

# ILF-Nepal

## The International Legal Foundation – Nepal

### CASE NOTES – SEPTEMBER 2009

*Editor's Note: ILF-Nepal has been challenging the jurisdiction of the Chief District Officer (CDO) over juveniles for almost a year. On October 12, 2009, the Supreme Court agreed and ruled that juvenile criminal cases are to be heard by the Juvenile Bench.*

#### Government of Nepal v. Saroj Rai (ILF-Nepal 364)(Adv. Pawan Kumar Jaisawal)

Saroj Rai was arrested on September 26, 2009, (over the Dassai holiday) and accused of disorderly conduct, a public offense. The police claimed that he was being arrested for pick-pocketing, though no stolen property was found on him. He said he was merely walking in his neighborhood.

The police placed him in adult custody, noting his age on the report as 16 to 17. When he met the ILF-Nepal lawyer at the CDO's office, on the first remand, Rai said that he was 14 and had done nothing wrong. The CDO was informed of Rai's age and made the change in the paperwork. Because the CDO's office is closed during the holiday, the jail/bail hearing did not take place until October 6. Over objection, the CDO set bail at 5,000 NPR, even though it was evident that a 14-year-old child would be unable to pay any amount. To further complicate matters, there was no room in the juvenile detention center and the client was placed again in adult custody.

ILF-Nepal filed a habeas corpus petition in the Supreme Court on October 9<sup>th</sup> arguing :

- 1) The CDO had no jurisdiction to handle juvenile cases per the Child Act 2048, Section 55 (2);
- 2) The juvenile was being housed illegally with adults in violation of Child Act Section 15, 19, 50; and
- 3) The charge sheet had not been filed within the statutorily required seven days.

International standards (including the Convention on the Rights of the Child) and all applicable precedents were also presented to the Court.

The Child Act, enacted in 1992, limited the jurisdiction of the CDO over juveniles in criminal matters to cases where the juvenile has an adult co-defendant. The inference was clear that the CDO had no jurisdiction if the child had no adult co-defendant. Nevertheless, the CDO continued to exercise jurisdiction over juveniles.

Late on October 12, the Supreme Court issued a two-page order holding that the CDO had no jurisdiction over juveniles under the Child Act and the Convention on the Rights of the Child as ratified by Nepal. The Court ordered the Home Ministry of Nepal to circulate the order to all

CDO offices in Nepal and to transfer all juvenile cases pending before the CDO to the Juvenile Bench in District Court.

Government of Nepal v Santalal Lama, Government of Nepal v Nar Bahadur Sunuwar (ILF-Nepal/Janakpur 9 & 10)(Advs. Achutam Kumar Acharya and Ajay Shankar Jha)

When ILF-Nepal lawyers met the clients in these two cases, they had been in custody for more than 200 days. They had been charged with a number of offenses under the Forest Act simply because they lived on reserved forest land. At a bail/jail hearing held before Assistant District Forest Officer in Dhanusha, one client had been denied bail and the other had been unable to post bail. ILF-Nepal filed a habeas corpus petition in the appellate court, arguing that under Section 65 of the Forest Act, only the Chief Forest Officer (CFO) has jurisdiction to conduct jail/bail hearings. The section has the same language as the equivalent section of the Public Offense Act regarding the jurisdiction of the CDO. In Kathmandu, ILF-Nepal had successfully argued that the Assistant CDO did not have the power to conduct jail/bail hearings, and the same arguments were made in this case. The Janakpur Appellate Court agreed and issued writs confirming the lack of jurisdiction for an unauthorized person to hear the case.

Government of Nepal v Ramesh Thapa Magar (ILF-Nepal 324)(Adv. Surya Pandey)

Our client was charged before the Kathmandu CDO with a public order offence under the Some Public (Offences and Punishment) Act. On the day of the jail/bail hearing, Advocate Surya Pandey, per the requirement, handed his notice of appearance to the secretarial staff in the CDO's office and waited to be called in to argue on behalf of the client. As he waited, the jail/bail hearing took place in the absence of counsel and the defendant. A high bail was set and our client remained in custody. ILF-Nepal filed a habeas corpus petition in the Patan Appellate Court, arguing that the exclusion of counsel from the hearing violated the right to counsel under the Interim Constitution Art. 24(2), the right to a fair trial under Art. 24(9), and to the right to liberty under Art. 12(2). In addition, the exclusion of counsel violated the right to a fair and public hearing under International Covenant on Civil and Political Rights Art 14(1) and the right to be tried in the defendant's presence under Art. 14(3)(d). ILF-Nepal also argued that the action of the CDO breached the Bar Association Act, which permits advocates to be present and to plead before every court and judicial office.

While the appellate court dismissed the habeas corpus petition, it added in the opinion book that a letter would be sent to all CDOs under the Court's jurisdiction stating that in all cases where the defendants are represented by lawyers, a decision can only be given after hearing that lawyer. The full written decision has not yet been issued.

Government of Nepal v Pemba Dawa Sherpa (ILF-Nepal 296) (Adv. Shyam Kumar Bishwokarma)

Our client, a 51-year-old trekking guide, was charged with the attempted abduction of two children. The FIR complainants were the mothers, who said that the client came into the flat, took the children, and locked himself in a room with the children. According to the prosecution,

the landlord had to come and break into the room and fight with the client to free the children. The crime scene report contradicted the claims that the door had been broken open. The client stated he was drunk and remembered nothing except waking up in the hospital with bruises all over his body. A jail/bail hearing was held and he was denied bail. ILF-Nepal appealed, arguing that there was no prima facie evidence of the actual crime or of any intention to commit it. He had been drunk and had no recollection of what had happened. He had no prior conviction. He did not know the children and they did not know him. The appellate court agreed that there was no prima facie evidence of the crime or of the intention to commit it, and it released him.

Government of Nepal v Amar Thapa Magar (ILF-Nepal 81)(Adv. Neelam Poudel)

Our client, a juvenile, was convicted by the Juvenile Bench of the Kathmandu District Court of motorcycle theft. The only evidence against him was his illegally obtained statement to the police. Nevertheless, he was convicted and sentenced to 15 days in prison and to a fine of 31,500 NPR. He will spend up to 2 years in prison paying off this fine at the rate of 25 NPR a day in accordance with the Punishment Act as applied to juveniles.

An appeal was filed, arguing that there was no evidence to convict him and that his sentence was unduly harsh, violating equal protection. The appellate court affirmed the conviction and sentence. Such convictions based on no admissible evidence are common, and this case will be appealed to the Supreme Court.

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