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ILF – West Bank

CASE NOTES – Fall and Winter 2014

This edition of the ILF-West Bank Case Notes highlights the impact that ILF-West Bank lawyers are having on their clients' cases and the larger justice system, as a result of their proactive pretrial motions practice and thorough investigation into the facts of each case.

The first two cases highlight common gaps in enforcement of procedural protections in the courts, which ILF-West Bank lawyers steadily combat by bringing pretrial motions and making procedural arguments at trial, even if judges deny those arguments. The ultimate goal is to educate judges and prosecutors on laws that they should be enforcing, and over time establish a pretrial motions practice that enables courts to resolve important issues before trial; thereby increasing efficiency of the court, and reducing unnecessary harm to the accused.

The second two cases in this edition highlight a key defense skill that is unfortunately not widespread amongst private attorneys in the West Bank: defense investigation. Many private lawyers providing criminal defense services accept wholesale the investigation file that is put together by police and prosecutors, and focus more on reducing the likely sentence for their client than on challenging the State's version of the facts. ILF-West Bank attorneys receive extensive training on defense investigation, including the importance of visiting the scene of the alleged crime, interviewing witnesses themselves, and searching for inconsistencies or procedural violations in the State's evidence. Conducting thorough defense investigation is not only an obligation to an individual client, but also an obligation to the criminal justice system as a whole as it holds police, prosecutors, and courts to rigorous standards of proof.

In the matter of A.A. (ILF Jenin 220, Attorney Sawsan Baniodih)

A.A. was accused of assault under Penal Code Article 334/1, section 16. The indictment stated that on October 30, 2014, when the complainant returned home from school around 11am, the accused attacked him by beating, scratching and choking him. The same day, the accused was brought before the court, and ILF-West Bank was assigned to represent him.

When the ILF-West Bank defense lawyer reviewed the court file, he found that A.A. was 10 years old at the time of the alleged incident. The defense lawyer immediately petitioned the court for dismissal of the case on the grounds that the accused was below the legal “age of responsibility”, i.e. the age at which an individual can be considered legally responsible for their actions. Attorney Baniodih petitioned the court for dismissal before the prosecutor laid the indictment, noting that in 2012 the legal age of reason was raised from nine years¹ to twelve years of age by Article 24 of the Palestinian Child Code. On the basis of this clear legal standard, the judge should have dismissed the case immediately. Instead, the judge waited until November 2, when the prosecutor officially laid the indictment, and at that point acquitted the young boy of all charges.

In this case, where the accused was clearly below the age of responsibility, it was a waste of judicial resources for the court to wait until the day of trial to acquit the accused, instead of dismissing the case pretrial. Further, prolonging the case also prolonged the associated fear and anxiety of a 10 year old boy and his family. In the years since the age of responsibility was raised, the ILF-West Bank has defended multiple cases in which an accused under 12 was indicted and prosecuted, and ILF-West Bank lawyers continue to encounter hesitation by the courts to enforce this and other straightforward procedural requirements (e.g. statutes of limitation). While the ILF’s primary goal is always ensuring a just end result for its clients—as was eventually reached here—the hope is that continued pretrial motions and arguments to dismiss cases in which the accused does not meet the “age of responsibility” will result in courts agreeing to resolve clear issues of law pretrial.

In the matter of H.M. (ILF Hebron 27; Attorney Yasser Qasrawi)

In September 2014, the Palestinian Criminal Procedure Code was revised to reflect an important change that ILF-West Bank attorneys had been working toward. Article 3 of the 2001 Criminal Procedure Code was amended to include a new provision that grants courts the discretion to dismiss a penal action in which the victim, after being properly notified, fails to attend court on two consecutive sessions. This is a vitally important step towards justice for Palestinian defendants, who often have cases stretch for months or even years due to the failure of prosecution witnesses to appear. Such continuances are a clear violation of the internationally recognized right to a speedy trial, and the consequences are particularly egregious when the accused held in detention. Arguing against these practices has been a priority for ILF-West Bank attorneys.

Using this revised law as a launching pad, just days after it was issued, ILF-West Bank attorney Yasser Qasrawi successfully argued for dismissal of the charges against his client in the Hebron Conciliation Court. His client, charged with assault, appeared in court repeatedly, ready to face the charges against him. The prosecution was notified twice to appear: first in May 2014 and again for the September 2014 court date. Both times, the prosecutor and witnesses failed to appear with no explanation or excuse. Prior to the enactment of this law, the Court would likely have adjourned the

¹ Outlined in Article 69 of the Palestinian Child Code (2004)

proceedings as many times as necessary to await the presence of the alleged victim and other witnesses, despite the lack of any explanation for their absence, despite the fact that the defendant dutifully appeared every time, taking days away from his own life, family and employment, and in violation of the right of the defendant to a speedy trial. Attorney Qasrawi was armed with the new law, and persuasively argued that the Court should dismiss the case. On September 9, 2014, the Judge agreed and dismissed all charges against the defendant. This is a significant victory for Mr. Qasrawi and his client, for the ILF-West Bank as a whole and – most importantly – for the universally recognized principles of the right to a speedy trial and of enforcement of the government’s obligation to meet its burden of proof when prosecuting a citizen.

In the matter of M.M. (ILF Jenin 47, Attorney Ghadanfar Kamanji)

The juvenile client, M.M., and his brother were accused of arson. The alleged victim claimed that on August 23, 2011, the two brothers had thrown a Molotov cocktail through the window of his children’s bedroom, and then set the front door on fire; this was allegedly the culmination of a history of fighting between the complainant and the co-accused.

Through close analysis of the investigation file, Attorney Kamanji found troubling contradictions between the complainant’s statement to police, and his later statement to prosecutors. In his statement to police, the complainant reported that he was in his children’s bedroom when the Molotov cocktail was thrown in, and he jumped from the window into the street in hopes of seeing the perpetrator, and at that point saw the co-accused. In his later statement to the prosecutor, he did not mention having jumped from the window, but rather said he had seen the co-accused from inside his children’s room after the Molotov cocktail had been thrown. This difference was significant. Upon conducting field investigation, Attorney Kamanji discovered that the window the Molotov cocktail was allegedly thrown through was on the third floor of the house, but the claimant did not report suffering any injuries when jumping from the window. Attorney Kamanji believed that the claimant left the “jumped from the window” portion out of his later statement to the prosecutors because he realized that part of his story was unbelievable, given his lack of injuries. Field investigation also indicated that the claimant’s wife and a third witness could not have seen the co-accused from where they were allegedly standing during the fire, indicating that their statements to the police were more likely based on what the complainant told them. These inconsistencies between statements, as well as discrepancies between the statements and the physical evidence, undermined the credibility of all three witnesses to the alleged crime.

At the trial, Attorney Kamanji began by arguing that the witness statements to the police and the prosecutor should be ruled inadmissible because of their contradictory and inconsistent nature. The court excluded the testimony of the complainant’s wife and the third witness, but accepted into evidence the complainant’s statements because, under Article 224 of the Criminal Procedure Code, “When the informant is the injured party, his testimony is admissible if it is related to the act.” However, during cross examination at trial, Attorney Kamanji elicited testimony from the complainant that both of his statements were true, at which point Attorney Kamanji highlighted the inconsistencies in the statements and successfully undermined the complainant’s credibility with the court. Further, Attorney Kamanji’s cross examination of the complainant called into question how the complainant would have seen anything once the fire began because any reasonable person would, at that point, be focused on saving his children from the burning room rather than looking out (or jumping out) the window to chase the perpetrators. Finally, Attorney Kamanji presented the testimony of the parents of M.M., who reported that they were certain their sons were home at the

time of the crime because they lock the house from the inside at night, after confirming that their sons are asleep, and keep the key in their bedroom.

On October 15, 2014, the First Instance Court of Jenin found M.M. not guilty of the alleged arson. This case affirmed the importance of defense investigation, which is a significant point of focus in the training of ILF-West Bank lawyers by the ILF's International Fellows. Without thorough defense investigation, M.M. might have been wrongfully convicted based on inconsistent and incredible evidence; instead, Attorney Kamanji won the acquittal of his client.

In the matter of S.R.Y.A. (ILF Hebron 32; Attorney Emad Salaymih)

S.R.Y.A. was accused by her father-in-law of theft of 20,000 New Israeli Shekels, meat and other food items. She was indicted for theft under Article 407 of the Penal Code, which carries a sentence of three months to one year imprisonment. The accused told police that she did not steal the money, meat or other items, but rather took them with her mother-in-law's permission. She also admitted to the police that sometimes she did take food without the permission of her father-in-law, but only to feed her children. The prosecution submitted as evidence the complainant's statement to the police, an investigation file, and a taped recording of the accused's confession where she admitted to stealing the money. The ILF-West Bank's lawyer presented a multi-layered defense, undercutting the prosecutor's claims on both factual and procedural grounds:

Attorney Salaymih first presented evidence that neither the father-in-law nor the police had found any of the allegedly stolen goods in the possession of the accused or in her living space. Second, Attorney Salaymih sought to affirmatively undermine the claims of the accused's father-in-law by allowing her client to testify that that her father-in-law had an ulterior motive for accusing her of theft: he wanted her to lose custody of her four children, ages 8, 6, 3, and 1. At the time the theft accusation was made, the accused had a custody case against her father-in-law pending in the local Family Court, attempting to secure custody of her children against her husband's parents. Her husband suffers from debilitating mental illness, and is additionally deaf and blind, and so official custody of their children was in dispute. The accused asserted that her father-in-law simply brought the theft case against her in an attempt to make her appear unfit before the Family Court. In support of her client's testimony, Attorney Salaymih also presented a written document from the official records of the Family Court showing that the father-in-law lied to that court by testifying that his daughter-in-law had been detained by the police for a week for the alleged theft, although no such detention had occurred; this perjury presented as part of an overall plan to discredit the accused before the Family Court so that the father-in-law could gain custody of the children.

Addressing the case on a procedural level, Attorney Salaymih submitted records showing that the father-in-law received insurance money for the care of his ill son (the husband of the accused); on that basis, Attorney Salaymih argued that the allegedly stolen money and food were in fact the property of the accused's husband, and thus, even if she had taken them, her actions could not have constituted theft. Finally, Attorney Salaymih argued that the accused's recorded confession was inadmissible because it had been recorded without the authorization of a conciliation court judge, in violation of Criminal Procedure Code Article 51(2) and Article 52.

On the basis of these arguments, the court acquitted the accused of all charges.

ILF-West Bank would like to thank all of the ILF's past International Fellows who have so generously lent the ILF their time and expertise. We would particularly like to thank Kiyomi Bolick, a public defender with the Colorado Office of the State Public Defender, Premal Dharia, a public defender with the Office of the Federal Public Defender in Baltimore, Maryland, Patricia Lavelle, a public defender with the Legal Aid Society of New York City, and Bahar Mirhosseini, an attorney with the Legal Aid Society of New York, who served as International Fellows during this period.

Nicole D. Taylor, ILF West Bank Director New York September 17, 2015