

## **2016 Case Notes**

*Arbitrary, illegal and excessive pre-trial detention, ignorance of or disregard for proper legal processes by police, prosecutors, and judges, and lack of access to meaningful representation remain serious issues that seriously impact upon the rights of the accused in Nepal, particularly the indigent accused. The following case notes show how proactive defense representation, including investigation, legal analysis, and building clear defense theories, instead of blind reliance on prosecution files, can expose facts that lead to more just outcomes for the accused.*

### **Client Acquitted in Drug Smuggling Case**

In this case, ILF-Nepal's effective representation was able to secure justice for a poor 26 year old man from Kavre who was accused of smuggling drugs. The client, a student from Kavre District, was arrested on June 30, 2016 and accused of smuggling 105 tablets of the prohibited drug Nitrovet from Raxaul, India to Kathmandu. The prosecutors demanded a fine of 100,000 to 2,000,000 rupees (approximately \$900-\$18,000 USD) and imprisonment of 2 to 10 years.

ILF-Nepal Advocate Chanchala Kaini met the client on July 6, 2016 at the Hetauda Detention Center on the sixth day following his arrest. The client had not had access to a lawyer and neither the police nor prosecutor had made him aware of what was happening in his case. He was enormously grateful to meeting Ms. Kaini and receive her help.

During Ms. Kaini's first interview with her client, he stated that he had not been involved in smuggling any drugs. He claimed he had been coerced into signing a statement of guilt at the government attorney's office without first being allowed to read it (and without being informed of his rights), and had been falsely accused by another person involved in the case.

Ms. Kaini represented the client before the court starting from the jail/bail hearing on 5 September 2016. Based on the comprehensive examination of documents, statements and other evidence submitted by the prosecutor, Ms. Kaini asserted at trial that none of the evidence proved that her client was involved in drug smuggling. Her defense investigation had revealed that the only evidence against her client was the word of the co-accused, which cannot legally be used as evidence to convict, in addition to the coerced, false statement signed by her client. As corroboration, Ms. Kaini's client testified in court that he had been coerced into signing the statement. The client was acquitted on 24 October 2016 in light of insufficient evidence.

### **Client Acquitted in Bigamy Case**

*This type of bigamy case, in which a husband abandons one wife and illegally marries a second one, is common in Nepal, where it can be very difficult to secure a legal divorce. Often, both the husband and the second wife are convicted of bigamy in such cases. Although lack of knowledge about the husband's first marriage is considered a valid defense, prosecutors often fail to investigate or consider the facts of these cases to determine whether the wife was aware of her husband's first marriage. In this case, the ILF-Nepal lawyer was able to establish that the prosecutor had no proof to substantiate a bigamy charge against the client.*

ILF-Nepal Advocate Bir Bahadur Khadka met the client in this case on February 12, 2016 at the Kohalpur Detention Center. The client, a 27-year-old woman from Satakhani, was arrested in Kohalpur on February 8, 2016 on the charge of bigamy, under Sections 9 and 10 of the Marriage Chapter of the General Code. She was accused of having deliberately married a man who she knew to be already married to someone else. He prosecutor demanded a fine of up to Rs 300,000 and a prison sentence of

up to 3 years. However, the client stated that she had not done anything wrong and was unaware that her new husband was already married.

To bolster their evidence against ILF-Nepal's client, the prosecution raised the fact that the defendant had previously been married, and had never divorced her first husband. This is not a criminal offense, since the defendant's husband had abandoned her over five years ago; the country code of Nepal states that if a person has been abandoned by their spouse with no contact from them, they are no longer legally considered to be married. However, the prosecutor raised it as pertaining to the client's morality concerning the institution of marriage.

On the first hearing, which took place on May 5, the ILF-Nepal lawyer asserted that none of the submitted documents and evidence confirmed that the victim married her husband knowing that she was going to be his second wife. The defendant also testified to this effect, and stated that her husband had lied to her about the fact that he was already married.

In the final hearing on July 11, Advocate Khadka stressed that the prosecutor had failed to document sufficient evidence to prove the charge of bigamy. He also presented the fact, confirmed after his interview of her relatives living in Kohalpur, that her first husband had not been seen in five years. The client was acquitted in light of insufficient evidence.

### **Client Acquitted in Grievous Assault Case**

*In this case, a juvenile client was charged with a serious crime, that of mutilation and disfigurement, after being involved in a physical altercation with two adult men. The ILF-Nepal lawyer was able to demonstrate before the court that the victims' injuries did not meet the standard for such a serious charge, and was able to secure the client's acquittal, protecting him from prosecutorial overreach. He was also able to end the client's improper and repeatedly extended detention in an adult detention facility, and secured his release into parental custody.*

The client in this case was a 15-year-old juvenile, who was arrested in Makwanpur on January 5, 2016 and charged with grievous assault and mutilation under Article 2 and 6 of the Assault Chapter of the Country Code. The prosecution claimed that the client, along with his father and adult brother (who were co-defendants), had attacked and beaten two adult victims, causing dislocation of the left shoulder of one and a fracture of the right hand as well as a back injury of the other. The prosecutor demanded a fine of Rs 150,000 and imprisonment of up to four years.

ILF-Nepal Lawyer Kamal Bahadur Ghising met the client at the Hetauda Detention Center and took the case on January 14, ten days after his arrest. By this date, his detention had already been extended four times; each time, he had been brought to the court by police who requested that the judge extend his detention "because further investigation was necessary" before filing the charge sheet or releasing him. For those ten days, the client was being held in general detention with adult detainees. He had not had access to legal counsel since his arrest, and had not been informed of the progress of his case by the police or prosecution.

The ILF-Nepal lawyer immediately began working to have the juvenile removed from adult detention, and on the date of the fifth extension request on January 19, he succeeded in having the client released into the custody of his mother. The charge sheet in the case was not filed until January 29, and the jail/bail hearing was held on January 31; without the intervention of ILF-Nepal, the juvenile would likely have been held in adult detention for almost two more weeks.

When interviewed by the ILF-Nepal lawyer, the client did not deny that he had been involved in a physical altercation with the victims. However, he did deny that any serious injury or mutilation had occurred. He stated that the victims had actually attacked his father and brother first, and that he had been defending them by fighting the victims off with a stick. He also stated that they had not appeared to be seriously injured.

Once the ILF-Nepal lawyer began examining the case file, he determined, based on a comprehensive examination of documents, statements, and other evidence submitted by the prosecutor, that the only evidence of serious injury or mutilation in the case was the statement of a doctor who had examined them immediately following the altercation and had given a medical report. However, upon further investigation, it became clear that the doctor had only performed a superficial examination, and that he was not, as he had been identified in the medical report, an orthopedist, meaning that he did not have the specialized medical knowledge necessary to state whether or not the x-rays taken of the accusers showed evidence of serious injury such as a fracture or back injury. Moreover, according to the case file, the victims had never returned to any doctor for a follow-up appointment. When the accusers appeared in court to testify about the incident, they also did not display any signs of serious or permanent injury or disfigurement.

The ILF-Nepal lawyer requested that the judge call the doctor to testify in court at the next hearing, rather than basing the prosecution's case purely on the medical report. At this hearing, which took place on June 2, the ILF-Nepal lawyer cross-examined the doctor, who stated that he was not in fact an orthopedist. He also stated that his medical opinion of the victims' injuries had been based on an examination of x-rays, but not on comprehensive radiological examinations such as a CT scan or MRI. The ILF-Nepal lawyer asserted that the medical evidence was not enough to confirm that the victims had been seriously injured or mutilated.

During the final hearing on July 12, 2016, the ILF-Nepal lawyer again stressed that the public prosecutor had failed to document satisfactory evidence to validate the charges of mutilation against the client, and stressed that the medical report presented by the prosecutor should be taken as exaggerated. He also reemphasized the fact that the client had stated that he was defending his father and brother from attack. Ultimately, the client was acquitted of the charge of mutilation and grievous assault in light of insufficient evidence.

### **Client Acquitted in Human Trafficking Case**

*The law is sometimes used as a weapon by parties to a dispute, and without the assistance of a dedicated advocate, defendants may be convicted of crimes they did not commit based only on the word of a person who wishes them ill. In this case, the client was accused of a crime by a person with whom her family had an existing dispute.*

The client, a 52-year-old housewife from Dodhara Chadani Municipality in Kanchanpur, was arrested on February 20, 2016 under Article 15(h) of Human Trafficking and Transportation Act 2007. She was accused of aiding the co-accused, her husband, in intentionally trafficking the accuser to India under the presence of securing domestic work for her, and then selling her.

The client's family contacted ILF-Nepal office on the day of her jail/bail hearing on March 17, 2016, and Lawyer Devraj Pant met the client at the District Police Office within a few hours. The client had not had access to a legal practitioner since her arrest and she had not been made aware of what was happening in her case by either the police or the prosecutor. Therefore, she was desperately waiting for legal counsel and was thankful for the assistance of ILF-Nepal.

Based on an examination of documents, statements, and other evidence submitted by the prosecutor, the ILF-Nepal lawyer determined that there was no evidence linking the client to the crime of trafficking. The only piece of evidence implicating the client was the accuser's statement that the client had called the co-accused on the phone and mobilized him to traffic the client. This statement was not supported by any other evidence in the case file. The defense lawyer further determined, upon further investigation, that the family of the accuser were in an ongoing dispute with the client's family over the ownership of a plot of land.

In the first hearing, the defense lawyer asserted that none of the submitted documents and evidence proved that the client had been involved in trafficking the victim, and also raised the dispute between the two families as a motive for fabricating the defendant's involvement. Consequently, the client was released after posting bail of NRs 20,000.

In the next and final hearing, the ILF-Nepal lawyer again stressed that the public prosecutor had failed to document satisfactory evidence to validate the charges against the client. Ultimately, the client was acquitted on May 4, 2016 in light of insufficient evidence.

### **Clients Released from Illegal Detention**

*The following case highlights the importance of defense lawyers in holding police and prosecutors actions to the law. The clients in this case had unequivocally been held in detention past the legal time limit, yet they continued to be detained because, until ILF-Nepal became involved in the case, they had no one on their side to insist that they must legally be freed.*

On January 12, 2016, Adv. Bimala Yadav of ILF-Nepal's Kathmandu office won the release of two clients who were being illegally held in detention. The clients had been arbitrarily arrested on Dec 31, 2015 and charged with violating the Some Public (Crime and Punishment) Act, 1970 which includes varied crimes such as disturbing the peace, public obscenity, hindering government employees, groping, and harassment. The clients had been returning to their home from a friend's house when they were abruptly arrested without reasonable grounds.

ILF-Nepal took the clients' cases after they had already been in custody for more than seven days. The Adv. Yadav argued that their detention was illegal, as Article 4 of the Some Public (Crime and Punishment) Act of 1970 requires a charge sheet to be filed within seven days from the commission of the offense and that while Article 4(2) of the Some Public (Crime and Punishment) Act of 1970 does allow people detained for SPO violations to be held for more than seven days without remand Adv. Yadav argued that this is only if reasonable grounds for the extension of their detention have been provided and that in this case no reasonable grounds had been stated for the clients extended detention. As such the requirements under Article 4(2) had not been met and the continued detention of the clients was in violation of the law.

Adv. Yadav then filed writs of habeas corpus with the Patan Court of Appeals, which granted the writs and freed the clients from their illegal detention on January 12, 2016.

### **Client Acquitted in Theft Case**

*The following case highlights the importance of early access to counsel and how increased access combined with quality representation can spare accused, particularly vulnerable accused, from being the victims of illegal detention or baseless convictions.*

On January 24, 2016, Adv. Kopila Shrestha secured the acquittal of a client based on insufficient evidence. The client, a 22-year-old electrician from Khotang province, was arrested on January 7, 2016 under Article 2(b), (g) and (h) of the Theft Chapter of the General Code. He was accused of stealing a cell phone. The client asserted his innocence, saying that he had simply happened to be standing nearby where the incident occurred and that his arrest was based solely on suspicion.

ILF-Nepal lawyer Kopila Shrestha met the client in court on January 8, 2016, one day after his arrest. Understandably, the client was agitated when he met Adv. Shrestha, as he had not had access to a lawyer since his arrest and he had not been made aware of what was happening in his case by the police or prosecutor. Moreover, he was desperate to see his 3-month-old daughter.

Adv. Shrestha immediately interviewed the client and reviewed the file. Based on an examination of the interview, documents, statements, and other evidence submitted by the prosecutor, Adv. Shrestha was able to develop her defense early on in the case. During the investigation period, she asserted that none of the submitted documents and evidence established that the client had stolen plaintiff's cell phone. Moreover, with close examination, it became clear that the reports and other statements mentioning the client had been taken from people who had not seen the incident, but had only heard about it from others. Therefore, according to Act 10 and 37 (2) of Evidence Act, 1974, those documents could not be considered evidence.

Given the lack of direct evidence against the client, Adv. Shrestha also stressed that according to Article 25 of Evidence Act, 1974, the prosecutor had failed to meet his legal burden of presenting sufficient evidence against the indigent accused to validate the charges against him.

During the jail/bail hearing, Adv. Shrestha highlighted that the entire case was based merely on suspicion, with no substantial evidence and no reliable witnesses. Furthermore, no stolen cell phone was recovered from the client, even though he was said to have been caught "red-handed".

The client was acquitted on the basis of insufficient evidence on January 24, 2016, approximately two weeks after being arrested. Had it not been for ILF-Nepal's advocacy and the early development of a defense strategy, the client may have been detained for months or years, and / or wrongfully convicted for a crime he never committed, which would certainly have cost him his job and would have separated him from his daughter and family.