

HIGH COURT OF GUJARAT

CORAM: HONOURABLE MR. JUSTICE VIMAL K. VYAS

Date: 24/11/2023

R/SPECIAL CRIMINAL APPLICATION (DIRECTION) NO. 15350 of 2023

XYZ ... APPLICANT(S)

VERSUS

STATE OF GUJARAT ... RESPONDENT(S)

Legislation and Rules:

Articles 226 and 227 of the Constitution of India

Section 482 of the Code of Criminal Procedure, 1973

Medical Termination of the Pregnancy Act, 1971

Indian Penal Code, Sections 376(2)(j), 376(2)(n)

Protection of Children from Sexual Offences Act, Sections 6, 10, 18

Subject: Application for the medical termination of pregnancy of a 16-year-old victim of sexual assault, considering her physical health and mental trauma.

Headnotes:

Medical Termination of Pregnancy Act, 1971 - Application for Termination of Pregnancy - Application under Articles 226 and 227 of the Constitution of India along with Section 482 of the CrPC and the Medical Termination of Pregnancy Act, 1971 - Applicant-victim, a minor aged about 16 years seeking termination of pregnancy resulting from rape - Application includes offences under Sections 376(2)(j), 376(2)(n) IPC and Sections 6, 10, 18 of the POCSO Act. [Para 2]

Medical Examination and Report - Court's order for medical examination by Civil Hospital, Bhavnagar's Medical Board - Medical Board's report indicating pregnancy of 27 weeks and 04 days with a viable fetus, suggesting possible methods for termination and highlighting potential risks. [Paras 4, 7, 8]

Victim's Consent and Psychological Evaluation - Court's interaction with victim to ascertain her will - Victim's firm decision to terminate pregnancy after being apprised of medical report - Assessment of mental and psychological preparedness as per guidelines. [Para 5]

Legal Precedents and Guidelines for Termination of Pregnancy - Reference to Supreme Court decisions and MTP Amendment Act, 2021 - Emphasis on the pregnant woman's autonomy and right to bodily integrity - Consideration of mental health and dignity of rape victims in allowing termination of pregnancy beyond standard legal limits. [Paras 10-14]

Direction for Termination of Pregnancy and Responsibilities - Court's directions for termination of pregnancy by senior medical professionals - Emphasis on safety and care during pre- and post-termination - Provisions for DNA sampling for investigation purposes - State's responsibility for the child if born alive and unclaimed by the victim, in adherence to Juvenile Justice Act, 2005. [Paras 14-16]

Conclusion - Petition disposed of with directions for immediate action and care for both the victim and potential child. [Para 17]

Referred Cases:

X vs. Union of India and Another (Miscellaneous Application No.2157 of 2023 in Writ Petition (Civil) No.1137 of 2023)

XYZ vs. The State of Gujarat & Ors (SLP (Cri) Dy. No.33790 of 2023)

Minor R through Mother H vs. State of NCT of Delhi and Another (W.P. (Cri) No.221 of 2023)

Suchita Srivastava vs. State (UT of Chandigarh) (2009) 9 SCC 1

Representing Advocates:

Mr. Rahil P Jain and Ms. Sonal M Joshi for the Applicant(s)

Mr. Utkarsh Sharma, APP for the Respondent(s)

ORAL ORDER

1. Draft amendment is allowed. The same shall be carried out forthwith.
2. The present application has been preferred by the applicant-victim under Articles 226 and 227 of the Constitution of India along with Section 482 of the Code of Criminal Procedure, 1973 as well as under the provisions of the Medical Termination of the Pregnancy Act, 1971, in connection with the FIR being No.11198641236506 of 2023 dated 16.11.2023 registered with the

Palitana Rural Police Station, for the offences punishable under Sections 376(2)(j), 376(2)(n) of the Indian Penal Code and Sections 6, 10, 18 of the Protection of Children from Sexual Offences Act, for a direction to the respondent authority to terminate the pregnancy of the applicant-victim who is aged about 16 years 06 months and 23 days, at the earliest, which is in the best interest of the victim considering her physical health and incident of rape causing grave injury to her mental health.

3. On 22.11.2023, this Court passed the following order :-

“1. Learned advocate for the applicant has tendered a draft amendment. The same shall be carried out forthwith.

2. Issue Notice, making it returnable on 23.11.2023. Learned APP waives service of notice for and on behalf of the respondents.

3. Meanwhile, let the victim be examined by the empaneled doctors of the medical board at the Civil Hospital, Bhavnagar. She shall be admitted in the hospital immediately, and the medical examination shall be carried out to let this Court know as to whether the termination of pregnancy is medically feasible.

4. Considering the fact that she is inclined to terminate the pregnancy, the doctors concerned shall follow settled guidelines to assess her mental and psychological preparedness. A copy of this order shall be provided to the learned APP forthwith. Direct service is permitted.”

4. Pursuant to the order passed by this Court dated 22.11.2023, the learned APP received a report from the Medical Board, Civil Hospital, Bhavnagar, dated 22.11.2023. On perusing the report, it appears that after examining the applicant-victim, the doctors from different branches/ departments, viz. gynecologist, pediatrician, obstetrician, radiologist and medicines, found the applicant-victim in good health and carrying a single live intrauterine fetus with gestational age of 27 weeks 04 days with baby weight approximately 1011 grams. Therefore, they have opined that since the applicant-victim is carrying a live fetus of 27 weeks and 04 days, medical termination of pregnancy can be performed as per the guidelines of the MTP Amendment Act, 2021, at the Gynec & Obstetric Department of the Hospital. The Medical Board has also suggested two options for the said treatment, viz. (i) Induction method; and (ii) Surgical – Hysterotomy/Cesarean section. Moreover, the Medical Board has also informed about the possible adverse effects out of the said treatment.

5. Thereafter, on 23.11.2023, this Court passed the following order :-

“1. This Court has, vide order dated 22.11.2023, directed that the victim be examined by the empaneled doctors of the Medical Board at the Civil Hospital, Bhavnagar. In response thereto, the learned APP has submitted a copy of the report dated 22.11.2023 issued by the Medical Board, Bhavnagar, which is ordered to be taken on record.

2. Today, with a view to ascertain the will of the victim, this Court interacted with the victim through virtual mode in presence of the learned advocate Mr.Rahil Jain for the applicant-victim and learned APP Mr.Utkarsh Sharma for the respondent-State, on the mobile phone no.8866035238 of one Smt.Harsha Dave, Admin Gruh Mata of Shreyas Balvikas Ghatak. This Court has taken care, while ascertaining the will of the victim, that except one lady police constable, no one else should be there along with the victim.

3. During the virtual hearing, while ascertaining the will of the victim, her attention was drawn to the medical report. However, she specifically stated that she inclines to terminate her pregnancy. Thereafter, this Court even permitted the victim to interact with her advocate through virtual mode if she desires and, thereafter, she talked with her advocate on his mobile phone.

4. After interacting with the victim, learned advocate Mr.Jain stated before this Court that the victim is firm in her decision to terminate her pregnancy, which suggests that she has made a willful and conscious decision to medically terminate her pregnancy.

5. In view of the above, the matter is ordered to be listed for tomorrow, i.e. on 24.11.2023, for further hearing.

6. The Medical Superintendent of the Civil Hospital, Bhavnagar, is directed to take care that the victim may not be influenced by anybody for the purpose of termination of pregnancy.”

6. Heard learned advocates for the respective parties and considered the opinion/report submitted by the Medical Board, Civil Hospital, Bhavnagar, as well as the written submission by the respondent no.1 - State.

7. On hearing both the sides, this Court has noticed that the applicant-victim is alleged to have been raped by the accused named in the FIR being No.11198641236506 of 2023 dated 16.11.2023 registered with the Palitana Rural Police Station for the offences punishable under Sections 376(2)(j), 376(2)(n) of the Indian Penal Code and Sections 6, 10, 18 of the Protection of Children from Sexual Offences Act.

8. A panel of doctors have opined that the applicant-victim is already carrying about 27 weeks of pregnancy with a specific report/opinion of the empaneled doctors that medical termination of pregnancy can be performed as per the guidelines of the MTP Amendment Act, 2021.
9. Learned APP has urged before this Court that the Court may, in a given set of circumstances, issue a direction for termination of pregnancy. However, the tissues from the fetus may be directed to be handed over for the purpose of DNA sampling in a scientific manner to the Investigating Officer.
10. In the case of ***X vs. Union of India and Another (Miscellaneous Application No.2157 of 2023 in Writ Petition (Civil) No.1137 of 2023)***, the Hon'ble Supreme Court has summarised the law regarding the medical termination of pregnancies. In paragraph-13, the Hon'ble Supreme Court has observed thus :

“Medical termination of pregnancies

13. The termination of pregnancies is governed by the MTP Act and the rules framed under it. The MTP Act is a progressive legislation which regulates the manner in which pregnancies may be terminated. Section 3 spells out certain conditions which must be satisfied before a pregnancy can be terminated. The conditions depend upon the length of the pregnancy. Where the length of the pregnancy does not exceed twenty weeks, one Registered Medical Practitioner must be of the opinion, formed in good faith, that:

a. 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 anguish caused by a pregnancy which occurs due to the failure of a contraceptive method is presumed to constitute a grave injury to the mental health of the woman; or

b. There is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy is presumed to constitute a grave injury to the mental health of the woman. The presumption adverted to in (a) above makes it evident that the MTP Act recognizes the autonomy of the pregnant woman and respects her right to choose the course of her life.

14. Where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks, two RMPs must be of the opinion discussed in the preceding paragraph. The categories of women where a pregnancy beyond 20 weeks and up to 24 weeks may be terminated are permitted to be prescribed by rules made by the delegate of the legislature. Rule 3B of the

MTP Rules (as amended in 2021) provides grounds for the termination of a pregnancy up to twenty-four weeks. The termination may be allowed in the following cases or for the following persons:

- a. Survivors of sexual assault or rape or incest;*
- b. Minors;*
- c. Change of marital status during the ongoing pregnancy (widowhood and divorce);*
- d. Women with physical disabilities with a major disability in terms of the criteria laid down under the Rights of Persons with Disabilities Act 2016;*
- e. Mentally ill women including mental retardation;*
- f. Foetal malformation that has a substantial risk of being incompatible with life or where in the event of birth, the child may suffer from physical or mental abnormalities and be seriously handicapped; and*
- g. Women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government.*

In X v. Principal Secretary, Department of Health and Family Welfare, GNCTD, this Court held that the benefits of Rule 3B(c) extend equally to both single and married women and that the benefits of Rule 3B extend to all women who undergo a change in their material circumstances.

15. Significantly, if in the opinion of an RMP, the termination of a pregnancy is immediately necessary to save the life of a pregnant woman, the provisions of Section 3 which relate to the length of the pregnancy and the opinion of two RMPs shall not apply. Section 4 (which concerns the place at which a pregnancy may be terminated) shall not apply to such cases as well. The design of the statute makes it evident that saving the life of the pregnant woman is of paramount importance, notwithstanding the length of the pregnancy.

16. Further, the provisions of Section 3(2) relating to the length of the pregnancy shall not apply to the termination of a pregnancy by an RMP, where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board. The Medical Board has the power to allow or deny the termination of a pregnancy the length of which is beyond twenty-four weeks. It may do so only after ensuring that the procedure would be safe for the woman at that gestation age and after considering whether the foetal malformation leads to a substantial risk of the foetus being incompatible with life, or where the child (if it is born) may suffer from such physical or mental abnormalities as to be seriously handicapped. Therefore, the outer temporal limit within which a pregnancy may be terminated is lifted in some cases.”

11. The learned advocate appearing for the applicant-victim, relying upon the decision of the Hon'ble Supreme Court in the case of **XYZ vs. The State of Gujarat & Ors** (SLP (Cri) Dy. No.33790 of 2023, decided on 21.08.2023), has submitted that the Supreme Court, in paragraphs-10, 12 & 14, held as under :

“10. We find that in the absence of even noticing the aforesaid portion of the report, the High Court was not right in simply holding that “the age of the foetus is almost 27 weeks as on 17.08.2023 and considering the statements made by the learned advocate for the petitioner-victim and the averments made in the application the petition for medical termination of pregnancy stands rejected”, which, in our view is ex facie contradictory. Being aggrieved by the said order the appellant has knocked the doors of this Court seeking expeditious relief.

12. Pursuant to the order of this Court dated 19.08.2023 as extracted hereinabove, the report of the Medical Superintendent, Dr.Kiran C.Patel Medical College & Research Institute, Bharuch and Chief District Medical officer-cum-Civil surgeon General Hospital, Bharuch, Gujarat has been placed on record, which states that the petitioner’s pregnancy is of 27 weeks 2 days +/- 2 weeks duration and the live intrauterine foetus weights around 1088 grams as per the ultra sonography done on 19.08.2023. Paragraphs 3 to 6 of the report reads as under :-

“3. There is no indication for termination of pregnancy as per Maternal Physical Health but as per history given by survivor this pregnancy is due to sexual assault with her, continuation of this pregnancy can affect her mental health and in addition survivor want to terminate pregnancy; Medical Termination of Pregnancy (MTP) at this stage of pregnancy can be done in this hospital if Honourable Court Permits.

4. *In that case the Medical Termination of Pregnancy would be done first by induction of Labour and if indicated then by Hysterotomy procedure after taking consent of survivor & explaining due risks to maternal health and fetal outcome.*
5. *At present the survivor is clinically fit for above mentioned procedure.*
6. *The Medical Termination of Pregnancy would not adversely affect child bearing capacity and General Health of the survivor in future.”*

14. *In Suchita Srivastava vs. State (UT of Chandigarh) (2009) 9 SCC 1, this Court expressed that the right of a woman to have reproductive choice is an insegregable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to her bodily integrity.*

12. In the case of **Minor R through Mother H vs. State of NCT of Delhi and Another (W.P. (Cri) No.221 of 2023, decided on 25.01.2023)**, the Delhi High Court held as under :

“12. In the case of sexual assault, denying a women right to say no to medical termination of pregnancy and fasten her with responsibility of motherhood would amount to denying her human right to live with dignity as she has a right in relation to her body which includes saying Yes or No to being a mother. Section 3(2) of the MTP Act reiterates that right of a woman. To force the victim to give birth to child of a man who sexually assaulted would result in unexplainable miseries.

One will shudder to think what a victim who is carrying such fetus in her womb must be going through each day, being reminded constantly of the sexual assault that she has undergone. Cases where sexual assault results into pregnancy of the victim are even more traumatic as the shadow of such tragic moment lingers on each day with the victim. It is this mental agony which has been taken into account by the MTP Act which lays emphasis on not only grave physical injury but also mental health of a pregnant woman. It therefore provides under Section 3(2)(i) that if the continuance of pregnancy would involve grave injury to the mental health of a pregnant woman, she can legitimately seek to terminate the same. In furtherance of the same intent, Section 3(2) Explanation 2 of the MTP Act provides that -

“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 pregnant woman.”

The present case stands covered under this explanation.

14. This Court takes note of the fact that Article 21 of the Constitution of India dealing with right to life invariably includes a life lived with dignity. The child herein is a victim of rape. Termination of pregnancy in cases, like present one, cannot be reduced merely to be defined as right of a woman sexually assaulted, but also to be recognized as a human right, as it affects dignified existence of a victim if the same is not permitted. It is not the privacy of the rape victim which is invaded by sexual assault, but her body is wounded and her soul is scared. It would not be appropriate to expect the minor victim who is a rape victim to take the burden of giving birth and raising a child, especially in a situation where she herself is passing through the age of adolescent. Doing so, will amount to asking a child to give birth and raise another child. Given the social, financial, and other factors that are immediately associated with the pregnancy, an unwanted pregnancy would surely have an impact on victim's mental health.”

13. At this stage, it would be profitable to refer to the decision of the Hon'ble Supreme Court, wherein 'the best interest' theory for the victim is settled. Moreover, considering the medical opinion given by the Medical Board as well as considering the trauma, mental agony and possible social ostracism which the applicant-victim has to undergo, this Court is inclined to allow the prayer for medical termination of the pregnancy.

14. Since the pregnancy of the applicant-victim exceeds 27 weeks as of now, the Court directs three senior most Gynecologists of the Civil Hospital, Bhavnagar, to examine the applicant-victim and also by a Psychologist attached to the Civil Hospital, Bhavnagar. The said team of doctors shall examine the applicant-victim, and after having interaction with her, undertake the procedure of surgery on urgent basis along with other required expert doctors like Physician, Anesthetic etc., if otherwise, there is unanimity amongst the doctors to the effect that such termination would be carried out safely.

15. Considering the fact that each day's delay will add to the victim's agony, the following directions are issued :

(i) The victim is permitted to get the pregnancy terminated at the Civil Hospital, Bhavnagar. The termination of pregnancy be carried out with all the necessary medical facilities available at the disposal of the Hospital and on ensuring proper care in pre-termination and post termination periods.

(ii) On production of this order, the Superintendent of the Civil Hospital, Bhavnagar, shall take immediate measures for constituting a medical team for conducting the procedure.

(iii) the victim shall file an appropriate undertaking, authorizing to conduct the surgery at her risk.

(iv) If the baby is alive at birth, the hospital shall ensure that the baby is offered the best medical treatment available, so that it develops into a healthy child.

(v) If the victim is not willing to assume the responsibility of the baby, the State and its agencies shall assume full responsibility and offer medical support and facilities to the child, keeping in mind the best interests of the child and the statutory provisions in the Juvenile Justice (Care and Protection of Children) Act, 2005.

(vi) The doctors shall take the necessary tissue samples from the DNA identification by following the scientific practice for DNA identification and such samples shall be handed over to the Investigating Officer concerned.

16. The learned APP shall communicate about this order to the Civil Hospital, Bhavnagar, forthwith. A copy of this order shall also be sent by the Registry to the Chief District Medical Officer cum-Civil Surgeon, General Hospital, Bhavnagar.

17. With above directions, the present petition stands disposed of. Direct service today is permitted.

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