

# ILF-Nepal

## The International Legal Foundation – Nepal

### 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 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.

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*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.

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*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.

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*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.

**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 to SPO 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.

*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  
ILF Executive Director  
December 15, 2010**