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WPCRL No.68 of 2020

11. 15.12.2020

This matter is taken up through Video Conferencing mode because of COVID-19 pandemic.

Heard Mr. P.K.Nanda, learned counsel for the petitioner and Ms. M.S. Sahoo, learned Additional Government Advocate for the State.

The writ application has been filed by the petitioner-Gopal Pattnaik @ Gopal Krishna Pattnaik on 04.08.2020 for issuance of writ of Habeas Corpus, inter alia, alleging that his elder daughter lodged an F.I.R. before the I.I.C. Khandagiri Police station regarding the missing of the victim girl and their suspicions to the effect that Opp. Party No.5 Raja Mallick, aged about 24 years, S/o. Sankar Mallick has allured her sister to some unknown place.

The grievance of the petitioner is that even though a prima-facie case is made out under Section 363 of the Indian Penal Code and F.I.R. No.425 of 2020 has been registered by the I.I.C. Khandagiri Police station, the Police did not take any step for rescue of the victim. Hence, the writ application.

On 12.08.2020, we directed the petitioner counsel to serve required numbers of extra copies of the brief on learned Addl. Government Advocate and in the interim we further directed the Inspector-in-charge of Khandagiri Police Station to take appropriate steps to rescue of the victim girl including raiding of the house of the Opp. Party No.5 to 8 and posted the case to 10.09.2020.

In view of the fact that the Opp. Party Nos.5 to 8 are accused in a criminal case, no notices were issued to them though

no such specific mention of the said fact has been made.. On 10.09.2020 , the learned Addl. Government Advocate prayed for some time to obtain instruction . Then on 16.09.2020, the case was again listed, wherein the learned counsel for the petitioner submitted before us that the victim girl has been kept confined in a house at Baramunda Bhagabati Basti, P.S. Khandagiri, District-Khurda. So we gave a specific direction to the Opp. Party No.4 to take immediate steps for recovery of the victim girl as early as possible. The case was again listed on 06.10.2020. On that day also, the learned Addl. Government Advocate again prayed for time as he had not received any instructions. We gave further direction to the Opp. Party No.4-Inspector-In-Charge, Khandagiri Police Station, Khandagiri, District-Khurda to take further steps to recover the victim girl as early as possible and that on the next date of listing (13.10.2020) he should join us through Video Conferencing mode. The case was again listed on 13.10.2020. On that day also, adjournment was sought for and the case was adjourned. The victim girl was recovered on 02.11.2020. She had been medically examined and her statement recorded under Sec-164 CrI.P.C and as per her wishes, she was left in the custody of her parents. The petitioner filed an interim application, i.e. I.A. No.33 of 2020 for appropriate orders by the Court for terminating the pregnancy of the victim girl (annexing a copy of the order sheet of the learned 4th Additional Dist & sessions Judge and the Ultrasound Report dated 11.11.2010 showing the pregnancy to be of approximately 18 weeks), which was listed on 04.12.2020 . The statement of the victim recorded under Sec- 161 and 164 CrI.P.C, and her medical examination report sent to us by email by the learned Addl. Govt. Advocate.

In view of the urgency of the matter we thought it fit to take up the application even though the victim girl had been recovered . On that day i.e. 04.12.2020, we directed the Deputy Commissioner of Police, Bhubaneswar to produce the victim girl before us through virtual mode on 07.12.2020 so that we could ascertain her opinion. On 07.12.2020, the victim girl was produced before us through Video Conferencing mode and we interacted with her and referred the case to the Capital Hospital, Bhubaneswar with a direction for examination of the victim girl by a Gynecologist and a Radiologist. They were specifically directed to report the exact age of pregnancy and whether termination of pregnancy shall in any way be dangerous to the health and life of the victim girl, both mentally and physically.

Their report was placed before us on 10.12.2020 but we were not satisfied with the report of the doctors of the Capital Hospital. Taking note of the fact that all the questions that were framed by us on 07.12.2020 had not been answered by the team of two doctors, we referred the case to a committee of Senior Doctors/ Professors and Heads of Department of Medicine, Psychiatry , Obstetrics and Gynecology , Pediatrics , Anasthesia of S.C.B., Medical College and Hospital to interact with and examine the girl and submit a report . The matter was directed be listed on 14.12.2020.

On 11.12.2020 an affidavit has been filed by the petitioner stating that neither the victim nor her parents wanted her to continue with the pregnancy. In compliance of the order passed by this Court on 10.12.2020, the committee examined the victim girl on 11.12.2020 and submitted their report in a sealed cover to the learned Advocate General , Orissa High Court vide

letter No 24282 dated 11.12.2020 which was opened by us in the Court on 14.12.2020. The committee comprised of the following members, namely-

- 1.Prof. C.B.K. Mohanty (DMET, Odisha),
- 2.Prof. Maya Padhi (In-charge-Superintendent),
- 3.Prof. S.K. Satapathy (HOD, Pediatrics),
- 4.Prof. J.K. Panda (HOD, Medicine),
- 5.Prof. Tushar Kar (HOD, O & G),
- 6.Prof. S.P. Swain (HOD, Psychiatric),
- 7.Prof. D. Routray (Professor, Anasthesiology),
- 8.Prof. S.Parida (HOD, Radiology) and
- 9.Dr. Puspanjali Khuntia (Assoc. Prof., O & G & Project Office Post Partum Center).

It appears that Prof Maya Padhi was present in the meeting held on 11.12.2020 but has not signed the report .The report is signed by eight members .

In the report it has been interalia stated that

- i) Radiological examination was not done due to her pregnancy but her age as per the High School Certificate Examination record showed that her date of birth is 23.04.2003 and she was yet to attain 18years.
- ii) Consent for examination was taken from her mother and elder sister (ANNEXURE 1) .
- iii) Members of the committee interacted with the victim and her family members (mother and elder sister). During such interaction, she has stated that she left her house against her will but under force and has been subjected to forceful sex which led to the pregnancy.
- iv) The victim as well as the accompanying guardians desired for termination of her present pregnancy.
- v) The Committee perused the past reports related to

clinical examination of the victim and subjected her to detail history taking, clinical examination and ultrasound examination .

- vi) She was examined by the two O&G specialists - the H.O.D and the Associate Professor , the H.O.D Medicine, Prof and H.O.D Pediatrics , Prof and H.O.D ,Psychiatry and Prof and H.O.D radiology.
- vii) The obstetrics ultrasound examination on 11.12.2020 revealed the intrauterine fetus to be of 21 weeks 5 days + 1 week(more than 20 weeks). No obvious congenital fetal abnormality was detected(ANNEXURE III).
- viii) Her last menstrual period was on 7th July 2020 and hence her gestation was calculated to be 22 weeks 3 days.
- ix) Psychiatric evaluation of the victim girl done by the H.O.D Psychiatry in presence of her mother revealed that although she was of sound mind but is suffering from adjustment issues with of emotional reaction, sense of insecurity , problems of college dropout and at times suicidal tendency .Although these mental health issues do not have any direct adverse impact on the outcome of the pregnancy but may exacerbate in view of her unmarried status , sense of insecurity in future and other associated emotional issues .
- x) It is well established in medical literature that teenage pregnancy carries an inherent risk of increased maternal and fetal adverse outcome (intra uterine growth retardation/ hypertension /preeclampsia/eclampsia) and increased incidence of fetal and maternal deaths.
- xi) The Committee ultimately opined that though her

physical condition does not contraindicate continuation of pregnancy and as the MTP Act 1971 does not permit medical termination of pregnancy beyond 20 weeks, the committee felt its inability to recommend medical termination of pregnancy as it had crossed 20 weeks. But it cannot be denied that her mental problems may have adverse impact on the future of the victim on social ground.

It is necessary to state here that our specific query as to whether termination of the pregnancy at this stage would pose any threat to the life of the victim girl was not answered. It is also necessary to state here that although the Committee did not think it advisable to conduct any radiological X-ray examination to determine her age, but unfortunately when the victim girl was rescued and sent for medical examination and ultrasound examination revealed a fetus of 16 weeks and 4 days, X-ray has been conducted 24.11.2020 to determine her age which has been found to be between 14- 17 years. It is common knowledge that X- ray examination is contra-indicated during pregnancy as it can have a deleterious effect on the fetus.

In such factual background, we have examined the statement of the victim girl recorded under Section 164 Cr.P.C. which shows that she was in love with Opp. Party No.5 and after leaving home stayed together for more than three months before she was rescued by the police and there was sexual relationship between them during their absence from their home . In our prima facie opinion, such sexual intercourse without consent of the victim girl or even with her consent cannot be held to be with consent in

the eye of law, in view of her age as she had not attained the age of majority (her date of birth being 23.04.2003 and as per the radiological examination her age has been opined to be between 14-17 years) . There is definitely no consent of the parents of the victim girl for her to have such kind of sexual relationship or pregnancy. In the case of **Suchita Srivastava and another vrs. Chandigarh Administration reported in (2009) 9 SCC**, the Hon'ble Supreme Court has examined the provision of the Act, 1972 and emphasized on the need of taking the pregnant woman is consent for medical termination of the pregnancy. In that case the woman has attained the age of majority. Though in this case, the victim girl has not attained the age of majority, she being a child under the age of 18 years, still as a abundant caution we have taken her opinion by interacting with her and she has also expressed her desire to terminate the pregnancy before the medical committee. The father of the victim girl named in the petitioner has also filed an affidavit to that effect.

The Supreme Court in the case of **Z vrs. State of Bihar, (2018) 11 SCC 572**, had examined the right of a women to terminate the pregnancy. The Hon'ble Supreme Court in para-16 of the judgment took note of the fact that India has ratified the Convention for Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993 and is under an international obligation to ensure that the right of a women in reproductive choices is protected. Article-11 of the said convention provides that all State party shall ensure the right to protection of health and safety in working conditions, including safe-guarding the function of reproduction. Article-12 of the conventions stipulated that the State party shall take all appropriate measures to eliminate

discrimination against women in the field of health in order to ensure, on the basis of equality of men and women, access to health care services including rights to relating to family planning.

Thus it is no doubt that right to progeny and termination thereof is a fundamental rights which springing from the right to life as enshrined under Article-21 of the Indian Constitution.

Section-3 of the Medical Termination of Pregnancy Act provides for the cases when pregnancy may be terminated by the registered medical practioner, it reads as follows:-

“(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 I.-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 II.-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) 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.”

Thus in a case where the pregnancy exceeds 12 weeks but does not exceed 20 weeks, it can be terminated by two registered medical practitioners. So, it is apparent from a reading of the provision that the law as it stands now does not permit medical termination of pregnancy after 20 weeks of pregnancy. In this case, the victim is pregnant for more than 20 weeks but less than 24 weeks.

Mr. Nanda, learned counsel has relied upon the bill titled “The Medical Termination of Pregnancy (Amendment) Act, 2020 which was introduced in the parliament to further amend the Act of 1971. Section-3 of that amending bill sought to extend the outer limit of termination of the pregnancy upto 24 weeks. The learned Addl. Government Advocate submitted that even though such a bill has been introduced in the Parliament, having been approved by the Union Cabinet and has been passed by the Lok Sabha, the said bill cannot be treated as a law in force as it is yet pending before the Rajya Sabha and the order of the Court should not be in

the light of such bill. We agree with the Additional Government as far as his contention that such a bill is not the law of the land but in para-2 statement of objects and reasons of said amending bill, it is reflected that due to passage of time and advancement of medical technology for safe abortion there is a scope for increasing the outer limit for terminating pregnancy especially for vulnerable women and pregnancy with substantial fetal abnormalities detected late in pregnancy. Further there is also need for increasing access of women to legal and safe abortion in order to reduce the maternal mortality and morbidity caused by unsafe abortion and its complications.

The learned counsel for the petitioner further submits that there are instances in which the Hon'ble Court as well as several High Court of the country have allowed medical termination of pregnancy beyond 20 weeks but less than 24 weeks.

In **X. vs. Union of India (2016) 14 SCC 382** medical termination of pregnancy of 23-24 weeks of a Rape victim was allowed by the Hon'ble Supreme Court to save the life of the woman.

In **X and other vs. Union of India (2017) 3 SCC 458** after 24 weeks of pregnancy as the pregnancy involves grave risk to the life of the petitioner and possible grave injury to her physical and mental health, medical termination was allowed by the Hon'ble Supreme Court.

In **Meera Santosh Pal vs. Union of India (2017) 3 SCC 462** the Supreme Court held that women's right to make reproductive choice is also a dimension of personal liberty as understood under Article-21 of the Constitution. Therefore, holding that there was possible grave injury to her physical and mental health as required

under Section 3 (2) (i) of the Act though the pregnancy was into 24 weeks, having regard to the aforesaid consideration, the Hon'ble Supreme Court allowed the petitioner to terminate her pregnancy.

In **Murugan vs. Union of India WPC 749/2017** decided on 06.09.2017, the Supreme Court has allowed medical termination of pregnancy beyond the statutory outer limit prescribed in the 1971 Act considering the fact that the victim girl was 13 years old and in trauma, even though the Board stated that termination will have equal danger for the mother.

We also take note of the reported cases of **Z vs. State of Bihar and Others, (2018) 11 SCC-572**, **Sheetal vs. Union of India (2018) 11 SCC 606**, **Sarmishta vs. Union of India, 2018 13 SCC 339** and **Mamta vs. Union of India (2018) 14 SCC 289**.

Termination of pregnancy has been allowed by different High Courts in some cases.

We particularly take into consideration to case of **Mujid Khan vs. Chhatisgarh 2018 SCC online CHSGH 791**. In that case the petitioner was the father of the victim of rape and sexual violence. He filed an application for appropriate order for termination of pregnancy. The learned single Judge of Chhatisgarh High Court took into consideration the various judgments passed by the Hon'ble Supreme Court as well as the other High Courts. Taking into consideration the various facts with particular reference to explanation one appended to Sub Section-2 of Section-3 of the Act, the mental agony of a rape victim, the High Court directed for Constitution of a medical Board to consider the feasibility of termination of pregnancy at that tender age.

We also take note of the fact that a Single Bench of our High Court in the case of **Runa Majhi vs. State of Orissa 2020 SCC**

online Orissa 677 did not permit termination of pregnancy of a mentally retarded victim who was 24 weeks pregnant and as the court found that none of the exceptions laid down in Section-3(4) (a) of the Act was applicable.

Giving our anxious consideration to the facts of the case , the provisions of the 1971 Act and the different judgments of Supreme Court and different High courts , we are of the opinion that in this case we should allow the medical Board, which has already been constituted to proceed with the medical termination of pregnancy of the victim girl , if there is no danger to the life of the victim girl. The medical termination of pregnancy should be carried out under the guidance of Dr. Tushar Kar, HOD of obstetrics and Gynecology, and during the procedure if they find any risk to the life of the victim girl then they have discretion to cancel the procedure for medical termination of pregnancy. The reasons which persuaded us to pass the order for termination of pregnancy are enumerated below:-

i). Conception by the minor girl (victim) is a result of the offence of rape committed by Opp. Party No.5. This fact is well decipherable from the statement under Section 164 Cr.P.C. of the victim girl as well as her statement before the medical Board.

ii). The unwed mother (victim girl), is a minor and has to undergo the ignominy of an undesirable pregnancy. It will hamper her further physical and mental growth. It will also affect her future education prospects.

iii). The social stigma the minor victim will face will be insurmountable in this case as the petitioner and his daughter belong to very humble walk of life.

iv). The social stigma the unborn child will face is also a matter of great concern to us as the child will definitely be viewed with disdain and will be looked down upon as an undesirable child by his/ her peers in society.

v). Though law (as per the 1971 Act) does not allow medical termination pregnancy after 20 weeks , the Central Government in its wisdom has introduced a bill for enhancing this period to 24 weeks . From the statement and objects of the reasons of the Amendment Act of 2020 , it is apparent that the present development of medical science makes it imperative for the amendment of provision of Section 3 of the Act to extend this permissible outer limit of pregnancy for termination.

vi). The committee in this case has also opined that the mental health problem of the victim may have adverse impact on the future of the victim on social ground.

vii) The Committee has not recommended for termination in view of Sec-3 of the Act of 1971 but has not stated that termination of pregnancy at this stage will pose any threat to the life of the victim girl.

The petitioner happens to be the father of the victim girl. The victim girl has given a statement to the Medical Board. An affidavit has also been filed by her father that she being a minor they do not want to continue the pregnancy. As stated earlier, we have also interacted with the victim girl on 07.12.2020. She very categorically stated before us that because of her inability to understand things due to her tender age and misconceived notion she has been impregnated by Opp. Party No.5 and that she does not want to continue her pregnancy. She has also stated before us that if her pregnancy is not allowed to be terminated her education

will be affected and she may face insurmountable difficulties.

In view of the above , we dispose of the writ application as well as the interim application, with the direction to the Medical Board Committee already constituted under the Chairmanship of the DMET to carry out the medical termination of pregnancy of the victim girl. But if during the procedure it is found that there is any danger to the life or well being of the victim girl , they have the discretion to cancel the same. However, we hope and trust that our orders shall be given effect to without any further delay.

Before proceeding with the medical termination of the pregnancy it shall be proper on the part of the Medical Board to obtain a declaration from the victim girl that she is not willing to continue with her pregnancy and she has given consent for its termination. It shall be also appropriate on the part of the medical Board to get such declaration of her guardians (parents of the victim girl).

We make it clear that our observations in this writ application shall not in any way affect the trial of the Opp. Party No.5 or the co accused in the case instituted against them. We further direct that the DNA sample of the fetus be preserved as it may be necessary for further investigation of the case / trial of the criminal case.

We also direct that necessary arrangements be made by the Deputy Commissioner of the Police and I.I.C Khandagiri Police Station for transport of the victim and her guardians to SCB Medical College and Hospital and their return to Bhubaneswar. The name of the victim is being withheld to protect her privacy.

As restriction of COVID-19 is continuing, learned counsel for the parties may utilize the soft copy of this order available in

the High Court's website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587 dated 25.03.2020.

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S.K. Mishra, J.

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Savitri Ratho, J.