ILF-Nepal

The International Legal Foundation – Nepal

CASE NOTES – DECEMBER 2009 & JANUARY 2010

Editor's Notes: Happy New Year to all. ILF-Nepal resumes its monthly Case Notes with interesting cases illustrating the courts' continued misunderstanding of the right to a speedy trial and some political issues tainting cases in the Terai. This month's notes also highlight the courts' improved understanding of the applicable burden of proof in criminal cases, the importance of early – pre charge-sheet – representation, and, as in the last case, a major step forward for defendants with mental disabilities.

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The meaningless right to a speedy trial in Nepal: courts recognize the violation but fail to provide a remedy.

Government of Nepal v. Bhutai Mukhiya (ILF-Nepal/Janakpur 25) (Advs. Achutam Kumar Acharya and Ajay Shankar Jha)

Bhutai Mukhyia, a sixty-seven year old man who ran a pharmacy, was arrested September 2, 2007, for violating the Narcotics Drug Act. When ILF-Nepal/Janakpur advocates met Mr. Mukhiya for the first time at the detention center, he had been detained without bail for two years. He had been charged with bringing into Nepal bottles of cough syrup and other medicines from India. Though courts must assign a lawyer to a poor person at the time of the charge sheet, Mr. Mukhiya had never been assigned counsel.

ILF-Nepal/Janakpur immediately filed a No. 17 petition demanding Mr. Mukhiya's release and dismissal of the charges on two grounds: (1) the delayed prosecution violated not only the statutory limitation on prosecution (one-year) under Court Management 14 an 15, but it also violated his rights to a fair and speedy trial under the IC 24(9) and ICCPR 26; and (2) the failure of the court to provide Mr. Mukhiya with an attorney at any point during his prosecution violated his right to counsel under IC 24(2), (9), and (10), and ICCPR 14(3)(b) and (d).

The Appellate Court agreed that a violation had occurred but instead of dismissing the case and releasing Mr. Mukhia, it issued an order to the District Court to decide the case as soon as possible. In other words, there was a violation but the government got a "do-over" while our client remains in prison.

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Some realities in the Terai.

<u>Government of Nepal v. Rajeev Kumar Karna</u> (ILF-Nepal/Janakpur 17) (Advs. Achutam Kumar Acharya and Ajay Shankar Jha)

This client was brought to the attention of ILF-Nepal by human rights groups.

Our client Rajeev Kumar Karna, a student, was arrested in September 2009 under Some Public Offenses Act for allegedly verbally abusing the police. His family has a tense and tragic history with the Dhanusha District police dating back to the insurgency: his brother disappeared and, after being arrested by Dhanusha police in 2003, was killed. The family attempted to file a complaint with the police, pressing them—unsuccessfully—to investigate and punish members of the department responsible.

When Rajeev was arrested, ILF-Nepal/Janakpur advocates went to the Dhanusha District police station to visit him. The police denied the lawyers access. They immediately filed a petition for a writ of habeas corpus because the charge sheet had not been filed in a timely manner. A charge sheet in such a case must be filed within 7 days and our client had already been held for 11 days. The Appellate Court agreed, and issued a writ of habeas corpus to release our client. Two weeks later, a charge sheet was filed and our client asked to appear. Because no legal extension for filing the charge sheet had ever been granted, the CDO actually had no jurisdiction over the case and had no power to file the late charge sheet. ILF-Nepal/Janakpur sought an injunction stopping the CDO from proceeding with the prosecution, as well as an interlocutory petition requesting dismissal of the illegally-filed charge sheet. The court agreed and issued an interim order prohibiting any actions by the CDO against our client while the decision on the injunction is pending.

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A better understanding of the burden of proof in criminal cases.

<u>Government of Nepal v. Biswa Maharjan</u> (ILF-Nepal 211) (Adv. Mohan Sashankar)

Biswa Maharjan, a juvenile, was arrested in April 2009, suspected of aggravated assault resulting from a fight over a SIM card. As a juvenile, he faced a term of imprisonment of 4 years. ILF-Nepal secured his release to his family pending trial. Court dates were set but neither the complainant nor the government witnesses appeared. At the final hearing, ILF-Nepal argued that the prosecution had failed to meet its burden of proof since not a single witness had been produced for examination. The only other evidence against Biswa was his illegally obtained

confession, inadmissible under Netra Bahadur Karki v. Government of Nepal Decision 7555, Nepal Law Reporter 2062. The district court agreed and acquitted him of all charges.

Government of Nepal v. Bishnu Century (ILF-Nepal 120) (Adv. Shyam Kumar Bishwakarma)

Bishnu Century was arrested in January 2009 with two co-defendants and was charged with the sale of controlled substances. Despite the obvious illegalities surrounding the arrest and search of our client, all based on information from an alleged confidential informant, and the highly suspicious identical statements of all co-defendants to the police, ILF-Nepal was unsuccessful in convincing either the district court or appellate court to release Mr. Century on bail and he remained in custody.

After one year in detention, Mr. Century was finally granted a final hearing. At the hearing, ILF-Nepal argued that the prosecution had failed to meet its burden of proving guilt beyond a reasonable doubt. The initial search had been illegal, there was no evidence that our client possessed any narcotics, and the confession obtained by the police was inadmissible, again under Netra Bahadur Karki v. Government of Nepal Decision 7555, Nepal Law Reporter 2062. ILF-Nepal also argued that the provision of the Narcotic Drugs Control Act requiring any person accused of possession of a narcotic substance to prove his/her innocence is unconstitutional since it shifts the burden of proof to the defendant. The District Court agreed that the prosecution failed to prove their case against Mr. Century and acquitted him of all charges.

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Early active representation leads to shorter detention

Government of Nepal v. Hom Bahadur Magar (ILF-Nepal 404) (Adv. Bir Bahadur Khadka)

State Cases Rule 11 allows the police to release a detainee during the investigation phase if detention is no longer necessary. Nevertheless, because lawyers in Nepal rarely get involved in a case during the investigation period, this provision is rarely used. In this case, it was.

In November 2009, several men attacked a wholesale store with knives and imitation pistols and stole 355,000 Rupees in cash. The incident drew the attention of the local news. On November 12, 2009, our client, Mr. Magar was arrested and suspected of being involved in the robbery. What had happened was that a few days after the robbery our client, who had loaned an acquaintance 20,000 rupees had been repaid. The acquaintance was arrested for robbery and our client with him. Mr. Magar had absolutely no involvement with the robbery.

The ILF-Nepal advocate met Mr. Magar just after his arrest and immediately began discussing the case with the investigating officer as well as the government attorney. The ILF-Nepal advocate pointed out all the evidence supporting his client's innocence. On December 8, 2009, a charge sheet was filed against the five co-accused but the government attorney, persuaded of our client's innocence, released him without charges.

Government of Nepal v. Rohit Kharel (ILF-Nepal 399) (Advocate Rakesh Sharma)

Court Management 119 provides that one cannot be held in pre-trial detention for a period which exceeds the time period of the statutory maximum sentence. The maximum sentence on the attempted theft pursuant to Civil Code, Chapter on Theft 17, is 15 days. In addition, Court Management 120 requires that the accused get credit for pre-trial detention time.

Our client Rohit Kharel was arrested on November 3, 2009, suspected of the attempted burglary of a shop. Nothing was seized from him but a broken lock and a rock were found in front of the shop. Our client was charged with attempted theft and bail was set at 1000 rupees. In the bail application filed by the government attorney, however, no claim amount was set. The claim amount generally provides a basis for detention beyond the statutory maximum 15 days.

Instead of appealing the bail decision, ILF-Nepal filed a petition in District Court arguing that Mr. Kharel should be released since he had spent more than 15 days in detention. The same district court that had set bail, granted the Petition and released the client agreeing that CM 119 applied and the client had completed his possible maximum sentence.

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Hurdles in the courtroom but a small step in the right direction for defendants with mental disabilities.

Government of Nepal v. Ganesh Bahadur Danuwar (ILF-Nepal 194) (Advs. Pawan Kumar Jaisawal, Achutam Kumar Acharya, Mohan Sashankar)

Court Management Section 188 provides in part that a judge has the discretion when adjudicating a person facing life imprisonment to impose a reduced sentence in light of mitigating circumstances. Advocates rarely invoke the section and courts rarely exercise their discretion under the statute. In this case, where the defendant was clearly mentally disabled, ILF-Nepal invoked the section and the court imposed a lesser sentence.

Our client Ganesh Bahadur Danuwar was arrested in April 2009, and charged with the murder of his wife and attempted murder of others present. Mr. Danuwar's diminished mental capacity was obvious at the first meeting with ILF-Nepal. Nevertheless, he spent months in detention before

being placed in a psychiatric hospital. He was discharged after 3 weeks with the vague diagnosis of “bordering intelligence/ poor emotional control.” There was no formal psychiatric report and the “diagnosis” is not a recognized under the DSM-IV. It may refer to Borderline Personality Disorder.

In December, on a court date set for the filing of the psychiatric report, the ILF-Nepal advocate assigned to the case was in Manang province on another matter and a colleague, appeared in court to get the report. The court decided that no witness examination would take place and that the final hearing would be held that day. The ILF-Nepal advocate standing in on the matter argued that (1) foregoing witness examination would violate our client's right to a fair trial and cross-examination of the witnesses against him, and that (2) forcing an attorney with minimal knowledge of the case to make final hearing arguments without time to prepare would violate our client's right to counsel and right to a fair trial. In this murder case involving a person with obvious mental disability, the court gave the ILF-Nepal advocate lunch time to prepare.

Our client had been arrested leaving the crime scene with a bloody butcher knife in his hand and had confessed to the police and to the court. ILF-Nepal argued, *inter alia,* that if the judge found sufficient evidence, it should exercise its discretion under Court Management section 188, take the mental disability evidence into consideration, and sentence our client to minimal time for the offense. ILF-Nepal argued that our client was clearly not in his "right mind." The hospital report diagnosing our client with "bordering intelligence/ poor emotional control," suggested that he had Borderline Personality Disorder. Because he was born with a diminished capacity to understand, he had a mind equivalent to that of a child. Indeed, it appeared that the dispute in this case began over smoking a cigarette – a cause unlikely to inspire murder in an emotionally mature adult. The ILF-Nepal advocate argued that his client was not thinking as a rational person, and so he should not be punished as such. Invoking his discretion under CM 188, the judge imposed a sentence our client of 10 years.

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The ILF would like to announce that Pawan Jaisawal who joined the office in August 2008 and, served as Deputy Director, has left ILF-Nepal to open his own law firm. We thank him for his contribution to the office and wish him well. The ILF also wants to thank Susan Lee, who has served as an International Fellow for four months, and who will be returning to practice in New York City, and welcome back returning International Fellows, Aileen Donnelly, senior counsel, from Dublin, Ireland, and Ken Plotz, former judge in Colorado, who will be at ILF-Nepal in March and April.

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February 12, 2010

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CASE NOTES – FEBRUARY 2010

Editor's Notes: This edition includes a major decision in which the court ordered a psychiatric examination after *the charge sheet had been filed to ensure a fair trial despite the absence of a specific statutory provision permitting such an order. This edition also includes progress — ever so slight — in the court's understanding of an individual's rights to be free from unreasonable searches and seizure. Finally and unfortunately, it also illustrates the tragic and illegal arbitrary detention of indigent Indian nationals in Janakpur and presumably in other areas of the Tarai.*

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ILF-Nepal effects a major step forward toward a meaningful right to a fair trial.

Government of Nepal v. Dan Bikram Thapa (ILF-Nepal 368)(Adv. Bimala Yadav)

According to the accusation, our client, Mr. Thapa, and the victim had a romantic relationship. He wanted to marry her; when she refused, he decided to kill her and himself. He allegedly used a knife to stab her in the heart and leg, then stabbed himself in the abdomen and slit his throat. According to the prosecution, this all happened in an open field. Our client lost consciousness and woke up in a hospital where he was treated for one month. When ILF-Nepal obtained information about Mr. Thapa, it he was discovered that he had been prescribed psychotropic medication when he was released from the hospital. It is clear that he had been diagnosed with a mental illness.

Chapter 1 on Punishment in the Civil Code says that at the time of committing an offense, if a person's mental condition is unstable such that he is unaware of his actions or that he is insane, the person is not subject to any accusation/blame or punishment. In addition, under Evidence Code Section 27, the burden of proof is on the defendant for any demand or request for relief from punishment or mitigation of sentence. Finally, State Cases Act (SCA) Section 15 provides that a psychiatric exam can be requested before the charge sheet is filed. Indeed, the charge sheet generally signals the end of all investigation. No provision prohibits later psychiatric examinations, but courts in Nepal interpret the absence of a specific provision permitting an action to be a prohibition against such action, even when a clear injustice would ensue.

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Having discovered later in the investigation that Mr. Thapa had a psychiatric problem, ILF-Nepal asked the court at the jail/bail hearing to have him undergo a psychiatric exam, arguing that under Interim Constitution (IC) Article 24(9) and International Covenant on Civil and Political Rights (ICCPR) Article 14(1) and (3), guaranteeing the right to fair trial and to counsel as well as right to equality under the law pursuant to IC Article 13, a person should have the right to a psychiatric examination even after the charge sheet has been filed so as to be able to defend his case. In addition, because the defendant has the burden of proving any demand or request for relief from punishment or mitigation of sentence, the defendant should have access to information pertinent to his defense regardless of the stage of the proceedings. ILF-Nepal further argued that should the court not issue an order for the mental health examination, our client would be denied effective representation. Without a mental examination of our client, the court would essentially have to decide the case without critical evidence. Amazingly, the court agreed to have client examined and transferred to Patan Mental Hospital for the exam.

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Given the constitutional rights to a fair trial and effective representation, courts agree that the defense should have access to police information before the charge sheet is filed.

Government of Nepal v. Bhim Bdr. B.K. (ILF-Nepal 450)(Adv. Surya Pandey)

On January 12, 2010, our client was standing with another in Sinamangal Shantti Nagar when police arrested them. They were searched, and 12 injections of Norphine/Digipon of unknown quantity were recovered from our client and 11 others from the co-accused. The police told the ILF-Nepal advocate that our client “sells drugs and has ruined many people.” ILF-Nepal immediately filed a discovery petition asking for information regarding these comments and the facts of the case. The court granted the petition stating, "The court informs the investigation authority to follow the law and wants the respective investigating authority to pay attention to the legal provision referred to in the petition." Further, the court ordered, "The investigation authority is informed to give information or make provisions to provide a copy of the various documents if asked for, that have been prepared besides the confidential investigation or which could have an adverse effect on the investigation."

This is not the first discovery order issued by a court in Kathmandu. Indeed, the first such order was issued in 2009 in the case of *Government of Nepal v. Yogesh Pun* (ILF-Nepal 209)(Adv. Surya Pandey). However, in this case, the court ordered the authorities to produce discovery to the defense instead of simply telling the police to follow the law. Such discovery is critical to the fairness of the justice system because it gives the defense sufficient information to be able rebut the accusations though alibi witnesses and other evidence.

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ILF-Nepal insists that courts respect the right to be free against unreasonable searches and seizure under the Interim Constitution.

Government of Nepal v. Hari Om Shrestha (ILF-Nepal 460) (Adv. Rakesh Sharma)

Hari Om Shrestha was arrested on January 17, 2010, in the pool hall where he works. He was frisked and taken back to his house. His house was searched and a one-rupee note recovered; he was arrested for allegedly selling heroin. The defense investigation discovered that his arrest was based on the accusation of an acquaintance who had been arrested the day before in possession of heroin and a scale. Neither police documents nor the seizure report provide any — let alone, as required by law, reasonable — grounds for the arrest and search.

The statutory provisions relating to searches are set forth in SCA Section 10 and Court Management (CM) Section 172. SCA Subsection 10(1) provides in pertinent part that an officer may search a person or place if "there are reasonable grounds to believe that any person or place has any person or material evidence relevant" to the crime investigated. Subsection 10(2) of the SCA then provides the procedural requirements for filling out a seizure report. In addition CM Section 172 provides that "if there are reasonable grounds to believe that there is possibility to find any goods or property in any house or place related to the offense which is to be investigated, and there is doubt that such goods or property in that house shall not be found if such [search] is delayed," then the police may search the person or place. When faced with a questionable arrest and seizure, the practice in Nepal is to request a copy of the seizure report pursuant to SCA 10 and CM 172, resulting in little protection against unlawful searches and seizures.

At the remand hearing in this case, however, ILF-Nepal filed a petition requesting the release of Mr. Shresta in violation of his rights to liberty and privacy under IC Articles 12 and 28, as well as ICCPR Articles 9 and 17. ILF-Nepal also challenged the admissibility of the evidence obtained in violation of SCA 10 and CM 172. While there is no statutory exclusionary rule in Nepal, the Supreme Court has made it clear that a confession obtained in violation of the right to counsel is inadmissible (*see Netra Bahadur Karki v. Nepal Government*, Nepal Law Reporter 2062, Decision number 7555). ILF-Nepal is arguing that the same logic should apply to the violation of a defendant's right to be free from unreasonable searches and seizures. Although in the past the courts have not shown a great understanding of such rights and violations, here the court took a step in the right direction, by issuing an order for the police to follow proper procedure.

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The following three cases describe the arbitraray detention and release of three Indian nationals in Janakpur.

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Government of Nepal v. Panchu Ansari (ILF-Nepal/Janakpur 52), Government of Nepal v. Sushil Kumar Chaudhary (ILF-Nepal/Janakpur 50), Government of Nepal v. Lalu aka Bhola Chaudhary (ILF-Nepal/Janakpur 53) (Advs. Achutam Kumar Acharya and Ajay Shankar Jha)

All three defendants were arrested on September 22, 2009, for disorderly conduct and talking back to the police. Four months later, on January 18, 2010, ILF-Nepal advocates met them in detention.

Sushil Kumar Chaudhary and Lalu aka Bhola Chaudhary were first remanded for seven days and then again for 25 days. Under SCA 15, a person may be held for a maximum of 26 days from the time of arrest to the filing of the charge sheet. On October 21, 2009, one month after the arrest, a charge sheet was filed against them, accusing them of various offenses under the Some Public Offenses Act. In such cases, the Chief District Officer (CDO) may only impose a fine. CM Section 118(3) permits the detention without bail pending trial where an accused does not have permanent domicile within Nepal *and* the alleged offense carries a possible sentence of six months or more. Nevertheless, at the jail/bail hearing, the CDO, invoking CM 118(3), denied bail.

ILF-Nepal advocates immediately filed habeas corpus petitions seeking the release of the two clients, arguing that the detention was illegal because they did not face more than six months of imprisonment. In addition, in the case of Mr. Chaudhary's case, the CDO had violated the statute of limitations when filing the charge sheet. The appellate court ordered their release.

In the case of Mr. Ansari, ILF-Nepal also filed a habeas corpus petition. When the CDO saw the result in the two other cases, he ordered the release of Mr. Ansari without waiting for a court ruling. In that case, the CDO had also exceeded his three-month time limit to decide the case and therefore had lost jurisdiction over the defendant.

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The ILF is happy to welcome back Aileen Donnelly from Dublin and Judge Kenneth Plotz from Colorado, both of whom are returning to ILF-Nepal for one month .The ILF also invites you to visit its new facebook page at: http://www.facebook.com/pages/The-International-Legal-Foundation/331956983340. Become a fan.

Natalie Rea
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March 11, 2010

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CASE NOTES — MARCH 2010

Editor's Notes: This edition illustrates how early investigation by defense counsel can uncover poor police work, leading to early release and even acquittal. This edition also underscores the injustices caused by the unavailability of quality representation for the poor when ethical rules prohibit the representation of co-defendants.

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Poor police work leads to illegal and lengthy pretrial detentions.

Government of Nepal v. Prem Gurung (ILF-Nepal 369) (Adv. Mohan Sashankar)

This case arose out of the fatal beating of the victim following a dispute over spilled beer. The victim had been in a restaurant having a beer when a man knocked over the beer. The dispute moved onto the street where a dozen people joined the fight. Mr. Gurung owned the neighboring restaurant. The victim was beaten with a carjack, with a rod, and with a rock. While he was still alive, someone put a piece of cloth in his mouth and then threw his body into the river. Fourteen people were arrested, and all made statements to the police. Four never mentioned Mr. Gurung; four said he hit the victim with his hands. Mr. Gurung admitted being present but denied any involvement. At the jail/bail hearing, Mr. Gurung was ordered held without bail.

ILF-Nepal appealed the no-bail order to the appellate court and then to the Supreme Court, where Mr. Gurung was finally ordered released. In the Supreme Court, ILF-Nepal argued that: 1) Mr. Gurung's statement to the police was inadmissible under *Nepal v. Karki*; 2) his mere presence at the scene does not amount to an offense; 3) the prosecution could not prove that Mr. Gurung was in the group of six who perpetrated the crime; 4) Mr. Gurung had not been involved in the phase of the incident that caused the victim's death; 5) the prosecution had over-indicted Mr. Gurung; and 6) at the jail/bail hearing, the court had violated Mr. Gurung's right to remain silent by continuing its questioning. During the Supreme Court argument, the court repeatedly asked the government attorney about Mr. Gurung's specific involvement the crime. The government attorney could not answer. The Supreme Court ordered the client to be released on a general court date. He had been in custody since September 17, 2009.

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Government of Nepal v. Ram Krishna Rai (ILF-Nepal 474) (Adv. Bir Bahadur Khadka)

On February 14, 2010, around 6:00 p.m., a bus ran into a group of pedestrians, and two people were killed on Chabahil Chowk. An infuriated crowd gathered and torched three buses. Later that evening, our client, 17 years old, was arrested and accused of having been involved in the torching of the buses. Our client, who works in a furniture store and supports his entire family, had been at the movie theater during the incident. The movie ran from 5:00 to 7:30 p.m., and he had the ticket. He repeatedly denied any involvement in the incident. ILF-Nepal investigated the matter and confirmed the time and location of the movie theater. It also confirmed with nearby shop owners that there had been a true mob scene after the accident. With all this information, the ILF-Nepal advocate went to the police presenting the police with the movie ticket, explaining that Mr. Rai was innocent. One police officer acknowledged that Mr. Rai was innocent but said that he could not do anything because the case has already been initiated.

In fact, both the State Cases Act (SCA) and the State Cases Rules give the police the authority to release a person from detention. SCA Section 21 provides that the police may release a person from custody "if it is found not necessary to continue the period of custody." State Cases Rule Section 11 refers back to SCA Section 21 and also permits early release, as long as the government attorney approves. In the past, ILF-Nepal's attempts to have charges dismissed early have been unsuccessful. This case was a small step forward because the prosecutor agreed not to include a claim amount in the charge sheet — which would have been the value of the three torched buses — making release more likely.

At the jail/bail hearing, ILF-Nepal argued that there was no evidence connecting Mr. Rai to the crime. Mr. Rai testified and the movie ticket was introduced into evidence. The court essentially dismissed the charges, by acquitting Mr. Rai at the jail/bail hearing.

Government of Nepal v. Ram K. (ILF-Nepal 340) (Adv. Bimala Yadav)

Our client, 13 years old, was charged with sexually abusing a child. The First Information Report was filed by the victim's mother. The medical evidence found no injury, and laboratory tests did not support the sexual abuse charge. The ILF-Nepal advocate obtained proof of age, showing that his client was, indeed, 13 years old. Section 11 of the Juvenile Act provides that a child under the age of 14, charged with an offense carrying a sentence of imprisonment, cannot be subject to more than six months in prison. If the child is between 14 and 16 years old, he may be sentenced to only half the sentence permissible for an adult. In other words, Nepal clearly recognizes the lesser culpability of children.

At the jail/bail hearing, the ILF-Nepal advocate had to overcome the court's reluctance to even listen to her argument. She managed to argue that the court lacked jurisdiction to even hear the case as it was past the 120 days to decide a juvenile case. In addition, even if the court had

jurisdiction, her client should be released, since he had been detained for seven months when the maximum prison sentence for a child is six months

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The following cases illustrate the tension between a lawyer's obligation to provide conflict-free representation and the courts' concern with judicial economy.

Government of Nepal v. Tul Bahadar Tamang (ILF-Nepal 470 (Adv. Surya Pandey); Government of Nepal v. Ajay Shresta (ILF-Nepal 371) (Adv. Surya Pandey); Government of Nepal v. Ramesh Thapa Magar (ILF-Nepal 324) (Adv. Surya Pandey); Government of Nepal v. Nabin Rai (ILF-Nepal 477) (Adv. Neelam Poudel)

These four cases all involved public offenses. In each case, ILF-Nepal filed a habeas corpus petition, arguing that the statute of limitations set forth in Section 4 of the Public Offense Act had been violated and that the defendants should be released. In each case, there were co-defendants. In Nepal, as elsewhere, the attorney-client privilege is recognized, and a lawyer may not disclose information obtained during a conversation with his or her client. If a lawyer represents more than one defendant, there is the risk of learning privileged information from one defendant that then cannot be used for the benefit of the co-defendant. To avoid this conflict, ILF-Nepal does not accept cases of co-defendants. When there is a co-defendant, ILF-Nepal will call another legal aid provider to represent the other defendant(s). In these cases, ILF-Nepal learned about the existence of co-defendants when arguing in the appellate court. The court asked ILF-Nepal to speak on behalf of all the defendants in each case, and ILF-Nepal had to refuse.

Government of Nepal v. Uddav Karki (ILF-Nepal 433) (Adv. Shyam Kumar Bishwakarma); Government of Nepal v. Ram Bahadur Pakrin (ILF-Nepal 421) (Adv. Neelam Poudel)

These two cases involved the same problem in the appeals of bail orders in district court. Again there were co-defendants, and again the appellate court asked ILF-Nepal to represent the potentially conflicting interests of the co-defendants. ILF-Nepal had to refuse again.

ILF-Nepal would like to welcome Melissa Dineen, a public defender from Philadelphia, who has joined the office for six months.

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April 15, 2010

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CASE NOTES – APRIL & MAY 2010

Editor's Notes: This edition illustrates some progress in the courts and with the Chief District Officer in the application of statutes and the implementation of Supreme Court precedent. It also includes a preview of a Public Interest Litigation case filed by ILF-Nepal challenging the presumptive detention section of the Arms and Ammunitions Act.

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Violations of the right to counsel are still all too common.

Government of Nepal v. Pappu Mukhiva (ILF-Nepal/Janakpur 60) (Adv. Ajay Shankar Jha and Achutam Kumar Acharya)

Our client, an unemployed 18-year-old from Janakpur, was charged, along with five co-defendants, with unlawful possession of a firearm under the Arms and Ammunition Act Section 3.2 and 5.1. The accused was arrested sometime in August or September 2008 and detained, without bail, for almost two years. He was convicted after trial on February 26, 2009, for possession of one bullet and fined 20,000 rupees. Because he is indigent, he served his fine in jail. ILF-Nepal advocates met him for the first time on April 21, 2010, at the Janakpur detention center. He had never had access to a lawyer.

Court Management Section 38(2) provides that where one is convicted and sentenced to only a fine, one cannot be held in prison for more than half of the maximum jail sentence. Here, our client was facing a maximum of 3 years in prison. Therefore, ILF-Nepal immediately filed a writ of habeas corpus in the Janakpur Appellate Court, arguing that he should be released since he had been detained for more than half the maximum sentence, or 18 months. He was immediately released. ILF-Nepal is currently drafting an appeal arguing that the conviction was obtained in violation of the right to counsel.

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When presented with the relevant legal authority, courts reach the right result.

Government of Nepal v. Joni Karki (ILF-Nepal 171) (Adv. Shyam Bishwakarma)

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Our client, a 15-year old boy with no prior record, was charged with attempted murder in connection with a street brawl. He, along with three friends, got into a fight with two people related to a previous incident. The brawl ended with everyone running away. Section 15 of Civil Code Chapter on Homicide defines attempted murder. It states in relevant part that one is guilty of attempted murder where he/she has "shot a gun, or exploded a bomb, or cut with a lethal (sharp) weapon, or attempted any other act with the intent to kill, compelling another to commit such act, or assisting in the commission of an act, and for whatever reason the act has not been completed." In *Mahendra Raz Bam v. HMG* (Nepal Law Reporter 2051, Vol. 36, no 4 page 226), the Supreme Court added an element to the offense, requiring evidence of third-party intervention. The Court held that the elements of attempted murder are: (1) the intent to kill; (2) an act reflecting such intent; and (3) the sudden presence and existence of a third party who stops the defendant's actions (the rationale is that anything less would fail to prove the defendant's intent to kill beyond a reasonable doubt).
In this case, the ILF-Nepal advocate convinced the Juvenile Court at the final hearing that the prosecution had not presented sufficient facts to establish third-party intervention as required by the precedent in *Mehandra Raz Bam v. HMG*. Mr. Karki, who faced a possible sentence of 5 to 12 years imprisonment, was acquitted.

Government of Nepal v. Rambahadur Pakhrin (ILF-Nepal 421) (Adv. Neelam Poudel)

As reported in the November 2009 edition of the Case Notes, the Supreme Court has held that Section 51 of the Punishment Act providing that every day in detention is equivalent to payment of 25 rupees is invalid because it has not been adjusted for inflation in 24 years (*Government of Nepal v. Prakesh Lama*, Writ No. 065-WS-009). In that case, however, the Supreme Court ordered the legislature to change the statute, suggesting that the proper value of a day in detention — measured by the value of a day of work by a day laborer — would be 190 rupees today. Because the Supreme Court ordered the legislature to act, lower courts feel that they do not have the authority to act until the legislature does so. However, ILF-Nepal advocates are arguing that courts should take the value of the day in detention into consideration by adjusting the value of the fine or the "claim amount." Courts are doing just that.

For example, Mr. Pakhrin was charged with the theft of a T.V. and a gas cylinder (the claim amount was 69,550 rupees). At jail/bail, judge set bail at 25,000 rupees. The ILF-Nepal Advocate appealed the bail amount arguing that the court should take into consideration the decision of the Supreme Court. The court apparently did and reduced the bail to 12,000 rupees.

* * *

After challenging the practices of the Chief District Officer for almost two years, ILF-Nepal is seeing progress in the Chief District Officer following basic procedural rules.

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Government of Nepal v. Suroj Nepal (ILF-Nepal 51) (Adv. Surya Pandey); Government of Nepal v. Suroj Rai (ILF-Nepal 546) (Adv. Bimala Yadav); Government of Nepal v. Ashok Basnet (ILF-Nepal 502) (Adv. Koplia Shrestha)

In all three cases, the Chief District Officer (CDO) filed charges within the seven-day statute of limitations. Only two years ago, the CDO ignored the statute of limitations and often held detainees up to 35 days without charges or stated grounds. In the case of Suroj Rai, the ILF-Nepal advocate insisted on having the jail/bail hearing on Friday so that her client could be released in time for his final exams.

* * *

ILF-Nepal has filed a Public Interest Litigation case challenging the constitutionality of the presumptive detention provision of the Arms and Ammunitions Act. This case may be of interest to other providers.

Government of Nepal et al. v. ILF-Nepal Advocates (Adv. Shyam Bishwakarma)

Section 24(a) of the Arms and Ammunition Act provides in part: "notwithstanding anything contained elsewhere in the prevailing law, the accused of the case pursuant to this Act shall be kept into custody on the basis of the evidence available then." Courts have interpreted Section 24(a) to mean that clients accused in Arms and Ammunition cases must be detained and are not entitled to bail. ILF-Nepal/ Janakpur is filing a Public Interest Litigation (PIL) arguing that the presumptive detention is unconstitutional in that it violates: (1) the client's right to equal protection pursuant to Interim Constitution (IC) Section 13(1); (2) the client's presumption of innocence pursuant to IC Section 24(5); and (3) the client's right to a fair trial pursuant to IC section 24(9). A PIL challenging a similar presumptive detention of Section 8 of the Human Trafficking Act was recently upheld by the Supreme Court (*Government of Nepal v. Advocate Kamalesh Dwiwedi*, Writ No. 064-WS-0027.)

***

The ILF is happy to welcome Melissa Dineen, a public defender from Philadelphia, and Adam Heyman, a public defender from Brooklyn. Melissa will be staying at ILF-Nepal until the end of the year as the deputy director of ILF-Nepal. Adam will be leaving at the end of July but returning in 2011.

Natalie Rea
ILF Executive Director
June 15, 2010

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ILF-Nepal

The International Legal Foundation – Nepal

CASE NOTES – SUMMER 2010 (June, July, August)

During the editor's summer vacation, the Supreme Court of Nepal issued another landmark decision on the meaning of the right to a speedy trial in quasi-judicial proceedings. For the past two years, ILF-Nepal has argued that Chief District Officers and other quasi-judicial officers repeatedly violate the constitutional and statutory rights to a speedy trial of the accused. As described in this issue's first case note, the Supreme Court agreed.

* * *

Government of Nepal v. Shanker Kumar Jha, (ILF-Nepal/Janakpur 66) (Adv. Achutam Acharyam and Ajay Shankar Jha, ILF-Nepal/Janakpur; Rakesh Sharma and Surya Pandey, ILFNepal/Kathmandu)

Mr. Shanker Shah was arrested on September 21, 2008, and charged by the Chief District Officer (CDO) in Janakpur with a violation of the Arms and Ammunition Act. He faced a possible sentence of three to five years and a fine. On September 11, 2010, ILF-Nepal/Janakpur advocates met Mr. Jha for the first time. He had been detained for almost two full years without a trial.

In Nepal, detainees are guaranteed a speedy trial under the State Cases Act, the International Covenant on Civil and Political Rights (ICCPR), and the Interim Constitution. The right to a speedy trial is an essential part of any fair trial guarantee because with time, evidence is lost and memories fade. Justice delayed is justice denied.

The statutory speedy trial scheme is set forth in Nepal's State Cases Act (SCA) and Court Management Act (CM). SCA Rule 14 guarantees a defendant the right to a speedy trial by requiring that courts reach a decision within 12 months of the filing of the charge sheet. SCA Rule 15 provides that the district court may seek permission for more time from the appellate court if needed. A statute permitting an extension of time, such as SCA Rule 15, is generally read to mandate that the request be made before the time limit has passed. Therefore, under Rules 14 and 15, if the district court needs more than 12 months to decide a case, it must ask the appellate court for more time before the 12 months have elapsed. In addition, ICCPR articles 9(3) and14(3) guarantee a fair and speedy trial, and the Interim Constitution of Nepal Article 24(2)(4)(10) guarantees a right to a fair trial.

In this case, ILF-Nepal argued that the prolonged detention of the defendant violated all these speedy trial guarantee provisions.

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In a lengthy decision, the Supreme Court reasserted the constitutional and statutory right to a speedy trial. While it declined to exercise its extraordinary power to grant a habeas corpus petition because the original detention letter was legal, it expressly criticized District Administration Officers, writing:

> Apparently quasi-judicial bodies, such as the CDO, have not paid attention to their legal obligation to the cases filed in their offices, creating a situation where the alleged defendants are detained for a prolonged time pending trial not abiding by the stipulated statutory time period following the stipulated procedure for a speedy and effective adjudication in accordance with law. Therefore a directive order has been issued to the Secretary of the Home Ministry of the Nepal Government to pass a circular and necessary directive along with an attached copy of this decision to all the District Administrative Office to pay appropriate attention to proceedings and resolving and getting resolved all cases with a similar nature promptly and to inform this court thereafter.

The court ordered that a trial be held within one month.

In its petition, ILF-Nepal had raised other issues including seeking release due to the right to counsel violation. The court rejected the argument on the grounds that the CDO had no notice that the accused had no counsel. This issue will be pursued further because in district courts, a defendant must be appointed counsel at the time of the charge sheet. This provision does not exist in quasi-judicial proceedings. It clearly should but it also means that in a speedy trial violation in a case pending in front of the district court, the Supreme Court supports granting a habeas corpus petition for violation of the right to counsel.

* * *

While the case of Mr. Jha was pending before the Supreme Court, ILF-Nepal was trying to assert the speedy trial rights of 21 defendants held in Chitwan under a detention order of the warden of the Chitwan National Park.

The Warden of Chitwan National Park v. Sukram Kumal, (ILF-Nepal 122) (Adv. Rakesh Sharma, ILF-Nepal/Nepalgunj; Ajay Shankar, ILF-Nepal/Janakpur)

Mr. Sukram Kumal, one of the accused, had been arrested on June 10, 2006, and immediately detained. He was charged under the Wildlife and Conservancy Act on July 3, 2006, and had been detained for four years without a trial.

At the request of ILF-Nepal, in June 2010, its advocates were granted access to detainees held pursuant to a jail order signed by the warden of Chitwan National Park. ILF-Nepal advocates identified 21 detainees who had been held without trial for more than 12 months since their charge sheet had been filed. Some had been held for over four years. Though ILF-Nepal does not

have an office in Chitwan or Hetauda, where the appellate court of the region is located, it decided to represent these men. It filed habeas corpus petitions on behalf of the 21 detainees, arguing, as it had in the case of *Shanker Jha*, that their lengthy detention violated their statutory and constitutional right to a speedy trial.

A different section, however, was at issue in this particular case. While SCA Rules 14 and 15 require the court to reach a decision within 12 months of the filing of the charge sheet (at the latest), SCA Rule 123 has ambiguous language arguably creating an exception to statutory speedy trial guarantees in cases where the defendant faces a sentence greater than five years. ILF-Nepal argued that Rule 123 should not be read as an exception for a number of reasons; but even if it were, the rule does not provide an exception to the speedy trial guarantees of the ICCPR and Interim Constitution and certainly should not provide an exception in quasi-judicial proceedings, where the same person — the Warden — is responsible for arresting, charging, and trying the defendant and, therefore, there is no judicial oversight.

The appellate court in Hetauda disagreed. Respectful of the heavy burden on the park wardens, who "are busy 24 hours a day caring for the wild animals," and recognizing the "global call to protect the wildlife," the court found that SCA Rule 123 provided an exception to the time limits set forth in SCA Rules 14 and 15. Those rules, according to the court, were merely "procedural." The court turned to CM 119. That section provides, in essence, that one cannot be held for a period longer than the maximum sentence the defendant would have faced had he/she been convicted. The appellate court used CM 119 to say that the legislature obviously anticipated delays in proceedings and ordered a speedy trial, implicitly finding a violation.

The court did not shy away from recognizing the delays in the justice system. It noted that the judiciary had prepared a five-year strategy with the target of deciding every case pending for more than one year in two years. The court then ordered the warden to conduct trials and decide these cases within three months.

Having ordered trials within 90 days, the warden held a so-called trial for Mr. Kumal on August 23. The warden refused ILF-Nepal's request for time to call witnesses, to cross-examine the government's witnesses, and to present evidence. In the absence of Mr. Kumal, the warden convicted him based on inadmissible and hearsay evidence and sentenced him to the maximum term of 15 years.

With the written decision in Shanker Jha's case now available, ILF-Nepal will try to convince the warden to conduct trials in accordance with due process as ordered by the Supreme Court. ILF-Nepal hopes that the so-called trial of Mr. Kumal will convince the appellate court to order the warden to conduct not only a "speedy trial" but a trial in accordance with the constitutional guarantees of the Interim Constitution.

* * *

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Quasi-judicial proceedings remain challenging.

Government of Nepal v. Bishnu Giri (ILF-Nepal/Janakpur 68) (Advs. Achutam Acharya and Ajay Shankar Jha)

Our client, a 51-year-old furniture maker with no criminal record, was charged with selling a gun to a co-defendant under the Arms and Ammunition Act Sections 3.2 and 5.1 (prohibiting the possession of a firearm, and prohibiting such possession without a firearm license, respectively) on September 16, 2007. Our client, however, was never arrested because the summons issued by the CDO was not properly posted at the client's home (as required by CM Section 110). Instead, the summons was posted in our client's village (he client 60 kilometers outside Janakpur). At the trial, no witness testified on behalf of the government or the co-defendant (the co-defendant was incarcerated for the duration of the case). In the absence of our client and his co-defendant, and without lawyers in the courtroom, both were convicted on June 1, 2010. Our client was sentenced to a term of two years. On June 10, 2010, the police easily found our client at home and took him to the CDO, who sent him to prison.

ILF-Nepal was contacted about the case on June 14, 2010, and it sought to appeal the conviction. In Nepal, however, a defendant who has not appeared at his/her trial may not appeal. CM 208, however, creates an exception where the summons demanding the client's appearance in court was defective.

ILF-Nepal filed a CM 208 petition, arguing that the summons procedure had been defective since it had not been posted at the defendant's home as required by CM 110, and therefore the client should be allowed to appeal his conviction. The appellate court agreed. It found that the summons procedure had not been properly followed, dismissed the summons, reversed the conviction, ordered a new trial, and set bail pending the new trial. Our client has been released.

* * *

Happily, courts are making progress in protecting the safety of juveniles in adult custody where juvenile detention centers are full.

Government of Nepal v. Surendra Shrestha (ILF-Nepal 531) (Adv. Shyam Kumar Bishwakarma)

Our client, an unemployed 15-year-old male with no criminal record, was charged with selling buprenorphine and diazepam on May 16, 2010. ILF-Nepal first met our client on May 24, 2010. The client's first remand date was on May 18, 2010, where he was held in custody in Hanumandhoka, the adult facility. Despite visiting with the client's parents and school, ILFNepal could not secure documents to prove the client's age at the second remand hearing on June 6, 2010. At the hearing, ILF-Nepal argued that the client should be released to his parents as he is a juvenile, and that the burden of proof is on the prosecution to prove that he is not a juvenile.

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In the alternative, if the court was unwilling to release the client, ILF-Nepal argued that he should be transferred from Hanumandhoka to a juvenile facility. The court ordered an age assessment (an examination by doctors to determine the age of the client) and granted the application to have the client moved to a juvenile facility. The client was immediately taken to Bhaktapur Child Correction Home, a juvenile facility, but was denied access as the facility was full. The client was then taken back to Hanumandhoka.

On June 17, 2010, ILF-Nepal filed a writ of habeas corpus with the appellate court in Patan, arguing that the client was a juvenile and that he should be released to his parents. In addition, ILF-Nepal argued that holding the client in Hanumandhoka was against children's rights, adding that Section 15 of the Child Rights Act of 1991, relating to juvenile justice, and Rule 29 of the Appellate Court Rule (1991) required that a juvenile be kept in a reform home. On June 21, 2010, the appellate court directed the police to let ILF-Nepal monitor the client's condition. The court ordered the police and the Kathmandu Department of Corrections to clarify within three days whether the client was being kept alone or with minors and whether facilities in the detention center were satisfactory.

On June 25, 2010, the police reported to the court that the client was being held in a separate cell in Hanumandhoka and was being provided basic needs such as water and food, and that the client was safe. The age assessment was also provided to the court and confirmed that the client was 15-16 years old. The appellate court denied the writ holding that while juveniles should be kept in reform homes and not in police custody, where the juvenile detention centers are full, keeping the juvenile in an adult facility in a separate cell with additional protections is legal. ILF-Nepal is currently drafting an appeal of the decision to the Supreme Court in Kathmandu, arguing that the appellate court was too vague in saying that the client was safe, that holding the client in an adult facility violates international standards on juvenile imprisonment, and that we cannot rely on the judgment of the police and corrections on such issues.

The ILF wants to thank Adam Heyman, a public defender from New York, for his contribution to our program. Adam will be returning to New York at the end of September. The ILF also wants to thank Shyam Bishwakarma for his contribution to the office since it opened. Shyam is leaving the office to pursue an LL.M and we wish him a lot of luck.

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CASE NOTES – FALL 2010 (September, October, November)

Editor's Notes: This fall has seen interesting developments in cases handled by the CDO involving violations of the Public Offense Act. In Patan, the appellate court is rejecting the CDO's unsupported claims that it has reasonable grounds, as required by Section 4, to detain a person more than seven days without filing a charge sheet. In Janakpur, the appellate court went even further and held that the CDO has no power to detain a person for more than a total of 35 days under section 6(1) of the Public offense Act. With these decisions, courts are beginning to exercise some oversight over quasi-judicial proceedings.

Government of Nepal v. Shanmbu Yadav (ILF-JKP 83) (Adv. Achutam Acharaya and Adv. Ajay Shanker Jha)

Section 6(1) of the Public Offense Act states in part that "if the Chief District Officer finds, in the course of the investigation, reasonable to hold the offender in detention, the offender may be held in detention for a period not exceeding thirty five days issuing a decision with the reasons thereof.." The section is interesting in that it is entitled "punishment" but then refers to "35 days for the purpose of investigation" which assumes the pre-charge sheet period. In other words, the section is extremely ambiguous.

When ILF-Nepal opened in August 2008, the CDO used the section to detain persons without charges for 35 days. At that point, the persons were often released without trial. Such an interpretation of section 6(1) was utterly illogical since a district court cannot permit the pre-charge sheet detention of a person accused of a violent felony for more than 25 days under State Cases Act 15. ILF-Nepal has challenged the CDO's detention practices, and the Appellate Court has made it clear that it cannot detain a person for more than 7 days before the charge-sheet without "reasonable grounds." The CDO's response to these decisions has been to allege "reasonable grounds" for any delay.

In this case, our client was arrested making noise in the street and later charged with a violation of the Public Offense Act. Bail was set in this matter in the amount of 10, 000 rupees (the maximum bail that the CDO may impose in an SPO case according to law). The client could not pay and was detained. ILF-Nepal advocates appealed the bail order, arguing that (1) the CDO lacked jurisdiction to hear the case because the charge sheet was not filed within 7 days and no reasonable grounds had been stated as required by SPO Act 4(2); (2) the bail set violated equal protection because the co-defendants all had bail set in the amount of 500 rupees; and (3) the CDO had not followed the bail requirements of Court Management 118 (10)(a) and (b) requiring consideration of the nature of our client's offense and the economic condition of the accused. ILF-Nepal also argued that under the SPO Act 6(1), the CDO may not detain someone more than 35 days for an offense unless it receives special permission from the Appellate Court. The court agreed and held that the maximum statutory period that the CDO can hold

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someone in custody in an SPO offense is 35 days. Our client was released after having spent 90 days in jail.

Government of Nepal v. Binod Laminchane (ILF-Nepal Case 690) (Adv. Sanu Dangol); Government of Nepal v. Jeevan Tamang (ILF-Nepal Case 693) (Adv. Kamal Ghising); Government of Nepal v. Prakash Karki (ILF-Nepal Case 692) (Adv. Sanu Dangol); Government of Nepal v. Dipak Karki, (ILF-Nepal Case 706) (Adv. Chanchalla Kaini)

Each case involves a violation of the Public Offense Act. In each case, the charge sheet was not filed within the statutory period required, seven days, and the CDO alleged that there were "reasonable grounds for the delay."

Each case involved public drunkenness and disorderly conduct where the arresting police officer was the only witness and the officer was the investigation. ILF-Nepal argued that the police was using the "reasonable grounds" exception as a pretext and the appellate court agreed. With these cases, the Appellate Court began questioning the CDO's claim of "reasonable grounds," providing oversight over the CDO proceedings.

* * *

The authorities continue to detain people on extremely questionable evidence. Early representation by ILF-Nepal continues to lead to early dismissals and acquittals.

Government of Nepal v. Tiratham Pasi, (ILF-Nepal/NPG No. 10) (Adv. Rakesh Sharma and Bir Bahadur Khadka)

Our client, a 55-year-old farmer and a resident of the Banke District, was arrested and charged with human trafficking. The alleged victim was his 22-year-old niece. The charges were brought by the young woman's father, our client's brother-in-law. The two men had had a dispute in the recent past, and the complainant still held a grudge against our client. The young woman had actually eloped with the cousin of our client who lives in India.

When ILF-Nepal/NPG met with Mr. Pasi, it seemed clear that the charges had been fabricated. The defense investigation, including interviews with members of the community, confirmed his story. Further review of the case file at the remand hearing revealed that the government had no evidence implicating our client. Through persistent effort, our advocates convinced the government attorney not to file a charge sheet. The client was released. Human trafficking accusations remain a common means to settle disputes.

Government of Nepal v. Santosh Bardewa, (ILF-Nepal 363) (Adv. Bimala Yadav)

Mr. Bardewa was accused of homicide, a violation of Civil Code, Chapter on Homicide, No.13 (3) (intentional murder) for causing the death of his neighbor, a drug addict. On September 21, 2009, the two men had an argument and a physical altercation. The neighbor fell, then got up and left with some relatives. He later died at Patan Hospital. The doctor who performed the autopsy testified that there was no outward sign of an assault, no sign of bruising, and he opined that it was possible that the cause of death was a drug overdose. In other words, there was absolutely no evidence of the cause of death. The

defense argued that in the absence of evidence of causation, Mr. Bardewa should be acquitted. The court agreed.

* * *

Cases involving juveniles accused of public offenses are slowly being transferred from the CDO to the juvenile bench. In Government of Nepal v. Suroj Rai,(ILF-Nepal 364), the Supreme Court held that the CDO did not have jurisdiction over juveniles accused of crimes.

Government of Nepal v. Sunil Kumal Yadav, (ILF-Nepal/JKP 12 &39) (Adv. Achutam Acharya)

Our client, a juvenile, was charged with a violation of the Arms and Ammunition Act, 2019 and a violation of Some Public Offenses Act, 1970. Both offenses are under the jurisdiction of the CDO when the accused is an adult. Nevertheless, in Janakpur, the matter was brought before the CDO. ILF-Nepal/JKP brought an application to the CDO to have the matter transferred to the District Court. The application was denied. ILF-Nepal advocates appealed this decision through a Rule 17 petition to the Appellate Court. The petition was granted and the matter moved to the District Court.

In contrast, in KTM, in the case of Government of Nepal v. Ramesh Chetri, (ILF-Nepal 676)(Adv. Mohan Sashanker), Mr. Chetri, a juvenile, was brought directly to the Juvenile Bench.

* * *

Efforts to obtain a speedy trial for the accused continue before the courts and the CDO.

Government of Nepal v. Jay Kisor Shah, (ILF-Nepal 278) (Adv. Mohan Sashanker)

Our client has been detained for more than one year. He was accused of possessing 30 grams of heroin in violation of Section 14 (g) of the Narcotic Drugs Act, 2066 (1976). The statute provides, in Section 14 (g) (1), "a term of imprisonment from five years to ten years and a fine of five thousand rupees to twenty five thousand rupees for anyone doing a transaction up to twenty-five grams." The statute provides in Section 14(g) (2) "a term of imprisonment of ten years to fifteen years and a fine from seventy thousand rupees to two hundred thousand rupees for anyone doing a transaction from 25 to 100 grams." Further, the statutory language "a transaction" suggests a sale or an exchange not mere use. In this case, the alleged drugs were neither preserved nor tested. There is no evidence to prove the amount and/or nature of the alleged substance.

Nevertheless, our client was in custody for over one year. As discussed in previous editions of the Case Notes, Court Management Sections 13, 14, and 15 provide in essence that a court must decide a case within 12 months of the date the charges were filed and the defendant had an opportunity to respond. Should the prosecution need more time, it must ask the Appellate Court permission to do so before the 12 month period has ended. Court Management No. 123 provides an exception in cases where the defendant faces more than five years imprisonment. However, it seems obvious that the exception should not be based on an unsupported accusation. ILF-Nepal filed a petition with the appellate court, but the section chief in the clerk's office refused the petition stating that "If the court followed these rules, they would have to release everyone." An appeal of that decision is pending.

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Government of Nepal v. Mukesh Shrestha, (ILF-Nepal 588) (Adv. Mohan Sashanker)

While a district court has 12 months to decide a case under CM 13, 14, and 15, the CDO has 120 days under Some Public (Offense and Punishment) Act 2037 (POA), section 6 (1). A CDO is not allowed to order a prison sentence over 24 hours without approval by the Appellate Court. CDOs circumscribe the limitation by imposing heavy fines that the poor cannot pay and therefore end up incarcerated for long periods of time. At the time of the alleged offense, two taxi drivers were involved in an altercation at the bus station. Our client was working at the time at the bus station; he had nothing to do with the altercation. A third taxi driver joined the brawl and punched our client who hit the man back. The next day, our client was back working at the bus stop when he was identified by one of the taxi drivers involved in the earlier brawl. Young Communist League (YCL) workers took our client by force to their office where they assaulted him and then transported him to the Maharajgunj police office.

On June 6, 2010, the day of the filing of the charge sheet, the CDO set bail at 20,000 rupees. Our client could not pay and has been held ever since. The ILF-Nepal advocate filed the habeas petition whereupon the CDO immediately scheduled a final hearing. He found our client guilty, imposed a fine of 3750 rupees and restitution in the amount of 5000 rupees, which the client was unable to pay.

The next day, the appellate court held a hearing on the habeas corpus petition, and ILF-Nepal argued that because the statutory time to resolve the case had expired before the CDO reached a verdict, the CDO had no jurisdiction over the case to impose a verdict, and the detention was illegal. The prosecutor argued that if the CDO lost jurisdiction to hear cases after 120 days, they would just have to open the doors of the jail and let people go; the prosecutor argued that it is impractical to follow the law. The habeas corpus was dismissed.

ILF-Nepal returned to the CDO the next working day and argued that it was illegal to detain someone on the basis that they could not pay restitution. The CDO was sufficiently convinced and ordered the client released.

Government of Nepal v. Ali Ansari, (ILF-Nepal/NPG 5); Government of Nepal v. Baldev Giri, (ILF-Nepal/NPG 6); Government of Nepal v. Anil Balmiki, (ILF-Nepal/NPG 7); Government of Nepal v. Kausnal Ali Ansari, (ILF-Nepal/NPG 8) (Adv. Rakesh Sharma and Bir Bahadur Khadka)

The clients in these four cases were arrested and charged under the SPO Act and held without bail pending trial. The maximum possible penalty for this offense is up to two years in jail (if a recommendation is approved by the Appellate Court) and a fine of up to 10,000.00 rupees.
ILF-Nepal filed habeas corpus petitions on behalf of each man arguing the following: 1) the CDO had failed to resolve the matters within 120-day limit set forth by the statute, the charge sheets had not been filed within the mandatory 7-day limit pursuant to the SPO Act 4 (1) and the CDO has no power to hold a person without bail according toSPO Act 6(1).Therefore, the CDO had lost its jurisdiction to hear the case. The appellate court agreed and released all 4 clients. It was the first time the CDO of Nepalgunj was successfully challenged on these grounds.

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The ILF wants to welcome the five new lawyers of ILF-Nepal: Sanu Dangol, Kamal Ghising, Chanchalla Kaini, Pooja Bhandari, and Dev Raj Pant as well as our new International Fellow, Deborah Trevino, a public defender from Las Vegas.

Natalie Rea
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December 15, 2010

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