

Supreme Court, Division Bench
Honorable Acting Chief Justice Mr. Hari Krishna Karki
Honorable Justice Mr. Nahakul Subedi

Judgement

Date of Decision: 2079/09/18 (2 January, 2023)

Case No.: 079-WH-0104

Subject: Habeas Corpus

Petitioner: Legal Practitioner Advocate Pushparaj Paudel on behalf name redacted Naya Basti
“A”

Vs.

Respondent: Sindhuli District Court et.al.

- In matters concerning children, a uniform time limit of one hundred and twenty days has been prescribed for the disposal of cases of any nature, and where the legislature, without distinguishing between ordinary, serious, and heinous offences, has fixed a definite time period for the disposal of all cases ranging from ordinary to heinous offences, the court must regard such determination as having been made by the law-maker after duly considering and appreciating all circumstances.

(Para No. 21)

- • Where a case cannot be concluded within the time limit prescribed by law, it becomes indispensable that the record of the case file itself discloses reasonable and justifiable grounds explaining why a decision could not be rendered within such period. In essence, by duly addressing the causes of delay apparent from the record and by ensuring accountability in instances of undue and unjustified delay, procedural lethargy in the conduct of cases can be effectively curbed. Such an approach would, in turn, render the implementation of Section 37 of the Children’s Act, 2075 more effective and meaningful.

(Para No. 22)

- When issuing an order to release a juvenile who has otherwise been ordered to be placed in a juvenile correctional home into the custody of a parent or guardian, the Juvenile Bench is required to also consider the impact or consequences that such an order may have on the victim. Although victims in criminal cases often desire that the accused be kept in detention and that the proceedings result in the imposition of the severest punishment, the accused is nevertheless entitled to avail of the facilities, safeguards, and benefits provided by law and accordingly, while issuing its orders, the Juvenile Bench is required to address both the perspectives in a balanced manner.

(Para No. 24)

On Behalf of the Petitioner: Learned Advocates Mr. Pushpa Raj Paudel, Bal Krishna Ghimire
and Ms. Yasashwi Thapa

On Behalf of the Respondent: Learned Joint-Government Attorney Pushpa Raj Bastola

Precedents Cited

- Nepal Law Magazine 2027, Decision No. 547
- Nepal Law Magazine 2067, Unit 4, Decision No. 8345
- Nepal Law Magazine 2074, Unit 10, Decision No. 10108
- Nepal Law Magazine 2067, Unit 10, Decision No. 8473
- Nepal Law Magazine 2075, Unit 10, Decision No. 10111
- Nepal Law Magazine 2064, Unit 2, Decision No. 7817

Relevant Laws:

- Child Act, 2075
- Constitution of Nepal
- Convention on the Rights of the Child, 1989
- Nepal Treaty Act, 2047
- National Penal Procedure Code, 2074
- Crime Victim Protection Act, 2075
- Special Court Act, 2059
- Summary Procedure Act, 2028
- Arbitration Act, 2055

Decision

Justice Nahakul Subedi: The summary of the facts and the order of the petition submitted before the jurisdiction of this court pursuant to Article 133 (2) and (3) of the Constitution of Nepal are as follows:

Fact Section

Redacted name Naya Basti “A” at the time of the remand hearing conducted by the respondent court on 2078/02/03 (corresponding to 17 May, 2021) relating to narcotic drugs (cannabis), was treated as an adult and accordingly was remanded to judicial custody where he has remained in custody. In the course thereof, by an order dated 2078/05/04 (corresponding to 20 August, 2021) issued by the same court, he was subsequently declared a minor and directed to be placed in the respondent Juvenile Correctional Home. In compliance with the said order, the petitioner has continued to remain in detention. The order directing placement in a juvenile correctional home is contrary to Articles 17 (1), 18 (1), (2), (3), 20 (9), and 39 of the Constitution of Nepal and Section 37 of the Act Relating to Children, 2075 is illegal. From the birth certificate and the medical report submitted by Sindhuli District Hospital and the order of the court dated 2078/05/04, it is evident that the redacted name Naya Basti “A” is a minor. Although Section 37 of the Act Relating to Children, 2075, stipulates that a case must be disposed of within 120 days from the date of filing of the case, however, in this case even after one year and six months of the trial

stage, no judgment has been delivered resulting in the petitioner minor being detained unlawfully. While any person may be detained or kept in custody only for the period necessary for the disposal of the case for trial, in the present case the respondent Sindhuli District Court was unable to render a decision within the 120-day period prescribed under Section 37 of the Act Relating to Children, 2075. Despite the expiration of this period, the petitioner minor was kept in custody for trial at the Juvenile Correctional Home, Sano Thimi, Bhaktapur, without disposal of the case, which is in direct contravention of Section 37 of the Act Relating to Children, 2075 resulting in the petitioner minor being unlawfully detained. As the fundamental rights guaranteed under Articles 16 (1), 17 (1), 18 (1), (2), (3), 20(9), and 39 (2) (8) of the Constitution of Nepal have been infringed, and based on the principles enunciated in Writ No. 078-WH-0008 regarding habeas corpus, the petitioner, Advocate Pushparaj Paudel, pursuant to Article 133 (2) of the Constitution of Nepal prays the court to issue an order of habeas corpus including any other appropriate order directing the immediate release of the redacted name Naya Basti “A” who has been unlawfully detained.

An order had been set aside by the court on 2079/8/25 (corresponding to 11 December, 2022) which reads as follows: what has transpired in this matter? Why should the order as sought by the petitioner not be issued? Provided, there are any reasons and grounds for not issuing the order, the respondent No. 1 is hereby directed to submit its rejoinder through the Office of the Attorney General and respondent No. 2 to submit its rejoinder in person or through the legal representative within 15 days excluding the period of travel. It is hereby directed to provide a copy of the writ petition and this order and to execute a summon in the name of respondents and to submit the case file upon receipt of the rejoinder or upon the expiry of the limitation period.

A rejoinder submitted on behalf of the Educational Program for Children with Minimal Facilities (UNICEF) Nepal, and the Juvenile Correctional Home, Sano Thimi, Bhaktapur is as follows:

Whether it be for investigation, trial or serving of sentence, the Juvenile Correctional Home has acted in accordance with the law by placing a child involved in conflict with the law in its custody only pursuant to an order issued by the court or the authority handling the case. The redacted name, Naya Basti “A,” was not placed in this correctional home at the Home’s own discretion; rather, he was sent here pursuant to the ref. no. 322 dated 2078/05/04 (corresponding to 20 August, 221) issued by the Sindhuli District Court. Consequently, there is no basis to make the Juvenile Correctional Home a respondent in this matter. Since the redacted name Naya Basti “K,” was not unlawfully held in custody by this correctional home, and since there is no basis for issuing an order of habeas corpus against the Home, the respondent requests the writ petition to that extent be dismissed.

The rejoinder submitted by Sindhuli District Court is as follows: According to the report submitted by D.S.P. Ravindra Khadka, during the investigation a total of 85 kilograms of narcotic cannabis was seized while being processed by a machine. An age determination was conducted in respect of the writ petitioner which indicated the petitioner’s age to fall between 16 and 18 years. Consequently, a separate case file was registered, namely Case No. 078-01-0241, on 2079/03/30 (corresponding to 14 July, 2022). Based on the case records, it is evident that during the course of investigation and while giving statements before this court, the writ petitioner admitted to having been involved in the handling and trafficking of narcotic cannabis. Based on statements given to the authorities and the court, reports, search and seizure reports, crime description memo, and age determination report and pending further collection of additional evidence as necessary, the court by its order dated 2078/05/04 directed that the petitioner be placed in the Juvenile Correctional Home, Sano Thimi, Bhaktapur, for pre-trial purpose. In the ongoing case, the arrest warrant issued

in the name of defendant Vijay Ghalan could not be executed initially because the address mentioned in the charge sheet matched a missing address, rendering service of the warrant impossible. Accordingly, on 2079/03/07 (corresponding to 21 June, 2022), the court attempted to have the address of the defendant Vijay Ghalan clarified by the plaintiff's side so that the warrant could be reissued. However, the address has not been clarified by the plaintiff. Pursuant to the court's order to produce witnesses for both plaintiff and defendant, a hearing was scheduled on 2079/05/29 (corresponding to 14 September, 2022) during which the plaintiff's representatives, including relevant employees appeared and submitted their deposition. On 2079/07/22 (corresponding to 8 November, 2022) since the plaintiff had not yet provided the address of another defendant in the on-going case, the court ordered that the proceedings of the case be presented upon the lapse of the case concerning the other defendant involved in the concerned case.

An order had been issued by this court on 2079/9/8 (corresponding to 23 December, 2022) seeking the Sindhuli District Court to furnish within one week information as to the status of proceeding of the case, as to whether or not the case has been listed for hearing and if it has been listed since when has the case been listed. It further directed to submit the case upon receipt of the response from Sindhuli District Court.

A letter having ref. no. 1872 dated 2079/09/14 (corresponding to 29 December, 2022) provided by Sindhuli District Court states that in the narcotic cannabis case filed against the petitioner, redacted name Naya Basti "A", out of five defendants, two defendants, Vijay Ghalan and Tapta Bahadur Moktan, were absconding. A 35-day arrest warrant was issued in the name of Vijay Ghalan which had been improperly executed, wherein the court had directed that the District Government Attorney's Office, Sindhuli to provide another address of Vijay Ghalan so that a fresh warrant could be issued and properly served, wherein an arrest warrant had been issued in the new address and the District Government Attorney's Office had been directed to properly execute the warrant and since response regarding defendant Vijay Ghalan has already been received from the District Government Attorney's Office and where the abscondee defendant Tapta Bahadur Moktan has not been present before the court, the court has ordered that the case and other corresponding cases be submitted for hearing on 2079/09/19 (corresponding to 3 January, 2023).

Order Section

The present writ petition was listed in the daily cause-list and submitted before the Bench for adjudication. The learned advocates Mr. Pushpa Raj Paudel, Mr. Balkrishna Ghimire, and Ms. Yashaswi Thapa on behalf of the petitioner argued that pursuant to Section 37 of the Act Relating to Children, 2075, a case involving a child must be disposed within 120 days from the date of filing of the case. Since this mandatory legal provision was not adhered to, and the period has already lapsed, the petitioner, redacted name Naya Basti "A," has been illegally detained and therefore, an order of habeas corpus should be issued to release the petitioner from unlawful detention and to place him under the custody of a guardian.

Joint Government Attorney Mr. Puspha Raj Bastola on behalf of the respondent Sindhuli District Court argued that since the District Court which is a competent authority in itself had issued the remand order and placed the petitioner in the Juvenile Correctional Home, the custody and supervision exercised by the Juvenile Correctional Home cannot be deemed unlawful. Although Section 37 of the Act Relating Children, 2075, provides for disposal of a case within 120 days, the use of the term "generally" in that provision indicates that it is not a mandatory requirement.

Therefore, where the case could not be decided within the prescribed period does not render the Juvenile Correctional Home's custody unlawful, and there is no basis for issuing an order of habeas corpus.

In this matter, since an order was issued by the Sindhuli District Court on 2078/05/04, to keep redacted name Naya Basti "A" in the Juvenile Correctional Home, Sanothimi, Bhaktapur for remand proceeding related to narcotic drugs (cannabis) case, the petitioner pursuant to the order has been being detained in the Correctional Home. The petitioner has filed a petition stating that although Section 37 of the Children's Act, 2075 prescribes for disposal of cases within one hundred and twenty days from the date of filing the case, the case even after a lapse of one year and six months, the case has not been disposed and hence the minor's detention is deemed to be unlawful. On the contrary, the rejoinder submitted by the Sindhuli District Court states that the defendant has been remanded to the Correctional Home pending his trial and since warrant had to be re-issued against other defendants, the case could not be disposed promptly and therefore, the detention of the defendant cannot be deemed to be unlawful.

Upon perusal of the petition and the rejoinder filed by the respective parties, and after hearing the reasoned submissions advanced by the learned advocates appearing on their behalf, this Bench is called upon to determine whether the limitation prescribed by law is mandatory in nature; whether, upon the expiry of such limitation period, a remand order lawfully issued is converted into unlawful detention; and whether, any order as sought by the petitioner is required to be issued?

2. Now, turning to the merits of the case, it is observed that when a narcotic drugs case (077-C1-0178) was filed before the Sindhuli District Court on 2079/02/02 against the petitioner, whose identity has been redacted as Naya Basti "A," the charge sheet was submitted stating the petitioner to be 19 years of age and treating him as an adult accused. However, upon consideration of the evidence produced by the petitioner, including the birth registration certificate and the age-determination report issued by the hospital, the said court, by its order dated 2079/05/04, conclusively determined that the petitioner had not completed 18 years of age, declared him to be a minor, and directed that the proceedings be conducted by placing him in a Juvenile Correctional Home. In these circumstances, it stands undisputed that the provisions of the Act Relating to Children, 2075 are applicable to the petitioner.
3. Article 39 of the Constitution of Nepal guarantees the rights of children as fundamental rights, and sub-clause (8) thereof expressly ensures that every child shall have the right to child-friendly justice. It thus appears that the constitutionally guaranteed "right to child-friendly justice" must be examined in the overall context of the justice system adopted by the Constitution of Nepal and the prevailing laws, including the special arrangements made with respect to children.
4. Article 20 (9) of the Constitution of Nepal provides that every person shall have the right to a fair trial by an independent, impartial, and competent court or judicial body. The right to a fair trial is regarded as an essential precondition for ensuring that the process of administering justice remains impartial and free from bias. A person accused of a criminal offence is entitled to have the charges brought against him to be heard fairly at every stage of the proceedings. The principle of a fair trial embodies the recognition that the determination of whether a person is guilty or not must be conducted impartially and in accordance with procedures prescribed by law. It further signifies that State authorities, while taking action in accordance with law and depriving an individual of liberty, cannot do so without adhering to

the procedures and standards of justice laid down by the Constitution and the prevailing laws. The right to a fair trial encompasses, inter alia, the entitlement of an accused person to receive prompt and expeditious justice regarding the charges brought against him, without undue delay, before an independent, competent, and impartial court, in strict conformity with the procedures and due process established by law. In this regard, this court through various cases has already developed a clear and consistent jurisprudential position¹.

5. Article 16 of the Constitution of Nepal guarantees that “**every person shall have the right to live with dignity,**” while Article 17 provides that “**no person shall be deprived of his or her personal liberty except in accordance with law.**” Together, these provisions recognize personal liberty as a fundamental right and unequivocally ensure that an individual’s freedom cannot be curtailed except in strict conformity with the law and due process. There is no doubt that these rights, enshrined as fundamental rights in the Constitution of Nepal, are mandatory and binding in terms of their implementation.
6. The aforementioned constitutional provisions establish that certain fundamental rights, including personal liberty, are inalienable under any circumstances, whether the individual is a person suspected of being under investigation for an offense, an accused, or a person convicted of a crime. Jurisprudence concerning human rights recognizes that the State is obliged to respect, protect, and promote these rights of the individual. This constitutes a fundamental duty of the State. It is also the State’s duty towards its citizens to ensure the practical guarantee of fundamental human rights in their lives through constitutional, legal, policy, programmatic, institutional, and international commitments. On the basis of this very principle, national and international mechanisms concerning human rights have been developed. With regard to the rights of children, it is evident that the Convention on the Rights of the Child, 1989, contains provisions that have a significant impact on the juvenile justice systems of the State Parties, and that these provisions, in turn, have influenced the juvenile justice systems of the respective countries. In the context of Nepal, the various provisions of the Act Relating to Children, 2075, which replaced the earlier Act Relating to Children, 2048, must be interpreted in conformity with the provisions of the said Convention.
7. In any criminal case, the fundamental principle of sentencing is that imprisonment should not be imposed² if other punishments proportionate to the offense are deemed sufficient and detention should generally be regarded as a measure of last resort. In the case of children, this principle is even more strongly established. When a remand order is issued during the course of investigation or trial, the placement of the accused in detention must also be considered in relation to the sentence that may ultimately be imposed, and detention should be ordered only where alternatives such as setting a date for appearance or granting bail are insufficient.

¹ Parshuram Banjade on behalf Yagyamurti Banjade vs. Durga Das Shrestha, Bagmati Special Court, Kathmandu et.al., (Nepal Law Magazine 2027, Decision No. 547)

Kishor alias Ram Bahadur Hamal vs. Department of Prison Management et.al., (Nepal Law Magazine 2067, Unit 4, Decision No. 8345)

Bijay Raj Tuladhar vs. Kathmandu District Court, Babbar Mahal, Kathmandu et.al., (Nepal Law Magazine, Unit 10, Decision No. 10108)

Advocate Neelam Paudel vs. Office of the Prime Minister and Council of Ministers (Nepal Law Magazine 2067, Unit 10, Decision No. 8473)

Advocate Ajay Shankar Jha “Rupesh” et.al., vs. Ministry of Home, Singha Durbar, Kathmandu et.al., (Nepal Law Magazine 2075, Unit 10, Decision No. 10111)

² Section 14 (e) of the Criminal Offence (Punishment Determination and Implementation) Act, 2074

National legal systems of majority nations, treat the placement of children in observation homes or any other form of state custody during investigation or trial with the utmost sensitivity, allowing it only as a measure of last resort. In this regard, Section 24 (1) of the Act Relating to Children, 2075, establishes as a general rule that children shall not be detained in the course of trial and no bail or guarantee shall be demanded and sub-section (2) provides that a child may be placed in a reform home during such proceedings only on the grounds and under the circumstances specified therein. Thus, the Act clearly contemplates that children only in exceptional cases may be ordered to be placed in an observation home for the purposes of remand.

8. Upon perusal of the provisions of the United Nations Convention on the Rights of the Child, 1989, the provision prescribes that the detention of children during investigation or trial must be used only as a measure of last resort. Article 37 (b) of the Convention provides that children shall not be subjected to arbitrary or unlawful arrest or detention, and that, during investigation or trial, they may be placed under the control of the State only as a measure of last resort and for the shortest appropriate period of time, consistent with the law. The foregoing provision of the Convention indicates that, where children must be placed under the control of the State for the purposes of remand, it is the obligation of the State Parties to provide by law that such detention be employed only as a measure of last resort and for the shortest appropriate period of time³.
9. Similarly, Rule 17 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) provides that restrictions on the personal liberty of children shall be imposed only after careful consideration, and that any such restrictions shall be limited to the minimum period necessary⁴. Similarly, Rule 2.3 of the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) provides guidance that the placement of children under the control of the State must take into account the circumstances of the case⁵. Rule 3.2 of the Tokyo Rules emphasizes that, in considering such placement, the nature and seriousness of the alleged offense must also be taken into account⁶, and Rule 6.1 underscores and emphasizes that children shall be placed under State control during investigation or trial only as a measure of last resort⁷.
10. Nepal ratified the Convention on the Rights of the Child, 1989, on 14 October 1990. Pursuant to Section 9 (1) of the Nepal Treaty Act, 2047, where the provisions of such international treaties or agreements are inconsistent with the provisions of prevailing law, the provisions of the treaty shall be enforceable as good as Nepalese laws. This court in various cases has previously held that the State cannot be exempted from the obligations imposed by the

³ “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”

⁴ Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum

⁵ “In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non- custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible”.

⁶ “The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims”.

⁷ Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

Convention ratified by Nepal⁸. Accordingly, in line with the international legal obligations accepted by Nepal, it is evident that legislation must be enacted and implemented to ensure that children may be placed in detention or imprisonment (correctional home) during remand only as a measure of last resort and for the shortest possible period. In this context, the provisions of Section 24 of the Act Relating to Children, 2075, concerning the placement of children in detention or in an observation home during remand must be implemented and interpreted by the State Parties in a manner that also takes into account the obligations under the aforementioned international law.

11. Article 126 (1) of the Constitution of Nepal, prescribes that **“powers relating to justice in Nepal shall be exercised by courts and judicial bodies in accordance with this Constitution, other laws, and recognized principles of justice.”** This further expands the scope of judicial power and allows the judiciary, in the administration of justice, to not only apply constitutional and legal provisions relating to criminal and juvenile justice, but also to assimilate and apply legal and doctrinal principles developed under international law and jurisprudence. In fact, the provision Article 126 (1) serves as a crucial link in translating the concept of an “independent, impartial, and competent” judiciary, envisaged in the Preamble of the Constitution, into practice. In this context, the concept of “juvenile-friendly justice,” envisaged under Article 39 (8) of the Constitution, must also be analyzed in light of the spirit and purpose of the aforementioned constitutional provision.
12. In this context, Section 16 of the Act Relating to Children, 2075, states that “priority shall be given for the best interests of children” whereas Sub-section (1) prescribes that **“the officials of every organization and institution that carries out activities related to children shall adopt necessary child friendly process by giving priority to the best interests of children, while doing every activity”** and Sub-section (2), prescribes that **“it shall be the responsibility of everyone to instantly help children whose life is in risk”** and Section 20 provides that **“a persons, officials, and the juvenile court involved in dispensing juvenile justice shall take into account the following matters, in the course of dispensing justice, in addition to the other matters as provided elsewhere in this Act.”** These provisions direct that certain special considerations must be observed while dispensing justice. Similarly, under the provisions relating to the establishment of juvenile courts, Section 30 (1) provides that **“The Government of Nepal may, on recommendation of the Judicial Council, form the required number of Juvenile Courts to originally proceed, try and settle the offence committed by the children.”** Subsection (3) provides that **“A juvenile bench shall be formed in each District Court for the proceeding, hearing and settlement of the offence to be dealt with the juvenile court until the Juvenile Court is formed under sub-section (1). Subsection (4) specifies the juvenile bench referred to in sub-section (1) shall consist of the following members: (a) District Judge, (b) Social service provider, (c) Child psychologist or child specialist.** Further, Subsection (6) provides that **“Notwithstanding anything contained in sub-section (1), if an adult person is involved, along with the child, in any offence, the matter shall be proceeded, tried and settled by the Juvenile Court in the case of the child, and the matter shall be proceeded, tried and settled pursuant to the prevailing laws in the case of the adult person by establishing a separate case file.”** Section 33 provides that **“If any child has been accused of offence before the commencement of**

⁸ a. Rabindra Prasad Dhakal vs. Nepal Government, Ministry of Home et.al., (Nepal Law Magazine 2064, Unit 2, Decision No. 7817)

b. Hadish Raen Sahji vs. Siraha District Court et.al., (Case NO. 078-WH-0159) Date of Decision: 2079/01/12

this Act and the case is being originally tried by the District Court or other body pursuant to the prevailing laws, the case shall be transferred to the concerned Juvenile Court after the commencement of this Act.” These provisions reflect the comprehensive legal measures necessary to ensure the constitutional right to juvenile-friendly justice.

13. Similarly, Section 37 of the Act Relating to Children, 2075, provides with regard to the timeframe within which cases involving children must be disposed of:

“37. Period for disposing of the case: Notwithstanding anything contained in the prevailing laws, the Juvenile Court shall generally dispose off a case within one hundred twenty days from the date of filing of the case and the proceeding and adjudication of such a case shall be made on the basis of continuous hearing”.

14. The foregoing legal provisions reflect the recognition that, due to the physical, mental, intellectual, and emotional immaturity of children, cases involving children must be approached in judicial proceedings from a perspective distinct from that applied to cases involving adults or general matters. The provisions under Section 37 of the Act Relating to Children, 2075, regarding the timeframe for the disposal of cases and the requirement of continuous hearings, must likewise be regarded as special measures necessary for the expeditious disposal of cases. In this sense, the procedural rules and the statutory timeframe prescribed by the Act for cases involving children carry particular significance. Accordingly, there can be no difference of opinion that a juvenile court or juvenile Bench, in addition to following other procedural requirements, must ensure that a case pending before the court is disposed of within the time limit specified by the Act. Viewed in the light of the constitutional provisions discussed above and the latest principles relating to the juvenile justice system, the provision under Section 37 must be understood as recognizing the child’s fundamental right to **“clean justice”** and **“juvenile-friendly justice,”** requiring that cases be disposed of within the statutory timeframe and in accordance with the prescribed procedural rules.
15. It is now necessary to consider as to whether or not the timeframe for the disposal of cases prescribed under Section 37 of the Act Relating to Children, 2075, is of a mandatory nature, and what would be consequences if the case is not disposed of within such timeframe. Section 37 of the Act provides that **“Notwithstanding anything contained in the prevailing law, the case shall, generally be disposed of within one hundred and twenty days.”** The phrase **“Notwithstanding anything contained in the prevailing law...”** carries particular significance from the perspective of legal interpretation. This provision is an overriding clause that overrides other provisions of the prevailing law. However, Section 84 of the Act, prescribes that **“the matters contained in this Act shall be governed by this Act and the other matters shall be governed by the prevailing law.”** In comparison to other prevailing legal provisions, this indicates that the Legislature has conferred a special legal status (overriding effect) not only on Section 37 but on the Act as a whole. While, from a legislative drafting perspective, the inclusion of both provisions may not have been strictly necessary, it must be understood that the Legislature intended to accord particular significance to the provisions of Section 37. It is a fundamental principle of legal interpretation that the Legislature employs such special language or phrasing only deliberately and with full consideration of its consequences. Provisions intended to confer a particular or special meaning are not included in law by the Legislature without purpose. Accordingly, given the special meaning, effect, and consequences of the provisions of Section 37, it cannot be regarded as ordinary provision.

16. Furthermore, the phrase “**the case shall be disposed within one hundred and twenty days**” used in Section 37 of the Act Relating to Children, 2075, indicates that the juvenile court or Bench has a mandatory, and not discretionary, obligation to dispose the case within the prescribed period. The word “**shall**” employed in this provision cannot be interpreted to mean that the court may or may not comply. In interpreting the law, the natural and direct meaning of the words used must be applied. While the word “shall” indicates that the case must be disposed within the time limit prescribed by law, the use of the phrase “shall generally dispose a case within one hundred and twenty days” in the same section calls for consideration of what circumstances the term “shall generally” contemplates and what the consequences would be if the case is not disposed of within that period.
17. Except in particular or exceptional situations, the word “generally” used in law is to be understood as a rule that applies in ordinary circumstances. The term “generally” serves to generalize the scope of the meaning of the other words used in the provision. The term “generally” is not used to refer to a specific circumstance. Since its use tends to moderate the binding force of the law, the inclusion of the phrase “generally” in Section 37 comparatively diminishes the mandatory force of the word “shall” used therein, rendering the provision more of a directive in nature. In this sense, based on the wording and structure of the section, Section 37 cannot be interpreted mechanically or mathematically to mean that every case must be disposed of within one hundred and twenty days in an absolute sense. Rather, it must be considered in relation to the circumstances of each individual case. Had the Legislature intended that every case be conclusively disposed of within that period under all circumstances, there would have been no need to use the phrase “generally” in the section. In fact, it appears that the Legislature, having taken into account the possibility that unforeseen circumstances beyond control may arise during the course of proceedings, which could prevent a case from being disposed of within the prescribed period, deliberately used the phrase “generally” in the section. Accordingly, the timeframe prescribed under Section 37 of the Act for the disposal of cases may, for reasonable cause not be strictly applicable. Even though the Act does not specify the consequences if a case is not disposed of within the timeframe prescribed under Section 37, it is evident that the period prescribed for the disposal of cases must be interpreted in the context of the Act Relating to Children, 2075, as a whole.
18. In fact, where the law addresses judicial proceedings involving children in a distinct and special manner, any failure to dispose of such cases within the period prescribed by law must also be taken seriously. If, from the records, a clear and understandable reason is evident for the case not being disposed of within the prescribed period, such a situation must be treated as a special and exceptional circumstance. It cannot be regarded as natural to interpret the non-mandatory nature of the timeframe under Section 37 as negating the obligation to dispose of the case within that period. Comparing the disposal of cases involving children with the general legal provisions under other laws, which prescribe ordinary time limits for case disposal, it would neither be reasonable nor justifiable to treat the prescribed period under Section 37 as discretionary. Furthermore, in the case of a minor placed in an correction home for remand under Subsection (2) of Section 24 of the Act Relating to Children, 2075, a situation where the case cannot be disposed of within the prescribed period would be beyond what the Act envisages. Any circumstance in which a child must remain in remand for an extended period due to non-disposal of the case within the prescribed time cannot be regarded as an ordinary or normal situation. In the context of the Act Relating to Children, 2075, which grants children charged with an offense the right, except in special circumstances, to be with

their parents or guardians, and considering that this court has previously interpreted the placement of a child in an observation home for remand as detention under the control of the State, it appears that in cases where a child is remanded to an observation home, any failure to dispose of the case within the prescribed period, resulting in the child remaining in remand for an extended duration would be contrary to the accepted principles of juvenile justice.

19. Now, with regard to the consequences if a case is not disposed of within the period prescribed under Section 37 of the Act, or within one hundred and twenty days from the filing of the charge sheet, it appears that the Act Relating to Children, 2075, unlike Section 77 (1) of the National Criminal Procedure Code, 2074, does not contain any specific provision concerning the outcome or subsequent procedure in the event that the case is not disposed of within the prescribed period. In this context, it appears that the court must adopt two fundamental approaches in interpreting Section 37. **First**, in the event that a case is not disposed of within the prescribed period, the court should take guidance from the provisions of Section 77 (1) of the National Criminal Procedure Code, 2074, regarding the consequences and procedures in such circumstances. **Second**, the court must, in relation to the application of Section 37, arrive at a reasoned conclusion based on the Act Relating to Children, 2075, the fundamental values of the juvenile justice system, relevant international conventions on the rights of the child and the concepts developed thereunder, as well as the interpretations and principles previously laid down by this court in matters relating to juvenile justice.
20. Upon analyzing the provisions of Section 37 of the Act Relating to Children, 2075, in light of both the foregoing approaches, it appears that the principle and legal framework envisage that, as a general rule, children shall not be placed in remand and bail or surety shall not be required, while placement in an observation home shall be regarded as an exception or special circumstance. In this context, where a case cannot be disposed of within the period prescribed under Section 37, the court must conduct a judicial review to determine whether a reasonable and legally valid cause for non-disposal within the prescribed period is evident from the record. In the course of such review, if no reasonable and legally justifiable cause is found, the court must also consider, in respect of minors placed in an observation home for remand, whether they can be entrusted to the care of a parent or guardian in accordance with Subsection (3) of Section 24. Fundamentally, the National Criminal Procedure Code, 2074, which operates as a general procedural law, provides that in cases where a defendant in remand is not disposed of within the prescribed period, such a defendant may be released on bail or surety while the proceedings continue⁹. If, from the perspective of juvenile justice, this general procedural approach under Section 77 of the Code were interpreted as inapplicable to children in remand under the special law, it would imply that the fundamental right of children to “juvenile-friendly justice,” guaranteed by the Constitution, would be confined solely to the constitutional provision. Such an interpretation would also run contrary to the spirit and purpose of the Act Relating to Children, 2075. The meaning and effect of Section 37 of the Act Relating to Children, 2075, which was enacted with the objective of safeguarding the best interests of the child, cannot be construed to be harsher or more stringent than Section 77 of the National Criminal Procedure Code, 2074. This Bench cannot presume that the Legislature was unaware of this fact. If, in the case of children placed in an observation home for remand under Subsection (2) of Section 24, the timeframe for disposal of cases under Section 37 is

⁹ Section 77 (1) – “If the case cannot be adjudicated within one year from the first date fixed for the examination of evidence in relation to any accused remanded in detention for trial pursuant to this Chapter and if such accused is still held in detention, the case may be proceeded and adjudicated by remanding such accused on bail/bond or guarantee.....”

regarded merely as a general guideline, the legal provision prescribing the period for case disposal under Section 37 loses all purpose and significance. Such an interpretation would effectively render Section 37 moribund, and at that point, the practical utility of the provision would also cease to exist. To prevent such a situation from arising, after the expiry of the period prescribed under Section 37, there is a rational basis to consider, in respect of children in an observation home, the application of the provision under Subsection (3) of Section 24 of the Act, whereby the court may, as necessary, entrust the child to a parent or guardian. Where such grounds are evident, the provision should be applied judiciously.

21. Certain procedural requirements to be followed by the court during the course of proceedings are of a nature that must be observed in all circumstances and cannot be compromised (non-compromising values). A case cannot be disposed of without completing specific procedural steps, such as sending notices to the accused, presenting and examining evidence, and other similar processes. In cases where, in addition to children, an adult is also an accused, even if a separate charge sheet is filed against the adult, the proceedings remain interrelated with the case involving the children. The process may be delayed if any accused is absconding, and in certain circumstances beyond control such as the disruption of regular court proceedings during the recent COVID-19 pandemic wherein, the proceedings may be extended. Even though such a situation arises from unforeseen circumstances, the fact that it may occur in the course of judicial proceedings cannot be denied. Moreover, under the prevailing law, the nature of cases varies, requiring the application of summary procedures, special procedures, or general procedures, and the procedural requirements to be completed as well as the timeframes within which a case must be disposed of are prescribed differently for each¹⁰, **in matters concerning children, a uniform time limit of one hundred and twenty days has been prescribed for the disposal of cases of any nature, and where the legislature, without distinguishing between ordinary, serious, and heinous offences, has fixed a definite time period for the disposal of all cases ranging from ordinary to heinous offences, the court must regard such determination as having been made by the law-maker after duly considering and appreciating all circumstances.**
22. It is observed that the Act Relating to Children, 2075, in prescribing the timeframe for the disposal of cases, does not specify particular circumstances as provided under Section 77 (1) of the National Criminal Procedure Code, 2074, which directs disposal “generally within one month after the completion of examination of in the case,” or under Section 131 (1), which prescribes that “in the case of an accused in remand... within one year from the first date fixed for recording evidence.” Rather, the Act mandates that a case be disposed of within one hundred and twenty days from the date of filing of the charge sheet. From this, it must be inferred that the Legislature intentionally framed the provision to ensure expeditious disposal

¹⁰ a. Section 131 (1) of National Criminal Procedure Code, 2074 “(1) The judge shall make judgment in a case generally within one month after the termination of examination of evidence in the case.”
b. Section 16 (1) of the Special Court Act, 2059 “The Special Court shall in general dispose a case within six months from the date of filing of the case”
c. Section 10 (1) of the Summary Procedure Act, 2028 – “Cases shall be disposed within ninety days after the submission of the note of defense or after the taking of statement where the statement has been taken and after the expiration of the time-limit for the submission of the note of defense or taking statement where the note of defense has not been submitted or statement has not been taken”.
d. Section 24 of the Mediation Act, 2055 - “Except as otherwise provided in the agreement, and subject to Subsection (7) of Section 17, the mediator shall, generally within one hundred and twenty days of the documents being submitted before the mediator shall under Section 14, deliver his or her decision.”

of cases. However, the use of the phrase “generally” indicates that, **where a case cannot be concluded within the time limit prescribed by law, it becomes indispensable that the record of the case file itself discloses reasonable and justifiable grounds explaining why a decision could not be rendered within such period. In essence, by duly addressing the causes of delay apparent from the record and by ensuring accountability in instances of undue and unjustified delay, procedural lethargy in the conduct of cases can be effectively curbed. Such an approach would, in turn, render the implementation of Section 37 of the Children’s Act, 2075 more effective and meaningful.**

23. Insofar as a case is not disposed of within the period prescribed under Section 37 of the Act Relating to Children, 2075, there exists, in respect of a minor in an observation home who is caught in a conflict with the law, the possibility of entrusting the child to the care of a parent or guardian under Subsection (3) of Section 24 of the Act. However, such a determination cannot be made mathematically by simply counting days and automatically transferring custody to a parent or guardian upon the expiry of one hundred and twenty days from the filing of the charge sheet. Its application cannot be mechanical or formulaic. Had the Legislature intended that a child be released from the observation home and placed under the care of a parent or guardian immediately upon the expiry of the one hundred and twenty-day period, such a provision would have been expressly stated in the Act. After a reasoned analysis of the nature and gravity of the offense, the manner in which it was committed, the age of the minor involved, the degree of the minor’s involvement, the nature of the evidence to be examined, the procedural steps yet to be completed, the time elapsed since the filing of the charge sheet, the estimated time for disposal of the case, and the possible punishment if the accused is found guilty, as well as other relevant facts, circumstances, and considerations of the case, if it is apparent that there would be no justification for keeping the minor in an observation home beyond the period prescribed by law, then in such situation, and pursuant to Sub-section (3) of Section 24 of the Act, it would be appropriate and prudent to entrust the child to the care of a parent or guardian. The determination of such a course of action must, however, be made based on the specific facts and circumstances of each case.
24. **When issuing an order to release a juvenile who has otherwise been ordered to be placed in a juvenile correctional home into the custody of a parent or guardian, the Juvenile Bench is required to also consider the impact or consequences that such an order may have on the victim.** The court’s objective is not only to explore possibilities of rehabilitation for the offender but also to safeguard the broader interests of the victim and society. In this context, the Constitution of Nepal, the Crime Victims Protection Act, 2075, and other prevailing laws guarantee the right of victims to remain protected from the offender. Therefore, in releasing a minor who, on the basis of prima facie evidence, is found to be involved in a criminal offense, the court cannot disregard the potential security risks to the victim and society, or any negative perceptions that may arise regarding the court or the judicial process. **Although victims in criminal cases often desire that the accused be kept in detention and that the proceedings result in the imposition of the severest punishment, the accused is nevertheless entitled to avail of the facilities, safeguards, and benefits provided by law and accordingly, while issuing its orders, the Juvenile Bench is required to address both the perspectives in a balanced manner.**
25. Now, when Section 37 of the Act Relating to Children, 2075, is examined in comparison with the timeframes prescribed for the disposal of cases under other prevailing laws, it must be

recognized that the circumstances and consequences arising from non-disposal of a case within the prescribed period under other laws are fundamentally different from those arising when a case before the Juvenile Bench is not disposed of within the period prescribed under the Act. In the case of children placed in an observation home for remand who are caught in conflict with law, if the case is not disposed of within the prescribed period, the very purpose of the provision under the Act relating to their placement in a correctional home for remand is rendered ineffective. **The provisions relating to remand under Section 24 of the Act Relating to Children, 2075, are fundamentally distinct and of a special nature compared to other prevailing legal provisions on remand. Therefore, if a case is not disposed of within the prescribed period, the rationale and effectiveness of this special remand provision would be nullified. Consequently, the provision cannot be appropriately compared with the legal provisions under other prevailing criminal laws regarding the timeframe for disposal of cases.**

26. In the present case, the Juvenile Bench pursuant to Section 24 (2) (a) and (b) of the Act Relating to Children, 2075, has ordered the placement of the child in a correction home. In light of the continued existence of this situation, the question as to whether or not the child pursuant to Sub-section (3) of the same Section, be entrusted to the care of a parent or guardian also becomes a matter for consideration in the context of the present case. In essence, Sub-section (2) of Section 24 of the Act specifically enumerates the grounds and circumstances under which a child may be placed in a correction home for the purpose of remand. Conversely, Sub-section (3) of the same Section provides for entrusting the child to the care of a parent or guardian only in situations “except in the circumstances referred to in Sub-section (2). Since the Act permits a child to be entrusted to the care of a parent or guardian on the ground that the case could not be concluded within the time limit prescribed under Section 37, such entrustment must be determined on the basis of Section 37 itself, the overall statutory scheme of the Act, the constitutionally guaranteed right of the child to juvenile-friendly justice, and the accepted principles of the juvenile justice system. Accordingly, it would not be appropriate to confine such a situation strictly within the phrase “except in the circumstances referred to in Sub-section (2)” as stipulated in Subsection (3) of Section 24. Given that the provision of Section 37 is of a special nature, in order to prevent it from becoming illusory or ineffective and to ensure its meaningful application, it follows that the provision of Section 24 (3) may, where necessary, be invoked and applied in a purposive and pragmatic manner. Even where the circumstances contemplated under Section 24 (2) existed and an order was made to place the child in a juvenile correctional home for the purpose of pre-trial detention, once the time limit prescribed under Section 37 has expired and Section 24 (3) is invoked on that ground, it would not be rational to hold that the circumstances under Section 24 (2) continue to subsist in the same manner. The basis and circumstances for the application of Section 24 (3) at the stage of passing a pre-trial detention order are distinct from the situation where, due to the expiry of the statutory time limit under Section 37, a condition arises warranting an order under Section 24 (3). Where such a situation emerges on account of the lapse of the time limit prescribed by law, it is appropriate to treat these two circumstances as legally and conceptually distinct.
27. With respect to the application of Section 37 of the Act Relating Children Act, 207), this court, in the habeas corpus case concerning the redacted name Phulmaya, Advocate Ajay Shankar Jha “Rupesh” v. Siraha District Court, Case No. 078-WH-0008 (Order dated 2078/4/27), has observed as follows: “*The time limit prescribed for deciding a case is directly related to the*

pre-trial status of the case. Where a person is kept in pre-trial detention, whether in prison, a juvenile correctional home, or otherwise under the control of the State, the legislative intent in prescribing a time limit for deciding the case is to ensure that an individual's liberty is not deprived for an indefinite period. Such statutory provisions are enacted at the very stage of legislative formulation with this objective in mind, and it would be inappropriate to regard them as merely ornamental or decorative in nature. Accordingly, the legislature, with the objective of preventing an accused person from being subjected prior to adjudication to prolonged pre-trial detention, placement in a correctional home, or continued control of the State for a duration tantamount to serving a sentence, has expressly prescribed a definite time limit within the relevant statute for the disposal of cases. In such circumstances, it is incumbent upon the adjudicating authority to remain vigilant and conscious of this legislative mandate. It cannot be accepted as a valid principle that where, for any reason, a competent authority or official fails to complete the required judicial process within the prescribed time, the adverse consequences of such failure should be borne by the accused person.” Interpreting the law in this manner, this court has held that cases must be disposed of within the statutory time limit, and where such disposal is not possible, an appropriate order placing the child under the care and responsibility of the guardian must be issued accordingly.

28. Now, in the light of the aforesaid theoretical and legal framework, and upon examining the facts and circumstances of the present case, it is evident that the petitioner, a juvenile in conflict with law, was arrested on 2077/11/07 in connection with a narcotics (cannabis) offence. By an order dated 2078/02/03, the petitioner was initially remanded into judicial custody for the purpose of trial, and subsequently, by an order dated 2078/05/04, upon being found to be a juvenile, was directed to be kept in a Juvenile Correction Home. It is further evident that a charge sheet against the petitioner was filed before the Sindhuli District Court on 2078/02/02. However, despite the lapse of one year and ten months from the date of filing of the charge sheet, the case has not yet been adjudicated. With regard to the status of the proceedings, this court, by its order dated 2079/09/08, sought information from the Sindhuli District Court. In response, it was reported that a 35-day arrest warrant issued in the name of defendant Bijay Ghalan had been improperly served, and that the matter was once again in the process executing summons. From the said response, it is evident that uncertainty persists as to when summons will be duly served upon the said defendant, when he will appear within the prescribed time, and when the processes of production of evidence and witness can effectively proceed. Consequently, the situation does not permit any definite assessment as to when the case is likely to reach final adjudication. Where the statute itself prescribes a specific time limit for disposal of a case, and a considerable period has elapsed far beyond such prescribed duration while the timeframe for final adjudication remains uncertain, continuing to keep a juvenile in conflict with law in a Juvenile Correction Home for the purpose of trial cannot be regarded as appropriate. In such circumstances, keeping the petitioner juvenile in pre-trial detention in a Juvenile Correction Home for an indeterminate period is clearly inconsistent with the letter, spirit, and overall scheme of the Act Relating to Children, 2075. Examining the substance of the charge, it is seen that the allegation pertains to trade in cannabis, which, in comparison to other narcotic offences, carries a relatively lesser penal consequence. Furthermore, the petitioner juvenile has already remained in a Juvenile Correction Home for a period exceeding one year and ten months, which is substantially longer than the time limit prescribed under Section 37 of the Children Act, 2075. Even considering the maximum punishment that could be imposed in the event of conviction, and upon an overall assessment of the facts, circumstances, and nature of the offence, no reasonable justification is established

for continuing to keep the juvenile in a Juvenile Correction Home for such an extended duration after expiry of the statutory period prescribed under Section 37 of the Act. Accordingly, the prolonged pre-trial detention of the petitioner juvenile in the Juvenile Correction Home, despite exhaustion of the statutory time limit, fails to meet the test of necessity, proportionality, and the best interests of the child, which form the cornerstone of the juvenile justice framework. In this situation, where the case has remained undecided for a period far exceeding the time limit prescribed by law, it is evident that the petitioner's constitutionally and statutorily guaranteed right to "child-friendly justice" has been seriously impaired. Having regard to the constitutional and legal framework of Nepal, together with the paramount consideration of the best interests of the child, no sufficient justification is found for the continued detention of the petitioner in a Juvenile Correction Home.

29. Upon consideration of whether an order of habeas corpus should be issued as claimed by the petitioner, it is observed that the petitioner has been placed in a Juvenile Correction Home pursuant to a lawful order of the Juvenile Bench, for the purpose of trial and in accordance with law. While the case has not been disposed of within the time limit prescribed under law due to non-fulfillment of certain procedural requirements, it is evident that, in such circumstances, the appropriate course is to place the petitioner under the custody of his guardian. Accordingly, no ground exists for the issuance of a habeas corpus order in the present matter.

30. However, in the present case, the petitioner, name redacted Naya Basti "A), against whom a case regarding the illicit trafficking of cannabis is pending before the Sindhuli District Court, has, due to the delay in disposal of the case far exceeding the period prescribed under Section 37 of the Act Relating to Children, 2075, namely, for over one year and ten months been compelled, unexpectedly, to remain in the Juvenile Correction Home for the purposes of trial. Upon due consideration of the facts, the reasons stated herein, and the principles heretofore laid down by this court, it is observed that such continued detention is not in conformity with the Constitution of Nepal, the Act Relating to Children, 2075, or the accepted principles of juvenile justice. Accordingly, in the absence of any other legal ground or case requiring the petitioner's detention, an order of mandamus is hereby issued in the name of the respondents ordering the petitioner to be placed under the custody of his guardian or legal custodian pursuant to Section 24 (3) of the Act Relating to Children, 2075, and to be produced before the court as and when required and until the disposal of the case, the petitioner's conduct and behavior shall be reported to the Juvenile Bench on a monthly basis.

31. Additionally, in accordance with the foregoing considerations, and based on the Constitution of Nepal, the relevant laws, the principles laid down by this court, and the accepted norms of juvenile justice, it is observed that in cases involving children, the proceedings and disposal of the case should, as far as possible, occur within the time frame prescribed under Section 37 of the Act Relating to Children, 2075. Where, despite such provisions, the case cannot be disposed of within the prescribed period, and a child is placed in a Juvenile Correction Home under Section 24 (2) of the Act, the court must consider, irrespective of whether an application is filed on behalf of the child, the following factors: the nature and gravity of the alleged offence, remaining procedural requirements, the estimated time for case disposal, potential punishment if found guilty, and the impact on the victim. Upon careful examination of these factors, the court may determine whether it is appropriate to place the child under the custody of a guardian or legal custodian pursuant to Section 24 (3) of the Act. Where such a

determination is made, the reasons for the decision shall be clearly stated, and the relevant records of the order shall be forwarded to this court. Furthermore, an order is issued in the name of the Chief Registrar of this court to provide a copy of this order to all the District Courts and to the Monitoring and Inspection Division for the purpose of monitoring and management of the order.

33. It is hereby ordered to provide a copy of this order to other respondents through the Office of the Attorney General. It is hereby ordered to remove the case from the registry and accordingly submit the case file to the Record Section.

Concurring with the above Opinion

Acting Chief Justice Hari Krihna Karki

Bench Officer: Raj Kumar Dahal/Shiva Wagle/Sadiksha Nepal

Computer Operator: Chandan Kumar Mandal

Dated Year 2079 of the Month of Paush Date 18 Day 2

(Corresponding to 2 January, 2023)