REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

TRIBUNAL DISTRITAL de DILI

SECÇÃO CRIMES GRAVES

Case No. 3/2003
Date: 9/6/2003
Original: English

Before:
Judge Sylver Ntukamazina, Presiding
Judge Francesco Florit, Rapporteur
Judge Maria Natercia Gusmao Pereira, member

Registrar: Joao Naro

Judgement of: 9 June 2003

THE PROSECUTOR
V.
Agustinho Atolan alias Quelo Mauno

JUDGEMENT

The Office of the Public Prosecutor:
Mr. Charles Nsabimana

Counsel of the accused
Ms. Maria Rocheteau

INTRODUCTION

The trial of Agustinho Atolan alias Quelo Mauno, aged around 35, farmer, married, born in Naetuna, Passabe sub-district, Oecussi district, hereinafter referred to as Agustinho Atolan, before the Special Panel for the Trial of Serious Crimes in the District Court of Dili (hereinafter: the "Special Panel") started on the 22nd May 2003 and ended today, the 9th June 2003 with the rendering of the decision.

After considering the plea of guilt made by the accused, all the evidence presented during the trial and the written and oral statements from the defense and from the Office of the Public Prosecutor (hereinafter: the "Public Prosecutor"), the Special Panel

HEREBY RENDERS ITS JUDGEMENT.

THE SPECIAL PANEL

The Special Panels were established, within the District Court in Dili, pursuant to Section (hereafter "Sect.") 10 of UNTAET Regulation (hereafter "U.R.") no. 2000/11 as amended by U.R 2001/25, in order to exercise jurisdiction with respect to the following serious criminal offences: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, as specified in Sections 4 to 9 of U. R. 2000/15.

APPLICABLE LAW

As specified in UNTAET Regulation No.1/1999, U.R.No.11/2000 as amended by U.R.2001/25, and U.R.No. 15/2000, the Special Panel for Serious Crimes shall apply:

- UNTAET Regulations and directives;
- applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
- the law applied in East Timor prior to 25.10.1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as it does not conflict with the internationally recognized human rights standards, the fulfillment of the mandate given to UNTAET under the United Nations Security Council Resolution 1272 (1999), or UNTAET regulations or directives.

PROCEDURAL BACKGROUND

On 17th February 2003, the Public Prosecutor filed before the District Court of Dili a written indictment (in English version) against the accused Agustinho Atolan charging him with murder as crime against humanity.

Copies of the statements of the witnesses Sebastiano Kolo Sufa, Serafin Kolo, Lusia Abi, Umbertus Ena, Francisca Netan and Agustino Sufa and copies of statements of the accused himself, were attached to the indictment. A sketch of the crime scene, a map of the area and two pictures of relevant sites were attached, too.

The Court clerk provided notification of the receipt of the indictment to the accused on 23rd February 2003 and to his Legal Representative on 24th February 2003 pursuant to Sect. 26.1 and 26.2 UNTAET Reg. 2000/30.

The preliminary hearing commenced on the 22nd of May 2003 before Judge Sylver Ntukamazina: after the preliminary formalities, encompassing the verification of the understanding of the charge by the accused and the recalling of the rights of the accused by the presiding Judge, the defendant pleaded guilty to the charge against him. During the hearing the Public Prosecutor and the Counsel for the accused lodged a document called "agreement on admissions" to confirm the plea.

The presiding Judge referred the case to the Panel, composed by the presiding Judge, by Judge Maria Natercia Gusmao Pereira and by Judge Francesco Florit, for the verification of the validity of the guilty plea, postponing the hearing to the 28th of May 2003.

After verifying the validity of the guilty plea and after finding that all the essential facts to prove the crime had been established, as required by Sec.29A.2 UNTAET Reg.2000/30, the Special Panel convicted the accused for the charge of the indictment.

The hearing was then postponed to today for the final written decision.

Interpreters for English, Bahasa Indonesia and the accused person's dialect (Baikeno) assisted every act before the Court.

FACTS OF THE CASE

The Public Prosecutor submitted that, in the widest scenario of the facts that disrupted the country in 1999, in the Oecussi area the presence of militia was granted by a group called Sakunar, to which the accused belonged. This militia group was fragmented by village sections under the direction of the supreme commander for the district, Simao Lopes. The accused was, according to the Public Prosecutor, the leader of the Sakunar militia in the village of Naetuna, heading a group of five fellow fighters.

In the Public Prosecutors view, in the morning of the 8th September 1999, after attending a meeting at Gabriel Kolo's house (the aforementioned being the militia leader in the village of Abani) the accused and other militia members were ordered by Kolo and other militia leaders, to execute killings of pro-independence campaigners in the village of Nibin. The order was carried out that same afternoon with an attack on the village by a group of men headed by Agustinho Atolan.

In the operation, the group raided the village, located Domingos Kolo and his family, arrested the victim and obliged him to follow them to Passabe. On the way, after kicking and dragging the victim in a beetle nut plantation, the militia members, under the direct order of the accused, hit and stabbed repeatedly Domingos Kolo, who died immediately from the wounds. Agustinho Atolan directly participated to the murder personally striking the victim with a knife.

The Public Prosecutor underlined that the act of the accused was undertaken as part of a widespread or systematic attack directed against the civilian population, and especially targeting those who were considered to be pro-independence, linked to or sympathetic to the independence cause for East Timor, with knowledge of the attack.

FACT FINDINGS

In the light of the admissions of all the evidence, the Court is convinced that the charge against Agustinho Atolan rests on solid evidential footings of which the confession is the last but most important piece.

The clear and undisputable confession of the accused, corroborated by the statement of Agustino Sufa alias Lafu Sufa Tali depicts the exact moment of

the murder, leaving no doubt to the relevant and direct involvement of the accused in it.

Furthermore, from the statements of the witnesses Sebastiao Kolo Sufa, Serafino Kolo and Lusia Abi (respectively son, brother and widow of the victim) comes the detailed picture of the attack perpetrated by groups of militia members in the afternoon of the 8th of September 1999 against the village of Nibin and the family and the belongings of the victim. The choral version of the relatives refers that the militia contingent that took hold of Domingos Kolo was clearly headed by the accused who gave orders to the militia members and directed the operations on the field. A further, if also skeletal, confirmation of the facts and particularly of the abduction of Domingos Kolo by the militia contingent headed by Agustinho Atolan, comes from the words of Francisca Neten, who directly saw what happened. The discrepancy on the day (8th Sept. according to victim's relatives while 9th for Francisca Neten) appears to be of minor importance, given the circumstances.

LEGAL FINDINGS

Upon the premise outlined above, the individual criminal responsibility of the accused for the crime outlined in the charge, can be affirmed.

In the first place, with regards to the qualification of the crime, the Court finds that the feature of the murder as crime against humanity (Sec.5 UNTAET Reg. 15/2000) occurs in the case, since many concurring elements elucidate that the murder was part of a widespread and systematic attack against civilian population, executed with the knowledge of the attack.

These elements can be found, in the opinion of the Court, not only in the execution of the murder, but mainly in the activity and circumstances which preceded the execution itself. In the aftermath of the popular consultation of August '99, a meeting was held on the 8th of September, in the morning, at the premises of a militia leader of Passabe (Gabriel Kolo, *chef do suco* of Abani and commander of the local Sakunar militia), at the presence of several militia leaders of the area (the accused mentions Andri Ulan, Julio Da Costa, Tomas Toto and Januario Da Costa). Augustinho Atolan attended the meeting where militia leaders planned killings and raids in the area. It is worth noticing that the order was generic, not referred specifically to the person of Domingos Kolo. The choice of the victim was made, in the words of the same accused (statement 17.11.2002), by the accused himself, for reasons that are only partially compatible with the ongoing fight between autonomy supporters and independence supporters but that, on the other hand, pertain to personal reasons

of resentment ("I'm angry with him because Domingos Kolo is rich"). When the attacks were planned by the militia leaders, a week after the referendum and when the result of the popular consultation was already known, they were meant as a revenge against the population of those villages that notoriously had granted support and shelter to independence supporters and campaigners. A revenge which could be mandated in generic terms, and, for this, conceived as a part of a systematic attack, leaving the same choice of the target and the execution of the mandate to other militia leaders or subordinates. In such context, it is perfectly compatible the mingling of personal envies ("I'm angry with him because Domingos Kolo is rich") to a widespread scenario. The attacks to villages were planned without choice of individual target because, at that time, after the consultation, the point was not so much to weaken the resistance of campaigners by killing the heads of pro-independence organizations or retaliating against the families of the fighters, but to punish the populations of the villages that had shown support to independence. As a consequence, the attack itself had to be widespread -this is why militia leaders from many villages and different districts were present at the meeting- and systematic -what's the point of hitting a single village?

The same way in which the task was executed tells us something about the qualification of the crime and the knowledge that the killing was not an isolated one, being inserted in a wider context. The modalities of the attack to the village of Nibin, with the presence of two groups of militias (one, small, headed by the accused, the other, made up of twenty/thirty, headed by a man called Liberatu Maunu), on one hand, illustrate the number of pro autonomy fighters involved in the operation, incompatible with a surgical or occasional action. On the other hand, the execution of the order to burn houses, steal livestock, arrest and execute those arrested, are clearly incompatible with the idea of an isolated crime.

A single act of murder, if it is a portion of a wider plan of aggression against civilian population, is qualified a crime against humanity and deserves a more severe treatment because, amongst other reasons, the participants to the plan, granting themselves, explicitly or not, mutual support and trust and shelter, seal a bargain which strengthen their capacity to strike and to gain impunity. In these conditions the single individual looses or weakens his sense of responsibility, of self-accountability, becoming a part of an organization whose goals transcend the wills and the strengths of the members. And in the crime outlined in the charge these features occur, since the gathering and the planning of killings, wreckage and disruption on an unidentified and indistinct mass of potential victims is the setting in which the murder is located.

The knowledge by the accused of the width of the attack can hardly be disputed, given his role as leader of a militia group and his participation in the meeting on the 8th of September,

For the abovementioned reasons, the accused is criminally responsible for the crime of murder as crime against humanity, in violation of Section 5.1.a of UNTAET Reg. 2000/15.

The Public Prosecutor and the Defense suggested in the joint statement that the accused be given a penalty of 7 years.

According to Sec. 10.1 (a) UNTAET Reg.2000/15, for the crimes referred to in Sect. 5 of the same regulation, in determining the terms of imprisonment for those crimes, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals. Moreover, in imposing the sentences, the Panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person" (Sect. 10.2).

The relevant discretion left to the judge in imposing the sentences (ranging from the minimum to 25 years of imprisonment) is tempered by the need to follow the general practice of the courts in East Timor and under international tribunals.

While the second reference appears of modest relevance in relation to the present case, involving a single murder, unlike precedents in other international courts, the first one is a relevant guideline to understand which kind of pattern the sentencing policy of the Special Panel has developed in the past three years.

The exam of previous decisions issued by the Special Panels in analogous cases (only trials for murders have been taken in consideration in the survey, for obvious reasons) shows a clear trend, set out from the very beginning of the activity of the Court.
When the trial takes place, the sentencing practice of this Court has been to asses the penalty for murder, in the vast majority of cases, in a range between twelve and sixteen years. While the main group of decisions in which the trend was set took place in the middle of year 2001 (Yoseph Leki case, Augustino Da Costa case, Manuel Gonsalves Leto Bere case, Carlo Soares case, Augusto Asameta Tavares case, Jose Valente case) it is worth noticing that also in a recent case the same practice was followed by the Court (Jose Cardoso Fereira case). Variations within the said range are widely justified with the need to

adapt the penalty to the circumstances of the single case; the few cases (three) when penalties fell out of the range, appear to be justified by specific reasons.

When the accused pleads guilty, the Court has shown a markedly lenient approach: in the few cases for murder treated in this way (Joao Fernandez case, Augusto dos Santos case and Marcourious de Deus case) the Panel has taken in consideration the opportunity to show a welcoming approach to those who, being regretful, chose a procedural option which spares time and resources of the Court. In the two most recent cases, a penalty of five years was thought to be a fair retribution for the wrongdoing committed and for the grief caused (it must be noted that in those cases the Court qualified the crimes as murders but not crimes against humanity).

In the majority of modern legal systems the guilty plea, in different shapes and with different features, gives the accused who faces a charge that cannot be challenged or that he or she does not want to challenge, the possibility to shortcut the trial and to accept a penalty immediately imposed by the judge. The inherent consequence for the advantages in terms of timesaving and procedural simplification is a relevant reduction of the penalty imposed if the accused is found guilty. Sometimes the Law or the Statute takes the duty to determine the reduction rate, depriving the judge of discretion on the issue, but most of times the Norm is silent and the judge or the Court are left free to asses the penalty in relation to the case and its circumstances; in the last eventuality, the judge will bear in mind the function and benefit of the application of the plea of guilt and will grant a discretionary reduction of the term that would be imposed if the accused were found guilty at the end of the trial.

In the use of a discretion of this sort, this Court has usually considered that, in the given circumstances, to represent an advantage for the accused, the reduction of the term which would be otherwise imposed at the end of the full trial, must be a material one, cutting around half of the term. A less drastic approach proved to be useless: after the first decision of the Special Panel, in the Joao Fernandes case, where the Court took a less lenient decision, more than one year elapsed before a second guilty plea was submitted.

In the end, as far as this issue is concerned, the Court is inclined to consider the plea of the accused as the most important and only relevant of the mitigating elements. The fact that the decision of the accused to plea guilty came at the end of a moral process of remorse, as a way to reconcile himself "*with his Timorese brothers as well as with God*" (words by the learned Counsel) is, in itself, of minor importance. What matters is the practical reflex of this internal

drive or, in other words, the cooperation with the Prosecution during the inquiry and with the Court, pleading guilty.

The following elements in mitigation, though brilliantly illustrated by the defense Lawyer, cannot have the same weigh, since they don't amount to an independent, conclusive reason for further consideration:

- the family condition of the accused is a generic element: the victim, as well, was a father of nine and his sons and his daughters, not to mention his wife, were present and were crying when he was abducted. But this was not enough to stop the accused;
- the illiteracy and humble background do not explain why the accused was given a leading role in the choice of the victim and in the execution of the attack and, on the other hand, why he participated in the reunion were the attack was planned. The same argument can be rebutted, noting in the first place that illiteracy is common in East Timor, so that it does not mean much in itself nor it puts the illiterate in a condition of weakness, and in second place that the humble background has not prevented the accused from an abusive and coercive exercise of power in the circumstances of the execution of the crime.

In the end, the crime was a brutal act, executed not only for reason of political fight but also for personal reasons of resentment ("I'm angry with him because Domingos Kolo is rich"). The wealth of the family was destroyed leaving nine children and a widow in dire straits. In the absence of a plea of guilt a crime like this would deserve a penalty of fourteen years, in keeping with the practices illustrated above. The reduction for the procedural shortcut elicited by the defendant brings the penalty to seven years of imprisonment.

DISPOSITION

For the aforementioned reasons, having found the accused Agustinho Atolan guilty, considering the arguments of the parties, the evidence presented at the sentencing hearing, the transitional rules of Criminal Procedure, the Special Panel

FINDS

the accused Agustino Atolan guilty for the charge of murder as crime against humanity, in violation of Section 5.1(a) UNTAET Regulation 2000/15;

In punishment of the crime, the Special Panel

SENTENCES

Agustinho Atolan to an imprisonment of seven years;

ORDERS

the defendant to pay the costs of the criminal procedure.

Credit for time served

According to Section 10.3 U.R. 15/2000, section 42.5 UR-30/2000 and Article 33 of Indonesian Penal Code; the Special Panel deducts the time spent in detention by Agustinho Atolan due to an order of an East Timorese Court. The defendant was arrested and detained since 17th november 2002 to date. Therefore he was under detention for six months and twenty three days. Accordingly, previous detention shall be deducted from the sentence today imposed, together with such additional time he may serve pending the determination of any final appeal.

Enforcement of sentence

Pursuant to Sections 42.1 and 42.5 of UR-2000/30, the convicted shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.

The sentence shall be executed immediately, provided this disposition as a warrant of arrest.

This decision is provided in one copy to the Defendant and his legal representative, Public Prosecutor and to the prison manager.

The Defense has the right to file a Notice of Appeal within the coming 10 days and a written appeal statement within the following 30 days (Sect. 40.2 and 40.3 UR-2000/30).

This Judgment was rendered and delivered on the 9th June 2003 in the District Court of Dili by

Judge Sylver NTUKAMAZINA, Presiding

Judge Francesco FLORIT, Rapporteur

Judge Maria NATERCIA GUSMAO PERREIRA.

(Done in English and Bahasa Indonesia, the English text being authoritative)