

ILF-Nepal

The International Legal Foundation

CASE NOTES – NOVEMBER 2009

Editor's notes: The most important case in this issue is not a case of ILF-Nepal but a great victory in a Public Interest Litigation ("PIL") filed by Kathmandu Law School. KLS challenged the continued validity of Sections 38 and 53 of the Punishment Act, unchanged since 1986, setting the value of one day in detention at 25 rupees, which effectively criminalized poverty in Nepal.

Government of Nepal v. Prakesh Lama (KLS case filed in 2007, decided in September 2009, and the written decision issued in October 2009) (writ petition 065-ws-0009 (2065))

In Nepal, if an accused cannot afford to pay bail or a fine, he or she will be allowed to pay through days in detention at a rate of 25 rupees per day. The value, equivalent to the daily pay of an unskilled laborer, was established 23 years ago when the legislature enacted Punishment Act 38 and 53. The effect of the statute has been the practical criminalization of poverty: where a person is sentenced to one month jail plus a 50,000 rupee fine, for example, a person with financial means will only serve one month in jail, but an indigent could serve more than five years in jail. In 2007, KLS filed a PIL challenging the continued validity of the statutes. ILF-Nepal learned about the PIL only when it attempted to file its own PIL and the registrar informed it that KSL had filed a similar PIL and that it had been decided. It took two months to get the written decision.

In essence, the PIL argued that: (1) the provisions violated the right to equal protection and the right to liberty guaranteed by the Interim Constitution (IC) and the International Covenant on Civil and Political Rights (ICCPR); and (2) at minimum, the present rate of 25 rupees per day should be modified to reflect inflation since the law was enacted 23 years earlier. The Supreme Court recognized that Punishment Act 38 and 53 resulted in the criminalization of poverty and suggested that they were inconsistent with the IC and international standards. The Court recognized the need for timely amendment of these provisions but stopped short of annulling the offending provisions. Instead, it directed the legislature to look into the issue and amend the statutes. The Court suggested that 190 rupees, the daily wage of an unskilled worker today, was probably a more accurate figure today.

ILF-Nepal immediately sought to implement that decision.

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Government of Nepal v. Mitra Bahadur Karki (ILF-Nepal 201) (Adv. Pawan Kumar Jaisawal and Neelam Poudel)

Mitra Bahadur Karki was arrested on April 13, 2009, for allegedly selling fake gold. Bail was set at 31,000 rupees. Mr. Karki could not pay and has been detained for seven months. ILF-Nepal filed a habeas corpus petition citing *Government of Nepal v. Prakesh Lama* and arguing that at 190 rupees per day, Mr. Karki should have been released after 163 days. To keep him in detention would violate the IC, ICCPR, and the precedent set by the Supreme Court in *Prakesh Lama*. The appellate court dismissed the petition and refused to recognize its own authority to implement measures to correct the unjust and unconstitutional effect of these laws.

Certain courts are showing a better understanding of the right to counsel and the right to remain silent.

Government of Nepal v. Nishant Thapa (ILF-Nepal 284) (Adv. Neelam Poudel)

Nishant Thapa was arrested and charged with possessing drugs in a public area known for drug dealing after dark. After he posted bail and was released, he stopped returning to court despite ILF-Nepal's efforts to secure his appearance. In Nepal, when a defendant fails to appear for his court appearances, the prosecution proceeds in his absence. Generally, lawyers will also stop appearing on their client's behalf but the case will continue. Attorneys who attempt to persist in representing absconded clients are often prevented from doing so by the court.

In this case, when Mr. Thapa did not appear, the ILF-Nepal advocate sought to conduct cross-examination of the government's witnesses on behalf of her absent client. The judge questioned her presence, suggesting she should not be there since her client was not there. The ILF-Nepal advocate argued that she must be permitted to represent her client because: (1) her client would be tried in absentia, and to deny him representation would violate his right to counsel under the IC and ICCPR; and (2) the Wakalatnama is a contract that obligates the attorney's representation through the end of the case, and that is not conditioned upon the client's presence in court. This judge agreed and the government witnesses were cross-examined.

In contrast, the court in *Government of Nepal v. June Rai* (ILF-Nepal 128) (Adv. Mohan Sashankar), refused to allow the ILF-Nepal advocate to argue on behalf of his absent client. An interlocutory appeal was filed but dismissed but eventually, Mr. Rai was found not guilty of attempted murder, the charges converted to assault with no further punishment.

Government of Nepal v. Yoman Bhattarai (ILF-Nepal 413) (Adv. Bir Bahadur Khadka)

Yoman Bhattarai is 14 years old. On October 30, 2009, along with two other young men, Mr. Bhattarai was arrested for the attempted murder of three adult men in Thamel. The advocate met the client one day before the charge sheet was filed. He advised Mr. Bhattarai to exercise his right to remain silent, and he agreed to do so. The advocate prepared a petition to the court asserting his client's right to remain silent.

When Mr. Bhattarai was presented to the bench to make a statement, the judge reluctantly accepted the petition from the advocate. When the clerk then proceeded to question the client about the facts of the case, the advocate intervened, asking the judge to prevent the questioning. The judge responded by asking Mr. Bhattarai directly, over the objection of defense counsel, if he was afraid to tell the court what happened, to which Mr. Bhattarai replied, fearfully, that he didn't know anything. In spite of the bullying from the judge, Mr. Bhattarai did not make an inculpatory statement to the court. He answered all the clerk's questions with: "I don't know."

At the jail/bail hearing the ILF-Nepal advocate successfully argued that the evidence presented by the prosecution failed to make a prima facie case of attempted murder. The statements of the complainants were inconsistent with each other and with police reports, and the idea that the three small teenage defendants had successfully attacked and robbed three grown men was implausible. Mr. Bhattarai was released on general court date in the custody of his older brother.

Government of Nepal v. Karan Shrestha (ILF-Nepal 395) (Adv. Kalayan KC)

According to an "expert," Karan Shrestha is 15 years old. He was arrested for allegedly stealing a cell phone from someone during a fight involving multiple people. Before the charge sheet was filed, the ILF-Nepal advocate advised his client of his right to remain silent, and Mr. Shrestha agreed to exercise that right. ILF-Nepal filed a petition to assert its client's right to remain silent. The clerk ignored the petition and proceeded to question Mr. Shrestha about the facts of the case. The ILF-Nepal advocate intervened and asked that the questioning stop. The judge directed the clerk to continue, but Mr. Shrestha answered each question by saying, "I wish to exercise my right to remain silent."

At the jail/bail hearing, the ILF-N advocate argued for the client's release based on lack of evidence against him; the fact that even if he were convicted, as a juvenile, he would have served all the required jail time; and that as a juvenile, the court must release him. Initially, the court would not release Mr. Shrestha unless there was a guardian or social welfare organization present, and even asked ILF-N to take custody of the client upon his release. A social welfare organization was found, and the client was released on general court date.

Post-acquittal detention continues to be a common problem in Nepal, but interventions by ILF-Nepal advocates have been successful in securing release.

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Government of Nepal v. Jogindra Paswan (ILF-Nepal/Janakpur 13) (Advs. Achutam Kumar Acharya and Ajay Shankar Jha)

Jogindra Paswan, a laborer, was arrested in May 2008 and charged with rape. He maintained his innocence and told the court that he had actually rescued the victim from a group of men who had attacked her. The police and prosecution nevertheless filed charges against him. When ILF-Nepal advocates first met with Mr. Paswan in the detention center, he had been detained for 18 months awaiting prosecution of his case, in violation of his rights to a fair and speedy trial. ILF-Nepal met Mr. Paswan on November 10 and was given access to the file. The advocates learned then that Mr. Paswan had been acquitted of all charges on November 8, 2009. ILF-N advocates immediately requested a letter from the court ordering Mr. Paswan's release, and took the letter themselves to the detention center to secure his release the same day.

Government of Nepal v. Anil Kharel (ILF-Nepal 375) (Adv, Pawan Jaisawal)

Any Kharel is a juvenile. He was arrested, along with others, on September 18, 2009, and charged with a Public Offense for damaging a taxi and beating up the driver. Mr. Kharel made a statement to the police that the driver had hit them. On October 20, the ILF-Nepal advocate met Mr. Kharel at the juvenile detention center and three days later filed an interlocutory appeal, arguing that: (1) neither his counsel nor guardian had been present when the statement was made in violation of the Children's Act Art. 19; and (2) the charge sheet had not been filed within seven days as required by Public Offense Act Art. 4. (Despite numerous habeas corpus petitions being filed based on this argument, charge sheets are still regularly not filed within the seven days by the CDO). The matter was heard for the first time on November 11 and rescheduled for November 20. That day, a Friday, the Appellate Court ordered Mr. Kharel released. This should have been the end of the case.

Effectuating the release of a client, however, is not easy. On Sunday, November 22, the ILF-Nepal advocate went to the court to make sure that the order had been sent to the CDO. The next day, he went to the CDO to make sure the release letter had been sent to the juvenile center where Mr. Kharel was being detained. The day after that, ILF-Nepal learned that the letter had been sent to the adult detention facility. Mr. Kharel was still incarcerated. On Wednesday, ILF-Nepal went back to the CDO, the letter was properly sent to the juvenile center and Mr. Kharel was released, almost one week after his release had been ordered.

Natalie Rea
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The ILF wants to thank Jake Stevens for his contribution to ILF-Nepal during the past three months. At the same time, we want to welcome Lisa A. Polansky, a criminal defense lawyer from Boulder, Colorado, who will be joining ILF-Nepal January 1, 2010.

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