



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE
RDTL
TRIBUNAL DISTRITAL de DILI
SECÇÃO CRIMES GRAVES

DISTRICT COURT of DILI
SPECIAL PANELS for SERIOUS CRIMES

Case No. 1 / 2002
Date: 8 July 2004
English original

Before: Judge Siegfried Blunk, Presiding
Judge Phillip Rapoza
Judge Jose Ximenes

Registrar: Joao Naro

The Deputy General Prosecutor for Serious Crimes

v.

Victor Manuel Alves

JUDGEMENT

For the Prosecution:
Ms. Wambui Ngunya

Defence Counsel:
Dr. Cancio Xavier, assisted by Ms. Maria Rocheteau

A. THE SPECIAL PANELS

1. The Special Panels for Serious Crimes in East Timor (hereinafter: Special Panel) were established within the District Court of Dili pursuant to Sec. 10 UNTAET Regulation (hereafter "Reg.") 2000/11 as amended by Reg. 2001/25, in order to exercise jurisdiction over the criminal offences (inter alia) of Murder as specified by Sec. 1.3 (d) Reg. 2000/15, for which according to Sec. 8 of the same Reg. "the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply."

All Reg. referred to in this judgement, have been upheld, after East Timor was recognized as independent on 20 May 2002, by Section 165 of the Constitution of the Democratic Republic of East Timor, which came into force the same day.

2. According to Sec. 3 Reg. 2000/15 the Special Panel shall apply foremost

- the law of East Timor as promulgated by Sec. 3 Reg. 1999/1,
- which are "the laws applied in East Timor prior to 25 October 1999"
- subsequent UNTAET Regulations.
- subsequent laws of democratically established institutions of East Timor.

3. The Special Panel has held that "the laws applied in East Timor prior to 25 October 1999" were Indonesian laws (Prosecutor v. Joao Sarmiento and Domingos Mendonca, Decision, 24 July 2003).

This opinion was confirmed by Sec. 2.3 (c) Law 10/2003 published on 10 December 2003.

B. PROCEDURAL BACKGROUND

4. The accused was detained from 12 December 2000 – 17 May 2001.

5. On 22 January 2002 the Deputy Public Prosecutor for Serious Crimes filed before the Special Panel a written indictment in English against the accused charging him with the crime of Murder in violation of Sec. 8 Reg. 2000/15 and Art. 340 Indonesian Penal Code (which requires premeditation), based on the following alleged facts:

"Alves attended the meeting at about 5 pm, in the company of four other men. One of them was armed with an automatic firearm. In this meeting, an argument took place between Alves and the chief of Desa Belio, Antonio Miguel Pacheco. This argument was about the burning of village houses. Pacheco said that he had information that Alves intended to burn some village houses.

Alves asked Pacheco if he would like to talk about such a situation. Pacheco refused. The two men continued to talk for a short time before Victor Manuel Alves got the gun from the armed man and fired two rounds into the air. Then Victor pointed the firearm at Pacheco and shot him on the back of the head causing his death".

The Court Clerk provided a notification of the receipt of the indictment to the accused on 25 January 2002 pursuant to Section 26 Reg.2000/30.

6. After the judge to whom the case had been assigned, returned to his home country, the case was reassigned to the present Presiding Judge.

7. On 21 January 2004 the prosecution requested a court order granting leave to amend the indictment in such a way that the accused is charged with murder in violation of Sec. 8 Reg. 2000/15 and Art. 338 Indonesian Penal Code (which requires deliberate intent, but not premeditation).

The (private) Defense Counsel Dr. Cancio Xavier and his assistant from the Serious Crimes Defense Lawyers Unit, Ms. Rocheteau, were given leave to respond to the request until 5 February 2004; they did not comment.

The Court on 10 February 2004 granted leave to amend the indictment because, although Sec.340 Indonesian Penal Code requires premeditation, two basic facts mentioned in the indictment speak against premeditation:

- The accused brought no weapon to the place where he would meet the victim. He had to take away the weapon, which he later used, from another person.
- The accused fired two warning shots before the fatal shot.

8. The Preliminary Hearing according to Sec. 29 Reg. 2000/15 was held on 16 March 2004. The trial hearing commenced on 28 May 2004, and the disposition of the convicting and sentencing was rendered on 18 June 2004.

Interpreters for English, Portuguese and Tetum assisted before the Court.

C. Factual Findings

1. Account of the facts proved (according to Sec. 39.3 (c) Reg. 2000/30)

9. Atauro, an island lying off Timor inhabited by several thousand people, was until 20 September 1999 occupied by soldiers of the Indonesian Armed Forces (TNI) like the rest of East Timor.

After the departure of the TNI and before the landing of InterFET on Atauro, there was a power vacuum, and the situation was characterised by the antagonism of two factions: supporters of independence and supporters of special autonomy within Indonesia.

Antonio Pacheco (the later victim), a former chief of the village of Beloi, had been a supporter of autonomy, and had collaborated with the local TNI commander, who had intended to kill at least 5 independence supporters and to destroy several houses. To avert this, the accused had bribed the TNI commander with 90 million Indonesian Rupiahs. The accused (who had been a soldier in the Portuguese army) also made him hand over two military automatic rifles of the type "G-3" before his departure; one of them with No. 64 branded on its butt. The TNI left Atauro on 20 September 1999 without the destruction of lives and property that was prevalent in the rest of East Timor.

10. On the morning of 23 September 1999 a public meeting was convened near the village of Beloi on the beach in the shade of a large tree, which was attended by representatives of the Church, the Resistance Council (CNRT), the Youth Organization, the council of the elderly, and the new village chief of Beloi. The accused was also called to this meeting. He took along the rifle "G-3" with No.64 on its stock, but on arrival gave it to the witness Bosco de Jesus Afonso to hold. At the meeting he urged the two factions to forget past strife and to work together harmoniously in the future. Referring to a rumour, that some people wanted to burn Antonio Pacheco's house, he said that he would kill them, if he found them out. Otherwise he spoke in a reconciliatory manner, and his speech was well received, apparently convincing most listeners. The meeting, which had progressed peacefully, was on the point of breaking up, when Antonio Pacheco (the later victim) arrived on the scene.

11. The accused greeted Antonio Pacheco politely, addressing him as "village chief" (which he had formerly been) and asked him to sit down to discuss matters. However Pacheco refused to sit down, although the accused asked him twice again. Instead, he vented his suspicion that the accused intended to burn his house, and spoke in a peremptory and impolite manner to him. The accused tried to enlist the help of Antonio Pacheco's elder brother Luis to calm him down, but he kept chasing Luis away, saying "Brother, don't sit with those dogs".

12. The accused went up to Bosco de Jesus Afonso, took the rifle from him, and walked towards Antonio Pacheco, who from a few metres away screamed several times "If you are a man, shoot me!" After Pacheco had picked up a handful of sand as if to throw into the accused's face, still screaming at him, the accused whose face was flushed with anger fired two shots upwards into the air, which caused confusion and fear among the bystanders, and made some of them run away.

When Antonio Pacheco kept shouting at him and turned as if to walk away, a third shot was fired from the gun held by the accused, unintentionally hitting the victim who was several metres away. The bullet entered the back of his head and came out of the left eye, killing him instantly.

The accused, when approached about the killing by a witness, said the victim should be respected and buried properly, and that he would take responsibility for his death. The victim left behind a wife and seven children.

2. Account of the facts not proved (according to Sec. 39.3 (c) Reg. 2000/30)

13. As the indictment alleged that the accused, before firing the fatal shot "pointed" the gun at the victim, but a rifle that is not pointing at a target cannot hit it, what the Prosecution probably meant in order to allege homicidal intent was, that the accused had taken aim at the victim. This, however was not proved for the following reasons:

The witness **Jose Marques**, when asked whether the accused took aim or shot the victim out of hand, replied, that he just shot. Asked later, whether the accused looked at the victim when he fired, he replied that he just fired. Later the witness clarified that, whereas the gun pointed at the victim, the accused was not looking that way, but in another direction.

Whether this testimony is in accordance with his statement given to Police on 4 January 2000, according to which the third shot was "directed", may be left open, as the exceptional grounds listed in Sec. 36.3 and Sec. 36.4 Reg. 2000/30 for taking a statement into evidence, do not apply.

When the witness **Francelino Lopes Nobre Nouzinho** was asked whether the accused took aim, he demonstrated that he pointed the rifle in one direction, and looked in another.

Also, the witness **Manuelito Pacheco**, on being questioned whether the accused took aim replied, that he did not.

The witness **Tomas Alves**, without being asked about this, stated that the accused did not take aim but looked the other way, and even asserted that he held the rifle with one hand only, which would make taking aim with the heavy military rifle G-3 even at short distances almost impossible.

Antonio Alves insisted that he did not witness the firing of the fatal third shot, having run away beforehand, even when he was confronted with a statement given to Police on 4 January 2000 from which the opposite could be inferred.

The witness **Januario Domingos Cabecas Soares** too, claimed not to have seen the third shot, having been about 20 metres away.

Bosco De Jesus Afonso, being the person who had held the rifle for the accused, and was therefore in a good position to witness the events (and in fact gave the most detailed account), stated and demonstrated that the accused fired the rifle backwards over his shoulder, repeating that the rifle "went backwards", Which is inconsistent with a deliberately aimed shot

14. In summary, not a single witness testified that the accused took aim at the victim.

There are no other indications that the accused intended to kill the victim; on the contrary the following circumstances also speak against homicidal intent: The accused did not carry the rifle from the beginning of the meeting, but left it in the safekeeping of someone else, and only later, having been severely provoked, took it up himself.

He did not fire the fatal shot without warning, but fired two shots in the air first. Under these circumstances the intent to kill was not proven.

15. However, the Court is convinced beyond reasonable doubt, that if the accused, before the third shot was fired had duly taken into account the large number of people present, the confusion he had caused by his two previous shots, his own angry state of mind, and his previous experience as a soldier, he could have foreseen that this shot would hit the victim or another person, and that he could have prevented it, wherefore he acted negligently.

D. LEGAL GROUNDS (according to Sec. 39.4(d) Reg. 2000/30)

1. Legal Findings

16. As the intent to kill the victim was not proven, the mental element of the crime stipulated by Art. 340 IPC was not fulfilled. However, since the causing of death by negligence is proven, the accused was convicted of the crime stipulated in Art. 359 IPC.

2. Jurisdiction,

17. As the Special Panel has jurisdiction over the crime of Murder, for which the applicable Penal Code in East Timor shall, as appropriate, apply (see para. 3), and as the applicable Penal Code in East Timor at the time of the alleged crime, for lack of a law passed by an East Timorese parliament or of a regulation promulgated by UNTAET, was the Indonesian Penal Code, the jurisdiction for the crime that was originally charged, namely Art. 340 Indonesian Penal Code (IPC), cannot be doubted.

For the later charge of Art. 338 IPC the Court also has jurisdiction, because (contrary to the translation provided by the Office of the Legal Advisor to UNMISSET) the correct translation of Art. 338 IPC does not contain the word "manslaughter", but only the word "killing", which is the translation of the Indonesian word "pembunuhan" used in Art. 338 as well as in Art. 340 IPC (Echols / Shadily, Indonesian – English Dictionary, 3rd edition, 1989, Cornell University Press).

18. The Court at the end of the trial had jurisdiction over the crime of Causing Death by Negligence (Art. 359 IPC) because, according to Sec. 32.4 Reg. 2000/30, "a crime which is a lesser included offense of an offense which is stated in the indictment, shall be deemed to be included in the indictment" as well, and Art. 359 IPC is a lesser offense included in Art. 338 IPC, as the material elements of the crime, namely causing death of the victim, is the same, and only the mental element is reduced from intent to negligence.

For the same reason the Special Panel in Case No.8 / 2001, where the accused had been charged with Art. 340 IPC but at the end of the trial could only be convicted of Art. 359 IPC had assumed its jurisdiction (Prosecutor v. Gaspard Leki, Judgement, 14 September 2002).

Accordingly, where an indictment charges an offense within the original jurisdiction of the Special Panels, the Court is competent to render a verdict on lesser included offenses of that crime, even though initially such offenses could not have been brought before the Special Panels. Thus, although an indictment charging the crime of Causing Death by Negligence (Art. 359 IPC) could not have been filed with the Special Panels, the Court is nonetheless competent to render a verdict on such crime as it constitutes a lesser included offense of a serious crime within the original jurisdiction of the Special Panels.

The same follows from Art. 191 (2) Indonesian Law of Criminal Procedure (applicable according to Sec. 54.5 Reg. 2000/30, Sec. 3.1 Reg. 1999/1), which reads:

"Art. 191 ...

(2) If the court is of the opinion that the act of which the accused has been accused has been proven, but such acts do not constitute an offense, all charges against the accused shall be dismissed."

This means that only if the proven facts do not constitute any offense at all, shall all charges be dismissed. It follows that, if the proven facts do constitute an offense, the charge shall not be dismissed, and the accused has to be convicted of that (lesser) offense.

Also, in view of the requirement for overall economy and efficiency of the judicial process, it would be a waste of time and resources if the Special Panels, having heard all the witnesses, would have to refer the case to a Judge of the Dili District Court who would then have to hear the same witnesses again, although the Special Panel itself is a panel within the Dili District Court.

3. Sentencing

a) Aggravating and mitigating circumstances

19. The following circumstances are aggravating:

There was no necessity for the accused to bring a rifle to the meeting at all, as the meeting to which he arrived late had proceeded in an orderly and peaceful fashion, the participants had no apparent weapons, and Antonio Pacheco was unlikely to take any drastic action after he had lost the support of the TNI following its departure from Atauro, and after InterFET had already landed in Dili.

His gun-handling experience as a soldier in the Portuguese Army should have warned him not to bring a loaded weapon to a crowded public meeting, where unforeseeable incidents are prone to happen.

The victim leaves behind a large family, that he cannot support any longer.

20. Mitigating, however, are the following circumstances:

The accused had been severely provoked by the hostile reaction of the victim to the repeated invitation to sit down and talk things over peacefully, by the exasperating challenge "If you are a man, shoot me", by the picking up of sand presumably to throw in his face, and by the indirect slandering of including him among the "dogs" with whom the victim's brother should not sit down.

Before the incident the accused had proved to be a responsible person looking after the welfare of the community by bribing successfully the Indonesian commander on Atauro, not to kill independence supporters and not to burn their houses. He also made him surrender 2 military rifles. In consequence Atauro was spared the destruction of life and property that was prevalent in the rest of East Timor after the popular consultation.

The victim, by contrast, had collaborated with the Indonesian military during its illegal occupation of East Timor, and yet the accused at the meeting urged the population not to harm him and his property, and spoke to him in a reconciliatory manner.

b) Sentencing policy

21. In its sentencing policy the Court according to Sec.10.1 (a) and 10.2 Reg. 2000/15 had recourse to the general practice in the courts of East Timor and in the International Tribunals, and took into account the individual circumstances of the accused and the gravity of his offense.

22. The sentencing aims of the Court were deterrence, retribution, reconciliation and reprobation.

Although the aim of deterrence that should be most prominent for Crimes against Humanity (see ICTY, Erdomevic Sentencing Judgement, 19 November 1996, para. 58), can for an ordinary crime caused by negligence obviously only play a minor role, it cannot be neglected altogether, as the taking of life is a grave matter, and must be seen to be punished.

The aim of reconciliation is particularly important in East Timor after a quarter century of strife and turmoil.

Reprobation plays a lesser role, as the Court is convinced that the conviction will serve as a warning to the accused, not to commit further crimes in future.

c) Sentencing

23. Under the circumstances a term of one year of imprisonment is necessary but also sufficient to achieve the above sentencing aims.

24. As the accused is firmly integrated in society, and the Court is convinced that the conviction itself will suffice as warning (particularly since he already spent almost half a year in detention), the prison sentence was suspended according to Art. 14 a (1) IPC.

The probation period chosen was two years, which is the maximum according to Art. 14 b (1) IPC.

Apart from the general condition of not committing any future criminal offenses, the Court imposed the special condition of compensating the dependants of the victim for the damage caused to them by his death according to Art. 14 c (1) IPC, because this is the most urgent requirement for alleviating the consequences of the crime.

The nature and extent of compensation must comply with the applicable laws and practice in Timor-Leste, which country has developed within its traditional justice framework a generally accepted system of compensation for the taking of life.

However, according to Art. 14 c (1) IPC the compensation has to be made within a fixed period of time shorter than the probation period, for which the Court decided one year to be adequate. In the event compensation is not forthcoming in time, it had to be clarified that the beneficiaries can appeal to a regular Court.

For the foregoing reasons the Court on 18 June 2004 rendered the following

Disposition

The Court convicts and sentences as follows:

1. The accused Victor Manuel Alves is

guilty of the Crime of Causing Death by Negligence
(Art. 359 Indonesian Penal Code)
and is sentenced to 1 (one) year of imprisonment

2. The punishment shall not be executed on the following conditions according Art. 14a.1, 14 b.1, 14 c.1 Indonesian Penal Code:

a) The accused compensates within one year the dependants of the victim Antonio Pacheco for his death according to the applicable law and practice of Timor- Leste (in the event that compensation is not made within one year, the dependants of the victim may bring the issue before a judge of the Dili District Court)

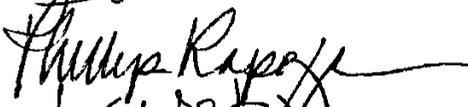
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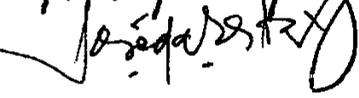
b) The accused does not commit a punishable act within a probationary period of two years.

3. In case of execution of the sentence 157 (one hundred and fifty seven) days already spent in detention shall be deducted according to Sec. 10.3 Reg. 2000/15.

4. The accused has to bear two thirds of the costs of the proceedings.

Judge Siegfried Blunk, Presiding 

Judge Phillip Rapoza 

Judge Jose Ximenes 

Special Panels for Serious Crimes in East Timor

(To be translated into Tetum, the English text remaining authoritative)