

DEMOCRATIC REPUBLIC OF EAST TIMOR  
DISTRICT COURT OF DILI  
SPECIAL PANELS FOR SERIOUS CRIMES

607  
P

Case: 1 / 2001 (Francisco Pedro & Apolinario dos Santos)

11 February 2005

**COURT DECISION  
ON DEFENSE MOTION TO PARTIALLY DISMISS THE  
INDICTMENT**

**Background**

The indictment dated 13 January 2001 alleged that Francisco Pedro repeatedly stabbed 2 victims, but brought charges that he did “commit, aid, abet or otherwise assist” in the murders.

When the Court in a decision dated 4 May 2001 pointed out that it does not make no sense to charge the same conduct (stabbing) as committing a crime and at the same time as aiding it, the Prosecution filed an “amended” indictment dated 10 May 2001 containing again the formulation the Court had objected to, but now also naming Apolinario Dos Santos as new defendant.

The Court on 22 May 2001 rendered a decision. The decision discusses the defects in the wording of the indictment, which the Court had pointed out before, and which were not remedied in the “amended” indictment dated 10 May 2001; then it goes on to examine the power of the Judge to dismiss the indictment, but in the end dismisses the “case”.

The Prosecution appealed the decision, but later withdrew the appeal, at the same time submitting a new indictment dated 31 January 2002.

On 6 May 2002 the fourth indictment against the same defendants was submitted.

608  
7

On 14 December 2004 the Prosecution filed a motion to be allowed to withdraw the third and fourth indictment.

The Defense on 8 February 2005 filed a motion that did not oppose the requested withdrawal, but requested the dismissal  
- of counts 4 and 5 of the indictment, arguing that the Court in its decision dated 22 May 2001 had dismissed them already  
- of counts 3 – 5 because the indictment did not allege the necessary *mens rea*.

## Discussion

1. Regarding counts 4 and 5 of the indictment dated 14 December 2004:

a) The trial of the case is not barred by the decision of the Court taken on 22 May 2001.

The decision discusses defects in the wording of the indictment dated 13 January 2001, which the Court had pointed out before, and which were not remedied in the “amended” indictment dated 10 May 2001; then the decision goes on to examine the power of the judge to dismiss the indictment, but in the end dismisses the “case”.

Since the Court could have dismissed the case only if the Prosecution had failed to make a *prima facie* case for the alleged crime (i.e. failed to present sufficient evidence to prove the crime, barring any defense), but since the reasoning of the decision does not discuss any evidentiary matters, the decision has to be interpreted in such a way, that only the indictment dated 13 January 2001 was dismissed (because of its defects), but not the whole case (because of lack of *prima facie* evidence).

From this follows that a new indictment can be submitted.

b) Neither is the trial of the case barred by the principle of *ne bis in idem*, as formulated in Sec. 11.1 Reg. 2000/15 which stipulates that no person shall be tried with respect to a conduct for which he has been convicted or acquitted by a panel. In this case, the decision of the panel taken on 22 May 2002 to “dismiss the case” is not a judgement of acquittal rendered after trial, but a decision taken *in camera* without trial.

c) Likewise, the general principle in international law of *ne bis in idem*, which stipulates that a person cannot be tried and punished more than once for the same crime (also called protection against double jeopardy), does not hinder trial of this case, because “there can be no violation of *non-bis-in-idem*, under any known formulation of this principle, unless the accused has already been tried.” (ICTY, *Tadic*, Decision on the Defense Motion on the Principle of Non-Bis-In-Idem, 14 November 1994).

609  
f

d) Although in some national legal systems a decision by the Prosecution to discontinue prosecutions can have a *res iudicata* effect, this has never become part of international law.

Moreover, in this case, when the Prosecution withdrew its appeal against the dismissal of the indictment, at the same time filed a new indictment (dated 31 January 2002), and even requested an arrest warrant for the accused. This was mentioned in para. 17 of the withdrawal motion (served on Defense on 2 February 2002), so that the accused had no grounds to assume that prosecutions would be discontinued.

**2. Regarding the purported failure of the indictment to allege the *mens rea* for the Crimes against Humanity of Murder (counts 3 – 5):**

The Crime against Humanity of Murder under customary international law, as recognized by Art. 6 (c) Nuremberg Charter, Art. 5 (c) Tokyo Charter, Art. 5 (a) ICTY Statute, Art. 3 (a) ICTR Statute, Art. 7.1 (a) ICC Statute, and Sec. 5.1(a) UNTAET Regulation 2000/15 does not require premeditation or deliberate intent, but only the intention to inflict grievous bodily harm in the knowledge that it is likely to cause death (ICTR Akayesu judgement, 2 September 1998, para. 590; ICTY Blaskic judgement, 3 March 2000, paras. 216,217; Special Panels Joni Marques judgement, 10 December 2001 para. 649).

Although generally an indictment should therefore allege briefly that the accused knew that the wounds inflicted were likely to lead to death, in the present case the weapons allegedly used were so dangerous and the wounds inflicted were so serious, that the likelihood of death goes without saying.

**3. As no objections were raised against the request of the Prosecution to withdraw the third and fourth indictments, and the withdrawal helps to clarify the issue, leave is to be given for this.**

The “amended” indictment dated 10 May 2001 need not be withdrawn as the Court never gave leave for the amendment.

610  
7

## Disposition

For the abovementioned reasons the Court decides:

1. The Defense Motion to dismiss counts 3- 5 of the indictment is dismissed
2. The Prosecution is given leave to withdraw the indictments
  - against Francisco Pedro filed on 31 January 2002
  - against Francisco Pedro and Apolinario dos Santos filed on 6 May 2002.

Judge Siegfried Blunk

Judge Samith de Silva

Judge Maria Pereira

Special Panels for Serious Crimes

