

# 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 Mukhiya, 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 and 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. Mukhiya, 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.*

**Government of Nepal v. Rajeev Kumar Karna (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.*

**Government of Nepal v. Biswa Maharjan (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

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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.

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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

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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.*

**Natalie Rea**  
**February 12, 2010**

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