



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

**TRIBUNAL DISTRITAL de DILI
SECÇÃO CRIMES GRAVES**

Before:
Judge Sylver Ntukamazina

Case No. 5/2002

**The Public Prosecutor
Versus
Carlos Ena**

Decision to the application for release of the accused Carlos Ena

For the Prosecutor:
Charles Nsabimana

For the Defence:
Alan Michael Gutman

Procedural background

- 1 On 23 May 2003, the Defence filed a motion under Section 27.2 of the Transitional Rules of Criminal Procedure, UNTAET Regulation 2000/30, as amended by UNTAET Regulation 2001/25, to apply for the immediate release of the accused Carlos Ena or, in the alternative, the imposition of substitute restrictive measures under Section 21 of the above-mentioned rules.
- 2 The Defence sustains the right of the accused to have his detention reviewed on Section 6.3 (k) of the mentioned Transitional Rules of Criminal Procedure.
- 3 By a decision issued on 30 May 2003, the Court scheduled the trial hearing on the 7th July 2003. In the same decision, and following the motion submitted by the Defence, the Court decided to hold a review hearing on the detention of the accused on 11 June 2003.
- 4 The Prosecution filed a written response to the Defence motion on 9th of June 2003.
- 5 On 11th June 2003 the Court held a hearing to decide on the detention review requested by the Defense Counsel.

Submissions of the parties

- 6 On 23 May 2003 the Defence Counsel for the accused Carlos Ena filed an application for the release of the accused on the following grounds:
 - a) The new delay in the proceedings occasioned by the postponement of this matter on 7 May and 13 May 2003.
 - b) The change in the personal circumstances of the accused deriving from the fact that the accused nephew, Domingos Obe, residing in Dili, provided a written undertaking to care for the accused and to ensure his attendance at Court.

- 7 The Defence proposed that, should the Court consider that there were reasonable grounds for detention under Section 20.8, it should deal with the case under Section 21 UNTAET Regulation 2001/25, which provides substitute restrictive measures as an alternative to an order of detention. The Defence accepted as possible restrictive measures those suggested by the Public Prosecutor in their application dated 5 June 2002.
- 8 The Defence contested the written response of the Public Prosecutor for relying in the principle on the ICTR decision *Prosecutor vs. Jerome Clement Bicamumpaka*¹. According to the Defence, it is a mistake to quote the ICTR in this matter as the rules of the ICTR differ substantially from the Law in East Timor. Namely, ICTR rules state that “only in exceptional circumstances can the trial chamber order the release of an accused person”, while in East Timor, as recalled by the Court in previous decisions including the decision in the case *The Public Prosecutor vs. Abilio Mendes Correia*² “the principle is liberty and detention is the exception in East Timor”.
- 9 The Defence also stated that the Public Prosecutor needs to present evidence of the necessity of the detention and that it is not sufficient for the Public Prosecutor to make allegations that simply repeat the requirements of the rules of criminal procedures but that evidence and other issues must be provided to the Court so that it can make a reasonable decision. The Defence also quoted the decision in the case *The Public Prosecutor vs. Edmundo Conceicao and Others*³ where the Court said “it is never enough to state the gravity of the offence as the basis of a request for pretrial detention”.
- 10 The Public Prosecutor stated that some of the grounds for the application of the Defence have already been decided in the decision on the 15th February 2003. In its decision the Court decided the extension of the detention because it founded that the gravity of the offence and the possible penalties connected to it could create a risk that the accused may attempt to interfere with the witnesses, the victims or any other persons. Reasonable length of the pretrial detention and the risk of flight were also grounds on which the Court funded the decision.

¹ Case No. ICTR-99-50-T

² The Public Prosecutor vs. Abilio Mendez Correia, Decision of 10th June 2003

³ The Public Prosecutor against Edmundo Conceicao and Others, Decision of 26th March 2003 on the application for the detention of Inacio De Oliveira, Jose Da Costa and Gilberto Fernandes

- 11 The Public Prosecutor also stressed that the decision of extension of detention for Carlos Ena was taken by the Court only about four months ago. The Prosecutor believes that nothing new has happened since the decision of the Court. The possibility of an alternative residence for the accused doesn't eliminate the danger of interference of victims, witnesses and other persons and the guarantees to prevent the risk of flight are not sufficient.
- 12 The Public Prosecutor defended that in its written submission it only referred indirectly to the ICTR jurisprudence, by directly quoting the jurisprudence of the Special Panels, namely the decision issued the 15th February 2003 in this very same case⁴.
- 13 Finally the Public Prosecutor signaled that the time spent by Carlos Ena under detention is the same amount of time the Court considered as reasonable for the co-accused Umbertus Ena when the previous decision was taken.

With respect to the request for release

- 14 On 5th June 2002 the Prosecutor filed two indictments against Carlos Ena and his brother Umbertus Ena where they are charged with crimes against humanity (murder, attempted murder and alternatively inhumane acts). The accused was arrested on the 6 May 2002 and has been held in detention to date.
- 15 On 10th June 2002, following a request by the Public Prosecutor, the Court decided the detention of the accused for the duration of the trial without prejudice to an appreciation by the Court during the Preliminary Hearing.
- 16 On 12th December 2002 the Defence filed an application for release of the accused. The Court heard the parties in the Preliminary Hearing held on 31 January 2003. In its decision of 15 February 2003 the Court, after deciding on the grounds of detention, rejected the Defence application and extended the detention of the accused for the duration of the trial.
- 17 On 23 May 2003 the Defence filed a new Application for the release of the accused person. The Defence sustains the application in two grounds:

⁴ The Public Prosecutor vs. Umbertus Ena and Carlos Ena, Decision of 15 February 2003.

- a) New delays in the proceedings occasioned by the postponement of the matter on 7 May and 13 May 2003.
- b) Change in the personal circumstances of the accused, namely the fact that his nephew Domingos Obe has provided a written undertaking to care for the accused and to assure his attendance at Court until compliance of the trial.

As to the new delay of the proceedings

- 18 The new delay of the proceedings must be considered in connection with the length of the detention. A delay by itself doesn't constitute a ground for release, as far as such a delay doesn't provoke the length of the detention to go beyond the limits of the reasonable. However, the possible impact of the delay in the overall length of the proceedings justify that the Court should re-examine this circumstance. However, the "test of reasonability" of the detention period must be done over the time already spent in prison and not over the hypothetical future period that a postponement of the case could add. In any case, it is true that the perspective of this future time can be taken into account by the Court as an additional element to be considered.
- 19 The jurisprudence of the Special Panel shows that an excessive length of the pre-trial detention can be considered as a new ground to revisit previous detention decisions. This has been the opinion of the Panel or of the individual Judges, *inter alia*, in the cases *The Public Prosecutor vs. Jose Cardoso*⁵, *The Public Prosecutor vs. Lino De Carvalho*⁶, *The Public Prosecutor vs. Damiao Da Costa Nunes*⁷ and *The Public Prosecutor vs. Abilio Mendez Correia*⁸. In this decisions the Court has noticed that there is not a concrete time limit, exceeding which, it can be automatically considered that this new ground appears. It is a matter for the Court to consider in a case-by-case basis and in light of several factors that may account for the length of detention. The Court does not need to revisit the grounds already taken into consideration in the previous decisions.

⁵ The Public Prosecutor vs. Jose Cardoso, Decision of 27 April 2002

⁶ The Public Prosecutor vs. Lino De Carvalho, Decision of 28 October 2002

⁷ The Public Prosecutor vs. Damiao Da Costa Nunes, Decision of 3rd June 2003

⁸ The Public Prosecutor vs. Abilio Mendez Correia, Decision 10th June 2003.

- 20 Pursuant to Section 6 UNTAET Regulation 2000/30, the accused has the right to be tried without undue delay. That means that criminal proceedings must be started and completed within a reasonable time. As already decided in the case *The Public Prosecutor vs. Carlos Soares*⁹, in matters of detention, the principle is the liberty and the detention the exception.
- 21 The Court notes that, in the present case, the accused person has been under detention for a period of 13 months. As already stated by the Court in its previous decision in this case, referring then to the other co-accused, Umbertus Ena, this length of the pre-trial detention, given the circumstances of the case, can still be considered as reasonable, keeping into account that the trial of this case is scheduled for the 7 July 2003. According to this Court,¹⁰ one of the circumstances that could justify the fact of keeping the accused person under pretrial detention is the imminent opening of the trial.

As to the new circumstances of the accused

- 22 The Court admits that the possibility of the accused to live in Dili constitutes a new circumstance to be taken into consideration and a ground to revisit the previous decision of the Court.
- 23 However, and without entering into the analysis of the other grounds for continued detention already decided by this Court, the Court believes that the risk of flight of the accused if released still exists. In its decision of 15 February 2003 the Court didn't connect in any way the risk of flight with the fact that the accused had his residence in Oecussi, but with the fact that the accused was aware of the gravity of the crime and the penalty that could be faced if convicted. A change of the residence of the accused to Dili doesn't constitute, according to this Court, a sufficient guarantee that the accused will come back for trial.

⁹ The Public Prosecutor vs. Carlos Soares, Decision on the application for the imposition of restrictive measures, 18 October 2002.

¹⁰ The Public Prosecutor vs. Damiao Da Costa Nunes, Decision of 3rd June 2003 and The Public Prosecutor vs. Abilio Mendez Correia, Decision 10th June 2003.

Therefore, the Court:

- 24 Rejects the defence application
- 25 Decides to extend the detention of the accused Carlos Ena for the duration of the trial.

Dili, 12 June, 2003

Judge Sylver NTUKAMAZINA

