

ILF-Nepal

The International Legal Foundation – Nepal

CASE NOTES – MARCH 2010

Editor's Notes: This edition illustrates how early investigation by defense counsel can uncover poor police work, leading to early release and even acquittal. This edition also underscores the injustices caused by the unavailability of quality representation for the poor when ethical rules prohibit the representation of co-defendants.

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Poor police work leads to illegal and lengthy pretrial detentions.

Government of Nepal v. Prem Gurung (ILF-Nepal 369) (Adv. Mohan Sashankar)

This case arose out of the fatal beating of the victim following a dispute over spilled beer. The victim had been in a restaurant having a beer when a man knocked over the beer. The dispute moved onto the street where a dozen people joined the fight. Mr. Gurung owned the neighboring restaurant. The victim was beaten with a carjack, with a rod, and with a rock. While he was still alive, someone put a piece of cloth in his mouth and then threw his body into the river. Fourteen people were arrested, and all made statements to the police. Four never mentioned Mr. Gurung; four said he hit the victim with his hands. Mr. Gurung admitted being present but denied any involvement. At the jail/bail hearing, Mr. Gurung was ordered held without bail.

ILF-Nepal appealed the no-bail order to the appellate court and then to the Supreme Court, where Mr. Gurung was finally ordered released. In the Supreme Court, ILF-Nepal argued that: 1) Mr. Gurung's statement to the police was inadmissible under *Nepal v. Karki*; 2) his mere presence at the scene does not amount to an offense; 3) the prosecution could not prove that Mr. Gurung was in the group of six who perpetrated the crime; 4) Mr. Gurung had not been involved in the phase of the incident that caused the victim's death; 5) the prosecution had over-indicted Mr. Gurung; and 6) at the jail/bail hearing, the court had violated Mr. Gurung's right to remain silent by continuing its questioning. During the Supreme Court argument, the court repeatedly asked the government attorney about Mr. Gurung's specific involvement the crime. The government attorney could not answer. The Supreme Court ordered the client to be released on a general court date. He had been in custody since September 17, 2009.

Government of Nepal v. Ram Krishna Rai (ILF-Nepal 474) (Adv. Bir Bahadur Khadka)

On February 14, 2010, around 6:00 p.m., a bus ran into a group of pedestrians, and two people were killed on Chabahil Chowk. An infuriated crowd gathered and torched three buses. Later that evening, our client, 17 years old, was arrested and accused of having been involved in the torching of the buses. Our client, who works in a furniture store and supports his entire family, had been at the movie theater during the incident. The movie ran from 5:00 to 7:30 p.m., and he had the ticket. He repeatedly denied any involvement in the incident. ILF-Nepal investigated the

matter and confirmed the time and location of the movie theater. It also confirmed with nearby shop owners that there had been a true mob scene after the accident. With all this information, the ILF-Nepal advocate went to the police presenting the police with the movie ticket, explaining that Mr. Rai was innocent. One police officer acknowledged that Mr. Rai was innocent but said that he could not do anything because the case has already been initiated.

In fact, both the State Cases Act (SCA) and the State Cases Rules give the police the authority to release a person from detention. SCA Section 21 provides that the police may release a person from custody “if it is found not necessary to continue the period of custody.” State Cases Rule Section 11 refers back to SCA Section 21 and also permits early release, as long as the government attorney approves. In the past, ILF-Nepal’s attempts to have charges dismissed early have been unsuccessful. This case was a small step forward because the prosecutor agreed not to include a claim amount in the charge sheet — which would have been the value of the three torched buses — making release more likely.

At the jail/bail hearing, ILF-Nepal argued that there was no evidence connecting Mr. Rai to the crime. Mr. Rai testified and the movie ticket was introduced into evidence. The court essentially dismissed the charges, by acquitting Mr. Rai at the jail/bail hearing.

Government of Nepal v. Ram K. (ILF-Nepal 340) (Adv. Bimala Yadav)

Our client, 13 years old, was charged with sexually abusing a child. The First Information Report was filed by the victim’s mother. The medical evidence found no injury, and laboratory tests did not support the sexual abuse charge. The ILF-Nepal advocate obtained proof of age, showing that his client was, indeed, 13 years old. Section 11 of the Juvenile Act provides that a child under the age of 14, charged with an offense carrying a sentence of imprisonment, cannot be subject to more than six months in prison. If the child is between 14 and 16 years old, he may be sentenced to only half the sentence permissible for an adult. In other words, Nepal clearly recognizes the lesser culpability of children.

At the jail/bail hearing, the ILF-Nepal advocate had to overcome the court’s reluctance to even listen to her argument. She managed to argue that the court lacked jurisdiction to even hear the case as it was past the 120 days to decide a juvenile case. In addition, even if the court had jurisdiction, her client should be released, since he had been detained for seven months when the maximum prison sentence for a child is six months

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The following cases illustrate the tension between a lawyer’s obligation to provide conflict-free representation and the courts’ concern with judicial economy.

Government of Nepal v. Tul Bahadar Tamang (ILF-Nepal 470) (Adv. Surya Pandey); Government of Nepal v. Ajay Shrestha (ILF-Nepal 371) (Adv. Surya Pandey); Government of Nepal v. Ramesh Thapa Magar (ILF-Nepal 324) (Adv. Surya Pandey); Government of Nepal v. Nabin Rai (ILF-Nepal 477) (Adv. Neelam Poudel)

These four cases all involved public offenses. In each case, ILF-Nepal filed a habeas corpus petition, arguing that the statute of limitations set forth in Section 4 of the Public Offense Act had been violated and that the defendants should be released. In each case, there were co-defendants. In Nepal, as elsewhere, the attorney-client privilege is recognized, and a lawyer may not disclose information obtained during a conversation with his or her client. If a lawyer represents more than one defendant, there is the risk of learning privileged information from one defendant that then

cannot be used for the benefit of the co-defendant. To avoid this conflict, ILF-Nepal does not accept cases of co-defendants. When there is a co-defendant, ILF-Nepal will call another legal aid provider to represent the other defendant(s). In these cases, ILF-Nepal learned about the existence of co-defendants when arguing in the appellate court. The court asked ILF-Nepal to speak on behalf of all the defendants in each case, and ILF-Nepal had to refuse.

Government of Nepal v. Uddav Karki (ILF-Nepal 433) (Adv. Shyam Kumar Bishwakarma); Government of Nepal v. Ram Bahadur Pakrin (ILF-Nepal 421) (Adv. Neelam Poudel)

These two cases involved the same problem in the appeals of bail orders in district court. Again there were co-defendants, and again the appellate court asked ILF-Nepal to represent the potentially conflicting interests of the co-defendants. ILF-Nepal had to refuse again.

ILF-Nepal would like to welcome Melissa Dineen, a public defender from Philadelphia, who has joined the office for six months.

**Natalie Rea
ILF-Nepal Director
April 15, 2010**