

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC NO.1741 OF 2021

(This is an application under Section 482 of the Code of Criminal Procedure, 1973.)

'X' **Petitioner**

-versus-

State of Odisha & Ors. **Opp. Parties**

Advocates appeared in the case through Hybrid Mode:

For Petitioner : Mr. Sarathi Jyoti Mohanty, Adv.

-versus-

For Opp. Parties : Mr. L. Samantaray, AGA

CORAM:

JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-10.11.2021

DATE OF JUDGMENT:-16.11.2021

S.K. Panigrahi, J.

1. "Justice is the sum of all moral duty" as observed by William Godwin who is considered to be one of the first exponents of utilitarianism, justly articulates the relevance in the present case. The Courts are duty bound to come to the rescue of the victims and alleviate their mental agony and suffering especially in cases where there is a lacuna in the law. Interpreting law in a contemporary legal perspective may be necessary to do complete justice in each case. The present petitioner seeks to assail the order dated 09.07.2021 passed by the Ld. S.D.J.M., Banki in G.R Case No. 137 of 2021 under Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as "the MTP Act" for brevity). Aggrieved by the order, the present petitioner, has approached this Court by way of present petition

under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Code” for brevity).

2. Shorn of unnecessary details, the substratum of the matter presented before this Court states that the petitioner is a resident of Vill- Bania, P.S- Baideswar, Dist- Cuttack. On 14.04.2021, the petitioner while returning to her house was gagged in the mouth by a towel and she was forcibly taken away to the nearby school. Thereafter, the accused persons forcibly committed rape on her and threatened to kill in the event she spoke about the act to her family members or police.

3. The petitioner lost her senses and narrated her ordeal to her father after returning home. The petitioner’s father intimated the village gentry about the said incident and consequently, a FIR was lodged in Baideswar Police Station. Pursuant thereto, the IIC of Baideswar Police Station registered the FIR against the present proforma Opp. Party Nos. 4 to 8 for commission of offence u/s 376-D, 506 and 34 of the Indian Penal Code, 1860 (hereinafter referred to as “the Penal Code” for brevity).

4. Mr. Sarathi Jyoti Mohanty, learned counsel for the petitioner submits that the petitioner, being an unmarried young girl has not just suffered physically and mentally but has also been deprived of maintaining a dignified social life due to commission of the said offence. In fact, rape is understood as humiliation, violation of self-determination and an intimate attack on the woman’s personhood. The learned counsel for the petitioner has further submitted that the petitioner has been pregnant for more than 4 months and feels morally insecure to step out of her house due to horrendous social stigma attached to such crime. The social

relations between men and women in which violence against women is often taken for granted, especially in cases like these the judge do decide their fate in the decision to abort or not to abort the pregnancy.

5. In the cases of this genre, the medical practice of abortion, legal and illegal, has expanded but the Psycho-physiological and social condition of the rape survivors form the essential aspects of medical judgment especially in therapeutic abortion case. In this context, it is worthwhile to advert to Section 3 of the MTP Act which provides a statutorily protected space 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.

(2A) 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.

(2B) 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.

(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 reasonable 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 lunatic, shall be terminated except with the consent in writing of her guardian.

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

6. Learned counsel for the petitioner submitted that despite the clear mandate of provisions, learned S.D.J.M., Banki has erroneously rejected the fervent plea of the petitioner on the grounds of lack of jurisdiction. Further the learned S.D.J.M., Banki has also opined that the petition could not be considered on its merit due to the fact that the conviction against the accused persons has not yet been established. He vehemently contended that the learned S.D.J.M., Banki has awfully failed to appreciate the fact that it is not necessary that the allegation of rape is required to be

proved before Section 3 of the MTP Act could be invoked. The said contention can be aptly reflected by the Madhya Pradesh High Court in the case of **Prosecutrix vs The State of Madhya Pradesh**¹:

“(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 subject to prosecutrix consenting for termination in writing”

7. Coming to the facts of the present case, the learned counsel pointed out that the victim is 20 years old girl of sound mind and the question of consent for termination of pregnancy may not be of relevance. However, the radiological report dated 06.10.2021 conducted by Dr.Sudipta Srichandan states that the gestational age is 26 weeks & 4 days +/- 2 weeks which is well beyond the statutory requirement. Therefore, to say what cannot be done in terms of the MTP Act, can be done if the court so directs, is a contradiction in terms. The Court needs to see what is legally possible. A thing that may be possible medically, may not be possible legally.

¹Writ Appeal No. 745/2021 (MP High Court)

8. While examining the instant case, the Court is confronted with a dynamic tension between the Court's power to protect the rights of the victim and the solicitude for the unborn. In fact, the crime like rape affects the lives of victims and associated physical and emotional consequences. Considering the gravity of the issue, in the absence of any report by medical team ascertaining the actual period of pregnancy, this Court considered it appropriate to direct the office of the Advocate General vide order dated 01.11.2021 in order to facilitate the petitioner for testing of the period of pregnancy accurately by a team of doctors as prescribed under the Act. Accordingly, the office of the Advocate General arranged for such a test to be conducted on 3rd November, 2021 and the test report submitted by the medical team of S.C.B. Medical College and Hospital, Cuttack suggests it may be unsafe for getting the termination done at this stage. In fact, allowing the termination at this stage could endanger the mother's life or even lead to substantial and irreversible impairment of a major bodily function.

9. The cumulative intent behind the MTP Act which is still a legally sterile subject but with significant safeguards for the victim and the unborn, the provisions of the Act has further been enriched by judicial interpretation. Reproductive choice of a woman has been recognised as a fundamental right by a three Judges Bench of Hon'ble the Supreme Court in the case of **Suchita Srivastava & Anr vs Chandigarh Administration**² wherein, it was observed that:

"11. A plain reading of the above-quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met. When the MTP Act was first

²(2009) 9 SCC 1

*enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. **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."*

10. Further, the judgment in *Suchitra Srivastava*³ (supra), notes that a perusal of the provisions of the MTP Act makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a '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' [as per Section 3(2)(i)] or when 'there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously

³(2009) 9 SCC 1

handicapped' [as per Section 3(2) (ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period. The explanations to this provision have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth-control methods since both of these eventualities have been equated with a 'grave injury to the mental health' of a woman. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(b) of the MTP Act, 1971. The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a 'mentally ill' person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is 'immediately necessary to save the life of the pregnant woman.

11. Similarly, while dealing with a pregnant rape victim's reproductive choice, the learned Division Bench of High Court of Rajasthan in the case of **State of Rajasthan vs S⁴**, iterated that the infringement of the fundamental right to life of the victim heavily

⁴D.B. Spl. Appl. Writ No. 1344/2019.

outweighs the right to life of the child in womb. It was further held as under:

“We are of the opinion that while making the above evaluation, the learned Single Judge did not take into account the correct perspective, the fact that the woman's right to make a reproductive choice has been recognized as a dimension of personality liberty by Hon'ble the Supreme Court in the case of Suchita Srivastava (supra). The reproductive choice has been held as covering procreation as well as abstention therefrom. Indisputably, a woman's right to privacy, dignity and bodily integrity is a fundamental right guaranteed by Article 21 of the Constitution of India. When the prospective child has been conceived as a result of rape, the eventuality has been held as causing grave injury to the mental health of a woman in the case of Suchita Srivastava (supra) and Explanation-1 to Section 3 of the MTP Act. While directing that the rape victim shall deliver the child, the learned Single Bench failed to consider the fact that the personal liberty of the woman was being impinged upon on two counts i.e. on her right to make a reproductive choice as well as posing a grave injury to her mental health and causing her Mental Trauma. In the comparative evaluation, the infringement of the fundamental right to life of the victim heavily outweighs the right to life of the child in womb. Therefore, we may reiterate that the fundamental right of the pregnant woman i.e. the child writ (12 of 20) [SAW-1344/2019] petitioner to get the pregnancy terminated would heavily outweigh the right of the foetus to be born.”

12. Further, the Hon'ble the Supreme Court in the cases of **Mrs. X And Ors vs Union Of India And Ors⁵**, **Mamta Verma vs. Union of India and ors.⁶**, **A vs. Union of India⁷** and **Meera**

⁵(2017)3 SCC 458

⁶(2018) 14 SCC 289

⁷(2018) 14 SCC 75

Santosh Pal & Ors. vs. Union of India & Ors.⁸, has permitted termination of pregnancy of a foetus with “abnormalities” where duration of pregnancy was up to 24 weeks. In both the cases, there was a substantial risk of the child suffering from such physical or mental abnormalities as to be seriously handicapped upon birth. In the case of *Mrs. X And Ors vs Union Of India And Ors (supra)*, the Hon’be Court posited that:

"9. Though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly."

13. Many judicial decisions permeates to the instant issue. Hon’ble High Court of Bombay in the case of *Sudha Sandeep Devgirkr vs Union of India*⁹ was of the opinion that the conspectus of the decisions of the Hon’ble Supreme Court makes it quite clear that the Supreme Court has construed the provisions of Section 5 of the MTP Act, not narrowly by adopting the principle of literal construction but liberally by adopting the principle of purposive construction. The Hon’ble Court has consistently permitted medical termination of pregnancies which had exceeded the ceiling of 20 weeks where medical opinion established that continuance of pregnancy involved grave injury to the mental health of the pregnant woman or where there was substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. This was despite the fact that there was no immediate danger to the life of the pregnant

⁸AIR 2017 SC 461

⁹WRIT PETITION NO. 10835 OF 2018

mother. In effect therefore, the Hon'ble Supreme Court read into the provisions of Section 5 of the MTP Act the contingencies referred to in clause (i) and (ii) of Section 3 (2)(b) of MTP Act. Needless to state, this was upon satisfaction that the risk involved in the termination of such pregnancies was not greater than the risk involved in spontaneous delivery at the end of the full term.

14. Pertinently, in the present case, there is no opinion of any registered medical practitioner that the continuance of pregnancy of the petitioner would involve a risk to her life or grave injury to her physical or mental health. Further, there is no suggestion that if the child were born, it would suffer from any physical or mental abnormalities as to be seriously handicapped. In any event, as per the provision, an opinion to terminate pregnancy assumes importance in cases the length of the pregnancy does not exceed twenty-four weeks. Unfortunately, in the present case, the pregnancy exceeds 24 weeks and as per the requirement of the statute, the medical opinion of not less than two medical practitioners has also not been obtained. Moreover, there is no medical opinion that termination of pregnancy is immediately necessary to save the life of the petitioner as per Section 5 of MTP Act. Viewed from every angle, the provisions of the MTP Act do not permit the termination of pregnancy of the petitioner.

15. Indisputably, in the case at hand, the victim is being forced to bear and care for the unwanted child is bound to severely impact her personality and womanhood. Considering the present situation, where the victim chose to approach the Court through her guardian as per the MTP Act seeking termination of her undesired pregnancy albeit with some delay, her request should have been

acceded to over and above the right to life of the child yet to be born. Though this issue has, time and again, knocks at the judicial threshold it is still crying for a unperplexed solution by way of suitable amendment in the statute governing the field.

16. Proper provisions are required to be made for the welfare, education and upbringing of the child. The child is innocent, just like the victim, his/ her mother. This Court is fully conscious of the hard realities of life and the possible traumas, the victim is undergoing and would face, in future. The ordeal mental agony and fear of social ostracism can take a toll on the victim and even on the unborn child. As stated hereinabove, there is no other legal option for her but to undergo suffering and deliver the baby since the pregnancy is over twenty-six weeks old.

17. In the present case, the factual matrix suggests that the petitioner and her father initially approached the police station for the purpose of termination of pregnancy, but were directed to approach the concerned court as the charge sheet was filed by then. In this regard, this Court feels that the Police officers could have acted more sensibly and, at the very least, guided them to approach District Legal Service Authority or Legal Services Units at Taluk Level or to any para legal volunteers. This would have, perhaps, helped the victim to get timely legal advice and may have saved her from suffering the forced delivery, imposed on her due to medico-legal compulsions.

18. It is imperative that every police man should be given proper understanding of the working of legal services authority at different levels. The legal services authority could provide training

modules to the police stations to sensitise and make the police officers aware of the role and functions of the authority. Upon registering a case, the police officers could then do well to suggest the victims to approach to the nearest legal service authority for legal assistance, if required. **The legal services authority at district level are also required to coordinate with the police department in setting up legal aid booths or providing legal services helpline numbers at each and every police station. The helpline numbers could be displayed in each police station to assist the victims.** Time is of the essence in matters involving MTP Act and no victim should suffer due to lack of onerous obligations involved in the process. Therefore, the role of legal services authority at district and taluk level assumes paramount importance to ensure no victim suffers due to lack of timely legal assistance.

19. In the light of the above, although this court is painfully conscious of the possible impact of this decision on the life of the petitioner, it is bound by the legal mandate. The physical, mental, psychological trauma suffered by the petitioner is formidable. Rape is a crime not only against a woman but against humanity at large as it brings out the most brutal, depraved and hideous aspects of human nature. It leaves a scar on the psyche of the victim and an adverse impact on society. In the present case, the agony experienced by the petitioner has left a more visible impact. Only the sufferer knows the extent of the suffering. It is heart-wrenching to imagine the situation of the petitioner and what lies ahead of her. This Court does feel that her welfare is, therefore, paramount consideration for this court. However, as regards the legal

position, the above discussion and the mandate of Section 3 of the MTP Act, in particular, leads only to one conclusion i.e., since the length of the pregnancy of the victim is over twenty-six weeks, this Court cannot permit its termination.

20. Given the peculiar facts and circumstances of this case, this Court believes that it may be necessary to pass certain orders in the interest of the victim and the unborn child. Keeping the welfare of the mother, child and the parents of the victim, this Court considers it appropriate to issue the following directions:

1).The District Collector, Cuttack shall ensure that arrangements are made to provide proper diet, medical supervision and medicines as may be necessary, to the victim throughout the remaining part of her journey of pregnancy. When the time for delivery arrives, proper medical facilities be made available for a safe delivery of the child.

2).The State Legal Services Authority shall ensure that the State Government shall pay an amount of Rs.10,00,000/- (rupees ten lakhs only) as compensation to the victim. This amount shall be over and above the compensation amount, if any, the learned Trial Court may direct to be paid to the victim and/or her child at conclusion of the trial in the underlying proceedings.

21. With the aforesaid orders, the present CRLMC is disposed of.

22. Urgent certified copy of this judgment/order be granted on proper application.

23. A free copy of this Judgment/ order be handed over to the learned Additional Government Advocate for the State for early compliance and another copy to the Secretary, State Legal Services Authority.

(S.K. Panigrahi)
Judge

Orissa High Court, Cuttack,
Dated the 16th Nov., 2021/B. Jhankar

