PS"

*Whether the order is speaking: Yes/No*  
*Whether the order is reportable: Yes/No*