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Supreme Court, Division Bench

Honourable Judge Anil Kumar Sinha

Honourable Judge Dr. Kumar Chudal

Order

O78-WH-0008

Case: Habeas Corpus

Advocate Ajaya Shankar Jha "Rupesh" on behalf of a coded name Phulmaya, Daughter of coded name Ram, held in Child Correction Home, Sanothimi, Bhaktapur for trial of a case, a permanent resident of Ward No 2 of Karjanha Municipality of District 16..... Petitioner

**Versus**

District Court of Siraha.....1Respondent

The summary facts of the writ petition, presented under the jurisdiction of this court under the Article 46 and clauses (2) and (3) Article 133 of the Constitution of Nepal, is as follows:

#### **Chapter of Facts**

- 1 **The petition reads as:** A common charge-sheet framed and lodged before District Court of Siraha with Case No: 075-CI-0462 on 12 July 2019 by the prosecution party against the minor Phulmaya along with adult defendants including Mr. Shyam Kumar Mahara, Birendra Kumar Shah, Ranjit Kumar Yadav accusing the minor Phulmaya being an accomplice for an offence under Sub-sections 1, 2, and 7 of Section 219 of National (Muluki) Criminal Code 2074 (2017, AD) and punishable under Subsection 1,2 and 3 (a) of the same Code demanding

Coded Name Phulmaya Versus District Court of Siraha, Case: Habeas Corpus, 078-WH-0008

the minor Phulmaya to be punished under Section 36 (4) of the Children Act 2075 (2018) on the basis of First Information Report submitted by coded name Mirchaiya Y. While the submission of the prosecution where Honourable District Judge Mr. Yogendra Prasad Shah holder of the jurisdiction for the cases brought against children was present, Honourable District Judge Mr. Phanindra Prasad Parajuli of the opponent District Court heard the case beyond jurisdiction and issued an order to the accused minor to be held in child correction home for trial. The order issued to hold the minor into correction home is against the provisions of the Constitution, current laws and special law, the Children Act and the precedents and judicial principles set by the honoured Court in the cases of similar subject matters.

Section 30 of the Children Act 2075 provides for Juvenile Courts and Juvenile Benches in each of the District Courts are established until Juvenile Courts. If adults are also involved in a case where a child is involved, the case of the child to be separately presented to, processed and heard by Juvenile Court. Same Act commands to dispense the case within hundred and twenty days, so the case was required to be finalised by 12 November 2020.

Therefore, as the rights and entitlements rendered by Articles 16 (1), 17 (1), 18 (1), (2) and (3), 20 (3) and (9) and 39 (2) and (8) are infringed, let the present petition be heard which is lodged in accordance with Rule 34 of the Supreme Court Regulations, and let a writ of habeas corpus be issued in accordance with Rule 37 and Article 133 (2) freeing the minor coded name Phulmaya immediately from the illegal detention.

- 2 An order by this court was issued dated 29 July 2021 asking the respondent what has happened to this? why a writ order is not be issued as demanded by the petitioner? And, issued an order to give a show cause notice (electronic) attaching a copy of the petition through electronic medium to submit response in writing with reasons within the office time of 01 August 2021. Taking a note to the sensitivity of the petition where it deemed the case is to be decided with immediacy, prescribing the date of hearing of the case on 02 August 2021, giving a notice to the Office of the Attorney General about date of hearing.
- 3 **The written response of the District Court Siraha reads as:** Though the accused coded name Phulmaya denied the offence before this court, has given statement admitting that s/he had told the three persons including defendant Birendra Kumar Shah to have forceful sex with the victim coded name as Mirchaya Y and the other defendants had done the same. By the evidence received at the immediate time including his/her statement taken by the investigating officer, victim's statement and the confirm FIR, victim was raped by other defendants turn by turn after having the mouth closed and tying hands of the victim in collusion of defendant coded name Phulmaya and s/he was sent to Child Correction Home, Bhaktapur for the trial of the case under the order of this court dated 15 July 2019. An arrest warrant was issued by the court in the name of the fled defendant Birendra Kumar Shah for his appearance to the court within 35 days by the performed notification on 13 August 2019 but he neither attended the court on given timeframe nor he could be arrested, the victim also failed to attend the court to give testimony though invited for so time and again and further notification was issued under Section

112 (4) (3) of National (Muluki) Criminal Procedure Code 2074 to the absentee Birendra Kumar Shah on 18 April 2021 but performance report has not been received yet on the notice delivered due to COVID 19 Pandemic. Moreover, while the issuance of the order for detaining the defendant in Child Correction Home on 15 July 2019, Honourable Judge Mr. Yogendra Prasad Shah was not present at the court as mentioned in the petition as he attended his office only on 14 August 2019 and the order was issued by the then present judge Honourable Mr. Phanindra Prasad Parajuli. Additionally, the case is being heard by the Juvenile Bench of this court and a hearing of the case is set for 01 August 2021. Therefore, no order is to be issued as to the demand of the petitioner, let the petition be quashed.

- 4 **An order issued by this court on 02 August reads as:** In the present petition, it has been claimed that a case that is to be tried by Juvenile Bench is tried by the bench otherwise. Therefore, what really happened in this case? Which of the judges were assigned to try the cases of children at the time of the charge-sheet of the present case was registered on 12 July 2019 and then after? Whether or not the case was tried and trial detention order was issued by the judge other than assigned one was present at the court? If so, what procedure is applied to ensure regulating such proceeding? What is the position of the case against the petitioner at present? Response is to be called from the District Court of Siraha within a week.
- 5 **Written response from District Court of Siraha dated 09 August 2021 reads as:** Assigned judge for chairing the Juvenile Bench while the registration of charge-sheet the case of forceful intercourse of Government of Nepal by FIR of Mirchaiya Y versus coded name Phulmaya before the court on 12 July 2019 seems to be Honourable judge Mr. Sudarshan Raj Pandey. The case is seen tried by the Bench of Honourable Judge Mr. Phanindra Prasad Parajuli. After Honourable Judge Yogendra Prasad Shah attended the court on 14 August 2019, the case seems being tried by Juvenile Bench. Presently, an order has been issued by the same Bench that FIR presenter and the victims are asked to attend the court and the timed notice was issued but the accomplishment of the notification seems to be incomplete yet. Whether the notification is accomplished or not, a new notification timed for a week is to be caused accomplished and as the defendant Shyam Kumar Mahara has given statement to the court stating that he is at the age of 15 years, ask him to submit documentary evidence that discloses his age and to be presented as per rule.

#### **Chapter of the Order**

- 6 On the petition that has been presented as per rule having scheduled in a daily cause/case list for making a decision, pleadings made by learned advocates Mr. Ajaya Shanker Jha, Mr. Pankaj Kumar Karna and Ms. Bimala Yadav, on behalf of the petitioner, is heard as they argued that Section 30 of the Children Act 2075 provides for Juvenile Courts and Juvenile Benches in each of the District Courts are established until Juvenile Courts. Section 37 of same Act commands to dispense the case within hundred and twenty days, so the case was required to be finalised by 12 November 2020. If adults are also involved in a case where a child is involved, the case of the child to be separately presented to, processed and heard by Juvenile Court. Such mandatory

legal provisions are not followed in the trial of the case of the petitioner and the District Court Judge required to be instructed to follow the law as there has been found law and procedures are executed erroneously. The defence pleading made by learned Deputy Attorney Mr. Niranjana Sthapit is also heard as he argued that though there had happened some procedural errors that the case had to be heard separately by splitting and the case of defendant Phulmaya required heard by juvenile bench, the order made for holding him in detention at Child Correction Home is made by a competent district court and those have been corrected and by the date 01 August 2021; the provision for the disposal of the case within hundred and twenty days is a general provision not a mandatory one is clearly observable by the term "generally" held in said Section. Therefore, the detention at Child Correction Home cannot be said as illegal. The procedural errors made by the District Court of Siraha could be corrected through instructive order, therefore, no circumstance existed to issuance of a writ of habeas corpus.

- 7 In this, petition's claim seems release of the petitioner from illegal detention through an issuance of writ of habeas corpus as the case is tried by an otherwise Bench having no authority to try the case as the legal provision has mandated the case to be tried by the Juvenile Bench, the case has not been disposed yet beyond the timeframe fixed by law, and the defendant is held in detention against the norms of fair hearing; and the written response seems soliciting the quash of the petition with argument that the respondent court has not infringed rights and entitlements of the petitioner as other defendants have turn by turn made forceful intercourse with the victim having her hands tied and causing her mouth closed in the collusion of the defendant coded name Phulmaya presented along with the charge-sheet had been held in Child Correction Home, Bhaktapur by the order of the court dated 15 July 2019.
- 8 It is seen that following issues are to be decided on the petition's claim and written response's counterclaim after having heard the logical pleading arguments made by learned advocates representing petitioner and respondent both parties:
  - A. What sorts of the concern or relation existed between the norms of fair hearing guaranteed under Article 20 (9) and norms of child/juvenile justice realized by Article 39 of the Constitution of Nepal and the matters raised in the petition?
  - B. Cases to be tried by the Juvenile Bench can be tried by other Authority/Court or Bench assuming the jurisdiction or not?
  - C. The timeframe prescribed for the disposal/making decision of the case determined by law is to be followed mandatorily or not? and,
  - D. Whether or not a writ of habeas corpus is to be issued/ordered as demanded by the petition?
- 9 Considering on the first question, whereas in the preamble of the Constitution of Nepal it is mentioned fully committed to democratic norms and values including civil liberties, fundamental rights, human rights, and independent, impartial and competent judiciary and concept of the rule of law, it is clear that one of the aims

and objectives of the Constitution is a fair hearing as well. In the Constitution, there are some entitlements granted to the accused persons who are charge for criminal offences as their fundamental entitlements. These entitlements to criminal justice are established human rights. Provisions are found as "Every person shall have the right to live with dignity" stated in Article 16 (1) and "No person shall be deprived of his or her personal liberty except in accordance with law" stated in Article 17(1) of the Constitution. Likewise, fundamental entitlements are found guaranteed as "All citizens shall be equal before law. No person shall be denied equal protection of law" in Article 18 (1) and "No discriminations shall be made in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology, or on similar other grounds" in Article 18 (2); and "The State shall not discriminate citizens on the grounds of origin, religion, race, caste, tribe, sex, economic condition, language or region, ideology, or on similar other grounds" in Article 18 (3). Similarly, provisions are found in Article 20 (9) that "Every person shall have the right to a fair trial by an independent, impartial, and competent court or judicial entity" and "Every child shall have the right to education, health, maintenance, proper care, sports, entertainment and overall personality development from the families and the State" in Article 39 (2), and "Every Child shall have the right to juvenile/child-friendly justice" and thereby child-friendly family and State aimed justice is found to be ensured. Right to justice concerns with the personal freedom of a person accused for an offence. A judicial principle has been found set by this Court in a case of Advocate Som Prasad Luitel Versus including Government of Nepal, Office of the Prime Minister and Council of Ministers (Writ of Mandamus with No. 3275 of th Year/Sambat 2064, order dated 06 February 2008) stipulating that this entitlement is obtainable not only for citizens but also to every person existed in the nation and it is acquired entitlement to stop the illegal and arbitrary removal of personal liberties by the State. Having the principle's continuation, it has been further accepted as "right to justice is available right to all without making any discrimination naming Nepali citizen or alien citizen" in a case of Ram Bahadur Hamal Versus Including Department of Prison Management (NeKaPa 2067 Issue 4, Decision No: 8345) and by these, norms and values of fair trial/hearing are not an ordinary one but are of a special nature and it is necessary to observe them sincerely.

- 10 The provision of fair trial/hearing contained in Article 20 (9) has its own norms and values. Explanation of this is found in case Advocate Nilam Paudel Versus including Office of the Council of Ministers (NeKaPa 2067, Issue 10, Decision No: 8473) in detail. Right to a fair trial is recognized at universal level and included in the International Covenant on Civil and Political Rights (ICCPR) 1966 and accepted as equivalent of Nepali law under Section 9 of the Treaties Act 2047 may not be withdrawn or withheld by the State or the Government under Rule of Law and the accused even voluntarily could not make a waiver against it. The provisions of "All persons shall be equal before the courts and tribunals in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, every one shall be entitled to a fair and

public hearing by a competent, independent and impartial tribunal established by law" contained in Article 14 (1) and right to be tried and heard without unreasonable delay contained in Article 14 (3) of the Covenant have recognized the norm of fair trial/hearing and due process for the hearing of case.

- 11 The above mentioned judicial norms and values are found incorporated in the provision of Article 126 (1) of the Constitution of Nepal that states "Powers relating to justice in Nepal shall be exercised by courts and other judicial bodies in accordance with this Constitution, other laws and recognized principles of justice". While viewing in this context, under the provision of *priority to be given for the best interests of children* Section 16(1) of the Children Act 2075 (2018) stated that "The officials of every organization and institution that carries out activities related to children shall adopt necessary child friendly process by giving priority to the best interests of children, while doing every activity" and Subsection (2) stated "It shall be the responsibility of everyone to instantly help children whose life is in risk" and Section 20 has directed to some special issues to consider stating that "A person, official and Juvenile Court involved in dispensing juvenile justice shall take into account the following matters, in the course of dispensing justice, in addition to the other matters as provided elsewhere in this Act". Similarly, for proving establishment of Juvenile Court, Subsection (1) of the Section 30 provides: "The Government of Nepal may, on recommendation of the Judicial Council, form the required number of Juvenile Courts to originally proceed, try and settle the offence committed by the children and Subsection (2) states: "The notice of formation of the Juvenile Courts pursuant to sub-section (1) shall be published in the Nepal Gazette, and the territorial jurisdiction and seat of such Courts shall be as mentioned in the same notice"; Subsection (3) states: "A juvenile bench shall be formed in each District Court for the proceeding, hearing and settlement of the offence to be dealt with the juvenile court until the Juvenile Court is formed under sub-section (1)"; Subsection (4) provides: "The juvenile bench referred to in sub-section (1) shall consist of the following members: (a) District Judge, (b) Social service provider, (c) Child psychologist or child specialist"; and Subsection (6) states: "Notwithstanding anything contained in sub-section (1), if an adult person is involved, along with the child, in any offence, the matter shall be proceeded, tried and settled by the Juvenile Court in the case of the child, and the matter shall be proceeded, tried and settled pursuant to the prevailing laws in the case of the adult person by establishing a separate case file"; and for the provision of transfer of the cases to Juvenile Court, Section 33 provides: "If any child has been accused of offence before the commencement of this Act and the case is being originally tried by the District Court or other body pursuant to the prevailing laws, the case shall be transferred to the concerned Juvenile Court after the commencement of this Act" and these are observed as the legal provisions. Similarly, in relation to the provision on duration (timeframe) of the disposal of the case, it is found a legal provision that Section 37 of the same Act states: "Notwithstanding anything contained in the prevailing laws, the Juvenile Court shall generally dispose case within one hundred twenty days from the date of filing of the case and the proceeding and adjudication of such a case

- shall be made on the basis of continuous hearing".
- 12 The recognized principles of fair trial/hearing discussed above are to be followed by the all stakeholders working for juvenile justice dispensation and there seems no circumstances to deny with this. As it has been seen that the justice dispensation of the cases related to children is to be maintained on the basis of recognized principles of fair trial/hearing as well as other addition rights and procedures availed under juvenile justice, it is indisputable that it is mandatory to follow the norms as the norms of fair trial/hearing enshrined in Sub Article (9) of Article 20 and norms of the juvenile justice enshrined in Article 39 of the Constitution of Nepal have direct concern and relationship.
  - 13 Considering on the second question, i.e., Cases to be tried by the Juvenile Bench can be tried by other Authority/Court or Bench assuming the jurisdiction or not?, Sub-article (3) of Article 20 of the Constitution of Nepal stipulates that "Any person who is arrested shall be produced before the adjudicating authority within a period of twenty four hours of such arrest, excluding the time necessary for the journey for the place of arrest to such authority; and such person shall not be kept in detention except on the order of such authority" and it is obviously observable that the Constitution itself has guaranteed that person may not be held in detention unless the adjudicating authority order to do so. An equivalent provision is existed in the Article 10 of the Universal Declaration of Human Rights that states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" which has emphasized on determination and adjudication of a criminal prosecution or charge must be accomplished by a competent tribunal.
  - 14 On the other side, Nepal has been a party to Convention on Rights of the Child 1989 which exited as an international law for the protection and promotion of child rights and juvenile justice. likewise, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985 has proved for notification to the parents on the taking children in conflict with law into a control, informal procedures (diversionary) to be adopted, the detention for investigating period is to be taken as last resort and applied for the shortest length of the time as far as possible, provided legal aid during investigation period, and the proceedings should be further in the participation and presence of the parents and so on. Children Act 2075 (2018) is found legislated and enforced as relatively naturalizing/incorporating the provisions of the international laws including the Convention on the Rights of the Child. The Act indicates establishment of Juvenile Courts and the cases are to be adjudicated at District Courts by having constituted Juvenile Bench until Juvenile Courts are established. It is found that Guidelines for Action on Children in the Criminal Justice System 1997 has provided the children who have not attended the age for criminal responsibility should not be subjected to criminal investigation, Juvenile Courts to be established for trying and adjudicating juveniles, and diversion or other initiatives as alternatives to traditional criminal justice system are to be developed.

15 Viewing above stated background, and jurisdiction of trial and adjudication is determined by law, it has been imperative to overview the legal provisions in the Children Act 2075 existed as special Act on the jurisdiction, proceedings and adjudicating cases where juveniles are involved with accusations of committing delinquent acts; and provisions contained in Sections 30,31, 32 and 33 required to be overviewed, which are as:

**30. Formation of the Juvenile Court:** (1) The Government of Nepal may, on recommendation of the Judicial Council, form the required number of Juvenile Courts to originally proceed, try and settle the offence committed by the children.

(2) The notice of formation of the Juvenile Courts pursuant to sub-section (1) shall be published in the Nepal Gazette, and the territorial jurisdiction and venue of such Courts shall be as mentioned in the same notice. (3) A juvenile bench shall be formed in each District Court for the proceeding, hearing and settlement

of the offence to be dealt with the juvenile court until the Juvenile Court is formed under sub-section (1). (4) The juvenile bench referred to in sub-section (1) shall consist of the following members:

(a) District Judge, [L]  
[SEP]

(b) Social service provider, [L]  
[SEP]

(c) Child psychologist or child specialist. [L]  
[SEP]

(5) The qualification, appointment, remuneration and other conditions of service of the social service provider, child psychologist or child specialist referred to in clauses (b) and (c) of sub-section (4) shall be as prescribed.

(6) Notwithstanding anything contained in sub-section (1), if an adult person is involved, along with the child, in any offence, the matter shall be proceeded, tried and settled by the Juvenile Court in the case of the child, and the matter shall be proceeded, tried and settled pursuant to the prevailing laws in the case of the adult person by establishing a separate case file.

**31.Exercise of jurisdiction of the Juvenile Court:** The exercise of jurisdiction of the Juvenile Court shall be made as prescribed.

**32. Proceeding by the Juvenile Court:** Even if the child attains the age of eighteen years during the proceeding of the case, such case shall be proceeded, tried and settled by the Juvenile Court itself. [L]  
[SEP]

**33. Cases to be transferred to the Juvenile Court:** If any child has been accused of offence before the commencement of this Act and the case is being originally tried by the District Court or other body pursuant



to the prevailing laws, the case shall be transferred to the concerned Juvenile Court after the commencement of this Act.

By these legal provisions, it is seen that initial proceedings, hearings and adjudicative disposal of the delinquent acts committed by juveniles are to be carried out by Juvenile Courts and until such Courts are established, they are to be carried out by Juvenile Benches constituted in District Courts. Constitution of Juvenile Benches those have seats at District Courts does not mean that the cases of delinquent acts committed by juveniles may be initiated, heard and disposed by District Courts as parallel initial jurisdiction. The provisions as of Subsection (5) of Section 30 that specifies to maintain separate files and lodge the cases in Juvenile Bench and District Court separately where children and adults are involved jointly in the offence; of Section 32 that even the juvenile reaches at the age of 18 years during the cases is under proceeding that is to be dealt by the Juvenile Bench itself; and of Section 33 that the cases of the juveniles existed in the proceedings at District Courts are to be transferred to Juvenile Benches, it is clear that District Courts rendered jurisdictions to initiate proceedings and hear the other cases as prescribed by laws and Juvenile Benches provided for the Juveniles/children are different judicial entities with different concepts.

16 In an order issued on 04 May 2021 by this Court in a habeas Corpus case of Advocate Ajaya Shankar Jha on behalf of Roshan alias Prasanta Adhikari versus Kathmandu District Court with Writ No: 077-WH-0304, it is seen a judicial principal has been propounded that: "as it is seen the case had been lodged against the petitioner before Kathmandu District Court on 14 August 2018 and then Act was effective at that time. It is observed that Section 55 of then Act had provided that juvenile cases to be dealt by Juvenile Bench. The Children Act 2075 (2018) was promulgated on 18 September 2018 by repealing that Act and prior to the commencement of the Section 33 of the later Act as it is found mentioned that the cases of underwent in the proceedings against juveniles for delinquent acts under the current laws at District Courts or else bodies as initial jurisdiction shall be transferred to Juvenile Courts by the commencement of present Act, and by virtue of that there was mandatory provision for the cases existed in other bodies or courts prior to the commencement of the Act required to be heard by Juvenile Courts (Benches); hence, the proceedings of the cases of the delinquent acts committed by the juveniles required to be initiated, heard and disposed only by Juvenile Courts (Benches).

17 On the basis of the above mentioned constitutional and legal provisions, international practice and interpretation made by this Court, this Bench could not agree upon the pleadings made by Deputy Attorney on behalf of the respondent with the argument that other judge of the same court may take jurisdiction to a case even in the condition where a judge of a District Court is assigned for exercising the jurisdiction of the Juvenile Bench. In the context where legal provisions are explicit as Subsection (1) of Section 16 of the

National Civil Procedural Code 2074 provides: **"In order for a court to proceed, hear and adjudicate a case, the court shall have jurisdiction to that effect pursuant to law"**. and Subsection (2) of the same provides: **"Any proceeding, hearing, order or verdict made in the course of a case by a court devoid of jurisdiction shall be void"**; the cases to be heard by Juvenile Bench is to be heard by the bench in particular or by the judge assigned for the bench.

18 Considering to the third question, i.e., the timeframe prescribed for the disposal/making decision of the case determined by law is to be followed mandatorily or not? It is observed that the Constitution and the current laws have accepted the norms of fair trial/hearing essentially and speedy justice is also one of the components of the norms. Article 14 (3) (C) has recognized that **"hearing should be without unreasonable delay"**. Section 26 (1) (E) of the Children Act 2075 provides **"to acquire speedy and fair justice from Juvenile Court"** as a right and the Section 37 under the title **"Period for disposing of the case:"** mentions **"Notwithstanding anything contained in the prevailing laws, the Juvenile Court shall generally dispose of a case within one hundred twenty days from the date of filing of the case and the proceeding and ~~the~~ adjudication of such a case shall be made on the basis of continuous hearing"**. Here while exacting the meaning of terms "shall dispose" can be observed as mandatory whereas the term "generally" has covered the exception. Rule 21 (1) of the Juvenile Justice Dispensation (Procedures) Regulations 2076 (2019) has additionally stated that the hearing of the cases shall be undertaken in a manner that the rights available to the juveniles under Section 26(1) of the Act in the process of hearing are executed.

19 In relation to the timeframe of finalizing adjudication by the authorizes of adjudicating the cases, taking the issues contained in Numbers 13, 14 and 15 of the Chapter of the Management of the Court of then National Code (Muluki Ain), in a case of habeas corpus of Writ No: 0070 of the Sambat 2066 of Shankar Shah Vs District Administration Office Dhanusa, this Court has given interpretation as: It is found that authorities performing judicial functions have a determined time period to conclude and finalize any cases brought before and if obstructed by any reason to dispose the case in time, the same is to be referred to the body that entertains the appeal thereto, and to conclude the case mandatorily as sanctioned. The fact of mandatory state of the legal provisions is also reflected by the overall objective of the provision. A judge owing responsibility adjudication must accept interminable truth that these provisions of National Code are not kept as showcase ornaments and these have judicious value and are dependent to the judicial conception and these are open commands for all who are empowered to administer the adjudication (justice). Legislators while constituting a particular Section or Number of in law legislate that by realizing the utility and inevitability of the same and the justice dispensing authority should espouse the law literally binding self within the ambit or limit of current law in adjudicating. Likewise, the judicial principle set out in a case of Man Singh Danggi Vs Government of Nepal (NeKaPa 2075 Issue 7 Decision Number 10056) stating

- "any authority body or an official created by law should perform functions as prescribed by law. In a situation where the law prescribes for a fixed time period and process, that timeframe and process requires to be followed compulsorily", where the legislature has provided a specific time period for giving verdict, it seems that the relevant authority/body is obligated to complete the task of justice dispensation compulsorily.
- 20 The time period to take decision in a case relates with the condition of the trial. When a person is under detention or in Child Correction Home or under the control of State for a trial, the legislature determines the time period for finalizing the adjudication while formulating law with a view of being inclined by the objective that the freedom of the person should not be deprived of for uncertain time period. Such provisions should not be believed as decorative ones. Taking a person under detention or in Child Correction Home or under the control of State for a trial relates with the punishment probable to be awarded to that person. The period spent in detention or custody or Correction Home for the investigation and trial of a case is deducted from the punishment set out by adjudication. No provisions are observed in current laws that if such person is acquitted judicially, the physical and mental pain suffered and social tag and the deprivations from the opportunities of situation of freedom are restored or compensation thereof are available. Moreover, it is not our judicial normative value that any person should suffer from the punishment prior he is convicted. Therefore, it is necessary that the adjudicator must be aware and alert on the timeframe prescribed by the relevant law by fixing the specific time period for disposal of the case with a view that no one should suffer a detention, Correction Home or control of State for a long time for trial for a long period as serving punishment prior to the disposal of the case. It cannot be accepted as a norm that the accused person should bear the burden of the failure of functional performance of a body or an authority in a prescribed time period.
- 21 Timeframe, law of limitations and time period for the disposal is fixedly provided for a suit at law. As there is a norm of fair trial that same procedures are applicable for both parties of the case, i.e., plaintiff and the defendant, it may not be compatible with the fair trial norms to take a double standard of assumption that the adjudicating body or authority is immune from the procedures set by the same Act. So, it seems appropriate to assume that the adjudicator is assigned with the responsibility to adjudicate the case within the fixed time period by the same law and procedures in the case having a harmony to the provisions for the parties of the case that the failure of performing tasks given within the period as instructed by the court with timed notifications or submission of rejoinder or written responses could not be entertained due to law of limitations or calculation of time period.
- 22 In this context, the mentioning of the case is to be adjudicated within hundred and twenty days though keeping the term "generally" in the same in the provision as "Notwithstanding anything contained in the prevailing laws, the Juvenile Court shall generally dispose of a case within one hundred twenty days from the date of filing of the case and the proceeding and [redacted] adjudication of such a case shall be made on the basis

of continuous hearing" contained in Section 37 of Children Act 2075, seems that it has envisioned that there could be a procedural delay as an exception. However, the preamble of the Children Act 2075 has put the best interest of children as a priority, Section 16 mentioned more on that and Section 24 has stated that no child shall be detained in the course of trial and no bail or guarantee shall be demanded from him or her; it seems provided that a juvenile may be kept in Child Correction Home for the trial in an exceptional circumstance. "Holding a child in detention or imprisonment may be only as a measure of last resort and for the shortest appropriate period of time" has been also set as judicial principle by this court in a case of Udaya Shaker Mandal Vs District Court of Surkhet and others (NeKaPa 2075, Issue 1, Decision No: 9930, p. 78) and by this as well the term "generally" contained in Section 37 seems as directly related to the condition of the trial of juvenile of that case. If any juvenile is held under control of State and taken there for longer period that creates deprivation of the liberty of the child. When juvenile is convicted for an offence, sentence determined, there are a lot of alternatives to adjourn it in terms of implementation under Subsection 6 of the Section 36. The duration of the time prescribed by the law is to be viewed in the relativity of this in cases of trial juveniles under trial who are held in detention, Correction Home or control of the State. It can be assumed that it would not be a best interest of child when s/he is kept under control of State beyond the period prescribed for adjudicative disposal.

- 23 Now, considering the fourth question, i.e., whether or not a writ of habeas corpus is to be issued/ordered as demanded by the petition? the constitutional provision contained in Sub-Article (1) of Article 17 that "No one shall be deprived of his personal liberty except in accordance with law" appears as considerable. The clause "Except in accordance with law" denotes in a manner consistent to law. The interpretation made by this Court in case of Krishna Kumari Shrestha on behalf of Prem Chaulagain Vs His Majesty's Government, Ministry of Home Affairs and others (NeKaPa 2061, Issue 2, Decision Number 7332) that "it is seen that Article 12 (1) of the Constitution of Kingdom of Nepal 2047 (1990) has guaranteed right to freedom to all citizens stating any person shall not be deprived of his personal liberty except in accordance with law. The clause "except in accordance with law" is applied in the said Article 12 (1). The clause except in accordance with law incorporates due process of law. As both substantive and procedural aspects are covered in due process it is imperative to obey both substantive and procedural due processes compulsorily. Among those two processes, if absence of any one of them is observed such proceeding may not be regarded as consistent with law" appears relevant. Similarly, in a case of Bijaya Raj Tuladhar Vs Kathmandu District Court and others (NeKaPa 2075, Issue 10, Decision Number 10108) Full Bench of this Court has held that a writ of habeas corpus is issued, if someone is held in detention in an unauthorized manner or without fair hearing/trial beyond the proceedings and order of other than the authorized official or by similar measures.
- 24 No dispute appears that the petitioner Phulmaya is a juvenile or a child. The prosecution seems to be brought against the juvenile along with other adult persons on through a single charge-sheet on 12 July

2019. Subsection (6) of the Section 30 of the Children Act 2075 has provided that **"Notwithstanding anything contained in sub-section (1), if an adult person is involved, along with the child, in any offence, the matter shall be proceeded, tried and settled by the Juvenile Court in the case of the child, and the matter shall be proceeded, tried and settled pursuant to the prevailing laws in the case of the adult person by establishing a separate case file"** and in a situation where such provision exists, separate charge-sheet for the petitioner juvenile and separate charge-sheet for other adult accused were essential to be lodged and if such had not happened the Court had to ask for separating the charges and manage hearings by separate Benches; however, it has not been so but heard the case by single charge-sheet and also single detention order has been found issued and it is also seen from the letter of Issuance No: 1053 dated 09 August 2021 of Siraha District Court that the detention order is issued by honorable judge who is not assigned for Juvenile Bench and hearings were carried out by such judge for time and again is also reflected by the presentation dates of hearing details of the Siraha District Court.

25 Such as in the present case the minor petitioner held in detention is observed as held in detention by the function of the Court for more than two years of period because of not being tried and heard in the period in accordance with Section 37 of Children Act 2075 as a result of not being tried by the authorized Bench that exercise basic rights of juvenile justice and in a situation where best interest of the child has been guidance of juvenile justice, the detained condition of the petition could not be considered a reasonable. Therefore, it is hereby asserted that the petitioner is to be freed from the detention by virtue of a writ of habeas corpus in accordance with Rule 37 of the Supreme Court Regulations, 2074 presently, keeping it the case would be as decided in the finally adjudicated.

26 Now, if the petitioner is not to be held in detention or in Child Correction Home for other cases, let information should be given to the patron or lawyer of the petitioner to present the petitioner to District Court of Siraha for the purpose of entrusting the guardian of the juvenile for care with a condition that the guardian cause the appearance of the juvenile to the Court when the Court asked for the same. Moreover, as the condition of hearing undertaken by the District Court of Siraha without upholding the laws including the Constitution and recognized principles of juvenile justice has been observed as mentioned above, let the District Court of Siraha be ordered in writing mentioning that now onward, proceed and dispose the cases where children are involved by observing the fundamental provisions of juvenile justice existed in current laws. Let the files be handed over to the Record Section by removing from the roster of the writ petitions.

Signature  
Judge

I agree upon the above judgement

Signature  
Judge

Bench Officer: Nirajan Pandey

Computer Operator: Bishnu Devi Shrestha

Done on Wednesday, 27<sup>th</sup> day of Month of Sauna of Sambat 2078, i.e., 11 August 2021.