

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CRIMINAL APPLICATION NO. 2239 of 2020**

PRIYANKABEN D/O HARSHADBHAI MAGANBHAI HALPATI

Versus

STATE OF GUJARAT

Appearance:

K T BELADIYA(9101) for the Applicant(s) No. 1

MR. H.K.PATEL, APP for the Respondent(s) No. 1,2,3

CORAM: **HONOURABLE MR.JUSTICE V.P. PATEL**

Date: 14/05/2020

ORAL ORDER

1. Heard learned Advocate Mr. K.T.Beladiya for the Petitioner through video conference.
2. Rule. Learned APP Mr. H.K.Patel waives service of Rule on behalf of the Respondents.
3. This petition is filed by the petitioner who is the victim of rape case, under Article 226 of the Constitution of India seeking termination of pregnancy under the Medical Termination of Pregnancy Act, 1971 (for short 'MTP Act').
4. Heard learned Advocate for the Applicant and learned APP for the Respondents. Considering the peculiar nature of case, this matter is taken up for final hearing.
5. The petition has seek relief in terms of paragraph 8 (A), (B), (C) which reads as under:

“(A) Your Lordships may be pleased to issue appropriate writ or order or direction to the respondent authority to terminate the pregnancy of petitioner – victim Priyanka who is aged 18 years, at the earliest, as the same being in best interest of the victim, considering her very young age, physical health and incident of rape causing grave injury to her mental health and further be pleased to direct the respondent no.3 to hand over, in scientific manner, the tissues drawn from the fetus for DNA identification to the Police Sub Inspector, Vijalpore Police Station for onward transmission of the same to the concerned Forensic Science Laboratory, interest of justice.

(B) Pending admission hearing and final disposal of this petition, Your Lordshipss may be pleased to direct the respondent no.1 to 3 to conduct

medical termination of pregnancy of the minor victim with two qualified surgeons including Gynecologist, Obstetrician and in presence of qualified physician with due care and precaution after carrying out necessary medical check-up, so as to avoid any likelihood of untoward harm to the physical or mental health of the minor victim Kiran, in the interest of justice.

(C) Your Lordships be pleased to Be grant Dispense With Affidavit of Deponent With Notarized Considering The Present Situation of Pandemic Covid 19, in the interest of justice.”

Facts of the case:

6.1 It is stated in the Application that the petitioner is aged 18 years and 7 months and she is doing work of goat grassing. The petitioner is residing in the village Vedcha, Taluka Vijalpore, District Navsari along with her parents and elder brother. The petitioner states that she belong to very poor family and the parents of the petitioner are earning their livelihood by doing agriculture work. That she has filed FIR with the Vijalpore police station, District Navsari which was registered being CR No. Part A-11822022201058 dated 1.5.2020 for the offence punishable under Section 366, 376(2)(N) and 506 (2) of the Indian Penal Code (for shor ‘IPC’).

6.2 It is further stated that the Accused is aged about 30 years and he also doing work of goat grassing like petitioner so he is also going for goat grassing five months prior to May 2020. Accused met petitioner in the field of goat grassing when the petitioner was alone with her goats in the field of goat grassing. The accused had forcibly raped the petitioner and administered threat to her that if she complain about the same to her parents, he would kill the petitioner and her parents and her brother. Out of fear and shock, the petitioner did not inform her parents and taking advantage of this situation, subsequently, the accused committed the said illegal act on the petitioner forcibly. The petitioner complained her mother about stomach ache and when the petitioner was taken to the Civil Hospital, Mandirgram, Navsari. The Director medically examined the petitioner and informed her about the petitioner is pregnant. Thereafter, the petitioner gone with her mother at Vijalpore Police Station and filed a complaint as stated herein above. Thereafter the petitioner is referred to the Navsari Civil Hospital for further treatment.

6.3 That the petitioner victim has informed her mother about the forceful rape and sexual harassment by the accused five months prior to May 2020. Upon medical examination, the petitioner is found to be carrying pregnancy

and is suffering immensely, mentally as well as physically. That the pregnancy is beyond stipulated period of 22 weeks, termination of pregnancy can be done after obtaining permission in accordance with the MTP Act.

6.4 It is also stated that he has taken decision of filing and seeking relief for termination of pregnancy with consent of all the family members of the petitioners and more particularly, taking into consideration the mental and physical condition of the petitioner girl. That the pregnancy is at crucial stage, the pregnancy is caused by the rape causing injury to mental health of the petitioner. That the termination of pregnancy is in the best interest of the petitioner.

6.5 It is also stated that the mental health of the pregnant woman coupled with the fact that bearing and rearing of a child in the womb would create a great mental agony to the victim for her entire life and may invite other social-economical problems. That the father and mother of the victim very emphatically reiterate that the untoward pregnancy of their daughter-victim was due to rape for which she suffered great physical and mental health. That the continuation of pregnancy may cause anguish trauma innumerable suffering of mental, physical, social and economical. Therefore the pregnancy is required to be terminated in the larger interest of justice.

6.6 That Section 3 of the MTP Act allows abortion only if specific conditions are met with. That the woman's right to make reproductive choices vis-a-vis dimension of personal liberty as understood under Article of the Constitution of India, the guidelines given by the Hon'ble Supreme Court that "it is important to recognize that reproductive choice can be exercised to procreate as well as abstain from procreating.

7. The coordinate bench has passed the below mentioned on 7.5.2020 which reads as under:

"The present applicant is the victim of a rape case registered vide FIR No.Part A 11822022201058 dated 01.05.2020 at Vijalpor Police Station, District Navsari, for offence punishable under Sections 366, 376, 376(2)(N) and 506(2) of the IPC.

By way of present application, the applicant has applied for termination of pregnancy which is of 21 weeks as per doctor report. Learned APP has inquired and submitted that this type of facility is available at Surat

Civil Hospital and if the victim approaches Surat Civil Hospital, Surat, then she will be examined there accordingly.

In view of the above circumstance, before passing of any order by this Court, it is required that health condition and the condition of pregnancy of the applicant is required to brought on record with risk factor, if any. Therefore, the present applicant shall go to Surat Civil Hospital on 09.05.2020 at about 10:00 a.m. along with three persons which may include parents of the victim for medical examination. The Senior Expert Doctors at Surat Civil Hospital are directed to examine the victim for termination of pregnancy of victim and about the risk factor. Moreover, doctors shall mention the stage and medical position of the victim girl and shall clarify whether termination of pregnancy of victim girl could be performed or not with detailed reasons. The Medical officer shall report to this Court about above aspects through learned Additional Public Prosecutor on or before 11:05.2020. Matter is adjourned to 12.05.2020. Looking to lockdown situation due to Covid19 pandemic, the applicant is at liberty to avail benefit of this order for visiting Surat Civil Hospital for physical examination from Navsari to Surat and back to Navsari. The Medical Officers shall examine the victim and in turn shall intimate in detail about the condition and stage of pregnancy with the opinion regarding the termination of pregnancy of victim girl to the learned APP. The learned APP shall in turn apprise the Court about the same.

Learned APP is directed to intimate the concerned doctors in this regard along with this order. Learned advocate for the applicant is directed to send copy of this order to the concerned authorities including the doctors and the police authority.”

8. In pursuance of the above order, this court has received the opinion of the penal doctor with case papers, which is taken on record. It reads as under.

8.1 It is noted on the case papers as under:

<i>C/o 5th RMOA, No complain, NoTT Taken</i>	
<i>T-normal, Pulse-92/min., SPo2-99% on room air, RS: NAD, CVS: NAD, Thyroid: NAD,</i>	<i>LMP: NK, D/W: NL, U/W:22 wks+6 days (2/5:21 wks 6days)</i>

<i>Breast – NAD, Liver – not palpable, Spleen – not palpable, No pedal edema,</i>	
<i>S/b: AP OG Unit 3</i>	
<i>P/A UT 24 WK EB Present relaxed</i>	<i>Adv Mamta reference -15 Hb/BL group / sickling awaited Psychiatric ref: for mental evaluation Inj TT lm given</i>
<i>USG: CA Present (OPD 20) USG: (2/5/2020) From HIRAL clinic Dr. Rajesh Desai Single intrauterine live fetus 21 wks 6 days with Bilateral renal pylectesis.</i>	
<i>S/b AP Psychiatry Seen by Dr. Sanjibani Panigrahi, Assistant Professor, Dept, of Psychiatry, GMC & NCH, Surat History given by patient and her mother, reliable History of multiple sexual assaults, Over 6 months Currently 22 weeks of gestation, referred for fitness for MTP No history of psychiatric disorder in the past No history of substance use Educated upto class 5.</i>	
<i><u>Mental Status examination:</u> Patient is conscious, oriented to time, place and person. Mood – Euthymic Affect – Congruent to stated mood No form of thought or perceptual abnormalities <u>Clinical impression – No active psychopathology at present</u></i>	

8.2 The panel doctor have opined as under:

“We here by examined a patient name of Miss Priyankaben Harshad Halpati, Age: 19 Years residing at Vedchha Kahjuri Faliyu coming to New Civil Hospital Surat, Obs. & Gynec OPD on 09-05-2020 at 11.00 am with complain of fifth running month of amenorrhea with no other complain. On her examination, her vitals we are normal. On per abdominal examination, she has 24 weeks of Intra uterine live pregnancy without any complication. He ANC profile has been sent.

In our opinion, Continuation of pregnancy may affect her physical and mental health. So termination of pregnancy is advisable with due risk after ANC profile report.

Panel Senior Doctors of Obs. & Gynec Department

<i>sd/-</i> <i>Dr. Saral Bhatia</i> <i>Associate Professor</i>	<i>sd/-</i> <i>Dr. Dhvani Desai</i> <i>Associate Professor</i>	<i>sd/-</i> <i>Dr. Parul Udhawala</i> <i>Assistant Professor</i>
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9. Learned Advocate for the Applicant has submitted that the Doctors have clearly opined that Continuation of pregnancy may affect her physical and mental health. So termination of pregnancy is advisable with due risk after ANC profile report. It is further submitted continuation of pregnancy is going to affect her mental and physical status, what is of prime importance is the health of the petitioner. He has urged that the 'Best interests' is prescribed by the Apex Court is the requirement as to whether the decision would subserve the interest of the person in question and the decision of the Court should be guided by the interests of the victim alone and not of those of other stakeholders. It is also the say of the learned advocate that the parents of the victim are also undergoing traumatic condition seeing the condition of the girl. It is also argued that it is the petitioner's right under Article 21 of the Constitution as a personal liberty whether she should carry the pregnancy or not. He has relied upon the judgments which will be discussed hereinafter.

10. Learned APP for the Respondent State argued that the Court should left it to the discretion of the team of Doctors, as has been done in case of **Chandrakant Jayantilal Suthar & Anr. v. State of Gujarat** [Special Leave to Appeal (Criminal) No. 6013/2015 arising from Spl. Criminal Application No. 4255/2015] wherein it had been observed that if the team of doctors is of the view that termination of pregnancy is immediately necessary to save life of the victim, the concerned doctor of the Civil Hospital shall perform necessary surgery. It is further argued that considering the facts and circumstances of the case, personal liberty as included in Article 21 of the Constitution, he has requested to pass just and equitable order.

11. Before advertng to the facts of the present case, the relevant provision of the MTP Act are required to be taken into consideration, which reads 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 pregnant 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 to the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) ...

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.”

12. This court has considered the following judgments cited by both the parties:

(a) Suchita Srivastava & Anr vs Chandigarh Administration reported in (2009) 3 GLH 468 wherein the Hon'ble Supreme Court has held as under:

“11. A plain reading of the above-quoted provision makes it clear that Indian

law allows for abortion only if the specified conditions are met. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. 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 recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

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."

(B) The Hon'ble Apex Court has observed in case of Chandrakant Jayantilal Suthar v. State of Gujarat reported in (2015 (8) SCC 721 as under:

"4. If the team of the afore-stated doctors is of the view that termination of the pregnancy is immediately necessary to save the life of Ms Maitri, the doctor concerned of the Civil Hospital shall perform necessary surgery, if the petitioner and Ms Maitri desire to go through to such abortion, without taking any permission from this Court. If there is no unanimity among the doctors, majority view of the doctors shall prevail."

13. As per Section 3 of the MTP Act, where the length of pregnancy does

not exceed 12 weeks, the registered Medical Practitioner and where such length of pregnancy exceed 12 weeks but does not exceed 20 weeks, two Medical Practitioners can terminate the pregnancy. But they have to form an opinion that the continuation of pregnancy would invoke a risk to the life of the pregnant woman or of grave injury to her physical 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.

13.1 Here in this case, pregnancy is of 24 weeks, therefore, the Medical Practitioners cannot on its own terminate the pregnancy. If they terminate the pregnancy without the order of the court, the act of the doctor amounts to an offence punishable under the Indian Penal Code or for any other for time being in force.

13.2 As per the Explanation 1 below Section 3 of the MTP Act, it is provided that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish cause by such pregnancy shall be presumed to constitute grave injury to the mental of the pregnant woman.

13.3 In this case the petitioner is pregnant because of forcible rape of incident by the accused. As per the contents of the petition, it is submitted that bearing and rearing of child in the womb would create a great mental agony to her for her entire life and invite many other socio-economical problems. This can be said to be a grave injury to the mental health of the pregnant woman.

13.4 In the case of Chandrakant Jayantilal Suthar v. State of Gujarat (supra) the pregnancy was of 24 weeks. The Hon'ble Supreme Court has granted permission to terminate the pregnancy considering the request of the victim and personal liberty and best interest factors.

13.5 The Hon'ble Supreme Court in case of Sarmistha Chakraborty v. Union of India reported in (2018) 13 SCC 339:(2017) 7 SCALE 389 has granted permission to terminate the pregnancy of 25 weeks.

13.6 Since the request is made by the petitioner herself, who has attained the age of more than 18 years, therefore, no written consent of her guardian is required under Section 4(A) of the MTP Act.

14. Considering the contents of the petition, provision of the applicable law,

ratio laid down by the Hon'ble Supreme Court in above referred to cases, right of privacy of the petitioner, medical reports, and bearing in mind the best interest principle, as discussed herein above, the court is of the view that termination of pregnancy of the petitioner will survive the interest of justice. Therefore, the petition is required to be allowed and accordingly stands allowed. She is permitted to terminate her pregnancy at the earliest.

15. The concerned Doctor shall terminate the pregnancy with due risk after ANC profile report. The outcome and well being of the petitioner shall be reported to this court within one week.

16. The Medical Superintendent of the New Civil Hospital Surat shall hand over, in scientific manner, the tissues drawn from the foetus for DNA identification to the investigating officer of the crime registered by the petitioner against the accused at Vejalpore Police Station, District Navsari for onward transmission of the same to the concerned Forensic Science Laboratory.

17. Registry is directed to provide copy of this order to the learned APP for onward communication and to the learned Advocate for the petitioner, to the concerned investigating officer and concerned New Civil Hospital Surat for follow up action by e-mail / fax message / or any other suitable electronic mode

18. With the above directions, this petition stands disposed of accordingly. Rule is made absolute.

MISHRA AMIT V.

(V. P. PATEL,J)

THE HIGH COURT
OF GUJARAT

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