

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

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 21085 of 2023

X

Vs.

The State of West Bengal and others

For the petitioner	:	Mr. Protik Dhar, Mr. Chittapriya Ghosh, Mr. Kuntal Ray, Ms. Priyanka Saha
For the State	:	Ms. Jhuma Chakraborty, Ms. Sangeeta Roy
Hearing concluded on	:	30.08.2023
Judgment on	:	31.08.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner is a 13-year old girl, represented by the Officer-in-Charge/Person-in-Charge, Snehachhaya Child Care Institution. The petitioner is a minor girl and a student of Class-VI, aged about 13 years. She is a survivor of aggravated penetrative sexual assault and sexual exploitation, allegedly by a person around 34 years old.
2. The petitioner's parents are migrant labourers who used to stay at Assam for earning livelihood and visit their native place once or twice a year. The petitioner, thus, had to stay alone at home with her younger sister. Needless to say, the petitioner comes from an extremely marginalized section of society, deprived of minimum

financial means, care and protection. Taking advantage of the situation, a next-door neighbour perpetrated the criminal act as indicated above on repeated occasions on the petitioner. She could not disclose anything to anyone due to fear of public stigma and retribution by the assailant.

3. Subsequently, symptoms of pregnancy became visible and the petitioner was taken to the Digha State General Hospital on August 12, 2023. Thereafter, pursuant to a complaint lodged by the Superintendent, Digha SG Hospital, a First Information Report (FIR) was registered, *inter alia* under Section 376(2)(n) of the Indian Penal Code (IPC) and Sections 4 and 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012.
4. The survivor/petitioner was taken into safe custody under the Child Welfare Committee (CWC), Purba Medinipur and was produced before the Medical Officer, Contai Sub-Divisional Hospital on August 13, 2023, where different tests were conducted on her, confirming the pregnancy of the petitioner. From a report from the diagnostic centre concerned, it transpires that as on August 18, 2023, the foetus was about 24 weeks and 6 days old. Thus, as of today, the foetus is almost 26 weeks old.
5. Learned Senior Advocate for the petitioner places reliance on Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 (in short, “the MTP Act”) as well as the Explanation thereto and Section 5(1) of the said Act as well.
6. Learned senior counsel also places reliance on a judgment of the

Supreme Court and another judgment of this Court in support of his contention that in certain circumstances, keeping in view the trauma and anxiety of the survivor of offences such as the present one and keeping in view the surrounding circumstances, the Court can pass orders directing the medical termination of pregnancy even at an advanced stage after the statutory period of 24 weeks.

7. The State submits a report corroborating the apprehensions of the petitioner. Learned counsel for the State also submits that due action under the criminal jurisprudence has already been taken against the perpetrator of the offence.
8. Since the matter is not adversarial, no affidavits are directed.
9. The judgment of the Supreme Court cited by the petitioner is an unreported one dated August 21, 2023 in the matter of *XYZ Vs. The State of Gujarat and others*.
10. In the said judgment the Supreme Court observed that the whole object of preferring a writ petition is to exercise the extraordinary discretion of the High Court in exercise of its constitutional power which is vested with the constitutional courts and discretion has to be exercised judiciously and having regard to the facts of the case, taking into consideration the relevant facts while leaving out irrelevant considerations and not vice versa. In the said case, the Supreme Court permitted termination of pregnancy of the appellant, in a case where an offence under Section 376(2)(n) had been committed on the victim. The foetus was about 28 weeks old when the order was passed by the Supreme Court. The Supreme Court

placed reliance on the judgment of *Suchita Srivastava Vs. State (UT of Chandigarh)*, reported at (2009) 9 SCC 1, where the Supreme Court observed that the right of a woman to have reproductive choice is an insegregable part of her personal liberty under Article 21 of the Constitution. She has a sacrosanct right to her bodily integrity.

11. The Court also considered *Sarmishtha Chakraborty and Another Vs. Union of India Secretary and Others*, reported at (2018) 13 SCC 339, where the Supreme Court observed that unless the pregnancy was terminated, the life of the mother and that of the baby to be borne would be in great danger and permitted termination of the pregnancy.
12. The Supreme Court further relied on *Murugan Nayakkar Vs. Union of India and Others*, in *Writ Petition (Civil) No.749 of 2017* where, while considering the case of a minor petitioner-survivor of alleged rape and sexual abuse, it was held that it would be appropriate that termination of pregnancy be allowed in accordance with the opinion of the Medical Board constituted by an order of Court.
13. Relying next on *X Vs. the Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and Others*, reported at AIR 2022 SC 4917, it was observed that a woman can become pregnant by choice irrespective of her marital status. In case the pregnancy is wanted, it is equally shared by both the partners. However, in case of an unwanted or incidental pregnancy, the burden invariably falls on the pregnant woman, affecting her mental and physical health.

14. Article 21 of the Constitution, it was observed, recognizes and protects the right of a woman to undergo termination of pregnancy if her mental or physical health is at stake. In the context of abortion, the right of dignity entails recognizing the competence and authority of every woman to take reproductive decisions, including the decision to terminate the pregnancy.
15. Apart from that the Supreme Court, in *XYZ Vs. the State of Gujarat*, observed that by contrast to pregnancy within the institution of marriage, in India, pregnancy outside marriage, in most cases is injurious, particularly after a sexual assault/abuse, and is a cause for stress and trauma affecting both the physical and mental health of the pregnant woman, the victim.
16. In such context, medical termination of pregnancy was directed by the Supreme Court with ancillary direction.
17. In the judgment of this Court in *Sri X Vs. The State of West Bengal and others*, similar principles were iterated, including that a pregnancy resulting from sexual assault could lead to immense mental trauma for a child. It was observed that Science is not yet foolproof as to when the embryo becomes a 'human', but an eleven-year old child's (there, the minor was eleven years old) humanity is undisputed.
18. A consideration of the said judgments indicates unerringly that the outer limit of 24 weeks of pregnancy as stipulated in Section 3(2)(b) of the MTP Act is not sacrosanct. Read in conjunction with the Explanation to the said sub-section as well as Section 5, there are

situations where a decision can be taken for termination of pregnancy where the continuance of pregnancy would involve a risk to the life of a pregnant woman or of grave injury to her physical and mental health or if there is a substantial risk that the child, if born, would suffer from serious physical or mental abnormality.

19. Survivors of sexual assault or rape or incest and minors come within the category of woman mentioned in sub-section (2)(b) of Section 3 as stipulated in Rule 3B of the 2003 Rules.
20. Section 5(1) provides that the restrictions relating to length of pregnancy shall not apply to termination of pregnancy where the medical practitioner concerned is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.
21. In the present case, the prospects are otherwise bleak for the survivor, since she suffered from repeated offences within the contemplation of Sections 4 and 6 of the POCSO Act, which pertains to aggravated penetrative sexual assault as well as Section 376 (2) (n) of the Indian Penal Code (IPC).
22. A 13 year old girl, in any event, does not have a mature physical constitution to bear child properly in most cases. That apart, the indelible trauma and scar which would be left in the mind of the survivor in the event she is compelled to continue with the pregnancy, cannot even be imagined. In the present case, the petitioner is, after all, only thirteen and is so unfortunate that even her parents deserted her to her own fate. Hence, it is the duty of

society at large to provide adequate care for the survivor in every respect.

- 23.** Hence, taking a comprehensive view of the relevant provisions of law as discussed above, the survivor is not only a minor but a victim of rape and aggravated penetrative sexual assault and, as such, the continuance of the pregnancy resulting from such heinous crime constitutes a grave injury to the mental health as well as physical constitution of the victim.
- 24.** Thus, the termination of such pregnancy is immediately necessary to save the life of the pregnant child.
- 25.** In such circumstances, in the present case, as the period of pregnancy is only about 26 weeks, which is merely two weeks advanced compared to the outer statutory limit of 24 weeks, for all practical purposes it would only be justified that the victim girl's pregnancy is directed to be terminated.
- 26.** Accordingly, WPA No. 21085 of 2023 is disposed of by directing the respondent no.1 to ensure that the petitioner is brought under the care of the respondent no.9-The Child Welfare Committee, Purba Medinipur to the SSKM Hospital in Kolkata, within 24 hours from now, under competent medical supervision. In the meantime, a Medical Board as contemplated in Section 3(2D) of the MTP Act, 1971, consisting of a gynaecologist, a paediatrician, a radiologist or sonologist and such other number of members as notified in the Official Gazette by the State Government, if applicable, shall be formed.

- 27.** The said Medical Board shall examine the child immediately after her being brought to the SSKM Hospital for ascertaining the pros and cons of medical termination of her pregnancy. In the event it is found that the scale tilts in favour of the termination of such pregnancy and the survivor/petitioner's health will not be jeopardized upon a medical termination of pregnancy procedure being conducted on her and that the petitioner is agreeable to such termination, the SSKM Hospital shall immediately arrange for experts in the field to carry out such medical termination procedure on the petitioner. It is expected that the entire exercise shall be concluded within 48 hours from the arrival of the petitioner to the SSKM Hospital.
- 28.** In the event the process culminates in the birth of a live foetus, the SSKM Hospital shall give all necessary medical support to the said child and, subject to the extant law in the field, place the child for adoption before an authorized agency in due process of law.
- 29.** After the entire procedure is over and the petitioner recovers fully, she will be discharged from the SSKM and the CWC (Purba Medinipur) shall take steps under the appropriate statute to place the petitioner in juvenile care under the relevant statute(s) in the event the petitioner remains deserted by her parents and family.
- 30.** During the entire process, the CWC (Purba Medinipur) shall also take pro-active steps to protect and take care of the minor sister of the petitioner, as contemplated under the relevant statute(s) if she is also found to be deserted by her parents and family and/or found to be a child in need of care and protection, if possible, housing her with the

petitioner, since they are apparently their only close family now.

31. Parties shall act on the server copy of this order without insisting upon prior production of certified copy.
32. There will be no order as to costs.
33. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)