

**IN THE COURT OF APPEAL OF EAST TIMOR
(CORAM: CLAUDIO XIMENES, P., EGONDA-NTENDE, J.A., CIRILIO
CRISTOVAO, AG. J.A.)**

HOLDEN AT DILI

CRIMINAL APPEAL NO. 7 OF 2001

JULIO FERNANDES

APPLICANT

VERSUS

PROSECUTOR GENERAL

RESPONDENT

RULING OF THE COURT

The applicant, Julio Fernandez, seeks leave of this court to file a written appeal statement out of time and or that an appeal written statement filed on 14th May 2001 be accepted by this court as validly done. The respondent conditionally opposes this application arguing that it has no merit, and in any case that the appeal lapsed as soon as the applicant failed to file an appeal statement within the time allowed at law. This is the ruling of this court in the matter.

The applicant was on the 1st March 2001 convicted by the special panel for serious crimes at Dili District Court with Murder contrary to section 340 of the Indonesian Penal Code. He was sentenced to serve a term of imprisonment of seven years. Counsel for the accused filed a notice of appeal on the 7th March 2001. The notice of appeal included the grounds on which the appeal was based. The registry of Dili district court prepared a record of appeal and transmitted it to this court. It is not certain when it arrived in this court. On 4th May 2001 this court issued hearing notices to the parties notifying them that the appeal would be heard on the 21st May 2001.

Counsel for the Respondent responded with a letter to the court and the applicant that this appeal had lapsed as the applicant had never filed an appeal statement as required by section 40.3 of the Transitional Code of Criminal Procedure, Regulation 2000/30. This letter seems to have shaken the Applicants counsel from slumber. The applicant subsequently filed the application before us for leave to file the appeal statement out of time, in accordance with section 50.1 of Regulation 2000/30.

At the hearing of this application, learned counsel for the applicant, Mr. Malunga, reiterated the arguments set forth in his application. The main ground is to the effect that the district court had not perfected the record of the trial, substantial portions of which were in Bahasa, a language presumably not understood by Mr. Malunga, within the time available for filing of the written statement of appeal. Mr. Malunga argued that without the record of evidence he would not be able to formulate grounds of appeal.

Ms Brenda Sue Thornton, learned counsel for the respondent opposed this application. In line with the written response to application, Ms Thornton submitted that the burden of showing that there was good cause for extension of time lay upon the applicant. She submitted that the applicant had not discharged this burden. It was not clear when the record became available to the applicant. As far as the question of substantial portions of the record being in Bahasa, she was of the view that this should offer no comfort to the applicant, as one of co-counsel, Mr. Cancio Xavier, was fluent in Bahasa. She prayed that this application be dismissed.

Section 40.3 of Regulation 2000/30 states, “A party who has filed a Notice of Appeal shall file a written appeal statement with the court of first instance within thirty (30) days after filing of its Notice of Appeal. If no written appeal is filed within this period, the party concerned is deemed to have withdrawn the appeal, and the decision of first instance shall be final.” Until time is enlarged under section 50.1 or a written appeal statement is accepted out of time under Section 50.2 of Regulation 2000/30, the appeal does not exist. It is deemed withdrawn. If a party desires that this court exercise its discretion under either of these two subsections it is for that party to establish good cause. We therefore agree with learned counsel for the respondent, Ms Thornton, that the burden of showing the existence of good cause rests upon the applicant.

Mr. Malunga has not explained why the applicants took no action at all in the thirty days that they had to file a written statement of appeal. For instance why did applicant’s counsel not approach this court requesting for more time since it should have been evident to them that they were not meeting the deadline? We are left with one impression. The applicant’s counsel were not diligent in pursuing the applicant’s appeal. It may be true, though it has not been established by the applicants, that the record of the trial or the translation of the same from Bahasa to English had not occurred by the end of the thirty-

day period. For this reason to amount to good cause, it was incumbent on the applicant to establish, before this court, that that is what had occurred. The applicants have failed to establish this to be the case. In the result we conclude that the applicant has failed to establish good cause for failing to file a written statement of appeal within thirty days from the filing of the notice of the appeal.

There are times when the consequences of dereliction of duty on part of counsel should not be visited upon a party. This may be one such occasion. We note that the notice of appeal filed in this matter contained grounds of appeal though this was not the document for this purpose. Nonetheless the notice of appeal provided the respondents with notice of the grounds upon which the appeal in this case was being made. Those are the grounds that have been enlarged upon in the written appeal statement of 14th May 2001. The respondent will not suffer any prejudice if this applicant is granted leave to proceed with this appeal. Exercising our discretion under Section 50.2 of Regulation 2000/30, we recognise the written appeal statement filed out of time, on 14th May 2001 as validly done. The hearing of the appeal may proceed on a date to be determined by this court.

Disposition

1. Application made under Section 50.1 of Regulation 2000/30 for leave to file a written appeal statement out of time is dismissed.
2. Written appeal statement filed on 14th May 2001 is accepted as validly done under Section 50.2 of Regulation 2000/30.

Dated at Dili this 29th day of June 2001.

Claudio Ximenes
President

Fredrick Egonda-Ntende
Judge of Appeal

Cirilio Cristovao
Acting Judge of Appeal