ILF-Nepal

The International Legal Foundation – Nepal

CASE NOTES – SUMMER 2010 (June, July, August)

During the editor's summer vacation, the Supreme Court of Nepal issued another landmark decision on the meaning of the right to a speedy trial in quasi-judicial proceedings. For the past two years, ILF-Nepal has argued that Chief District Officers and other quasi-judicial officers repeatedly violate the constitutional and statutory rights to a speedy trial of the accused. As described in this issue's first case note, the Supreme Court agreed.

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Government of Nepal v. Shanker Kumar Jha, (ILF-Nepal/Janakpur 66) (Adv. Achutam Acharyam and Ajay Shankar Jha, ILF-Nepal/Janakpur; Rakesh Sharma and Surya Pandey, ILFNepal/Kathmandu)

Mr. Shanker Shah was arrested on September 21, 2008, and charged by the Chief District Officer (CDO) in Janakpur with a violation of the Arms and Ammunition Act. He faced a possible sentence of three to five years and a fine. On September 11, 2010, ILF-Nepal/Janakpur advocates met Mr. Jha for the first time. He had been detained for almost two full years without a trial.

In Nepal, detainees are guaranteed a speedy trial under the State Cases Act, the International Covenant on Civil and Political Rights (ICCPR), and the Interim Constitution. The right to a speedy trial is an essential part of any fair trial guarantee because with time, evidence is lost and memories fade. Justice delayed is justice denied.

The statutory speedy trial scheme is set forth in Nepal's State Cases Act (SCA) and Court Management Act (CM). SCA Rule 14 guarantees a defendant the right to a speedy trial by requiring that courts reach a decision within 12 months of the filing of the charge sheet. SCA Rule 15 provides that the district court may seek permission for more time from the appellate court if needed. A statute permitting an extension of time, such as SCA Rule 15, is generally read to mandate that the request be made before the time limit has passed. Therefore, under Rules 14 and 15, if the district court needs more than 12 months to decide a case, it must ask the appellate court for more time before the 12 months have elapsed. In addition, ICCPR articles 9(3) and14(3) guarantee a fair and speedy trial, and the Interim Constitution of Nepal Article 24(2)(4)(10) guarantees a right to a fair trial.

In this case, ILF-Nepal argued that the prolonged detention of the defendant violated all these speedy trial guarantee provisions.

In a lengthy decision, the Supreme Court reasserted the constitutional and statutory right to a speedy trial. While it declined to exercise its extraordinary power to grant a habeas corpus petition because the original detention letter was legal, it expressly criticized District

Administration Officers, writing:

> Apparently quasi-judicial bodies, such as the CDO, have not paid attention to their legal obligation to the cases filed in their offices, creating a situation where the alleged defendants are detained for a prolonged time pending trial not abiding by the stipulated statutory time period following the stipulated procedure for a speedy and effective adjudication in accordance with law. Therefore a directive order has been issued to the Secretary of the Home Ministry of the Nepal Government to pass a circular and necessary directive along with an attached copy of this decision to all the District Administrative Office to pay appropriate attention to proceedings and resolving and getting resolved all cases with a similar nature promptly and to inform this court thereafter.

The court ordered that a trial be held within one month.

In its petition, ILF-Nepal had raised other issues including seeking release due to the right to counsel violation. The court rejected the argument on the grounds that the CDO had no notice that the accused had no counsel. This issue will be pursued further because in district courts, a defendant must be appointed counsel at the time of the charge sheet. This provision does not exist in quasi-judicial proceedings. It clearly should but it also means that in a speedy trial violation in a case pending in front of the district court, the Supreme Court supports granting a habeas corpus petition for violation of the right to counsel.

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While the case of Mr. Jha was pending before the Supreme Court, ILF-Nepal was trying to assert the speedy trial rights of 21 defendants held in Chitwan under a detention order of the warden of the Chitwan National Park.

<u>The Warden of Chitwan National Park v. Sukram Kumal</u>, (ILF-Nepal 122) (Adv. Rakesh Sharma, ILF-Nepal/Nepalgunj; Ajay Shankar, ILF-Nepal/Janakpur)

Mr. Sukram Kumal, one of the accused, had been arrested on June 10, 2006, and immediately detained. He was charged under the Wildlife and Conservancy Act on July 3, 2006, and had been detained for four years without a trial.

At the request of ILF-Nepal, in June 2010, its advocates were granted access to detainees held pursuant to a jail order signed by the warden of Chitwan National Park. ILF-Nepal advocates identified 21 detainees who had been held without trial for more than 12 months since their charge sheet had been filed. Some had been held for over four years. Though ILF-Nepal does not have an office in Chitwan or Hetauda, where the appellate court of the region is located, it decided to represent these men. It filed habeas corpus petitions on behalf of the 21 detainees, arguing, as it had in the case of *Shanker Jha*, that their lengthy detention violated their statutory and constitutional right to a speedy trial.

A different section, however, was at issue in this particular case. While SCA Rules 14 and 15 require the court to reach a decision within 12 months of the filing of the charge sheet (at the latest), SCA Rule 123 has ambiguous language arguably creating an exception to statutory speedy trial guarantees in cases where the defendant faces a sentence greater than five years. ILF-Nepal argued that Rule 123 should not be read as an exception for a number of reasons; but even if it were, the rule does not provide an exception to the speedy trial guarantees of the ICCPR and Interim Constitution and certainly should not provide an exception in quasi-judicial proceedings, where the same person — the Warden — is responsible for arresting, charging, and trying the defendant and, therefore, there is no judicial oversight.

The appellate court in Hetauda disagreed. Respectful of the heavy burden on the park wardens, who "are busy 24 hours a day caring for the wild animals," and recognizing the "global call to protect the wildlife," the court found that SCA Rule 123 provided an exception to the time limits set forth in SCA Rules 14 and 15. Those rules, according to the court, were merely "procedural." The court turned to CM 119. That section provides, in essence, that one cannot be held for a period longer than the maximum sentence the defendant would have faced had he/she been convicted. The appellate court used CM 119 to say that the legislature obviously anticipated delays in proceedings and ordered a speedy trial, implicitly finding a violation.

The court did not shy away from recognizing the delays in the justice system. It noted that the judiciary had prepared a five-year strategy with the target of deciding every case pending for more than one year in two years. The court then ordered the warden to conduct trials and decide these cases within three months.

Having ordered trials within 90 days, the warden held a so-called trial for Mr. Kumal on August 23. The warden refused ILF-Nepal's request for time to call witnesses, to cross-examine the government's witnesses, and to present evidence. In the absence of Mr. Kumal, the warden convicted him based on inadmissible and hearsay evidence and sentenced him to the maximum term of 15 years.

With the written decision in Shanker Jha's case now available, ILF-Nepal will try to convince the warden to conduct trials in accordance with due process as ordered by the Supreme Court. ILF-Nepal hopes that the so-called trial of Mr. Kumal will convince the appellate court to order the warden to conduct not only a "speedy trial" but a trial in accordance with the constitutional guarantees of the Interim Constitution.

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Quasi-judicial proceedings remain challenging.

<u>Government of Nepal v. Bishnu Giri</u> (ILF-Nepal/Janakpur 68) (Advs. Achutam Acharya and Ajay Shankar Jha)

Our client, a 51-year-old furniture maker with no criminal record, was charged with selling a gun to a co-defendant under the Arms and Ammunition Act Sections 3.2 and 5.1 (prohibiting the

possession of a firearm, and prohibiting such possession without a firearm license, respectively) on September 16, 2007. Our client, however, was never arrested because the summons issued by the CDO was not properly posted at the client's home (as required by CM Section 110). Instead, the summons was posted in our client's village (he client 60 kilometers outside Janakpur). At the trial, no witness testified on behalf of the government or the co-defendant (the co-defendant was incarcerated for the duration of the case). In the absence of our client and his co-defendant, and without lawyers in the courtroom, both were convicted on June 1, 2010. Our client was sentenced to a term of two years. On June 10, 2010, the police easily found our client at home and took him to the CDO, who sent him to prison.

ILF-Nepal was contacted about the case on June 14, 2010, and it sought to appeal the conviction. In Nepal, however, a defendant who has not appeared at his/her trial may not appeal. CM 208, however, creates an exception where the summons demanding the client's appearance in court was defective.

ILF-Nepal filed a CM 208 petition, arguing that the summons procedure had been defective since it had not been posted at the defendant's home as required by CM 110, and therefore the client should be allowed to appeal his conviction. The appellate court agreed. It found that the summons procedure had not been properly followed, dismissed the summons, reversed the conviction, ordered a new trial, and set bail pending the new trial. Our client has been released.

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Happily, courts are making progress in protecting the safety of juveniles in adult custody where juvenile detention centers are full.

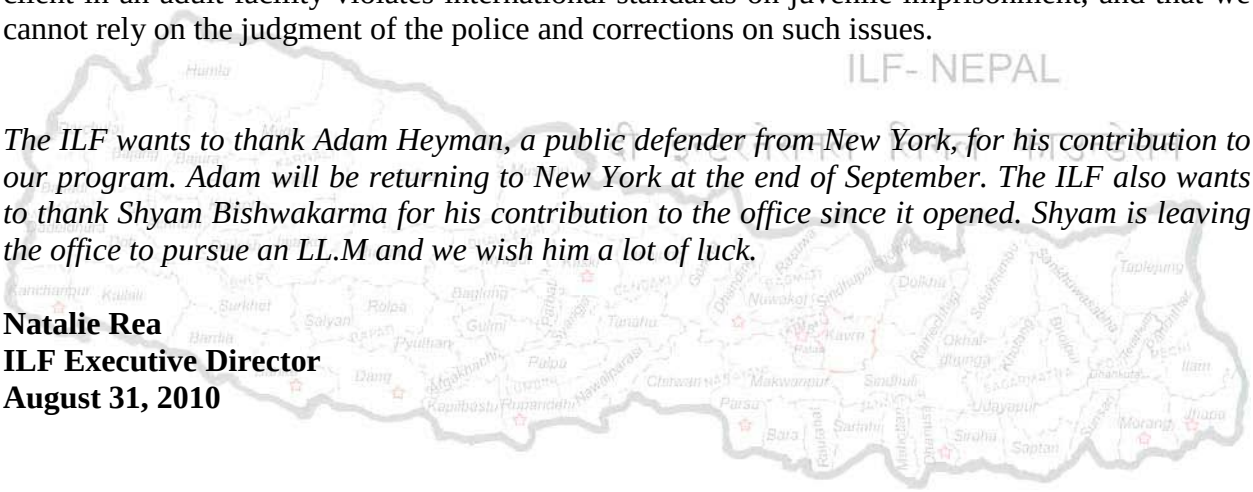
Government of Nepal v. Surendra Shrestha (ILF-Nepal 531) (Adv. Shyam Kumar Bishwakarma)

Our client, an unemployed 15-year-old male with no criminal record, was charged with selling buprenorphine and diazepam on May 16, 2010. ILF-Nepal first met our client on May 24, 2010. The client's first remand date was on May 18, 2010, where he was held in custody in Hanumandhoka, the adult facility. Despite visiting with the client's parents and school, ILFNepal could not secure documents to prove the client's age at the second remand hearing on June 6, 2010. At the hearing, ILF-Nepal argued that the client should be released to his parents as he is a juvenile, and that the burden of proof is on the prosecution to prove that he is not a juvenile.
In the alternative, if the court was unwilling to release the client, ILF-Nepal argued that he should be transferred from Hanumandhoka to a juvenile facility. The court ordered an age assessment (an examination by doctors to determine the age of the client) and granted the application to have the client moved to a juvenile facility. The client was immediately taken to Bhaktapur Child Correction Home, a juvenile facility, but was denied access as the facility was full. The client was then taken back to Hanumandhoka.

On June 17, 2010, ILF-Nepal filed a writ of habeas corpus with the appellate court in Patan, arguing that the client was a juvenile and that he should be released to his parents. In addition,

ILF-Nepal argued that holding the client in Hanumandhoka was against children's rights, adding that Section 15 of the Child Rights Act of 1991, relating to juvenile justice, and Rule 29 of the Appellate Court Rule (1991) required that a juvenile be kept in a reform home. On June 21, 2010, the appellate court directed the police to let ILF-Nepal monitor the client's condition. The court ordered the police and the Kathmandu Department of Corrections to clarify within three days whether the client was being kept alone or with minors and whether facilities in the detention center were satisfactory.

On June 25, 2010, the police reported to the court that the client was being held in a separate cell in Hanumandhoka and was being provided basic needs such as water and food, and that the client was safe. The age assessment was also provided to the court and confirmed that the client was 15-16 years old. The appellate court denied the writ holding that while juveniles should be kept in reform homes and not in police custody, where the juvenile detention centers are full, keeping the juvenile in an adult facility in a separate cell with additional protections is legal. ILF-Nepal is currently drafting an appeal of the decision to the Supreme Court in Kathmandu, arguing that the appellate court was too vague in saying that the client was safe, that holding the client in an adult facility violates international standards on juvenile imprisonment, and that we cannot rely on the judgment of the police and corrections on such issues.



The ILF wants to thank Adam Heyman, a public defender from New York, for his contribution to our program. Adam will be returning to New York at the end of September. The ILF also wants to thank Shyam Bishwakarma for his contribution to the office since it opened. Shyam is leaving the office to pursue an LL.M and we wish him a lot of luck.

Natalie Rea
ILF Executive Director
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