

# ILF-Nepal

The International Legal Foundation

## CASE NOTES – SUMMER 2011 (JULY AND AUGUST)

*Editor's Notes: This edition focuses again on the endless trial delays resulting in violations of the right to a speedy trial. Courts delayed proceedings for a number of reasons, including: the failure of witnesses to appear; the failure of courts to ensure that local authorities produce special evidence as ordered; and other non-specific, unjustifiable court postponements. One defendant has even been detained for more than a year as the court waits for an absconding co-defendant to appear. The cases described here have been delayed at least one year, and some as long as three years.*

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As discussed in a number of previous editions, Nepal guarantees the right of its detainees to a speedy trial. The Supreme Court of Nepal has declared that the right to a speedy trial is an essential component of a fair trial guaranteed by Nepal's Interim Constitution of 2063 Article 24(9).<sup>1</sup> In addition, Articles 14(3)(c) and 9(3) of the International Covenant on Civil and Political Rights (ICCPR), which Nepal has ratified, mandate that persons detained on criminal charges be tried within a "reasonable time" or be released in the event of undue delay.<sup>2</sup> Court Management No. 14 sets one year as the maximum period for courts to reach a decision in criminal cases.<sup>3</sup> Judicial Administration Act § 8(3)(b) grants appellate courts jurisdiction to resolve a case in which a party has suffered prejudice as a result of an extraordinary delay in the proceedings.<sup>4</sup> The remedy for undue delay in trial proceedings, set forth in Court Management No. 123, is release of the detainee either on personal recognizance or on bail.<sup>5</sup> Nepal provides sanctions for speedy trial violations in a number of other sections including Court Management No. 13, 15, 122, and 127. The right to speedy trial as embodied by these statutory limits has been recognized time and again by the Supreme Court of Nepal. Nevertheless, unjustifiable trial delays are endemic to the criminal justice system in Nepal. Unfortunately, many of ILF-Nepal's clients continue to languish in detention centers for several years awaiting trial and the resolution of their cases.

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<sup>1</sup> Shankar Kumar Shah v. District Office Dhanusha, 2066, Writ No. WH-0070. "[T]he IC's art 24(2) and 24(9) (10) has as a whole assimilated the aforementioned provision regarding right to speedy trial documented in the international documents.... There seems no need to argue to the fact that as per the principle of Right to a Speedy Trial, any person in custody on a case, loses his/her liberty and therefore in the case on the petitioner the issue of a speedy and fair trial and deciding his case, is incorporated in the principle of Fair Trial. It is the legal duty and obligation of the judicial body or quasi judicial body to render a speedy trial following due process of law to every person or a criminally accused in accordance with law...." This case was ILF-Nepal/Janakpur 66 and is featured in ILF-Nepal Case Notes for Summer 2010.

<sup>2</sup> ICCPR Art. 9(3): "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment." ICCPR Art. 14(3): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:... To be tried without undue delay."

<sup>3</sup> Court Management No. 14: "The cases must be settled within the time period mentioned below: (1) First decision [decision of court of first instance] must be made within one year from the time respondent submits the answer or from the time the complaint must be answered. ..."

<sup>4</sup> Judicial Administration Act § 8(3)(b): "The appellate court shall have the power to do initial proceeding and decision in the following cases: ... The case in which the proceeding has extraordinarily been prolonged and consequently a party has suffered prejudice ..."

<sup>5</sup> Court Management No. 123: "If the case is not settled within one year from the first court date designated for examination of evidence in relation to the person detained under this Chapter, the further case proceedings must be done by releasing the person on bail or personal guarantee if the defendant is detained [without bail] and he must be released without bail or personal guarantee if he is detained under [because bail was set but not paid]. Provided that this provision shall not apply to the person accused of any offense which carries five years imprisonment or more or life imprisonment, and in the case of a defendant with prior convictions, the court can continue the proceedings by keeping the defendant in detention if the court deems it reasonable."

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*One blatantly unjustifiable reason for delay is the absence of a co-defendant.*

Government of Nepal v. Rosan Gurung (ILF-Nepal 519) (Adv. Neelam Poudel)

Rosan Gurung, a 17-year-old porter, was arrested on April 20, 2010, and charged with human trafficking along with a co-defendant who was never arrested. While it appears that our client may have had a prior romantic relationship with the alleged victim, there was no evidence that he was involved in trafficking or exploitation of any kind. Nevertheless, he was detained pending trial. After the charges were filed, the district court summoned the alleged victim multiple times to testify, but the witness never appeared. The court also repeatedly issued summonses for the co-defendant without success. The court repeatedly adjourned the case.

The failure of a co-defendant to appear in court, however, is not a legitimate basis for staying the proceedings against a defendant held in custody. Indeed, Court Management No. 122 explicitly grants trial courts the authority to “settle the case by examining whatever is to be examined only for the one detained” and prohibits the prolonged detention of the accused who is before the court without “reason.” Even if the trial court finds a reason to stay the proceedings, Court Management No. 191 mandates that defendants who are present before the court “shall not be so continued to be in detention” until the fugitives are brought to court, “irrespective of whether the arrested defendant confesses or denies the allegation.” In other words, a detained defendant maintains his or her right to a speedy trial even when their case is joined with that of a fugitive co-defendant. If the court wishes to delay the trial until the absent co-defendant appears, the detained defendant must be released from custody.

In this case, as the proceedings dragged on, ILF-Nepal filed a petition pursuant to Court Management No. 122, demanding that the court resolve the case against Mr. Gurung, as the one-year statutory limit prescribed by Court Management 14 was rapidly approaching. Rather than release Mr. Gurung from detention or decide the case against him, the court ordered yet another general hearing date and issued another summons for the co-defendant. The previous summons was sent over five months ago, to no avail. Now, more than a year has passed since the client was formally charged, and ILF-Nepal’s lawyer has filed another petition demanding release pending further proceedings in the case asserting that Court Management 122 and the client’s right to a speedy trial have been violated. Although the court is refusing to formally issue a decision on this petition, for the first time in this case the court has fixed a date for witness examination on September 19, 2011.

Government of Nepal v. Bimala Tamang (ILF-Nepal 668)(Adv. Neelam Poudel)

Bimala Tamang was arrested on September 27, 2010, and charged with forging her citizenship card. Bail was set at 60,000 NR, which Tamang could not post. ILF-Nepal appealed the bail order, but the appeal was denied, leaving Tamang and two co-defendants in custody pending trial while a fourth co-defendant absconded. Since the charge sheet was filed on October 24, 2010, no witness examination date has ever been set. The court keeps adjourning the case, refusing to set witness examination dates and instead issuing summonses for the fugitive co-defendant to appear. The other three co-defendants remain in custody.

With the one-year statutory time limit approaching, ILF-Nepal filed a petition with the district court requesting that Tamang be released and further proceedings be held as mandated by Court Management 122. As in the case of Rosan Gurung, described above, the court refused to formally issue a decision on

ILF-Nepal's speedy trial petition. However, the court has agreed to set a witness examination date in September 2011.

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*Courts have also delayed proceedings for the failure of a witness to appear.*

Government of Nepal v. Kumar Gurung (ILF-Nepal 316) (Adv. Mohan Sashankar)

Kumar Gurung was charged, along with seven others, with kidnapping his employer, for whom he had worked as a driver for many months. Gurung was arrested on June 16, 2009. On July 19, 2009, the court issued a detention order pending trial. ILF-Nepal's advocate promptly appealed the order requesting our client's release, but the request was denied. Between December 28, 2009, and January 4, 2010, witness examinations were held, but the complainant, the government's essential witnesses, failed to appear in court. The court adjourned the case for several months until the complainant finally testified in court on September 27, 2010 — more than one year after defendant's arrest.

Even after taking this testimony, the court declined to schedule a final hearing and ILF-Nepal immediately filed a habeas corpus petition for the client's release due to the trial delays. The Supreme Court dismissed the habeas petition, declaring that where a district court is continuing a case for the purpose of obtaining information (in this case, essential witness testimony), the detention cannot be said to be illegal. At the time of this writing, the district court has not yet scheduled a final hearing date. The previous judge delayed the hearing several times *sua sponte*, and also granted continuances requested by the numerous codefendants' lawyers. The case is now awaiting the assignment of a new judge.

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*Proceedings were also delayed when courts ordered special evidence produced but then took no measures to ensure that the authorities produced that evidence as requested.*

Government of Nepal v. Bhim Adhikari a.k.a. Bhim Nepali (ILF-Nepal 865) (Advs. Kamal Ghising and Kopila Shrestha)

Bhim Adhikari, a 30-year-old day laborer, was arrested along with two co-defendants on October 19, 2008, and charged with rape and theft. The court issued an order to freeze the defendants' assets on November 13, 2008, and a witness examination was conducted four months later on March 5, 2009. No defense lawyer was present at any of these hearings and none of the alleged victims appeared to testify.

ILF-Nepal stepped into the case in March 2011. By that time, two years had passed with no progress in the case, and all three co-defendants had been held in custody for almost three years. ILF-Nepal immediately filed a habeas corpus petition requesting the client's release on the grounds that he had been detained beyond the one-year statutory limit. The registrar at the Supreme Court refused to accept the petition, and ILF-Nepal appealed. The Supreme Court dismissed the appeal, citing a precedent that declared that when the district court continues a case for the purpose of obtaining information, it is not illegal to keep the defendant(s) in custody (*Government of Nepal v. Kumar Gurung* [ILF-Nepal 316] [Adv. Mohan Sashankar] [see above]).

However, the delay in this case was caused by the district court rather than the failure of the complainant to appear. Here, because the client and the co-accused were charged with rape, they face a possible sentence that includes forfeiture of their assets to finance compensation for the alleged victims. The district court sent letters to the home districts of each of the three co-defendants requesting that the local

Village Development Committees (VDC) provide an accounting of each defendant's assets. Though the district court sent several such letters, the VDCs never sent anything back to the courts. If a court orders special evidence to be produced, it should be obligated to ensure that the evidence is produced and not allow delays to extend the custody of defendants pending trial. In this case, the court did nothing to ensure that the information was produced and simply continued to delay the proceedings. Ultimately, ILF-Nepal took matters into its own hands and sent two paralegals to personally obtain the information. The first spent several days traversing Nepal to hand-deliver letters from the Kathmandu District Court to the VDCs in Dolkha and Sindhupalchowk Districts. He obtained letters from both stating that the two co-defendants had no assets. A second paralegal in Janakpur traveled to Udayapur District and obtained a letter confirming that ILF-Nepal's client also had no assets. These property assessments were submitted to Kathmandu District Court, and finally the court moved to schedule a date for a final hearing on September 12, 2011.

Government of Nepal v. Kul Bahadur Bhujel (ILF-Nepal 207)(Adv. Neelam Poudel)

Kul Bahadur Bhujel was arrested on March 19, 2009, and charged with rape. At the jail/bail hearing, the alleged victim appeared in court and recanted. However, the district court refused to dismiss the case or even set bail and release the client from custody. ILF-Nepal appealed, but the appellate court affirmed the district court's detention order. Thereafter, no essential government witnesses ever appeared to testify before the court. The district court refused to schedule a date for final hearing arguments because a letter from the client's home district detailing the assets to be frozen for forfeiture was still outstanding.

After months of stalling by the court, and more than a year after the arrest, ILF-Nepal petitioned in October 2010 to dismiss the case and release the client because his rights to a fair and speedy trial had been violated. The appellate court refused to dismiss the case, but ordered the district court to resolve the case as soon as possible. For the next several months, ILF-Nepal sought to have the different VDCs and government officials provide the relevant documentation of the client's assets. Finally, in late April 2011, the district court received paperwork detailing the assets and scheduled a final hearing date. Amazingly, the court again adjourned the final hearing several times to attempt to re-call the alleged victim, who had never appeared to testify. After several months, a final hearing was held, and the client was convicted. An appeal is pending.

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*Courts have been receptive to arguments that civil disputes do not belong in the criminal justice system.*

Government of Nepal v. Milan Limbu (ILF-Nepal 852)(Adv. Sanu Dangol)

Milan Limbu was late on his rent, and when his landlord ordered him to leave the premises, he refused, hoping that he could scrape together enough money to pay. However, before he had a chance to do so, he was arrested and accused of theft by the landlord.

The laws in Nepal regarding legal eviction of tenants generally favor the tenant, and to legally evict Limbu, the landlord would have undoubtedly had to expend substantial time and resources in litigation. Calling the police was a much more expedient, if illegal, way to remove an undesirable tenant. The district court was persuaded by the evidence and ILF-Nepal's arguments to acquit the client of all charges.

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*When authorities do not follow up on case outcomes, many defendants remain detained illegally.*

Government of Nepal v. Sanjay Sah Kanu (ILF-Nepal/Hetauda 16)(Adv. Chanchala Kaini)

Sanjay Sah Kanu was arrested in Birgunj in September 2010 and charged with Some Public Offense. He did not have a lawyer, could not afford the 15,000 NR bail imposed, and was sent to jail pending trial. When ILF-Nepal's advocate met with Kanu in a jail in Birgunj on August 10, 2011, he had no idea what, if anything, was happening in his case.

The advocate immediately went to the Birgunj District Administration Office to examine the court file. She discovered that the case had already been decided by the CDO in March 2011, and a fine of 5,000 NR had been imposed. Our client was not brought to the trial and was never informed of the decision. The CDO, when confronted with this information, answered that he had no record of Kanu's detention; he thought he had posted bail and absconded. ILF-Nepal's advocate obtained an order from the CDO for the client's immediate release from his illegal detention, hand-delivered the letter to the jail, and made sure that Kanu's relatives were waiting for him when he was finally released later that day after nearly a year of detention.

*The ILF would like to thank Liyah Brown for her contribution as an International Fellow to ILF-Nepal for the past three months, and welcome Sol Davis, who will be serving as an International Fellow at ILF-Nepal for the next three months. Davis is a lawyer from the Juvenile Rights Practice of the Legal Aid Society in New York.*

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