

ILF-Nepal

The International Legal Foundation – Nepal

CASE NOTES – JANUARY 2009

Editor's notes: This issue of the Case Notes discusses further efforts by ILF-Nepal to obtain access to investigative materials pre-charge-sheet and describes an extraordinary day at the CDO's office in Lalitpur. Unfortunately, we cannot report that a decision has been reached in the case of our 15-year old client, Bipin Sutiari, discussed in the December notes. In that case, the Supreme Court ordered a hearing to determine whether the VDC birth certificate - superior as a matter of law to an age assessment under Juvenile Regulations Rule 15 – is superior to the age assessment as a matter of fact in this case.

Prem Jirel v. Government of Nepal (ILF-Nepal 94) (Adv. Bimala Yadav)

Mr. Pirel was ILF-Nepal's first client before the Lalitpur CDO. The CDO seemed to be unaware of the constitutional right to counsel and the statute of limitations for public offense as set forth in Section 4 of the Public Offense Act. Our client was arrested for a simple public offense. When ILF-Nepal's lawyer appeared on his client's behalf on January 11, 2009 [9/27/2065], the CDO – in violation of the client's constitutional right to counsel – refused to allow ILF-Nepal to represent her client. The CDO stated that ILF-Nepal needed an agreement to provide representation. ILF-Nepal's lawyer, a licensed Nepali lawyer, argued that her client should not be denied his right to counsel and she should be allowed to argue. The CDO refused to hear her and remanded the client for 15 days in violation of the statute of limitations. ILF-Nepal's lawyer was also later denied access to her client held in police custody.

Sagar Lama v. Government of Nepal, (ILF-Nepal 92) (Adv. Bimala Yadav)

In this case, ILF-Nepal made progress in obtaining information from the police at remand and successfully convinced the court to respect Mr. Lama's right to remain silent.

Sagar Lama was arrested on December 27, 2008 [9/12/2065] and charged with the theft of a motorcycle. He faced a possible sentence of one month and a fine equivalent to the value of the stolen property. ILF-Nepal appeared on his behalf for the first time on January 8, after he had been detained for 12 days. Under section 15 of the State Cases Act a court may order judicial custody for up to 25 days but only if it finds reasons for investigative detention. ILF-Nepal's written petition for access to the investigative file to be able to oppose the police's request for

additional detention was denied (courts seem reluctant to include written applications in the file) but the court ordered the police to produce the investigating officer on the case at the next remand hearing to answer questions regarding the status of the investigation. At the next remand hearing, the Investigation Officer appeared and stated that the investigation had been concluded but the documents had to be prepared. The Court then adjourned the case for 5 additional days.

The charge sheet was filed on January 19 and the Jail/bail hearing held on January 20. On that day, our client successfully asserted his right to remain silent. Under Court Management Section 127, the first step to be taken on the day the charge sheet is filed is to have the defendant make a statement. Section 127 provides in part that when the defendant is taken to court “the entire file should be read to the defendant, and he [the defendant] should be asked whether he admits or denies the accusations.” This despite the constitutional right to remain silent provided by the interim constitution Art. 24 (7). In this case, ILF-Nepal lawyer successfully argued that her client did not have to make a statement. He wanted to exercise his right to remain silent. The court’s bench assistant, as is the practice, ignored the request, and began questioning the client. Mr. Lama told the court "I want to exercise my right to remain silent." The bench assistant then conferred with the court and they agreed that a defendant is guaranteed the right to silence under Nepal's Interim Constitution and did not insist on having our client make a statement.

Gyanu Pokhrel v. Government of Nepal, (ILF-Nepal 59) (Advs. Surya Pandey and Mohan Sashankar)

On December 5, 2008, two individuals from an anti-human trafficking group, arrested our client and two days later, turned her over to the police. She was charged with assisting two co-defendants, with selling the complainant to someone in India. Gyanu Pokhrel, a 17-year-old young woman was charged under the Human Trafficking and Transportation Act of 2064, sections 1(a), 3, 4(2)(b), 15(1)(a),(g), and 17. The charged offense is punishable up to 20 years in prison.

When ILF-Nepal first met her on December 16th [9/1/2065], Ms. Pokhrel had been repeatedly remanded at the request of the police. During the first meeting with our client, the police constable informed us that Ms. Pokhrel was not involved in the trafficking and that she was innocent. On her third remand hearing on December 22nd [9/7], we argued that she should not be held in custody since the police information indicated that she was not involved. The police said nothing, the court ignored the information that we had been provided, and remanded our client for 7 days until December 29, 2008 [9/14/2065].

In order to confirm the information informally given to us by the police, the office filed a petition on December 23rd [9/8], for pre-charge sheet discovery, requesting a copy of the investigation file. Pursuant to provisions of the interim constitution providing the right to counsel and ICCPR

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Art. 14(3)(b) guaranteeing counsel time to prepare, the District Court ordered access to the file. (The courts are ordering access to the investigative file but not as a matter of course). The police refused to turn over a copy of the investigation file. At the next remand, ILF-Nepal's lawyer convinced the police to show him a file where our lawyer found that the police report included clear exculpatory evidence. The information was brought to the attention of the court. Seemingly unaware of ICCPR Art. 9(3), providing that the general rule is NOT custody during pretrial proceedings, the Court remanded our client again and asked that the charge sheet be filed within 2 days. The charge sheet was filed and statements by our client and co-defendants taken over a period of days. When that evidence was presented, ILF-Nepal argued that given the lack of evidence showing any involvement of our client, the court ordered her release. Her two co-defendants are being held without bail. To date, our requests for the police report has been denied.

Pradip Thapa v. Government of Nepal, (ILF-Nepal 68) (Adv. Achutam Acharya)

In this case, ILF-Nepal successfully challenged the common practice of having detention ordered by unauthorized officials and not the CDO himself. Of course, the case also involves the more-common untimely filing of the charges in public offense cases.

As we have discussed in prior Case Notes, Section 4 of the Some Public Offense Act provides that the statute of limitations for filing the charge sheet is 7 days from the day of the incident if the case is brought by the police, and 14 days from the filing of the FIR in cases begun by an FIR complainant. In addition, in cases begun by an FIR, if the CDO finds "reasonable grounds," the filing of the indictment may be delayed for up to 35 days. This does not mean that detention can be ordered for 35 days. Once the charges are filed, only the CDO can conduct the jail/bail hearing. Indeed, some Public Offense Act section 5(1) states that the CDO has original jurisdiction to try and hear cases prescribed under the Act. The exceptional clause of Local Administration Act section 11(4) states that the CDO cannot delegate his case hearing authority.

Pradip Thapa was arrested on November 26, 2008 [8/11/2065] for allegedly creating a public disturbance and threatening individuals in public. He was arrested along with two co-defendants with a public offense. Since the case was not begun by an FIR, the charge sheet had to be filed within 7 days of the incident or by December 3rd [8/18]. The charge sheet was not filed until December 22nd [9/7], or 19 days late. In a common procedure, the CDO was not present at the Jail/Bail hearing and the hearing was conducted by the Assistant CDO who set bail at 9000 NPR. Our client cannot pay the bail and is detained.

ILF-Nepal's lawyer filed a *habeas corpus* petition in the Supreme Court challenging the illegal detention. He argued that a person has a right to a fair trial by a judicial body or a competent court of law under Nepal's Interim Constitution section 24(9). Some Public Offense Act section 5(1) states that the CDO has original jurisdiction to try and hear cases prescribed under the Act and under Local Administration Act section 11(4), the CDO cannot delegate his case hearing

authority. Interim Constitution section 24(3) and Some Public Offense Act section 3(2), read together, state that a person shall not be held in detention beyond a twenty-four hour period without an order from the case hearing authority. Thus, it is illegal for an official *other* than the CDO, who has the case hearing authority, to order a defendant's detention beyond the twenty-four hour period. In the petition, ILF-Nepal also argued that the detention was illegal because the charge sheet was filed untimely in violation of the statute of limitations.

After a number of adjournments, a hearing was held in Supreme Court where Justices Min Bahadur Rayamajhi and Kalyan Shrestha, found the detention of each client to be illegal and ordered their immediate release. While the final decision has not been issued, it appears that the court will be focusing on the unlawful delegation of power to the Assistant CDO. ILF-Nepal is still hoping for a ruling regarding the statute of limitations in cases before the CDO.

Natalie Rea, ILF-Nepal Director
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January 31, 2009

As of January 30, 2009, Ken Plotz, a judge from Colorado, will be replacing Bejal Shah, and joining Dan Alterman as an International Fellow at ILF-Nepal.

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