Supreme Court, Division Bench

Honorable Justice Jagdish Sharma Poudel

Honorable Justice Dr. Ananda Mohan Bhattarai

ORDER

072-RE-0262

Case: Rape

Advocate Bimala Yadav on behalf of Dhiraj Tamang …..........................1 (Petitioner/Defendant)

VS.

Government of Nepal ……………………………………………….1 (Defendant/Petitioner)

The case-file was, among others, studied after hearing the pleadings by advocate Surya Bahadur Pandey on behalf of juvenile defendant Dhiraj Tamang following the submssion of remarks along with explanation in the context of the petition filed as per No. 17 of Chapter on Court Management of General Code demanding that the order issued by the Kathmandu District Court on 23 February 2016 and the order by the Appellate Court Patan on 8 April 2016 be declared invalid.

When the order was issued by the Kathmandu District Court on 23 February 2016 at a time when copies of the related documents prepared during investigation including by the legal practitioners of petitioner defendant Dhiraj Tamang following his arrest on charge of rape were demanded, it was found that the copies thereof were not likely to be provided now in view of Rule 46(b) of the District Court Regulations, 2052 (1997) as the case was yet to be registered with a court and was still under investigation, besides to be taken care of by a closed bench. Since the order was issued on 8 April 2016 by the Patan Appellate Court stating that Kathmandu District Court (KDC) on 01 March 2016 had issued a decision allowing the related documents to be received concerning the petition filed under No. 17 of Chapter on Court Management against the order, nothing furhter is deemed necessary to be said regarding the previous order of the KDC.

The petitioner is primarily deemed demanding the copies of the documents prepared during the investigation. Article 20 of the Constitution of Nepal guarantees the right to justice and its Sub-Article 2 ensures that the person who is arrested shall have the right to consult a legal practitioner of his or her choice and has the right to get informed thereof. In case the documents prepared in course of the case investigation are not provided to the party concerned or a legal practitioner representing him or her, it will amount to causing obstruction to meaningful defence during the investigation and the right to a fair hearing as provided for in Article 20(9) will not be guaranteed. Besides, the petitioner of 15 years is deemed underage and Clause 19 of the Childrens Act, 2048 (1992) has a clear provision that no cases related to a juvenile defendant can be adjudicated without a defense lawyer. If the party or legal practitioners concerned are not informed of the documents prepared in course of the investigation, the case cannot be called represented or defended in a proper and meaningful way, and this causes a lack of guarantee for a fair hearing.

The acts like arresting a person but not informing him or her of the reasons thereof, and detaining a person after arrest but not providing him or her with the documents warranting his or her detention do not go well with the letter and spirit of the rights guaranteed in Nepal's Constitution and laws.

Therefore, the order issued by the Kathmandu District Court on 26 February 2016 and the order made by the Patan Appellate Court on 8 March 2016 upholding this decision do not match. However, as the petitioner is deemed to have already obtained the copy as things stand now, the situation calling the order to be declared invalid cannot be invoked in view of the case under scrutiny.

As the similar situation may appear time and again in course of the investigation or inquiry of other cases in the future as well, a permanent arrangement is deemed necessary, allowing the party concerned to have access to documents prepared during the investigation within the duly and reasonably stipulated period of time. Besides, it would deem desirable to have in place an appropriate arrangement that will not interfere with the investigation. In this context, the Kathmandu District Court and the Patan Appellate Court have been directed through this order for providing copies of the case-file and documents prepared during the investigation.Execute as per the law.

(signed) (signed )

Justice Justice

Date: Friday, 27 January 2017