

**THE HIGH COURT OF JUDICATURE FOR MADHYA
PRADESH AT JABALPUR
(Division Bench)**

Writ Petition No.12155/2021

.....Petitioner

Versus

State of Madhya Pradesh and othersRespondents

Coram:

**Hon'ble Mr. Justice Mohammad Rafiq, Chief Justice
Hon'ble Mr. Justice Vijay Kumar Shukla, Judge**

Presence :

Shri Harpreet Singh Ruprah, Advocate for the petitioner.
Shri Swapnil Ganguly, Deputy Advocate General for the respondents/State.

Whether approved for reporting- Yes.

Law laid down:

Medical Board opined that the victim has history of delayed milestone, poor understanding, poor self-care, inability to speak, drooling of saliva since childhood. The Medical Board further opined that on examination, it was found that patient is unable to take care of self, her hygiene is very poor and her intellectual abilities are poor. In view of these factors, patient was opined to suffer from SEVERE MENTAL RETARDATION WITH BEHAVIORAL PROBLEMS. The Medical Board was further of the view that mental age of the victim is that of a minor, being only 6 years. According to them, she is unable to take care of herself and, therefore, she would not be able to take care of the fetus. In our considered view, in a situation like this, it would be hazardous to allow her to continue with the pregnancy till full duration. It may even be more dangerous to the unborn child too. In facts like these, this Court cannot lose sight of the psychological trauma the victim would have to undergo all this time. She being not in a position to take a decision due to her intellectual deficiency, decision of her guardian to consent for termination of unwanted pregnancy has to be accepted as a move in her best interest. Not permitting the rape victim in the present case to go in for medical termination of unwanted pregnancy would amount to compelling her to continue to bear such pregnancy for full duration and deliver the child, which would be violative of her bodily integrity, which would not only aggravate her mental trauma

but would also have devastating effect on her overall health including on psychological and mental aspects. This is violative of her personal liberty, to borrow the words of the Supreme Court in **Suchita Srivastava (supra)**, (para 22) because “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”. In the peculiar facts of the case, her personal integrity has to be respected.

Explanation 2 to Section 3(2) of the MTP Act has expanded the scope of “grave injury to mental health” by raising a presumption that “the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman”. “Such pregnancy” here refers to pregnancy “alleged to have been caused by rape”. Thus, the legislature has by providing for raising such presumption rather expanded the meaning of the expression “grave injury to mental health” of the rape victim for deciding whether it would constitute a grave risk to the mental health of the pregnant woman in the meaning of Section 3(2)(i) of the MTP Act. The Court would also be entitled to reasonably visualise the environment in which the victim will have to live in immediate foreseeable future to decide the question of her mental health.

Explanation 2 to Section 3(2) of the MPT Act expands the concept of “grave injury to mental health” by raising a presumption that anguish caused by any pregnancy as a result of rape shall be presumed to constitute a grave injury to the mental health of a pregnant woman. Therefore, for the purposes of Section 3(2) of the MTP Act, the expression “grave injury to mental health”, is used in a liberal sense by the legislature itself and further Section 3(3) of the MTP Act, in terms provides that in determining whether continuance of pregnancy would involve such risk of injury to the health as is mentioned in Section 3(2), account may be taken of the pregnant woman’s actual or reasonable foreseeable environment. Section 3(3) of the MTP Act, makes reference not merely to physical injury but also to mental injury. In fact, the aspect of a pregnant woman’s actual or reasonable foreseeable environment has greater nexus to aspect of mental health as compared to physical health, particularly in the present context. This legislative liberality when it comes to expanding the concept of the grave injury to mental health cannot evaporate no sooner the ceiling of 24 weeks prescribed in Section 3(2)(b) of the MTP Act is crossed. If the expression “life” in Section 5(1) of the MTP Act is not to be confined to mere physical existence or survival, then, permission will have to be granted under section 5(1) of the MTP Act for medical termination of pregnancy which may have exceeded 24 weeks, if the continuance of such pregnancy would involve grave injury to the mental health of the pregnant woman.

Medical termination of pregnancy of the Victim-A, daughter of the petitioner, permitted.

Since writ petition- allowed on applying provisions of Section 3(2)(i) read with its Explanation-2 to the facts of the case, the question of constitutional validity of Section 3(2)(ii) was left untouched.

Reference made to

Z Vs. State of Bihar and others (2018) 11 SCC 572
Murugan Nayakkar Vs. Union of India & others (2017) SCC Online SC 1902
Meera Santosh Pal & others Vs. Union of India & others (2017) 3 SCC 462
Suchita Srivastava & Another Vs. Chandigarh Administration (2009) 9 SCC 1
Tapasya Umesh Pisal Vs. Union of India & others (2008) 12 SCC 57
XYZ Vs. Union of India & others, 2019 SCC OnLine Bom 560=(2019) 3 Bom CR 400
Kalpana Singh Vs. Government of NCT of Delhi & others, WP(C) No.115/2021 decided on 11.1.2021
Sundarlal Vs. The State of M.P. & others, W.P.No.20961/2017-decided on 6.12.2017
Victim (A) Vs. State of Rajasthan & others, S.B.Criminal W.P.No.148/2020, decided on 26.2.2020
ABC Vs. State of Chhattisgarh & others, W.P. (C) No.2294/2021 decided on 25.06.2021

Significant Paragraphs:- 21 to 23

Hearing convened through Video Conferencing:

O R D E R

(14.7.2021)

Per: Mohammad Rafiq, C.J.

1. This writ petition has been filed by praying for a direction to the respondents to allow her daughter (hereinafter referred to as “Victim-A”) to undergo medical termination of pregnancy at the State expense. The petitioner has also challenged the constitutional validity of Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 (for short “the MTP Act”) to the extent it stipulates a ceiling of 24 weeks for medical termination of pregnancy with the prayer the same be declared as ultra virus Article 14 and 21 of the Constitution of India. The petitioner has also challenged the order dated 6.7.2021 passed by the Third Additional Sessions Judge, Hoshangabad in MJC-R No.207/2021 rejecting application of the petitioner for permission to terminate pregnancy of Victim-A.

2. The petitioner is resident of Village Baagrata, Tehsil Babai, District Hoshangabad of State of Madhya Pradesh. She belongs to

Scheduled Tribe community. She is wholly illiterate, living below poverty line. She does not have any moveable or immoveable property. According to the petitioner, she and her husband work as a labourer. Her daughter Victim-A is aged about 23 years and she is mentally retarded. The petitioner and her husband left their village for Ujjain for earning livelihood by doing labour work. When they returned back after some time, the petitioner found that her daughter Victim-A was behaving in a peculiar manner. Their daughter Victim-A informed them in sign language about certain stomach pain. On making further enquiry, she learnt that one of her neighbours had committed rape upon her. She immediately took her to the doctor, who found that she was pregnant. The petitioner lodged a First Information Report with the Police Station Babai. District Hoshangabad, which has been registered for offence under Section 376(2)(1) of the IPC as Crime No.301/2021. The accused was arrested on 20.6.2021. The police got Victim-A medically examined and also obtained the medical report about her mental health. Victim-A was thereafter sent for further medical examination on 22.6.2021, upon which it was confirmed that she was carrying pregnancy of 22 weeks. The petitioner immediately filed an application under Section 3 of the MTP Act on 30.6.2021 before the Judicial Magistrate First Class, Hoshangabad, seeking permission for termination of her pregnancy, who rejected the same on 2.7.2021. Since 3rd and 4th July, 2021, being Saturday and Sunday, were holidays, the petitioner filed application under Section 3 of the MTP Act with the same prayer before the Third Additional Sessions Judge, Hoshangabad on 5.7.2021, which was registered as MJC-R No.207/2021. The same

was however rejected on the very next working day i.e. 6.7.2021 under the ignorance about the latest law whereby maximum length of pregnancy under Section 3(2)(b) of the Act, which was earlier 20 weeks, was raised to 24 weeks by amendment to that effect by the Act 8 of 2021 published in the Gazette of Government of India on 25.3.2021.

3. When the matter was listed before this Court on 12.7.2021, the Court directed the Medical Superintendent, Hamidia Hospital, Bhopal to constitute a Multi Disciplinary Medical Board consisting of registered medical practitioner each from the Department of Gynaecology, Psychiatry, Paediatrics and Radiology or any other specialist, in his discretion, as per the MTP Act for having the radiological examination of the fetus to determine the status of its health and also give the bona fide opinion as to whether the medical termination of the pregnancy would be necessary to save the life of the victim. A report of the Medical Board has been produced today, which reads thus:-

“The findings of the Medical Board are as follows:-

1. Survivor age 24 y/f (as per AADHAR card). As per the history narrated by mother, she has history of delayed milestone, poor understanding, poor self care, inability to speak, drooling of saliva since childhood. She has been certified as Mental Retardation by District Hospital Hoshangabad. On examination, it was found that patient is unable to take care of self, her hygiene is poor, her intellectual abilities are poor. In view of these, patient suffers from **SEVERE MENTAL RETARDATION WITH BEHAVIORAL PROBLEMS**.

2. Obstetric Ultrasound was performed on 13.07.2021 and it reveals a single live intrauterine fetus of Gestational Age by USG is 25 week 5 days +/- 2 weeks. During this scan No gross congenital anomaly was detected.

3. There is alleged history of sexual assault, which has resulted in pregnancy. During her Antenatal checkup done on 13.07.2021, it was found that she is vitally stable. Today, she is having single live intrauterine fetus of Gestational Age is 25 week 5 days without evidence of gross congenital anomaly (as per USG report

dated 13/07/2021). As per the MTP Act, 1971, Medical termination of pregnancy is permissible up to 20 weeks and as per the amendment made in MTP Act, 2021, termination of pregnancy is permitted up to 24 weeks gestation age.

4. There is no immediate risk to the life of pregnant woman in continuation of Pregnancy.

5. Survivor is a case of SEVERE MENTAL RETARDATION WITH BEHAVIORAL PROBLEMS. Mental age of the survivor is that of a Minor (Mental age approximately 6 years). She is unable to take care of self and she will not be in a position to take care of the baby, if she delivers it.

OPINION: Based on above findings, Medical Board is of the opinion that Survivor is a case of SEVERE MENTAL RETARDATION WITH BEHAVIORAL PROBLEMS, she is antenatal with 25 weeks 5 days live pregnancy. She is unable to take care of self and she will not be in a position to take care of the baby, if she delivers it. There is no immediate risk to the life of pregnant woman in continuation of Pregnancy.”

Apart from the report of the Medical Board, the Radiologist in the Department of Radiodiagnosis GMC and SZH Hospital, Bhopal in his report has given the following conclusion:-

“Total cervical length- 3.5 cm.

Impression- Single live intrauterine fetus of MGA 25 WKS 5 days (+/- 2 weeks) without evidence of any gross congenital anomaly detected in the present scan.”

4. Shri Harpreet Singh Ruprah, learned counsel for the petitioner submitted that Medical Board in their collective opinion as well as Radiologist, have concluded that the Victim-A is bearing pregnancy of 25 weeks and 5 days, with the variation of +/- 2 weeks. That means that even according to the experts, the duration of pregnancy could even be 23 weeks. The petitioner upon being advised immediately filed an application before the Court of Judicial Magistrate First Class on 30.6.2021 which was rejected on 2.7.2021. Thereafter the petitioner again filed an application before 3rd Additional Sessions Judge, Hoshangabad on 5.7.2021, which too was dismissed on 6.7.2021 under ignorance of the amended provision of law which came into effect from

25.3.2021 whereby outer limit of the duration of pregnancy, for permitting termination, was increased from 20 weeks to 24 weeks. In the first place, the delay if all has taken place, is not attributable to the petitioner or atleast the Victim-A, secondly, even the experts are not certain about the age of the fetus by indicating in their opinion that the Victim A is antenatal with 25 weeks 5 days live pregnancy, which is adjustable, plus or minus, by two weeks and thirdly there is no risk to the life of the Victim-A even if her pregnancy is terminated now. Learned counsel further argued that even otherwise, as per report of the Medical Board, Victim-A is a case of severe mental retardation with behavioural problems and her mental age is of a minor aged approximately 6 years. She is unable to take care of herself and she is not in a position to take care of the baby, if she delivers it. Moreover, this Court may consider the case of the petitioner for permitting termination of pregnancy in view of Section 3(2)(b)(i) read with Explanation (2) thereto, according to which if a pregnancy is alleged 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.

5. Learned counsel in support of his arguments relied upon the judgments of the Supreme Court in **RBI Vs. Peerless General Finance & Investment Co. Ltd.** (1987) 1 SCC 424; **Sonali Kiran Gaikwad Vs. Union of India** in W.P.(C) No.928/2007 decided on 9.10.2007; **Tapasya Umesh Pital Vs. Union of India & others** (2008) 12 SCC 57; **X Vs. Union of India** (2017) 3 SCC 458; **Meera Santosh Pal Vs. Union of India** (2017) 3 SCC 462; **Murugan Nayakkar Vs. Union of**

India & others (2017) SCC Online SC 1902; **Z Vs. State of Bihar** (2018) 11 SCC 572; **Sarmishtha Chakrabortty Vs. Union of India** (2018) 13 SCC 339 and **A Vs. Union of India & others** (2018) 14 SCC 75. Learned counsel also relied upon the Division Bench judgment of Bombay High Court in **Sheikh Ayesha Khatoon Vs. Union of India & others** (2018) SCC Online Bom 11.

6. Per contra, Shri Swapnil Ganguly, learned Deputy Advocate General submitted that though the Medical Board in their collective opinion as well as Radiologist in his individual opinion have opined that the gestational age of fetus appears to be 25 weeks 5 days with the variation of +/- 2 weeks. In any case, now when the outer limit is 24 weeks, primary consideration for grant of permission for medical termination of pregnancy would be the possible risk to the life of the woman concerned or the fetus. In most of the cases relied by the learned counsel for the petitioner, report of the medical expert was in favour of either of the situations whereas in the present case, the Medical Board had opined that there is no immediate risk to the life of the woman or the fetus.

7. We have given our anxious consideration to rival submissions, perused the material on record and studied the cited precedents.

8. A perusal of the afore-quoted opinion of the Medical Board in condition no.1 indicates that the survivor is a case of severe mental retardation with behavioral problems. Mental age of the survivor is approximately 6 years. She is unable to take care of herself and therefore, obviously she will not be in a position to take care of the baby, if she delivers the one. In conclusion no.2 of the aforesaid

opinion of the Medical Board, the victim-A is opined to be a single live intrauterine fetus of gestational age by USG is 25 week 5 days +/- 2 weeks with the possibility of age being either less or more by 2 weeks, which is indicated by “+/- of 2 weeks”. This is also the opinion given by the Radiologist. We have to therefore now examine whether in the facts like these, this Court would be justified in refusing to grant permission for medical termination of the pregnancy on the law available on the subject.

9. Section 3 of the MTP Act is relevant for the purpose of deciding the present case, which reads as under:-

“Section 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 Clause (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.”

10. It is indeed surprising that the Third Additional Sessions Judge, Hoshangabad relied on unamended Section 3 of the MTP Act rather than considering the amended provision, which has now increased the permissible outer limit for termination of pregnancy from 20 weeks to 24 weeks. This means that if the law was correctly read and applied by him, the permission of medical termination of the pregnancy could have been granted as the period of 24 weeks had yet not passed on the date the said Court was approached. Be that as may be, Section 3(2)(b), which is relevant for deciding the medical termination of pregnancy,

inter alia provides that subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner 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. The first Explanation thereto relates to Clause (a), which 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. This Explanation may not be relevant for deciding the present case, but the second Explanation of Section 3(2) would in the facts of the present case have bearing on the interpretation of Section 3(2)(i) of the MTP Act, which stipulates that 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. (emphasis supplied)

11. Admittedly, in the present case, the Victim-A, daughter of the petitioner, was subjected to rape and according to experts, her mental age is only 6 years and therefore, regardless of her biological age, the

consent for sexual intercourse in her case would be irrelevant. The First Information Report was lodged by her mother for the offence of Section 376(2)(1) of the IPC against the accused with the Police Station Babai, District Hoshangabad in Crime No.301/2021. This therefore would bring the case of her daughter within the purview of Explanation (2) which provides that the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman, who in this case is Victim-A. Moreover, what is peculiar about this case is that the Medical Board itself has opined that duration of pregnancy is variable by two weeks. The victim is unable to take care of self, her hygiene is poor, her intellectual abilities are poor, her mental age is only 6 years and therefore, obviously she will not be in a position to take care of the baby, even if she delivers it.

12. This Court is cognizant of the fact that the Victim-A is mentally retarded, and her mental age having been adjudged by the experts to be only 6 years, therefore, all the steps on her behalf could be and were in fact taken by her mother, who is her natural guardian. She immediately filed an application before the Court of JMFC, Hoshangabad on 30.6.2021 which was rejected on 2.7.2021 and thereafter, immediately on the very first next working day i.e. on 5.7.2021, she filed the application before the Third Additional Sessions Judge, who being ignorant of the amended provision, which came into effect from 25.3.2021, rejected the same under the misconception that the outer limit for grant of permission of medical termination of pregnancy was 20 weeks and not 24 weeks. Sub-section (4) of Section 3 requires

consent of the guardian of a minor, or a major who is mentally ill person. The exceptions to this rule of consent have been given in Section 3(4)(a) of the MTP Act, which provides that when the pregnant woman is below eighteen years of age or is a “mentally ill” person, then consent of her guardian would have to be obtained. Since in the present case the mental age of the Victim-A was determined approximately 6 years, her pregnancy can be medically terminated with the consent of the guardian who is actually natural mother of Victim-A. The permission/consent has to be therefore necessarily assumed.

13. In **Murugan Nayakkar** (supra), the petitioner, who was 13 years of age, was a victim of alleged rape and sexual abuse. She preferred a writ petition for termination of her pregnancy. The Medical Board opined that termination of pregnancy at this stage or delivery at term will both have equal risk to the mother. The Supreme Court held that considering the age of the petitioner, trauma which she *prima facie* suffered due to sexual abuse and the agony she is going through at the present, it would be appropriate to allow termination of pregnancy. In **Tapasya Umesh Pisal Vs. Union of India and others** (supra), the victim, who was 24 years old, was seeking permission to undergo medical termination of the pregnancy, which had progressed to 24 weeks. The Supreme Court held that it is difficult to refuse the permission to the petitioner to undergo medical termination of pregnancy as it is certain that if the foetus is allowed to be born it would have a limited life span with serious handicaps which cannot be avoided. In **Kalpana Singh vs. Government of NCT of Delhi &**

others (supra), the victim had pregnancy of 25 weeks and 5 days, which was permitted to be terminated medically.

14. The Supreme Court in **Suchita Srivastava and Another Vs. Chandigarh Administration** reported in (2009) 9 SCC 1, held that 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. Reproductive rights include a woman's entitlement to carry 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. The Lordship further held 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". The Explanations to Section 3 however also contemplate 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.

15. This Court in Writ Petition No.20961/2017-**Sundarlal Vs. The State of M.P. & others**, decided on 6.12.2017, was dealing with the case of minor daughter of the petitioner, who was kidnapped and a First

Information Report at his instance was registered under Sections 363, 366, 376 of the IPC read with Section 4 and 6 of the Protection of Children From Sexual Offences Act, 2012 against the accused. The police secured the custody of the minor daughter of the petitioner, who was handed over to the petitioner. On medical examination, she was found to be carrying pregnancy of about 16 weeks. The petitioner being guardian gave consent for termination of the pregnancy of his minor daughter. This Court while directing constitution of a committee of three medical practitioners to form bonafide opinion as to termination of pregnancy and retention of DNA sample of fetus and providing all medical assistance and care to the victim observed as under:-

“12. In Explanation I, the law makers made it clear that where pregnancy is alleged by victim because of rape, a presumption can be drawn that such pregnancy constitute a grave injury to the mental health of pregnant woman. In the present case, this is not in dispute that victim is a minor and petitioner is praying for termination of pregnancy because her daughter is a rape victim. This court in *Haloo Bi* (supra) (*Haloo Bi @ Halima Vs. State of M.P. & others* 2013 (1) MPHT 451) opined that we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the victim is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child.”

16. The Rajasthan High Court in Victim (A) Vs. State of Rajasthan & others, S.B.Criminal Writ Petition No.148/2020, decided on 26.2.2020, was dealing with the case where the Medical Board had opined the age of the fetus to be 23 +/- 2 weeks. Relying on the decision of the Supreme Court in **Meera Santosh Pal & others Vs. Union of India & others** (2017) 3 SCC 462, where permission was granted for termination of pregnancy of a term of 24 weeks and another judgment of the same High Court in **Nisha Vaishnav Vs. State of**

Rajasthan S.B. Civil Writ Petition No.1271/2019, decided on 29.1.2019, the High Court allowed termination of pregnancy, in view of aforesaid Explanation (2) to Section 3(2) of the MTP Act as it was a case where a minor victim was subjected to rape and held that anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the petitioner.

17. In ABC Vs. State of Chhattisgarh & others, Writ Petition (C) No.2294/2021, vide judgment dated 25.06.2021, the High Court of Chhattisgarh dealing in a case of rape victim bearing pregnancy of 14 weeks and 3 days, relying on the judgment of Supreme Court in **Meera Santosh Pal** (supra) permitted the termination of pregnancy, holding thus:

“8. The explanation clause of Section 3 of MTP Act takes within its ambit not only the physical injury but also to mental injury and anguish. It is obvious that if the victim is subjected to rape and if she is forced to give birth to a child in the social scenario she has to face a life time anguish apart from the fact the child who is born will also have to face disdain of the society. Under the circumstances, it is directed that the petitioner shall be entitled to Medical termination of pregnancy. In order to carry out the pregnancy State shall form a panel of expert doctors at the District Hospital Durg as early as possible. The hospital shall take due care of the petitioner's health and provide her all medical support. It is further directed that the DNA of the child shall also be preserved considering the fact that the victim has already lodged a report under Section 373 which will eventually be required at a future date. The petitioner is directed to appear at District Hospital Durg on Wednesday i.e. 23.06.2021.”

18. The Bombay High Court in X Vs. Union of India & others 2018 (2) Mh.L.J. 46, was dealing with a case of victim who was mentally retarded, deaf and dumb and her pregnancy was of 18-19 weeks. The case of the guardian before the Court, like in the present case, was that the victim was unable to take care of herself and therefore, she would not be able to take care of the fetus. The Court

relying on the judgment of the Supreme Court in **Suchita Srivastava** (supra) held as under:-

“13. The crucial question here is whether permission can be granted to terminate the pregnancy of 22 weeks in this case. The victim in this case is deaf, dumb and mentally retarded; therefore, she is unable to make a choice on her own whether to terminate the pregnancy or to continue with it. She has no such intellectual capacity, therefore, her guardian should be given that right to make choice. This case is also required to be considered from the physical point of view of the victim. Victim is deaf, dumb and mentally retarded. She is unable to take any decision. In fact, she is not even aware that she has been raped and she is pregnant. It has been stated by her guardian and brother that she is not even able to take care of herself. Question therefore arises under such circumstance as to how she would take care of child to be borne? It has been stated in the medical certificate that "On Paediatrics examination, survivor has gross development delay with Down Syndrome". If we consider "Down Syndrome", it means "is a genetic disorder caused by the presence of all or part of a third copy of chromorome". It is typically associated with physical growth delays, characteristic facial features and mild to moderate intellectual disability. The medical literature would show that there is no cure to the "down syndrome". No doubt, a person with down syndrome may lead a normal life, but in the present case, when the victim is unable to take care of herself, there is every possibility that she will not be able to take care of the foetus. Though the certificate states that the risk of termination of pregnancy is within normal acceptable limits; it would be hazardous to ask her to bear the pregnancy. It is not only dangerous to her, but dangerous to the unborn child also. Apart from danger to the life of the petitioner, this Court has to take note of the psychological trauma the petitioner is undergoing as a result of carrying unwanted pregnancy. The pregnancy of the petitioner is definitely unwanted for her and it is violative of her personal liberty. Since she is unable to take decision due to intellectual disability, her guardian is taking the said decision, which is in the best interest of the victim and her survival. In the circumstances, we do not notice any impediment in permitting petitioner to terminate unwanted pregnancy.” (emphasis supplied)

19. In **Z Vs. State of Bihar and others** (2018) 11 SCC 572, the Supreme Court was dealing with a case of mentally retarded rape victim, who was found to be pregnant and was also HIV positive. The issue before the High Court was whether medical termination of pregnancy should be permitted. The High Court having relied on doctrine of “parens patriae” and “compelling State interest” declined medical termination of pregnancy, which had advanced in 23-24 weeks. The Supreme Court on detailed analysis reversed the verdict of the

High Court. Explanation 2 to Section 3(2)(b), which has been relied by the learned counsel for the petitioner, was at that time Explanation 1, which provided that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the same has to be presumed to constitute a grave injury to the mental health of the pregnant woman. The Supreme Court held that once such a statutory presumption is provided, the same comes within the compartment of grave injury to mental health of the victim. Following observations made by the Supreme Court in paras 23 are worth quoting:-

“23. We have already anlaysed in detail the factual score and the approach of the High Court. We do not have the slightest hesitation in saying that the approach of the High Court is completely erroneous. The report submitted by the IGIMS stated that termination of pregnancy may need major surgical procedure along with subsequent consequences such as bleeding, sepsis and anesthesia hazards, but there was no opinion that the termination could not be carried out and it was risky to the life of the appellant. There should have been a query in this regard by the High Court which it did not do. That apart, the report shows that the appellant, who was a writ petitioner before the High Court, was suffering from mild mental retardation and she was on medications and her condition was stable and she would require long term psychiatry treatment. The Medical Board has not stated that she was suffering from any kind of mental illness. The appellant was thirty-five years old at that time. She was a major. She was able to allege that she had been raped and that she wanted to terminate her pregnancy. PMCH, as we find, is definitely a place where pregnancy can be terminated.”

20. The Division Bench of Bombay High Court in a case on its own motion in **XYZ Vs. Union of India and others**, 2019 SCC OnLine Bom 560=(2019) 3 Bom CR 400 held that 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. The Division Bench referred to certain international treaties concerning human rights. In that context, the Division Bench observed that the pregnancy takes place within the body of a woman and has profound effects on her health, mental well being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control her own body and fertility and motherhood choices should be left to the women alone. The basic right of a woman is the right to autonomy, which includes the right to decide whether or not to get pregnant and stay pregnant.

21. While dealing with Explanation 1 of Section 3(2) of the MTP Act, which after amendment is now Explanation 2, the Bombay High Court in the above case observed that this Explanation expands the concept of "grave injury to mental health" by raising a presumption that anguish caused by any pregnancy as a result of rape shall be presumed to constitute a grave injury to the mental health of a pregnant woman. In fact, the Explanation states that where pregnancy is alleged by a pregnant woman to have been caused by rape, anguish caused by

such pregnancy shall be presumed to constitute a grave injury to the mental health of a pregnant woman. Therefore, for the purposes of Section 3(2) of the MTP Act, the expression “grave injury to mental health”, is used in a liberal sense by the legislature itself and further Section 3(3) of the MTP Act, in terms provides that in determining whether continuance of pregnancy would involve such risk of injury to the health as is mentioned in Section 3(2), account may be taken of the pregnant woman’s actual or reasonable foreseeable environment. Section 3(3) of the MTP Act, makes reference not merely to physical injury but also to mental injury. In fact, the aspect of a pregnant woman’s actual or reasonable foreseeable environment has greater nexus to aspect of mental health as compared to physical health, particularly in the present context. This legislative liberality when it comes to expanding the concept of the grave injury to mental health cannot evaporate no sooner the ceiling of 24 weeks prescribed in Section 3(2)(b) of the MTP Act is crossed. If the expression “life” in Section 5(1) of the MTP Act is not to be confined to mere physical existence or survival, then, permission will have to be granted under section 5(1) of the MTP Act for medical termination of pregnancy which may have exceeded 24 weeks, if the continuance of such pregnancy would involve grave injury to the mental health of the pregnant woman.

22. Curial question that we posed to ourselves at the beginning of this judgment still is whether this Court in the facts of the present case, would be justified in refusing to permit medical termination of pregnancy? According to Medical Board, the victim has history of

delayed milestone, poor understanding, poor self-care, inabilities to speak, drooling of saliva since childhood. The Medical Board further opined that on examination, it was found that patient is unable to take care of self, her hygiene is very poor and her intellectual abilities are poor. In view of these factors, patient was opined to suffer from SEVERE MENTAL RETARDATION WITH BEHAVIORAL PROBLEMS. The Medical Board was further of the view that mental age of the victim is that of a minor, being only 6 years. According to them, she is unable to take care of herself and, therefore, she would not be able to take care of the fetus. In our considered view, in a situation like this, it would be hazardous to allow her to continue with the pregnancy till full duration. It may even be more dangerous to the unborn child too. In facts like these, this Court cannot lose sight of the psychological trauma the victim would have to undergo all this time. She being not in a position to take a decision due to her intellectual deficiency, decision of her guardian to consent for termination of unwanted pregnancy has to be accepted as a move in her best interest. Not permitting the rape victim in the present case to go in for medical termination of unwanted pregnancy would amount to compelling her to continue to bear such pregnancy for full duration and deliver the child, which would be violative of her bodily integrity, which would not only aggravate her mental trauma but would also have devastating effect on her overall health including on psychological and mental aspects. This is violative of her personal liberty, to borrow the words of the Supreme Court in **Suchita Srivastava (supra)**, (para 22) because “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". In the peculiar facts of the case, her personal integrity has to be respected.

23. Explanation 2 to Section 3(2) of the MTP Act has expanded the scope of "grave injury to mental health" by raising a presumption that "the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman". "Such pregnancy" here refers to pregnancy "alleged to have been caused by rape". Thus, the legislature has by providing for raising such presumption rather expanded the meaning of the expression "grave injury to mental health" of the rape victim for deciding whether it would constitute a grave risk to the mental health of the pregnant woman in the meaning of Section 3(2)(i) of the MTP Act. The Court would also be entitled to reasonably visualise the environment in which the victim will have to live in immediate foreseeable future to decide the question of her mental health.

24. In view of the above discussion, the present writ petition seeking permission for medical termination of pregnancy of the Victim-A, daughter of the petitioner, is allowed. She shall be produced before the Medical Superintendent, Hamidia Hospital, Bhopal by tomorrow, who is directed to ensure the medical termination of the pregnancy of Victim-A under the supervision of the experts at the earliest by taking all the precautions. The Superintendent of Police, Hoshangabad shall arrange for transportation of the Victim-A along with her parents to Hamidia Hospital, Bhopal. It is further directed that DNA sample of the fetus shall be saved for the purposes of evidence to be led by the

prosecution before the Court in the criminal case of rape registered in the matter. All expenses shall be borne by the State.

25. Since this Court was persuaded to allow the writ petition on applying provisions of Section 3(2)(i) read with its Explanation-2 to the facts of the case, the question of constitutional validity of Section 3(2)(ii) was left untouched.

26. The writ petition is accordingly **disposed of**.

(Mohammad Rafiq
Chief Justice

(Vijay Kumar Shukla
Judge

C.