



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

DISTRICT COURT of DILI
SPECIAL PANELS for SERIOUS CRIMES

Case No. 4 c / 2003
Date: 16 November 2004
English original

Before: Judge Siegfried Blunk, Presiding
Judge Samith de Silva
Judge Maria Pereira

The Deputy Prosecutor-General for Serious Crimes
v.
Domingos Metan

JUDGEMENT

For the Prosecution:
Mr. Charles Nsabimana

Defense Counsel:
Ms. Chitra Subramoni

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 (inter alia) over Crimes against Humanity as specified by Sec. 1.3 (c) Reg. 2000/15, among them the criminal offences of the Crime against Humanity of Murder (Sec. 5.1 (a) Reg. 2000/15), the Crime against Humanity of Torture (Sec. 5.1 (f) Reg. 2000/15), and the Crime against Humanity of other Inhumane Acts (Sec. 5.1 (k) Reg. 2000/15).

All Regulations referred to in this judgement, have been upheld by Section 165 of the Constitution of the Democratic Republic of East Timor, which came into force on 20 May 2002.

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. On 15 February 2003 in Case 4 / 2003 the Public Prosecutor filed before the Special Panel an indictment inter alia against the accused Domingos Metan, charging him with the Crimes against Humanity of Murder and Torture.

The Court Clerk provided a notification of the receipt of the indictment by the accused on 19 March 2003 pursuant to Section 26 Reg.2000/30.

5. The Preliminary Hearing for this accused was held on 24 October 2003 according to Sec. 29 Reg. 2000/15.

After the International Judge to whom the case had been assigned, returned to her home country, the case was reassigned to the present (presiding) International Judge on 5 February 2004.

As the Defense Counsel of the accused Domingos Metan had stated during the Preliminary Hearing that she would discuss with the Prosecutor about her client (regarding a possible plea-agreement) a Court Order was issued on 4 March 2004 requesting the Defense Counsel to state unequivocally until 16 March 2004 whether the accused will plead guilty; if not, to specify evidence and name witnesses according to Sec. 29.2 (e) Reg. 2000/30.

The Defense Counsel on 12 March 2004 requested extension of the time limit, asserting that it had not been possible to consult with the accused in his village due to lack of a bridge over a flooded river.

The Court on 15 March 2004 issued an order extending the time limit until 20 April 2004, and scheduling a pre-trial conference for 27 April 2004.

6. Following a Court Order dated 11 March 2004 which pointed out to the Prosecution (inter alia) that the facts alleged in the indictment did not sufficiently support the charge of torture, and that it could not be ascertained for a certain count of the indictment which accused persons are charged with which form of responsibility, the prosecution on 22 March 2004 sought amendments, replacing the charge of the Crime against Humanity of Torture by the Crime against Humanity of Other Inhumane Acts, and charging the accused in the remaining counts with being responsible "as individual" without specifying with which of the various forms (theories) of responsibility according to Sec. 14.3 (a) – (d) Reg. 2000/15 he was being charged.

The Defense on 7 April 2004 objected to this on the grounds that, without specification of a certain form and category of responsibility, the accused was insufficiently aware of the charges, and was hampered in preparing his defense, wherefore the Defense prayed the court to order the prosecution to detail the category of responsibility, and failing that, to dismiss the charges.

After the Court granted leave in a decision dated 6 July 2004 to further amend the indictment in accordance with the views expressed in that decision, an amended indictment was submitted on 23 July 2004, to which the Defense on 9 September 2004 objected mainly on the grounds that it did not state the category of individual responsibility for each offense, and prayed for a court order to call upon the prosecution to remedy this defect.

6. The Court on 13 September 2004 decided to reject the prayer of the Defense, and gave leave to amend the indictment, stating that although from Reg. 24.1 (b) Reg. 2000/30 can be deduced that the indictment, when it charges the accused with individual responsibility, should state which of the various categories of individual responsibility contained in Sec. 14.3(a) – (d) Reg. 2000/30 he is being charged with, the panel in its present composition and its majority did not regard this as a compulsory, rather as a voluntary requirement because, given the difficulties of investigation and translation on Timor-Leste, it will often be difficult to ascertain at the investigational stage the precise category of individual responsibility to be taken into account, and this will often only be clarified during the presentation of evidence before the Court.

7. A fourth member was added to the panel on 18 October 2004 according to Sec. 19.1 Reg. 2000/30 as it was doubtful whether one International Judge on the panel would be available until the end of the trial.

The trial hearing commenced on 22 October 2003.

When the accused pleaded guilty only to the charge of Murder but not to the charge of Other Inhumane Acts (beating of Francisco Beto), the Court on the morning of 27 October 2004 severed his case, renumbered it as Case 4 c, and went ahead with the trial of those co-accused who had pleaded (totally) guilty, sentencing them on the same day.

8. After the case of the accused had been called up again in the afternoon of 27 October 2004, and the prosecution had withdrawn the charge of Other Inhumane Acts, the Court sentenced the accused on the same day.

He later in the day gave testimony as a witness in the remaining Case 4 b / 2003 against Lino Beno.

Interpreters for English, Tetum and Baiceno (a language spoken in the district of Oecussi) assisted before the Court.

C. ACCOUNT OF THE PROVEN FACTS

(pursuant to Sec. 39.3 (c), (d) Reg. 2000/30)

9. According to the final guilty plea of the accused which in itself was credible, and was consistent with the statements the co-accused Agostinho Cloe, Agostinho Cab, Lazarus Fuli, Antonio Lelan had made before the same panel in their trial (Case 4 / 2003) on 25 October 2004 in the context of their guilty pleas, the Court is convinced of the following facts:

10. In September 1999 the accused, an illiterate, subsistence farmer aged about 24 - 29, was a member of the "Sakunar" militia, that was organized and controlled by the Armed Forces of the Republic of Indonesia which was illegally occupying East Timor despite its declaration of independence on 28 November 1975. The main purpose of this militia was to terrorize civilians who were suspected as independence supporters. The East Timorese civilian Anton Beto had been suspected as such.

The leader of the "Sakunar" militia for Bebo village was Anton Lelan Sufa, who commanded a militia group, of which the accused Timorese citizen was a member.

On 16 September 1999 in the village of Netensuan in Oecussi, East Timor, the accused, together with two other members of this group, namely Agostinho Cab and Lino Beno, received orders by Anton Lelan Sufa to kill Anton Beto, whereupon the accused intentionally stabbed the victim with a large knife. Agostinho Cab had shot an arrow into the throat of the victim and had hit him on the head with a stone, whereas Lino Beno had stabbed him as well. As a result of these combined wounds the victim died within minutes. The accused knew that such wounds were likely to cause death.

11. These acts were part of a country-wide campaign of violence organized and controlled by the Indonesian Armed Forces to intimidate and punish independence supporters, particularly after the population of East Timor at the Popular Consultation held on 30 August 1999 had overwhelmingly voted against remaining an (autonomous) province of Indonesia. The accused was aware of this context.

D. LEGAL FINDINGS

12. The accused, by taking part in the attack committed against Anton Beto with arrows and knives, and by stabbing the victim himself with a large knife, intentionally contributed to the victim's death. He acted purposely in collaboration with Agostinho Cab and Lino Beno, and therefore has to be held accountable as co-perpetrator for causing the death of Anton Beto, without the Court having to determine whether death would have been caused solely by the wound inflicted by him.

The accused knew that his criminal act was part of a systematic attack on a civilian population.

The accused therefore committed the Crime against Humanity of Murder under customary International Criminal Law as recognized by Art. 6 (c) Nuremberg Charter, Art.5 (c) Tokyo Charter, Art. 5 (a) ICTY Statute, Art. 3 (a) ICTR Statute, Art. 7.1 (a) ICC Statute, and pursuant to Sec. 5.1(a) Reg. 2000/15.

14. The fact that Reg. 2000/15 did not yet exist when the criminal act was committed, is irrelevant, because the Crime against Humanity of Murder is not based on written, but on **customary law**, and has been accepted as such by the International Community for more than half a century. In International Criminal Law it is unnecessary to have provisions similar to the ones contained in national penal codes specifying offences; what is necessary are statutes defining the jurisdiction of the International Tribunals. This was expressed with clarity in ICTY, Delalic Decision, 15 Oct. 1999 para 26:

“... the Tribunal’s Statute does not create new offences but rather serves to give the Tribunal jurisdiction over offences which are already part of customary law.”

For the same reason the conviction of the accused of a crime under customary International Law cannot violate the principle *nullum crimen sine lege*: unwritten customary law is law just as written law. This is recognized by Sec. 9.1 Timorese Constitution, according to which customary principles of international law are part of the legal system of East Timor. Since this Section is part of the “Fundamental Principles” of the constitution, it obviously takes precedence over the personal right in Sec. 31.5 Timorese Constitution, that criminal law shall not be enforced retroactively.

Unlike the crime of murder under the national law of most countries, the Crime against Humanity of Murder under international law does not require deliberate intent or premeditation (ICTR Akayesu Judgement 2 Sept. 1998, para. 589-590; ICTY, Blaskic Judgement, 3 March 2000 para. 217; Special Panels, Marques Judgement, 11 Dec. 2001 para. 649). It is sufficient that the perpetrator intended to cause grievous bodily harm with the knowledge that it was likely to cause death, which the accused did.

The accused committed the offense “jointly” with others in the sense of Sec. 14.3 (a) Reg. 2000/15, wherefore he bears individual responsibility.

15. There are no grounds for exclusion of criminal responsibility:

a) The assertion by the accused Domingos Metan that he was forced to join the militia by a beating so severe that he vomited blood, does not mean that he was coerced to commit the *crime* by an imminent threat of death, as would be required by Sec. 19.1 (d) Reg. 2000/15) for a plea of coercion. The same applies to his claim, that Sufa made him crawl on hands and knees.

b) Even if Anton Lelan Sufa were to be considered as the accused's "superior" in the sense of Sec. 21 Reg. 2000/15 pursuant to whose orders he acted, this would not relieve him of criminal responsibility, but would only be a mitigating factor.

Since the Court has considered the fact that the accused regarded Sufa as his commander a mitigating circumstance (*infra* para. 18) the issue can be left open.

16. The Special Panels have exclusive jurisdiction over the Crime against Humanity of Murder according to Sec. 1.1 Reg. 2000/15.

Since both the accused and the victim are East Timorese, and the offence was committed in East Timor, the question of the universal jurisdiction of the Special Panels (Sec. 2.2. Reg. 2000/15) does not arise.

E. SENTENCING

1) Aggravating and mitigating circumstances

17. Aggravating is the brutality and callousness of the killing of Anton Beto. Particularly despicable is, that he committed these crimes against his fellow-countrymen in the interest of a foreign power that was illegally occupying his home country.

18. Mitigating is that he was an illiterate farmer in his twenties who must be considered a victim of circumstance himself, as he is very unlikely to have committed the crimes without the despicable system of the Indonesian Armed Forces (TNI) of pitting one part of the local population against another and the campaign of militia violence unleashed by TNI after the popular consultation had turned out to be unfavourable to them.

He showed remorse, and regretted his crime.

The Court also took into account that the accused has to provide by farming for a wife and soon for a child, as well as for his parents, so that a prison term is particularly harsh for him. On the other hand, for such grave crimes justice must be seen to be done, so that he could not be spared a prison sentence.

2. Sentencing policy

19. The Court in its sentencing policy 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 offenses

The sentencing aims of the Court were deterrence, retribution, reconciliation and reprobation. Most prominent in accordance with the Security Council's general aim of restoring and maintaining peace were deterrence and retribution (see ICTY, Erdomevic Sentencing Judgement, 19 November 1996, para. 58). For violations of international law the most important aim is deterrence (ICTY, Delalic Judgement, 16 November 1998, para.1234).

20. In East Timor there is an additional requirement for deterrence because living just across a porous border with Indonesia live hundreds of recalcitrant ex-militia men with the capability of once again destabilizing this country by means of murder.

The aim of reconciliation is particularly important in East Timor after a quarter century of strife and turmoil, that in some parts of the country amounted to civil war.

Reprobation in the case of this accused however plays a lesser role because he, as stated above, was a victim of a singular historical situation, and is unlikely to commit similar crimes again.

Under these circumstances a term of five years of imprisonment is necessary but also sufficient to achieve the above sentencing aims.

23. Because the accused pleaded to be able to return home before commencing his prison term to make arrangements with his many dependants for his long term of absence, and also to make preparations on his farm for the impending monsoon season, the Court ordered him to start his prison term only after 4 weeks.

Against these requirements of the accused the Court weighed the risk of flight, but deemed this risk as comparatively small due to the strong Timorese tradition, rooted in "Adat", of taking responsibility and paying respect to authority.

24. For the foregoing reasons the Court on 27 October 2004 rendered the following

Disposition of the Decision:

The Court convicts and sentences the accused Domingos Metan as follows:

1. The accused is guilty of the Crime against Humanity of Murder according to Sec. 5.1 (a) Reg. 2000/15 committed against Anton Beto ,
and is sentenced to 5 (five) years of imprisonment.
2. The accused has to bear the costs of the proceedings against him as regulated by law.
3. The accused is ordered according to Sec. 42.6 Reg. 2000/30 to commence his prison term on Thursday 25 November 2004.
25. The convict shall serve his prison term in East Timor.
26. The convict is informed that he can appeal this decision by filing a Notice of Appeal no later than 10 (ten) days after the release of this decision.

Judge Siegfried Blunk, Presiding

Judge Samith de Silva

Judge Maria Pereira

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