

ILF-Nepal

The International Legal Foundation – Nepal

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.

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 through 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 arbitrary detention and release of three Indian nationals in Janakpur.

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) (Adv. 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
ILF Executive Director
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