IN THE COURT OF APPEAL OF EAST TIMOR
(CORAM: CLAUDIO XIMENES, P., EGONDA-NTENDE, J.A., CIRILIO CRISTOVAO, AG. J.A.)

HOLDEN AT DILI

CRIMINAL APPEAL NO. 7 OF 2001

JULIO FERNANDES **APPLICANT**

VERSUS

PROSECUTOR GENERAL **RESPONDENT**

RULING OF THE COURT

The applicant, Julio Fernandez, seeks leave of this court to file a written appeal statement out of time and or that an appeal written statement filed on14th May 2001 be accepted by this court as validly done. The respondent conditionally opposes this application arguing that it has no merit, and in any case that the appeal lapsed as soon as the applicant failed to file an appeal statement within the time allowed at law. This is the ruling of this court in the matter.

The applicant was on the 1st March 2001 convicted by the special panel for serious crimes at Dili District Court with Murder contrary to section 340 of the Indonesian Penal Code. He was sentenced to serve a term of imprisonment of seven years. Counsel for the accused filed a notice of appeal on the 7th March 2001. The notice of appeal included the grounds on which the appeal was based. The registry of Dili district court prepared a record of appeal and transmitted it to this court. It is not certain when it arrived in this court. On 4th May 2001 this court issued hearing notices to the parties notifying them that the appeal would be heard on the 21st May 2001.

Counsel for the Respondent responded with a letter to the court and the applicant that this appeal had lapsed as the applicant had never filed an appeal statement as required by section 40.3 of the Transitional Code of Criminal Procedure, Regulation 2000/30. This letter seems to have shaken the Applicants counsel from slumber. The applicant subsequently filed the application before us for leave to file the appeal statement out of time, in accordance with section 50.1 of Regulation 2000/30.

At the hearing of this application, learned counsel for the applicant, Mr. Malunga, reiterated the arguments set forth in his application. The main ground is to the effect that the district court had not perfected the record of the trial, substantial portions of which were in Bahasa, a language presumably not understood by Mr. Malunga, within the time available for filing of the written statement of appeal. Mr. Malunga argued that without the record of evidence he would not able to formulate grounds of appeal.

Ms Brenda Sue Thornton, learned counsel for the respondent opposed this application. In line with the written response to application, Ms Thornton submitted that the burden of showing that there was good cause for extension of time lay upon the applicant. She submitted that the applicant had not discharged this burden. It was not clear when the record became available to the applicant. As far as the question of substantial portions of the record being in Bahasa, she was of the view that this should offer no comfort to the applicant, as one of co-counsel, Mr. Cancio Xavier, was fluent in Bahasa. She prayed that this application be dismissed.

Section 40.3 of Regulation 2000/30 states, "A party who has filed a Notice of Appeal shall file a written appeal statement with the court of first instance within thirty (30) days after filing of its Notice of Appeal. If no written appeal is filed within this period, the party concerned is deemed to have withdrawn the appeal, and the decision of first instance shall be final." Until time is enlarged under section 50.1 or a written appeal statement is accepted out of time under Section 50.2 of Regulation 2000/30, the appeal does not exist. It is deemed withdrawn. If a party desires that this court exercise its discretion under either of these two subsections it is for that party to establish good cause. We therefore agree with learned counsel for the respondent, Ms Thornton, that the burden of showing the existence of good cause rests upon the applicant.

Mr. Malunga has not explained why the applicants took no action at all in the thirty days that they had to file a written statement of appeal. For instance why did applicant's counsel not approach this court requesting for more time since it should have been evident to them that they were not meeting the deadline? We are left with one impression. The applicant's counsel were not diligent in pursuing the applicant's appeal. It may be true, though it has not been established by the applicants, that the record of the trial or the translation of the same from Bahasa to English had not occurred by the end of the thirty-

day period. For this reason to amount to good cause, it was incumbent on the applicant to establish, before this court, that that is what had occurred. The applicants have failed to establish this to be the case. In the result we conclude that the applicant has failed to establish good cause for failing to file a written statement of appeal within thirty days from the filing of the notice of the appeal.

There are times when the consequences of dereliction of duty on part of counsel should not be visited upon a party. This may be one such occasion. We note that the notice of appeal filed in this matter contained grounds of appeal though this was not the document for this purpose. Nonetheless the notice of appeal provided the respondents with notice of the grounds upon which the appeal in this case was being made. Those are the grounds that have been enlarged upon in the written appeal statement of 14th May 2001. The respondent will not suffer any prejudice if this applicant is granted leave to proceed with this appeal. Exercising our discretion under Section 50.2 of Regulation 2000/30, we recognise the written appeal statement filed out of time, on 14th May 2001 as validly done. The hearing of the appeal may proceed on a date to be determined by this court.

Disposition

1. Application made under Section 50.1 of Regulation 2000/30 for leave to file a written appeal statement out of time is dismissed.
2. Written appeal statement filed on 14th May 2001 is accepted as validly done under Section 50.2 of Regulation 2000/30.

Dated at Dili this 29th day of June 2001.

Claudio Ximenes
President

Fredrick Egonda-Ntende
Judge of Appeal

Cirilio Cristovao
Acting Judge of Appeal

IN THE COURT OF APPEAL OF EAST TIMOR
(CORAM: Claudio Ximenes, P., Fredrick Egonda-Ntende, J.A., Antonio Helder Viana de Carmo, Ag. JA.)

CRIMINAL APPEAL NO. 7 OF 2001
(Arising from Original Criminal Case No. 02/PID.C.G./2000/PD.Dil. of the Special Crimes Panel of Dili District Court)

JULIO FERNANDES **APPELLANT**

VERSUS

PROSECUTOR GENERAL **RESPONDENT**

JUDGEMENT OF FREDRICK EGONDA-NTENDE, JUDGE OF APPEAL

1. I agree with the majority of this court that all the grounds of appeal advanced forth in this appeal are without merit. I am unable, however, to join the majority of this court, on the route they have chosen to travel thereafter, in this case. I set out below my reasons why this appeal cannot succeed, why the orders of the trial court should be left to stand and why I part company with the majority of this court.
2. The appellant was convicted in the court below, (Judge Maria Natercia Gusmao Pereira dissenting), of the offence of murder contrary to Section 340 of the Indonesian Penal Code. He was sentenced to serve a term of imprisonment of seven years. He appeals against both conviction and sentence. The respondent, the Prosecutor General, opposes the appeal.
3. So far as can be gathered from the record of the trial the facts of this case are that on the 26th September 1999 the appellant, a platoon commander, in Falantil, (a guerrilla force fighting for the independence of East Timor from Indonesia), came down from the mountains to Ermera. He testifies that he came down to protect the population from militia and the Indonesian Army but later said he came down to look for his family. He found a huge angry crowd near the military centre. He saw someone in critical condition sitting on a chair surrounded by the crowd. The person's ears had been cut off and he was bleeding. The crowd was yelling 'kill him' 'kill him'.
4. He let out a yell, and then approached the person sited on the chair. He questioned him. After satisfying himself that the person sited on the chair was a militia member from the answers he received from him the appellant proceeded to kill him. He stabbed him twice and the person collapsed dead. The appellant ordered the crowd to bury the deceased and he left the scene. He claims that he killed the deceased on orders of the mob or crowd present at the scene.
5. At the trial in the court below the appellant testified to the foregoing. The prosecution called three witnesses, Rita Pinto De Araujo, Mario Soares, and Flavianus Lemos a.k.a. Mauterus. The trial court upon application by the

prosecution then accepted statements of witnesses 7-12 on the prosecution's list of witnesses to constitute the evidence of those witnesses. In addition reports made by a pathologist, photographs taken in the course of investigations were just passed over to the court as evidence in this case, without the testimony of the authors or those who took the photographs. As it were the record of investigations was just turned over to the court. Counsel for accused did not object to this course of action. On the contrary they consented to it.

6. After consideration of the evidence in the case the trial court, with one judge dissenting concluded that the prosecution had proved the offence of murder contrary to section 340 of the Indonesian Penal Code. The court rejected the defence of duress. It sentenced the accused to seven years imprisonment. In her dissenting opinion, Judge Maria Natarcia Gusmao Pereira, found that the element of premeditation had not been proven, and instead found that the accused ought to be convicted of the offence of murder contrary to Section 388 of the Indonesian Penal Code.
7. In the appeal before us the learned Counsel for the Appellant has basically raised two grounds of appeal. Firstly that the court below erred in law to convict the appellant when, on the evidence before the court, it had been established that the accused acted under duress, thus excluding whatever criminal liability he would otherwise have incurred. In support of this ground he referred to various portions of the evidence on record both by the appellant and prosecution witnesses. Secondly it was argued that the sentence imposed by the trial court was so severe so as to induce a state of shock. Counsel argued for more a lenient sentence, should this court uphold the conviction of the accused.
8. Learned Counsel for the Prosecutor General opposed this appeal. She argued that the trial court had not committed any material error of law or fact. The court had rightly considered the defence of duress put forward by the accused and found that the acts complained of were not induced by duress as claimed. With respect to the sentence it was argued that the sentence handed down was the lowest sentence ever handed down by the panel for this kind of offence. Counsel submitted that it was not excessive but well within range of accepted sentences. The trial court had taken into account all the mitigating circumstances in favour of the accused. She prayed that the sentence be upheld.
9. Duress as a defence is available to an accused by virtue of Section 19 of Regulation 15 of 2000. The relevant portion of the section states, "19.1 A person shall not be criminally responsible if, at the time of that person's conduct: (a), (b), (c), (d) the conduct which is alleged to constitute a crime within the jurisdiction of the panel has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) made by other persons; or (ii) constituted by other circumstances beyond that person's control."
10. There are five elements for the defence of duress to be available to an accused under this section. (The provisions also cover the defence of necessity as the threat of imminent death or continuing or imminent serious bodily harm can be

constituted by circumstances beyond the accused's control rather than only threats.)

(a) There must be a threat of imminent death or of continuing or imminent serious bodily harm.

(b) Such threat or threats made by other persons or constituted by circumstances beyond the acccused's control.

(c) The threat or threats or circumstances must be directed to or against the accused or some other person.

(d) The accused person must act necessarily and reasonably to avoid the threat.

(e) In so acting the accused is not to cause or intend to cause greater harm than the one sought to be avoided.

11. In order for the defence of duress to succeed there must be evidence before the court that supports the existence of the above five elements. Counsel for the appellant submits that all the accused has to do is raise the defence of duress, and it is the duty of the prosecution to negative or disprove its existence. The duty to prove the indictment rests on the prosecution all the time. If any defence is raised the prosecution, in order to succeed must demolish the defence. But that is not all, in my view. In a defence of this kind, like that of self-defence, an evidential burden of proof shifts to the accused to put the defence in issue. It is not just enough to claim that he acted under duress. Evidence has to be produced by the person seeking to take advantage of this defence that establishes the existence of the five elements referred to above. He need not establish the matter beyond reasonable doubt but may do so on a balance of probabilities. It is then for the prosecution to establish beyond reasonable whether that defence is available or not to the accused in answer to the indictment.
12. The trial court reviewed the defence of duress. It concluded that there was no evidence of a serious threat of imminent death or bodily harm against the accused. That the accused had more than two options open to him including taking the victim into custody. The court was of the view that duress was a defence of the last moment. It is the contention of the appellants counsel that these findings were wrong on the evidence available before it, especially the testimony of the appellant at the trial.
13. The court below makes some findings that are not based on the testimony before the court. For instance, "The special panel believes that the crowd did not threaten Julio Fernandez, but called him in order to take revenge on the militia man and to punish him in an "official" way, through a Falantil member. The same happened to the witness Flaviano Lemos, who was a member of the C.R.N.T. and highly considered and respected in the community like Julio Fernandez. The crowd asked him to kill Americo, but he was able to refuse and to walk away."
14. I am unable to find in the testimony of the accused or the three witnesses called by prosecution that Julio was called to the scene of crime. The claim that Flaviano Lemos was asked to kill Americo is also not in evidence. In fact in Flaviano's testimony he states that the shouts of 'kill him' 'kill him' were not directed toward himself. He does not state if they were directed to anyone else. The trial court chose a hypothesis to explain the belief the court formed. This hypothesis may well be correct but it is not supported by evidence. It is to the evidence alone,

evidence properly adduced before the court, that a court must have regard to in making findings of fact.

15. Examining the record of evidence for myself, I find that whatever the true objective of the appellants visit to the scene, he without invitation approached the crowd. He initially claimed he had come down from the mountains to protect the community from the militia, being a Falantil member. Subsequently he claimed that he had come to look for his family. On arrival at the scene he let out a yell. He claims that he had shouts of 'kill him, kill him'. There is no evidence to show that these shouts were directed towards him. He found a crowd that was doing "its thing". The victim was already bloodied and had been made to sit on chair. His ears had been cut off. All this was before the arrival of the appellant on the scene. The crowd was baying for the victim's blood and clearly the state of the victim before the arrival of the appellant reveals a deliberation to inflict the most severe pain and suffering on the victim before causing his death. If this was a crowd out of control just ready to lynch the victim it is unlikely he would have been sited on a chair with severe mutilation being inflicted deliberately. The victim would have been on the ground hacked to death.
16. In his opening statement the appellant told the trial court, "I am a member of Falantil and I came to the city to defend the community. At that time I saw that a mob had beaten the victim. I killed the victim because I was forced by the mob of people who were at the scene of the crime. As a Falantil member I have fought the Indonesian troop all this time in search for truth and justice, therefore, if in this instance, as a Falantil member, I am found guilty, I am willing to be sentenced/to accept my punishment in accordance with the law."
17. Later he responded to questions as follows:
    J: When you asked the victim if he was a militia member, he answered yes and then you killed him?
    D: Yes, I asked him with the intention of knowing for sure who he was. As a member of Falantil I need to know this so I can answer or take responsibility if there are any claims in the future.
    J: If the victim had have responded that he wasn't a militia member when you questioned him, what would you have done?
    D: I would have left him, but the crowd knew he was a militia member."
18. Later on the appellant explained how he perceived the threat.
    J: Before you stated that you killed the victim because you were forced/pressured by the mob. What pressure/force did you experience at that particular moment at the scene?
    D: I felt pressured because the faces of the people were distressed because husbands, wives, children and parents had been murdered by the militia, and if I didn't kill the victim maybe the mob would have killed me."
19. It appears clear to me from this evidence together with the evidence on the record that it has not been established that there was in existence, at the time the offence was committed, any threat of imminent death or bodily injury to the appellant or any other person, other than the victim. There is no evidence pointing to an actual threat made to the appellant at the time in question. The accused's claim that he was forced by the mob is not sufficient to establish the presence of a threat of

imminent death. It is just a claim that has to be supported by evidence of the actual threats of imminent death. There must be evidence indicating the existence of the threat of imminent death. The accused may have had his own suspicions but these do not amount to a threat of imminent death.

20. The defence of duress is available upon rather stringent conditions. Failure to establish any one of the five elements puts the defence beyond reach. In the instant case none of the five elements that bring the defence into play have been established. I agree with the conclusion of the court below, and the majority opinion of this court that on the evidence on record duress was not available to the appellant. I would dismiss all the grounds of appeal related to duress.
21. The appellant contends that the sentence imposed upon him was harsh and shocking. He asserts that the court did not take into account the mitigating circumstances in his favour, which include that he was a first offender. He had an impeccable record, was a decorated member of Falantil, and a respectable member of the community. The Prosecutor General opposes this ground, asserting that this was the most lenient sentence handed down for this offence in all cases that the court had dealt with to date. She referred to the cases that a show a range of sentences from 8 years to 16 years for the offence of murder contrary to section 340 of the Indonesian Penal Code.
22. I have examined the decision of the court below in this regard. It is clear, as night follows day that the court took into account the mitigating circumstances the appellant complains about. This is what the court said. "9) The special Panel bears in mind that the accused is married with children (however this may be said of many accused persons and cannot be given any significant weight in a case of this gravity), has no previous conviction and is highly regarded and respected in the community."
23. As to the appellant being a member of Falantil, the court took this into account, and rightly in my view, as one of the aggravating circumstances on the facts of this case. It said, "5) Julio Fernandez was a Falantil since 1991 and was a platoon commander. He acknowledged that as, a Falantil member, he knew that there was an order not to kill militia members. Therefore the murder of Americo de Jesus Martins, besides violating the law, is also a breach of Falantil rules."
24. The trial court went on to enunciate what it termed its sentencing policy, a controversial and dangerous policy without a basis in law that worked to the benefit of the appellant. The court stated, "11) In this case, more than others, punishment is also a contribution to reconciliation and to deter such crimes in the hard times during which they occurred. ***Julio Fernandez could not be acquitted from the charge of murder because he killed a militia member immediately after the rampages suffered by East Timor civilian population. The situation can only be deemed relevant in determining the penalty***." (emphasis is mine).
25. The trial court, after initially treating the fact that the appellant disobeyed Falantil instructions in killing the victim as an aggravating circumstance, decided to give him a break on the punishment. The court notes that though it cannot acquit him for killing a militia member, this will be taken into account in sentence. And what was the result? The shortest sentence given so far for the offence of murder

contrary to Section 340 of the Indonesian Penal Code.[1] In the trial courts view, "this was necessary in this case more than in any other case," in order to advance reconciliation. The court did not say what distinguishes this case from all the others. But this is implicit in the sentence that follows. The distinguishing feature in this case, from others handled by the special panel, is that the deceased was a militia member and the accused a member of the Falantil, the liberation army.

26. The sentencing policy of the special panel, enunciated for purposes of this case, and apparently not applied thereafter, is dangerous for suggesting that in the eyes of the law the life of an individual belonging to a group accused of committing atrocities is of less value or will count for less, compared to others in determining sentence. Reconciliation was turned into a vehicle to justify undue leniency for a case that appeared not to be fitting into the main pattern of cases coming before the court. Reconciliation, the stated aim of the court below in determining the appropriate sentence in this case, is not the direct role of the courts. That is a role best left to the political arena, i.e. the legislative and executive arms of government together with civil society. The duty of the courts is to administer justice according to law, to determine sentence according to law, and not according to court enunciated policy. It may be that one of the secondary effects of accountability provided by the justice system is to promote reconciliation in the long run.
27. The trial court was in error in promulgating this sentencing policy for this case. The result was a lenient sentence for the appellant. But by operation of law Section 41.6 of the Transitional Code of Criminal Procedure it is not open to the appeal court to enhance sentence, on appeal by the accused person. In the result I would reject the appeal against sentence, leaving the sentence of the lower court, in force.
28. However, the majority in this case are of the view that the conviction in this case for the offence of murder contrary to section 340 of the Indonesian Penal Code is not supported by the evidence on record. The majority determines that the

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1. [1] In case number 07/2000, The Prosecutor versus Agustinho da Costa the accused was charged with murder contrary to Section 340 of the Indonesian Penal Code. The accused belonged to a group opposed to the pro-independence groups. He was convicted of murder of a pro-independence activist, who was staff member of UNAMET, and had links with the Falantil. He was sentenced to 15 years imprisonment. In case number 12/2000, The Prosecutor versus Carlos Soares, the accused was charged of murder contrary to Section 340 of the Indonesian Penal Code. The accused acting on orders of the militia killed an old and disabled man who was trying to run to the mountains for safety. He was found guilty of murder as charged. The court did not find any aggravating circumstance. It sentenced the accused to 15 years and six months imprisonment.
2. In case number 8 of 2001, The Prosecutor v Francis Dos Santos Laku, the accused was charged with murder contrary to section 340 of the Indonesian Penal Code. After a trial the court found established that though the accused was not the main perpetrator of the crime in question, he was the one who issued orders for the killing of the victim. In doing so he was acting under orders too from the Government at the time. The court found no aggravating circumstances. It sentenced the accused to 8 years imprisonment. In case number 3/2001, the Prosecutor versus Jose Valente, the accused was charged with murder contrary to section 340 of the Indonesian Penal Code. The accused was found to have belonged to an armed militia group and had shot one Cabral, killing him. He was convicted as charged and sentenced to twelve years and six months imprisonment.

evidence on record can only support a conviction for the offence of murder contrary to Section 338 of the Indonesian Penal Code. In doing so the majority concludes that that the evidence in support of premeditation is lacking, and I suppose, to that extent, agree with the minority opinion of the court below. The conviction of the court below is set aside and substituted with a conviction under Section 338 of the Indonesian Penal Code.

29. This matter was not raised at all on appeal. And neither did the parties have an opportunity to address us either orally or in writing on this matter. I am aware that the trial court, and consequently this court, may convict an accused with a minor and cognate offence, that is an offence all of whose elements form part of the more serious offence, if the evidence submitted does not support the more serious offence in the indictment but is sufficient to support a conviction for the minor and cognate offence. (See Section 32.4 of the Transitional Code of Criminal Procedure.)
30. Nevertheless I do not deem it good practice by this court, to raise an issue on its own and without hearing the parties on that issue, proceed to determine the matter at issue. The purpose of a hearing is to provide an opportunity to the parties to canvass the court on all issues arising before it, necessary for a decision in the matter. If it turns out that in the opinion of the court, there is a significant issue overlooked by the parties, on which the decision of the case may turn, the court should make every effort to hear the parties on that issue. This may be by request for a written response or orally during the hearing of the appeal.
31. As already noted on the issue of premeditation there was no consensus. I shall set out both views in the court below, starting with the minority opinion. " Considering that with premeditation means that there is time between when the intent to murder arises and the intent is actually realised for the perpetrator/accused to calmly think about how the murder is to committed. The time should not be too short, however nor should it be too long, the important issue is if there is time for the perpetrator/accused to think calmly and organise the murder; Considering that in the defence submitted by the public defender during the hearing, the accused was overcome with emotion and the screams of the huge crowd, the accused did not have sufficient time to contemplate, the accused was very emotional upon hearing the responses of the victim who stated that he intended to go to Atambua-West Timor because he was a member of the Darah Merah Militia Group, so that the murder of the victim was sudden, the accused could not extricate himself from this incident; Considering that in the hearing the judge has determined the actions of the accused occurred spontaneously and without premeditation; Considering that the element of with premeditation in this article has not been established;"
32. It is clear in this quote of the minority decision of the trial court the judge took account of the written statement of defence submitted by counsel for the appellant which purported to set out the facts that the defence was going to prove at the trial. Unfortunately I have perused the record of evidence and it is clear the appellant never testified to that effect in the testimony on record. The judge was in error, in my view, to take into account matters that had not been proved into evidence on which she based her finding that the evidence did not support the

existence of the element of premeditation. Allegations made in pleadings of the parties are not evidence. They remain allegations until proof is provided. In this case there is no testimony to the effect that the accused was overcome with emotion and the screams of the huge crowd. The testimony of the appellant himself shows that he acted with calm and deliberation.

33. The majority opinion of the court below discussed this matter, and stated, "3) The special panel deems it inappropriate to qualify the crime with the lesser offence of manslaughter. According to the C.P.I. (applicable as mentioned above), which derives from the Dutch Penal Code, the difference between murder (art.340) and manslaughter (art.338) is premeditation.
Premeditation, according to Indonesian jurisprudence and the interpretation of murder in different countries, does not necessarily imply a long-term planning of the conduct. It's enough to take the life of the victim or to withdraw from that intention. The time for the decision can be very short (i.e. minutes or seconds), but what is important is that nothing exceptional interferes with the decision. Julio Fernandez approached Americo, questioned him, listened to his answers, decided to kill him and then stabbed him twice. He was sure the victim was dead, ordered he be buried and walked away. It was not an instinctive reaction to a very peculiar situation, but a decision reached by reasoning, after which followed conduct."
34. If references are made as was done in this case to Indonesian jurisprudence and jurisprudence from other jurisdictions it was not enough for the trial court to do so without providing the reference and source of that information. It is standard practice I take it in the writing of judgements that if reference is made to extraneous sources of law whether of binding or persuasive authority citation be provided, not just to demonstrate the authenticity of the source or the material but to provide means for checking such references out. It is unfortunate that none are indicated here. I do hope that in the future the special panel will provide citation in respect of materials they referred to in their judgements.
35. In the appeal before this court the appellant has not challenged the finding of the court below that the element of premeditation was proved. Instead he attacked only the refusal of the court below to find that he was acting under duress, which excuses the crime and excludes criminal responsibility. I am inclined to agree with the trial court that premeditation was proved in this instance. According to The Macquiarie Concise Dictionary, third edition, the meaning of premeditate is "to meditate, consider, or plan beforehand." And the meaning of 'premeditation' is "1. the act of premeditating. 2. *Law* sufficient forethought to impute deliberation and intent to commit the act." (Page 909)
36. Premeditation imports the mental act of formulating a plan to carry out a certain activity, to achieve the desired consequences. Obviously this requires some time but how much time? This must depend on the circumstances of each particular case, which have to be considered to determine if premeditation, separate from intention, occurred. The majority of this court, if I understand there position correctly, (that position is set out in Portuguese, a language I do not understand and for which no translation is provided), is that the offence in question was committed spontaneously out of emotion without the time for premeditation. With respect, I beg to disagree. The testimony of the accused tells a different story.

37. The appellant arrived at scene. His objective was to protect the community in his own words. He proceeded to where the victim was seated, immobilized with both his hands tied. The victim was bleeding. Both his ears had already been cut off. He interrogated him and in his mind his plan was clear. If the victim was a militia member the appellant was going to kill him. If he was not, the appellant was going to walk away from the scene. He acted with deliberation, knowing that as a member of Falantil, he had to act with knowledge and take responsibility if questions were to arise in future.
38. I shall repeat his testimony to that effect below.
"J: When you asked if he was a militia member, he answered yes and then you killed him?
D: Yes, I asked him with the intention of knowing for sure who he was. As a member of Falantil I need to know this so I can answer questions or take responsibility if there are any claims in the future;
J: If the victim had have responded that he wasn't a militia member when you questioned him, what would you have done?
D: I would have left him, but the crowd knew he was a militia member."
39. The responses to the questions put to him do not reveal an accused that acted spontaneously and emotionally without reason. On the contrary we see here a measured deliberation that reveals premeditation, the consideration of what to do, in event of certain responses, and with an eye to the future too. It is not known how long all this played out in terms of time from the arrival of the appellant on the scene and to the killing of the victim. Nevertheless, parting company with the majority in this court, I agree with the majority opinion in the court below that the appellant acted with premeditation in killing the deceased in this case. I would find that he was rightly convicted of murder contrary to Section 340 of Indonesian Penal Code.
40. I would like to discuss one other matter before taking leave of this case. I raised it during the hearing of the appeal. Were the parties correct according to law to submit by agreement statements of witnesses as evidence in court without calling those witnesses to testify in court? In dealing with this question I shall start by setting out in detail portions of the record of the trial that deal with this aspect of the case.
41. "Then the Presiding Judge asked the following questions to the Public Prosecutor:
PJ: Is the Public Prosecutor ready to present the evidence and witnesses in today's hearing?
PP: Yes, the witness Carlos de Jesus is the witness who filed the report on the murder. If the Public Defender does not object I would like to submit this report now. Then there is the witness Barry Gibson who conducted the exhumation and documented this with 18 photographs. If there are no objections these witnesses do not need to be called, as their statements are sufficient as evidence in this case. Then the Public Prosecutor stated that if there was no objection from the Public Defender witnesses No. 7-12 didn't need to attend, as their activities were related to the witness Barry Gibson, namely the exhumation and documentation of the exhumation and gravesite. Therefore we request for the Panel to consider this motion.

PJ: Are the witnesses ready to appear before the court in this hearing?
PP: Yes, most of them are ready to be questioned before the court."

42. "Then at the instruction of the Presiding Judge the Public Prosecutor brought the first witness into the court room, and in response to the Presiding Judge's questions the witness stated the following:" (The testimony of prosecution witness number one and two followed.) Immediately after that testimony of those two witnesses the record reads, " Then the Presiding Judge stated that the witnesses' statements would be sufficient. The Presiding Judge then asked the following questions to the Public Defender:"
43. "PJ: Do you agree with the request from the Public Prosecutor, that there is no need to question witnesses 7-12, and it will be sufficient to read out their statements?
PD: Yes we agree.
The Presiding Judge then asked the Public Prosecutor to submit the evidence, and at this request the Public Prosecutor asked that the evidence in the possession of the Public Defender we compared with evidence in the possession of the Public Prosecutor. At this request the Presiding Judge stated that as the Public Defender had agreed, there was no need to question witnesses 7-12 in the hearing."
44. "Then the Public Defender stated that the evidence in his possession was not the same as that in the possession of the Public Prosecutor. Due to this fact the Public Prosecutor and Public Defender approached the bench to compare the aforementioned evidence. Then the Presiding Judge stated that the panel agreed with the request of the Public Prosecutor for the statements 7-12 to be submitted and ordered the Public Prosecutor to call in the next witness. On the 6/01/2000 the Public Defender had agreed for the statement of Witness 1 to be read out and witness 3 did not need to be summoned, but the reports on the exhumation, photographs of the exhumation numbered 1-11 must be submitted in the case file. The Photographs numbered 1-17 in the possession of the Public Prosecutor would be submitted in this hearing if there was no objection by the Public Defender. Then the Public Prosecutor submitted all the evidence in relation to this case to the Panel."
45. In response to the question I posed to Counsel whether this was the correct way according to the law to adduce evidence at trial counsel for the Prosecutor General submitted that the panel had the authority to admit and consider any evidence that it deemed relevant in accordance with Section 34.1 of the Transitional Code of Criminal Procedure. On his part, counsel for the appellant submitted the applicable provision was Section 36.3 of the Transitional Code of Criminal Procedure, which governed this area but that it was capable of two or more interpretations.
46. Several sections dealing with evidence in the Transitional Code of Criminal Procedure must be read together in order to arrive at the correct way in which evidence ought to be admitted onto the record of a trial. I would start by referring to Section 33.3 of the Transitional Code, which states, "Evidence shall be presented in the most direct manner possible, subject, to the other sections of the present regulation." As this regulation states it must be read together with the

other provisions of the regulation. But as it were the first rule is that the evidence must be presented in the most direct manner possible.

47. I turn to Section 36.1 of the same code. It states, "Witnesses shall be heard directly by the court, unless for good cause the Court determines that a different procedure may be used. Any procedure for presentation of witness testimony must take account of the rights of all parties to a fair hearing." The court is required here to hear directly from the witness such witness's testimony. It presumes a witness standing before court and testifying directly. Witness statements recorded in writing during the investigation of the case do not qualify to be witness testimony as such. It is the oral testimony before court that is evidence produced in the court.
48. Section 36.1 allows the court for good cause to determine a different procedure. Such exceptions could be for instance in sexual offences where it may be inappropriate for an infant/child victim to testify in the immediate presence of the accused. A different method of presentation of its testimony may be ordered by court such as the child testifying from a nearby room and connected by Television/Video Link to the Court Room. Or it could be the child testifying in the courtroom with the aid of mirrors obstructing her from seeing the accused but being observed by all others in court.
49. Section 36.3 of the Transitional Code deals with situations where prior statements of witnesses or experts may be admitted into evidence. I set it out. "On exceptional grounds, the Court may allow the statement of a witness or expert witness to be admitted in evidence or may allow the presentation of the evidence of witness by deposition, video link testimony, or any other method it deems appropriate, in the following circumstances: (a) the witness or expert witness has died or is otherwise permanently incapable of testifying in court due to his or physical condition or health; (b) the prosecutor and the accused and legal representative agree with such proceeding; (c) the direct interrogation of the witness or expert witness can not be expected due to the inaccessibility of that person or due to the distance of the domicile of that person or place of current residence from the place of the hearing and taking into consideration the importance of the statement of that person for the trial; or (d) it is provided in the present regulation."
50. Combined in this one section are two sets of different situations envisaged by the law. One is in respect of admission of statements of a witness, on exceptional grounds into evidence. The exceptional grounds are not set out in the section. The other situation is the presentation of evidence of a witness by deposition, video-link testimony, or any other method it deems appropriate in clearly defined circumstances in (a), (b), (c) and (d). These circumstances set out are applicable only in respect of presentation of evidence by deposition, video-link or other appropriate method. The use of the word, 'or' between 'evidence' and 'may allow' is to denote that the situation described preceding the 'or' is in alternative to the situation described following the 'or'. 'Or' is used disjunctively. Consequently the circumstances set out in (a), (b), (c) or (d) of the section 36.3 are not connected to the first part of that section which reads, "On exceptional grounds, the Court may allow the statement of a witness or expert witness to be

admitted in evidence". Those circumstances are confined to the alternative situation envisaged, that is the presentation of evidence by deposition, video-link or other method deemed appropriate.

51. If the court is to apply the first part of that Section 36.3, it must find that exceptional circumstances do exist. In legal proceedings agreement of parties to a proceeding can hardly qualify to be an exceptional circumstance. There is nothing exceptional about it whatsoever in my view. In the court below, no reason was provided why it was not possible to proceed in the ordinary way. In fact the record shows that the prosecution stated that the witnesses need not be called as their statements were sufficient evidence. No reference was made at law as to what law was applicable in taking that route. The court's intervention does not indicate that there was any attempt to consider what was the law applicable in such circumstances at all. The court and counsel chose to move in the dark, unaided by the light of the law that applies to reception of evidence by the court.
52. The procedure that the court adopted to accept prior written statements of witnesses 7 –12, including reports of expert witnesses, photographs and any other papers so received was contrary to the law, rendering all that material, to be wrongly part of the record. In order for the court to proceed that way, it was important that firstly an exceptional reason was established, in accordance with Section 36.3 of the Transitional Code. Thereafter those statements would have to be proved in the ordinary way by direct evidence that there are statements made by the people alleged to have made them. It is just not enough for the Prosecutor to pass them across, from the bar to the bench, in an omnibus fashion without proof that they are the statements of the people they purport to be.
53. I would order the same to be expunged from the record with the result that I would have no regard to any of that material in considering the case before us. But as it turns out the evidence of the appellant, and the three witnesses called by the prosecution is able to sustain a conviction as I have opined above.

Dated at Caicoli, Dili this 29th Day of 2001.

Fredrick Egonda-Ntende
Judge of Appeal.