

K vs The Principal Secretary Health And ... on 18 January, 2023

Author: Satish Chandra Sharma

Bench: Chief Justice, Subramonium Prasad

\$~23

*

+

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 13479/2022 & CM APPLs. 40980/2022, 41610/2022

K

Through: Dr. Amit Mishra, Adv

versus

THE PRINCIPAL SECRETARY HEALTH AND FAMILY
WELFARE DEPARTMENT GOVT OF NCT OF DELHI & ORS.

..... Respon

Through: Ms. Hetu Arora Sethi, ASC for
GNCTD with Mr. Arjun Basra,
Advocate for Respondents No.1 &
Ms. Aishwarya Bhati, ASG with M
Manisha Agrawal Narain, CGSC
with Ms. Ameya, Ms. Rakshita
Goyal, Mr. Sandeep Singh Somari
Ms. Mona Dureja, Advocates for
Ms. Manisha Agrawal, CGSC with
Mr. Jitendra Kumar Tripathi, Go
Pleader for UoI
SI Chanchal, PS Amar Colony

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

% 18.01.2023

1. The instant Writ Petition has been filed by the Petitioner under Article 226/227 of the Constitution of India praying for the following reliefs:

□A. Permit the Petitioner to get terminated the ongoing pregnancy of her unmarried minor daughter through registered medical practitioners at any goven1ment Hospital immediately as per section 3(2) (a) (i) r/w section 3(3), 3(4) & section 4 MTP Act without reporting the case to the local police as mandated under section 19 (1) POCSO Act as the said pregnancy is the result of "consensua1 and close relationship".

B. Direct the Respondent No. 2 to amend section 3 MTP Act so as to allow married/unmarried minor girls between 16 to 18 years to terminate their unwanted

pregnancy arising from consensual relationship without reporting the case to the local police as mandated under section 19(1) POCSO as the latter restricts & violates their fundamental right to privacy, personal autonomy, dignity and reproductive choice which are inseparable part of right to life under Article 21 of the Constitution of India.

C. Order an immediate Interim Relief or stay during the course of proceedings.

2. On 20.09.2022 this Court passed the following order:

□. The instant Writ Petition has been filed by a mother praying for the immediate termination of the pregnancy of her unmarried minor daughter through registered medical practitioners at any Government Hospital, as permitted under Section 3(2)

(a) (i) r/w Section 3(3), 3(4) & Section 4 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'the MTP Act') without reporting the case to the local police as mandated under Section 19 (1) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act') on account of the fact that the said pregnancy is the result of a "consensual and close relationship".

2. The Petitioner has also prayed for an Order directing Respondent No. 2 to amend Section 3 of the MTP Act so as to allow married/unmarried minor girls between 16 to 18 years to terminate their unwanted pregnancy arising from a consensual relationship without requiring to report the case to the local police as mandated under Section 19 (1) POCSO as the latter restricts and violates their fundamental right to privacy, personal autonomy, dignity and reproductive choice which are an inseparable part of the right to life under Article 21 of the Constitution of India.

3. The facts of the case reveal that on 08.09.2022, the daughter of the Petitioner informed the Petitioner about pain in her abdomen. It is stated that the Petitioner took her daughter to a doctor on 09.09.2022 and an ultrasound scan was conducted. It was found that the Petitioner's daughter is about 17 weeks and 5 days pregnant and, consequently, the daughter of the Petitioner was referred to civil hospital. It is stated that all government and private hospitals refused to terminate the pregnancy of the daughter of the Petitioner without reporting the case to the local police. Aggrieved by these events, the Petitioner has filed the instant Writ Petition.

4. At this juncture, it is pertinent to quote the relevant Section 3 of the MTP Act, 1971, and Section 19 of the POCSO Act, 2012.

□Section 3 of the Medical Termination of Pregnancy Act, 1971

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 4 [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 19 of the POCSO Act.

19. Reporting of offences.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person (including the child), who has apprehension that an offence under this Act is likely to be

committed or has knowledge that such an offence has been committed, he shall provide such information to,--

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be--

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under subsection (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

5. A perusal of Section 3(2)(b)(i) of the MTP read with Section 3(4) of the MTP Act shows that the pregnancy of a woman who is under 18 years of age can be terminated only with the consent of a guardian if the length of pregnancy does not exceed 20 weeks provided that not less than two registered medical practitioners are of the opinion that the continuance of the pregnancy would involve a risk to the life or grave injury to the physical health and the mental health of the pregnant woman. However, Section 19 of the POCSO Act makes it mandatory for any person who apprehends that an offence under the POCSO Act is likely to be committed or has knowledge that such an

offence has been committed, to report such incident to Special Juvenile Police Unit or local police. Therefore, as per the mandate of law, the medical practitioners are obliged to file a report regarding the pregnancy of a minor girl to the local police or to the Special Juvenile Police Unit.

6. This Court issued notice on 16.09.2022 and had requested Ms. Aishwarya Bhati, learned ASG, to appear in this matter and assist this Court. Accordingly, the case was adjourned to today.

7. It is submitted by Ms. Bhati that both the Acts must be read harmoniously and the welfare of the minor girl is paramount. This Court is in complete agreement with the submission of Ms. Bhati that instead of entering into the debate regarding harmonizing between the MTP Act and the POCSO Act, at this juncture, it is necessary that the pregnancy of the Petitioner's daughter is terminated immediately so as to prevent the Petitioner's daughter, who is a minor, from undergoing the trauma of going ahead with an unwanted pregnancy which will inevitably subject her to grave physical and mental injury.

8. The Union of India is, therefore, directed to ensure that the pregnancy of the Petitioner's daughter is terminated at AIIMS, Delhi on the Government's expenses. The Respondents are free to proceed ahead in accordance with law, but any report, which is registered by the police, must be kept in a sealed cover and it will be subject to the final outcome of the instant Writ Petition. This Court is aware that the interim relief being granted amounts to the final relief that is being sought by way of the instant petition, however, in the facts of this case, this Court is of the opinion that the termination of the pregnancy of the unmarried minor daughter of the Petitioner needs to be conducted at the earliest so as to not render the instant petition infructuous.

9. The Respondents are directed to file a reply before the next date of hearing.

10. List on 18.01.2023.

3. Today learned ASG has informed this Court that the controversy involved in the present case has been concluded by the Apex Court in its judgment dated 29.09.2022, in Civil Appeal No. 5802 of 2022, titled as X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.. She has drawn the attention of this Court towards paragraphs No.79, 80 & 81 of the said judgment. The aforesaid paras are reproduced as under:

□79. Furthermore, Section 19(1) of the POCSO Act requires that any person, including a child, who has knowledge of the commission of an offence punishable under the POCSO Act, or an apprehension that such an offence may be committed, is mandatorily required to provide information to the Special Juvenile Police Unit or the local police. Section 19(2) of the POCSO Act stipulates that every such report under Section 19(1) shall be ascribed an entry number and recorded in writing, read over to the informant, and entered in a book to be kept by the police unit. Failure to report, as mandated by Section 19, is a punishable offence under Section 21 of the POCSO Act. Neither the POCSO Act nor the Protection of Children from Sexual Offences Rules 2012 prescribe a template or a format for the report mandated under

Section 19(1).

80. When a minor approaches an RMP for a medical termination of pregnancy arising out of a consensual sexual activity, an RMP is obliged under Section 19(1) of the POCSO Act to provide information pertaining to the offence committed, to the concerned authorities. An adolescent and her guardian may be wary of the mandatory reporting requirement as they may not want to entangle themselves with the legal process. Minors and their guardians are likely faced with two options - one, approach an RMP and possibly be involved in criminal proceedings under the POCSO Act, or two, approach an unqualified doctor for a medical termination of the pregnancy. If there is an insistence on the disclosure of the name of the minor in the report under Section 19(1) of POCSO, minors may be less likely to seek out RMPs for safe termination of their pregnancies under the MTP Act.

81. To ensure that the benefit of Rule 3B(b) is extended to all women under 18 years of age who engage in consensual sexual activity, it is necessary to harmoniously read both the POCSO Act and the MTP Act. For the limited purposes of providing medical termination of pregnancy in terms of the MTP Act, we clarify that the RMP, only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act. The RMP who has provided information under Section 19(1) of the POCSO Act (in reference to a minor seeking medical termination of a pregnancy under the MTP Act) is also exempt from disclosing the minor's identity in any criminal proceedings which may follow from the RMP's report under Section 19(1) of the POCSO Act. Such an interpretation would prevent any conflict between the statutory obligation of the RMP to mandatorily report the offence under the POCSO Act and the rights of privacy and reproductive autonomy of the minor under Article 21 of the Constitution. It could not possibly be the legislature's intent to deprive minors of safe abortions.

4. In light of the aforesaid, no further orders are required in the present petition.

5. Accordingly the Writ Petition is disposed of along with the pending applications.

SATISH CHANDRA SHARMA, CJ SUBRAMONIUM PRASAD, J JANUARY 18, 2023 Rahul