

ILF - Nepal

The International Legal Foundation – Nepal

CASE NOTES – January – April 2013

Editor's Notes: This edition of Case Notes covers the legal aid activities carried out by ILF-Nepal before the courts and quasi-judicial bodies while representing indigent people accused of crimes. In this edition we focus on a new legal issue raised by the ILF-Nepal, the right to equal protection under the law, illegal detention, and the prevalent violation of the three months limit to decide cases in quasi-judicial proceedings.

In this case, ILF-Nepal interpreted a law to address a new legal issue regarding Muluki Ain (General Code) Chapter on Court Management Number 88, about which no court in Nepal had ever spoken. The court not only recognized the legality of the request but also took affirmative action on it.

Government of Nepal v. Kumar T. (Kathmandu # 1013 "A") (Adv. Ajay Shankar Jha "Rupesh")

Kumar, 26, was arrested on 26 May 2011 and charged with homicide and theft after an elderly woman was killed and her belongings stolen. A jail/bail hearing of the case was conducted on 29 June 2011 and Kumar was ordered to be detained without bail pending trial.

On 20 October 2011 ILF-Nepal met Kumar, who had been detained for almost five months, and offered to represent him because he did not have a lawyer and could not afford one. ILF-Nepal immediately obtained a copy of the case file, which revealed that another charge sheet had previously been filed regarding the same incident. However, the earlier charge sheet named the stepson of the decedent as the perpetrator and did not mention Kumar. Moreover, there was an ongoing trial against the stepson as a result of a police investigation. ILF-Nepal also learned that the stepson was being held in detention without bail. While the case against the stepson was ongoing, the brother of the stepson made a new complaint accusing Kumar of the murder, which did not mention his accused brother. On the basis of this new complaint, the police arrested Kumar, conduct an investigation against him, and obtain his confession. The police filed a separate charge sheet against Kumar.

The Muluki Ain (General Code) Chapter on Court Management (CM) Number 88 provides, "once a complaint ... is filed or made on a criminal case with the case trying office, any addition set down by the same person that there are also more accused shall not be valid. This restriction shall not apply to the police report (Charge sheet)." The Government Attorney filed a second charge sheet against Kumar pursuant to this provision, and the court accepted it as a supplemental complaint.

ILF-Nepal argued that, according to the provision, the police may file an additional charge sheet on the same case if they are adding a new co-accused. Clearly, this second charge sheet was not a supplement to the previously filed charge sheet, but was a completely new one. Moreover, in the previous charge sheet no co-accused was indicated, and the second charge sheet did not show any connection between Kumar and the first suspect accused in the incident. ILF-Nepal argued that the second charge sheet filed against Kumar is

invalid pursuant to CM Number 88, and must be quashed. The court agreed, dismissing the charge sheet and acquitted Kumar of all charges.

This case is significant because a new issue regarding CM 88 was raised in which no courts had ever opined, nor had the Supreme Court set any case law. However, ILF-Nepal interpreted CM 88 from a new prospective, convincing the court to consider on this facet of the law. The court agreed with the arguments made by ILF-Nepal and decided accordingly. This case also brings into practice a provision that was in the statute but had not previously been utilized.

The Interim Constitution of Nepal guarantees the right to equal protection under the law; however, the poor are frequently not treated equally.

Government of Nepal v. Bikram M. (Kathmandu #2032) (Adv. Surya Bahadur Pandey)

On 9 April 2012, 16-year-old Bikram was arrested and charged with theft. A jail/bail hearing of the case was conducted and bail was set in the amount of NRs 5,000 (US\$ 57). Bikram could not post the bail and was held in detention pending trial.

Muluki Ain, Chapter on Punishment Number 53 provides that the term of imprisonment for any amount owed to the government, including criminal fine, shall be determined at the rate of 25 rupees (US\$ 0.29) per day. Therefore, if Bikram's bail was considered an amount owed to the government, the jail term calculated at the rate of 25 rupees per day would be served within seven months. Similarly, the right to equal protection under the law is enshrined in the Article 13 of Interim Constitution of Nepal, which guarantees that all the persons to be treated equally and fairly by the law and courts, both in procedures and in the substance of law. In this case, a person able to afford the bail would have been out the same day; however, Bikram had to languish in detention for almost nine months waiting for justice.

ILF-Nepal filed a petition at the district court requesting Bikram's release on the basis of the aforementioned provision and his constitutional rights. The petition was declined by the court, which held that the Chapter on Punishment Number 53 is only applicable in cases of imprisonment or fine after conviction. ILF-Nepal filed a writ of habeas corpus at the appellate court on the same grounds and the right to a speedy trial. The appellate court also dismissed the petition on the same basis. However, the court accepted ILF-Nepal's argument regarding the defendant's right to a speedy trial. Considering that no proceedings had been taken in Bikram's case, the court set a hearing date on the same week.

At the hearing, Bikram was acquitted of the charges. An innocent 16-year-old's right to liberty and equal protection under the law were violated for more than nine months because he was poor.

In last four months ILF-Nepal secured the release of 28 detainees from illegal detention

Government of Nepal v. Rajan L. (Hetauda #112) (Adv.Kamal Bahadur Ghising)
Government of Nepal v. Dhan Bahadur D. (Hetauda# 124) (Adv.Kamal Bahadur Ghising)
Government of Nepal v. Ashok L. (Kathmandu# 2131) (Adv. Bimala Yadav)
Government of Nepal v. Dinesh T. (Kathmandu# 2046) (Adv. Sanu Maiya Dongol)
Government of Nepal v. Bishal G. (Kathmandu# 2153) (Adv. Sanu Maiya Dongol)
Government of Nepal v. Pritam S. (Kathmandu# 2155) (Adv. Sanu Maiya Dongol)
Government of Nepal v. Hari N. (Kathmandu# 2161) (Adv. Sanu Maiya Dongol)
Government of Nepal v. Nitesh G. (Kathmandu #2162) (Adv. Sanu Maiya Dongol)
Government of Nepal v. Dev Kumar C. (Kathmandu #2160) (Adv. Sanu Maiya Dongol)
Government of Nepal v. Sani S. (Kathmandu #2164) (Adv. Bimala Yadav)
Government of Nepal v. Prakash T. (Kathmandu # 2163) (Adv. Bimala Yadav)
Government of Nepal v. Gyan Bdr B. (Kathmandu # 2159) (Adv. Bimala Yadav)
Government of Nepal v. Ramesh K. (Kathmandu# 2165) (Adv. Kopila Shrestha)
Government of Nepal v. Rabin S. (Kathmandu # 2198) (Adv. Kopila Shrestha)
Government of Nepal v. Phurbu S.(Kathmandu # 2215) (Adv. Kopila Shrestha)
Government of Nepal v. Jivan G. (Kathmandu # 2167) (Adv. Sashi Basnet)
Government of Nepal v. Anil B. (Kathmandu # 2168) (Adv. Sashi Basnet)
Government of Nepal v. Nabaraj P. (Kathmandu # 2210) (Adv. Sashi Basnet)
Government of Nepal v. Kangaroo AKA Pasang L. (Kathmandu # 2211) (Adv. Sashi Basnet)
Government of Nepal v. Sujan P. (Kathmandu# 2169) (Adv. Sanu Maiya Dongol)
Government of Nepal v. Bikash L. (Kathmandu # 2170) (Adv. Sanu Maiya Dongol)
Government of Nepal v. Narendra M. (Kathmandu # 2187) (Adv. Sanu Maiya Dongol)
Government of Nepal v. Shange S. (Kathmandu # 2175) (Adv. Bimala Yadav)
Government of Nepal v. Sanjay Bdr. G. (Kathmandu # 2176) (Adv. Bimala Yadav)
Government of Nepal v. Dilli Kumar R. (Kathmandu # 2171) (Adv. Bimala Yadav)
Government of Nepal v. Kumar P. (Kathmandu # 2172) (Adv. Bimala Yadav)
Government of Nepal v. Sabin T. (Kathmandu # 2185) (Adv. Bimala Yadav)
Government of Nepal v. Aale T. (Kathmandu # 2186) (Adv. Bimala Yadav)

In Nepal, the quasi-judicial authorities do not have a bench or other infrastructure necessary for judicial case hearing. The case deciding officers, who are appointed by the executive branch of the government, are neither trained in law nor have any formal legal education. The case hearing procedures at these authorities do not comply with the principles of a fair trial and the authorities hardly listen to the arguments made by the legal practitioners. Therefore, legal practitioners rarely represent clients before quasi-judicial authorities.

However, from its establishment ILF-Nepal has been representing indigent people accused of crimes before quasi-judicial authorities and has been successful in improving the traditional practice of adjudication performed by these authorities. Unfortunately, ILF-Nepal had to suspend its legal services last year due to funding crisis. During that time there was a gap in the access to counsel for accused before quasi-judicial bodies, and the authorities reverted to traditional illegal practices. Early this year, ILF-Nepal resumed its legal services and has been successful in releasing 28 clients from the illegal detention.

The quantitative report published by the Attorney General's office shows that in the last fiscal year 2068/69 B.S. (2011/12) the Chief District Officers (CDOs) across Nepal tried 424 cases of people accused with disorderly conduct under the Some Public Offenses (SPO) Act, among which 98% people were convicted.

Most of the people convicted were not represented by legal practitioners and the CDO's decisions were almost never challenged for not following the due process of law.

However, through continuous legal representation and persistent effort, ILF-Nepal is committed to improving the practice of the quasi-judicial authorities.

Violation of the three month statutory limitation for deciding a case is frequent in quasi-judicial proceedings.

Government of Nepal v. Surya Bahadur B. (Hetauda # 123)

Government of Nepal v. Dhan Bahadur D. (Hetauda # 124)

Government of Nepal v. Rajan L. (Hetauda # 112) (Adv. Kamal Bahadur Ghising)

Surya, Dhan and Rajan were arrested separately for disorderly conduct and charged under Some Public Offense (SPO) Act, which falls under the jurisdiction of Chief District Officer (CDO), a quasi-judicial authority.

ILF-Nepal learned that a jail/bail hearing was conducted in each of the cases without the representation of a lawyer and a bail amount was set. The defendants were unable to post bail and were sent to detention to await trial. The defendants were then forgotten in the system.

Section 6 of SPO Act requires such cases to be decided within three months. However, Surya and Rajan had been languishing in jail for 5 months and Dhan for 4 months when ILF-Nepal met them. ILF-Nepal filed for a writ of habeas corpus, challenging the violation of the statutory limitation for deciding the cases and requesting the release of the clients from illegal detention. The appellate court agreed, and all three clients were released. Because the charge sheets were originally filed in accordance with the law, the court did not dismiss the charge sheets but rather ordered that the cases be disposed of as soon as possible.

Offenses under the SPO Act are rarely disposed in timely manner by CDOs. ILF-Nepal continues to challenge this due process violation as it represents hundreds of indigent clients before quasi-judicial proceeding.

ILF-Nepal secures the release of detainees who were sent to the jail and then forgotten in the system.

Government of Nepal v. Mahendra T. et.al (Hetauda # 125) (Adv. Kamal Bahadur Ghising)

Mahendra was arrested with two co-defendants on 31 August 2012 for disorderly conduct and charged under the SPO Act. The court held a jail/bail hearing and set bail, but they were unable to post the bail and were sent to detention to await trial.

When ILF-Nepal met Mahendra on 12 February 2013, he and his co-defendants had been detained for almost six months, unaware of any developments in the case. ILF-Nepal immediately obtained a copy of the case file and discovered that the case had been decided on 24 December 2012 in their absence. They were each convicted and fined NRs 3,000 (US\$ 34).

Muluki Ain, Chapter on Punishment Number 53 provides that the term of imprisonment for any amount owed to the government, including criminal fine shall be determined at the rate of 25 rupees per day. Therefore, pursuant to provision of Number 53, the detainees had cleared their fined amount at the rate of 25 rupees per day in 4 months.

The ILF-Nepal advocate immediately filed a petition before the CDO requesting the release of the clients pursuant to Chapter on Punishment Number 53. The clients were released on the same day.

Government of Nepal v. Sushil S. (Hetauda # 111) (Adv. Kamal Bahadur Ghising)

When ILF-Nepal met Sushil, he had been detained for 10 months on the charges of disorderly conduct under the SPO Act. Similar to the aforementioned clients, Singh had no idea about any of proceedings in his case. ILF-Nepal immediately obtained a copy of the case file, which showed that the case was decided on 11 June 2012 in his absence. Sushil had been convicted and a fine set in the amount of NRs 3,000 (US\$ 34).

Pursuant to Chapter on Punishment Number 53, Singh's jail term should have completed in four months at the rate of 25 rupees per day. However, he had been languishing in the jail for almost 10 months, unaware that there had even been a hearing in his case.

ILF-Nepal immediately filed a petition before the CDO requesting Sushil's immediate release on the basis of Number 53, which was granted.

ILF-Nepal would like to extend its gratitude to Swiss Agency for Development and Cooperation for providing funding and would like to welcome back three advocates: Ms Kopila Shrestha and Ms Sashi Basnet based in Kathmandu office, and Mr. Rajendra Prasad based in Janakpur office.

Thank you,

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