

ILF – West Bank

The International Legal Foundation – West Bank

CASE NOTES – Spring/Fall 2013

Editor’s Note: This edition of the case notes focuses on the burden of proof, the practical results of the ILF’s unique and effective approach to training criminal defense lawyers and defense lawyers’ important role in protecting the accused against procedural violations.

The following cases showcase the pivotal role defense lawyers can play in upholding even the most basic tenet of criminal justice- that the prosecutor has the burden of proving the defendant’s guilt. The important role of counsel in providing sound legal advice to the accused, safeguarding defendants’ rights, and fearlessly promoting their clients’ best interests are the fundamental principles underlying ILF-West Bank lawyers’ representation of their clients.

In the matter of S.M (ILF Jenin 16, Attorney Ghadanfar Kamanji)

The ILF-West Bank represented a client, S.M., in Jenin who was charged with assault under Article 334 of the Penal Code. The judge offered the client a plea agreement where he would plead guilty to the assault and receive a fine. On its face this appeared to be favorable resolution for the client; however, ILF-West Bank lawyer Ghadanfar Kamanji understood his ethical responsibility, and asked the court for the opportunity to consult with the client and provide legal advice based on his study of the client’s file. After speaking to Mr. Kamanji, the client chose to turn down the agreement and proceed to trial in hopes of avoiding a criminal record.

At trial, the prosecution requested to submit the contents of the investigation file in its entirety, without calling witnesses to testify to the creation and reliability of the documents. This violates Article 207 of the Criminal Procedure Code. Mr. Kamanji objected on that basis, and the judge agreed that the prosecution must properly present their evidence, starting with live testimony from the complainant whom the client was accused of assaulting. The complainant was subpoenaed and during cross-examination, Mr. Kamanji was able to highlight the inconsistencies in the complainant’s version of events: first, that the complainant was absent from work for only one day, rather than the 14 days as recorded in the medical report; and second, that the complainant did not see who assaulted him and therefore could not be sure that it was the client who actually struck him, contradicting what he said in his initial statement to police. After testifying, the complainant was detained by the court for giving false testimony.

In addition to the lack of credible evidence against the client, Mr. Kamanji argued that the case was required to be dropped under Article 334(2) of the Penal Code, which states that a criminal case for misdemeanor assault can proceed based solely on the written or oral complaint of the alleged victim when the alleged assault caused 10 or fewer days of illness or loss of work. Given

that the complainant's testimony had been disproved during cross-examination, the case against the client could not proceed.

During the final pleading Mr. Kamanji argued that the prosecution clearly had not met its procedural or evidentiary burdens in this case. The court agreed, and the case was dismissed.

In the matter of M.M (ILF Jenin 32, Attorney Ghadanfar Kamanji)

The client, a juvenile, was charged with theft under Article 406 of the Penal Code. Prior to the appointment of the ILF-West Bank lawyer, Ghadanfar Kamanji, M.M.'s mother had made numerous unsuccessful bail applications. Once appointed to the case, Mr. Kamanji set about preparing a bail application that identified the statutory considerations that applied in the case. In particular, Mr. Kamanji emphasized the test set out in Article 119 of the Criminal Procedure Code, namely that the prosecution needed to present reasons why the investigation *required* the client's continued detention. All too often, West Bank prosecutors simply state that the investigation is ongoing, without explaining how this actually requires the client's detention.

In an effort to have his client released on bail, Mr. Kamanji highlighted several factors: (1) the fact that the police interrogation of the client was complete; (2) the fact that the complainant had withdrawn his complaint; and (3) the fact that Articles 68 and 69 of the Child Code offered further protections to M.M. as a juvenile. Article 68 provides that juveniles must not be subject to any treatment "that is derogatory to human dignity," and Article 69 provides that "Priority shall be given to preventive and educational means" and that deprivation of freedom "shall be avoided to the extent possible." Further, Mr. Kamanji highlighted that none of the circumstances set out by Article 3 of the Juvenile Reform- where factors in the denial of bail are listed- applied in this case. After just one request, because Mr. Kamanji held the prosecution to its burden, and as a result of his strong procedural arguments, the client was released on bail.

In the Matter of F.A. (ILF Ramallah 73, Attorney Suad Jawan)

On March 9, 2011, the client was arrested, detained and charged with drug possession and drug use; he pleaded not guilty. The prosecutor submitted the evidence that had been seized from the client at the time of arrest, but requested additional time from the court to notify witnesses who would testify on behalf of the prosecution and to gather other evidence. The ILF-West Bank lawyer, Saud Jawan, motioned for the client to be released on bail pending trial, but the court refused to set bail and adjourned the case until May 5, 2011.

At the May 5th hearing, the prosecution did not present witnesses because the prosecutor had failed to notify them; the prosecutor requested more time to notify potential witnesses, and Ms. Jawan motioned again for bail. The court granted both requests, and adjourned the case again until June 6, 2011. Between June 6, 2011 and October 9, 2013- more than two years- the prosecutor failed again and again to notify and produce witnesses against the client. Ms. Jawan repeatedly argued that the court should not grant the prosecutor's request, especially in light of

the client's constitutional right to a speedy trial under Palestinian Basic Law Article 30. Finally, after 13 adjournments, on October 9, 2013, the court accepted the Ms. Jawan's request to deny the prosecutor any more chances, and ordered the prosecution to end its evidence. On November 25, 2013, the court found the client not guilty of all charges based on the prosecutor's insufficient evidence and failure to prove the elements of the alleged crime.

If the client had to face this case without access to effective counsel, there would have been no one to pressure the court to hold the prosecution to its burden to produce evidence. There is no way to know how long the client would have remained in detention or in legal limbo, unable to move on with his life.

ILF-West Bank maintains an intensive mentoring program that trains Palestinian lawyers on the importance of proactive defense investigation. Without training, many lawyers build defense arguments that are only responsive to the prosecution's evidence; however, thorough and proactive defense investigation allows lawyers to not only respond to the prosecution's evidence, but to also develop affirmative defense strategies.

In the matter of R.S.S.A.I (ILF Jenin 5, Attorney Ghadanfar Kamanji)

The client, who was 15 at the time of his arrest, was accused of breaking the window of a truck belonging to Kufurrayi Municipality, and was charged with damaging property under Article 445 of the Penal Code. On its face, the evidence against the client appeared strong: the client confessed to the police and prosecution, and the crime was allegedly witnessed by the truck's driver and the head of the municipality. However, by engaging in proactive defense investigation, the ILF-West Bank lawyer, Ghadanfar Kamanji, discovered that the truck driver could not have seen what he claimed to have seen. He did not have a clear view of the location of the damage, it was raining, and people were gathered around his vehicle. Even more damaging to the prosecution's case was the fact that the head of the municipality was not actually in the town when the crime occurred. Mr. Kamanji developed a defense strategy that highlighted all of these inconsistencies. Furthermore, Mr. Kamanji and the client made the tactical decision that the client should testify about the pressure he was under when he gave statements to the police and prosecution, even if it meant exposing the client to cross-examination.

Ultimately, through a combination of Mr. Kamanji's dogged investigation efforts and clever strategizing, the client was acquitted by the court. The court based its decision on the testimony of the client and the evidence that Mr. Kamanji presented, and most notably, did not take into account the client's statements to police or prosecutors.

Cases in the West Bank are often fraught with procedural issues. The Code of Penal Procedure establishes extensive rules about logging formal charges, presenting witnesses and other evidence, and other aspects of proper procedure; however, without advocates to provide them

with quality representation, many defendants are convicted and imprisoned despite clear violations of the procedural laws designed to protect the accused and the integrity of the justice system overall. The following case shows how ILF-West Bank lawyers hold courts and prosecutors to their procedural obligations.

In the Matter of M.R.A. (ILF Jenin 52, Attorney Maryam Jaradat)

The ILF-West Bank represented a client who was accused of making threats, assault, and throwing rocks at a home. The claimant was the father of the alleged victim. The claimant did not witness the alleged assault; his wife told him what had allegedly occurred. When the client was arrested and indicted on January 27, 2013, he was not asked whether he would like to hire a lawyer, and the prosecutor did not read the indictment aloud to him. The indictment listed the offenses as making threats, illegal under Penal Code Article 351, and assault, illegal under Penal Code Article 334; it did not list throwing rocks, which is illegal under Penal Code Article 467(2). The client pleaded not guilty.

On March 11, 2013, the prosecutor submitted its evidence, including the testimony of the claimant. Through cross-examination, the ILF-West Bank lawyer, Maryam Jaradat, established for the court that the claimant had not himself been present at the scene of the alleged crimes, and that he heard the story second-hand from his wife. On October 10, 2013, the prosecutor concluded his case and asked the court to convict the client. Ms. Jaradat decided not to submit any evidence to the court; instead, the lawyer argued that the client should be acquitted based on multiple procedural errors. First, Criminal Procedure Code Article 239 requires the prosecutor to read out the charges in the indictment to the accused person, and provides that the prosecutor cannot allege acts that are not cited in the charging instrument. The prosecutor in this case failed to read the charges to the client, and failed to list “throwing rocks” as a charge on the indictment. Second, Criminal Procedure Code Article 244 requires the court to ask an accused person whether he or she would like to hire a lawyer, and to appoint one if the accused is incapable of hiring a lawyer. The court failed to do so in this case. Third, pursuant to Criminal Procedure Code Article 223, the claimant’s testimony was inadmissible because he was not at the scene at the time of the alleged incident. Based on these persuasive and well analyzed procedural arguments, on October 20, 2013, the court acquitted the client of all charges.

The ILF would like to thank International Fellows Shama Farooq, Daniel Breger and Theresa Ristenpart for providing expert mentoring and training to the ILF-West Bank lawyers during the reporting period. Their contributions are truly invaluable. We would also like to welcome Dominique Day as our new International Fellow in the ILF-West Bank Office.