

ILF-Nepal

The International Legal Foundation – Nepal

CASE NOTES – DECEMBER 2008

Editor's note: This issue of the Case Notes provides a small window into the defense practice in misdemeanor cases and cases involving arms and ammunition under the jurisdiction of the Chief District Officer ("CDO") as well as juvenile litigation.

Kshitij Lama v. Government of Nepal (ILF-Nepal 11) (Adv. Bimala Yadav)

This case raised questions about the statute of limitations and the time limit for a decision in misdemeanor cases. Our client was charged under the Public Offense Act (the "Act") Section 2 after a fight broke out in the hotel where he worked and the owner filed a complaint. Under section 6 of the Act, the CDO has three months from the day of the filing of the charge sheet –7 or 14 days from the date of the incident – to decide a case. Section 4 of the Act provides that the statute of limitations for public offenses is 7 days from the day of the incident if the case is brought by the police and 14 days in cases begun by the filing of a First Information Report ("FIR"). In addition, in cases begun by an FIR, if the CDO finds "reasonable grounds," the filing of the indictment may be delayed up to 35 days. Even though the CDO has no power to impose a prison sentence after conviction of even one day without the approval of the appellate court, the CDO interprets the 35 day extension of the statute of limitation as a blanket right to file an indictment in 35 days and to detain the accused during that time.

In this case, an FIR was filed on August 22 [5/6]¹, our client was arrested on August 24 [5/8], and remanded. The charge sheet was filed September 19 [6/3], or 29 days after the incident, 28 days after the filing of the FIR, and 14 days beyond the statute of limitations. Bail was set at NPR 2000, and since our client could not pay, he was remanded. One day of detention amounts to 25 NR and bail was deemed paid on November 12 [7/27]. To date, our client is still being detained.

On November 25 [8/10], the office attempted to file a *habeas corpus* petition in the Patan appellate court but the registrar rejected the petition on the grounds that the court had previously dismissed a *habeas corpus* petition filed by our office in the case of *Santosh Nepali*, described in

¹ Nepali date

the November Case Notes.² On November 26 [8/11], our office appealed the rejection by the Appellate Court registrar and the argument was held on November 27 [8/12]. That day, instead of ordering a date for the CDO, through the public prosecutor, to answer, the court asked for the file of Santosh Nepali. Three days later, on November 30 [8/15], the court ordered the CDO to produce our client's file within 3 days or by December 3 [8/18]. Again, the CDO did not produce the file and on December 4 [8/19], we filed a *mandamus* petition to order the CDO to obey the court order. On December 5 [8/20], the court granted the *mandamus* petition but did not set a date for the production of the file. On December 16 [9/1], more than 3 weeks after ILF-Nepal's original attempt to file a *habeas corpus* petition, the appellate court reversed the registrar's rejection. The *habeas corpus* was filed and accepted that day and on December 17 [9/2], the judge ordered the prosecutor to appear with the detainee and to file a written answer on December 21 [9/6]. On that day, our client was produced, but the CDO had not produced the file so the case was adjourned again. The next day, the file was produced and even though our client was not, the court heard arguments.

The court had no question about the obvious statute of limitations violation. The court focused on the three-month period for the CDO to decide a case. One judge commented that since the CDO can impose a heavy fine (after conviction) and therefore, keep a person in prison for a long period of time if the person cannot pay, he need not reach a decision within 3 months. As a result, the *habeas corpus* was dismissed. Our client has now been detained for 4 months without a decision. In all likelihood, the CDO will convict him and impose a fine equal to the time he has spent in pretrial detention.

Bipin Sutiari v. Government of Nepal (ILF-Nepal No. 7) (Adv. Bimala Yadav)

On September 7 [5/22], ILF-Nepal accepted the case of Bipin Sutiari, accused of homicide. Bipin is 15 years old and his family brought us the original birth certificate issued by the Village District Council ("VDC"). In Nepal, a child is a person under the age of sixteen. Juvenile Regulations Rule 15 provides four methods to prove age: 1) hospital birth certificate, if such evidence does not exist, then 2) a birth certificate issued by the VDC, if no such document exists, then 3) school records, and if such records do not exist, then 4) an age assessment by an expert. On September 12 [5/27], we submitted a copy of the original VDC birth certificate to the court at the pre-indictment remand proceeding to make sure that Bipin would be put in child custody. The court ignored the document and Bipin was returned to adult custody.

² The case of Santosh Nepali was completely irrelevant. In that case, the court actually granted our appeal challenging our client's pretrial detention on speedy trial grounds. The appellate court sent the case back to the district court – scheduled to be judgeless for one month -- to order release and our office filed a *habeas corpus* petition to hasten the release of our client. That petition was dismissed.

On September 16 [5/31], our office filed a *habeas corpus* petition in Supreme Court to release Bipin from adult custody. On September 17 [6/1], the court asked the attorney general's office to answer within 3 days, but in the meantime, the prosecution submitted an age assessment document stating that our client was between 16 and 18 and most probably 17. On September 22 [6/6], the charge sheet was filed in KTM district court. That day, the Nepal Bar Association ordered a strike and lawyers were told that if they appeared in court they would be disciplined. Bipin was remanded without bail to adult custody. On September 26 [6/10], the *habeas corpus* was dismissed because the charge sheet had been filed and therefore, there was a "change in circumstances."

On October 17 [7/1], the office filed an interlocutory appeal challenging the District Court's finding that Bipin was not a juvenile. The Patan Appellate Court refused to set a date certain for the District Court to respond. The office then filed a petition asking for a date certain. The Appellate Court set November 7 [7/22], for a hearing. Despite the clear language of the rule saying that the birth certificate is conclusive evidence of age, outweighing an age assessment, the Court affirmed the finding that Bipin was an adult.

On November 26 [8/11], we appealed that finding to the Supreme Court. The next day, the Supreme Court ordered the appellate court to respond without setting a court date. On December 14 [8/29], the Supreme Court ordered the file and the public prosecutor to appear. On December 21 [9/6], the public prosecutor asked for a one week adjournment. The next court date in Supreme Court is set for December 28 [9/13]. In other words, more than three months after our office filed its first *habeas corpus* petition to have Bipin adjudicated a juvenile, no final decision has been reached and Bipin, age 15, remains in adult custody.

Natalie Rea, ILF-Nepal Director
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As of January 4, 2009, Daniel Alterman, a criminal defense lawyer from New York City, will be replacing me as International Fellow at ILF-Nepal. I will be supervising the program from New York and visiting the office every three months.

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