

(2022) 02 GUJ CK 0070

In the Gujarat High Court

Case No : R/Special Criminal Application No. 632 Of 2022

Jashiben W/O Pravinsinh Thakor

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 17-02-2022

Acts Referred:

Constitution Of India, 1950 — Article 38(1), 226

Indian Penal Code, 1860 — Section 363, 366

Medical Termination Of Pregnancy Act, 1971 — Section 3, 3(3)

Citation : (2022) 02 GUJ CK 0070

Hon'ble Judges : Sonia Gokani, J; Aniruddha P. Mayee, J

Bench : Division Bench

Advocate : Kishore Prajapati, Jirga Jhaveri

Final Decision : Disposed Of

Judgement

Sonia Gokani, J

1. This Court on 04.02.2022 passed the following order:-

"1. This is a petition preferred by the mother for seeking custody of the corpus who has allegedly been taken away by the respondent no.4 with the following prayers:-

"(A) Your Lordships may be pleased to issue a writ of habeas corpus or any other appropriate writ, order or direction directing the respondents no. 2 and 3 to produce minor corpus Anjana before this Hon'ble Court and further the Hon'ble Court may be pleased to set herself free from illegal confinement of respondent no.4 and give the custody of Anjana to the petitioner.

(B) During the pendency and final disposal of this petition Your Lordships may be pleased to direct the respondent authorities to submit action taken report and to produce minor corpus Anjana before this Hon'ble Court.

(C) Your Lordships may be pleased to grant any other and further relief that may

be deemed fit and proper in the interest of justice.”

2. It can be noticed from the averments set out in the application that the incident had taken place on 10.06.2021 and the daughter of petitioner was missing. The petitioner contacted Visnagar Taluka Police Station and requested to lodge an FIR, however, it could be lodged only on 02.07.2021 being FIR No. 11206002210669 for the offences punishable under Sections 363 and 366 of the Indian Penal Code.

2.1. The written complaint was given on 14.08.2021 to the Deputy Superintendent of Police, Mehsana and requested to find his daughter.

2.2. It is urged that she was in an illegal custody of the respondent no.4 and eventually they approached this Court under Article 226 of the Constitution of India urging that there are fair possibilities of the girl having been abused sexually.

3. This Court issued notice and directed the corpus to be brought. On 25.01.2022, the corpus was brought before this Court and after a detailed talk with the corpus in presence of Full Time Secretary, District Legal Services Authority, Mehsana, when she insisted to go to the Women Protection Home, certain directions to that effect were issued. It is also revealed to this Court that after about a week's time, she had shown the desire to join the parents and accordingly, she has been produced today from the District Legal Services Authority, Mehsana in presence of the Full Time Secretary.

3.1. In medical report issued by the Civil Hospital, Ahmedabad, it has been revealed that she carries 10 weeks of pregnancy. She is present with her parents and jointly it is urged that she needs to get her foetus terminated.

4. Considering the provisions of Termination of Pregnancy Act, which provides for such termination when the person is victim of rape, she being extremely young and a victim of rape and victim under POCSO Act, we deem it appropriate to consider such request.

5. This Court in case of Maltidevi Gambhirsingh Sahani vs. State of Gujarat [Special Criminal Application No. 4921/2020] in case of victim of rape had directed the process of termination of pregnancy to be undertaken.

5.1. Section 3 of the Medical Termination of Pregnancy Act, 1971 provides that where length of pregnancy does not exceed 12 weeks and where the length of pregnancy exceeds 12 weeks, but, not 20 weeks and if, not less than two registered medical practitioners are of the opinion, formed in good faith, that the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury, 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, the termination can be directed. However, the very section in the explanation provides 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. Sub-section (3) of Section 3 of the Act also provides that in determining, whether the continuance of pregnancy would involve such risk of injury to the health, as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

5.2. This Court in case of *Rekhaben vs. State of Gujarat* [2019 SCC OnLine Guj 3239] has discussed the 'best interest test' which the Apex Court has given in case of rape victim urging for termination of pregnancy and also her social circumstances, provides that, the Court needs to ascertain the course of action which would serve the best interests of the person concerned. The Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim and the victim's interest alone shall be a guiding factor for the Court and not of any other stakeholders such as guardians or society in general.

"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 faced 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.

Bearing in mind the decision of the Apex Court and keeping the 'Best interests' test as the parameter, in the opinion of this Court, in the present set of circumstances, careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim, if are considered, this Court is of the opinion that termination of pregnancy requires to be permitted, which is in the best interest of the victim. It is to be noted that the team of Doctors have on 18th February 2016 submitted report and opined, thus - After reviewing history and detailed examination, blood reports and sonography done at Civil Hospital, Sola, our opinion is as follow :

Psychiatric evaluation suggest patient is not suffering from any psychiatric disorder and patient is psychiatrically fit. Considering involuntary pregnancy and unwillingness of victim to continue pregnancy her mental trauma may increase if pregnancy continues. Anesthetic evaluation suggest that slightly more risk of anesthesia if pregnancy will terminated at present. Medical and surgical evaluation suggest that if proper nutrition and care is maintained through feeding jejunostomy, there is no physical harm in continuation of pregnancy or termination of pregnancy at present. There is same or slight increase risk to victim if pregnancy is terminated before term than physiological normal delivery at term.

As per MTP Act, termination of pregnancy can be done up to 20 week of pregnancy. At present, patient had 24 week live pregnancy.”

6. Let a joint report be obtained from the Head of Department, Obstetrics & Gynecology, Civil Hospital, Ahmedabad and one Senior Doctor.

6.1. Let the corpus remain present with the parents and the willingness to terminate the pregnancy medically shall be conveyed as provided under the Act and the doctors shall also opine on the psychological and physical examination of the corpus that she can withstand the termination of pregnancy.

7. We could notice the FIR lodged by the parents alleging rape and the subsequent medical report of the victim being pregnant by 10 weeks. So as to ensure that the process may not further enhance the period of pregnancy, once the mental and physical condition is opined to be good for the purpose of termination in the medical opinion, and if there is no threat to her life, she is being permitted to terminate the pregnancy ensuring the best medical facilities, proper care and supervision.

7.1. Let the termination be carried out, once the team of doctors, minimum two in number, is of the opinion that it is feasible to so do it, without further reference to this Court. Unless otherwise opined by the medical experts needing indulgence of this Court, the process of termination shall be expedited and scientifically collected tissues be handed over to the police officer present which shall also be sent for DNA test. Once sent to the FSL, the report shall go to the concerned Court conducting the trial under the POCSO Act for the same to be considered as scientific evidence.

7.2. Rest of the procedure shall be followed in detail, along the line of the directions issued by this Court in case of Bhavikaben d/o Rameshbhai Solanki vs. State of Gujarat [Special Criminal Application No. 1155/2016] while dealing with one such rape victim.

8. Once the entire procedure is over, it shall be reported to this Court for the Court to thereafter pass other and further orders in relation to the compensation and otherwise.

9. As per the decision rendered by the Apex Court in case of Delhi Domestic Working Women’s Forum vs. Union of India [(1995) 1 SCC 14], victim corpus is entitled to the legal aid right from the time the FIR is lodged. It shall be provided without any loss of time by the District Legal Services Authority, Mehsana for the hand-holding till the completion of trial. Periodical vigilance of the DLSA would also be inevitable in all such cases.

10. Matter to appear on 17.02.2022. Copy of the order passed in Special Criminal Application No. 1155/2016 be tagged while sending this order to the learned APP for onward communication and due execution.”

2. Today the corpus is brought before us. It has been reported to this Court that

the foetus has been terminated and the sample has been sent for examination at the Forensic Science Laboratory for the purpose of sessions trial. The condition of the corpus is good. She would need more counseling and the Investigating Officer as well as the Full Time Secretary, District Legal Services Authority shall ensure such periodical counseling at the end of the experts.

3. Though directed on the last occasion for the legal aid to be provided to the victim, so far no appointment has been done. We reiterate the directions of the Apex Court in case of Delhi Domestic Working Women's Forum (supra) and would like to reproduce the same:-

"15. In this background, we think it necessary to indicate the broad parameters in assisting the victims of rape.

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss.

Some, for example, are too traumatised to continue in employment.

(8) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.”

3.1. First four directions of the Apex Court are often observed in breach. We also noticed that the Investigating Officer when was inquired, she also has pleaded her ignorance. There is no list of empaneled advocates noticed in the police stations. Therefore, it is also necessary for us to show the indulgence by drawing the attention of the Director General of Police for the purpose of issuance of necessary circular/ direction/ notification for every police station of the State to maintain, for effective implementation of the directions issued in the year 1995, without further loss of time.

3.2. Let an affidavit be caused to be filed before this Court of due implementation of the directions by the Director General of Police after six weeks.

4. Compensation to the victim as per the Victim Compensation Scheme shall be provided within four weeks’. The amount of compensation shall go to the victim’s account directly and she being a minor, the mother can be a joint account holder. The amount shall be used for her further studies and welfare.

4.1. The Member Secretary, High Court Legal Services Authority shall undertake the said exercise of compensation.

4.2. In relation to the appointment of the advocate in the instance case, the Full Time Secretary, District Legal Services Authority, Mehsana shall act expeditiously and report to this Court since panel of advocates is not formed as yet.

5. We have spoken to the parents of corpus to take good care of the corpus and streamline her studies as well as extracurricular activities. The District Legal Services Authority, Mehsana and the Police Inspector, Mehsana both can extend necessary assistance whenever the parents would require.

6. We appreciate the role of Full Time Secretary, District Legal Services Authority, Mehsana in arranging video conference on different dates and for all follow-up actions.

7. With the above directions, this petition stands disposed of. Copy of this order be given to learned APP for her to communicate to the appropriate authority.