

2017 Case Notes

Habeas won against the arrest of a court date attending defendant during the trial

PDS- Nepal was granted with a landmark habeas which has set a precedent that no defendant can be sent to prison to serve sentence while appeal is accepted providing court date and under sub-judice.

A juvenile client accused of rape case represented by Hetauda Office lawyer Chanchala Kaini was convicted with an imprisonment of 5 years and 6 months but the punishment was postponed for two years. The trial court's decision was affirmed by the High Court and the lawyer moved to Supreme Court. Appeal before Supreme Court was filed during the period of postpone of sentencing. Supreme Court accepted his appeal providing him on general court data. In the meantime, while the case was running at the Supreme Court, the client turned into an adult and was arrested by the trial court for the claimed implementation of the postponed decision despite the fact that he had been regularly attending the court dates.

Kathmandu Office lawyer Sanu Maiya Dangol had been following the case at the Supreme Court and quickly filed a petition seeking to release client on bail under the provision of No. 194 (2) of Court Management of MULUKI AID (General Code). No. 194 (2) have provision that "The appeal hearing office may release a person on bail or security until the time-limit for making appeal expires and, where a memorandum of appeal has been filed, until the settlement of appeal in a case where the person is convicted by judgment of an offence and sentenced to imprisonment, and the term of such imprisonment does not exceed ten years and the case is one in which it is not required to be held in detention for trial or if that person has not been held in detention for trial " but registrar of Supreme court rejected to release client on bail (this is the jurisdiction of registrar to accept bail for cases related to supreme court). Then advocate filed petition against registrar order before bench (justice) and requested to accept bail. Division bench of Supreme Court affirmed registrar rejection order and denied to accept bail. Then Advocate Sanu Maiya Dangol suggested by ED Ajay Shankar Jha to file writ of habeas corpus before Supreme Court. When writ petition of habeas corpus was submitted before Supreme Court, registrar again refuse to register that petition, causing that division bench already rejected bail request. ED Ajay Shanakar Jha himself drafted a petition against registrar rejection order and filed before judges. Single bench of Supreme Court collapsed registrar rejection order and instruct to register writ petition of habeas corpus. In this petition advocate Jha raised the issue that no one can be send prison to serve sentence particular in the situation when higher court has accepted appeal with the facility on general court date. He also linked rule 70 of district court regulation, 2052 (BS). As per the rule 70, convicted person can only send to prison to serve sentence once case was entirely disposed from higher court. As appeal from client is still sub-judice before Supreme Court and had not decided yet, trial court cannot send client to prison to serve sentence. Advocate Sanu Maiya Dangol and Advocate Ajay Shankar Jha both made argument at final hearing and finally Supreme Court agreed with writ petition and granted writ of habeas corpus and issued order to release client from illegal detention. After this order, client released from prison and taking court dates.

This case is not only an example of legal representation made by PDS-N not been able to obtain release under the one conditions set by the court, counsel consider pursuing modification of the conditions of release under the procedures available, also an example for strategic litigation which make clear procedural things for others too.

Habeas won against the separate imprisonment of a defendant for a due sentence despite having served through a subsequent conviction.

A Habeas petition filed by PDS-Nepal challenging the imprisonment of a client for already served sentence, through a case that followed, was granted by the High Court.

The client in a drugs case was illegally arrested and sent to prison to serve the due sentence of the previous case after posting the bail of Rs. 20,000 for second case. He had already served the imprisonment of 1 month and 7 days before posting the bail imposed for the second offense. For the previous drugs case, he was convicted with a sentence of 2 months along with Rs. 2000 fine. As he was detained for 23 days during investigation, a sentence of 1 month and 7 days was due. He was arrested immediately after posting the bail for second case and handed a detention letter for, what they claimed, the due sentence.

In the preceding drugs case, the client was released on bail after jail/bail hearing but was later convicted with 2 months' sentence and Rs. 2000 fine agreeing to the lawyer's pleading that he was just a consumer of drugs. After more than one month of this conviction, the client was arrested again for a new charge of drugs selling while he was in the absconding status after trial court's decision of the preceding case. Off the two months he was detained for 23 days during investigation that left a due sentence of 1 month and 7 days.

PDS- Nepal Hetauda office lawyer Chanchala Kaini filed a writ of Habeas Corpus citing the violation of No. 120 of Court Management of *MULUKIAIN* (General Code) and argued during the hearing that the sentence of the previous case should not be imposed to a defendant separately if he had served the equivalent sentence for any case that followed. The provision as per No. 120 says punishment of fine or imprisonment as may be held imposable by judgment on a person held in detention for trial shall be realized or recovered from the person upon deducting the figure of fine already paid by him or her or the term of detention in which he or she has been so held from the amount of such fine or term of imprisonment.

The High court agreed to her pleading and granted Habeas. This case is another example of the PDS-Nepal work, correcting procedural irregularities by court itself in absence of lack of knowledge of proper procedural law which cause someone behind bar.

Case No. 4368, PDS-Nepal Lawyer - Karuna Thapaliya, Kathmandu Office

PDS-Nepal' tireless litigation through a habeas corpus petition secured the release of a juvenile who was illegally detained in the prison.

Charge- Some Public Offense, as per No. 2 (c, g and h) of SPO Act demanding a bail of up to Rs 25,000 and up to one year of imprisonment.

The 14 year old tenth grader juvenile boy was arrested on 15 April 2017 and accused of disturbing the public peace by using obscene speech to a (foreigner) women as well as doing molestation on her in a public place. The Kathmandu CDO imposed him with a bail of Rs. 25,000 and was eventually sent to Dillibazar Prison as he failed to deposit the bail. The lawyer met the client after 14 days of arrest on 30 April 2017 at Kathmandu CDO Office while he was brought to Kathmandu CDO office from New Baneshwor Detention for jail/bail hearing and pleaded before the CDO. As she had very less time to prepare her argument, she quickly talked to the client and gathered few case facts from him and prepared herself to defend him

The client gave his statement to the bench that, on the day of incident he was returning drunk from New Year celebration program organized by the shelter home where he used to live until the last Dashain festival. On his way back to his rented room, he saw the foreigner women who used to regularly visit the shelter home to distribute food to the resident children including him. He admitted that he used obscene words shouting at her and disturbed the public peace but denied the accusation that he had molested her.

During the jail/bail hearing, the lawyer pleaded that the prosecutor has claimed the client an adult without any evidence and demanded that he should be handed over to either parental custody or juvenile correction home. The CDO's bench ordered the client to post a bail of Rs 25,000 but the client was sent to Dillibazar Prison for remand as he failed to do so.

The client was deprived of his school because of his arrest and trial. His poor parents from Kalikot needed to travel for more than 24 hours on a bus to Kathmandu to see him after the PDS-Nepal lawyer informed them over telephone about the case. Kalikot is a remote hilly district in mid-western part of Nepal from where most of the people travel south towards the Terai region as well as the neighboring India to work on daily wages. They were sad for two reasons - son being accused of a criminal case, and had a big travelling expense to Kathmandu incurred due to his arrest. In addition, the client's parents missed the opportunity to cast their votes in the local elections (May 14) as they were in Kathmandu on that date. The lawyer kept assuring that PDS-Nepal was working at it best to ensure justice to their beloved son.

As the age of the client was claimed to be 16 years by the prosecutor and the CDO's decision coming accordingly, it was really challenging for PDS-Nepal to gather the evidence that prove him a juvenile. However, the defense lawyer was able to collect a copy of his birth certificate from the school that clearly stated that he was only 14 years old.

PDS-Nepal quickly challenged the CDO's decision of sending the juvenile client to remand at Jagannath Dewal Prison and filed a writ of Habeas Corpus before the Patan High Court on May 3 demanding an immediate release of the client. However, later it was found through detention letter issued by CDO office that one of their staff had mistakenly informed our lawyer verbally that the client was sent to Jagannath Dewal Prison. After confirming that the client was illegally detained in Dillibazar Prison along with adult inmates, the lawyer filed petition requesting the withdrawal of the filed writ petition citing the inclusion of name of wrong prison. The court agreed and canceled the petition that allowed PDS-Nepal to file a new petition on 9 May.

During the show cause hearing on the habeas petition on 12 May 2017, the government attorney claimed that the detention of the client was justifiable and a common provision as he had failed to post the bail.

However, the PDS-Nepal lawyers argued before the court that a juvenile should neither be ordered to post a bail nor sent to prison for remand. They reminded the bench of the provisions in the Juvenile Procedures Act 2006 that the date mentioned in the birth certificate issued by the local registrar shall be the official evidence of age if, for any reasons, the birth certificate issued by the hospital could not be produced before the court. They also argued, as per the provision in no. 50(1) of the Children's Act 1990 that the juvenile defendants should either be handed over to the parents or be sent to the juvenile correction home.

During the final hearing on 17 May 2017, the lawyers pleaded that this case falls under jurisdiction of the juvenile bench at District Court but not the CDO office. In addition, the lawyers reminded the bench of Right to Freedom, Right to Equality, Presumption of Innocence, Right to a Fair Trial, and

Rights to Child specifically the Right to a Juvenile Friendly Justice guaranteed by the Constitution of Nepal. The court agreed to the lawyers' pleading and gave an order to immediately free the illegally detained client. The client is satisfied with the court decision and his defense lawyers while the parents were very much happy to see their son freed after 9 days illegal detention.

The outcome of this case is certain to be a significant precedent in the future cases mainly because of the court's acceptance that the juvenile should not be ordered to post bail, detained or imprisoned among the adult inmates, and the CDO Office should be conscious on and should not breach its adjudicating jurisdictions.

Case No.: 583, PDS-Nepal Lawyer - Chanchala Kaini, Hetauda Office

Charge- Infanticide, As per No. 1 and 13(3) of Chapter on Homicide, the General Code. Demanding life imprisonment

PDS-Nepal's criminal defense service to a juvenile mother charged of Infanticide secured her a reduced sentence despite the prosecutor's demand for life imprisonment.

The client is a 15-year-old unmarried girl who was charged of killing her baby immediately after giving birth in a cornfield and burying immediately. She was accused of intentionally pulling the baby's umbilical cord to let die because of excessive bleeding.

The Lawyer met the client at the Hetauda Detention Center while on her regular detention center visit to look for unrepresented and illegally detained criminal defendants. She then contracted the case with the client's consent and interviewed her. After having confidential conversation with the juvenile client, the lawyer came to know that she got pregnant because of repeated rapes for many weeks by her own elder brother but never dared to tell her parents or any other persons due to fear. She had hidden her pregnancy by wearing long and thick clothes, which went unnoticed as it was winter during the last months of her pregnancy.

On the day of the incident, the client accompanied the married elder sister, on foot, to husband's home carrying some stuff and reached there in the evening after walking for almost 3 hours. She then noticed she had a labor pain and rushed to the nearby cornfield eventually giving birth to a baby. As she was in total confusion, she accidentally pulled the umbilical cord leading to death followed by excessive bleeding from the navel. Shockingly frightened by all those happenings within a few moments, she buried the dead baby under soil (digging loose soil with the small wooden sticks) and came back to sister's house pretending to be physically normal.

The next morning one of her sister's relatives made noise from the cornfield that he saw something like human hair off something buried there and many persons immediately gathered to take the baby out. Now, a big question among them was who buried the baby and in a moment everyone suspected the client for two reasons - first, the houses there did not have any women in the final month of pregnancy and the second, she looked feeble. After being harshly interrogated by the villagers, she admitted she had buried the dead baby saying that the baby was accidentally killed during birth.

The police arrived the village on the third day and arrested her to take her to the detention center in the neighboring district (Bara) instead of Makwanpur (the district where incident occurred) saying that her home was in Bara making her to walk for few hours ignoring her physical condition on the third day of her maternity. She was later transferred to the Hetauda detention center in Makwanpur. The mother in the first week of maternity was not provided with even a warm blanket in the detention center for two days but a women constable later provided her one personally.

The lawyer represented the client during the pre-trial stage and demanded with the court to take her handcuffs off informing that she was juvenile as well as a mother in maternity. The court then ordered the police accordingly. During the jail/bail hearing the lawyer demanded for the handing the client to parental custody mentioning that she was only 14 years old but the prosecutor claimed she was 16 and should be sent to jail for the remaining trial period. She was then sent to the Bharatpur prison and was kept together with adult prisoners.

As the site of incident was very far from Hetauda, the lawyer contacted the client's family members through telephone and found that the baby was killed because of bleeding due to pulling of the navel. She asked the family members to bring her birth registration certificate to prove that the client was a juvenile; they brought that from home and was a very important evidence of the client being a juvenile. In the meantime, the age assessment was ordered by the court; was done using the technology of bone X-Ray that suggested her to be 16 years.

The lawyer then moved to Supreme Court with a Habeas Petition demanding the client be transferred to a Juvenile Correction Center for the rest trial period. Executive Director Advocate Mr Ajay Shankar Jha and Training and Legal Director Advocate Mr. Surya Bahadur Pandey pleaded that the client be sent to the correction home mentioning the provisions in Juvenile Justice Procedural Rules 2006, Children's Act 1992. As per the provisions, birth registration certificate shall be taken in first priority as a valid evidence whenever questions about evidences come in case of determining the age. The Supreme Court accepted the birth registration certified by the local registrar as an evidence and ordered for her transfer to the Juvenile Correction Center Bhaktapur (in Kathmandu Valley), the nearest from Hetauda.

During the final hearing, the prosecutor demanded that the client be convicted with life imprisonment claiming that she had killed the baby intentionally; otherwise, she would have shouted to her sister, at least, at the time of giving birth. In addition, the prosecutor said she would have informed about the incident in the evening itself to her sister and her family members.

However, PDS- Lawyer referred to the post-mortem report of the baby, which could not determine the cause of death and reminded the court of the client's acceptance that the baby was born live but was killed later but unintentionally.

The lawyer demanded either the client be acquitted, as she never had Mens Rea to kill the baby and, if not possible for that, be convicted with alternative sentence with the use of discretionary power of the judge for reducing the sentence. In addition, she demanded that the conviction be postponed highlighting that the client herself was a real victim because she was raped her own elder brother several times imposing pregnancy that eventually led to the baby's birth and immediate death.

The judge partially accepted the arguments of the lawyer but denied to record the client's birth certificate, as evidence because the original birth certificate registration book presented to the court did not have dispatch number for that birth certificate. But, the judge used his discretionary power provided by No. 188 of the Chapter on Homicide, The General Code and convicted the client with 3 years of imprisonment far less than the life imprisonment demanded by the prosecution side. The judge explained in the decision that sentencing the client for life imprisonment would be harsh, as she has accepted that the baby was alive at birth, and the prosecutor could not present a solid evidence because the post mortem report could not determine the cause of baby's death.

The client's parents thanked the lawyer for her tireless pleadings and representation throughout the trial to secure their daughter a minimum sentence, while the lawyer assured them of taking the case

to high court to plead for her acquittal soon after receiving the full text of court decision. The client's brother who was a co-accused in the infanticide case got acquitted. He was never charged of incest because the 6-month limitation to file FIR had exceeded at the time she exposed that he had raped her.