



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL
TRIBUNAL DISTRIITAL de DILI
SECÇÃO CRIMES GRAVES

Case No.18/2001 the Public Prosecutor vs. Benjamin Sarmento.

Before:
Judge Maria Natereia Gusmao Pereira, Presiding

Case No.18/2001

The Public Prosecutor
Versus
Benjamin Sarmento

Decision on the Application for release of the Accused Benjamin Sarmento

For the Prosecutor:
Shyamala Alagendra

For the Defense:
Siphosami Malunga

Procedural background

1. On 3rd February 2003, the defense filed a motion under Section 27.2 UNTAET Regulation No 30/2000 as amended by UNTAET Regulation 25/2001 of the Transitional Rules of Criminal Procedure, to apply for the immediate release of Benjamin Sarmiento (the Accused) for the reason given herein or, in the alternative, the imposition of substitute restrictive measures.
2. The Prosecution responded to the defense counsel Application on 20th February 2003.
3. On 24th February 2003, the Court deemed it urgent to hear the Application and decided to hold a review hearing of the detention of Benjamin Sarmiento on Friday 28th February 2003.
4. On the 28th February 2003 a review hearing was held and the Defence maintained the arguments submitted in the Application for the release on restrictive measures of the Accused in oral submissions he underline only the issues with respect to the Prosecution's submissions, and submitted that this Court should be distinguish the position at the International Criminal Tribunals on the issue of detention. And the Prosecution's orally responded to the Defense counsel's Application.

Submissions of the parties

5. The Defense for the Accused applied for the immediate release of the Accused on the grounds that there are further delays in the proceedings. He submits these grounds are sufficient to persuade the Court that the Accused should be released. The Defence of the Accused does not repeat any of the arguments raised during previous bail Applications, save to say that the same factual circumstances apply.
6. In addition the Defence highlighted that recent developments have made this Court unable to safeguard this right of the Accused. There have been so many delays caused by the current state and the justice system. It is the submission of the Defence that the justice system should not detain people for issues they cannot deal with expeditiously. In this particular case, the right of the Accused to be tried within reasonable time or released pending trial is being substantially violated. According to the Defense, the judicial system must if it is unable to deal with

people it takes into custody release them. That release does not mean that the charges will be dropped.

It is submitted that this is not failure on behalf of the Prosecution, the Defence or the Court itself.

7. For the Defense, if the Court still takes the view that there are reasonable grounds for detention under Section 20.8, it should deal with the case under Section 21 of UNTAET Regulation 2001/25, which provides substitute restrictive measures as an alternative to an order of detention.
8. The Accused agreed to comply with substitute restrictive measures that the Court deems appropriate.
9. The Prosecution opposed the Application and requested that the Accused person be detained until the end of the trial. The prosecutors submitted that the Application for release of the Accused person ought to be dismissed on the main three reasons; (1) the issue of the Accused's detention has already been decided by this Court and now is (*res judicata*), (2) the right of review of detention under Section 6.3(k) of UNTAET Regulation is not an automatic right, and (3) grounds for continued detention exist.
- 10 This Court will assess the issue of the Accused detention being already decided by this Court and is *res judicata*, the right of review of detention under Section 6.3 of UNTAET Regulation 2000/30, before analyzing the substantial grounds for the release of the Accused presented by the defense.

With respect to the issue that the Accused is detention has already been decided by this Court and is now *res judicata*.

11 The Prosecution stated that a similar Application for release had been made previously and a decision was issued to extend the detention of the Accused on 1st September 2001 and 22nd March 2002. The Special Panel expressly decided that the Accused is to be detained for the duration of the trial for reasons stated therein.

12 It is entrenched in the principles of law that a matter finally adjudicated upon by a competent court of law may not be subsequently re-opened or challenged this principle as known as (*res judicata*).

- 13 It is not contested that the principle of *res judicata* is applicable to the Special panel. The only issue here is whether or not the principle of *res judicata* is applicable in the present case.
- 14 The Defense did not made submissions with respect to the issue of *res judicata*.
- 15 As already decided in the case the Prosecution v Jose Cardoso, it is the opinion of this Court that decisions relating to detention can be revisited only with the presentation of new grounds. It would be a waste of time and useless to issue a decision which immediately there/after can be revisited without presenting any new grounds. The right of the Accused to have his detention reviewed at regular interval does not mean that a party can bring before the Court the same reasons upon which the Court initially decided, only that new grounds have to be submitted.
- 16 In the present case the Special Panel has previously decided on the issue of the detention of the Accused for the duration of the trial.
- 17 From the elements on the file, it is clear that many decisions have been made in order to extend the detention of the Accused for the duration of the trial. The basis of those decisions was mainly the risk of the Accused to flee the jurisdiction in order to avoid trial and the gravity of the crimes. The Defense's Applications does not state any facts to show that the previous decisions of the Special Panel are wrong, in which case he should have seized the Appeal Court of the matter.
- 18 The Court agrees with the Prosecution that there must be finality to proceedings. Once an issue has been raised and deliberated upon, the same issue cannot be the subject matter of another decision in the absence of new or change circumstances.
- 19 However, in the present case, The Court finds relevant the submissions of the defense that the length of time and additional time passed by the Accused in jail since the last order of detention can be considered as a change in the circumstances of the case. Only the further delay gives the defendant the right to have his custody reviewed under Section 6.3 (k) UNTAET Regulation 2001/25.

With respect to the right of review of detention under Section 6.3(k) of UNTAET Regulation 2001/25

- 19 Both the Prosecution and the Defense agree that pursuant to Section 6.3(k) of UNTAET Regulation 2001/25, the Accused has a right to have the grounds of his detention reviewed at regular intervals.
- 20 As already decided in Jose Cardoso case, this Court considers that **this right arises in two times: (1) when the previous period of detention expires or (2) where there are some changes affecting any one of the grounds upon which the Accused's detention is based.**
- 21 In the present case the Defense has raised the same grounds as it raised in previous Applications. Only the new delay in the proceedings, the issue of length of time, which is still on going, could be considered as a new ground submitted by the Defense.

With respect to the substantial grounds for continued detention

- 22 According to Section 20.7 of UNTAET Regulation 2001/25, the Court may order continued detention if there is reason to **believe** that a crime has been committed; that there is sufficient **evidence** to support a reasonable belief that the Accused was a **perpetrator**; and that there are reasonable grounds to believe that **detention is necessary.**
- 23 **Section 20.8 of UNTAET Regulation 2001/25 provides that reasonable grounds for detention exist when: (a) there is reason to believe that the detainee will flee to avoid criminal proceedings; (b) there is a risk that the evidence may be tainted, lost, destroyed or falsified; (c) Danger to Victims, Witnesses or any other person; (d) there is reason to believe that the suspect will continue to commit offences or pose a danger to public safety or security.**

24 Section 20.12 of UNTAET Regulation 2001/25 says: *“On exceptional grounds, and taking into account the prevailing circumstances in East Timor, for particularly complex cases of crimes carrying imprisonment for ten years or more under the law, the Investigating Judge or the Judge to whom the matter has been referred upon the filing of the indictment may, at the request of the public prosecutor, order the continued detention of a suspect, if the interest of justice so requires, and as long as the length of pretrial detention is reasonable in the circumstances and having due regard to international standards of fair trial.”*

There is sufficient evidence to support a reasonable belief that the Accused was the perpetrator of the alleged crimes with which they are respectively charged.

25 This Court has already decided on the exceptional grounds of detention for the duration of the trial. It will check if anything has changed with respect to those grounds which are: Gravity of the offense, danger to victims, witness or any other person, length of pretrial detention and risk of flight.

Gravity of Offences with which the Accused is charged.

26 The Court already decided in its decision issued on September and March that the charges against the Accused are serious. The penalty for those crimes is up to 25 years. It is not possible to say for sure that the Accused will flee once released or will threaten the witnesses. No one can predict the future. However, the nature of the allegations against the Accused and the possible penalties create a risk that the Accused may flee to avoid the criminal proceedings, or may attempt to interfere with the witnesses. The measures to protect the witnesses taken by the Court will be of little value once the Accused is released.

27 The Accused was re-arrested on 12 March 2001. He is charged with nine counts of crimes against humanity, including murder, imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law, deportation or forcible transfer of population and persecution. Taking into account the fact that the penalty for the crimes the Accused is charged is up to 25 years on each count, there is a possibility that the Accused will try to escape to avoid the sentence. There are a large number of witnesses (44 witnesses) who could provide information in this case, so they need to be protected.

28 This Court agrees with the prosecution that the gravity of the crimes with which persons Accused are charged can be assessed as a ground for continued detention. Reference will be made to the Jurisprudence from the ICTR and ICTY, specially to the case Prosecutor v Jerome Clement Bicamumpaka ¹ where the Court found at "19. *Under these circumstances, and, notably (1) the gravity and factual and legal complexity of the charges against the Accused, (2) the "gravity" of the sentence he might be facing, should he be found guilty, (3) the complexity of the joint proceedings which adds to their overall length and (4) the necessity to deliberate and render decisions on the pre-trial Motions filed by the Parties, the Chamber, mindful of the Accused's right to be tried without undue delay envisioned under Article 20(c) of the Statute, concludes that the length of the Accused's detention remains within acceptable limits and in accordance with the interests of justice.*"

29 The Court will refer (*mutatis mutandis*), to the case the Prosecutor v Delalic et al. in which the Trial Chamber held at paragraph 29 that: "*The second element which must be considered in determining whether the Accused has proven exceptional circumstances sufficient to justify his provisional release is the Accused's role in the crime or crimes alleged. As noted earlier, the greater the role of the Accused, the more difficult it will be for him to justify his provisional release*".²

Danger to Victims, Witnesses or any other person

30 This Court has already decided on 22nd March 2002 that, although it is not possible to say for sure that the Accused will threaten the witnesses once released, that the nature of the allegations against the Accused and the possible penalties create a risk that the Accused may attempt to interfere with the witnesses. The Court underlined also that the measures to protect the witnesses taken by the Court would be of little value once the Accused is released.

31 The Accused's undertaking that he will not communicate with any witnesses cannot be a guarantee that the Accused will not do it, considering the circumstances of the case.

32 The Defence made no submissions regarding this matter. The Prosecution is right to underline that the Accused has been in detention and as such did not have the opportunity to communicate with the victims and/or the witnesses.

33 This Court is still not satisfied that once released, the Accused would not pose a danger to victims and witnesses. Reference can be made (*mutatis mutandis*) to the ICTY case of the

¹ Case No. ICTR-99-50-T

² IT-96-21, paragraph 29.

- 34 Prosecutor v. Kunarac and Kovac³. The Trial Chamber says that it may only order the provisional release of an Accused if it is satisfied that the Accused will not pose a danger to any victim, witness or other person. It underlined that " *The willingness of the Accused to give personal undertakings in this regard, cannot be sufficient in the circumstances of the case, the most important of which is that other indictees are still at large.*
- 35 The Court cannot rely on the fact that the evidence in the case has been collected and that there is no longer a danger of the Accused tampering with such evidence. Many witnesses are waiting to come before the Court in order to give their testimonies. Furthermore if the **Accused released** at this stage, when the trial is about to commence, **it would have a negative impact on the willingness of the victims and or witnesses to participate in the trial proceeding.**

Length of pre-trial detention

- 36 This Court has already stated in its decision issued on 22nd March 2002 that the length of the pretrial detention constitutes an exceptional ground to release the Accused.
- 37 Pursuant to Article 9 (3) of the International Covenant on Civil and Political Rights, anyone detained on a criminal charge has the right to trial within a reasonable time or to release pending trial: "anyone arrested and detained on a criminal charge shall be brought promptly before a judge or other officer authorized by the law to exercise judicial power and shall be entitled to trial within a reasonable time or to release".
- 38 Pursuant to Section 6 UNTAET Regulation 2001/25, the Accused have the right to be tried without undue delay. That means that criminal proceedings must be started and completed within a reasonable time.
- 39 The issue of length of detention as an exceptional circumstance warranting release, and the issue of the right of the Accused to be tried without undue delay is to be evaluated on a case-by-case basis and in light of several factors that may account for the length of detention.
- 40 The Court **agrees** with the Defense that the main aim of the right to trial within reasonable time is to limit the length of a person's

³ ICTY, The prosecutor v. Kunarac and Kovac

detention before trial, and that in cases involving serious charges such as homicide or murder, where the Accused is denied bail or release by the court, the Accused must be tried as expeditiously as possible.

- 41 It is true also that in the present case the Accused has been detained two years. However, considering the nature and the seriousness of the charges, the Court deems that the length of detention of the Accused is still reasonable, notwithstanding the duty of the Special Panel to expedite proceedings within the following months. And as decided in the case the Prosecution V Umbertus Ena and Carlos Ena, there is an expectation that the Special Panel will expedite proceedings considering the recent ruling of this Court to allow a single judge to hold a preliminary hearing, and the plan of establishing two full panels deal with serious crimes.
- 42 The Court realizes that the trial of the Accused has been postponed several times, however none of the postponements have been at the request of the Accused or caused by him and the Court also agrees with the Defence that it is not due to failure on behalf of the Prosecution, the Defence or the Court itself.
- 43 This is in accordance with the jurisprudence of the International Tribunals. For example, in the case of the Prosecutor v Jerome Clement Bicomungu⁴ the Court found reasonable in the circumstances the period of two years of detention. It stated: *"the court has to have regard, inter alia, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition to complying with the 'reasonable time' requirement." Under these circumstances, and, notably (1) the gravity and factual and legal complexity of the charges against the Accused, (2) the "gravity" of the sentence he might be facing, should he be found guilty, (3) the complexity of the joint proceedings which adds to their overall length and (4) the necessity to deliberate and render decisions on the pre-trial Motions filed by the Parties, the Chamber, mindful of the Accused's right to be tried without undue delay envisioned under Article 20(c) of the Statute, concludes that the length of the Accused's detention remains within acceptable limits and in accordance with the interests of justice."*
- 43 In light of all those reasons, the length of Benjamin Sarmiento's detention remains within acceptable limits in accordance with the interest of justice and international standards of fair trial.

⁴ Case No. ICTR-99-50-T

Risk of Flight

- 44 This Court has already decided in previous decision that the nature of the allegations against the Accused and the possible penalties create a risk that the Accused may flee to avoid the criminal proceedings⁵.
- 45 In oral submissions, the Prosecution noted the Defense's arguments with relation to the distinctions between the International Tribunals and the **Special Panel** in East Timor. The Prosecution noted that the arguments are based upon the assumption that the Accused will not flee the jurisdiction of the Special Panels. The Prosecution stressed that until this day there has been no co-operation where suspects or accused persons have been indicted who are outside East Timor and who have been surrendered to East Timor. The Prosecution stressed that an accused may flee outside East Timor and the Court will have to depend on co-operation from the government of the Republic of Indonesia.
- 46 It shall not be a general rule that persons waiting trial be detained in custody, but release shall be subject to a guarantee to appear for trial. However, the risk of flight is relevant to justify the pretrial detention. And in the present case, it has been shown that there is a risk that the Accused will flee if released.
- 47 It is true that Accused had been released once but this was only for a month and it is for simple murder as a crime describing on Section 8 of RU 15/2000 and Section 340 of Indonesia Penal Code. However for this stage the Court can't predicate for the future because the amended indictment against the Accused is different as crimes against humanity.
- 48 The Court is of the opinion that the fact the Accused did not return voluntarily from West Timor to East Timor but was arrested in the District Same and as mentioned by the Accused that his family is now living in West Timor. There is no guarantee that if the Court releases him he will not try to go back there once released. As submitted by the Prosecution, the Accused was indicted with nine counts of crimes against humanity.
- 49 This Court is therefore not satisfied that once released, the Accused will appear for trial.

⁵ Special Panel for the trial of serious crimes, the Prosecutor v. Joni Franca and 2 others, 27 November 2001.

50 For all the above reasons, the Court deems unsubstantiated the request presented by the Defense for the Accused.

The Court:

51 Rejects the request of the Defense.

52 Decides to extend the detention of the Accused for the duration of the trial.

Dili, February 7th, 2003



Judge Maria NATERCIA GUSMAO PEREIRA, Presiding