

IN THE COURT OF APPEAL OF EAST TIMOR

(Coram: Claudio Ximenes, P., Fredrick Egonda-Ntende, J.A., & Jacinta C. da Costa, J.A.)

Criminal Appeal No 25 of 2001

(Arising from Criminal Case No. 09/PID.C.G/2001 of the Special Panel of Dili District Court)

Lino De Carvalho

Appellant

Versus

Prosecutor General

Respondent

JUDGEMENT OF FREDRICK EGONDA-NTENDE, JUDGE OF APPEAL

1. We have agreed to issue four orders in this appeal, as I presume will be set out in the leading Judgement of this court. Unfortunately for me, that judgment is in Portuguese, a language I do not understand, and there are no translation services, to assist me in that regard. I have therefore decided to briefly explain my reasons for the decisions made today.
2. This is an appeal from an interlocutory decision of the Special Panel for Serious Crimes of Dili District Court. The appellant seeks to overturn the decision of the trial court, allowing the respondent in this court, the Prosecutor General, to file an amended indictment. The appellant seeks an order from this court to order the court below to proceed to trial on the old indictment only in respect of the case against the appellant. The respondent opposes this appeal. The respondent also contends that this appeal was improperly admitted to this court as no leave was granted by the court of appeal for this appeal to be filed.
3. The appellant was charged with one count of murder contrary to Section 340 of the Indonesian Penal Code and three counts of maltreatment contrary to Section 351 of the Indonesian Penal Code. Counsel for the Appellant made an application to the trial court, seeking several orders. Firstly he sought for an order of severance of the charges against the appellant from those of others jointly charged with the appellant but not before the court. Secondly the appellant sought an order dismissing the charge for murder for being incurably defective as it charged the appellant with both commission of the main offence, and aiding, abetting or otherwise assisting in the commission of the main offence, without facts supporting aiding, abetting and or otherwise assisting in the commission of the crime. Lastly he sought an order dismissing the three counts of maltreatment, as the special panel had no jurisdiction to try those offences.
4. The respondent had no objection to the appellant being severed from the indictment with other people. She however applied that an amended indictment be filed against the appellant for various counts of murder, and crimes against

humanity. The court below accepted her request, and it is from that decision that the appellant appeals.

5. Before the appeal can be considered there is the question of whether the appeal is properly before this court. The Prosecutor General contends that it is not, as no leave to appeal was granted by this court as required under Section 27 of the Transitional Code of Criminal Procedure, Regulation 2000/30. Counsel for the appellant did not address this point specifically.
6. On the 20th August 2001 the appellant filed in this court an application for leave to appeal. On 28th August 2001 the President of the Court granted leave to appeal without holding a hearing or notifying the parties that a hearing will be held to hear this matter. On 14th September 2001 the Respondent filed both a response to the application for leave and a motion to dismiss the interlocutory appeal filed on 20.10.2001. This double application was never scheduled for hearing but the appeal was fixed for hearing on 19th October 2001. At the hearing the respondent raised the question of the validity of the appeal, arguing that this court had granted no leave.
7. Section 27.4 of the Transitional Code of Criminal Procedure governs this matter. I shall it out in full. "27.4 The Court of Appeal may grant leave to appeal from a decision on a motion where:

(a) the decision from which appeal is sought would cause such prejudice to the case of the party seeking leave to appeal as could not be cured by the final decision of the trial;

(b) the issue on which appeal is sought is of general importance to proceedings before the courts of East Timor; or,

(c) upon other good cause being shown by the party seeking leave to appeal."

8. The question is can a single judge of the court of appeal exercise the jurisdiction granted to the court under this section? I think not. Exercise of Jurisdiction by the court is governed by Section 15.2 of Regulation 2000/30, as amended by Regulations 2001/18 and 2001/25, generally, except where there are specific provisions to the contrary. It reads, "15.2 The judges shall sit in panels of three judges. The panel shall take its decisions by majority vote. The vote of each judge shall have equal weight." For the court of appeal to be properly constituted, it must be composed of a panel of three judges.
9. I understand that the single judge who heard this matter was of the view that since no procedure had been set under Section 27 of the Transitional Code he could call into aid the provisions of Section 12A.12 which empower the President to appoint a single judge of the court of appeal to hear interlocutory appeals in respect of some detention orders made by the investigating judge. Section 12A specifically deals with detention orders and appeals there from to the Court of Appeal. It has no relevance to other interlocutory appeals. The legislature, in its wisdom, did not extend the powers granted here to the President, to other areas where an interlocutory appeal was allowed, albeit with leave of court. As no power or authority was granted, it could not just be assumed, as the single judge so

erroneously did in this case. This was not just a matter for procedure. It is a jurisdictional issue.

10. In agreement with the all the judges of this panel I hold that the single judge had no jurisdiction to entertain the application for leave to appeal, and the decision made by the single judge of this court is immediately vacated.
11. There is one other aspect of this matter that I wish to comment upon. And that is a judge making a decision without hearing parties or hearing from one party only, and in this case, it was only the applicant. No notice of hearing of the appellant's application for leave to appeal was given to the opposite party. Probably no formal hearing was held. It has been suggested that holding a hearing is excessive formalism, and that if a court has jurisdiction it should go ahead to decide a motion, even without holding a hearing, as apparently was done in this case.
12. It is an international human rights norm, enshrined in the International Covenant for Civil and Political Rights that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (See Article 14 thereof.) This has been restated in more or less the same words in Section 2 of the Transitional Code of Criminal Procedure headed Fair Trial and Due Process. If there is an issue in a criminal proceeding that is in contention between the parties, a court ought not to decide the same without holding a hearing, a fair and public hearing of the parties before making a decision. So it must be with all motions though there may be exceptions allowed by law. To do otherwise is to infringe the right to a fair and public hearing. Had the single judge who had the application for leave to appeal had jurisdiction to do so; I would still have vacated that order, if it were made without hearing the parties, or one of the parties.
13. During the hearing of this matter we heard from the Prosecutor General why the application for leave should not be granted. The appellant stood by the application and the written legal brief filed in the matter. The merits of the appeal too were argued before us. We have decided in light of having heard the parties, the written legal briefs filed by each side, the desire that all interlocutory matters before us in this case be decided expeditiously to allow the main trial to proceed, and protecting the accused's right to a trial without delay, that we shall examine the application for leave before this court. If we find the application justifies grant of leave, we shall grant the leave and proceed to determine the appeal as we have had an oral hearing on its merits too.
14. The application for leave does not cite any specific ground among those found in Section 27.4 of the Transitional Code as the basis for the application. It just states intended grounds of appeal and why the court below should be reversed, leaving it to the court, to find justification. That is not good enough in my view. The application should show which of the grounds upon which it is authorised to make this application it relies upon. It could be any one of the following; "(a) the decision from which appeal is sought would cause such prejudice to the case of the party seeking leave to appeal as could not be cured by the final decision of the trial. (b) the issue on which the appeal is sought is of general importance to the proceedings before the courts of East Timor; or (c) upon good cause being shown by the party seeking leave to appeal." It is not clear as to which of these three

grounds he relies upon for his application. Not having attempted to comply with Section 27.4 of the Transitional Code of Criminal Procedure, and to relate the grounds contained therein to the questions involved in this intended appeal, I find this application without merit.

15. On the other hand if one considered the question of 'deficiency' of an indictment or form of indictment to be of general importance to proceedings of the courts in East Timor, it may be possible to consider the application, as in substance containing an important question to be decided in order to guide the courts in East Timor. This is more so as it has been suggested that the court below has made inconsistent decisions on this issue. For that reason it may be beneficial to the proceedings of the courts in East Timor if this appeal was heard, and the question related to charging the commission of an offence together with aiding abetting and or assisting in the commission of that offence in one count is dealt with. With some reluctance on my part, I agree to grant leave for this appeal to be heard.
16. The gist of the appellant's first ground of appeal seems to be set forth in paragraphs 13 and 14 of the interlocutory appeal. I set them out. "13. In this Preliminary motion the defence requests the Special Panel pursuant to its power to consider the charge laid out against Lino de Carvalho of, with deliberate intent and premeditation, aiding, abetting, or otherwise assisting in the murder of Sabino dos Santos (or Sabino Pereira), not complying with the law. 14. And for the Special Panel to invite (order) the Prosecution to amend the Indictment, changing the charge to be in conformity with the statement of the facts, or including enough facts to support the charge set forth against the accused. The special panel must set up a certain limit for the Prosecution to file an amended indictment, this occasion an indictment that can be said to be in accordance to the criminal procedure rules in force in East Timor."
17. In paragraph 16 the appellant states, "The defence stands that the Count 3 of the initial indictment doesnot meet this standards required by the law. The Defence believes that this inaccuracy is due to a misunderstanding on the real meaning of the concepts of <<aiding>>, <<abetting>> and <<assisting>> in a crime, in opposition to the concept of <<committing>> the same crime."
18. In dealing with this matter, the court below stated, "13. The Court deems that the statement of the facts is concise, according to Section 24.1(c) of UNTAET Regulation 2000/30. At this stage the Court will not rule on relevance of the facts. If the Defence is of the opinion that the facts presented by the PP in the indictment are not enough or irrelevant to support the charge, he will have an opportunity to submit it to the Court during the trial and produce evidence to support its submissions."
19. "14. The Court agrees with the Defence that there is a distinction between committing the crime and aiding, abetting and assisting the same crime. But the question is not to distinguish the principal that commit the crime and the accomplices that assist the principal perpetrating the crime. Here, the Court has to decide whether or not the PP has to precise in the indictment and for each count of the charge, the mode of responsibility for a crime; and in the present case if the PP is obliged to clarify that Lino de Carvalho is alleged to have committed the

crime as a principal or by aiding, abetting or otherwise assisting in the murder of Sabino do Santos.”

20. “15. Section 24 of UNTAET Regulation 2000/30 requires only that the indictment includes a complete and accurate description of the crime imputed to the accused and a concise statement of the fact upon which the accusation is made.”
21. “16. The law does not require that the PP specify in the indictment the mode of the responsibility for the crime. The Defence was not able to submit to the Court the grounds of such specification. It only referred to some decisions of International Criminal Tribunal for the former Yugoslavia to define the concepts of aiding, assisting and committing a crime. It was advanced by the PP and appeared to the Court that even in those cases cited by the Defence like in some other indictments of ICTY, it is not specified the mode of responsibility of the crime.”
22. The court below rejected the appellant’s motion that the charges relating to aiding, abetting or otherwise assisting in the murder of Sabino Dos Santos should be dismissed at this stage. I have no reason to differ from the reasoning of the trial court and the orders it made at this stage of the trial. All the other matters raised by this appeal are matters that can be dealt with by a final decision of the trial court without any prejudice to the appellant. I would accordingly reject this appeal. I would order that this matter be remitted back to the trial court to proceed with the trial of the case in the manner ordained by the law.

Dated and Signed at Caicoli, Dili this 29th day of October 2001

Fredrick Egonda-Ntende
Judge of Appeal