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HIGH COURT OF ORISSA: CUTTACK

BLAPL No.5249 OF 2020

(In the matter of an application under Section 439 of the
Criminal Procedure Code, 1973)

Dr. Debashis Ghosh ... Petitioner

Versus

State of Odisha & another ... Opposite Parties

For Petitioner : M/s. Devashis Panda,
D.K. Naik, D.K. Mohapatra
S. Panda, Advocates

For Opp. Party : Mr. L. Samantaray,
Additional Government Advocate

PRESENT

THE HONOURABLE SHRI JUSTICE S.K. PANIGRAHI

1. The present application under Section 439 Cr.P.C. has been filed in connection with C.I.D. (C.B.) P.S. Case No.05 of 2020 (Raiboga P.S. Case No.41 of 2020) corresponding to Special G.R. Case No.88 of 2020 pending in the Court of the learned Additional District & Sessions Judge-cum-Special Judge, Sundargarh wherein the Petitioner is alleged to have committed an offence punishable under Sections 313/166/201/120(B), IPC read with Sections 17/21 of the POCSO Act and Section 3(2)(v) of the SC/ST (PA) Act.

2. The factual conspectus as narrated in the F.I.R., in brief, is that a minor girl aged about 13 years was produced before the Child Welfare Committee on 15.06.2020 by the Biramitrapur Police Station and was subsequently sent to the Open Shelter, Bisra. Since the victim girl had complained of pain, she was taken for treatment to Bisra C.H.C. and therefrom to Rourkela Government Hospital. During counseling, she disclosed that she was three months pregnant through her boy-friend named Sagar and her step-father, she was rescued by the Biramitrapur Police and a medical termination of pregnancy was performed on 15.06.2020 at Biramitrapur C.H.C. On 22.06.2020 as has been alleged by her before the Child Welfare Committee that Bada Babu of Biramitrapur P.S. was keeping sexual relationship with her since last three months and another policeman of Biramitrapur P.S. had also kept physical relationship with her once. Thereafter F.I.R. was lodged by one Shreebanta Jena, District Child Protection Officer, Sundargarh on 23.06.2020 for the offences punishable under Sections 376(2)(n)/376(3)/313, IPC read with Section 6 of the POCSO Act against the petitioner and others as Raiboga P.S. Case No.41 of 2020 which was subsequently re-registered as C.I.D.(C.B) P.S. Case No.05 of 2020. Basing on the F.I.R., investigation was taken up. During course of investigation,

the petitioner was arrested and forwarded to the court on 07.07.2020 under Sections 313/166/201/120-B, IPC, under Sections 17 and 21 of the POCSO Act, 2012 read with Section 3(2)(v) of S.C. & S.T (PA) Act, 2015.

- 3.** The Petitioner herein has clarified his position on the present matter vide Letter No.184 dated 02.07.2020 by stating that the I.I.C of Biramitrapur P.S. had called him to his office at about 3.30 to 4.00 P.M. on 14.06.2020. The I.I.C. stated that they had rescued the victim of rape from Biramitrapur Bus stand area where she was wandering alone. The victim disclosed that her parents are staying in Delhi who are working as labourers and that she did not want to go to her relatives' house, as her step-father is one of the accused persons. It was further stated that the victim requested that a procedure for abortion be conducted. The I.I.C. thereafter informed the Petitioner that he has made necessary arrangements for the victim's stay at C.W.C., Rourkela to keep the incident confidential in order to save the life of the minor girl.
- 4.** It was further stated by the Petitioner that he could perform the procedure for termination of pregnancy in good faith in view of the mental health condition of the minor victim girl. He further allegedly stated that as the victim is a minor girl, as per the

provisions of the Medical Termination of Pregnancy Act, 2003, certain legal procedures were needed to be complied with which the I.I.C. undertook to provide. After 15 minutes, the I.I.C. handed over the police requisition and sent the victim girl with the caretaker in Police vehicle around 5.45 P.M. The Petitioner stated that since the victim girl was a vagabond, the Police had taken upon themselves to act as her guardian and were acting as good Samaritans. By the time the victim reached the C.H.C., it was already 6 P.M. and the Petitioner decided to conduct the procedure on 15.06.2002 in order to afford an opportunity to the victim girl to compose her thoughts. Further, the lady Police Constable who was sent by the I.I.C. of the Biramitrapur P.S. in the police vehicle along with the victim girl to take care of her during and after the procedure has signed the consent Form "C" as provided under the M.T.P. Act, 2003 as the caretaker.

5. The Petitioner has further stated that in the requisition letter the I.I.C. had mentioned that the parents of the victim who were labourers were residing in Delhi and that it was also mentioned that her step-father was one of the accused persons. The Petitioner in good faith assumed that the lady police personnel was the best "caretaker" given the circumstances at hand.

6. The Petitioner has further clarified that he has not chosen the lady Constable to be the custodian instead he had asked the I.I.C. of Biramitrapur P.S. to provide female police personnel to act as the guardian/caretaker who had in turn sent the said lady Constable Pramila Ekka OAPF-80 to be her caretaker as her legal guardians were in Delhi. It was stated that since there was a police requisition in which police had already shown to have made arrangements for her stay and to have taken responsibility of the victim girl, he did not consider it necessary to inform the C.W.C. The duration of pregnancy was ascertained by P/A and P/V examination which was conducted by him and showed that her pregnancy was around 45 days old. Her urine test for pregnancy was positive which was done as per the protocol.
7. As per the petitioner's version, as the case was of police requisition where the I.I.C. had requested him to keep the incident confidential, the Petitioner had also not enquired the matter from ANM and ASHA. Though it was a Medico-legal procedure since there was no request to preserve the product of conception in the requisition of I.I.C. of Biramitrapur P.S., the emergency procedure was conducted in good faith to save the life and dignity of the victim. He further states that he consulted one Mr. Bhabani Shankar Panda, who was the State Training

Coordinator on 14.06.2020 itself as the matter was new to the Petitioner and the victim was a minor girl in order to ascertain the procedure to be followed. Lastly, he stated that he had admitted the patient on 14.06.2020 at 6.00 P.M. and conducted the procedure on 15.06.2020 at 8.30 A.M. giving one complete night to the victim to think it through.

- 8.** Most importantly, it has been brought on record that, when a police case was registered, an internal enquiry was conducted in the matter by the Chief District Medical & Public Health Officer, Sundargarh by comprising a four members expert team and the joint inquiry report submitted by the team has returned a finding that no irregularity or illegality has been committed by the accused-petitioner in terminating the pregnancy of the victim girl.
- 9.** The Petitioner had moved the Trial Court by way of an application under Section 439, Cr.P.C. on 07.07.2020 seeking enlargement on bail which was rejected.
- 10.** Heard learned Counsel for the parties. The contentions of the learned counsel for the Petitioner Shri Devashis Panda are that (a) the accused-petitioner is languishing in jail custody since 07.07.2020 (b) the accused-petitioner is aged about 51 years and is a registered medical practitioner and is the Medical Officer in Charge of CHC, Biramitrapur. (c) The petitioner has terminated the

six weeks old pregnancy of the victim based on the police requisition issued by the IIC of Biramitrapur P.S. on 14.06.2020 in accordance with the provisions of the Medical Termination of Pregnancy Act 1971. (d) The petitioner opined in good faith that the continuance of pregnancy of the victim girl would involve a risk to mental health of the victim as the pregnancy is alleged to have been caused by rape. (e) The petitioner has obtained the signature of the caretaker namely Constable Pramila Ekka on Form-C, as no other guardian of the victim was available at that point of time. (f) There is no conspiracy between the IIC of Biramitrapur P.S. and the petitioner to illegally abort the pregnancy of the victim girl and the same was done in good faith. Per contra, Shri Samantaray, learned AGA appearing for the State has submitted that (a) The principal accused namely Ananda Chandra Majhi, the then IIC of Biramitrapur P.S. found a neglected girl and sexually exploited her and when she became pregnant, the principal accused hatched a conspiracy with the present accused-petitioner Dr. Debashis Ghosh and aborted her pregnancy. (b) The requisite procedures have not been complied with by the IIC (c) The Petitioner ought to have preserved the aborted foetus for DNA profiling which was not done. Thus, it is a case of connivance and conspiracy.

- 11.** The first infraction of law alleged in that of POCSO Act, the Rule 4(3) of the POCSO Rules 2012 provides that, when the police receives information under sub-Section (1) of Section 19 of the Act and have a reasonable apprehension that the offence has been committed by a person against a child who is found to be homeless or absence of parental support, the local police shall produce the child before the concerned C.W.C. within 24 hours of receipt of such report together with reasons in writing as to whether the child is in need of care and protection under sub-Section (5) of Section 19 of the Act in order to enable the CWC to do the needful. There appears to be some controversy as to whether the said procedure was complied with or not by the I.I.C. However, insofar as the present petitioner is concerned, the same has no bearing due to the fact that all compliances under the aforesaid Act and rules framed thereunder should have been complied with by the police and the doctor had no role in the aforesaid scheme of things.
- 12.** In order to better appreciate the controversy in question, the provisions of the Medical Termination of Pregnancy Act have to be relied upon. Section 3 of the Act provides the manner and circumstances under which a pregnancy may be terminated as under: -

“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 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 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.*

(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 lunatic, shall be terminated except with the consent in writing of her guardian.*

(b) *Save as otherwise provided in C1.(a), no pregnancy shall be terminated except with the consent of the pregnant woman.”*

- 13.** A mindful reading of Section 3 of the MTP Act makes it clear that the language is very clear and unambiguous. The Section begins with a non-obstante clause, overriding the provisions of any other law in force. It prescribes 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. Thus, only under the above two scenarios 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.

- 14.** Section 4 of the Act stipulates the place where the pregnancy may be terminated and mandates under Section 4 (a) that the same must be conducted at the hospital established or maintained by the government. Section 4 of the Act is quoted hereunder:-

“4. Place where pregnancy may be terminated.-
No termination of pregnancy shall be made in accordance with this Act at any place other than,-

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

- 15.** It is to be borne in mind that in the present case, the medical termination of pregnancy was carried out by the petitioner in the C.H.C. which is established and maintained by the government. Thus, insofar as the requirement of conducting the procedure in an appropriate place is concerned, it is seen that the same was conducted not in a private setting but at a place prescribed under law. Another aspect to be kept in mind is that Section 8 of the Act affords protection to the medical practitioner for action taken in good faith. Section 8 states that no suit for other legal proceedings shall lay against any registered medical practitioner for any damage caused likely to be caused by anything which is in good faith done or intended to be done under this Act.
- 16.** Similar issue has been succinctly dealt in an English case in ***The King v. Bourne***¹ wherein for the first time the aspect of mental health was read into the meaning of protecting the life of the mother. It was held that the words “preserving the life of the mother” must be construed in a reasonable sense. They are not limited to the case of saving the mother from violent death: they

¹[1939] 1 K.B. 687

include the case where continuance of the pregnancy would make her a physical or mental wreck. The circumstances in which the victim could become a mental wreck was envisaged in the context of the rape cases. Over the passage of time, this aspect of mental health of the victim has found place by way of legislation in the form of the present Act which makes it an exception and a valid ground for the medical termination of pregnancy. The only requirement in the law as it stands today is that the due process and procedure prescribed under the Act must be followed. For the purposes of the instant case, the question also arises as to whether consent within the meaning of Section 2 (a) of the Act has been obtained validly from a guardian. Section 2 (a) of the Act reads as follows:-

“2.(a) "guardian" means a person having the care of the person of a minor or a lunatic;”

From a reading of the aforesaid provision, it is clear that a guardian can be any person who is charged with the duty of care of the person in distress who is either a minor or a lunatic. In the instant case, the lady Constable, who accompanied the victim has been stated to have accorded consent on her behalf in order to conduct the procedure. The petitioner herein has acted in good faith based on the said consent and keeping in mind that the

pregnancy in question was due to commission of rape on the victim girl. That being the case for the purposes of the instant application, it has to be held that insofar as the petitioner herein is concerned, he has acted in good faith having believed that the consent of the lady Constable who was taking care of the victim girl which sufficiently complied with the law. At this stage, only a prima facie view needs to be formed as to whether the petitioner who is a medical practitioner has acted in good faith or not.

17. In the case of ***Jacob Mathew v. State of Punjab and Anr.***², the Hon'ble Supreme Court took note of the fact that the criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards. Having made such an observation, it has proceeded to lay down extensive guidelines in relation to the prosecution of medical professionals as hereunder: -

“51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the

²(2005) 6 SCC 1

interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied

that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.”

In fact, the Hon’ble Supreme Court has drawn a distinction between “*error of judgement*” and “*rashness or negligence simplicity*” while dealing with issues of complaints relating to medical negligence in relation to medical practitioners. The same has to be kept in mind although it is not entirely related to proceedings under the Medical Termination of Pregnancy Act, however, a corollary may be drawn as to the manner in which complaints against medical professionals are to be dealt with.

18. In the case of ***Spring Meadows Hospital v. Harjol Ahluwalia***³, the Hon’ble Supreme Court has held that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence. A similar view echoed

³(1998) 4 SCC 39

in the case of ***Suresh Gupta (Dr.) v. Govt. of NCT of Delhi***⁴, the Hon'ble Supreme Court has held that when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as "criminal". It can be termed "criminal" only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

19. In the case of ***Martin F. D'Souza v. Mohd. Ishfaq***⁵, the Hon'ble Supreme Court relying on the view expressed in ***Jacob Mathew's case*** (*supra*) has held that the Investigating Officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion, preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial opinion applying the Bolam test. It was also held that a doctor should not be arrested in a routine manner simply

⁴(2004) 6 SCC 422

⁵(2009) 3 SCC 1

because a charge has been levelled against him. Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the Investigating Officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld.

20. Similarly, in the case of *Kusum Sharma v. Batra Hospital*⁶, the Hon'ble Supreme Court has pithily observed that it is a matter of common knowledge that after happening of some unfortunate event, there is a marked tendency to look for a human factor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. A professional deserves total protection. It has been held that refuge ought to be sought under Sections 88, 92 and 370 of the Penal Code, 1860 has taken care to ensure that people who act in good faith should not be punished and adequate protection must be accorded to the professionals and particularly medical professionals.

⁶(2010) 3 SCC 480

21. In the case of *Vinod Jain v. Santokba Durlabhji Memorial Hospital*⁷, the Hon'ble Supreme Court relying on the decision of *Hucks v. Cole*, Lord Denning speaking for the Court observed as under:

“A medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.”

22. In the case of *Vijender v. State of Haryana*⁸, the Punjab and Haryana High Court has held that in every case where a complaint of rape is lodged and the victim is found to have become pregnant and she does not want to retain the foetus, the pregnancy itself may be treated as involving grave mental injury and the medical assistance must be secured to the rape victim at the nearest Government hospital with a request through the rape victim or the guardian depending on whether the person is a minor or not to take an opinion from the competent medical personnel about the feasibility of termination of pregnancy and carry out the procedure without wasting any time. It has been

⁷(2019) 12 SCC 229

⁸2014 SCC OnLine P&H 19056

further held that a rape victim shall not be further traumatized by putting through a needless process of approaching Courts for taking permission. The Medical Termination of Pregnancy Act does not contemplate such a procedure at all and the medical personnel before whom the person shows up is bound to respond to an information regarding complaint of rape and if evidence is available that the person is a victim of rape, the medical personnel will take decision regarding the termination of pregnancy and carry out the procedure. If a plea for termination of pregnancy is made that should be dealt with such sensitivity as the occasion demands.

23. In the case of *GB Subba Rao v. State of M.P.*⁹, the Hon'ble High Court of Chhattisgarh has held that in terms of Section 3 of the Act, 1971, pregnancy may be terminated by registered medical practitioner and the practitioner shall not be guilty under the Penal Code, 1860 if any pregnancy is terminated by him in accordance with the provisions of the Act, 1971. As per Section 3(2) of the Act, 1971, subject to the provisions of sub-Section (4), a pregnancy may be terminated by a registered medical practitioner if 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 has further been held that in

⁹2020 SCC OnLine Chh 1732

Explanation (1) of the said Section of the Act, it is mentioned 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. From the provisions of the Act 1971, it is clear that pregnancy out of rape caused grave injury to the mental health of the pregnant woman. The same was also a case where the complainant conceived out of rape, therefore, such pregnancy shall constitute grave injury to her mental health. The aforesaid judgements appear to be the correct view and the right approach in view of the statutory framework under the Act in question, which specifically provides that there is a presumption that any pregnancy caused on account of rape of the victim shall be presumed to constitute a grave injury to the mental health of the victim. The Legislature being cognizant of the malady existing in society has carved out an exception for such circumstances. What has also weighed favourably of the Petitioner is the fact that the enquiry conducted by a board of doctors, constituted by the Chief Medical Officer has also rendered a finding that the Petitioner has acted in good faith and thus found on the right side of the Golam's Test.

24.In view of the aforesaid discussion, it is held that the present case is meritorious in nature and the petitioner deserves to be enlarged on bail based on the facts and circumstances of the present case. Hence, this Court hereby directs that the petitioner be released on bail in connection with C.I.D. (C.B.) P.S. Case No.05 of 2020 (Raiboga P.S. Case No.41 of 2020) corresponding to Special G.R. Case No.88 of 2020 by the learned Additional District & Sessions Judge-cum-Special Judge, Sundargarh on such terms and conditions as deemed just and proper.

It is, however, clarified that the aforesaid discussions are limited for the purposes of the present application only and the learned trial court shall proceed to arrive at its own decision in the trial, uninfluenced by the observations made hereinabove.

The Bail Application is accordingly disposed of.

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S. K. Panigrahi, J.