

Supreme Court, Joint Bench

Honourable Chief Justice Shree Kalyan Shrestha

Honourable Justice Shree Devendra Gopal Shrestha

Order

071-WO-0753

Subject: Mandamus.

Advocate Punyashila Dawadi Ghimire, resident of Lalitpur Sub Metropolitan City, Ward No. 5, Manbhawan, Lalitpur district..... 1

Advocate Shashi Adhikari, resident of ibid..... 1

Member of JuRI-Nepal and advocate Basanta Prasad Adhikari, resident of ibid, Ward No. . . . Bhaisepati..... 1

Nawaraj Thapaliya, resident of ibid..... 1

vs

Office of the Prime Minister and Council of Ministers, Singhadurbar, Kathmandu..... 1

Ministry of Law, Justice, Constitutional Assembly and Parliamentary Affairs, Kathmandu..... 1

Ministry of Women, Children and Social Welfare, Singhdurbar, Kathmandu..... 1

Home Ministry, Singhadurbar, Kathmandu 1

Police Headquarters, Naxal, Kathmandu 1

Brief facts and decision of the case registered in this Court falling within its jurisdiction as per Article 32 and 107 (2) of the Interim Constitution of Nepal are as below:

We the petitioners have the locus standi to file this application as provided for in Article 107 of the Interim Constitution of Nepal, 2007. We also have the right to constitutional remedy provided by Article 32 of the Interim Constitution of Nepal, 2007 for the practice of human rights and fundamental rights. Accordingly, we would like to plead that we have come before the competent Court with a sensitive issues of public concern to promote gender justice by making arrangements to provide immediate interim relief to women and children who are victims of sexual violence so that they will be empowered to seek justice.

There is no controversy on the fact that sexual violence against women including rape and human trafficking are not only acts of extremely inhumane, unsocial and immoral nature but also crimes that are condemnable and prohibited. Internalizing this understanding, Article 20 of the Interim Constitution of Nepal guarantees that there shall be no discrimination on the grounds of being a woman, and if any physical, moral or other violence against a woman is committed, it is provided that such and act is punishable by law. Likewise, the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other international treaties have recognized the fundamental human rights of every woman and child to be free from violence. In addition, there is a binding obligation on the part of the state and its responsible agencies to take necessary measures to create an environment where other citizens of the society can enjoy the basic human rights to live with dignity, freedom, equality and dignity while being protected from acts of violence against women such as human trafficking, rape, sexual violence, etc. However, in practice, women and children have not been freed from the vicious cycle of gender-based violence and discrimination. They continue to suffer from rape and sexual crimes, as well as other acts of sexual violence committed under the guise of various evil customs.

However, it is not that there there have been no measures taken to bridge the gap between the legal guarantee of access to justice for rape victims and the practical reality. Service centers and rehabilitation centers that provide shelter and security services to victims of domestic violence and human trafficking operating in 23 districts under the Office of Women and Children, establishment and mobilization of a domestic violence prevention fund, establishment and operation of a hospital-based one-door crisis management center to provide integrated

services against domestic violence are some examples of the measures. However, these efforts are not enough compared to the seriousness of the problem.

The fact that women victims of violence receive immediate and free financial assistance is not a matter of welfare conception, but of human rights. It is important to look at it from human rights angles. It can be seen that the system of interim relief and other necessary social assistance to the women who have been victims of domestic violence is in practice elsewhere as well. The comparative experience of various countries underlines its necessity and appropriateness. It is seen that many countries have made arrangements to provide immediate relief to the victims of sexual crimes by taking into account the immediate and long-term risks that they may face as well as harmful impacts on their health.

Therefore, first information report (FIR) against rape and sexual violence is hardly filed, and even if it gets filed, the victims are forced to turn indifferent to pursue it due to socio economic reasons, and they become inactive in justice process. This will lead the situation of impunity and the crime will continue to recur in the society. Therefore, in order to end such a situation, let an order of mandamus be issued to make necessary arrangements to identify, as soon as an FIR is filed, the victim of rape and sexual or gender based crime and to immediately provide the "interim relief amount" in order to facilitate the practical implementation of their right to judicial remedy. Application filed as above.

What has happened in this? Why an order as demanded by the petitioners should not be issued? Send the notice to furnish the written responses within 15 days excluding the time for travel from the date of the receipt of this order. Once the written response received or once the time lapses, table to case to the bench as per the rule. Order as above by a single judge bench of this Court on 31 March 2015.

In order to combat domestic violence and other discriminatory acts against women, the Government of Nepal has enacted laws including the Domestic Violence (Offense and Punishment) Act, 2066 (2009), Human Trafficking and Transportation (Control) Act, 2064 (2007), and The Sexual Harassment at Workplace (Prevention) Act, 2071 (2014). With the aim of effectively implementing the provisions of the Act, Domestic Violence (Offense and Punishment)

Rules, 2067 (2010), and Human Trafficking and Transportation (Control) Act, 2065 (2008) have also been framed duly implemented. Meanwhile by exercising the right of the recently promulgated Sexual Harassment at Workplace (Prevention) Act, 2071 (2014), I submit to the competent court that a Regulation for this Act shall also be framed in the near future. In addition, abuse and violence against women of this type are punishable under the Muluki Ain (General Code), 2020, in the Chapter on Husband and Wife, Chapter on Incestual Rape, Chapter on Physical Hurt/Battery, Libel and Slander Act, 2016 (1959). Likewise, Nepal is a party to the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol.

For the implementation of the above mentioned legal arrangements, the Government of Nepal has framed and implemented Gender-based Violence Prevention Fund (Operation) Rules, 2067, Rehabilitation Centre Operation Guidelines, 2068, Single Women Security Fund Operation Standard, 2071. The above-mentioned funds have made arrangements for the rescue, relief and compensation to the women, children and single women who have ben victims of gender-based violence and human trafficking. Service centres and rehabilitation centres are operated in 17 and 8 locations respectively across the country. The women who have suffered gender-based violence are kept in the service centres and the women who have ben victims of human trafficking have been kept at the rehabilitation centres where they are receiving different services and facilities. The Ministry of Women, Children and Social Welfare is preparing to operate Mangala-Sahana long-term Rehabilitation Center taking into consideration of the women who need long term protection. In addition to this, various programs against domestic violence and trafficking have been conducted continuously in all 75 districts through the women and children's offices.

Similarly, the bill related to witchcraft accusations has been submitted to the Parliament and is in the process of becoming a law. As per the order on various writ petitions from the respected Court, a law is being drafted regarding various types of social evils that discriminate against women. Therefore, based on above grounds and reason, it is herewith informed to the respected Court that in order to remove the various types of discrimination and acts of violence against women and build a society based on gender equality, various legal and institutional

arrangements, as well as activities and programs are being conducted. And hence an order as demanded by the opponents does not require to be issued, and let the writ petition be quashed. Written statement from the Ministry of Women, Children and Social Welfare as above.

The Government of Nepal has been as sensitive as possible regarding the crime of sexual and gender violence. With an aim of providing easy access to justice for the victims, the Government of Nepal has issued the Legal Aid Act, 2054 to provide necessary legal aid to those unable to protect their legal rights due to economic and social reasons and has been conducting various programs and the respected court is also recruiting paid legal professionals, and free legal aid has is being provided on a regular basis. The Government of Nepal has provided various facilities to the victims as interim relief as provided for in the laws including the Domestic Violence (Offense and Punishment) Act, 2066, Domestic Violence Prevention Fund (Operation) Rules, 2067. In addition, to further address this issue, the Government of Nepal has presented the Criminal Procedure Bill to the Parliament and the Ministry is working on a conceptual document toward drafting Crime Victim Protection bill. Following an order of the Court, the existing law does incorporate a provision with regard to the interim relief. Therefore, the writ petition appears meaningless, and deserves to be quashed. Written response as above from the Ministry of Law and Justice.

Article 20 of the Interim Constitution of Nepal, 2063, provides for the rights of women. According to the said article, there is no discrimination against any other person on the basis of being a woman. Also, in sub-section (3) of the same article, there is a provision that no rape shall be committed against a woman by means of physical violence or any other form of violence and such acts shall be punishable by law. Article 20 protects the rights of women against all forms of physical, mental and other violence against women as criminal acts. The government of Nepal has put in place various legal and legal arrangements for the prevention of sexual crimes including rape, effective investigation and protection of abused women. Based on the need and available resources, more such arrangements will be made. It is important to be aware of the potential abuse of sexual harassment, such as sexual harassment. There is no need to make additional arrangements when other institutional and legal arrangements are being made for the

protection of victims of sexual violence. Written response from the Ministry of Home Affairs as above requesting that the writ petition should be dismissed.

The Preamble of the Interim Development of Nepal, 2063 (2007) has resolved to carry out progressive restructuring of the state in order to address the existing racial, ethnic, regional and gender problems in the country. Various laws and policies such as the Policy to make special arrangement for women's health, education and employment rights, policy of social security for women, policy of positive discrimination for women, thematic laws such as Children Act, 2048, Human Trafficking and Transportation (Control) Act, 2064 (2007), Domestic Violence (Offense and Punishments)) Act 2066 (2009), Gender Violence Prevention Fund (Operation) Rules, 2067, Emergency Child Rescue Fund Operation Act, 2067, Single Women Protection Fund (Operation) Rules, 2070, Sexual Harassment at Workplace (Prevention) Act, 2071 (2014), etc. are now enacted and implemented. Likewise, Nepal is also party to the International Convention on the Elimination of All Forms of Racial Discrimination 1965, International Covenant Economic, Social and Cultural Rights, 1966, International Covenant on Civil and Political Rights, 1966, Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Conventional against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984, and Convention on the Rights of Persons with Disabilities, 2006. So, there can no dispute on the fact that the Government of Nepal is committed to creating conditions for access to justice by complying with the obligations contained in the international legal provisions.

With respect to the question of providing immediate interim relief amount to the victims of rape and other sexual violence cases immediately upon receiving the information of the crime and FIR is filed in order for them to obtain justice with ease, relief is being provided with the use of Gender-based Violence Prevention Fund (Operation) Rules, 2067, Emergency Child Rescue Fund Operation Rules, 2067, Single Women's Protection Fund (Operation) Rules, 2070, and therefore there is no need to issue additional orders on the same matter. Therefore, the petition deserves to be dismissed based on the grounds and reasons explained above. Written response as above from the Office of the Prime Minister Council of Ministers.

Since this office does not have the right to enact laws and since the responsibility of this office is only to enforce the law that is enacted authorized agency, and as there is also no claim of the non-enforcement of such laws from the Police Headquarter, the appeal filed by the petitioner making this office as one of the opponents deserves to be dismissed. The written response as above the Headquarter of Nepal Police, Naxal.

In the present case that came to the bench as per the daily case list, learned advocate Shree Punya Shila Dawadi Ghimire and Mr. Raju Chapagai argued as below: In our societies, FIR is hardly filed in cases of rape and sexual crimes. Even if it is filed, due to economic and social reasons victims cannot actively participate in the judicial process, and this has led to the rising impunity. In many countries of the world, it is found that the victims are supported with immediate and suitable interim relief program to facilitate the practical implementation of the right to legal remedy for women victims of sexual crimes. In our case, although there are some relief programs for the victims, they have not been effective, and the process of getting relief for the victims is very complicated. Therefore, we request for a directive order in the name of the respondents.

Learned Joint-Attorney General Kiran Paudel argues as below: The Constitution has arranged for a separate fundamental right for the women. In order to combat domestic violence and other discriminatory acts against women, the Government of Nepal enacted laws including the Domestic Violence (Offense and Punishments) Act, 2066, Human Trafficking and Transportation (Control) Act, 2064, and Sexual Harassment at Work Place (Prevention) Act, 2071. The arrangements in the Act have been effectively implemented and the rules have also been arranged, and the Gender-based Violence Prevention Fund (Operation) Rules, 2067, Rehabilitation Center Operation Guidelines, 2068, Single Women Protection Fund Operation Standards, 2071, have been framed and implemented. The above-mentioned funds have provided rescue, relief, compensation to the women, children and single women who have been victims of domestic violence and trafficking. Service centers are being run in 17 different places and rehabilitation centers in different 8 places. Therefore, the appeal of the opposition should be rejected.

After having listened to the arguments made by the learned advocates as well as the learned Joint-Government Attorney, and after reading all the documents together with the FIR application, it is now clear that a decision has to be made whether or not there is a need to issue an order as demanded by the petitioners.

In this regard, there is no doubt that sexual violence against women, including rape and human trafficking, is not only an inhuman, antisocial, immoral act, but also universally reprehensible and punishable. Article 20 of the Interim Constitution of Nepal, 2063 guarantees that no discrimination will be made on the grounds of being a woman and further provides that any act of violence including physical and mental shall be punishable by law. Likewise, the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other international treaties recognize freedom from violence as an inalienable fundamental human right of every woman and child. Therefore, it is a binding obligation of the State and its responsible Agencies to take necessary measures to create an environment where women can be protected from acts of violence against women such as human trafficking, rape, sexual violence, and freely enjoy the fundamental human rights of freedom, equality, and dignity on par with other citizens of the society.

However, in practice, women and children have not been free from the vicious cycle of gender-based violence and discrimination. In addition to rape and other sexual, they have continued to suffer from the acts of gender based violence committed on grounds of various social evils crimes. Although there are some laws and regulations, crimes including domestic violence and rape are occurring on a daily basis. Therefore, it is the duty of the state to create an environment in which no one becomes a victim of sexual crimes. It is the failure of the state in its duty of trust and protection if anybody under its jurisdiction suffers from sexual crimes. In such a situation, the state must make every effort to implement the right to legal treatment of the victim.

The State must take reasonable measures to facilitate access to justice. From the very beginning, an environment should be created in which the victims feel taken care of and protected by the state. If there are other social and cultural reasons that block women who have suffered mental, physical, psychological and emotional pain due to rape and human trafficking,

they must be wiped off. Also, the situation that discourages women from filing complaints due to their weak social and emotional status in the family pressures must be addressed.

There should also not arise a situation whereby not only the woman who is forced to suffer sexual violence from a relative or a family member but also relatives who support her get displaced. Similarly, it is also reported that sexual violence and domestic violence from husbands and other members of the family have not come to light. This poses a challenge to the overall development of women. The state needs to pay attention to this. And it is necessary for women victims of violence to have access to justice. In order to create a favorable environment for justice, interim relief, compensation and other protective and supportive programs and measures should be expanded and made effective.

It is seen from the written response that the Government of Nepal, under the Office of Women and Children, and in order to help women have access to justice, has established and operated service centres and rehabilitation centres in 23 districts to provide services including shelter and security for victims of violence and human trafficking. It is also seen that there is a domestic violence prevention fund established and operated, and hospital-based one-door Crisis Management Center has been established and operated to provide integrated services against gender based violence. Likewise, there are also various laws and regulations enacted. But those laws and regulations have not covered all the districts.

In all districts, security and service centers have not been established, and because of their lack of security, it is seen that the victims have to face serious obstacles in accessing justice. Those who are not able to get such benefits should be provided with various benefits also from the point of view of equality. In other words, if there is a provision to grant immediate interim relief at the stage of filing complaint, it will help the victim in seeking justice and the plaintiff will not be discouraged from filing the complaint and will not have to live in a helpless state. It is thus evident that an interim relief package required at the very outset of the justice process in order to empower the victim. Since such aid is not a subject of welfare concept but a subject of fundamental human rights, when a situation is created where injustice is tolerated by being discouraged from seeking justice, it will create negative impact in the enjoyment by the

victimized women of their rights guaranteed in the Constitution and International Human Rights treaties. Article 20 of the Interim Constitution of Nepal, 2063 guarantees that no gender discrimination shall be done on the grounds of being a woman, and provides that it is punishable by law if anybody commits physical, emotional or other violence against a woman. In addition, Article 20(1) provides legal protection against all forms of gender violence, while Article 13 guarantees the right to equal and special protection of the law.

The Right to Equality provision of the Interim Constitution of Nepal, 2063, provides for non-discrimination on the basis gender, while under the the Rights of Women provision it commits to non-discrimination on the basis of being a woman. It also guarantees that no acts of physical, sexual or other violence against women shall be committed and that such acts are punishable by law. In the same way, the Right to Social Justice provision ensures that women who have been left behind due to economic, social and educational reasons shall also have the right to participate in the State bodies on the basis of inclusive principle. In this way, it is the responsibility of the state to implement the provisions adopted by the Constitution from the point of view of gender justice and gender equality.

It is the responsibility of the government to adopt measures to improve or repeal any laws, rules, customs and practices that promote discrimination against women. In the same way, the state must not step back from the obligation created by the international convention to which the Government of Nepal is a party. No civilized society and state can turn away from the issues raised by the petitioner. The characteristics of any is its dynamism. There should be made timely reforms in the law as expected by the modern society. The State should also be involved in the process of timely amendment and reformation of laws. In addition, the Courts should also encourage states to enact appropriate laws through judicial reviews. The state should not give continuity to any legal provisions that discriminate against women and children by ignoring the commitment expressed by its fundamental law and the expectations in the international documents.

Access to justice for victims of sexual violence is a right protected also under prevailing international law. Ensuring legal remedies is an important part of access to justice. After being victimized, if a victim is in a state where he/she has lost the power to seek and obtain remedies from the justice system, then he/she is considered to be deprived of access to justice. Also, the creation of such a condition means the violation of the enjoyment of the legal rights. Therefore there is no "loss" of consciousness. We humans who are born naturally as we are, are not born by choosing a specific gender/sex. Therefore it is the state's duty to grant equal rights to all the citizens.

Article 8 of the Universal Declaration of Human Rights provides that every person has the right to an effective remedy by a competent national tribunal against violations of his or her fundamental rights granted by law. The International Covenant on Civil and Political Rights guarantees the right to a legal remedy. Article 2(3)(a) thereof provides that a person shall have the right to an effective legal remedy if the rights and freedoms recognized herein are violated. Likewise, Article 2 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women stipulates that the state must take all kinds of measures to end discrimination against women.

In a country like ours with a patriarchal social culture, women are not economically independent, and if the state does not provide legal protection to them, they will not be in a situation to seek legal remedies. Also, women should not be forced to endure more violence and discrimination. General Recommendation No. 19 of the CEDAW Committee of the Convention on the Rights of Women has also recommended various protective measures that the States should take to end violence against women. They include measures such as providing compensation and other necessary support services to the victims.

The 1989 Convention on the Rights of the Child has guaranteed access to justice and the right to legal remedies for children who are victims of violence. Article 3 of which states that the state must take appropriate measures taking into account the welfare of children affected by

violence, while Article 39 states that all appropriate measures must be taken to promote the physical and psychological recovery and social reintegration of children affected by violence to promote their health, self-esteem and dignity. The State cannot merely remain a mute spectator to fulfil these obligations. Likewise Article 8 (b) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000 stipulates that the state must ensure various rights of the children including right to compensation and other remedies. According to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 adopted by the United Nations for the international standards on the rights of victims, victim has the right to have access to justice and reasonable compensation and social assistance from the state.

Access to Justice Commission under the chairmanship of Honorable Chief Justice has been formed in Nepal. It is the human right of everyone to get justice in a simple, easy and effective manner, every citizen has the right to ask for and receive justice without any objection from a competent and impartial body. It is the responsibility of the state to create a conducive environment for all citizens to seek and receive justice through a competent body. But at practical level, justice has not reached for all citizens. If economically, socially and educationally backward communities, especially women, poor, helpless and disabled face violations of their rights, they are found to have lacked access the justice institutions due to various reasons. It cannot be said that all individuals are equally capable of enjoying the rights provided by constitution and law. There is also a constitutional provision that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, *Pichhada* class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent *Kahs Arya*.

Therefore, it may take take a long time for the judicial remedy to the victims of sexual violence and until then, if there is no improvement in the situation of the victims, even if justice is obtained from the court, the victim will be in a situation where he/she will not able to experience the justice. Once recognized as victims of sexual violence, regardless of whether or not investigation or justice process is ongoing, until the end of such a process, there has to be an arrangement for the the health, education, relief, judicial and legal aid and protection of the victims. Therefore, it is herewith established that a directive order deserves to be issued in the name of the Government of Nepal including the Ministry of Women, Children and Social Welfare to make arrangements for a Sexual Violence Fund, to make procedures to easily access support from the Fund thus established, to enhance victims' access to the relief, to design and implement a separate programme as per the need and requirement of the stakeholders after consulting with them, to make an arrangement of an interim relief fund until the case is settled. Provide the information of the order to the opponents through the Office of the Attorney General. Deduct the cost of the writ petition and submit it to the records division as per the rules.

Chief Justice

I concur with the above decision.

Justice

Dated: Thursday, 4 February 2016.....

Bench Officer: Ram Prasad Basyal

Computer Setting: Bibek Guragai