

Being a mother is a fortune to women in and around the world. While many dream to be mother at some point in their life, there are many others who cannot achieve the same. There are women suffering from reproductive diseases who cannot carry a child in their womb and hence, sort to adoption, surrogation, or IVF procedures. While there are few women who lose the dream even after almost chasing it till the end. Annually, there are lakhs of miscarriages in India, resulting from assorted reasons.

Miscarriage is often conferred in a negative light internationally. There is just a miniscule difference which separates a genuine miscarriage from an illegal one. Miscarriage has been mostly defined by medical jurists. One definition on the internet is "expulsion of the ovum or embryo from the uterus after conception"[1]. As per Mr. Batuk Lal, miscarriage or abortion means "the pre-mature expulsion of the product of conception, an ovum of the foetus from the uterus at any period of pregnancy before the full term is reached." [2] Miscarriage, abortion and pre-mature labour are now accepted as a synonymous term.[3] However, it is to be also noted that all miscarriages are abortions but not all abortions are miscarriages.

Indians might consider abortion or miscarriage as a religiously wrongful act where it is said that the soul inside the aborted or miscarried foetus would suffer from a major karmic obstacle. It is said that such soul's spiritual progress drifts back to the cycle of life, death, and rebirth.

While recently we have witnessed that anti-abortion laws were passed in the USA. It stirred up two different opined mind-sets, wherein one set of people believed that abortion is murder while others believed that the same is the reproductive right of a woman.

In terms of Indian Law, miscarriage or abortion is not defined under any statute. So how is "Miscarriage" defined under Indian Laws?

It has been rephrased to a more acceptable and humane way - "Medical Termination of Pregnancy." One of the major reasons for the same was for protecting medical professionals from facing the backlash of the society for suggesting abortion for patients, who cut close with life and death. This term is well-accepted by the society since medical practice concerns with such termination only under necessary circumstances.

However, miscarriage has been talked about in the Indian Penal Code, 1860[4] (hereinafter, IPC or "the Code") and Medical Termination of Pregnancy Act, 1971[5] (Hereinafter, MTP). Sections 312[6] to 318[7] of Chapter XVI in the Indian Penal Code deals with offences related to miscarriage. The latter was enacted to legitimize certain pregnancy terminations, only by registered medical professionals for safely conducting such process. It permits a woman to legally undergo abortion if the pregnancy or the birth of the child would lead to injury to her mental or physical health, or if the foetus is diagnosed to be abnormal, or if the pregnancy occurred due to rape or failure of contraceptives.

In this Research Paper, focus has been primarily laid on Section 313 and Section 318 of the Indian Penal Code, 1860 which deal with "Non-consensual miscarriage" & "Concealment of birth by secret disposal of dead body", respectively.

Section 313, Indian Penal Code, 1860

Section 313 of the Code states that:

"313. Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with the child or not, shall be punished with imprisonment for life, or with imprisonment for either description for a term which may extend to ten years, and shall also be liable to fine."

To elucidate this section in simple words, whosoever commits the miscarriage of a woman without the said woman's rightful consent, as mentioned under Sec. 313 of the Indian Penal Code, 1860, whether the said woman is quick with the child or not, such individual shall be subjected to a punishment in the form of life imprisonment or imprisonment for a term of either description of ten years. The individual shall also be liable for fine which shall be depending on the decree passed by the Court of Law. A woman is said to be quick with a child when the mother can feel the movements of the fetus, which refers to an advanced stage in the mother's gestation period.

Such offence is a cognizable and non-bailable offence. Cognizable offence refers to one where the accused can be arrested by the police without an arrest warrant and the police, in such a case, can initiate investigations on the matter without the word of the Court. Section 2(c) of the Code of Criminal Procedure (hereinafter, CrPC) defines cognizable offences which is defined as offences with punishments of life imprisonment, imprisonment for a period of 3 years, and death punishment.

Non-bailable offences are for those offences which are heinous in nature such as for culpable homicide, murder, rape, etc. Moreover, the offence under Sec. 313 can be filed by the victim or even the relatives or friends of the same.

It is to be highlighted that the offence is one where there should be the woman's consent, and the onus lies on the accused's shoulders. Usually proving such onus, becomes difficult because if the accused is found guilty during the investigation, then the responsibility of proving innocence before the Court lies on the accused itself. Under this section, the individual carrying out the process of unsolicited abortion is alone punished[8].

Moreover, if the informant has strong evidences and arguments where he or she proves that the accuse has deliberately caused such abortion and poses a malicious intention, the latter is punished as the Court deems fit.

In the case of *Tulsi Devi v. State of UP*[9], the accused, a woman, had kicked a pregnant woman in her abdomen which ended up in the latter having a miscarriage. The accused woman's conviction u/ Sec. 313 was thus, sustained.

In the case of *Hasi Mohan Barman & Anr. v. State of Assam & Anr.*, 2007[10] it was held that when the complainant and the accused have been married, the sentence is deducted to the period already undergone in the best interest of justice. The conviction is maintained but the sentence can be reduced where such appeal is accordingly partly allowed. Herein, the Gauhati HC modified the sentence of five years' imprisonment w/ a fine of Rs. 7000/- imposed on both appellants punished u/Sec. 313 r/w/Sec. 34 of CrPC, to that of three years' imprisonment and Rs. 5000/- each.

In a renowned case[11] from the High Court of Maharashtra, the accused, who had illicit relations with a woman and impregnated her in the course of their relationship, had caused miscarriage of the same woman to leave no imprints of his illicit relationship. He was convicted by the High Court under Section 313 as well.

In the case of *Pranab Kanti Das v. State of West Bengal*[12], the accused, who was a doctor, administered a pill to his pregnant wife having full knowledge that the same will result in miscarriage and such miscarriage took place. The accused was charged u/ Sec. 313 of IPC.

In the case of *Shantaram Krishna Karkhandis v. State of Maharashtra*[13], it was held that the vital element of accusing u/ Sec. 313 should be the lack of consent of the prosecutrix.

The Code provides that if miscarriage is caused voluntarily in good faith with the intention of saving the life of the mother, then such person would not be held liable. Good faith has been defined under Section 52 of the Code.[14] If the act is not done in good faith, the person shall be held guilty under Sec. 312[15].

Section 313, read with Section 312, states that if the offence under the latter is committed by the accused without the due consent of the woman, then the accused can be held liable with life imprisonment, which even includes medical practitioners with malicious intentions towards not saving the mother's life. When medical professionals are found guilty under Section 312 or Section 313.

Such act cannot be excusable even under Section 8[16] of the Medical Termination of Pregnancy Act, 1971, which provides termination of some pregnancies by Medical Practitioners holding a valid Practice License. Consequently, if a medical practitioner causes miscarriage under IPC in good faith he cannot be convicted for that act.[17]

However, in cases where there is no iota of proof or evidence of causing miscarriage of a woman, the accused cannot be held liable under these aforementioned sections. The same can be substantiated with the case of *Pato Devi v. State of Bihar*[18], wherein the accused had no idea of the informant being 6-months pregnant and had allegedly assaulted the informant as per the facts of incident. The same was held true even in the post-mortem reports of the dead fetus where the investigators could not put a gander on the reason of abortion. The Court held that the appellants or the accused cannot be held liable under Section 313 or Section 315[19] of the Code.

The charge for Section 313 is as follows:

I (name and office of Magistrate, etc.), hereby charge you (name of the accused) as follows:

That you, on or about the – day of ----, at -----, voluntarily caused AB (the woman who miscarried) then being with child to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said AB, and thereby committed an offence punishable under Section 313 of the Indian Penal Code and within the cognizance of the Court of Session."[20]

Section 318, Indian Penal Code, 1860

Section 318 of the Code states that:

"318. Concealment of birth by secret disposal of dead body. —Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavors to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

In simple words, Section 318 implies that individuals who are accused with secretly masking off or concealing the death of a child by burying or disposing off the body of the child, whether he or she dies before or after or during the birth, in question can be tried under this section and will be subjected to two years of imprisonment, or fine, or both.

Under this Section[21], the concealment of a foetus of four months is not an offence but when it crosses the sixth- or seventh-month mark, it can be held as an offence. However, the concealment of the former is chargeable under Section 312[22] and 511[23] of the Code. The offence is deemed complete when after the birth of the child, dead or alive, is concealed by any means whatsoever.[24]

This offence is mostly committed when the child is illegitimate or where the pregnant mother is not married and is subjected to the discerning social stigmas and judgments. Irrespective of the gender, generally the woman faces backlash, abandonment, and disparagement. Under such conditions, coupled with lack of economic stability, many women resort to abortions in an unhygienic and surreptitious manner.

Such abortions are usually done by quacks or midwives and the mother's life gets subjected to a lot of risk. Most cases are tilted towards the birth of girl children since a female is considered a curse or a burden in the Indian society.[25] We often witness in the newspapers that such foetuses are thrown into the river, cremated, or left for the wild animals to feed on.

However, this Section has the following elements: [26]

1. The disposal of child's body in secrecy:

The prime principle of this provision under the Indian Penal Code is to prevent infanticide, specifically the female infanticide. The first element deems that the dead body of the child must be masked off in secrecy for a person to be charged under this provision. The Registration of Births & Deaths Act, 1969 mandates that every birth and every death ought to be registered with the local authorities or municipalities, for

which a respective birth or death certificate will be issued. This is done to keep a record of all such births and deaths. Moreover, it aids in various civil transactions.

2. "Dead Body" of the Child:

This provision specifies that the child should not be in a foetus or an embryo but a grown and fully formed human child for the charge of burying the same to be imposed. In *Radha v. State of Rajasthan*[27], it was held that if the body of the child was alive and not dead, then the offence under Section 318 would not be constituted but the act would attract other offences as specified under the Code.

In the case of *State v. Kehari Singh* [28], the accused was charged under Section 318 but the Court held that he cannot be held liable under the same for reasons that the birth of the child was known to the people of the village where the accused lived and hence, the intention of the accused was not to conceal the birth of the child. Similarly, when the child took birth in a hospital and was left unattended by the nurses for 24 hours, it was held that the birth of the said child was publicized and thus, cannot amount to concealment of birth.[29]

3. Intention of Concealment or Attempting to Conceal said birth:

The last element specifies that the accused, to be charged under this Section, must conceal, or try to conceal the birth of the child in question.

All these elements need to be established, absentia of either of the three would not amount to an offence under this Section.[30]

The offence under Section 318 is bailable, cognizable, and non-compoundable.

Non-compoundable offences are those wherein the crime is so heinous that the complainant does not possess the right of taking back the charges levied against the accused. Bailable offence refers to such offences which the arrested person can be bailed out of the prison after submitting the bail report to the police authorities under whom the person is held in jail. Moreover, this offence is triable by a First-Class Magistrate. Cognizable offences have been explained in the previous chapter of Section 313.

Conclusion & Suggestions

We are at an era where people prefer taking the risk of abortion for keeping their pregnancy in dark. This shows how much our society has staggered in terms of mentality and providing support to another human being. It is a shame as a society that many people end up losing their lives, including that of the unborn children, who had no role to play from the first. Killing off unborn or alive children where the fault does not lie on them is clearly a heinous crime.

While such points need to be kept in mind, we should also remember that people might end abusing the provisions provided under these Acts[31]. There are many ways in which one can wrongfully use these provisions which were laid down by our law-makers with good intentions.

The Fifth Law Commission has suggested a five-pointer list for reforming the already existing laws for protecting children[32].

Out of which the following deal with Section 313 & 318 of the IPC:

1. Perceiving the maximum punishment provided for in Sec.313 for causing miscarriage without woman's consent (i.e., Imprisonment for life) is 'excessive', it suggested that it should made punishable by 'rigorous imprisonment for a term which may extend to ten years, and fine.'
2. Section 318, penalizing the concealment of birth by secret disposal of dead body, should be deleted as the concealment of birth can be punished under the law relating to registration of births and deaths, and killing of a child after birth and concealing the birth to suppress the killing can be punished under Section 201 of the IPC.
3. A new Section 318 (in place of the proposed deleted Section 318) making illegal omission to provide, without any lawful excuse, necessities of life, knowing that the omission will endanger the life or seriously impair the health of that person, should be added.[33]

However, the irony is such that none of these recommendations found place by in the eyes of the law makers. We ought to remember that such crimes leave a bad impression in the minds of the people residing in the society, which is extremely harmful and would not render reliable results in the future. Hence, merely formulating laws will not help us achieve what is laid down in the Statutes.