

(2018) 02 BOM CK 0004
In the Bombay High Court
Case No : 956 of 2018

"ABC"

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 02-02-2018

Acts Referred:

[Constitution of India](#), [Article 21](#) - Amendment of the Schedule
[Code of Criminal Procedure, 1973](#), [Section 164](#) - Recording of confessions and statements
[Indian Penal Code, 1860](#), [Section 34](#), [Section 363](#) - Acts done by several persons in furtherance of common intention - Punishment for kidnapping
[Medical Termination of Pregnancy Act, 1971](#), [Section 3](#), [Section 3\(1\)](#), [Section 4](#), [Section 5](#), [Section 3\(1\)\(b\)\(i\)](#) - When pregnancies may be terminated by registered medical practitioners - When pregnancies may be terminated by registered medical practitioners - Place where pregnancy may be terminated. — Sections 3 and 4 when not to apply - When pregnancies may be terminated by registered medical practitioners

Citation : (2018) 02 BOM CK 0004

Hon'ble Judges : S.S.Shinde, S.M.Gavhane

Bench : Division Bench

Advocate : Sujit A. Patil, V.D.Salunke, A.B.Girase

Final Decision : Dismissed

Judgement

1. Rule. Rule made returnable forthwith and heard finally with the consent of learned Counsels appearing for the respective parties.
2. The minor victim girl who is physically abused and mentally tortured has approached this Court through

her father - the guardian for seeking directions in the nature of writ of mandamus, thereby directing to terminate her pregnancy by following the procedure as described under the Medical Termination of Pregnancy Act, 1971 [hereinafter referred as to "the MTP Act"] and further directions to conduct DNA test of unborn fetus, so as to determine natural parents of it.

3. The guardian father of the victim contends that he has four daughters and one son. The victim is minor daughter aged about 16 years. She is studying in 10th standard. As per her bona fide certificate issued by the school, her date of birth is 05.01.2001. It is further contended that his elder daughter has married on 06.01.2013 with one Vikas Rathod and he is not maintaining his wife. Vikas drove his wife out of his house. Therefore, she is residing with the petitioner. Some complaints were filed against the matrimonial family members of elder daughter of the petitioner and therefore there was grudge in the mind of that family.

4. According to the petitioner on 27.11.2017 when victim went in the morning to answer the nature's call outside the house, she did not return. The petitioner tried to search her. However, he could not find her. The petitioner suspected that his son-in-law Vikas and his family, who had grudge in the mind, must have kidnapped the victim to pressurize the petitioner for not filing any complaint. When the petitioner could not find the victim, he lodged the First Information Report in Kingaon Police Station bearing No.144 of 2017 on 30.11.2017 under section 363 read with section 34 of the

Indian Penal Code. After the said crime was registered, the son-in-law of the petitioner brought the victim in the police station on 04.12.2017. At that time, statement of the victim was recorded wherein she did not allege any overtact on the part of Vikas and she refused for any medical examination. On this count, she was remanded in Child Rehabilitation Home at Latur. In the said Home, statement of the victim under section 164 of Code of Criminal Procedure came to be recorded on 11.12.2017 by the PSI attached to Gandhi Chowk Police Station, Latur, in which she narrated the entire incident and made accusation against Vikas Rathod of committing rape by threatening her to her life, and against him and his father of inserting some substance in her mouth and of putting a handkerchief in her mouth. Thereafter, offence punishable under section 376 of the IPC was added in the above said crime.

5. The petitioner contends that after recording statement as above of the victim, she was referred on 20.12.2017 to the Government Hospital, Latur for medical examination. Upon medical examination, it was found that she is carrying two months' pregnancy. Thereafter, the accused and his relatives threatened the complainant for dire consequences, if he does not take case back. Therefore, applications were submitted in the police station.

6. According to the petitioner, minor victim who was under constant mental and physical pressure of the accused, initially did not attribute any overtact against the accused. Only when she was in Child Rehabilitation

Home, she has gathered courage and she narrated the incident. As such, firstly the victim was sexually assaulted and then she was pressurized for not giving any statement against the accused. Thus, the victim became pregnant due to heinous act committed by the accused person. Therefore, considering her age, her marital status, physical and mental condition and her education, it is desirable to terminate unwanted pregnancy in the light of provisions under sub- section 2(b)(i) of section 3. of the MTP Act. It is contended that after getting knowledge of pregnancy of the victim, the petitioner and his entire family was disturbed and was in shock and therefore some time was consumed.

7. Considering aforesaid contentions in the petition and prayer of the petitioner to send the victim for medical examination and opinion of two experts, by order dated 23.01.2018, we had directed to produce the victim before the Medical Board constituted for the purpose under the MTP Act, with directions to the Medical Board to forthwith examine the victim and tender report to this Court. The petitioner was medically examined at Government Medical College and Hospital, Aurangabad, by expert committee consisting of the following five members:-

- i) Dr. Shrinivas Gadappa (Chairman) Prof. & HOD, OBGY
- ii) Dr.Prashant Titare (Member) Asso. Prof. Radiology
- iii)Dr.P.S. Patil (Member) Prof. & HOD Paediatrics
- iv) Dr. Ghuge (Member) Prof & HOD, Psychiatry
- v) Dr.Rashmi Bengali (Member) Asso. Prof. Anaesthesia

8. Said Committee tendered to this Court a report

dated 25.01.2018. Said report is taken on record and marked "X" for the purpose of identification. In the said report, the following findings are recorded :-

- 1) From general medical examination she has no active medical complaints.
- 2) Obstetric examination her vital parameters are within normal limits with 16.2 weeks of pregnancy.
- 3) Ultrasonographic examination suggestive of single live intrauterine foetus of approximately 16 weeks 2 days. No gross lethal foetal anomaly (Report attached)
- 4) On Psychiatric examination, clinically she is of average intelligence. No active current psychopathology. Her concept and judgment are intact. She is aware about the incident and the consequences about the continuation of pregnancy.

9. The conclusions of the said Committee are as follows :-

- 1) Current pregnancy, on clinical and ultrasonographical examination is around 16.2 weeks of gestation. No gross lethal congenital anomalies in the foetus.
- 2) Her physical and mental health is within normal limits.
- 3) Under the Medical Termination of Pregnancy Act, 1971 (34 of 1971) under clause 3 of 2 on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with a "mentally ill person" etc.; when the length of pregnancy is less than 20 weeks.
- 4) Risk of termination of pregnancy is within normal acceptable limits.

10. The provisions of sections 3,4 and 5 of the MTP Act, which provide for termination of certain pregnancy by the registered medical practitioner and which are relevant are 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.

Explanation 1 - 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.

Explanation 2 - Where any pregnancy occurs as a result of failure of any device or method used by

any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnancy woman.

(3) in determining whether the continuance of a 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 [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.

4. Place where pregnancy may be terminated - No termination of pregnancy shall be made in accordance with this Act at any place other than

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(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as a Chairperson of the said Committee.

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.

5. Sections 3 and 4 when not to apply -

(1) The provisions of section 4, and so much of

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 the termination of a 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.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation 1 - For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2 - For the purposes of this section, so much of the provisions of clause (d) of section 2 relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

11. Referring the above provisions, this Court in

Writ Petition No.14173 of 2017 "X (since minor through

her mother) Vs. The Union of India & Ors., (Coram :

R.M.Borde & Smt.Vibha Kankanwadi,JJ) in para 10 of the

judgment dated 12.12.2017 observed as under :-

"10. Although section 3 of the Act provides the limit of 12 weeks for medically terminating pregnancy by a medical practitioner and, where the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks and if, not less than two medical practitioners are of opinion, formed in good faith, the continuance of pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or that 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, it would be permissible to terminate the pregnancy. It must be noted that section 5 of the Act is not controlled by the limitation in respect of duration of pregnancy contained in sections 3 and 4 of the Act. If in the opinion of medical experts, arrived at in good faith, the termination of

pregnancy is immediately necessary to save the life of the pregnant woman, such a pregnancy can be terminated. It also must be noted that Explanation 1 to section 3 records that where the pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy can be presumed to constitute a grave injury to the mental health of the pregnant woman. Sub-section (1)(b)(i) of section 3 refers to the risk involved to the pregnant woman which includes even injury in respect of mental health. There shall not be reason to doubt that since pregnancy in the instant matter is as a result of offence of rape, it causes a huge mental trauma and such inference is in consonance with explanation 1 to section 3(1) of the Act of 1971."

12. Moreover, in the above decision, the decision of the Hon''ble Supreme Court in the case of Suchita Srivastava Vs. Chandigarh Administration, 2009(9) SCC 1, was referred wherein it has been observed 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. It is important to recognize that productive choice can be exercised to procreate as well as to abstain from procreating. Moreover, in para 19 of the aforesaid judgment, the Apex Court has observed as under :-

"19. As evident from its literal description, the "Best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances forced by the victim. It is important to note that the Court''s decision should be guided by the interests of the victim alone and not those of other stakeholders such as guardians or society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights."

13. This Court in the case of "X" Vs. Union of India & Ors. in W.P.9915 of 2017 (Coram : R.M.Borde & S.M. Gavhane, JJ) decided on 10.08.2017 observed that Explanation 1 to section 3 records that where the pregnancy is alleged by the pregnant woman to have been caused by rape,

the anguish caused by such pregnancy can be presumed to constitute a grave injury to the mental health of the pregnant woman. Sub-section (1)(b)(i) of section 3 refers to the risk involved to the pregnant woman which includes even injury in respect of mental health. There shall not be reason to doubt that since pregnancy in the instant matter is as a result of offence of rape, it causes a huge mental trauma and such inference is in consonance with explanation 1 to section 3(1) of the MTP Act. It was further observed that it must be noted that the pregnancy carried by petitioner is as a result of physical abuse thrust against her and that she has a choice whether to continue with such pregnancy which is result of offence against her person. The freedom of making choice by a woman which is integral part of personal liberty cannot be taken away. It shall also be taken into consideration that besides physical injury, the legislature has widened the scope of term injury by including injury to mental health of a pregnant woman. If continuation of pregnancy is harmful to mental health of a pregnant woman, then it shall be construed as a good legal ground for permitting her to terminate pregnancy and, since in the instant matter, pregnancy is alleged to be as a result of physical abuse, in view of section 5 of the MTP Act, the choice of the victim of rape of terminating unwanted pregnancy needs to be respected. Observations made by Division Bench of this Court in Suo Motu Public Interest Litigation no. 1/2016 in the matter of High Court on its own motion Vs. The State of Maharashtra reported in LEX(BOM) 2016 9 page 114, in paragraph no. 13 of the

judgment are relevant for consideration which read thus :

13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted

Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.

14. In the case of "X" Vs. Union of India (Supra), this Court has also observed that 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. As has been stated above, the freedom of petitioner to make choice to terminate unwanted pregnancy which is result of physical abuse needs to be respected and such freedom of choice shall have to be construed as integral part of her personal liberty.

15. In the present case, the date of birth of the petitioner is 05.01.2001. On the date of filing of petition on 15.01.2018, she completed 17 years of her age. Thus, there is no dispute that she is a minor being below 18 years of age and therefore she filed this petition through her father - the guardian. On complaint of her father, crime was registered in Kingaon Police Station, Dist. Latur, initially for the offence

punishable under section 363 read with section 34 of the IPC against Vikas and his father and then after recording statement of the victim, offence under sections 376 of the IPC was added. Thus, it is clear that the minor victim who claims termination of pregnancy by filing this petition through her father is a victim of rape. The report of the expert committee under the MTP Act, 1971 shows that current pregnancy of the victim is of around 16.2 weeks. Thus, it is clear that length of the pregnancy of the victim exceeds 12 weeks but does not exceed 20 weeks and hence said pregnancy can be terminated by registered medical practitioners, if not less than two registered medical practitioners are of opinion formed in good faith that continuation of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her 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, in the light of provisions under section 3 (2)(b) (i) and (ii) of the MTP Act.

16. In the present case, from the conclusions recorded by the expert committee under the MTP Act, in its report (Exh."X"), it is not stated that there is substantial risk if the child is born, in the light of sub-clause (ii) of clause (b) of sub-section(2) of section 3 of the MTP Act. However, considering the contentions in the petition that the pregnancy is caused by rape, the case of the petitioner falls under sub-clause (i) of clause (b) of sub-section(2) of section 3

of the MTP Act.

17. Keeping this in view, now it is to be seen whether the victim in the present case can be allowed to terminate the pregnancy in the light of aforesaid said provision. The expert committee in its report gave four conclusions referred in detail in para No. 9 (supra). Amongst said conclusions, conclusion No.3 is that under the Medical Termination of Pregnancy Act, 1971 (34 of 1971) under clause 3 of 2 on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with a "mentally ill person" etc.; when the length of pregnancy is less than 20 weeks.

18. It appears from the above conclusion that in case pregnancy arises from sex crime like rape or intercourse with mentally ill person and when the length of the pregnancy is less than 20 weeks, there can be termination under the MTP Act. This conclusion does not state that in case pregnancy of the present victim is allowed to continue, the same would involve risk to the life of the victim or grave injury to her physical or mental health. However, from the above referred admitted facts that the victim is pregnant because of rape and crime is registered against the accused for the offence punishable under section 376 of the IPC, it can be said that said pregnancy has been foisted on the victim against her wish and said pregnancy is unwanted pregnancy. Therefore, anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman, as per Explanation 1 under section 3 referred to above. Another reason to hold so

is that admittedly the victim is taking education in 10th standard and she is residing in the village. Therefore, she will have to face to the blame of the society, if she continues with the pregnancy and even it would be difficult for her to continue with her education. Naturally, therefore said pregnancy would cause huge trauma to victim. As the petitioner victim is minor, the petition is filed by her father - guardian. As she is minor, as per sub-section (4) of section 3 of the MTP Act , consent in writing of her guardian is required to terminate pregnancy. However, considering her age i.e. 17 years, on her request through her Counsel, in order to know her wish when heard in the Chamber, she also disclosed that it is difficult for her to show her face to the people in the village and school due to the pregnancy with which does not wish to continue. The expert committee conclusion also shows that risk of termination of pregnancy is within normal acceptable limits. In these circumstances, for the reasons discussed above, we hold that there is no impediment in allowing the petitioner - victim to terminate her pregnancy.

19. Learned counsel for petitioner, states on instructions, that the petitioner would like to complete the procedure of termination of pregnancy at Government Medical College, Latur, which is approved as per section 4 of the MTP Act as informed by the Government Pleader. The Dean of Government Medical College, Latur is thus directed to forthwith complete the procedure of termination of pregnancy of minor petitioner under supervision of the team of medical experts after

obtaining consent in writing of guardian as per law. Two members of the team shall be experts in Obstetrics and Gynecology.

20. Since according to petitioner, the pregnancy carried by her is as a result of offence of rape, complaint has already been lodged and the matter is under investigation, the Dean, Government Medical College, Latur is directed to preserve tissue sample and blood sample of the foetus for carrying out necessary medical tests including DNA, finger printing/mapping. The Investigating Officer conducting investigation in the matter shall ensure that the samples of tissues and blood etc. shall be forwarded to the Regional Forensic Laboratory, Aurangabad, for DNA, Finger printing/mapping and for carrying necessary tests and the samples and report shall be preserved for the purpose of trial of the offence.

21. It is made clear that the Doctor who have put their opinions on record shall have the immunity in the event of occurrence of any litigation arising out of the instant petition.

22. Rule is accordingly made absolute. There shall be no order as to costs.

23. Parties and all concerned to act upon authenticated copy of this judgment.