



ETTA

East Timor Transitional Administration

DISTRICT COURT of DILI

SPECIAL PANEL for SERIOUS CRIMES

Before:

Judge Maria Natercia Gusmao Perreira, Presiding

Judge Sylver Ntukamazina

Judge Antero Luis

Case No.18/2001

The Public Prosecutor

Versus

Benjamin Sarmento

Romeiro Tilman

Joao Sarmento

Domingos Mendonca

The request for the release of the accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento

For the Prosecutor:

Essa M. Faal

Shyamala Allegendra

For the Defense:

Siphosami Malunga and Lizete Quintao, for the accused Benjamin Sarmento

Silvia de Bertodano and Gancio Xavier, for the accused Joao Sarmento

Gilbert Sembrano, for the accused Romerio Tilman

1. On the 13th February 2002, during the hearing, the Defense for the above-mentioned accused persons filed a request for the release of the accused Benjamin Sarmiento, Romerio Tilman and Joao Sarmiento.
2. The Defense for the accused Benjamin Sarmiento submitted first an application for immediate release made in terms of section 47 of UNTAET Regulation 2000/30, for the following reasons:
 - The last order of detention of the Judge Benfeito Mosso Ramos is a nullity and that, if the detention of the accused is pursuant to that order, it too is a nullity
 - Assuming that the accused is not detained pursuant to judge Ramos order of 1 September 2001 but pursuant to an earlier order regarding the rape allegation, in the absence of a valid detention regarding the rape case, the accused should be released.
 - The only valid and legal order regarding the detention of the status of the accused in this case is that issued by the Special Panel in February when it released the accused.
- 3 The defense of the accused Benjamin Sarmiento submitted also an application for release of the accused Benjamin Sarmiento, based on substantial grounds, pursuant to Section 29.5 UNTAET Regulation 2000/30.
- 4 The defense argued that there are no reasons and no exceptional grounds, according to Section 20.12 of UNTAET Regulation 2000/30, to keep his client in detention. The Public Prosecutor must show the exceptional circumstances provided by Section 20.12 UNTAET Regulation 2000/30. There is no reason to believe that the accused will flee to avoid criminal proceedings. He came back voluntarily from West Timor. It would not be the first time the court released an alleged militia member, and the Court previously released the accused himself. The Court could grant substitute measures and order the accused to report to the local Civpol. There is also no reason to be afraid that the accused will pressure the witnesses or the victims. The fact that the alleged offence with which the accused is charged is serious does not mean

that the accused has to stay in jail. Serious charges are not enough to provide grounds for custody. The accused should be released.

- 5 The defense of the accused Joao Sarmiento also filed under Section 27.2 UNTAET Regulation 2000/30 an application for an immediate release of the accused, or in the alternative for the imposition of substitute measures. She asked the Court to nullify the Decision of Judge Ramos, which was made without jurisdiction and in violation of the law.
- 6 The defense submitted that there are no reasonable grounds for detention under Section 20.8 UNTAET Regulation 2000/30 as read in accordance with Article 9.3 of the ICCPR, and therefore the defendant should be released.
- 7 The defense also argued that there are no exceptional grounds for extension of detention in this case according to section 20.12 UNTAET Regulation 2000/30. Or, in order to justify a period of pre-trial imprisonment for a period of longer than nine months (section 20.8 and 20.9 UNTAET Regulation 2000/30), the Court must find that there are exceptional, as opposed to simply compelling, grounds.
- 8 The defense stated also that the gravity of the offense is not a ground for detention under section 20.8 of the rules or under any recognized principle of international law. For the defense, it is not sufficient to simply say that the circumstances are the same as they were when the order for detention was last made. The case for release gets stronger as the pretrial period lengthens.
- 9 The defense submitted also that the defendant should be released for the purpose of guaranteeing equal treatment with the codefendant Domingos Mendonca who is awaiting trial on conditional release. It is submitted by the defense that there is nothing material to distinguish his case from the case of this defendant. Both Defendants are charged with similar crimes at the same level of responsibility. Also for the defense, there is nothing to suggest that the defendant is more likely to flee the jurisdiction, or interfere with witnesses, than his co-defendant Domingos Mendonca.

- 10 Lastly, it is submitted by the defense that if the Court is still of the view that there are reasonable grounds for detention under Section 20.8, the defense requests the court to order substitute restrictive measures as an alternative to an order of detention.
- 11 The defense of the accused Romerio Tilman adopted for his client all the submissions of the Public Defender Sipposami Malunga with respect to the nullity of Judge Ramos decision. The Defense emphasized the rights of the accused under detention to have, upon request, the grounds of his detention reviewed at regular intervals, pursuant to section 6.3 UNTAET Regulation 2000/30. He also submitted that there are no exceptional grounds, pursuant to Section 20.12 to keep his client in jail.
- 12 For the defense the long period of detention of the accused (Detention of about two years, from February 2001 until now) can be considered as an exceptional circumstance for the release of the accused. This Court could refer its previous decision in Joao Franca decision when it says: *"The Court agrees with the Defense that the length of the pretrial detention constitutes an exceptional ground to release the accused. Pursuant to Article 9 (3) of the International Covenant on Civil and Political Rights, anyone detained on a criminal charge has the right to trial within a reasonable time or to release pending trial: "anyone arrested and detained on a criminal charge shall be brought promptly before a judge or other officer authorized by the law to exercise judicial power and shall be entitled to trial within a reasonable time or to release"*.
- 13 The PP objected to the application of the Defense of Benjamino Sarmiento saying that the application is not properly before the Court in terms of the procedure lay down in Section 47 of Regulation 2000/30. The papers provided to the prosecution and to the Court by the defense are incomplete. The special Panel does not have jurisdiction to consider the application under Section 47 UNTAET regulation 2000/30. Therefore the Prosecution asked the Court to dismiss the application without any further consideration.

- 14 The PP opposed the application of release of the accused made by the defense, and requested that the three accused persons be detained until the end of the trial. For the PP there is likelihood that the accused persons will flee to avoid criminal proceedings, that witnesses may be tampered with or their safety jeopardized, the safety of the accused persons cannot be assured and that there are likelihood that the accused persons could commit other criminal offences.
- 15 The PP advanced that the issue of the detention of the 3 accused has already been decided on the 1st of September 2001. That decision is still valid and pending. That order cannot be revisited
- 16 For the PP, it is true that pursuant to Section 6 (k), the accused if under detention has the right, upon request, to have the grounds of his detention reviewed by a competent judge or judges at regular intervals. However, the Court cannot review the detention if there are no new grounds. In the present case, it is the PP's submission that the defense failed to show any new ground, any new element.
- 17 The PP submitted also that the accused persons are charged with numerous very serious crimes. The length of present pretrial detention is quite normal for the accused, which are charged with many counts of crimes against humanity.
- 18 The PP stated also that a similar application had been made previously and a decision was issued to extend the detention of the accused. There is no reason to change this similar order made by the Court. He then opposed the release of the accused because the grounds, conditions and circumstances on which their detentions were previously decided and extended the last time have not changed. The risk of them fleeing has not decreased.
- 19 This court has already decided on the request for immediate release made in terms of section 47 of Regulation 2000/30. During the hearing on the 14 February 2002, it was decided that this Court does not have jurisdiction to hear the habeas corpus request against the decision of Judge Ramos. The Special Panel forwarded that application to Dili District Court.

- 20 However, the reasons advanced within the application of the habeas corpus, namely the nullity of the order of judge Ramos were submitted by the defense of the 3 accused, together with the substantial grounds for the release of the accused. This Court will assess the issue of the nullity of judge Ramos' decision, before analyzing the substantial grounds for the release of the accused presented by the defense.

With respect to the nullity of the decision of Judge Ramos

- 21 The first issue this Court has to analyze is the jurisdiction to change a decision made by another judge from the same panel. Section 55 (2) says that an act done by any official is a nullity which cannot be remedied without new proceedings and may be found by the court at any stage (...)"'. The terms " may be found by a court at any stage' means that the court which is dealing with the case can find the irregularity which falls within the scope of the points (a) to (f) of UNTAET Regulation 2000/30. This Panel will be therefore competent to find a nullity judge's Ramos decision in the case that it falls within the points mentioned above.
- 22 The defense submitted that judge'Ramos decision is a nullity because it violates points (a) and (d) Section 55.2 of UNTAET Regulation 2000/30, since he seated alone in the case, while, according to section 20.11 UNTAET Regulation 2000/30, only a panel duly constituted as such can hear matters relating to the detention. For the Defense, there is no doubt that the presence of the full panel of judges was required by law for the decision on the detention to be made. It is therefore submitted by the defense that Judge Ramos made his decision without jurisdiction to do so.
- 23 With respect to that submission, the PP argued that Judge Ramos had jurisdiction to decide on the issue of detention.
- 24 Section 18.1 UNTAET regulation 2000/11 provides that there shall be a presiding judge on each panel who will be the judge to whom the case was initially distributed.
- 25 Sections 20.11 and 20.12 UNTAET Regulation 2000/30 says, "...the Judge to whom the matter has been referred upon the filling

of the indictment may, at the request of the Public Prosecutor, order the continued detention of a suspect..."

- 26 During the preliminary hearing, Section 29.5 of UNTAET Regulation 2000/30 allows the Panel of judges or the competent judge, at their own motion or at the request of the accused or his or her legal representative to assess the necessity of the detention of the accused.
- 27 It is clear, from the provision of UNTAET Regulation 2000/30 mentioned above (Section 18.1, 20.11&12, and 29.5), that before the preliminary hearing a judge to whom the matter has been referred upon the filing of the indictment can decide the extension of detention of the accused. At and after the preliminary hearing, it will be the Panel of judges or a competent judge.
- 28 The defense submitted also that Judge Ramos decision is a nullity pursuant to section 55.2 (d) UNTAET Regulation 2000/30. This section considers as a nullity an act made " where the suspect, the accused or the legal representative were absent from the proceedings where their presence is required by law or UNTAET Regulations". The defense is arguing that it is a legal requirement for a party to any proceeding to be afforded an opportunity to be heard by a tribunal before any decision is made.
- 29 It is true that one of the fundamental rights to a fair trial is to afford to any party in the proceedings an opportunity to be heard by a tribunal before taking any decision.
- 30 Section 2.2 provides that all persons shall be equal before the Courts of law. In the determination of any criminal charge against a person or the rights and obligations of a person in a suit of law, that person shall be entitled to a fair and a public hearing by a competent established in accordance with UNTAET Regulations..."
- 31 Article 9 (3) of the international covenant of civil and political rights provides that: " Anyone arrested or detained on a criminal charge must be shall be brought promptly to justice before a judge

or other officer authorized by law to exercise judicial power and shall be entitled to trial with a reasonable time or to release.

- 32 And Section 20.1 requires that a hearing be conducted in reviewing the necessity of further detention of an accused. It is said " At the hearing the suspect must be present, along with his or her legal representative, if such a legal representative has been retained or appointed".
- 33 All section 20 is called review hearing. Does it mean that all the reviews of detention made within that section have to be done in a hearing?
- 34 That is in accordance with the opinion of the Court of appeal Judge Frederic Egonda Ntende when he says that: "The presence of an accused at his trial, or at a proceeding where a matter that affects him is an issue, is one of the tenets of a fair hearing provided for in Section 2.1 of Regulation 2000/30. The accused is entitled to be heard before a decision, especially an adverse decision, is made in the course of the proceedings for which he has been arraigned before the court" (Court of Appeal, Julio Fernandez &19 others Versus The Public Prosecutor).
- 35 However, Section 20.9, 10, 11 &12 do not follow the example of Section 20.1 and oblige expressly the judge to hold a hearing for the review of the detention.
- 36 With respect to that issue, the Court of Appeal decided on 14 February 2001 that Section 20.9, 10, 11 and 12 does not require the Court to hold a hearing, and therefore the default to hold a hearing cannot be considered as a nullity pursuant to Section 55.2. C, but as an irregularity pursuant to Section 55.3 UNTAET Regulation 2000/30. The Court of Appeal Says: " *Entrando na materia do recurso, diz recorrentes quenao foramnotificados do requerimento do prolongamento da prisao preventiva e nao foram ouvidos pelo Colectivo Special antes de proferir a decisao recorrida. Na verdade nao consta dos autos que os recorrentes tivessem sido notificados do requerimento do prolongamento da prisao preventiva ou avidos de qualquer forma antes de ser proferida a decisao recorrida – o que viola manifestamente o direito do*

arguido a ser ouvido antes de lhe ser imposta qualquer medida de coacção (artigo 2.2 do Regulamento 2000/30). Não consta, porém, dos autos que tivesse havido alguma audiência para a qual não tivessem sido convocados nem estado presentes os recorretntes e seu defensor. De resto não é obrigatório a realização de audiência pública para a reapreciação da prisão preventiva nos termos do artigo 20.9, nem para se decidir sobre o prolongamento da prisão preventiva nos casos previstos nos artigos 20.11 e 20.12 do Regulamento 2000/30. Por isso não se pode concluir, como pretendem os recorretes, pela nulidade insaneável prevista no artigo 54.2- c) do citado diploma. O que se verifica é uma mera irregularidade sanável nos termos do artigo 54.3 do regulamento citado.

- 37 According to Section 2.3 UNTAET Regulation 2000/11, the decision of the Court of Appeal is binding: "Judges, notwithstanding their rank or grade within the hierarchy of courts have to respect all decisions made by the Court of Appeal. Such decisions are binding and the independence of the individual judge is not affected"
- 38 It is however undisputed that before making any decision the accused has to be given an opportunity to express on the grounds for detention.
- 39 In the present case, it is true the decision attacked was made pursuant to Section 20.12 UNTAET Regulation 2000/30, which does not require expressly the review hearing and the presence of the accused and his legal representative. However the decision violates the fundamental rights for a fair trial set out in section 2.2 of UNTAET Regulation No.2000/30, and Article 9(3) of ICCPR. The judge simply refers in his decision to the arguments of the Prosecutor. The accused and the defense were not given an opportunity to express on the grounds for detention. Therefore, the decision taken is an irregularity pursuant to section 55.3 UNTAET Regulation 2000/30.
- 40 Finally the defense is advancing that the law (Section 55.2(e) UNTAET Regulation 2000/30) did of type not authorize Judge Ramos' actions. For the defense there is no provision in the law for

a single judge to sit alone and decide on the detention of a suspect and or accused following the expiration of 6 months. It has been showed previously that before the preliminary hearing a judge to whom the matter has been referred upon the filing of the indictment can decide the extension of detention of the accused. That is valid when the detention of an accused is beyond six months. It is therefore not possible to nullify the decision of Judge Ramos with respect to that ground.

With respect to the order on which the accused is detained

- 41 The defense advanced that the accused was duly released in February in relation to the charges of murder in violation of section 8 UNTAET Regulation 2000/30 and article 340 of Indonesian Penal Code. The accused was rearrested on 12 March 2001 for alleged crime regarding a rape allegedly committed in 1999. On 21 May 2001, the prosecutor filled an application for the amendment of the original indictment filed on 27 November 2000 to include additional counts. The rape allegation upon which the accused was arrested did not form part of the amended indictment filed on 7 August 2001. On the 10 July 2001, the Prosecutor filed a request for extension of detention of the accused with respect to the crime against humanity (Kidnapping, unlawful deprivation of liberty, rape and murder). The defense is saying not understand the basis of the accused detention, as the initial basis of his arrest was the rape case. On the 9 August 2001, the prosecutor made an application for the extension of detention of the accused though it was not clear what detention order they were seeking to have extended. For the defense, the original order for the initial detention of the accused following his arrest for rape lapsed.
- 42 It is true that the accused was released on 27 February 2001 and rearrested on 12 March 2001. However, his arrest was not in relation to alleged rape case, but the case already pending before the Special Panel.
- 43 The request filed by the PP on 7 March 2001 for detention of Benjamin Sarmiento had many grounds, including the investigation being made for the rape of four women.

- 44 The Court rejected the grounds for arrest based on the alleged rape case. It says " *Considering that point 3) of the request relates to the investigation of a different case, the competence of which belongs to the investigating judge and not to the Special Panel*".
- 45 The Court took into account that there were reasons to believe that the accused will flee to avoid criminal proceedings in the case already pending before the Court. It is said that: " *(...) taking into account that, in the report of John Duncan and in the interrogatory of the accused attached to the request, there are evidence that: - the house of Benjamin have been destroyed, - the family of the accused lives in West Timor. Considering that those circumstances can be deemed as reasons to believe that Benjamin Sarmento will flee to avoid criminal proceedings (...); Considering that, pursuant to section 29.5 of U.R 2000/30, the court can, at it own motion, assess the necessity of the detention of the accused in accordance with Section 20 of U.R 2000/30; Considering that the date of the trial has already been set up for 22.05.2001, and that the pretrial detention will not exceed 9 months, therefore compelling grounds for the extension of detention are met.*
- 46 It is clear for the reasons outlined above that Benjamin Sarmento was not rearrested and detained pursuant to an order regarding the rape allegations, but pursuant to a charge of murder relating to the alleged killing of Lorenzo Martins. That charge was included in the indictment submitted to the Court on the 7 August 2001, which indictment have been amended to include, in addition to the alleged killing of Lorenzo Martins, other charges and co-accused.
- 47 Anyway, taking into account the present indictment pending before the Court, it is within the jurisdiction of the Special Panel, pursuant to section 29.5 to review the detention of an accused, at any stage of the procedure, with respect to the substantial grounds of detention of the accused persons.

With respect to the substantial grounds to release the accused

- 48 Section 29.5 provides that " At their own motion or at the request to the accused or his or her legal representative, the panel of judges or the competent judge, shall assess the necessity of the detention

of the accused in accordance with Section 20 of the present regulation and may order any measure consistent with Section 20.6 of the present regulation.

- 49 According to Section 20.7 of UNTAET Regulation 2000/30, the court may order continued detention if there is reason to believe that a crime has been committed; that there is sufficient evidence to support a reasonable belief that the accused was a perpetrator; and that there are reasonable grounds to believe that detention is necessary.
- 50 Section 20 of UNTAET Regulation 2000/30 provides that reasonable grounds for detention exist when: (a) there is reason to believe that the detainee will flee to avoid criminal proceedings; (b) there is a risk that the evidence may be tainted, lost, destroyed or falsified; (c) there is reason to believe that the suspect will continue to commit offences or pose a danger to public safety or security.
- 51 The accused Benjamin Sarmiento was arrested on 12 March 2001. He is charged with 9 counts of crimes against humanity, including murder, imprisonment or other severe deprivation of physical liberty, deportation or forcible transfer of population and persecution.
- 52 The accused is allegedly involved in the murders of Carlito de Araujo, Luis Boco Siri, Agapito de Araujo, Afonso da Costa, Armindo da Costa, Carlito da Costa and Lorenzo Tilman, imprisonment or other severe deprivation of physical liberty, deportation or forcible transfer of population and persecution. So, the crimes of the accused are more serious than other crimes. There is a possibility that the accused will try to escape to avoid the sentence. There are a number of witnesses (44 witnesses) who could provide information in this case, so they need to be protected.
- 53 The accused Romerio Tilman has been in detention since 12 March 2001. He is charged with 5 counts of crimes against humanity, including murder, imprisonment or other severe deprivation of

physical liberty in violation of fundamental rules of international law, deportation or forcible transfer of population and persecution.

- 54 The accused Joao Sarmiento has been in prison since 31 March 2001. He is charged with 5 counts of crimes against humanity, including murder, deportation or forcible transfer of population and persecution.
- 55 From the list of evidence submitted to the Court (statement of witnesses, statements of the accused, documentary evidence, and other evidence), this Court is of the opinion that there are reasons to believe that several serious crimes have been committed. There is also sufficient evidence to support a reasonable belief that the accused Benjamin Sarmiento, Romerio Tilman and Joao Sarmiento were the perpetrators of the alleged crimes with which they are respectively charged.
- 56 It is true that, as submitted by the Defense, the seriousness of the crime is not a ground for extension of detention.
- 57 However, this Court agrees with the PP that the crimes against humanity against the accused persons are serious. The penalty for each of those crimes is up to 25 years. The nature of the allegations against the accused and the possible penalties create a risk that the accused may flee to avoid the criminal proceedings, or may attempt to interfere with the witnesses.
- 58 The defense of the three accused persons is right to say that until now there is no evidence that the defendant have attempted to pressure, manipulate or endanger the safety of the witnesses, nor would commit any offense or pose danger to public security and safety. However, the Court is of the opinion that the fact they did not do it in the past is not a guarantee they will not do it in the future. No one can predict the future.
- 59 The fact that an accused like Joao Sarmiento fled to West Timor, returned of his own accord, and immediately delivered himself into police custody is not a guarantee that he will not flee again. Also a person to flee does not necessarily need to have travel documents.

- 60 There is no evidence that the accused Joao Sarmiento could not have financial resources or no contact in West Timor or Indonesia. The fact that his relatives are in East Timor is not in itself a guarantee.
- 61 It is true that the evidence in this case have been collected for all the three accused persons. However, this Court is still waiting for the testimonies of 43 witnesses.
- 62 The Court agrees with the Defense that the length of the pretrial detention constitutes an exceptional ground to release the accused, and that the case for release gets stronger as the pretrial period lengthens. Pursuant to Article 9 (3) of the International Covenant on Civil and Political Rights, anyone detained on a criminal charge has the right to trial within a reasonable time or to release pending trial: “anyone arrested and detained on a criminal charge shall be brought promptly before a judge or other officer authorized by the law to exercise judicial power and shall be entitled to trial within a reasonable time or to release”.
- 63 Pursuant to Section 6 UNTAET Regulation 2000/30, the accused has the right to be tried without undue delay. That means that criminal proceedings must be started and completed within a reasonable time.
- 64 In the present case, it is true that Benjamin Sarmiento and Romerio Tilman have been in jail for one year and 10 days and Joao Sarmiento for 11 months and 22 days. However, considering the nature and the seriousness of the charges, and that the preliminary hearing finished on the 14 February 2002, and the date of the trial set on the 4 April 2002, the time is still reasonable, notwithstanding the duty of the Special Panel to expedite proceedings in following three months.
- 65 The Court agrees with the defense that it shall not be a general rule that persons awaiting trial be detained in custody, but release shall be subject to a guarantee to appear for trial. However, the risk of flight is relevant to justify the pretrial detention. And in the present case, it has been shown that there is a risk that the accused will flee if released.

- 66 The defense of Joao Sarmento submitted also that the defendant should be released for the purpose of guaranteeing equal treatment with the codefendant Domingos Mendonca who is awaiting trial on conditional release. The Court is of the opinion that the two accused are not in the same situation. They are not charged with similar crimes. Joao Sarmento is charged with 3 counts of crimes against humanity (murder) and 2 counts of crimes against humanity (deportation and forcible transfer of population. Persecution) while Domingos mendonca is charged with 2 crimes against humanity (murder) and one crime against humanity (persecution).
- 67 Benjamin Sarmento, Romerio Tilman and Joao Sarmento are charged with multiple counts of crimes against humanity and their pretrial detention is consistent with international standards of human rights.
- 68 For all the above reasons, the Court deems unsubstantiated the request presented by the Defense for the release of the accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento.
- 69 The Court:**
- 70 Considers that there are no grounds to declare a nullity judge's Ramos decision of the 1st September 2001. Says that the decision contains only some irregularities as provided by Section 55.3 UNTAET Regulation 2000/30.
- 71 Rejects the request of the Defense to release the accused.
- 72 Decides that the detention of the accused Sarmento, Romerio Tilman and Joao Sarmento be extended for the duration of the trial.

Dili, March 22, 2002

Judge Maria NATERCIA GUSMAO PERREIRA, Presiding
Judge Sylver NTUKAMAZINA
Judge Antero LUIS