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THE DEMOCRATIC REPUBLIC OF EAST TIMOR

DILI DISTRICT COURT

THE SPECIAL PANELS FOR SERIOUS CRIMES

Before:
Judge Phillip Rapoza

CASE NO. 19/2001

DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

-AGAINST-

ABILIO MENDES CORREIA

**Decision on the Defendant's Motion to Exclude Prosecutor's
27 January 2004 "Transfer of Material" from Court File**

For the Prosecutor:
Per Halsbog

For the Defendant:
Alan Gutman

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Decision

The Court, having reviewed the Defendant's Motion to Exclude Prosecutor's 27 January 2004 "Transfer of Material" from Court File and, having reviewed the Prosecution's response, decides as follows:

The Defendant asserts that the Prosecutor has no right under the Transitional Rules of Criminal Procedure (TRCP) to file with the Court materials in addition to those specifically provided for in TRCP Sec. 24.1 and 24.2. The Defendant further asserts that, for the Prosecutor to file any additional materials, the prior approval of the Court is required pursuant to a motion under TRCP Sec. 27.2. The Defendant claims that materials placed in the Court file without such prior authorization could "unjustly bias the tribunal and the public against the accused" (Motion, Par. 15).

As the Defendant acknowledges in his Motion, the presence of material in the Court's file does not, in itself, render them admissible at trial. Nonetheless, he reasons that the placement of such material in the court file is "by definition prejudicial," presumably because information that may be inadmissible at trial could be put before the panel by placement in the court file.

The Court need not rule on the Defendant's underlying assertion that the Prosecutor had no right to file his 27 January 2004 "Transfer of Material" with the Court as it discerns no resulting prejudice to the Defendant. At the outset, we dispense with the allegation that the public may be caused to feel bias against the accused as the adjudication of the defendant's guilt is performed by a panel of experienced judges and not by a lay jury drawn from the public at large.

The Court notes that the filing of witness statements, reports and other materials has long been a routine practice before the Special Panels.¹ Over the life of the Special Panels almost 50 cases have been adjudicated and the Defendant has not cited one instance in which there is evidence that the panel's possible pretrial exposure to material contained in the court file prejudiced the defendant. Nor has he cited one successful appeal in which

¹ The judicial system contemplated by the Transitional Rules for Criminal Procedure is largely of civil law origin, although common law influences are evident. In the civil law tradition, court files routinely contain the information here objected to by the Defendant. We observe that the Rules, although not specifically addressing the practice, do suggest its application by reference to the Prosecutor filing with the indictment both a concise statement of the facts, TRCP Sec. 24.1(c), and a list "describing the evidence that supports the indictment" TRCP Sec. 24.2. There is no indication as to the extent of detail called for by the description. Nor is there a suggestion that it would be improper to provide a "description of the evidence" in the form of filed copies of the evidence itself. We also note the provision in TRCP Sec. 36.6 that "witnesses shall be examined first by the court" and then by the parties. This practice presumes a prior familiarity with the facts of the case on the part of the Court which is at least on a par with that of the parties.

the Court of Appeal reversed a conviction in whole or in part based on prejudicial pretrial exposure to materials contained in the court file.

The transparency of court proceedings is manifested in the use of public trials, the public presentation of the evidence, the emphasis on orality in the development of evidence, the cross-examination of witnesses, and the availability of the right to rebuttal. Moreover, each verdict is supported by a written decision in which the panel states all the facts that they considered in reaching their decision and recites the pertinent legal provisions that they applied in determining the case. The transparency with which the panel explains both the factual and the legal bases for its decision is a substantial guarantee of fairness.

There are numerous instances in which the Rules contemplate that the Court will be aware of information unduly prejudicial to the Defendant without that knowledge preventing the panel from deciding the case fairly. For example, in circumstances where a Defendant offers an admission of guilt to the Court as part of a guilty plea pursuant to TRCP Sec. 29A.1, the Court may reject the plea and resume the trial without considering the Defendant's admission. Although aware of the Defendant's acknowledgement of culpability before the Court, the panel "shall consider the admission of guilt as not having been made, in which event it shall order that the trial continue under the ordinary trial procedures provided in this Regulation" (TRCP Sec. 29A.3).

Clearly, if three judges who have heard the defendant admit his guilt can then try him under the Rules as if the admission had never been made, the expectation is that the panel members will only decide the case based on the evidence properly before them and not based on any other information.

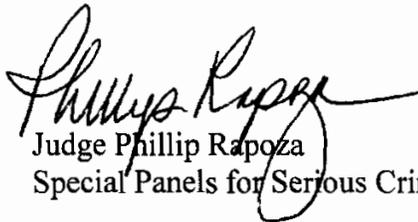
Similarly, if at trial the Public Prosecutor begins to offer evidence that the Defendant contends will be unduly prejudicial to him, the Court must be advised as to the nature of the presumably prejudicial evidence in order to rule on the question of its admissibility. In these circumstances, the panel hears the offending information and, even though it may decline to permit its use as evidence, it will be aware of its existence. Nonetheless, the panel will continue to hear the case. It is hardly likely that, following exposure to the offending material the panel would recuse itself out of concern that it may no longer be impartial.

The reason for both these examples is simple. A judge who acts as a factfinder is presumed to deliberate solely on the evidence properly before him. Even in common law systems, when a defendant chooses a bench trial over a jury trial, the judge who sits as a finder of fact is allowed broader latitude in what comes before him because it is presumed that, unlike a lay jury, he knows what evidence he may or may not consider in reaching a final verdict. Suggesting that a judge will decide a case, or even form his controlling impressions, on material that never comes before him as evidence is to misunderstand, in a way that a judge never would, his role in the proceedings and the basis for his decision-making.

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Accordingly, the Defendant having failed to demonstrate that he has suffered, or is likely to suffer, prejudice by the inclusion in the court file of the items to which he objects,

The motion of the Defendant is DENIED.


Judge Phillip Rapoza
Special Panels for Serious Crimes

Date: 1 March 2004