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REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

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**TRIBUNAL DISTRITAL de DILI
SECÇÃO CRIMES GRAVES**

Before:

Judge Sylver Ntukamazina

Judge Maria Natercia Pereira

Judge Siegfried Blunk

Case No. 5/2002

**The Public Prosecutor
Versus
Umbertus Ena and Carlos Ena**

**Decision on the Prosecution Motion to Admit Further Evidence dated
30 January 2004**

For the Prosecutor:

Charles Nsabimana

For the defense:

Ana Beatriz Sanchez Lara (for Umbertus Ena)

Alan Michael Gutman (for Carlos Ena)

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Procedural background

1. On 15 September 2003 commenced the trial of Umbertus and Carlos Ena.
2. On 30 January 2004, the Public Prosecutor filed a “Motion to Admit Further Evidence” pursuant to Section 33.2 and Section 34.1 of the UNTAET Regulation 2000/30. The objective of the motion is to request the Court to allow the Prosecutor to:
 - Call the witness Zeforino Da Cruz Sau, former interpreter in the Serious Crimes Unit that participated in the interview of the accused Carlos Ena at Oecussi Civpol Headquarters, to testify.
 - Submit additional documentary evidence in the form of a Report on Human Rights Violations During 1999 in Oecussi District, dated November 2001, by Carolyn Graydon, UNTAET Oecussi District Human Rights Officer.
3. On 5 February 2004, the defense counsels for Carlos and Umbertus Ena filed an Objection to the Prosecution motion alleging its lack of legal basis. The defense alleges that the invoked Sections 33.2 and 34.1 were not applicable and that the rule applicable to motions of that nature is 27.2. Accordingly the defense counsels requested the motion to be dismissed.
4. On the same date the defense counsels for Carlos and Umbertus Ena filed a written response to the Prosecution motion in the alternative that the motion would be consider by the Court. The defense requests the Court the following:
 - Defense of Carlos Ena: To dismiss the request of the Prosecutor to call Zeferino Da Cruz Sau to testify or, in the event that the Court grants the motion, that the investigators Fernando Souto and Luis Alves are also called to testify, that the scope of examination of the witnesses be expanded to include issues of competence and all evidence gathering in which they participated, and furthermore to prohibit all contact between the Prosecutor and said individuals before and during their testimonies.
 - Joint request by both defense counsels: To dismiss the request of the Prosecutor to submit the report by Carolyn Graydon.

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Submissions of the parties

5. On his motion the Prosecutor submits two requests to present further evidence. Regarding the first request, to call the witness Mr. Zeforino Da Cruz Sau, the Prosecutor states that the witness will testify that the accused Carlos Ena was advised about all his rights prior to taking of the statement (where he confessed to the crimes) and that the accused made his statement to the investigators voluntarily.
6. The Prosecutor adds that it is in the best interest of the administration of justice that the Court has before it all available evidence to assist the truth seeking process. Furthermore, the Prosecutor states that the Special Panels, in its decision dated 26 November 2003 in the case *The Public Prosecutor vs. Damiao Da Costa Nunes*, allowed the Prosecutor to call a witness who was present during the recording of the accused statement and the court admitted the statement of the accused through the witness.
7. To this first request the defense counsels replies that the Prosecutor had his opportunity to call the witness during the prosecution case in chief, as since 10 December 2003 he knew that the defense was seeking the suppression of the statement of the accused.
8. Moreover the defense questions the neutrality and impartiality of the witness as an employee of the Serious Crimes Unit at the time and for having performed an integral role in the investigation in question.
9. The defense continues by explaining that in case doubts exist regarding whether a statements was voluntary made, in the absence of conclusive proof to the contrary any doubt must be resolved in favor of the suspect.
10. Regarding the case-law invoked by the Prosecutor the defense counsel alleges that the decision in the case *Damiao Da Costa* refered to a different situation. At the time the question was to determine if the accused understood National Tetum (being his language Tetum Suai) and if at the time of the interview there could have been linguistic misunderstanding. The present case questions the proper explanation and understanding of the fundamental and constitutional rights of a suspect.
11. Regarding the second request of the Prosecutor, with respect to the admission of a Report on Human Rights Violations in 1999 in Oecussi District, the Prosecutor alleges that the report will serve to support the general allegations of the widespread or systematic attacks that occurred in Oecussi, that the documentary evidence is both relevant and of probative value to the case and that the admission of the report will not prejudice the accused in any way.

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12. The defense counsels reply that they have reasons to believe that the proposed report has been in possession of the Prosecution since before the indictment was issued, yet the Prosecutor elected not to include it in the list of evidence as required by Section 24.2 U.R. 2000/30 and Section 24.4 (a).
13. The defense also notes that the standard governing the admission of additional evidence is that of due diligence. The Prosecutor has already completed the presentation of its evidence and has closed his case.
14. The Defense further adds that the report failed to meet the requirements of foundation, authenticity and reliability. The author of the report is not anymore available to testify and the Prosecutor knew that she was available to testify until October 2003, however choosing not to add the report to the indictment. The defense counsels question the Prosecutor motives to produce the report after the author has left the jurisdiction of the Court.
15. The defense alleges that the moment of the presentation of the report (after the Prosecution case is finished and violating the accused rights to have an adequate time and preparation of the defense) and the fact that the author of the report cannot be interrogated would make the acceptance of the report contrary to the principle of a fair and public hearing.
16. The defense requested the Court to dismiss the motion of the Prosecution in this point or alternatively that the author of the report be called to testify and to produce and disclose all files, notes, records of interviews, identities of the persons and sources upon which the allegations and findings in the report are based.

As to the legal basis of the motion

17. The Prosecutor filed a motion to present additional evidence pursuant to Section 33.2 and 34.1. Section 33.2 reads:

After the defense has presented its case the prosecution shall be given the opportunity to respond to the defense evidence. The defense will then be allowed to reply to the prosecution. The court shall call any additional witnesses it wishes to hear or evidence that it wishes to be presented after the parties have completed their submissions.

18. This section doesn't make reference to any particular kind of motions that the parties can raise at this point. It just gives the Prosecutor a right to respond that doesn't include the right to call more witnesses. On the contrary, the Court itself has the right to call new witnesses.

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19. Under UNTAET Regulation 2000/30, Section 27.2 is the only legal basis to lodge motions other than preliminary motions. Motions for appropriate relief, as called in the Regulation, can be oral or written.
20. However, Section 27.2 only establishes which is the legal basis for the action of lodging a motion. It does not say anything about its contents. Therefore, most of the time, motions cannot be lodged only pursuant to Section 27.2: they also need support in another Section of the Regulation.
21. In the present case the Prosecutor invoked correctly Section 33.2 and 34.1 to support the content of its request. The Prosecution omitted to mention that the motion was lodged under Section 27.2. However, considering that every (non-preliminary) motion falls ultimately under Section 27.2 the Court considers that the fact that the Prosecutor omitted to invoke that Section must be understood as a mere lapsus and cannot be considered especially relevant as far as the legal basis regarding the content of the motion were identified.
22. Therefore the Court understands that the Prosecutor, using his right to lodge a motion pursuant to Section 27.2 has sustained the content of its requests in Sections 33 and 34 and therefore admits the motion.

As to the request to call the witness Zeforino Da Cruz Sau

23. The Court notes that Section 32.2 does not confere the Prosecutor the right to call more witnesses once it has presented its case but only to respond to the defence evidence. Section 33 explains clearly which should be sequence to present evidence at trial.
24. The Court admits that it retains the power to change the order of this procedure when particular reasons justify it (i.e. the discovery of new elements with crucial importance for the finding of the truth). In the present case the Court is not convince of the existence of any particular reason that justifies the Prosecutor to call a new witness.
25. The Prosecutor, as the defense counsel of Carlos Ena correctly notes, knew in advance that the defense counsel challenged the validity of the statement of the accused Carlos Ena and the procedure by which it was produced. The Prosecutor, if convinced of the need to defend the reliability of the given statement could have called the witness Zeforino Da Cruz, or any other witness related with that aspect of the case- during its examination in chief.
26. Also and as already mentioned Section 33.2 just gives the Prosecutor a right to respond that doesn't include the right to call more witnesses. The Court itself has the right to call new witnesses.

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27. Considering the above-mentioned reasons the Court decides therefore not to call the witness and dismiss this part of the motion of the Prosecution.

As to the request to admit a Report on Human Rights violations in Oecussi

28. The Special Panels, in previous decisions in this and other cases¹, have already shown that a certain degree of flexibility is allowed in the admission of documentary evidence. The Court considers that often documents are sought to be admitted into evidence not as ultimate proof of guilt or innocence, but to provide a context. The Court can accept this kind of documents, with an eminently non-legal nature, but by their very same nature, their probative value can be questioned and therefore it will be carefully weighted by the Court.

29. Also the Special Panels have stated that the admission into evidence of this kind of documentary evidence does not mean that for the Court the content of the report is a proven fact. Therefore, the facts mentioned in the report, the methodology used to produce it or the impartiality of its author can be challenge by the parties.

30. In the present case it seems that the author of the report is unavailable. ^(see also 36.3c) The Court regrets that the Prosecutor had waited to submit the document and takes note of the complaints of the defense counsel regarding this aspect.

31. However, the Court will admit the report as documentary evidence ~~but~~ and the value of the given report will be carefully considered by the Court.

Therefore,

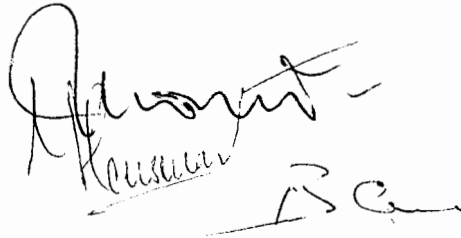
- The Court admits the validity of the motion.
- The Court rejects the request of the Prosecutor to call a new witness
- The Court admits the request of the Prosecutor regarding the admission of new documentary evidence and therefore admits into evidence the Report on Human Rights Violations during 1999 in Oecussi District, dated November 2001, by Carolyn Graydon.
- Says that the probative value to be given to the report will be weighed by the Court.

¹ See for example *The Public Prosecutor vs Carlos and Humbertus Ena*, decision of 4 December 2004

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Dili, 12 February 2004

Judge Sylver NTUKAMAZINA
Judge Maria Natercia PEREIRA
Judge Siegfried BLUNK



Handwritten signatures of the judges: Sylver NTUKAMAZINA, Maria Natercia PEREIRA, and Siegfried BLUNK.