

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

MONDAY, THE 19TH DAY OF APRIL 2021 / 29TH CHAITHRA, 1943

WP(C).No.9982 OF 2021(W)

PETITIONER:

XXX

BY ADV. SRI.K.RAKESH

RESPONDENTS:

- 1 UNION OF INDIA
REPRESENTED BY ITS SECRETARY,
MINISTRY OF WOMEN AND CHILD DEVELOPMENT,
NEW DELHI, PIN-100 001.
- 2 THE STATE OF KERALA
REPRESENTED BY ITS SECRETARY,
DEPARTMENT OF WOMAN AND CHILD DEVELOPMENT,
GOVERNMENT SECRETARIAT,
TRIVANDRUM, PIN - 695 001.
- 3 THE SUPERINTENDENT
MEDICAL COLLEGE HOSPITAL, MANJERI,
MALAPPURAM DISTRICT, PIN - 676 121.
- *4 THE SUPERINTENDENT
MEDICAL COLLEGE,
KOZHIKODE.

(ADDITIONAL R4 IS SUO MOTU IMPLEADED AS PER
ORDER DATED 16.04.2021 IN WP(C)9982/2021.)

SRI. K.B.UDAYAKUMAR, SR.PUBLIC PROSECUTOR
SRI. JAGADEESH LAKSHMAN, CGC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 19.04.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 19th day of April, 2021

Complaining of stomach pain, a minor girl of 13 years along with her parents approached the hospital. After physical examination, the doctor noticed that the girl was pregnant by almost six months.

2. Pursuant to registration of a crime, during investigation, it was suspected that the offence was committed by the 14 year old sibling of the victim and a report in that regard was filed before the Juvenile Justice Board. Ext.P2 is the birth certificate which shows the date of birth of the victim as July, 2007. The scan report dated 1.4.2021, produced as Ext.P3, shows the foetus as 24 weeks and 4 days old. Contending that the petitioner's daughter is a victim of a rape by her own brother, the father of the victim has approached this Court seeking a direction to terminate the pregnancy of his daughter.

3. This writ petition came up for admission on 23.4.2021 and a direction was issued to the 3rd respondent at Manjeri immediately constitute a Medical Board to ascertain the possibility of performing medical termination of pregnancy on the victim. Considering the

gestational age of the foetus it was directed that the report ought to be submitted to court on the same day before 4 p.m.

4. Unfortunately, even though the Medical Board was constituted, the victim was admitted at the Medical College Hospital, Kozhikode and hence she could not appear before the 3rd respondent at Manjeri. Thereafter, this Court impleaded the Superintendent of Medical College, Kozhikode as additional 4th respondent and directed the said respondent to constitute a Medical Board and report to this Court as to whether the medical termination of pregnancy can be performed on the victim. The report was directed to be placed before this Court for consideration today.

5. I have heard Adv.Rakesh K., learned counsel for the petitioner, Sri.Jagadeesh Lakshman, learned Central Government Counsel and Adv.K.B.Udayakumar, learned Senior Public Prosecutor.

6. Pursuant to the direction mentioned above, the learned Government Pleader has made available the report of the Medical Board which was convened on 18.4.2021 with the following members:

Chairman :

1. Dr.C.Sreekumar, Superintendent, IMCH, Govt.Medical College, Kozhikode.

Members :

2.Dr.Nurul Ameen A.M., Deputy Superintendent and Associate Professor, Obstetrics and Gynaecology, IMCH, Govt.Medical College, Kozhikode.

3.Dr.Priya N, RMO and Associate Professor, Obstetrics and Gynaecology IMCH, Govt.Medical College, Kozhikode.

4.Dr.Ajithkumar V.T., Head of the Department, Pediatrics, Govt.Medical College, Kozhikode.

5.Dr.Beena Guhan, Head of the Department (in-charge) Obstetrics and Gynaecology, Govt.Medical College, Kozhikode.

6.Dr.Devarajan, Head of the Department, Radio diagnosis, Govt.Medical College, Kozhikode.

7.Dr.Rajeswary Pillai, Chief, Unit 6 and Additional Professor, Obstetrics and Gynaecology Department, Govt.Medical College, Kozhikode.

8.Dr.Amrutha Ramachandran, Medical Officer in charge, Family Welfare Unit, and Additional Professor, Obstetrics and Gynaecology IMCH, Govt.Medical College, Kozhikode.

7. The observations of the Medical Board were as follows :

Observations

The Medical Board went through the records of the rape victim aged 13 years (IP No.7292/IMCH), examined the patient and arrived at the following observations :

As per the MTP Act 2021, she is beyond the limit of legal MTP (Gestational age by Ultrasound Scan is 26 weeks and 6 days)

If MTP is considered she stands following medical risks :

1. The victim may need multiple inductions.
2. If Medical Induction fails, she may need surgical intervention (hysterectomy)
3. There is the chance that the fetus may survive.

Medical Termination of this pregnancy can be considered accepting the higher risks and facts mentioned above.

8. From the aforesaid report, it is evident that the gestational age of the foetus is 26 weeks and 6 days.

9. The position of law regarding medical termination of pregnancy is well settled. When the period of gestation exceeds that prescribed in Sections 3 and 4 of the Medical Termination of Pregnancy Act, 1971 (for short 'the Act'), medical termination of pregnancy can be carried out only by an order of a court of law. The statute has provided in Section 3 of the Act that if the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks, termination can be carried out only after two registered medical practitioners form an opinion that the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical and mental health or there is substantial risk to the child after born. Explanation 1 to Section 3 specifies that if the pregnancy is caused on account of a rape committed on the woman, it shall be presumed that the anguish caused by the pregnancy would constitute a grave injury to the mental health of the pregnant woman. The words used in explanation is "shall be presumed". The word "shall be presumed" created as a statutory presumption clearly shows the intention of the legislature. In the case of rape, the

anguish on account of the pregnancy is statutorily regarded as a grave injury to the mental health of the pregnant woman, sufficient to terminate the pregnancy on the basis of opinion of two registered medical practitioners.

10. The period of gestation mentioned above has been changed to 24 weeks by the Amendment Act No.8 of 2021. The Explanation 1 to Section 3 has been changed to Explanation 2 to Section 3. Since in the present case, the period of gestation has reached 26 weeks and more, the question as to the effect of the amendment and whether the amendment has been notified are not being considered.

11. In the instant case, the pregnancy is that of a minor girl of 13 years. The said pregnancy will cause a grave injury to the minor which will remain a scar throughout her life. It may even have the possibility of reminding the victim of the incident of rape. It is obviously not in the interest of the society to have this young victim to undergo the trauma of the incident of rape everyday in her life. The anguish that the pregnancy causes to her will be lifelong and she may have to live with the traumatic experience throughout her life. The parents and the siblings will also have to share this trauma

throughout their lives.

12. Petitioner contended that the victim was in fact born as a premature child and has other medical conditions which would also aggravate, if the pregnancy is not terminated. The young age of the victim, the consequences pregnancy will force upon the victim, her parents and even the unborn child are matters which this Court cannot ignore.

13. This court has in the judgments in **ABC v. Union of India & others** (2020 (4) KLT 279) and **Ms. X v. State of Kerala and Others** (2016 (4) KLT 745), etc, ordered termination of pregnancy exceeding 20 weeks in the case of rape victims who were not mentally prepared to deliver the child, in order to save their lives. In the judgment in **A v. Union of India** [(2018) 4 SCC 75] Supreme Court ordered termination of pregnancy in a case where the gestational age was 25-26 weeks. In the decision in **Sarmishtha Chakraborty v. Union of India** [(2018) 13 SCC 339], Supreme Court ordered termination of pregnancy when the gestational age was 26 weeks. Similarly in **Meera Santosh Pal v. Union of India** [(2017) 3 SCC 462] also, permission was granted when the pregnancy crossed 24 weeks, in view of the medical reports pointing out the risk involved. In the

judgment reported in **Neethu Narendran v. State of Kerala** (2020 (3) KHC 157) also, this court permitted termination of pregnancy when gestational age crossed 23 weeks.

14. As found in many of the above referred cases, the minor victim in this case, is also not prepared to deliver a child in the given situation. The threat of severe mental injury to the victim is statutorily presumed under the Explanation to Section 3 of the Act. In view of the trauma that the minor girl has undergone and taking note of the opinion of the medical board, I am of the view that the writ petition ought to be allowed permitting termination of pregnancy to be performed on the daughter of the petitioner.

15. In view of the opinion of the Medical Board that the medical termination of pregnancy can be considered, if the higher risk and facts mentioned in the report are acceptable, this Court elicited the views of the parents of the victim through the counsel for the petitioner. They also expressed their desire to terminate the pregnancy taking into account the traumatic experience for the victim as well as the possible genetic disorders that may befall the unborn child due to the close relationship with the alleged offender of the rape.

16. Considering all the above factors, it is declared that pregnancy of petitioner's minor daughter is liable to be terminated forthwith.

17. In the above circumstances, since each day's delay would be crucial for the victim and the family, I direct the Superintendent of Medical College, Kozhikode (additional 4th respondent) to terminate the pregnancy of the minor girl, who is the victim in Crime No.116 of 2021 of the Nilambur Police Station, through competent Doctors, under his supervision, immediately without delay, and if possible today itself or at any rate, within 24 hours from 12 p.m. on 19.4.2021. The Medical Board shall maintain a complete record of the procedure performed on the victim girl for termination of her pregnancy.

18. There will be a further direction to the doctors to take the tissue of the foetus for DNA identification and maintain the same intact for future purposes, especially due to the fact that a criminal case is pending in the instant case.

19. The Registry and all concerned, shall see that absolute privacy is maintained with respect to the identity of the petitioner while issuing the certified copy of the judgment or otherwise. There

shall be a direction that copy of the writ petition, affidavit, the documents annexed to it and the medical report shall not be issued to any third person without obtaining orders from this Court.

The writ petition is allowed as above.

Handover to the learned Government Pleader.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps

APPENDIX

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1 TRUE COPY OF THE FIR AND FIS IN CRIME
NO.116/2021 OF THE NILAMBUR POLICE
STATION DATED 1.4.2021.
- EXHIBIT P2 TRUE COPY OF THE BIRTH CERTIFICATE
DATED 27.05.2014 OF THE MINOR VICTIM
ISSUED BY THE NILAMBUR MUNICIPALITY.
- EXHIBIT P3 TRUE COPY OF THE SCAN REPORT OF THE
VICTIM ISSUED ON 1.4.2021 FROM CLEAR
SCAN DIAGNOSTIC CENTRE, NILAMBUR.