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TC-L

NATIONAL CRIMINAL LAW MOOT COURT COMPETITION, 2019

IN THE HON'BLE SUPREME COURT OF WONDERLAND

SPECIAL LEAVE PETITION NO. ___/2019

IN THE MATTER OF

STATE OF WONDERLAND..... APPELLANT

VERSUS

ROMSAY BOLTON..... RESPONDENT

AND

PIL NO. ___/2019

IN THE MATTER OF

LGBT RAKSHAKS..... PETITIONER

VERSUS

STATE OF WONDERLAND..... RESPONDENT

MEMORIAL ON BEHALF OF THE APPELLANT/PETITIONER

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LIST OF ABBREVIATIONS

AIR	:	All India Reporter
DPSP	:	Directive Principles of State Policy
Art.	:	Article
F.I.R	:	First Information Report
FSL	:	Forensic Science Laboratory
Hon'ble	:	Honourable
L.G.B.T	:	Lesbian, Gay, Bisexual, Transgender
MLC	:	Medico-Legal Cases
S	:	Section
SCC	:	Supreme Court Cases
SRS	:	Sex Reassignment Surgery
UDHR	:	Universal Declaration of Human Rights
V.	:	Versus

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STATEMENT OF JURISDICTION

THE APPELLANT/ PETITIONER HAS INVOKED THE JURISDICTION OF THE HONOURABLE
SUPREME COURT OF WONDERLAND.

UNDER ARTICLES 136 AND 32 OF THE CONSTITUTION .

THE RELEVANT EXCERPT OF ARTICLE 136 READS AS FOLLOWS:

“136. Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.”

THE RELEVANT PORTION OF ARTICLE 32 READS AS FOLLOWS:

“32. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.”

STATEMENT OF FACTS

- Alosh Kumar is a resident of the State of Thunder Pradesh who ascertained in his childhood that he did not belong to the same gender. He moved to Tumbai, the hub of the fashion industry. On 23rd January 2009, Alosh underwent a sex change surgery and adopted the name of Alice. She pursued a professional course in the same year and became an integral part of the fashion industry.
- On 25th December, 2014, Alice went to a party where she was allegedly raped by a leading producer and member of the ruling party, Mr. Romsay Bolton. The medical examination report concluded that she was subjected to sexual intercourse.
- On 2nd March, 2015, Alice committed suicide by hanging herself and posted a video of herself on social media. Post mortem report showed little amount of alcohol in her blood and cause of her death was concluded as suicide.
- Accused was charged under Sections 306 and 377 of the WPC, 1860. During the Trial, 4 people gave testimonies. The Trial Court convicted the accused under the aforementioned Sections. The matter went onto the Hon'ble High Court of Thunder Pradesh and the accused was acquitted. As a part of the I-TOO movement, after acquittal of accused, two people alleged sexual abuse by the accused. An appeal was made against acquittal of accused in the Supreme Court of Wonderland.
- Two Acts namely, The Transgender Persons(Protection of Rights) Act and The Trafficking of Persons(Prevention, Protection and Rehabilitation) Act; came into force in 2019. The Hon'ble Court had also recently dismissed the Writ Petition challenging rape laws in the country. LGBT Rakshaks, an NGO filed a PIL before the Supreme Court challenging the constitutional validity of rape laws under WPC and constitutional validity of the two acts passed.
- The Appeal and PILs are listed on 16th March 2019 for final disposal.

STATEMENT OF ISSUES

ISSUE 1: WHETHER, ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE AND IN LAW, THE ACCUSED IS LIABLE UNDER SECTION 377 OF WPC, 1860?

ISSUE 2: WHETHER, ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE AND IN LAW, THE ACCUSED IS LIABLE UNDER SECTION 306 OF WPC, 1860?

ISSUE 3: WHETHER, ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE AND IN LAW, S. 375 & S. 376 IS ULTRA VIRES THE CONSTITUTION?

ISSUE 4: WHETHER, ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE AND IN LAW, THE WONDERLAND TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 IS ULTRA VIRES THE CONSTITUTION?

ISSUE 5: WHETHER, ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE AND IN LAW, THE WONDERLAND TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) ACT, 2019 IS ULTRA VIRES THE CONSTITUTION?

SUMMARY OF ARGUMENTS

CONTENTION 1: THAT THE ACCUSED IS LIABLE UNDER SECTION 377 OF WPC, 1860.

It is humbly submitted that the Accused cannot be held liable under S. 377 of the WPC, 1860. That all the necessary essentials of S. 377 seek to be satisfied in the present case. Furthermore, in cases of sexual assault, the sole testimony of the victim stands to be a reasonable ground for incriminating the Accused. In the present case, the testimony of the victim is found to be credible and finds corroboration in medical evidence. Furthermore, the testimony of the eyewitness leaves no room for any doubt regarding the guilt of the Accused.

CONTENTION 2: THAT THE ACCUSED IS LIABLE UNDER SECTION 306 OF WPC, 1860.

It is humbly submitted that the accused abetted the Appellant to commit suicide and therefore is in violation of S. 306 r/w S. 107 of the Wonderland Penal Code, 1860. That the deceased was aggravated by the continuous conduct of the Accused which was followed by psychological and social distress that stimulated the deceased to commit suicide. Further, the dying declaration of the deceased is tenable in the evidentiary laws of the country as the same fulfils the tests of admissibility

CONTENTION 3: THAT S. 375 & 376, WPC, 1860 ARE ULTRA VIRES THE CONSTITUTION.

It is humbly submitted that Sections 375 and 376 of the WPC are ultra vires the constitution by mere reason that they are inconsistent with the Article 14, 15 & 21 of the Constitution by the nature of not being gender neutral. That all the citizens of the country are bestowed with equal protection of law and equal availability of remedy in cases of infringement of fundamental rights. Further, it is submitted that S. 375 and S. 376 of WPC act as an obstruction to implementation of such rights.

CONTENTION 4: THAT THE TRANSGENDER PERSONS (PREVENTION, PROTECTION AND REHABILITATION) ACT, 2019 IS ULTRA VIRES THE CONSTITUTION.

It is submitted that fundamental Rights are those rights that are guaranteed to every citizen of India by virtue of him/her being born a human being and the aforesaid Act is violative of the said fundamental rights, hence by such reason against the provisions of the Constitution. The impugned Act is not in consonance with other gender based laws in the country, which questions the implementation of other such laws on members of the Transgender Community. Further, the implementation of the Act poses as a hindrance on a Welfare state like Wonderland.

CONTENTION 5: THAT THE TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) ACT, 2018 IS ULTRA VIRES THE CONSTITUTION.

It is humbly submitted that The Trafficking Act is ultra vires the Constitution as it violates fundamental rights under Articles 14, 15, 19(1)d, 19(1)g and 21 of the Constitution. The impugned act takes away an individual's right to equal protection by law, protection from discrimination, freedom of movement and residence, freedom of occupation and life and personal liberty. Further any statute that contravenes with basic provisions of the Constitution to such a large extent is ultra vires. Moreover, there is a manifest arbitrariness in the provisions of the statute and arbitrariness is the antithesis of the Rule of Law.

ARGUMENTS ADVANCED

***CONTENTION 1: THAT THE ACCUSED IS GUILTY UNDER SECTION 377 OF
WONDERLAND PENAL CODE, 1860***

1.1. THAT ALL THE ESSENTIALS OF 377 WONDERLAND PENAL CODE, 1860 SEEK TO BE SATISFIED.

1. It is humbly submitted that Section 377 of the Wonderland Penal Code, 1860 in essence outlines the offence of Unnatural Carnal intercourse. On the perusal of such section, *The Madras high court*,¹ arrived at the following conclusion that in order to attract culpability under Section 377, I.P.C, it has to be established that, “A person accused of this offence had carnal intercourse with man, woman or animal; Such intercourse was against the order of nature; The act by the accused was done voluntarily and that there was penetration.”

1.1.1 Evidence of Carnal Intercourse with a woman.

Alice is to be recognized as a woman.

2. It is submitted that Alice was initially born as Alesh, but during her childhood realized that she did not identify herself as a man but rather as a woman. In order to blend her ‘Sex’ and ‘Gender’, she underwent a Sex-reassignment Surgery on 23rd of January 2009.
3. In *National Legal Services Authority V UOI &Ors*², whilst reviewing the legal status of Transgenders, The Supreme court held that, “When we examine the rights of transsexual persons, who have undergone SRS, the test to be applied is not the “biological test” but the “psychological test”, because psychological factor and thinking of transsexual has to

¹Calvin Francis v. State of Orissa, 2 Crimes 455 (1992)

² NALSA v. UOI, 5 SCC 438 (2014)

be given primacy than binary notion of gender of that person. Further, they held that “If a person has changed his/her sex in tune with his/her gender characteristics and perception, which has become possible because of the advancement in medical science, and whine that is permitted by/in medical ethics with no legal embargo, there is no impediment, legal or otherwise, in giving due recognition to the gender identity based on the re-assigned sex after undergoing SRS. For these reasons, we are of the opinion that even in the absence of any statutory regime in this country, a person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well”

4. *In the instant case at hand*, with reference to the aforesaid judgment and the evident facts in the form of Alice’s behaviour, it is submitted with utmost clarity that Alice is to be recognized as a woman. To do otherwise, would not only be gross injustice on the part of this judicial branch but also be a violation of Alice’s constitutional rights.
5. Furthermore, it is of prime importance to take consideration of the fact that Alice was in society too, addressed and recognized as a woman. Such aspect comes into notice through the article published in the “The Times of Wonderland” wherein she was sought to be a beautiful saga of LGBT icon, who was born in a middle class family and came over every difficulty in life to find true soul as a successful woman.³

Medical evidence of Carnal Intercourse.

6. It is highly submitted that as per *Law Lexicon’s* dictionary that ‘Carnal Intercourse’ is to be described as unnatural sexual intercourse entailing punishment under 377 IPC. ⁴ That while dealing with a charge under 377 IPC, the *Sind High Court* deduced that “to decide

³ Para 6 of moot proposition

⁴Justice C.K Thakker& M.C. Thakker, Vol.1 at 277, (ed.2, 2011)

whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism.”⁵

7. Hence, it would be reasonable to deduce that for an act to be classified as ‘Carnal Intercourse’, the ingredients that need to be satisfied are mentioned to be, unnatural sexual intercourse and penetration. In the instant case, consequent to being sexually assaulted by the Accused, Alice was medically examined. Such medical examination concluded that she had been subjected to sexual intercourse which furthers the proof of penetration. Such intercourse was against the order of nature and thus, unnatural.

1.1.2 The Intercourse was against the ‘Order of Nature’

8. It is submitted that any act of sexual intercourse would come under the ambit of Section 377, of WPC, 1860 if such sexual intercourse is regarded as being against the ‘order of nature’. Further, to comprehend what is constituted to be in the ordinary course of nature, the object for engaging in sexual intercourse has to be considered.
9. That Sexual intercourse is indispensable in a human’s life as it is the sole means to procreate. The natural object of the same, is thus procreation and not gratification of any lust. The cultural construction of sexuality negates any sexual activity that is non-productive of semen. Hence, any sexual act which does not lead to procreation would be considered to be a sexual act against the ‘order of nature’ as has been contended in ***Khanu V Emperor***⁶.
10. It is submitted that Section 377 has a wide ambit, it is not a narrow section but one that leaves room for different interpretations in accordance to the need of the society. Discussing the ambit of Section 377, the Kerala High Court in the case of ***Sirkar v. Gula***

⁵Khanu v. Emperor, AIR SIND 286 (1925)

⁶Supra note 5

*Mythien Pillai Chaithu Maho Mathu*⁷ asserted that the words used in the Penal Code were very simple and wide enough to include all acts against the order of nature.

11. *In the instant case*, Alice had been subjected to ‘Sexual intercourse’ as is evident from her medical examination conducted immediately after such sexual assault. It is necessary to mention here that notwithstanding the fact that Alice in light of her SRS possessed female genitalia, she did not possess any female reproductive organs. The absence of such organs eliminates any possibility of her conceiving, thus any sexual act undertaken with her would be unnatural act against the order of nature in accordance of the aforesaid cases.
12. Furthermore, The *Gujarat High Court*⁸ has enunciated that any sexual act if it is imitative of sexual intercourse to appease sex urge or sexual appetite, would be an unnatural offence, against the order of nature
13. . *In the instant case*, the sexual act undertaken by the Accused was imitative of coitus and in cause for appeasing his sexual lust, and thus would be considered to be under the ambit of ‘Carnal Intercourse against the Order of Nature’

.1.1.3. That such act was done voluntarily

14. .It is humbly submitted that an act can be said to have been done voluntarily, if a person engages in it on his/her own accord and in absence of any external influence. “A person is said to cause an effect “voluntarily” when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.
15. In the instant case, there is no evidence which would create an inclination towards believing that the accused partook in such carnal intercourse without his own consent.

⁷Sirkar v. Gula Mythien Pillai Chaithu Maho Mathu, TLR 14 (Ker) Appendix 43 (1908)

⁸Lohana Vasantlal Devachand v. State, AIR Guj 252 (1968)

The only lack of consent in being involved in such carnal intercourse was on the part of Alice which is apparent from the fact that she was caused injuries by the accused.

1.1.4 That Penetration had occurred.

16. That to constitute an offence under Section 377, WPC, 'Penetration' is of paramount importance. In the absence of concrete evidence of 'penetration', a charge under 377, WPC may be disproved with ease.

17. In the course of analysis of such section, the *Kerala High court*⁹ has held that "The word 'penetrate' means in the Concise Oxford Dictionary, 'find access into or through, pass through.'"

18. *In the instant case*, the medical examination reports of Alice explicitly states that she was subjected to a sexual intercourse¹⁰. It is submitted that the clause for 'penetration' can be logically derived through such medical report and seeks to have been satisfied.

19. With reference to judicial precedents and in the light of the facts of the case, it can be reasonably concluded that all the ingredients of 377 are satisfied in the present case.

1.2 THAT ALL OF THE EVIDENCE EFFECTUATES THE GUILT OF THE ACCUSED.

20. It is humbly submitted that in order to demonstrate the guilt of an accused in a case under criminal law, it is of substantial importance to analyse the evidence at hand. That the word 'evidence' is derived from the Latin word *evidens* or *evidere* which means "to show clearly; to make clear to the sight; to discover clearly; to make plainly certain; to ascertain; to prove."¹¹

⁹State of Kerala v. Kudumkara Govindan, CriLJ 818 (1969)

¹⁰ Para 10 of moot proposition

¹¹Ratanlal & Dhirajlal, The Indian Penal Code at 1, (26th ed. 2017)

21. It is submitted that in *the present case*, there is existence of such evidence that would in all probabilities lead to proving the guilt of the Accused.

1.2.1 That the case of the Prosecution can stand on the ground of the Sole testimony of the Prosecutrix

22. It is humbly submitted that in criminal trials the testimony of the 'Prosecutrix', is to be provided a higher footing than the rest. It is so due to the fact that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust. That it is considered improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.¹²

23. That it has been held by the Hon'ble *Supreme Court*¹³ that if the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration, except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.

24. In this regard it would be pertinent to illustrate certain observations made in the case of *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat*,¹⁴ wherein it is observed that "Rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted"

25. It is submitted that *in the present case*, the Appellant's testimony in the form of a dying declaration is substantive to hold ground in the court of law. That the Appellant in her

¹²Ranjit Hazarika Vs State of Assam, (1998) 8 SCC 635

¹³Dola @ Dolagobinda Pradhan & ANR. Vs. State of Odisha, , CRIMINAL APPEAL NO.1095 OF 2018

¹⁴Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,(1983) 3 SCC 217

dying declaration has stated that she had been sexually assaulted and that the Accused is to be blamed for the same.

26. That the Appellant had, immediately following the events of her sexual assault publicly shamed the acts of the Accused at the Christmas Party.¹⁵ Furthermore, Alice never deferred from her initial claim, even when due to such claim she lost, the important aspect of her life that was her work. That when Appellant made a press conference after such event to “Wonderland Samachar”, she did not deny her initial statement and added that because of the said incident, her career was suffering. It is submitted that it is evident from perusal of the abovementioned facts that the Appellant had no cause for falsely implicating the Accused at the cost of her dignity in the present case. Moreover, it is apparent that she has lost more work by publicizing her sexual assault than she would have had she repressed it. This further proves the fact that the Appellant in all probability, was reiterating the truth in the manner of her sexual assault as she alleged. Moreover, it is submitted that the Appellant had committed suicide on the 2nd of March, 2015. She had no cause for being so exceedingly devastated that would provide for her to not see, any other option but suicide except the psychological trauma that results from being sexually molested. That if she was, in all probability, fabricating such story, she wouldn’t have taken the massive step of committing suicide.

27. In the light of the aforesaid cases and facts, it can be deduced that the Appellant’s testimony is truthful and should be refrained from being considered with suspicion. Furthermore, it does not require any corroboration except from medical evidence.

1.2.2 Medical examination

¹⁵ Para 9 of moot proposition

28. It is submitted that medical evidence has been for long taken into consideration during a criminal trial. That such evidence aids in corroborating the testimony of the victim or proving its falsity. That the Supreme court in the case of, ***Machindra Vs Sajjan Galfa Rankhamb &Ors***¹⁶ has stated that in criminal cases relating to offences against the human body, Medical evidence has a decisive role to play. Further, ***Madhya Pradesh High Court***¹⁷ has also contended that ‘Medical Evidence’ has been accepted as being corroborative of the charge.
29. Furthermore, the medical evidence adduced by the prosecution has great corroborative value. It seeks to prove that the injuries could have been caused in the manner alleged.¹⁸ That as the offence of rape is committed in privacy and direct evidence of rape is rarely available, corroboration of the testimony of the complainant is sought from medical evidence.¹⁹
30. In ***Joseph s/o Kooveli Poula V State of Kerala***²⁰, the Supreme Court held that “if there had been sexual intercourse, the victim must have made some strong resistance being a grown up lady and, in the process, some injuries would have been found on the vagina/private parts of the body or some other parts indicative of any such force and it would be too much to assume that there would have been no injuries whatsoever on the body on this account”
31. *In the present case*, the medical examination of Alice observed ‘slight marks of injuries’ and that she had been subjected to sexual intercourse. That the injuries in the presence case, keeping in view the judicial precedents enunciated above, provide for a

¹⁶Machindra v. Sajjan Galfa Rankhamb&Ors, (2017) 13 SCC 491

¹⁷Vinod Kumar V State of Madhya Pradesh, (1987)CrLJ 1541,1543

¹⁸Jaising P. Modi, Modi’s Medical Jurisprudence and Toxicology, at 34 (23rd ed. 2005)

¹⁹ Ibid

²⁰Joseph s/o Kooveli Poula v. State of Kerala, (2000) 5 SCC 197

corroboration to the effect that Alice had been sexually assaulted. These injuries in all probability resulted from her struggling against the advances of the Accused.

32. Furthermore, the medical examination clearly states that she had been subjected to sexual intercourse which works towards removing any doubt regarding her testimony.

1.3. THAT THE TESTIMONY OF WITNESSES HOLDS GOOD IN THE EYES

33. It is humbly submitted that Sexual assault is an act which is commonly committed behind closed doors. The maximum evidence for such cases roots from circumstances. The same has been held by the Supreme court, in the case of *Shivaji v. State of Maharashtra*²¹, wherein it was stated that "In most of the cases where death sentences are awarded for rape and murder and the like, there is practically no scope for having an eyewitness. They are not committed in the public view. But the very nature of things in such cases, the available evidence is circumstantial evidence" Further, in the case of *G.Parshwanath v. State of Karnataka*²² wherein the Supreme Court laid down that, the evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists of an eyewitness account of the facts in issue in a criminal case.

34. It is submitted that in the instant case, the evidence of Mr. Han solo, being the only key evidence should be given weightage as it acts as a glimmer of hope for the victim in the court of law. Further, he asserted that he was 'positive' when he saw the accused going downstairs from the same floor where alleged incident happened and thus acts as a direct evidence exhibiting the guilt of the accused.

²¹Shivaji v. State of Maharashtra, (2008) 15 SCC 269

²² G. Parshwanath v State of Karnataka,(2010) 8 SCC 593

35. Furthermore, *in the instant case*, the evidence of Mr .Theon Greyjoy, being the director of the movie which was produced by Mr. Romsay is likely to be tainted and does not hold much value in the court of law.
36. It is submitted that the I-TOO movement unveiled the mask of the accused with hidden intentions where the two brave souls stood up and spoke in public narrating their alleged instances of sexual harassment. That taking into account of the statements by the two victims, the sexual offences of the accused should not be stacked in or trailed out.
37. It is humbly submitted that the law does not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Taking into consideration the facts of the case, the pronouncements of landmark judgments, the Appellant should be entitled to a fair verdict. That mere possibilities or remote possibilities cannot be the foundation of acquitting the accused from the clutches of law.

**CONTENTION 2: THAT THE ACCUSED IS LIABLE UNDER SECTION 306 OF
WPC, 1860**

2.1 THAT ESSENTIAL INGREDIENTS OF ABETMENT SEEK TO BE SATISFIED.

38. It is humbly submitted before this Hon'ble Court that the accused in this case, Mr. Romsay Bolton has abetted the suicide of the the Deceased, Alice and therefore is in violation of Section 306 R/w Section 107 of the Wonderland Penal Code, 1860 and is consequently liable for the appropriate punishment thereunder. The basis for this submission predicated upon the essential elements of the offences are presented hereunder:

2.1.1. The Deceased Has Committed Suicide

39. The facts and stipulations of the matter load to the inescapable conclusion that the deceased has committed suicide by hanging herself at her flat.²³ The following facts are elemental in this conclusion:

- (i) *Intent to commit suicide:* That the Appellant had uploaded a public video affirming her intent to commit suicide at around 3 AM in the morning before she had hanged herself. In the said video the Appellant is clearly crying and is traumatized from her past and her recent sufferings in life meted out to her at the hands of fate, the criminal justice system and the Accused. It is expedient to note that in this video the intent to commit suicide is manifest as the Appellant had stated that “*it was Ramsay Bolton, the Accused who had compelled her to commit suicide and thus it is he who would be solely responsible for her death*”. This video, under the evidentiary laws of the country holds the position of a dying declaration of the Appellant as to the cause of death²⁴.
- (ii) *Death of theAppellant:* The Appellant had been found dead in her apartment by her friends in subsequent to the upload of the video.
- (iii) *Conclusion of Suicide under the Post Mortem Report:* The post mortem report had conclusively set out the cause of death as suicide by the Appellant. This conclusion under the post-mortem report goes towards assisting the Court in appreciating the facts of the matter and determining the cause of death²⁵. Further, the usage of the word “concluded”²⁶ with regard to the cause of death under the post mortem must be

²³ Para 12 of moot proposition

²⁴ Section 32(1), The Indian Evidence Act, 1872.

²⁵Dayaram and Anor v State, (1986) 3 Crimes 446.

²⁶Concluded which carries with it an implication that such conclusion was drawn after due deliberations-Black’s law dictionary

appreciated. Thus, in the present case the Post mortem report acts as a corroborative piece of evidence to the fact that the Appellant has committed suicide.

40. In the Instant case, in light of the overwhelming evidence to this effect and the conclusion of the post mortem conclusion towards the same, it manifests that the Appellant had met her end by way suicide.

2.2. The Accused Abetted the Suicide of the Appellant Person

41. It is humbly submitted before the Hon'ble court that the word "Instigation" literally means to goad or urge forward or to provoke, incite, urge or encourage a person to do an act. ²⁷Thus, to constitute 'instigation', a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by "goading" or 'urging forward'. ²⁸ The dictionary meaning of the word "goad" is "a thing that stimulates someone into action; provoke to action or reaction."²⁹

42. In the case of *Ranganayaki v. Emperor*³⁰ The court held that, Law does not require Instigation to be in a particular form or that it should only be in words. The Instigation may be by conduct. Whether there was an Instigation or not is a question to be decided on the facts of each case". That the Apex court in the case of *Randhir Singh vs. State of Punjab* enunciated on the essence and purport of Section 306 as under "Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing"

43. *In the present case*, taking confidence on the aforesaid two judgments, the Appellant, was aggravated by the conduct of the accused to commit suicide as she was forcibly sexually

²⁷ Dr. Harish Singh Gaur, The Indian Penal Code, Volume 1 at 352, (13th ed. 2008)

²⁸Raghunath Das V. Emperor, AIR 1920 Pat 502

²⁹Chitresh Kumar Chopra vs. State, AIR 2010 SC 1446

³⁰Rananayaki v. Emperor, 2004 (4) Crimes 179

assaulted on the night of the Christmas party. The event was followed by an emotional and psychological distress associated with the stigma of feeling unworthy of a better life which is a natural consequence of being sexually assaulted.

44. The Apex court in the case of *Praveen Pradhan vs. State of Uttaranchal & Anr*³¹, held that in such cases under Section 306, “an inference has to be drawn from the circumstances that had created the situation that a person felt totally frustrated and committed suicide.”

45. *In the Instant case*, after the incident of the Christmas party, the fashion and the movie industry were divided in support and Alice lost all her working assignments in the film industry, where the Accused was an influential man and a leading producer.³² The Appellant was being imperilled to continuous death threats even though she was sexually assaulted by the accused and was the victim in impugned case. It is submitted that the accused possessing a dominant position gives him a weapon in his armoury to disrupt her career and have her creditability questioned. That in all eventuality the film industry divided its votes in favour of the accused by the reason of his leading name in the film Industry and the Appellants’ story that was once named as a beautiful saga of a LGBT Icon completely shut her experience and made her feel all unobtrusive.

46. In the case of *Amit Kapoor v. Ramesh Chander*³³, The Court held that “there could be cases in Abetment where the circumstances created by the accused are such that a person feels totally frustrated and finds it difficult to continue existence”

47. Further, in the case of *Yogesh Kumar Sahu v. State of Chhattisgarh*³⁴ the court enunciated that in a given set of circumstances, an inference has to be drawn from the

³¹Praveen Pradhan vs. State of Uttaranchal & Anr (2012) 9 SCC 734

³² Para 8 & 11 of moot proposition

³³ Amit Kapoor v. Ramesh Chander, (2012) 9 SCC 460

circumstances and it is to be determined whether circumstances had been such which, in fact, had created the situation that a person felt totally frustrated and committed suicide, it may amount to abetment punishable under Section 306 of the Penal code.

48. *In the present case at hand*, the Appellant from becoming a successful fashion designer and a name in the Industry to losing all her work assignments became a victim of her own self raised voice against the acts of the accused. The press conference made by the Appellant before 'Wonderland Samachar' claiming that she lost all her working assignments because she stood against bad people and started receiving death threats is a reasonable likelihood to point towards the guilt of the accused in all eventualities.

49. That the Appellant spent her entire life working towards a particular goal and attaining the triumph where she was today in her career but the same were tumbledown because of the acts of the accused which abetted the Appellant to commit suicide.

50. It is submitted before the Hon'ble court that the intense frustration and helplessness of the appellant stemming from the course of conduct of the accused ushered the Appellant to end her life.

51. Further, in *Vijay Kumar Rastogi v. State of Rajasthan*³⁵, The Apex Court held that there should be a live link or a proximate link between the act of the accused and the act of committing suicide. It is humbly submitted before this Hon'ble Court, *that in the present case*, there was a proximate link of the acts of the accused in assaulting the victim trailed by his comportment and the reason of the Appellant's suicide. The accused by his acts or by continuous course of conduct created such circumstances that the deceased was left with no other option but to commit suicide, an 'Instigation' may be inferred.³⁶

³⁴Yogesh kumar Sahu v. State of Chattisgarh, Cr Revision 593 of 2017

³⁵ Vijay Kumar Rastogi v. State of Rajasthan, 2012 (2) Crimes 628

³⁶ Ramesh Kumar v. State of Chattisgarh, 2001 (1) SCC 618

52. Thus, an insinuation can be traced towards the guilt of the accused from the chain of events, which led the Appellant lose her work incipiently, followed by death threats wherein it can be orchestrated that the accused abetted the Appellant to commit suicide

2.3. THAT THE DYING DECLARATION OF DECEASED IS ADMISSIBLE IN THE COURT OF LAW.

53. It is humbly submitted before the Hon'ble Court that the dying declaration made by deceased on 2nd March, 2015 is admissible as Evidence³⁷ evidentiary laws of the country.

2.3.1 That Essentials of Dying Declaration are fulfilled

54. In the case of *Patel Hiralal Joitaram v. State of Gujarat*³⁸ it was stated that, "Two categories of statements are made admissible in evidence and further made them as substantive evidence. They are: (1) his statement as to the cause of his death; (2) his statement as to any of the circumstances of the transaction which resulted in his death." That In *Rattan Singh v. State of Himachal Pradesh*³⁹ The court held that "there need not necessary be a direct nexus between circumstances and the death. Further, it is not necessary that the circumstances should be proximate, for even distant circumstances can also be admissible under section 32. It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transaction which resulted in death"

55. It is humbly submitted that the cause of the death of the Appellant was the abetment by the Accused and all his series of instances that followed after the Appellant was sexually assaulted by the accused. That even though the Appellant committed suicide after two

³⁷ Section 32, Evidence Act

³⁸Patel Hiralal Joitaram v. State of Gujarat, (2002) 1 SCC 22

³⁹ Rattan Singh v. State of Himachal Pradesh, 1997 Cri LJ 833

months of the incident, it is not likely to have the effect of attenuating the heuristic value of the dying declaration.

56. That abetment has taken place as the accused by his continuous course of conduct created such circumstances wherein the Appellant was devastated to such an extent that she could not overcome the psychological effects of the instances that had occurred and committed suicide. That the sexual assault was not in isolation and thus a reasonable nexus can be made out between the circumstances stated by the victim and her death as necessary in the cases of Section 32⁴⁰.

57. In *Ram Bihari Yadav v. State of Bihar*⁴¹ It was held that dying declaration is a substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused. Further in *State of Gujarat v. Kali Chunilal Savji*⁴² The court emphasized on the legal maxim '*Nemo moriturus praesumitur mentire*' and held that the general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the most powerful consideration to speak the truth'

58. *In the present case* at hand, it is humbly submitted that declaration by the Appellant was made in extremity of the circumstances caused by the Accused and is entitled to great weightage. Hence its veracity in the instant case is entitled to inspire confidence of the court of law with no intrinsic infirmity.

2.3.2. That the Appellant was in a fit state of mind

⁴⁰Ameer Jain vs. State of Karnataka, 2004 CrLJ 4801

⁴¹Ram Bihari Yadav v. State of Bihar, 1998 Cri LJ 2515

⁴²State of Gujarat v. Kali Chunnilal Savji, 2004 (4) Guj LR 3277

59. It is humbly submitted that reliance should be placed on the landmark case of **NALSA vs. Union of India**⁴³ the court was of the opinion that to be eligible for hormone therapy, the person needs at least two psychiatrists to certify that he/she is mentally sound and depression and transvestism have to be ruled out first.”
60. It is submitted that the Appellant was in a fit mental state of mind while undergoing a sex change operation as an inference can be drawn from the aforesaid case, wherein it can be inferred from the series of events that followed after that, that her reason to commit suicide was not because of the death of her parents and her unwillingness to live but because of the incident that happened on the night of the Christmas party and the subsequent situations created by the accused from his conduct.
61. Further, in the case of *State of Gujarat v. Rabri Pancha Punja*⁴⁴, the court held that the dying declaration retains its full value if it can justify that the victim could identify the accused and the version narrated by victim is intrinsically sound and accords with probabilities. It is submitted that, in the present case, the Appellant mentioned the name of the accused to be the sole person responsible for her death and the fact that she narrated the whole series of events, is conclusive of the proof that her *laterm morterm* were innately sound and she was in a fit state of mind, Hence, great solemnity and sanctity is likely to be attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to connect a case as to implicate an innocent man.⁴⁵ Furthermore, a true and a voluntary dying declaration needs no corroboration and can be a sole basis of conviction.⁴⁶

⁴³Supra note 2

⁴⁴State of Gujarat v. Rabri Pancha Punja, Cri LJ. 1981; NOC: 171 (Guj)

⁴⁵ K.R. Reddy v. Public Prosecutor, 1976 (3) SCC 618

⁴⁶Khushal Rao v. State of Bombay, 1958 SCR 552

CONTENTION 3: THAT S. 375 & 376 OF WPC, 1860 ARE ULTRA VIRES THE CONSTITUTION.

62. It is humbly submitted before this Hon'ble Court that S. 375 and 376 of the WPC, is *ultra vires* the Constitution. That Art 13 of the Constitution provides that if any law is contrary to the fundamental rights and provisions of the Constitution then that law shall be void to the extent that it is inconsistent with the Constitution.

63. In the case of *Anuj Garg v. Hotel Association of India*⁴⁷, it was observed that although a pre constitutional law is saved in terms of Art 372 of the Constitution, challenge to its validity on the touchstone of *Article 14, 15 and 19* of the Constitution is permissible in law.

3.1 Violative of Article 14 and 15.

64. With regards to Article 14, it has been held in *Maneka Gandhi v. Union of India*⁴⁸ that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment for all its citizens.

65. That it has been established, all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination⁴⁹.

66. That Art. 15(1) is an extension of Art.14 and expresses a particular application of the general principles of equality embodied in Art.14. That the combined effects of Arts. 14 and 15 is not that the state cannot pass unequal laws, but if it does pass unequal laws, the

⁴⁷AnujGarg v. Hotel Association of India (2008) 3 SCC

⁴⁸Maneka Gandhi v. UOI,(1978) 1 SCC 248

⁴⁹ Art 7 of the UDHR

ingenuity must be on some reasonable ground and that due to Art. 15(1) religion, caste, sex, or place of birth alone is not and cannot be a reasonable ground for discrimination.⁵⁰

67. It is submitted that in the present scenario, the rape laws under the WPC fail to occupy the scope of gender neutrality. Sections 375 and 376 of the WPC, only cover instances of rape of a woman by a man and fail to cover those instances where a man or transgender becomes a victim and thus, there is in existence no remedy for victims of rape, who are not women by sex. Hence, there is a clear discrimination on the aspect of 'sex'. Such a circumstance provides for a violation of the fundamental right of Article 14 and 15 of such individuals along with Articles 7 and 8 of the UDHR which is not only signed but also ratified by Wonderland.

3.2 Violative of Article 21

68. It is submitted that Rape is the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life with human dignity contained in Art 21⁵¹.

69. It is stated that in *State of Punjab v. Gurmit Singh and Ors*⁵² it was enunciated that, "We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault-it is often destructive of the whole personality of the victim." It is submitted that The Supreme Court has affirmed the rights of the LGBT community are not 'so-called' but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential

⁵⁰M.P. Jain, Indian Constitutional Law at 987(6th ed. 2012)

⁵¹Bodhisattwa Gautam v. Subhra Chakraborty (1996) 1 SCC 490

⁵² State of Punjab v. Gurmit Singh and Ors,(1996) 2 SCC 384

component of identity. Equal protection demands protection of the identity of every individual without discrimination.⁵³

70. Notwithstanding such judgement, the rape laws in Wonderland are still discriminatory towards Transgenders, and fail to recognize the need for remedy when they are violated sexually. Thus, there is no provision for the protection of their rights under Art.21. Furthermore, it is submitted that Wonderland is a welfare state and it is the duty of the State to provide protection to its citizens from violation of rights, albeit such duty on the part of the state, the rape laws in country are provide no means to get justice to the Transgender community. It is submitted that understanding the predicament of such transgenders all over the world, the United Nations in their report⁵⁴ have advised countries to, prohibit discrimination based on sexual orientation and gender identity.

71. Despite such attempts on the part of UN and the courts, Alice, suffered in violation of her dignity at the hands of the Accused. The law did not even recognize what has happened with her as rape. This is the tragic reality of all victims of rape who are not women under the existing rape laws. In conclusion, the section is discriminatory and violative of basic rights of the citizens of Wonderland. It is submitted that Art 13(1) of the Constitution provides that all laws in force at the commencement of the Constitution which clash with the exercise of the fundamental rights conferred by Part III of the Constitution shall, to that extent, be void. This has been reiterated in the case of *Keshavan Madhava Menon v. State of Bombay*⁵⁵. Hence, it must be declared unconstitutional to the extent that it is not gender neutral. The same was reiterated in the case of *Mahendra Lal Jaini v. State of*

⁵³Justice KS Puttaswamy(Retd) v. Union of India (2017) 10 SCC 1

⁵⁴ Report of the Secretary General on Conflict Related Sexual Violence, un.org, (25th February 2019, 3:40 pm)
<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/report/s-2018-250/SG-REPORT-2017-CRSV-SPREAD.pdf>

⁵⁵Keshavan Madhava Menon v. State of Bombay (1951) SCR 228

*U.P*⁵⁶ where it was observed that- the words “to the extent of the inconsistency or contravention” make it clear that when some provisions of a statute become unconstitutional on the account of inconsistency with fundamental rights, only the repugnant provisions of the law in question shall be treated by the Courts as void

CONTENTION 4: THAT THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2019 IS ULTRA VIRES THE CONSTITUTION

72. It is humbly submitted before this Hon’ble Court that The Transgender Persons (Protection of Rights) Act, 2019, (hereinafter referred to as ‘The Transgender Act’) is ultra vires the constitution. That the Act instead of empowering transgender people in the country, is further weakening their position and is reinforcing pre-existing prejudices against them.

73. That Wonderland has signed and ratified the UDHR⁵⁷ which provides for human rights to people of every colour, from every race and ethnic group; whether or not they are disabled; citizens or migrants; irrespective of their sex, their class, their caste, their creed, their age or sexual orientation. Not providing such rights that are rudimentary to human existence is a violation of individual’s right to life and dignity under Article 21

4.1. THAT THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 VIOLATES FUNDAMENTAL RIGHTS OF THE CONSTITUTION

74. It was enunciated in the case of *Namit Sharma v. Union of India*⁵⁸ that, a law which violates the fundamental right of a person is void. Fundamental Rights are intrinsic to the

⁵⁶Mahendra Lal Jaini v. State of U.P, AIR 1963 SC 1019

⁵⁷ Universal Declaration of Human Rights Signatories, unethiopia.org, (27th February 2019, 6:00pm)

unethiopia.org/universal-declaration-of-human-rights-signatories/

⁵⁸Namit Sharma v. UOI, (2013) 1 SCC 745

existence of a person and it is the paramount duty of State to provide and protect such rights of its citizens.

4.1.1. Violation of article 21

75. It is submitted that all human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The prominence of these natural rights can be found in the fact that these are fundamental for their proper existence. Life bereft of liberty would be, without honour and dignity and it would lose all significance and meaning. That life itself would not be worth living which is why liberty is called the very quintessence of civilised existence.⁵⁹

76. It is humbly submitted that under the impugned Act, there is no right for the Transgenders' to self-determine their gender. Further, the Apex court in the case of *NALSA v. UOI*⁶⁰ enunciated according predilection to the transgender people by upholding their rights to identify themselves as a man, woman or as a third gender and strengthening their right to dignity, freedom and personal autonomy guaranteed under Article 21. The impugned Act does not follow the spirit of the aforesaid judgement made by the Apex Court and hence does not stand in harmony with Article 21.

77. It is further submitted that the Transgender Act makes the right of self-identity of the Transgenders contingent on its acceptance by the District Screening Committee⁶¹. Furthermore, that according to the Act, all Transgenders can only identify as transgender, as a third gender and not as male or female which further depends on scrutiny and certification. Further, The Act provides for a 'screening process' to recognise

⁵⁹Siddharam Satlingappa Mhetre v. State of Maharashtra, AIR 2011 SC 312

⁶⁰ Supra note 2

⁶¹ Section 5, Transgender Act

the identity of transgender citizens with an inference that some applicants will be ruled out. Hence, this is in violation of the part and parcel of Article 21. Moreover, if a transgender person is denied a Certificate of Identity, the act does not provide for appeal or review of such decision of the District Screening Committee.

78. That In the case of **Kharak Singh v. State of U.P**⁶², it was observed that “Art. 21 guarantees the protection of personal autonomy of an individual. Personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-expression falls within the realm of personal liberty guaranteed under Art. 21 of the Constitution. “Furthermore, the Act defines a transgender person as someone whose gender does not match with the gender assigned to that person at birth. This is in sheer contradiction to the *NALSA v. UOI*⁶³ judgment which rules that If a person has changed his/her sex in tune with his/her gender characteristics then the person should be recognized as the gender they had the surgery to become.

79. That *AK Gopalan v State of Madras*⁶⁴ it was observed that-“In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. Confining people of the transgender community to identify only as the third gender is a violation of their rights under Article 21. Furthermore, the Transgender Act does not specify if the terms ‘male’ and ‘female’ talk about biological sex which includes the

⁶²Kharak Singh v State of U.P., AIR 1963 SC 1295

⁶³Supra note 2

⁶⁴ A.K Gopalan v. State of Madras, AIR 1950 SC 27

human anatomy or if it also refers to one's psychological sense of gender, which includes how a person chooses to feel, identify and express oneself.

4.1.2 **Violation of Article 14 and 15**

80. The Transgender Act sheds light on the offences and penalties⁶⁵ related to transgender which includes the offence of sexual abuse. The punishment for rape or any kind of sexual abuse in accordance with the Transgender Act is very moderate and less in contrast with the punishment under of Sec 376 of the Indian Penal Code, which applies to female victims of rape. This disparity in the punishments under both the Acts is a clear indication of the fact that the dignity and safety of Transgenders is not as imperative to the law makers of the country as the dignity and safety of cisgender people.

81. It was stated in the case of *Anita Kushwaha v. Pushap Sudan*⁶⁶ that, "Access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution which provides equality before law and equal protection of laws" It is further submitted that there is no equal protection of laws given to transgender people when the matter of sexual offences is under consideration. The Transgender Act gives a cap of punishment for 2 years to a transgender victim's sexual abuser. However, the WPC punishes the perpetrators for a minimum of 7 years and maximum punishment of life imprisonment with fine. Hence, the element of "equal protection of laws"⁶⁷ is in clear violation.

82. In the case of *State of West Bengal v. Anwar Ali*,⁶⁸ the Court observed that Article 14 secures all persons within the territories of India against arbitrary laws as well as

⁶⁵ Section 19 of the Transgenders' Act

⁶⁶ Anita Khushwaha v. Pushap Sudan, (2016) 8 SCC 509

⁶⁷ Art 21 of the Constitution

⁶⁸ State of West Bengal v. Anwar Ali, (1952) AIR 75

arbitrary application of laws. A punishment of 2 years is too measly for a crime as heinous as rape.

83. Moreover, the aforesaid provision is highly discriminatory in nature. It is in pure violation of Art 14 and Art 15 of the Constitution of Wonderland. That as stated in the case of *Maneka Gandhi v. UOI*⁶⁹ Equality is the faith and creed of our democratic republic and without it, neither the Constitution nor the laws made under it could reflect the common conscience of those who owe allegiance to them. And if they did not, they would fail to command respect and obedience without which any Constitution would be doomed to founder on the rocks of revolution.

84. It is submitted that infinitesimal shield of sexual assault and Rape laws governing transgender people are not at par with the rape laws governing cisgender citizens which not only is a breach of Article 14 and 15 but also is a ground to hold the Act Ultra vires the constitution.

4.1 THAT THE ACT IS ARBITRARY AND UNREASONABLE IN NATURE.

85. It is submitted that the Transgender Act defines a transgender person as someone whose gender does not match with the gender assigned to that person at birth giving no freedom to Transgenders to identify themselves as male or female. The provisions restrict the scope and confines their right to identifying themselves as a third gender only.

86. The aforesaid element has given intensification to a major issue that a number of laws and statutes in the country of Wonderland are based on gender, firstly, The Hindu Succession Act, and secondly, multiple sections of the WPC. Further, The Code of Criminal Procedure, 1973, Protection of Women from Domestic Violence Act, 2005, The Sexual

⁶⁹Supra note 5

Harassment of Women At Workplace (Prevention, Prohibition, Redressal) Act, 2013, Hindu Adoptions and Maintenance Act, 1956 for discernible exemplars.

87. It is submitted that there is an absence of clarity under this Act as to how these laws will be applicable to the transgender people. That, thus, the Transgender Act is in dissonance with multiple laws of the country that are dominant in obtaining justice. The impugned Act is an obstruction to justice as people from the transgender community have no remedy for a lot of transgressions. In a landmark case of *Ashby v. White*⁷⁰, the Court observed, “When the law clothes a man with a right he must have means to vindicate and maintain it and remedy if he is injured in the exercise and enjoyment of it, and it is a vain thing to imagine a right without a remedy for want of right and want of remedy are reciprocal”. In another case *Shiv Shankar Dal Mills v. State of Haryana*⁷¹ it was stated “The law ubi jus ibi remedium, becomes from this point of view something more important than a mere tautological proposition.

88. Taking reliance on the aforesaid case, the mere reason of according the Transgender with a third gender has given rise to ambiguity in regards to gender based laws. It is submitted they have no remedy hence no right arises for them. This is a violation of transgender people’s right to equality under Article 14 and Article 15 of the Constitution. As stated in *Ahmedabad St. Xavier’s College Society v. State of Gujarat*⁷², Art. 14 of the Constitution enshrines upon the State not only the duty to protect against inequality but also entails a positive obligation to create a just, fair and equal society that ensures equality of status and opportunity to all citizens. The articles enshrined in the Constitution, are designed not only to prevent disabilities of minorities but also create positive rights for them.

⁷⁰Ashby v. White, (1703) 92 ER 126

⁷¹ Shiv Shankar Dal Mills v. State of Haryana, (1980) 2 SCC 437

⁷²Ahmedabad St. Xavier’s College Society v. State of Gujarat, AIR 1974 SC 1389

89. In addition to all of the aforesaid elements, there subsists lack of affirmative action to help the transgender community. While the Bill prohibits discrimination, it does not explicitly include a definition of discrimination that covers the range of violations that Transgenders face. However, despite the Supreme Court in 2014⁷³ directing the government “to extend all kinds of reservations in cases of admission in educational institutions and for public appointments” to transgender persons, the Bill does not contain any provisions related to affirmative action.

90. It is well-settled in the case of *OnkarLal Bajaj v. Union of India*⁷⁴ that the equal treatment to unequals is nothing but inequality. To put both categories tainted, and the rest at par is wholly unjustified, arbitrary, and unconstitutional for being violative of Art.14 of the constitution. That unequals cannot be clubbed and there cannot be a clearer image of discrimination and stigmatisation that a respectable community faces and this Act only furthers such segregation. The court in the case of *Swamy v. Director, CBI*⁷⁵, The court retrieved that a statute cannot be struck down by mere reason of it being unreasonable or arbitrary, it has to be coupled with invalidity on grounds of Constitutional provisions. Keeping in focus that such Act is based upon unreasonable elements and provides for utter and complete disregard to fundamental rights of the Constitution, it is submitted that such Act is Ultra vires the Constitution.

⁷³ Supra note 2

⁷⁴Onkar Lal Bajaj v. UOI, AIR 2003 SC 2562

⁷⁵Swamy v. Director CBI, (2005) 12 SCC 752

CONTENTION 5: THAT TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) ACT, 2019 IS ULTRA VIRES THE CONSTITUTION

91. It is humbly submitted before this Honourable Court that The Trafficking of Persons (Prevention, Protection and Rehabilitation) Act, 2018 (hereinafter referred to as ‘The Act’) is unconstitutional as it is violative of fundamental rights. The Act is in violation of Articles 14, 15, 19(1) d, and 21 of the Constitution.

92. It was stated in the case of *Namit Sharma v. Union of India*⁷⁶ that, every law has to pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. A law which violates the fundamental right of a person is void. In such cases of violation, the Court has to examine as to what factors the Court should weigh while determining the constitutionality of a statute.

5.1 THAT THE ACT IS IN VIOLATION OF THE FUNDAMENTAL RIGHTS

5.1.1 That the Act is in violation of Articles 14 and 15

93. It is submitted that the Hon’ble *Supreme Court*⁷⁷ has observed that Art. 14 to Art.16 enshrine the principle of equality and absence of discrimination. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms⁷⁸.

94. That chapter V of The Act sheds light on Search, Rescue and Post Rescue Activities. The entire chapter completely disregards the consent of an individual to be rescued and rehabilitated. Sections 16 and 17 of the Act forcefully segregate rescued individuals by putting them in protection homes. That treating consensual workers in the same light as

⁷⁶ Supra note 61

⁷⁷ Dasaratha v. State of A.P, AIR 1961 SC 564

⁷⁸ Supra note 2

others, is a clear violation of Art 14 and 15. Institutionalization of victims in homes, ostensibly for their protection and rehabilitation without giving importance to consent of the individual is antithetical to fundamental rights and re-integration.

95. Furthermore, The United Nations Special Rapporteur on Trafficking in Persons⁷⁹ illustrates that “detention of victims of trafficking is incompatible with a rights-based approach to trafficking because it inevitably compounds the harm already experienced by trafficked persons and denies them the rights to which they are entitled”

5.1.2 That The Act is in violation of Articles 19(1)d, and 21

96. It is submitted that Article 19(1)d of the Constitution guarantees to every citizen the right to move freely throughout the territory of Wonderland and to reside and settle in any Part of the of the Territory.

97. In contravention to such rights, the Act detains an individual in the name of rehabilitation without any regard for voluntary sex workers and beggars. That sex work and begging is the means of livelihood for certain communities including but not limited to the transgender community. The Supreme Court⁸⁰ has on this aspect enunciated that institutionalization is a not a necessity for rehabilitation.

98. Art. 19(1)(g) provides the citizens of Wonderland, the right to practice any profession, or to carry on any occupation, trade or business. Occupation has been defined as an activity of a person undertaken as a means of livelihood or a mission in life.⁸¹ And hence covers the scope of ‘sex work’ and ‘begging’.

⁷⁹ United Nations Special Rapporteur on Trafficking in Persons, ohchr.org, (28th February 2019, 2:00pm), <https://www.ohchr.org/en/issues/trafficking/pages/traffickingindex.aspx>

⁸⁰Buddhadev Karmaskar vs State of West Bengal (2011) 8 SC 289

⁸¹T.M.A Pai Foundation v. State of Karnataka (2002) 8 SCC 481

99. Article 21 of the Constitution guarantees the Right to life and personal liberty to all its citizens. That in the case of *Olga Tellis and Ors v. Bombay Municipal Corporation and Ors*⁸² it was observed “*Deprive a person of his right to livelihood and you shall have deprived him of his life.*” It is submitted that the act in question by restricting ‘sex work’ and ‘begging’ violates both Art 19 and Art 21 of the Constitution. A person’s hard earned livelihood cannot be taken away from him without him being proved an offender. Taking away means of livelihood and hard earned money of an individual is a gross violation of his rights under Article 21.

5.2 THAT THE ACT MANIFESTS ARBITRARINESS

100. It is submitted that the *Supreme Court*⁸³ has perused that “the exercise of power should not be made against the spirit of the provisions of the basic policy of the constitution, otherwise it would tend towards arbitrariness’

That Arbitrary as “*depending on individual discretion; founded on prejudice or preference rather than on reason or fact.*”⁸⁴

101. It is submitted that the Rule of law is true antithesis of arbitrariness.”⁸⁵ *Rule of Law is embodied in the Constitution- in the ideals enshrined in the Preamble and in Part III. Over time, the Constitution has been interpreted by the judiciary in a manner so as to afford a liberal interpretation to the principle. Rule of Law has been held to mean due process and a just, fair and non-arbitrary procedure.* The Act enlists an ambiguous and unclear provision which constricts the due application of the said act.

⁸²Olga Tellis and Ors v. Bombay Municipal Corporation and Ors, (1985) SCC (3) 545

⁸³Ram Chand & Ors. Vs. Union of India & Ors (1994) 1 SCC 44

⁸⁴Black’s Law dictionary

⁸⁵ADM Jabalpur v. Shiv Kant Shukla (1976) AIR 1207

102. It is submitted that in general parlance offences that are graded higher must be more culpable, But while trafficking under Section 370, IPC, which attracts punishment of 7-10 years, 'Aggravated forms of trafficking' attracts the punishment of mere 10 years. Moreover, trafficking for the purposes of begging is considered "aggravated", whereas trafficking for sexual exploitation is not included in such definition. Furthermore 'slavery and practices similar to slavery', which capture the most atrocious forms of coercion and bondage under domestic and international law, have also been termed as simple trafficking.

103. Furthermore, the act also provides that the Investigating Officer while forwarding the report of an offence punishable with imprisonment of more than 2 years, if suspicious about the source and origin of the money, may submit an application before the designated Court for freezing the accused person's bank accounts and any money held by him. This provision is arbitrary and vague as it is entirely based on the suspicion of the IO.

Hence, in light of such provisions and their counter affects, the act can be said to be arbitrary.

PRAYER

Wherefore, in light of the facts of the case, issues raised, arguments advanced and authorities cited, Counsel on behalf of the Respondent humbly prays before the Hon'ble Supreme Court of Wonderland, to kindly adjudge and declare that:

1. That the Accused, Mr Romsay Bolton is guilty under the charges of S.377 and S.306, Wonderland Penal Code, 1860.
2. That Section 375 and Section 376 of the Wonderland Penal Code are *ultra vires* the Constitution and hence, void in nature.
3. That the Wonderland Transgender Persons (Protection of Rights) Act, 2019 is *ultra vires* the constitution and hence, void in nature.
4. That the Wonderland Trafficking of Persons (Prevention, Protection and rehabilitation) Act, 2019 is *ultra vires* the constitution and hence, void in nature.

And pass any such order, judgment, or direction that the Hon'ble Court deems fit and proper in the interests of justice.

For this act of kindness, the Counsel for the Appellant as is duty bound shall forever pray.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sd/-

THE COUNSEL FOR THE APPELLANT/PETITIONER