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REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

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**TRIBUNAL DISTRIITAL de DILI
SECÇÃO CRIMES GRAVES**

Before:
Judge Sylver Ntukamazina

Case No. 27/2003

**The Public Prosecutor
Versus
Rudolfo Alves Correia**

**Decision on the Defense Motion to Dismiss the Indictment dated 23
January 2004**

For the Prosecutor:
Shyamala Alagendra

For the defense:
Pamela Reusch

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Procedural background

1. On 25 September 2003 the Public Prosecutor filed an indictment against Rudolfo Alves Correia. In the indictment the accused is charged in one count with murder as Crime against Humanity.
2. The Preliminary Hearing took place on 4 December 2003. In the Preliminary Hearing the defense counsel of Rudolfo Alves Correia made a request to clarify whether Antonio Pinto and Antonio B were the same person. The indictment mentions a one Antonio Pinto aka Antonio B as one of the co-participants, together with the accused, in the criminal acts in question. The defense believes that Antonio Pinto and Antonio B are two different persons.
3. The Court ordered the Public Prosecutor to clarify the issue of the identity of Antonio Pinto and Antonio B within 10 days.
4. On 23 January 2004, the defense counsel of Rudolfo Alves submitted a preliminary motion pursuant to Section 27.1 (a) of UNTAET Regulation 2000/30, titled Motion to Dismiss the Indictment. The Defense attached a copy of signed statements of witnesses Antonio Malimau and Baptista De Costa to the motion.
5. On 16 February 2004 the Public Prosecutor filed a "Response to Motion by Defence Counsel to Dismiss Indictment Dated 23 January 2004." On the same date the Prosecutor filed a motion to amend the indictment.

Submissions of the parties

6. In its motion the defense counsel states that the Defense has investigated the issue of whether Antonio Pinto and Antonio B are the same person and discovered evidence by two signed witness statements from Antonio Malimau and Baptista De Costa clearly stating that they are two separate people.
7. The defense refers to paragraphs 13 and 14 of the Indictment where Antonio B is mentioned as an alias for Antonio Pinto (para. 13) and where is told that the accused Rudolfo Alves Correia told Antonio Pinto to shoot the victim Domingos Nu Nu Alves (para. 14).
8. The defense invokes Section 24.1 that states that the indictment shall include a complete and accurate description of the crime imputed to the accused and a concise statement of the facts upon which the accusation is made.
9. The defense also invokes Section 6.3 (b) that confers upon the accused "the right to be informed in detail, in a language which he or she understands, of the nature of the charges against him or her."

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10. The defense concludes that the confused identification of Antonio causes substantial doubt as to who received if any the order from Rudolfo Alves Correia to shoot Domingos Nu Nu Alves. Further, it creates substantial doubt, which goes to the substance of the allegations made against the accused, and casts substantial inaccuracy over the imputed crimes of the accused. Finally it casts substantial doubt on the overall Prosecution investigations in the case.
11. Therefore the defense requests that the indictment be dismissed without delay.
12. The Public Prosecutor, in her response to the motion to dismiss the indictment states that the submissions of the defense counsel are exaggerated and have no legal merit and/or basis.
13. The Prosecutor states that the matter referred in the motion –the correct name of the co-participant in the crime charged- could be dealt with a simple amendment of the indictment. The fact that the Prosecutor did not clarify the issue of the name of the co-perpetrator does not warrant the dismissal of the indictment.
14. According to the Prosecutor the Dismissal of Indictment is a matter of last resort, and ought only be allowed in exceptional circumstances. In support of this opinion the Prosecutor quotes the ICTY decision of 16 May 2001 in the case *The Prosecutor v Radoslav Brdanin and Momir Talic*. The decision reads: “*Even where a trial would amount to a miscarriage of justice, it would only be in exceptional circumstances that the dismissal of the indictment would be appropriate*”.
15. In her Motion to amend the Indictment the Prosecutor requested leave to amend the indictment against the accused in the following terms:
16. Paragraph 13 of the indictment where reference is made to “*Antonio Pinto aka Antonio B or Mautersa*” be amended such that the name “*Antonio Pinto aka Antonio B or Mautersa*” be replaced by the name “*Antonio B aka Mautersa*”.
17. Paragraph 14 of the indictment where reference is made to “*Antonio Pinto*” be amended such that the name Antonio Pinto be replaced by the name “*Antonio B aka Mautersa*”.
18. The Prosecutor states that from the witness statements submitted by the Prosecutor and the additional statements submitted by the defense counsel it appears that the name of the person who participated together with the accused in the alleged murder of Domingos Nunu Alves is “Antonio B” who is also known as “Mautersa”.
19. The Prosecutor states that the amendment would be respecting the right of the accused to be informed of the charges against him and will eliminate any doubt as to the identity of the co-participants in the offence.

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20. Furthermore, the amendment sought does not alter the nature of the charges against the accused and it would be in the interest of justice.
21. The Prosecutor believes that the amendment is not prejudicial to the accused.

Discussion

22. The defense counsel alleges that the Prosecutor, when summarizing the facts, has identified wrongly one of the co-participants in the attack resulting in the crime of murder with which the accused is charged. The defense counsel believes that Antonio B and Antonio Pinto are not the same person and provides two witness' statements to support his claim.
23. The Court agrees with the defense that the identity of the co-participant Antonio was not sufficiently clear for the Court and needed to be clarified by the Prosecutor.
24. However, the Court believes that the reasonable doubts upon the identity of the co-participant named Antonio are not a sufficient reason to dismiss the Indictment as requested by the defense counsel. Since the accused is charged with individual criminal responsibility, and this also encompasses the committing of a crime through another person (Sect.14.3 (a) Reg.2000/15), which person need not be criminally responsible himself, the name of that person is not of such significance to amount the dismissal of the indictment.
25. The facts, as presented in the Indictment, mention a group of TNI soldiers participating in the arrest and killing of Domingos Nu Nu Alves. The Prosecutor identifies the accused Rudolfo Alves Correia as one of the members of the group and in particular as the one who gave the order to kill Domingos.
26. While the identity of the final executor of the act –being Antonio Pinto, Antonio B or any other person- is important for the Court, it does not change the nature of the allegations against Rudolfo Alves. At the present stage, the wrong identification of that person has the same relevance that the lack of identification of the other TNI soldiers participating in the attack.
27. The defense invokes Sections 24.1 and 6.3 (b)UNTAET Regulation 2000/30 regarding the contents of the indictment and the rights of the accused to be informed in detail of the nature and cause of the charges against him.
28. Section 24.1 states that the indictment shall include a complete and accurate description of the crime imputed to the accused and a concise statement of the facts upon which the accusation is made. The Court believes that the very same

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nature of a criminal investigation suggests that for a description of the facts to be considered complete, it cannot be expected that it covers all the possible aspects of the case. In every criminal case, witnesses do not necessarily know all the particulars and identity of the participants of the crime and therefore the identity of some of these participants can remain unknown.

29. The Prosecutor in his description of the facts narrates the participation of the accused, together with a group of unknown soldiers, in the charged crime. The number of soldiers is not specified, nor are specified their names or military rank. This lack of precision cannot affect the validity of the Indictment, although, obviously, can affect its credibility and offers arguments for the defense to challenge the facts during the trial.
30. Furthermore, the motion to amend the indictment presented by the Prosecutor clarifies the issue of the identity of the co-participant in the alleged facts and therefore should eliminate the concerns of the defense counsel regarding the right of the accused to be informed of the nature and cause of the charges against him.
31. The Court believes that such an amendment does not alter the nature of the charges against the accused and it is not prejudicial for the accused.
32. Section 32.1 allows the prosecutor, after the indictment has been presented and prior to the commencement of the trial, to amend the indictment only with leave of the Court.

Therefore,

- The Court rejects the defense motion to dismiss the Indictment
- The Court grants leave to amend the Indictment in the terms proposed in the Prosecutor' motion dated 16 February 2004.

Dili, 2 March 2004

Judge Sylvester NTUKAMAZINA

