

CWP-6733-2016

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

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Date of Decision: 30.05.2016

R (name withheld) and another

... Petitioner(s)

Versus

State of Haryana and others

... Respondent(s)

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH
DHALIWAL**

- | | |
|--|------------|
| 1) Whether Reporters of the local papers may be allowed to see the judgment ?. | YES |
| 2) To be referred to the Reporters or not ?. | YES |
| 3) Whether the judgment should be reported in the Digest ? | YES |

Present: Mr. Gopal Sharma, Advocate,
for the petitioners.

Mr. Sandeep S. Mann, Sr. DAG, Haryana.

Mr. Ramesh Chahal, Advocate for
respondent Nos.9 and 10.

Ms. Tanu Bedi, *Amicus Curiae*.

Paramjeet Singh Dhaliwal, J.

1. In this judgment, a complex set of issues connected with different fields of law arise for consideration. The issue, although, relates to the medical termination of pregnancy of a minor girl beyond the legally permissible gestation period of 20 weeks but other issues such as right to life, health and abortion (which includes victim-mother and the foetus), human rights and issues of social and religious concerns

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are involved. The main focus will be on the issue of late termination of pregnancy resulting from the alleged rape and a brief reference to other ancillary issues which are intricately connected with this complex issue will also be made.

2. In this judgment, full name of petitioner No.1 has been withheld and she has been referred to as 'R'.

3. Instant writ petition has been filed under Articles 226/227 of the Constitution of India for issuance of a writ in the nature of mandamus directing respondent No.7 to terminate the pregnancy of the child in the womb of petitioner No.1, a minor girl, who is an alleged victim of rape, as the continuation of pregnancy would cause grave injury to her and would also be unsafe and dangerous for the life of the petitioner-victim. Further prayer is for issuance of a writ in the nature of mandamus directing respondent Nos.1 to 3 to conduct a fair and impartial investigation in FIR No. 20 dated 04.03.2016, under Section 365 IPC, registered at Police Station Women, Mewat and to hand over the investigation of the case to some higher officials, not below the rank of Superintendent of Police, the life and liberty of the petitioners be also protected and to take legal action against the erring police officials. It is further prayed that during the pendency of the present writ petition, petitioner-victim may be permitted to terminate the pregnancy and directions be issued to respondent no. 7. i.e. Civil Surgeon, Civil Hospital-cum-Government Medical College, SHK Mewat Government Medical College, District Mewat or any other Specialized Government

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Hospital for providing all medical help to petitioner No.1-victim and direction may be issued to the hospital authorities to preserve the fetus, which would enable the investigating agency for DNA test in order to prove the commission of offence of alleged rape by the accused person.

FACTS

4. Registration of FIR by petitioner No.2

Petitioner No. 2-father of petitioner No.1, submitted a complaint to the Women Police Station, Nuh that his daughter aged about 14/15 years was with her friend Urmila, daughter of Amar Chand on 29.02.2016, at about 9.00 P.M. in his house as her house is near to his house. Petitioner No. 2 and other family members also went to sleep. In the morning, when they woke up, his daughter was not in the house. They searched for her, but could not find her anywhere. They also inquired about her from Urmila and her mother, but they did not get any information regarding whereabouts of their daughter from them. They had suspicion that she had been got kidnapped by Urmila. On the basis of complaint made by petitioner No. 2, an FIR No.20 dated 04.03.2016, under Section 365 of IPC was registered at Women Police Station at Nuh.

5. Police Proceedings and medico-legal examination

Petitioner No. 1 was recovered on 04.03.2016. She was produced before the Medical Officer at Government Medical College, Nalhar, Nuh. Petitioner No. 1 declined to get herself medico-legally examined. Thereafter she was produced before the Illaqa Magistrate on

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05.04.2016, her statement was recorded under Section 164 of Code of Criminal Procedure in which petitioner No.1 stated that she had gone with accused Mubarik at her own sweet will. She was not kidnapped and/or allured.

6. **Averments in writ petition**

Petitioner No.2 has filed this writ petition being father and natural guardian of petitioner No. 1. It is averred that the Investigating Officer in connivance with the accused put pressure upon minor girl and got her statement recorded under threat before the Judicial Magistrate 1st Class, Mewat. The Court sent her (minor) to Nari Niketan, Karnal. Petitioner No. 1 while staying in Nari Niketan sent an application to the Judicial Magistrate 1st Class, Mewat showing her willingness to stay with her parents. On 09.03.2016, petitioner no. 2 filed an application for issuance of production warrant of petitioner No.1 before the Court, who ordered handing over her custody to her parents. On 10.03.2016, petitioner No.1 narrated the entire story to her parents and disclosed that respondent No.8 had committed rape upon her in October, 2015 by putting her under threat. He also prepared her obscene video-clip and under the garb of the same, he exploited her and committed rape upon her many a time. Petitioner No.1 was forcibly kidnapped on 29.02.2016. The alleged offences were committed by accused-respondent No. 8 and his associates. Thereafter, on 14.03.2016, petitioner No.2 filed an application before the Judicial Magistrate Ist Class, Mewat for issuance of direction to the investigating officer/SHO for conducting medico-

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legal examination of petitioner No.1. On 16.03.2016, the Judicial Magistrate Ist Class directed the investigating officer to get petitioner No.1 medico-legally examined. She was examined at Civil Hospital-cum-SHKM Government Medical College, Nalhar. The medical examination of petitioner No.1 was not conducted properly and no pregnancy test was conducted in spite of the fact that the doctor of Civil Hospital-cum-SHKM Government Medical College, Nalhar was made aware of the alleged rape committed upon petitioner No.1. The investigating officer also did not act in a fair manner. The petitioners met the senior police officials but no one paid any heed to their grievance. Representations were also given to Director General of Police Haryana and Inspector General of police for protecting the life of petitioners and their family members at the hands of the accused and his associates.

7. **Written statement**

In response to notice of motion, respondent Nos.1 to 5 filed written statement admitting the fact that the petitioner-victim is a minor. It is averred that the victim was recovered by the police of P.S. Punhana and was taken to Civil Hospital-cum-SHKM Government Medical College, Nalhar for medico-legal examination. Initially, she refused to get herself medico-legally examined. She was produced before the Court and her statement under Section 164 Cr.P.C. was recorded wherein she stated that she had gone with accused-Mubarik at her own sweet will and was not kidnapped and allured. She refused to accompany her

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parents and thereafter the Court sent her to Nari Niketan. Other averments made in writ petition have been denied.

8. I have heard the learned counsel for the parties and perused the record.

9. **Submissions made by learned Counsel for petitioners:**

Mr. Gopal Sharma, learned counsel for the petitioners vehemently contended that the police officials have not discharged their duty with due diligence and faithfully, rather they connived with the accused persons. The investigating officer helped the accused out of way and her statement under Section 164 Cr.P.C. was got recorded under threat. Petitioner No.1 was not got medico-legally examined and her signatures were obtained to show that she had declined to get herself medico-legally examined. He further contended that she was always ready and willing for her medico-legal examination and wanted termination of her pregnancy.

10. **Submissions made by Ms Tanu Bedi, Advocate Amicus Curiae:**

10.1 Ms. Tanu Bedi, *amicus curiae* vehemently contended that petitioner No. 1 is the sole decision maker on the basis of the medically-informed consent either to terminate the pregnancy or to continue with the same. As there cannot be any termination of pregnancy without the express and voluntary consent of the woman, in the same manner the pregnancy should not be forced to be continued without her voluntary consent, especially when the facts of the case show that the very act which led to the conception was an involuntary act. No doubt, the

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protection of right of unborn child is an obligation cast upon the State under the Constitutional provisions, yet in view of the unambiguous language of Section 5 of the Medical Termination of Pregnancy Act, 1971 (for brevity, 'MTP Act'), the conflict between the right to life of mother and the right to life of unborn child would yield in favour of the right to life of mother. To force a woman to continue with the pregnancy which she does not want to continue is an infringement of right to privacy and dignity of the woman as well as an infringement of the right to a healthy and dignified life of the nascent life in her womb.

10.2 Learned *amicus curiae* submitted further that the facts of the present case reveal that the choice available to the Petitioner No. 1 under the provisions of the law was snatched away from her due to the ignorance exhibited by the medical experts, lawyers and investigating officers at the relevant stages. Petitioner No. 1 is beseeching to terminate the pregnancy, she does not want to carry, but she is being denied this because of a helpless exercise only on account of gestation period of pregnancy running beyond 20 weeks. Learned *amicus curiae* further contended that in the last one year, two reported judicial pronouncements, one by the Hon'ble Supreme Court and another by the Hon'ble Gujarat High Court, lifted the bar contained under Section 3 of MTP Act in the similar circumstances but in the present case the same could not be done as the required assistance and co-operation did not come forth from the medical experts as happened in the two cases came before the Hon'ble Supreme Court and Hon'ble Gujarat High Court.

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10.3 Ms. Bedi further submitted that she has personally talked to petitioner No.1 in camera and has placed on record of this court the conversation in compact disc., she had with petitioner No.1. The law permits abortion legally if the pregnancy is the result of crime. Ms. Bedi made reference to Sections 3 to 5 of the MTP Act. Section 3 of the Act requires

- a). permission of one doctor if pregnancy is less than 12 weeks and
- b). permission of minimum of 2 doctors if the pregnancy is more than 12 weeks but less than 20 weeks gestation period;

to opine and carry out termination of pregnancy. Section 5 of the MTP Act carves out an exception for carrying out termination of pregnancy required immediately to save the life of a pregnant woman irrespective of the length of pregnancy.

10.4 Learned *amicus curiae* made reference to the provisions of MTP Act that registered medical officers are required to understand the spirit behind the provisions of MTP Act lifting the embargo on termination of pregnancy beyond 20 weeks in cases as contemplated under Section 5 of the MTP Act. The opinion mentioned therein can be formed by a single doctor also. She further contended that expertise of the doctors is to take precedence over every thing which includes the judgment of the Court. She contended that the provisions of MTP Act do not contemplate authorization or approval from any court. In fact, whenever a matter concerning medical termination of pregnancy on any ground whatsoever comes before the courts, the courts have invariably

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based their decision on the opinion of the medical board. There is not a single instance found where the Courts have given directions against the conclusions drawn by the medical board. In fact, the very exercise of approaching the courts in such situations results in unnecessary wastage of time and, many a times, renders the remedy sought unavailable to the victim.

10.5 In support of her contentions, Ms. Bedi has relied upon following judgments:

- (i) ***Roe vs. Wade*** 35 L Ed 2d 147 : 410 US 113 (1973);
- (ii) ***Suchita Srivastava and another vs. Chandigarh Administration*** AIR 2010 SC 235;
- (iii) ***Kavita vs. State of Haryana and others*** 2015 (2) RCR (Criminal) 606 (P & H);
- (iv) ***Minor daughter of Sh. Rudharpal vs. State of Haryana and others*** 2015 (4) R.C.R. (Criminal) 423.
- (v) ***Bashir Khan vs. State of Punjab and another*** 2014 (4) R.C.R. (Criminal) 148.
- (vi) ***Vijender vs. State of Haryana and others*** 2015 (1) R.C.R. (Civil) 163.
- (vii) ***Chandrakant Jayantilal Suthar & another vs. State of Gujarat*** 2015 (6) R.C.R. (Criminal) 83.
- (viii) ***Bhavikaben vs. State of Gujarat***, Criminal Application No.1155 of 2016, decided on 19.02.2016;
- (ix) ***D. Rajeswari vs. State of T.N and others*** 1996 CrL. L.J. 3795;
- (x) ***Dr. Nikhil D. Dattar, Gynaecologist, Mr. X and Mrs. Y being wife of Mr. X Vs. Union of India (UOI) and State of Maharashtra*** 2008(110) BOMLR3293
- (xi) ***Ashaben vs. State of Gujarat & Others*** 2015 (4)

Crimes 1

(xii) ***V. Krishnan vs. G. Rajan alias Madipu Rajan and the Inspector of Police (Law and Order)***
MANU/TN/0279/1993;

(xiii) Articles with regard to laws on medical termination of pregnancy worldwide.

10.6 Ms. Bedi further vehemently contended that the State of Haryana, investigating officer and the doctors of Civil Hospital-cum-SHKM Government Medical College, Nalhar, Nuh are responsible for wastage of time as a result of which statutory period for termination of pregnancy under the MTP Act has exceeded. Petitioner No. 1 has told the learned *amicus curiae* that she was under pressure as a result of which she refused to get herself medically examined at the first stage, when she was recovered and produced before the doctor. Subsequently by moving an application on 14.03.2016, the victim sought to get herself examined by medical officer for the alleged crime of rape. Petitioner No. 1 was examined by the Medical Officer on 16.03.2016, but there is no reference to the pregnancy of petitioner No.1 in the MLR and even no tests were conducted to ascertain the pregnancy. In fact, a bare perusal of this document will show that the medical examination was conducted in the most irresponsible manner. The precious time was lost due to delay. As the pregnancy is the result of rape and petitioner No. 1 is anguished due to such pregnancy, the termination could have been done by the medical officers of Civil Hospital-cum-SHKM Government Medical College, Nalhar, Nuh. No permission was required from the court and only consent of the minor-victim and her guardian, as required under

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law, was needed.

10.7 Ms. Bedi has relied upon ***Bashir Khan's case (supra) and Vijender's case (supra)*** wherein the issue of wastage of time in approaching the court has been examined and the importance of consent of minor with regard to termination of her pregnancy is mentioned. For the purpose of requirement of minor's consent in addition to the consent of legal guardians, the reliance is also placed on the judgment of the Division Bench of the Madras High Court titled as ***V. Krishnan's case (supra)***.

10.8 Ms. Tanu Bedi further contended that the authorities at the relevant stages, be they police officers, medical officers, lawyers or the courts, should be well-versed with the provisions of law. As the time is the essence of availing the remedy of medical termination of pregnancy in the exigent situations, the importance of availing the same should be communicated to the victim and her family members immediately. It was submitted that the lawyers must eschew from filing the unnecessary applications for seeking medical termination of pregnancy within 20 weeks of gestation period and should guide their clients accordingly. It was further argued by her that as mentioned in the judgments passed by this Court in the case of case ***Bashir Khan's case (supra)*** and ***Vijender's case (supra)***, the judicial officers should be proactive and in the eventuality of filing of such applications instead of technical dismissal of the same, plea of the woman should be forwarded to the medical board for an appropriate action immediately. Even though the provisions of

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law warrant the consent of legal guardian in cases of minority and/or mental illness of the woman, but still efforts should be made to give due regard to the real desire and want of the woman who is carrying the pregnancy. The general guidelines are required to be issued by this court to all the concerned in such cases for the submissions made hereinabove.

10.9 Ms. Tanu Bedi made reference to the conversation which she had with the victim. During the conversation, the victim vehemently insisted on committing suicide in-case pregnancy is not terminated. The victim's unequivocal rejection of the child in her womb, and her threat to commit suicide if she's forced to carry on with the pregnancy is a serious issue. The peculiar situation warrants the consideration of the same under the language of the statute, namely MTP Act, as contained in Section 5 of the Act which unambiguously gives power to the doctor to carry out medical termination of pregnancy, unfettered by any legal bars, to save the life of victim/woman.

10.10 Ms. Bedi further made reference to the orders dated 23.04.2016, 02.05.2016 and 13.05.2016 and report of the Medical Board of the Civil Hospital-cum-SHKM Government Medical College, Nalhar, Nuh dated 26.04.2016 and the reports of the Medical Board of PGIMER, Chandigarh, dated 04.05.2016 and 14.05.2016. It was submitted by Ms. Bedi that the juxtaposition of the orders of the Hon'ble Court with the reports of the medical boards would show an unfortunate absence of required ingenuity and gumption on the part of the medical experts to understand the spirit and import of the order in the

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background of peculiar circumstances in which they were passed. The learned *amicus curiae* has implored to refer the matter to AIIMS, New Delhi for an opinion by the experts in the field in the nature of possibility of termination in view of threat of suicide by the victim; the possibility of premature delivery as the foetus is reportedly stated to be viable (reliance was placed on a news item which showed that recently in Ireland, a country which bans abortion completely, a teenager pregnant due to rape, who could not be allowed permission for abortion, was helped by the doctors during the 26th week of gestation period by delivering the child prematurely through C-Section, and relieving her of the burden of carrying the pregnancy to its full term). She has further drawn the attention of the court to the laws relating to medical termination of pregnancy in other countries and submitted that in countries like Canada, China, and North Korea, there is no upper limit of gestation period within which the termination of pregnancy can be legally sought by a woman. It was also submitted that in the eventuality of both the options being ruled out by the team of medical experts, the victim should be counselled regularly, in addition to giving her the best pre-natal care. If it is found by the experts that in any circumstance, petitioner No. 1 is not ready to keep the child with her after delivery, the efforts to give the child in adoption should begin at the earliest by the concerned adoption agencies in active co-operation with the medical authorities under whose care petitioner No. 1 may remain till her delivery. Ms. Bedi further submitted that the conditions in various Nari

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Niketans are very pathetic as the same act like jail and therefore, in addition to directions for improvement of such places, it is imperative that the sending of rape victim and woman to Nari Niketan under judicial orders should be the last resort and the courts should explore other options where the women in need of shelter and protection can be sent. Reference has also been made to the issue of ethics and law in such cases.

11. **Submissions made by learned Counsel for the State:**

Learned State counsel vehemently contended that the pregnancy of the victim was already more than 21 weeks, when writ petition was filed. Petitioner No. 1 refused to get herself medico-legally examined and gave in writing as a result of which doctor at the Civil Hospital-cum-SHKM Government Medical College, Nalhar could not examine her. Petitioner No.1 made a statement under Section 164 Cr.P.C. that she had voluntarily gone with accused-Mubarik at her sweet will, she was not kidnapped nor allured. The State has done its duty and had recovered the girl. The police is likely to apprehend the culprits and investigation is in progress.

12. **Submissions by learned Counsel for Respondent Nos.9 and 10:**

Learned counsel for respondent Nos. 9 and 10 vehemently contended that they have no role in the present episode. They are being harassed by the investigating officer unnecessarily. He also sought transfer of investigation to a senior officer of the police not below the rank of Deputy Superintendent of Police.

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13. I have given my anxious thoughtful consideration to the arguments raised by the learned counsel for the parties.

14. Petitioners filed this petition on 06.04.2016. However, due to objection raised by the Registry, it came up for hearing before this Court on 08.04.2016.

15. During the pendency of this writ petition, medical reports were received from the Civil Hospital-cum-SHKM Govt. Medical College, Nalhar and PGIMER, Chandigarh.

16. On 23.04.2016, this Court passed the following order:

“Registry has reported that respondent No.8, 11 and 12 have been duly served and respondent No.6 is on training at Police Academy, Madhuban.

On filing of correct address of respondent No.6, notice be issued to her for 28.04.2016.

Dasti only.

Petitioner No.1 will be at liberty to appear on 25.04.2016 before respondent No.7-Civil Surgeon, Mewat, who shall appoint a Board of Doctors to examine petitioner No.1 and submit report on the date fixed as to whether pregnancy can be terminated without any harm to the life of petitioner No.1.”

17. In compliance of the order dated 23.04.2016, the ‘R’ was examined by the board of doctors and her clinical and radiological (Ultrasonography) examination was done on 26.04.2016. The report was received in court in a sealed cover and same was opened in the court. The relevant extract of the report reads as under:

“Clinical Findings: Primigravida at about 22 weeks of pregnancy with fetal movements present.

USG findings: Single live fetus, 22 weeks 2 days Gestational age as per BPD (Bi-parietal diameter) and 22 weeks as per FL (Femur Length).

Opinion:

After clinical and radiological examination, the board is of opinion that “termination of pregnancy at this stage, that is 22 weeks of gestation, will be harmful to the life of patient (name withheld sic.).

Moreover, as per medical termination of Pregnancy Act, 1971, the termination of pregnancy can be carried out only up to 20 weeks of pregnancy.”

18. On 28.04.2016, learned counsel for the petitioners sought time to search law on the subject that in spite of 22 weeks pregnancy, it can be terminated without any harm to petitioner No. 1 and case was adjourned to 02.05.2016.

19. On 02.05.2016, this Court passed the following order:

“Learned counsel for the petitioners contends that petitioner No.1 is a minor girl, her pregnancy is the result of alleged rape. The prayer in this petition is for termination of pregnancy.

Vide order dated 23.04.2016 petitioner No.1 was referred to Civil Surgeon, Mewat for opinion whether pregnancy could be terminated without any harm to the girl. As per report dated 26.04.2016 the team of doctors of SHKM, Government Medical College, Nalhar, Nuh has opined that the pregnancy

is of 22 weeks and termination thereof at this stage would be harmful to the girl.

Today, learned counsel for the petitioners relies upon the judgment of the Gujarat High Court dated 23.07.2015 passed in Chandrakant Jayantilal Suthar v. State of Gujarat and the judgment of the Hon'ble Supreme Court in Chandrakant Jayantilal Suthar & another v. State of Gujarat, 2015(6) R.C.R. (Criminal) 83 arising from the aforementioned judgment of the Gujarat High Court, to contend that it is also to be seen whether continuance of pregnancy would be harmful to the victim girl. Learned counsel for the petitioners prays that second opinion with regard to termination of pregnancy of petitioner No.1 may be got from the PGIMER Chandigarh as the PGIMER is a super-speciality hospital.

Keeping in view the above judgments and the peculiar facts and circumstances of the case, I direct that petitioner No.1 should be examined by three senior-most Gynaecologists, a Clinical Psychologist and a Psychiatrist of the PGIMER Chandigarh. The said team of doctors shall examine petitioner No.1 and shall decide whether there is a serious threat to her life if pregnancy is terminated and will it have adverse affect upon the psychology of petitioner No.1 if the pregnancy is not terminated. Petitioner No.1 is directed to appear before the Head of the Department of Obstetrics and Gynaecology, PGIMER Chandigarh, on 03.05.2016 at 10.00 a.m. Head of the Department of Obstetrics and Gynaecology in consultation with the Director of the PGIMER shall

constitute a Board of doctors consisting of three Gynaecologists, one Psychologist and one Psychiatrist . The Board of doctors shall submit its report to this Court forthwith. If the Board decides to carry out termination of pregnancy, it can be done without further orders from this Court and they can proceed for termination of the pregnancy. If the termination is carried out then necessary tissues of the fetus shall be preserved for DNA examination/identification. If there is no unanimity in the opinion of the doctors, the view of the majority of the doctors shall prevail. To determine the age of petitioner No.1, ossification test or any other test may also be conducted.

Learned counsel for the State is not in a position to assist the Court in this matter. Advocate General, Haryana is directed to be present in Court on the next date or depute some competent officer to assist the Court as larger issues are involved in this petition.

Adjourned to 4.5.2016.

Copy of the order alongwith a copy of report dated 26.04.2016 be sent to the Director, PGIMER, Chandigarh/concerned Head of the Department at PGIMER by FAX. A copy of the order be also supplied to the learned counsel for the petitioners under signatures of the Bench Secretary.”

20. In pursuance of the order dated 02.05.2016, PGIMER Chandigarh Centre sent its report which reads as under:

“Report of the Medical Board

A meeting of the medical board constituted on the directions of Justice Paramjeet Singh Dhaliwal, Hon'ble Punjab & Haryana High Court, Chandigarh was held on 03.05.2016 at 4.00 p.m. in the Committee Room of MS Office under the Chairpersonship of Prof. Vanita Suri, HOD Obstt. Gynaecology. Following members attended the medical board meeting:

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| 1. Prof. Vanita Jain, Deptt. Of Obstt. & Gynae. | Member |
| 2. Prof. Jaswinder Kalra, Deptt. Of Obstt. & Gynae. | Member |
| 3. Prof. D. Basu, Deptt. Of Psychiatry | Member |
| 4. Prof. Adarsh Kohli, Deptt. Of Psychiatry | Member |
| 5. Dr. S.P.Mandal, Assoc. Prof. Deptt. Forensic Medicine | Member |
| 6. Dr. Tulika Singh, Assoc. Prof. Deptt. Of Radiodiagnosis | Member |
| 7. Dr. Pankaj Arora, Asstt. Prof. Deptt. Of Hospital Admn. | Member |

The medical board was briefed that the patient (name withheld) daughter of Jamshed resident of Punhana presented herself at PGIMER, Chandigarh on 3.5.2016 at 10.00 a.m. The patient was examined in the Gynae. OPD by Prof. Vanita Suri and Prof. Vanita Jain. The physical examination reveals a pregnant female with gestation age 22 to 24 weeks. Ultrasonography was done in the Radiodiagnosis Department which reveals gestation age to be 23 weeks and 2 days. X-ray of wrist and elbow of the patient were taken to determine the bone age.

The psychiatric assessment was carried out by Prof. D. Basu and Prof. Adarsh Kohli.

According to the MTP Act 1971, medical termination of pregnancy can be carried out up to 20 weeks of pregnancy with the opinion of two registered medical practitioners. The termination of

pregnancy at 23 weeks of gestation carries usual risk as per the gestational age.

The Board after going through the physical examination, radiological examination, psychiatric and psychological examination is on the opinion:

- 1. The bone age of the patient 'R' (name withheld) is 18 to 20 years as per the X-ray examination.*
- 2. The gestational age of the pregnancy is more than 20 weeks (23 weeks) as per the ultrasonography examination.*
- 3. The termination of pregnancy cannot be carried out as per the provisions of MTP Act 1971.*
- 4. There is possibility of harm to the patient due to social and emotional consequences of continuation of pregnancy.”*

21. On 05.05.2016, Ms Tanu Bedi, Advocate was appointed as *amicus curiae* to assist the court and case was adjourned to 06.05.2016. On that day, the case was adjourned to 10.05.2016.

22. On 10.05.2016, *amicus curiae* submitted that she wanted to personally talk to petitioner No. 1. Petitioner No. 1 came on 13.05.2016 and Ms. Tanu Bedi talked to her in camera and informed the court, relevant reference to that has been in the order dated 13.05.2016 which reads as under:

“In pursuance of order dated 10.05.2016, petitioner No.1, namely R is present in Court. Ms. Tanu Bedi, Amicus Curiae has personally talked to petitioner No.1 at length and has informed the Court

about the psychology of petitioner No.1 who is inclined to commit suicide if the pregnancy is not terminated. Learned Amicus Curiae has made reference to the report of the PGIMER wherein it is mentioned that there is possibility of harm to the patient due to social and emotional consequences of continuation of pregnancy. Learned Amicus Curiae made further reference to the judgment of Gujarat High Court in Special Criminal Application No.1155 of 2016 titled 'Bhavikaben v. State of Gujarat' decided on 19.02.2016. Learned Amicus Curiae argued that opinion of the Board is only to the effect that the Medical Termination of Pregnancy Act, 1971 (for short 'MTP Act') does not provide for termination past 20 weeks of pregnancy. The Board should re-examine that even though the MTP Act does not permit termination of pregnancy, whether termination at this stage is possible and such termination will not affect petitioner No.1 in any manner, including physically and psychologically. Learned Amicus Curiae also made reference to Section 5 of the MTP Act, which reads as under: -

“5. Sections 3 and 4 when not to apply.- (1) The provisions of Sec.4 and so much of the provisions of sub-section (2) of Sec. 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioner, shall not apply to the termination of a pregnancy by the registered medical practitioner in case 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. (2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is

not a registered medical practitioner shall be an offence punishable under that Code, and that Code shall, to this extent, stand modified.”

In the light of above, the Board should re-assess the termination of pregnancy and if an opinion favouring termination is formed then the Board may proceed further for termination of the pregnancy without any further orders from this Court. The Board should consider in an holistic sense the matter, including the mental state of petitioner No.1. The aspect that petitioner No.1 has told the learned Amicus Curiae that in case the pregnancy is not terminated, she may commit suicide, should also be taken into consideration.

Petitioner No.1 is directed to appear before the same Board of doctors constituted earlier by PGIMER on 14.05.2016. In case some member of the earlier constituted Board is not available, same may be replaced by a Doctor of the relevant department. Report on all the aspects which have been dealt with by the Board earlier and to be dealt now, be sent to this Court confidentially in a sealed cover.

Adjourned to 16.5.2016.

Copy of this order alongwith a copy of judgment of Gujarat High Court in Bhavikaben (supra) and a copy of earlier opinion dated 03.05.2016 be sent to the Director, PGIMER, Chandigarh/concerned Head of the Department at PGIMER by FAX. A copy of the order be also supplied to the learned counsel for the petitioners under signatures of the Bench Secretary.”

23. Thereafter, a report dated 14.05.2016 was also received from the PGIMER, Chandigarh which reads as under:

“ Report of the Medical Board

A meeting of the medical board constituted on the directions of Justice Paramjeet Singh Dhaliwal, Hon'ble Punjab & Haryana High Court, Chandigarh was held on 14.05.2016 at 12.00 noon in the Committee Room of MS Office under the Chairpersonship of Prof. Vanita Suri, HOD Obstt. Gynaecology. Following members attended the medical board meeting:

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| 1. Prof. Vanita Jain, Deptt. Of Obstt. & Gynae. | Member |
| 2. Prof. Jaswinder Kalra, Deptt. Of Obstt. & Gynae. | Member |
| 3. Prof. Adarsh Kohli, Deptt. Of Psychiatry | Member |
| 4. Dr. S.P.Mandal, Assoc. Prof. Deptt. Forensic Medicine | Member |
| 5. Dr. Tulika singh, Assoc. Prof. Deptt. Of Radiodiagnosis | Member |
| 6. Dr. Pankaj Arora, Asstt. Prof. Deptt. Of Hospital Admn. | Convener |

Prof. D. Basu, Deptt. Of Psychiatry could not attend the meeting.

The members of the board pursued the directions of the Punjab & Haryana High Court. The board observed that the previous meeting of the board was held on 3.5.2016 at which time it was determined through ultrasonography that gestation is of 23 weeks and 2 days. As on 14.05.2016, the gestation age of the foetus would be 25 weeks. Considering the gestational age has attained the age of viability (more than 24 weeks) implying that the pregnancy could not be terminated without harming the new born child. In addition this will have severe ethical considerations because the foetus is viable. The members were also of the opinion that gestation

related risk has further increased. If the delivery is conducted at this stage, the chances of child being born alive are there and the long term complications of premature birth for the surviving child will have to be weighed. Hence the board was of the opinion that the termination of pregnancy should not be carried out at this stage.”

24. **Relevant Provisions of Law:**

1. Constitution of India { Articles 21, 39(e), 39 (f), 41, 42, 47 and 51-A(e)}
2. Medical Termination of Pregnancy Act, 1971 (Sections 3, 4 and 5)
3. Code of Criminal Procedure, 1973 (Sections 53-A and 164-A)
4. Indian Penal Code, 1860 (Sections 312 to 318)
5. Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002.

24.1 It would be apposite to reproduce relevant provisions. Articles, 21, 39 (e), 39 (f), 41, 42 and 47 of the Constitution of India read as under:

“21. Protection of life and personal liberty. - No person shall be deprived of his life or personal liberty except according to procedure established by law.

39. Certain principles of policy to be followed by the State.- The State shall, in particular, direct its policy towards securing-

(a) to (d) xxxxx

(e) *that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter*

avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

41. Right to work, to education and to public assistance in certain cases.—*The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.*

42. Provision for just and humane conditions of work and maternity relief.—*The State shall make provision for securing just and humane conditions of work and for maternity relief.*

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.—*The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.*

51-A. Fundamental duties.- It shall be the duty of every citizen of India-

(a) to (d) xxxxx

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending

religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.”

24.2 Sections 3, 4 and 5 of MTP Act read as under:

"Section 3 : When pregnancies may be terminated by registered medical practitioners

(1) Notwithstanding anything contained in the Indian Penal Code, 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 of the pregnant woman's actual or reasonably 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 3 ["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.

Section 4 : Place where pregnancy may be terminated.

No termination of pregnancy shall be made in accordance with this Act at any place other than-

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee :

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.

Section 5 : Sections 3 and 4 when not to apply

(1) The provisions of section 4 , and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case 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.

(2) Notwithstanding anything contained in the Indian Penal Code, 1860 (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in Section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (b) of Section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation 1.-For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2.-For the purposes of this section, so much of the provisions of clause (d) of Section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply."

24.3 Sections 53-A and 164-A of the Code of Criminal Procedure read as under:

“53-A Examination of person accused of rape by medical practitioner

- 1. When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place*

where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

2. The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely-

- (i) the name and address of the accused and of the person by whom he was brought,*
 - (ii) the age of the accused,*
 - (iii) marks of injury, if any, on the person of the accused,*
 - (iv) the description of material taken from the person of the accused for DNA profiling, and”.*
 - (v) other material particulars in reasonable detail.*
- (3) The report shall state precisely the reasons for each conclusion arrived at.*
- (4) The exact time of commencement and completion of the examination shall also be noted in the report.*
- (5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section.”*

164 A. Medical examination of the victim of rape.– (1)

Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of a such a practitioner, by any other registered medical practitioner, with the consent of such

woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her and prepare a report of his examination giving the following particulars, namely:-

- (i) the name and address of the woman and of the person by whom she was brought;*
- (ii) the age of the woman;*
- (iii) the description of material taken from the person of the woman for DNA profiling;*
- (iv) marks of injury, if any, on the person of the woman;*
- (v) general mental condition of the woman; and*
- (vi) other material particulars in reasonable detail.*

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigation officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-

section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation. – For the purposes of this section, “examination” and “registered medical practitioner” shall have the same meanings as in section 53”.

24.4 Sections 312 to 318 of the Indian Penal Code read as under:

“312. Causing miscarriage.--*Whoever voluntarily causes a woman with child to miscarry, shall if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

Explanation.-A woman who causes herself to miscarry, is within the meaning of this section.

313. Causing miscarriage without woman's consent.--*Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

314. Death caused by act done with intent to cause miscarriage.--*Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with*

imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

If act done without woman's consent.- And if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above mentioned.

Explanation.-It is not essential to this offence that the offender should know that the act is likely to cause death.

315. Act done with intent to prevent child being born alive or to cause it to die after birth.-Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

316. Causing death of quick unborn child by act amounting to culpable homicide.--Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

317. Exposure and abandonment of child under twelve years, by parent or person having care of it.--Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly

abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Explanation.-This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.

318. Concealment of birth by secret disposal of dead body.-- *Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavors to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

24.5 Chapter 1.1 of the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 reads as under:

“B. Duties and responsibilities of the Physician in general:

1.1 Character of Physician *(Doctors with qualification of MBBS or MBBS with post graduate degree/ diploma or with equivalent qualification in any medical discipline):*

1.1.1 A physician shall uphold the dignity and honour of his profession.

1.1.2 The prime object of the medical profession is to render service to humanity; reward or financial gain is a subordinate consideration. Who- so-ever chooses his profession, assumes the obligation to conduct himself in accordance with its ideals. A physician should be an upright man, instructed in the art of healings. He shall keep himself pure in character and be diligent in caring for the sick; he should be modest, sober, patient, prompt in discharging his duty without anxiety; conducting himself with propriety in his profession and in all the actions of his life.

1.1.3 No person other than a doctor having qualification recognised by Medical Council of India and registered with Medical Council of India/State Medical Council (s) is

allowed to practice Modern system of Medicine or Surgery. A person obtaining qualification in any other system of Medicine is not allowed to practice Modern system of Medicine in any form.

24.6 Chapter 2 of the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 reads as under:

“2. DUTIES OF PHYSICIANS TO THEIR PATIENTS

2.1 Obligations to the Sick

2.1.1 Though a physician is not bound to treat each and every person asking his services, he should not only be ever ready to respond to the calls of the sick and the injured, but should be mindful of the high character of his mission and the responsibility he discharges in the course of his professional duties. In his treatment, he should never forget that the health and the lives of those entrusted to his care depend on his skill and attention. A physician should endeavour to add to the comfort of the sick by making his visits at the hour indicated to the patients. A physician advising a patient to seek service of another physician is acceptable, however, in case of emergency a physician must treat the patient. No physician shall arbitrarily refuse treatment to a patient. However for good reason, when a patient is suffering from an ailment which is not within the range of experience of the treating physician, the physician may refuse treatment and refer the patient to another physician.

2.1.2 Medical practitioner having any incapacity detrimental to the patient or which can affect his performance vis-à-vis the patient is not permitted to practice his profession

xxxx to xxxxx

2.5 Engagement for an Obstetric case: *When a physician who has been engaged to attend an obstetric case is absent and another is sent for and delivery accomplished, the acting physician is entitled to his professional fees, but should secure the patient's consent to resign on the arrival of the physician engaged.*

25. Case law on medical termination of pregnancy:

(i) Judgments of Indian Courts:

25.1 In the case of **Jacob George v. State Of Kerala**, (1994) 3 SCC 430, the Hon'ble Supreme Court observed as under:

"1. Life is said to be the most sublime creation of God. It is this belief and conception which lies at the root of the arguments, and forceful at that, by many religious denominations that human beings cannot take away life, as they cannot give life. This idea is so intense with some religious leaders that they would even oppose any measure of birth control. Abortion or miscarriage would be opposed with greater force by these persons.

2. Mahatma Gandhi, Father of the Nation, urged long back in Harijan that God alone can take life because He alone gives it. For the Jains taking away of even animal life is a sin, as, according to them, animals are as much part of God as human beings. Buddhists too preach Ahimsa.

3. Our Rig Veda II recites:

"Grant us a hundred autumns that we may see the manifold world.

May we attain the long lives which have been ordained as from yore." Atharva Veda I contains the following:

"May we be enabled to see the sun for a long time."

The aforesaid shows that life is beyond price and it is not only a legal wrong, but a moral sin as well, to take away life illegally.

4. *In the present appeals we are not concerned with taking away of life before its birth. We are concerned with destruction of foetus life. This is what is known as abortion or miscarriage. To dispel any doubt as to whether the foetus has a life, what has been stated by Taylor in his Principle and Practice of Medical Jurisprudence may be noted where the learned author has opined at p. 332 (13th Edn.) that legally both abortion and miscarriage are synonymous because the foetus being regarded as a "human life ... from the moment of fertilisation". It may, however, be stated that sometimes the word 'miscarriage' is used for "spontaneous abortion" and "abortion" for "miscarriage produced by unlawful means".*

5. *This distinction is, however, not material for our purpose because Section 312 of the Penal Code speaks about causing of miscarriage and Section 314 punishes the person who has intent to cause miscarriage of a woman and while doing so causes the death of such woman. It is under this section that the appellant has been found guilty by the High court of Kerala after setting aside the acquittal order of the learned Assistant Sessions Judge. For the offence under Section 314, the appellant has been sentenced RI for 4 years and a fine of L 5,000.00. The High court had also taken suo motu cognizance against the order of acquittal and it is because of this that along with the criminal appeal filed by the State which was registered as Criminal Appeal No. 415 of 1989 the High court disposed of Cr.RC No. 44 of 1989, which is relatable to its own action. So, two aforesaid appeals have been preferred by the appellant. It may be*

stated that out of fine of L 5,000.00 as awarded, a sum of L 4,000.00 was directed to be paid to the children of the deceased towards compensation for loss of their mother, in case of realisation of fine.

6. *Our law-makers had faced some difficulty when our Penal Code was being enacted. The authors of the Code observed as below while enacting Section 312:*

"With respect to the law on the subject of abortion, we think it necessary to say that we entertain strong apprehension that this or any other law on that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated often leaves a stain on the honour of families. The power of bringing a false accusation of this description is therefore a formidable engine in the hands of unprincipled men. This part of the law will, unless great care be taken, produce few convictions but much misery and terror to respectable families, and a large harvest of profit to the vilest pests of society. We trust that it may be in our power in the Code of Criminal Procedure to lay down rules which may prevent such an abuse. Should we not be able to do so, we are inclined to think that it would be our duty to advise his Lordship in council rather to suffer abortion, where the mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions which would occasion more suffering to the innocent than to the guilty."

So what finds place in the aforesaid section is the result of very mature and hard thinking and we have to give full effect to it.

7. *After the enactment of the Medical Termination of Pregnancy Act, 1971, the provisions of the Penal Code relating to miscarriage have become subservient to this Act because of the non obstante clause in Section 3, which permits abortion / miscarriage by a registered practitioner under certain circumstances. This permission can be granted on three grounds:*

(i) Health when there is danger to the life or risk to the physical or mental health of the woman;

(ii) humanitarian such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman;

(iii) eugenic - where there is substantial risk that the child, if born, would suffer from deformities and diseases. (See Statement of Objects and Reasons).

8. *The above shows that concern for even unborn child was evinced by the legislature, not to speak of hazard to the life of the woman concerned."*

25.2 The Hon'ble Apex Court in the case of ***Suchita Srivastava and another (supra)*** has held as under:

"10.In this regard we must stress upon the language of Section 3 of the Medical Termination of Pregnancy Act, 1971 [Hereinafter also referred to as 'MTP Act'] which reads as follows :-

"3. When pregnancies may be terminated by registered medical practitioners :-

xxxx to xxxx

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.

12. A perusal of the above mentioned provision makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a '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' [as per Section 3(2)(i)] or when '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' [as per Section 3(2)(ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the

gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period. The explanations to this provision have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth-control methods since both of these eventualities have been equated with a 'grave injury to the mental health' of a woman. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4) (b) of the MTP Act, 1971. The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a 'mentally ill' person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is 'immediately necessary to save the life of the pregnant woman'. Clearly, none of these exceptions are applicable to the present case.

13. In the facts before us, the State could claim that it is the guardian of the pregnant victim since she is an orphan and has been placed in Government-run welfare institutions. However, the State's claim to guardianship cannot be mechanically extended in order to make decisions about the termination of her pregnancy. An ossification test has revealed that the physical age of the victim is around 19-20 years. This conclusively shows that

she is not a minor. Furthermore, her condition has been described as that of 'mild mental retardation' which is clearly different from the condition of a 'mentally ill person' as contemplated by Section 3(4)(a) of the MTP Act.....”

15. As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the requirement of consent contemplated by Section 3(4) (b) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.”

30.In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim. Lastly we have urged the need to look beyond social prejudices in order to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities.”

25.3 In the case of ***Chandrakant Jayantilal Suthar (supra)***, the Hon'ble Supreme Court has held as under:

“4. Looking at the peculiar facts of the case, we direct that Ms. Maitri Chandrakant Suthar shall be examined by

three senior most available Gynecologists of the Civil Hospital, Ahmedabad at Asarwa, along with Dr. Riddhi Ketan Shukla, who had examined Ms. Maitri on 25th July, 2015 and also by a Clinical Psychologist attached to the Civil Hospital.

5. *The afore-stated team of doctors shall examine Ms. Maitri and after having an interaction with her, shall decide whether there is a serious threat to her life, if the child is not aborted.*

6. *If the team of the afore-stated doctors is of the view that termination of the pregnancy is immediately necessary to save life of Ms. Maitri, the concerned doctor 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. In case of abortion, the hospital authorities shall take necessary tissue from the fetus for DNA identification.*

7. *Intimation of this order shall be sent to the Medical Superintendent of the Civil Hospital, Ahmedabad, at Asarwa, forthwith by the Registry. The learned counsel appearing for the State shall also give intimation of this order to the Superintendent of the Civil Hospital, Ahmedabad, that if Ms. Maitri approaches the Civil Hospital on 29th July, 2015, necessary arrangements for her stay as an Indoor-patient shall be made by him so that on 30th July, 2015 around 11.00 a.m. or at the time suitable to the afore-stated doctors, she can be examined.*

8. *Intimation of this order shall also be given to Dr. Riddhi Ketan Shukla by the learned counsel for the*

petitioner. If, for any reason, Dr. Riddhi Ketan Shukla can not remain present, the remaining four doctors shall examine Ms. Maitri and act as per this order.

25.4 In ***Komalavalli vs. C.R. Nair and Ors. 1984 CriLJ 446***, a

Division Bench of the Hon'ble Madras High Court has held as under:

“On going through the affidavit filed by the petitioner-detinue and after hearing her and her counsel, we are satisfied that the petitioner has been impregnated against her will and that unless the pregnancy is terminated the petitioner will suffer traumatic and psychological shock. Hence we grant permission to the petitioner to terminate her pregnancy. This is subject to the condition that qualified gynaecologists examine her and find that the pregnancy can be terminated without detriment to the petitioner's life and safety. Subject to the above condition, we direct the petitioner to be transferred to the Government Maternity Hospital, Egmore, Madras, for undergoing termination of pregnancy.

2. After undergoing the requisite treatment at the hospital, the petitioner will be transferred back to the custody of Abaya Nilayam, Mylapore, Madras. The Superintendent of Abaya Nilayam will inform Thiru Raja, Secretary, Madras District Legal Aid and Advice Board, Madras, about the date of return of the petitioner-detinue to Abaya Nilayam. On receipt of such information, the petition is ordered to be posted before us in a week therefrom. On that date, we will pass further orders regarding the future custody of the detenue. The detenue's husband is also present in court and he states that he will make the necessary arrangements for the future custody of the detenue.”

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25.5 In the case of **V. Krishnan (supra)**, a Division Bench of the Hon'ble Madras High Court declined the termination of pregnancy of 16 years old girl and issued further directions.

25.6 In the case of **D. Rajeswari (supra)**, the Hon'ble Madras High Court has held as under:

“32. The narration of events as given by her in the petition and the counter filed by the respondents, would clearly show that she was raped by several persons on several dates against her will. Besides the allegation of rape, as contained in the records filed by both the parties, the mental anguish and agony and grave injury to her mental health, being suffered by the petitioner due to the continuance of the unwanted pregnancy in her womb is also clearly spelt out by the petitioner herself in her affidavit.

33. Having regard to the factual position as narrated by the petitioner, which was not disputed by the respondents, this Court is constrained to come to the conclusion that unless the pregnancy of the petitioner is terminated, not only the mental shock and anguish would be caused, but also an irreparable loss would be caused to her, which cannot be remedied.

34. In view of the clear observations made by Srinivasan, J. speaking for a Bench, in the above referred V. Krishnan's case (1994 (1) Mad LW (Cri) 16) and in the circumstances of this case, I am fully satisfied that the continuance of the pregnancy in the womb of the petitioner would definitely involve the risk as mentioned in Section 3(2)(b), Explanation-I to Section 3 and Section 3(3) of the Act.

35. In view of the above discussion, I deem it fit to direct the Chairman and Superintendent, Government Kasturba

Gandhi Hospital for Women and Children, Madras-5, to conduct medical termination of pregnancy of the petitioner and preserve fetus to enable the investigating agency to ask for DNA test, which would be helpful in order to prove the case of rape alleged by the petitioner, against the persons during the course of trial.”

25.7 The Constitutional validity of The Medical Termination of Pregnancy Act, 1971 was a subject matter of challenge before a Division Bench of the Hon'ble Rajasthan High Court on the ground of being unethical and violative of Article-21 of the Constitution of India. While up-holding the constitutional validity of the Act, the Division Bench in the case of ***Nand Kishore Sharma & Ors. v. Union of India & Anr.***, AIR 2006 Raj.166 observed thus -

"4. The issues relating to medical termination of pregnancy in common parlance known as 'abortion' are indeed of public importance. Counsel for the parties attempted to go into the length and breadth of the issue. In our opinion, however, the point for consideration lies in a narrow compass. This Court is not supposed to enter upon a debate as to when foetus comes to life or the larger question touching upon the ethics of abortion. We are merely concerned with the validity of the relevant provisions of the Act. At the outset, it may be mentioned that the petition was sought to be argued as if the Act has been enacted to legalise abortions but from a bare reading of the relevant provision it would appear that Act aims at termination of pregnancy in the interest of the woman or the to-be-born child. Section 3 may be quoted in extenso as under :

"3. When pregnancies may be terminated by registered medical practitioners :-

xxxx to xxxx

5. On a plain reading, it is manifest that Section 3 permits termination of pregnancy by registered medical practitioner(s) on being satisfied, in good faith, that the continuance of pregnancy would involve a risk to the life of the pregnant woman or cause grave injury to her physical and mental health; or that if the child were born, it would suffer from such physical or mental abnormalities as would render it seriously handicapped. As per the Explanation, where pregnancy is caused by rape, the anguish of pregnancy is regarded as 'grave injury to the mental health' of the pregnant woman. If the pregnancy occurs as a result of failure of any device or method used by the woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy is also treated as constituting 'grave injury to the mental health' of the pregnant woman.

6. It would appear that dominant object to achieve which the law has been enacted is to save the life of the pregnant woman or to relieve her of any injury toward physical and mental health or prevent the possible deformities in the child - to be born. We find support from the Statement of Objects and Reasons of the Act, the relevant portion of which reads as under :

"There is thus avoidable wastage of the mother's health, strength and, sometimes, life. The proposed measure which seeks to liberalize certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure - When there

is danger to the life or risk to physical or mental health of the woman; (2) on humanitarian grounds - Such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.; (3) eugenic grounds - Where there is substantial risk that the child, if born, would suffer from deformities and diseases."

7. *The object of the Act being to save the life of the pregnant woman or relieve her of any injury to her physical and mental health, and no other thing, it would appear the Act is rather in consonance with Article 21 of the Constitution of India than in conflict with it. While it may be debatable as to when the foetus comes to life so as to attract Article 21 of the Constitution of India, there cannot be two opinion that where continuance of pregnancy is likely to involve risk to the life of the pregnant woman or cause grave injury to her physical and mental health, it would be in her interest to terminate the pregnancy.*

8. *The perusal of Section 3 also makes it clear that the Act does not give a carte blanche to any person, even a medical practitioner, to cause termination of pregnancy. The Act provides in express terms that the pregnancy can be terminated upto twenty weeks and only by registered medical practitioner. If the length of pregnancy exceeds twelve weeks upto twenty weeks, it can be terminated only if a Board of at least two registered medical practitioners is of the opinion, in good faith, that the continuance of pregnancy involves risk to the life of the pregnant woman or cause grave injury to her physical and mental health.*

9. *An important aspect of the case is that the termination of pregnancy is not something which is*

provided for the first time by the Medical Termination of Pregnancy Act. Section 312 of the Indian Penal Code too protects termination of pregnancy described as miscarriage; if it is done "in good faith for the purpose of saving the life of the woman". Similarly Section 315 of the Indian Penal Code protects any act done with intent to prevent child from being born alive or causing it to die after its birth "if such act has been done in good faith for the purpose of saving the life of the mother". To bring home the point, it would be useful to quote Sections 312 and 315 as under :-

"Section 312. Causing miscarriage,- Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 315. Act done with intent to prevent child being born alive or to cause it to die after birth.- Whoever before the birth of any child does any act with the intention of thereby preventing the child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with

both.

10. It would not be out of place to mention that the deficiency in the Indian Penal Code as regards termination of pregnancy or abortion was noticed in the Statement of Objects and Reasons in the following words :

"The provisions regarding the termination of pregnancy in the Indian Penal Code which were enacted about a century ago were drawn up in keeping with the then British Law on the subject. Abortion was made a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. It has been stated that this very strict law has been observed in the breach in a very large number of cases all over the country. Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy.

11. Read in the context of Sections 312 and 315, IPC, it would appear that the object of the Act was to make the provisions relating to termination of pregnancy stringent and effective rather than to permit blatant termination of pregnancy. Section 312 of the IPC made causing miscarriage an offence except in good faith for the purpose of saving the life of the woman without laying down the manner in which pregnancy could be medically terminated. Section 3 of the Act provides the guidelines or limitation within which the pregnancy could be terminated."

25.8 In the case of **Dr. Nikhil D. Dattar, Gynaecologist (supra)**, it has been held as under:

“20. The Statement of Objects and Reasons of the said Act undoubtedly discloses that the legislation in the nature of the said Act was enacted to regulate the matters in relation to the termination of certain pregnancies. Sections 3 and 5 clearly speak of right to terminate pregnancy under the specified circumstances and after taking necessary precautions and after obtaining medical opinion of the medical experts who are required to give their opinion in good faith in that regard. Section 5 can be resorted to for termination of pregnancy when the non-termination of pregnancy would be dangerous to the life of pregnant woman. It is not a mere desire to terminate the pregnancy that will entitle either pregnant woman to go for termination of pregnancy or for the doctors to assist the pregnant woman to terminate the pregnancy by taking resort to Section 5 of the said Act. There has to be an opinion formed in good faith by a medical expert in that regard before going for termination of pregnancy. Undoubtedly, the experts have to ascertain whether there is danger to the life of a pregnant woman on account of pregnancy.

21. As regards the physical or mental abnormalities of serious nature to the child to be born which could be the cause for termination of pregnancy, the legislature in its wisdom has imposed certain period within which the pregnancy can be terminated. Nothing is placed on record on behalf of the petitioners even to remotely suggest that the period so prescribed by the statute has been arbitrarily prescribed or that there is no logic behind the period prescribed by the legislature in that regard.

22. In the circumstances, the petitioners have not placed on record even any material which could perhaps justify the

exercise of our discretion in writ jurisdiction to allow the petitioner No.3 to terminate the pregnancy. No exceptional case in that regard has been made out so as to exercise discretionary jurisdiction under Article 226 of the Constitution of India to issue any writ in the matter.”

25.9 In the case of **Vijender(supra)**, learned Single Judge of this Court has held as under:

“5. There has been a similar petition before this Court on a previous occasion which was disposed of in CWP No. 14058 of 2014 decided on 02.08.2014. I had directed that in every case where a complaint of rape is lodged and the victim is found to have become pregnant and she does not want to retain the foetus, the pregnancy itself may be treated as involving grave mental injury and the medical assistance must be secured to the rape victim at the nearest Government hospital with a request through the rape victim or the guardian depending on whether the person is a minor or not to take an opinion from the competent medical personnel about the feasibility of termination of pregnancy and carry out the procedure without wasting any time. A rape victim shall not be further traumatized by putting through a needless process of approaching Courts for taking permission. The Medical Termination of Pregnancy Act does not contemplate such a procedure at all and the medical personnel before whom the person shows up is bound to respond to an information regarding complaint of rape and if evidence is available that the person is a victim of rape, the medical personnel will take decision regarding the termination of pregnancy and carry out the procedure. If a plea for termination of pregnancy is made that should be dealt with such sensitivity as the occasion demands.

6. *In the writ petition referred to above in CWP No. 14058 of 2014, this Court has directed the order copy to be dispatched to the Director General of Police for the States of Punjab, Haryana and Union Territory, Chandigarh. If this direction had been taken seriously and the information must have percolated to the SHO, he would not have forced the petitioner to approach this Court for appropriate direction. This order is directed to be sent to the Director General of Police, Haryana who will in turn communicate the matter to the SHO concerned and elicit the information as to why he did not assist the rape victim to secure the medical assistance in the manner that she deserved in spite of directions already given by this Court.*

7. *The writ petition is disposed of with the above directions. If the petitioner brings the rape victim with identification and produces the copy of this order, the District Medical Officer or the officer who holds the power of superintendence over the facilities in the Government Hospital, Hisar shall carry out the directions forthwith. A copy of this order be issued under the signature of Special Secretary of this Court.”*

25.10 In the case of **Bashir Khan (supra)**, learned Single Judge of this Court has observed as under:

“8. Considering the fact every passing day could harm her physically and mentally, I am of the view that she must be examined by the two medical practitioners attached to the Obstetric and Gynaecology department at PGI and the Director, PGI, Chandigarh, will immediately constitute an ad hoc Medical Board to examine the petitioner on 04.08.2014 and if they are of the view that the length of pregnancy does not exceed 20 weeks, proceed to terminate

the pregnancy by appropriate medical procedure. No further direction is necessary from the court before the actual procedure is done, needless to say, care being taken to ensure physical and mental safety of the victim.

9. *To ensure that the victim of rape who becomes pregnant does not lose time by applying from court to court, there shall be general instructions given by the Director General of Police to all the police stations who register cases of rape and who come by information that the victim has become pregnant to render all assistance to secure appropriate medical opinions and also provide assistance for admission in Government hospitals and render medical assistance as a measure of support to the traumatized victim. The need to apply to the court for permission would arise only in a situation where there is a conflict of whether the pregnancy must be terminated or not or when the opinions of two medical practitioners themselves differ. It is hardly necessary in a situation where there is no contest and the victim gives her own consent and the guardian also gives consent and there is proof of such pregnancy was resultant to an offence of rape. This instruction shall also be circulated to all the Station Inspectors manning police stations in the State of Punjab.*

10. *Issue copy of the order dasti. Registry may dispatch the order copy to the Director, PGI, Chandigarh, to carry out the directions for immediate constitution of the Medical Board for examination of the patient and to carry out the opinion if it were to be that the patient requires the medical procedure for termination of pregnancy. Since the birth certificate of the victim is not available, I have taken the age to be 14 years on the assertion of the parent. The medical practitioner may carry out such test as it finds*

necessary to ascertain her age. This is only by way of caution, for, even without reference to the age and if she was more than 14 years of age if she was a victim of rape, there is not an age restriction for carrying out the termination of pregnancy. There is also a direction to take appropriate samples of the foetus for DNA testing that could be used, if necessary at an appropriate time.

25.11 In the case of ***Kavita (supra)***, the victim in question was only 12 years old who was impregnated as a result of which the gestation period had crossed 34 weeks; the termination of pregnancy was declined by the learned Single Judge, however, the Division Bench issued various directions.

25.12 In the case of ***(minor) daughter of Sh. Rudarpal (supra)***, this Court has held as under:

“8. Taking a cue from the order passed in Kavita's case (supra), this petition is also hereby disposed of with certain directions, which are as follows:-

(i) Since Rudarpal, who is alleged to be a daily wage worker and is a resident of Sonapat, would find it difficult to visit Chandigarh very often and it would be easier for him to take 'X' for routine checkup to the Pt. B.D. Sharma University of Health Sciences, Rohtak, therefore, the Registrar, Pt. B.D. Sharma University of Health Sciences, Rohtak, who is though not a party in this case, is directed to admit 'X' as an indoor patient as and when the need in this regard arises;

(ii) The Registrar, Pt. B.D. Sharma University of Health Sciences, Rohtak shall provide a private room to 'X' so that she could be attended by her family member(s);

(iii) It shall be the duty of the authorities of the Pt. B.D. Sharma University of Health Sciences, Rohtak to

provide all requisite medicines, food, clothing and other facilities as are required to be made available to 'X' or her attendant(s), well in advance and the Professor and Head of the Department of Obstetrics and Gynaecology of the Pt. B.D. Sharma University of Health Sciences, Rohtak shall personally monitor such requirements;

(iv) The Medical Superintendent of the Pt. B.D. Sharma University of Health Sciences, Rohtak shall be obligated to ensure meticulous compliance of every advice, recommendation, suggestion or order in this regard made to him/her by the Professor and Head of the Department to Obstetrics and Gynaecology Department;

(v) The Professor and Head of the Department to Obstetrics and Gynaecology of the Pt. B.D. Sharma University of Health Sciences, Rohtak would further supervise the periodical needs of 'X' like psychiatric consultation or related assistance from other departments of the Pt. B.D. Sharma University of Health Sciences, Rohtak, which shall also be provided timely;

(vi) The authorities of the Pt. B.D. Sharma University of Health Sciences, Rohtak shall ensure adequate privacy to 'X' and her family members while she would be an indoor patient and the identity of 'X' shall not be disclosed and shall also not be exposed to the public and media.

(vii) The Chief Secretary to the State of Haryana, Principal Secretary, Department of Health and all other concerned departments of State of Haryana are directed to ensure the reimbursement of bills or expenditure incurred on the victim by the Pt. B.D. Sharma University of Health Sciences, Rohtak, forthwith but not later than two weeks from the date of submission of the bills.

9. It is made clear that the petitioner shall always be at liberty to approach this Court for any other directions, if need arises.

10. With these directions, the present petition is hereby disposed of.

11. Before parting, I would place on record my appreciation to the authorities of the PGIMER, Chandigarh and the members of the Medical Board who have wasted no time in complying with the request made by this Court on 14.09.2015 and examined 'X' on the next day i.e. 15.09.2015 and produced the report today, enabling this Court to dispose of this case at the earliest to give appropriate relief to 'X' and her family members."

25.13 In ***Janak Ramsang Kanzariya vs. State of Gujarat and another*** 2012 (7) R.C.R. (Criminal) 2025, the Hon'ble Gujarat High Court has held as under:

"14. Considering the above and keeping in mind the best interest of minor, Janakben, and her parents and likely consequences and innumerable mental, physical, social and economical problems in future if pregnancy is not allowed to be terminated and resulted into birth of a child, this Court has come to the conclusion that the present case falls within the parameters of Sections 3 and 4 of the MTP Act. There is no bar, as provided in Explanation I to sub-section (2) of Section 3 of the MTP Act, for termination of pregnancy in case of a rape victim if such pregnancy is caused by rape.

15. Having regard to the factual and legal position as discussed hereinabove and not disputed by Mr. Shivang Shukla, learned Additional Public Prosecutor for the respondent-State, the provisions of the MTP Act, and considering the judgment of the Apex Court in the case of Sudhita Srivastava [supra], this Court is constrained to issue the following directions :

[i] The Civil Surgeon, Government General Hospital, Surendranagar, is directed to conduct medical

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

[ii] It is clarified that if the concerned panel of doctors are of the opinion that termination of pregnancy would affect the life and safety of minor, Janakben, they shall not terminate the pregnancy, otherwise, they shall terminate the pregnancy.

[iii] The blood group of minor, Janakben, is B+ as per the medical report and, therefore, special arrangement be made for providing adequate quantity of blood in the event of necessity.

[iv] The foetus be preserved to enable the Investigating Agency to send it for DNA test.

[v] Minor, Janakben, be discharged from the hospital after termination of pregnancy only if she is found to be medically fit to reside with her parents and, thereafter, she may be called for periodical check-up to know about status of her health as and when required and found necessary and she be provided medicine, proper diet and nutritious food as may be necessary for her health.

25.14 In Special Criminal Application No.1786 of 2013 (***Jankiben Ronakbhai Patel v. State of Gujarat & Anr.***), decided on 21.06.2013, learned Single Judge of Gujarat High Court allowed the termination of pregnancy of a rape victim who was major and her pregnancy was of nineteen weeks.

25.15 In the case of ***Ashaben (supra)***, the Hon'ble Gujarat High Court has held as under:

“12. *I may only say having regard to the peculiar facts and circumstances of the case that the applicant will*

have to bravely go ahead with the pregnancy and when time comes, she should deliver the child. I am conscious of the fact that it is easy for a judge to say so in his judgment because it is ultimately the applicant who will have to face the hard days ahead, but as observed above, howsoever harsh one may find the law, yet it remains the law and one has to respect it. She must understand that termination at this stage will put her own life in peril. I can only remind her of what Helene Evans, a victim of rape, had to say in these type of situations. I quote "After the abortion, I wanted to die. How could I live when I had just ended the life of my child? The negative feelings resulting from the rape were not eliminated by the abortion. Nothing was solved; instead, the grief was now doubled."

13. *I may also quote a short extract from an article "rape, incest and abortion; searching beyond the myths by David C. Reardon Ph.D. " Finally we must recognise that children conceived though sexual assault also deserve to have their voices heard. Rebecca Wasser-Kiessling, who was conceived in a rape, is rightfully proud of her mother's courage and generosity and wisely reminds us of a fundamental truth that transcends biological paternity. "I believe that God rewarded my birth mother for the suffering she endured, and that I am a gift to her. The serial rapist is not my creator, God is."*

Similarly, Julie Makimaa, who works diligently against the perception that abortion is acceptable or even necessary in cases of sexual assault, proclaims. "it doesn't matter how I began. What matters is who I will become."

14. *In the result, this application fails and is hereby rejected. However, I would like to issue few directions in*

the matter;

(1) The District Superintendent of Police, Botad shall take over the investigation of the first information report bearing No.C.R. No.I-10 of 2015 registered with the Ranpur Police Station and see to it that it is completed at the earliest in accordance with law. I am told that out of the seven persons named as an accused in the first information report, three have been arrested, whereas the other four are yet not arrested and are absconding. All steps should be taken to see that the other four co-accused are arrested at the earliest.

(ii) The Collector, Botad shall personally look into the matter and keep a close watch on the applicant and her family members including the husband of the applicant. The Collector shall ensure that proper medical facilities are provided to the applicant and the child is delivered safely. The Collector shall also see to it that after the delivery of the child, the child is looked after well and is not abandoned in any manner. If necessary, the Collector can avail of the services of any NGO or any other govt. social organisation in this regard.”

25.16 In Special Criminal Application (Quashing) No.4255 of 2015, titled as '**Chandrakant Jayantilal Suthar & Anr. vs. State of Gujarat**', decided on 23.07.2015, learned Single Judge of Gujarat High Court has held as under:

“30. This Court is unable to accede to this proposition, as Section 3(2)(d)(i), read with Explanation1, specifically state the duration of the pregnancy, which duration does not exceed twenty weeks. Had the length of the pregnancy not exceeded twenty weeks, the argument of the learned counsel for the petitioners could have been accepted. However, as it is an admitted fact that the pregnancy is now

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a little over twentyfour weeks, this Court is unable to accept the submissions of the learned advocate for the petitioners.”

25.17 In the case of ***Bhavikaben(supra)***, the rape victim was 18 years old and her pregnancy was 24 weeks, termination was permitted.

(ii) Judgments of Foreign Courts:

25.18 In the case of ***The King vs. Bourne*** 1. K.B. 687: [1938] 3 All ER 615, it was held as under:

“The charge against Mr. Bourne is the very grave charge under the Offences against the Person Act 1861, s. 58, that he unlawfully procured the abortion of the girl who was the first witness in the case. It is so grave a crime that the punishment may be penal servitude for life. It is one of those crimes, like murder, which is only triable by the judges of the High Court, and, judging by the cases that come before the court, [3 All E. R. 616] it is a crime by no means uncommon. This is the second case at these July sessions at this court where a charge of an offence against that section has been preferred, and I mention that case only to show you how different the case now before you is from the type of case which usually comes before a criminal court. In that case, a woman without any medical skill or any medical qualifications did what is alleged against Mr. Bourne here: she unlawfully used an instrument for the purpose of procuring the miscarriage of a pregnant girl. She did it for money. £2 5s. was her fee, and she came from a distance to a place in London to do it. £1 had to be paid to make the appointment. She came, she used her instrument, and, within an interval of time measured not by minutes but by seconds, the victim of her malpractice was

dead on the floor. She was paid the rest of her fee and she went away. That is the class of case that usually comes before the court. The case here is very different. A man of the highest skill, openly, in one of our great hospitals, performs the operation. Whether it was legal or illegal you will have to determine, but he performs the operation as an act of charity, without fee or reward, and unquestionably believing that he was doing the right thing, and that he ought, in the performance of his duty as a member of a profession devoted to the alleviation of human suffering, to do it. That is the case that you have to try today.”

25.19 In that case, a 14 years old girl was raped by five soldiers as a result of which she became pregnant. An eminent gynaecologist performed an abortion on her and was charged with the offence of conducting an illegal abortion. He was acquitted.

25.20 In the case of ***Roe v. Wade (supra)*** the Supreme Court of the United States in its landmark decision established that most laws against abortion violate a constitutional right to privacy, thus, overturning all State laws restricting the abortion that were inconsistent with the decision. Jone Roe, wanted to terminate her pregnancy because she contended that it was a result of rape. Relying on the then current state of medical knowledge, the decision established a system of Trimesters that attempted to balance the State's legitimate interests with the individual constitutional rights. The Court ruled that the State cannot restrict a women's right to an abortion during the first trimester, the State can regulate the abortion procedure during the second trimester "in ways that are reasonably related to maternal health" and in the third trimester,

demarcating the viability of the foetus, a State can choose to restrict or even to prescribe abortion as it would deem fit. It was held that "the childbirth endangers the lives of some women, voluntary abortion 'at any time and place' regardless of medical standards would impinge on a rightful concern of the society. The woman's health is part of that concern as is the life of the foetus after quickening. These concerns justify the State in treating the procedure as medical one.

25.21 A West German Constitutional Court in the abortion reform law case **(1975) 39 B Verf GE** observed that the West German Constitutional Court laid down the following proposition :

- (1) "Everyone" in Article 2 includes an unborn being;*
- (2) Human life exists in embryo from the fourteenth day of the conception;*
- (3) It is the duty of the State to protect and promote the life of the foetus and defend it from unlawful interference by other person;*
- (4) The right of development accrues in the foetus from the mother's womb and is not complete even after birth;*
- (5) If the foetus was considered only as a part of the maternal organism, the termination of pregnancy would remain entirely in the sphere of private life, not warranting public interferences. But because the foetus is "an autonomous human being" under the protection of the Constitution, the termination of pregnancy has a social dimension which demands public regulation;*
- (6) The Constitution also protects a woman's right to free development of her personality, which includes freedom to*

decide against parenthood. But this right is not guaranteed without limitations. The right of others, the constitutional order, and the moral code all restrict it;

(7) A compromise which guarantees both the protection of foetus as well as the freedom of abortion of a pregnant woman is impossible because the termination of pregnancy always means "destruction of unborn life". The legal order cannot, therefore, make a woman's self-determination, the principle of its regulations. On the other hand, the protection of foetus must be given priority to the woman's right of self-determination;

(8) The State is to effectively fulfil its duty to protect the "developing life". In discharging this duty the State is to make a reasonable adjustment between unborn right to life and the woman's right to her own life and health. The unborn's right to life can lead to burdens for the woman which sharply exceed those of a normal pregnancy. In such a case, the State may exempt the pregnant woman from punishment for destroying the foetus where there is necessity to protect the pregnant woman from a threat to her life or a threat of a serious impact on her health or other cases, where the burden is extraordinary; and

(9) The duty of the court is not to put itself in the legislator's place, but to determine whether the legislator has fulfilled its duty to protect the "developing life" and made a reasonable adjustment between the right of the unborn and the right of the pregnant woman. (see D.D. Basu, Commentary on Constitution of India, Vol.III Edn, 2008 3143)

25.22 The Abortion Act, 1967 of the UK also in its Article 2 does not confer an absolute right to life to the unborn child. It was so held in

Paton v. United Kingdom (1980) 3 EHRR 408. Abortion is permitted if the continuance of the pregnancy involves risk. The right to life of foetus is subject to an implied limitation allowing the pregnancy to be terminated in order to protect the life of a mother. The same was upheld in ***H v. Norway*** {(1992) 73 DR 155}.

25.23 The Hon'ble Supreme Court of Canada interpreted Article 7 of the Canadian Charter which guarantees an individual's right to life, liberty and freedom and security of a person. In the leading case of ***Morgentaler Smoling and Scott v. R*** (1988) 44 DLR (4th) 385, the Court focused on the bodily security of the pregnant women. The Criminal Code of that country required a pregnant woman, who wanted an abortion, to submit an application to a therapeutic committee, which resulted in delays. The Supreme Court found that such a procedure infringed the guarantee of security of a person. This subjected the pregnant woman to psychological stress.

25.24 In the case of ***R.R vs. Poland***, application No.27617/04, decided on 26.05.2011 by the European Court of Human Rights, the case concerned a woman who was deliberately refused genetic tests during her pregnancy by doctors who were opposed to abortion. The woman and the doctors suspected a severe genetic abnormality in the fetus, but the doctors withheld the tests until the legal time-limit for abortion had expired. R.R. tried desperately to obtain the relevant genetic tests, that she may have had the opportunity to make an informed decision about whether or not to terminate her pregnancy. She saw numerous doctors

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and went to several hospitals and clinics, she even travelled to doctors in other regions than her own – at one point she was even hospitalized for a few days, during which time the doctors only carried out irrelevant tests – but all to no avail. Only when it was too late for an abortion, was her suspicion that the baby she was carrying had a genetic abnormality confirmed. The child was subsequently born with Turner syndrome. The Court treated the case under Articles 3 and 8 of the Convention and found a violation of both of these provisions. Articles 3 of the Convention which, insofar as relevant, reads as follows:

“No one shall be subjected to ... inhuman or degrading treatment...”

25.25 Article 8 of the Convention, insofar as relevant, reads as follows:

“1. Everyone has the right to respect for his private ... life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

25.26 The European Court after considering the relevant Articles of the Convention came to the conclusion as under:

“159. The Court notes that the applicant was in a situation of great vulnerability. Like any other pregnant woman in her situation, she was deeply distressed by

information that the foetus could be affected with some malformation. It was therefore natural that she wanted to obtain as much information as possible so as to find out whether the initial diagnosis was correct, and if so, what was the exact nature of the ailment. She also wanted to find out about the options available to her. As a result of the procrastination of the health professionals as described above, she had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment. She suffered acute anguish through having to think about how she and her family would be able to ensure the child's welfare, happiness and appropriate long-term medical care. Her concerns were not properly acknowledged and addressed by the health professionals dealing with her case."

26 It would be appropriate to understand the term 'medical termination' and its historical aspects. The medical termination of pregnancy is commonly known as 'abortion'.

27. **What is abortion?**

The word 'abortion' comes from the Latin word '*abortio*' which means to abort, miscarriage, deliver prematurely. The Latin word '*abortus*' means miscarriage, premature, untimely birth. In medical-terminology abortion means ending a pregnancy prematurely. An abortion is when the pregnancy is ended so that it does not result in the birth of child. This is, in fact, called termination of pregnancy. The termination of pregnancy is extremely controversial issue all over the world. The major dilemma is whether a mother or a victim of rape has a

right to terminate her pregnancy at any time she wishes or unborn child has a right.

28. **Historical Aspect of Abortion:**

28.1 Abortion was accepted in the ancient Greece and Rome. Romans and Greeks were not much concerned with protecting the unborn, but they did object to abortion. Earlier belief among the philosophers was that a foetus did not become formed and begin to live until at least 40 days after conception for a male, and around 80 days for a female. In Politics, Book Seven Part XVI, 350 B.C.E. (before common era), Aristotle, a great philosopher wrote:

“... when couples have children in excess, let abortion be procured before sense and life have begun; what may or may not be lawfully done in these cases depends on the question of life and sensation.”

28.2 Under English common law, abortion was a crime after quickening but the seriousness of that crime was different at different times in history. In 1920, English Law added a get out clause that stopped abortion being a crime if it was done in good faith for the purpose of only preserving the life of the mother.

28.3 In 1938, in the case of ***R vs. Bourne's (supra)***, an abortion was performed on a 14 years old girl, victim of rape. The Court acquitted the doctor who carried out the abortion and faced the legal action observing that the girl's mental health would have suffered had she given birth. This established that mother's mental suffering could be a sufficient reason for abortion. In this case, Mr. Justice Macnaghten

observed as under:

“As I have said, I think that those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman. ”

28.4 Similarly, the decision rendered by Supreme Court of USA in ***Roe vs. Wade's case (supra)*** made the abortions legal in United States of America.

29. In India, MTP Act has been enacted on the lines of U.K. Abortion Act, 1967.

30. Section 3 of the MTP Act requires permission of one or more than one doctor to opine and carry out MTP depending upon the gestational period. Section 5 of MTP Act carves out an exception for carrying out termination of pregnancy required immediately to save the life of the pregnant women irrespective of length of pregnancy. The opinion in good faith can be made even by single doctor too. The scheme of the MTP Act indicates that pregnancy can be terminated in good faith if the continuance of pregnancy would involve risk to the 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 was born, it would suffer from such a physical or mental abnormalities as to be seriously

handicapped. The MTP Act provides a defence for those who carry out the abortion under certain parameters of MTP Act. The main objects of the M.T.P Act are perceived 'need' to prevent some sections of the population from reproducing and national interest and other necessary exigencies. The scheme of the MTP Act can be summed up as under:

*“1. **Reasons to seek termination of pregnancy** should be as mentioned under Section 3 of MTP Act. If those reasons are not present, no pregnancy can be legally terminated.*

*2. **Length of pregnancy** is a vital factor to give green signal for termination.*

*3. **Pre-requisites of doctor’s opinion** to declare fit for termination as per law. The Length of pregnancy determines the need for opinion of one or more doctors.*

*4. **Consent of woman** or her guardian (minor and mentally ill) is mandatory.*

*5. **To save life of woman, Section 5 lifts the embargo of termination** on post 20-weeks pregnancy and requirement of more than one doctor’s opinion. But the language used is “immediately”.*

*6. **No provision stipulates judicial authorization of MTP** in any case including those necessitating termination on account of mental anguish in woman due to rape committed on her.”*

31. The Courts allowing or declining termination of pregnancy always depend upon the opinion of the doctors. It may be a rare case where court passes order contrary to opinion of medical boards. This is due to reason that medical and health professionals are the experts in this

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field. The catena of judgments referred above clearly indicates that many a time, time is wasted in getting the opinion of the medical board and by that time even statutory period lapses.

32. In fact, the statute provides for early termination of pregnancy not on demand but on satisfaction of certain conditions. The requirements that need to be fulfilled are enumerated in Section 3(2) of the MTP Act. Apart from that, upto 20 weeks of pregnancy, there are no impediments in law for termination of pregnancy, if those conditions exist. Even then, there appears to be a practice of approaching the courts for termination of pregnancy before the completion of 20 weeks. Many a time, even doctors while examining the rape victims do not probe the possibility of pregnancy and many a time in spite of pregnancy, its notice is not taken and medico-legal reports are prepared in a casual manner, unmindful of the consequences specifically in rape cases. The practice stems from lack of awareness on the part of the doctors, investigating officers, lawyers and courts. The cases are filed by the counsel without sometime being aware of the provisions of the Act and the need of urgency in such cases. The practice of filing such cases has been condemned by this Court in *Bashir Khan's case (supra)* and subsequently, in the case of *Vijender's case (supra)*. The judgments in the said cases mention issuance of orders to the Director General of Police of the State of Punjab, Haryana and the U.T. to ensure that such cases of termination of pregnancy should not be brought to court.

33. **Why are the late abortions still necessary?**

33.1 Unwed teenagers who may have suffered pregnancy due to the alleged rape may not know that they are pregnant until they feel the baby kick. This is known as quickening. At this stage, foetal movements occur between 17th to 20th week of pregnancy, when at this stage issue of termination of pregnancy arises the legal scholars, ethicists and others continue to dissect this complicated issue. Social policy makes the issue of late abortion worse. The doctors, physicians and social policy makes the issue of late abortion worse. The doctors, physicians, gynaecologists and obstetricians grapple the following issues in relation to the late termination of pregnancy

- (i) what is appropriate or not as per their own beliefs;
- (ii) whether abortion should now be carried out in obstetrical wing of the hospital where foetus can be monitored and
- (iii) whether neonatologist should be present at the time of termination of pregnancy; where a live birth is a possibility.

Terminating pregnancy at advanced stage, say 28 weeks, may not be advisable as this may be high risk pregnancy. We can make an attempt to draw a line at 24 weeks, as this period is fixed by the statutes in various other countries. Even Draft Medical Termination of Pregnancy (Amendment) Bill, 2014 is pending in the Parliament, according to which decision to allow abortion between 20 and 24 weeks can be taken in good faith by the competent person. The revision of the legal limit for termination of pregnancy is long due. In fact, medical technology has leaped beyond the MTP Act and assumptions of medical ethics. Most of

the doctors try to remain within law and do not consider the peculiar circumstances of the case before them. Advances in neonatology may have an impact on the judgment in *Roe vs. Wade's case (supra)* to render it obsolete. Some abortions are necessary beyond the statutory limit in the light of circumstances under which they are sought and, therefore, we require to streamline the system in this regard.

33.2 There is a possibility that when a child is born alive, he/she may be required extraordinary care. The saying is '*fear inspires caution*'. In case, foetus is born alive during late termination of pregnancy, physician, gynaecologist and obstetricians confront a serious problem as performing late abortion is the gap between abstract theory on foetal viability and realities of medical practice. Pregnancy due dates, date of conception and foetal viability are still an uncertain area. Viability is more difficult to assess. As per the opinion of the gynaecologist, 24 weeks foetus physically appears to resemble a child but his lungs and brain are still not fully developed, nor its eye-lids are open.

33.3 The MTP Act is an inadequate act and only appears to have been designed to serve the interest of the family planning programme. Under the MTP Act, women have restricted right to termination of pregnancy. The declared objects of the MTP Act are to help women, who become pregnant as a result of rape, women who are pregnant due to contraceptive failure (applicable to married women/marital sexuality) or to reduce the risk of severely handicapped children being born.

33.4 Right to abortion involves the fundamental right of the mother and the foetus. Now the issue arises at what stage a foetus can be seen as an individual in its own right. It is a disturbing issue. The notion that the foetus is an individual in its own right infuses an emotional angle to the entire issue on abortion. The abortion causes emotional turmoil for many women and their families. The woman has an exclusive and inalienable right over her body and her reproduction and that cannot be transferred to her family or the State. This is more relevant in our country where child bearing is governed by social mores. Article 21 of the Constitution of India provides right to life and right to privacy. Article 6(1) of the International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life. But, the right of the mother is to be balanced with the right of unborn. One view is that human being does not exist as a legal person until after birth. The foetus does not enjoy independent legal personality. In the case of **Mr. Vijay Sharma and Mrs. Kirti Sharma vs. Union of India** AIR 2008 Bom. 29, it was held that foeticide of girl child is a sin; such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39 (e) of the Constitution which states that the principle of state policy that the health and strength of women is not be abused. It ignores Article 51 (A) (e) of the Constitution which envisages that it shall be the duty of every citizen of India to renounce practice derogatory to the dignity of the women. The legislature in the MTP Act has not defined anguish that it must be termed as grave injury

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to the physical and mental health of the victim. The Hon'ble Supreme Court in catena of judgments has developed the various rights under the concept of personal liberty under Article 21 i.e. right of free enjoyment, right to human dignity, right to have access to justice, right to privacy. Thus even in the best circumstances, this Court believes that no law or a person can ethically compel a woman to carry on pregnancy that she does not want. When pregnancy has progressed to a point where the foetus has become viable, one is compelled to view the situation from the point of the woman as well as the potential child.

34. Psychological Effects of rape, impregnation and refusal of termination of pregnancy for want of legal sanction on the victim:

Victims of rape impregnated due to the act experience both short and long term psychological effects. Deep physical trauma is most common and lasting effect of rape. The medical literature and studies are galore with the instances of Post Traumatic Stress Disorder (PTSDs) in rape victims. Due to the less evolved society, more so in this part of the world, till date the rape victim carries more stigma than the person accused of the offence of rape. Those assaulted repeatedly at very young age may need treatment and counselling for the rest of their lives. Rape of minors and young girls, at the hands of unconscientious criminals continuously increasing in various parts of the country, is itself a matter to be ashamed of as a society and needs deliberations to curb the menace. What makes it worse is the callous attitude of the person in authority, specifically the investigating officers. Rape of innocent and

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minor girls on the one hand, and the complete absence of sensitivity, empathy in the society towards the victims and, moreover, the misogynistic response by the authorities on the other hand, is highly condemnable. The daughters of India are falling prey to a deeply misogynistic society. We need sensitive people at various echelons in the set up of investigation of criminal cases and rehabilitation of victims of crime who will hear the cries of anguish of the victims with an open mind and a sensitive heart. The perpetrators of such heinous crimes roam in streets like wolves in forests and threaten the victims and their families of dire consequences as a result of which tears stream down their faces.

35. **Need for Counselling and Mental Health Evaluation from time to time:**

35.1 There is extensive research to the fact that the incident of violence on the body of a victim re-visits her thinking process many times a day. The counselling is necessary to help her overcome this trauma. The Indians are perceived to have faith in religions and God. God is a wonderful counsellor; we have learnt from scriptures and holy books. The sufferings must reach to a minimum level of severity and for this purpose, counselling is a necessity. The denial of such services which are critical for making an informed decision as to whether to seek abortion or not also violates the right to be free from inhumane and degrading treatment. The assessment of minimum level of suffering is a relative term. It depends upon the circumstances of the case, such as duration of treatments, its physical and mental effects and the age and

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state of health of the victim. Paradoxically, both the rape and abortion are violations and infringement of right to life.

36. In this case, the alleged pregnancy is the result of a crime of rape. The minor and her legal guardian have expressed in an unequivocal desire to get the pregnancy terminated. The doctors at Civil Hospital cum SHKM Government Medical College, Nalhar, Nuh should have examined the possibility of pregnancy of the petitioner-victim in terms of Section 164-A of Code of Criminal Procedure and helped the minor and her legal guardians to make an informed decision with regard to termination or continuation of the pregnancy. The doctors who conducted the initial medico-legal examination at Nalhar did not perform their duty as doctors with due diligence and did not carry out pregnancy test in spite of the information that she is victim of alleged sexual assault. The petitioner No. 1 during the course of conversation *in camera* with Amicus Curiae had given the threat to commit suicide if the pregnancy, which is causing her a lot of mental anguish and embarrassment in the society as per her understanding, was not allowed to be terminated. Such a statement of the victim reflects the state of acute mental and physical health problem. Even in the medical report dated 3rd of May 2016 submitted by the Board of Doctors, PGIMER it is mentioned that “there is a possibility of harm to the patient due to social and emotional consequences of continuation of pregnancy.” This court vide order dated 13.05.2016 directed the Medical Board of PGIMER to reassess the termination of pregnancy of Petitioner No. 1 and, if the same is

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medically feasible, they should go ahead with the termination of pregnancy without further orders from the court. The Medical Board of the PGIMER also determined the bone age of petitioner No. 1 through X-Ray examination to be 18 to 20 years.

37. Section 3 of MTP Act stipulates that the pregnancy which exceeds 12 weeks but does not exceed 20 weeks may be terminated if not less than 2 registered medical practitioners can form an opinion in good faith that continuation of pregnancy will pose risk to the life of the pregnant woman or will cause grave injury to her physical and mental health. The pregnancy in the present case is the result of rape and the victim is a minor as per the assertion in the Writ Petition and admission in the written statement of State Government. However, the age of the petitioner No. 1 as per x-ray examination of her bones has been determined between 18 to 20 years by the Medical Board, PGIMER constituted on 03.05.2016 under the the directions of this Court. Meaning thereby she might be major and is legally capable to take a decision with regard to her termination of pregnancy. Even if she is a minor, her father –her natural Guardian, had given the consent for the same and has approached this Court. This Court is of the opinion that in the present case applying the '*best interest test*' as explained by the Hon'ble Supreme Court in *Suchita Srivastava's* case (*supra*), the pregnancy of petitioner No. 1, which is the result of alleged rape and has caused deep mental anguish to her, constraining her to demand the termination of the same in unequivocal terms, may have been terminated

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by the doctors of PGIMER, which is an imminent institution on the medical sciences. This observation finds strength from the fact that the gestation period of pregnancy was not beyond 24 weeks at that time and this Court had given the legal authority to the medical board to carry out the termination if the same is necessary for preserving the life and health of Petitioner No. 1. This court is of the considered opinion which is corroborated from the opinion of psychiatrist of PGIMER that continuance of the pregnancy is certainly a grave injury to petitioner No. 1's physical and mental health. The doctors in such circumstances cannot be penalized when they act in good faith and help a hapless victim to abort the pregnancy caused due to rape. It appears that doctors did not carry out termination of pregnancy for fear of prosecution under the penal provisions referred to in the foregoing paras of this judgment. This court is of the view that the fear of chilling effect of prosecution needs to be removed from the mind of doctors. Section 3 of MTP Act provides a defence when the termination is done in accordance with the conditions set out in the MTP Act. Further, a medical practitioner is protected by Section 8 of MTP Act for "any damage caused or likely to be caused by anything" for any act done in good faith under the MTP Act. This court has to base its judgment completely upon the opinion of the experts in the field and cannot issue directions on its own. The courts only interpret the provisions of law and pass the order accordingly. To remove this fear of prosecution in the minds of the doctors, the authorities concerned should issue procedural guidelines so that they

may act without fear in the interest of the patient.

38. Way back in 1938 in the case of *King vs. Broune (supra)*, it was held that when a doctor on reasonable grounds and with adequate knowledge in the field comes to a conclusion of probable consequences of pregnancy that it will make the concerned victim /woman physically and mentally wrecked then the concerned doctor/doctors, if decide for termination of pregnancy, are proceeding with purpose of preserving the life of women. On the anvil of the settled position of law, the best interests parameters and the social circumstances that may be faced by the rape victim, the decisions of Court as well as of the doctors should be guided by the interest of the victim alone. Bearing this in mind, this court had given liberty to the doctors of the PGIMER to go ahead with termination of pregnancy if it is not harmful to the victim and, rather, is required to preserve her mental and physical health. But the board decided according to their wisdom not to go ahead with the same and came to a conclusion that the termination of pregnancy should not be carried out at this stage. In view of the opinion of Medical Board of PGIMER, this court cannot pass the order to terminate the pregnancy of petitioner No. 1.

39. This Court is of the considered opinion, in the light of the findings in the report dated 3rd of May 2016 to the effect that there is a possibility of harm to the patient due to social and emotional consequences of continuation of pregnancy, then the inference can be drawn that it will certainly cause grave injury to her physical and mental

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health. Moreover, in the order dated 13.05.2016, this Court had referred to the judgements of the Hon'ble Apex Court and the Hon'ble Gujarat High Court vide which the Courts have granted the permission for termination of pregnancy beyond the prescribed period of 20 weeks under the MTP Act. The order also contains reference to Section 5 of the MTP Act which gives power to the doctor to go ahead with the termination of pregnancy if the same is necessitated on account of saving the life of the woman. Therefore, pursuant to the order of this Court, there was no risk of prosecution of the doctors if they would have gone ahead with the termination of pregnancy of petitioner No.1. At that juncture, petitioner No.1 and her father - her natural guardian, were ready to give consent for termination of pregnancy.

40. During the course of arguments, Ms. Tanu Bedi, *amicus curiae* submitted that the petitioners come from area nearer to Delhi and she may be referred to AIIMS for exploring further possibilities of termination of pregnancy in view of the advancement in medical sciences.

41. I would request Director of AIIMS to constitute another medical board of equivalent or Larger number of doctors as of the PGIMER to explore the possibility of termination of pregnancy. The Court requests the Director of AIIMS to do the needful as soon as possible and inform the Court about the actions taken. The petitioners will be at liberty to appear before the medical board of AIIMS at the earliest possible. The medical experts of AIIMS are further requested to

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provide all the facilities including counselling etc. and explore the possibility for carrying out the termination of pregnancy if possible or other option in the best interest of the petitioner-victim. They are also requested to reserve a special room for petitioner No.1 and her family, as required at the appropriate time. In case the Board rules out the termination at this stage and petitioner No. 1 is required to take the pregnancy to its full term and the petitioners inform the Board about their unwillingness to keep the child, efforts should be made to make arrangements for the adoption of child by involving the concerned officials from Central Adoption Resource Authority (CARA). All the expenses incurred in this regard shall be borne by the department of health and family welfare, Haryana. The State of Haryana is directed to tentatively deposit ₹50,000/- as expenses forthwith with the authorities of AIIMS. If the amount of expenses exceeds, the same shall also be payable by the Health Department, Government of Haryana.

42. In view of the foregoing discussion, interim directions are issued as under:

- (i) Principal Secretary, Department of Health & Family Welfare, Government of Haryana, shall deposit a sum of ₹5000/- per month in the account of petitioner No. 1 for food and medical expenses. The deposit shall be made on or before 7th of each calendar month w.e.f. 01.06.2016 for one year.
- (ii) The Chief Medical Officer, Nuh and the Medical

Superintendent of Civil Hospital-cum-SHKM Government Medical College Malhar shall depute a senior obstetrician/ gynecologist to examine petitioner No. 1 from time to time and give proper advice in the matter of medicine and due medical facilities of health professionals i.e nurses etc.. This will be in addition to the help and assistance to be provided to Petitioner No. 1 by AIIMS, New Delhi.

- (iii) The Medical Superintendent of AIIMS shall also provide the adequate medical help as aforesaid to victim-petitioner No. 1.
- (iv) Whenever Petitioner No. 1 visits for medical checkup and counselling , the concerned doctors shall deal with her sympathetically. The counselling shall be provided to her regularly as per the mental health of petitioner No. 1 and the requirement for the same in view of the alleged threat of suicide by her.
- (v) The State of Haryana shall also deposit an amount of Rs.5 lakh in fixed deposit in the name of petitioner No. 1 as damages and expenses as the officers at the helm of affairs failed to act with due diligence. This amount will be in addition to the other claim of petitioner No. 1 under the provisions of law. The said amount shall remain in fixed deposit in a scheduled

Bank; however, the interest accruing on it can be paid to petitioner No.1 only after 31.06.2017, by the concerned bank, if demanded by petitioner No. 1.

- (vi) It is clarified that the amounts awarded by this Court are in addition to the entitlement as per provisions of Code of Criminal Procedure.
- (vii) This Court has already issued directions in various cases as *Kavita, Vijender and Bashir Khan (supra)*, referred in the earlier part of the judgement. It is emphasized that each of those directions should also be followed in letter and spirit.
- (viii) The Central Government is advised to consider making amendments to the Medical Termination Of Pregnancy Act, 1971 and clarify in so many words to the doctors that they will not be unnecessarily prosecuted if they act in accordance with the rules in good faith to save the life of a victim of rape or to prevent grave injury to her physical and mental health. Termination of pregnancy in good faith which results from crime is otherwise permitted under the provision of MTP Act.
- (ix) Seminars for investigating agencies, doctors, lawyers and judicial officers who have occasion to deal with such cases should be organized periodically. They

should be sensitized about the urgency and immediate need of counselling and other medical assistance required to a rape victim. The respective departments having control over these agencies should regularly update its officers/officials about the legal provisions and settled law on the subject.

- (x) The Refresher Courses for the members of the Superior and Subordinate Judiciary of the States of Punjab, Haryana and U.T.Chandigarh be held to make them aware of the provisions of the MTP Act and urgency in such cases. In order to ensure that if any case is brought before the gestation period reaches 20 weeks, victim be informed about her choice to seek termination at the earliest.
- (xi) The copy of this judgment be sent to the offices of Advocate Generals of Punjab and Haryana and the Standing Counsel for U.T., in order to ensure that if, and when, any case is brought to Court for passing of any orders under the MTP Act, the said case can be determined on the first day itself by sending the woman to the medical board immediately for quick action if possible under the provisions of law. The need for filing of reply should not arise so as to avoid wasting of precious time available with the pregnant

victim.

(xii) The Registry is directed not to mention the name of rape victim in the cause list, judgment order, but they may refer to her name by mentioning the first alphabet of her name.

(xiii) The Counsel representing the victim of rape are also requested not to disclose the identity of victim in the petition in the head-note of petition. They may also write the first alphabet of name of the victim and may quote 'name withheld' in particulars.

43. Taking the facts and circumstances of the case into account, this Court holds that the prayer of the petitioners for the termination of pregnancy of petitioner No. 1 cannot be granted at this stage in view of the medical reports so far submitted before this Court.

44. As an abundant caution and leaving no stone unturned to time out some solution to the woes of a hapless victim heard in this Court, this Court requests the authorities of AIIMS, New Delhi to re-assess the possibility of termination of pregnancy of the victim in this case and take a call keeping in mind the advancement in medical sciences and the spirit behind the MTP Act. The Medical Board of AIIMS, New Delhi may take decision in good faith in the best interest of the victim of crime.

45. Though, this Court has issued some directions in the interest of the victim as regards the care and attention to be given to her during

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her pregnancy and other procedure, if any, carried out by the medical expert, for the post-delivery period, the directions issued by this Court in the present case and in other cases involving similar issue to the concerned authorities are not exhaustive and monitoring of these directions by this Court is necessary as it has come into notice of this Court during the hearing of this case that the same are not being implemented faithfully.

46. Disposed of in the aforementioned terms.

47. To come up on 07.07.2016 for further proceedings.

48. Before parting with this judgment, I would like to place on record my appreciation to Ms. Tanu Bedi, *amicus curiae* for the assistance rendered to this Court.

49. Registry is directed to seal the audio-recording CD submitted by Ms. Tanu Bedi and be kept in a safe custody and copy of the same shall not be supplied to anyone.

50. Copy of this judgment be given to the petitioners free of costs on urgent basis.

51. It is made clear that nothing observed herein will have any bearing on the decision of the criminal case and the court concerned will adjudicate the case on its own merits.

52. Registry is directed to send a copy of this judgment to the following for necessary compliance:

- (i) Director and Medical Superintendent, AIIMS, New Delhi through **FAX** and **e.mail**.

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- (ii) All the judicial officers in the States of Punjab and Haryana and U.T. Chandigarh.
- (iii) The Director Generals of Police of both the States of Punjab and Haryana and Inspector General of Police, U.T. for circulation to the Senior Superintendents of Police.
- (iv) Advocate Generals of Punjab and Haryana and Standing Counsel of U.T. Chandigarh.
- (v) Bar Council of Punjab and Haryana and Bar Association, Punjab and Haryana High Court, Chandigarh.

30.05.2016

parveen kumar

(Paramjeet Singh Dhaliwal)
Judge