

2018 Case Notes

***Editor's Note:** PDS-Nepal pushes to protect the speedy and fair trial rights of all of their clients. Often, cases linger in the system because witnesses fail to appear in court or because of mismanagement of court schedules. People accused of crimes then either languish in custody until their cases are disposed of or, if released, have the burden of returning to court time after time which may negatively impact their education, work and/or family life. For women, the social stigma of being involved in the court system is an additional factor that makes it important for defense lawyers to proactively advocate for dismissal and other remedies that lead to the swift disposition of cases. For instance, in the case described below, PDS-Nepal zealously advocated for the barring of witnesses who fail to respond to the court subpoena.*

Charge: Attempt to Murder

Advocate: Roshan Kumar Jha

PDS-Nepal's client, Ms. Sushma Deula and her husband Roshan Kumar Deula were married three years ago. Within two months of marriage they began to live separately. On April 30, 2017, Sushma was charged with attempted murder with the allegation that on April 30, 2017, she along with several others, tried to kill Roshan with a sharp object. Sushma has consistently denied the allegations. During the trial, the District Court ordered witness examination on July 4, 2017. No prosecution witness responded to the order or appeared in the court on the said date, and the Kathmandu District Court ordered a new date for witness examination on July 10, 2017. Once again, no witnesses appeared. On the same day, PDS-Nepal filed a petition in the court demanding the court bar the testimony of any witnesses who failed to appear based on the right to fair trial, speedy trial, and due process as per the legal provisions of clause 144 and 115 of the Chapter on Court Management of General Code (Muluki Ain)¹. The Kathmandu District Court denied the petition without a legal basis and issued a call for the witness.

To protect the clients right to a speedy trial, PDS-Nepal filed an interlocutory appeal to the High Court on July 19, 2017, claiming that order made by District Court to recall the witnesses was against the law. Once a party has failed to present a witness on the scheduled court date according to Clause 144 and 115 those witnesses cannot testify and as a result PDS-Nepal argued that the witness's testimony should be barred. Unfortunately, the petition filed by PDS-Nepal was quashed by the High Court, which reasoned that as per rule 15(2) of the Government Case Rule (2005)², witness can be provided another date.

Subsequently, PDS-Nepal filed another interlocutory appeal under clause 17 of CM of General Code before Supreme Court on July 21, 2017, raising the issue that a witness can be called based on rule

¹ Number 144 of the Chapter on Court Management of General Code (Muluki Ain) states that "The parties of a case shall themselves cause the presence of their respective witnesses set forth in the complaint and the statement of defense on the date fixed by the office. If any party is not able to cause such presence, such a witness shall not be examined. Similarly, Number 115 of the same code states that "A witness who does not appear on the date fixed for examination of evidence shall be eliminated". Further, if the police or prosecutor are unable to produce their witness on the provided court date, such witness can only be provided another court date if police/prosecutor make a request to the court under provision of rule 15(2) of the Government Cases Rules, 2055 (1999)

² Rule 15(2) of the Government Cases Rules, 2055 (1999) states, "If the police are unable to produce the prosecutors' witness at the date stipulated by the court, a Muchulka (deed or recognizance) has to be prepared mentioning the reasonable cause of such failure in the presence of officials of Village Development Committee or municipality, in the format stipulated in schedule 14 and submitted to the Government Attorney office. Accordingly, if the Government Attorney requests another date to produce the witness along with the Muchulka, then the court may order another date for presenting the witness

15(2) but first the police have to produce a *muchulka* (an affidavit that lists the reasons why the witness was unable to appear) which is given to the public prosecutor, who must then request a new court date. The court itself cannot issue such an order without this formal request from public prosecutor which is what occurred in this case.

The Supreme Court agreed with PDS-Nepal's argument, recognizing this issue as a potential violation of procedural law and issuing an interlocutory order, as per Supreme Court Rule No. 52, that no witness shall testify in this case until a decision has been made. Following this, in defiance of the Supreme Court's order, the District Court reissued its order for the witness to testify in violation of the procedures under the law, causing the Supreme Court to issue a directive on March 9, 2018, that the District Court and the Office of the Attorney General are to respect the parameters of the law in calling witnesses.

This case ended on May 8, 2018 with Sushma Deula acquitted of all charges from the 21 No. Bench of Honorable Bhisma Raj Prasai.

Attached below are the scanned copy of the directive order from the Supreme Court:

01/05/2024
 MA 302719/2024
 2024-05-01 10:00:00
 2024-05-01 10:00:00
 2024-05-01 10:00:00

सबोच्च अदालत, संयुक्त इजलास
 माननीय न्यायाधीश श्री ईश्वरप्रसाद खतिवडा
 माननीय न्यायाधीश श्री सपना प्रधान मल्ल
 आदेश



054-RE-0026

सुमा देउलाको कानून व्यवसायी अधिवक्ता रोशनकुमार झा निवेदक / प्रतिवादी
 विरुद्ध
 सांघी गवाह उपस्थित गराउने नेपाल सरकार विपक्षी / वादी

मुद्दा- ज्यान माने उद्योग ।

श्री काठमाण्डौ जिल्ला अदालत

निवेदकका तर्फबाट उपस्थित विद्वान अधिवक्ताहरू श्री अजय शंकर झा र श्री सूर्य बहादुर पाण्डे तथा विपक्षी वादीका तर्फबाट उपस्थित महान्यायाधिवक्ताको कार्यालयका शाखा अधिकृत श्री योगेश खनाल प्रस्तुत गर्नु भएको बहस समेत सुनियो ।

यसमा सरकारी मुद्दा सम्बन्धी नियमावली, २०१५ को नियम १५(२) बमोजिमको प्रकृया नै परा नगरिएको अवस्थामा काठमाण्डौ जिल्ला अदालतबाट जाहेरवाला लगायतका वादी पक्षका साक्षी उपस्थित गराउनु भनी मिति २०७४/३/२७ मा दोस्रो पटक आदेश गरेको र सो आदेश उपर मुलुकी ऐन, अदालती बन्धोबन्धको १७ नं. बमोजिम निवेदन गर्दा साक्षी आदेशलाई सदर गरी उच्च अदालत पठनबाट मिति २०७४/४/४ मा आदेश भएको भनी प्रस्तुत निवेदन पर्न आएको देखियो । साक्षी, सबैद तिकाउने बुझ्ने सम्बन्धमा सरकारी मुद्दा सम्बन्धी नियमावली, २०१५ को नियम १५(२) मा निम्नानुसारको प्रावधान रहेको देखिन्छ-

“अदालतको आदेश बमोजिम प्रहरीले सरकारी पक्षको साक्षी, गवाहलाई तोकिएको दिनमा उपस्थित गराउन नसकेको अवस्थामा उपस्थित गराउन नसक्नाको मुनासिब माफिकको कारण खोली सम्बन्धित गाउँ विकास समिति वा नगरपालिकाका पदाधिकारी वा भद्र भसादमीहरूको रोहवरमा अनुसूची १४ बमोजिमको ढाँचामा मुचुल्का खडा गरी सम्बन्धित सरकारी वकील कार्यालयमा पेश गर्नु पर्नेछ । सरकारी वकीलले उक्त मुचुल्का समेत संलग्न राखी पुनः साक्षी गवाह उपस्थित गराउनका लागि समय माग गरी अनुरोध गरेमा

(Signatures)



अदालतले त्यसरी माग गरिएको समयमा पुनः साक्षी गवाह उपस्थित गराउने आदेश दिन सक्नेछ ।

उपरोक्त नियम १५(२) मा रहेको प्रावधानलाई हेर्दा अदालतको आदेश बमोजिम प्रहरीले सरकारी पक्षको साक्षी, गवाहलाई तोकिएको दिनमा उपस्थित गराउन नसकेको अवस्थामा पुनः साक्षी गवाह उपस्थित गराउने आदेश अदालतले दिन सक्ने नै देखिन्छ । तर त्यस्तो आदेश दिनु पूर्व केही खास प्रकृया प्रहरीले र सम्बन्धित सरकारी वकीलले अनिवार्य रूपमा पालना गर्नु पर्ने प्रावधान समेत सोही नियम १५(२) मा रहेको पाइन्छ । मिसिल संलग्न कागजातहरूबाट नियम १५(२) बमोजिम मुचुल्का खडा गरी साक्षीको वकपत्रका लागि सरकारी वकीलले अनुरोध गरेको अवस्था देखिएन । कुनै मुचुल्का नगरिएको र सरकारी वकीलबाट अनुरोध समेत नगरिएको अवस्थामा पुनः (दोस्रो पटक) साक्षी उपस्थित गराउन भनी आदेश गरेको पाइयो । कानूनमा रहेका प्रावधानको अनुशरण गर्नु पर्ने दायित्व सबैमा रहन्छ । निश्चित प्रकृया पूरा भएपछि मात्र फल साक्षी गवाह बुझ्ने आदेश गर्नु पर्ने बाध्यात्मक कानूनी प्रावधान रहे भएको अवस्थामा त्यस्तो रूपमा नै परा नगरि गरिने आदेशले कानूनी मान्यता प्राप्त गर्न सक्दैन । नियमावली पनि कानून नै हो । नियममा खास कार्य गर्दा खास-खास प्रकृया अपनाउनु पर्ने गरी प्रावधान समावेश भएपछि त्यसको पालना गर्नु नै पर्दछ । उपरोक्त कानून बमोजिमको प्रकृया पालना नगरी भएको काठमाण्डौ जिल्ला अदालतको मिति २०७४/३/२७ को बेरीतको आदेशलाई सदर गरेको उच्च अदालत पठनको मिति २०७४/४/४ को आदेश बेरीतको देखिदा बदर गरी दिएको छ ।

अतः अदालतको आदेश बमोजिम वादी नेपाल सरकार पक्षले आफ्नो साक्षी गवाहलाई तोकिएको तारिखका दिन अदालतमा उपस्थित गराउन नसकेको अवस्थामा पुनः साक्षी, गवाह उपस्थित गराउने, बुझ्ने आदेश गर्दा वा उपस्थित गराउनु पर्दा सुनुवाई प्रतिरक्षाको अवसर दिलाउने सम्बन्धमा प्रचलित Equality of arms सम्बन्धी सिद्धान्त, स्वच्छ सुनुवाई सम्बन्धी मान्यता तथा सरकारी मुद्दा सम्बन्धी नियमावली, २०१५ को नियम १५(२) बमोजिमको प्रकृया समेतको अनुशरण गर्ने गर्नु होस् ।

सरकार वादी हुने फौजदारी मुद्दामा वादी पक्षका साक्षी, गवाह बुझ्ने सम्बन्धमा उपरोक्त अनुशरण गर्नु गराउनु भनी अन्य सबै जिल्ला अदालतहरूमा समेत लेखी पठाई दिनु । साथै यो आदेशको प्रतिलिपि समेत साथै राखी साक्षी, गवाह उपस्थित गराउने सम्बन्धमा सरकारी मुद्दा सम्बन्धी नियमावली, २०१५ को नियम १५(२) मा रहेको प्रावधानको अनुशरण गर्ने, गराउने अवस्थाका लागि श्री महान्यायाधिवक्ताको कार्यालयमा समेत लेखी पठाई दिनु ।

(Signatures)
 न्यायाधीश

दिने सम्ख्या-२०७४ साल फाल्गुण २५ गते रोज ६ शुभम

(Signature)

Editor's Note: The following case demonstrates the harsh reality of Nepal's sluggish judicial functioning, which consequently threatens the legal and human rights of the accused through unlawful detention and the coercive interrogation. This case also highlights the tenacity of PDS-Nepal's appeals practice. As it can be difficult to piece together the facts of a case after it has been decided, contracting a client during their appeal is not often successful in the broader legal system. However, PDS-Nepal's lawyers undergo rigorous and specific training to determine human rights abuses that can invalidate parts of evidence, testimony, or procedure, in order to grant the clients fair and equal access to justice.

On March 19, 2010, Mr. Padam Bahadur Waiba, a permanent resident of Churiyamai Rural Municipality of Makwanpur district, was arrested for intentional murder of Mr. Bir Bahadur Lopchan. Fifty years old Mr. Waiba, a rickshaw driver by profession, was the sole bread winner of his family of five.

On the night of March 5, 2010, Mr. Bir Bahadur Lopchan was found dead in his resident. Mr. Lopchan lived with his wife and his daughter. Prior to the incident on that day, his daughter had gone to neighbour's house to watch T.V and his wife had gone to the traditional healer for check-up. Upon their return, they found Mr. Lopchan dead in his room. They called Mr. Chandra Bahadur Lopchan (son of the deceased, who was then serving in the Nepal Army). The son arrived next day and filed F.I.R requesting for identification of responsible person.

After twelve days another F.I.R was registered accusing Mr. Padam Bahadur Waiba along with two co-accused: Mr. Panas Moktan and Mr. Manoj Theeng for the murder of Mr. Bir Bahadur Lopchan. One of the co-accused, Mr. Moktan, was involved in a land dispute with Mr. Lopchan, whereas another co-accused Mr. Theeng was a relative of accused Mr. Waiba, whose only connection to Mr. Lopchan was that they had been involved in a physical altercation sometime in the past. Even though there was no direct evidence and no eye witnesses in this case, Makwanpur District Court convicted them on January 19, 2012 on the grounds of Chapter related to Homicide 1, 13(1), and 13(3), with each conviction carrying a life sentence.

It was after this primary trial that PDS-Nepal's advocate Mr. Kamal Bahadur Ghising first met Mr. Waiba, in Bhimphedi Detention Center in his routine detention center visits. Mr. Ghising began representing Mr. Waiba by filing an appeal at the Appellate Court in Hetauda on June 11, 2012. Thanks to interference by the prosecution, acceptance on the petition was delayed until October 9. Mr. Ghising then, on November 20, filed a request to show cause for the delay, and argued that the District Court hearing had been unlawful. The Appellate court finally heard the case on January 22, 2013, and found that the District Court hearing had been lawful and valid. Undiscouraged, PDS-Nepal filed an appeal to the Supreme Court on May 27, and prepared to investigate the case more fully. During the case investigation, it was revealed that Mr. Waiba's statement was taken without his consent and no free legal aid service was provided from the time of arrest which is against the constitutional provisions.

Due to the Supreme Court's limited time, the case was initially scheduled for October 2015, two years later, and then postponed again to January 1. At this hearing, where the defendant was represented by PDS-Nepal's Training and Legal Director Surya Pandey, the Supreme Court

ordered a memorandum to call the plaintiff on March 4. However, the case was postponed again due to availability issues by the justices, and then again on April 30 and September 25 by the lawyers of the co-accused. Then, on December 4 2016 and May 30, 2017, the plaintiff filed a petition to postpone. It was only on May 31, eight years after the initial trial, six years after PDS-Nepal first began representing Mr. Waiba, that the court finally held a hearing. The hearing was brief, as Mr. Pandey's argument consisted of only four parts: that there had been no direct or circumstantial evidence; that the plaintiff had failed to prove the allegation; that the confession before the investigative authority had not been corroborated by any evidence; and that, as the benefit of the doubt must go to the accused, Mr. Waiba must be acquitted. The court quickly ruled in PDS-Nepal's favor. After eight years long imprisonment, the defendant was set free.

Besides direct legal representation to the accused in the court room, throughout the case time, PDS-Nepal's lawyers were in regular in touch with his family members providing counseling and case updates. This demonstrates PDS-Nepal's commitment of going above and beyond to secure the rights of its clients.

Editor's Note: *Illegal and arbitrary actions by authorities have resulted in violations of the rights of many accused, who are forced to cooperate with authorities at great personal expense, even when no credible evidence exists of their guilt. In this case, PDS-Nepal succeeded for the first time in securing compensation for a wrongfully accused man.*

Charge: *Attempted Rape*

Advocate: *Mr. Devraj Pant (Attorney In Charge, Western Region)*

In 2018, the festival of Maghi fell on January 18. Maghi is the holiest day of the year for the Tharu people, an indigenous ethnic group who are frequent targets for police harassment. That day, two brothers, Man Bahadur and Lahanu Chaudhary, were celebrating the festival with their family and friends when they were approached by the police and arrested for raping a woman from their neighborhood. As they were led away, they swore they were innocent.

Devraj Pant, the Attorney In Charge for PDS-Nepal's Western Region of Nepal, was at the Kanchanpur detention center on a routine visit when he picked up Lahanu's case (due to PDS-Nepal's conflict of interest rules, PDS-Nepal cannot represent multiple co-defendants). Immediately, he noticed that the facts as alleged couldn't possibly have happened. The alleged crime scene was a crowded public place which would have generated multiple eye-witnesses, but none stepped forward. A medical report, requested by the victim, had not revealed injuries consistent with rape. Meanwhile, Lahanu told PDS-Nepal that he had been tortured by police during his initial interrogation, and revealed that he had personal medical details with the potential to exonerate him of all charges.

Despite overwhelming evidence in favor of Lahanu, the case continued through the spring and summer. At one point, Lahanu was sent to Kathmandu, a fifteen hour drive away, to engage in a medical examination, with travel and lodging to be paid at his own expense. A day laborer, Lahanu was unable to provide the funds without going into significant debt and further impoverishing his family. He became depressed and despondent over the mounting debt and the loss of work over the months that he spent fighting these charges. Devraj found himself fighting two battles: One for his client's innocence, and one to keep him out of poverty. During the trial, he repeatedly stressed

the harmful effects that this process was having on Lahanu's life and livelihood, and demanded that the state compensate him.

On September 21, the court found both brothers not guilty, and – in a momentous success for PDS-Nepal and for the rights of the accused – ordered that the Kanchanpur District Administration office pay 115,000 NRS to the Chaudary brothers as compensation for damages that they had suffered as a result of the charges.

Editor's Note: *The new Criminal Code of Nepal, enacted on August 17, has opened the door for more fair and efficient resolution of cases. Government Attorneys have significantly more leeway to now critically evaluate the case file ahead of the charge sheet hearing and negotiate with defense counsel. In this case, a PDS-Nepal client was arrested for driving his auto rickshaw for a man who was transporting 1,500 tablets of NitroSun, a narcotic and sedative. Through an intervention with the Government Attorney, PDS-Nepal was able to convince him that there is no professional or legal responsibility for a driver to screen his clients for drugs, and that therefore there was no way for the client to know that he was engaging in an illegal act. As a result, the case was dismissed prior to the charge sheet filing.*

Charge: Drug Case

Advocate: Mr. Sunil Karn

On July 20, 2018, Gautam, a 41-year-old father of two living with his parents, wife, and children in poverty, was arrested while transporting a client in his auto rickshaw, which he had been driving ever since he left foreign employment the year before. The co-accused, Mr. Arjun Ram Sarki, had hired Gautam's rickshaw to travel from Biratnagar to Itahari. The route took them past the Nimuwa Police Checkpoint, where officers found 1,500 tablets of NitroSun, a popular narcotic, and arrested them both on the spot.

Advocate Sunil Karn from PDS-Nepal met Gautam for the first time on August 22, in the District Police Office of Morang, shortly after his third remand hearing. When he reviewed the case file, Mr. Karn noticed that Sarki had corroborated Gautam's story. The next day, Mr. Karn visited the Government Attorney's office, where he spoke with the prosecutors who were working on the case. He asked them to consider that there were no grounds to arrest his client, given the information in the case file. They requested some time to consider this line of thinking, and at the next court date, on September 3, Pokharel and Basti agreed not to file charges. Gautam was released the same day.