

Supreme Court Division BENCH
Honourable Justice Ms. Sushila Karki
Honourable Justice Mr. Jagadish Sharma Paudel

Order

Date of Order: 2071/10/19 (corresponding to 2 February, 2015)

067-CR-1288

Case Type: Human Trafficking, Child Marriage, Rape

Appellant/Defendant: Lok Bahadur Karki and others, currently imprisoned in Jhapa District Prison Office, resident of Bhojpur District, Kot Village Municipality, Ward No. 6

Vs.

Respondent/Plaintiff: "Kh" Kumari (name redacted), resident of Jhapa District, Duwagadi Village Municipality, Ward No. 5, on behalf of the Government of Nepal

- In order to constitute an offence of human trafficking under Clause 4 (2) (b) of the Human Trafficking and Transportation (Control) Act, 2064, it is not necessary that the act of trafficking or transportation of a person be fully accomplished. For the purpose of establishing such offence, if the act of separating a person from their residence, place, and guardian and has been transported from one location to another within Nepal, but remains yet to be delivered to the intended destination, such act nonetheless shall be deemed to constitute the said offence.

(Para No. 5)

- In accordance with the said provision, it is apparent that the defendants have neither claimed that the consent of the victim's guardian was obtained, nor have they produced any evidence to establish that the victim had attained the age of twenty years. As noted above, the victim was only fourteen (14) years old at the time of the incident and had not attained the statutory age requirement for a valid marriage. Accordingly, it stands established that the marriage purportedly contracted between the victim and the defendant was not a lawful marriage, but constitutes an offence of child marriage.

(Para No. 7)

- No. 1 under the Chapter on Rape of the *Muluki Ain* (Country Code) provides that "if any person has sexual intercourse with a woman without her consent or has sexual intercourse with a minor below sixteen years of age with or without her consent, such person shall be deemed to have committed rape." Pursuant to this provision, any person who engages in sexual intercourse with a woman without her consent, or with a girl below sixteen years of age irrespective of her consent, shall be deemed to have committed the offence of rape.
- At the time of the incident, where the victim was below sixteen years of age, arguments to the effect that the defendant had married the victim or that the victim had consented to sexual intercourse are not capable of receiving legal recognition.

(Para No. 9)

- Where the victim is 14 years of age, any marriage solemnized with such a minor cannot be deemed valid in the eyes of law, and any act of sexual intercourse with her cannot be considered lawful and shall be deemed an act of rape.

(Para No. 10)

- Where the victim in person has appeared before the investigating officer and gives a statement in relation to the offence, and where such statement has been promptly certified by the nearest District Court, the contents of such statement of the victim pursuant to Section 6 (3) of the Human Trafficking and Transportation (Control) Act, are admissible as evidence.
- It is not permissible, from the standpoint of justice, to adopt a narrow interpretation requiring an inquiry into whether the victim merely appeared before the investigating officer at the scene and gave a statement regarding the incident, or whether the victim herself had filed the first information report or complaint to initiate the investigation of the offence. The fact that the complaint or information was lodged by the parents or guardian of the minor victim, rather than by the victim herself, does not render the duly certified statement given by the victim at the scene devoid of evidentiary value, nor does it preclude such statement from being admitted as evidence.

(Para No. 14)

- In relation to the offense of human trafficking and transportation, the admissibility of the victim's statement as evidence does not depend on whether the complaint for the offence was lodged by the victim or by any other person. What is determinative is whether or not such statement of the victim has been certified by the court.
- The statement of the victim, duly authenticated by the court, cannot be rejected on the mere technical ground that the minor victim did not lodge the complaint in person, or that she did not appear before the court to testify, as such rejection would be contrary to the legal provision contained in Section 6 (3) of the Human Trafficking and Transportation (Control) Act, 2064.

(Para No. 17)

- Compensation must also be provided to the victim, the victim's family, and society at large. Its underlying objective is to restore the victim, as far as possible, to the position existing prior to the commission of the offence. Compensation awarded to a crime victim must therefore be capable of returning the victim to the pre-victimization condition or facilitating the victim's rehabilitation. Accordingly, the provision of real and effective compensation to crime victims cannot be ensured merely by the enactment of compensation-related legislation. Such legislation must itself be adequate and effective, and, equally importantly, must be implemented in a practical, realistic, and effective manner.

(Para No. 20)

- The Convention on the Rights of the Child, 1989 obliges the State Parties to make necessary arrangements for the protection and care of children in the best interest of the child, and to adopt appropriate legal, administrative, social and educational measures to safeguard children from all forms of physical or mental violence, injury or abuse, exploitation, and sexual abuse, while in the care of parent, legal guardians or any other person. As Nepal, is also a State Party to the said Convention, Nepal cannot be absolved from these obligations.

(Para No. 22)

- Henceforth, for victims of such offences entitled to compensation, the amount of compensation determined by the court's final decision should be provided promptly from a separate fund established by the Government of Nepal and provision should be made to recover the disbursed amount from the offender as government claim. In view of this, it is evident that the Government of Nepal must establish the necessary and appropriate institutional and administrative infrastructure to implement such mechanism effectively.

(Para No. 31)

- The right of victim of crime to receive compensation must be regarded as an integral part of the right to life as guaranteed under Article 12 of the Interim Constitution of Nepal. Accordingly, in the context of Nepal, it is evident that the right to compensation for crime victims is a matter to be addressed within the framework of the right to life as guaranteed under Article 12.

(Para No. 32)

- In awarding compensation to the victim, the nature, severity, and cruelty of the suffering endured by the victim as a result of the offence must form the basis for measuring such compensation. The offender's economic status or capacity must not be allowed to assume a decisive role or become the basis for determining such compensation. Otherwise, arguments such as the offender being unidentified, absconding, economically weak, or a minor could be advanced to restrict or curtail the victim's right to receive compensation. If such situation were to arise, the victim would be deprived of the right to life and access to justice would not be secured, and the judicial protection of the victim's fundamental right to life and basic human rights would be denied.

(Para No. 34)

- Based on the provisions of Article 12 and 20 of the Interim Constitution of Nepal, 2063, the norms of international instruments, and comparative practices of other countries, the right of a crime victim to receive compensation must be recognized as an integral part of the right to life. Receiving compensation constitutes a fundamental right of the victim of crime. It is the obligation of the court to ensure that this right is implemented effectively, realistically and fully, and it is the overarching duty of the State to facilitate and guarantee the delivery of justice to the victim.

(Para No. 40)

- Where the offender lacks the financial capacity to pay compensation, or where the offender cannot be identified or is absconding, it shall be the duty of the State, in its capacity as the guardian of the citizen, to provide such compensation to the crime victim

(Para No. 41)

- According to victimology, whether or not the offender is identified, and whether or not the offence is prosecuted, a victim of crime is entitled to adequate compensation for survival sufficient for their subsistence. Such compensation must be adequate, and the rehabilitation of the victim must be immediate, and it is the responsibility of the State to ensure both the compensation and the rehabilitation.
- In cases involving violence against women, rape, human trafficking and transportation, the compensation for the suffering endured by the victim must be immediately provided by the State, in its capacity as the guardian and protector of its citizen, and such provisions falls within the obligations of the State. The State may enact appropriate legal arrangements to recover the amount of compensation from the offender. The system must not inflict additional suffering on the victim by depriving them of the right to receive compensation solely on the ground that the compensation cannot be recovered from the offender.

(Para No. 42)

- The amount of compensation adjudged to be payable to the victim by the defendants should be immediately provided by the Government of Nepal, and the said amount shall be recovered from the defendants as government amount. Henceforth, for victims of such offences, it is necessary to establish a separate fund from which the compensation amount determined by the court's final decision can be immediately disbursed, and provisions made for recovering the same from the offender. It is imperative to create the requisite and appropriate infrastructure to implement this system without delay, and a written communication to this effect should be sent to the Government of Nepal, and Office of the Prime Minister and Council of Ministers.

(Para No. 44)

On behalf of the Appellant/Defendant: Learned Advocates Bhojendra Bahadur Khatri, Ram Prasad Aryal, and Tara Khanal

On behalf of the Respondent/Plaintiff: Learned Joint-Government Attorney Pushkar Sapkota

Supreme Court Bulletin Cited:

- Supreme Court Bulletin, 2063, Jesth 1-15, Page 2
- Supreme Court Bulletin, 2063, Jesth 16-31, Page 3

Relevant Laws:

- No. 2 under the Chapter on Marriage of the *Muluki Ain* (Country Code)
- No. 10 on the Chapter on Rape of the *Muluki Ain* (Country Code)
- Evidence Act, 2031, Clause 18
- Convention on the Rights of the Child, 1989, Article 3 (2), 19
- Interim Constitution of Nepal, 2063, Article 12 and 20

- Human Trafficking and Transportation (Control) Act, 2064, Clauses 3, 4 (2), 6 (1) (2) (3) (4), 5, 9, 15, 17
- Domestic Violence (Offense and Punishment) Act, 2066, Clause 0

Court of First Instance

Honourable Justice Shaligram Koirala

Justices Deciding at Appellate Level

Honourable Justice Mohan Bahadur Karki

Honourable Justice Rewant Bahadur Kunwar

Order

Hon. Justice Sushila Karki: The brief facts and decision of the case filed pursuant to the Section 9 of the Judicial Administration Act, 2048, falling within the jurisdiction of this court, challenging the decision of the Appellate Court, Ilam dated 2067/06/06 is as follows:

Summary of the First Information Report:

The First Information Report filed by “B” Kumari states as follows: the complainant had stated that her daughter has been working for several years at the resident of Ranjana Subba, resident of Jhapa District, Anarmani Village Municipality, Ward No. 4, Jhapa District. About 2/3 years ago, her daughter left the house of her own accord and went missing. On 2064/05/28 (corresponding to 14 September, 2007), it was learned from the local area police Anarmani that her daughter had been apprehended while working at the house of Somkant Bhattarai, resident of Jhapa Shannishchare-8. Upon inquiry, it was revealed that while working at the house, Lok Bahadur Sarki, had deceived her, solemnized a marriage forcibly, and subsequently, along with Lakshmi Maya B.K., attempted to transport her via Arjundhara towards India for the purpose of trafficking. The complainant “B” Kumari, filed this report stating that Lok Bahadur Sarki and Lakshmi Maya B.K. forcibly married the minor girl and attempted to sell her, and requested that legal action be taken against them in accordance with the law.

Brief Statement of the Victim:

The certified statement of the victim “A Kumari” (name redacted) made before the competent authority states as follows: The victim stated that while she was working at the house of Somakant Bhattarai, residing in Shanishchare-8, Jhapa District, Lok Bahadur Sarki, who was also working at that house, lured her with various inducements, promising good food and education, and deceived her into accompanying him to Dharan. Upon arrival in Dharan, she was taken to the house of Bhuma B.K., where she was forced to identify herself as “Karki” and to assume a false surname. Despite her resistance, Lakshmi Maya B.K. also forced her into a marriage, applied vermilion powder (*sindoor*), and subjected her to sexual assault. Subsequently, on 2064/05/26 (corresponding to 12 September, 2007) she was brought to the house of Lakshmi Maya B.K. to be transported towards Sikkim, India. Fearing the situation, she was instructed to claim that if questioned she was told to identify herself to be 18 years of age. While being taken towards India

for trafficking by Lok Bahadur Sarki and Lakshmi Maya B.K., the victim was scared and informed two women whose names are unknown who intervened and rescued her. The victim further stated that the Lakshmi Maya B.K., her daughter Bhuma B.K. and Bhuma B.K.'s husband were involved in forcefully getting her married and that Lakshmi Maya B.K. and Lok Bahadur Sarki were the principal persons involved in attempting to traffic her to India. and requested to punish them according to law.

Brief Statements of the Defendants:

The statement made by defendant Lakshmi Maya B.K. before the investigating authority states as follows: Lok Bahadur Sarki is a relative of her family. He had been residing in Shanishchare, Jhapa. On 2064/5/16 (corresponding to 2 September, 2007), he along with my daughter Bhuma B.K. called me to Dharan. When I reached there, I found that Lok Bahadur Sarki was preparing to marry Radhika Gurung. After making further inquiries, on 2064/5/18 (corresponding to 4 September, 2007) I solemnized the marriage between "K" Kumari and Lok Bahadur Sarki and performed the *tika* (applying the vermilion powder) ceremony. Subsequently, both of them came to my house. My daughter was in Sikkim, India, and while we were preparing to go there, local residents apprehended them on the belief that they intended to traffic her. However, she stated that there was no intention to traffic her.

The statement of the defendant, Lok Bahadur Sarki, made before the competent authority states as follows: I solemnized the marriage with "K" Kumari thereby making her my wife. There was no agreement that I would refrain from sexual intercourse; I engaged in sexual intercourse with her twice on 2064/05/19 (corresponding to 5 September, 2007). Lakshmi Maya B.K. also applied *Tika* (vermillion powder). The marriage took place at the house of her daughter Bhuma B.K. Later, when "K" Kumari refused to stay at the house of Somkant Bhattarai, where she had previously resided, I advised her to reside and work in Sikkim, India and accordingly, on 2064/05/26 (corresponding to 12 September, 2007) I brought her to the house of Lakshmi Maya B.K. I was apprehended on 2064/05/28 (corresponding to 14 September, 2008) while travelling towards Sikkim. I had no intention to traffic her.

Statement of Hem alias Ram Bahadur Siwa is as follows: I am well acquainted with Lok Bahadur Sarki. However, he has never brought his wife, "K" Kumari, to my house. I have heard that she was apprehended while being taken for trafficking after the marriage.

Situational Report:

The situational report of Ranjana Subba et al. states that she came to know that minor "K" Kumari, aged 14, daughter of "Kha" Kumari, resident of Duwagadi, Jhapa District, had been forcibly married to the defendant Lok Bahadur Sarki and was apprehended in the course of a suspected trafficking attempt. Upon inquiry, it was learned that "K" Kumari was residing at the house of Somkant Bhattarai in Jhapa, Sanishchare-8, when Lok Bahadur Sarki, who was working there, lured her and took her to the residence of Bhuma B.K. in Dharan. With the assistance of Lakshmi Maya B.K., a child marriage was solemnized, and the minor was subjected to sexual abuse. While being taken toward India on 2064/5/28 B.S. (14 September 2007), they were apprehended. It was noted that Lok Bahadur Sarki had previously been imprisoned. The report further states that Lok Bahadur Sarki conducted the child marriage, and that Bhuma B.K., her

husband, and Lakshmi Maya B.K. assisted in performing the marriage. Lok Bahadur Sarki and Lakshmi Maya B.K. were apprehended during the suspected trafficking attempt, and they should be punished according to law.

Contents of the Charge-Sheet:

It is alleged that the defendant Lok Bahadur Sarki committed child marriage and the defendants Lakshmi Maya B.K., Kishor Bishwakarma, and Bhuma Bishwakarma forcibly married the victim, and that defendant Lok Bahadur Sarki forcibly married the 14-year-old victim and, with the consent of the defendants Kishor Bishwakarma and Bhuma Bishwakarma, defendants Lok Bahadur Sarki and Lakshmi Maya B.K. attempted to sell the victim to India, but were arrested wherein the victim was rescued. Therefore, the defendants are charged with the following offenses: from among the defendants, Lok Bahadur Sarki is hereby charged for committing an offence contrary to No. 2 (3) under the Chapter of Marriage of the *Muluki Ain* (Country Code) and No. 1 and 3 (3) under the Chapter of Rape and Section 3 and Section 4 (2) (a) under the Human Trafficking and Transportation (Control) Act, 2064, and punishment hereby sought pursuant to No. 2 (3) under the Chapter of Marriage of the *Muluki Ain* and No. 3 (3) under the Chapter of Rape of the *Muluki Ain* and compensation pursuant to No. 10 under the Chapter of Marriage and that the defendant be punished pursuant to Section 15 (1) (e) (1) under the Human Trafficking and Transportation (Control) Act, 2064. Likewise, where the defendant Lakshmi Maya B.K. has committed an offence contrary to No. 2 (3) under the Chapter of Marriage of the *Muluki Ain* it is hereby requested that she be punished pursuant to No. 2 (3) under the Chapter of Marriage and that the defendant also be punished pursuant to Section 15 (1) (e) (1) under the Human Trafficking and Transportation (Control) Act, 2064, and where the defendants Kishor Biswakarma and Bhuma Biswakarma has committed an offence contrary to No. 2 (3) under the Chapter of Marriage of the *Muluki Ain* and Section 3 and Section 15 (1) (h) of the Human Trafficking and Transportation (Control) Act, 2064, punishment pursuant to No. 2 (3) under the Chapter of Marriage of the *Muluki Ain* and Section 15 (1) (h) of the Human Trafficking and Transportation (Control) Act, 2064 and that the victim be compensated pursuant to Section 17 of the Human Trafficking and Transportation (Control) Act, 2064.

Statement of the Defendants in the Court:

Deposition of the defendant Lok Bahadur Sarki before the court is as follows: I had previously become acquainted with Lakshmi Maya B.K. while serving a five-year prison sentence for the offence of raping the sister of Lal Bahadur Bishwakarma, and that I had performed a ritual with her and had made her my foster sister. After my release from prison, I began cultivating the of Somakant Bhattarai. The victim, “K” Kumari, also resided at the house of Somakant Bhattarai, and I had known the defendant and told her that I was 17 years of age. I informed the victim that I intended to marry her and that she knew that I belonged to a Sarki caste. With mutual consent, we agreed to marry, and on 2064/05/06 (corresponding to 23 August, 2007) we went to the house of Bhuma B.K., daughter of Lakshmi Maya B.K., in Dharan. The house owner provided Rs.

17,000, which was used to purchase items for the marriage, and the marriage was solemnized on Krishna Ashtami, 2064/05/18 (corresponding to 4 September, 2007) on the date and time fixed by the house owner. The marriage was conducted with the free consent of the victim, and that sexual intercourse took place only after the marriage in accordance with marital relations; no forced sexual intercourse occurred. Lakshmi Maya B.K. was invited by phone and performed the *tika* (applying the vermillion powder) ceremony. Bhuma B.K. and Kishor B.K. did not coerce the victim into marriage; the marriage and subsequent sexual relations occurred with the victim's consent. No sexual activity occurred before the marriage. On 2064/05/26 (corresponding to 12 September, 2007), the defendant, the victim, and Bhuma's husband, Kishor B.K. returned to Arjundhara, Jhapa. Kishor B.K. returned to Dharan the following day. As the victim did not wish to remain at Somakant's house, the defendant, along with Lakshmi Maya B.K., planned to go to Sikkim, India, where Lakshmi Maya's daughter Binda (Binu) Biswakarma was residing wherein with the consent of the victim we planned to travel to India wherein I covered the expenses for the travel. On 2064/05/28 (corresponding to 14 September, 2007), while traveling toward Sikkim the local villagers at Milidanda, Shanishchare, apprehended and physically assaulted me, believing that the victim was being trafficked. I had no intention of trafficking the victim and that we were traveling to Sikkim for employment and livelihood. The statements made by the victim are false and have been made to implicate me.

The defendant Lakshmi Maya B.K. stated before the court that while her husband was in detention at the Jhapa Prison in connection with a rape case, the defendant Lok Bahadur Sarki was also detained in the same prison. During that period, when she went to visit her husband, she became acquainted with Lok Bahadur Sarki and performed the *bhaitika* (ceremony regarding foster brother) ritual with him. After his release from prison, Lok Bahadur Sarki stayed at her house and also lived in another house while engaging in agricultural work. She stated that she had not seen the victim prior to the events in question. She further stated that Lok Bahadur Sarki had lured the victim for the purpose of marriage and taken her to the house of her daughter in Dharan, and that she was summoned there by telephone. Upon going to Dharan, as the marriage had already been performed, she applied *tika* and returned to her own home. About a week later, Lok Bahadur Sarki, and her elder son-in-law and the victim came to her house. The son-in-law returned to Dharan the following day. She further stated that as her younger daughter was residing in Sikkim, India, Lok Bahadur Sarki and the victim proposed to take her there. When she said that she did not have money to send her, they stated that they would take her themselves. Accordingly, on 2064/05/28, while she was traveling with them to take her daughter to Sikkim, local villagers apprehended them on the allegation that the victim was being taken for trafficking, and she was also assaulted, with water being poured on her. She asserted that she had neither lured the victim nor arranged her marriage with Lok Bahadur Sarki, nor had she attempted to take the victim for the purpose of trafficking.

Order of Jhapa District Court:

As it has been confirmed that the defendants Lakshmi Maya B.K. and Lok Bahadur Sarki were apprehended while taking the victim toward India for the purpose of trafficking, and as the evidence immediately available indicates that the defendants Lok Bahadur Sarki and Lakshmi Maya B.K. appears to have committed the offence, the defendants pursuant to Section 8 of the Human Trafficking and Transportation (Control) Act, 2064, are hereby remanded to judicial custody pending trial.

Pursuant to the order of the trial court, correspondence was made directing the appearance of witnesses for both the plaintiff and the defendants; however, neither party produced their respective witnesses.

Decision of Jhapa District Court:

With respect to the defendants Kishor Bishwakarma and Bhuma Bishwakarma, the court hereby directs that their share of property be immediately frozen and that their case pursuant to No. 190 of the Court Proceeding (*Adalati Bandobasta*) remain pending and that the proceeding against them be carried out upon them being located and arrested, or upon their presence, or after the expiry of the statutory period. As regards the other defendants, Lok Bahadur Sarki and Lakshmi Maya B.K. since they have been found guilty of committing the offences as charged, it is held, from among the defendants, since Lok Bahadur Sarki, has committed an offence pursuant to Sections 3 and 4 (2) (a) of the Human Trafficking and Transportation (Control) Act, 2064, and where the victim is a fourteen year old minor, the defendant pursuant to Section 15 (1) (e) (1) of the Human Trafficking and Transportation (Control) Act, 2064, is hereby sentenced to 16 years imprisonment and is fined Rs. 100,000 (one hundred thousand rupees). With respect to the other charge, the defendant is found to have committed the offence under No. 1 and 3 (3) under the Chapter on Rape of the *Muluki Ain*, and is accordingly sentenced to imprisonment for a term of six (6) years for that offence. However, as the defendant has already been sentenced to sixteen (16) years' imprisonment in the aforesaid case relating to human trafficking and transportation, and as separate punishment is not to be imposed pursuant to No.10 under the Chapter on Punishment, no additional sentence is required to be imposed in this regard. The defendant was also charged with having committed an offence under No. 2 (3) under the Chapter on Marriage of the *Muluki Ain*. As the commission of such offence has been established, the prescribed punishment would be six (6) months' imprisonment and a fine of NPR 10,000 (Ten Thousand Rupees). However, since the defendant has already been sentenced to sixteen (16) years' imprisonment and a fine of NPR 100,000 (one hundred thousand rupees) in the human trafficking and transportation case, and as the offence arises out of the same transaction, No. 10 under the Chapter on Punishment is applicable and therefore, no additional punishment is required to be imposed. As regards the other defendant, Lakshmi Maya B.K., her involvement in the incident has been established, and she is found guilty of having committed the offences as charged. Accordingly, for the offences committed under Sections 3 and 4 (2) (a) of the Human Trafficking and Transportation (Control) Act, 2064, she is pursuant to Section 15 (1) (e) (1) of the same Act is to imprisonment for a term of sixteen (16) years and a fine of Rs. 100,000 (one hundred thousand rupees). The defendant is also found guilty of having committed an offence contrary to No. 2 (3) under the Chapter on Marriage of the *Muluki Ain*, for which the prescribed punishment would be six (6) months' imprisonment and a fine of NPR 10,000. However, as she has already been sentenced to sixteen (16) years' imprisonment and a fine of NPR 100,000 under the Human Trafficking and Transportation (Control) Act, 2064, and as No. 10 under the Chapter on Punishment does not permit the imposition of a lesser additional sentence where a greater sentence has already been imposed, no further punishment is required to be imposed for this offence.

Appeal Petitions Filed by the Defendants before the Appellate Court:

The appellants have stated before the competent authority as well as the courts that they have not committed any act as alleged in the charge-sheet. They have asserted that “K” Kumari herself had consented to marry the defendant Lok Bahadur Sarki, and that when it was proposed to solemnize the marriage at the very house where the victim and the defendant were residing, the victim “K” Kumari did not agree, whereupon, with the mutual consent of both parties, they went to Dharan and resided there for the purpose of marriage. It has been further contended that money was requested from the house owner, and upon going to the house of Lakshmi Maya B.K.’s daughter in Dharan, marriage materials were purchased and the marriage was solemnized in the presence of “K” Kumari. It is further alleged that thereafter “K” Kumari, with a conspiratorial intent to falsely implicate the appellant-defendants, made an untrue statement alleging that she was being forcibly married and trafficked under the pretext of being taken towards Sikkim. The appellant-defendants have consistently denied the alleged offences before the competent authority and the court. However, without properly evaluating the denial statements and without conducting a due and proper assessment of the other evidence contained in the case file, the trial court relied on alleged inculpatory statements and rendered a flawed judgment. Accordingly, by finding the appellant-defendants guilty of the offence under Sections 3 and 4(2) (a) of the Human Trafficking and Transportation (Control) Act, 2064, and sentencing each of them, pursuant to Section 15 (1) (e) (1) of the same Act, to imprisonment for a term of sixteen (16) years and a fine of Rs. 100,000 (one hundred thousand rupees), the Jhapa District Court delivered an erroneous judgment. The appellants therefore pray that the said judgment be set aside and that the appellant-defendants, Lok Bahadur Sarki and Lakshmi Maya B.K be acquitted of the charges as claimed.

Summary of the Appeal Petition filed by the Plaintiff before the Appeal Court:

Since it has been held that the defendant Lok Bahadur Sarki committed rape, compensation ought to have been awarded to the victim pursuant to No. 10 under the Chapter on Rape of the *Muluki Ain*, and, pursuant to Section 17 of the Human Trafficking and Transportation (Control) Act, 2064, appropriate and reasonable compensation, not less than an amount equivalent to fifty percent of the fine imposed on the defendants Lok Bahadur Sarki and Lakshmi Maya B.K., ought to have been ordered to be paid to the minor victim. As the District Court, Jhapa, failed to address or make any order in this regard, the Government of Nepal, as plaintiff, has filed an appeal before the Appeal Court, Ilam, seeking annulment of the judgment of the District Court, Jhapa, to that extent and an order directing payment of compensation to the victim.

Order of the Appeal Court:

From the certified deposition made by the victim in QA 4 and 13, it is evident that the defendant Lok Bahadur and others had gone to the extent of attempting to traffic the victim and without ascertaining and determining this aspect, the decision of the District Court is open to consideration and may result in a different conclusion and therefore, this court pursuant to No. 202 under the Chapter of Court Proceedings (*Adalati Bandobasta*) and Rule 47 of the Appeal Court Regulation, 2048, hereby orders to submit the case for hearing upon the presence of the plaintiff or upon the expiry of the limitation.

In this matter, following the order dated 2067/02/11 (corresponding to 25 May, 2010) directing that the respondents be summoned in connection with the appeal filed by the respondent-

defendants, and it being evident that, an appeal petition has been filed on behalf of the plaintiff, the Government of Nepal, 2067/03/24 (corresponding to 8 July, 2010), and therefore, it is hereby ordered that notice of the said appeal filed on behalf of the plaintiff, the Government of Nepal, be given to the respondent-defendants and that the matter be presented for hearing in accordance with the prescribed legal procedure.

Decision of the Appeal Court:

In respect of this matter, the defendants ought to have been punished for the offence under Section 3 and Section 4 (2) (b) under the Human Trafficking and Transportation (Control) Act, 2064, and sentenced in accordance with Section 15 (1) (e) (2) of the same Act, with compensation ordered to be paid pursuant to Section 17 thereof. However, the Jhapa District Court, by its judgment dated 2066/05/31, instead held the defendants liable to punishment under Section 15 (1) (e) (1) of the said Act without awarding compensation. As such the said judgment of the Jhapa District Court does not appear to be in accordance with law to that extent, and is therefore to that extent is set aside. It is found that the defendants Lok Bahadur Sarki and Lakshmi Maya B.K. committed the offence under Section 3 and Section 4 (2) (b) under the Human Trafficking and Transportation (Control) Act, 2064, and that the victim was a fourteen-year-old minor. Accordingly, pursuant to Section 15 (1) (e) (2) of the said Act, each of the defendants is sentenced to imprisonment for a term of twelve (12) years and a fine of Rs. 100,000 (one hundred thousand rupees). With respect to the compensation, this court pursuant to Section 17 of the said Act, hereby orders the defendants Lok Bahadur Sarki and Lakshmi Maya B.K. to pay compensation of Rs. 50,000 (rupees fifty thousand) each to the victim. In addition, pursuant to No. 10 under the Chapter of Rape of the *Muluki Ain*, the defendant Lok Bahadur Sarki shall pay an additional compensation of Rs. 25,000 (twenty-five thousand rupees) to the victim. With respect to the remaining charges, the defendant Lok Bahadur Sarki is found to have committed the offence under No. and No. 3 (3) under the Chapter on Rape of the *Muluki Ain*, and accordingly, pursuant to Clause 3 (3) of the same Chapter, he is liable to imprisonment for a term of six (6) years. He is further found guilty under Clause 2 (3) under the Chapter of the *Muluki Ain* and is thereby sentenced to six (6) months' imprisonment and a fine of Rs. 10,000 (ten thousand rupees). However, as the defendant has already been sentenced in the same in the human trafficking and transportation case to an imprisonment for a term of twelve (12) years and a fine of Rs. 100,000 (one hundred thousand rupees), and as the imposition of an additional sentence is barred by No. 10 under the Chapter on Punishment of the *Muluki Ain*, no separate or additional punishment is required to be imposed in respect of the aforesaid offences. With regards to the other defendant, Lakshmi Maya B.K., although she is liable under No. 2 (3) under the Chapter on Marriage of the *Muluki Ain* to a sentence of six (6) months' imprisonment and a fine of Rs. 10,000 (ten thousand rupees), she has already been sentenced in the same human trafficking and transportation case to imprisonment for a term of twelve (12) years and a fine of Rs. 100,000 (one hundred thousand rupees). In view of No. 10 under the Chapter on Punishment of the *Muluki Ain*, which bars imposition of an additional sentence where the graver punishment has already been imposed, no further punishment is required to be awarded. Accordingly, since the judgment delivered by the Jhapa District Court on 2066/05/31, is found to be proper, the said judgment to that extent is upheld by this court. The appellants' plea seeking acquittal from the charges, therefore, cannot be sustained.

Appeal Petition Filed by the Defendants before this Court:

As “K” Kumari willingly accepted the marriage proposal and received the ceremonial tika, Lakshmi Maya B.K. cannot be held liable for polygamy. Accordingly, the joint appeal filed by the defendants before this Court seeks to overturn the judgment of the Appellate Court, Ilam, which was rendered to their prejudice, and to secure their acquittal.

An order had been set aside by this court which reads as follows: Since the judgment does not examine the capacity of the defendant to pay compensation, nor specify from which assets the compensation is to be paid, and considering that the victim has not personally appeared in court to give testimony, the findings of the trial and appellate courts could be affected. Accordingly, in accordance with No. 202 of the Court Proceedings (*Adalati Bandobasta*), the respondents are directed to be summoned and the matter presented accordingly.

Decision of this Court

In accordance with rules, the present appeal petition, along with related case file was placed on the cause list and presented before the bench for adjudication. The following arguments were heard and the case file was examined.

On behalf of the appellant-defendants, learned counsel Mr. Bhojendra Bahadur Khatri, Mr. Ram Prasad Aryal, and Mr. Tara Khanal contended as follows: Although the alleged victim, “K” Kumari, is claimed to be a 14-year-old minor, her exact age has not been independently verified from any credible source. Furthermore, in her certified statement, the victim merely expressed a suspicion that she might be taken for trafficking. The complaint appears to have been filed solely on the basis of this unsubstantiated suspicion, without corroborating evidence. The complaint itself alleges an intent to commit human trafficking and names only Lok Bahadur Sarki as the accused. Lakshmi Maya B.K.’s name does not appear anywhere in the complaint, indicating that there is no formal allegation against her. Moreover, the charge sheet merely states that the act was intended for the purpose of buying and selling; it does not establish that the act of trafficking was actually completed. Given that the essential elements of human trafficking were not fulfilled, the court’s conviction of the defendants for having completed the offense is unsustainable. Accordingly, the defense submits that the judgment is erroneous, and the decision of the Appellate Court should be set aside and that the defendants should be acquitted of all charge.

Learned Joint Government Attorney, Mr. Pushkar Sapkota, on behalf of the respondent-plaintiff, submitted that the claim for conviction or any reduction in punishment against the defendants is not justified. Under the law, where compensation is mandated, only half of the fine may be applied as reparation; consequently, the economic status of the defendants is irrelevant. Section 17 of the Human Trafficking and Transportation (Control) Act, 2064, provides for the payment of compensation but does not prescribe the manner or method of payment. Therefore, the grounds cited regarding the defendants’ presence are unsubstantiated. The right of the victim to receive compensation is a legal entitlement that cannot be curtailed by the financial capacity or status of the defendants. Section 6 (1) of the Act mandates that the victim’s statement be recorded and certified at the nearest district court. In such circumstances, even if the victim does not personally appear in court to give testimony, the court is empowered to admit the statement as evidence.

Furthermore, the defendants themselves appeared in court and admitted that they married the victim, engaged in sexual intercourse, and traveled with her toward Sikkim, India. Accordingly, it cannot reasonably be held that the act amounted merely to an attempted human trafficking offense. Section 9 of the Act classifies this offense under strict liability, placing the burden on the defendants to prove that they did not commit the offense. In the absence of any supporting witnesses or evidence presented by the defendants, the appellate court's decision is both reasonable and legally sound, and therefore must be upheld.

After hearing the arguments as outlined above and considering the matter for decision, it appears necessary to focus and resolve the following questions:

1. In Bhadra, 2064, at the time of the incident what was the age of the victim?
2. As to whether or not the actions of the defendants constitute the offense of human trafficking and transportation,?
3. As to whether or not a marriage with a minor and subsequent sexual intercourse even with her consent constitutes the offenses of child marriage and rape?
4. As to whether or not in a case of human trafficking and transportation, if the victim's statement has been recorded and certified before the competent authority, can such certified statement be admitted as evidence even if the victim does not personally appear in court?
5. What is the concept of compensation for a crime victim, and what are the international provisions and practices in this regard?
6. In cases of human trafficking and rape, once a guilt has been established by the court, how should the compensation be appropriately provided to the victim?
7. Is the decision of the Appeal Court, Ilam, in conformity with law, or not?

In this case, from among the defendants, Lok Bahadur Sarki was found guilty of the offence under Sub-clause (3) of Clause 2 under the Chapter on Marriage of the *Muluki Ain*; Clause 1 and Sub-clause (3) of Clause 3 under the Chapter on Rape; and Sections 3 and Sub-clause (a) of Sub-section (2) of Section 4 of the Human Trafficking and Transportation (Control) Act, 2064. Accordingly, punishment was imposed pursuant to Sub-clause (3) of Clause 2 under the Chapter on Marriage of the *Muluki Ain* and Sub-clause (3) of Clause 3 under the Chapter on Rape of the *Muluki Ain*, and compensation was ordered to be paid to the victim in accordance with No. 10 under the Chapter on Rape of the *Muluki Ain* and Clause (1) of Sub-clause (e) of Sub-section (1) of Section 15 of the Human Trafficking and Transportation (Control) Act, 2064, and the defendant Lakshmi Maya B.K. was found guilty of the offence contrary to Sub-clause (3) of Clause 2 under the Chapter on Marriage of the *Muluki Ain*, and was sentenced in accordance with Sub-clause (3) of Clause 2 thereof; further, pursuant to Clause (1) of Sub-clause (e) of Sub-section (1) of Section 15 of the Human Trafficking and Transportation (Control) Act, 2064 (2007), and accordingly was ordered to pay compensation to the victim. Further, with respect to the accused Kishor Bishwakarma and Bhuma Bishwakarma, they were charged with having

committed an offence contrary to Sub-clause (3) of Clause 2 of the Chapter on Marriage of the *Muluki Ain*, as well as offences under Section 3 and Clause (ja) of Sub-section (1) of Section 15 of the Human Trafficking and Transportation (Control) Act, 2064 (2007). The prosecution sought punishment pursuant to Sub-clause (3) of Clause 2 of the Chapter on Marriage of the *Muluki Ain* and Clause (ja) of Sub-section (1) of Section 15 of the Human Trafficking and Transportation (Control) Act, 2064 (2007), and compensation to the victim in accordance with Section 17 of the said Act. Further, with respect to the accused Kishor Bishwakarma and Bhuma Bishwakarma, they were charged with having committed an offence contrary to Sub-clause (3) of Clause 2 under the Chapter on Marriage of the *Muluki Ain*, as well as offences under Section 3 and Clause (h) of Sub-section (1) of Section 15 of the Human Trafficking and Transportation (Control) Act, 2064. The prosecution sought punishment pursuant to Sub-clause (3) of Clause 2 under the Chapter on Marriage of the *Muluki Ain* and Clause (h) of Sub-section (1) of Section 15 of the Human Trafficking and Transportation (Control) Act, 2064 (2007), and compensation to the victim in accordance with Section 17 of the said Act. With respect to the defendants Kishor Bishwakarma and his wife Bhuma Bishwakarma had ordered that their share of property be immediately frozen and that their case pursuant to No. 190 of the Court Proceedings (*Adalati Bandobasta*) of the *Muluki Ain*, remain pending and that the proceedings against them be carried out upon them being located and arrested, or upon their presence before the court, or upon expiry of the statutory limitation period. With respect to the defendant Lok Bahadur Sarki and Lakshmi Maya B.K., the Jhapa District Court held each of them liable to a sentence of sixteen (16) years' imprisonment and a fine of NPR 100,000 (one hundred thousand rupees). Against the said judgment, cross-appeals were filed by both the prosecution and the accused. Upon appellate review, the Ilam Appellate Court modified the original judgment in part and held that the accused Lok Bahadur Sarki and Lakshmi Maya B.K. shall each undergo twelve (12) years' imprisonment and pay a fine of NPR 100,000 (one hundred thousand rupees). With regard to the compensation, the appellate court ordered that the accused Lok Bahadur Sarki and Lakshmi Maya B.K., pay Rs. 50,000 (fifty thousand rupees) each, and that the defendant Lok Bahadur Sarki pay an additional Rs. 25,000 (twenty-five thousand), amounting in total to NPR 125,000 (one hundred and twenty-five thousand rupees), to be paid to the victim. Modifying the original decision of the Jhapa District Court, the Appeal Court, Ilam had rendered its decision, wherein appeals against the said decision were filed before this court.

In the present case, since the defendants Kishor Bishwakarma and Bhuma Bishwakarma were absconding, their respective shares of property were ordered to be stayed, and that the proceedings against them were kept in abeyance pursuant to No. 190 of the Court Proceedings (*Adalati Bandobasta*) of the *Muluki Ain*, with the remaining actions to be taken upon them being located and arrested, or upon their presence before the court, or upon expiry of the statutory limitation period. In view of this position, the court need not make any further observation on that aspect.

2. At the outset, while considering the first issue, *namely the age of the victim at the time of the occurrence, that is, in Bhadra 2064 B.S.*, it is noted that the complaint petition states that the victim was born around the year 2050 B.S. The said complaint petition appears to have been filed on 2064/05/30. As per the particulars mentioned in the complaint petition, the victim was only fourteen (14) years of age at the time of the occurrence. Likewise, in the duly recorded statement of the victim, she has also stated that she was fourteen (14) years of age.

In their statements made before the competent authority, the defendant Lok Bahadur Sarki and Lakshmi Maya B.K. have stated that they were unaware as to whether the victim was a minor; however, they have not been able to clearly assert that the victim was a major. Similarly, the witnesses to the situational report including Ranjana Subba, have also stated that the victim was fourteen (14) years of age. Thus, from the complaint petition as well as other materials on record, it stands established that the victim was fourteen (14) years old at the time of the occurrence. As the defendants have failed to rebut this fact by objective and cogent evidence, there is no basis to it hold otherwise. Therefore, this Bench does not concur with the contention advanced on behalf of the appellant-defendants that the victim at the time of the incident had attained majority and was an adult

3. Turning to the second issue, namely whether the *acts of the defendants constitute the offence of human trafficking and transportation*, it is deemed relevant and appropriate to examine the definition of the offence of human trafficking and transportation as provided under the prevailing law. With regard to the definition of human trafficking and transportation, provisions have been made under Sections 3 and 4 (2) (b) and Section 15 (1) (e) (2) of the Human Trafficking and Transportation (Control) Act, 2064 (2007). Section 3 (1) of the said Act provides that “no one shall commit or cause to commit human trafficking and transportation” and Sub-section (2) prescribes that “if anyone commits an act under Sub-section (1) that shall be deemed to have committed an offence under this Act. Likewise, Section 4 (2) (b) defines the act of human trafficking and transportation as follows: “To take anyone from their home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep the person into ones custody or take to any place within Nepal or abroad or hand the person to somebody else for the purpose of prostitution and exploitation.
4. From a plain reading of the foregoing provisions, it is evident that any act whereby a person, with the intention of engaging another in prostitution or exploiting them, induces, entices, lures, deceives, defrauds, conspires, coerces, or otherwise forcibly separates the person from their place of residence, location, or guardian, retains the person under their control, transports the person from one place to another within Nepal or abroad, or delivers the person to another, constitutes the offence of human trafficking and transportation.
5. In the present case, the victim, owing to her fragile financial circumstances, had been residing in another household and assisting with domestic chores. It appears that the appellant-defendant, Lok Bahadur Sarki, was also engaged in similar work in the same household. During this period, Lok Bahadur Sarki allegedly induced the victim with promises of providing good food, proper care, education, and a comfortable future, thereby compelling her into marriage with him. This fact has been recorded in her statement QA 8 before the competent authority. The foregoing fact is further corroborated by the victim’s statement made before this court. In order to constitute an offence of human trafficking under Clause 4 (2) (b) of the Human Trafficking and Transportation (Control) Act, 2064, it is not necessary

that the act of trafficking or transportation of a person be fully accomplished. For the purpose of establishing such offense, if the act of separating a person from their residence, place, and guardian and has been transported from one location to another within Nepal, but remains yet to be delivered to the intended destination, such act nonetheless shall be deemed to constitute the said offence.

6. In the present case, the evidence, including the statements of the defendants, establishes that they attempted to separate and abduct the victim from the household in Jhapa, where she was employed, under the pretext of marriage, with the intent of taking her to India for the purpose of prostitution. In the course of this attempt, the defendants endeavored to transport the victim from Jhapa to Dharan, and subsequently from Dharan back to Jhapa en route to Sikkim, India, when they were apprehended in Jhapa. In view of the foregoing, the conduct of the defendants clearly falls within the ambit of the definition of the offence under Section 4 (2) (b) of the Human Trafficking and Transportation (Control) Act, 2064. Accordingly, the contention advanced on behalf of the appellant-defendants, that no offence of human trafficking and transportation was committed and that only an attempt was made cannot be sustained in law.
7. Turning to the third issue, the appellant-defendants contend that since the alleged marriage and sexual act were with a woman of age, no offence of child marriage or rape could have occurred. In this regard, and based on the findings and discussion under Issue No. 1, it has been established that the victim was only fourteen (14) years of age at the time of the occurrence. It is therefore necessary to clarify the circumstances under which an offence of child marriage is constituted. In the present context, the provisions of No. 2 under the Chapter on Marriage of the *Muluki Ain* are particularly relevant. Clause 2 under the Chapter on Marriage provides that “a marriage shall not be solemnized unless the female and the male have attained the age of eighteen years with the consent of their guardian, or twenty years without such consent.” Under the said provision, the age threshold for marriage is determined based on the presence or absence of guardian consent: with guardian consent, both the male and female must be at least 18 years old, and without guardian consent, at least 20 years old. In the present case, there is a contention that a marriage was solemnized between the victim and the defendant, Lok Bahadur Sarki. In accordance with the said provision, it is apparent that the defendants have neither claimed that the consent of the victim’s guardian was obtained, nor have they produced any evidence to establish that the victim had attained the age of twenty years. As noted above, the victim was only fourteen (14) years old at the time of the incident and had not attained the statutory age requirement for a valid marriage. Accordingly, it stands established that the marriage purportedly contracted between the victim and the defendant was not a lawful marriage, but constitutes an offence of child marriage.
8. In the present context, with respect to the defendant Lakshmi Maya B.K., it is evident from the record that she herself participated in and facilitated the marriage between the accused Lok Bahadur Sarki and the victim, a fact which she has admitted both before the competent authority and before in the court. This assertion is further corroborated by the photographs taken during the marriage ceremony, which are part of the record. Accordingly, it stands established that the defendant Lakshmi Maya B.K. has committed an offence contrary to Clause 2 under the Chapter on Marriage of the *Muluki Ain*. In view of the foregoing, the

contention raised in the appeal, and the argument advanced on behalf of the appellant that a valid marriage was solemnized and that no child marriage occurred, is not acceptable.

9. Turning to the question of whether sexual intercourse with a 14 year–old girl constitutes rape, it is pertinent to examine the definition of rape under No. 1 under the Chapter on Rape of the *Muluki Ain*. No. 1 under the Chapter on Rape of the *Muluki Ain* (Country Code) provides that “if any person has sexual intercourse with a woman without her consent or has sexual intercourse with a minor below sixteen years of age with or without her consent, such person shall be deemed to have committed rape.” Pursuant to this provision, any person who engages in sexual intercourse with a woman without her consent, or with a girl below sixteen years of age irrespective of her consent, shall be deemed to have committed the offence of rape. At the time of the incident, the age of the victim was 14 years and that there is no dispute that sexual intercourse occurred between the victim and the defendant. At the time of the incident, where the victim was below sixteen years of age, arguments to the effect that the defendant had married the victim or that the victim had consented to sexual intercourse are not capable of receiving legal recognition. Accordingly, in light of the foregoing provisions, facts, and discussion, it stands established that the defendant Lok Bahadur Sarki, committed rape against the victim. Consequently, the contention advanced in the appeal, and the arguments raised on behalf of the accused, that no rape was committed cannot be accepted.
10. Since the victim at the time of the incident was only 14 years of age and made from the deposition made by the defendant Lok Bahadur Sarki before the competent authority and the court he has admitted that he had induced the victim into marriage and had sexual intercourse, and where the age of the victim was 14 years, the marriage solemnized cannot be deemed to be a valid marriage and where the act of sexual intercourse with the victim is deemed to be an act of rape. Therefore, pursuant to the above facts, provisions and the explanations provided therein, it is evident and established that the defendant Lok Bahadur Sarki had solemnized a child marriage and had committed an act of rape and the other defendant Lakshmi Maya B.K. has committed an act contrary to the No. 2 under the Chapter of Marriage of the *Muluki Ain* constituting an offence of child marriage.
11. Turning to the fourth issue, namely the question of human trafficking and transportation, it is noted that the statement made by the victim before the competent authority has been duly certified by the court. In considering whether such a certified statement can be admitted as evidence even in the absence of the victim’s appearance before the court, it is relevant to observe that, in the present case, a complaint has been lodged against the defendants. It is evident that while attempting to take the victim to Sikkim, India, local residents intervened, suspected wrongdoing, and handed the victim over to the police. From the conduct of the defendants, it appears that the victim, purportedly married, was being taken to Sikkim, while the defendant Lok Bahadur Sarki remained in Nepal, residing at the house of the landowner. Considering the statements of the defendants, the testimonies of witnesses present at the scene, and the victim’s statement before the competent authority, which has been certified by the court, together with the relevant legal provisions and the discussion above, it stands established that the incident occurred as alleged in the charge.

12. In the present case, it has been contended by the defendants' counsel that, since the victim did not appear to testify in the court, her statement cannot be admitted as evidence. In this context, it is pertinent to refer to the provisions of Section 6(1) of the Human Trafficking and Transportation (Control) Act, 2064. Section 6 (1) prescribes the following: "If the person reporting under Section 5 is a victim, the police office should take the statement immediately and the victim shall be taken to the nearest district court to certify the statement as soon as possible." Similarly, Section 6 (2) provides that "if the police office brings to certify a statement, the district judge, notwithstanding anything contained in the prevailing law and even if the offence related with that statement does not fall within the jurisdiction of that district court, the judge of that District Court shall upon reading out the statement shall make note of any difference in the statement and shall certify the statement therein. Likewise, Section 6 (3) prescribes the following: If the statement of the victim is certified under Subsection (2), the court can take the certified statement as evidence even if the victim does not appear in the court in the course of further court proceeding
13. Pursuant to the said provision, where a complaint is lodged by the victim herself under the Human Trafficking and Transportation (Control) Act, 2064, the police are required to record her statement promptly and, for the purpose of certifying the statement, to produce her at the nearest District Court without delay. Even if the victim does not appear in court during the course of proceedings, such a certified statement may be admitted by the court as evidence.
14. In the present case, the complaint lodged by the victim's mother at the Area Police Office, Anarmani, Jhapa, was registered on 2064/05/30 (corresponding to 16 September, 2007) and on the following day, 2064/05/31 (corresponding to 17 September, 2007), the victim's statement was recorded before the competent authority and subsequently certified by the Jhapa District Court on the same day. The language of the Act indicates that the provision applies where the complaint is made by the victim herself. Accordingly, for such a statement to be admitted as evidence in court in the absence of the victim, it appears that the declarant of the statement the person making the complaint must be the victim herself. However, under Section 18 of the Evidence Act, 2031, any fact expressed by a person in the document prepared in the course of inquiry or examination of any act, incident or situation pursuant to the prevailing law, may be taken as evidence in case the person appears before the court and records the statement as a witness. Section 6 of the Human Trafficking and Transportation (Control) Act, 2064, constitutes a specific procedural exception to this general rule. It requires the police to record the victim's statement immediately and to produce the victim without delay before the nearest District Court for certification. Further, Sub-section (3) of Section 6 provides that a statement so certified may be admitted as evidence by the court even if the victim does not appear during the course of proceedings, thereby introducing a flexible approach regarding the admissibility of such certified statements in judicial proceedings. The language of Section 6 of the Human Trafficking and Transportation (Control) Act, 2064, which requires that when a victim of a heinous and inhuman crime such as human trafficking appears before the investigating officer, her statement must be recorded immediately and that she be produced without delay before the nearest District Court for certification, underscores

the special importance and priority that the legislature has accorded to the protection of the victim. Terms such as “immediately,” “without delay,” and “nearest District Court” reflect the lawmaker’s intent to ensure the prompt and secure recording of the victim’s statement for her protection. It is evident that, with a view to ensuring the protection, safety, and access to justice of the victim, the legislature incorporated the foregoing special provisions in the Human Trafficking and Transportation (Control) Act, 2064, which was enacted subsequent to the Evidence Act, 2031. The relevance of this specific provision must be examined in the context of determining whether any fact collected during the investigation constitutes the victim’s own statement or a statement made by any other person. Where the victim herself appears before the investigating officer and gives a statement regarding the offence, and such statement is promptly certified by the nearest District Court, the statement may be admitted as evidence in accordance with Section 6 (3) of the Human Trafficking and Transportation (Control) Act, 2064. It is not necessary, for the statement to be admissible, to inquire whether the victim herself filed the complaint or whether the complaint was filed by her parents or guardians in order to initiate the investigation. The fact that the complaint or FIR may have been lodged by the victim’s parents or guardian does not, in itself, render the certified statement inadmissible or deprive it of evidentiary value. Such a restrictive interpretation would not be consistent with the interests of justice.

15. Given the particularly grave and sensitive nature of the offence of human trafficking and transportation, and considering that victims of such offences may be unable to appear in court for testimony due to pressure, influence, or other reasons exerted by the accused, the law provides that once the victim’s statement is recorded before the competent authority, she must be promptly produced before the court for certification. A statement so certified may, in the course of proceedings, be admitted as evidence even if the victim does not appear in court. In this context, reference may be made to the case of *Maila alias Vivek Dong vs. Government of Nepal* concerning the offence of trafficking in human body parts (Supreme Court Bulletin, 2066, Jestha 1–15, pg. 2), wherein the court laid down that recognizing the particularly sensitive nature of the offence and the practical difficulty of securing the victim’s presence at the time the court seeks testimony, the legislature, acknowledging this reality, provided that the victim’s statement, if available, should be recorded on the spot and certified by the court. Once such a statement is certified, the victim’s non-appearance in court for examination does not diminish its evidentiary value or impede the course of justice. Similarly, in the case of *Government of Nepal vs. Ravindra Silwal* concerning the offence of human trafficking (Supreme Court Bulletin, 2066, Jestha 16–31, pg. 3), the court held that where the statement of the victim, once certified by the court, is supported by corroborative evidence available in the record, the victim’s non-appearance in court for testimony does not preclude reliance on that statement. Furthermore, the court emphasized that the burden of proving that the certified statement is false rests on the accused.
16. Section 6 (1) of the Human Trafficking and Transportation (Control) Act, 2064, provides that where the victim herself lodges a complaint, the police shall record her statement immediately and produce her without delay before the nearest District Court for certification. However,

the provision does not preclude the recording and certification of the victim's statement where the complaint is lodged by a person other than the victim. Section 6 (2) further requires that, upon receipt of a complaint, the police shall promptly record the victim's statement, produce her before the District Court, and have the presiding judge read the statement aloud to the victim before certifying it. These provisions neither mandate that the victim herself must file the complaint, nor, in the case of a minor victim, deny her the protections and benefits of the Act simply because the complaint was filed by her parents or guardian.

17. In relation to the offence of human trafficking and transportation, the admissibility of the victim's statement as evidence does not depend on whether the complaint for the offence was lodged by the victim or by another person. What is determinative is whether or not such statement of the victim has been certified by the Court. The essence of the provision is to ensure that the victim's statement, once certified, may be received as evidence. There is no provision that bars the court from admitting a certified statement as evidence merely because the complaint was filed by someone other than the victim. The statement of the victim, duly authenticated by the court, cannot be rejected on the mere technical ground that the minor victim did not lodge the complaint in person, or that she did not appear before the court to testify, as such rejection would be contrary to the legal provision contained in Section 6 (3) of the Human Trafficking and Transportation (Control) Act, 2064. In such circumstances, even if the victim did not herself file the complaint, where she has given a statement at the scene and such statement has been certified by the court, it may be admitted as evidence in the course of proceedings. Accordingly, this court cannot concur with the grounds taken for summoning and ordering the presence of the opponents.
18. In the present case, in considering the role of the victim's on-the-spot statement as the primary evidence for establishing the offence, it is pertinent to note that under Section 9 of the Human Trafficking and Transportation (Control) Act, 2064, the offence of human trafficking and transportation is one of strict liability. In such an offence, the burden of proof rests on the accused, and the benefit of the doubt is not available to the defendant. In the present case, the defendants were required to adduce objective evidence to establish that the victim was not taken or transported from the place or residence where she was living for the purpose of committing the offence of human trafficking or transportation. However, it is evident that no such evidence has been produced on behalf of the defendants. The victim's statement recorded at the scene is corroborated by other independent evidence, including the statements of persons examined in the course of the investigation, which together substantiate that the offence was committed by the defendants as charged. Accordingly, the contention advanced on behalf of the defendants during argument, that the victim's statement given before the competent authority could not be relied upon as the principal evidence solely because the victim did not appear before the court for deposition lacks legal merit and is accordingly rejected.
19. Turning now to the fifth issue, namely the concept of compensation for crime victims, together with the relevant international legal provisions and prevailing practices, it is

appropriate to briefly delineate the notion of victim compensation¹. Crime victim compensation refers to the redress for the mental or physical trauma, suffering, or economic loss sustained by a victim as a consequence of a criminal act. Black's Law Dictionary defines compensation as follows: "Compensation is a payment of damages, or any other act that a court orders to be done by a person who has caused injury to another²." Similarly, John P. J. Dussich, in defining victim compensation, states that "Victim compensation is a formal administrative procedure provided by law which provides only monetary relief to victims for 'out-of-pocket' real expenses directly resulting from the victimization, to be paid by the state after the victim is found to qualify according to specific criteria determined by the relevant state or federal law³. From these definitions, it is evident that compensation constitutes monetary reparation for the loss suffered by the injured party, to be borne by the person responsible for the harm or, in appropriate cases, by the state, as directed by an order of the court. The primary objective of victim compensation is the restoration of the victim, that is, to facilitate the victim's recovery to the extent possible by alleviating the consequences of the harm suffered.

20. The right of a victim to receive compensation is also understood within the framework of reparative or restorative justice. In its ordinary sense, reparation denotes the making good of the harm suffered by a victim as a result of a criminal offence. Black's Law Dictionary defines "reparation" as "the act of restoring; restoring to its rightful owner; the act of making good or giving an equivalent for any loss, damage, or injury; and indemnification⁴. Likewise, "restorative justice" refers to a systematic and formal legal response to crime victimization that places emphasis that emphasizes healing the injuries that resulted from the crime and affected the victims, offenders and communities. This process is a departure from the traditional retributive form of dealing with criminals and victims which traditionally have generally perpetuated the conflict which resulted in the original crime⁵. This concept is founded on the principle that it is not sufficient for an offender merely to pay a fine to the State; rather, compensation must also be provided to the victim, the victim's family, and society at large. Its underlying objective is to restore the victim, as far as possible, to the position existing prior to the commission of the offence. Compensation awarded to a crime victim must therefore be capable of returning the victim to the pre-victimization condition or

¹ "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. (Article 1 of ANNEX of UN DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER).

² Brayan A. Garner(Ed), (1999), BLACK'S LAW DICTIONARY (9th ed), St. Paul, United States of America: West Group, p.1477.

³ John P. J. Dussich,(2006), *Victimology – Past, Present And Future*, RESOURCE MATERIAL SERIES No.70, pp.116-129.

⁴ Brayan A. Garner(Ed), (1999), BLACK'S LAW DICTIONARY (7th ed), St. Paul, United States of America: West Group, p.1477.

⁵ John P. J. Dussich,(2006), *Victimology – Past, Present And Future*, RESOURCE MATERIAL SERIES No70, pp.116-129. To be recovered suggests that a person has at least regained their prior level of well-being and at best, has exceeded it. This state may be measured by identifying their previous mental condition and determining if they have at least regained that prior status using the criteria of: trust in others, autonomy of self, individual initiative, competency in daily activities, self-identity, interpersonal intimacy, control over personal situations, successful relationships, safety in daily activities, acknowledgment of memory, trauma symptoms have become manageable, self esteem is restored, resourcefulness is achieved, and there is an improved ability to ward off potential threats.

facilitating the victim's rehabilitation. Accordingly, the provision of real and effective compensation to crime victims cannot be ensured merely by the enactment of compensation-related legislation. Such legislation must itself be adequate and effective, and, equally importantly, must be implemented in a practical, realistic, and effective manner.

21. The issue of a crime victim's entitlement to compensation cannot be treated lightly, as such compensation is often directly linked to the victim's very survival. Where a victim receives appropriate compensation in a timely manner, it may enable the victim to rebuild and continue life with dignity. Conversely, the failure to provide adequate and timely compensation may render the victim virtually lifeless, due to compounded economic, social, physical, and psychological consequences. Viewed in the context of our society, it is predominantly women and children from poor and marginalized backgrounds who fall victim to offences such as rape, human trafficking and transportation, and domestic violence. For such victims, compensation assumes even greater significance, as it serves not merely as monetary relief but as a critical means of survival, rehabilitation, and reintegration into society.
22. An examination of the legal framework relating to compensation for crime victims reveals relevant international obligations, particularly under the Convention on the Rights of the Child, 1989. Article 3(2) of the Convention provides that *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of parents, legal guardians, or other persons legally responsible for the child, and, to this end, shall take all appropriate legislative and administrative measures*. Similarly, Article 19 of the same Convention obliges States Parties to take *all appropriate legislative, administrative, social, and educational measures* to protect children from *all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child*. The Convention on the Rights of the Child, 1989 obliges the State Parties to make necessary arrangements for the protection and care of children in the best interest of the child, and to adopt appropriate legal, administrative, social and educational measures to safeguard children from all forms of physical or mental violence, injury or abuse, exploitation, and sexual abuse, while in the care of parent, legal guardians or any other person. As Nepal, is also a State Party to the said Convention, Nepal cannot be absolved from these obligations.
23. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 also provides significant guidance in this regard. Paragraph 12 of the Declaration stipulates that where full restitution to victims of serious crimes cannot be obtained from the offender or other sources, States should endeavor to provide financial compensation to such victims⁶. Similarly, paragraph 13 of the Declaration emphasizes that States should promote the establishment, strengthening, and expansion of national funds for compensation to victims

⁶ When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes.

of crime, and should encourage measures to ensure that such funds are adequately resourced and effectively administered⁷.

24. Likewise, the European Forum for Victim Services has urged its member States to establish arrangements whereby victims of serious crimes may receive prompt compensation from public funds for the physical and economic harm suffered, even in circumstances where the offender has not been identified. Similarly, the Council of Europe has adopted the Convention on the Compensation of Victims of Violent Crimes, 1988, which sets out various standards and guiding principles for the provision of relief and compensation to victims of crime⁸.
25. One of the most significant forms of relief and support to be provided to victims of crime is reparation for the harm suffered as a consequence of the offence. A survey of comparative practices reveals that financial assistance is widely adopted as the primary and most effective means of victim compensation. In providing such financial compensation, different countries have adopted diverse mechanisms and modalities suited to their respective legal and institutional frameworks. By way of illustration, **Poland** has established a dedicated public compensation mechanism through the creation of the *Foundation for Assisting Victims of Crime*, which functions as a special public compensation fund. Likewise, in **France**, there exists a system whereby victims of serious crimes are entitled to receive emergency financial assistance even prior to the final adjudication of the criminal case by the court.
26. In **India**, the right of crime victims to compensation has been recognized as an integral component⁹ of the right to life and personal liberty guaranteed under Article 21 of the Constitution of India. In India¹⁰, the State¹¹ has assumed responsibility to provide compensation¹² to victims of serious offences, including rape and other forms of sexual

⁷ The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

⁸ Pedro R. David,(2006), *Measures to Protect Victims of Crime and the Abuse of Power in the Criminal Justice Process*, RESOURCE MATERIAL SERIES No.70, 131ST INTERNATIONAL TRAINING COURSE VISITING EXPERTS' PAPER. Retrieved from < <http://www.unafei.org> > on December 20, 2014.

⁹ Mukesh Yadav & et al,(2014),*Compensation and Rehabilitation of Rape Survivors A Constitutional Right* , *JOURNAL OF INDIAN ACADEMY OF FORENSIC MEDICINE*, Vol. 36, No. 3, pp. 0971-0973..

¹⁰ Supreme Court of India recently observed that no compensation can be adequate nor can it be of any respite for the victim but as the State has failed in protecting such serious violation of a victim's fundamental right, the State is duty bound to provide compensation, which may help in the victim's rehabilitation. The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.

¹¹ In several cases thereafter, the apex court has repeated its order, making compensation an integral aspect of right to life." In this background, the court held that it is necessary, having regard to the Directive Principles contained under Article 38 (1) of the Constitution of India to set up Criminal Injuries Compensation Board. Compensation for victims should be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board should take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

¹² In several cases thereafter, the apex court has repeated its order, making compensation an integral aspect of right to life." In this background, the court held that it is necessary, having regard to the Directive Principles contained under Article 38 (1) of the Constitution of India to set up Criminal Injuries Compensation Board. Compensation for victims should be awarded by the court on conviction of the offender and by the

violence. Similarly, in **Bangladesh**, there exists both a legal framework and established practice for the provision of compensation to victims of crime¹³.

27. The legal framework and practice relating to compensation for victims of crime in Japan are likewise noteworthy. The relevant provisions are contained in the Crime Victim Assistance Act¹⁴. Under this framework, a victim is entitled to receive compensation both from the offender and from the State. Where compensation is paid by the State, the amount so disbursed is recoverable by the government from the offender in accordance with law¹⁵.
28. Turning to the practice in the **United Kingdom**, it is evident that compensation to victims of crime is administered through the Criminal Injuries Compensation Authority¹⁶. Since 1996, the State has provided victims of crime with compensation in prescribed amounts as a matter of public responsibility¹⁷. It is further observed that enhanced compensation is awarded in cases where the victim contracts AIDS as a consequence of the offence¹⁸. The United Kingdom has ratified the European Convention on the Compensation of Victims of Violent Crimes in 1990. Likewise, in **Canada** various statutory and administrative arrangements exist to ensure compensation for victims of crime. The Ontario Compensation for Victims of Crime Act, 1990 established the Criminal Injuries Compensation Board, which is entrusted with the responsibility of awarding compensation to victims of crime in accordance with the amounts and criteria prescribed by law¹⁹. Similar mechanisms exist in the United States of America and Australia. In the **United States**, in particular, it is observed that in most federal states, fines and fees imposed upon offenders are deposited into a dedicated Crime Victims' Fund, and the amounts accumulated in such funds are utilized for the purpose of providing

Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board should take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

- ¹³ For total implementation of the UN Declaration enactment of new laws providing for protection and restitution of victims of offences is necessary. It has been observed that in some statutes that came into existence in Bangladesh at the beginning of the new millennium, some provisions have been made to compensate, rehabilitate and protect victims and witnesses of offences. The statutes listed below have some provisions for compensation and restitution of the victims of offences, without having recourse to the tardy process of civil litigation. 1. The Legal Aid Act 2000 (Act VI of 2000) 2. Act for Suppression of Cruelty to Women and Children 2000 (Act VIII of 2000) 3. Act for the Disabled Person 2001 (Act XII of 2001) 4. Control of Acid Act 2002 (Act I of 2002) 5. Acid Offences Act 2002 (Act II of 2002)
- ¹⁴ CRIME VICTIM ASSISTANCE ACT, Law No. 36 of 1980, art. 8 (amended 2008), Cited in Shigenori Matsui, (2011), *Justice for the Accused or Justice for Victims?: The Protection of Victims' Rights in Japan*, ASIAN-PACIFIC LAW & POLICY JOURNAL, Vol.13, No. 1, pp.55-95.
- ¹⁵ Shigenori Matsui, (2011), *Justice for the Accused or Justice for Victims?: The Protection of Victims' Rights in Japan*, ASIAN-PACIFIC LAW & POLICY JOURNAL, Vol. 13, No.1, pp.55-95.
- ¹⁶ Mukesh Yadav & et al, (2014), *Compensation and Rehabilitation of Rape Survivors A Constitutional Right*, JOURNAL OF INDIAN ACADEMY OF FORENSIC MEDICINE, Vol. 36, No. 3, pp. 0971-0973. Set up in 1964 the *Criminal Injuries Compensation Authority* is responsible for administering the Criminal Injuries Compensation Scheme throughout England, Wales and Scotland.
- ¹⁷ Mukesh Yadav & et al, (2014), *Compensation and Rehabilitation of Rape Survivors A Constitutional Right*, JOURNAL OF INDIAN ACADEMY OF FORENSIC MEDICINE, Vol. 36, No. 3, pp. 0971-0973. From 1996 each injury was awarded a specific fixed compensation ranging from 1000 UK Pounds to 250000 UK Pounds. Apart from these; the applicants are also eligible to get compensation for earnings and special expenses for up to UK 250000 Pounds. The Ministry of Justice now funds the entire scheme; it was formerly funded by the Home Office. Victims as well as their relatives/dependants are entitled for compensation for personal injuries as well fatal injuries.
- ¹⁸ Awards can be increased if victims of sexual offence can demonstrate they contracted AIDS as a result of the offence. An increase in awards for victims of child sexual abuse was also put in place.
- ¹⁹ Several provinces in Canada have enacted laws ensuring victims of crimes are compensated. The Ontario Compensation for Victims of Crime Act, 1990 provides for the establishment of a Criminal Injuries Compensation Board. In its terms, victims their dependents or by persons looking after them can claim compensation.

compensation to victims of crime²⁰. In **Australia** (Western Australia), victims are entitled to claim compensation pursuant to the Criminal Injuries Compensation Act, 2003²¹.

29. Based on the comparative review of the practices, provisions, and analyses from various countries, it appears that at the international level, there are generally two primary methods for funding compensation to crime victims²²:

1. Compensation from Offenders' Fines and Penalties:.
2. Compensation from State-Established Funds:

30. Among the aforementioned methods, the second method, providing compensation from a fund established through government budget is observed to be more widely adopted internationally. The advantage of this approach lies in its practicality: the victim's compensation does not depend on the financial capacity of the offender, thereby enabling the victim to receive timely restitution. This method has therefore been recognized as more effective in ensuring prompt and adequate redress for victims.

31. Based on the above legal provisions, comparative practices, and scholarly discussion, it appears appropriate for Nepal to adopt the second method. Accordingly, for victims of such offences entitled to compensation, the amount of compensation determined by the court's final decision should be provided promptly from a separate fund established by the Government of Nepal and provision should be made to recover the disbursed amount from the offender as government claim. In view of this, it is evident that the Government of Nepal must establish the necessary and appropriate institutional and administrative infrastructure to implement such a mechanism effectively.

32. As the sixth issue for consideration, regarding the nature and adequacy of compensation available to victims of human trafficking, trafficking in persons, and rape in Nepal, it is pertinent to note that Article 12 of the Interim Constitution of Nepal, 2063, under the Right to Freedom, provides that "Every person shall have the right to live with dignity²³, and no person shall be deprived of personal liberty except in accordance with law²⁴. Similarly, under Article 20 of the Interim Constitution of Nepal, 2063, it is provided that "every child shall have the right to protection from physical, mental, or any other form of exploitation. Such acts of exploitation shall be punishable by law, and the person subjected to such acts shall be entitled to compensation as determined by law. Based on these provisions, the right to

²⁰ Mukesh Yadav & et al,(2014),*Compensation and Rehabilitation of Rape Survivors A Constitutional Right* , JOURNAL OF INDIAN ACADEMY OF FORENSIC MEDICINE, Vol. 36, No. 3, pp. 0971-0923

²¹ Mukesh Yadav & et al,(2014),*Compensation and Rehabilitation of Rape Survivors A Constitutional Right* , JOURNAL OF INDIAN ACADEMY OF FORENSIC MEDICINE, Vol. 36, No. 3,pp. 0971-0973. A similar regime is prevalent though state legislations in the United States and Australia as well, where several states have enacted legislations and through their respective budget allocations ensured that victims of crimes are compensated accordingly. In Western Australia for example, under the Criminal Injuries Compensation Act २००३, compensation can be sought for an incident reported to the police regardless of whether a person has been identified, charged or convicted of the offence.

²² Pedro R. David,(2006), *Measures to Protect Victims of Crime and the Abuse of Power in the Criminal Justice Process*, RESOURCE MATERIAL SERIES No.70, pp. 92-105. Retrieved from < <http://www.unafei>> on December 20, 2014.

²³ Article 12 (1) of the Interim Constitution of Nepal, 2063

²⁴ Article 12 (2) of the Interim Constitution of Nepal, 2063

compensation for victims of crime should be considered an integral part of the right to life under Article 12 of the Interim Constitution of Nepal. Therefore, it is clear that the right to compensation for victims of crime in Nepal should be addressed under the right to life as stated in Article 12. The right of victim of crime to receive compensation must be regarded as an integral part of the right to life as guaranteed under Article 12 of the Interim Constitution of Nepal. Accordingly, in the context of Nepal, it is evident that the right to compensation for crime victims is a matter to be addressed within the framework of the right to life as guaranteed under Article 12.

33. Under Section 17 of the Human Trafficking and Transportation (Control) Act, 2064, it is provided that the court shall issue an order to provide compensation to the victim which shall not be less than half of the fine levied as punishment to the offender. Similarly, No. 10 under the Chapter of Rape of the *Muluki Ain*, stipulates that where a person is found guilty of committing rape, the court shall, having regard to the physical and mental harm suffered by the victim, order the offender to pay such compensation as deemed appropriate. In determining such compensation, the court shall consider the gravity of the offence, and where the victim has died as a result of the offence the suffering caused to any minor children dependent on the victim shall also be taken into account. Furthermore, under Section 10 of the Domestic Violence (Offence and Punishment) Act, 2066, the court may order the offender to pay reasonable compensation to the victim, taking into account the nature and extent of the domestic violence, the suffering endured by the victim, and the respective economic and social circumstances of the victim and the offender.
34. From the foregoing provisions, it is evident that our legal system likewise recognizes the right of a victim to receive compensation from the offender as a legal entitlement of the victim. In awarding compensation to the victim, the nature, severity, and cruelty of the suffering endured by the victim as a result of the offence must form the basis for measuring such compensation. The offender's economic status or capacity must not be allowed to assume a decisive role or become the basis for determining such compensation. Otherwise, arguments such as the offender being unidentified, absconding, economically weak, or a minor could be advanced to restrict or curtail the victim's right to receive compensation. If such situation were to arise, the victim would be deprived of the right to life and access to justice would not be secured, and the judicial protection of the victim's fundamental right to life and basic human rights would be denied. Accordingly, in the interest of justice, such an adverse situation is always deemed impermissible and unacceptable.
35. In the present context, the observation of Justice Krishna Ayyar in *Rattan Singh v. State of Punjab*²⁵ is particularly relevant, wherein it was stated: "It is a weakness of our jurisprudence that the victims of the crime and the distress of the dependants of the prisoner do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law. This is a deficiency in the system which must be rectified by the legislature."

²⁵ RATTAN SINGH VS. STATE OF PUNJAB,(१९८०), AIR, Supreme Court,p. ८४.

36. In the context of the foregoing discussion, the circumstances of the present case show that the life of a helpless minor came to an end before it could fully unfold. It appears that the mother, “Kha” Kumari, due to her economic hardship, placed her young daughter in another household as a domestic worker. The victim, not having attained adulthood, is shown to have been completely immature and helpless in physical, mental, educational, economic, and familial terms. By reason of the lack of a secure place to live and the absence of familial protection and care, the victim was compelled to live in an unsafe environment. It is evident that, due to this precarious situation, she became vulnerable to sexual violence and incidents of human trafficking.
37. Children have open and impressionable minds and are easily influenced by their peers. In the present case, the victim being a minor, it is noteworthy that the accused, Lok Bahadur Sarki, had previously served a prison sentence for the offence of rape. Acting in collusion with the co-defendant, Lakshmi Maya B.K., and pursuant to their joint plan, the victim was transported from Jhapa to Dharan, and subsequently from Dharan back to Jhapa en route to Sikkim, India, under the pretext of a sham marriage, with the intent to sell her, as is evident from the evidence on record.
38. In Nepal, a significant number of families live below the poverty line. Due to economic hardship, which prevents them from providing adequate care, education, and healthcare for their children, many parents are compelled to send their children to work in the homes of others as domestic laborers, or as child workers in brick kilns, textile factories, and other workplaces. These vulnerable and defenseless individuals, separated from the protection of their families and communities, are increasingly subjected to crimes such as human trafficking and exploitation on a daily basis. Due to the fragile economic condition of the family, children often reside in the homes of others to work, which exposes them to potential physical or mental violence, harm or abuse, sexual exploitation, and sexual abuse. In order to protect and safeguard such children, the State has a protective and parental duty as prescribed under the Convention on the Rights of the Child. It is evident that, in this regard, much remains to be done in our country to effectively fulfil these obligations.
39. It appears that in Nepal, a clear and consistent judicial approach for ensuring prompt and adequate compensation to victims of crime has yet to be established. There is no systematic method to determine the actual quantum or form of such compensation, nor to facilitate the victim’s livelihood through it. In practice, even compensation awarded by courts has rarely been received by victims. Marginalized, impoverished, and disadvantaged individuals bear the brunt of criminal acts and violence, yet the amounts ordered by the courts are often unenforceable or impossible for perpetrators to pay. A study conducted by the Supreme Court indicates that, to date, only two victims have actually received compensation. For a realistic understanding of the state of victim compensation, this fact must be noted and considered as judicial knowledge.
40. Based on the provisions of Articles 12 and 20 of Nepal’s Interim Constitution, 2063, the norms of international legal instruments, and comparative practices of other countries, the right of a crime victim to receive compensation must be recognized as an integral part of the right to life. Receiving compensation constitutes a fundamental right of the victim of crime.

It is the obligation of the court to ensure that this right is implemented effectively, realistically, and fully, and it is the overarching duty of the State to facilitate and guarantee the delivery of justice to the victim.

41. On the basis of the principle of social contract²⁶ as well, it is the duty of the State to provide protection and security to all persons residing within its territory. Where the State fails to provide adequate protection, individuals residing within its territory become victims of crime and are consequently deprived of access to justice. This fosters distrust in the justice system itself. It must be recognized that the State's failure or weakness in its protective mechanisms contributes to the victimization of individuals. On this basis, the State bears a duty to provide compensation to the crime victim. Accordingly, such compensation must be provided without delay. Where the offender lacks the financial capacity to pay compensation, or where the offender cannot be identified or is absconding, it shall be the duty of the State, in its capacity as the guardian of the citizen, to provide such compensation to the crime victim
42. Cases involving rape, human trafficking, and transportation of persons often extend over prolonged periods, and final adjudication may take considerable time. By the time the case reaches its conclusion, circumstances may have changed significantly, resulting in victims being unable to receive compensation, and in some instances, having been displaced or migrated. An offense remains an offense, and the victim must receive compensation in any case. According to Victimology, whether or not the offender is identified, and whether or not the offence is prosecuted, a victim is entitled to adequate compensation for survival sufficient for their subsistence. Such compensation must be sufficient (adequate), the rehabilitation of the victim must be immediate, and it is the responsibility of the State to ensure both the compensation and the rehabilitation. In cases involving violence against women, rape, human trafficking and transportation, the compensation for the suffering endured by the victim must be immediately provided by the State, in its capacity as the guardian and protector of its citizen, and such provisions falls within the obligations of the State. The State may enact appropriate legal arrangements to recover the amount of compensation from the offender. The system must not inflict additional suffering on the victim by depriving them of the right to receive compensation solely on the ground that the compensation cannot be recovered from the offender.
43. Now, turning to the seventh and final issue, upon consideration of the aforementioned legal provisions, principles, facts, evidence, and the overall analysis, it is established that the accused Lok Bahadur Sarki, with the assistance of his acquaintance and co-accused Lakshmimaya B.K., induced the minor victim on the pretext of marriage, entered into child marriage, and trafficked her with the intent to sell her. Accordingly, the commission of the said offence stands proved. Therefore, the accused Lok Bahadur Sarki and Lakshmimaya B.K. are liable to punishment under Section 15(1), Clause (e), Sub-clause (2) of the Human

²⁶ In [moral](#) and [political philosophy](#), the social contract or political contract is a theory or model, originating during the [Age of Enlightenment](#), that typically addresses the questions of the origin of society and the legitimacy of the authority of the [state](#) over the [individual](#). Social contract arguments typically posit that individuals have consented, either explicitly or tacitly, to surrender some of their freedoms and submit to the authority of the ruler or magistrate (or to the decision of a majority), in exchange for protection of their remaining [rights](#). The question of the relation between [natural and legal rights](#), therefore, is often an aspect of social contract theory.

Trafficking and Transportation (Control) Act, 2007 (2064), and are hereby sentenced to imprisonment for a term of twelve (12) years each and to a fine of Rs. 100,000 (one hundred thousand rupees) each. With regard to the compensation payable to the victim, it is held that compensation pursuant to Section 17 of the Human Trafficking and Transportation (Control) Act, 2064, shall be recovered from the accused Lok Bahadur Sarki and Lakshmi Maya B.K. in the sum of Rs. 50,000 (fifty thousand rupees) each. In addition thereto, an amount of Rs. 25,000 (twenty-five thousand rupees) shall be recovered from the accused Lok Bahadur Sarki pursuant to No. 10 under the Chapter on Rape of the *Muluki Ain*. Accordingly, a total sum of Rs. 125,000 (one hundred and twenty-five thousand rupees) is hereby ordered to be paid to the victim by way of compensation. As the judgment rendered by the Appellate Court, Ilam, on 2067/06/06 is found to be consistent with law and proper, the same is hereby affirmed. The grounds raised in the appeal by the accused do not merit acceptance and is hereby quashed.

44. The amount of compensation adjudged to be payable to the victim “K” Kumari by the defendants should be immediately provided by the Government of Nepal, and the said amount shall be recovered from the defendants as government amount. Henceforth, for victims of such offences, it is necessary to establish a separate fund from which the compensation amount determined by the court’s final decision can be immediately disbursed, and provisions made for recovering the same from the offender. It is imperative to create the requisite and appropriate infrastructure to implement this system without delay, and a written communication to this effect should be sent to the Government of Nepal, and Office of the Prime Minister and Council of Ministers. It is hereby ordered to do as per the particulars.

Particulars

In the particulars of the decision of the Appeal Court, compensation in the amount of Rs. 75,000 (seventy-five thousand rupees) from the defendant Lok Bahadur Sarki and Rs. 50,000 (fifty thousand rupees) from the defendant Lakshmi Maya B.K., totaling Rs. 125,000 (one hundred and twenty-five thousand rupees), was recorded as payable to the victim by way of compensation. However, in view of the finding recorded hereinabove that the victim is entitled to receive the said amount of compensation immediately from the Government of Nepal, it is hereby ordered to the Jhapa District Court that the compensation amount of Rs. 125,000 (one hundred twenty-five thousand rupees) be forthwith made available to the victim “K” Kumari by the Government of Nepal, and that a record be maintained for recovery of the said amount from the defendants Lok Bahadur Sarki and Lakshmi Maya B.K. in the manner of recovery of government dues.....1

A copy of this judgment shall be made available to the Government of Nepal through the Office of the Attorney General.....2

It is hereby ordered to remove the case from the registry and to submit the case file accordingly.

Concurring with the above Opinion

Justice Jagdish Sharma Paudel

Dated Year 2071 of the Month of Magh Day 19 Day 2

(corresponding to Year 2015 of the Month of February Date 2 Day 2)

Bench Officer: Ramesh Rijal, Arjun Prasad Koirala