

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 19822 of 2023

Sri X

Vs.

The State of West Bengal and others

For the petitioner	:	Mr. Pratik Dhar, Mr. Chittapriya Ghosh
Hearing concluded on	:	16.08.2023
Judgment on	:	17.08.2023

Sabyasachi Bhattacharyya, J:-

1. The present writ petition has been filed by the father of an unfortunate minor girl of 11 years who is studying in Class V.
2. The minor was a victim of a gang rape, which invited proceedings under Section 376DB of the Indian Penal Code (IPC) and under Section 6(1) of the Protection of Children from Sexual Offences Act, 2012 (for short, "the POCSO Act").
3. The minor, as of today, is pregnant for about 25 weeks and 6 days.
4. The pregnancy was a result of the atrocity committed on the minor victim.
5. The father of the minor, on her behalf, seeks medical termination of the unwanted and unwarranted pregnancy, in view of the trauma which would be suffered by the minor in the circumstances, if the birth of the child goes through.

6. The learned Senior Advocate appearing for the petitioner cites Sections 3 and 5 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as, “the 1971 Rules”) as well as the connected Rules of 2003. It is contended that although under Section 3(2)(b), the outer length of pregnancy which can be medically terminated under the Act is 24 weeks. The Act has to be taken as a whole. Explanation 2 of Section 3(2) provides that for the purposes of Clauses (a) and (b), where any pregnancy is alleged to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Section 5 provides for situations where Sections 3 and 4 would not apply. In sub-section (1) thereof, such non-applicability has been extended to the termination of a pregnancy in a case where the registered medical practitioner is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.
7. The learned Senior Advocate cites three judgments of coordinate Benches of this Court. A judgment of a three-Judge Bench of the Supreme Court is also referred to.
8. Since the writ petition is not adversarial, no affidavits are directed.
9. Insofar as the first coordinate Bench judgment of this Court cited by the petitioner is concerned, the same was reported at *2022 SCC OnLine Cal 2631 [Dipak Sharma and another Vs. State of West Bengal and others]*. However, in the said case, no question of law as in the present case arose, although the victim was held to be likely to face

ostracization apart from financial distress. No general proposition of law, as such, was laid down therein.

10. In the next case reported at *2023 SCC OnLine Cal 277 [X (since minor through her mother Ansura Khatoon) Vs. State of West Bengal and others]*, the provisions of the statute were interpreted, and it was held that the urgency of medical intervention by way of termination of pregnancy was sufficiently impressed upon the Court.
11. In both the above cases, however, the pregnancy was within the outer limit of 24 weeks.
12. In the third coordinate Bench judgment, reported at *2023 OnLine Cal 1171 [Sabita Pradhan Vs. State of West Bengal and others]*, the victim of rape was 17 years of age and was 30+ weeks' pregnant at the time of filing of the writ petition.
13. It was observed that the minor girl was admittedly a rape victim as required under Rule 3B(a). Further, the consensus of the Medical Board was that the pregnancy could be terminated as per the existing MTP Law. Although the risks of termination at an advanced stage of pregnancy had been mentioned, the Report indicated that the pregnancy could be terminated. The psychotropic mental state of the petitioner's daughter and her anxious verbal output in relation to the sexual abuse were relevant pointers for immediate medical intervention, it was observed by the learned Single Judge. Under such circumstances, the mother of the minor was directed to give her consent to the termination of pregnancy as per the Act and the consent of the minor girl was also directed to be taken. The writ

petition was disposed of in terms of the said observations. Thus, in the said case, although the pregnancy was of 30+ weeks, the Court took into consideration the fact that the pregnancy could be terminated under Rule 3B(a), taking into consideration the psychotropic mental state of the victim and her anxious verbal output in relation to the sexual abuse.

- 14.** A cue, thus, can be taken from the said judgment, since here, the minor victim is 11 years of age, as opposed to the 17-year-old girl in the above case and is 25+ weeks pregnant, much less than the 30+ weeks scenario in the said case.
- 15.** In the three-Judge Bench of the Supreme Court, reported at *2022 SCC OnLine SC 905 [X Vs. Principal Secretary Health and Family Welfare Department and another]*, the Supreme Court observed, despite 24 weeks of pregnancy having been crossed, that the petitioner had moved the High Court before she had completed 24 weeks' pregnancy and the delay in the judicial process cannot work to her prejudice. In such circumstances, a medical board was directed to be formed in terms of the provisions of Section 3 (2D) of the Act.
- 16.** In *Sabita Pradhan's case*, the learned Single Judge had passed an order directing medical termination of pregnancy in respect of a victim who was 30+ weeks pregnant.
- 17.** The judgment of the Supreme Court, although took into consideration the date of filing of the writ petition, which was prior to 24 weeks, the same principle cannot be applied to all cases, since, taken to its logical culmination, such ratio could be applicable even to an

advanced stage of labour. Moreover, the concept of “complete justice” available to the Supreme Court under Article 142 of the Constitution is not vested in this court.

- 18.** However, inspiration can be drawn from both the judgments of the Supreme Court as well as *Sabita Pradhan’s case*.
- 19.** In such perspective, we are to look into the background of enactment of the Statute. The law, as it stood before enactment of the 1971 Act, as founded on the Indian Penal Code, made abortion a crime for which the mother as well as the abortionist could be punished, except when it was induced in order to save the life of the mother.
- 20.** In recent years, healthcare and medical technology have improved. That apart, the awareness of society about the rights of a woman to her body has also expanded exponentially, leading to the enactment of the statute. By subsequent amendments of the year 2021, Section 3(2)(b) has been modified, extending the length of pregnancy, permitted to be terminated medically, to 24 weeks.
- 21.** Section 3(2)(b) now provides that a pregnancy may be terminated by a registered medical practitioner where the length of the pregnancy exceeds 20 weeks but does not exceed 24 weeks in case of such category of women as may be prescribed by Rules made under the Act, if not less than two registered medical practitioner are of the opinion, formed in good faith, that either the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical and mental health or there is a substantial risk that if

the child were born, it would suffer from any serious physical or mental abnormality.

- 22.** The “category of woman” mentioned in sub-section (2)(b) has been stipulated in Rule 3B of the 2003 Rules. The relevant clauses of the same are Clauses (a), which provides for survivors of sexual assault or rape or incest, and (b), relating to minors.
- 23.** The other relevant provision which could be looked into is Section 5. Sub-section (1) thereof provides, *inter alia*, that the restrictions relating to length of pregnancy shall not apply to the termination of the pregnancy by a registered medical practitioner in cases 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.
- 24.** Thus, the very short window of flexibility of interpretation is whether the present case comes within Section 5(1) or the interpretation of the other Sections of the Act can permit, in exceptional cases, a deviation from the 24-week outer limit.
- 25.** In the present case, as per the prevalent norms and guidelines circulated by the Supreme Court, the details of the petitioner have not (rightly so) been disclosed in the writ petition. The documents which are relevant in the context but may reveal the identity of the petitioner have also been placed before the Court in a sealed envelope. Since the relevant facts are disclosed in the writ petition itself, I do not find any necessity to open the sealed envelope and the same remains intact as a part of the record.

- 26.** The background of the case in a nutshell is that the petitioner comes from an extremely weak financial background. She is merely 11 years old and is a school-going child. The tender age of 11 indicates that the victim has barely attained puberty.
- 27.** At such a tender age, when children of better-off sections of society bloom into new life-experiences, the petitioner was rudely brought to terms with harsh realities of life. Whereas motherhood could have come as a matter of choice much later in life, it was imposed on our little protagonist as a slur and not a blessing. The immense mental trauma of such a child can only be imagined in the wildest nightmare.
- 28.** Even without discussing in detail the surrounding circumstances, it is evident that if the victim gives birth to a child, being herself only 11 years of age and unsure about her next meal, since she hails from a financially challenged family, the physical trauma and mental shock of giving birth to a child as a result of the atrocities committed on her would be unimaginable and would, in all probability, remain as a reminder of the episode with her forever. The imprint which will be left on the victim would be beyond repair.
- 29.** That apart, it is also obvious that a child, if given birth to by the victim, who is herself but a child, would have extremely poor chances of a healthy upbringing and/or even a normal birth.
- 30.** Seen in such context, the provision of Clauses (i) and (ii) in Section 3(2) of the 1971 Act are squarely applicable.
- 31.** The continuance of the pregnancy would definitely involve a risk to the life of the pregnant girl as well as of grave injury to her physical and

mental health. Moreover, there would be a substantial risk that if the child were to be born it would suffer from serious physical or mental abnormality, apart from being deprived of a normal, healthy childhood.

- 32.** Although the said sub-clauses are circumscribed by sub-section (2)(b) of Section 3, which fixes the outer limit of pregnancy at 24 weeks, there is no reason why the said provision should not be read in conjunction with Section 5(1) of the Act, which stipulates that in certain cases of termination of pregnancy being immediately necessary to save the life of the pregnant woman, the restriction of length of pregnancy as stipulated in Sections 3 and 4 would not apply.
- 33.** In the present case, which is exceptional of the first order, the spirit of Section 5(1) is fully applicable. The pregnancy, if it reaches fruition, would put the life of the pregnant woman at risk, both due to the mental trauma and the physical ordeal through which she is having to and will have to undergo. The episode of childbirth, if permitted, would not end in a flash but would be a permanent stigma throughout the life of the petitioner, apart from being extremely detrimental to her physical and mental wellbeing and that of the yet-unborn. Bringing a child to see the light of the day is not always welcome. In the present case, all facets of balance of convenience and inconvenience cry out in favour of the medical termination of the pregnancy.
- 34.** That apart, it is required to be kept in mind that the FIR was lodged only in July 28, 2023 and an ultrasonography detected the stage of pregnancy only on August 3, 2023.

- 35.** The irony in the case is that the delay caused in lodging the complaint, pregnancy being detected at the benevolent interference of the District Child Welfare Committee, and consequentially approaching this Court, was primarily due to the poverty of the family of the victim girl and the lack of social support for her family. The utter misery in which the family lives, coupled with the tremendous trauma of a gang rape of an 11 year-old child, was the sole reason for the writ petition being filed late.
- 36.** In fact, the active interference of several persons, including counsel for the petitioner, the respondent no.12/Officer-in-Charge of the Kolaghat Police Station and the Child Welfare Committee, Purba Medinipur as well as the Legal Aid Services was what made it possible for the victim's father to move the present writ petition.
- 37.** The victim cannot, thus, face double jeopardy, being deterred by societal apathy in approaching the court so late, after having become the victim of such a brutal offence in the first place, and again, to be saddled with a rigorous and academic interpretation of law (which is so easy to ruminate on, sitting in the comfort of the air-conditioned court room) to defeat every fundamental right which the victim has as a budding young lady, a minor child, a citizen of India and as a human being as such.
- 38.** In any event, the learned Senior Advocate for the petitioner is justified in arguing that the same standard need not fit all. The outer limit of 24 weeks, which has been stipulated by the Parliament as a general proposition, cannot be a rigid edict set in stone, which does not lend

itself to malleability even in just and exceptional cases, on humanitarian considerations, if not for any other reason.

- 39.** The writ court, as a court of equity, cannot shut its eyes so tight that a tender life goes to waste. Only 25+ weeks, as opposed to the statutory 24 weeks, of pregnancy have elapsed. It is not yet too late. Science is not yet foolproof as to when the embryo becomes a 'human', but an eleven-year old child's humanity is undisputed.
- 40.** The right of the victim which will be violated, if the prayer in the present writ petition is refused, is on the exalted plane of nothing less than her right to life, as enshrined in the Constitution of India.
- 41.** Thus, the facts of the present case leave no manner of doubt that law should be relaxed to the utmost to accommodate yet another minor daughter of ours, an unfortunate victim of social apathy, who should at least be given a new lease of life by being permitted to have medical termination of her in-the-circumstances unfortunate pregnancy.
- 42.** Accordingly, the respondent nos.7 and 8 are directed to constitute a Medical Board within the contemplation of Section 3(2D) of the Medical Termination of Pregnancy Act, 1971, consisting of a gynaecologist, a paediatrician, a radiologist or sonologist and such other number of members as notified in the Official Gazette by the State Government, if and as applicable. Such Medical Board shall be formed within 24 hours from now and shall hold the necessary examination of the minor victim girl within 48 hours thereafter for ascertaining the pros and cons of medical termination of her pregnancy. A report in that regard shall be filed by the said

Medical Board through respondent nos.7 and 8 on August 21, 2023, when the writ petition shall be placed at the top of the list for passing final orders.

(Sabyasachi Bhattacharyya, J.)