

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

**WRIT PETITION (CIVIL) NO. 4 OF 2016**

Supreme Court Women Lawyers Association (SCWLA) ... Petitioner

VERSUS

Union of India & Anr. ... Respondents

**O R D E R**

**Dipak Misra, J.**

The petitioner, Supreme Court Women Lawyers Association (SCWLA), being immensely sensitively ignited by the atrocious, inconceivable and brutal sexual offence where certain psychologically and possibly psychographically perverted culprits have not even spared 28 days old baby girl and also in certain situations have monstrously behaved with other small girls who come within two to ten years of age as if they are totally trivial commodities, has invoked the jurisdiction of this Court under Article 32 of the Constitution of India for considering imposition of “chemical

castration” as an additional punishment for such child abusers.

2. In support of the cause projected, it is submitted by Ms. Mahalakshmi Pavani, learned senior counsel along with Ms. Shiva Vijay Kumar, Ms. Anita Bafna and Ms. Purna Kumari, learned counsel for the petitioner that reading certain news items in the newspapers in the morning has become quite a dreadful and lamentable experience for any sensitive person in this country and extremely agonizing and anguishing for any woman as the concept of civility and conception of civilised society seem to have veered on the path of destruction, and degradation from the basic human values. She has drawn our attention to the news items in the Times of India, New Delhi dated December 07, 2015, Times City, dated December 8, 2015 and various TV reports which reflect that two to five year old girl children have been abused and raped. Sometimes, as she would put with all vestige of distress at her command, the tender angelic girls have been abducted, brutally ravished and murdered. It is urged by her that she is absolutely conscious that this Court may not be inclined to issue a mandamus to create a

punishment in respect of an offence but indubitably this Court can give a suggestion so that the legislature can appositely respond to the collective cry.

3. Learned senior counsel has drawn inspiration from the decisions rendered in ***Vishaka & Ors. v. State of Rajasthan & Ors.***<sup>1</sup> and ***Sakshi v. Union of India & Ors.***<sup>2</sup> to stress the point that this Court can always lay the guidelines in the said regard. Additionally, learned counsel for the petitioner highlighting the fundamental value of human rights and dignity of the children submitted that when a child is born, thought of the Creative Intelligence or Almighty comes into action. It is canvassed by her that when a child sees the mother earth it is a grace to the human race but unfortunately the life span of a girl child is guillotined before it blossoms because of unimaginable carnal desire of some.

4. We have sought assistance of Mr. Mukul Rohatgi, learned Attorney General for India. Responding to the

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(1997) 6 SCC 241

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(2004) 5 SCC 518

submissions of he learned senior counsel for the petitioner, it is very fairly put forth by Mr. Rohatgi that a society which is civilized and replete with cultural values of thousand years old and respects child and human rights, child abuse and the rape of a girl child can never be tolerated, and the culprits deserve to be dealt with iron hands of law. However, Mr. Rohatgi would submit that this Court should not suggest a particular or specific punishment to be introduced as it is in the domain of wisdom of the Legislature. That apart, canvassed Mr. Rohatgi, the punishment suggested by the Petitioner-Association is more out of passion rather than rational deliberation. In essence, the submission is that punishment is provided under Section 376 of the Indian Penal Code (IPC) in respect of a woman who is minor but there may be circumstances where more specific attention may be necessitous for dealing with the rapist of a girl child.

5. At the very outset, we must make it clear that the courts neither create offences nor do they introduce or legislate punishments. It is the duty of the Legislature. The

principle laid down in ***Vishaka's case*** is quite different, for in the said case, the Court relied on the International Convention, namely, "Convention on the Elimination of All Forms of Discrimination against Women", especially Articles pertaining to violence and equality in employment and further referred to the concept of gender equality including protection from sexual harassment and right to work with dignity and on that basis came to hold that in the absence of enacted law to provide for effective enforcement of the basic human right of gender equality and guarantee against the sexual harassment and abuse, more particularly against sexual harassment at work places, guidelines and norms can be laid down in exercise of the power under Article 32 of the Constitution, and such guidelines should be treated as law declared under Article 141 of the Constitution. The following passage from the said authority makes the position clear:-

"... The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and

norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. ...”

6. We have referred to the said passage as it is clear that the Court has clearly taken note of the constitutional silence or constitutional abeyance and dealt with the constitutional obligation to protect the right of women at the workplace. The Constitution Bench in ***Manoj Narula v. Union of India***<sup>3</sup>, while dealing with the said principle, has observed:-

“... The said principle is a progressive one and is applied as a recognised advanced constitutional practice. It has been recognised by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest. Liberalisation of the concept of locus standi for the purpose of development of public interest litigation to establish the rights of the have-nots or to prevent damages and protect environment is one such feature. Similarly, laying down guidelines as procedural safeguards in the matter of adoption of Indian children by foreigners in *Laxmi Kant Pandey v. Union of India*, (1987) 1 SCC 66, or issuance of guidelines pertaining to arrest in *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416, or directions issued in *Vishaka v. State of Rajasthan* (supra) are some of the instances.”

7. In the case at hand, the Legislature has enacted the law and provided the punishment and, therefore, we cannot

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3 (2014) 9 SCC 1

take recourse to the **Vishaka** principle. There is no constitutional silence or abeyance.

8. In **Sakshi** (supra), the Court was dealing with a Public Interest Litigation filed by the Petitioner-Association to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particularly those who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation. The Court took note of various statutory provisions and the constitutional command, referred to the international conventions, pronouncement in **S. Gopal Reddy v. State of A.P.**<sup>4</sup> and the report of the Law Commission, and opined as follows:-

“The writ petition is accordingly disposed of with the following directions:

(1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be

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4 (1996) 4 SCC 596

equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

These directions are in addition to those given in *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384.”

9. We shall refer the said authority at a later stage, but suffice to say here that the Court neither proceeded to legislate nor did it provide for a punishment.

10. In the case at hand, we are concerned with the rape committed on a girl child. As has been urged before us that such crimes are rampant for unfathomable reasons and it is the obligation of the law and law makers to cultivate respect for the children and especially the girl children who are treated with such barbarity and savageness as indicated earlier. The learned senior counsel appearing for the peti-



tioner has emphasized on the obtaining horrendous and repulsive situation.

11. In this context, we may usefully refer to Section 376 IPC, as amended with effect from February 3, 2013 which reads as follows:-

**“376.Punishment for sexual assault--(1)(a)** whoever, except in the cases provided for by sub-section (2) commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to 10 years and shall also be liable to fine. (b) If the sexual assault is committed by a person in a position of trust or authority towards the complainant or by a near relative of the complainant, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine.

(2) Whoever,-

(a) Being a police officer commits rape-

(i) Within the limits of the police station to which he is appointed; or

(ii) In the premises of any station house; or

(iii) On a woman or minor in his custody or in the custody of a police officer subordinate to such officer; or

(b) Being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such

public servant; or

(c) being a member of the armed forces deployed in area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place of institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.--For the purposes of this sub-section.--

(a) 'armed forces' means the naval, military and airforces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) 'hospital' means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) 'police officer' shall have the same meaning as assigned to the expression 'police; under the Police Act, 1861(5 of 1861);

(d) 'women's or children's institution' means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the inception and care of women or children.”

12. It is submitted by Ms. Pavani, learned senior counsel that Section 376(2)(i) deals with a culprit who commits rape

on a woman who is under 16 years of age but the instances are numerous where the girl children and babies are raped. Highlighting further, it is proponed by her that when the society faces perversion where the child abuse like rape is rampant, there is a warrant for specific provision for imposing higher and severe punishment on such culprits as there is a provision under Section 376B which deals with sexual intercourse by husband upon his wife during separation or Section 376C, sexual intercourse by a person in authority or Section 376E, punishment for repeated offender.

13. It is urged by Ms. Pavani, learned senior counsel that the term "child" requires to be defined, regard being had to the situation obtaining in the present day society. Learned counsel would suggest that a woman below 16 years is definitely a minor but a child, though a minor, may stand in a different category. The pain and suffering of a child is a brutal assault on her physical frame, when she is raped. She has no idea about sex or rape. It is a nightmare. Therefore, concern expressed by the Petitioner-Association

is justified. It is not a Utopian thought or “floating fancy” of unwarranted assumption. It is the demonstration of reality in concrete terms. When a society moves in this way, there has to be instillation of fear of law and the punishment has to be definitive in a different way. In such a situation the classical understanding of crime by Marcus Aurelius, the Roman Emperor of 2<sup>nd</sup> Century A.D., who had said that poverty is the mother of crime may not hold good, for the crimes committed on girl children has no nexus with the economic status of the perpetrator of crime; on the contrary, may have nexus with neurotic behavior. In fact, this is a crime which is a shameless demonstration and total insensitive exposition of attitude to a victim. It is a gross violation of the social values and a failure of an individual. It is an act of extreme depravity. Therefore, the situation that has emerged compels one to rethink.

14. We must appreciate the stand taken by Mr. Rohatgi, learned Attorney General for India, who has keenly expressed his concern relating to the child abuse. It can never be forgotten that it is duty of the society to make a child happy. In this regard, it is apt to quote a few lines

from *Buxton*:-

“The first duty to children is to make them happy. –If you have not made them so, you have wronged them, –No other good they may get can make up for that.”

15. This Court cannot provide a higher punishment. It can only suggest to the Legislature. We are absolutely conscious that IPC provides punishment for the offence of rape . There can be no doubt that a girl child is a minor but may be a time has come where a distinction can be drawn between the girl children and the minor, may be by fixing the upper limit at 10 for the girl children. We are disposed to think so as by that age, a child, a glorious gift to mankind, cannot conceive of any kind of carnal desire in man. Once she becomes a victim of such a crime, there is disastrous effect on her mind. The mental agony lasts long. Sorrow and fear haunt forever. There is need to take steps for stopping this kind of child abuse and hence, possibly there is a need for defining the term “child” in the context of rape and thereafter provide for more severe punishment in respect of the culprits who are involved in this type of crime. In the light of the said decision, we part with the suggestion

with the fond hope that Parliament would respond to the agony of the collective, for it really deserves consideration.

We say no more on this score.

16. We have earlier stated that we shall refer to the authority in **Sakshi** (supra). In the said case, after issuing the directions, the Court has observed thus:-

“The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at an alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.”

17. The writ petition is accordingly disposed of.

.....J.  
(Dipak Misra)

.....J.  
(N.V. Ramana)

New Delhi,  
January 11, 2016.