

UNITED NATIONS



NATIONS UNIES

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ETTA

East Timorese Transitional Administration

DILI DISTRICT COURT

SPECIAL PANEL for SERIOUS CRIMES

Case No.01/00.C.G.2000
Date: 25/01/2000
Original: English

Before:

**Luca L. Ferrero, Presiding Judge,
Sylver Ntukamazina, Judge Rapporteur,
Maria Natercia Gusmao Pereira, Judge.**

The Office of the Public Prosecutor: Miss Brenda Hollis and Mr. Antonino.

Counsel of the accused: Cansio Xavier, Olga B. Nunes and Joao Riberio.

Judgment of: January 25, 2001

**THE PROSECUTOR
V.
Joao FERNANDEZ**

SENTENCING JUDGEMENT

I. INTRODUCTION

The trial of Joao Fernandez, 22 years, also known as Joao Atabe, hereafter "accused", who was born in Atudara village, Kailako Sub-district, Bobonaro District, before the Special Panel of Dili District Court, for the Prosecution of Persons Responsible for Serious Criminal Offences, hereafter "Special Panel", commenced on 10/01/ 2001 and came to a close on 25/01/2001.

This Special Panel was established, within the District Court in Dili, pursuant to section 10 of UNTAET Regulation No. 2000/11, 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 section 4 to 9 of UNTAET Regulation No. 2000/15.

Having considered all of the evidence presented during the course of this trial, the Special Panel,

HEREBY RENDERS ITS JUDGEMENT.

II. THE PROCEEDINGS

A) BACKGROUND

1. On 18.07.2000, the accused, 22 years, was arrested by the CIVPOL Phil. LECOMTE of Bobonaro District CIVPOL on the basis of the Indonesian Code of Criminal Procedure, but the Court did not find on the file any document about the detention and the extension of detention pursuant to section 19 and 20 of regulation 2000/30 on transitional rule of Criminal Procedure.
2. On the 15 November 2000, the Office of the Deputy General Prosecutor for Serious Crimes filed an indictment against the accused. The indictment was submitted to the special Panel for Serious Crimes at Dili District Court.
3. On 10 January 2001, during the preliminary hearing, the accused pleaded guilty to the charge of murder as stipulated in section 8 of UNTAET regulation 15/2000 and Article 340 of Penal Code of Indonesia.
4. After verifying the validity of his guilty plea, particularly in light of section 29A of UNTAET regulation 30/2000, the Special Panel entered a plea of guilty against the accused on the charge of the indictment. Furthermore, it was decided to set the

date of pre-sentencing hearing for 16 January 2001 for final statement of the Public Prosecutor and the Defense. On 16 January 2001, because of the lack of the interpreter, the case was postponed to 18 January 2001, date on which a hearing was held. The Special Panel set then the date of 25 January 2001 for the decision.

5. On 18 January 200, just before the final statement, it was asked to the Public Prosecutor why the accused is charged with one murder since the evidences in the file show that there were more victims. The Public Prosecutor answered that in 1999 in East Timor, there were widespread and systematic attacks against civilian population, and that Maliana case was a part of them. The prosecutor then explained that she charged one murder because there is no evidence of crimes against humanity, the accused is detained and seek a quick justice.

B) THE GUILTY PLEA

6. As stated earlier, the accused pleaded guilty to the charge set forth in the indictment against him. In accordance with section 29A.1, the Special Panel sought to verify the validity of guilty plea. To this end, the Panel asked the accused:
 - a) If he understood the nature and the consequences of the admission of guilt;
 - b) If his guilty plea was voluntarily made, if he did it freely and knowingly without pressure, or promises;
 - c) If his guilty plea was unequivocal, i.e. if he was aware that the said plea could not be refuted by any line of defense.
7. The accused replied in the affirmative to all these questions. Furthermore, the Special Panel was satisfied that the matters referred to in Section 29 A.1 of UNTAET Regulation No.2000/30 are established and found that the guilty plea was based on sufficient facts. It therefore found the accused guilty of murder, as stipulated in Section 8 of UNTAET Regulation No. 2000/15 and Article 340 of penal code of Indonesia.

III. APPLICABLE LAW.

8. As specified in UNTAET Regulations No. 1/1999, No.11/2000 and No. 15/2000, the Special Panel for Serious Crimes shall apply:
 - a) UNTAET Regulation and directives;
 - b) Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
 - c) The law applied in East Timor prior 25.10.1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as they do not conflict with the internationally recognized human rights standards, the fulfillment of the mandate

given to UNTAET under the UNITED NATION SECURITY COUNCIL RESOLUTION 1272 (1999), or UNTAET Regulations or directives. 126

9. Therefore, the Court will apply UNTAET Regulation No. 2000/15 and Article 340 of the Penal Code of Indonesia, and UNTAET Regulation No.2000/30 on Transitional Rules of Criminal Procedure.
10. As can be seen from a reading on the provisions on penalties, especially Article 340 of the penal code of Indonesia, the penalties that the Special Panel can impose on a convicted of murder are capital punishment, life imprisonment or a maximum of 20 years of detention. UNTAET Regulation No. 1999/1 excludes the capital punishment (section 3.3.) and UNTAET Regulation No.15/2000 section 10 excludes life imprisonment by providing that it has to be for a specified numbers of years, which may not exceed a maximum of 25 years.

IV. SENTENCING

A. Facts of the case.

11. The Prosecutor submitted to the Court that, on 8 September 1999, in the village of Maliana in the District of Bobonaro, the accused did with deliberate intent and with premeditation take the life of Domingos Gonsalves Pereira.
12. The accused admitted the charge as alleged in the indictment. He states that, as a member of the Dadarus Merah Militia, he was ordered on 8 September 1999 to come to the house of the Militia Leader Natalino Monteiro in Ritabou Village. He acknowledges that himself and other militia members were provided with samurai swords and ordered to go to the POLRES Station in Maliana to kill people, and they went, after being brought to the KOLAMIR (Military Station) in Maliana where they painted their faces black.
13. The accused acknowledges that while he was at POLRES Station, he got the order to enter the compound and kill all the males. He further declared that the chief of the POLRES Station led himself and Joao Gomblo, one other militia member, to one room where, Domingos Gonsalves Pereira, the village chief of Ritabou was hiding. He admitted that he pulled Domingos Gonsalves Pereira out from his hiding place and stabbed him with his sword in the back. He added that Joao Gomblo on his turn stabbed the victim twice in the chest, after the late fall to the ground.
14. The accused admits that since the victim was still alive and tried to get up, he stabbed him a second time in the back, and after this the victim died.

15. The accused acknowledges that he killed the victim on the order of TNI (Tentara National Indonesia) and Militia commander for being a pro-independence supporter. 167

16. The accused accepted also all the evidence and the statements of the witnesses presented by the prosecutor, i.e. statement of witness Augusta Godinho dated 14 July 2000, statement of witness Jacinta Pereira dated 15 July 2000, and witness Isabel Pereira dated 17 July 2000. All witnesses in their statements identified the accused as the person who stabbed Domingos Gonsalves Pereira until he died.

B. Judgement.

17. In light of the admissions of all the evidence made by the accused in addition of his plea of guilty, the Special Panel, on 16 January 2001, accepted his plea and found him guilty for taking the life of Domingos Gonsalves Pereira, with deliberate intent and with premeditation, and hereby committed murder, a crime stipulated in section 8 of UNTAET Regulation Nno.2000/15 and article 340 of the Penal Code of Indonesia.

18. The essential elements of the murder, which are deliberate intent, premeditation and take life, are met. The accused desired and intended to kill the victim because he was a pro-independence supporter (deliberate intent), went to the house of the militia leader where he was provided with samurai swords, painted his face black, before going to kill the victim at the POLRES Station (Premeditation), and pulled out the victim from his hiding place and stabbed him with his sword in the back until he died (takes life).

C. Facts related to the sentence.

19. Aggravating circumstances:

- a) After Domingos Gonsalves Pereira was killed, the accused admitted that he was going to kill "Anino" because he is the son of the victim, but John Gomblo stopped him. The accused jointly with the other militia members has also planned to kill all the males at POLRES Station.
- b) The accused, by committing the serious crime of murder, sought out the victim, pulled him out of a hiding place, and killed him in presence of his daughters, what is a particularly heinous crime.

20. Mitigating circumstances:

- a) The accused has aided in the administration of justice by cooperating and providing full disclosure in the investigations of the crimes that occurred in

Maliana District in 1999, and agreed to continuing to aid in the prosecution of persons responsible for those crimes.

- b) It is important to recall that the accused pleaded guilty and his public acknowledgment was made immediately after his arrest.
- c) The special Panel bears in mind the age of the accused. He does not know precisely his date of birth, but was 22 years old on 18/07/2000. He is currently 23 years of age. At the date of the commission of the offence on 08/09/1999, he was 21 years of age. The Special Panel has also taken into consideration the fact that the accused has no previous conviction. However this may be said of many accused persons and cannot be given any significant weight in a case of this gravity.
- d) Joao Fernandez was following the orders of the TNI and Militia Commander (Natalino Monteiro and Marcos Tato Mali).

21. Having reviewed all the circumstances of the case, the Special Panel is of the opinion that exceptional circumstances in mitigation surrounding the crime committed by the accused afford him some clemency.

V. VERDICT

The Special Panel for Serious Crimes at the District Court of Dili,

For the foregoing reasons;

Delivering its decision in the Public;

Pursuant to Section 8 of UNTAET Regulation 2000/15 and Article 340 of the Penal Code of Indonesia

Noting the indictment submitted by the Public Prosecutor on 15 November 2000;

Noting the Plea of guilty of Joao Fernandez, on the 10 January 2001 on the charge of murder as stipulated in Section 8 of UNTAET Regulation 2000/15 and Article 340 of the Penal Code of Indonesia;

Having heard the closing statements of the Prosecutor and the Defense counsel;

Having found Joao Fernandez guilty on the charge of murder;

IN PUNISHMENT OF THE ABOVE MENTIONED CRIME;

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1. Sentences Joao Fernandez to an imprisonment of 12 years for the crime of murder he has been convicted
2. Rules that this judgment shall be enforced immediately
3. Rules that credit shall be given to Joao Fernandez for the period during which he has been detained
4. Orders Joao Fernandez to pay the costs of the criminal procedure



Judge Luca L. Ferrero, Presiding
Judge [Signature] Tukamazinga, Rapporteur
Judge Maria Natércia [Signature]

REGISTERED IN THE FILE : on 25 January 2007

[Signature]
Jose Manuel Simões

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PENGADILAN DISTRICT DILI
PANEL HAKIM UNTUK KEJAHATAN BERAT
KASUS NO. 1/Pid. Berat/2000

Majelis Hakim :

Hakim Luca Ferrero, Presiding
Hakim Silver Ntukamazina
Hakim Maria Natercia Gusmao Pereira

JAKSA UNTUK KEJAHATAN BERAT
V
JOAO FERNANDES Alias JOAO ATABAE

KEPUTUSAN TIDAK SEPENDAPAT
OLEH HAKIM MARIA NATERCIA GUSMAO PEREIRA
MENGENAI FAKTA-FAKTA DAN HUKUM
UNTUK KEJAHATAN BERAT

JAKSA UNTUK KEJAHATAN BERAT :
BRENDA SUE THORNTON
ANTONINHO GONCALVES

TIM PENGACARA DARI PUBLIC DEFENDER OFFICE :
CANCIO XAVIER
OLGA B. NUNES
JOAO RIBEIRO
SIPO MALUNGA

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Setelah membaca fakta- fakta yang diajukan dalam dakwaan oleh Jaksa terhadap Joao Fernandes yang mana dituduh dengan pembunuhan berencana sesuai dengan Peraturan Undang-Undang 15/2000 section 8 dan pasal 340 KUHP Indonesia, pada prinsipnya demi memberikan keadilan kepada seluruh masyarakat Timor Lorosae seharusnya sebagaimana dalam fakta-fakta kasus ini lebih tepat didakwa dengan Kejahatan Terhadap Kemanusiaan sebagaimana dalam peraturan Undang-Undang 15/2000 section 5.

Hakim tidak dapat memutuskan (menvonis) lebih dari apa yang diajukan dalam surat dakwaan kalau Jaksa tidak melakukan perubahan dakwaan sebagaimana dalam pasal 32 Reg. Undang-Undang 30/2000.


Hakim Maria Natercia Gusmao Pereira

Translation

Dissenting Opinion of Judge Maria Natercia Gusmao Pereira

Dili District Court
Special Panel for Serious Crimes
Case number No. 1-2000

The Panel

Judge Luca Ferrero, Presiding
Judge Sylver Ntukamazina
Judge Maria Natercia Gusmao Pereira

The Public Prosecutor

Versus

Joao Fernandes alias Joao Atabae

Dissenting Judgement of Judge Maria Natercia Gusmao Pereira
Regarding the facts and the sentencing for serious crimes

Serious Crimes Prosecutor:

Brenda Sue Thorton
Antoninho Goncalves

For the Public Defenders office

Cancio Xavier
Olga B. Nunes
Joao Ribeiro
Sipo Malunga

After reading the facts submitted in the charges by the Public Prosecutor against Joao Fernandes who is charged with premeditated murder in accordance with UNTAET regulation 15/2000 section 8 and section 340 of the Indonesian Penal code, in accordance with the principle of bringing justice to all the people of Timor Leste the facts in this case indicate that the defendant should have been charged with crimes against humanity according to UNTAET regulation 15/2000 section 5.

A judge can not decide on more than what is submitted in the indictment if the Prosecutor does not change the indictment in accordance with paragraph 32 of UNTAET regulation 30/2003

(signed)

Judge Maria Natarica Pereira

ORIGINAL WRITTEN IN INDONESIAN, WHICH IS THE AUTHORITATIVE VERSION.

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