
(2019) 06 BOM CK 0050
In the Bombay High Court
Case No : Criminal Writ Petition No. 451 Of 2019

ABC

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 19-06-2019

Acts Referred:

Indian Penal Code, 1860 — Section 376, 376(2)(n)
Medical Termination Of Pregnancy Act, 1971 — Section 3, 3(1), 3(2), 4, 5, 5(1)

Citation : (2019) 06 BOM CK 0050

Hon'ble Judges : P.N. Deshmukh, J; Pushpa V. Ganediwala J

Bench : Division Bench

Advocate : J.B. Gandhi, S.A. Ashirgade

Final Decision : Allowed

Judgement

Pushpa V. Ganediwala, J

1. Rule. Rule is made returnable forthwith and heard finally with the consent of Shri J.B. Gandhi, learned counsel for the petitioner and Shri S.A. Ashirgade, learned APP for the respondents.

2. The petitioner in this petition, a victim in the Crime No. 153 of 2019, registered at police station Durgapur, Dist Chandrapur, for the offence punishable under Section 376(2)(n) of the Indian Penal, has sought directions to terminate her pregnancy in the interest of justice.

3. We have heard the learned counsel for the parties.

We have perused the record and opinion of the Medical Board, Chandrapur, which was called by this Court, as per order dated 13.06.2019.

4. It is the case of the petitioner that the petitioner is a Commerce Graduate and pursuing her career in competitive exams. While pursuing her studies, she came in contact with one Avinash Meshram on instagram in 2017 and they had developed love relationship. As a result of the said relationship, Avinash Meshram

promised that he shall marry the petitioner and on the said pretext, he had sexual intercourse with the petitioner. As a result of the same, the petitioner has conceived in January 2019. The said fact was known to Avinash Meshram. He again assured to marry her.

5. It is further submitted that as the petitioner is proceeding towards advance stage of pregnancy, the said Avinash is now avoiding to receive phone calls of the petitioner and has broken all the contacts with the petitioner and also refused to marry her. Feeling aggrieved by his behavior, the petitioner lodged FIR against him for offence punishable under section 376 of the Indian Penal Code at P. S. Durgapur. She was referred for Medical examination. She was found carrying pregnancy of 21 weeks and one day.

6. It is further submitted that the accused on the pretext of marrying her sexually exploited her and thereby cheated her. She is undergoing a tremendous mental trauma which will last not only during her pregnancy but for her entire life. She does not want to carry the stigma of un-wed mother during her entire life due to the act of the accused. As the law doesn't permit termination of advance stage of pregnancy, she approached this Court.

7. Having heard the learned counsel for the parties for some time and having perused the law and the record, we called opinion of the Medical Board, Chandrapur, on the following points. We have received the report with the following opinion. The said report with points is reproduced here in seriatum.

"(i) Whether the continuance of the pregnancy would involve risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

Ans.- No. The continuation of pregnancy would not involve the risk to the life of the pregnant women or of grave injury to her physical or mental health more than the normal pregnant women.

ii) Whether there is A substantial risk that if the Child were born, it would suffer from such physical or mental abnormalities AS to be seriously handicapped.

Ans. - No. There is no substantial risk that if the child were born After full term And it would not suffer from such physical or mental abnormalities AS to be seriously handicapped. However, if M.T.P. is permitted, Aborted foetus may show signs of life, but may not survive.

iii) Whether, having regard to the advanced stage of pregnancy, there is Any danger (other than the usual danger which Arises even in spontaneous delivery At the end of full term), if the pregnant mother is permitted to terminate her pregnancy ?

Ans. - Yes. Having regard to the advanced stage of pregnancy, there is increased risk of complication (other than the usual danger which Arises even in spontaneous delivery At the end of full term) if the pregnant mother is permitted to terminate her pregnancy At this stage of 22 weeks gestation.

iv) The medical process best suited to terminate the pregnancy And the possibility of child being born Alive, in the process.

Ans. - At this gestation (22 weeks), the termination of pregnancy would be best done by induction with extra Amniotic normal saline infiltration followed by augmentation with injection oxytocin or tablet misoprostol. The possibility of child being born Alive could not be commented.

v) Any other issues, which the medical board regards AS relevant, in such matters.

Ans. - No other issues which the medical board regards AS relevant in such matter.

8. Section 3 of the Medical Termination of Pregnancy Act, 1971, 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 twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners Are,of opinion, formed in good faith, that -

(i) the continuance of the pregnancy would involve A risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is A substantial risk that if the child were born, it would suffer from such physical or mental abnormalities AS to be seriously handicapped."

A perusal of Section 3 of the Act indicates that in any case if the pregnancy of a woman exceeds 20 weeks, a registered medical practitioner is not allowed to terminate the pregnancy.

9. The Division Bench of this Court in the case of XYZ Vs. Union of india & Ors., in Writ Petition No. 10835 of 2018 decided on 03.04.2019, after referring the whole law on the Subject, in its comprehensive judgment, concluded inter-alia that where the pregnant woman, after length of pregnancy has exceeded 20 weeks, seeks to terminate such pregnancy on the ground that its continuance would involve grave injury to physical or mental health or there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped, such pregnant woman will have to seek permission from the Supreme Court or High Court and unless such

permission is granted, no registered medical practitioner can terminate such pregnancy, except under circumstances as mentioned Section 5 (1) of the Medical Termination of Pregnancy Act, 1971.

10. This Court in the above referred judgment in para 64 also observed that the Supreme Court in the case of *Sonali Kiran Gaikwad vs. Union of India* (Writ Petition (C) No. 928 of 2017 decided on 09.10.2017, did not intend that the permissions to medically terminate pregnancy, in cases where the length of the pregnancy exceeded 20 weeks and where the termination of such pregnancy was not immediately necessary to save life of the pregnant woman, cannot be granted by the High Court in future cases, having territorial jurisdiction.

11. In the instant case, undisputedly the impugned pregnancy is to an unwed mother, who feels herself to have been cheated at the hands of her ex-lover Avinash Meshram. The Explanation (1) to Section 3 clearly demonstrates that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. As per opinion of the Medical Board, at present she is carrying pregnancy of 22 weeks. The Medical Board opined that if the medical termination of pregnancy is permitted, aborted foetus may show signs of life, but may not survive. For answer to question No. 3, it is opined that having regard to the advanced stage of pregnancy, there is increased risk of complication, if the pregnant woman is permitted to terminate her pregnancy at the stage of 22 weeks gestation. The best suited method to terminate the pregnancy at the stage of 22 weeks gestation, as per the Medical Board's opinion, would be by induction with extra amniotic normal saline infiltration followed by augmentation with injection Oxytocin or tablet misoprostal.

12. In regard to the query as to the injury to the mental health of the pregnant woman if the pregnancy is continued, the Medical Board opined that the continuation of pregnancy would not involve grave injury to her mental health. However, in our opinion, the said conclusion by the Medical Board is without any base and does not appear to be in consonance with the provisions of MTP Act, 1971.

13. One of the objects and reasons for the enactment of the MTP Act is to liberalise certain existing provisions relating to termination of pregnancy on humanitarian grounds such as when the pregnancy arises from a sex crime like rape or intercourse with a lunatic etc.

14. As stated earlier, Section 3 of the said Act permits termination of pregnancies upto the period of 20 weeks gestation if 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. The Explanation-I to the said section Made it explicit that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the woman.

15. Section 5(1) of the said Act inter-alia provides that so much of the provisions of sub-section(2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to termination of pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

16. The Division Bench of this court in the aforesaid judgment in the case of 'XYZ' after referring a series of judgments reached to the conclusion that the Supreme Court has construed the provisions in section 5 of the MTP Act, not narrowly by adopting the principle of literal construction but liberally by adopting the principle of purposive construction. In the said judgment, it is observed that the expression 'life' as it Appears in section 5 of the MTP Act is to be construed liberally so as to effectuate the purpose for enactment of MTP Act as reflected in the Statement of Objects and Reasons. Narrow and literal interpretation of the expression 'life' in section 5 of the MTP Act as restricted to mere physical existence or mere animal existence will also not be in harmony with the constitutional principles of life, personal liberty and human dignity which also includes a woman's right to make reproductive choice. It is further observed that if the pregnant woman is forced to continue with her pregnancy merely because the pregnancy has extended beyond the ceiling of 20 weeks, there would arise a serious affront to the fundamental right of such mother to privacy, to exercise a reproductive choices, to bodily integrity, to her dignity.

17. As regards risk to the life of the petitioner in the instant case, the Medical Board opined that having regard to the advanced stage of pregnancy there is increased risk of complication other than the usual danger which arises even in spontaneous delivery at the end of full term. However, there is no firm opinion about the danger to the life of the petitioner.

The Supreme Court and the many High Courts have allowed the MTP upto the 28 weeks gestation period.

18. Undoubtedly, the case of the petitioner falls within the criteria as laid down in section 3 of the MTP Act. However, she is running with 23 weeks gestation period. She felt herself aggrieved and cheated at the hands of her ex-lover. She bonafidely waited for him to marry her. On his refusal to marry her, she immediately lodged FIR against him and approached this court for directions of MTP on the ground of her mental distress, trauma and anguish. We take the judicial notice of the fact that in India a child to an unwed mother is taken as a social stigma of a serious nature and she does not want to carry such stigma for her entire life. In our opinion, it would neither be beneficial for the petitioner not for the fetus in her womb. In the present social milieu in India, we can visualize the future complications she may have to face in her social and married life if she would be deprived of now to exercise her reproductive choice, which has its origin in her fundamental right to life, liberty and human dignity.

19. As a word of caution, we would like to advice her before taking such drastic decision at this advanced stage of pregnancy, it would be better to consult some expert gynecologist about the future long term complications on her health and reproductive system. She may also consult the Child Welfare Committee of the District. If she does not want the child, she has the option to give the child in adoption as per the law under Juvenile Justice Act. As per the procedure established by CARA, the central agency, her name would be kept undisclosed forever and she or the child is not allowed to meet each other forever. Even, the name of the biological parents of the child would be kept undisclosed from the child forever in its life. She has both the options to exercise.

20. In the above conspectus, we are of the opinion that the continuance of such pregnancy would cause grave injury to the mental health of the petitioner. She is allowed to exercise her choice to terminate the pregnancy, she being major, at her own risk. We pass the following order.

"i) The procedure of termination of pregnancy of the petitioner Shall be carried At Government medical College, chandrapur, which is Approved AS per section 4 of the MTP Act AS informed by the Government pleader.

ii) The dean of Government medical College, chandrapur is thus directed to forthwith complete the procedure of termination of pregnancy of the petitioner AS per the procedure established under the laws under supervision of the team of medical experts After obtaining consent in writing of the petitioner AS per law. Two members of the team shall be experts in Obstetrics And Gynecology.

iii) Since according to petitioner, the pregnancy carried by her is AS A result of offence of rape And FIR has already been lodged And the matter is under investigation, the investigation Officer may remain present And to take necessary steps if the same is required for investigation in the crime for DNA profiling.

vi) Rule is accordingly made Absolute. There shall be no order AS to costs.

vii) parties And All concerned to act upon authenticated copy of this judgment.