



UNITED NATIONS TRANSITORY ADMINISTRATION IN EAST TIMOR

COURT OF APPEAL

Criminal Appeal N. 2001/02

(Lawsuit originally from the Dili District Court)

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The Judges of the Special Collective of the Court of Appeal agree as follows:

**João Fernandes** (also known as **João Atabae**), married, farmer, with 22 years old, born in Atudara, Kailaco, Bobonaro, East Timor, son of Miguel Martins and Agostinha dos Santos, and living in Cailaco, Bobonaro, has appealed to this Court of Appeal from the decision of the Dili District Court Collective of Judges for Serious Crimes (from now on designated by Special Collective) to convict him, as the author of a crime of murder, foreseen and punished by the Section 340 of the Indonesian Penal Code, applicable in East Timor by the Section 3 of the Regulation 1999/1 of UNTAET, with a 12 years prison.

In his allegations, the appellant states, in what matters to this case, the following:

The Special Collective has not considered the appellant confession, made during the hearing, in which he said that his action hasn't resulted of premeditation and deliberated intention of killing Domingos Gonçalves Pereira but he acted under the orders of Natalino Monteiro, of the District Commander (KAPOLRES) and of the Indonesia Troops (TNI).

And based on that he asks the Court of Appeal:

- a) to review the decision of the Collective of Judges for the Serious Crimes;
- b) to acquit the accused of the decision of that Court, as stipulated on the articles 48 and 55, paragraph I, section 2e of the Indonesian Penal Code and on the section 16 of the Regulation 15/2000;
- c) to decide that the accused don't have to pay the lawsuit's expenses;
- d) to make the best possible justice, even if it decides in a different way.

All considered, it behoves to resolve.

The appellant, João Fernandes, is accused of the following:

João Fernandes was a member of the militia Dadurus Merah Puti;



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On September 8, 1999 he received orders to go to the house of the militia chief, Natalino Monteiro, in the village of Ritabou;

Samurai swords were handed to the accused and to other members of the militia and it was told them to go to the POLRES station of Maliana to kill people;

Before they went to the POLRES station, the accused and the other members of the militia were leaded to KORAMIL on Maliana, where they painted their faces in black;

On the POLRES station, the accused and the other members of the militia were ordered to enter and kill all men;

The POLRES chief leaded João Fernandes and another member of the militia to a room where Domingos Gonçalves Pereira, chief of the village of Ritabou, was hidden;

João Fernandes dragged Domingos Gonçalves Pereira from where he was hidden and stabbed him on the back with his sword;

After Domingos Gonçalves Pereira fall on the ground, João Gomblo stabbed him twice in the chest;

Has the victim been still alive and trying to get up, João Fernandes stabbed him for the second time in the back;

Domingos Gonçalves Pereira have died after that stroke;

He was murdered under the orders of the TNI and of the Militia Commanders because he was a supporter of independence.

The accused has taken the life of Domingos Gonçalves Pereira deliberately and with premeditation, violating, therefore, the Section 8 of the Regulation 2000/15 of the UNTAET and the section 340 of the Indonesian Penal Code.



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By understanding that it has been a confession of guilt by the accused on the terms of the Section 29A of the Regulation 2000/30, the Special Collective has pronounced the sentence of p. 162 to p. 169, refuted by this appeal.

In order to understand the questions raised by the appellant we have to know if a confession of guilt was made on the terms of the Section 29A and what's the consequence of that confession.

The Section 29A establishes (under the title "Proceedings in the case of Confession of Guilt") the following:

*29A.1 When the accused makes a confession of guilt in any diligence in the presence of a Examining Magistrate, or any other Judge or Collective of Judges, before the final decision, the Court or the Judge before who the confession is made should verify if:*

- (a) The accused understands the nature and the consequences of the confession of guilt;*
- (b) The confession is made voluntarily by the accused after enough consultations with his defender; and*
- (c) The confession of guilt is supported by facts that are present:*
  - (i) In the accusation and confessed by the accused;*
  - (ii) In any material presented by the Public Prosecution that supports the accusation and accepted by the accused; and*
  - (iii) Any other evidence such as the statement of witnesses, presented by the Public Prosecution or by the accused.*

*29A.2 If it considers the presuppositions of the Section 29A.1 of this regulation, the Court will contemplate the confession of guilt together with any additional evidence presented, as establishing every essential facts to complete the crime which is referred in the confession of guilt, and can sentence the accused for that crime.*

*29A.3 If it does not consider as verified the presuppositions established in the Section 29A.1 of this regulation, the Court will contemplate the confession of guilt as not been made, and it decides the continuation of the trial under the standards of a regular trial foreseen in this regulation.*



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*29A.4 If it understands that there's the need to establish more facts for a good decision of the motive, considering the plaintiff's interests, the Court can:*

- a) Ask to the Public Prosecution to present additional evidence, including the statement of witnesses; or*
- b) Order the continuation of the trial according to the standards of a regular trial foreseen in this regulation, in which case it should consider the confession of guilt has not been made.*

*29A.5 The Public Prosecution and defence's positions regarding the modification of the accusations, the confession of guilt or the imposed sentence does not bind the Court.*

The confession consecrated in the Section 29A is a confession of guilt of a crime and not only a confession of facts, which can later be qualified by the court. Through it, the accused accepts that he had committed the crime charged by the accusation, without any reservation. After checking the confession of guilt, the Court must consider all essential facts to complete the crime which are referred on that confession as established and can sentence the accused for that crime.

Hereby, the Section 29A.1 imposes to the Court that, before it consider all essential facts to complete the crime which are referred on that confession as established and sentence the accused, it assures (a) that the accused understands the nature and the consequences of the confession of guilt; (b) that the accused has confessed voluntarily and after enough consultations with his defender; and (c) that the confession of guilt is supported (i) by facts that are present on the accusation, (ii) by elements of evidence presented by the Public Prosecution to support the accusation and accepted by the accused, and (iii) by any other evidence presented by the Public Prosecution or by the accused.

On the current appeal case, the appellant does not raise any question related to the accomplishment of the settled by the Section 29A.1 by the court. Namely, he does not state in his allegations that he didn't understand the nature and the consequences of the confession of guilt; or that he hadn't confessed voluntarily or hadn't consulted previously with his defendant on the subject.

However, it understands that, despite the Special Collective had considered valid the confession of guilt, he shouldn't have been convicted but acquitted - because one of the proven facts was



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that he acted under the orders of Natalino Monteiro, the leader of POLRES and the leader of the KODIM of Maliana, and that his conduct hadn't resulted from his deliberated and premeditated will of taking Domingos Gonçalves Pereira's life.

The appellant seems to understand that the confession of guilt referred by the Section 29A leads only to a confession of the facts present on the accusation, which will be later juridically qualified by the court, which even can decide for the acquittal of the accused of the crime referred by the confession. Such interpretation won't be the best one, due to the text of the Section 29A and to the mechanism established by it, which is quite different from the solution (that the accused's confession refers only the facts) consecrated on the article 344 of the Portuguese Penal Proceedings Code<sup>1</sup>.

Examined the documents, it is verified that in the minutes of the hearing of January 10, 2001, it is reported that the accused, now the appellant, asked by the President of the Special Collective about what he had to say on the document's facts, has declared that he found himself guilty, that he agreed and accepted the charge of being the author of a homicide foreseen and punished on the section 340 of the Indonesian Penal Code and the Section 8 of the Regulation 2000/15, that he was aware of the consequences of that acceptance of guilt, that he had made the confession of guilt voluntarily and after talking with his lawyer, that he accepted the evidence presented by the Public Prosecution.

In view of that, it is fulfilled the settled by the Section 29A.1 and 29A.2, in terms of being able to conclude that there were, in fact, a confession of guilt that allowed the Special Collective to

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<sup>1</sup> The text of the 344<sup>th</sup> article of the Portuguese Penal Proceedings Code is as following:

*Article 344 (Confession)*

*1 – In the case of the accused declare the will to confess the facts that he is charged with, the president, under the risk of nullity, ask him if he does it on free will and under no constraint, as well as how he proposes himself to make a full confession, without any reservations:*

- a) To renounce to the production of the evidence related to the facts he is charged with and their resulting consideration as proved;*
- b) Immediately passing to the oral allegations and, if the accused shouldn't be acquitted for other reasons, to the decision of the applicable sanction; and*
- c) Reduction of the justice tax by half.*

*2 – From the stated on the previous paragraph, are excluded the cases in which:*

- a) There are co-accused and any of them doesn't make a full confession, coherent and without reservations;*
- b) The court, in it's convictions, suspects from the free nature of the confession, namely by doubts about the full imputability of the accused or the veracity of the confessed facts; or*
- c) The crime is punishable with a prison sentence of more than five years.*

*3 – If a full confession without reservations is verified in the cases of the previous paragraph, or there is a partial confession or with reservations, the court decides, in it's free convictions, if there must take place and in what extent, in relation to the confessed facts, the production of the evidence.*



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declare as established the facts that are part of the crime charged by the accusation and condemn the accused for that crime.

Verified the regularity of the confession of guilt, it's no longer needed to produce evidence on the trial's hearing about the facts that are part of the charged crime. The trial goes immediately to the final allegation stage, foreseen in the Section 38. Before the oral allegations, there might take place an additional evidence, as settled by the Section 29A.4 – a), if the Court considers it necessary for a good decision of the cause, taking into account the plaintiff's interests. After the allegations, it goes to the decision stage, foreseen in the Section 39. But with the particularity that the Collective must condemn the accused for the crime referred in the confession of guilt.

Besides the processual aspect, it matters to consider the substantive aspect of the appellant objections. The appellant states that, in view of the proven facts by his confession (of guilt), the Special Collective should had acquitted him the charges because his action hasn't resulted from premeditation and deliberated intent of killing Domingos Gonçalves Pereira, but he acted under the command of Natalino Monteiro, the Commander of the District (KAPOLRES) and the Indonesian Troops (TNI), acquittal according with the stated in the articles 48 and 55, paragraph I, section 2e of the Indonesia's Penal Code and in the Section 16 of the Regulation 2000/15.

Here it matters to know, first of all, what are the proven facts and after to know if those facts are part of the charged crime and lead to the conviction of the accused, as decided by the Special Collective.

In view of the appellant's confession of guilt, those facts will be the ones referred in the accusation and essential to integrate the crime of which were made a confession of guilt, by the rule of the referred Section 29.2, that is, the following:

João Fernandes was a member of the Dadurus Merah Puti militia;

On September 8<sup>th</sup>, 1999, he received orders to go to the house of the militia leader Natalino Monteiro, on the village of Ritabou;

Samurai swords were delivered to the accused and other members of the militia and they were ordered to go to the Maliana's POLRES station to kill people;



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Before they went to the POLRES station, the accused and the other militia's members were driven to the Maliana's KORAMIL, where they painted their faces black;

In the POLRES station, the accused and the other militia's members received orders to enter the facilities and kill all men;

João Fernandes and another member of the militia were driven by the POLRES chief to a room where was hidden Domingos Gonçalves Pereira, chief of the Ritabou village;

João Fernandes dragged Domingos Gonçalves Pereira from where he was hidden and stabbed him in the back with his sword;

After Domingos Gonçalves Pereira fell on the ground, João Gomblo stabbed him twice in the chest;

As the victim was still alive and trying to get up, João Fernandes stabbed him in the back for the second time;

Domingos Gonçalves Pereira died after that stroke;

Domingos Gonçalves Pereira was murdered under the order of the TNI and the militia Commanders because he was a supporter of independence;

The accused has taken the life of Domingo Gonçalves Pereira deliberately and with premeditation.

Besides these facts, the court must consider also as proven that the accused has confessed the facts and accepted his guilt, co-operating on the finding of the truth.

In presence of the proven facts, we must conclude that the appellant has committed the crime foreseen and punished by the article 340 of the IPC. In fact, the appellant has taken Domingos Gonçalves Pereira's life – he dragged Domingos Gonçalves Pereira from where he was hidden and stabbed him on the back with a sword twice, the second time when he saw that the victim



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was still alive even after being also stabbed twice on the chest by someone called João Gomblo. The accused has taken Domingos Gonçalves Pereira's life deliberately.

Despite it's not clearly written on the description of the facts made by the accusation (as it should be, for not be any doubts), we must conclude from the accused conduct, described in the accusation and proved, that he acted with the intention to kill Domingos Gonçalves Pereira: he dragged the victim from his hiding-place and stabbed him with a sword; and he stabbed him again when he verified that he was still alive after being stabbed by someone else and trying to get up.

The proven facts allow, also, to easily conclude that the appellant committed the murder with premeditation: Samurai swords were handed to the accused and to other militia members and it was ordered to them to go to the Maliana's POLRES station to kill people; before they arrive at the POLRES station, the accused and the other militia members were driven to the Maliana's KORAMIL, where they painted their faces black; at the POLRES station, the accused and the other militia members were ordered to enter the facilities and kill all men; João Fernandes and another militia member were driven by the POLRES chief to a room where was hidden Domingos Gonçalves Pereira, who the accused has killed.

In opposition to what the appellant states, the fact that he acted under someone else's orders, from the militia chief, Natalino Monteiro, from the Maliana's POLRES commander or from the indonesian armed forces (TNI), doesn't mean that he did not act intentionally and with premeditation, nor it excludes his criminal responsibility for the murder of Domingos Gonçalves Pereira.

In the IPC there isn't any rule that determines the exclusion of the criminal responsibility in those cases. The rule of the article 51 of the IPC (foreseeing the exclusion of the criminal responsibility in the cases of execution of orders) demands, for the exclusion of the penal responsibility, that the agent that had acted by executing an official order given by the competent authority – which wasn't the appellant's case, seeing that neither the militia chief Natalino Monteiro nor the Maliana's POLRES commander nor the indonesian armed forces (TNI) had legal competence to order the killing of people, nor the appellant had a legal obligation to execute that order.



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The articles 48 and 55, paragraph I, section 2e of the Indonesian Penal Code and the section 16 of the Regulation 2000/15, invoked by the accused as a legal foundation for the changing of the Special Collective decision to his acquittal from the crime that is imputed to him in this lawsuit, have no application to the present case. Reading those articles is sufficient to verify that fact.

After we come to the conclusion that the appellant has effectively committed the crime of murder with premeditation, for which he was convicted and from which there isn't any cause of exclusion from his criminal responsibility, the Court of Appeal has to verify if the sentence applied by the Special Collective is suitable to the case. That's because the appellant also asks that the Court of Appeal decide in the fairest manner.

For this effect, we must consider the judgement of the Special Collective.

And by that purpose, it matters to say that, in spite of the existence of a confession of guilt as stated by the Section 29A of the Regulation 2000/30, the judgement to pronounce must comply with the regime established on the Section 39 of the same regulation. That's because the law doesn't foresee any special proceeding when there is a confession of guilt, besides to stated in the Section 29A. The Section 29A.2 just states that if the presuppositions established in the section 29A.1 are considered as verified, the Court will consider the confession of guilt, together with any presented additional evidence, as establishing all essential facts for the crime referred by the confession of guilt, and can convict the accused for that crime. So, as was stated before, the proceeding to follow after checking the regularity of the confession of guilt is to go to the production of additional evidence as stated in the section 29A.4, if that's the case, and after to the final allegations foreseen in the section 38 and to the decision phase foreseen in the section 39.

Examining the judgement of the Special Collective by the light of the referred section 39, it's noted that it takes some effort to state that that judgement complies with the foreseen on that section. The information of the proven facts is very defective – in fact the Special Collective just stated what the accused had admitted (“the accused admitted this...”, “the accused admitted that...”), instead of clearly indicate the facts that the Court considered as proven, such as is imposed by the section 39.3 – c. That rule imposes the Court to take a clear position, mentioning the facts that it considers as proven (and those which it doesn't, if any). So, it's more correct to write down in the judgement “The Collective Court considers as proven the following facts: ...”



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(and write down the proven facts), and “The Collective Court considers as not proven the following facts: ...” (and write down the facts not proven).

In the Special Collective judgement the information of the fact and legal foundations of the decided (imposed by the section 39.3 – d) is almost null – what, in association with the defective information of the proven facts, makes it difficult to understand the reason why the Court understood that there was a first degree murder crime foreseen in the article 340 of the IPC and not a murder as foreseen in the article 338 of the same diploma, and why it as determined the sentence of 12 years of prison and not of 10 years or less.

In the judgement, the Special Collective relied on aggravating circumstances that didn't appear in the accusation – in violation of the principle (consecrated in the section 32.4) according to which the facts not present in the accusation shouldn't be considered to aggravate the responsibility of the accused and from which he hadn't the change to defend himself. And, on the other hand, it has simply forgotten the aggravating circumstances that were present in the accusation and were proven.

However, the referred deficiencies don't integrate an irreparable nullity as foreseen by the section 54. It constitutes, instead, simple irregularities, to know as foreseen by the section 54.3.

So, the nullity of the Special Collective judgement can't be concluded.

Now entering in the extent of the sentence to apply to the appellant, the following must be taken into account:

The juridical value protected by the article 340 of the IPC is the human life. On that aspect, the crime committed by the accused is very serious, since it as resulted in the suppression of the human life, which is the most precious good anyone has. So, the fact's degree of illegality is high. The fraud is deep – the appellant stabbed the victim twice, the second one after verifying that these was still alive and trying to get up after being stabbed by a João Gomblo. The motivation of the crime was the fact that de accused be a supporter of the independence of East Timor. The murder was used by the accused and his group to punish Domingos Gonçalves Pereira for having a different political option. The appellant committed the crime of murder in the scope of a combined action in which he, as a member of the Dadurus Merah Puti militia, was acting under



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the order of that group's chief in the village of Ritabou, Natalino Monteiro, with the purpose of killing all men that were, then, in the POLRES facilities. The degree of guilt of the appellant is high. It's also high the needs of prevention, general and special. Opposing the aggravating circumstances mentioned above, the accused has only the confession in his favour, which in this case has contributed to the finding of the truth.

The concrete sentence shouldn't, therefore, be under 12 years of prison. Not being allowed the Court of Appeal to apply a higher sentence than the one applied on the primary jurisdiction, prevented by the foreseen in the section 41.6 of the Regulation 2000/30, the sentence of 12 years of prison fixed by the Special Collective should be maintained.

About the lawsuit expenses, it matters to take into account that the accused has contributed with the confession to speed up the lawsuit and, on the other hand, it's not known that he has an economic capability to support the lawsuit expenses.

So, taking into account the foreseen by the section 52.2 of the Regulation 2000/30, the appeal should proceed on that part.

On the other hand, it can't be considered that the accused had raised clearly futile questions, so as to may be convicted in the appeal charges, as foreseen by the section 41.5 of the Regulation 2000/30.

By the exposed, the Collective of Judges of the Court of Appeal deliberates

- a) To judge as unfounded the appeal interposed by the accused João Fernandes, except on the expenses;
- b) To confirm the judgement of the Special Collective, except on the conviction of the appellant on the expenses;
- c) To change the Special Collective's decision so that the accused shouldn't be convicted to pay the lawsuit expenses;
- d) Not to convict the accused of the appeal's expenses.

Dili, July 29<sup>th</sup>, 2001



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Cláudio de Jesus Ximenes – President/Rapporteur

Cirilo José Cristóvão

**JUDGEMENT OF EGONDA-NTENDE, J.A.**

**Introduction**

I agree with the majority that this appeal must be dismissed, as it has no merit. However, this is, in my minority view, far from being the end of the matter. Perusing the record of proceedings and what is styled the “Sentencing Judgement” of the District Court I have come across two matters, touching on the duty of a trial court in managing proceedings under section 29A of Regulation 2000/30, the Transitional Code on Criminal Procedure, that need to be dealt with. The major question of the two is whether a trial court can proceed to order sentence without convicting an accused of an offence first. The second matter is with regard to the duty of the trial court to satisfy itself that the conditions set out in Section 29A.1 of Regulation 2000/30 have been met.

I am aware that it is somewhat unusual for a court of appeal to proceed and deal with matters of law in its judgement which it has not had the benefit of the views of the parties or their counsel, as the case may be. I find myself in this unusual situation by a reason of a verbal rule imposed by the President of this court, that he shall not permit judges, to ask Counsel to respond to any matter of law during the hearing of the causes before the court.

**Facts**

The appellant, João Fernandes, was by an indictment dated 14<sup>th</sup> November 2000 and submitted to court on 15<sup>th</sup> November 2000 indicted of murder contrary to Sections 340 of the Indonesian Penal Code and Section 8 of Regulation 2000/15. It is alleged that João Fernandes did with deliberate intent and with premeditation take the life of Domingos Gonçalves Pereira on 8<sup>th</sup> September 1999 at Maliana, the district of Bobonaro. The appellant was arraigned before the trial court on 10<sup>th</sup> January 2001. He pleaded guilty as charged.

In its “Sentencing Judgement” the trial court recounts what occurred in the following words, “3. On 10 January 2001, during the preliminary hearing, the accused pleaded guilty to the charge of murder as stipulated in section 8 of UNTAET regulation 15/2000 and article 340 of the Penal Code of Indonesia.”

“4. After verifying the validity of his guilty plea, particularly in light of section 291 of UNTAET regulation 30/2000, the special panel entered a plea of guilty against the accused on the charge of the indictment. Furthermore, it was decided to set the date of pre-sentencing hearing for 16



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January 2001 for final statement of the Public Prosecutor and the Defence. On 16 January 2001, because of the lack of the interpreter, the case was postponed to 18 January 2001, date on which a hearing was held. The Special Panel set then the date of 25 January 2001 for the decision.”

“6. As stated earlier, the accused pleaded guilty to the charge set forth in the indictment against him. In accordance with Section 29A.1, the Special Panel sought to verify the validity of the guilty plea. To this end, the Panel, asked the accused: a) If he understood the nature and consequences of the admission of guilt; b) If his guilty plea was voluntarily made, if he did it freely and knowingly without pressure, or promises; c) If his guilty plea was unequivocal, i.e. if he was aware that the said plea could not be refuted by any line of defence.”

“7. The accused replied in the affirmative to all these questions. Furthermore, the Special Panel was satisfied that the matters referred to in Section 29A.1 of UNTAET regulation No.2000/30 are established and found that the guilty plea was based on sufficient facts. It therefore found the accused guilty of murder, as stipulated in Section 8 of UNTAET Regulation No. 2000/15 and Article 340 of penal code of Indonesia.”

“17. In light of the admissions of all the evidence made by the accused in addition of his plea of guilty, the Special Panel, on 16 January 2001, accepted his plea and found him guilty for taking the life of Domingos Gonçalves Pereira, with deliberate intent and with premeditation, and hereby committed murder, a crime stipulated in section 8 of UNTAET Regulation No. 2000/15 and article 340 of the Penal Code of Indonesia.”

Reading paragraphs 3,4, 6, and 7 of the Sentencing Judgement quoted above, creates the impression that on the 10<sup>th</sup> January, after the accused pleaded guilty, the trial court satisfied itself if this was proper in the circumstances. After so satisfying itself, it then convicted the accused of the offence by finding him guilty as charged. When one reads further though on, in Paragraph 17 of the sentencing judgement, it is stated that the accused was found guilty as charged on the 16<sup>th</sup> January 2001. In paragraph 4 of the judgement we are told that the 16<sup>th</sup> January was set for a pre-sentence hearing and by necessary implication that conviction of the accused was done on 10<sup>th</sup> January 2001. This contradiction in the sentencing judgement could be said to have been a typographical error. Nevertheless it merits investigation for the question of a conviction is fundamental to a criminal proceeding.

I shall turn to the record of the trial that is before this court. The record of the trial for 10<sup>th</sup> January 2001 is set out below in part.

“Presiding Judge: Can the Public Prosecutor submit all the evidence in relation to this case?”

Public Prosecutor: I can't submit all the evidence I referred to before as some of it has not been photocopied yet, this is due to power shortages.



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After that at 12.55 the Presiding Judge announced that the hearing would be suspended for several minutes.

Then the hearing was re-opened at 1.15, and the Presiding Judge immediately explained that the court, in accordance with UNTAET Regulation 30/2000 would consider the fact that the defendant had made an admission of guilt and accepted all the charges, as well as the evidence submitted, by the Public Prosecutor, therefore the Panel decided to adjourn this trial until the 16<sup>th</sup> January 2001, to hear the final statements from both parties (Public Prosecutor and Public Defender/Defendant).

Then the Presiding Judge declared the hearing closed.”

It is clear from the foregoing that no conviction of the accused was made on that day. No finding was made that the accused is guilty of a particular offence or crime though note was made of the fact that he had pleaded guilty, and accepted all charges and evidence presented by the Public Prosecutor. The charges accepted are not mentioned or particularised. It is not mentioned if the evidence that the Public Prosecutor could not submit at the time was subsequently submitted or abandoned. The hearing of the case was adjourned to 16<sup>th</sup> January 2001 “to hear final statements from both parties...”

On the 16<sup>th</sup> January 2001 the proceedings were adjourned to 18<sup>th</sup> January 2001 due to the absence of an interpreter. What is stated in paragraph 17 of the sentencing judgement of the district court that on 16<sup>th</sup> January 2001 the special panel accepted the guilty plea of the accused and found the accused guilty “for taking the life of Domingos Gonçalves Pereira, with deliberate intent and with premeditation, and hereby committed murder, a crime stipulated in section 8 of UNTAET Regulation No. 2000/15 and article 340 of the Penal Code of Indonesia” is not an accurate account of what occurred on that day. The record of the trial shows that no such proceedings occurred on 16<sup>th</sup> January 2001. As of the 16<sup>th</sup> January, 2001 the accused had not been convicted on his own plea of guilt of the offence with which he was charged or any other offence for that matter, as far as the record of the trial for those dates reveal. To the contrary, the sentencing judgement has given both dates as dates on which the accused was found guilty of the offence with which he was charged. If this is so what was the necessity of convicting the accused twice for same offence?

I turn to the proceedings of the 18<sup>th</sup> January 2001 as viewed from the record of the trial. On that day there was a pre-sentence hearing, with the court hearing from both the prosecution and the defence. The proceedings were then adjourned to 25<sup>th</sup> January 2001. On the 25<sup>th</sup> January 2001 the court read out its sentencing judgement I shall set out the last part thereof, part V. Verdict, in full.



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“The Special Panel for Serious Crimes at the District Court of Dili,

For the foregoing reasons;

Delivering its decision in the Public;

Pursuant to Section 8 of UNTAET Regulation 2000/15 and Article 340 of the Penal Code of Indonesia

Noting the indictment submitted by the Public Prosecutor on 15 November 2000;

Noting the Plea of guilty of João Fernandes, on the 10<sup>th</sup> January 2001 on the charge of murder as stipulated in Section 8 of UNTAET Regulation 2000/15 and Article 340 of the Penal Code of Indonesia;

Having heard the closing statements of the Prosecutor and the Defence Counsel;

Having found João Fernandes guilty on the charge of murder;

1. Sentences João Fernandes to an imprisonment of 12 years for the crime of murder he has been convicted
2. Rules that this judgement shall be enforced immediately
3. Rules that credit shall be given to João Fernandes for the period during which he has been detained
4. Orders João Fernandes to pay the costs of the criminal procedure”

After reciting a number of matters the court makes four sentencing orders. Among the matters it recited was that “it had found João Fernandes guilty on the charge of murder”. I have not been able, in spite of searching the record to find on the record such a finding. In my view it is clear that the special panel did not make a specific finding that the accused was guilty of the murder of Domingos Gonçalves Pereira contrary to sections 340 of the Indonesia Penal Code and Section 8 of Regulation 2000/15. The special panel did not convict the accused at any point throughout these proceedings, in spite of the contradictory assertions in its sentencing judgement that this was done on both 10 January and 16 January 2001. The sentencing judgement itself was concerned substantially with only sentencing the accused. That is determining the penalty or penalties that the accused was to suffer. This is both evident in the overall content of the decision, its heading, and in the orders made at the end of the decision. All the four orders made related to sentencing, i.e. imposition of penalty.

#### Discussion of Law applicable to the facts

What then is the consequence of sentencing an accused without first convicting such an accused of an offence? In my mind the answer to this question is simple and it is provided by reading together Sections 29A, 39 and 54 of Regulation 2000/30, the Transitional Code of Criminal Procedure. I will start by referring to Sections 29A.1 first. I set it out below.



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“Section 29A Proceedings on an Admission of Guilt”

“29A.1 Where the accused makes an admission of guilt in any proceedings before the Investigating Judge, or before a different judge or panel at any time before a final decision in the case, the court or judge before whom the admission is made shall determine whether:

- (a) The accused understands the nature and consequences of the admission of guilt;
- (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
- (c) The admission of guilt is supported by the facts of the case that are contained in: (i) The charges as alleged in the indictment and admitted by the accused;  
(ii) Any materials presented by the prosecutor which support the indictment and which the accused accepts; and  
(iii) Any other evidence, such as the testimony of witnesses, presented by the prosecutor or the accused.”

“29A.2 Where the court is satisfied that the matters referred to in Section 29A.1 of the present regulation are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.”

Section 29A.3 deals with the situation where the trial court is not satisfied that matters mentioned in Section 29A.1 have been established. Section 29A.4 deals with the situation the trial court considers that in the interests of justice, coupled with the interests of the victims, a more complete set of facts should be presented, than that presented earlier on in accordance with Section 29A.1. The trial court could under that section order the prosecutor to present additional evidence or that the trial be continued in the ordinary manner. Section 29A.4 of Regulation 2000/30, in my view, explains why the court in Section 29A.2 has a discretion to convict or not to convict an accused at that stage. This is because of these further two choices or two courses of action that are open to are a court in Section 29A.4.

The trial court below had three choices after satisfying itself that Section 29A.1 had been complied with. It could have proceeded as provided in Section 29A.1 or as in 29A.4 of Regulation 29A.1. The trial court chose not to bring into play Section 29A.4 referred to above. The trial Court chose to accept the plea of guilty. A note to the effect signed by all the three judges and dated 10.01.2001 is on the file. It states, “The Court, according to Section 29A Reg.2000/30, considers that the accused made an admission of guilt and accepted all the evidences presented by the Public Prosecutor, therefore the Court decides to postpone the hearing on 16.01.2001 at 9.00hr for the final statements of the parties.”



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This note does not convict the accused of the offence to which he pleads guilty or any other offence for that matter. The court accepts his admission and adjourns for further hearing. Curiously it also does not make a finding that all the essential facts required to prove the crime to which the admission of guilt relates have been established as required by Section 29A.2 of Regulation 2000/30.

In my view at this stage it was incumbent upon the court to make a choice of proceeding under one of the following Sections, 29A.2 or 29A.3 or 29A.4(a) or (b) of Regulation 2000/30. It appears the trial court opted for Section 29A.2 but failed to comply with it in its entirety. Definitely the trial court did not proceed with the possible options under Sections 29A.3 and 29A.4. of the same regulation.

If the trial court had found the accused guilty at that stage and convicted him of the crime he had pleaded guilty to, the trial court would then have been in a position to jump to Section 39(2) and Section 39(3) of the same regulation for the next step. I shall set out this section below.

Section 39, Decision

“39.1 After the hearing is completed, the court shall begin deliberations in private. The court shall decide in accordance with Section 9.2 of UNTAET Regulation No.2000/11. The court shall pronounce on the guilt or innocence of the accused. If the accused is found guilty, the Court shall state the qualification of the crime and its penalty.”

“39.2 If the accused is found guilty, the court in its discretion may receive additional evidence from the parties before determining the appropriate penalty.”

“39.3 The court shall prepare a final written decision. The final written decision shall be registered by the Registrar as an official entry into the court file. The written decision shall contain the following element:

- (a) the identification of the court, the identity of the judges and the identification of the parties;
- (b) an account of the events and circumstances of the case tried by the court;
- (c) an account of the facts that the court considered proved and the facts that were not proved;
- (d) an account of the factual and legal grounds of those considerations;
- (e) a finding in relation to the innocence or guilt of the accused identifying the section applied of the penal legislation;
- (f) *an order relating to the penalty if the accused is found guilty*, (emphasis is mine)
- (g) an order relating to the costs of the trial;
- (h) an order relating to the disposal of physical evidence seized during the investigations;



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- (i) an order pursuant to Section 49.2, if applicable;
- (j) an order pursuant to Section 51.2, if applicable; and
- (k) the signatures of all judges.”

The trial court appears to have jumped to Section 39.2 of Regulation 2000/30 with its decision of 10/01/2001. Without convicting the accused of any offence it called for pre-sentence hearings, and subsequently sentenced the accused to a term of imprisonment without ever convicting him. There lies the fatal error to those proceedings. Under Section 39.3(f) of the same regulation it is only possible to make an order relating to the penalty if the accused is or has been found guilty of an offence. It is not possible to make such an order before a finding of guilty has been made. To sentence i.e. to impose a penalty on an accused before a conviction for an offence “is a type of proceeding that is not authorised by law.”

Section 54.2 states, “ An act which meets any of the following criteria is a nullity which cannot be remedied without new proceedings, and may be found by a court at any stage:

- (a)
- (b)
- (c)
- (d)
- (e) Where the proceedings were a type not authorised by law;”

In my view the proceedings of the special panel in so far as it proceeded to sentence the accused, that is to impose a penalty, without convicting the accused of an offence, was a type of proceeding that was not authorised by law, and consequently, is a nullity, in accordance with Section 54.2 of the Transitional Code of Criminal Procedure, Regulation 2000/30. In such a case this court can do nothing to remedy this error.

The majority contends that on the record of the trial, and the sentencing judgement, there are enough elements to show that the accused accepted that he committed the offence with which he was charged, and that the special panel found that all elements of the offence charged, were amply supported by the admission of guilty and evidence on record. Even if that is accepted, (which in my view can only be done with many qualifications), this cannot cure the omission committed by the special panel as the omission nullifies all subsequent proceedings. It is an error of law that cannot be remedied on appeal or by the court of appeal.

I now turn to the second issue. And that is the duty of the trial court to comply with the requirements of Section 29A.1 of the Transitional Code of Criminal Procedure/Regulation 2000/30. I shall set out the proceedings in the court below that relate to this issue. These are the proceedings on 10/01/2001.



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“Presiding Judge: What is your statement in relation to this case?”

Defendant: I am guilty.

Presiding Judge: The Public Prosecutor charges you with violating article 340 of the Indonesian Penal Code and Regulation 15, Section 8 in relation to your actions in committing the murder of the victim Domingos Gonçalves Pereira. Do you agree with the charges made by the Public Prosecutor?

Defendant: Yes, I agree and I accept;

Presiding Judge: If you agree with the charges made by the Public Prosecutor are you aware of the consequences?

Defendant: Yes, I am aware.

Presiding Judge: In relation to this confession of guilt you have made voluntarily, have you ever submitted this to the Public Defender?

Defendant: Yes I have submitted this to the Public Defender.

Presiding Judge: Is this confession of guilt correct and there is nothing else to add?

Defendant: That is correct.

Presiding Judge: Do you agree with the evidence and witness statements presented by the Public Prosecutor?

Defendant: Yes I agree.

Presiding Judge: Can the Public Prosecutor submit the evidence in this hearing?

Public Prosecutor: Yes.

Presiding Judge: Can the Public Prosecutor submit the original testimonies of the witnesses, then submit any additional motion.

Public Prosecutor: Yes, I can submit the original testimonies in accordance with the form on the rights of the Public Defender/Defendant, therefore I submit this form on the rights of the defendant, namely: no. 1 and 2.

Presiding Judge: Do you still have new evidence in relation to this case?

Public Prosecutor: Yes, there is still new evidence, namely: no.1—13 and I can submit this evidence in this hearing.

Then the Presiding Judge asked the following questions to the Public Defender:

Presiding Judge: Has the Public Defender received all the evidence submitted by the Public Prosecutor in today’s hearing?

Public Defender: Yes

[The Presiding Judge and Judge Maria asked the defendant several questions about how the offence was committed.]



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Then the Presiding Judge asked the following questions:

Presiding Judge: Can the Public Prosecutor submit all the evidence in relation to this case?

Public Prosecutor: I can't submit all the evidence I referred to before as some of it has not been photocopied yet, this is due to power shortages.

After that at 12.55 the Presiding Judge announced that the hearing would be suspended for several minutes.

Then the hearing was re-opened at 1.15, and the Presiding Judge immediately explained that the court, in accordance with UNTAET Regulation 30/2000 would consider the fact that the defendant had made an admission of guilt and accepted all charges, as well as the evidence submitted by the Public Prosecutor, therefore the Panel decided to adjourn this trial until the 16<sup>th</sup> January 2001, to hear the final statements from the both parties (Public Prosecutor and Public Defender/Defendant)

Then the Presiding Judge declared the hearing closed."

Under Section 29A.1, (already set out above), the court or judge before whom an admission is made is required to determine, that is to ascertain, whether:

- (a) The accused understands the nature and consequences of the admission of guilty.
- (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
- (c) The admission of guilt is supported by the facts of the case that are contained in
  - (i) the charges as alleged in the indictment and admitted by the accused;
  - (ii) Any materials presented by the prosecutor which support the indictment and which the accused accepts; and
  - (iii) Any other evidence, such as the testimony of witnesses, presented by the prosecutor or the accused."

In the case at hand the Presiding Judge asked the accused if he was aware of the consequences of agreeing with the charges made by the Public Prosecutor. The accused responded that "Yes, I am aware." To my mind, at this stage it cannot be said objectively speaking that an accused is aware of the consequences of a guilty plea by merely saying so. The consequences of the guilty plea are legal. The consequences ought to be articulated by the accused or the court, or any other officer of the court. It is not enough in my view just to repeat the words of a statute without complying with the substance of those provisions. What was required here were a set of questions by the court that could elicit responses from the accused that would show whether he understood or not the nature and consequences of an admission of guilt. Or the court could explain to the accused the nature and consequences of his admission of guilt, and thereafter



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inquire from him, if he understood or not. An admission of guilt is the full acceptance by the accused that he committed the offence with which he is charged. The consequences of such admission are that the accused would thereby waive his right to a full trial, and is prepared to be convicted only on his own plea of guilty, without the prosecution being obliged to call evidence and prove this case against him beyond reasonable doubt. The record of the trial court ought to show that the accused understood these consequences. In the present case all the Presiding Judge did was to repeat the words of the Regulation, and on the record of proceedings in this case there is no information that shows that the accused understood the consequences of an admission of guilt. Section 29A.1(a) of the Transitional Code of Criminal Procedure was not complied with.

Secondly, the trial court ought to ascertain that the admission of guilt is voluntarily made by the accused after sufficient consultation with defence counsel. The Presiding Judge did this through questioning of the accused, though the questions could have been better framed.

Thirdly, the trial court is obliged to ascertain, if the admission of guilt is supported by the facts of the case contained; (i) in the indictment, and admitted by the accused; (ii) in any materials presented by the prosecutor that support the indictment and which the accused accepts, and in any other evidence, presented by the prosecutor or the accused.

In the case at hand there are numerous references referring to the prosecutor submitting evidences to the court and the public defender. The record does not though detail what is the nature of this evidence, and at what point it was admitted on the record of trial. In any case it appears to be a misnomer to refer to these items, whatever there are, as evidence, when such are not before the court proved in the ordinary way. The more appropriate reference would be to refer to such items as materials presented by the prosecutor, and which the accused accepts, as envisioned in Section 29A.1(b) of the Transitional Code of Criminal Procedure. Those materials as mentioned on the record of the trial of the case do not amount to evidence as provided in Sections 33 to 37 of the Transitional Code of Criminal Procedure. In the case at hand the record does not support the suggestion that some evidence was tendered in this case.

Whatever facts gathered in this case ought therefore to have been gathered from the materials supplied by the Public Prosecutor and accepted by the accused. The record of the trial court should show the specific nature of these materials, and indicate specifically which material was accepted by the accused. Then the facts can be garnered there from to ascertain if the plea of guilty is consistent with the admission of guilt. These facts must be ascertained before the plea of guilty is accepted. On the record of the trial court, all we have is the Presiding Judge asking, "Do you agree with the evidence and witness statements presented by the Public Prosecutor?" The



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record must particularise the evidence and the witness statements that are being referred to, and it is preferable that the defendant signifies his acceptance in respect of each item of evidence, or material, after its purport has been made clear to him.

There is one other point at this stage. The Presiding Judge referred to witness statements, interchangeably, as original testimonies of the witnesses, which to my mind are two different things. One is a statement recorded outside court, and the other is a statement on oath before the court. The two are different things having different legal effect. On the record, there was no testimony of witnesses before the trial court. And if what was referred to were written statements of witnesses, these statements for purposes of these proceedings could form only materials, under Section 29A.1(ii). The imprecise use of language leaves the record somewhat confused. Lastly I must refer to the order for the costs made by the trial court. Section 52 of the Transitional Code of Criminal Procedure governs costs of the criminal proceeding. I shall set it out in part.

“52.1 The costs of a criminal proceeding shall be accounted and registered by the court.”

“52.2 In a case in which the accused is found guilty, the court shall consider the circumstances of the convict to pay all or part of the costs of the criminal procedure...”

The court below just made an order that the accused must pay the costs of the criminal procedure. It had not convicted the accused of any offence. It had not accounted and registered the costs of the criminal proceeding. The court below did not consider, as it was required to do, the circumstances of the convict. Perhaps in the circumstances that was rather difficult as there was actually no convict before the court. Nor in the circumstances could the trial court consider the offence of which the convict had been convicted. However, in light of these provisions, it is essential, to make those considerations before an order to pay costs is made. Should an order be made without either convicting an accused first, or making those considerations required to be made under Section 52.2 of the Transitional Code of Criminal Procedure, such proceedings as relate to the making of that order, and the order itself, are “a type of proceeding unauthorised by law.” Such proceedings and the order made in pursuance of them are a nullity.

I am aware that in the questioning of the accused by the court, the accused supplied answers that leave one in no doubt that the plea of guilt submitted by him is founded on sufficient facts. The trial court, though, in my view, made such grave errors of law amounting to a nullity within the terms of Section 54.2(e). No action by this court can at law cure those errors. Not even being certain, based on the accused’s own statements to the court, that the accused committed the offence he was charged with is sufficient to arrest the situation. For those reasons I am, regrettably, unable to join the majority of this court, and uphold the proceedings below, or take any other course of action, other than to declare those proceedings a nullity.



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**Disposition**

I would order that the proceedings in the lower court, especially the sentencing decision, and the orders made therein, a nullity. I would further order that this case is an appropriate case, following Section 41.4 of the Transitional Code of Criminal Procedure, for new proceedings to be initiated in the District Court of Dili.

Dated at Dili this 29<sup>th</sup> day of June 2001.

Fredrick Egonda-Ntende

Judge of Appeal