



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

**RDTL**

**TRIBUNAL DISTRIAL de DILI**

**SECÇÃO CRIMES GRAVES**

Before:

Judge Sylver Ntukamazina, Presiding

Judge Maria Natercia Gusmao Pereira

Judge Siegfried Blunk

**Case No. 5/2002**

**The Public Prosecutor**

**Versus**

**Umbertus Ena and Carlos Ena**

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**Decision to the motion of the Defense of Carlos Ena to call the co-accused Umbertus Ena to declare as a witness**

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**For the Prosecutor:**

Charles Nsabimana

**For the defense:**

Alan Gutman

Ana Beatriz Sanchez

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## Defence Motion of Carlos Ena to call a co-accused as a witness

1. In some countries, the testimony of a co-accused is accepted. However, the value of his testimony must be carefully weighted. For example, in some common law countries, when the trial is before a jury it applies the so-called accomplice rule. The Accomplice Rule consists on the fact that the Judge (tryer of law) must tell the jury (tryer of fact) how the evidence can be used. In that case the judge must warn the jury that they can use the evidence but they must be cautious in doing so. The jury must be told to weight the evidence carefully. It is a way to show that the testimony is *a priori* suspicious and its reliability can be questioned (for example, the same thing goes for the unsworn testimony of children).
2. One of the problems that the testimony of a co-accused acting as a witness can present is up to what point his testimony must be really considered as that of a witness or on the contrary that of an accused. If a co-accused is called as a witness, does he have to take an oath? Can be cross-examined with the risk of incriminating himself?
3. Contrary to the general rule against self-incrimination that applies in most countries<sup>1</sup> –and that could apply in the case of a co accused or accomplice- in some countries<sup>2</sup> the norm is that a witness cannot refuse to answer for fear of self-incrimination. The rule in this case is that the witness must answer, but should state his or her objection. Any evidence given can then not be used against him or her in a later trial, if there is one. The Rules of Procedure and Evidence of the ICTY provided with a similar mechanism.<sup>3</sup>
4. The Special Panel cannot apply this method. Section 35.4 is clear about it: *If it appears to the Judge that a question is likely to elicit a*

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<sup>1</sup> For example the United States

<sup>2</sup> For example Canada

<sup>3</sup> ICTY Rules of Evidence and Procedure [Identical wording is used in the ICTR Rules of Evidence] Rule 90 (E)

*A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony.*

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*response that can incriminate the witness the Judge shall advise the witness of his/her right not to answer.*

5. The Court believes that an examination of a witness that, being the witness himself an accused, would suffer continual interruptions to avoid self-incrimination and would add very little to the process of finding out the truth considering that the reliability of the testimony could be questioned for the obvious interest in the result of the case.

6. Furthermore, the rules on the criminal procedure clarify the role of the accused during criminal procedure. Section 30.5 of the rules states that:

*“Where the accused decides to make a statement, the Court may question him or her about the statement. The Court may then invite the public prosecutor and legal representative of the accused for additional questions.”*

7. Section 30.7 of the rules provides that:

*“ The accused shall be given the opportunity to address the Court regarding any issue raised during the hearing, provided that such issue is relevant to the proceedings”.*

8. Finally Section 33.1 says that:

*“Each party is entitled to call witnesses and present evidence. The presentation of evidence shall be directed by the Presiding Judge. Unless otherwise ordered, evidence at trial shall be presented in the following sequence:*

*(a) the statement of the accused, if he or she chooses to make a statement;*

9. It is therefore clear that the rules provide how an accused can present evidence in his or her case, by making a statement according to the relevant sections of the rules. The rules do not consider a case where an accused can be a witness in his own case.

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10. As long as Carlos Ena and Umbertus Ena are charged of the same counts in the same indictment, and that the Court did not decide any severance of the charges, Carlos Ena and Umbertus Ena are co-accused in the same case. One being a witness of the other would mean that the accused is asked to testify on the facts he is himself charged.
11. There is no need for the accused to testify on the facts he himself and his co-accused are charged. The rules allow him to make a statement during the proceedings, which is admitted into evidence. The law does not allow him to testify under oath in his own case, and concerning the facts he is charged with.
12. It would be very difficult to protect the rights of the accused if he was asked to testify concerning the facts he is charged with, especially with respect to the right to remain silent and not to make an admission of guilt, to chose not to speak during the proceedings, the right not to be compelled to testify against himself, the right to be free from any form of coercion, etc...
13. Regarding this rights, that apply from the very same moment of the detention, Section 6.2 says:

*Immediately upon arrest, the suspect shall be informed by the arresting police officers of the reasons for his or her arrest and any charges against him or her, and shall also be informed that he or she has the following rights:*

*(a) the right to remain silent and not to admit guilt, and that silence will not be interpreted as an admission; (...)*

*(h) the right not to be compelled to testify against himself or herself or to admit guilt, and that if he or she chooses not to speak in the proceeding, such silence will not be held against him or her in the determination of innocence or guilt;*

*(i) the right to be free from any form of coercion, duress or threat, torture, or any other form of cruel, inhuman or degrading treatment or punishment;*

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**Therefore the Court:**

- Decides to reject the motion of the defense.
- Says that the accused Umbertus Ena cannot testify in the present case but may only make a statement in the case he wants to.

**Dili, 4 December 2003**

**Judge Sylver Ntukamazina, Presiding**

**Judge Siegfried Blunk**

**Judge Maria Natércia Gusmão Pereira**

*Arson*  
*Blunk*  
*M. Gusmão*