A DR. JACOB GEORGE

v.

STATE OF KERALA

APRIL 13, 1994

B [R.M. SAHAI AND B.L. HANSARIA, JJ.]

Criminal Law—Indian Penal Code—Sections 312, 314, 357, Medical Practitioner—Homeopath—Without proper training—Causing miscarriage of woman resulting in death—Held guilty—Imprisonment for four months—
C *Upheld—Fine of Rs. 5000 enhanced to Rs. one lakh—Sentence reduced to one already undergone.*

Medical Termination of Pregnancy Act, 1971—Section 3—Exceptions Held : Not covered.

D *Probation of Offenders Act—Section 12—Benefit of—Denied.*

Penology—Theories of punishment—Purposes discussed.

The appellant-homeopath was charged under various provisions of I.P.C. including section 314 for causing miscarriage to a woman, which
E **resulted in her death. The case of the prosecution, based on the version of PW-1 was that the deceased was taken to the appellant's hospital on 15.1.1987 for an abortion and she was operated upon around 10 P.M. the same day. The appellant declared that the operation was successful. However at around 5 A.M. on 16.1.1987 she was found dead. The prosecution**
F **witness PWs. 3 and 4 who were nurses of the appellant's hospital turned hostile.**

The case of the appellant was that it was PW-1 who sought to abort the pregnancy by crude method resulting in some emergent treatment.

G **The trial court hald that the charges had not been established beyond reasonable doubt and therefore acquitted the appellant.**

The High Court, taking *suo motu* cognizance fo the matter and in the appeal by the State, held that the appellant was guilty, relying on the evidence of PW-1 and disbelieving the version of the appellant. The High
H **Court sentenced him to undergo 4 months imprisonment in addition to**

which a fine of Rs. 5000 was also imposed. The High Court also refused to give the benefit of Probation of Offenders Act to the appellant. A

In appeals to the Court the Appellant contended : (1) that the evidence of PW-1 was not to be believed, since it stood uncorroborated, as PWs. 3 and 4 had turned hostile; (2) that the granting of probation would have removed the disqualification attached to conviction; and (3) that the substantive period of imprisonment may be reduced to one already undergone by him. B

Disposing of the appeals, this Court

HELD : 1. There is no reason to disagree with the High Court in having placed reliance on evidence of PW-1 as he had played a vital role in the entire episode. [491-G-H] C

2. The failure of the appellant to inform the police when the deceased got admitted speaks volumes against the veracity of the defence case. [492-B] D

3. The evidence of PW-1 is corroborated by the post-mortem report which shows that the appellant had absolutely no training to handle the gadgets used in termination of pregnancy. [492-E] E

4. The conviction of the appellant as awarded by the High Court is upheld as the case is apparently not covered by any exceptions in the Medical Termination of Pregnancy Act of 1971. [492-G]

5. The benefit of Probation of Offenders Act is rightly denied to the appellant keeping in view the nature of the offence and manner in which the appellant performed the operation. [493-C] F

V. Manickam Pillai v. *State*, (1972) Cr. L.J. 1488, distinguished.

6. In the facts and circumstances of the case, the fine is enhanced from Rs. 5000 to a sum of Rs. one lakh. [495-D] G

Harikrishnan v. *Sukhbir Singh*, AIR (1988) S.C. 1127, referred to.

7. The substantive period of imprisonment is reduced to the one already undergone which is of about two months. [495-H] H

A **[The Court observed that this Judgment may not be understood to have expressed any opinion on the right of the deceased or for that matter, any woman of this country to go in for abortion, as this question has not arisen directly in this case. The Court further observed that it is not expressing any opinion whether such a right can be read in Article 21 of the Constitution, and if, so to what extent.] [495-G]**

B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 638-39 of 1990.

From the Judgment and Order dated 16/19.10.1990 of the Kerala High Court in Crl. A.No. 415/89 in Crl. R.C. No. 44 of 1989.

C

R.K. Jain, Ashish Malhotra, G.Prakash and R. Sasiprabhu for the Appellant.

M.T. George for the Respondent.

D

The Judgment of the Court was delivered by

HANSARIA, J. Life is said to be the most sublime creation of God. It is this belief and conception which lies at the root of the arguments, and forceful at that, by many religious denominations that human beings cannot take away life, as they cannot give life. This idea is so intense with some religious leaders that they would even oppose any measure of birth control. Abortion or miscarriage would be opposed with greater force by these persons.

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2. Mahatma Gandhi, Father of the Nation, urged long back in Harijan that God alone can take life because He alone gives it. For the Jains taking away of even animal life is a sin, as, according to them, animals are as much part of God as human beings. Buddhists too preach Ahinsa.

F

3. Our Reg Veda II recites :

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> "Grant us a hundred autumns that we may see the manifold world. May we attain the long lives which have been ordained as from yore."

Atharva Veda I contains the following :

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> "May we be enabled to see the sun for a long time".

The aforesaid shows that life is beyond price and it is not only a legal wrong, but a moral sin as well, to take away life illegally. A

4. In the present appeals we are not concerned with taking away of life before its birth. We are concerned with destruction of foetus life. This is what is known as abortion or miscarriage. To dispel any doubt as to whether the foetus has a life, what has been stated by Taylor in his 'Principle and Practice of Medical Jurisprudence' may be noted where the learned author has opined at page 332 (13th Edn.) that legally both abortion and miscarriage are synonymous because the foetus being regarded as a "human life..... from the moment of fertilisation". It may, however, be stated that some times the word "miscarriage" is used for "spontaneous abortion" and "abortion" for "miscarriage produced by unlawful means". B C

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 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 for RI four years and a fine of Rs. 5,000. The High Court had also taken *suo motu* cognizance against the order of acquittal and it is because of this that alone with the criminal appeal filed by the State which was registered as Criminal Appeal No. 415/89, the High Court disposed of Cr. R.C. No. 44/89, 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. 5,000 as awarded, a sum of Rs. 4,000 was directed to be paid to the children of the deceased towards compensation for loss of their mother, in case of realisation of fine. D E F

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 : G

> "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 H

A where it is not substatiated 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 must misery and large harvest of profit to the vilest pests of society. We trust that it may be in our power in the B Code of 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 C 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, D 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 :

E (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;

F (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 un-born child was evinced G by the legislature, not to speak of hazard to the life of the concerned woman.

9. The allegations which led the High Court to find the appellant guilty under section 314 were these Deceased Thankamani was married to one Sathyan. After the marriage they lived as husband and wife for about H one and half yars and a son was born out of the wed lock. About six months

thereafter, Sathyan reportedly deserted Thankamani but then there was reconciliation three months prior to the death of Thankamani who became pregnant again. For reason not quite known, Thankamani told her mother that she would desire to go for abortion since she did not want another child. The mother, who was examined as PW2 in the trial, sent for PW1 her brother-in-law and told him about the predicament of Thankamani. PW1 happened to know the clinic (hospital) being run by the appellant in Nilambur where abortions were being done.

10. Prosecution case is that on 14.1.87, PW1 and Thankamani went to the clinic and the matter was discussed with the appellant. Thereafter, she was admitted and the appellant agree to abort her on payment of Rs. 600, of which Rs. 500 was paid immediately undertaking to pay the balance afterwards, which amount was paid on 15.1.87. On that day Thankamani was taken to operation theatre at about 10 P.M. and at mid night the appellant told that the operation was successful. PW1 however found Thankamani unconscious. She regained consciousness at about 5 A.M. of 16th and asked for some water. PW1 instead brought a cup of tea which Thankamani could drink with difficulty and started shivering. On information given to appellant he came with a nurse and on examination found Thankamani in sinking condition. Forth came out from her mouth and life ebbed out of her. What happened thereafter is not material, except that after some time police was informed which set it into motion resulting in chargesheeting of the appellant under various sections including section 314. In the trial which commenced, 16 witnesses were examined, apart from bringing many documents on record. The learned trial court, however, held that charges had not established beyond reasonable doubt and therefore acquitted the appellant.

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

12. A perusal of the impugned judgment of the High Court shows that it has placed reliance principally on the evidence of PW1, who is the cousin of Thankamani. As he had played a vital role in the entire episode and is a near relation of Thankamani we find no reason to disagree with

A the High Court in having placed reliance on his evidence. The defence case that it was PW1 who sought to abort the pregnancy by crude method i.e. insertion of stick and rod into the uterus was rightly disbelieved by the High Court as if the condition of Thankamani became serious because of such a crude method and Thankamani was brought to hospital for some emer-
B gent treatment, as is the defence case, appellant, being the head of the clinic, must have informed police in view of the medico-legal significance, as pointed out by the High Court. The failure of the appellant to do so definitely speaks volumes against the veracity of the defence suggestion, as pointed out by the High Court.

C 13. The submission of Sh. Jain that evidence of PW1 is the only evidence to find the appellant guilty inasmuch as PWs 3 and 4 had turned hostile, and so there was virtually nothing to corroborate the evidence of PW1, is not quite correct. As to PWs 3 and 4 turning hostile it was an expected somersault because they were the nurses of the clinic and discre-
D tion must have been taken by them to the better part of valour. But then, PW5, who too was an employee in the clinic did admit that Thankamani had been admitted in the clinic on 14th and not on 15th night as was the defence case. The postmortem examination conducted by PW11, according to whom the death should have taken place at about 36 hours prior to his examination which was at about 3.00 p.m. of 17th, would also corroborate
E the evidence of PW1 as to the date and time of the death of Thanakamani. 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
F in this regard as "daring, crude and criminal". We therefore, agree with the High Court that an innocent life was sacrificed at the alter 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
G 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.

15. This takes us to the question of sentence. The High Court has
H awarded sentence of 4 years and a fine of Rs. 5000, of which a sum of Rs.

4,000 was made payable to the children of the deceased towards compensation for the loss of their mother. Shri Jain has urged that the appellant has undergone imprisonment for about two months, and the sentence may be reduced to the period already undergone. Indeed the learned counsel has further prayed in this regard to grant the benefit of Probation of Offenders Act referred us to a decision of Madras High Court in *V. Manickam Pillai* v. *State,* (1972) 1 Crl. Law Journal 1488, where the High Court had granted such a benefit. We are, however, of the opinion that keeping in view the nature of the offence and character of the appellant, he does not deserve the benefit of probation. If a homeopath takes to his head to operate a pregnant lady and perforate her uterus by trying to abort, he does not deserve the benefit of probation. It would have been a different matter if a trained surgeon while carrying out the operation in question with the consent of the lady, as in the present case, would have committed some mistake of judgment resulting in death of the patient. The present case is poles apart.

16. We, therefore, refuse to give benefit of the aforesaid Act to the appellant. We may, however, put on record that Shri Jain advanced this submission as granting of probation would have removed the disqualification attached to conviction because of what has been stated in section 12 of the aforesaid Act. We do not, however think that if the appellant is required to be given this protection and if his practice were to suffer because of the unwanted act undertaken by him, let it suffer, as it is required to suffer.

17. Let us now deal with Shri Jain's submission that the substantive period of imprisonment may be reduced to the one already undergone which is of about 2 months. To decide whether this contention merits acceptance, we have to inform ourselves as to why a punishment is required to be given for an offence of criminal nature. The purpose which punishment achieves or is required to achieve are four in number. First, retribution : i.e. taking of eye for eye or tooth for tooth. The object behind this is to protect the society from the depradations of dangerous persons; and so, if somebody takes an eye of another, his eye is taken in vengeance. This form of protection may not receive general approval of the society in our present state of education and understanding of human psychology. In any case, so far as the matter at hand is concerned, retribution cannot have full pay, because the sentence provided by 314 is imprisonment of either

A description for a term which may extent to ten years where the miscarriage has been caused with the consent of the woman as is the case at hand. So death penalty is not provided. The retributive part of sentencing object is adequately taken care of by the adverse effect which the conviction would have on the practice of the appellant.

B 18. The other purpose of sentence is preventive. We are sure that the sentence of imprisonment already undergone would be an eye opener to the appellant and he would definitely not repeat the illegal act of the type at hand.

C 19. Deterrence is another object which punishment is required to achieve. Incarceration of about two months undergone by the appellant and upholding of his conviction by us which is likely to affect the practice adversely, would or should deter others to desist them from indulging in an illegal act like the one at hand.

D 20. Reformation is also an expected outcome of undergoing sentecnce. We do think that two months sojourn of the appellant behind the iron bars and stone walls must have brought home to him the need of his changing the type of practice he had been doing as a homeopath. The reformative aspect of punishment has achieved its purpose, according to
E us, by keeping the appellant inside the prison boundaries for about two months having enabled him to kown during this period the trauma which one sufferes in jail, and so the appellant is expected to take care to see that in future he does not indulge in such an act which would find him in prison.

F 21. Section 314 has not visualised the sentence of imprisonment only, but permits imposition of fine also. The High Court has imposed a fine of Rs. 5,000. According to us, however, the fine is required to be enhanced considerably. We have taken this view *inter alia*, because of what has been provided in section 357 of the Code of Criminal Procedure which has a
G message of its own in this regard. It was spelt out by this Court in *Harkishan* v. *Sukhbir Singh*, AIR (1988) SC 2127, in which Shetty, J. speaking for a two-judge Bench stated that the power of imposing fine is intended to do something to re-assure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is to some extent
H a contructive approach to crimes and a step forward in a criminal justice

system. It is because of this that it was recommended that all criminal courts should exercise this power liberally so as to meet the ends of justice, be cautioning that the amount of compensation to be awarded must be reasonable. A

22. What is reasonable has to depend upon the facts and circumstances of each case. Let us see what should be the quantum of fine to be imposed in the present case. We are concerned here with the death of a woman deserted by a husband who wanted to abort. We understand that she had a son born to her earlier and that son must have became a destitute with no one to look after. The appellant, on the other hand seems to have had a roaring practice as would appear, *inter alia,* from the photographs of his clinic put on record. The building is an RCC one and is three-storeyed and presents a good look. B C

23. If a child has to be nursed in these days and nursed reasonably, a sum of Rs. 1,000 per month would definitely be necessary. We, therefore, think that the fine to be imposed should be of Rs. One lakh, and so, we enhance the fine from Rs. 5,000 as awarded by the High Court to a sum of Rs. One lakh. We grant six months time to the appellant for depositing this amount, as prayed by Shri Jain. On this amount being deposited with the Registry of this Court, steps would be taken to deposit the same in a nationalised bank in the name of the son of the deceased after ascertaning the same from appropriate authority. The bank would allow the guardian of the aforesaid son to withdraw the interest on the aforesaid amount till the son becomes major. On the son becoming major, it would be for him to decide as how to use the money and the bank would therefore act in accordance with the decision taken by the son. D E F

24. Before closing, we may state that ths judgment of ours may not be understood to have expresed any opinion on the right of Thankamani or for that matter of any woman of this country to go for abortion, as this question has not arisen directly in this case. We are not expressing any opinion whether such a right can be read in Article 21 of the Constitution; and if so, to what extent. G

25. The result is that the appeals are disposed of by upholding the conviction of the appellant. The sentence awarded by the High Court is modified by reducing the substantive sentence of imprisonment to the one already undergone and by enhancing the fine to a sum of Rs. one lakh to H

A be deposited and dealt with as stated above. If the fine as enhanced by us would not be paid within six months from today, the sentence as awarded by the High Court would get revived and the appellant would undergo the remaining part of imprisonment. To enable the High Court to monitor the matter, the appellant would inform the High Court also about the fact of his depositing the sum of Rs. One lakh if and when he would do so. The B High Court would wait for a period of six months from today to see whether the aforesaid amount has been deposited. In case it would be noted that it has not been done so, it would take necessary steps for execution of the sentence as awarded by it.

V.M. Appeal disposed of.