CHAPTER FIVE

MEDICAL TERMINATION OF PREGNANCY

Prior to 1971, abortions were governed solely by Sections 312-314 of the Indian Penal Code 1860 (IPC) and could not be performed except for saving a pregnant woman's life. In 1971, the Medical Termination of Pregnancy Act (MTP Act) was enacted to eliminate abortions by untrained persons and in unhygienic conditions and to reduce maternal morbidity and mortality.[1] In ***Jacob George v. State of Kerala***,[2] the Supreme Court clarified that the provisions of the IPC relating to miscarriage are subservient to the MTP Act.

A challenge to the constitutional validity of the MTP Act on the premise that it violates the fundamental right to life of an unborn child was rejected by the Rajasthan High Court in ***Nand Kishore Sharma v. Union of India***.[3] It held that the MTP Act was in consonance with Article 21 of the Indian Constitution as its dominant object was to save the life of pregnant women, to prevent any injury to their physical or mental health, and to prevent possible impairments in the child to be born. With the Supreme Court's decision in ***Suchita Srivastava v. Chandigarh Administration***,[4] a woman's right to make reproductive choice, including the choice to procreate or abstain from procreating has been recognized as part of her personal liberty under Article 21 of the Indian Constitution.[5] The Bombay High Court, in ***High Court on its Own Motion v. State of Maharashtra***,[6] reiterated the position stated in ***Suchita Srivastava*** and further opined that:

> A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. … These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.
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> … According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.

Although the MTP Act liberalized the law on abortion when compared to the provisions of the IPC, it does not provide women an unrestricted right of abortion. The permissibility of abortion under the Act has frequently come up for adjudication before the Courts. This chapter contains cases pertaining to:

- Seeking Judicial Authorization for Medical Termination of Pregnancy
- Termination Beyond the 20-Week Period
- Consent of a Minor for Medical Termination of her Pregnancy
- Consent of a Mentally Disabled Woman for Medical Termination of her Pregnancy
- Spousal Consent for Medical Termination of Pregnancy
- Prosecutions for Contravention of the MTP Act

Seeking Judicial Authorization for Medical Termination of Pregnancy

While the MTP Act does not require judicial authorization for the termination of a pregnancy, courts are repeatedly approached for this purpose. In cases where women (or their guardians, in the case of minors) have sought permission for termination of pregnancies resulting from rape *within* the 20 week gestational limit under the MTP Act, courts generally tend to affirm Section 3 of the MTP Act and either permit such termination or direct a medical board to explore with the woman or girl the possibility of termination in consonance with Section 3 of the MTP Act.[7] For example, in ***X v. Govt of NCT of Delhi***,[8] an HIV positive woman was 18 weeks pregnant as a result of forced prostitution. The woman was lodged in a government protection home and her initial request for abortion was denied by the concerned authorities.

She petitioned the Delhi High Court against this denial. The High Court allowed the termination of her pregnancy, relying on Section 3 of the MTP Act, and in particular her willingness to terminate a pregnancy that resulted from rape as well as the mental, physical, social and economic problems that the woman was likely to face from continuation of the pregnancy.

At the same time, in ***Bashir Khan v. State of Punjab***,[9] and ***Kamla Devi v. State of Haryana***,[10] the Punjab and Haryana High Court clarified that for a pregnancy under the 20 week gestational limit, there is no requirement to obtain permission of any authority for termination of pregnancy under the MTP framework aside from the medical opinion of the requisite number of medical practitioners and consent of the woman or guardian in case of a minor.

In ***Hallo Bi v. State of Madhya Pradesh***,[11] a woman under-trial prisoner approached the High Court of Madhya Pradesh seeking permission for termination of her pregnancy of about 12 weeks, which was a result of forced prostitution. Her initial request made to the jail authorities was forwarded to a chief judicial magistrate, who rejected it. The High Court allowed her to terminate her pregnancy relying on the ruling in ***Suchita Srivastava*** that a women's right to make reproductive choices is a dimension of her personal liberty and in view of the medical opinion on feasibility of abortion. It held that "forced prostitution" amounts to rape and was covered within the conditions stipulated under Section 3(2) of the MTP Act for termination of pregnancy.

Termination Beyond the 20-Week Period

Under Section 5 of the MTP Act, termination of pregnancies *beyond* 20 weeks is permitted if one registered medical practitioner is of the opinion, formed in good faith, that such termination is "immediately necessary" for saving the life of the pregnant woman. The Section does not require any judicial authorization for post-20 weeks terminations. However, when doctors deny abortion post-20 weeks, pregnant women approach the Supreme Court and High Courts seeking permission to terminate the pregnancy.[12] In such cases, Courts generally direct the setting up of a medical board comprising of a multi-specialty team of doctors to examine the pregnant woman and provide a medical report to the Court.[13] In adjudicating such cases, courts have looked at the following different factors while determining the permissibility of terminating a pregnancy beyond 20 weeks:

RISK TO THE PREGNANT WOMAN FROM CONTINUING WITH THE PREGNANCY

In most post-20 weeks cases courts require a medical opinion on the risks of continuing with the pregnancy in order to determine whether the pregnancy would endanger the life of the pregnant woman. In ***Meera Santosh Pal v. Union of India***,[14] the Supreme Court emphasized a woman's right to reproductive autonomy and bodily integrity, and stated that this includes the right to take all steps necessary to preserve her own life. Therefore, the Court permitted termination of a pregnancy that posed a danger to the pregnant woman.

In ***High Court on its Own Motion v. State of Maharashtra***,[15] the Bombay High Court opined that continuing *any* unwanted pregnancy to term "represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health."

RISK TO THE PREGNANT WOMAN FROM TERMINATION

Courts also routinely seek medical opinion on the risks associated with terminating the pregnancy. Though termination of pregnancy in accordance with medical standards at any stage of the pregnancy is by itself not associated with high risk of morbidity or mortality,[16] where a medical opinion by the court-appointed medical board raises concerns about the risks of termination associated with the particular health condition of the pregnant woman, courts have been reluctant to authorize termination of the pregnancy. For example, the Rajasthan High Court in ***Jamana Suthar v. State of Rajasthan***,[17] and Punjab and Haryana High Court in ***Kavita v. State of Haryana***,[18] disallowed termination of pregnancy because the medical opinion stated that it was likely to endanger the life of the minor rape survivors.

Likewise, the Supreme Court in ***Alakh Alok Srivastava v. Union of India***,[19] ***Murugan Nayakkar v. Union of India***,[20] and ***Chanchala Kumari v. Union of India***,[21] heavily relied on the medical board's opinion concerning the risks involved in termination of pregnancy without making an explicit reference to Section 3 or 5 of the MTP Act. All three cases dealt with pregnancies of very young children. In ***Alakh Alok Srivastava***, the medical board opined that the risk of terminating the pregnancy was higher than the risk of carrying the pregnancy to term. Based on this opinion, the Court declined permission to terminate a pregnancy over the 20-week limit. In the other two cases, however, the respective medical boards were of the opinion that the risk from terminating the pregnancy was less than the risk of carrying the pregnancy to term. The Supreme Court accordingly permitted the termination of pregnancy in both cases.

RISK TO THE PREGNANT WOMAN AS A RESULT OF FOETAL IMPAIRMENT

Pregnant women have approached the Supreme Court and High Courts across the country seeking permission to terminate pregnancies after 20 weeks following foetal impairment diagnoses. Where women receive diagnoses of foetal impairments that are incompatible with extra-uterine life, courts have tended to permit such abortions, stating that carrying such a pregnancy to term poses risks to the mental and physical health of the pregnant woman. In ***Meera Santosh Pal v. Union of India***,[22] and ***X v. Union of India***,[23] the Supreme Court emphasized that a pregnant woman has the right to preserve her own life and cannot be forced to continue a pregnancy that may cause her physical or mental injury. In both these cases there were fatal foetal impairments and the medical opinion noted that carrying the pregnancy to term would pose risks to the pregnant woman's mental and physical health.[24] Similarly, in ***Mamta Verma v. Union of India***,[25] and ***X v. Union of India***,[26] the Supreme Court permitted post-20 week abortions on the ground of foetal impairments that were incompatible with life outside the uterus. In both cases, the Court also took into account the risk of mental injury to the pregnant woman from carrying the pregnancy to term.[27] In ***Shaikh Ayesha Khatoon v. Union of India***,[28] the Bombay High Court allowed termination of a 27 weeks' pregnancy, where there were several foetal impairments and low chances of independent survival post-birth. The Court also held that in order to meet the object of the MTP Act and advance the cause of justice, the conditions for medical termination of pregnancy provided under Section 3(2)(b)(i) & (ii) of the MTP Act should be read into Section 5(1), which considers termination of pregnancies over 20 weeks. It thus ruled that in cases of foetal impairments, mental injury caused to the woman would be sufficient to meet the requirement of Section 5 and denial of her choice to terminate the pregnancy would violate her personal liberty under Article 21.[29]

Courts have taken a similar approach in cases where there are foetal impairments that are compatible with extra-uterine life, but would require extensive surgical interventions carrying a very high risk of mortality or morbidity. The Supreme Court in ***Sarmishtha Chakrabortty v. Union of India***,[30] and ***Sonali Sandeep Jadhav v. Union of India***,[31] the Bombay High Court in ***Priti Mahendra Singh Rawal v. Union of India***,[32] and the Himachal Pradesh High Court in ***Geeta Devi v. State of Himachal Pradesh***,[33] all allowed medical termination of pregnancies in such circumstances since continuation of the pregnancy would pose a risk to the mental health of the pregnant woman. In ***Tapasya Umesh Pisal v. Union of India***,[34] however, the Supreme Court permitted termination of a 25-week pregnancy solely on the ground that the foetal impairment was linked to high mortality and morbidity after birth, required multiple corrective surgeries after birth, and was associated with a limited life span. Referring to Section 3 (2) (b) (ii) of the MTP Act which allows for termination of pregnancies until 20 weeks if there is a substantial risk that the child if born would "suffer from such physical or mental abnormalities as to be seriously handicapped," the Court held that since this case falls within the purview of this section, except for the gestational limit, it would be in the interests of justice to permit the abortion.

In contrast to the cases mentioned above, when the foetal impairment does not impact the likelihood of extra-uterine survival, and the medical opinion does not disclose any risks to the mental or physical health of the pregnant woman, courts have been reluctant to permit abortion post-20 weeks. This was the case in ***Sheetal Shankar Salvi v. Union of India***,[35] and ***Savita Sachin Patil v. Union of India***.[36]

Likewise, the Bombay High Court disallowed termination of pregnancy only on the ground of foetal impairment in ***Nikhil D. Datar v. Union of India***.[37] Petitioners in this case challenged the constitutionality of Section 5 (1) of the MTP Act since it does not cover cases of foetal impairments involving substantial risk of serious disability in the child. This challenge was dismissed by the Bombay High Court on the reasoning that the legislature had, in its wisdom, placed gestational limits upon abortion of impaired foetuses. An appeal against this decision is pending in the Supreme Court.[38] The appeal challenges the constitutionality of the 20-week limit prescribed under Section 3(2)(b) for foetal impairment on grounds that this limit violates the right to life, health and dignified existence of women guaranteed under Article 21 of the Indian Constitution.

PREGNANCY RESULTING FROM RAPE

In ***Ashaben v. State of Gujarat***,[39] the Gujarat High Court adopted a strict interpretation of Section 5 of the MTP Act stating that it allowed termination of pregnancies exceeding 20 weeks only if continuation of pregnancy would endanger the life of the pregnant woman and not on the ground that the pregnancy resulted from rape. A similar approach was followed by the Gujarat High Court in ***Chandrakant Jayantilal Suthar v. State of Gujarat***.[40] In this case, the Court was also guided by the fact that no medical opinion had been produced which suggested that continuing with the pregnancy would pose a danger to the life of the pregnant woman. On appeal, the Supreme Court directed the constitution of a medical board to examine whether the continuation of the pregnancy would pose a serious threat to the life of the pregnant woman, and if so determined, then to proceed with the abortion without seeking any additional permission from the Court.[41]

However, the Kerala High Court in ***Ms. X v. State of Kerala***[42] allowed termination of pregnancy of a rape survivor by extending the ambit of Section 5 of the MTP Act to cover situations where such pregnancy results in grave mental stress and change of attitude in her normal life for which she is not prepared.

In ***Bashir Khan v. State of Punjab***,[43] and ***Kamla Devi v. State of Haryana***,[44] the Punjab and Haryana High Court recognized the physical and mental harm caused to rape survivors due to delay in termination of pregnancy; the Court directed the State to provide all assistance to rape survivors seeking abortion in obtaining requisite medical opinion and services.

In a pending case titled ***Anusha Ravindra v. Union of India***,[45] the Supreme Court has admitted a matter regarding the need for framing appropriate medico-legal guidelines for setting up a permanent mechanism for expedient termination of pregnancies beyond 20 weeks in cases involving rape survivors and foetal impairment, and for urgent and safe termination of pregnancy. The Court, however, rejected the prayer for a direction to the legislature to accordingly amend Section 3 (2) of the MTP Act.

RAPE OF A MINOR

In ***Suchita Srivastava v. Chandigarh Administration***,[46] a case pertaining to abortion for a 19-year-old woman with intellectual disabilities, the Supreme Court stated that in cases where the Court is deciding the permissibility of abortion in the exercise of its *parens patriae* jurisdiction, it should consider the "best interest" of the woman concerned, through careful evaluation of the medical opinion on feasibility of abortion and consideration of her social circumstances. Such determination should be guided solely by the interest of the woman and not of her guardian or society in general. It should be independent of considerations such as the woman's understanding of the sexual act or any apprehensions about her capacity to carry the pregnancy to its full term or discharge her maternal responsibilities.

Though ***Suchita Srivastava*** did not deal directly with abortion for minors, High Courts have relied on this judgment and have adopted a "best interests" approach in determining the permissibility of abortion for minors. In ***Bhavikaben v. State of Gujarat***,[47] the Gujarat High Court allowed medical termination of pregnancy taking into account the young age and health of the rape survivor, the grave mental injury caused due to the unwanted pregnancy, and the medical opinion indicating no risk to her life from termination of pregnancy. Similarly, in ***Madhuben Arvindbhai Nimavat v. State of Gujarat***,[48] and ***Pujaben Subedar Yadav v. State of Gujarat***,[49] the High Court left the discretion with the medical practitioners to terminate the pregnancy if in their opinion the termination requested was in the best interest of the minor rape survivor.

The Punjab and Haryana High Court in ***R v. State of Haryana***,[50] also applied the best interest test and considered the grave injury caused to physical and mental health of the minor rape survivor due to the social and emotional consequences of continuation of pregnancy, which was corroborated by the medical opinion. However, since the medical board constituted in this case gave an opinion against termination of pregnancy on the ground that the pregnancy was beyond the 20-week limit in the MTP Act, the Court felt unable to permit such termination. In its order, the Court also emphasized the necessity of revising the time limit under the MTP Act to permit abortions beyond 20 weeks. It advised the State to amend the MTP Act to clarify that doctors acting in good faith and in accordance with the rules to save the life of rape survivor or prevent grave injury to her physical or mental health will not be unnecessarily prosecuted.

In ***X (since minor through her mother) v. Union of India***,[51] the Bombay High Court allowed termination of pregnancy of a deaf and mute minor rape survivor, diagnosed with Down syndrome, under Section 5 of the MTP Act. Aside from the danger to her life from continuation of pregnancy, the Court also considered the psychological trauma caused due to the unwanted pregnancy and opined that the pregnancy was violative of her personal liberty and against her best interest.

In ***Bhatou Boro v. State of Assam***,[52] the medical board refused to give an opinion for termination of pregnancy of a minor rape survivor as it had exceeded 20 weeks. Noting the decisions of the Supreme Court where it allowed termination of pregnancies of over 20 weeks, the Gauhati High Court directed the medical board to re-examine the minor in light of the impact of the unwanted pregnancy on her mental health, and terminate her pregnancy if medically feasible, without being constrained by the legal limits under the MTP Act.

Consent of a Minor for Medical Termination of her Pregnancy

Section 3(4)(a) of the MTP Act mandates the written consent of the guardian of a minor girl or a "mentally ill" woman or girl before termination of her pregnancy. In ***V. Krishnan v. G. Rajan***,[53] the Madras High Court held that if a minor wished to continue her pregnancy, an abortion could not be performed only on the basis of her guardian's consent, especially when the medical report did not indicate any foetal impairment and the minor was found to be fully aware of the consequences of pregnancy.

Similarly, in ***Marimuthu v. Inspector of Police***,[54] the Court relied on the Convention on Rights of Child, the object of MTP Act and women's right to autonomy and bodily integrity to state that Section 3(4) cannot be read as to dispense with the consent of the minor where she wishes to continue her pregnancy. The Court also discussed issues relating to teenage pregnancy, child marriage and the age of consent under Protection of Children from Sexual Offences Act, 2012.

On the other hand, the Madhya Pradesh High Court in ***Sundarlal v. State of MP***,[55] stated that it is not necessary to obtain a rape survivor's willingness to terminate her pregnancy, where she is a minor and her guardian consents to such termination.

Consent of a Mentally Disabled Woman for Medical Termination of her Pregnancy

In ***Suchita Srivastava v. Chandigarh Administration***,[56] the Supreme Court was approached on behalf of a woman diagnosed with "mental retardation" challenging the High Court's order for termination of her pregnancy without her consent. The Court affirmed that the consent of a woman, who has attained the age of majority and does not suffer from any "mental illness" (as distinct from "mental retardation" and as defined under Section 2 (b) of the MTP Act), constitutes an essential condition for termination of pregnancy. It pointed out that the legislative provisions treat "mental retardation" differently from mental illness. In its decision, the Supreme Court recognized and emphasized that a woman's right to make reproductive choices is a dimension of her personal liberty under Article 21 of the Indian Constitution.[57]

Spousal Consent for Medical Termination of Pregnancy

While consent of the woman is an essential requirement for termination of her pregnancy as stated under Section 3(4)(2)(b),[58] the MTP Act does not require the husband's consent for terminating the pregnancy of a major woman.

In ***Anil Kumar Malhotra v. Ajay Pasricha***,[59] the Supreme Court dismissed the appeal against the Punjab and Haryana High Court's decision in ***Dr. Mangla Dogra v. Anil Kumar Malhotra***,[60] rejecting a suit for damages filed by the husband against his wife and doctors for terminating his wife's pregnancy without his consent on the reasoning that the MTP Act does not require the husband's consent for an abortion. The Gujarat High Court in ***Nirav Anupambhai Tarkas v. State of Gujarat***,[61] upheld dismissal of a criminal complaint filed by a husband against his wife and her family for terminating her pregnancy despite his opposition, on the ground that his consent was not required for the termination.[62]

Prosecution for Contravention of the MTP Act

Termination of pregnancy without a woman's consent is a non-bailable offence under Section 313 of IPC. A strict approach has been adopted by the Court while considering bail applications or petitions for quashing criminal prosecution filed in such cases. The Orissa High Court in ***Binod Bihari Naik v. State of Orissa***,[63] dismissed a doctor's petition for quashing of criminal prosecution for allegedly terminating a pregnancy without the woman's consent as a *prima facie* case had been established against him.

The Delhi High Court in ***Sushil Kumar v. Govt of NCT of Delhi***,[64] rejected anticipatory bail applications filed by a husband and his family accused under Section 313 of the IPC for forcing his wife to consume abortion pills, on the ground that these allegations were of a very serious nature. In ***Dr. Saraswati v. State of Maharashtra***,[65] where an abortion that was carried out contrary to provisions of the MTP Act resulted in the death of the pregnant woman, the Bombay High Court rejected the bail application, since a strong *prima facie* case existed that the doctors' actions had led to the death of a woman.

The Supreme Court in ***Surendra Chauhan v. State of M.P.***,[66] upheld the Madhya Pradesh High Court's decision to convict the accused for causing a woman's death by miscarriage. The accused had had "illicit relations" with the woman, which resulted in pregnancy, and had then brought her to a clinic where neither the doctor nor the clinic fulfilled the MTP Act's and Rules' requirements. Both the doctor and the present accused were convicted under Section 314 of the IPC.

In ***Raj Bokaria v. Medical Council of India***,[67] the Court stressed that it is mandatory to record the formation of medical opinion on termination of pregnancy under Section 5(1), in the form prescribed under the Medical Termination of Pregnancy Regulations, 2003. Due to the absence of such record, the Court upheld action by the Ethics Committee of the Medical Council of India against the petitioner-doctor, who had terminated a woman's pregnancy of over 20 weeks in order to protect her life.

Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence relating to state obligations to ensure access to abortion. Human rights mechanisms have recognized that denial of abortion information and services profoundly affects women's lives and health and hinders the fulfillment of a range of civil, political, economic, and social rights. As such, human rights standards and jurisprudence recognize state obligations to decriminalize abortion; to permit abortion at a minimum to ensure women's lives, health, in cases of rape, incest, or severe or fatal foetal impairment; and ensure access to abortion in practice where legal including by providing information and addressing socio-economic needs of women seeking abortion.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).[68] Under international law all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.[69] The Supreme Court has held that in light of the obligation to "foster respect for international law" in Article 51 (c) of the Indian Constitution, "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."[70]

INTERNATIONAL TREATY STANDARDS

TREATIES

- **CEDAW, Articles 1-3, 5(a), 10(h), 12, 16(e)** (outlining women's rights to equality in law and practice, to health including access to family planning information and services, and to determine the number and spacing of children; and defining states' duty to eliminate cultural prejudices based on stereotyped roles for men and women).
- **ICESCR**, **Articles 2(2), 3, 12(1)** (guaranteeing the rights to health, equality, and non-discrimination).
- **ICCPR, Articles 2(1), 6, 7, 17** (protecting the rights to life, non-discrimination and equality, freedom from torture and ill-treatment, and privacy).
- **Convention on Rights of the Child, Articles 2(2), 3, 5-6, 12, 16, 24** (protecting the rights to life, health, non-discrimination, development, privacy, and to express their views and having them given due weight; and outlining that all rights are to be interpreted through the lens of the best interest of the child, with respect for their evolving capacities).
- **Convention on the Rights of Persons with Disability (CRPD), Articles 3, 5-7, 8(1)(b), 10, 12, 17, 22, 23(1)(b), 25** (calling for respect for the inherent dignity, individual autonomy including freedom to make one's own choices and guaranteeing rights to life, privacy, personal integrity, non-discrimination, legal capacity on an equal basis with others and support in exercising this capacity; outlining state duties to "combat stereotypes, prejudices and harmful practices relating to persons with disability, including those based on sex and age;" and safeguarding the rights to sexual and reproductive health founded on a basis of free and informed consent, including the rights to decide on the number and spacing of children, to access age-appropriate reproductive and family planning information, and to access the necessary means to exercise these rights).

SELECTED GENERAL COMMENTS

- **Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the ICCPR, on the right to life***, U.N. Doc. CCPR/C/GC/36 (2018), para. 8 (outlining that states may not adopt measures on voluntary termination of pregnancy that violate women's rights to life and other rights under the treaty, including rights to non-discrimination, freedom from inhuman and degrading treatment, and privacy; calling on states to remove existing barriers and not introduce new barriers to women's access to safe and legal abortion, including by refraining from criminalizing women who receive abortion or abortion providers; affirming that states parties must prevent the stigmatization of women seeking abortion and provide safe, legal and effective access to

abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, including in cases of rape or fatal foetal impairment).

- **Human Rights Committee,** ***General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)***, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), paras. 10-11 (indicating that in order to ensure women's equal rights to life, states must ensure that women do not have to undergo life-threatening clandestine abortion and calling for states to report on whether women who have become pregnant from rape have access to safe abortion as part of the obligation to ensure women's equal rights to freedom from inhuman and degrading treatment).
- **Committee for Economic Social and Cultural Rights,** ***General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the ICESCR)***, U.N. Doc. E/C.12/GC/22 (2016), paras. 13-14, 18-19, 21, 28, 34, 40-49 (calling on states to liberalize abortion laws, and guarantee abortion access complying with the AAAQ framework, meaning that it is accessible, available, acceptable, and of good quality; noting specifically that states must ensure access to safe, confidential and respectful abortion services and quality post-abortion care and the availability of trained medical personnel and essential medicines including abortion medicine and post-abortion care; recognizing that states must ensure that women's access to such goods and services is not hindered due to ideologically based policies, practices, or refusals of care; and outlining that criminalizing abortion is discriminatory against women).
- **Committee for Economic Social and Cultural Rights,** ***General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)***, U.N. Doc. E/C.12/2000/4 (2000), paras. 8, 11, 14, fn 12, 21, 23, 34 (defining the right to health as the right to "control one's health and body, including sexual and reproductive freedom," which means that states must guarantee women and girls access to "safe, effective, affordable and acceptable methods of family planning of their choice" and remove "all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health").
- **CEDAW Committee,** ***General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19***, U.N. Doc. CEDAW/C/GC/35 (2017), paras. 18, 31(a) (affirming that criminalization of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, constitute violations of women's sexual and reproductive health rights as well as forms of gender-based violence that may amount to torture or cruel, inhuman or degrading treatment; and calling on states to repeal laws that criminalize abortion).
- **CEDAW Committee,** ***General Recommendation No. 24 on Article 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1 (1999), paras. 14, 31 (outlining that states should remove all barriers and restrictions to women's access to health services, including sexual and reproductive health, and in particular should not require women to get authorization from third parties, such as husbands, parents, or health authorities; and calling on states to remove punitive criminal measures imposed on women who undergo abortion).
- **CEDAW Committee,** ***General Recommendation No. 34 on the rights of rural women***, U.N. Doc. CEDAW/C/GC/34 (2016), paras. 38-39 (instructing states to guarantee rural women's and girls' access to safe abortion and quality post-abortion care, regardless of whether or not abortion is legal, supported by adequate financing; and further requiring states to remove obstacles on rural women's access to sexual and reproductive health services, particularly by repealing laws that criminalize abortion or require waiting periods or third party consent for abortion).
- **Committee on the Rights of the Child,** ***General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence***, U.N. Doc. CRC/C/GC/20 (2016), paras. 38-39, 46, 59-61 (encouraging the decriminalization of abortion in order to "ensure that girls have access to safe abortion and post-abortion services, […] with a view to guaranteeing the best interests of pregnant adolescents and ensur[ing] that their views are always heard and respected in abortion-related decisions;" and outlining that "[a]ll adolescents should have access to free, confidential, adolescent-responsive and non-discriminatory sexual and reproductive health services, information and education" free of barriers such as third-party consent requirements or stigma).

- **Committee on the Rights of the Child, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24)***, U.N. Doc. CRC/C/GC/15 (2013), paras. 24, 31, 54, 56, 70 (outlining state obligations to ensure health systems and services can meet the sexual and reproductive health needs of adolescents, including safe abortion services; recognizing rights of children to consent to abortion without permission of a parent, guardian, or caregiver; and recommending states ensure access to safe abortion and post-abortion care, irrespective of whether abortion itself is legal).
- **Joint statement by the CRPD and CEDAW Committees, *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities***, 19 Aug. 2018 ("States parties should decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, including women with disabilities;" outlining that states must address the root causes of discrimination against women and persons with disability).
- **CRPD Committee, *General Comment No. 3 (2016) on women and girls with disabilities***, U.N. Doc. CRPD/C/GC/3 (2016), paras. 32, 40, 44, 63(a) (reaffirming that states must ensure that women and girls with disabilities can access understandable and appropriate information, services, and supported decision-making in order to ensure their right to medical care, including sexual and reproductive health care, on the basis of autonomous and informed consent).

INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, *L.C. v. Peru*, Communication No. 22/2009**, UN Doc. CEDAW/C/50/D/22/2009 (2011), paras. 8.7-8.18, 9(b)(ii) (where a 13-year-old girl tried to commit suicide after becoming pregnant following rape and was denied critical medical care due to her pregnancy, including an abortion: finding violations of, *inter alia*, the rights to non-discrimination, to health, life and dignity, to access health services, and to be free from sex-based stereotypes that put women's and girls' reproductive function before their personal rights; and requiring the state to establish a legal framework the provides effective, timely access to legal abortion for women and legal clarity for providers, and to train health providers to support reproductive rights, including and particularly for adolescents and sexual violence survivors).
- **Human Rights Committee, *K.L. v. Peru*, Communication No. 1153/2003**, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), paras. 6.1-8 (where an adolescent girl was denied a legal abortion on the basis of fatal foetal impairment, to the foreseeable detriment of her mental and physical health, holding that where abortion is legal it must be accessible in practice, and finding violations of the rights to effective remedy, to privacy, to special protection as a minor, and to be free of inhuman and degrading treatment; and requiring the state to pay compensation and guarantee non-repetition).
- **Human Rights Committee, *L.M.R. v. Argentina*, Communication No. 1608/2007**, U.N. Doc. CCPR/C/101/D/1608/2007 (2011), paras. 9.2-11 (where a rape survivor with an intellectual disability sought an abortion as permitted under the law and the hospital received an injunction from a judge prohibiting her from receiving a legal abortion that delayed the abortion past a gestational period where the hospital would perform it even after the Supreme Court overturned the injunction: finding violations of her rights to privacy, to be free from cruel and inhuman treatment, with a particular view to her vulnerability due to her disability, and to access an effective remedy that could guarantee timely access to legal abortion in practice; and requiring the state to provide compensation and guarantees of non-repetition).
- **Human Rights Committee, *Mellet v. Ireland*, Communication No. 2324/2013**, U.N. Doc. CCPR/C/116/D/2324/2013 (2016), paras. 7.1-9 and ***Whelan v. Ireland*, Communication No. 2425/2014**, U.N. Doc. CCPR/C/119/D/2425/2014 (2017), paras. 7.1-9 (two cases where pregnant women received a diagnosis of a fatal foetal impairment and were forced to travel abroad for an abortion because the law in Ireland did not allow an abortion in such cases: finding that the legal restrictions on access to abortion caused her foreseeable pain and suffering amounting to cruel and inhumane treatment and violated her right to privacy and equality; and instructing the state to amend its laws and Constitution so as to ensure "effective, timely and accessible procedures for pregnancy termination in Ireland" as well as access to relevant information).

UNITED NATIONS HUMAN RIGHTS EXPERTS

- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health), *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 54-55, 57-60 (outlining that women are entitled to reproductive health information and services that are respectful of autonomy, privacy and confidentiality, provided by properly trained personnel; and that women may not be denied the right to consent-based health care justified by the best interests of the unborn child or due to spousal or other third-party consent requirements).
- **SR Health, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. E/CN.4/2004/49 (2004), paras. 25-27, 30, 39 (establishing women's right to autonomous decision-making regarding their sexual and reproductive health and the number and spacing of children; recommending the removal of punitive provisions against women who undergo abortions; emphasizing that women should be offered information and counselling regarding where and when a pregnancy may be terminated legally; and underlining states' duty to ensure that health information and services are available to marginalized groups).
- **Working Group on the issue of discrimination against women in law and in practice, *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends***, Position paper (2017), pp. 4-7 (outlining, *inter alia*, that women's rights to non-discrimination require that abortion should never be criminalized, that regulations governing abortion after the first trimester "must not result in creating a barrier" that would lead a woman to pursue an unsafe termination, and that access to abortion services should be autonomous, affordable and effective; highlighting that where access to abortion after the first trimester is limited to certain grounds, those grounds should be expansive; and reiterating that human rights are accorded only upon birth).
- **Working Group on the issue of discrimination against women in law and in practice, *Report of the Working Group on the issue of discrimination against women in law and in practice***, U.N. Doc. A/HRC/32/44 (2016), paras. 79-83, 107(b)-(c) (instructing states to decriminalize abortion; instructing states to repeal restrictive laws and policies, such as those prohibiting access to information on legal abortion, requiring third-party authorization from medical professional(s), a hospital committee, a parent, guardian or spouse, or permitting conscientious objection by health practitioners without ensuring access to an alternative provider; highlighting that such restrictions are discriminatory on the basis of socioeconomic status; and outlining that women should be able to terminate a pregnancy on request during the first trimester, or later on broad grounds).
- **Office of the High Commissioner on Human Rights et al., *Preventing Gender-Biased Sex Selection: An Interagency Statement OHCHR, UNFPA, UNICEF, UN Women and WHO*** (2011), p. V (emphasizing that states must address prenatal sex selection "without exposing women to the risk of death or serious injury by denying them access to needed services such as safe abortion to the full extent of the law," which would constitute further violations of their rights to life and health).

REGIONAL CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

- ***Tysiac v. Poland*, Application no. 5410/03 (2007)**, paras. 105-130 (where a woman suffered the loss of her eyesight due to pregnancy but was denied an abortion on the grounds of risk to her health, even though her right to access abortion was guaranteed in Polish law: finding violations of her right to private life, encompassing the rights to personal autonomy, physical integrity, and to access information; reiterating that where legal, abortion must be practically accessible; and articulating the state's obligation to regulate abortion so as to alleviate any chilling effect on access to legal abortion in practice).
- ***P. and S. v. Poland*, Application No. 15966/04 (2009)**, paras. 108-109, 111, 128-137, 157-169 (where a 14-year-old rape survivor was denied abortion care and where medical professionals shared her personal information without her permission: affirming state duty to ensure adolescents' autonomous reproductive choices and privacy; establishing that authorities should have taken into account her young age and vulnerability as a rape survivor; and finding violations, *inter alia*, of the rights to be free from ill-treatment, to private life, and to liberty and security of the person).

- ***R.R. v. Poland*, Application no. 27617/04 (2011)**, paras. 148-162, 179-214 (where a woman was denied access to prenatal testing that would have enabled her to decide whether to access a legal abortion on the basis of foetal impairment: ruling that the state had failed to ensure her right to private life and to freedom from inhuman and degrading treatment; and concluding that the state must guarantee the availability of relevant, full and reliable information, including on foetal health, to pregnant women).

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

- ***Paulina Ramírez v. Mexico*, Report Nº 21/07, Petition 161-02, Friendly Settlement (2007)** (outlining the terms of a friendly settlement by a State providing reparations, public apology, and preventing reoccurrence in a case involving a 13-year-old rape survivor who was given false information about the safety of abortion procedures and therefore decided to carry her pregnancy to term under incorrect, coercive pretenses).
- ***Asunto niña Mainumby respect de Paraguay*, Precautionary Measures Nº 178/15 (2015)**, paras. 11-20, 23, *[available only in Spanish]* (where a 10-year-old rape survivor's health was determined to be at risk from her pregnancy and interruption of pregnancy was indicated by her physicians, instructing the state to make all medical options available to her in order to protect her rights to life and personal integrity, to access adequate medical treatment, to participate in all health decisions affecting her health in accordance with her age and maturity, and to protection from future abuse).

INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***B. c. El Salvador,* Precautionary Measures No PM 114/13 (2013)**, paras. 11-17 et seq., *[available only in Spani*sh] (where a woman's rights to life, health and integrity were at risk due to health complications during her pregnancy with a foetus with fatal impairments, and abortion was prohibited regardless of circumstances: calling on the state to ensure that the medical professionals were free to initiate appropriate treatment urgently, in view of the woman's request for an abortion).

RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

IN THE HIGH COURT OF MADRAS

V. Krishnan v. G. Rajan
(1994) 2 MWN (Cri) 333
Srinivasan and Abdul Hadi, JJ.

A father filed a petition in the Madras High Court seeking termination of his minor daughter's pregnancy after she left home and married against his will. Though the daughter wanted to continue with the pregnancy, the father argued that as per the MTP Act a minor's consent for MTP was irrelevant. The Court adjudicated upon the issue in light of Article 21 of the Indian Constitution that guarantees the right to life and personal liberty to all, including minors.

Srinivasan, J.: "…

2. …[T]he petitioner has prayed for issue of a direction to the Superintendent, Government Kasthuri Bhai Gandhi Hospital, Triplicane, Madras, to terminate the pregnancy of his daughter Sasikala. Thus, he prays for a direction to put an end to a life in the womb of Sasikala on the ground that she is still in her teens and teenage pregnancy will lead to many complications physically, physiologically, mentally and socially…

…

7. When this petition came up before us on 8.11.1993, we directed the Public Prosecutor to utilise the services of a Medical Practitioner to ascertain whether the girl is pregnant and report to this Court. We adjourned the matter by a week. Pursuant thereto the girl was taken to Anbu Clinic, Thiruvanmiyur, situated near Avvai Home. Dr. K.R. Radha, M.B.B.S., D.D. has examined the girl and given her findings as follows:—…

The certificate does not disclose any abnormality. One can say that the girl will deliver a child in the normal course.

8. Thereafter, the girl was also produced in Court and the matter was heard. We thought fit to put some questions to the girl in our Chamber. We spoke to the girl and found that she was not willing to have the pregnancy terminated. We recorded the same and posted the matter in Court for arguments. Counsel on both sides argued at length. We thought it better to record the evidence of the girl in so far as it relates to the prayer in this petition and also give an opportunity to the petitioner's counsel to cross-examine her. Her deposition was recorded *in camera*. We have found that the girl is quite capable of understanding things. She had no hesitation whatever in answering all questions put to her by counsel for the petitioner as well as by Public Prosecutor. The Court put some questions. Her answers are quite clear and specific. She knows her mind and she appears to be having definite ideas about her future. Her answers disclose enormous self-confidence on her part. In particular, the petitioner's counsel asked her as to what she would do if the first respondent deserts her, after some time. Her answer is "I am not worried". Counsel put another question as to what she would do if the first respondent disowns the child. Pat came the answer that she will bring up the child herself. At the end of the examination, the Court asked her as to what she meant when she said that she is not worried if Rajan deserts her. She clarified by saying that she will live alone even if he deserts her. According to the girl, her mother left the house with her younger brother when she was aged about 5. According to her, the first respondent married her and after the marriage they had sexual relationship resulting in the pregnancy. A perusal of her deposition shows that she is fully aware of the consequences of the pregnancy and the child-birth. She is quite categoric that the pregnancy should not be disturbed. It is quite obvious that she has already started loving the child that is growing in her womb …

…

MILLION DOLLAR QUESTION.

12. This question is not reported to have arisen before any Court in India. It is of great importance and relevance in the present day society as the number of teenage pregnancies is said to be on the increase. The question is whether the guardian of a minor girl is entitled to an order from the Court directing the termination of the pregnancy of his ward when the pregnant girl is not agreeable for such termination.

…

40. In India causing abortion has been an offence for ever. The Indian Penal Code uses the expression miscarriage and deals with it in S. 312 to 318. S. 312 reads:

> "Whoever voluntarily causes a woman with child to miscarry, shall, if such marriage is 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."

Thus, the only exception is that caused in good faith for the purpose of saving the life of the woman. Under the section, the consent of the pregnant woman is immaterial as she is also liable to be punished. In August 1971, Parliament passed the Act with a design to create more exceptions to the strict provisions of the Penal Code. … Whatever might have been the motive for the legislation, we are concerned only with the provisions thereof. According to the preamble, the Act is to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. S. 2(a) defines guardian as a person having the care of the person of a minor or lunatic. S. 2(c) defines a 'minor' as a person who under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. The expression 'registered medical practitioner' is defined in S. 2(d) of the Act. S. 3 is the pivotal section. It reads thus:—…

...

42. The provisions of the Act do not confer or recognise any right on any person to cause anabortion or termination of pregnancy. Even the pregnant woman cannot terminate the pregnancy except under the circumstance set out in the in the Act. Even during the first trimester, the woman cannot abort at her will and pleasure. There is no question of abortion 'on demand'. S. 3 is only an enabling provision to save the registered medical practitioner from the purview of the Indian Penal Code. Termination of pregnancy under the provisions of the Act is not the rule and it is only an exception. The normal rule that the pregnancy should continue to its term shall prevail unless a registered medical practitioner in the case of a pregnancy not exceeding twelve weeks or two registered medical practitioners in the case of a pregnancy exceeding 12 weeks but less than twenty weeks, opine in good faith that the continuance of the pregnancy would involve (i) a risk to the life of the pregnant woman, or (ii) grave injury to her physical or mental health, or (iii) 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. … Under explanation I to S. 3(2), if the pregnancy is alleged to have been caused by rape, the mental anguish resulting therefrom shall be presumed to constitute a grave injury to the mental health of the pregnant woman. The Explanation only provides for a presumption which can be rebutted in the facts and circumstances of the case. It is not necessary for us to refer to Explanation II in the present case. Sub-S. (4)(a) of S. 3 provides that if the pregnant woman has not attained the age of 18, or if she is a lunatic, the pregnancy shall not be terminated except with the consent of her guardian in writing. Sub-S. (4)(b) provides that no pregnancy shall be terminated except with the consent of the pregnant woman save as otherwise provided in clause (a).

43. Learned counsel for the petitioner places considerable reliance on the provisions of Sub-S. (4)(a) and (4)(b) of S. 3. It is contended by him that Sub-S. (4)(b) is subject to the provisions of Sub-S. (4)(a) and in the case of a minor, it is only the guardian who can decide whether the pregnancy should be terminated or not. According to him, the application of Sub-S. 4(b) is excluded by its own language if the pregnant woman has not attained the age of eighteen. We are unable to accept this contention. The entire scheme of the Act shows that the provisions thereof can be invoked only by the pregnant woman. If she happens to be a minor, the registered medical practitioner, who is approached for terminating the pregnancy, must take care to get the consent of the guardian of the minor in writing. Sub-S. (4)(a) can never be understood as dispensing with the consent of the pregnant woman if she is below 18 years of age. The provision is only intended to help the registered medical practitioner to take into account all the relevant facts and circumstances as set out

in S. 3 so as to decide whether the continuance of the pregnancy will involve any of the risks mentioned in the Section. For example, Sub-S. (3) requires the medical practitioner to take into account the pregnant woman's actual or reasonably foreseeable environment while determining the question whether the continuance of the pregnancy would involve such risk as is mentioned in Sub-S. (2). In the case of a minor, it is, therefore, necessary for the medical practitioner in order to ascertain the relevant facts under Sub-S. (3) to notify the guardian of the minor and get his written consent.

44. Learned counsel for the petitioner submits that the pregnancy of the petitioner's daughter has been caused by rape as defined by the Indian Penal Code and the requirements of Sub-S. (2) of S. 3 of the Act are fulfilled. According to him, the continuance of the pregnancy would involve grave injury to the physical or mental health of his daughter. There is no substance in this contention. As pointed out already, Explanation I provides only for a presumption. No doubt the Court is bound to presume, as the expression used is "shall be presumed". But, such presumption can be rebutted on the facts. In the present case, the question whether the pregnancy is caused by rape cannot be decided here, as it may arise before the Metropolitan Magistrate. But, even if it is assumed that the pregnancy is caused by rape, there is no question of anguish caused by such pregnancy in the pregnant woman. We have already pointed out that Sasikala is very keen on continuing the pregnancy and bearing the child. Hence, the continuance of the pregnancy will not cause any injury to her mental health.

45. Learned counsel for the petitioner invites our attention to the judgment of a Division Bench of this Court in *Komalavalli v. C.R. Nair and others* (1983 L.W. (Crl.)190). The petitioner therein was a woman having two children. She was gang-raped by three or four persons and became pregnant. She was detained in a Women's Welfare Institution. She applied under Article 226 of the Constitution of India for a direction to the Government Maternity Hospital to terminate her pregnancy. The Court was satisfied that she was impregnated against her will and unless the pregnancy was terminated, she will suffer traumatic and psychological shock. Hence, the Court granted the petition subject to the condition that qualified gynaecologists examine her and find that pregnancy can be terminated without detriment to her life and safety. The petitioner's husband was also a party to the proceeding. He was present in Court. The Bench has recorded that he stated that he will make the necessary arrangements for the future custody of the petitioner. That ruling will have no bearing in this case. Counsel on both sides have not been able to place before us a ruling of any Court in India which has a relevance to this case.

…

47. … Even if the petitioner is entitled to pray for termination of pregnancy, the same can be ordered only if the continuance of the pregnancy would involve the risks mentioned in sub-S. (2) of the S. 3 of the Act. In the present case, the petitioner has not made out any ground for granting the prayer. We are also of the opinion that if termination of pregnancy is ordered against the will of Sasikala, it will undoubtedly affect her mental health and there is likelihood of her physical health also being affected thereby.

48. The learned Additional Public Prosecutor rightly points out that the Constitution of India does not make any distinction between a major and a minor in the matter of fundamental rights. According to him, Article 21 of the Constitution of India is wide enough to include the right of the girl Sasikala to continue her pregnancy and have a child. In Durga Das Basu's "Shorter Constitution of India", 10th Edition, the following passage is found at page 108:—

> "Are there any unenumerated Fundamental Rights under the Constitution of India? A view is recently gaining ground that even though a right is not specifically mentioned in Art. 19(1), it may still be regarded as a fundamental right if it can be regarded as 'an integral part' of any of the fundamental rights specifically mentioned in Art. 19(1) as distinguished from the ordinary incidents of a named right.
>
> Consonant with this view, it has been held that the following unenumerated rights can be enforced under Art. 19 even though not mentioned therein:
>
> (a) Right to travel, which is necessary for exercising one's fundamental rights of trade or business under Art. 19(1)(d).
>
> (b) Right to privacy, as an integral part of the freedom of movement under Art. 19(1)(d).
>
> (c) Right to receive such higher or professional education as is necessary for carrying on a particular trade or profession, under Art. 19(1)(g).
>
> (d) Right to human dignity.
>
> (e) Right of an accused to a speedy trial."

Again, at page 157 it is said:

> "Right of privacy. 1. In *Kharak Singh's case* (AIR 1963 S.C. 1295), domiciliary visit by the Police without the authority of a law, was held to be violative of Art. 21, assuming that a right or privacy was a fundamental right derived from the freedom of movement guaranteed by Art. 19(1)(d), as well as personal liberty guaranteed by Art. 21.
>
> 2. But such right would not be absolute but must be subject to reasonable restrictions so that a provision for domiciliary visits would not be unreasonable if confined to habitual criminals or persons having criminal antecedents. Nor would it be violated by posting Policemen immediately outside the jail.
>
> 3. Similarly, wire-tapping of voluntary conversation, for the purpose of investigation of crime, has been upheld, assuming that privacy of conversation would be derived from personal liberty' under Art. 21."

49. The learned Additional Public Prosecutor referred to the judgment of the Supreme Court in *Govind v. State of Madhya Pradesh and another* (AIR 1975 SC 1378). Dealing with the right of privacy, the Court said that it will necessarily have to go through a process of case-by-case development. The Court referred to the judgment of the Supreme Court of the United States in *Roe v. Henry Wade* (1973) 410 U.S. 113).

50. Our attention is drawn to the judgment of the Supreme Court in *State of Maharashtra v. Madhukar Narayan Mardikar* (AIR 1991 SC 207). It is held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes. So also it is not open to any and every person to violate her person as and when he wishes.

51. We are also of the view that the life of the child in the embryo cannot be taken away for the reasons urged by the petitioner.

...

CONCLUSION

55. Taking the facts and circumstances of the case into account, we hold that the prayer of the petitioner cannot be granted…"

IN THE SUPREME COURT OF INDIA

Jacob George v. State of Kerala
(1994) 3 SCC 430
R.M. Sahai and B.L. Hansaria, JJ.

A homeopath was charged for committing an offence under Section 314 of the IPC for causing the death of a woman in the process of carrying out an abortion. He was acquitted by the Sessions Court. On appeal, the High Court of Kerala reversed the decision and convicted him under Section 314 of the IPC. While deciding the appeal, the Supreme Court made observations on the relationship between the IPC and the MTP Act.

Hansaria, J.: " …

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 Rs 5000. 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 CrRC 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 Rs 5000 as awarded, a sum of Rs 4000 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).

…

10. …The learned trial court…held that charges had not been established beyond reasonable doubt and therefore acquitted the appellant.

11. On appeal being preferred by the State and suo motu cognizance being taken by the High Court, the acquittal order has been set aside and the appellant has been convicted and sentenced as aforesaid, after refusing to give the benefit of Probation of Offenders Act as prayed for. Hence these appeals under Article 136 of the Constitution.

…

13. …What was found in autopsy would clearly show that the uterus got perforated because of employing scientific gadgets by the appellant a homeopath, which shows that he had absolutely no training to handle the gadgets. The High Court has rightly described the exercise of the appellant in this regard as "daring, crude and criminal". We therefore, agree with the High Court that an innocent life was sacrificed at the altar of a quack.

14. We would, therefore, uphold the conviction as awarded by the High Court, as the case is apparently not covered by any exception mentioned in the aforenoted Pregnancy Termination Act. It may be pointed out that the High Court did not accept the case of the prosecution insofar as the offence under Section 201 of the Indian Penal Code, or for that matter, under Section 342, is concerned.

…"

IN THE SUPREME COURT OF INDIA

Surendra Chauhan v. State of M.P.
AIR 2000 SC 1436
D.P. Wadhwa and Ruma Pal, JJ.

In this appeal from a Madhya Pradesh High Court decision, the accused had "illicit relations" with a woman, as a result of which the woman got pregnant. When she was three months pregnant, the accused took her to a clinic to terminate her pregnancy. However, she did not survive the procedure. The doctor's qualifications and the clinic did not comply with the MTP Act and Rules requirements. The question before the court was whether the accused had been rightly convicted by the High Court under Section 314 of the IPC (for causing death by miscarriage) and Section 34 of the IPC (common intention with the doctor).

Wadhwa, J.: "Appellant Surendra Chauhan (Chauhan) has been convicted for an offence under Sections 314/34 of the Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment for seven years and a fine of Rs 10,000 and in default of payment of fine to undergo further rigorous imprisonment for a period of two years. Chauhan and Dr Ravindra Kumar Sharma (Sharma) were tried together. While Sharma was tried under Section 314 IPC Chauhan was tried under Sections 314/34 IPC. Sharma had also been convicted under Section 314 IPC and similarly sentenced as Chauhan by the trial court. Both filed appeal in the Madhya Pradesh High Court. Their conviction and sentence were upheld and their appeal dismissed by judgment dated 7-1-1998. Both sought leave to appeal from this Court under Article 136 of the Constitution against the judgment of the High Court. Sharma was refused leave. Chauhan was granted leave and that is how the matter is now before us.

2. Alpana, a young girl of 24 years of age, was living with her mother Lalita Soni, a teacher, along with her younger sister, 18 years of age. Alpana was not married. On 23-3-1993 Alpana told her mother that she was feeling unwell and would herself go to the hospital. Next day in the morning when her mother was sitting in "pooja", Alpana told her that she was going to the hospital. She also told her mother that she along with Chauhan would be going to Sharma for her treatment. As noted above, Sharma stands convicted and sentenced. The same day, at about 2 or 3 p.m. while Lalita was resting in her home, both Sharma and Chauhan came to her and told her that Alpana was in a serious condition. Sharma said that Alpana was under treatment in his hospital. Chauhan said that the condition of Alpana was serious. Lalita told them that her husband was not in the house and when he would come they would both go to the hospital. Both the accused, i.e., Sharma and Chauhan said that the condition of Alpana was very serious and insisted Lalita to accompany them. On this Lalita immediately went along with them. In the hospital of Sharma she saw her daughter Alpana lying on the table inside the clinic. Lalita found that her daughter was dead. She asked what was the reason of the treatment and death of her daughter. On that Chauhan told her that he was having illicit relations with Alpana as a result of which she was carrying pregnancy of two to three months. He also told Lalita that he got Alpana admitted in the hospital for her abortion and during the treatment the condition of Alpana became serious causing her death. Lalita then went to inform her husband Mohan Lal and again went to the hospital of Sharma by which time the police had also arrived and there was a crowd standing outside the hospital.

3. Dr D.C. Jain is the Professor of Forensic Medicines in Medical College, Raipur. In his deposition he said that in his opinion Alpana was carrying pregnancy of three months. He did not find any injury in the uterus or vagina. He said it was possible that the abortion was caused without applying anaesthesia to the deceased causing her death or her death could be due to fear. He found that the uterus was enlarged containing blood clots. He gave his opinion as under:

"Deceased was pregnant, foetus should be in uterus. Foetus age is 3 months. No injury to uterus or vagina detected. It is possible that the deceased died of vagal inhibition due to the effect of abortion without anaesthesia or due to fear."

In his cross-examination he said that shock also takes place during the state of fear. Dr H.K. Josh performed post-mortem on the dead body of Alpana. According to him the cause of death was shock.

4. There have been concurrent findings that Chauhan was having illicit relations with Alpana with the result that she became pregnant. He accompanied her to the clinic of Sharma for her abortion. It has also come on record that Sharma was having a degree of Bachelor of Medicine in Electrohomoeopathy from the Board of Electrohomoeopathic Systems of Medicines, Jabalpur (M.P.). This entitled him to practise in Electrohomoeopathic systems of medicines. He also possessed a Diploma of Bachelor of Medicine and Surgery in Ayurved. Alpana met her death in the clinic of Sharma either due to shock or without applying anaesthesia while she was undergoing abortion. Sharma is not a medical

practitioner, who possesses any recognised medical qualification as defined in clause (*h*) of Section 2 of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has any experience or training in gynaecology and obstetrics.

5. Section 314 IPC is as under:

"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."

From the record it is apparent that Sharma and Chauhan had the intent to cause miscarriage of Alpana, who was pregnant, and death was caused to Alpana by Sharma while conducting abortion…

…

7. During the course of investigation the police also recovered some instruments from the dicky of the scooter of Sharma allegedly used for causing abortion. One Hindi book containing the literature on abortion, contraceptives and one Hindi book containing an illustrative abortion guide were seized from the clinic of Sharma…

…

13. There is another aspect of the matter. After the coming into force of the Medical Termination of Pregnancy Act, 1971 provisions of IPC relating to miscarriage became subservient to that Act because of the non obstante clause in Section 3 which section is as under:

"3.(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.

…

14. Under Section 4 of the Act termination of pregnancy shall be made in accordance with the Act and at a hospital established or maintained by the Government or a place approved by the Government for the purposes of the Act. Rule 4 of the Medical Termination of Pregnancy Rules, 1975, framed under the Act, provides as to how a place under Section 4 could be approved and how inspection etc. of such place is to be carried out. A place shall not be approved under Section 4:

"(*i*) unless the Government is satisfied that termination of pregnancies may be done therein under safe and hygienic conditions; and

(*ii*) unless the following facilities are provided therein, namely:

(*a*) an operation table and instruments for performing abdominal or gynaecological surgery;

(*b*) anaesthetic equipment, resuscitation equipment and sterilisation equipment;

(*c*) drugs and parenteral fluids for emergency use".

15. In the present case Sharma was certainly not competent to terminate the pregnancy of Alpana nor his clinic had the approval of the Government. Even the basic facilities for abortion were not available in his clinic. Chauhan took Alpana to the clinic of Sharma with the intent to cause her miscarriage and then her death was caused by Sharma while causing abortion, which act was done by Sharma in furtherance of the common intention of both Sharma and Chauhan. There is no escape from the conclusion that Chauhan had been rightly convicted under Sections 314/34 IPC.

16. The question then arises of the sentence awarded to Chauhan. We are of the opinion that the sentence awarded is rather on the higher side. We would, therefore, reduce the sentence of imprisonment to one-and-a-half years (18 months) rigorous imprisonment but would enhance the fine to Rs 25,000 and in default of payment of fine Chauhan to undergo further rigorous imprisonment for a period of one year. In case fine is realised the same shall be payable to Lalita Soni, the mother of Alpana.

17. The appeal is thus partly allowed."

IN THE HIGH COURT OF RAJASTHAN

Nand Kishore Sharma v. Union of India
AIR 2006 Raj 166
S.N. Jha, C.J. and Rajesh Balia, J.

In this public interest litigation, the petitioner challenged the constitutional validity of Section 3(2)(a) & (b) and Explanations I and II to Section 3 of the MTP Act, arguing that the provisions legalized abortion and permitted the killing of an unborn child. The High Court considered the dominant object behind the MTP Act to decide whether its provisions violate Article 21 of the Indian Constitution.

Jha, C.J.: "The petitioner who claims to be a social activist has filed this writ petition as a Public Interest Litigation questioning the vires of the Medical Termination of Pregnancy Act, 1971 (in short, the Act) particularly Section 3(2)(a) and (b) and Explanations I and II to Section 3 of the Act as being unethical and violative of Article 21 of the Constitution of India.

…

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:…

…

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:—…

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.

12. In the above premises, we are satisfied that the Act or the provisions particularly complained of, cannot be said to be invalid, and no case thus is made out for interference by the Court.

…"

IN THE HIGH COURT OF BOMBAY

Nikhil D. Datar & Ors. v. Union of India
(2008) 110 Bom LR 3293
R.M.S. Khandeparkar and A.A. Sayed, JJ.

A woman received a diagnosis of substantial foetal cardiac abnormalities only in the 24th week of her pregnancy and sought permission from the Bombay High Court for termination of her 26 week pregnancy. Together with her husband and doctor, she challenged the constitutionality of Section 5 of the MTP Act in so far as it does not include the contingencies specified in Section 3(2)(b)(ii) to permit medical termination of pregnancy post the 20 week-limit in cases where there is a "substantial risk" that the child upon birth would suffer from "such physical or mental abnormalities as to be seriously handicapped."

Khandeparkar, J.: "**1.** …

2. By the present petition, the petitioners are seeking declaration that Section 5 of The Medical Termination of Pregnancy Act, 1971, for short "the said Act", to the extent it does not include the eventualities specified under Section 3(2)(b)(ii) of the said Act is ultra vires and that, therefore, the Section 5(1) of the said Act should be read down to include the said eventualities, and consequently should be read to include the following words "and 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" and hence direction should be issued to the respondents to allow the petitioner No.3 to terminate the pregnancy.

3. The facts which are not in dispute are that the petitioner No.3 is currently in 26th week of pregnancy. During 24th week of pregnancy, the petitioner No.3 having undergone the necessary medical tests learnt that the foetus in her womb was diagnosed to have congenital complete heart block. The petitioner Nos.2 and 3 consulted the petitioner No.1 and sought his opinion about the possibility for termination of pregnancy after learning about the alleged anomalies in the foetus.

4. It is the case of the petitioners that though the termination of pregnancy has been advised, on account of statutory provisions comprised under the said Act, the doctors are reluctant to perform the necessary surgical operation in that regard.

…

9. The provision of law, as comprised under Section 3(1) of the said Act, provides that 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 the said Act. Sub-section (2) of Section 3 of the said Act provides that subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,- where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or 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 - 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 there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Explanation I provides that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation II provides that 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. Sub-section (3) thereof provides that 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 reasonable foreseeable environment. Sub-section (4) provides that no pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian, and save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

10. Section 5 of the said Act, which is yet another section dealing with the pregnancy, in its sub-section (1) provides that 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. Sub-section (2) provides that notwithstanding anything contained in the Indian Penal Code, 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.

11. The above provisions of law comprised under the said Act clearly disclose the circumstances under which pregnancy can be terminated. Undoubtedly, Section 5 of the said Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy on the ground that delivery of a child may result in some abnormalities in or to the child to be born. It strictly restricts to the cases where life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression "good faith" discloses that the opinion has to be based on the necessary examination required to form such an opinion.

12. As far as Section 3(2)(b)(ii) is concerned, it clearly speaks of right to terminate the pregnancy where there is a substantial risk in allowing the child to take birth as it would suffer from such physical or mental abnormalities as to be seriously handicapped. However, such right is restricted to the maximum period of twenty weeks of pregnancy and not beyond it. Section 3(2)(b)(ii) is very clear in that regard. It also provides that before opting for such pregnancy within the said period, it is necessary for two registered medical practitioners to form an opinion in good faith for termination of the pregnancy. In case, the pregnancy has not exceeded twelve weeks, then such an opinion can be formed in good faith by any one medical practitioner.

13. In the case in hand, the opinion expressed by the Committee which was constituted pursuant to the direction of this Court has clearly opined that "there are very least chances that child will be born incapacitated and handicapped to survive. On medical reasons, the committee feels that the findings observed do not have substantive significance to resort the termination of pregnancy."

14. The findings which have been arrived at on examination of the petitioner no.3 and various reports of her medical examination and which have been reproduced in the earlier part of the order, undoubtedly refer to "complete heart block with a ventricular rate of 50-55 per minute,"; however, it also discloses the finding to the effect that "heart is structurally and functionally normal. Great arteries are in mal position (L-malposition) without any other structural defects and

it is viable to normal life provided there are no other structural anomalies in the heart. In the echocardiogram done outside, no other structural anomalies are identified. Only small percentage of kids will be symptomatic and will require implantation of the pace maker costing less than, one lakh of rupees which will be replaced by adult pace make at a later date, leading to normal life."

…

17. Undoubtedly, the opinion given by Dr. Shakuntala Prabhu and Dr. Snehal Kulkarni refers to the possibility of "a substantial risk if the child were born it would suffer from physical or mental abnormalities as to be seriously handicapped." However, the opinion itself discloses the necessary treatment which is required to be given to overcome the problem which the child on its birth may face, apart from the fact that considering the defects as they are noticed today, both the doctors are not sure that cardiac surgery would be required at or after the birth to the child and according to them, it would all depend upon post delivery sonography to be conducted. The question No.3 and answer thereto is very clear in this regards and reads thus:-

> "Q.3 Since there are only two defects noticed, can you surely say that the cardiac surgery will not be required at/after birth?
>
> Ans: No.
>
> - On post delivery sonography, 50% of babies show additional defects.
>
> - In such cases cardiac surgery is required."

Being so, taking into consideration the opinion expressed by the doctors' committee from J.J.Group of Hospital as well as the Two Expert Committee of two doctors which was constituted by the petitioners themselves, there is no categorical opinion before us from the medical experts to the effect that "if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped."

Apart from the fact that already the period of 26 weeks of pregnancy has passed, even the requirements of the provisions of law under Section 3(2)(ii) read with Section 3(2)(b) are not satisfied. In other words, even if the petitioners were to approach this Court before the expiry of 20 weeks of pregnancy, based on the medical opinion placed before us, it would not have been possible for this Court to issue direction for exercise of right in terms of Section 3 of the said Act.

18. It was sought to be argued on behalf of the petitioners that the preamble of the said Act clearly provides that there is avoidable wastage of the mother's health, strength and, sometimes, life, and therefore, the legislation in the form of the said Act seeks to liberalise certain existing provisions relating to termination of pregnancy which is nothing but a health measure in cases where there is danger to the life or risk to physical or mental health of the woman as also on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc., and where there is substantial risk that the child, if born, would suffer from deformities and diseases, and considering the eventualities under which the pregnancy can be terminated in terms of Section 3, the same should be read in Section 5 also. According to the learned Advocate, there was lapse on the part of the legislators in not including such eventualities under Section 5 of the said Act and relying upon the decision of the Apex Court in the matter of Union of India v. Association for Democratic Reforms & Anr., reported in (2002)5 SCC 294, the learned advocate for the petitioners submitted that the said lacuna is required to be filled in by reading down Section 5 to include such eventualities.

19. We are afraid the contention on behalf of the petitioners if accepted would virtually amount to legislating upon Section 5 of the said Act. Under the guise of reading down a provision of law, the Courts are not empowered to legislate upon a statute. That is essentially the function of the legislature.

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 experts 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…

…"

IN THE HIGH COURT OF RAJASTHAN

Jamana Suthar v. State of Rajasthan
2009 SCC OnLine Raj 3468
Dinesh Maheshwari, J.

A minor girl, who had conceived as a result of rape, filed an application through her parents before the concerned authorities to facilitate the medical termination of her pregnancy. Given the inaction of the authorities, the minor approached the High Court seeking a writ of mandamus directing the concerned authorities to terminate her pregnancy. The High Court examined whether the minor's pregnancy of around 25 weeks could be terminated under Section 5 of the MTP Act.

Maheshwari, J.: "…

The petitioner is said to be a minor married girl residing with her father but who was allegedly kidnapped on 02.01.2009 and a report in that regard was lodged by her father at Police Station, Sri Dungargarh where FIR No. 22/2009 was registered for the offences under Sections 363, 366 and 120B IPC. The petitioner's father also filed a Habeas Corpus Petition bearing No. 1311/2009 to this Court alleging inaction on the part of the police authorities in recovering the petitioner from the illegal detention of the accused Shanker Lal. It is borne out from the record that the petitioner was allegedly recovered by the police in the last week of May 2009 from the State of Karanataka and was produced before the Judicial Magistrate and her statements were recorded on 02.06.2009 wherein she alleged kidnapping by three named accused persons and also stated herself having been subjected to rape by the accused continuously leading to pregnancy.

It is the case of the petitioner that she submitted an application before the concerned authorities through her father to get rid of the unwanted and illegal pregnancy caused by rape...The petitioner has also filed with the additional affidavit the applications said to have been made on 13.06.2009 to the Superintendent of Police, Bikaner in this regard as Annexure-6 and that to the Collector, Bikaner on 08.07.2009 as Annexure-7.

This petition was filed only on 13.07.2009 stating that there had been inaction on the part of the respondents in not providing the petitioner the facility of medical termination of pregnancy that amounted to violation of her fundamental right; and it was prayed that by way of mandamus, the respondents be directed to terminate the pregnancy of the petitioner according to the provisions of the Medical Termination of Pregnancy Act, 1971 ('the Act of 1971') without delay and to pay her compensation for inaction of not terminating the pregnancy with immediate effect.

…The petitioner did visit the medical college on 21.07.2009 and a Board was constituted to examine her…

The Board stated its opinion regarding the proposition of termination of pregnancy thus:

> "As per MTP Act termination of pregnancy can be done upto 20 weeks of pregnancy. The present case is having pregnancy of 25 ± 1 week duration. So the medical termination of pregnancy is not indicated. Above 20 weeks of pregnancy it can be terminated only on therapeutic consideration for the mother, when continuation of pregnancy will involve a risk to mother's life. In present case there is no condition which could involve risk to mother's life."

…

…Looking to the submissions made on 30.07.2009, this Court, in the first session, passed the following order:-

> "…
>
> Having regard to the facts and circumstances of this case, it is considered appropriate and hence directed that if the petitioner Jamana Suthar appears today before the Chief Judicial Magistrate, Bikaner, her statements be got recorded particularly in regard to the propositions as stated in the writ petition that she wants termination of her pregnancy. After such statements, if she attends the hospital concerned wherein she was examined earlier by the Medical Board under the orders of this Court, her case may specifically be examined by a responsible Medical Officer particularly on her wishes and intentions and so also about the medical opinion if there would be likelihood of any danger to her life in case of carrying out termination of pregnancy at this stage.
>
> It shall be ensured that copies of the report from the Medical Officer as well as the statements reach the Government Counsel and/or the Registry of this Court per fax today itself.
>
> …"

...

In her statement on 30.07.2009, the petitioner stated that she was carrying pregnancy of about six months but was desirous of terminating the same. …

On 30.07.2009, however, the Medical Board stated its opinion in the following terms:-

> "(1) There would be likehood of danger to her life in case of carrying out termination of pregnancy at this stage.
>
> (2) If labour is induced for carrying out termination of pregnancy there are chances of live birth of new born as the maturity of foetus is 26 weeks and estimated foetal weight is 755 gms."

…

Though the learned counsel for the petitioner has made a fervent appeal for issuing directions for permitting the pregnancy of the petitioner to be terminated for the same having been caused against her wishes and because of rape, this Court finds itself unable to grant relief for several reasons and factors. Looking to the background facts and circumstances and pendency of investigation, this Court is not in a position to directly come to the conclusion that it had been a matter of rape. Leaving this aspect aside, and assuming that the pregnancy for whatever reason had been against the wish and desire of the petitioner, the intriguing aspect in the present matter is that by the time the petitioner chose to file this writ petition i.e., on 13.07.2009, the pregnancy had been of about 24 weeks, as is borne out from the medical reports. It does not appear that the petitioner or her parents at the time when she was recovered and made the statement before the Court and investigating agency in the first week of June 2009 made any suggestion about her desire to have the pregnancy terminated so that her matter could have been considered in terms of Section 3 of the Act of 1971. Then, it is very difficult to find if the petitioner specifically made the representations as alleged on 12/13.06.2009. In any case, it remains entirely inexplicable that this petition was chosen to be filed only on 13.07.2009.

The facts repeatedly found from the medical reports are to the effect that at the time of filing of the petition, the petitioner had the pregnancy of about 24 weeks and then, the report dated 30.07.2009 even states the opinion about likelihood of danger to her life in case of carrying out termination at this stage and so also of the possibility of live birth.

The learned counsel for the petitioner strenuously made the submissions that when read in the context of Explanation 1 to Section 3, where pregnancy caused by rape is said to be of grave injury to the mental health of a pregnant woman, the same aspect must *ipso facto* ought to have been made applicable to the provisions of Section 5 of the Act of 1971 too whereby the pregnancy could be terminated if required immediately in order to save the life of the pregnant woman. The submissions as made by the learned counsel attempted at finding incorrectness or invalidity in any of the provisions as contained in the Act of 1971 cannot be countenanced in this writ petition for no such basis having been laid in the petition; and if the vires of the enactment were to be challenged at all, it was required that the petition was framed accordingly to be laid before the appropriate Division Bench.

Noteworthy it is that the provisions of the Act of 1971, particularly its Section 3 have been held valid by the Division Bench of this Court in the case of *Nand Kishore Sharma v. Union of India*: AIR 2006 Rajasthan 166.

Though the learned counsel for the petitioner has attempted to refer to certain decisions in *V. Krishnan v. G. Rajan alias Madipu Rajan the Inspector of Police (Law and Order)*: 1994 (1) Madras Law Weekly (Criminal) 16, *Komalavalli v. C.R. Nair*: 1984 Cri.L.J. 446; *D. Rajeshwari* v. *State of Tamil Nadu*: 1996 Cri. L.J. 3795; and the orders passed by the Hon'ble Punjab and Haryana High Court in *Chandigarh Administration v. Unknown*: CWP No. 8760/2009 on 09.06.2009 and 17.07.2009; and but none of them could be applied to the petitioner's case in view of the length of the pregnancy and the present medical reports not supporting her case.

In the given set of facts and circumstances, this Court is unable to find any legal ground within the frame work of law, particularly in view of the Act of 1971, to grant the relief to the petitioner as prayed for.

However, if, on and for the reasons and circumstances as contemplated by Section 5, any opinion is formed in good faith by a registered medical practitioner about necessity of immediate termination of pregnancy, this order shall not be treated to be of any comment in that regard.

This order shall also not be of any impediment for any other relief, if claimed and prayed for by the petitioner in accordance with law. It is made clear that in the given circumstances, even the aspect of claim of compensation by the petitioner has not been heard and finally decided by this Court in this petition.

…"

IN THE SUPREME COURT OF INDIA

Suchita Srivastava & Anr. v. Chandigarh Administration
(2009) 9 SCC 1
K.G. Balakrishnan, C.J., and P. Sathasivam and B.S. Chauhan, JJ.

A woman diagnosed with "mental retardation" became pregnant as a result of rape while she was living as an inmate in a government run welfare home in Chandigarh. The Chandigarh Administration had received approval from the Punjab and Haryana High Court to terminate her pregnancy (of 19 weeks), as it was considered by the court to be in her best interest. In this appeal, the Supreme Court examined the validity of the High Court's order which did not take into account the woman's consent. It also considered what should be the appropriate approach for a court while ascertaining the "best interests" of an intellectually disabled woman in exercise of its "parens patriae" jurisdiction.

Balakrishnan, C.J.: "Leave granted. A Division Bench of the High Court of Punjab and Haryana in *Chandigarh Admn. v. Nemo*, by orders dated 9-6-2009 [CWP No. 8760 of 2009, order dated 9-6-2009] and 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009], ruled that it was in the best interests of a mentally retarded woman to undergo an abortion.

2. The said woman (name withheld, hereinafter "the victim") had become pregnant as a result of an alleged rape that took place while she was an inmate at a government-run welfare institution located in Chandigarh. After the discovery of her pregnancy, the Chandigarh Administration, which is the respondent in this case, had approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child.

3. The High Court had the opportunity to peruse a preliminary medical opinion and chose to constitute an expert body consisting of medical experts and a judicial officer for the purpose of a more thorough inquiry into the facts. In its order dated 9-6-2009 [CWP No. 8760 of 2009, order dated 9-6-2009], the High Court framed a comprehensive set of questions that were to be answered by the expert body. In such cases, the presumption is that the findings of the expert body would be given due weightage in arriving at a decision. However, in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009] the High Court directed the termination of the pregnancy in spite of the expert body's findings which show that the victim had expressed her willingness to bear a child.

4. Aggrieved by these orders, the appellants moved this Court and the second appellant, Ms Tanu Bedi, Advocate appeared in person on 20-7-2009 and sought a hearing on an urgent basis because the woman in question had been pregnant for more than 19 weeks at that point of time. We agreed to the same since the statutory limit for permitting the termination of a pregnancy i.e. 20 weeks was fast approaching.

…

6. After hearing the counsel at length we had also considered the opinions of some of the medical experts who had previously examined the woman in question. Subsequent to the oral submissions made by the counsel and the medical experts, we had granted a stay on the High Court's orders thereby ruling against the termination of the pregnancy.

7. The rationale behind our decision hinges on two broad considerations. The first consideration is whether it was correct on the part of the High Court to direct the termination of pregnancy without the consent of the woman in question. This was the foremost issue since a plain reading of the relevant provision in the Medical Termination of Pregnancy Act, 1971 clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any "mental illness". As will be explained below, there is a clear distinction between "mental illness" and "mental retardation" for the purpose of this statute.

8. The second consideration before us is that even if the said woman was assumed to be mentally incapable of making an informed decision, what are the appropriate standards for a court to exercise "parens patriae" jurisdiction? If the intent was to ascertain the "best interests" of the woman in question, it is our considered opinion that the direction for termination of pregnancy did not serve that objective. Of special importance is the fact that at the time of hearing, the woman had already been pregnant for more than 19 weeks and there is a medico-legal consensus that a late-term abortion can endanger the health of the woman who undergoes the same.

…

13. [Upon discovery of the pregnancy of the woman], [t]he Director-Principal of GMCH thereafter constituted a three-member Medical Board on 25-5-2009 which was headed by the Chairperson of the Department of Psychiatry in the said hospital. Their task was to evaluate the mental status of the victim and they opined that the victim's condition was that of "mild mental retardation".

…

TERMINATION OF PREGNANCY CANNOT BE PERMITTED WITHOUT THE CONSENT OF THE VICTIM IN THIS CASE

18. Even though the expert body's findings were in favour of continuation of the pregnancy, the High Court decided to direct the termination of the same in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009]. We disagree with this conclusion since the victim had clearly expressed her willingness to bear a child.

19. The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be "mentally retarded" should give her consent for the termination of a pregnancy.

20. 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 "the MTP Act") …

21. 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.

22. 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.

23. A perusal of [Sections 3 and 4 of the MTP Act] 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*)]…

24. The Explanations to Section 3 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.

25. 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.

26. 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.

27. 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.

28. It is pertinent to note that the MTP Act had been amended in 2002, by way of which the word "lunatic" was replaced by the expression "mentally ill person" in Section 3(4)(*a*) of the said statute. The said amendment also amended Section 2(*b*) of the MTP Act, where the erstwhile definition of the word "lunatic" was replaced by the definition of the expression "mentally ill person" which reads as follows:

> "2. (*b*) 'mentally ill person' means a person who is in need of treatment by reason of any mental disorder other than mental retardation;"

The 2002 amendment to the MTP Act indicates that the legislative intent was to narrow down the class of persons on behalf of whom their guardians could make decisions about the termination of pregnancy. It is apparent from the definition of the expression "mentally ill person" that the same is different from that of "mental retardation". A similar distinction can also be found in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This legislation treats "mental illness" and "mental retardation" as two different forms of "disability". This distinction is apparent if one refers to Sections 2(*i*), (*q*) and (*r*) [of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.] which define "disability", "mental illness" and "mental retardation" in the following manner:

> "2. (*i*) 'disability' means—
>
> …
>
> (*vi*) mental retardation;
>
> (*vii*) mental illness;
>
> ***
>
> (*q*) 'mental illness' means any mental disorder other than mental retardation;
>
> (*r*) 'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence."

The same definition of "mental retardation" has also been incorporated in Section 2(*g*) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

29. These legislative provisions clearly show that persons who are in a condition of "mental retardation" should ordinarily be treated differently from those who are found to be "mentally ill". While a guardian can make decisions on behalf of a "mentally ill person" as per Section 3(4)(*a*) of the MTP Act, the same cannot be done on behalf of a person who is in a condition of "mental retardation".

30. The only reasonable conclusion that can be arrived at in this regard is that the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is indeed an essential condition for proceeding with the termination of a pregnancy.

31. 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.

32. Besides placing substantial reliance on the preliminary medical opinions presented before it, the High Court has noted some statutory provisions in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as well as the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 where the distinction between "mental illness" and "mental retardation" has been collapsed. The same has been done for the purpose of providing affirmative action in public employment and education as well as for the purpose of implementing anti-discrimination measures. The High Court has also taken note of the provisions in IPC which lay down strong criminal law remedies that can be sought in cases involving the sexual assault of "mentally ill" and "mentally retarded" persons. The High Court points to the blurring of these distinctions and uses this to support its conclusion that "mentally ill" persons and those suffering from "mental retardation" ought to be treated similarly under the MTP Act, 1971. We do not agree with this proposition.

33. We must emphasise that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights.

Termination of pregnancy is not in the "best interests" of the victim

34. In the impugned orders, the High Court has in fact agreed with the proposition that a literal reading of Section 3 of the MTP Act would lead to the conclusion that a mentally retarded woman should give her consent in order to proceed with the termination of a pregnancy. However, the High Court has invoked the doctrine of "parens patriae" while exercising its writ jurisdiction to go beyond the literal interpretation of the statute and adopt a purposive approach. The same doctrine has been used to arrive at the conclusion that the termination of pregnancy would serve the "best interests" of the victim in the present case even though she has not given her consent for the same. We are unable to accept that line of reasoning.

35. The doctrine of "parens patriae" has been evolved in common law and is applied in situations where the State must make decisions in order to protect the interests of those persons who are unable to take care of themselves. Traditionally this doctrine has been applied in cases involving the rights of minors and those persons who have been found to be mentally incapable of making informed decisions for themselves.

36. Courts in other common law jurisdictions have developed two distinct standards while exercising "parens patriae" jurisdiction for the purpose of making reproductive decisions on behalf of mentally retarded persons. These two standards are the "best interests" test and the "substituted judgment" test.

37. As evident from its literal description, the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court's decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.

38. The application of the "substituted judgment" test requires the Court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. This is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent.

39. In the present case the victim has been described as a person suffering from "mild mental retardation". This does not mean that she is entirely incapable of making decisions for herself. The findings recorded by the expert body indicate that her mental age is close to that of a nine-year-old child and that she is capable of learning through rote memorisation and imitation. Even the preliminary medical opinion indicated that she had learnt to perform basic bodily functions and was capable of simple communications. In light of these findings, it is the "best interests" test alone which should govern the inquiry in the present case and not the "substituted judgment" test.

40. We must also be mindful of the varying degrees of mental retardation, namely, those described as borderline, mild, moderate, severe and profound instances of the same. Persons suffering from severe and profound mental retardation usually require intensive care and supervision and a perusal of academic materials suggests that there is a strong preference for placing such persons in an institutionalised environment. However, persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time.

41. A developmental delay in mental intelligence should not be equated with mental incapacity and as far as possible the law should respect the decisions made by persons who are found to be in a state of mild to moderate "mental retardation".

42. In the present case, the victim has expressed her willingness to carry the pregnancy till its full term and bear a child. The expert body has found that she has a limited understanding of the idea of pregnancy and may not be fully prepared for assuming the responsibilities of a mother. As per the findings, the victim is physically capable of continuing with the pregnancy and the possible risks to her physical health are similar to those of any other expecting mother. There is also no indication that the prospective child may be born with any congenital defects. However, it was repeatedly stressed before us that the victim has a limited understanding of the sexual act and perhaps does not anticipate the social stigma that may be attached to a child which will be born on account of an act of rape.

43. Furthermore, the medical experts who appeared before us also voiced the concern that the victim will need constant care and supervision throughout the pregnancy as well as for the purposes of delivery and childcare after birth. Maternal responsibilities do entail a certain degree of physical, emotional and social burdens and it was proper for the medical experts to gauge whether the victim is capable of handling them.

44. The counsel for the respondent also alerted us to the possibility that even though the victim had told the members of the expert body that she was willing to bear the child, her opinion may change in the future since she was also found to be highly suggestible.

45. Even if it were to be assumed that the victim's willingness to bear a child was questionable since it may have been the product of suggestive questioning or because the victim may change her mind in the future, there is another important concern that should have been weighed by the High Court. At the time of the order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009], the victim had already been pregnant for almost 19 weeks. By the time the matter was heard by this Court on an urgent basis on 21-7-2009, the statutory limit for terminating a pregnancy i.e. 20 weeks, was fast approaching. There is of course a cogent rationale for the provision of this upper limit of 20 weeks (of the gestation period) within which the termination of a pregnancy is allowed. This is so because there is a clear medical consensus that an abortion performed during the later stages of a pregnancy is very likely to cause harm to the physical health of the woman who undergoes the same.

…

48. …[I]t is our considered opinion that the direction given by the High Court (in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009]) to terminate the victim's pregnancy was not in pursuance of her "best interests". Performing an abortion at such a late stage could have endangered the victim's physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure.

49. We must also mention that the High Court in its earlier order had already expressed its preference for the termination of the victim's pregnancy (see para 38 in order dated 9-6-2009 [CWP No. 8760 of 2009, order dated 9-6-2009]) even as it proceeded to frame a set of questions that were to be answered by an expert body which was appointed at the instance of the High Court itself. In such a scenario, it would have been more appropriate for the High Court to express its inclination only after it had considered the findings of the expert body.

50. Our conclusions in the present case are strengthened by some norms developed in the realm of international law. For instance one can refer to the principles contained in the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [GA Res 2856 (XXVI) of 20-12-1971] which have been reproduced below:

> "1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
>
> 2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
>
> 3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
>
> 4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
>
> 5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.
>
> 6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
>
> 7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities."

Special emphasis should be placed on Principle 7 (cited above) which prescribes that a fair procedure should be used for the "restriction or denial" of the rights guaranteed to mentally retarded persons, which should ordinarily be the same as those given to other human beings.

51. In respecting the personal autonomy of mentally retarded persons with regard to the reproductive choice of continuing or terminating a pregnancy, the MTP Act lays down such a procedure. We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 1-10-2007 and the contents of the same are binding on our legal system.

52. The facts of the present case indeed posed some complex questions before us. While we must commend the counsel for their rigorous argumentation, this case also presents an opportunity to confront some social stereotypes and prejudices that operate to the detriment of mentally retarded persons. Without reference to the present proceedings, we must admit to the fact that even medical experts and judges are unconsciously susceptible to these prejudices. [See generally: Susan Stefan, "Whose Egg is it anyway? Reproductive Rights of Incarcerated, Institutionalised and Incompetent Women", 13 Nova Law Review 405-56 (November 1989).]

53. We have already stressed that persons who are found to be in borderline, mild and moderate forms of mental retardation are capable of living in normal social conditions and do not need the intensive supervision of an institutionalised environment. As in the case before us, institutional upbringing tends to be associated with even more social stigma and the mentally retarded person is denied the opportunity to be exposed to the elements of routine living.

For instance, if the victim in the present case had received the care of a family environment, her guardians would have probably made the efforts to train her to avoid unwelcome sexual acts. However, the victim in the present case is an orphan who has lived in an institutional setting all her life and she was in no position to understand or avoid the sexual activity that resulted in her pregnancy. The responsibility of course lies with the State and fact situations such as those in the present case should alert all of us to the alarming need for improving the administration of the government-run welfare institutions.

…

54. It would also be proper to emphasise that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents. Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation. The said "eugenics theory" has been used in the past to perform forcible sterilisations and abortions on mentally retarded persons. [See generally: Elizabeth C. Scott, "Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy", Duke Law Journal 806-65 (November 1986).] We firmly believe that such measures are anti-democratic and violative of the guarantee of "equal protection before the law" as laid down in Article 14 of our Constitution.

55. It is also pertinent to note that a condition of "mental retardation" or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities.

CONCLUSION AND DIRECTIONS

…

57. The substantive questions posed before us were whether the victim's pregnancy could be terminated even though she had expressed her willingness to bear a child and whether her "best interests" would be served by such termination. As explained in the forementioned discussion, our conclusion is that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her "best interests".

58. 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.

59. 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.

60. The findings recorded by the expert body which had examined the victim indicate that the continuation of the pregnancy does not pose any grave risk to the physical or mental health of the victim and that there is no indication that the prospective child is likely to suffer from a congenital disorder. However, concerns have been expressed about the victim's mental capacity to cope with the demands of carrying the pregnancy to its full term, the act of delivering a child and subsequent childcare. In this regard, we direct that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

61. Since there is an apprehension that the woman in question may find it difficult to cope with maternal responsibilities, the Chairperson of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (constituted under the similarly named 1999 Act) has stated in an affidavit that the said Trust is prepared to look after the interests of the woman in question which will include assistance with childcare. In the said affidavit, it has been stated that this Trust will consult the Chandigarh Administration as well as experts from the Post Graduate Institute of Medical Education and Research (PGIMER) in order to ensure proper care and supervision.

62. If any grievances arise with respect to the same subject-matter in the future, the respondent can seek directions from the High Court of Punjab and Haryana under its writ jurisdiction. The present appeal is disposed of accordingly."

IN THE HIGH COURT OF DELHI

Dr. Raj Bokaria v. Medical Council of India
2010 SCC OnLine Del 4125
S. Muralidhar, J.

The petitioner, a doctor, terminated a woman's pregnancy of over 20 weeks in order to protect her life following a diagnosis of foetal impairments. This diagnosis was causing extreme mental stress and deteriorating the pregnant woman's health. However, the woman died during the course of the termination procedure. The Ethics Committee of the Medical Council of India penalized the petitioner for terminating a pregnancy beyond 20 weeks in contravention of Section 3 of the MTP Act. The petitioner challenged this order before the Delhi High Court arguing that the Ethics Committee overlooked Section 5 of the MTP Act, which permits termination of pregnancy to save a woman's life. While adjudicating on the petitioner's claim, the High Court examined the requirements for complying with Section 5 of the MTP Act.

Muralidhar, J.: " …

2. The wife of Respondent No. 2, late Dr. Roopa Dutta, a gynaecologist and obstetrician herself, was being treated at the Moolchand Kheratiram Hospital, Respondent No. 3 herein, by a team of four doctors headed by the Petitioner during her second pregnancy in 2003. An ultrasound carried out after 20 weeks of pregnancy revealed that the foetus had a single umbilical artery. Amniocentesis done in Ganga Ram Hospital revealed that the chromosome count in the foetus was abnormal being 22. It is stated by the Petitioner that late Dr. Roopa Dutta was also a known patient of asthma and could not accept the thought of delivery of an abnormal child. It is stated that she suffered from extreme mental stress and aggravated asthma and her condition became precarious. The Petitioner states that in light of the above complication, the issue was discussed with Respondent No. 2 and his late wife. she and her husband therefore took a conscious decision to discontinue the pregnancy in order to protect the life of late Dr. (Mrs.) Roopa Dutta. It is claimed in the petition that this decision to discontinue pregnancy was a normal and accepted medical practice and a certificate dated 26th June 2004 issued by the East Delhi Gynecologist Forum is enclosed in support of such submissions. However, the records showing that a consultation was held by the Petitioner with the deceased and her husband, and that an opinion was formed by the Petitioner to terminate the pregnancy is not placed on record. It is the admitted position that there is no such record maintained in the present case.

3. It is stated that late Dr. Roopa Dutta was admitted to the RAV unit of Respondent No. 3, headed by the Petitioner, at 11 am on 6th October 2003 for discontinuation of pregnancy by inducing pre-term labour. A consent form signed by the patient and her husband has been produced. The asthma evaluation was done by one Dr. S.K. Jain. It is claimed that on 8th October 2003 the deceased got good contractions and delivered a gasping foetus spontaneously at 9.25 am at a time when the Petitioner was not present. The delivery apparently happened in the room itself. After delivery, the deceased was shifted to the labour room for further observation and management. However, since the placenta was not expelled for more than an hour, a bona fide decision was taken to remove the placenta manually under anaesthesia to prevent any further complication. It is claimed that at that time the patient was conscious and was aware of the decision. It is claimed that neither she nor her husband objected to it. On the operation-table before induction, the deceased had an episode of severe bronchospasm for which I.V. steroids and broncho dilators were given but she became hypoxic and had falling oxygen saturation. Ultimately, the interventions by the attending doctors did not help and the deceased expired in the evening of 9th October 2003.

…

6. The above submissions have been considered by this Court. It has been correctly submitted that the impugned order of the Ethics Committee essentially turned on the legal opinion given by its retainer on an interpretation of Section 3 of the MTP Act. It was opined, and in the view of this Court, correctly, that in terms of Section 3(2) the satisfaction of one medical practitioner was required for terminating a pregnancy which does not exceed 12 weeks. That satisfaction had to be either that the continuation 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 that there was a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. For termination of a pregnancy between 12 and 20 weeks, such opinion must be of two medical practitioners. Therefore, there was no question of terminating a pregnancy by inducing pre-term labour beyond the 20th week of pregnancy. A reference was made to the decision in Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1.

7. What is significant as far as the present case is concerned is that it was not denied that the pre-term labour inducement of labour was resorted to beyond 20 weeks of pregnancy. Clearly, therefore, the prohibition under Section 3 of the MTP Act was attracted. The only defence, however, is that Section 5 of the MTP Act was overlooked and action of the Petitioner was justified thereunder.

…

9. The reply of learned counsel for the Petitioner to the question whether any record to show the forming of opinion by the Petitioner in terms of Section 5(1) was produced either before the DMC or before the MCI, was in the negative. It is submitted in fact that there was no such document, although it was asserted that such opinion was in fact formed by the Petitioner. It was submitted that there was no such practice of maintaining any such record of the decision taken to go in for inducement of pre-term labour even when the pregnancy was more than 20 weeks. However, the importance of maintenance of such record was not denied by counsel for the Petitioner.

…

11. On a reading of Section 5 of the MTP Act, it appears to this Court that the opinion formed by the medical practitioner to go for either MTP or pre-term inducement of labour when the pregnancy is beyond 20 weeks, has necessarily to be in writing and in the prescribed format. There was no question of there not being any record whatsoever of the forming of such opinion of the medical practitioner. The argument advanced by Ms. Acharya that in a case of emergency there may be no time for recording such opinion cannot explain the failure to record an opinion in the present case. The facts narrated by the Petitioner herself show that a very conscious decision was taken of going for a pre-term inducement of labour sometime around 6th October 2003 when the deceased was admitted to Respondent No. 3 hospital. Even at that time the opinion of the Petitioner should have been recorded. The pre-term induced delivery took place on 8th October 2003. There was sufficient time, therefore, for the Petitioner to record her opinion, mandatorily required by Section 5(1). In terms of Rule 3(1) of the Medical Termination of Pregnancy Regulations, 2003 the medical practitioner has to record her opinion in Form I. The non-maintenance of records to show the basis on which an opinion was formed to going in for a pre-term inducement in a case where the pregnancy is beyond the 20th week is indeed a very serious lapse. There can be no excuse whatsoever for a medical practitioner seeking to defend herself with reference to Section 5 of the MTP Act not maintaining any record of the formation of the opinion in terms of Section 5(1) read with the Regulations of 2003. In the considered view of this Court, the above factor alone is enough to demonstrate the gross negligence on the part of the Petitioner.

12. It was repeatedly urged that the question whether there was negligence on the part of the Petitioner can be judged only with reference to expert opinion which is still awaited. This submission does not impress this Court in the facts and circumstances of the present case. There had to be in the first place an opinion formed by the Petitioner as required mandatorily by Section 5(1) MTP Act. It is only thereafter that one can proceed to test such opinion and examine whether any ordinarily skilled gynaecologist and obstetrician would have formed a similar opinion in the facts and circumstances. The opinion, if recorded by the Petitioner, would have reflected the application of mind of the Petitioner with reference to the medical records of the patient. Absent such recording of opinion, the question of evaluation of the Petitioner's opinion with reference to the opinion that may have been formed by an ordinarily skilled medical practitioner does not arise. In that view of the matter, there is no need to examine the other question whether the Petitioner ought to have been given copies of the statement of the other doctors or permitted to cross-examine them.

13. This Court finds that no ground is made out for interfering with the impugned order of the Ethics Committee of the MCI. The writ petition along with pending applications is dismissed, but in the circumstances, with no order as to costs."

IN THE HIGH COURT OF GUJARAT

Nirav Anupambhai Tarkas v. State of Gujarat
2011 SCC OnLine Guj 5577
M.D. Shah, J.

A husband filed a complaint against his wife and her family alleging commission of an offence under Section 312, IPC for terminating her pregnancy despite the opposition of the husband. The lower courts rejected his complaint. The issue that arose before the High Court was whether a husband's consent is required under the MTP Act in addition to the pregnant woman's consent for termination of her pregnancy.

Shah, J.: "…

2. The facts of the case in brief are that a complaint was filed by the petitioner-original complainant against the respondent Nos. 2-6-original accused before the Court of learned Chief Judicial Magistrate, Vadodara for the offences punishable under Sections 312 read with Secs.202 and 114 of IPC…It is further stated that as his wife became pregnant, he took her to Dr. Miraben Pankajbhai Desai on 19-12-2002, who informed that growth of the child was normal. However, when his wife wanted to terminate the pregnancy, he opposed to the same. The respondent No. 2 then approached Dr. Meeraben, however, as there was no consent of the husband, she did not agree for abortion…However, on 20-12-2005 the respondent No. 3 came to Vadodara and on the next day took away respondent No. 2 and went to Surat and approached Dr. Chetanaben. As there was no consent of husband, said doctor also did not agree for abortion. Thereafter, the respondent Nos. 2 to 5 went to Dr. Bhardwaj Joshi, who terminated the pregnancy of respondent No. 2 ... On inquiry, the police submitted a report stating that no offence was committed and hence, an order dated 8-2-2006 was passed by the learned Magistrate dismissing the complaint by holding that consent of the husband is not required as per Medical Termination of Pregnancy Act, 1971 ('the Act' for short). Revision being Criminal Revision Application NO. 65 of 2006 preferred before the Sessions Court was also rejected by the learned Sessions Judge vide order dated 27-7-2007. Hence, the present petition.

…

5. This Court has gone through the complaint together with the impugned orders of both the courts below. This Court has also gone through the provisions of the Act. It appears that the learned Chief Judicial Magistrate by detailed reasons dismissed the complaint filed by the complainant. Said order has been confirmed by the learned Sessions Judge, Vadodara, by elaborate reasons. It was held by the learned Sessions Judge that provisions of Sub-Section (4) of Sec.3 of the Act makes it mandatory to obtain consent of the pregnant woman in terminating the pregnancy but the court did not find it mandatory to accept the consent of husband. It was also held by the learned Sessions Judge that when there are two children out of the wedlock and wife and husband are not in goods terms since long, wife would not be compelled by the doctor to obtain consent of the husband. The findings appear to be just, legal and proper and no illegality or irregularity has been committed by both the courts below in arriving at the said findings. In view of the above, this petition does not have any merit and is hereby dismissed..."

IN THE HIGH COURT OF PUNJAB AND HARYANA

Dr. Mangla Dogra v. Anil Kumar Malhotra
ILR (2012) 2 P&H 446
Jitender Chauhan, J.

A civil suit was filed by a husband against his wife, her family and her doctors for recovery of damages on account of mental pain and agony suffered by him due to termination of his wife's pregnancy in the absence of any medical requirement and without obtaining his consent. The Civil Court rejected the claim of the doctors and family members that the suit was not maintainable. In these revision petitions before the High Court, the issue was whether the express consent of the husband is required for terminating a pregnancy once consent of the wife has been obtained and provisions of the MTP Act are complied with. Further, if such consent of the husband is required, whether the husband is entitled to damages in case such termination is carried out without his consent.

Chauhan, J.: "…

2. The facts giving rise to these Civil Revisions originated from a matrimonial dispute between respondent No. 1 Anil Kumar Malhotra and respondent No. 2, Seema Malhotra. The marriage between the parties was solemnized on 17.4.1994. Out of the wedlock, a male child was born on 14.2.1995. The parties resided at Panipat. Due to the hostilities and strained relations between the parties, Seema Malhotra along with her minor son had been staying with her parents at Chandigarh since 1999. Respondents No. 5 is the brother of respondent No. 2, whereas respondent Nos. 3 & 4 are her parents. Respondent No. 1, Seema Malhotra filed an application under section 125 Cr.P.C claiming maintenance from the husband, Anil Kumar Malhotra. On 9.11.2002, during the pendency of the application under section 125 Cr. P. C, with the efforts of the Lok Adalat, Chandigarh, she agreed to accompany the husband. As a consequence, the couple went to Panipat. On 2.1.2003, Anil Kumar Malhotra came to know that Seema Malhotra had conceived. The wife-Seema Malhotra did not want to continue with the pregnancy and she wanted to get the foetus aborted, as despite their living together, the differences between them persisted. It was the case of the husband-respondent No. 1 that on the pretext of getting herself medically examined, the wife went to Dr. (Mrs.) Riru Prabhakar, Prabhakar Hospital, Panipat. However, she was adamant to get the foetus aborted but the husband refused. On 3.1.2003, she contacted her mother at Chandigarh. On the advice of her mother, she along with her husband and son came to Chandigarh. On 4.1.2003, they went to General Hospital, Sector 16, Chandigarh. The husband refused to sign the papers giving his consent to terminate the pregnancy. The husband filed a suit for mandatory injunction restraining the wife from getting the foetus aborted. That suit was withdrawn in September, 2003, as the respondent No. 2 underwent MTP (Medical Termination of Pregnancy) at Nagpal Hospital, Sector 19, Chandigarh. The MTP was done by Dr. Mangla Dogra assisted by Dr. Sukhbir Grewal as Anesthetist. The husband-respondent No. 1 filed a civil suit for the recovery of Rs. 30 lacs towards damages on account of mental pain, agony and harassment against the wife, Seema Malhotra, her parents, brother, Dr. Mangla Dogra and Dr. Sukhbir Grewal for getting the pregnancy terminated illegally. The ground taken in the suit is that the specific consent of respondent No. 1, being father of the yet to be born child, was not obtained and the MTP was done in connivance with respondents No. 2 to 6.A11 the respondents are jointly and severally responsible for conducting the illegal act of termination of pregnancy without any medical requirement…

…

6. Defendant No. 1 informed the doctor that she did not want to continue with the pregnancy as this was an unwanted pregnancy and on examination by defendant No. 5, it was found that pregnancy was less than 12 weeks old, the defendant No. 5 after getting due consent from defendant No. 1, terminated the pregnancy. **Under Section 3(4)(b) of the Act, only the consent of the pregnant woman undergoing the termination of pregnancy is required. An unwanted pregnancy as per Explanation II to Section 3(2) of the Act is a grave injury to the physical or mental health of the woman**. The defendant No. 5 and 6 have conducted the abortion strictly in accordance with the provisions of the Act and they have no connivance with defendant Nos. 2 to 4 in any manner, whatsoever, as alleged by the plaintiff-respondent No. 1.

...

16. The question arising for consideration in these revisions is "whether the express consent of the husband is required for unwanted pregnancy to be terminated by a wife?"

17. This is the most unfortunate case where a husband has brought privileged acts and conducts of husband and wife in the court. The relation between the husband and wife became sour in the year 1999, when the wife started residing with her parents at Chandigarh. It is an admitted fact that on 09.11.2002, during proceedings under section 125 of the Code of Criminal Procedure, with the efforts of the Lok Adalat, Chandigarh, the wife agreed to accompany the husband and started residing with her, under one roof. Naturally, they have cohabited as husband and wife while residing together. Besides love and affection, physical intimacy is one of the key elements of a happy matrimonial life. In the present case, the wife knew-her conjugal duties towards her husband. Consequently, if the wife has consented to matrimonial sex and created sexual relations with her own husband, it does not mean that she has consented to conceive a child. It is the free will of the wife to give birth to a child or not. The husband cannot compel her to conceive and give birth to his child. Mere consent to conjugal rights does not mean consent to give birth to a child for her husband. The wife did so in order to strength the matrimonial ties. On 02.01.2003, admittedly the husband and wife came to know that the wife was pregnant from her husband. She did not want to give birth to a child and showing unwillingness, got her pregnancy terminated in January, 2003, from the petitioners in Civil Revision No. 6337 of 2011 who are authorized to do so under the Act.

18. The argument of the Ld. counsel for the husband/respondent has to be rejected in view of the medical termination of pregnancy Rules, 1975. Rule 8 provides as under:—

> " **8. Form of Consent-The consent referred to in sub section (4) of Section 3 shall be given in Form C."**
>
> **Form C is prescribed as under:—**
>
> FORM C
>
> (see rule 8)
>
> I .....daughter/wife of ..... Aged..... about years of ..... (here state the permanent address)..... at present residing .....at do hereby give my consent of the termination of my pregnancy at .....
> .....
>
> (State of name of place where the pregnancy is terminated)
>
> .....
>
> Signature
>
> Place .....
>
> Date .....

19. This form is to be signed by the wife only, showing her willingness to have the pregnancy terminated or aborted. The Medical Termination of Pregnancy Act, 1971 (34 of 1971), no where provides for the express or implied consent of the husband. The wife is the best judge and is to see whether she wants to continue the pregnancy or to get it aborted. The husband has unsuccessfully brought an action for perpetual injunction restraining the wife to get the pregnancy terminated, but the suit was dismissed as withdrawn.

20. When the husband has no right to compel her wife not to get the pregnancy terminated, he has no right to sue the wife for compensation. The husband also has no cause of action against the wife on this account. Keeping in view the strained relations between the husband and wife, the decision of the wife to get the termination of unwanted foetus was right.-It was not the act of termination of pregnancy, due to which relation became sour, but the relations between the husband and the wife were already strained. So, keeping in view the legal position, it is held that no express or implied consent of the husband is required for getting the pregnancy terminated under the Act.

21. Now the next question arises for consideration is as to whether the husband has any cause of action or right to sue against the medical practitioners, for getting the pregnancy terminated under the Act. Section 8 of the Act provides as under:—

> "**8. Protection of action taken in good faith-No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to he caused by anything - which is in good faith done or intended to be done under this Act."**

22. It is a personal right of a woman to give birth to a child, but it is not the right of a husband to compel her wife to give birth to a child for the husband. No doubt the judicial precedents are there, where the courts have considered the termination of pregnancy by the wife as mental cruelty and gave divorce to the husband on this ground, keeping in view the unique facts and circumstances of the case. But, in the case in hand, the parties have a son born on 14.02.1995. The relations of the parties became strained and in the year 1999 the wife started living separately from her husband at Chandigarh. At the time of the second conception the age of the son was about eight years, who is with the mother/wife. No body can interfere in the personal decision of the wife to carry on or abort her pregnancy which may be due to the reason that an effort to live together under one roof has failed and that their son was of eight years. She approached the petitioners, who are admittedly an authorized hospital to have the pregnancy terminated. A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the menial health of the pregnant women. When the husband/plaintiff, came to know that his wife was pregnant from his loins, it was his duty to convince his wife to continue with the pregnancy, but his coming to the court by filing a Civil Suit for permanent injunction restraining the wife from getting the pregnancy terminated was a shameful act on his part. Because in the mean time, the wife was successful in getting the pregnancy terminated from a duly authorized medical practitioner, so he had to withdraw the Civil Suit, the same having become infructuous. He does not pause there, but came to the court bringing an action by filing a Civil Suit, for recovery of Rs. 30 lacs towards damages on account of alleged pain, agony and harassment undergone by the plaintiff on account of termination of pregnancy. The act of the medical practitioners (herein the Revision petitioners) was perfectly legal. No offence or tortuous act was committed by the medical practitioners. So it is held that the act of the medical practitioners Dr. Mangla Dogra and Dr. Sukhbir Grewal, in Civil Revision No. 633 7 of 2011 was legal and justified. The plaintiff/husband has failed to bring any document on record to show that the act of the medical practitioners was illegal or unjustified and thus they are liable to pay the damages. The act of the medical practitioners can not be termed as unethical.

…

27. The medical termination of pregnancy Act 1971 does not empower the husband, far less his relations, to prevent the concerned woman from causing abortion if her case is covered under section 3 of that Act. Under section 312 of the Indian Penal Code, 1860 causing miscarriage is a penal offence. Relevant civil law has since been embodied in the Act legalising termination of pregnancy under certain circumstances. Since law is liberal for effecting such termination, the Act does not lay down any provision on husband's consent in any situation.

…

30. Keeping in view the above discussion, it is held that no cause of action accrued to the plaintiff-husband against the present petitioners, in Civil Revision No. 6337 of 2011 and No. 6017 of 2011. They are not necessary and proper parties in the suit and the suit qua them appears to have been filed with ulterior motive best known to the husband/plaintiff. The continuation of the Civil Suit against these petitioners would amount to the abuse of process of law and miscarriage of justice and this Court would not feel hesitate to come to the rescue of the petitioners.

…"

IN THE SUPREME COURT OF INDIA

Anil Kumar Malhotra v. Ajay Pasricha & Ors.
Civil Appeal No. 4704 of 2013 (Order dated October 27, 2017)
Dipak Misra C.J., A.M. Khanwilkar and D.Y. Chandrachud, JJ.

The husband filed an appeal in the Supreme Court against the Punjab and Haryana High Court order in Dr. Mangla Dogra v. Anil Kumar Malhotra (ILR (2012) 2 P&H 446) wherein the High Court had dismissed his suit claiming damages from his wife, her relatives and doctors for an abortion without the husband's consent. The Supreme Court was asked to test the reasoning of the High Court judgment which had held that Section 3(4)(b) of the MTP Act read with Rule 8 of the MTP Rules 1975 indicates that a woman does not require her husband's consent for terminating her pregnancy.

Misra, C.J., and Khanwilakar and Chandrachud, JJ.: "…

Having considered the submissions advanced by learned counsel for the parties, we are not inclined to entertain these appeals and the same are accordingly dismissed. No order as to costs."

IN THE HIGH COURT OF MADHYA PRADESH

Hallo Bi @ Halima v. State of Madhya Pradesh
2013 Cri LJ 2868 (MP)
S.C. Sharma, J.

An incarcerated woman filed an application with the jail authorities requesting for termination of her pregnancy, which resulted from forced prostitution. The jail authorities forwarded her application to a chief judicial magistrate who rejected her application. The woman then filed a petition in the High Court of Madhya Pradesh for directions to the concerned State authorities to permit her to terminate her pregnancy. The issue before the Court was whether the termination of pregnancy was permissible under Section 3(2)(ii) Explanation 1 of the MTP Act.

Sharma, J.: "The petitioner before this Court, who is in Jail … for an offence punishable under section 302 of the Indian Penal Code, has filed this present petition for issuance of an appropriate writ, order or direction directing the respondents to permit the petitioner to terminate her pregnancy.

2. The contention of the petitioner is that she was forced into prostitution by one Usman and on account of forced prostitution, she became pregnant. Petitioner has further stated that an application was submitted to the Jail Authorities for termination of pregnancy and the matter was forwarded to the Indore (sic) for grant of necessary permission and the CJM in a mechanical manner, on 14-12-2012 has rejected the petitioner's application for grant of termination of pregnancy.

3. Section 3 of The Medical Termination of Pregnancy Act, 1971 provides a medical opinion by a registered medical practitioner and, therefore, the matter was immediately referred to obtain an opinion from the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College/M. Y. Hospital, Indore. The petitioner was subjected to medical examination by Dr. Laxmi Maroo, Professor and Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College, Indore and her report reflects that at the time of medical examination, the petitioner has stated that she is not willing for termination of pregnancy.

4. Again the matter was listed before this Court on 11-1-2013 and as a statement was once again made before this Court by the learned counsel for the petitioner that the petitioner now wants to terminate the pregnancy, the Superintendent of Jail, Distt. Jail, Indore was directed to produce the petitioner before this Court on 15-1-2013.

5. The petitioner was present before this Court on 15-1-2013 and the petitioner in open Court categorically stated that she was forced into prostitution, she was sold in the State of Rajasthan and on account of the forced prostitution, she has become pregnant. The petitioner has categorically stated in the open Court that she wants to terminate pregnancy and at the relevant point of time the medical examination took place she was nervous and scared of the surrounding environment as well as she was very tense. The observation has been made by the Doctor that she does not want to terminate the pregnancy. This Court, by way of abundant caution has requested respected lady Lawyers of this Court to interact with the petitioner and Ms. Meena Chaphekar and Mrs. Vinita Phaye, Advocates have interacted with the petitioner and have informed this Court that the petitioner wants to terminate the pregnancy. The first medical examination of the petitioner took place on 10-1-2013 and the age of the foetus was assessed at 11 weeks and 4 days and therefore, keeping in view Rule 3, clause (2), subclause (b), a report of two registered medical practitioners/Governent Doctors was required.

6. This Court has again referred the matter for medical opinion and now, today, a fresh report has been received. The report has been submitted on behalf of two Doctors posted at M.Y. Hospital, Indore and both are Gynaecologist. They have opined that the pregnancy can be terminated. The report has been received through Superintendent of Jail, District Jail, Indore and the same is taken on record.

7. Mrs. Vinita Phaye, learned counsel for the respondent-State has also argued before this Court that pregnancy can be terminated keeping in view section 3 of The Medical Termination of Pregnancy Act, 1971.

8. As statement was made by the petitioner in the open Court that she was subjected to forced sex/rape, she was also directed to submit an affidavit and she has submitted an affidavit dt. 15-1-2013. The affidavit reflects that she was subjected to forced sex. She has stated that she wants to terminate the pregnancy and does not want to give birth to the child. Thus, the petitioner has not only filed an affidavit, but had stated in open Court that she was subjected to forced sex and wants to terminate the pregnancy. The report as required under The Medical Termination of Pregnancy Act, 1971 is also in favour of the petitioner.

…

12. In the present case, the petitioner wants to abort the child and has challenged the order passed by the CJM, rejecting her prayer to abort the child. Section 3 provides for medical opinion of a registered medical practitioner and as the length of pregnancy is about 12 weeks, the matter was referred to M.Y. Hospital, Indore for obtaining medical opinion of two Doctors. Two lady Doctors including the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College/M. Y. Hospital, Indore has categorically stated that pregnancy of the petitioner can be terminated vide report dt. 16-1-2013, meaning thereby the medical opinion to abort the child is in her favour.

13. …The Medical Termination of Pregnancy Act, 1971 was enacted in 1971. The Medical Termination of Pregnancy Act, 1971 provides for abortion, in case of woman whose physical/mental health are endangered by the pregnancy, woman facing birth of a potentially handicapped or malform (sic) child, rape, pregnancy in unmarried girls under the age of 18, with the consent of guardian, pregnancies in lunatics, with the consent of a guardian, pregnancies which are result of failure in sterilization. This Act provides for termination of pregnancy in case of rape which is in fact, forced sex with the victim who was led into prostitution by use of force and, therefore, in the peculiar facts and circumstances of the case, keeping in view, the statement of the petitioner, the Act of 1971 does permit abortion in the peculiar facts and circumstances of the present case also. The Act of 1971 provides for a legal method of abortion in respect of cases mentioned in the Act. It is really shocking that in our country every year almost 11 million abortions takes place and 20000 women die every year due to abortion related complications. Most abortion related maternal deaths are attributable to illegal abortions and, therefore, the Medical Termination of Pregnancy Act, 1971 has authorised a procedures for abortion in respect of cases mentioned in the Act. It certainly provides for a safeguard to women to abort a child keeping in view the statutory provisions as contained under the Act. Pre-natal Test for determining the sex of the foetus, is a crime under the Indian laws and a punishment is also provided under various statutory provisions for termination of pregnancy and for determining the sex of foetus. However, the present case is having a distinguishing feature, the sex of the child has not been determined, foetus is on account of the forced prostitution, as alleged by the petitioner, and, therefore, case of the petitioner in respect of the abortion, is squarely covered under the Explanations where permission can be granted for abortion as per the statutory provisions as contained under The Medical Termination of Pregnancy Act, 1971.

…

15. The Medical Termination of Pregnancy Act, 1971 provides for termination of pregnancy on health grounds and in those cases where there is a danger to life or risk to physical or mental health of a woman and also on humanitarian ground where the pregnancy arises from sex crimes like rape or intercourse with lunatic woman etc…

16. Section 3 provides for Opinion from a registered Medical Practitioner where the length of pregnancy does not exceed 12 weeks and where the length of pregnancy exceed 12 weeks, from two medical practitioners and permission can be granted where pregnancy is alleged by the pregnant woman to have been caused by rape and the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of a pregnant woman. The Statement of Objects & Reasons for enacting the Act of 1971 was to help a victim of a sex crime like rape or intercourse with a lunatic woman also.

17. In the present case, the petitioner who was present in the Court was brave enough to state before everyone that she was forcibly forced into prostitution. She was sold for prostitution and every day she was subjected to forced prostitution/ rape. Forced prostitution, in the considered opinion of this Court, virtually amounts to rape and, therefore, this Court is of the considered opinion, that the petitioner's case falls under Explanation 1 of section 3, clause (ii) of the Act of 1971.

18. We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child.

19. The Apex Court in the case of *Suchita Srivastava v. Chandigarh Administration*, reported in (2009) 9 SCC 1, in paras, 20 to 27, 31 and 58 has held as under :—

"…

> 22. 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.

23. A perusal of the abovementioned 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 bom, 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.

…

25. 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.

…"

20. In the present case, the petitioner understands what pregnancy is. She has consented for abortion. The medical opinion is in her favour. She does not want to raise the child of a rapist and, therefore, the relief prayed for in the relief clause is granted to the petitioner directing the respondents to carry out the process of abortion immediately…

…

23. In the result, the writ petition is allowed. The petitioner is granted permission to abort the child keeping in view the statutory provisions as contained under The Medical Termination of Pregnancy Act, 1971. The Superintendent of District Jail, Indore is directed to admit the petitioner in M.Y. Hospital, Indore for terminating the pregnancy. It is needless to mention that the petitioner shall be provided with all medical assistance and care after the pregnancy is terminated, she will again be provided with all medical assistance by the respondent State. It is needless to mention that the Superintendent of District Jail, Indore after the pregnancy is terminated shall file status report to the Principal Registrar of this Court and for a further period 6 months, he will file a monthly status report in respect of health of the petitioner.

…"

IN THE HIGH COURT OF DELHI

Sushil Kumar v. Govt of NCT of Delhi
2013 SCC OnLine Del 2068
R.V. Easwar, J.

Criminal cases under Sections 498A and 313 of the IPC were registered against a husband and his family for forcing his wife to consume abortion pills. The husband and parents-in-law of the woman filed applications for anticipatory bail before the Delhi High Court.

Easwar, J.: "…

2. The present applications have been filed in the following circumstances. Aarti Gupta, the complainant, was married to Ashish Gupta on 15.01.2013. On 09.04.2013, she filed the complaint with the police narrating that immediately after the marriage, her husband Ashish Gupta, father-in-law Sushil Kumar and mother-in-law Mithilesh started torturing her and also verbally abusing her. According to the complainant, her husband Ashish Gupta used to allege that she was having

an illicit affair with some other boy. Unable to bear the torture Aarti went to her parental house but her parents sent her back to the matrimonial home. The mental and physical torture and abuse, however, continued. On 02.04.2013, on coming to know that the complainant was pregnant her in-laws took her to the house of one Sunita (one of the applicants herein) and after verbally abusing the complainant and alleging that the child in her womb was not that of Ashish Gupta, they forcibly made her swallow abortion pills. She was left unattended and it was on 05.04.2013 that the in-laws of the complainant came back and called the parents of the complainant, apparently to inform them of her condition. The complainant was taken to the parental house on 05.04.2013. On that day she started bleeding. She was treated by Dr. Sapna Verma at Kondli. The doctor told the complainant that the child may be saved. Some ultrasound treatment was given to the complainant. However, on 09.04.2013 she started bleeding again heavily whereupon her mother brought her to the hospital. There her statement was recorded. On the basis of the statement and the MLC of the complainant a case under section 498A/313/34 of the IPC was registered.

3. The applicants herein filed bail applications under section 438 of the Cr.P.C. before the Sessions Court which were turned down. The learned Sessions Judge perused the MLC wherein the girl had informed the doctor that some MTP pill (abortion pill) was given to her forcibly by her father-in-law. The Sessions Court also noted that in her statement recorded under section 164 of the Cr.P.C., the complainant had stated that she had been pressurised by her in-laws and husband to give statement in their favour. The complainant told the Sessions Judge in the Court that she was made to consume the medicine forcibly and was pressurised to make statements exonerating the bail applicants.

4. On a consideration of the entirety of facts and the nature of the allegations, the Sessions Court found no ground for the grant of anticipatory bail; the applications were dismissed.

…

7. I have carefully considered the rival submissions and weighed the circumstances of the case. The complainant was present in Court. From her demeanour and the manner in which she responded to the queries of the Court, it appears to this Court that she was under tremendous pressure and compulsion. She clearly appeared traumatised. From the complaint it is seen that there is enough material to show that all the three applicants had significant roles in forcing her to swallow the abortion pills. The complainant Aarti Gupta is of tender age and at this age serious damage could have been caused to her reproductive system by forcing her to swallow abortion pills without medical advice or supervision. In her complaint, she has referred to some *Sadhu Baba* whose assistance was taken by the applicants for causing the miscarriage. The MLC has been perused by the lower court wherein it has been recorded that the complainant had informed the doctor that she was forcibly given abortion pills. The letters alleged to have been written by her exonerating the applicants herein do not appear to me to be voluntary and in fact she has stated so before the lower court. She has also stated before the lower court, as recorded in the impugned order, that she was made to consume the medicine forcibly and was pressurised into giving a statement exonerating the applicants. The so-called settlement between the complainant and her husband appears unreal and concocted.

8. Considering the MLC and the serious nature of the allegations made in the complaint, the applications for anticipatory bail cannot be allowed. I reject them.

9. This Court takes a serious view of the matter. It is clear that unbearable pressure is being brought upon her by the in-laws of the complainant. The safety and security of the complainant is another concern in this case. The complainant says that she is now residing in her parental home and this has been confirmed by her father who is also present in Court. I, therefore, direct the SHO concerned to afford adequate protection to the complainant by arranging a visit by a constable to her parental home every day in the morning and in the evening to ensure that no harm is caused to her. I also direct the trial court to verify the age of the complainant at the time of the marriage. It also appears to me that the police should, as a part of their investigation in this case, trace the so-called *Sadhu baba* whose assistance was allegedly taken by the applicants and make a thorough investigation by recording his statement and dealing with him in accordance with law.

…"

IN THE HIGH COURT OF BOMBAY

Dr. Saraswati v. State of Maharashtra & Ors.
2013 SCC OnLine Bom 1014
T.V. Nalawade, J.

These bail applications were filed before the Bombay High Court in a case where the two applicants allegedly caused or aided in sex determination and abortion contrary to the provisions of the MTP Act. The applicants were also accused of non-maintenance of proper records under the Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994.

Nalawade, J.: "…

2. The first application is filed by Dr. Smt. Mundhe in R.C.C. No. 163/2012, which is filed by Appropriate Authority for offences punishable under sections 3-A, 4(5), 5, 6, 8 and 19 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as 'PCPNDT Act' for short) and also under the Rules framed under this Special Act. The second application is filed by the State against Dr. Smt. Mundhe, for cancellation of bail, granted to her by Additional Sessions Judge, Ambajogai, District Beed in C.R. No. 42/2012 registered in Parli City Police Station. The chargesheet is filed in this crime for offences punishable under section 304, 312, 314, 315, 316 and 201 r/w. 34 of Indian Penal Code and also for offences punishable under section 3, 4-B and 6 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'MTP Act' for short). The chargesheet is also filed for the offences punishable under the provisions of PCPNDT Act. The third application is filed for bail by Dr. Shri. Sudam Mundhe in C.R. No. 42/2012 registered in Parli City Police Station for aforesaid offences, in which chargesheet is filed against this applicant also.

…

4. Dr. Shri. Mundhe is General Orthopedic Surgeon. Dr. Smt. Mundhe is Obst. and Gynecologist. At the relevant time, they owned and run Mundhe Hospital in Parli. In R.C.C. No. 302/2010, which was filed under the provisions of PCPNDT Act prior to the incident in question, the sonography machine of this hospital was seized by Appropriate Authority and they were prevented from using pre-conception and pre-natal diagnostic techniques. The permission given to this hospital for termination of pregnancy was also cancelled by Appropriate Authority by order dated 6.9.2011. One more case of illegal termination of pregnancy, abortion was filed against them in the past.

5. On 17.5.2012 one Smt. Vijaymala Patekar, a married woman, was brought to this hospital by her husband, accused No. 3 from C.R. No. 42/2012. She was having four daughters and she was again pregnant. This couple wanted to determine sex of the foetus. After clinical examination of this lady, Dr. Shri. Mundhe referred this lady to Padmawati Hospital from Jalgaon of Dr. Kolhe for sex determination ... Case Nos. 473/2011 and 505/2011 were already filed against Dr. Shri. Kolhe in Jalgaon by the Appropriate Authority under PCPNDT Act. His sonography machine was seized. He was also prevented from using such diagnostic techniques. In spite of these circumstances, Dr. Kolhe was using one sonography machine and in the present case, he determined the sex of foetus of Vijaymala. It was female foetus and it's age was around 18 to 20 weeks.

6. When Smt. Vijaymala was brought back to Mundhe Hospital after sex determination, medicines were given and operation was performed for abortion on 18.5.2011. The foetus was destroyed by burning it in the field of Dr. Shri. Mundhe by his employees. Smt. Vijaymala died due to this operation on 18.5.2011 itself. Dr. Shri. Mundhe informed to Parli City Police that Vijaymala had come to the hospital as she had bleeding (PV) and she died in his hospital. Neither in the hospital of Dr. Kolhe, nor in the hospital of Shri. Mundhe, complete and correct record in respect of Smt. Vijaymala was created. Dr. Mundhe informed to police that the pieces of foetus were thrown by him in drainage system. After receipt of this report, one Police Inspector of Parli Police Station gave report to the police station and on the basis of this report, the crime was initially registered for offences punishable under section 304-A and 201 of I.P.C. vide C.R. No.42/2012. The offences punishable under the provisions of MTP Act and PCPNDT Act were also mentioned in the report. There are allegations made against this Police Officer that he joined hands with Dr. Mundhe. After completion of investigation, the chargesheet came to be filed for aforesaid offences.

7. On 13.6.2012 the Appropriate Authority under PCPNDT Act filed complaint, R.C.C. No. 163/2012, in the Court of Judicial Magistrate, First Class, Parli.

8. C.R. No. 42/2012 was registered on 18.5.2012 and this couple came to be arrested on 19.5.2012. On the same day, J.M.F.C. granted bail to them as the crime was initially registered for offence punishable under section 304-A of I.P.C. On 16.7.2012 another Police Officer gave report to J.M.F.C. and requested for permission to add section 304 of I.P.C. and

other offences also. The permission came to be granted. This couple then came to be arrested for commission of the newly added offences. In Criminal Application No. 425/2012, Additional Sessions Judge granted bail to Smt. Mundhe on 24.9.2012. Initially the bail was refused to Smt. Mundhe by the same Presiding Officer by order dated 23.8.2012. The subsequent application came to be filed after filing of the chargesheet and only on the ground of filing chargesheet, the bail came to be granted to Dr. Smt. Mundhe. The Sessions Court has, however, refused bail to Dr. Shri. Mundhe.

9. In private complaint, R.C.C., No. 163/2012 process was issued by J.M.F.C. This couple appeared before J.M.F.C. J.M.F.C. refused bail to both these accused. Criminal Application No. 145/2013 was filed in Sessions Court by both the accused. Their application came to be rejected on 12.6.2013. Thus, in R.C.C. No. 163/2012 Dr. Smt. Mundhe has been behind bars since 3.4.2013. In C.R. No. 42/2012, Dr. Shri. Mundhe has been behind bars since 13.6.2012. Bail is refused to him up to Supreme Court in other case like R.C.C. No. 302/2010.

…

15. The aforesaid record and the submissions show that both the applicants were causing or aiding for the determination of sex. They were also causing abortion illegally in their hospital. Atleast two cases of such abortion are filed against this couple. There is allegation that they were causing abortion of female foetus and they were never maintaining proper record as provided under PCPNDT Act.

16. The two special Acts like MTP Act and PCPNDT Act are made with specific purpose. The provisions of MTP Act show that the termination of pregnancy is ordinarily to be done in the Government Hospital. The termination can also be done at a place approved by the State or District Level Committee (Section 4). At other places, the termination of the pregnancy is not allowed. There is Rule 5 regarding approval of places and conditions of the same are also laid down. Section 5(5) provides that when the termination of pregnancy is caused at other places than the places mentioned in section 4 of the Act, it is made punishable with imprisonment of two years and it may extend to seven years. The abortion can be caused only when the conditions laid down in section 3 of the Act are fulfilled. The opinion of one registered medical practitioner, which needs to be given in good faith, needs to be obtained in writing, when the age of the foetus does not exceed 12 weeks. If the age of the foetus is above 12 weeks and it does not exceed 20 weeks, the opinion of two such registered medical practitioners needs to be obtained. Some exceptions are given in that regard. But, it can be said that in the first places the abortion, termination can be caused only in the approved places. The provisions show that they are made to save registered medical practitioner from use of provisions of I.P.C. against them, but for that, he must satisfy the aforesaid conditions. There are some exceptional circumstances, but for that also the act must be done in the approved places. No pregnant woman can be allowed to abort at her will. This position of law also needs to be kept in mind. Prima facie, there has been breach of all such provisions in the present case.

17. The object behind the provisions of PCPNDT Act is the prohibition of sex selection either before or after conception. The sex selection leads to female foetucide [sic]. The object shows that it is to prevent the abuse of diagnostic techniques as it is discriminatory against the female sex and it affects the dignity and status of woman. The Act provides the modes, which need to be used to give effect to the provisions of Act. For that, procedure for permission and regularisation of use of such techniques is provided. The diagnosis is possible only under certain conditions and only by registered institutions. Punishment is provided for violation of the provisions. The other object is to uphold the medical ethics. The provisions of section 3 (3) of this Act show that no medical practitioner shall conduct or cause to be conducted or aid in conducting himself or through any other agency to any other person any pre-natal diagnostic technique at place other than the place registered under the Act. Thus, the provision is wide enough to include the instances in which doctors like present matter refer the case to other doctor for diagnosis. Section 3-A is on the same line and it is particularly for sex selection. Section 3 (3) is meant for the use of diagnostic techniques for sex determination. These provisions need to be read together. Section 5 shows that there is prohibition of communicating the sex of foetus. Thus, the doctor, using the techniques, is not allowed to tell the sex of foetus to the pregnant woman or her husband or anybody. Section 6 is made to prevent the use of techniques for sex determination. The wording used in this section is also similar and it is wide enough to include doctor like Shri. Mundhe, who refers the cases to other doctor for sex determination. Section 23 provides for punishment and it shows that for first offence, the imprisonment for three years is provided, but for subsequent offence, the imprisonment may extend for five years. These offences are made cognizable and non bailable. The provision of section 28 regarding cognizance of such offence is already mentioned.

18. As the record was not maintained in both the hospitals, even at later stage, it will be difficult for the applicants to show that there was some emergency and so, they took decision to terminate the pregnancy. When there is a breach of the provisions of such special Acts and when such act is done with the intention to make money, it becomes very easy to draw

inference that there was no emergency as such. Further, when there is material of aforesaid nature, prima facie, it can be said that there was the intention to do an act, which was likely to cause death of Vijaymala. The age of foetus was around 18 to 20 weeks. In view of the facts and circumstances of the present case, it can be said that there is strong prima facie case for offence punishable under section 304-I of I.P.C. The punishment of imprisonment for life is provided for this offence. This offence was committed after getting released on bail in other case of illegal abortion by the applicants. If such persons are at large, they are dangerous to the society. It is sure that they will commit similar offence after getting released on bail.

19. The learned counsel for Authority appointed under PCPNDT Act supplied the data regarding the ratio of male-female birth in Beed District, where the applicants were practicing. It is as under :-… The aforesaid material is sufficient to show that the applicants had played leading role in bringing down the rate of birth of female child in Beed District.

20. Dr. Shri. Mundhe is behind bars in C.R. No. 42/2012 and also in cases filed under PCPNDT Act. There is no question of granting discretionary relief in favour of Dr. Shri. Mundhe in view of the aforesaid circumstances. Hon'ble Apex Court has refused bail to him in one PCPNDT case. Thus, it is not a fit case to grant bail to Dr. Shri. Mundhe. So, the Criminal Application bearing No. 1055/2013 needs to be rejected.

…

25. In view the aforesaid position of law and the facts of this case, this Court holds that bail cannot be granted to Smt. Mundhe in Criminal Application No. 3350/2013. Further, the bail granted to her by Sessions Court in C.R. No. 42/2012 needs to be cancelled. After cancellation of bail granted to Smt. Mundhe in C.R. No. 42/2012, granting of bail in application No. 3350/2013 would become meaningless. As the proceedings have arisen out of the same incident and the applicants are the main offenders, this Court holds that no bail can be granted to them. So the order.

…"

IN THE HIGH COURT OF DELHI

X v. Govt. of NCT of Delhi & Anr.
2013 SCC OnLine Del 6473
Sunita Gupta, J.

The petitioner was rescued from forced prostitution in a police raid and lodged in a protection home. The medical examination revealed that she was HIV positive and about 18 weeks pregnant. The respondent authorities denied her request for termination of pregnancy, which was sought on the grounds that it was a result of rape and was likely to cause grave injury to her physical and mental health. She then approached the Delhi High Court seeking directions to respondent authorities for facilitating the medical termination of her pregnancy.

Gupta, J.: "This is a writ petition under Article 226 of the Constitution of India read with Section 482 Cr. P.C. for issuance of appropriate directions to the respondent to facilitate medical termination of pregnancy which is likely to cause grave injury to the petitioner and put the child at substantial risk, if born.

2. Notice of the petition was issued to the respondents. Status report has been filed by the State wherein it is stated that on 29th August, 2013 an information was received from J.R. Sharan, Project Coordinator, Rescue Foundation and Ms. Hem Lata, Probation Officer, Rescue Foundation that 3-4 girls were forcibly kept in Kotha No. 41, 1st Floor, G.B. Road, Delhi and they were subjected to forcible prostitution. On this information a raiding team was constituted and raid was conducted at the Kotha. Four girls, including the petitioner, were rescued. On the statement of one of the rescued girl FIR No. 124/2013 dated 30th August, 2013 under Sections 376/365/342/109 IPC read with Section 3/4/5/6 ITP Act was registered at Police Station Kamla Market. During investigation petitioner disclosed that she was brought to Delhi from her village by an unknown boy and was sold at GB Road where she was compelled to do prostitution. Her statement under Section 164 Cr. P.C. was recorded wherein she supported her previous statement. Present petition has been filed by the petitioner stating therein that she is now about 19 years of age. When the petitioner was taken by the authorities of respondent No. 1 Nirmal Chhaya for medical examination at Deen Dayal Upadhayay Hospital, New Delhi it was found that she is HIV positive and is about 19 weeks pregnant. She informed the authorities and the doctors that the child was conceived in forceful and undesired sexual intercourse against her will and given her ill-health and the likelihood that the child will also be born at risk, she wishes to medically terminate her pregnancy as it is a cause of stress and grave injury to her medical health. Since

the petitioner is in the protective custody of respondent No. 1 she has not been permitted to exercise her legal rights of medically terminating her pregnancy which she expresses to cause grave threat to her physical and mental safety. As such, it was prayed that directions be issued to the respondent to facilitate medical termination of pregnancy.

3. I have made inquiries from the petitioner in the presence of her counsel Ms. Nandita Roy, Advocate in my Chamber. She has expressed her willingness to get her pregnancy terminated. She states that her parents have already died. She has a younger brother to support. She is unable to carry her pregnancy to full term due to social stigma as she is victim of circumstances whereby she was taken to brothel and was forced to indulge in prostitution.

4. In the status report filed by the State, State has given no objection if permission is granted for termination of pregnancy as it will not affect the investigation in any manner. Superintendent, Department of Women and Child Development, Nirmal Chhaya, Jail Road has also given no objection to the decision taken by the petitioner for terminating her pregnancy.

5. On 5th December, 2013, she was examined by the medical board consisting of Dr. Poonam Aggarwal and Dr. Ritu Goel and the board opined that she is 18 months (18 weeks?) plus pregnant hence her pregnancy can be terminated after routine investigation. The victim has expressed her willingness to terminate the pregnancy and she understands the consequences of her act.

6. In *Suchita Srivastava v. Chandigarh Administration*, 2009 (4) R.C.R. (Criminal) 232 : 2009 (4) R.C.R. (Civil) 258 : 2009 (5) Recent Apex Judgments (R.A.J.) 306 : (2009) 9 SCC 1, Supreme Court has held as under:

> "37. As evident from its literal description, the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court's decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evidence that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights."

7. A plain reading of provision in the Medical Termination of Pregnancy Act, 1971 clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer any "mental illness". The Explanations to Section 3 have 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 such circumstances, consent of the pregnant woman is an essential requirement for proceeding with the termination of the pregnancy under Section 3 of the Act. A woman has the option to get the pregnancy terminated by a registered medical practitioner, if it does not exceed 12 weeks. If the duration of the pregnancy exceeds 12 weeks but does not exceed 20 weeks such a termination can be done by not less than two registered medical practitioners, who will give the opinion whether the continuance of the pregnancy would involve a risk to the life of the pregnant woman and grave injury to her physical and mental health.

8. To carry a child in her womb by a woman as a result of conception through an act of rape is extremely traumatic, humiliating and psychologically devastating. In similar circumstances, permission was granted by this Court in *K.M. Mahima v. State* 2004 (1) R.C.R. (Criminal) 546 : 2003 VI AD (Delhi) 510; *X v. The State (N.C.T. of Delhi)* 2013 (2) R.C.R.(Criminal) 430 : 2013 (2) JCC 1068 and *Janak Ramsang Kanzariya (Minor) through Manjuben Ramsang Kanzar v. State of Gujarat*, 2012 (7) R.C.R. (Criminal) 2025 : 2011 Crl.L.J. 1306.

9. The petitioner, aged 19 years, hails from poor strata of the society and is likely to face innumerable mental, physical, social and economical problems in future. There are no reasons to prevent her not to exercise her option voluntarily in her interest.

10. For the foregoing reasons, the petition is allowed with the directions to respondent No. 1 to accompany the petitioner 'X' and to produce her before medical superintendent, Deen Dayal Upadhayay Hospital, New Delhi within three days to get her pregnancy terminated where board of two medical practitioners would be constituted by Medical Superintendent which will take the decision immediately for termination of the pregnancy and it will be terminated in accordance with the provision of Section 3 of the Act.

11. The petition is allowed in the above terms. Respondent No. 1 shall ensure that the petitioner is provided proper medicine, diet and nutritious food as may be necessary for her health…

…"

IN THE HIGH COURT OF PUNJAB AND HARYANA

Bashir Khan v. State of Punjab
AIR 2014 P&H 150
K. Kannan, J.

This writ petition was filed by the parent of a minor girl who became pregnant as a consequence of rape, challenging the Magistrate's order declining the application for termination of her pregnancy. The High Court examined whether any judicial authorization is required for termination of pregnancies in accordance with Section 3 of the MTP Act especially when there is no dispute on whether the pregnancy should be terminated.

Kannan, J.: "The writ petition is at the instance of the parent of a minor girl, called 'the victim' here, who is reported to have been raped as a consequence of which, she has become pregnant…

2. The petitioner has approached the SDJM, Balachaur, through an application under Section 3 for termination of her pregnancy. It has been stated in the petition that the victim is only 14 years of age, that she had been illegally abducted and raped. The victim is in fragile health and she did not want to retain the foetus. It was claimed on her behalf by the parent that continuance of pregnancy would involve risk to the life of the victim and cause grave injury to physical and mental health. A statement had been recorded from the victim's mother Alima that she does not want to carry foetus and that she wanted to terminate the pregnancy. The Magistrate has recorded the statement of the victim herself that she had been raped and that she did not want the pregnancy. A doctor by name Kiran Kaushal, Gynaecologist, attached to the Government Hospital at SBS Nagar, has certified that the termination of pregnancy was possible, though the person was anaemic and a minor. The doctor has also given a status report which was called for from the doctor stating that she was anaemic with RH-Ve Blood group. She has observed that before termination of pregnancy, her hemoglobin count Would require to be built up to ensure availability of blood and that termination could be effected in a hospital where there were two or more gynaecologists as teenage pregnancy termination carries many risks to the patient. Apart from even the risk of surgery to gynaecologist who perform the procedure. It is also suggested in the report that she would require NDT injection to ensure her future obstetric carrier. The Sub Divisional Magistrate, however, was of the view that the application was not maintainable before a Judicial Magistrate since there was no specific provision empowering the Judicial Magistrate to pass an order granting permission to terminate the pregnancy. The petitioner has approached the court after an adverse order of the Magistrate declining to terminate the pregnancy.

3. There can be no two opinions that the conditions necessary for terminating the pregnancy do exist. There is prima facie case material available through lodging of FIR for offences under Section 376 and other related provisions. Section 3 of the Medical Termination of Pregnancy Act, 1971 sets out the circumstances when pregnancy may be terminated by registered medical practitioner. Clause 2 states that 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 the opinion, formed in good faith, that the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health, medical termination of pregnancy could be performed. Explanation 1 lays down that where 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. In this case, there is a statement recorded by the Magistrate from the victim that she had been raped and that she does not want to retain the foetus. Since she is woman who has obtained the age of puberty and the party is a Muslim, the father is the guardian. He has also expressed that he would desire the pregnancy to be terminated. The mother's statement has also been given before the Magistrate that she wanted to terminate the pregnancy for her daughter.

4. Section 4 of the MTP Act sets out the place where the pregnancy may be terminated. It shall be in a hospital established or maintained by government or a place approved for the purpose of this Act by government. Since the pregnancy is reported to be more than 14 weeks, the requisite certification of two registered medical practitioners has not been brought forth before this court in the manner contemplated under Section 3(2)(b). It should have been possible for either the State or the parties themselves to have approached the District Medical Officer and who should have given direction for constitution of a two members committee of doctors to give opinion on the fact that the continuance of pregnancy would have involved risk to the life of the woman and there was grave injury of physical or mental health of the petitioner. The State need not have applied to the magistrate, a procedure which has been adopted in this case. On the other hand, if the Investigating Officer comes by information that the offence of rape has resulted in pregnancy and the victim had expressed that she did not want to retain the foetus, the State could have assisted the victim to secure the necessary certification and admitted her in a government hospital or a recognized institution for carrying out the

other medical procedure necessary for such termination. The Magistrate was justified in holding that he did not have the competency, but here again, a little more resourcefulness on his part would have helped the party to secure what was redressable through the procedures that were in conformity with law, namely, of a direction to the competent head of medical institution to examine the petitioner by two medical practitioners in the manner contemplated under Section 3(2) and secured their opinion and taken further medical steps for carrying out the opinion, if it were to involve in the medical termination of pregnancy. The dismissal of the petition and an application before this court has again resulted in a needless waste of time by another 10 days.

5. In a matter relating to termination of pregnancy of a minor who is a victim of rape, there needs to be a greater sense of urgency which has been lost in this case. Thankfully things are not far too beyond the period when appropriate reparation is still possible. Between the time when the party has appeared before the Magistrate on 01.07.2014 till now, 4 additional weeks have passed.

6. I wanted to assure myself that the victim girl was taking a decision about termination of pregnancy knowing its actual implications. I therefore attempted to wean her from her immediate parents' presence and sought the assistance of Ms. Vandana Malhotra, Additional Advocate General, Punjab, to speak to her and elicit from her whether she was expressing her will to terminate the pregnancy. I also enquired the victim in the presence of the counsel of both sides whether she wanted to retain foetus or terminate the same. She does not want to retain the foetus and though, she looks young, she seems reasonably collected in her faculties to take an informed decision to herself. The father, who is the petitioner, is also in court to state that he stood by what he has stated in the petition regarding his own consent for termination of pregnancy.

7. 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 (sic) 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.

8. 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…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.

…"

IN THE HIGH COURT OF PUNJAB AND HARYANA

Kamla Devi v. State of Haryana
CWP No. 2007 of 2015, decided on February 9, 2015
K. Kannan, J.

The petitioner became pregnant as a consequence of rape and approached the High Court for permission to terminate her pregnancy. The Court examined whether any judicial authorization is required for termination of pregnancies under Section 3 of the MTP Act.

Kannan, J.: "**1.** The petitioner has adopted a needless procedure which has landed herself in difficulties. There is no provision that requires a person to apply before the Deputy Commissioner for permission to terminate the pregnancy. The medical termination whose foetal gestation is less than 12 weeks requires no permission and the medical practitioner in a Government hospital will be competent to undertake such a procedure. The fact that a person is a victim of rape is itself a circumstance in the Medical Termination of Pregnancy Act to carry out the termination. If it is beyond the period of 12 weeks and less than 20 weeks of foetal gestation, it would require to be placed before a committee of two doctors and the decision will be taken for termination of pregnancy after taking consent from the victim and if she is a minor with the guardian's consent. The issue has already been dealt with by this Court and there is no need to re-state the law. The petitioner may get herself admitted before the Government hospital in the jurisdiction within which she is a permanent resident and seek for appropriate procedure for termination of pregnancy. The same be done on the medical examination of the person confirming the pregnancy and after the hospital satisfies itself about the mental and physical condition of the petitioner to go through with the procedure.

2. Lessons are not learnt, neither by the parties nor by the State authorities even after decisions of this Court. Even apart from a direction that the order of this Court should be circulated to all the jurisdictional police to assist a victim of rape to secure an immediate attention for medical termination of pregnancy, if a petition seeking for termination of pregnancy is filed, the matter does not appear to have sunk in the manner that it should have been done. There is an urgent call to the police operating within the State of Punjab and Haryana to sensitize the investigating officers to play a positive role and secure full emotional support to relieve the trauma for a rape victim. The exhortation of Court falls to deaf ears and this is yet another case which spells out utter insensitivity to respond to the wailings of a woman who is already traumatized by the act of rape on her.

3. The writ petition is disposed of. On production of this order, the termination of pregnancy will be carried out by the hospital, as referred to above."

IN THE HIGH COURT OF GUJARAT

Ashaben v. State of Gujarat & Ors.
2015 AIR CC 3387
J.B. Pardiwala, J.

The petitioner was abducted and kept in unlawful confinement, where she was gang-raped for several months. As a result, she became pregnant. On escaping, she filed an FIR and informed the investigating officer that she wanted to terminate her pregnancy. The doctor and subsequently the lower court declined her request for termination of pregnancy as she had crossed the 20-week gestational limit prescribed under Section 3 of the MTP Act. In this writ application challenging the lower court's order and seeking permission to terminate the pregnancy, the Court examined whether termination of pregnancy could be permitted post 20 weeks gestation if the conception was the result of rape.

Pardiwala, J.: "Two questions of considerable importance i.e.,

(1) Is the foetus a human being with a fundamental right to life?

and

(2) Does a woman have the right to choose whether or not to have an abortion?

fall for my consideration in this writ application filed by a victim of an alleged rape who is carrying pregnancy as on today of around 28 weeks.

…

2.1 The applicant - a married lady aged 23 and mother of two children lodged a First Information Report bearing C.R. 1-10/2014 with the Ranpur Police Station on 16.3.2015 for the offence punishable under sections-366, 376(D), 354, 506(2), 323. 344 r/w sec. 114 of I.P.C. inter alia stating that on 13.7.2014 while she was outside her house on a road, all of a sudden one of the accused persons grabbed her from behind and took her away forcibly. Later on six other accused persons joined the accused who had forcibly kidnapped the first informant and was kept in unlawful confinement at different places for a period of about 9 to 10 months. During that period she was subjected to forcible sexual intercourse...

2.2 It is her case that on account of forcible sexual intercourse by seven accused she became pregnant and by the time she could lodge the FIR and get herself freed from the clutches of the accused she was pregnant by 24 weeks.

2.3. It appears that after the registration of the FIR she expressed her desire before the Investigating Officer to get the pregnancy terminated. The Circle P.I. of the Botad Circle filed an application dated 23rd March, 2015 addressed to the JMFC, Dhandhuka seeking permission for termination of the pregnancy as prayed for by the victim. It also appears that the victim was forwarded to the General Hospital, Sola at Ahmedabad for her medical examination and the medical examination revealed that there was a "single intrautaine Live foetus of 23 weeks and 3 days". In the certificate at Annexure-C it has been stated that although the patient requested for the termination of the pregnancy yet having regard to the provisions of the Medical Termination of The Pregnancy Act the foetus could be aborted provided the same is upto 20 weeks in age. Since the foetus in the case of the victim was of 24 weeks, the Doctor refused to terminate the pregnancy without any valid permission from the Court.

2.4. The Principal Civil Judge, Dhandhuka vide order dated 26th March, 2015 refused to accord the permission for termination of the pregnancy having regard to the provisions of the law and the age of the foetus.

2.5. In such circumstances referred to above, the applicant has come up with a fervent appeal that being a victim of rape she would not like to continue with the pregnancy and deliver the child.

…

4.4. The above provisions of law comprised under the said Act clearly disclose the circumstances under which the pregnancy can be terminated. Undoubtedly, section 5 of the said Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy beyond 20 weeks on the ground of having conceived on account of rape. It strictly restricts to the cases where the life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression "good faith" discloses that the opinion has to be based on the necessary examination required to form such an opinion.

4.5. As far as section 3(2)(b)(ii) is concerned, it clearly speaks of the right to terminate the pregnancy where there is a substantial risk in allowing the child to take birth as it would suffer from such physical or mental abnormalities as to be seriously handicapped. However, such right is restricted to the maximum period of twenty weeks of pregnancy and not beyond it. Section 3(2)(b)(ii) is very clear in that regard. It also provides that before opting for such pregnancy within the said period, it is necessary for two registered medical practitioners to form an opinion in good faith for termination of the pregnancy. In case, the pregnancy has not exceeded twenty weeks, then such an opinion can be formed in good faith by any one medical practitioner.

4.6. The Apex Court in the case of *Suchita Sriuastava* [sic] v. *Chandigarh Administration*[AIR 2010 SC 235.] , in paras, 20 to 27, 31 and 58 (Paras 10, 11, 12, 13, 15 and 30 of AIR) has held as under:

> *"20. 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:…*
>
> *A plain reading of the abovequoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met.*
>
> *21. 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.*

22. 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 MIT Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

23. 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.

24. 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.

25. 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.

26. 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.

...

31. 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.

58. 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."

...

6. While up-holding the constitutional validity of the Act, the Division Bench in the case of ***Nand Kishore Sharma & Ors. vs. Union of India & Anr.***, *AIR 2006 Raj.166* observed thus –

> *"4. […] 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:…*
>
> …
>
> *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 :*
>
> *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.*
>
> …
>
> *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."*

7. As I am considering the issue of the right to life of foetus, I deem it appropriate to quote a West German Constitutional Court decision in the abortion reform law case (1975) 39 B Verf GE. In the said case 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 selfdetermination, 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)

8. Roe Vs Wade 35 L Ed 2d 147 : 410 US 113 (1973) became one of the most politically significant decisions of the Supreme Court of the United States. This is a landmark United States Supreme Court decision establishing 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, demarketing 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."

8.1 The 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 Morgentalor Smoling and Scott vs. R (1988) 44 DLR (4th) 385, the Court focused on the bodily security of the pregnant women. The Criminal Code of the 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.

8.2 The Abortion Act, 1967 of the UK also in its Article 2 does not confer an absolute right to life to the unborn. It was so held in Paton Vs. 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 Vs. Norway ((1992) 73 DR 155)

8.3 I may quote with profit a decision of the Supreme Court in the case of ***Jacob George Versus State of Kerala, (***1994) 3 SCC 430, in which the Supreme Court observed as under:

"[…]

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."*

…

11. Having heard the learned Counsel for the parties and having gone through the materials on record, I find myself unable to grant the relief as prayed for mainly for two reasons.

11.1. First, considering the background facts and pendency of investigation I am not in a position to directly come to the conclusion that it had been a matter of rape. Secondly, for the time being I leave this aspect of rape aside. Assuming that the pregnancy for whatever reason had been against the wish and desire of the applicant, the intriguing aspect in the present case is that by the time the applicant chose to file this writ petition i.e., on 31.3.2015, the pregnancy had been of about 27 weeks as is borne out from the medical reports. Although it is the case of the applicant that since she was in unlawful confinement of the accused persons she had no opportunity to get the pregnancy terminated within the statutory time period as provided in the Act, yet I am unable to accept such submission as the law does not permit the termination of pregnancy beyond 20 weeks except in cases where the life of the mother is in danger.

11.2. The learned Counsel for the applicant strenuously contended that when read in the context of the Explanation-1 to section 3, where pregnancy caused by rape is said to be of grave injury to the mental health of a pregnant woman, the same aspect must ipso facto ought to have been made applicable to the provisions of section 5 of the Act of 1971 too whereby the pregnancy could be terminated if required immediately in order to save the life of the pregnant woman. Mr. Barot wants this Court to read something on the statute which the legislature has not thought fit to provide.

11.3. A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operating. A statute must of course be given effect to whether a Court likes the result or not.

11.4. I may quote with profit a decision of the Supreme Court in the case of *Rohitash Kumar* v. *Om Prokash* [2013 (121) AIC 163 (SC); 2013 (136) FLR 92; (2013) 11 SCC 451 : AIR 2013 SC 30] :

> "22. The Court has to keep in mind the fact that, while interpreting the provisions of a Statute, it can neither add, nor subtract even a single word. The legal maxim "A Verbis Legis Non Est Recedendum" means, "From the words of law, there must be no departure". A section is to be interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the Court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act, The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a Statute, or read words into it which are not part of it, especially when a literal reading of the same, produces an intelligible result. (Vide: *Nalinakhya Bysack v. Shyam Sunder Haidar:* [AIR 1953 SC 148.] *Sri Ram Ram Narain Medhi v. State of Bombay* [AIR 1959 SC 459.] ; *M. Pentiah v. Muddala Veeramallappa* [AIR 1961 SC 1007.] ; *The Balasinor Nagrik Co-operative Bank Ltd. v. Babubhai Shankerlal Pandya* [AIR 1987 SC 1107.] ; and *Dadi Jagannadham v. Jammulu Ramulu* [(2001) 7 SCC 71; AIR 2001 SC 2699; 2001 AIR SCW 3051.] .
>
> 23. The Statute is not to be construed in light of certain notions that the legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The Courts have to administer the law as they find it, and it is not permissible for the Court to twist the clear language of the enactment, in order to avoid any real, or imaginary hardship which such literal interpretation may cause."

11.5. I am conscious of the fact that to carry a child in her womb by a woman as a result of conception through an act of rape is not only extremely traumatic for her but humiliating, frightening and psychologically devastating and as a human being, more particularly in the Indian society she becomes an object of scorn and ostracisation. This is very unfortunate. However, at the same time, assuming for the moment that termination at this stage is permissible, there would be likelihood of danger to the life of the applicant in case of cariying-out termination of pregnancy. If labour is induced for carrying-out termination of pregnancy, in every possibility the same would result in a live birth of a new born as the maturity of foetus is 28 weeks.

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…

…

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

> (i) 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…
>
> (ii) …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 organization in this regard.

…"

IN THE HIGH COURT OF PUNJAB AND HARYANA

Kavita v. State of Haryana
2015 SCC OnLine P&H 7425
Surya Kant and P.B. Bajanthri, JJ.

A minor girl, aged 12 years, became pregnant as a result of rape. By the time her mother became aware of the pregnancy, she had crossed the 20-week gestational limit prescribed under Section 3 of the MTP Act. A single judge of the High Court rejected the request for termination of her pregnancy under Section 5 (1) based on the medical opinion that continuation of pregnancy did not pose any immediate threat to her life. Aggrieved by the said order, this letters patent appeal was filed before the High Court seeking permission to terminate the minor rape victim's pregnancy of about 34 weeks.

Kant, J.: "This letters patent appeal assails the order dated 31.03.2015 passed by learned Single Judge which indeed unfolds an extremely painful and heart breaking story of a rape victim. The appellant's daughter is a 12 years old minor girl who has been subjected to repeated sexual assaults and is now burdened with pregnancy of about 34 weeks. By the time, the hapless mother came to know about this hideous act, it had already crossed the maximum limitation of 20 weeks prescribed under Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'the Act'), for lawful termination of an unwanted pregnancy. Since the appellant and her minor daughter (rape victim) both were desirous of getting the involuntary pregnancy terminated, the only recourse could have been under Section 5 ((1) of the Act, which bids the immediate termination of such a pregnancy if is urgently necessary to save the life of the mother.

2. The learned Single Judge undertook such an exercise. The victim was examined by the Medical Board of Post Graduate Institute of Medical Education and Research (for short, 'PGIMER'), Chandigarh on 26.03.2015, who opined that at that particular time, there was no imminent danger to the life of the victim if the pregnancy was to continue.

3. When this appeal came up for preliminary hearing before us on 06.04.2015, we were informed that physical and mental health of the victim has deteriorated. We, thus, directed the PGIMER authorities to constitute another Medical Board preferably comprising five subject-specialists from different streams to independently re-examine the victim.

4. The PGIMER authorities have promptly complied with that order and a Medical Board consisting seven senior subject-experts of PGIMER, Chandigarh, re-examined the victim on 07.04.2015 at 12.00 noon and have opined as follows:-

> "…The records of the patient ____ (victim) were reviewed. The patient was examined in the presence of her mother Kavita. An ultrasound was performed.
>
> On examination, the patient was found to be mildly anaemic and had normal blood pressure. The gestation of pregnancy is about 34 weeks. Ultrasound shows a healthy live fetus of around 33 weeks with estimated baby weight of 1.98 kg.

A psychiatric consultation was taken to assess the mental health of _____(victim). A psychiatric and psychological assessment has been initiated.

Interpretation: Each pregnancy poses a risk to the health of a woman. In this case, the risk of pregnancy is higher because of the age of the girl. However, termination of pregnancy at this period of gestation carries a higher risk to the girl than allowing the pregnancy to continue with regular pregnancy check up in Gynae OPD at weekly intervals.

It needs to be emphasized that termination of pregnancy at this period of gestation is likely to result in the birth of a live baby. The Board is of the opinion that termination of pregnancy now is not necessary and may be rather more harmful to the life of the girl.

However, psychological assessment of the child requires time owning to the sensitive nature of the issue and her age. The child is needed to come for further psychiatric evaluation and counseling, if necessary (Room No. 210, Psychiatry OPD, Level-II, New OPD Block, PGIMER, Chandigarh)……"

5. Having regard to the above reproduced medical opinion, nothing is left to our discretion exercisable under Section 5 or any other provisions of the Act.

6. Faced with this, learned counsel for the appellant submits and very aptly that the Medical Board has viewed that the victim child, owing to the sensitive nature of the issue and her age, requires periodical medical check-up and supervision to prevent any harm to her own life. He, thus, rightly contends that interventions of this Court for the safety of victim's life are certainly called for. We are in outrightly agreement with the learned counsel, hence, dispose of this appeal with the following directions:-

(i) The Director, PGIMER, Chandigarh, would admit the victim as an indoor patient as and when she is taken for this purpose by the appellant.

(ii) The Director, PGIMER, Chandigarh shall provide a private room to the victim and her mother or any other family-member who is the attendant of victim in the private ward.

(iii) It shall be the duty of the authorities of the PGIMER, Chandigarh to provide all the requisite medicines, food, clothing and other facilities as are required to be made available to the victim or her attendant, well in advance.

(iv) We request Dr. Vanita Jain, Professor, Department of Obst. & Gynaecology, to personally monitor such requirements. The Medical Superintendent, PGIMER, shall be obligated to ensure meticulously compliance of every advice, recommendation, suggestion or order of Dr. Vanita Jain, in this regard.

(v) Dr. Vanita Jain would further supervise the periodical needs like psychiatric consultation or related assistance from other departments of PGIMER which shall also be provided timely.

(vi) The expenditure incurred so far by the appellant on the medical examinations of the victim by the Medical Boards constituted by the PGIMER under the orders of this Court, shall be reimbursed to her by the State of Haryana forthwith but not later than two weeks from the date of submission of the bills.

(vii) The PGIMER authorities shall be entitled to seek reimbursement of their entire expenditure including the room charges etc. etc., from the State of Haryana.

(viii) 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 PGIMER, Chandigarh, within a period of two weeks of submission of such bills.

(ix) The PGIMER authorities shall ensure that adequate privacy is provided to the victim and her family while she is an indoor patient and the identity of victim is not disclosed. She shall be kept as an indoor patient without permitting the general public including Media etc. to have any access to her.

…

…"

IN THE HIGH COURT OF GUJARAT

Chandrakant Jayantilal Suthar v. State of Gujarat
(2016) 2 GLH 662
Abhilasha Kumari, J.

A minor girl became pregnant as a result of rape. An application filed by her parents before the Sessions Court seeking permission to terminate her pregnancy was denied as her pregnancy had crossed the 20-week gestational limit prescribed under Section 3 of the MTP Act. In this writ application, the petitioners challenged the order of the Sessions Court and sought permission to terminate the minor's pregnancy arguing, inter alia, that the provisions under Section 3 are discretionary and do not constitute an absolute bar on termination of pregnancy beyond 20 weeks.

Kumari, J.: "…

2. Sometimes, the Court is confronted with a dilemma where the case before it is such that the legal implications of the decision would have repercussions upon the life of an individual. The present is one such case.

…

4. The petitioners before this Court are the parents of the victim girl, who have challenged the order dated 10.07.2015, passed by the learned Additional Sessions Judge, Sabarkantha, in Miscellaneous Criminal Application No. 332 of 2015, whereby, their application for permission to terminate the pregnancy of their minor daughter, came to be rejected.

…

6. The victim girl, aged fourteen years, made a complaint on the basis of which a First Information Report (FIR) being C.R.I-60/2015 came to be registered on 29.06.2015, before the Talod Police Station, under Sections 376 and 328 of the Indian Penal Code and Sections 5(4)(2), 6, 9I and 10 of the Protection of Children from Sexual Offences Act, 2012 ("the POCSO Act"). The narration in the FIR is to the effect that the victim, who is a student of the tenth standard, was suffering from typhoid; therefore, sometime in February 2015, her mother took her to Ranasan. The clinic of Dr. Jatinbhai K. Mehta (the doctor) is located near the Bus stand at Ranasan and the mother of the victim took her there for treatment, at about 9:30 am on the fateful day. The doctor took the victim into his chamber and asked her mother to wait outside. After drawing the curtains, the doctor allegedly asked the victim indecent questions and gave her an injection, after which the victim lost her consciousness. When the victim recovered and regained her consciousness she realised that her clothes were in disarray and she was suffering from pain in her private parts. She realised she had been raped by the doctor and asked him why he had done such a thing. The doctor allegedly threatened the victim that if she disclosed the incident to her mother or uncle (who lived in Ranasan), he would ruin her life. The victim, therefore, did not disclose the incident to her mother.

7. When the victim did not get her menstrual periods for two or three months, her mother and her uncle took her for a check-up to Dr. Karshanbhai Patel at Nikoda, on 28.06.2015. After examining the victim, it was found that she was pregnant. The victim then disclosed the incident of rape to her mother and uncle. The FIR was lodged the next day, on 29.06.2015.

8. On 09.07.2015, the parents of the victim, the petitioners herein, filed Criminal Miscellaneous Application No. 332 of 2015 in the Court of the learned Additional Sessions Judge, Sabarkantha at Himmatnagar, who is also the designated Special Judge under the POCSO Act, seeking permission to terminate the pregnancy of the victim as the said pregnancy was the result of rape and the victim was not ready to accept the pregnancy. It was stated in the application that the victim, being a minor, is not in a position to physically or mentally go through the pregnancy and was in depression. The family, being financially weak, could not bear the additional burden. It was stated that the studies of the victim would suffer, she would face social stigma and her life would be ruined, if permission to terminate the pregnancy was not granted.

9. The Sessions Court directed that the victim be examined by a Gynaecologist. Dr. Anita K. Purohit examined the victim on 10.07.2015. On the basis of the Sonography report dated 10.07.2015, prepared by "Sarita Digital X-Ray and Sonography Clinic" and signed by Dr. Ketan M. Gadhvi, the Gynaecologist opined that as per the Sonography Report, the pregnancy cannot be terminated in view of the provisions of the Medical Termination of Pregnancy Act, 1971 ("the MTP Act"). However, if the Court so directs, the pregnancy could be terminated after arrangements for providing blood are made.

10. As per the Sonography Report dated 10.07.2015, the foetus was of about 23 weeks and 6 days, that is, about 24 weeks. Taking into consideration the aspect that the pregnancy of the victim was over twenty weeks, the Sessions Court declined to accord permission for the termination of the pregnancy, keeping in view the provisions of the MTP Act. It is this order of the Sessions Court that is impugned before this Court.

…

25. This Court would have to admit that, to arrive at a decision in a case such as the present one involving a minor victim of rape, saddled with an unwanted pregnancy with all its physical, mental, emotional and social implications on the one hand and the statutory provisions of law on the other hand, is a difficult task. There is not the remotest doubt that the law of the land is to be upheld, obeyed and applied and every judge of the High Court is bound by a constitutional oath to do so. However, there are times when a poignant situation arises in a case where the application of the law gives rise to a situation that would have physical, mental and social connotations upon the life of an innocent girl. Nevertheless, the law is the law, and has to be obeyed.

26. The legislature has enacted the MTP Act after due deliberation, taking into consideration all surrounding and relevant factors. The intention of the legislature in enacting the statute is evident from the language employed. The first and foremost rule in construing a statutory provision is the rule of literary construction. If the provision of the statute is unambiguous and the legislative intent is clear from it, no other rules of interpretation are required to be resorted to and the statutory provision is to be followed as it is.

27. In the present case, the relevant statutory provision is Section 3 of the MTP Act, which is reproduced hereinbelow, for ready reference: …

28. A bare reading of the entire section makes it clear that the language is straightforward, clear and unambiguous. The section begins with a non-obstante clause, overriding the provisions of any other law in force. It states that no registered medical practitioner shall be held guilty of an offence under the IPC or any other law, if any pregnancy is terminated by him in accordance with the provisions of this Act. Therefore, the legislature intended that the termination of pregnancy by any registered medical practitioner has to be **in accordance with the provisions of the MTP Act**. Section 3(2) of this Act permits the termination of pregnancy [subject to sub-section (4)] only on two grounds, namely, when (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. Only under the above two situations can an opinion be formed for the termination of the pregnancy. If the length of the pregnancy does not exceed twelve weeks, the opinion of one registered medical practitioner is required. If the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, the opinion of two registered medical practitioners is necessary. There is no provision in Section 3 that permits the termination of a pregnancy, the length of which **exceeds twenty weeks**. As per sub-section (4) of Section 3, the written consent of a guardian is necessary in the case of a woman below eighteen years or a mentally ill woman. Section 5 of the MTP Act permits the termination of the pregnancy in case a registered medical practitioner is of the opinion formed in good faith, that the termination of the pregnancy is immediately necessary to save the life of the pregnant woman. This section, as well, nowhere states a pregnancy exceeding twenty weeks can be terminated.

29. An argument has been advanced by the learned counsel for the petitioners that the unwanted pregnancy that is a result of rape and has caused great anguish to the victim and, therefore, constitutes a grave injury to her mental health in terms of explanation I to Section 3(2) of the MTP Act. Therefore, as per Section 3(2)(b)(i), this is a ground for the termination of the pregnancy, especially when the parents of the minor girl have given their consent.

30. This Court is unable to accede to this proposition, as Section 3(2)(d)(i), read with Explanation-1, 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 a little over twenty-four weeks, this Court is unable to accept the submissions of the learned advocate for the petitioners.

31. The legislative intent running through the MTP Act, especially Section 3 thereof, is clear and unambiguous. The maximum length of pregnancy permissible of being terminated is twenty weeks. Had the Legislature intended that a pregnancy, the length of which exceeds twenty weeks can be terminated, it would have clearly stated so, while enacting the provision. The Court cannot read into the provisions of a statute something that is not there or is not intended to be there by the Legislature. It is bound to follow the law as it is. As stated earlier, there is no ambiguity in the provisions of

Section 3, so as to make it necessary to follow any other rule of interpretation, except the literal rule of construction. The Court cannot legislate under the garb of interpretation [*B. Premanand v. Mohan Koik–I* - (2011) 4 SCC 266].

...

33. As this Court has observed earlier, the provisions of a statute, if clear and unambiguous, are to be read as they are and the plain and unambiguous meaning, which is indicative of the legislative intent, is to be given effect. There is nothing in Section 3 of the MTP Act which provides for the termination of a pregnancy, the length of which **exceeds** twenty weeks. If the Legislature had intended so, it would have been so enacted. The function of the Court is only to expound the law and not to legislate. It cannot read into the law what has not been either enacted, or intended. Section 3 of the MTP Act is a clear-cut provision of law which specifically provides for the termination of a pregnancy, clearly specifying the length of such pregnancy, not exceeding twenty weeks. The proposition advanced by Mr. Popat that Section 3 is not a mandatory provision, is not convincing. The clear and unambiguous provisions of a statute are to be followed as they are, being the law of the land. No discretion has been granted to any Court or authority in Section 3, to deviate from its provisions. The submission that Section 3 of the MTP Act is a discretionary provision, is untenable.

34. Another relevant aspect is that in the present case, there is no opinion of any registered medical practitioner that the continuance of the pregnancy of the victim would involve a risk to her life or grave injury to her physical or mental health. Nor has it been opined that if the child were born, it would suffer from any physical or mental abnormalities as to be seriously handicapped. In any case, even under the above situations, an opinion to terminate the pregnancy can only be formed if the length of the pregnancy does not exceed twenty weeks. In the present case, the length of the pregnancy now exceeds twenty four weeks. There is no medical opinion that the termination of the pregnancy is immediately necessary to save the life of the pregnant woman as per Section 5 of the MTP Act. Viewed from every angle, the provisions of the MTP Act do not permit the termination of the pregnancy of the victim.

...

36. It has been pointed out to the Court by the learned counsel for the petitioners that in the report of the Gynecologist, it has been stated that, though the pregnancy of the victim cannot be terminated as per the MTP Act, however, if the Court so directs, it can be terminated after making proper arrangements for blood. With due respect to the Gynecologist, the Court is required to see what is **legally permissible** and not what is possible dehors the legal provisions. A thing that may be possible medically, may not be permissible legally. One such example is the sex determination of a foetus. It may be medically possible but it is prohibited by law. Therefore, to say that what cannot be done in terms of the MTP Act can be done if the Court so directs, is a contradiction in terms. The Court cannot direct anything to be done that is not permissible in law.

37. As regards the legal position, the above discussion leads only to one conclusion, and that is that since the length of the pregnancy of the victim is over twenty-four weeks, this Court cannot permit its termination in view of the provisions of Section 3 of the MTP Act.

38. Under the circumstances, the impugned order dated 10.07.2015, passed by the learned Additional Sessions Judge, Sabarkantha, does not suffer from any error of law. Consequently, the application cannot be accepted.

39. Having arrived at the above conclusion, this Court is painfully conscious of the implications of the decision on the life of the victim. The girl is only fourteen years old, is a student of Standard-X and has her whole life ahead of her. The economic condition of the petitioners (her parents) is weak and they can ill-afford the additional burden of the child. The pregnancy is unwanted and is the result of rape. The physical, mental, emotional and psychological trauma faced by the victim is formidable.

40. Rape is a crime not only against a woman but against humanity at large as it brings out the most brutal, depraved and hideous aspects of human nature. It leaves a scar on the psyche of the victim and an adverse impact on society. In the present case, the rape suffered by the victim has left a more visible impact-an unwanted child. Only the sufferer knows the extent of the suffering. But sometimes, there is no other option but to go through the trauma, such as in the present case. It is heart-wrenching to imagine the situation of the victim and what lies ahead of her. Her welfare is, therefore, the paramount consideration for this Court. It would be in the best interest of the victim if she manages to continue with her studies after the child is born. The State Government can be requested to provide help for herself and her child and its upbringing. There is also the factor of social stigma, society being as it is. This has to be countered boldly by all concerned. Whatever has happened to the victim and whatever its consequences, are not her fault at all.

She cannot, and should not, be blamed for it. She needs the support of the authorities and enlightened citizens of society, more than anything else. She, too, deserves to be educated, dream her dreams, and, in times to come, have a home and family of her own, just like any other young girl. Humanity and society should assist, her and others like her, in this regard.

…

44. In giving birth to the child, the victim and her parents are required to be given full assistance and co-operation by the Government authorities, at every level. To this end, this Court considers it appropriate to issue the following directions:-

1) The Collector, Sabarkantha, shall ensure that arrangements are made to provide proper diet, medical supervision and medicines as may be necessary, to the victim throughout the duration of her pregnancy. When the time for delivery arrives, proper medical facilities be made available to effect a safe delivery.

2) Though the studies of the victim are bound to be interrupted for some time, however, the Collector, Sabarkantha, shall try to ensure that she continues her studies even after the birth of the child, maybe as a private student, if it is not possible for her to study as a regular student for some time.

3) The Collector, Sabarkantha, shall ensure that the child, when born, is not abandoned or neglected. He should also keep a watch to ensure that no harm comes to the child. If the victim and her parents so permit, efforts can be made for the child to be adopted in case the victim does not want to, or is unable to, bear the burden of its upbringing. The services of a reputed NGO can be availed of in this regard.

4) In addition to the amount of Rs. 25,000/- ordered to be given to the victim by the Sessions Court as interim compensation, the State Government shall pay her an amount of Rs. 1,00,000/-.

5) … The District Superintendent of Police, Sabarkantha, shall supervise the investigation of the case and ensure that it is completed expeditiously.

..."

IN THE SUPREME COURT OF INDIA

Chandrakant Jayantilal Suthar & Anr. v. State of Gujarat
(2015) 8 SCC 721
Anil R. Dave and Kurian Joseph, JJ.

In this appeal filed against the decision of the Gujarat High Court in Chandrakant Jayantilal Suthar v. State of Gujarat ((2016) 2 GLH 662), the Supreme Court directed the hospital authorities to terminate the minor rape victim's pregnancy without obtaining any permission from the Court, if the medical opinion indicates that such termination is immediately necessary to save her life and consent to abortion is given by her guardian and herself. The Court added that majority view of the doctors should be considered if the medical opinion is not unanimous.

Dave and Joseph, JJ.: "…

3. Looking at the peculiar facts of the case, we direct that Ms. M [*name redacted by editors*] shall be examined by three seniormost available Gynaecologists of Civil Hospital, Ahmedabad at Asarwa, along with Dr Riddhi Ketan Shukla, who had examined Ms [M] on 25-7-2015 and also by a Clinical Psychologist attached to the Civil Hospital. The aforestated team of doctors shall examine Ms [M] and after having an interaction with her, shall decide whether there is a serious threat to her life, if the child is not aborted.

4. If the team of the aforestated doctors is of the view that termination of the pregnancy is immediately necessary to save the life of Ms [M], the doctor concerned of the Civil Hospital shall perform necessary surgery, if the petitioner and Ms [M] 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.

5. In case of abortion, the hospital authorities shall take necessary tissue from the foetus for DNA identification.

..."

IN THE HIGH COURT OF GUJARAT

Bhavikaben v. State of Gujarat & Ors.
(2016) 3 RCR (Cri) 362
Sonia Gokani, J.

The petitioner became pregnant as a result of rape while she was a minor. She attempted suicide by consuming acid which damaged her internal organs. Due to her pregnancy, she could not undergo the required surgical operation and therefore, filed this writ petition seeking permission to terminate her pregnancy of about 24 weeks. In its decision, the High Court considered the "best interest" of the rape victim in view of her young age and medical opinion indicating grave injury to her mental and physical health from continuation of pregnancy resulting from rape.

Gokani, J.: "This petition is preferred under Article. 226 of the Constitution of India seeking termination of pregnancy under the Medical Termination of Pregnancy Act, 1971 ("MTP Act" for short) in the following factual background.

2. The petitioner herein was born on 1st June 1997 and is aged 18 years. She is victim of rape. Her mother has lodged a complaint against the accused persons, being IC. R No. 55 of 2015 registered with Chorwad Police Station, District Junagadh for the offence punishable under Sections 376,506 (2) & 114 IPC. According to complainant on 26th September 2015, the victim was found from the bathroom, after having consumed acid, and therefore, she was immediately removed to Raghuvanshi Hospital at Keshod. On 2nd October 2015, a letter written by the accused to the victim since was found from the residence, she had revealed to the parents that as a minor she was lured by the accused and rape was committed on her. When she missed her monthly periodical cycle and on realizing that she was carrying pregnancy, she revealed the fact to the accused and insisted on marrying him. The accused refused any such relation and perturbed victim had chosen to end her life by consuming acid. A complaint also came to be filed by the mother of the victim which set the criminal machinery into motion. By preferring the present Application, it is urged by the victim that consumption of acid in solid liquid form has damaged her organs like Esophagus, Liver, etc. She was advised to undergo surgery of esophagus, but the surgery could not be performed on account of her pregnancy. Having found that this continuance of pregnancy is causing serious threat to her physical and mental health and this may also create serious complications to the child that may be born, she contemplated termination of pregnancy under the provisions of MTP Act. The victim's parents are carrying on agricultural labour work on the field of others and the family has scant financial resources. Therefore, a request is made to allow her to terminate pregnancy, which is of 24 weeks.

3. This Court, vide its Order dated 17th February 2016, had passed the following order:

> "A detailed medical report needs to be called for before permission of termination of pregnancy is acceded to. And therefore, the Medical Superintendent, Sola Civil Hospital, Sola, Ahmedabad is directed to cause to examine the petitioner by a panel of senior-most Gynecologists of the Sola Civil Hospital. The aforesaid team of doctors shall examine the victim on 18th February 2016 and after an interaction with her, shall give in writing opinion at the earliest, bearing in mind the advanced stage of pregnancy and her physical and mental condition, whether there will be a substantial risk to the life of the petitioner, if the child was born, or that the child would suffer from such physical or mental abnormalities as to be seriously handicapped.
>
> The Medical Superintendent, Sola Civil Hospital, Ahmedabad shall admit the petitioner today itself and shall only discharge her after the Court's order.
>
> …"

4. Today, the report of Medical Superintendent, GMERS Medical College & Hospital, Sola, Ahmedabad dated 18th February 2016 is produced on the record. It appears that a committee of six members was constituted by the Medical Superintendent and the said team of Doctors have given their opinion that continuation of pregnancy will adversely affect her mental status; of course, it will not affect her physical status. It had then been referred to the Professor & Head, OBGY Department, GMERS Medical College, Ahmedabad and according to the Professor & Head-OBGY Department, the pregnancy since at present is of 24 weeks and MTP Act permits termination of pregnancy till 20 weeks, the same can be carried out, if permitted by the Court's order, in extreme situation and considering the increased risk of termination at this gestational age. However, as per the opinion of team of Doctors, the survival of new born is very less due to extreme prematurity.

…

8. Before adverting to the facts in the instant case, provisions of MTP Act, particularly Section 3 requires reproduction—…

9. This Act permits termination of pregnancy where the length of pregnancy does not exceed twelve weeks or where such length of pregnancy exceeds twelve weeks but does not exceed twenty weeks, if in the opinion of two registered medical practitioners, in cases of sub section [2](b) of Section 3, continuance of pregnancy would involve a risk to the life of a pregnant woman or of grave injury to her physical or mental health, or there is a substantial risk that if a child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Explanation provides that 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. Pregnancy thus can be terminated by registered medical practitioner where it is not of more than twelve weeks. If it is of more than twelve weeks, but less than twenty weeks, two medical practitioners need to opine that continuance of pregnancy would involve a risk to the life of pregnancy woman or that it may cause grave injury to her physical or mental health. Likewise, physical or mental abnormalities of a child to be born is also one of the grounds for medical practitioners to terminate the pregnancy. Further, no pregnancy of any woman who has not attained the age of 18 years, or who having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.

10. The Apex Court in case of *Chandrakant Jayantilal Suthar v. State of Gujarat* [Su pra] had left it to the discretion of the medical practitioners, considering the peculiar facts, who were to decide after interaction with the victim, as termination of pregnancy was immediately necessary to save life of the victim herself, it did not want the Doctors to wait for the permission of the Court, if there was a unanimity amongst the doctors; otherwise directed the majority view to prevail. While so doing, the Court directed the Hospital authorities to take necessary tissue from the fetus for DNA identification.

11. In case of *Suchita Srivastava v. Chandigarh Administration*, reported in 2009 (3) GLH 468, the Apex Court has laid down the theory of best interest test to hold that the Court is required to ascertain the course of action which would serve the best interests of the per son in question. The Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. The Court's decision should be guided by the interest of the victim alone and not those of stakeholders such as guardians or society in general…

12. Bearing in mind the decision of the Apex Court and keeping the 'Best interests' test as the parameter, in the opinion of this Court, in the present set of circumstances, careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim, if are considered, this Court is of the opinion that termination of pregnancy requires to be permitted, which is in the best interest of the victim.

13. It is to be noted that the team of Doctors have on 18th February 2016 submitted report and opined, thus—

> "After reviewing history and detailed examination, blood reports and sonography done at Civil Hospital, Sola, our opinion is as follow:
>
> - Psychiatric evaluation suggest patient is not suffering from any psychiatric disorder and patient is psychiatrically fit. Considering involuntary pregnancy and unwillingness of victim to continue pregnancy her mental trauma may increase if pregnancy continues.
>
> - Anesthetic evaluation suggest that slightly more risk of anesthesia if pregnancy will terminated at present.
>
> - Medical and surgical evaluation suggest that if proper nutrition and care is maintained through feeding jejunostomy, there is no physical harm in continuation of pregnancy or termination of pregnancy at present.
>
> - There is same or slight increase risk to victim if pregnancy is terminated before term than physiological normal delivery at term.
>
> - As per MTP Act, termination of pregnancy can be done up to 20 week of pregnancy. At present, patient had 24 week live pregnancy.
>
> - If the child will born [sic] at present, the chances of survival of new born is very less due to extreme prematurity. But, if it delivers at term there will not increase chance of physical or mental abnormalities or seriously handicapped.
>
> Considering all experts opinion continuation of pregnancy will adversely affect her mental status but will not affect her physical status."

14. Professor & Head, OBGY Department, GMERS Medical College, Sola, Ahmedabad has opined, thus—

> "(1) Pregnancy at present is 24 weeks. As per MTP law, MTP can be carried out only till 20 weeks in said case.
>
> (2) However termination can be carried out, if permitted by the Court order in extreme situation considering increased risk of termination at this gestational age in the said situation. As per the opinion of Pediatrician, the child born at this age is not likely to survive due to extreme prematurity."

15. If the opinion of the team of Doctors is taken into consideration, it could be noticed that her mental status will adversely be affected, if pregnancy continues. She, therefore, falls under the criteria set out in the MTP Act. This continuance of pregnancy since involves grave injury to her mental health as her pregnancy being the result of rape, the anguish caused also is to be constituted as a grave injury to the mental health of the victim, and therefore also; termination of pregnancy is permitted.

16. This Court had noticed, before referring the victim to the team of medical experts, that she is being fed through Rielis tube and except liquid naturally nothing could be provided. Her frail physical and mental health is on account of trauma of rape she underwent and it appears almost an impossibility for her to look after herself. She also attempted suicide when humiliated by the accused. All these factual circumstances that emerge on record, particularly very young age of the petitioner leads this Court to conclude in favour of grant of her request. Delay in approaching this Court has placed statutory constraints which is because of various grounds narrated - chief amongst the same is her poor health and poverty stricken condition of parents. However, when medical opinion does not indicate this act of termination to risk her life, following the best interest test, request warrants to be acceded to.

17. Therefore, it is being directed that with best medical facilities available and on ensuring the proper care and supervision, termination of pregnancy shall be carried out. Doctors shall take necessary tissue from the fetus for DNA identification by following scientific practice prescribed by the Standard Medical Practice for DNA identification.

..."

IN THE HIGH COURT OF PUNJAB AND HARYANA

R v. State of Haryana
2016 SCC OnLine P&H 18369
Paramjeet Singh Dhaliwal, J.

A minor girl had become pregnant as a result of a rape. Despite being tasked to undertake an initial medico-legal examination, the concerned doctor did not examine her for pregnancy. This contributed to the loss of time and her pregnancy exceeded the statutory limit of 20 weeks by the time she approached the High Court seeking termination of pregnancy. The petitioner repeatedly stated that she would commit suicide if she was made to carry the pregnancy to term. The Court had to decide whether permission could be granted to terminate a 21 weeks pregnancy of a minor rape survivor whose termination of pregnancy was delayed due to the laxity of a government doctor.

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 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.

…

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…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 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.

…

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 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, uptil 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 at 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 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 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 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 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 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 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 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 reassess 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 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.

…"

IN THE HIGH COURT OF GUJARAT

Madhuben Arvindbhai Nimavat v. State of Gujarat
2016 SCC OnLine Guj 662
Sonia Gokani, J.

This writ petition was filed by a minor girl seeking permission for termination of her pregnancy resulting from rape, after her request was declined by the Sessions Court. The High Court considered the "best interest" of the minor rape victim, relying on Suchita Srivastava v. Chandigarh Administration ((2009) 9 SCC 1), to decide whether termination of her pregnancy of over 20 weeks should be allowed.

Gokani, J.: "Petitioner herein is a minor girl who through her legal guardian and father who is a labourer has preferred this petition under Article 226 of the Constitution of India seeking termination of pregnancy. She is a victim of rape and aged about 14 years. The FIR came to be filed with Mahila Police Station, Rajkot being I-CR No. 51 of 2016 for the offence punishable under Section 376 of the Indian Penal Code.

...

3. An application was given to the learned Sessions Judge in relation to the said I-CR No. 51 of 2016 seeking termination of pregnancy on 24.5.2016. It was urged that she is having pregnancy of 18 months (*sic*) and as per the Medical Rules, upto 20 weeks, she can be permitted to terminate the pregnancy.

4. Sessions Court rejected such request relying on the provisions of Medical Termination of Pregnancy Act 1971 ("MTP Act" for short). It also appears that the Court had called the Assistant Professor (Ob & Gy) Government Medical College, Rajkot personally and he was also asked to give exact opinion in respect of the length of pregnancy. In continuation of his earlier opinion, he has examined the victim carefully and opined that he was unsure whether pregnancy exceeds 20 weeks.

5. Both the sides have been heard at length.

…

7. Learned APP Mr. Ronak Raval has also relied upon some of the judgments delivered by this Court and submitted that the Court may direct for termination of pregnancy, if deems fit, considering the mental health and overall picture.

8. A short question that arises in this petition is as to whether termination of pregnancy be permitted as requested for as the girl is only 14 years of age, having hemoglobin level of 6.5% only and when she is carrying pregnancy of 22 weeks presently.

9. This Court, in case of *Chandrakant Jayantilal Suthar v. State of Gujarat*, reported in **Special Criminal Application No. 4255 of 2015** dealt with the law on the subject extensively and denied the permission this wise; …

10. The said order was challenged before the Apex Court and the Apex Court overruled the order as reported in (2015) 8 SCC 721. Relevant paragraphs are reproduced hereunder:

> *"3.* […]
>
> *4. If the team of the aforestated doctors is of the view of that termination of the pregnancy is immediately necessary to save the life of Ms. Maitri, the doctor concerned of the Civil Hospital shall perform necessary surgery, if the petitioner and Ms. Maitri desire to go through to such abortion, without taking any permission from this Court. If there is unanimity among the doctors, majority view of the doctors shall prevail.*
>
> *5. In case of abortion, the hospital authorities shall take necessary tissue from the foetus for DNA identification.*
>
> […]*"*

…

11. This Court in case of *Bhavikaben d/o Rameshbhai Solanki v. State of Gujarat* in Special Criminal Application (Direction) No. 1155 of 2016 while dealing with the case of a rape victim who had made a request for termination of pregnancy considering the decision rendered in the case of *Chandrakant Jayantilal Suthar v. State of Gujarat*. (Supra) and on discussing the provisions of Medical Termination of Pregnancy Act 1971, the pregnancy was permitted to be terminated. It would be appropriate to reproduce relevant paragraphs which reads as under:- …

12. This Court in case of *Poojaben Vershibhai Charla (Minor) through Vershibhai @ Varsingh Govindbhai Charla v. State of Gujarat* in Special Criminal Application (Direction) No. 1681 of 2016 has also dealt with the similar issue and also took note of the decision in the case of *Suchita Srivastava v. Chandiagarh Administration*, reported in 2009 (3) GLH. 468, and keeping parameters of "Best Interest Test, permitted termination after seeking medical opinion.

13. In the matter on hand, this Court shall have to consider the course of action bearing in mind the 'best interest' theory victim girl is very young. Her trauma, mental agony and possibilities of social ostracism needs to be kept in view. In the present set of circumstances, on careful inquiry of the medical opinion on continuing feasibility of continuing pregnancy as well as social circumstances faced by the victim, the Court's decision has to be guided by the best interest of the victim alone and not of the stakeholders not of the guardian also.

14. At this stage, the certificate issued by the Associate Professor of Department of Obstetrics and Gynecology, PDU, Government Medical College, Rajkot, is reproduced hereunder: -…

15. It can be noticed that patient has severe anemia with 6.5% haemoglobin as mentioned hereinabove and the pregnancy of 22 weeks and 3 days as on 7.6.2016. The Medical opinion suggests that termination can be carried out with the order of the Court and after correction of anemia with due risk of the procedure.

16. Since the request is made by the petitioner herself with the consent of the parents, bearing in mind, her very young age and incident of rape with pregnancy, grave injury to her mental health is to be presumed. Her fragile health and poor haemoglobin level requires that the team of the Doctors needs to examine her once again and also ensure her safety as this Court is of the opinion that it would be in the best interest of the victim to permit the termination of pregnancy, if otherwise, there is unanimity amongst the Doctors to the effect that such termination would be carried out safely.

17. Let the Senior Expert Doctor interacting with the prosecutrix - petitioner and her parents and without further reference to this Court, take a decision bearing in mind the 'best interest principle' and terminate her pregnancy as soon as possible.

18. The outcome and well being of the petitioner shall be reported to this Court within one week. The concerned Doctors shall examine the level of haemoglobin and carry out all other necessary tests before proceeding to terminate the pregnancy. Once termination is over, the petitioner - minor shall continue to receive treatment for the length of period deemed necessary by the Senior Most Doctor of the team.

19. Medical Superintendent PDU Civil Hospital, Rajkot shall hand over, in scientific manner, the tissues drawn from the foetus for DNA identification to the Police Inspector, Mahila Police Station, Rajkot for onward transmission of the same to the concerned Forensic Science Laboratory.

..."

IN THE SUPREME COURT OF INDIA

X v. Union of India
(2016) 14 SCC 382
Jagdish Singh Khehar and Arun Mishra, JJ.

The petitioner was 24 weeks pregnant and was diagnosed with several foetal impairments incompatible with extra uterine life. Having crossed the 20 week limit prescribed under Section 3(2) of the MTP Act, the petitioner filed a writ petition before the Supreme Court seeking permission to terminate her pregnancy. The Supreme Court was to adjudicate upon the issue of whether it would be justified and legal to terminate the 24-week pregnancy of the petitioner.

Khehar and Mishra, JJ.: "

…

6. By our Motion Bench order dated 22.07.2016, we had accepted the suggestion of the learned Solicitor General for India, and the learned counsel for the State of Maharashtra in directing respondent No. 2 - the State of Maharashtra, to constitute a Medical Board at KEM Hospital and Medical College, Mumbai, to medically examine the petitioner.

7. In furtherance of the direction issued by this Court, a Medical Board comprising of the following seven doctors was constituted at the KEM Hospital and Medical College, Mumbai. …

8. The Medical Board has submitted a report dated 23.07.2016, which is taken on record and marked as Annexure A. In its analysis, the report inter alia recorded as under:

> "4. From General Medical Examination she has no active medical complaints.
>
> 5. Obstetric examination shows 24 weeks pregnancy, with severe polyhydramnios, with foetal parts not felt. On internal examination, the cervix is closed and high up.
>
> 6. Radiological diagnosis is single live foetus with gestational age of 23 weeks 3 days with following malformations: 1) excencephaly, i.e. evidence of no skull valut above orbit, with presence of brain tissue floating in amniotic fluid, 2) Omphalocele (presence of liver, intestines and stomach bubble outside the abdomen and in the amniotic cavity). 3) Heart is bulging into the omphalocele sac. 4) Kyphoscoliosis which is an anomaly of the spine involving the thoracolumbar vertebrae with polyhydramnios (excessive amniotic fluid) with closed vertix."

9. Based on the above medical examination, the findings of the Medical Board were expressed as under:

> "1. Current pregnancy is about 23-24 weeks by clinical and radiological evaluation.
>
> 2. In view of severe multiple congenital anomalies, the foetus is not compatible with extra-uterine life.
>
> 3. Risk to the mother of continuation of pregnancy can gravely endanger her physical and mental health.
>
> 4. Risk of termination of pregnancy is within acceptable limits.
>
> Hence the Medical Board advises that the patient, Ms. X should not continue with this pregnancy."

10. The question that arises for our consideration is, whether it would be justified and legal, to terminate the pregnancy of the petitioner, which the Medical Report itself shows, as of 24 weeks duration?

11. Learned Attorney General representing the Union of India has invited our attention to Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'the Act') which is extracted below:

> "3. When pregnancies may be terminated by registered medical practitioners.-
>
> (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-
>
> (a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that-

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation 1.-Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken to the pregnant woman's actual or reasonable foreseeable environment.

(4)(a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a [mentally ill person], shall be terminated except with the consent in writing of her guardian.

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

…Section 3 leaves no room for doubt, that it is not permissible to terminate a pregnancy, after 20 weeks. However, Section 5 of the Act lays down exceptions to Section 3.

12. Section 5 of the Act is also reproduced hereunder:

"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 (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."

A perusal of Section 5 of the Act reveals, that the termination of pregnancy, which is necessary to save the life of the pregnant woman, is permissible.

…

13. Having perused the Medical Report (relevant extracts whereof have been reproduced hereinabove), we are satisfied, that a clear finding has been recorded by the Medical Board, that the risk to the petitioner of continuation of her pregnancy, can gravely endanger her physical and mental health. The Medical Board has also expressed an advice, that the patient should not continue with the pregnancy. In view of the findings recorded in para 6 of the report, coupled with the recommendation and advice tendered by the Medical Board, we are satisfied that it is permissible to allow the petitioner to terminate her pregnancy in terms of Section 5 of the Medical Termination of Pregnancy Act, 1971. In view of the above, we grant liberty to the petitioner, if she is so advised, to terminate her pregnancy.

14. The writ petition is disposed of in the above terms…"

IN THE HIGH COURT OF MADRAS AT MADURAI

Marimuthu v. Inspector of Police
(2016) 6 CTC 90
S. Vimala, J.

This writ petition was filed by a father seeking termination of his daughter's pregnancy. The petitioner alleged that his daughter was kidnapped and raped by a 17 year-old boy while she was a minor. However, the girl had attained majority at the time she was produced before the Court and wanted to continue her pregnancy. The issue before the Court was whether under Section 3(4) of the MTP Act, a minor's pregnancy could be terminated with the consent of her guardian when the minor does not consent to termination.

Vimala, J.: "Whether the father/guardian of the minor pregnant daughter can get the foetus of the minor daughter aborted, when the pregnant minor daughter herself is not agreeable for such termination is the question raised in this case;

2. In other words, whether the minor daughter's right to life under Article 21 includes the right to beget a life or create a life is the more pertinent issue raised.

BRIEF FACTS:

3. The writ petition seeking to terminate the pregnancy of his daughter, was filed by the father and presented before this Court in person by both the father Marimuthu and mother Selvarani.

3.1. Originally, the petitioner/father preferred a complaint before the 1st respondent complaining that his minor daughter was missing (from 13.02.2016). The 1st respondent after investigation, arrived at the conclusion that one Sithanathan, S/o. Perumal kidnapped the petitioner's daughter by offering false promise of marriage and on 14.04.2016, they were secured. Thereafter, a case of girl missing registered in Crime No. 57 of 2016 was altered into Sections 417, 366A and 376 of IPC and Section 4 & 5 of POCSO Act.

3.2. The accused was arrested and produced before the Juvenile Justice Board, as he was aged 17. The petitioner's daughter was sent for medical examination. On 15.04.2016, the Doctor gave the report that the minor girl was pregnant and the age of the womb was found to be 14 weeks.

3.3. The critical period of twenty weeks, before which alone there can be a safe abortion, was over by 05.07.2016. The father alleged that his minor daughter was made pregnant on account of the rape committed by the accused and therefore, the 1st respondent should refer the petitioner's daughter to the Medical Officers (R2 and R3) in order to get the pregnancy terminated. So seeking this writ of mandamus has been filed.

4. The father and the mother appeared in person before this Court on 20.07.2016. On hearing both of them, the alleged minor daughter Mariammal and the alledgedly responsible persons Sithanathan were suo motu impleaded as R4 and R5 by this Court and the impleaded parties were directed to be produced before this Court on 21.07.2016.

4.1. On 21.07.2016, this Court has passed the following order:

> "2……
>
> 3. Today, both the respondents 4 and 5 appeared before this Court and Sithanathan/R5 has admitted that he is the person responsible for the pregnancy of Mariammal. However, the said Mariammal is not in a position to say whether she is prepared to beget the child or is willing to terminate her pregnancy.
>
> 4. In order to avoid further loss of time, this Court feels it appropriate to refer the daughter of the petitioner Mariammal to the Rajaji Government Medical College Hospital, Madurai. The Dean of Rajaji Government Medical College Hospital, Madurai is directed to depute a team of Doctors, consisting of not less than three registered medical practitioners to examine Mariammal and find out,
>
> a) the duration of pregnancy;
>
> b) to ascertain as to whether it is advisable to terminate her pregnancy at this stage; and
>
> c) whether 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, as contemplated under Section 3(2)(i) of the Medical Termination of Pregnancy Act, 1971 and submit a report to this Court forthwith."
>
> …

4.3. After examination of the pregnant girl/R4, the Dean, Madurai Medical College, Madurai has submitted a report dated 21.07.2016 to this Court, wherein it has been stated as under:

> "Single live intra uterine gestation of 21-22 wks"

4.4. Before medical examination, when the Doctors sought for consent of the minor girl for examination, the girl has stated that she is not willing to abort the foetus itself. Necessary endorsement also finds place in the report. Perhaps, that could have been the reason as to why with regard to the safety of abortion, no specific opinion has been expressed.

5. The contention of the father is that the continuance of the pregnancy would cause a risk of injury to the health of the girl, as the pregnancy is on account of rape committed on her. Such unwanted pregnancy would constitute a grave injury to the mental health of the daughter and therefore, it should be ordered to be aborted.

6. But the contention of the minor daughter is that the pregnancy was not out of coercion, but out of voluntary sexual intercourse between her and the 5th respondent and she has the total and complete pleasure in carrying the foetus and therefore, there should be no order for abortion.

7. In order to appreciate the contentions raised, it is necessary to look into Section 3(2) of the Medical Termination of Pregnancy Act. Before deciding this issue, it is equally important to find out whether the petitioner's daughter was a minor on the date of alleged rape and whether the consent of the petitioner's daughter is mandatory before ordering termination of pregnancy at the request of the father…

8. The issue regarding necessity/importance of consent of the minor girl has to be considered in the light of rights made available to children under the International Conventions and the Indian Law.

9. The United Nations Convention on the Rights of the Child (UNCRC) providing for the rights of children cover all civil, political, social, economic and cultural rights of every child.

> a) Right to Survival: A child's right to survival begins before a child is born. According to Government of India, a child life begins after twenty weeks of conception. Hence the right to survival is inclusive of the child rights to be bom, right to minimum standards of food, shelter and clothing, and the right to live with dignity.
>
> b) Right to Protection: A child has the right to be protected from neglect, exploitation and abuse at home, and elsewhere.
>
> c) Right to Participation: A child has a right to participate in any decision making that involves him/her directly or indirectly. There are varying degrees of participation as per the age and maturity of the child.

d) Right to Development: Children have the right to all forms of development: Emotional, Mental and Physical. Emotional development is fulfilled by proper care and love of a support system, mental development through education and learning and physical development through recreation, play and nutrition.

10. Before deciding the issue regarding the consent of the pregnant girl, whether she was a minor or major on the date of the alleged occurrence and as on date of production before this Court are material issues to be considered.

MINORITY/MAJORITY:

…

11.2. Therefore, on the date of occurrence, both of them were minors and on the date of production before this Court, both of them were above 18 years of age.

12. Now the next question is, when the victim girl was minor at the time of incident, and when the victim girl was a major on the date of production before this Court, when she was pregnant, whether consent of the victim girl is essential in deciding the issue regarding termination of her pregnancy.

13. Obviously, the victim girl was not in a position to express herself completely and freely, as she was depending upon her parents at this crucial stage of pregnancy as well as in need of moral support. Therefore, she was not in a position to engage a counsel for herself, though she had a different opinion with regard to retention of her pregnancy. Therefore, this Court thought of getting assistance to the Court by appointing an Amicus Curiae. Accordingly, Mr. K.P.S. Palanivel Rajan was appointed as Amicus Curiae.

14. Learned counsel for the petitioner invited the attention of this Court to Section 4(a)(b) of the Medical Termination of Pregnancy Act, 1971 under which it is stated that save as otherwise provided in Clause (a) [reference is to Clause 4(a)], no pregnancy shall be terminated except with the consent of the pregnant woman. Section 4(a)(b) is already extracted supra.

15. Under the Indian Penal Code, termination of pregnancy is an offence. To save the registered medical practitioners from the penal offences, Section 3 of Medical Termination of Pregnancy Act, 1971 provides for exceptions under which termination is not an offence. In other words, Section 3 of the Medical Termination of Pregnancy Act, 1971 is an enabling provision/saving provision to save the registered medical practitioner from the purview of the Indian Penal Code. Termination of pregnancy under the provisions of the Act is not the rule, but it is only an exception. Under Section 3(2), there can be no termination of pregnancy, if the length of pregnancy had exceeded 20 weeks. Only exception is found in Section 5 under which pregnancy can be terminated to save the life of the pregnant woman, if the opinion of the medical practitioner is formed in good faith.

16. The entire scheme of the Act show that the provisions are intended to save the pregnant woman. So far as the medical practitioners are concerned, if they find that the pregnant woman happens to be a minor, they must take care to get the consent of the guardian in writing. Whether consent of the minor can be dispensed with, if she is found to be below 18 years of age is the issue under challenge. In other words, whether Sub-Section 4(a) can be understood as dispensing with the consent of the pregnant woman if she is below 18 years of age, is the crucial issue for consideration.

17. At the time of conception, no doubt, the petitioner's daughter was below 18 years of age, but she had attained 18 at the time of hearing by this Court. This is a case where, not even a forced pregnancy or unwanted pregnancy is alleged by the victim girl.

18. It is not the case of the victim that the pregnancy would give her the feeling of the bearing the violence or aggravating her mental trauma. The victim girl seems to be mature enough to understand the implication of the pregnancy. Under such circumstances, whether choice of motherhood can be deprived to her, especially when her answers to the Court (in front of the parents of both parties and the respective counsels) gave satisfaction to the Court that the decision taken by her to retain the pregnancy had been taken on account of informed decision knowing fully well about the implication of the pregnancy.

19. In English Law, the opinion of the parents or natural guardians in the matter of abortion is irrelevant and if the minor girl is capable of understanding the implication, her opinion is quite relevant and important.

19.1. The American Law takes into account the rights of the minor vis-a-vis the maturity level. In *Denforth's case* (49 L.Ed. 2d 788), it was held (1) that mature minors have a right to make their own decisions about abortion without parental involvement; (2) that mature and immature minors must, as a matter of constitutional law, have the opportunity, through an alternative judicial or administrative procedure, to obtain an abortion without parental consent or consultation; and (3) that with respect to immature minors, the sole test must be their own best interests.

20. The provision under Section 4(a)(b) should be interpreted having regard to the objective of the Medical Termination of Pregnancy Act and having regard to the scheme of that, it can never be interpreted as dispensing with the consent of the minor in case the minor wants to retain the pregnancy.

21. This Court was conscious of the urgency involved in passing orders when the issue was with regard to termination of pregnancy. But, startling facts were presented to the Court one after the other. Only during enquiry, this Court decided to spend some time for enquiry, especially in the medical report itself, it had been mentioned that the victim girl was not willing to have the pregnancy terminated and this Court decided to go by that report. At the end of the enquiry, the person responsible for pregnancy submitted that he had already married the victim girl and produced the photograph in support of the same. In fact, a memo has been filed on behalf of R5, submitting that he had married the victim girl on 14.02.2016 in Thiruavinankudi Murugan Temple at Palani. On hearing this statement made on 22.07.2016, both parties on both sides agreed that the foetus need not be aborted.

22. On account of twist and turns, this Court was driven to decide the next issue regarding the validity of marriage in terms of the provisions of the Prohibition of Child Marriage Act, 2006. Under the provisions of the said Act, the marriage is a void marriage, only if the circumstances prescribed under Sections 12(a) to (c) exist. It is the case of the victim girl that such circumstances were not available in her case. …

23. When the marriage itself is not shown to be a void marriage, then the request of the father to terminate the pregnancy of the daughter without the consent/concurrence of the daughter cannot be permitted.

24. Under such circumstances, the permission sought for by the father to terminate the pregnancy of his daughter is declined. Hence, the petition deserves to be dismissed.

25. Though it was not difficult to take a decision even at the initial stage, because of the fact that the daughter of the petitioner did not want to get her pregnancy terminated, still, it presented a lot of difficulties having regard to the issue raised regarding constitutional validity of certain sections of POCSO Act.

26. Originally, the age of consent with regard to forcible sexual intercourse was 16 under Section 375 of the Indian Penal Code, which was later raised to 18. Under the POCSO Act, the consent of victim is immaterial uptill her age of 18. Apprehension was expressed that many parents, who do not accept marriage of their daughter are likely to prefer false cases against the partner of the girl. The study by the National Law School, Bangalore was brought to the notice of the Court and it is appropriate to extract important observations in the report…

27. The Protection of Children from Sexual Offences Act, 2012 (POCSO Act), defines a 'child' to mean 'any person below the age of eighteen years' and raised the age of consent from 16 years under the Indian Penal Code (IPC) to 18 years. The Act adopted a protectionist approach under the assumption that a uniform age of consent would be in accordance with the UN Convention on the Rights of the Child, 1989.

28. In the UK, the age of consent is 16 years. In the US, it varies from 16 to 18 across states. It is 14 years in Germany and Italy, and 15 in France.

29. The National Law School team examined judgments, court proceedings and also spoke to the lawyers and the victims. In absolute numbers, 555 cases ended in acquittals and only 112 led to convictions.

29.1. The National Commission for Protection of Child Rights had in 2010 proposed that any consensual sexual act should not be an offence when it involves two persons who are both above 14 and are either of the same age or the age difference is not more than three years.

30. In *Teddy Bear Clinic for Abused Children v. Minister of Justice and Constitutional Development*, [2013] ZACC 35, the Constitutional Court of South Africa confirmed that provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, which criminalised consensual sexual conduct of adolescents above 12 years and below 16 years, were unconstitutional. The imposition of criminal liability on adolescents engaging in consensual sexual conduct was opposed to the right to dignity, right to privacy, and contrary to the best-interests principle. It observed that the provisions '…criminalise a wide range of consensual sexual conduct between children: the categories of prohibited activity are so broad that they include much of what constitutes activity undertaken in the course of adolescents' normal development…. the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents.'

CHILD MARRIAGE PROHIBITION:

31. The Prohibition of Child Marriage Act, 2006 (PCM Act) seeks to prohibit the solemnization of marriages of girl below the age of 18 years and boys below the age of 21 years. The Act prescribes penalties for the solemnization, promotion, and allowing of child marriages. A male above 18 years of age can be punished under the Act for contracting a marriage with a girl under 18 years. The Act is, however, silent on sexual relations in a child marriage. It extends legitimacy to children bom [sic] of child marriages thus indirectly acknowledging sexual intercourse within a child marriage. Under the Indian Penal Code, 1860 (IPC), sexual intercourse by a man with his wife above 15 years of age, is an exception to rape. The Criminal Law Amendment Act, 2013 raised the age of consent to 18 years but did not disturb this exception. As a result, sexual intercourse with a wife above 15 years of age and below 18 years of age will not amount to rape under the IPC.

32. Even though legitimacy is attached to children born of child marriages, the complications and dangers of teenage Pregnancy/Negative impact of child marriage/ unintended/ unplanned/ unwanted/ unwarranted pregnancies caused on account of sexual relationship, cannot be ignored:

33. The teenage pregnancy has a serious impact not only on the pregnant woman, but also on parents and the effect is very grave and long-lasting. The medical, psychological, economical and social impact of early child bearing are significant especially when the pregnant woman remains unmarried. Early child bearing harms the health of both the mother as well as the child. It goes to the extent of causing maternal mortality. It is reported that teenage deliveries are complicated by obstructed labour and other problem. The children bom of such pregnancy suffer low weight, low educational facilities, abandonment, caught in a cycle of poverty and thereby loosing development, upliftment and social recognition.

34. Therefore, it is time that child marriage should be prohibited, but the question is what should happen to the marriage which is already performed due to lack of awareness?

35. Learned counsel appearing as Amicus Curiae to assist the Court pointed out that the attention of the Standing Committee was invited on the aspect of consent and the Committee expressly rejected the suggestion on the following reasoning:

> "6.9. The Committee has also a word of caution. By having the element of consent, the focus would be on the victim which would invariably lead to revictimisation of the victim in the hands of the justice delivery process and would be especially problematic when dealing with children. The Committee would like to point out that a great deal of jurisprudence supports the theory that law should move away from this classical approach of trials in such cases and focus on the conduct of the accused and the circumstances surrounding the offence rather than the conduct of the victim thereby obviating the necessity of lengthy cross-examination of the victim on the issue of consent."

36. This Court, in the case of *T. Sivakumar v. Inspector of Police, Thiruvallur Town Police Station, Thiruvallur District*, reported in (2011) 4 MLJ (Crl) 315, gave a finding that until a female child of child marriage elects to accept the marriage on attaining the age of 18 years, her custody cannot be entrusted to the male party to the marriage. There is also a finding that the minor girl, who entered into the marriage, which is prohibited under Section 3 of the Prohibition of Child Marriage Act is not an offender.

37. The problems associated with teenage is manifold, which is in the form of teenage love, teenage marriage, teenage suicide and teenage murder all on account of so called teenage romance. When the teenage boys and girls have the barrier to discuss it with their family members, it is appropriate that there should be a team of experts consisting of Doctors/Lawyers/Psychologists/Psychiatrists/Welfare Experts/Welfare Counsellors, who would be in a position to confidentially guide them and counsel them. This body is the need of the hour in every school and college. This Court endorse the view expressed by the District Judge of Delhi by name Dharmesh Sharma, who made a clarion call for creating public awareness about the impact of girl or boy marrying at a tender age or indulging in unsafe sexual activities.

…

39. The right to autonomy to the woman and to decide what to do with their own bodies, including whether or not to get pregnant, and if pregnant whether to retain the pregnancy and to delivery the child, i.e. the right to motherhood is towards their empowerment and it is in accordance with the International Covenant on Human Rights. Considering the right to life, which includes the right to beget a life and the right to dignity, the right to autonomy and bodily integrity, the foetus cannot be ordered to be aborted against the wishes of the victim girl.

40. Whether the foetus carried is a pain or pleasure is the subjective opinion of the minor girl and the girl has formed an opinion that it is the total delight, when India has ratified the conventions on the rights of the Child and when the consent of the victim girl cannot be dispensed with while aborting pregnancy, this Court has no option except to decline permission to terminate pregnancy, leaving it open the question, who is to bear the cross?

41. In the result, this Writ Petition is dismissed. No costs.

42. These contradictions/controversies/conflict, which touch upon the constitutional validity of POCSO Act cannot be decided by this Court sitting single, as the matter involves constitutional validity or to be decided by the Division Bench as ordered by the Hon'ble Chief Justice of this Court. If deemed appropriate, the Hon'ble Chief Justice would consider posting this matter before the Division Bench for deciding the constitutional validity of POCSO Act.

…"

IN THE HIGH COURT OF BOMBAY

High Court on its Own Motion v. State of Maharashtra
2017 Cri LJ 218
V.K. Tahilramani and Mridula Bhatkar, JJ.

A judge during her visit to a women's prison, received a requisition from a woman inmate for termination of her 16 weeks pregnancy. The medical officer of the jail informed the judge that the jail authorities had sent a proposal for termination of the woman's pregnancy to a hospital committee and such proposal was still pending before the committee. The judge brought the woman inmate's requisition and pending proposal to the notice of the High Court of Bombay. She sought issuance of directions to the hospital and the jail authorities for urgent action to be taken on the woman's requisition for termination of the woman's pregnancy. Noting that other female inmates are also facing similar problems in accessing abortion services, the High Court took cognizance of the matter and treated it as a Public Interest Litigation. The Court examined the procedure followed in cases where medical termination of pregnancy is sought by a female prisoner.

Tahilramani, J.: "The background of this PIL, coming before us, is that Ms. A.S. Shende, Judge, City Civil & Sessions Court, Greater Bombay visited Byculla District Prison on 25.4.2016 in view of directions of this Court. Generally women prisoners in Mumbai are kept in District Women Prison, Byculla, Mumbai. During the visit, one inmate/under-trial prisoner namely Shahana gave a requisition for obtaining permission to terminate her pregnancy. The requisition given by Shahana is part of this PIL. In the requisition, she has stated that she already has a baby who is five months old. The baby was suffering from convulsion/epilepsy, hernia, loose motion as well as fever. Shahana's health was also not good and she was suffering from repeated bleeding. Shahana was four months pregnant. Shahana stated that in all these circumstances, it was very difficult for her to maintain and take care of her five months old baby and herself and in addition, the baby which she was expecting, hence, she requested that she be allowed to medically terminate her pregnancy.

2. Ms. Shende, the learned Judge made inquiry with the Jail Superintendent as well as the Medical Officer attached to the jail. She was informed by the Medical Officer about the health condition of five months old baby of Shahana and pregnancy of Shahana. The medical officer also supported the contention of Shahana in respect of termination of pregnancy. Learned Judge Ms. Shende was further informed by the Medical Officer attached to jail that for obtaining permission for termination of pregnancy, a proposal has to be sent to the Committee which will take time, therefore, considering the state of health of the baby and the mother and the application given by Shahana, the learned City Civil & Sessions Judge thought it fit to forward all the papers including the application/requisition given by Shahana to the High Court for information and urgent action, by her letter dated 26.4.2016. Along with the letter, Ms. Shende sent requisition of Shahana along with her medical papers along with copy of application dated 21.3.2016 sent by the Superintendent, Mumbai District Women Prison, Byculla, Mumbai addressed to Sir J.J. Group of Hospitals, Mumbai for grant of permission for surgery/medical termination of pregnancy. The concern of the learned Judge was that though the letter dated 21.3.2016 was addressed to the hospital, till 26.4.2016, no medical termination of pregnancy was carried out. In view of that, the learned Judge Ms. Shende requested for urgent directions to be given to Jail Authorities as well as Dean of J.J. Hospital to take immediate necessary action according to law. In view of this report, the Registry of this Court then sought following directions:-…

3. The directions at 'A' to 'C' were approved and the matter was placed before the Hon'ble the then Chief Justice who directed that this matter be treated as Suo Motu PIL and assigned the matter to this Bench. This is how this matter has come up before us as a number of female prisoners are faced with a similar situation.

…

7. If a pregnancy is to be terminated, it is to be done strictly as per the norms provided in the Medical Termination of Pregnancy Act, 1971 (for short, 'The Act') especially Sections 3, 4 and 5…

8. Sections 3 and 5 of the Act are the only sections which allow termination of pregnancy. Section 5 can be invoked at any time if the registered medical practitioner is of the opinion in good faith that termination of pregnancy is immediately necessary to save the life of the pregnant woman irrespective of restriction of 12 or 20 weeks as mentioned in Section 3. Thus, Section 5 stands altogether on different footing. We are concerned with Section 3. Whether a woman can make her choice to continue with the pregnancy or to terminate it within a restricted period as contemplated in Section 3 of the Act.

9. In the affidavit of Dr. Khan Sayeed Ahmed, Medical Officer of Byculla District Prison, it is clearly stated that if a prisoner who is pregnant shows her willingness for termination of pregnancy, the norms set out in Section 3 of the Act are strictly followed and if the length of the pregnancy exceeds maximum of 20 weeks as stated in Section 3 of the Act, then Section 5 of the Act is followed.

10. It appears that earlier, there was some misconception that for obtaining permission for medical termination of pregnancy of a prisoner, the proposal has to be sent to a Committee. Referring the case to a Committee would entail delay in the termination of pregnancy. This delay in terminating the pregnancy could have some serious or unnecessary complications which may affect the pregnant lady adversely. However, on going through the Medical Termination of Pregnancy Act and the Rules, as well as the Prison Manual, we find that it is not necessary to refer the case of a pregnant prisoner who wants to terminate her pregnancy to a Committee. The Committee which is referred to under 2(e) of the Medication Termination of Pregnancy Rules 2003 and to which there is a reference in Section 4 of the Act is a Committee whose job is only to approve the place where a pregnancy can be terminated. A prisoner has to simply indicate that she wants to terminate her pregnancy as its continuance would cause grave injury to her physical and mental health. She would then be referred to the Government hospital and if her case was covered by Sections 3 or 5 of the Act, the pregnancy would be terminated.

11. Section 3(2) states that where the length of pregnancy does not exceed twelve weeks, it can be terminated by a registered medical practitioner if he is of the opinion that the case falls under Section 3(2)(a), (b)(i) or (ii). In case of termination of pregnancy exceeding twelve weeks and not exceeding 20 weeks, then same opinion but of not less than two registered medical practitioners is to be sought. The registered medical practitioners should opine that the continuance of pregnancy either would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health. Section 3(2)(b)(ii) pertains to the risk involved to the health of the child. The present case of medical termination of pregnancy is to be considered under Section 3(2)(b)(i) which allows the termination of pregnancy if there is risk to the life of the pregnant woman or of grave injury to her physical or mental health.

12. Besides physical injury, the legislature has widened the scope of the termination of pregnancy by including "a injury" to mental health of the pregnant woman. Thus, if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination if the pregnancy is not exceeding 20 weeks. Explanations 1 and 2 have stated the presumptions in respect of grave injury to mental health of the pregnant woman. The law-makers have considered and taken care of the mental condition of the pregnant woman. In the case of termination of pregnancy, the injury caused either to body or mind is considered. However, mental health can deteriorate if it is forced or unwanted pregnancy. Let us advert to Explanation 1. Under Explanation 1, if a woman is pregnant due to rape, then anguish caused by such pregnancy is to be presumed to constitute a grave injury to mental health of the pregnant woman. As per Explanation 2, if the pregnancy is accidental on account of failure of device or method used by married woman or her husband for the purpose of limiting the number of children, then the said pregnancy if unwanted, it may be presumed to constitute grave injury to mental health of the pregnant woman. These two explanations stating presumptions do not restrict the scope of the various other circumstances causing grave injury to mental health of woman who is pregnant. We do not want to deal with Explanation 1, as it is very specific about cases of rape and mental anguish to a woman in such cases is obvious. If pregnancy is due to rape, then there is bound to be complete mental break down of a victim. We need to interpret Explanation 2 which is restricted only to a married couple. However, today a man and a woman who are in live-in-relationship, cannot be covered under Explanation 2 whereas Explanation 2 should be read to mean any couple living together like a married couple.

13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.

14. A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.

15. According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.

16. Women in different situations have to go for termination of pregnancy. She may be a working woman or homemaker or she may be a prisoner, however, they all form one common category that they are pregnant women. They all have the same rights in relation to termination of pregnancy. As stated earlier, as per Prison Manual, for prisoners, there is provision for pregnant prisoners. Chapter XLI is on Women Prisoners. Rule 7 in said Chapter pertains to "Pregnancy of Women Prisoners, which is as follows:

> "When a woman prisoner (convict or undertrial) is found or suspected to be pregnant at the time of her admission or at any time thereafter, the Medical Officer shall report the fact to the Superintendent. As soon as possible arrangements shall be made to get such prisoner medically examined at the hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery etc. After ascertaining necessary particulars, a report shall be sent to the Dy. Inspector of General of Prisons, stating the date of her admission, term of sentence, the date of release, duration of pregnancy, probable date of delivery etc.

17. Rule 8 states about Births in prison. Rule 9 is in respect of children of women prisoners. However there is no provision specifically relating to termination of pregnancy of women prisoners either convict or under-trial.

18. When a woman prisoner is admitted in prison, she is medically examined, history of her last menstrual period is taken and urine pregnancy test is carried out. One register is maintained in which noting on these aspects is made including if she is pregnant and if pregnant, procedure stated in paragraph 5 above is followed. However, we understand that sometimes a convict or under-trial women prisoner may not be aware of her pregnancy and she may be unable to disclose the fact of pregnancy at the time of admission in the prison. Hence, medical check up of all the women prisoners who are of reproductive age should be done at least once every month for two months from their admission in jail to ascertain whether the woman is pregnant. Moreover, a woman prisoner if found pregnant should be informed by the Medical Officer attached to the prison that she can get the pregnancy terminated if it is such that it falls under Section 3(2)(a), (b)(i) or (ii). This onus is cast on the medical officer. If she wants to terminate the pregnancy, she should be sent to the civil hospital on an urgent basis to help her to terminate the pregnancy.

19. Rule 1 of Section II of Chapter "Non Statutory Rules" falling in Chapter IV relating to Maharashtra Prisons (Prison Hospital) Rules 1970 reads as under:-

> 1. For all administrative purposes, the Medical Officer is subordinate to the Superintendent of the prison except as regards the medical treatment of the sick. He shall have a free hand in the medical treatment of the inmates of the Hospital whether sick or convalescent or under observation, subject to Jail discipline. He is under the general control of the I.G of Prisons.

20. Though pregnancy is not a sickness, the case of pregnant prisoner will fall in "Under Observation" category, hence, the Medical Officer will have the right to decide whether the prisoner requires termination of pregnancy and send her to Civil Hospital on urgent basis to help her to terminate the pregnancy.

21. If a pregnant prisoner wants to terminate her pregnancy, then provision of section 3(2)(b)(i) or (ii) are applicable. She being a prisoner should not be treated differently than any other pregnant women. We, with all responsibility state that Section 3 of Medical Termination of Pregnancy Act bestows a very precious right to a pregnant woman to say no to motherhood. It is the right of a woman to be a mother so also it is the right of a woman not be a mother and her wish has to be respected. This right emerges from her human right to live with dignity as a human being in the society and protected as a fundamental right under Article 21 of the Constitution of India with reasonable restrictions as contemplated under the Act. Human rights are natural rights and thus a woman has a natural right in relation to her body which includes her willingness to be a mother or her unwillingness to be a mother.

22. Section 3(2)(b)(i) is an extension of the human right of a woman and this needs to be protected. Woman owns her body and has right over it. Abortion is always a difficult and careful decision and woman alone should be the choice maker. A child when born and takes first breath, is a human entity and thus, unborn foetus cannot be put on a higher pedestal than the right of a living woman. Thus, fundamental right under Article 21 of Constitution of India protects life and personal liberty which covers women. This right of exercise of reproductive choice though is restricted by Medical Termination of Pregnancy Act, 1971, it also recognizes and protects her right to say no to the pregnancy if her mental or physical health is at stake. Thus, it is a regulated procedure.

23. We would like to refer to the decision of the Supreme Court in the case of *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1 where it is observed that 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 recognize that reproductive choice 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."

24. Advocate Ms. Manjiri Shah stated that she had a discussion with the Head of the Department of Gynaecology in J.J Hospital where women prisoners in Mumbai are referred in cases of pregnancy. The Out Patient Department (O.P.D) timings are 8.00 a.m to 12.00 p.m and it was found that generally women prisoners were brought to the hospital at about 11.30 a.m to 12.00 p.m, hence, on that day, though the woman prisoner is examined, it is not possible to carry out all the tests which are necessary in relation to the pregnancy. Therefore, it was felt that it would be advisable that the woman prisoner who is pregnant reaches the hospital at about 8.00 or 8.30 a.m and after examination, the tests can be prescribed and carried out on the same day by the afternoon and the tests results would be received by the evening, hence, by the time, the woman prisoner went back to the prison, the entire tests and reports are ready due to which the next step can be decided and the next date of operation/medical procedure can be decided on that day itself.

25. In Mumbai, when the prisoners are to be taken to the Court or hospital, it is the job of L.A Squad to escort them, however, it is seen that except in cases of dire medical emergency, the L.A Squad gives preference to prisoners who are to be produced in the Court and sometimes, sufficient staff is not available to take the prisoners to the hospital. In case where there is no emergency, then that prisoner is not taken to the hospital on that day and may be taken to hospital after a day or two. In case of pregnant prisoner, if the pregnancy has to be terminated, normally it has to be done in 12 weeks as set out in Section 3(2)(a) or 20 weeks as set out in 3(2)(b) of the Act provided it falls under Section 3(2)(b)(i) or (ii). In cases of pregnancy, every day is important on account of growth of foetus. Once a woman prisoner is found to be pregnant and she indicates that she wants to terminate the pregnancy, she should be immediately referred to the hospital and it should be ensured that her pregnancy is terminated. The Jail Administration and Escort Division to ensure that as far as possible such lady prisoner reaches the hospital by 8.30 a.m A female prisoner cannot have access to facility of medical termination of pregnancy if her case falls under Section 3 or 5 of the Act, therefore not providing her with the facility amounts to forcing a woman to continue with a pregnancy she does not want which by itself constitutes a grave injury to her mental health and as such would fall under Section 3(2)(b)(i) of the Act. Hence, such a pregnancy can be lawfully terminated.

26. We are further informed that in the prison, OPD case papers are maintained in loose format. In such case, there is risk of the case papers getting mixed up or lost. In our opinion, it would be proper that in addition, an 'OPD Register' is maintained in the jail in which brief details of the patient are given. The name of the prisoner, medical problem and follow up should be stated briefly in the register. This OPD Register be produced for inspection to the Sessions Judge/Magistrate who is deputed to visit the jail.

27. In view of the above, directions are given as under:-

1. (i). Upon admission into a jail/prison, every woman prisoner of child bearing age shall undergo a Urine Pregnancy Test (UPT) within 5 days of being admitted to jail.

(ii) Every woman prisoner of child bearing age shall undergo a second UPT approximately 30 days after admission into jail/prison in case the UPT under 1(i) is not positive.

2. In case, the urine pregnancy test is positive, the Medical Officer shall inform the prisoner that she can get the pregnancy terminated if her case falls under Section 3 or 5 of The Medical Termination of Pregnancy Act.

3. If the prisoner indicates she wants to terminate the pregnancy, her statement should be recorded by the Jail Authority or Medical Officer to that effect and the record of the statement be maintained. A copy of that statement be forwarded with the prisoner when she is referred to the hospital.

4. If the prisoner indicates that she wants to terminate the pregnancy, the Medical Officer and Jail Superintendent shall ensure that woman prisoner is sent on urgent basis to the nearest Government Hospital to help her terminate the pregnancy. It is made clear that they shall not wait for any order of the Court if the case falls under Sections 3 or 5 of the Act.

5. Every prison shall maintain "Prison OPD Register" where details of every prisoner examined either by the prison medical officer/doctor or visiting doctor are entered. Such register shall contain in brief (i) the name of the prisoner; (ii) convict or undertrial number, (iii) the medical complaint of the prisoner; (iv) the advice of the doctor (including referral of the patient to the nearest government Hospital) and (v) the date for follow up when necessary. The Prison OPD Register be produced for inspection of the Sessions Judge/Magistrate deputed to visit the prison.

6. The Jail Superintendent and escort division to ensure that such prisoner as well as other prisoners needing medical treatment in a hospital are sent to the hospital as far as possible by 8:30 a.m i.e when O.P.D opens.

7. After discharge from the said hospital, the prison authorities shall take due care of the woman prisoner until she fully recovers from the medical termination of her pregnancy.

…"

IN THE HIGH COURT OF KERALA

Ms. X v. State of Kerala
(2016) 4 KLT 745
Shaji P. Chaly, J.

The petitioner alleged that she had been raped and had conceived as a result. She filed an FIR to this effect and approached the hospital authorities for terminating her pregnancy. As the hospital authorities rejected her request repeatedly, she approached the Superintendent, Medical College Hospital who too declined her request stating that she had crossed the 20 week limit prescribed under Section 3 of the MTP Act. While deciding on her writ petition seeking permission to terminate her pregnancy, the High Court considered the grave injury caused to the mental health of the petitioner while carrying a pregnancy resulting from rape.

Chaly, J.: "…

2. Petitioner is a victim of rape and is in need of Medical Termination of Pregnancy. She approached the Government Hospital, Kasaragod, but they declined to do MTP. Thereafter, she approached the 2nd respondent for termination, but there also, it was informed that MTP cannot be conducted as the pregnancy period has exceeded 20 weeks. It is in this background, this writ petition is filed seeking direction to respondent No. 2 to conduct MTP, and a direction to the 3rd respondent to collect sample and do the needful for DNA test of the child in the womb.

3. According to the petitioner, intimacy was developed by her with one person while she was working in a shop, and the said person has cheated the petitioner and by giving promise of marriage, she was successively subjected to sexual relationship, by which she became pregnant. However, the said person solemnized marriage with another lady on 14.05.2016, and accordingly she preferred a complaint, evident from Ext.P1 FIR.

4. Petitioner was admitted in Government Hospital, Kasaragod on 18.07.2016 and was treated for three days and discharged on 21.07.2016. Even though petitioner requested for MTP, the hospital authorities told her to come on another day. Thereafter, again she was admitted as in patient on 01.08.2016 and discharged on 03.08.2016. However, nothing took place. Again, she went to the hospital on 17.10.2016 and was treated as out patient. Being confronted with such situation, petitioner approached the 2ndrespondent for MTP. However, stating that the pregnancy period has exceeded 20 weeks, 2nd respondent refused to conduct MTP. These are the circumstances persuaded the petitioner to approach this Court seeking the reliefs sought for.

…

6. Ext.P1 FIR reveals, petitioner has filed a complaint against the person and police has registered a crime, alleging offence under Sec.376 of the Indian Penal Code. Therefore, there is a prima facie case put forth by the petitioner. Now, the question is whether MTP could be done by the 2nd respondent as per the provisions of the Medical Termination of Pregnancy Act, 1971 [for short, Act 34 of 1971], and the Rules and Regulations thereto. Sec.3(1) of the Act enables a registered medical practitioner to terminate pregnancy in accordance with the provisions of this Act, irrespective of the penal provisions contained under the Indian Penal Code. Sub-section (2) of Sec.3 permits termination, subject to sub-section (4), which are as follows: …

7. Therefore, on evaluating the circumstances under sub-section (2)(a), a pregnancy could be terminated if it does not exceed twelve weeks. However, an exception is carved out by which a pregnancy which exceeds the period of twelve weeks, but does not exceed twenty weeks, if not less than two registered medical practitioners are of the opinion formed in good faith that 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, it could be done. Explanation 1 thereto provides, where any pregnancy is alleged by the pregnant woman to have been caused by rape, the consequences thereto shall be presumed, to constitute a grave injury to the mental health of the pregnant woman. Petitioner is aged more than 18 years and therefore consequence of sub-section (3) do not arise.

8. Therefore, on an evaluation of sub-section (2) as such, it is clear, the maximum period up to which a MTP can be done is twenty weeks period of pregnancy. However, Sec.5 takes care of a situation, in order to save the life of the pregnant woman. Sec.5(1) reads as follows: …

9. Therefore, on an evaluation of the said provisions, it is specific and clear, if it is in the opinion of two medical practitioners, formed in good faith, that the MTP is necessary to save the life of the pregnant woman, the stipulations contained under sub-section (2) of Sec.3 vanish.

10. When the situation in the present context is analyzed, petitioner is not mentally prepared to deliver a child and such situation can cause innumerable mental stress and change of attitude in the normal life of the petitioner. Moreover, the circumstances explained show that petitioner did not expect such conduct and behaviour from the person with whom she maintained intimate and affectionate relationship. The circumstances narrated will show, petitioner is and was not mentally prepared to accept the state of affairs at which she is now. The said circumstances, in my view is to be treated as one under Sec.5 of the Act.

11. The Apex Court had occasion to consider such a situation in '*Ms. X v. Union of India*' [AIR 2016 SC 3525]. There, the Court was considering a question with respect to termination of 24 weeks' pregnancy and held in paragraph 6 as follows:

> "6. Having perused the Medical Report (relevant extracts whereof have been reproduced hereinabove), we are satisfied, that a clear finding has been recorded by the Medical Board, that the risk to the petitioner of continuation of her pregnancy, can gravely endanger her physical and mental health. The Medical Board has also expressed an advice, that the patient should not continue with the pregnancy. In view of the findings recorded in para 6 of the report, coupled with the recommendation and advice tendered by the Medical Board, we are satisfied that it is permissible to allow the petitioner to terminate her pregnancy in terms of Section 5 of the Medical Termination of Pregnancy Act, 1971. In view of the above, we grant liberty to the petitioner, if she is so advised, to terminate her pregnancy".

12. Reckoning the facts and circumstances and the law involved, I am of the considered opinion that 2nd respondent shall take necessary steps in conducting MTP in accordance with the provisions of Act 34 of 1971, after securing required permission from the petitioner or any of her close relatives, in compliance with the medical ethics as per the relevant Act and Rules, and after having sufficient and necessary consultation, even by constituting a Medical Board.

13. There will be a direction also to the 2nd respondent to preserve sufficient material if MTP is done in order to conduct the DNA test, enabling the 3rd respondent to carry on the investigation with sufficient proof and evidence in respect of Ext. P1 FIR registered. …

…"

IN THE SUPREME COURT OF INDIA

Meera Santosh Pal v. Union of India
(2017) 3 SCC 462
S.A. Bobde and L. Nageswara Rao, JJ.

A 24 weeks pregnant woman invoked the writ jurisdiction of the Supreme Court seeking permission to terminate her pregnancy following a diagnosis of foetal anencephaly as she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. According to the Medical Board's opinion, the condition of the foetus was not compatible with extra-uterine life and the continuation of pregnancy could gravely endanger the physical and mental health of the petitioner. The Supreme Court considered the issue of whether the rights to bodily integrity and reproductive autonomy call for permission to allow the woman to terminate her pregnancy.

Bobde and Rao, JJ.: "**1.** Petitioner 1, Meera Santosh Pal, 22 years old, has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. She apprehended danger to her life, having discovered that her foetus was diagnosed with anencephaly, a defect that leaves foetal skull bones unformed and is both untreatable and certain to cause the infant's death during or shortly after birth. This condition is also known to endanger the mother's life.

2. [W]hile issuing notice to the respondents, this Court gave a direction for examination of Petitioner 1 by a Medical Board consisting of…seven doctors:

…

4. By its report dated 12-1-2017, the Medical Board has examined Petitioner 1 with specific reference to their special expertise for general, medical, radiological, psychiatric and anaesthetic evaluation. An obstetric evaluation was done by two obstetricians. Ultrasonography was performed at KEM Hospital on 12-1-2017 by the Additional Professor, Radiology. The said Board has further reported that obstetric examination shows 24 weeks' pregnancy, external ballottement present, foetal parts not well felt with mild polyhydramnios. On internal examination, the cervix is posterior and OS is closed. Ultrasonography diagnosis has revealed a single live foetus with anencephaly with mild polyhydramnios with hypotelorism.

5. We have been informed that the foetus is without a skull and would, therefore, not be in a position to survive. It is also submitted that Petitioner 1 has undergone psychiatric evaluation. She is reported to be coherent, has average intelligence and with good comprehension. She understands that her foetus is abnormal and the risk of foetal mortality is high. She also has the support of her husband in her decision-making.

6. Upon evaluation of Petitioner 1, the aforesaid Medical Board has concluded that her current pregnancy is of about 24 weeks. The condition of the foetus is not compatible with extra-uterine life. In other words, the foetus would not be able to survive outside the uterus.

7. Importantly, it is reported that the continuation of pregnancy can gravely endanger the physical and mental health of Petitioner 1 and the risk of her termination of pregnancy is within acceptable limits with institutional backup.

8. This Court, as at present being advised, would not enter into the medicolegal aspect of the identity of the foetus but considers it appropriate to decide the matter from the standpoint of the right of Petitioner 1 to preserve her life in view of the foreseeable danger to it, in case she allows the current pregnancy to run its full course. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull.

9. In *Suchita Srivastava v. Chandigarh Admn.* [*Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] a Bench of three Judges held "a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution". The Court there dealt with the importance of the consent of the pregnant woman as an essential requirement for proceeding with the termination of pregnancy.

10. The crucial consideration in the present case is whether the right to bodily integrity calls for a permission to allow her to terminate her pregnancy. The report of the Medical Board clearly warrants the inference that the continuance of the pregnancy involves the risk to the life of the pregnant woman and a possible grave injury to her physical or mental health as required by Section 3(2)(*i*) of the Medical Termination of Pregnancy Act, 1971. Though, the pregnancy is into the 24th week, having regard to the danger to the life and the certain inability of the foetus to survive extra-uterine life, we consider it appropriate to permit the petitioner to terminate the pregnancy. The overriding consideration is that she has a right to take all such steps as necessary to preserve her own life against the avoidable danger to it.

11. In these circumstances given the danger to her life, there is no doubt that she has a right to protect and preserve her life and particularly since she has made an informed choice. The exercise of her right seems to be within the limits of reproductive autonomy.

12. In the circumstances, we consider it appropriate in the interests of justice and particularly, to permit Petitioner 1 to undergo medical termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971… We order accordingly.

…"

IN THE SUPREME COURT OF INDIA

X & Ors. v. Union of India & Ors.
(2017) 3 SCC 458
S.A. Bobde and L. Nageswara Rao, JJ.

The petitioner, a woman who was 22 weeks pregnant, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of pregnancy as she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. She had received a diagnosis of foetal bilateral renal agenesis and anhydroamnios. According to the Medical Board, these foetal impairments were incompatible with extra-uterine life and the pregnancy would endanger the physical and mental health of the mother. The Supreme Court considered the issue of whether permission for medical termination of pregnancy should be granted beyond 20 weeks in light of these facts.

Bobde, and Rao, JJ.: "…

2. Petitioner 1 Mrs X is about 22 years old. She has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. According to her, the foetus which is about 22 weeks old on the date of the petition has a condition known as bilateral renal agenesis and anhydroamnios. She apprehends that the foetus has no chance of survival and the delivery may endanger her life.

3. In order to verify the condition of Petitioner 1, this Court by order dated 3-2-2017 [*X v. Union of India*, WP (C) No. 81 of 2017, order dated 3-2-2017 (SC)] , while issuing notice to the respondents, directed examination of the petitioner by a Medical Board consisting of…seven doctors:…

4. By its report dated 4-2-2017, the Medical Board as constituted by this Court has given its expert opinion upon reviewing the complete history as narrated by Petitioner 1 and her brother along with all the papers. Petitioner 1 was examined by all the Board Members with specific recourse to the specialty.

5. The learned Solicitor General who appears on behalf of the Union of India had the report evaluated by Doctor Veena Dhawan from the Ministry of Health. The said doctor does not disagree with the findings by the Medical Board and is also in agreement with the proposed action by the Medical Board. The salient features of the report are:

> "… Ultrasonography diagnosis is that single live foetus with gestational age of 24 weeks 3 days with bilateral renal agenesis with double outlet right ventricle with ventricular septal defect with two vessel cord with anhydroamnios.…
>
> Opinion of Paediatric Surgeon in charge of Birth Defect Clinic: There is risk of intrauterine foetal death/stillbirth and there is no chance of long-term post-natal survival, and no curative treatment is available at present for bilateral renal agenesis."

6. There is thus a clear diagnosis of the condition of the single live foetus which is said to have bilateral renal agenesis which means the foetus has no kidneys and anhydramnios which means that there is an absence of amniotic fluid in the womb. Further, there is a clear observation that there is a risk of intrauterine foetal death i.e. death within womb and there is no chance of a long-term post natal survival. What is important is that there is no curative treatment available at present for bilateral renal agenesis.

7. The Medical Board has opined that the condition of the foetus is incompatible with extrauterine life i.e. outside the womb because prolonged absence of amniotic fluid results in pulmonary hypoplasia leading to severe respiratory insufficiency at birth. From the point of view of the petitioner, the report has observed risk to the mother since continuation of pregnancy can endanger her physical and mental health.

8. We have already vide order dated 16-1-2017 [*Meera Santosh Pal v. Union of India*, (2017) 3 SCC 462] upheld the right of a mother to preserve her life in view of foreseeable danger in case the pregnancy is allowed to run its full course. This Court in that case relied upon *Suchita Srivastava v. Chandigarh Admn.* [*Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , where a Bench of three Judges held: (SCC p. 15, para 22)

> "*22.* … a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution."

In these circumstances we find that the right of bodily integrity calls for a permission to allow her to terminate her pregnancy. The report of the Medical Board clearly warrants the inference that the continuance of the pregnancy involves the risk to the life of the petitioner and a possible grave injury to her physical or mental health as required by Section 3(2)(*i*) of the Medical Termination of Pregnancy Act, 1971. It may be noted that Section 5 of the Act enables termination of pregnancy where an opinion if formed by not less than two medical practitioners in a case where opinion is for the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

9. Though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly.

…"

IN THE SUPREME COURT OF INDIA

Savita Sachin Patil & Anr. v. Union of India & Ors.
(2017) 13 SCC 436
S.A. Bobde and L. Nageswara Rao, JJ.

The petitioner, a 26-week pregnant woman, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of her pregnancy. She learned that her foetus had Down syndrome, and according to the Medical Board, if born, the baby was "likely" to face mental and physical challenges. It also opined that the pregnant woman faced no physical risk upon continuation or termination of the pregnancy. The Supreme Court considered the issue of whether permission to medically terminate the pregnancy should be granted in light of these facts.

Bobde and Rao, JJ.: "**1.** Petitioner 1 Savita Sachin Patil, has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy.

…

3. By order dated 23-2-2017, …while issuing notice to the respondents, this Court gave a direction for examination of Petitioner 1 by a Medical Board consisting of…seven doctors…

4. Petitioner 1 is 37 years old and she is into her 26 weeks of pregnancy as on 25-2-2017. …

5. It is not in dispute that the foetus of Petitioner 1 has been diagnosed with Trisomy 21, more commonly known as Down Syndrome, a condition that causes severe physical and mental retardation to the foetus. As in all such cases, two important considerations are involved — (*i*) danger to the life of the mother, and (*ii*) danger to the life of the foetus.

6. The Medical Board has submitted its report dated 25-2-2017. On perusal of the said report, we find that the said report contains the following two significant features for the purposes of passing this order:

> (*1*) As far as the mother is concerned, the report states that "there is no physical risk to the mother of continuation or termination of pregnancy";
>
> (*2*) As far as the foetus is concerned, the report states that "if the baby is born with Trisomy 21, it is *likely* to have mental and physical challenges".
>
> As regards the prognosis, the said medical report clearly does not and possibly cannot, observe that this particular foetus will have severe mental and physical challenges. It states that the "baby is likely to have mental and physical challenges".

7. In the earlier part of the said medical report, there is no observation made by the aforestated Medical Board that every baby with Down Syndrome has low intelligence, but it was observed that "intelligence among people with Down Syndrome is variable and a large proportion may have an Intelligence Quotient of less than 50 (severe mental retardation)".

8. In any case, it is not possible to discern the danger to the life of Petitioner 1 in case she is not allowed to terminate her pregnancy. In the facts and circumstances of the case, it is not possible for us to grant permission to Petitioner 1 to terminate the life of the foetus.

9. In view of the above, as is presently advised, we decline Prayer (*a*) of the petitioners for directing the respondents to allow Petitioner 1 to undergo medical termination of the pregnancy."

IN THE SUPREME COURT OF INDIA

Sheetal Shankar Salvi & Anr v. Union of India & Ors.
(2018) 11 SCC 606
S.A. Bobde and L. Nageswara Rao, JJ.

The petitioner, a 27 weeks pregnant woman, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of her pregnancy. According to the opinion of the Medical Board, the foetus had various severe physical anomalies and after birth, the child was likely to have severe physical and mental morbidity. It also opined that there was no physical risk to the pregnant woman and there was a likelihood of a live birth and survival of the baby once born for a variable period of time in case the pregnancy was terminated at 27 weeks. The Supreme Court considered the issue of whether medical termination of pregnancy should be granted in light of these facts.

Bobde and Rao, JJ.: "**1.** Petitioner 1, Sheetal Shankar Salvi has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy.

2. By order dated 23-3-2017 [*Sheetal Shankar Salvi v. Union of India*, WP (C) No. 174 of 2017, order dated 23-3-2017 (SC)] , while issuing notice to the respondents, this Court gave a direction for examination of Petitioner 1 by a Medical Board consisting of…seven doctors:…

3. Petitioner 1 is into her 27th week of pregnancy…

4. It is not in dispute that the foetus of Petitioner 1 has been diagnosed with polyhydramnios with Arnold Chiari malformation Type 2, severe hydrocephalus with lumbosacral meningomyelocele and spina bifida with tethered cord.

5. The Medical Board has submitted its report dated 25-3-2017. On perusal of the said report, we find that the said report contains the following significant features for the purposes of passing this order:

> (1) The diagnosis of Arnold Chiari malformation Type 2 with meningomyelocele with tethered cord has been made on the basis of ultrasonography.
>
> (2) The mother's physical condition is normal and there is no physical risk to the mother, due to continuation or termination of pregnancy. But she is anxious about outcome of pregnancy.
>
> (3) The foetus has severe physical anomalies which will compromise post natal quality of life and the child will have severe physical and mental morbidity on survival.
>
> (4) If the pregnancy is terminated at 27 weeks, the baby may be born alive and may survive for variable period of time.

6. Apparently, it has not been possible for the aforesaid Medical Board to determine the period of time for which the baby is likely to survive. It also appears from the said report that the baby is not likely to survive like a normal baby. However, having regard to the fact that there is no danger to the mother's life and the likelihood that "the baby may be born alive and may survive for variable period of time", we do not consider it appropriate in the interests of justice to direct the respondents to allow Petitioner 1 to undergo medical termination of her pregnancy. In fact, the aforesaid Medical Board has itself stated that it does not advise medical termination of pregnancy for Petitioner 1 on medical grounds.

7. The only other ground that appears from the observations made in the aforesaid medical report apart from the medical grounds, is that Petitioner 1 is anxious about the outcome of the pregnancy. We find that the termination of pregnancy cannot be permitted due to this reason.

8. In the facts and circumstances of the case, it is not possible for us to grant permission to Petitioner 1 to terminate the life of the foetus.

9. In view of the above, as at presently advised, we decline the prayer of the petitioners for directing the respondents to allow Petitioner 1 to undergo medical termination of the pregnancy. Hence, the writ petition is dismissed."

IN THE HIGH COURT OF GUJARAT

Pujaben Subedar Yadav - Minor Through her Father Subedar Ramchandra Yadav v. State of Gujarat & Ors. 2017 Cri LJ (NOC 719) 225

J.B. Pardiwala, J.

This writ petition was filed to seek permission for termination of pregnancy of a minor girl, who had conceived as a result of rape and had crossed the 20-week limit for termination of pregnancy prescribed under Section 3 of the MTP Act. Following its approach in Madhuben Arvindbhai Nimavat v. State of Gujarat (2016 SCC OnLine Guj 662), the High Court in its decision considered the young age of the minor rape victim and grave mental injury caused to her from continuation of pregnancy to determine whether to permit the termination of the pregnancy.

Pardiwala, J.: "…

3. It appears from the materials on record that the minor daughter of *Sudedar Ramchandra Yadav* is a victim of rape. She is sixteen years of age. On account of rape, she got impregnated. As on date, she is carrying pregnancy of just above twenty weeks. She seeks appropriate orders or directions to the authorities concerned of the Civil Hospital to get the pregnancy terminated. Since the age of the foetus is a bit little above twenty weeks, the permission of the Court is necessary. An F.I.R. has also been registered being I-C.R. No. 98 2017 with the Ramol Police Station, Ahmedabad for the offence punishable under Section 376 of the Indian Penal Code and Sections 5 and 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act, 2012').

...

5. Indisputably, no application was filed before the Court below seeking the necessary permission. At this point of time, if I would relegate the writ applicant to apply before the Court concerned, it will take some more time and the same will not be in the interest of the victim. In such circumstances, as an exceptional case, I am taking up this matter.

6. Having regard to the fact that the victim is aged sixteen and is carrying pregnancy of above twenty weeks, the same will cause lot of mental stress and grave injury to her mental health.

7. A Coordinate Bench of this Court had an occasion to consider almost an identical issue in the case of *Madhuben Arvindbhai Nimavat (Minor) through Arvindbhai Narottambhai Nimavat v. State of Gujarat* [Special Criminal Application No. 3679 of 2016 decided on 8th June 2016]. Let me quote the entire judgment as under: …

> *1. "*[…]
>
> *15. Since the request is made by the petitioner herself with the consent of the parents, bearing in mind, her very young age and incident of rape with pregnancy, grave injury to her mental health is to be presumed. Her fragile health and poor haemoglobin level requires that the team of the Doctors needs to examine her once again and also ensure her safety as this Court is of the opinion that it would be in the best interest of the victim to permit the termination of pregnancy, if otherwise, there is unanimity amongst the Doctors to the effect that such termination would be carried out safely.*
>
> […]*"*

8. Dr. Shirish Jayprakash Toshniwal attached to the Civil Hospital is personally present in the Court. Dr. Toshniwal submits that as such the termination is not likely to endanger the life of the victim. The general risk will always remain. Dr. Toshniwal has personally examined the victim, and otherwise, the victim is in a fit condition to undergo termination of pregnancy.

9. In such circumstances referred to above, I dispose of this writ application with the following directions:

> [I] Let two other Doctors along with Mr. Toshniwal examine the victim once again for the purpose of carrying out the procedure of termination of the pregnancy.
>
> [II] After the necessary examination is undertaken, the team of Doctors shall proceed to terminate the pregnancy at the earliest.
>
> [III] The pregnancy be terminated, if otherwise, there is unanimity amongst the Doctors to the effect that such termination would be carried out safely.

> [IV] The Medical Superintendent of the Civil Hospital, Ahmedabad shall hand over, in a scientific manner, the tissues drawn from the foetus for the DNA identification to the Investigating Officer of the concerned police station for onward transmission of the same to the concerned Forensic Science Laboratory.
>
> [V] Once the termination is over, the victim shall continue to receive treatment for the length period deemed necessary by the Senior Most Doctor of the Team.

10. With the above, this writ application is disposed of…"

IN THE SUPREME COURT OF INDIA

Sarmishtha Chakrabortty & Anr. v. Union of India & Ors.
2017 SCC OnLine SC 897
Dipak Misra and A.M. Khanwilkar, JJ.

The petitioners, a woman who was 26 weeks pregnant and her husband, invoked the writ jurisdiction of the Supreme Court for medical termination of pregnancy of the first petitioner because she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. According to the Medical Board, the continuation of pregnancy could cause severe mental injury to the first petitioner. It further opined that the foetus had a cardiac malformation and would require intense surgeries post birth, which would have high risk of morbidity and mortality. The Supreme Court considered the issue of whether permission for medical termination of pregnancy should be granted beyond 20 weeks in light of these facts.

Misra and Khanwilkar, JJ.: "**1.** The petitioners, the husband and wife, have moved this petition under Article 32 of the Constitution with manifold prayers. In the course of hearing, Mr. Colin Gonsalves, learned senior counsel appearing for the petitioners, has restricted his argument to prayer (g) which pertains to issue of direction for constituting a medical board to assess the pregnancy of the 1st petitioner and direct for termination of the pregnancy.

2. When the matter was listed on 21.6.2017, the Court took note of the prayer for appointment of a panel of doctors at a Government hospital in Kolkata to examine the state of health of the mother and accordingly directed the matter to be listed on 23.6.2017. When the matter was listed on 23.6.2017, this Court had passed the following order:—

> In pursuance of the previous order of this Court "dated 21.06.2017, learned standing counsel appearing on behalf of the State of West Bengal has placed on the record his instructions indicating that a team of senior Doctors may be constituted to evaluate the mental and physical health of the first petitioner and the state of health of the foetus. At this stage, the pregnancy is in its 25th week.
>
> The court has been apprised of the medical reports produced on record by the petitioners, including the opinion of Doctor Devi Shetty, which is annexed to the paper book. We accordingly constitute a Medical Board consisting of the following Doctors to examine the first petitioner and her foetus at the Institute of Post Graduate Medical Education & Research (SSKM Hospital) situated at 244 A.J.C. Bose Road, Kolkata-700 020:.."

…

4. It is submitted by Mr. Colin Gonsalves, learned senior counsel appearing for the petitioners that the medical report clearly stipulates the condition of the 1st petitioner and if the report is appositely appreciated, the direction, as prayed for, deserves to be granted. We think it appropriate to reproduce the observations and opinion of various members of the Medical Board. The report of the Medical Board reads as under:—

> "…Opinion of Dr. Saroj Mondal, Asst. Professor of the Department of Cardiology, IPGMER-SSKM Hospita, Kolkata …
>
> As the foetus has complex cardiac anomaly and if pregnancy continued mother will need delivery in a highly equipped centre with facility of neonatal cardiac intervention and surgical facility and will need multiple staged cardiac surgical operation and each occasion, it will have high morbidity and mortality risk.
>
> …

Impression of Dr. Santanu Dutta, Associate Professor of the Department of C.T.V.S., IPGMER-SS KM Hospital, Kolkata - …

It is evident from the report that the neonate needs complex cardiac corrective surgery stage by stage after birth. But there is high mortality at every step of this type of staged surgeries.

Opinion of Dr. Sujitesh Saha, Associate Professor of the Department of Paed. Surgery, IPGMER-SSKM Hospital, Kolkata

…

After birth multiple staged cardiac corrective surgery will be required which will be associated with high mortality and morbidity at every stage.

Opinion of Dr. Suchandra Mukherjee, Professor & HOD of Neonatology, IPGMER-SSKM Hospital, Kolkata

…

In view of the cardiac malformation, the baby, after birth will require intensive cardiac monitoring and staged management through the surgical procedures which will have high risk of morbidity and mortality depending upon the postnatal course.

…

The patient, 1st Petitioner of the case Mrs. Sarmisth Chakrabortty, 33 years old, w/o Mr. Anirban Chakrabortty was examined by the Board Members and all the members expressed their views. Two Gynaecologists, (1) Professor Subhash Chandra Biswas & (2) Professor Arati Biswas, on good faith examined the patient physically and observed the following findings:

...

Patient, herself spontaneously expressed her wish not to continue this pregnancy in view of the detected foetal cardiac anomalies so far. On reviewing of the available records of the patient i.e. U.S.G., Foetal Echo-Cardiography including the prescription of the attending Obstetrician in Apollo Hospital, Kolkata, the other members of the Board (Radiologist, Cardiologist, Neonatologist, Pediatric Surgeon and Cardiac Surgeon) have opined that "the foetus has been detected to have cardiac malformation in the form of Tetralogy of Fallot, Large perimembranous VSD with inlet extension (bidirectional flow), Aorta from LV overriding the VSD, Pulmonary Atresia, Duct/MAPCA dependent pulmonary circulation and Good Ventricular function. The child, if born alive, need complex cardiac corrective surgery stage by stage after birth. But there is high mortality and borbidity at every step of this staged surgeries". The cardiac anomaly has been confirmed by serial investigations.

In view of the above facts and opinion, we, the two Gynaecologists, in good faith like to opine that the patient is at the threat of severe mental injury, if the pregnancy is continued.

Therefore, if the patient wants termination of this pregnancy, she may be allowed with prior informed consent of inherent risk of her health for procedural inventions, because there is additional risk of termination of the pregnancy once it is beyond 20 weeks as the present case is. However, this is a special case and conclusion has been drawn on its individual merits."

5. On a perusal of the aforesaid report, it is clear as crystal that the Medical Board is of the view that it is a case for termination of pregnancy, as a special case. As the last paragraph would show, the Board has mentioned that the patient is at the threat of severe mental injury, if the pregnancy is continued. It has also opined that the child, if born alive, needs complex cardiac corrective surgery stage by stage after birth. But there is high mortality and borbidity (sic) at every step of this staged surgeries.

6. Mr. Gonsalves, learned senior counsel has drawn our attention to two orders, one passed in Meera Santosh Pal v. Union of India [WP (C) No. 17 of 2017 decided on 16.1.2017], wherein this Court, after considering the report of the Medical Board, has held thus:—

"Upon evaluation of petitioner no. 1, the aforesaid Medical Board has concluded that her current pregnancy is of about 24 weeks. The condition of the foetus is not compatible with extra-uterine life. In other words, the foetus would not be able to survive outside the uterus.

> Importantly, it is reported that the continuation of pregnancy can gravely endanger the physical and mental health of petitioner no. 1 and the risk of her termination of pregnancy is within acceptable limits with institutional back up."

7. Learned senior counsel has also drawn our attention to another order passed in Mrs. X v. Union of India [WP (C) No. 81 of 2017 decided on 7.3.2017] wherein this Court had allowed the termination of pregnancy. The Court had taken the Medical report into consideration which was to the following effect:

> "There is thus a clear diagnosis of the condition of the single live foetus which is said to have bialateral renal agenesis wheich (sic) means the foetus has no kidneys and anhydramnios which means that there is an absence of amniotic fluid in the womb. Further, there is a clear observation that there is a risk of intrauterine foetal death, i.e. death within womb and there is no chance of a long term post natal survival. What is important is that there is no curative treatment available at present for bilateral renal agenesis.
>
> The Medical Board has opined that the condition of the foetus is incompatible with extra-uterine life, i.e. outside the womb because prolonged absence of amniotic fluid results in pulmonary hypoplasia leading to severe 4 respiratory insufficiency at birth. From the point of view of the petitioner the report has observed risk to the mother since continuation of pregnancy can endanger her physical and mental health.

8. Mr. A.K. Panda, learned senior counsel appearing for the Union of India has drawn our attention to two other orders, one passed in Savita Sachin Patil v. Union of India [WP (C) No. 121 of 2017 decided on 28.02.2017] and another in Sheetal Shankar Salvi v. Union of India [W.P. No. 174 of 2017 decided on 27.3.2017]. In the case of Savita Sachin Patil, the Court declined to grant permission by holding, thus:

> "As regards the prognosis, the said medical report clearly does not and possibly cannot, observe that this particular foetus will have severe mental and physical challenges. It states that the "baby is likely to have mental and physical challenges."
>
> In the earlier part of the said medical report, there is no observation made by the aforestated Medical Board that every baby with Down Syndrome has low intelligence, but it was observed that "intelligence among people with Down Syndrome is variable and a large proportion may have an intelligence Quotient of less than 50 (severe mental retardation)".
>
> In any case, it is not possible to discern the danger to the life of petitioner no. 1 in case she is not allowed to terminate her pregnancy.
>
> In the facts and circumstances of the case, it is not possible for us to grant permission to petitioner no. 1 to terminate the life of the foetus.
>
> In view of the above, as it presently advised, we decline the prayer (a) of the petitioners for directing the respondents to allow Petitioner No. 1 to undergo medical termination of the pregnancy."

9. In Sheetal Shankar Salvi, after perusing the report, the Court observed that there is no danger to mother's life and the liklihood that the baby may be born alive and survive for variable period of time, and, therefore, it would not be appropriate to allow the petitioner No. 1 to undergo medical termination of her pregnancy.

10. The orders which have been referred to by Mr. Panda, in our considered opinion, rest on their own facts. Frankly speaking, cases of this nature have to rest on their own facts because it shall depend upon the nature of the report of the Medical Board and also the requisite consent as engrafted under the Medical Termination of Pregnancy Act, 1971.

11. In the instant case, as the report of the Medical Board, which we have produced, in entirety, clearly reveals that the mother shall suffer mental injury if the pregnancy is continued and there will be multiple problems if the child is born alive. That apart, the Medical Board has categorically arrived at a conclusion that the in a special case of this nature, the pregnancy should be allowed to be terminated after 20 weeks.

12. In the case of Suchita Srivastava v. Chandigarh Administration [(2009) 9 SCC 1), the Court has expressed the view that the right of a woman to have reproductive choice is an insegregable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity. The case at hand, as we find, unless the pregnancy is allowed to be terminated, the life of the mother as well as that of the baby to be born will be in great danger. Such a situation cannot be countenanced in Court.

13. Regard being had to the aforesaid and keeping in view the report of the Medical Board, we are inclined to allow the prayer and direct medical termination of pregnancy of the 1st petitioner…"

IN THE SUPREME COURT OF INDIA

Alakh Alok Srivastava v. Union of India
WP (C) No. 565 of 2017 (Order dated July 28, 2017)
J.S. Khehar, C.J. and D.Y. Chandrachud, J.

This writ petition was filed to seek permission to terminate the pregnancy of a minor girl who had conceived as a result of rape and had crossed the 20-week limit for termination of pregnancy prescribed under Section 3 of the MTP Act.

Khehar, C.J. and Chandrachud, J.: "1. In continuation of motion Bench order dated 24-07-2017, Mr. Mahavir Singh, Member Secretary, State Legal Services Authority, UT Chandigarh, who is present in the Court, has produced for our perusal a report of the Medical Board, in a sealed cover. We have perused the report, which contains the following recommendations:

> "The girl child is in a good state of health at present except mild pallor (anemia). The girl child is a known case of congenital heart defect (Ventricular Septal Defect) which was corrected in 2013 at PGI Chandigarh. At present she is asymptomatic and the corrected Ventricular Septal Defect is unlikely to interfere with the progress of pregnancy.
>
> On clinical and ultrasound examination the fetus is approximately 32 weeks old, alive and doing well (Biophysical profile, Non Stress Test and umbilical artery Doppler study – normal).
>
> Estimated weight of the fetus is approximately 1.6 kg and there is no apparent fetal congenital malformation.
>
> In view of the above, continuation of pregnancy may not pose any additional risk to the girl child and the fetus, other than the age related risk which is higher than adult pregnant woman. Continuation of pregnancy is less hazardous for the girl child and fetus than termination of pregnancy at this stage."

2. We direct, that the report be resealed. In view of the recommendation made by the Medical Board, we are satisfied, that it would neither be in the interest of the girl child, nor of the life of fetus, which is approximately 32 weeks old, to order medical termination of pregnancy. We, therefore, hereby decline the instant prayer made in the petition.

3. We are however of the view, that the girl child should be extended due medical care. We are informed, that she is being treated at the Government Hospital, Sector-32, Chandigarh, which we are satisfied is fully equipped to render the best medical-aid possible. It shall be open to the treating doctors to evaluate the health of the girl child, for selecting the best mode of delivery, for the child.

…"

IN THE SUPREME COURT OF INDIA

Sonali Sandeep Jadhav & Anr. v. Union of India & Ors.
Writ Petition (Civil) No. 551 of 2017 (Order dated July 28, 2017)
Dipak Misra and A.M. Khanwilkar, JJ.

The petitioner, a woman who was 22 weeks pregnant, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of pregnancy as she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. She had received a diagnosis of foetal aqueductal stenosis and hydrocephalus, a foetal impairment with a very high probability of brain damage and possible cognitive impairment. According to the Medical Board, the continuation of pregnancy would pose severe mental injury to the woman. The Supreme Court considered the issue of whether permission for medical termination of pregnancy could be granted beyond 20 weeks in light of these facts.

Misra and Khanwilkar, JJ.: "On 24th July, 2017, this Court had passed the following order:-

> "…It is submitted by Mr. Colin Gonsalves, learned senior counsel that the petitioner is at present pregnant and her pregnancy is of 22 weeks who has been examined by Dr. K.N. Singh, a Paediatric Neurologist and has recorded the following findings:
>
> > "Sonography examination of gravid uterus (anomaly scan) done at Lilavati Hospital and Research Centre on 24.06.2017 showed both lateral ventricles are moderately dialated. Lateral ventricle at atrium measures: 14 mm. Hence, foetal MRI which is more sensitive was performed at Global Hospitals, Parel on 28.6.2017 which revealed moderate symmetric dialatation of the lateral ventricles. Each ventricle measures approximately 1.6. cm at the level of the atrium. The cavum septum pellucidum is well visualised. There is mild dialation of the third ventricle. Fourth ventricle is normal. The cerebral aueduct is not visualised. No flow is detected in the cerebral aqueduct. There is thinning of the surrounding cortical mantle and white matter.
> >
> > Impression:
> >
> > MRI of the foetal brain reveals moderate symmetric obstructive hypocephalus. These findings are consistent with cerebral stenosis. There is thinning of the brain parenchyma.
> >
> > The dilatation of the ventricles is likely to increase with the passage of time and may increase significantly before delivery causing harm to the developing brain and possibly cognitive impairment. After birth bay will need neurosurgical procedure like shunting which may be quite costly."
>
> In view of the aforesaid, we are inclined to direct that the petitioner shall be examined by Medical Board consisting of Heads of the Departments of Gynecology, Neurology and Cardiology of J.J. Hospital at Mumbai. The examination shall take place within two days. …"

In pursuance of the aforesaid order, the petitioner No.1 has been examined by a team of experts of Sir J.J. Group of Hospitals. The observations of the Obstetrician and Gynecologist reads as follows:-

> "Pregnancy diagnosed in second month of pregnancy…
>
> - USG done by Dr. Anirudha Badade, MD. DMRD., on 27/03/2017 shows pregnancy of 8 weeks 4 days.
>
> - Her second visit was on 02/05/2017.
>
> - In her third visit on 13/06/2017 she was advised foetal anomaly scan.
>
> - Anomaly scan done on by Dr. Anirudha Badade, MD. DMRD., 23/06/2017 shows 21 weeks 1 day pregnancy.
>
> - It shows ventriculomegaly (SIV) atrial diameter 13 mm.
>
> - USG done at Lilawati Hospital 24/06/2017 shows lateral ventricle 14 mm. Isolated bilateral moderate lateral ventriculomegaly.
>
> - Foetal MRI done at Global Hospital dt.28/06/2017 showed moderate symmetrical obstructive Hydrocephalus consistent with cerebral aqueductal stenosis with thinning of parenchyma.

- Dr. Deepak Ugra, MD. (PAED) FRCPCH (London). Consultant Pediatricial at Lilawati Hospital, Research Centre, Mumbai on 30/06/2017 opined that the a very high probability that the baby will have a significant brain damage.

- On 04/07/2017 Dr. K.N. Shah, Pediatric Neurologist states that dilatation of ventricles is likely to increase with the passage of time and may increase significantly before delivery causing harm to the developing brain and possibly cognitive impairment. After birth, baby will need neurological procedure like shunting which may be quite costly."

The Neurologist, who examined the petitioner No.1, has opined thus:-

> "As per foetal MRI done on 28/06/2017 the foetus has complex Neurological condition called Aqueductal Stenosis and Hydrocephalus. This condition will continue to progress putting pressure effect on the brain. After the delivery, surgical treatment may be offered which entails risk of mortality and morbidity. In spite of best possible treatment the Neurological out come is guarded in nature."

The opinion of the Cardiologist is as follows:-

> "I have gone through the Ultrasonographic records of the foetus. The records do not reveal any foetal heart structural abnormalities at this time."

The final opinion of the Committee reads as follows:-

> "Patient spontaneously expressed her desire not to continue with the pregnancy. She has also submitted a letter which states that she desires termination of pregnancy since there is substantial risk of mortality and morbidity in the foetus if born alive. We find that continuation of pregnancy shall pose severe mental injury to her. We have explained hazards of the procedure which she has understood. Such terminations can only be possible if awarded by Hon'ble Supreme Court."

In view of the individual opinions of the Obstetrician and Gynecologist and the Neurologist and the ultimate opinion of the Committee, we are inclined to allow the prayer (a), as prayed for by the petitioners in the writ petition.

…"

IN THE SUPREME COURT OF INDIA

Mamta Verma v. Union of India & Ors.
2017 SCC OnLine SC 1150
S.A. Bobde and L. Nageswara Rao, JJ.

The petitioner, a woman who was 25 weeks pregnant, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of her pregnancy because she had crossed the 20 week limit prescribed under Section 3(2) of the MTP Act. The Medical Board confirmed a diagnosis of anencephaly in the foetus and found that it is unlikely to survive outside the uterus. Further, it opined that the continuation of pregnancy could pose severe mental health risks for the petitioner. The Supreme Court considered whether permission for medical termination of pregnancy could be granted beyond 20 weeks in light of these facts.

Bobde and Rao, JJ.: "**1.** Petitioner - Mamta Verma, aged 26 years, has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. She apprehended danger to her life, having discovered that her foetus was diagnosed with Anencephaly, a defect that leaves foetal skull bones unformed and is both untreatable and certain to cause the infant's death during or shortly after birth. This condition is also known to endanger the mother's life.

2. By order dated 04.08.2017, while issuing notice to the respondents, this Court gave a direction for examination of the petitioner by a Medical Board…

…

4. The aforesaid Medical Board has examined the petitioner and stated that as on 08.08.2017, she was into her 25th week and 1 day of pregnancy. The said Board has further opined as follows :

> "Patient wants pregnancy to be terminated as the foetus is not likely to survive. It is causing immense mental agony to her.
>
> After going through the Ultrasonography reports, Committee is of opinion that there is no point to continue the pregnancy as foetus has ANENCEPHALY which is non-compatible with life and continuation of pregnancy shall pose severe mental injury to her."

5. We have been informed that the foetus is without a skull and would, therefore, not be in a position to survive. It is also submitted that the petitioner understands that her foetus is abnormal and the risk of foetal mortality is high. She also has the support of her husband in her decision making.

6. Upon evaluation of the petitioner, the aforesaid Medical Board has concluded that her current pregnancy is of 25 weeks and 1 day. The condition of the foetus is not compatible with life. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull.

7. Importantly, it is reported that the continuation of pregnancy can pose severe mental injury to the petitioner and no additional risk to the petitioner's life is involved if she is allowed to undergo termination of her pregnancy.

8. In the circumstances, we consider it appropriate in the interests of justice and particularly, to permit the petitioner to undergo medical termination of her pregnancy under the provisions of Medical Termination of Pregnancy Act, 1971…"

IN THE SUPREME COURT OF INDIA

Tapasya Umesh Pisal v. Union of India
(2018) 12 SCC 57
S. A. Bobde and L. Nageshwar Rao, JJ.

The petitioner approached the Supreme Court by way of a writ under Article 32 of the Indian Constitution, seeking permission to terminate her pregnancy of 24 weeks. She sought termination on the ground that there was risk to her life from carrying a foetus with a cardiac anomaly which is associated with a high rate of morbidity and mortality if the child is born alive. The Court considered whether termination of pregnancy beyond 20 weeks could be permitted on this ground, especially when the medical opinion suggested that if the pregnancy resulted in a live birth, the child so born would have serious disabilities and would have a very short life span.

Bobde and Rao, JJ.: "**1**. Petitioner Tapasya Umesh Pisal, aged 24 years, has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. She apprehended danger to her life, having discovered that her foetus was diagnosed with tricuspid and pulmonary atresia, a cardiac anomaly in the foetus.

2. By order dated 4-8-2017, while issuing notice to the respondents, this Court gave a direction for examination of the petitioner by a Medical Board consisting of Dr Sambare, HOD, Gynaecology and Dr Nityanand Thakur, Paediatric Cardiac Surgeon of B.J. Govt. Medical College, Pune, and authorised it to appoint other necessary doctors, if required, for the said purpose.

3. As per the report dated nil, received from the Dean, B.J. Govt. Medical College & Sassoon General Hospital, Pune, Maharashtra, the following members of the said hospital were included in the Committee/Board:

(1) Dr Ajay Chandanwale, Dean BJGMC, Pune.

(2) Dr Pradip Sambarey, Professor & Head, Obstetrics and Gynaecology, BJGMC Pune.

(3) Dr Nityanand Thakur, CVTS Department BJGMC Pune.

(4) Dr Aarti Kinikar, Professor & Head, Department of Paediatrics BJGMC Pune.

(5) Dr Shephali Pawar, Professor, Department of Radiology, BJGMC Pune.

4. The aforesaid Medical Board has examined the petitioner and stated that as on 7-8-2017, she was into her 24th week of pregnancy. She was accompanied by her husband and they are aware of the cardiac anomaly and the associated morbidity of the baby if born alive. The salient features of the said report are as under:

> (1) The foetus is diagnosed as having hypoplastic right heart with tricuspid and pulmonary atresia with small size pulmonary arteries.
>
> (2) The surgeries that will be necessary on the foetus have been reported to carry high morbidity and mortality.
>
> (3) It is also reported that in spite of the surgeries, such children do not achieve normal oxygen level and would remain physically incapacitated. The life span of these children even after corrective surgeries is limited as described in medical literature.
>
> (4) The paediatrician has reported that it appears to be an isolated complex congenital heart disease with increased morbidity and mortality post delivery.
>
> (5) The Radiologist has reported a complete absence of right ventricle and pulmonary and tricuspid valve atresia.

5. We also have on record the opinion of an eminent surgeon Dr Devi Shetty of Bangalore who has stated that most of these children do not live till the adult life. Their life is precarious because of the problems resulting from low oxygenation in the body. According to Dr Nityanand Thakur, Cardiac Surgeon, and member of the Medical Board, there is a near certain chance of severe handicap or sudden death of the baby after birth.

6. Upon evaluation of the petitioner, the aforesaid Committee/Medical Board has concluded that the baby if delivered alive, would have to undergo several surgeries after birth which is associated with a high morbidity and mortality.

7. But for the time period, it appears that the case falls under Section 3(2)(*b*) of the Medical Termination of Pregnancy Act, 1971, which reads as under:

> "**3.** ***When pregnancies may be terminated by registered medical practitioners.***—
> (1) * * *
>
> (2)(*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."

8. In these circumstances, it is difficult for us to refuse the permission to the petitioner to undergo medical termination of pregnancy. It is certain that the foetus if allowed to born, would have a limited life span with serious handicaps which cannot be avoided. It appears that the baby will certainly not grow into an adult.

9. In view of the above, we consider it appropriate in the interests of justice and particularly, to permit the petitioner to undergo medical termination of her pregnancy under the provisions of Medical Termination of Pregnancy Act, 1971. Mr Ranjit Kumar, learned Solicitor General appearing for the respondents, has not opposed the petitioner's prayer on any ground, legal or medical. We order accordingly.

10. The termination of pregnancy of the petitioner will be performed by the Doctors of the hospital where she has undergone medical check-up. Further, termination of her pregnancy would be supervised by the abovestated Committee/ Medical Board who shall maintain complete record of the procedure which is to be performed on the petitioner for termination of her pregnancy.

11. With the aforesaid directions, the instant writ petition is allowed in terms of prayer (a) seeking direction to the respondents to allow the petitioner to undergo medical termination of her pregnancy."

IN THE SUPREME COURT OF INDIA

Murugan Nayakkar v. Union of India
WP (C) No. 749 of 2017 (Order dated September 6, 2017)
Dipak Misra, C.J., and Amitava Roy and A.M. Khanwilkar, JJ.

This writ petition was filed to seek permission to terminate the pregnancy of a minor girl, who had conceived as a result of rape and had crossed the 20 week limit for termination of pregnancy prescribed under Section 3 of the MTP Act.

Misra, C.J., and Roy and Khanwilkar., JJ.: "The petitioner who is a 13 years old girl and a victim of alleged rape and sexual abuse, has preferred this writ petition for termination of her pregnancy. When the matter was listed on 28.8.2017, this Court has directed constitution of a Medical Board at Sir J.J. Group of Hospitals, Mumbai. Be it noted, this Court had also mentioned the composition of the team of doctors. The petitioner has appeared before the Medical Board on 1.9.2017 and the Medical Board that has been constituted by the order of this Court expressed the opinion that the termination of pregnancy should be carried out. That apart, it has also been opined that termination of pregnancy at this stage or delivery at term will have equal risks to the mother. The Board has also expressed the view that the baby born will be preterm and will have its own complications and would require Neonatal Intensive Care Unit (N.I.C.U.) admission.

…

Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this Court, we think it appropriate that termination of pregnancy should be allowed.

In view of the aforesaid premise, we direct the petitioner to remain present at the Sir J.J. Group of Hospitals, Mumbai in the evening of 7.9.2017 so that the termination of pregnancy can be carried out preferably on 8.9.2017. Mr. Nishant R. Katneshwarkar shall apprise the Dean of Sir J.J. Group of Hospitals, Mumbai so that he/she can make necessary arrangements for termination of the pregnancy.

…

The writ petition is accordingly disposed of. There shall be no order as to costs."

IN THE SUPREME COURT OF INDIA

Chanchala Kumari v. Union of India
WP (C) No. 871 of 2017 (Order dated September 21, 2017)
Dipak Misra, C.J., and Amitava Roy and A.M. Khanwilkar, JJ.

This writ petition was filed to seek permission to terminate the pregnancy of a minor girl, who had conceived as a result of rape and had crossed the 20-week limit for termination of pregnancy prescribed under Section 3 of the MTP Act

Misra, C.J., and Roy and Khanwilkar, JJ.: "Espousing the cause of the daughter, a minor girl, aged about 13 years, a victim of rape, the mother has preferred this writ petition seeking medical termination of her pregnancy. When the matter was listed before this Court on 15th September, 2017, the Medical Board was directed to be constituted at AIIMS, New Delhi comprising of certain doctors as per the names suggested by Mr.Ranjit Kumar, learned Solicitor General after obtaining instructions. The initial report was not specific and thereafter this Court on 18th September, 2017 passed the following order:-

> "Let the matter be listed on Thursday, 21st September, 2017 on which day the Medical Board, consisting of Head of Departments, Obstetric and Gynecology, Paediatrics, Psychiatry, Radiology and Neurology from All India Institute of Medical Sciences (AIIMS), New Delhi shall give its opinion with regard to medical termination of pregnancy. When we say medical termination of pregnancy we mean to convey all the factors including the factor of life of the fetus."

The competent authority of AIIMS, New Delhi, regard being had to the fact situation has constituted the Medical Board of 11 doctors. The report submitted by the Medical Board today reads as follows:-

> "The case of Ms. 'X' was re-examined by the board members after which the board opines as follows:
>
> Ms. 'X' is 24 weeks pregnant and termination of pregnancy is feasible. However, the ultrasound report shows 'low lying placenta', attempt to terminate pregnancy carries the risk of severe bleeding in which case a caesarian section will be required."

On a perusal of the report, we find that the termination of pregnancy is feasible. In view of the aforesaid, the termination of pregnancy is hereby allowed. The victim being accompanied by her mother shall report at AIIMS, New Delhi on Friday, 22nd September, 2017 at 9.00 a.m. and thereafter the competent authority of AIIMS shall do the needful in the matter ensuring that all safety measures are taken. The Institute shall preserve the terminus fetus. Needless to say all expenses shall be borne by the AIIMS, New Delhi.

..."

IN THE SUPREME COURT OF INDIA

Anusha Ravindra v. Union of India
W.P. (C) 934/2017 (Order dated October 13, 2017)
Dipak Misra, C.J., A.M. Khanwilkar and D.Y. Chandrachud, JJ.

In this writ petition, the petitioner sought medico-legal guidelines for urgent and safe termination of pregnancy under safe medical facilities; and constitution of a committee for framing of appropriate medico-legal guidelines for setting up a permanent mechanism for expedient termination of pregnancies beyond 20 weeks in the cases involving rape survivors and foetal impairments. The petitioner also sought a direction to the legislature to accordingly amend Section 3(2) of the MTP Act. The Court considered whether to admit the petition and which reliefs, if any, to address.

Misra, C.J., and Khanwilkar and Chandrachud, JJ.: "In this writ petition, the petitioner has prayed for the following reliefs:-

> "a) Frame and issue urgent appropriate medico legal guidelines for urgent and safe termination of pregnancy under safe medical facilities;
>
> b) Constitute a committee for framing of appropriate medico legal guidelines for setting up a permanent mechanism for expedient termination of pregnancies beyond 20 weeks in the exceptional cases particularly involving rape survivors and women and abnormal foetus's under safe medical facilities; with adequate inputs from an association of professionals & experts;
>
> c) Issue urgent appropriate writ, order and/or direction to the respondents to urgently suitably amend Section 3 of the Medical Termination of Pregnancy Act, 1971, so as to permit termination of pregnancies of more than 20 weeks for expedient termination of pregnancies beyond 20 weeks in the cases particularly involving rape survivors and women with abnormal foetus's under safe medical facilities."

On a perusal of the reliefs sought, we find that as far as the prayer (c) is concerned, that is in the legislative realm, hence we are not inclined to address the said prayer.

As far as the prayers (a) and (b) are concerned, we are of the prima facie view that they have become necessary to be addressed.

Issue notice, fixing a returnable date within four weeks."

IN THE HIGH COURT OF HIMACHAL PRADESH

Geeta Devi v. State of Himachal Pradesh & Ors.
2017 SCC OnLine HP 1574
Dharam Chand Chaudhary and Vivek Singh Thakur, JJ.

The petitioner, a woman who was 32 weeks pregnant, invoked the writ jurisdiction of the High Court for medical termination of her pregnancy. She was diagnosed with mild to moderate mental retardation and atrial septal defect (hole in her heart). According to the Medical Board, the foetus had an abnormal head growth and the possibility of its survival outside the womb was low. Even if it survived, once born the child could suffer from severe cognitive and motor impairments. The Board also opined that there was danger to the physical and mental health of the petitioner. The Himachal Pradesh High Court considered the issue of whether permission for medical termination of pregnancy should be granted in light of these facts.

Chaudhary, J.: "The petitioner aged 19 years, having mild to moderate mental retardation, and an unfortunate mother has approached this Court for seeking a direction to the Medical Superintendent, Kamla Nehru Hospital for Mother and Child, Shimla to arrange for abortion of a foetus in her womb on the grounds inter-alia that it is risky for her to complete the normal period of pregnancy and deliver child on the due date.

2. On very first day of hearing i.e., 6.10.2017, following order came to be passed in this matter:

> "2. In the meanwhile, we direct respondent No.2 to have the petitioner (hereinafter referred as to 'X') medically examined from a Medical Board comprising of at least five doctors, to be headed by Head of the Department of Gynecology of any of the State Level Hospitals in the State of Himachal Pradesh. Needless to add, respondent No.2 shall consider directions issued by the Hon'ble Supreme Court from time to time and more specially order, dated 7th February, 2017, passed in Writ Petition (Civil) No. 81 of 2017, titled as Mrs. X and Ors. Passed in Civil Appeal No. 10463 of 2017, titled as Ms. Z Vs. The State of Bihar and Ors. Needful shall be done within a period of one week.
>
> 3. We clarify that the Medical Board shall consider the medical health and condition of the foetus, as also the mother, more so, in the light of the provisions of the Medical Termination of Pregnancy Act, 1971.
>
> 4. We are informed that 'X' is physically challenged and as such, perhaps she may not be able to travel alone to the place of sitting of the Medical Board. In these circumstances, we direct respondent No.2 to ensure that she be conveniently and comfortably brought to the place of her examination in an ambulance and taken back to the place of her residence in the company of a lady medical attendant.
>
> 5. We also direct Member Secretary, H.P. State Legal Services Authority to follow up with 'X' for ensuring compliance of the order. Registrar General is directed to communicate the order to the Member Secretary, H.P. State Legal Services Authority. List on 13th October, 2017."

3. Therefore, while issuing notice to the respondents, a direction was given for conducting medical examination of the petitioner by a Medical Board, left open to be constituted by the 2nd respondent. Consequently, the Medical Board comprising… six doctors, expert in their respective field came to be constituted…

…

6. The examination of the petitioner by the Medical Board comprising six doctors expert in their respective field amply demonstrates that the petitioner a mild and moderately mentally retarded mother is carrying the pregnancy of about 32 weeks. The report of ultrasound reveals that a single live intra-uterine foetus having abnormal head growth is in her womb. The foetal head is enlarged and still growing due to fluid accumulation. Also that, in case of vaginal delivery, destructive operation upon the foetal head may be required and in that event life of the foetus may also jeopardize. The termination of pregnancy at this stage may need major surgical procedure with the consequences such as, bleeding, sepsis and anesthesia hazards. In the event of pregnancy is to be continued the foetus may have severe cognitive and motor impairments even after surgical procedure also. As a matter of fact, the opinion of the Medical Board reads as follows:

Opinion of the Medical Board dated 16.10.2017

…

1. **Risk to Child**

a) Because of abnormal foetal head which is enlarged and still growing due to fluid accumulation which has led to severe thinning of brain which may result in mental retardation.

b) The possibility of this child's survival outside the womb of the mother is low.

c) Even if the child survives, the child will require surgical intervention and even after surgical intervention there may be severe mental retardation to the child.

2. **Risk to Mother**:

a) As detailed in the previous medical opinion of the board the mother is having mild to moderate mental retardation.

b) Normal vaginal delivery is not possible in this case due to short stature.

c) Only option is surgical intervention. More the pregnancy in this case is going to advance, head size will increase further and there will be more complications in the surgery and thus more risk to the mother as well.

d) Inspite of surgical approach to deliver the baby the head of the baby may be required to be decompressed by taking out fluid which further limits the chances of survival.

e) During the investigations of the mother on 13.10.2017, she has been found suffering with suspected Atrial Septal Defect, which is hole in the heart which may further lead to the complications of surgery.

…

7. It is thus seen that the mother, petitioner herein having mild to moderate mental retardation and short stature, the only available option as per the medical opinion is left with i.e., to go for premature delivery with surgical intervention because to allow the pregnancy to continue up to its normal tenure, the head size of the foetus will increase further and in that event the surgery is going to become more complicated, besides causing more risk to her life. In that event even the head of the baby (foetus) may also necessitate decompression by taking out fluid out of it which may also limit the chances of survival of the baby. The petitioner herein is also found to be suffering from suspected Atrial Septal Defect i.e. hole in the heart, which may lead to further complications at the time of surgery.

8. Not only this but as per medical opinion, the enlarged head of foetus is still growing further due to fluid accumulation which in the opinion of the Board may lead to severe thinning of brain and ultimately result in mental retardation. The possibility of survival of the baby outside the womb of the mother would also be low. Not only this but even if the baby survives, may require surgical intervention and despite that also, the baby may suffer with severe mental retardation. The report submitted by the Medical Board is, therefore, exhaustive one and self speaking. On perusal of the report, we are fully satisfied that allowing the pregnancy to complete its normal tenure and delivery of foetus/baby on due date is dangerous not only to the life of the petitioner but the foetus/baby may also not survive. The examination of the petitioner, general, medical, radiological and psychiatric, therefore, amply demonstrates that to allow the pregnancy to continue is not in the interest of the petitioner nor in that of foetus in her womb. The anaesthetic and obstetric evaluation also reveals that condition of the foetus is not compatible with extra uterine life. In other words, the foetus may not be able to survive outside the uterus, besides causing danger to the life of the petitioner, if she is made to wait for the delivery of baby on due date. The continuation of pregnancy, therefore, endangers the physical and mental health of the petitioner. Therefore, we find the present a fit case where the risk of termination of her pregnancy is within the acceptable limits. In a similar case titled ***Meera Santosh Pal and Others V. Union of India and Others, Writ Petition (Civil) No. 17 of 2017, decided on 16th January, 2017,*** having similar set of facts and circumstances, the Apex Court has held as follows:

> "This Court, as at present being advised, would not enter into the medico-legal aspect of the identity of the foetus but consider it appropriate to decide the matter from the standpoint of the right of petitioner no.1 to preserve her life in view of the foreseeable danger to it, in case she allows the current pregnancy to run its full course. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull. In Suchita Srivastava and Anr. vs. Chandigarh Administration [(2009) 9 SCC 1], a bench of three Judges held "a woman's right to make reproductive choices is also a

dimension of 'personal liberty' as understood under Article 21 of the Constitution". The Court there dealt with the importance of the consent of the pregnant woman as an essential requirement for proceeding with the termination of pregnancy. The Court observed as follows:-

> "22. 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. Further more, women are also free to choose birth control methods such as undergoing sterilization 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....."

The crucial consideration in the present case is whether the right to bodily integrity calls for a permission to allow her to terminate her pregnancy. The report of the Medical Board clearly warrants the inference that the continuance of the pregnancy involves the risk to the life of the pregnant woman and a possible grave injury to her physical or mental health as required by Section 3 (2)(i) of the Medical Termination of Pregnancy Act, 1971. Though, the pregnancy is into the 24 week, having regard to the danger to the life and the certain inability of the foetus to survive extra uterine life, we consider it appropriate to permit the petitioner to terminate the pregnancy. The overriding consideration is that she has a right to take all such steps as necessary to preserve her own life against the avoidable danger to it.

In these circumstances given the danger to her life, there is no doubt that she has a right to protect and preserve her life and particularly since she has made an informed choice. The exercise of her right seems to be within the limits of reproductive autonomy…"

9. It is seen that points in issue in the present writ petition are squarely covered by the judgment ibid in favour of the petitioner because here also as per the report submitted by the Medical Board, continuance of pregnancy involves risk to the life of the petitioner and in case she is not permitted to terminate the pregnancy, likely to suffer grave injury, not only to her physical, but mental health also. The relief sought in this writ petition, therefore, is also covered by Section 3(2)(i) of the Medical Termination of Pregnancy Act, 1971. True it is that the pregnancy is at an advance stage i.e. 32 weeks, however, having regard to the danger to the life of the petitioner and expert opinion that the foetus may not survive to extra uterine life, we deem it appropriate to grant permission to the petitioner to terminate the pregnancy. Above all, in view of the ratio of the judgment of the Apex Court in **Meera Santosh Pal's** case supra, the petitioner has every right to take all steps necessary to preserve her own life against the avoidable danger to it. It is also necessary to protect and preserve her life…

10. In view of what has been said hereinabove, we allow the present writ petition and dispose of the same with the following directions:-

i) The 5th respondent i.e. Medical Superintendent, Kamla Nehru Hospital, Shimla is directed to arrange for termination of the pregnancy of petitioner by the expert Gynaecologist(s) under the supervision of the Medical Board constituted pursuant to the orders passed by this Court at the earliest possible and without any further loss of time.

ii) Since in the opinion of the Medical Board, the petitioner is mild to moderate mentally retarded mother, therefore, in addition to her own affidavit in support of the writ petition, consent of her father or mother, as the case may be, be obtained before she is subjected to surgical intervention (ceasarean) enabling her to deliver the baby prematurely.

iii) The DNA of the newly born baby be preserved by the team of doctors for being used during the course of investigation, inquiry and trial in criminal case stated to be registered in Police Station, Banjar, District Kullu, H.P. under Sections 376(2) (L) of the Indian Penal Code and also in other civil consequences which may follow after premature delivery and survival of the newly born…

…"

IN THE HIGH COURT OF GAUHATI

Bhatou Boro v. State of Assam
(2018) 2 Gau LR 577
Hrishikesh Roy, J.

This writ petition was filed seeking permission to terminate the pregnancy of a minor girl, aged 11 years, who became pregnant as a result of rape. The High Court referred to the decisions of the Supreme Court, where it allowed termination of pregnancy exceeding 20 weeks in cases involving a threat to the woman's life or grave injury to her physical or mental health. It directed the Medical Board to re-examine the minor to determine whether termination of her pregnancy was feasible, independent of the limitations under the MTP Act.

Roy, J.: "…

2. The matter pertains to a minor girl of around 11 years, who is carrying an unwanted pregnancy. The victim was sexually assaulted over a period of time by an elderly neighbor and the family recently learnt of the victim's plight.

3. After lodging the FIR on 15.9.2017 (Annexure-1), leading to registration of the Khetri P.S. Case No.106/2017, under Section 376 IPC, read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POSCO Act'), the father of the victim approached the Gauhati Medical College & Hospital (GMCH) authorities for termination of pregnancy of the minor but the Doctors did not accede to the said request. Therefore, this petition is filed with prayer for constitution of a Medical Board, to examine the feasibility of terminating the pregnancy, of the minor victim.

4. Following the Court's direction issued on 25.10.2017, for constitution of the Medical Board by the Superintendent of the Gauhati Medical College & Hospital (GMCH), the victim visited the Hospital and the Doctors at the GMCH examined her on 28.10.2017. The report under the signature of the Chairman of the Medical Board, produced by Mr. B. Gogoi, reflects that the ultrasound test conducted on 26.10.2017, revealed that the girl was undergoing 26 weeks + 1 day of gestation period. Therefore, the Medical Board opined that under the existing norms, the patient is unfit to undergo medical termination of pregnancy.

5. The above opinion of the Medical Board is with reference to the legal restriction on medical termination of pregnancy, imposed by the Medical Termination Of Pregnancy Act, 1971 (hereinafter referred to as 'the MTP Act'). But the Board did not state whether it is medically feasible, to attempt termination of pregnancy of the child victim. In other words, if the Doctors were at liberty to independently decide without being impeded by the MTP Act, whether the procedure for termination of pregnancy can be attempted. This aspect is being considered by the Court, as the petitioner, who is the father of the victim, has indicated that the victim child does not wish to carry the pregnancy, to its full term.

6. The MTP Act was substantially structured on the Abortion Act of 1967, which was the law in England. The legislature intended to provide only a qualified right to abortion and the Indian Law does not recognize termination of pregnancy, as a normal recourse, for expecting mother. In Suchita Srivastava vs. Chandigarh Administration, reported in the (2009) 9 SCC 1, the Supreme Court declared that a woman's right to make reproductive choices is also a dimension of "personal liberty", under Article 21 of the Constitution of India. Reading the provisions of the MTP Act, the Court held that in case of pregnant woman, there is also "compelling State interest", in protecting the life of the prospective child. Hence, it was observed that the MTP Act should be viewed as reasonable restriction placed by law on the exercise of reproductive choices.

…

8. The perusal of the above provisions of the MTP Act, makes it clear that normally, pregnancy can be terminated only when a Medical practitioner is satisfied that continuation of the pregnancy, involve risk to the life of the pregnant woman or a grave injury to her physical or mental health. Legal presumption of grave injury to the mental health to the pregnant woman must be drawn, under the explanation (I) of Section 3(2), which says that if pregnancy is the result of rape, grave injury to the mental health is the logical legal presumption.

9. In the recent judgment in Meera Santosh Pal vs. Union of India, reported in (2017) 3 SCC 462, the Supreme Court, while considering the case of a pregnant lady in the 24th week, reflected on the right of the mother to protect and preserve her own life and allowed her to undergo medical termination of pregnancy, well beyond the 20 weeks bar, stipulated by the MTP Act.

10. In a more recent order, delivered on 6.9.2017, in the case of Murugan Nayakkar vs. Union of India (WP(C) No.749/2017), the Supreme Court noted that the termination at a mature stage of pregnancy, will have equal risk for the mother and the child. However, considering the age of the child mother and the trauma, she is suffering as a victim of sexual abuse and keeping in mind the report of the Medical Board, the Court permitted termination of pregnancy, for the young victim.

11. In another matter, the Supreme Court, on February 7, 2017, in the case of X and others vs. Union of India, reported in (2017) 3 SCC 458, after referring the earlier decision in Suchita Srivastava (Supra) and Meera Santosh Pal (Supra), while noting that continuation of pregnancy involves risk to the life of the petitioner and possible grave injury to her physical or mental health, allowed termination of pregnancy, even after 24 weeks of gestation.

12. The key aspect which needs to be borne in mind in the instant case, filed by the victim's father is that the sexually abused pregnant girl is aged around 11 years only. Naturally, this is an unwanted pregnancy and therefore, the victim approached the GMCH, for abortion but the same was refused on account of the MTP Act. The last week's opinion given by the Medical Board is with reference to the existing norms under the MTP Act and Rules. But it is obvious that the Medical Board had not taken into account the anguish and trauma of the child victim of sexual abuse and her sufferings in carrying the unwanted pregnancy. The impact on the mental health of the young victim presumed in law, under explanation (I) of Section 3(II) of the MTP Act, have also not been taken into account, by the Medical Board.

13. Considering the above, while issuing returnable notice, the Medical Board of the GMCH is directed to immediately evaluate the feasibility of termination of pregnancy of the child mother, focusing on her interest, without being shackled by the MTP Act. The continuation of pregnancy for the child mother has certainly compromised her mental health and therefore, it should be assessed by the Medical Board if the risk of termination of pregnancy is within the acceptable limits, with institutional backup of the GMCH. In that event, with the consent of the father of the minor victim, the appropriate procedure should be attempted in the present case. If termination of pregnancy can reasonably be attempted, the Medical Board is at liberty and should take an appropriate decision, after re-evaluating the patient. If medically feasible, the necessary steps should then be taken, to relieve the child mother of the anguish and trauma, on account of the unwanted pregnancy. It is ordered accordingly.

..."

IN THE HIGH COURT OF BOMBAY

Priti Mahendra Singh Rawal v. Union of India & Ors.
Writ Petition No. 11940 of 2017 (Order dated November 6, 2017)
Shantanu Kemkar and G. S. Kulkarni, JJ.

The petitioner, a woman who was 26 weeks pregnant, invoked the writ jurisdiction of the High Court for medical termination of pregnancy as she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. Her foetus was diagnosed with serious neurological and skeletal impairments. The Medical Board opined that the impairments caused high chances of mortality and morbidity in the child, necessitating multiple surgeries. It added that there were high chances of meningitis, and physical and intellectual disabilities. The Bombay High Court considered whether permission for medical termination of pregnancy should be granted in light of these facts and whether the criteria of "substantial risk of serious physical handicap" in the foetus under Section 3(2)(ii) of the MTP Act was met.

Kemkar and Kulkarni, JJ.: "Petitioner Priti Mahendra Singh Rawal has approached this Court under Article 226 of the Constitution of India, seeking direction to the first respondent to produce a report of the appropriate committee which may be constituted by this Court for her examination and submitting its report as to whether the petitioner can be allowed to get the pregnancy terminated.

2. On 3 November 2017 this Court while issuing notices to the respondents, constituted a committee of experts from Sir.J.J.Groups of Hospitals, Mumbai. As per the Medical Board's report as constituted by this Court, the petitioner has been medically examined by the Committee. The Committee has submitted its opinion. A detailed opinions of various experts are filed alongwith the said opinion of the dated 4 November 2017. The Committee which has examined the petitioner opined thus:

"OPINION OF THE COMMITTEE

DATE-04/11/2017

UPON EXAMINATION OF THE PATIENT PRITI AND AFTER CAREFULLY STUDYING THE SONOGRAPGHY REPORTS AND FOETAL 2D ECHO REPORTS, IT IS CONFIRMED THAT THERE ARE MULTIPLE SERIOUS NEUROLOGICAL AND SKELETOL ABNORMALITIES IN THE FOETUS. THERE IS ARNOLD CHIARI MALFORMATION WITH HYDROCEPHALUS WITH LARGE LOWER THORACIC AND LUMBAR POSTERIOR SPINAL DEFECT ASSOCIATED WITH A LARGE MENINGOMYELOCELE. THELOWER LIMB SHOWS NO MOVEMENT ASSOCIATED WITH ABNORMAL CONTOUR OF THE FOOT AND AN ELONGATED URINARY BLADDER. THESE APPEARANCES ARE SUGGESTIVE OF NEUROGENIC ETIOLOGY. THESE ABNORMALITIES HAVE HIGH CHANCES OR MORBIDITY & MORTALITY IN THE NEWBORN. IT ALSO REQUIRES MULTIPLE SURGERIES. THERE ARE HIGH CHANCES OF MENINGITIS, MENTAL RETARDATION, PARALYSIS OF LOWER LIMBS AND LOSS OF URINE AND BOWEL CONTROL THERE IS NO MAJOR CARDIAC ABNORMALITY.

THE WOMAN HAS BEEN EXPLAINED THE OUTCOME OF THIS PREGNANCY IN THE LANGUAGE SHE UNDERSTANDS. SHE IS MENTALLY SOUND & ABLE TO TAKE HER OWN DECISION ABOUT MEDICAL TERMINATION OF PREGNANCY.

THE CONDITION OF THE FOETUS FULFILLS THE CRITERIA OF "SUBSTANTIAL RISK OF SERIOUS PHYSICAL HANDICAP" IN THE FOETUS.

THE PREGNANT WOMAN HAS VOLUNTARILY EXPRESSED HER DESIRE TO TERMINATE THE PREGNANCY AND IS WELL INFORMED ABOUT THE NATURE OF THE FOETUS AND ITS OUTCOME.

THE PREGNANCY IS ADVANCED TO 25 WEEKS 6 DAYS AND IS BEYOND 20 WEEKS CUT OFF OF THE MEDICAL TERMINATION ACT. HENCE, SHE HAS APPROACHED HON. HIGH COURT, BOMBAY FOR TERMINATION OF PREGNANCY.

AT THIS STAGE OF PREGNANCY THE RISK OF TERMINATION REMAINS THE SAME AS THE NATURAL LABOUR AT TERMS.

THUS IF THE COURT PERMITS THE PREGNANCY CAN BE TERMINATED AS DESIRED BY THE WOMAN…."

3. We have gone through the aforesaid opinion as also the opinion of various other experts including Paediatrics Surgeon, Professor and HOD of Department of Paediatrics, Professor and HOD of Cardiovascular Surgery, Associate Professor and HOD of Department of Psychiatry. …The condition of the foetus fulfills the criteria of "substantial risk of serious physical handicap" in the foetus. It is also clear that the petitioner has voluntarily expressed her desire to terminate the pregnancy and is well informed about the nature of the foetus and its outcome.

4. Having regard to the aforesaid, it is very difficult for us to refuse the permission to the petitioner to undergo medical termination of the pregnancy. It is certain that if the petitioner's foetus is allowed to born, there is risk that it would suffer from lifelong serious physical handicap, which cannot be avoided. It appears that the baby will certainly not grow any further.

5. In view of the above peculiar situation and having due regard to the fundamental rights conferred on the petitioner under Article 21 of the Constitution of India to live life of dignity, it will be appropriate and in the interest of justice to permit the petitioner to undergo the medical termination of pregnancy under the provisions of the Medical Termination of Pregnancy Act,1971. Such fundamental right as conferred on the petitioner would not allow her to lead and live a life of misery."

IN THE HIGH COURT OF MADHYA PRADESH

Sundarlal v. State of M.P & Ors.
AIR 2018 (NOC 589) 205
Sujoy Paul, J.

This writ petition was filed by a father seeking termination of his minor daughter's pregnancy, who had conceived as a result of rape. The High Court considered whether, and under what circumstances, termination of a pregnancy should be permitted for pregnancies that result from rape.

Paul, J.: "In this petition filed under Article 226 of the Constitution of India, the petitioner has prayed for a direction to the respondents for terminating the pregnancy of his minor daughter who is allegedly a rape victim. In addition, petitioner has prayed for grant of suitable compensation.

…

3. The petitioner contended that the victim is a minor. The petitioner being guardian has given his consent for terminating the pregnancy. If such pregnancy is forced upon the victim, it will violate her right of "personal liberty" as enshrined under Article 21 of the Constitution of India. Mr. Chaturvedi, learned counsel for the petitioner in support of this contention relied on Section 3 of the Medical Termination of Pregnancy Act, 1971 (the Act of 1971) and the judgment of Supreme Court reported in (2015) 8 SCC 721, [*Chandrakant Jayantilal Suthar v. State of Gujarat*].

4. *Per-contra*, Mr. Yadav, learned Deputy A.G. produced the documents dated 04.12.2017, 05.12.2017 and the consent letter of petitioner whereby he has given consent for examining the victim relating to pregnancy. By letter dated 04.12.2017 the SHO, P.S. Mundi, District Khandwa requested the Gynaecologist, District Hospital Khandwa to examine and give report on following points: (i) the duration of pregnancy of the victim; (ii) whether the victim's pregnancy can be terminated; and (iii) any other opinion which is justifiable. In the bottom of this letter, the Gynaecologist, Dr. Laxmi (the complete name of doctor is not legible in the document) has given her opinion: viz (i) that the victim is having pregnancy of a period of five months; (ii) upto five months (20 weeks), the pregnancy can be terminated; & (iii) NIL.

…

11. A careful reading of Section 3 of the Act of 1971 makes it clear that where length of pregnancy does not exceed 20 weeks and not less then two registered medical practitioners have formed an opinion in good faith that the continuance of pregnancy would involve a risk to the life of pregnant woman or of grave injury to her physical or mental health, the pregnancy can be terminated by a registered medical practitioner. This act of medical practitioner, if aforesaid conditions are satisfied, will not attract the penal provisions mentioned in Indian Penal Code. In other words, such registered medical practitioner shall not be guilty of any offence under the IPC or under any other law for the time being enforce if conditions mentioned in Section 3 or Section 5 of the Act are satisfied.

12. In Explanation I, the law makers made it clear that where pregnancy is alleged by victim because of rape, a presumption can be drawn that such pregnancy constitute a grave injury to the mental health of pregnant woman. In the present case, this is not in dispute that victim is a minor and petitioner is praying for termination of pregnancy because her daughter is a rape victim. This court in *Hallo Bi* (supra) opined that we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the victim is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child.

13. In the present case, the victim was not subjected to medical examination by two or more registered medical practitioners which is a statutory requirement as per Section 3(2)(b) of the Act of 1971. In absence of fulfilling this statutory requirement, permission cannot be granted for terminating the pregnancy.

14. The Apex court in 2009 (9) SCC (*Suchita Srivastava v. Chandigarh Administration*) opined that Section 3(4)(a) and 5(1) of the Act of 1971 creates exceptions to the rule of pregnant woman's consent, namely, when pregnant woman is below 18 years. Thus, in the present case, consent of victim is not required. More so when petitioner/guardian is willing to furnish such consent. In the said judgment, it was further held that 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 reason 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.

15. The judgment of *Suchita Srivastava* (supra) was consistently followed by Supreme Court. In 2017 (3) SC 462 (*Meera Santosh Pal v. Union of India*), the Apex court followed the said principles. In the case of *Meera Santosh Pal* (supra), the Supreme Court permitted to woman to undergo medical examination under the Act of 1971 and directed the doctors of the hospital to take appropriate action for termination of pregnancy of petitioner No. 1. In (2017) 3 SCC 458 (*Xv. Union of India*), the Apex Court reiterated the principles laid down in *Suchita Srivastava*(supra) and held 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.

16. In the present case, as noticed, the victim was not medically examined by two or more registered medical practitioners. Thus, conditions mentioned in Section 3 are not fulfilled. At the same time, it cannot be forgotten that the singular opinion of gynecologist shows that pregnancy is about 20 weeks. Thus, there is a great urgency in this matter. This court cannot shut its eyes from the statutory limit for terminating a pregnancy [see para 45 of the judgment of *Suchita Shrivastava* (supra)].

17. Apart from this, Section 5 permits termination of pregnancy in relation to length of pregnancy mentioned in sub-section (2) of Section 3 of the Act of 1971 if as per the medical opinion termination of such pregnancy is necessary to save the life of pregnant woman. As noticed, these aspects require medical examination by the medical practitioner.

18. Considering the seriousness and urgency of this matter, this petition is dispose of with following directions:

> **(i)** The victim is a minor and; therefore, if petitioner gives consent for terminating the pregnancy of victim, there shall be no need to obtain the willingness of the victim;
>
> **(ii)** The victim/guardian has a valuable right to take a decision regarding termination of pregnancy and such right is flowing from Article 21 of the Constitution;
>
> **(iii)** A victim of rape cannot be compelled to give birth to a child of rapist. Thus, if conditions of the Act of 1971 are fulfilled, the pregnancy of victim can be terminated;
>
> **(iv)** The respondents shall constitute a Committee of three registered medical practitioners as per the Act of 1971 and such Committee/practitioners shall form opinion in good faith relating to termination of pregnancy of the victim. Needless to mention that Committee has to form its opinion as per the mandate of Act of 1971. The Committee shall be constituted within 24 hours from the date of receipt of this order and shall examine the victim within 24 hours therefrom. Needless to emphasis that in the event of difference of opinion amongst medical practitioners, the majority view will prevail;
>
> **(v)** If the Committee comes to the conclusion that pregnancy of the victim can be terminated in consonance with Section 3 or Section 5 of the pregnancy as per law forthwith. Needless to emphasize that victim shall be provided with all medical assistance and care after pregnancy is terminated. She will be provided with medical assistance by the respondent-State;
>
> **(vi)** The respondents are directed that in the event pregnancy is terminated, they will keep DNA sample of the foetus and shall also keep the same in a sealed cover as per procedure prescribed;
>
> **(vii)** Since counsel for the petitioner has not pressed the relief regarding compensation, this question is left open and liberty is reserved to the petitioner to file appropriate proceedings in this regard;
>
> **(viii)** At the cost of repetition, in my opinion, there is a great urgency in this matter, considering the duration of pregnancy. Thus, it shall be the duty of the respondents to ensure strict compliance of this order within stipulated time;
>
> **(ix)** Respondent No. 2 and 3 shall personally monitor and ensure that this order has been complied with.
>
> …

19. With the aforesaid directions, the **petition is disposed of.**"

IN THE HIGH COURT OF BOMBAY AT AURANGABAD

"X" (since minor through her mother) v. Union of India
2017 SCC OnLine Bom 9334
R.M. Borde and Vibha Kankanwadi, JJ.

A criminal case was registered for rape of a minor girl, who was "deaf-mute" and had "severe mentally retardation". Upon her medical examination, she was found to be around 18-19 weeks pregnant. As the lower court denied permission to terminate her pregnancy, this writ petition was filed by the girl's mother before the High Court. The Court examined whether termination of the girl's pregnancy, which was then 22 weeks, should be allowed under Section 5 of the MTP Act.

Kankanwadi, J.: "…

3. The guardian of an unfortunate deaf-dumb-mentally challenged victim, who has already suffered physical abuse and mental torture has approached this Court seeking direction in the nature of writ of mandamus directing respondent no. 3 to carry out termination of unwanted pregnancy which is result of physical abuse thrust against the victim.

4. The guardian-mother of the victim (petitioner) contends that her daughter is the victim in Crime No. 120/17 registered with Dhadgaon Police Station, Dhadgaon, District Nandurbar, which has been registered on 07.11.2017. After the medical examination of the victim was conducted on 02.11.2017 in a hospital at Akkalkuwa, it is found that she is pregnant and length of the pregnancy is 18 to 19 weeks. Thereafter, she was taken to Nandurbar Hospital on 05.11.2017 for further treatment. It was found that some unknown person had taken disadvantage of the physical situation of the victim, had committed rape on her. The victim is deaf-dumb and mentally retarded. Brother of the victim had lodged report against unknown person for the said crime. He had also filed application on 12.11.2017 for termination of pregnancy to respondent No. 4. However, respondent No. 4 told that since the victim is deaf-dumb-mentally challenged, he will not be able to perform the operation. In the mean time, victim was referred to Medical Superintendent, S. B. H. G. M. C. & Hospital, Dhule for her mental assessment. It was diagnosed with "Severe Mental Retardation". An application was then preferred before Sessions Judge, Shahada for permission for termination of pregnancy. Final report was given on 28.11.2017. The said application was rejected on 04.12.2017. Hence, this petition.

5. Taking into consideration the contentions raised in the petition, by order dated 07.12.2017, we had directed and referred the victim for medical examination before the Board constituted at Government Medical College & Hospital, Aurangabad. The medical examination was directed in order to ascertain extact (sic) psychological and physical condition of the victim.

…

7. The Committee has recorded following findings in the report tendered to this Court :

1. From general examination she has no active medical complaints.

2. On Obestetrics examination her vital parameters are within normal limits With approximately 22 weeks of pregnancy.

3. Ultrasonographic examination suggestive of single live intrauterine foetus of approximate 22 weeks, Nuchal thickness 7mm, Unilateral pelvi ureteric Junction obstruction.

4. ENT examination, survivor is congenitally deaf and mute.

5. On psychiatric examination, survivor clinically seems to be of sever intellectual disability.

6. On Paediatrics examination, survivor has gross development delay with Down Syndrome.

8. The conclusions of the Committee are as follows :

1. Current pregnancy, on clinical and ultrasonographical examination is around 22 weeks by gestation. With Nuchal thickness 7mm, unilateral pelvi ureteric junction obstruction

2. Survivor clinically seems to be of severe intellectual disability.

3. Risk of termination of pregnancy is within normal acceptable limits.

9. The Medical Termination of Pregnancy Act, 1971 provides for termination of certain pregnancy by the registered Medical Practitioner…

10. Although section 3 of the Act provides the limit of 12 weeks for medically terminating pregnancy by a medical practitioner and, where the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks and if, not less than two medical practitioners are of opinion, formed in good faith, the continuance of pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or that 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, it would be permissible to terminate the pregnancy. It must be noted that section 5 of the Act is not controlled by the limitation in respect of duration of pregnancy contained in sections 3 and 4 of the Act. If in the opinion of medical experts, arrived at in good faith, the termination of pregnancy is immediately necessary to save the life of the pregnant woman, such a pregnancy can be terminated. It also must be noted that Explanation 1 to section 3 records that where the pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy can be presumed to constitute a grave injury to the mental health of the pregnant woman. Sub-section (1)(b)(i) of section 3 refers to the risk involved to the pregnant woman which includes even injury in respect of mental health. These are the situations in respect of termination of pregnancy of a woman who is not suffering from any physical abnormalities. There shall not be reason to doubt that since pregnancy in the instant matter is as a result of offence of rape, it causes a huge mental trauma and such inference is in consonance with explanation 1 to section 3(1) of the Act of 1971.

11. Honourable Supreme Court in the case of *Suchita Srivastava Vs. Chandigarh Administration* reported in 2009 (9) SCC 1, has observed that 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 choice can be exercised to procreate as well as to abstain from procreating. In the instant matter, when the victim was before the Medical Board, she had communicated (It appears that while indicating the psychiatric examination), that she has no other option than to commit suicide if she is forced to continue pregnancy. It must be noted that the pregnancy carried by petitioner is as a result of physical abuse thrust against her and that she has a choice whether to continue with such pregnancy which is result of offence against her person. The freedom of making choice by a woman which is integral part of personal liberty cannot be taken away. It shall also be taken into consideration that besides physical injury, the legislature has widened the scope of term injury by including injury to mental health of a pregnant woman. If continuation of pregnancy is harmful to mental health of a pregnant woman, then it shall be construed as a good legal ground for permitting her to terminate pregnancy and, since in the instant matter, pregnancy is alleged to be as a result of physical abuse, in view of section 5 of the Act of 1971, the choice of the victim of rape of terminating unwanted pregnancy needs to be respected. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.

12. In the matter of *Appellant "X" v. Union of India* reported in (2016) 14 SCC 382: AIR 2016 SC 3525, the Honourable Apex Court considering the provisions of section 5 of the Act of 1971, permitted termination of pregnancy of duration of 23 to 24 weeks. It is observed in the judgment that section 3 leaves no room for doubt that it is not permissible to terminate pregnancy after 20 weeks however, section 5 of the Act lays down exception to section 3. It is further observed that termination of pregnancy which is necessary to save life of a pregnant woman is permissible. The Honourable Apex Court in the matter of *Appellant X v. Union of India* reported in (2017) 3 SCC 458: AIR 2017 SC 1055, granted permission for termination of pregnancy of duration of 24 weeks since it was noticed that the foetus could not survive.

13. The crucial question here is whether permission can be granted to terminate the pregnancy of 22 weeks in this case. The victim in this case is deaf, dumb and mentally retarded; therefore, she is unable to make a choice on her own whether to terminate the pregnancy or to continue with it. She has no such intellectual capacity, therefore, her guardian should be given that right to make choice. This case is also required to be considered from the physical point of view of the victim. Victim is deaf, dumb and mentally retarded. She is unable to take any decision. In fact, she is not even aware that she has been raped and she is pregnant. It has been stated by her guardian and brother that she is not even able to take care of herself. Question therefore arises under such circumstance as to how she would take care of child to be borne? It has been stated in the medical certificate that " On Paediatrics examination, survivor has gross development delay with Down Syndrome". If we consider "Down Syndrome", it means "is a genetic disorder caused by the presence of all or part of a third copy of chromorome (sic)". It is typically associated with physical growth delays, characteristic facial features and mild to moderate intellectual disability. The medical literature would show that there is no cure to the "down syndrome". No doubt, a person with down syndrome may lead a normal life, but in the present case, when the victim is unable to take care of herself, there is every possibility that she will not be able to take care of the foetus. Though the certificate states that the risk of termination of pregnancy is within normal acceptable limits; it would be hazardous to ask her to bear the pregnancy. It is not only dangerous to her, but dangerous to the unborn child also. Apart from danger to the life of the petitioner, this Court has to take note of the psychological trauma the petitioner is undergoing as a result

of carrying unwanted pregnancy. The pregnancy of the petitioner is definitely unwanted for her and it is violative of her personal liberty. Since she is unable to take decision due to intellectual disability, her guardian is taking the said decision, which is in the best interest of the victim and her survival. In the circumstances, we do not notice any impediment in permitting petitioner to terminate unwanted pregnancy.

…"

IN THE HIGH COURT OF ORISSA

Dr. Binod Bihari Naik v. State of Orissa
2018 Cri LJ 2676
S.K. Sahoo, J.

This application under Section 482 of the Code of Criminal Procedure, 1973 was filed for quashing of criminal proceedings against the applicant doctor who was accused of causing abortion of a woman's 24 weeks pregnancy without her consent. The applicant had previously approached the magistrate's court arguing that the case was not maintainable as the termination of her pregnancy was carried out by him in due discharge of his official duty.

Sahoo, J.: "…

3. In this application under section 482 of Cr.P.C., the petitioner Dr. Binod Bihari Naik has challenged the impugned order dated 06.09.2003 of the learned S.D.J.M., Kuchinda passed in G.R. Case No. 281 of 2002 in taking cognizance of offences under sections 493/503/313/34 of the Indian Penal Code and issuance of process against him. The said case arises out of Kuchinda P.S. Case No. 85 of 2002.

…

7. The prosecution case, as per the first information report lodged by the victim on 16.08.2002 before the officer in charge, Kuchinda police station is that she was aged about twenty years and the co-accused Lochan Pujhari kept physical relationship with her on the assurance of marriage for which she became pregnant. It is further stated that she was taken to a doctor by the co-accused Lochan Pujhari, his elder brother Gobinda, his mother and brother-in-law as per their previous plan giving false impression to her for formal check up of the child in the womb. The co-accused persons talked with the doctor and left the victim with the doctor who administered some medicines to her for which she became senseless and after one hour when she got back her senses, she found that her six months pregnancy had been terminated. She was told by the co-accused persons not to disclose about the same before anybody and threatened with dire consequence.

8. On the basis of such first information report, Kuchinda P.S. Case No. 85 of 2002 was registered on 16.08.2002 under sections 493/506/313/34 of the Indian Penal Code and section 3 of the SC & ST (PA) Act and after completion of investigation, charge sheet was submitted on 24.08.2003 against the petitioner as well as the co-accused persons under sections 493/506/313/34 of the Indian Penal Code and section 3 of the SC & ST (PA) Act.

9. Mr. J.R. Dash, learned counsel appearing for the petitioner fairly submitted that the provision under section 197 of Cr.P.C. would not be applicable in the case as the allegation against the petitioner is that in a private clinic, he aborted the pregnancy of the victim and therefore, it cannot be said that the act was done in due discharge of his official duty as a public servant. However it is contended by the learned counsel for the petitioner that the victim was brought to the clinics of the petitioner where she was accompanied by others including her lover and with the consent of the victim, the pregnancy was terminated and therefore, the ingredients of the offence under section 313 of the Indian Penal Code are not attracted.

10. Mr. Prem Kumar Patnaik, learned Additional Government Advocate for the State on the other hand submitted that even though the other offences like under sections 493 and 506 of the Indian Penal Code are not attracted against the petitioner but the statement of the victim and other materials clearly reveal that at the relevant point of time, the victim was pregnant for six months and the victim has categorically stated that she was administered with some medicines for which she became senseless and by the time she got back her senses after one hour, the termination had already been completed and therefore, there is no material on record that the victim consented for causing the miscarriage and therefore, the ingredients of the offence under section 313 of the Indian Penal Code is clearly applicable against the petitioner.

11. On perusal of the available materials on record, certain factual aspects are not disputed i.e. (i) the victim was pregnant for six months (ii) the termination of pregnancy was done in a private clinic situated at Majhipali by the petitioner.

12. Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereafter 'MTP Act') reads as follows:—…

...

16. Thus in view of sub-section (2) of section 3 of the MTP Act, there can be no termination of pregnancy if the length of the pregnancy had exceeded twenty weeks. The only exception is found in section 5 of the MTP Act under which the pregnancy can be terminated immediately to save the life of the pregnant woman at any stage of pregnancy, if the opinion of the registered medical practitioner is formed in good faith. Section 5 of the MTP Act strictly restricts to the cases where the life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression "good faith" discloses that the opinion has to be based on the necessary examination required to form such an opinion.

17. In this case, not only the pregnancy period of the victim was six months and therefore has exceeded twenty weeks but also there is absolutely no material that to save the life of the victim, the termination of pregnancy was necessary. The victim has categorically stated that she was taken to the private clinics situated at Majhipali by the family members of co-accused Lochan Pujhari by giving an impression of formal check up of the child in the womb where the doctor gave some medicines to her for which she became senseless and after one hour, when she regained her senses, she came to know that there has been termination of her pregnancy. When she confronted about such termination to the co-accused persons, they told her not to disclose the incident before anybody and threatened her with dire consequence. Therefore, it is apparent from the statement of the victim that her consent had not been taken before termination of pregnancy.

18. It is prima facie clear from the available materials on record that neither the procedure as laid down under sections 3, 4 and 5 of the MTP Act have been followed nor the consent of the victim has been taken for termination of her six months pregnancy. Therefore, when there is no material that the miscarriage was done in good faith for the purpose of saving the life of the victim and the victim's consent for such miscarriage has not been obtained but it was done in a clandestine manner making the victim senseless by administering some medicine, I am of the view that the prima facie ingredients of the offence under section 313 of the Indian Penal Code is made out so far as the petitioner is concerned.

19. Therefore, I am not inclined to invoke my inherent power to interfere with the impugned order. Accordingly, the Crl.M.C. application being devoid of merits, stands dismissed.

..."

IN THE HIGH COURT OF BOMBAY

Shaikh Ayesha Khatoon v. Union of India
2018 SCC OnLine Bom 11
R.M. Borde and R.G. Ketkar, JJ.

A woman who was 27 weeks pregnant invoked the writ jurisdiction of the High Court for medical termination of pregnancy. The Court set up a Medical Board which opined that there were severe foetal impairments, including cardiac, bowel and neurological issues. The Medical Board also found that if born, the child would face substantial risk of severe physical disability, and low chances of independent neo-natal survival. The High Court considered whether the contingencies prescribed under Section 3(2)(b) of the MTP Act can be read into Section 5 (1) to allow medical termination of pregnancy of a woman post the 20-week cut off.

Borde, J.: "…

2. The petitioner is a lady undergoing 27th week of pregnancy and is praying for issuance of a direction to the respondents to allow her to undergo medical termination of pregnancy at medical facility of her choice and at her expenses. It is the contention of the petitioner that on Sonographical examination of the foetus it was revealed that it (foetus) suffers from several foetal anomalies including a congenital malformation. The report of Sonography dated 18.12.2017 is annexed at Exhibit 'A' to the petition. The Sonologist on examination reported several foetal anomalies as recorded below:

(a) Inencephaly

(b) Cerebellar hypoplasia

(c) Hydranencephaly

(d) Laryngeal Atresia

(e) Atrium - Venticular septal defect

(f) Double outlet single ventricle

(g) Stomach not visible

3. It is reported that above congenital malformations increased the likelihood of an underlying genetic abnormality which could be ruled out with invasive testing and micro array. It is further reported that considering the number and severity of the malformations; chances of independent intact neonatal survival appear less. In view of the report of the Sonologist, the petitioner has approached this Court seeking relief, as sought above. The petitioner has also requested to refer her for further examination to Medical Committee in order to confirm the diagnosis of the Sonologist and to assist the Court in arriving at a decision as regards the request made by the petitioner in the instant Petition.

4. Considering this, the learned Vacation Bench while directing issuance of notice to the respondents on 2.1.2018 directed respondent No. 2 State of Maharashtra to get the petitioner examined by the Medical Board of Sir J.J. Groups of Hospitals, Mumbai consisting of Dean of the hospital, Head of Department (Gynecology), Professor and Head of Department of Pediatric/Cardiac Surgeon, Professor and Head of Department of Radiology and Psychiatry and any other expert in the field.

5. The petitioner appeared before the Committee and she was medically and radiologically examined on 3.1.2018. The USG impressions recorded in the report are thus:

USG Impressions	Single live intrauterine gestation of mean gestational age 26 weeks and 5 days with gross polyhydramnios and multiple severe - cranial, complex cardiac and bowel anomalies as described above. Suggest cardiology opinion for the cardiac anomaly and genetic work up for underlying chromosomal anomalies as multiple foetal abnormalities are seen.

…

7. The Committee has recorded its opinion as narrated below:

> **"COMMITTEE OPINION**
>
> UPON EXAMINATION & AFTER CAREFUL STUDY OF MULTIPLE SONOGRAPHY REPORTS, IT IS CONFIRMED THAT THE FOETUS SUFFERS FROM SERIOUS NEUROLOGICAL, CARDIAC & BOWEL ABNORMALITIES WITH A VERY HIGH CHANCE OF MORBIDITY & MORTALITY.
>
> THE WOMAN WAS BEEN EXPLAINED ABOUT THE OUTCOME IN THE LANGUAGE SHE UNDERSTANDS.
>
> THE CONDITION OF THE FOETUS FULFILLS THE CRITERIA OF "**SUBSTANTIAL RISK OF SERIOUS PHYSICAL HANDICAP**" IN THE FOETUS.
>
> THE PREGNANT WOMAN HAS VOLUNTARILY EXPRESSED HER DESIRE TO TERMINATE THE PREGNANCY AND IS WELL INFORMED ABOUT THE NATURE OF THE CONDITION OF FOETUS AND ITS OUTCOME. SHE IS EXTREMELY ANGUISHED WITH THE CONDITION OF THE FOETUS INUTERO.
>
> THE PREGNANCY HAS ADVANCED TO 27 WEEKS AND IS BEYOND 20 WEEKS CUT OF THE MEDICAL TERMINATION OF PREGNANCY ACT. HENCE SHE HAS APPROACHED HONOURABLE COURT FOR TERMINATION OF PREGNANCY.
>
> AT THIS STAGE OF A PREGNANCY, THE RISK OF TERMINATION REMAINS THE SAME AS THAT OF NATURAL LABOUR AT TERM.
>
> THUS IF THE COURT PERMITS THE PREGNANCY CAN BE TERMINATED AS DESIRED BY THE WOMAN."

8. There is a little doubt that there are foetal anomalies reported and the chances of survival of the foetus appear less and there is a substantial risk of severe physical handicap. The learned Counsel appearing on behalf of the petitioner, therefore, urges that this a fit case for according permission to the petitioner to undergo medical termination at the center of her choice.

…

11. …It is the contention of the petitioner that firstly the trauma that the petitioner is likely to suffer is life threatening and it shall be construed that exercise of a choice in the event there are foetal abnormalities found and the chances of survives of the baby, if allowed to take birth, are minimum, is a matter to be considered within the parameters of Section 5 of the Act of 1971. Apart from this, the petitioner contends that the provisions of sub-section (2) including clauses (i) & (ii) of sub-section (2)(b) of Section 3 are required to be read in Section 5 except the outer limit of twenty weeks that has been provided in sub-section (2)(b) of Section 3 of the Act of 1971.

12. The petitioner thus contends that if 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, it will be open for the Court to accord permission to terminate the pregnancy by taking recourse to Section 5 of the Act of 1971. It is further contended that the concluding portion of Section 5 prescribing the limitation in permitting such a choice or issuing direction in respect of termination of the pregnancy only in the event to save the life of the pregnant woman shall have to be interpreted harmoniously and looking to the object of the provision. It also needs to be considered that a pregnant woman has a right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. In this context reliance can be placed on the observations of Hon'ble Supreme Court in the matter of *Suchita Srivastava v. Chandigarh Administration* reported in (2009) 9 SCC 1. In paragraph-11 of said judgment, it is observed by the Hon'ble Supreme Court as narrated below:

> "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."

13. It is further observed 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)(b)(i) of the Act of 1971] 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)(b)(ii) of the Act of 1971]. It is true that Clauses (i) & (ii) of subsection 2(b) of Section 3 are attracted in the case where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks. However, as has been recorded above Section 5 permits termination of pregnancy by a 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. It shall also have to be construed that Section 5 brings within its ambit the provisions of Section 4 and so much of the provisions of sub-section (2) of Section 3 of the Act of 1971 except the limitation in respect of length of the pregnancy of 20 weeks as provided in sub-section (2)(b) of Section 3 of the Act of 1971. It would thus be logical to conclude that the contingencies referred in Clauses (i) & (ii) of sub-section (2)(b) of Section 3 will have to be read in Section 5 of the Act of 1971 and it would be relevant to consider the threat perception and substantial risk involved if the child were to born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. The contingencies laid down in Clauses (i) & (ii) of sub-section (2)(b) of Section 3 shall therefore equally apply to the request of a pregnant woman seeking permission to terminate the pregnancy beyond 20 weeks and accordingly Section 5(1) will have to be construed, to meet the object and purpose of enactment and to promote cause of justice.

14. As has been recorded above, the freedom of a pregnant woman of making choice of reproduction which is integral part of "personal liberty", whether to continue with the pregnancy or otherwise cannot be taken away. It shall also be taken into consideration that besides physical injury, the legislature has widened the scope of the termination of pregnancy by including "a injury" to mental health of the pregnant woman. Thus, if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination of pregnancy if all the conditions incorporated in legal provision are met. In the instant matter the petitioner claims that it would be injurious to her mental health to continue with the pregnancy since there are severe foetal abnormalities noticed and it would also be violative of her "personal liberty" to deny her the choice to terminate the pregnancy. The provisions of Section 5 of the Act of 1971 shall have to be interpreted in the manner for advancing the cause of justice. In this context it would be appropriate to refer to the judgment of Division Bench of this Court in the matter of *High Court on its own motion v. the State of Maharashtra*, reported in 2017 Cri L.J. 218. In paragraph-13 of the judgment, it is observed thus:

> "13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account."

…

15. While interpreting the provisions of Section 5 of the Act of 1971, it must be borne in mind the principle that the section must be construed as a whole whether or not one part is a saving clause and similarly **elementary rule of construction of section is made of all the parts together** and that **it is not permissible to omit any part of it; the whole section must be read together**…The words of Statute are first understood in their natural, ordinary and popular sense and phrases and sentences are construed according to their grammatical meaning unless there be something in the context, or in the object of the statute in which they occur or in the circumstances in which they are used, to show that they were used in special sense different from their ordinary grammatical meaning. The basic principle that while interpreting the provisions of a Statute one can neither add nor subtract even a single word, has to be kept in mind. A section is to be interpreted by reading all of its parts together, and it is not permissible to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, it is not open to the Court to add and amend, or by construction, make up for the deficiencies, which has been left in the Act. **The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven**. The Court, while interpreting statutory provisions, cannot add words to a Statute, or read words into it which are not part of it, especially when a literal reading of the same produces an intelligible result. [Vide *Nalinakhya Bysack v. Shyam Sunder Haldar*, AIR 1953 SC 148; *Sri. Ram Narain Medhi v. State of Bombay*, AIR 1959 SC 459; *M. Pentiah v. Muddala Veeramallappa*, AIR 1961 SC 1107; *The Balasinor Nagrik Co-operative Bank Ltd. v. Babubhai Shankerlal Pandya*, (1987) 1 SCC 606 : AIR 1987 SC 849; and *Dadi Jagannadham v. Jammulu Ramulu*, (2001) 7 SCC 71].

…

22. In the instant matter, on reading of Section 5 of the Act of 1971, it does transpire that the contingencies and the parameters laid down in clauses (i) & (ii) of sub-section (2)(b) of Section 3 shall have to be read in Section 5 except the bar of limitation as provided in Section 3(2)(b) of the Act of 1971. It would not be appropriate to over look the contingencies laid down in clauses (i) & (ii) of sub-section (2)(b) of Section 3 while considering the request of a pregnant woman for termination of the pregnancy if the conditions laid down in clauses (i) & (ii) of sub-section (2)(b) of Section 3 are satisfied it would provide a good ground for exercise of jurisdiction under Section 5 of the Act of 1971.

23. The Ministry of Health and Family Welfare, Government of Maharashtra has prepared the MTP (Amendment) Bill and the notification in that regard was published on 29.10.2014. The State Government has proposed amendment to Section 3 of the Act of 1973 and clause (C) is proposed to be added which reads thus:

> "(C) the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy shall not apply to the termination of a pregnancy by a registered health care provider where the termination of such pregnancy is necessitated by the diagnosis of any of the substantial foetal abnormalities as may be prescribed."

24. Considering the above proposed amendment, according to us, the interpretation which we have put to Section 5 of the Act of 1971 appears to be a logical and same is in consonance with the proposed changes as suggested by the State in the MTP (Amendment) Bill notified on 29.10.2014.

26. For the reasons recorded above, the Writ Petition is allowed. The petitioner is permitted to undergo medical termination of pregnancy at a medical facility of her choice. The petitioner undertakes to report to the approved center for carrying out the procedure of medical termination of pregnancy within two days from today.

…"

Endnotes

1 *See* Statement of Objects and Reasons, MTP Act, 1971; Statement of Objects and Reasons, MTP Amendment Act 2002.

2 (1994) 3 SCC 430.

3 AIR 2006 Raj 166.

4 (2009) 9 SCC 1.

5 This position has been reiterated by a 9 judge bench of the Supreme Court in Puttaswamy v. Union of India, (2017) 10 SCC 1 (*See* Chapter 1, "Introduction: Constitutional and Human Rights Framework for Reproductive Justice in India").

6 2017 Cri LJ 218.

7 *See* Jankiben Ronakbhai Patel v. State of Gujarat & Anr., Gujarat Special Criminal Application No.1786 of 2013; D. Rajeswari vs. State of T.N & Ors., 1996 Crl. L.J. 3795 Mad; K M. Mahima v. State & Ors., 106 (2003) DLT 143; Janak Ramsang Kanzariya (Minor) thro' Manjuben Ramsang Kanza v. State of Gujarat & Anr., Gujarat Special Criminal Application No. 707 of 2010 / 2011 Cri LJ 1306; Hallo Bi v. State of MP, Madhya Pradesh Writ Petition No. 408 of 2013; (Minor) Priyanka Girishkumar Patel thro' Father Girishkumar v. Principal Secretary & Ors., Gujarat Special Civil Application No. 93 of 2013; X v State (NCT of Delhi), Delhi Writ Petition (Criminal) No. 449 of 2013; Bashir Khan v. State of Punjab, AIR 2014 P&H 150; Vijender v. State of Haryana, Punjab & Haryana Civil Writ Petition No. 20783 of 2014; Aastanaben Sattarbhai Jumabhai v. State of Gujarat, Gujarat R.SCR.A 1084/2016; Poojaben Vershibhai Charla (Minor) Thro' Vershibhai @ Varsingh Govindbhai Charla v. State of Gujarat & Ors., Gujarat Special Criminal Application (Direction) No. 1681 of 2016; Sundarlal v. The State of M.P & Ors., Madhya Pradesh W.P No. 20961/2017.

8 2013 SCC OnLine Del 6473.

9 AIR 2014 P&H 150.

10 CWP No 2007 of 2015, decided on Feb. 9, 2015 (High Court of Punjab and Haryana).

11 2013 Cri LJ 2868 (M.P.).

12 Many such cases are filed directly in the Supreme Court under Article 32 of the Indian Constitution. In Sonali Kiran Gaikwad v. Union of India, W.P. (C) 928/2017 (Order dated Oct. 9, 2017) (Supreme Court) the Supreme Court stated that "future such cases can be filed in the respective High Courts having territorial jurisdiction."

13 In August, 2017, the Secretary, Health and Family Welfare issued a letter to all States and Union Territories *vide* D.O. No. M. 12015/58/2017-MCH requesting them to establish permanent Medical Board/s in each State/ Union Territory to examine such post-20 weeks abortion cases as the courts may refer to them.

14 (2017) 3 SCC 462.

15 2017 Cri LJ 218.

16 World Health Organization, WHO launches new guideline to help health-care workers ensure safe medical abortion care (2019), *available at* https://www.who.int/reproductivehealth/guideline-medical-abortion-care/en/.

17 2009 SCC OnLine Raj 3468.

18 2015 SCC OnLine P&H 7425.

19 W.P. (C) 565 / 2017 (Order dated July 28, 2017) (Supreme Court).

20 W.P. (C) 749 / 2017 (Order dated Sept. 6, 2017) (Supreme Court). *See also* Gausiya Gulam Pathan v. Union of India, W.P. 13228/2017 (Order dated Dec. 5, 2017) (Bombay High Court) (permitting termination of a 25-week pregnancy of a 13 years old girl, in line with the decision of the Supreme Court in *Murugan Nayakkar*).

21 W.P. (C) 871 / 2017 (Order dated Sept. 21, 2017) (Supreme Court).

22 (2017) 3 SCC 462.

23 (2017) 3 SCC 458.

24 *See also* Sonali Kiran Gaikwad v. Union of India, W.P. (C) 928/2017 (Order dated Oct. 9, 2017) (Supreme Court).

25 2017 SCC OnLine SC 1150.

26 (2016) 14 SCC 382.

27 *See also* Mrs. A v. Union of India, W.P. (Civil) No. 728/2017 (Order dated Aug. 31, 2017) (Supreme Court).

28 2018 SCC OnLine Bom 11.

29 *See also* Siddamma Golsar v. Union of India, W.P. No 766/2017 (Bombay High Court) (permitting abortion post- 20 weeks relying on *Shaikh Ayesha Khatoon*).

30 2017 SCC OnLine SC 897.

31 Writ Petition (Civil) No. 551 of 2017 (Order dated July 28, 2017) (Supreme Court).

32 Writ Petition No. 11940 of 2017 (Order dated Nov. 6, 2017) (Bombay High Court).

33 2017 SCC OnLine HP 1574.

34 (2018) 12 SCC 57.

35 (2018) 11 SCC 606.

36 (2017) 13 SCC 436.

37 (2008) 110 Bom LR 3293.

38 Nikhil D. Datar v. Union of India, C.A. No. 7702 / 2014 (Supreme Court).

39 2015 AIR CC 3387.

40 (2016) 2 GLH 662.

41 (2015) 8 SCC 721.

42 (2016) 4 KLT 745.

43 AIR 2014 P&H 150.

44 CWP No 2007 of 2015, decided on Feb. 9, 2015 (High Court of Punjab and Haryana).

45 W.P. (C) 934 / 2017 (Order dated Oct. 13, 2017) (Supreme Court).

46 (2009) 9 SCC 1.

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69 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained i*n U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001)*, Arts. 3-4.*

70 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.