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East Timorese Transitional Administration

DISTRICT COURT of DILI
SPECIAL PANEL for SERIOUS CRIMES

In chamber
Judge MARIA NATERCIA, Presiding
Judge Marcelo Dolzani DA COSTA, Rapporteur
Judge Luca L. FERRERO, Member

Case # 2001/01 – The Public Prosecutor *Versus* FRANCISCO PEDRO, *alias CHICO*
Public Prosecutor: Ms. Brenda Sue Thornton
Public Defenders: Mr. Nuno Torres Pinheiro and Mr. Cancio Xavier

I

Brief report of the facts submitted to the Panel

The Public Prosecutor served during the last preliminary hearing held on 11 May the original and copies of her response to the defence preliminary motion, together with a request of amendment of the indictment. She included **Apolinario dos Santos** as accused; despite he formerly was an eyewitness in the first indictment. She read out the conclusions and also submitted a request for a warrant of arrest against **Apolinario dos Santos**. The requested amendment and the warrant of arrest were on a new statement of the victim of the attempted murder; the testimony was not collected yet and the Public Prosecutor requested the Court to hear – in closed session – that person, present out of the Courtroom.

She also asked "clarification with respect to the admissibility as evidence of statements of the accused to the police".

Finally, she requested the Court should not to disclose the name of the new accused during the public preliminary hearing.

The defence entirely objected the request of amendment and the response to her preliminary motion on behalf of Francisco Pedro. For the defence, that was not an amendment, but a *new* indictment. A new defendant in the charges would not only delay the proceedings, but would also result in a further delay of 45 days awaiting for preliminary hearing.

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II

About the refusal to amend the indictment for clearly identify the count against Francisco Pedro

1. **The Public Prosecutor and its duty of impartiality**

After the investigation, the Public Prosecutor shall discharge his or her duty of impartiality to bring a criminal action before a competent court ***if the result so warrants*** (Section 24.1 UR-2000/30). That means, if the investigations previously carried out really convey to the existence of a crime and its perpetrator. Therefore, the Public Prosecutor is authorized to the criminal prosecution only when it was held previous investigation that convinced him or her to consider a conduct as a crime. Otherwise, it would be useless the principle stated in Section 4.2 UR-2000/16: "the public prosecutor shall act without bias and prejudice and in accordance with their impartial assessment of the facts and their understanding of the applicable law in East Timor, without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor".

The impartiality of the Public Prosecutor also is revealed in Section 19.7 of UR-2000/30. It states: if "there is sufficient evidence that a crime has been committed, but the evidence against the suspect is not sufficient and there is no reasonable possibility to bring additional evidence into the case" or "there is insufficient evidence that a crime has been committed" (letters *a* and *e*), the Public Prosecutor may dismiss the case and request the order to release of the suspect. One could also say, in other words, that the previous investigation by itself does not entitle the Public Prosecutor to submit an indictment, considering the premises provided by Section 19.7 UR-2000/30. There shall be sufficient evidence against the suspect.

As shown, the duty of impartiality may even result in dismissing a case. The Public Prosecutor cannot make a charge regardless previous investigation or when such investigation has not sufficient grounds to file the indictment.

2. **The Court and its duty to assess the indictment**

UR-2000/30 endowed the courts to look over those duties assigned to the Public Prosecutor.

There are at least three moments for the Court to role its ongoing role in assessing the indictment.

Firstly, when the defence raises a motion grounded on defects in the form of the indictment, therefore prior to the commencement of the trial. At that stage, the Court could even assess the legal requirements of the indictment. Prior the commencement of the trial, also the Public Prosecutor, may amend the indictment, but only with the leave of the Court (Section 32.1 of UR-2000/30).

Secondly, after the trial has begun and prior to final decision in the case, "if the evidence at trial establishes qualification of the crime or crimes which is different than that which appears in the indictment may, at the request of the Public Prosecutor, allow the amendment of the indictment" (Section 32.2 of UR-2000/30).

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The aforementioned rules provide that the duty of impartiality of the Public Prosecutor and the duty of the Court to control it, together with the legal requirements of the indictments, persist until the end of the proceedings.

The last moment is at the end of the trial: the accused shall not be convicted of a crime that was not included in the indictment or which is a lesser included offence of an offence deemed to be included in the offence stated in the indictment (Section 32.2 of UR-2000/30).

The first conclusion is:

The Court shall play an indispensable role on controlling the indictment, especially on fulfillment of the requirements provided by Section 24.1 of UR-2000/30.

3. **The right of the defence to allege defects in the indictment**

The defence has the right to raise motions at any time, since prior to the commencement of the trial. Those motions may be:

(a) *preliminary*, if the matter issued is one of those provided by letters *a, b* and *c* of Section 27.1 of UR-2000/30; or
(b) *others for appropriate relief*, after a case is assigned to a panel or judge, as provided by Section 27.2 of UR-2000/30.

To allege defects in the form of the indictment is a classic example of preliminary motion (UR-2000/30, Section 27.1.*[a]*).

Those defects have their definition by excluding one of the elements required in Section 24.1. For example, it is absolutely failing an indictment that states the accused is Mr. "whatever his name is" in place of writing the name and particulars of the accused (Section 24.1[*a*]). The Public Prosecutor is not allowed to present an indictment against an uncertain and unidentified person. How many persons named Joao live in East Timor? The particulars of the accused shall be as detailed as possible in order to make sure to the Court the defendant behind the bar is really the same one mentioned in the indictment. This is a fair example, but likely to be true in East Timor.

Second conclusion:

Until the trial has not commenced, the defence may allege failures in the indictment by filing motions.

4. **The consequences of refusing to amend the indictment by the Public Prosecutor**

On playing such a role, the Court shall verify about the alleged defects and therefore shall grant the motion with the purpose of ordering to the Public Prosecutor the due amendment. It would make no sense the Court grant the motion and order to the accusation to provide the adjustment and even so the Public Prosecutor still could insist remaining with the same words and expressions considered inaccurate by the previous Court decision.

For instance, the Public Prosecutor seems to be very concerned about the individual criminal responsibility. Nevertheless, by reproducing the words of the law ("to aid, to abet or otherwise to assist"), the Public Prosecutor actually harms the

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right to a defence against a "complete and accurate description of the crime imputed to the accused".

Thereby, the judge has the power to order the amendment, to suggest the way to fulfill the requirements of law, but not – he himself – to amend the indictment. If the Public Prosecutor does not agree about the released decision, he or she cannot refuse to fulfill it, but he or she shall file the appropriate appeal as provided by the following Section 27.4[b].

Third conclusion:
It is not allowed for the Public Prosecutor to refuse to make the amendment.

5. **The power of the judge to dismiss the indictment.**

At this time, one can make a single question: Is it possible to dismiss a case before the trial?

The answer is committed to the judges as provided in Section 27.3:

> *Decisions on motions, except as provided in Sections 23 and 27.4 of the present regulation, are not subject to interlocutory appeal.* ***The granting of a motion to dismiss the case for any reason shall be deemed a final decision in the case and shall be subject to appeal as provided in Part VII of the present regulation.***

This Court has been suggesting to the Public Prosecutor to make the amendment by granting preliminary motions grounded on defects in the indictment. This suggestion should be read indeed as an order.

However, the order was vain. The Public Prosecutor insists either by using the same inappropriate expressions or by amending indictments regardless the instruction released by the Court.

The penal prosecution is leaded by universal principles of Justice. The presumption of innocence (erroneously called sometimes as a non-guilty presumption) and the right to the due process of law arise as one of the most imperative standards in international human rights covenants. Those principles cannot be challenged while interpreting any rule and shall be disseminated throughout every section in the regulations issued by UNTAET. Judges and Courts shall be the pledge of those principles full accomplishment. If a policy of one of the parties in trial or a conduct are not conform to them, the Court or the judge is entitled not to apply it or to declare it invalid.

Section 2 of UR-2000/30 provided the right to a fair trial, among many other world-known guarantees originated from the due process of law principle:

> "All persons shall be equal before the courts of law. In the determination of any criminal charge against a person or of the rights and obligations of a person in a suit of law, that person shall be entitled to a fair and public hearing by a competent court (...)"

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By insisting in alternative counts and refusing to adjust the statement of the facts to the charges, the Public Prosecutor reveals their actions as an abuse of his or her right to the prosecution. The Public Prosecutor, furthermore, breaks one principle, not only a rule – the right to a fair trial.

The last conclusion:

A Court shall dismiss the case before the trial in event of granting a motion grounded on defects in the indictment that jeopardizes and constrains the right to a fair trial of the accused. By refusing to amend the indictment to adjust it according to the requirements of the Section 24.1 of UR-2000/30, the Public Prosecutor makes worthless his task for the accusation, since we really do not have an indictment if the description of the crime is not accurate and complete.

6. The case before the Court and its solution

In this very case, firstly we had an indictment that does not fulfill the requirements set up in the Section 24.1. The Court invited the Public Prosecutor to make an amendment. That was an opportunity to remedy a simple irregularity through a single amendment.

The Court agrees on what stated by the Public Prosecutor in point 7 of her response. "The requested amendment does not change in anyway the allegations against Francisco Pedro". That means that the new indictment, as the former one, does not fulfil the requirements pursuant Sect. 24.1 of U.R. 2000/30 and does not accomplish the order of this Court.

The Court reaffirms the grounds in the decision rendered on last 4 May. In order to avoid repeating what is entirely considered and recorded, this Panel remarks that a charge cannot include all the possible alternative conducts provided by the law. Moreover, when one conduct logically excludes another.

In accordance to the jurisprudence of ICTY (International Criminal Tribunal for the former Yugoslavia), the verbs *to assist, to commit, to abet* or *otherwise to assist* a crime are not all compatible. In fact, an individual can be said to have committed a crime when he physically perpetrates the relevant criminal action. As opposite, to the commission of a crime, *aiding, abetting* and *assisting* is a form of accessory liability. "The act of assistance needs not to have caused the act of the principal"[1].

The distinction between *participation in a common criminal plan or enterprise*, on one hand, and *aiding and abetting a crime*, on the other, is also supported by the Rome Statute for an International Criminal Court. Its Article 25 distinguishes between a person who "contributes to the commission or attempted commission of (...) a crime", where the contribution is intentional and done with the purpose of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime; from a person who, "for the purpose of facilitating the commission of such a crime, aids, abets or

[1] Prosecutor v. Anto Furundzija, case n. IT-95-17/1-T, Judgement May, 10 dec 1998; Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, case no. IT-96-23-T & IT-96/23/1-T, Judgement 22 February 2001.

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otherwise assists in its commission or its attempted commission, including providing the means for its commission".

Therefore, the action of one perpetrator who *commits* or of more co-perpetrators who participate in the commission stands separate from the conduct of abettors and aiders. So different that they cannot belong to the same person when committing the same crime. They are antithetical.

For the reasons said above and for those already mentioned in the prior decision, the Court deems that the charges are not accurate, pursuant to Sect. 24 of U.R. 2000/30.

Furthermore, the requested amendment – instead of being more accurate, clarifying the conducts of the accused Francisco Pedro – compounded the violation of the rights of the defense. In fact, the Public Prosecutor transformed the witness Apolinario dos Santos in accused.

The prosecution against Apolinario dos Santos was based on "new evidence": a witness who was standing out the courtroom during the preliminary hearing.

Even disregarding the point that the alleged new accused had no counselor to receive and to reply the amendment, the fact that a witness can be suddenly transformed in accused reveals both the feeble investigations and the recklessness in the accusation. The investigation should come before the indictment; further evidences shall be a rare exception.

Last but not least, the Court remarks that also the charge related to **Apolinario dos Santos** repeats the same inaccuracy pointed out above. The Public Prosecutor alleged that he was the vehicle driver who transported the victims and that he threatened one of them. Such conducts for sure cannot be defined as *committing* a crime of murder, since are clearly accessory to the principal imputed to the accused **Francisco Pedro**.

III

Rules about the accused statements

UNTAET Regulations are quite clear about the weight of the statement of the accused during the proceedings.

According to Sect. 33.1 of U.R. 2000/30, during the trial, "each party is entitled to call witnesses and present evidence". "Unless otherwise ordered, evidence at trial shall be presented in the following sequence: (a) the statement of the accused, if he or she chooses to make a statement; (b) evidence of the prosecution; (c) evidence of the defence". The use of singular *statement* and the present tense *chooses* can only mean that letter (a) refers just to the statement of the accused during the trial, pursuant to Sect. 30.4 of U.R. 2000/30. Otherwise letter (a) would have been likely "*the statements the accused chose to make during the investigation*".

This interpretation is confirmed by Section 33.3 of U.R. 2000/30, which requires that "evidence shall be presented in the most direct manner possible". Obviously the statement made in front of the police is not the most direct manner possible to present the statement of the accused to the Court.

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More than that, Section 33.4 of U.R. 2000/30 provides about the previous statements of the accused, saying that "a statement or confession made by the accused before an Investigating Judge may be admitted as evidence if...". That is, in other cases, the previous statements cannot be admitted as evidence.

This means that, if the accused chooses not to make a statement during the trial, the judge can use as evidence only the statements made in front of the investigating judge and not those made in front of the police and/or the Public Prosecutor.

In the reverse to what arguments the Public Prosecutor, the judgments of this Court do not rely on those statements collected before the police. Indeed, the Court already admitted as evidence only the statements made by the accused during the preliminary hearing (cases: *P.P. vs. Julio Fernandez, P.P. vs. Carlos Soares Carmona* and *P.P. vs. Manuel Leto Bere*) because believes that the statements made in front the Panel have the same legal value of those made in front of the Investigating Judge, pursuant to Sect. 24.3 of U.R. 2000/30.

The same can be said for the statement made in front of the Panel during the review hearing about extension of detention, pursuant to Sect. 20.11 and 20.12 of U.R. 2000/30.

For these are the rules, the only statements of the accused that can be deemed as evidence are those made in front of a judge: (a) the investigating judge during the investigation, (b) the Panel after the submission of the indictment or during a review hearing about pre-trial detention, (c) the Panel during the Preliminary hearing and, finally, (d) the Panel during the trial.

This is consistent with the principle of fair trial: the only statements that can be used are those collected by a third and impartial party – the judge or panel – in the presence of both the Public Prosecutor and the Defence Counsel.

There is only one exception: in the proceeding of admission of guilt, any kind of statement can be used as evidence [Sect. 29A.1, (c), (*iii*)]. But the exception proves the rule, and it is consistent with the decision of the accused that pleaded guilty to the charges, *after the judge determined whether he/she understood the nature and consequences of the admission of guilt and he/she had sufficient consultation with defence counsel.* The consultation and the consequences include the legal value of prior statements as evidence.

However, it cannot be said that the statements made in front of the police and/or the Public Prosecutor are useless.

First of all, they are part of the investigation and therefore the basis for the prosecution of the accused and for the alleged charges.

They can be also used to assess the ground for the detention, pursuant to Sect. 19.1 and 20.7 U.R. 2000/30.

IV

After the aforementioned reasons, the Special Panel decides:

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(a) to reject the requested amendment of the indictment presented by the Public Prosecutor (to transform the witness **Apolinario dos Santos** in accused), and consequently also to dismiss the request of warrant of arrest;
(b) to dismiss the case related to the accused **Francisco Pedro** *alias* **Chico**, consequently also to revoke the substitute measures;
(c) to order to the Court clerk to hand back the file to the Public Prosecutor; and
(d) to confirm that the statements of the accused before the police cannot be deemed as evidence during the trial

One copy of this decision shall be previously served to the parties in order to avoid a time-consuming announcement and translation during the hearing scheduled to next Wednesday, 23.

Rendered in chamber,
Dated in Dili, on 22 May 2001.

Judge MARIA NATERCIA, Presiding

Judge Marcelo Dolzani DA COSTA, Rapporteur

Judge Luca L. FERRERO, Member

Served on the Defence
22/05/2001

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