

Supreme Court, Division Bench

Honourable Justice Hari Prasad Phuyal

Honourable Justice Dr. Kumar Chudal

Judgment

Date of Judgment: 2079/11/21 (corresponding to 5 March, 2023)

Case: Homicide

075-CR-2303

Appellant/Plaintiff: Nepal government through the First Information Report filed by Police

Vs.

Respondent/Defendant: Durga Bahadur B.K., son of Shashidhar B.K., resident of Parbat District former Pang Village Development Committee Ward No. 8 currently Kusma Municipality Ward No. 1 currently in detention at the Prison Office in Parbat

075-CR-2379

Appellant/Defendant: Durga Bahadur B.K., son of Shashidhar B.K., resident of former Pang Village Municipality Ward No. 8, currently Kusma Municipality Ward No. 1 currently in detention at the Prison Office in Parbat

Vs.

Respondent/Plaintiff: Nepal government through the First Information Report filed by Police

076-RC-0048 (For Sanction)

Appellant/Plaintiff: Nepal government through the F.I.R. filed by Police

Vs.

Respondent/Defendant: Ambika Kandel, daughter of Bhumi Raj Kandel, resident of former Pang Village Municipality Ward No. 8 currently Kusma Municipality Ward No. 1 currently in detention at the Prison Office in Parbat

- In the offenses resulting from unprotected sexual activities during the period of adolescence, the rights of the child or the adolescent must also be taken into consideration. Provided, the

offenses resulting from unprotected sexual activities are not observed leniently and where the minors or the adolescents are incarcerated for a longer period during their youth, then this will create problems in the social rehabilitation of such minors or adolescents. Rather than terming the pregnancy resulting from unprotected sexual relationships during the adolescent period as illegal or immoral, they should rather be viewed as an unsafe and negligent sexual relationship.

(Para No. 15)

- The foetus does not have an independent existence and its existence lies within the mother's womb. In the case of Laxmi Devi vs. the State, it has been established that provided the interest of the foetus is to be considered then such interest lies with the mother. The March 8 Principles in particular Principle 14 states that “no one may be held criminally liable on the basis that their conduct is alleged to be harmful to their own pregnancy” should be considered seriously and provided foetal infanticide is deemed to be a punishable offence then even a minimal sentence considering a women’s autonomy, social environment and reproductive rights would fulfil the objective of the law.

(Para No. 19)

On behalf of Plaintiff Nepal government: Learned Deputy Attorney General Dr. Tek Bahadur Ghimire

On behalf of the Defendant Durga Bahadur B.K.: Learned Advocate Gopal Prasad Sharma

Precedents Cited:

- Nepal Law Reporter, Decision No. 10665\
- Nepal Law Reporter, Decision No. 8464

Relevant Laws:

- *Muluki Ain* (Country Code)
- Reproductive Health Rights Act, 2075
- Criminal Offences (Sentencing and Execution) Act, 2074

Court of First Instance Deciding the Case:

Honourable District Judge Dhruva Prasad Sapkota
Parbat District Court

Decision at the Appellate Level:

Honourable Justice Sheshraj Shivakoti
Honourable Justice Shri Hari Prasad Paudel
High Court Pokhara, Baglung Bench

Judgment

Justice Hari Prasad Phuyal: The brief fact and the judgment of the case presented pursuant to Clause 9 of the Judicial Administration Act, 2073 and Clause 145 of the Criminal Procedure Code, 2074, under the scope of appeal and sanction and falling under the jurisdiction of this court is as follows:

FACT SECTION

A police report dated 2074/5/16 (corresponding to 1 September, 2017) was submitted which reads as follows: that this police office was informed through the telephone by the local people that a corpse of a new born baby was found in the kitchen garden of the house belonging to Baburam Kandel located at Parvat district Kusma Municipality, Ward No. 1, Sidhali. Upon receiving the information, a police team under my command immediately reached the crime scene and completed the preliminary investigation including the post-mortem of the new born baby. During the investigation, 17 years old Ambika Kandel, daughter of Bhumi Raj Kandel, resident of Sidhali, Ward No. 1, Kusma Municipality, Parvat District, informed that she had an illicit relationship with 25 years old Durga Bahadur B.K., son of Sashidhar B.K., and wherein she had become pregnant. She further stated that she had repeatedly informed Durga Bahadur B.K. about her pregnancy wherein he informed Ambika to conceive the child and kill the child upon birth and threatened her not to reveal about the pregnancy to anyone and threatened her with dire consequences. Ambika Kandel further stated that since she was petrified she did inform anyone including her family members and on the night of 2074/05/16 (corresponding to 1 September, 2017) at around 24:30 hours, she started experiencing birth pangs and on the pretext of going to the toilet and approximately around 02:00 hours in the morning she gave birth to a baby boy in the toilet of her house. After the birth of the baby and as instructed by Durga Bahadur B.K. she cut the umbilical cord and smothered the child with her hand and realising that the child had stopped crying and knowing that the new born child had died she stealthily took the child and disposed the child in the kitchen garden of the house belonging to Baburam Kandel that was adjacent to her house and returned to her home. Having recorded these statements, Ambika Kandel was immediately taken into custody and Durga Bahadur B.K. was arrested from Durlung Chowk, Ward No. 7, Kusma Municipality of Parvat District and they have been presented along with this police report for necessary proceedings.

A cognizance report of the dead body was prepared on 2074/5/16 (corresponding to 1 September, 2017) which describes the following: that the body was located within the four boundaries covering the garden of Baburam Kandel in the north, a mule track going from Sidhali to Banau in the east, boundary land of Chattra Nath Kandel in the north and 19 feet 11 inch cow shed belonging to Baburam Kandel in the south located at Parbat district Kusma Municipality Ward No. 1 Sidhali, wherein the body of the new born baby was lying in the kitchen garden of Baburam

Kandel with its head facing north and feet east and the body was in a supine position and was covered with mud and ants.

A crime scene report was prepared on 2074/5/16 (corresponding to 1 September, 2017) describing the four boundaries of the crime scene which states the following: mule track going from Sidhali to Banau in the east, house of Bhumeraj Kandel in the west, house of Dhan Bahadur B.K. in the north and land of Bhumi Raj Kandel in the south located at Parbat district Kusma Municipality Ward No. 1. It was identified that within these four boundaries, approximately 17 years old Ambika Kandel daughter of Bhumi Raj Kandel had on 2074/5/16 (corresponding to 1 September, 2017) had given birth to a baby boy at around 02:00 in the morning and had killed the child

A deed of recovery had been prepared on 2074/5/16 (corresponding to 1 September, 2017) with the following descriptions: mule track going from Sidhali to Banau in the east, land of Bhumeraj Kandel in the west, land of Dhan Bahadur B.K. in the north and vacant land of Bhumi Raj Kandel in the west located at Parbat district, Kusma Municipality 1 Sidhali and within these four boundaries, and within the house of Bhumi Raj Kandel, the clothes worn by Ambika Kandel while giving birth to the child has been recovered.

The autopsy report states the cause of death as hemorrhagic shock due to hemorrhage from umbilical cord.

The deposition made by the defendant Ambika Kandel before the investigating officer on 2074/5/23 (corresponding to 8 September, 2017) reads as follows: that my home is located in Parbat district former Pang Village Development Committee Ward No. 2 currently Kusma Municipality, Ward No. 1, Pang Sidhali. I live with my mother and younger sister whereas my father lives separately with my step-mother. I am currently studying in Class 7 at Kharibot Govindanath Dev Sharma Secondary School located at Pang. I attend school when the school is in session and during the holidays I stay at home and help with household chores such as gathering of fodder and agricultural works. Since, the house of Durga Bahadur B.K., who was arrested along with me, is nearby my home we would often meet and engage in conversation. There was a rice mill near his house and since there is a small grocery shop in the rice mill he would often stay at the shop. I used to occasionally visit the shop to buy noodles and cookies or to grind rice at the mill. During these visits, Durga Bahdur B.K. would offer me noodles and cookies and used to mollycoddle me. He would also from time to time provide me with money and share his feelings and would also talk about marrying me. When I went to purchase things he would not accept the money given by me and would provide the items free of cost and upon returning from the shop he would also provide me with money. I also fell in love with him and I used to visit him at his shop even when I didn't have any work and he would also call me to meet him. He showed a lot of affection towards me. On 2073/09/10 (corresponding to 25 December, 2016), at around 14:00 hours I had gone to his shop to buy noodles and Durga B.K. was alone in the shop. Upon my arrival, he touched the sensitive parts of my body including my breasts and

private parts and made me lie down on the bed that was in the shop and slowly undressed me and without using any protective measures we both for the time had consensual sexual intercourse wherein he ejaculated his sperm inside my body. After our physical relationship, he consoled me and advised me not to worry and that he would shoulder the responsibility and offered me some noodles and gave me 500 rupees wherein I returned home. After that we would often meet and indulge in sexual intercourse in his shop or we used to meet in the fields. After our first encounter my menstrual cycle stopped and when I informed him he told me to smother and kill the child and throw it in the forest without letting anyone know about it and threatened to kill me if I informed anybody. I was frightened and stayed back at home with my mother and I would sleep in separate rooms. On the night of 2074/05/15 (corresponding to 1 September, 2017) after having dinner I went to my room to sleep. Approximately at around 24:30 hours, I started experiencing abdominal pain and in the early morning of 2074/05/16 (corresponding to 2 September, 2017) I went to the bathroom and while sitting there I gave birth to a live baby boy at around 02:00. After the baby was born, the baby started crying, and as instructed by Durga B.K. I smothered and killed the new born child and disposed the baby in the kitchen garden of Baburam Kandel's house and returned home and changed my blood-stained clothes and went to sleep.

The deposition made by the defendant Durga Bahadur B.K. before the investigating officer on 2074/5/23 (corresponding to 8 September, 2017) reads as follows: my house is located in Parbat district former Pang Village Development Committee, Ward No. 8, currently Kusma Municipality Ward No. 1 Pang Sidhali. I have known Ambika Kandel who was arrested along with me since her home is nearby. Since I own a small shop in the mill, Ambika would occasionally come over to buy goods and would sometimes bring corn and paddy to grind in the mill. When she used to come to my shop alone, I would sometimes offer her noodles and biscuits and talk to her affectionately and would also offer her some money and would confess my love to her and would also tell her that I would marry her someday. When she used to come to buy goods, I would give her the goods without taking any money and I would also give her money upon her return. She also fell in love with me and would come over to my shop even when she didn't have any work and she would call me to meet her. She loved me very much. On 2073/09/10 (corresponding to 25 December, 2016) at around 14:00 hours, while I was alone in my shop Ambika came to buy noodles. After she arrived, I closed the door of my shop and touched the sensitive parts of her body including her breasts, and private parts and made her lie down on the cot in my shop and undressing her we had consensual sexual intercourse without using any contraceptive measures and I ejaculated my sperm inside her vagina. Upon completing our sexual intercourse, I consoled her and told her not to worry and told her that I would shoulder all responsibilities and offer her some noodles and gave her 500 rupees. After that, we would often meet and have sex in my shop and we would sometimes also meet in the fields. After our first encounter she informed me that she had missed her periods. I used to tell her that she should kill the child after its birth and dispose it in the jungle without anyone knowing. As suggested by me, Ambika Kandel gave birth to the child and killed the child by strangling and severing the umbilical cord.

The document drawn by Baburam Kandel on 2074/5/25 (corresponding to 10 September, 2017) reads as follows: My home is in a place called Sidhali which is located in Parvat District, Kusma Municipality Ward No. 1. On 2074/05/16 (corresponding to 2 September, 2017) at around 8:00 am, after completing my household chores, I was on my way to cut fodder in the field and while passing through the kitchen garden located at the back of my house, I saw the dead body of a new born baby in the kitchen garden near my house wherein I informed the police and my neighbours. The police arrived and carried out an investigation of the body and I have heard that the new born baby was born out of wedlock between Ambika Kandel approximately 17 years of age and daughter of Bhumiraj Kandel and Durga Bahadur B.K. son of Sashidhar B.K. who resides in the same place and as instructed by Durga B.K. the child was killed by smothering and severing the umbilical cord. Therefore, Ambika Kandel who has been involved in killing the child and Durga B.K. who has been involved in inciting her to kill the child should be dealt pursuant to the law.

The document drawn by Huma Kandel on 2074/5/25 (corresponding to 10 September, 2017) reads as follows: when my daughter Ambika Kandel was arrested and interrogated, it was through the interrogation that I came to know that she had an illicit physical relationship with Durga Bahadur B.K. and upon conceiving had delivered a fully grown child and conniving with Durga Bahadur B.K. they had strangled and severed the umbilical cord and upon killing the child had disposed the child. I had noticed that my daughter Ambika Kandel had a belly bump at a very young age and at times she would inform us that she was having her monthly periods and therefore, I was not aware of this. Since, both of them have been involved in killing and disposing a child that was born through illicit physical relationship should be subjected to maximum legal actions.

On-site document drawn on 2074/5/25 (corresponding to 10 September, 2017) by Prakash Pun, Prakash Regmi and Bishnu Rijal reads as follows: that the local people had telephoned and informed the police of the findings of a dead body of a new born baby in the kitchen garden of Baburam Kandel's house located at Sidhali, Parbat district Kusma Municipality Ward No. 1 wherein the police upon receiving the information had arrived at the crime scene and carried out a preliminary inquiry including the examination of the dead body and during the course of inquiry, it was revealed by Ambika Kandel approximately 17 years of age and daughter of Bhumiraj Kandel resident of Sidhali, Parbat district Kusma municipality Ward No. 1 that she had an illicit affair with Durga Bahadur B.K. age 25 son of Sashidhar B.K. living in the same area and upon informing Durga B.K. about her pregnancy she informed that Durga B.K. advised her to kill and dispose the child without informing anyone and had threatened her with dire consequences and owing to the threat she had borne the child without letting anyone know about it and on 2074/05/16 (corresponding to) at approximately 24:30 she experienced abdominal pains and in the pretext of going to the toilet in the early morning (night) at around 02:00 she gave birth to a fully matured grown baby boy and when the child started crying she as instructed by Durga Bahadur B.K. smothered the child and cut the umbilical cord and without letting anyone know she disposed the child in the kitchen garden of Baburam Kandel's house. Therefore, Ambika Kandel who cut the umbilical cord and smothered and killed and disposed the child and Durga B.K. who had incited her to kill the child should be punished pursuant to the homicide.

A charge-sheet on behalf of the plaintiff Nepal government had been filed which sought for life imprisonment for defendant Ambika Kandel since she had committed an offence contrary to No. 13 (3) under Chapter 1 relating to Homicide under the *Muluki Ain* (Country Code) and likewise, where the other defendant Durga B.K. had instructed the defendant Ambika Kandel to kill and dispose the child upon its birth, and where the defendant has committed an offence pursuant to No. 13 (4) under Chapter 1 relating to Homicide, the defendant Durga B.K. should be punishment pursuant to No. 13 (4) of the said Chapter.

The deposition made by the defendant Ambika Kandel before the Parbat District Court reads as follows: the content of the crime scene report and the police report is true. As instructed by Durga Bahadur B.K. I had killed the child that was born through an illicit relationship with Durga B.K. The contents of the deed of recognisance of recovery report are true. The photographs attached with the case file are the photographs of the deceased child that I had given birth to and had killed. The contents of statement that I made before the authorized officer are correct and the signature on the document is mine. The contents of the crime scene document made by the people present are true.

The deposition made by defendant Durga Bahadur B.K. before the Parbat District Court reads as follows: I was not aware about the contents of the crime scene report. I had not gone to the crime scene and that the contents of the police report is false. I am not aware of the police report. I did not tell the defendant Ambika Devi Kandel to kill the child after its birth. I have been falsely accused. I have never had physical relationship with her. Since, I am a disabled person and I have been falsely charged to prove that I am an accused. I am not aware of the contents that have been made in the recovery recognisance report and I am also not aware of the photographs that have been attached with the case file. Although, the signature on the statement made before the authorized officer is mine, the contents of the statement is not mine. Since I was intimidated and coerced by the police, I signed the document without reading it. At that time, I was not aware as to what kind of statement had been recorded, and I have come to know about the contents of the statement today while deposing my statement before this court. The contents are false and the accusations made against me are false and I am innocent.

A detention order had been issued by Parbat District Court on 2074/06/01 (corresponding to 17 September, 2017) which reads as follows: pursuant to the prima-facie evidence obtained therein, the defendants cannot be deemed to be innocent and where the conditions pursuant to No 118 (2) of the *Adalati Bandobasta* (Court Management) is prevalent against the defendants and pursuant to the prima-facie evidence obtained therein they are hereby ordered to be detained until proved otherwise and a detention slip pursuant to No. 121 of the *Adalati Bandobasta* (Court Management) is hereby provided and are hereby ordered to be sent to the district prison office. The defendant Ambika Kandel while deposing before this court had stated her age to be 15 years and that she was studying in Class 7 of Shahid Govindnath Secondary School located at Pang, Parbat district Kusma Municipality Ward No. 1. The court hereby issues an order to submit the

form that was submitted during her admission in the school and at the expense of the government an order is hereby issued to the district prison office to conduct an age verification test at the Gandaki Zonal Hospital, Pokhara, Kaski. Where the investigation has been completed, an order is hereby issued to the district police office to present the defendants, the persons submitting their statement in the crime scene report and the doctor performing the autopsy to be present through the office of the District Government Attorney's Office for their deposition and to inform the defendants to present their witness.

The deposition made by police constable Nirmal Gaha before the Parbat District Court is as follows: "the contents of the crime scene and the police report are true. Upon receiving the information of the finding of an unclaimed dead body of a new born baby that was disposed in the kitchen garden of Baburam Kandel's house, I, along with my team proceeded to the crime scene and found the baby in a naked state with its mouth and dead body covered with ants. Upon carrying out an inquiry it was found that the defendant, Ambika Kandel through an illicit relationship with Durga Bahadur B.K. and had become pregnant and upon repeatedly informing Durga Bahadur B.K., he informed Ambika not to disclose the information to anyone and to kill and dispose the child upon its birth, wherein the defendant Ambika gave birth to a new born child in the toilet of her house on 2074/5/16 (corresponding to 1 September, 2017) and upon severing the umbilical cord, killed and disposed the child in the kitchen garden of Baburam Kandel's house which was later recovered by me and my team.

The deposition made by Prakash Pun, witness to the situational report before the Parbat District Court reads as follows: "that the contents of the statement made by me during the course of investigation and the signature affixed therein is mine. The defendant's house and my house are nearby. I came to know about the incident after a rumour that a child had been abandoned in the village. I do not know as to whether or not the new born baby was stillborn or was born alive. When we went to the scene the new born baby was lifeless. I do know as to whether or not the defendants Ambika Kandel and Durga Bahadur B.K., were in a close relationship.

The deposition made by police constable Keshab Prasad Sharma before the Parbat District Court is as follows: "the contents of the police report submitted on 2074/05/19 (corresponding to 4 September, 2017) and the signature affixed therein is mine. The body of the child was found in the kitchen garden of Baburam Kandel's house. The dead body was covered with ants, mud and dried foliage. The defendant Ambika Kandel had stated that since the defendant Durga Bahadur had informed her to kill the child upon its birth, she had given birth and killed the child in the toilet".

The deposition made by medical practitioner Dr. Milan Shrestha before the Parbat District Court reads as follows: "the post mortem report of 2074/5/16 (corresponding to 1 September, 2017) was prepared and submitted by me. The signature on the said report is mine. The umbilical cord of the child was not tied. Since the umbilical cord was not tied death occurred due to excessive

bleeding. While carrying out the post-mortem, it was observed that the diaphragm was found to be at the sixth level of the rib, the lungs were fully expanded and while carrying out the Hydrostatic Test, the lungs floated in water indicating that the child was born alive

The deposition made by Huma Kandel before the Parbat District Court is as follows: “the content in the document drawn during the course of the investigation and the signature affixed therein is mine. I came to know about the incident upon the arrival of the police from the District Police Office. My daughter used to leave the house saying that she was having her monthly periods. I was not aware that she was pregnant. I do not know as to whether or not the defendant Durga Bahadur B.K. is involved in the incident? I did not know anything”.

The statement recorded by Prakash Regmi before the Parbat District Court is as follows: “on the date of the incident I was in Kusma bazaar. I came to know about the incident through Facebook and the media. I did not go to the crime scene. I do not know as to whether or not the new born baby was stillborn or was born alive. I came to know that a new born baby was found dead in the village. I came to know about the intimacy of the defendants only after the incident. I do not know as to whether or not Durga Bahadur B.K. was involved in the incident”

The deposition made by Bishnu Rijal, a person attesting the situational report before the Parbat District Court is as follows: “the contents of the document drawn during the course of the investigation and the signature affixed therein are mine. I was in Kusma bazaar on the date of the incident. I came to know about the incident after the villagers informed me over the phone. I did not go to the place where the child was found. I do not know as to whether or not the new born baby was stillborn or was born alive. I do not know as to whether or not the defendants Ambika Kandel and Durga Bahadur B.K. had an intimate relationship”.

The deposition made by Seti B.K. witness of the defendant Durga Bahadur B.K. before the Parbat District Court is as follows: “my home is at an equal distance of 10 minutes from the homes of defendants Ambika Kandel and Durga Bahadur B.K. I have never witnessed any intimacy between the defendants Ambika Kandel and Durga Bahadur B.K. I saw the child disposed in the kitchen garden of my uncle's house. I did not know as to whether or not the child was disposed after killing it. I have never seen the defendants Durga Bahadur B.K. and Ambika Kandel promenading together. Durga Bahadur is handicapped and he should not be sentenced pursuant to the charge-sheet’.

The deposition made by Baburam Kandel before the Parbat District court reads as follows: “the contents on the document drawn during the course of the investigation and the signature affixed therein are mine. I had seen the dead body of the infant in my kitchen garden. We had informed the police and by the time they arrived, the body was covered with ants. I do not who commissioned the crime and disposed the body. I came to know about other details through the police investigation. I had never witnessed any attachment between Durga Bahadur B.K. and Ambika Kandel prior to the incident”.

The deposition made by Bhumiraj Kandel, witness of defendant Ambika Kandel before the Parbat District Court reads as follows: “my daughter Ambika Kandel's date of birth is 2059/04/15 (corresponding to 31 July, 2002). I do not know as to whether or not Ambika Kandel gave birth to a live child or whether the child was stillborn”.

The decision of the Parbat District Court dated 2075/02/22 (corresponding to 5 June, 2018) is as follows: that the defendant Ambika Kandel had confessed that she illegally conceived the child of another defendant Durga Bahadur B.K. and as instructed by him she had given birth to a matured child and had killed the child and where it has been proved beyond any reasonable doubt that the defendant has committed an offence contrary to No. 13 (3) under Chapter 1 relating to Homicide, the defendant pursuant to 13 (3) is hereby sentenced to life. However, considering her age, her adolescence, her confession and her cooperation with the judicial process and the circumstances leading to killing of the child to hide from public shame, the Bench deems that the life sentence imposed pursuant to No. 13 (3) under Chapter 1 relating to Homicide seems to be in extremity and therefore, the Bench pursuant to No. 188 of the *Adalati Bandobasta* (Court Management) of the *Muluki Ain* (Country Code) hands down a sentence of 10 (ten) years and submits the same for sanctioning. With regards to the defendant Durga Bahadur B.K., the defendant while deposing before the investigating officer has confessed to the commissioning of the offence and that the defendant Ambika Kandel while deposing before the investigating officer had confessed that she had conceived a child through an illicit relationship with the defendant Durga Bahadur B.K. and as instructed by Durga B.K. had given birth to a child and upon killing the child had disposed the child in the jungle and has corroborated and supported the statement made before the investigating officer in the court. Provided, the defendant Durga Bahadur B.K. had not had any physical relationship with the defendant, it would not be proper for the defendant Ambika Kandel to make such allegations. Where the other witnesses have not been able to state that the defendant Ambika Kandel had physical relationship with people other than the defendant Durga Bahadur B.K. it is evident that Ambika Kandel had conceived a child through illicit physical relationship with Durga Bahadur B.K. and that the defendant Durga B.K. had instructed Ambika Kandel to kill and dispose the child has been proved beyond any reasonable doubt and therefore, the defendant Durga Bahadur B.K. is hereby deemed to have commissioned an offence contrary to No. 13 (4) under Chapter 1 relating to Homicide under the *Muluki Ain* (Country Code) and the defendant pursuant to No. 13 (4) is sentenced to life.

An appeal petition was filed by the defendant before the High Court, Pokhara, Baglung Bench on 2075/04/25 (corresponding to 10 August, 2018) stating that the opponent Nepal government has not been able to claim and prove that the defendant was present at the crime scene and that the defendant had been involved in any activities, that there was no reason for the defendant to instruct the other defendant to kill the new born child and that the court merely relied on the statement of the co-accused Ambika Kandel and misinterpreted her statement, that pursuant to Clause 25 of the Evidence Act, 2031, the burden of proof lies on the plaintiff Nepal government but on the contrary the government has failed to prove the defendant's involvement. The defendant's statement before the court and the social circumstances were not taken into consideration and the defendant has been wrongfully convicted for life for an offence not

committed by the defendant, and therefore, the defendant requests the decision of the Parbat District Court be overturned and justice be served to the defendant.

On 2075/09/ 25 (corresponding to 9 January, 2019) an order had been issued by the High Court, Pokhara, Baglung Bench stating that the defendant Durga Bahadur B.K. pursuant to No. 13 (4) under the Chapter of Homicide of the *Muluki Ain* (Country Code) had been sentenced for life and that the other defendant Ambika Kandel pursuant to No. 13 (3) under the said Chapter was sentenced to life with confiscation of property. An appeal had been filed by the defendant Durga Bahadur B.K., whereas no appeal was filed by the defendant Ambika Kandel. Clause 40 (2) of the National Penal (Code) Act, 2074 (2017), does not provide any legal provision for life imprisonment with confiscation of property and pursuant to legal provisions prescribed under Clause 144(2) of the National Criminal Procedure (Code) Act, 2074 (2017), provided an appeal is filed by one defendant and an appeal is not filed by another defendant and where the decision on the appeal will render the judgment of the lower court to be affected in the case of the defendant not making the appeal, the high court hearing the appeal shall pass a judgment in accordance with the law and recording the reasons thereof also in the case of such defendant. Therefore, where the sanctioning and execution of punishment rendered by Parbat District Court is questionable, the High Court pursuant to Clause 140 (3) of the National Criminal Procedure (Code) Act, 2074 and Rule 112 of the High Court Regulation, 2073 hereby issues an order to notify the High Government Attorney's Office, Baglung and defendant Ambika Kandel to be present before the court.

An order by the High Court, Pokhara, Baglung Bench had been issued on 2075/10/8 (corresponding to 22 January, 2019) wherein the court had noted that the Parbat District Court on 2075/2/25 (corresponding to 8 June, 2018) had passed a judgment wherein pursuant to No. 13 (4) on the Chapter relating to Homicide under the *Muluki Ain* (Country Code) the defendant Durga Bahadur B.K. was sentenced to life and pursuant to No. 13 (3) on the Chapter relating to Homicide the other defendant Ambika Kandel was sentenced to life with confiscation of property. In lieu of the decision, a 70 day appeal summon was issued in the name of the defendant Ambika Kandel which was executed in person on 2075/4/14 (corresponding to 30 July, 2018). Where an appeal petition was not registered within the limitation period, the Bench hereby orders to register her case in the form of sanction and to present pursuant to the rules.

A judgment by the High Court, Pokhara, Baglung Bench had been made on 2075/10/28 (corresponding to 11 February, 2019) which reads as follows: that the Parbat District Court on 2075/2/22 (corresponding to 5 June, 2018) had pursuant to No. 13 (4) of the Chapter relating to Homicide under the *Muluki Ain* (Country Code) had sentenced the defendant Durga Bahadur B.K. to life, and where the decision is not consistent, the said decision to some extent is reversed and the defendant pursuant to No. 16 on the Chapter Relating to Homicide under the *Muluki Ain* (Country Code) is hereby sentenced to 10 (ten) years. With regards to the other defendant Ambika Kandel, the defendant before the investigating authority and the court had confessed in killing the child owing to public shame and had assisted in the investigation and where an appeal petition

had not been filed on her behalf, the court pursuant to No. 205 of the *Adalati Bandobasta* (Court Management) under the *Muluki Ain* (Country Code) can intervene and entertain the case. The defendant according to 2075/2/22 (corresponding to 5 June, 2019) decision had pursuant to No. 13 (3) on the Chapter Relating to Homicide under the *Muluki Ain* (Country Code) been sentenced to life along with confiscation of property. However, Clause 40 (2) of the National Penal (Code) 2074 (2017) prescribes that confiscation shall not be imposed for that offence after the commencement of this Act and therefore, the judgment of Parbat District Court to that extent is hereby reversed and the defendant is hereby sentenced to life. Considering the provisions prescribed under No. 188 of the *Adalati Bandobasta* (Court Management) and taking cognizance of the circumstances leading to the commissioning of the offence, her age, family conditions and the assistance provided by her during the investigation, the court deems it pertinent and appropriate to sentence the defendant to 7 (seven) years and pursuant to No. 188 under the *Adalati Bandobasta* (Court Management) the court hereby refers the case to the Supreme Court for sanction.

An appeal petition on behalf of the appellant plaintiff the Nepal government had been filed on 2076/01/30 (corresponding to 13 May, 2019) before this court. The appellant stated that the defendant Durga Bahadur B.K. pursuant to No. 13 (4) under the Chapter Relating to Homicide had been sentenced to life by the Parbat District Court. However, the High Court Pokhara, Baglung Bench reversing the sentence had reduced the sentence of the defendant and since the decision to reverse the sentence is contrary to the relevant laws and the established principles, the appellant seeks for reversal of the High Court decision and requests the court to sentence the defendant Durga Bahadur B.K. according to the sentence sought in the charge-sheet.

An appeal petition by the appellant defendant Durga Bahadur B.K. had been filed before this court on 2076/2/8 (corresponding to 22 May, 2019) stating the following: that the defendant had no reasons whatsoever to kill the new born child and that the defendant had not killed the child and neither had the defendant instructed and conspired with anyone to kill the child. The defendant has been wrongly accused of conspiring and instructing to kill the child and has been a victim of a crime that the defendant was never involved in and therefore, the decision of High Court, Pokhara, Baglung Bench dated 2075/10/28 (corresponding to 11 February, 2019) is contrary and inconsistent to the facts, laws, evidence and established principles and therefore, the appellant defendant requests the court to overturn the judgment and to acquit the defendant from the charges.

An appeal for sanction was registered in favour of the defendant Ambika Kandel.

It has been observed by this Bench that the decision of the High Court Pokhara, Baglung Bench dated 2075/10/28 (corresponding to 11 February, 2019) had been challenged by the plaintiff Government of Nepal, and an appeal petition had been filed seeking to reverse the initial judgment and punish the defendant pursuant to the claim sought by the plaintiff. Similarly, through case no. 075-CR-2379, the defendant Durga Bahadur B.K. had filed an appeal requesting

the court to overturn the said decision. Therefore, the Bench pursuant to Clause 140 (3) of the National Criminal Procedure (Code) Act, 2074 (2019) hereby directs to provide a notice to Nepal government and the defendant appellant to rebut the pleas of appeal.

Decision

The case appearing on the cause-list pursuant to the rules had been submitted before the Bench for decision. Dr. Tek Bahadur Ghimire, learned Deputy Attorney General on behalf of the plaintiff Nepal government argued that the defendant Durga Bahadur B.K. had instructed co-defendant Ambika Kandel to kill the new born baby that was born through their physical relationship, and since there were no grounds or reasons to falsely implicate the co-defendant Durga Bahadur B.K. as evidenced by the documents submitted in the case file, the High Court made an oversight regarding the role of the principal accused Durga Bahadur B.K. and therefore, the decision to impose a lighter sentence to the principal defendant is erroneous and the defendants should be sentenced pursuant to the original charge-sheet.

Learned advocate Mr. Gopal Prasad Sharma on behalf of the defendant Durga Bahadur B.K. argued that the opponent Nepal government has not been able to claim or prove that the defendant Durga Bahadur B.K. was present at the crime scene and that he had committed any act. He further argued that there was no reason for the defendant to instruct in killing the child and conviction on the basis of the statement of the co-defendant Ambika Kandel and sentencing the defendant pursuant to No. 16 under the Chapter of Homicide is unjustifiable and seeks the honourable court to reverse the decision of the High Court and to provide justice.

Upon hearing the arguments and deliberations made by the learned legal professionals from both the Parties and upon perusal of the case file submitted for sanction in favour of Ambika Kandel, it for this Bench to decide as to whether or not the decision of High Court, Pokhara, Baglung Bench is proper? As to whether or not the appeal petition submitted by appellant plaintiff Nepal government and another appellant defendant Durga Bahadur B.K. is tenable and as to whether or not the request for sanction submitted in favour of defendant Ambika Kandel is tenable?

2. While considering the verdict, it has been observed that a charge-sheet stating the following had been submitted: that the defendant Ambika Kandel of Parbat district Kusma Municipality Ward No. 1 Sidhali had conceived a child out of an illicit sexual relationship with co-defendant Durga Bahadur B.K. and upon repeatedly informing the defendant about the pregnancy, the defendant Durga Bahadur B.K. had instructed to kill the child and dispose it in the forest without letting anyone know about it. Accordingly, on 2075/5/16 (corresponding to 1 September, 2018) at around 24:30 hours, the defendant Ambika Kandel gave birth to a male child and when the child started crying she severed the umbilical cord and smothered the child with her hands and disposed the child in the kitchen garden behind the house of Baburam Kandel wherein the defendant Ambika Kandel had been charged under No. 13 (3) under the Chapter of Homicide under the *Muluki Ain* (Country Code) with life along with

confiscation of property and the other co-defendant had been charged under No. 13 (4) under the same Chapter for life.

3. The defendant Ambika Kandel pursuant to No. 13 (3) under the Chapter of Homicide under the *Muluki Ain* (Country Code) was sentenced to life with confiscation of property, however considering her age, and the background leading to of the offense, the court pursuant to No. 188 of the *Adalati Bandobasta* (Court Management) under the *Muluki Ain* (Country Code) had sentenced the defendant to 10 (ten) years whereas the other co-defendant Durga Bahadur B.K. pursuant to No. 13 (4) under the Chapter of Homicide was sentenced to life. However, the decision of the Parbat District Court was partly reversed by High Court, Pokhara, Baglung Bench wherein the defendant Ambika Kandel was sentenced to 7 (seven) years and the co-defendant Durga Bahadur B.K. pursuant to No. 16 under the Chapter of Homicide under the *Muluki Ain* (Country Code) was sentenced to 10 (ten) years. An appeal petition against the decision of High Court, Pokhara, Baglung Bench, was filed by the plaintiff, the Nepal government and the defendant Durga Bahadur B.K. before this court. Likewise, where an appeal petition in favour of defendant Ambika Kandel had not been filed, a review for validation of sanction had been submitted before this court.
4. Principal contention of the appeal of the appellant plaintiff Nepal government was that the defendant Durga Bahadur B.K. had instructed the co-defendant Ambika Kandel to kill the child that was born through their physical relationship and therefore, the defendant Durga Bahadur B.K. is the principal main defendant in this case and therefore, the defendant should be punished pursuant to the claims made in the charge-sheet. Likewise, the principal contention of the appellant defendant Durga Bahadur B.K. is that the defendant was charged merely on suspicion and assumption and that the defendant had no reason to kill the child and that the defendant had not instructed anyone to kill the child and that the defendant had not conspired with anyone and should be acquitted from the charges.
5. With regards to the recital of the appeal petition, the Bench observes that the case had commenced with the submission of the police report which states that based on the information provided by the local people about the finding of a dead body of new born baby in the kitchen garden of the house of Baburam Kandel located at Parbat District, Kusma Municipality Ward No. 1 Sidhali on 2074/05/16 (corresponding to 1 September, 2017) and upon reaching the crime scene and carrying out an inquiry, it was found that the defendant Ambika Kandel and co-defendant Durga Bahadur B.K. had physical relationship wherein the defendant Ambika Kandel conceived a child and upon the birth of the child and as instructed by the defendant Durga Bahadur B.K. had killed the child wherein the defendants Ambika Kandel and co-defendant Durga Bahadur B.K. had been taken into custody and have been submitted along with this report for necessary action.
6. The defendant Durga Bahadur B.K. while deposing before the court denies having given instruction to Ambika Kandel to kill the child after birth. He also denies to have maintained any physical relationship with her and states that he has been falsely accused. However, the

appellant defendant Durga Bahadur B.K. while deposing his statement before the investigating officer confesses in having an amorous courtship with the defendant Ambika Kandel and that they had consensual physical relationship resulting in the defendant Ambika Kandel being pregnant and upon being informed about the pregnancy, the defendant had instructed to kill the child upon birth and dispose it in the jungle without letting anyone know about it wherein Ambika had killed the child as instructed by the defendant.

7. The statement given by defendant Ambika Kandel before the investigating officer and the court corroborates the above statement wherein the defendant Ambika Kandel while deposing before the investigating officer and the courts states that she had an amorous relationship with Durga Bahadur B.K. and that they indulged in consensual physical relationship resulting in her being pregnant, and upon repeatedly informing Durga Bahadur B.K. about her being pregnant, he had instructed her to kill and dispose the child after its birth without letting anyone know about it. Thereafter, on the night of 2074/5/16 (corresponding to 1 September, 2017) at around 24:30, she experienced abdominal pain and went to the toilet wherein at around 2:00 in the night she gave birth to a fully grown male child and when the child started to cry the defendant Ambika Kandel as instructed by Durga Bahadur B.K. severed the umbilical cord and strangled the child and when the child stopped crying, the defendant stealthily returned to her home and went to bed.
8. During the investigation of the crime scene it has been noted that the dead body of a matured new born male child was also found in the kitchen garden located at the northern side of the house of Baburam Kandel and that the body was covered with ants and soil. Likewise, in the crime scene report, description of the four boundaries along with the toilet where the child was killed by Ambika Kandel, deed of recognisance containing the recovery of the clothes worn by the defendant while giving birth to the child, autopsy report confirming the cause of death due to haemorrhagic shock due to haemorrhage from the umbilical cord, the statements of Baburam Kandel, Huma Kandel, and police constable Nirmal Gaha and the statements of Prakash Pun, Prakash Regmi, and Bishnu Rijal made at the crime scene and before the court confirms to the commission of the crime. The defendant Ambika Kandel has confessed to the commission of the crime. On the basis of the nature of the crime scene and examination of the dead body, crime scene report and the deed of recognisance constructed at the crime scene corroborates the statement made by defendant Ambika Kandel before the investigating officer and before this court and therefore, it is evident that the defendant Ambika Kandel was involved in the murder of the new born child.
9. With regards to the appellant's contention regarding his ignorance in the involvement in the crime and that he should not be punished since he was not involved in the killing of the new born child, it is evident that although the appellant defendant has denied the charges in court, the defendant while deposing before the investigating authority had confessed in having an amorous relationship with co-defendant Ambika Kandel and also admitted that they had consensual physical relationship resulting in Ambika Kandel being pregnant, and upon

hearing about the pregnancy had instructed to kill the child upon its birth and has admitted to the allegations made therein. While deposing before the court, the appellant stated that the statement given before the investigating authority was not voluntary and was extracted through extreme torture. However, the defendant has not been able to state otherwise his signature on the confession sheet and the defendant has stated that there are no visible injuries on his body and neither the defendant has filed any complaint against such torture. Provided, a Party who seeks to refute or reject the statement on the grounds that it was extracted through torture must provide credible evidence to that effect. Where the confessions obtained cannot be proved otherwise then such confessions can be accepted as evidence.

10. In the process of resolving a dispute, provided there is a lack of direct evidence then conclusion should be drawn upon evaluating other circumstantial evidence. It is not necessary that eyewitness should be present in all criminal incidents. In this situation there is no alternative but to make a justifiable inference upon analysing, commenting and evaluating the statements made by the defendants in the case, the nature of the crime scene and post-mortem report and other relevant evidences. In this context, the defendant Ambika Kandel while deposing before the investigating authority and the court has stated that the defendant Durga Bahadur B.K. was responsible for her pregnancy and that as instructed by the defendant had killed the new born baby. This statement provided by Ambika Kandel is further corroborated by the crime scene, the nature of the dead body, the deed of recognisance, the post-mortem report and other relevant evidences. Likewise, the defendant, Durga Bahadur B.K. has not been able to provide any reasons as to why Ambika Kandel would make such false accusations. Therefore, despite the lack of eyewitnesses, upon analysis of the evidence attached with the case file, it is evident that the co-defendant Ambika Kandel had as instructed by the appellant defendant Durga Bahadur B.K. killed the new born baby and therefore the court cannot concur with the appellants contention.
11. With regards to the decision relating to the defendant Ambika Kandel, Article 38 of the Constitution of Nepal under the Right of Women prescribes that every woman shall have the right to safe motherhood and reproductive health. The “Right to Safe Motherhood and Reproductive Health Act, 2075” has been enacted and implemented to respect, protect, and fulfil this right and to make maternal and reproductive health services safe, qualitative, easily available and accessible. Under this Act, every woman has the right to reproductive health, the right to receive prenatal services, as well as parturition services and emergency obstetric and new born emergency care services. Where the constitutional and the legal provisions categorizes the obstetric services as essential services, there is a practice of giving birth in various government or community health institutions, or giving birth through the assistance of a midwife. With these provisions in place, it has been noted that the defendant Ambika Kandel by hiding her pregnancy for a long period of time and at a very tender age and without the assistance of any person and in a state of fear of public shame, mental trauma and the agony of inter-caste relationship had delivered a child in a toilet considered to be unsafe. In

order to avoid social stigma and public shame, the mother who gave birth to a child without contemplating the consequences of her act had killed the child upon its birth and has confessed to committing the offence and has been assisting with the judicial process from the very outset and therefore, provided the defendant is punished pursuant to the prevailing Act and laws the punishment would be deemed to be extreme and therefore, taking cognizance of the conditions therein handing down a lighter sentence would fulfil the purpose and objective of the criminal law.

12. The right to reproductive health is considered as an integral part of women's human rights. With regards to rights, the reproductive health is an important issue from the perspective of women's health. The right to reproductive health under women's human rights is addressed by various international human rights declarations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child to name a few. Article 3 of The Universal Declaration of Human Rights, Article 6.1¹ and 9.1² of the International Covenant on Civil and Political Rights, and Article 6.1³ and 6.2⁴ of the Convention on the Rights of the Child, relates to the life, liberty and security of women. Article 10.2⁵, Article 12.1⁶ and Article 12.2⁷ of The International Covenant on Economic, Social and Cultural Rights, prescribes rights relating to women's health, reproductive health and family planning and Article 10, 11.2, 11.3, 12.1 and 14.2 on the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, have made further provisions in this regard. Likewise, Article 16.1⁸ of the Convention has made special arrangements allowing the women to decide freely the right to give birth or not to give birth. Thus, international human rights conventions have recognized women's rights, including the right to reproductive health, and Nepal has approved and

¹ Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

² Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

³ States Parties recognize that every child has the inherent right to life.

⁴ States Parties shall ensure to the maximum extent possible the survival and development of the child.

⁵ The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

⁶ The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

⁷ The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

⁸ States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

ratified these Conventions and Declarations. Furthermore, the Constitution of Nepal has made provisions for the right to reproductive health, and has also enacted the Safe Motherhood and Reproductive Health Rights Act, 2075.

13. The present case is related to infanticide and the literal meaning of the term "*jatak*" means a new born baby. A new born or stillborn infant is referred to as a "*jatak*". The Pragya Nepali Dictionary also defines "*jatak*" as a new born infant; a new born baby.⁹ The offence relating to the killing a new born baby is termed as infanticide. In modern parlance, this crime is also referred to as killing of new born baby murder.¹⁰ In a separate Chapter under the 1990 B.S. *Muluki Ain* (Country Code), "*jatak mara*" has been termed as infanticide. However, this act has now been included as homicide under No. 18 under the Chapter on Homicide in the 2020 B.S. *Muluki Ain* (Country Code). In cases relating to infanticide, the courts in general has taken a liberal approach and has exercised No. 88 of the *Adalati Bandobasta* (Court Management) and treats such cases as an offence with lesser punishment.
14. The Infanticide Act, 1938 of the United Kingdom defines infanticide as the killing of a child under the age of twelve months by the mother whose balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child¹¹. Similarly, the Indian Penal Code, 1860 also prescribes for punishment for infanticide, which may be imprisonment or fine or both¹². Clause 184 of the National Penal (Code) Act, 2074 (2017) prescribes that a person having the custody of an infant, child, patient or elderly person shall not throw or abandon or shall not desert so as to cause danger to the body or life of such infant, child, patient or elderly person and failure to do so may result in imprisonment and fine¹³.
15. In offenses resulting from unprotected sexual activities during the period of adolescence, the rights of the child or the adolescent must also be taken into consideration. Provided, the offenses resulting from unprotected sexual activities are not observed leniently and where the minors or the adolescents are incarcerated for a longer period during their youth, then this will create problems in the social rehabilitation of such minors or adolescents. Rather than terming the pregnancy resulting from unprotected sexual relationships during the adolescent period as illegal or immoral, they should rather be viewed as an unsafe and

⁹ Pragya Nepali Extensive Dictionary

¹⁰ Prof. Dr. Rajit Bhakta Pradhanang and Dr. Laxmi Prasad Mainali, Introduction to Criminal Law, Lumbini Publication, pg. 638

¹¹ Infanticide, as defined by the Infanticide Act 1938, an Act of the Parliament of the United Kingdom, is when a mother causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child.

¹² Section 315 Act done with intent to prevent child being born alive or to cause it to die after birth.—Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

¹³ Clause 184 of National Penal Code, 2074

negligent sexual relationship. Principles¹⁴ have developed where pregnancy resulting from unsafe or unprotected sexual relationship and any acts that may affect one's pregnancy should not be categorized as a criminal offence and therefore, such issues should be interpreted with greater leniency.

16. Punishment relating to infanticide should be looked through the lens of rights relating to reproductive health. Giving birth to a child secretly and in unsafe surroundings is not only a result of our social structure, the society's rigid perspective on sexual relations, and strict legal provisions, but on the contrary should be considered pursuant to the right to safe and dignified motherhood. Principles relating to women's right not to give birth to an unwanted pregnancy are being developed and therefore, the notion of imposing harsher punishment for such acts cannot be considered to be in favour of women's freedom."
17. Through the F.I.R. of D.S.P. Homnath Adhikari et.al. and plaintiff Nepal government vs. 44 Kusma (9) name withheld residing at Child Reform Home, Bhaktapur (Nepal Law Reporter Magazine, Decision No. 10,665) the court opined that committing an act of infanticide by any age group of women, or by any group of children whose age has been determined by law or by women below the age of twenty owing to unsafe sexual relationship should be looked pursuant to the changes in the constitutional, legal and social perspective. The women involved in such acts are not cruel and criminal but on the contrary the male have been irresponsible and the women have been forced to be involved in such acts and there are circumstance where the women whether married or single are forced to hide, abandon or kill the child upon its birth. Although such acts committed by a women may be considered crimes relating to homicide, they should however be viewed with a humanitarian viewpoint and provided they are of tender age their developmental phase should be taken into consideration. To imprison women for committing a crime in a certain state of affairs may lead the women to be associated with dangerous criminals and this may inter alia pose a problem in her social rehabilitation. Where "social shame" has been the reason for a crime, this court has observed the tendency of imposing minimum possible sentence. Therefore, from a judicial viewpoint and considering the grounds and reasons relating to the offence and furthermore taking cognizance of self-dignity, right to equality, and changing identity and dynamics of women in the society, imposing a minimum sentences in such kind of offences will fulfil the objective of justice.
18. In the writ petition (Nepal Law Reporter Decision No. 8464) filed by Laxmi Devi Dhikta against the Nepal government Office of the Prime Minister and Council of Ministers et.al., this court ruled that that the decision to give or not to give birth to a child falls within the broader context of reproductive health and reproductive rights, and it also includes the right

¹⁴ The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty, March 2023, Principle 14, 15, 16.

to abortion in cases where a woman who is pregnant does not wish to continue with the pregnancy.

19. Furthermore, the right to reproduction should not be construed as an obligation to reproduce. Under the right to reproduction also lies the right not to reproduce. Just as the right to work implies the freedom not to work, the right to reproduction also encompasses the right not to reproduce. The court in the said case had analysed that the issue of abortion is a health-related problem, and that the right to health is a fundamental right equivalent to right to life. The Constitution of our country recognizes right to social justice, and the State's directive policies acknowledge the state's responsibilities in providing special protection to women's rights and therefore, a woman's right to abortion or problems related to pregnancy cannot be considered to be entirely a private matter and cannot be isolated from other social responsibilities. In the present case, the birth of a new born baby and its surrounding as well as the life, health, and reproductive rights of the woman committing the crime must be considered with moderation. The foetus does not have an independent existence and its existence is only within the mother's womb. In the case of Lakshmi Devi Dhikta vs. the State, it has been established that provided the interest of the foetus is to be considered then such interest lies with the mother. The March 8 Principles in particular Principle 14, states that "no one may be held criminally liable on the basis that their conduct is alleged to be harmful to their own pregnancy" Should be considered seriously and provided foetal infanticide is deemed to be a punishable offence then even a minimal sentence considering a woman's autonomy, social environment and reproductive rights would fulfil the objective of the law.
20. Based on the grounds, reasons, and the evidence assessed hereinabove, the District Court pursuant to No. 13 (4) under the Chapter of Homicide under the *Muluki Ain* (Country Code) and the High Court, Pokhara, Baglung Bench had pursuant to No. 16 under the Chapter of Homicide had sentenced the appellant defendant Durga Bahadur B.K. to 10 (ten) years wherein the defendant Durga Bahadur B.K. while deposing before the District court had denied his involvement, and in the absence of any eye witnesses, he was accused by the co-defendant and in the absence of any factual evidence or proof, it cannot be deemed that he was directly involved in the act of committing the offence of infanticide. Although, it is evident that the defendant was the reason for the defendant Ambika Kandel in being pregnant and where the new born baby upon birth had died, it can be deemed that the defendant was culpable in causing the death of the child and therefore the defendant pursuant to No. 17 (3) under the Chapter of Homicide is hereby sentenced to two (2) years in imprisonment.
21. The District Court pursuant to No. 13 (3) under the Chapter of Homicide under the *Muluki Ain* (Country Code) had sentenced the other defendant Ambika Kandel to life with confiscation of property. On 2075/10/28 (corresponding to 11 February, 2019) the High Court, Pokhara, Baglung Bench applying No. 188 of the *Adalati Bandobasta* (Court Management) under the *Muluki Ain* (Country Code) had sentenced the defendant to seven (7) years which the Bench opined to be just and appropriate The defendant Ambika Kandel

while deposing before the investigating authority had confessed to the crime and had assisted in the judicial process, and since the defendant was a minor girl below 18 years of age and upon being pregnant had committed the crime to avoid social shame, the defendant pursuant to the legal provisions prescribed in No. 188 of the *Adalati Bandobasta* (Court Management) under the *Muluki Ain* (Country Code) and Clause 18 (a) of the Criminal Offences (Sentencing and Execution) Act, 2074 and taking cognizance of the age of the defendant at the time of commissioning of the offence, circumstances relating to the crime, the social and economic conditions, the defendant Ambika Kandel is hereby sentenced to 2 (two) years which would fulfil the objective of the criminal justice.

22. The appellant defendants Durga Bahadur B.K. and Ambika Kandel during the course of investigation had been arrested on 2075/5/16 (corresponding to 1 September, 2018) and have been in detention till date (2079/11/21 corresponding to 23 February, 2023), and where the sentence imposed upon them has already been served, the defendants unless if they are to be detained in any other case or for any other reason, it is hereby ordered to inform the concerned prison office to release them immediately. Where an abridged version of the order had already been issued on 2079/11/21 (corresponding to 23 February, 2023) the court does not deem to state anything further. It is hereby ordered to do as per the particulars.

Particulars

As mentioned in the judgment section, the judgment passed by the High Court, Pokhara, Baglung Bench on 2075/10/28 (corresponding to 11 February, 2019) against the appellant defendant Durga Bahadur B.K. and other defendant Ambika Kandel has been partially reversed wherein pursuant to No. 17 (3) under the Chapter of Homicide under the *Muluki Ain* (Country Code) the defendant Durga Bahadur B.K. has been sentenced to 2 (two) years and defendant Ambika Kandel pursuant to the provisions prescribed under No. 188 of the *Adalati Bandobasta* (Court Management) of the former *Muluki Ain* (Country Code) and Clause 17 (a) of the Criminal Offences (Sentencing and Execution) Act, 2074 has been sentenced to 2 (years) and it is hereby ordered to do as per the particulars.

- To correspond to the District Court to amend the detention slip 1
- To notify the plaintiff Nepal government regarding the judgment 2
- To provide a copy of the judgment to the concerned party upon receipt of fee as prescribed by the rules.....3
- To enter the judgment into the electronic system and to remove the case from the case file....4
- To submit the case file to Parbat District Court and Record Section 5

Concurring with the above Opinion:

Honorable Justice Dr. Kumar Chudal

Bench Officer: Kumar Khatiwada

Research Assistant: Laxmi Rana (Section Officer) and Rubina Dahal (Intern)

Computer Typist: Krishnamaya Khaiwada

Dated Year 2079 Month of Falgun Date 21 Day 1

(Corresponding to Year 2023 Month of March Date 5 Day 1)