

ILF-Nepal

The International Legal Foundation

CASE NOTES – OCTOBER 2009

Editor's Note: Two acquittals discussed in this edition suggest that trial courts have started to impose a heavier burden of proof on the prosecution though not yet the required burden of proof beyond a reasonable doubt. However, there seems to be little progress in getting courts consistently to recognize of a defendant's fundamental right to remain silent.

Government of Nepal v. Deepak Darji (ILF-Nepal 233) (Adv. Mohan Sashankar)

Deepak Darji, a bus driver, was arrested on April 27, 2009, while returning from India, and charged with possession of explosives. The facts were simple. His bus was boarded by the police as he entered Kathmandu and a box allegedly containing mercury was found on the bus. Mercury can be used as an explosive. In an inadmissible statement made to the police, he admitted possessing the mercury.

At trial, the prosecution introduced the seizure report but did not call seizing officers to testify. A box labeled “mercury” was brought to court, but no scientific report identifying the content was presented. In fact, the box was never even opened. At the final hearing, the prosecution argued that the allegations were sufficient to convict; he never even acknowledged the lack of proof presented in court. ILF-Nepal carefully argued that the burden of proof was on the prosecution and that guilt had to be established beyond a reasonable doubt, citing the Interim Constitution Art. 24(5); Evidence Act Art. 24; and *Government of Nepal v Suresh Saha* Decision No. 7806, dated 1218/2063; 2064 (Nepal Law Reporter Vol. 49 No. 1). The court explicitly denied that that reasonable doubt was the basis for the decision. It acquitted because no scientific analysis of the “mercury” was presented by the prosecution. Indeed, there was virtually no evidence against our client and the prosecution had not met any burden of proof.

Government of Nepal v. Binod Dhakal (ILF- Nepal 234) (Adv. Mohan Sashankar)

Binod Dhakal is a taxi driver. On April 22, 2009, he was arrested as he slept in his car. He was accused of being part of a group of people who jumped out of the cab and attempted to abduct the complainant. In court, Mr. Dhakal made a statement admitting that he had been present during the incident but had had nothing to do with the abduction, which had been committed by his customers. Although abduction is nominally a non-bailable offense, ILF-Nepal secured his release on 5,000 rupees bail. The FIR complainant never testified in court.

At the final hearing, the prosecutor sought a conviction based on non-admissible facts, without acknowledging that the initial FIR complaint was not sufficient to support a conviction. The court, a different one, rejected the reasonable doubt standard enunciated in *Government of Nepal v Suresh Saha*, (*see supra*), stating that "that [was] a murder case, this is an attempted abduction case: Why should the same principle apply?" Nevertheless, the court found the client not guilty.

ILF-Nepal lawyers have fought to inform clients of their rights, to convince them to remain silent, and to convince courts to respect the right. The following three cases illustrate the continued challenges.

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

Nepal recognizes a defendant's right to remain silent [*see* Interim Constitution Art. 24(7); *Chandra Bahadur v. Government of Nepal* Writ No. 1169 (2047), dated 3/24/2050; ICCPR Art., 14(3)(g).] This right, however, runs counter to practices and to Court Management Section 127, requiring a defendant to make a statement as the first step of the jail/bail hearing.

Prem Gurung was one of 15 people arrested for the killing of a police deputy inspector. The incident began as a bar dispute over a spilled beer, continued into the street, and ended with the beating and drowning of the decedent in the Bagmati River. Our client was arrested weeks later and beaten. He refused to make a statement to the police. In court, the other 14 defendants made statements denying any involvement (some after confessing to the police). Mr. Gurung was second to last to be called by the clerk to make a statement. The ILF-Nepal advocate orally interceded and asserted his client's right to remain silent. The court ordered that the examination proceed and that the clerk ask each question regardless. Mr. Gurung, seated next to his lawyer, was forced to assert his intent to remain silent more than 20 times. The clerk took an increasingly prosecutorial tone, asking "Don't you think whoever did this should be punished? [Yes.]. So should you be punished? [No.]." Mr. Gurung was ordered held without bail, and ILF-Nepal has filed an interlocutory appeal pursuant to Rule 17 of the Court Management Act.

Government of Nepal v. Dan Bikram Thapa (ILF-Nepal 368) (Adv. Bimala Yadav)

Dan Bikram Thapa was charged with murder after a dispute. He was also seriously injured and hospitalized for one month. At the bail/jail hearing, the ILF-Nepal advocate attempted to file a written application asserting her client's intention to remain silent. At first, neither the bench clerk nor the judge wanted to accept the application. They insisted that the application be filed with the Court Registry Office. That office refused the application and sent ILF-Nepal back to the court. The ILF-Nepal advocate argued that the petition was simply a written memorialization of her client's assertion of his right to remain silent and the court finally accepted it. It refused to

rule on the issue, and the bench clerk, as in the above case, insisted on asking each and every question.

Government of Nepal v. Santosh Bardeba (ILF-Nepal 363) (Adv. Bimala Yadav)

Santosh Bardeba was accused of the murder of his neighbor, with whom he had a fight a few hours before the man's death. The autopsy report did not list a cause of death. Apparently, the decedent, a habitual drug user, was able to walk after the fight. Nonetheless, the complainant, his mother, alleges that he died from injuries suffered in the fight. Again, the ILF-Nepal advocate filed a written application asserting her client's right to remain silent. The application was finally accepted, but the bench clerk ignored the request and questioned Mr. Bardeba. When Mr. Bardeba then requested that he be allowed to provide information about defense witnesses (required at the bail/jail hearing to avoid having the witnesses later precluded), the clerk refused, stating that the defendant could not both assert his right to remain silent and provide such information. ILF-Nepal was successful in distinguishing between the two acts, and the witness information was recorded. The client was remanded, and an appeal will be filed once the autopsy is complete.

Government of Nepal v. Ram Kumar Dulal (ILF-Nepal 367), Government of Nepal v. Jeevan Lama (ILF-Nepal 373), Government of Nepal v. Ram Kuar Gharti (ILF-Nepal 376) (Adv. Rakesh Kumar Sharma); Government of Nepal v. Manoj Rai (ILF-Nepal 379) (Adv. Kalayan K.C); Government of Nepal v. Rabindra Thakur (ILF-Nepal 367(a)), Government of Nepal v. Nirmala Tamang (ILF-Nepal 377) (Adv. Bir Bahadur Khadka); Government of Nepal v. Suraj Khulal (ILF-Nepal 368), Government of Nepal v. Dk Lama (ILF-Nepal 374) (Adv. Sunil Kumar Karn); Government of Nepal v. Nirajan Aryal (ILF-Nepal 365), Government of Nepal v. Prakash Shahi (ILF-Nepal 349) (Adv. Kalayan K.C.); Government of Nepal v. Badri Thapa (ILF-Nepal 370); Government of Nepal v. Gelu Sherpa (ILF-Nepal 369), Government of Nepal v. Ajay Shrestha (ILF-Nepal 371) (Adv. Surya Pandey).

In all these cases before the CDO, the charge sheet was not filed in a timely manner despite a recent Supreme Court decision making the rule clear. See *Ajay Sharma v. CDO, Writ No. 0039, dated 2065/11/21(March 4, 2009)*. As a result, all these clients were illegally detained. Fortunately, the Appeals Court has proven both receptive to the habeas corpus petitions filed by ILF-Nepal and impatient with the CDO and government attorney excuses for their failures to adhere to the law.

ILF-Nepal would like to welcome four new lawyers to its staff: Bir Bahadur Khadka and Rakesh Kumar Sharma from Nepalgunj, and Kalayan K.C. and Sunil Kumar Karn from Biratnagar, where ILF-Nepal will be opening offices in 2010.

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