

Judgement

English

Proceeding No. 06/2002

Defendant – Paulino de Jesus

The representative of the Public Prosecution accused the defendant Paulino de Jesus attributing to him the facts described in the records which, in short, are the following: in September 1999, the accused, Paulino de Jesus, was a member of the TNI – “Tentara Indonesia Forces” and was operating in the village of Lourba, in Bobonaro district.

On 10 September 1999, the accused, Paulino de Jesus, as well as two other soldiers, Pedro Mau and Sabino, attacked the family of Juvita Saldanha and Dinis Cardoso. Juvita was fired at by a bullet, but survived. Their daughter, Lucinda Saldanha, of 12 years of age, died as a result of the action perpetrated by Paulino, who attacked her with a knife, stabbing her on the back while the other soldiers held her by the arms. These facts occurred amid countless actions perpetrated by the pro-integrationist forces against the Timorese population in the immediate aftermath of the result of the 30 August 1999 popular consultation.

This being the case, the accusation charged the accused Paulino de Jesus with the commission of crimes against humanity consubstantiating in attempted-homicide against Juvita Cardoso and in **homicide** against Lucinda Saldanha, both of which were perpetrated on 10 September 1999, in Bobonaro, and which were part of the generalised attacks perpetrated against the Timorese population and which were, in this sense, known to the defendant.

Following the investigation, the Public Prosecution filed the accusation [*folios* 91/94 (in English), 95/98 (Indonesian)], and the accused, whose preventive detention was decreed and served, was informed of it (*folios* 100). The preliminary hearing was held within the legal timeframe (*folios* 139/143). During the presentencing investigation, the defence pleaded the release on own recognizance for the accused, which was not granted, as per

decisions written down on the records (*folios* 148/157, 186/191). The request of the prosecution to amend the indictment so as to include the charge against the defendant of a crime against humanity was dismissed (*folios* 501/505), and the annexation of documentary evidence by both parties was also dismissed.

The hearing of the prosecuting and the defence witnesses (the transcription of the depositions are contained in the attached records) started on 5 August 2003 (*folios* 10 of the attachment) and concluded on 8 September 2003 (*folios* 115/131). The following persons were heard: the victim, **Juvita Saldanha** (25-45/45), five prosecuting witnesses: **Dinis Cardoso** (*folios* 15/25), **Marques Henriques** (*folios* 27/39), **Feliciano Verdial** (*folios* 40/43), **Lourenço Marques Martins** (*folios* 54/60), **Abrao de Jesus** (*folios* 77/86) and four defence witnesses: **Maria Soares** (*folios* 77/86), **Joao da Conceçao Govealete** (*folios* 87/103), **Giriamina Monis Nunes** (*folios* 104/109) and **Luiza S. Jesus** (*folios* 115/131). The victim Juvita was heard once again (*folios* 141/145), and the trial witness, **Filismina da Conceçao** (*folios* 149/156), was also heard.

During the pre-sentencing investigation the parties presented documents and, after the phase of presentation of evidence was concluded, they presented their closing arguments on 8 December 2003. The prosecution based its allegations on the evidence brought under the adversary system and stated that the defendant was the author of the crimes described in the indictment, which is why the prosecution asked for his conviction. The defence, in turn, pleaded the acquittal of the defendant since, in the defence's understanding, it was clear that Paulino de Jesus was not the author of the criminal acts mentioned in the indictment.

During the pre-sentencing investigation all the formalism required by the UNTAET Regulation in force was complied with. Copies of all the judicial proceedings, as well as a recording of the judicial proceedings in CD-Rom and in video, are available.

Analysis of the Facts

The trial of this case took into consideration that the judges knew, through substantial documentation, through witnesses depositions and through the records that, in 1999, the Maubere population was victim of intense violation propagated by the pro-integrationist Indonesian forces, which counted with the support of the renowned militia, groups of local civilians, whose objective was to support the autonomy of the country without separating it from the Indonesian yoke. Such militia groups of militia were diverse, and they perpetrated generalised attacks against individuals of any age whom they suspected of supporting the independence of the country. The attacks also extended to Timorese goods and property, which were systematically destroyed, burnt or looted.

On 10 September 1999, the village of Lourba, in Bobonaro district, was one of the places that suffered an attack perpetrated by members of military forces and the militia who burnt countless houses and killed and wounded several people, among whom the victims contained in these records.

Analysis of the Evidence

Deposition of the Accused

Paulino de Jesus, at the time when the facts occurred, worked as a soldier of the Indonesian military forces (*Tentara Indonesia Force*), which had been dictating the rules in the then occupied Timor-Leste since 1975. Therefore, in 1999, being a soldier of the TNI, Paulino de Jesus worked and acted in favour of the autonomy of Timor. His personal deposition, rendered in *folios* 111/133, describes, in detail, the manner in which the military forces and the militia were operating in Timor, especially in the period preceding the popular consultation of 30 August 1999. He made it clear that there were precise instructions from the leaders that those individuals who supported independence should be the object of strong repression, that is, they should be

imprisoned or killed. He described scenes of aggression and torture (*folios* 110/124).

With regard to the facts described in the indictment, the accused denies having participated in them. He stated that, on 10 September, after learning of the result of the popular consultation, the soldiers and militias were given instructions to attack villages where pro-independence people could be found. But he states that he himself received instructions to take people to Atambua, in Western Timor. Thus, on 10 September, the accused and his relatives, as well as other families, went to that area, outside of the country. The accused denies that he was in the village of Lourba on 10 September 1999, the place where the facts described in the indictment took place (*folios* 128/1330).

Evidence of the Prosecution

The prosecution brought to the records as evidence the depositions of the victim **Juvita Saldanha** and of the witnesses **Dinis Cardoso** (*folios* 15/25), **Marques Henriques** (*folios* 27/39), **Feliciano Verdial** (*folios* 40/43), **Lourenço Marques Martins** (*folios* 54/60), and **Abrao de Jesus** (*folios* 62/71).

Only **Juvita and Dinis** claimed to have witnessed the defendant killing their daughter Lucinda. The other prosecution witnesses describe the actions of the soldiers and the militias on the days that followed the results of the popular consultation. Juvita and Dinis both say that they were at home, at around 18:00 hours, when they saw many soldiers and militias arriving in several (perhaps 20) mikroletes, who started burning houses and chasing the residents who ran away. The family of Juvita and Dinis fled to the nearest stream, but was caught by Pedro Mau and Sabino, who were able to grab Lucinda. They grabbed her by the arms and then Paulino arrived, killing the girl by thrusting the knife in her back, which then emerged in the chest of the little girl. After that, Pedro Mau, who also had a rifle on his hands, shot Juvita, hitting her on the left leg. The bullet entered the posterior-lateral side of the right leg of Juvita.

No examination was done on the body of the victim Lucinda. According to Dinis and Juvita's accounts, everybody fled from the area after the attack and, when they went back to the same area, they found the mortal remains of the victims already in decomposition and buried them.

The witnesses **Marques Henriques, Lourenço Marques Martins and Abrao de Jesus** were also militias at the time, and participated in several actions under the orders of the military forces. They say that they joined the militias to avoid being killed out of suspicion of being pro-independence. They knew the accused and stated that the latter used to serve as a TNI soldier and that he was in Bobonaro on the day that these acts were perpetrated, when a group received instructions to attack the village of Lourba. They say that several soldiers and militias went there, more than 60, and that they all had gone on foot from Bobonaro to Lourba, and that that village had suffered three attacks on three different days. **Abrao** said that Paulino was in Bobonaro on that day, but was not able to say whether Paulino had gone to Lourba (*folios 64*). **Marques Henriques** said that the accused had left Bobonaro and had gone to Lourba, with some Javanese (*folios 36*). **Lourenço** claimed to have seen Paulino going to Lourba with the group of militias and soldiers (*folios 57*). None of them were present in Lourba on 10 September and they only learned that houses had been burnt and that people had been killed in Lourba.

The deposition of **Feliciano Verdial** accounts that he helped the victim, Juvita, and that she was wounded on the leg. She had told him that she had been a victim of the militias, but she did not tell him the details perpetrated against her. He does not know the accused and knows nothing about the facts described in the indictment.

Evidence of the Defence

In their accounts, the defence witnesses support the statement of the accused according to which he had travelled with his family to Atambua on 10 September, and returned from

there on the next day. **Maria Soares and Luiza S. Jesus**, daughters of the accused, said that the entire family went to Atambua early in the morning on 10 September. When they arrived in Atambua, the defendant set up a place for everybody to stay, he spent the day there and slept there. He returned to Bobonaro the next morning accompanied by Luiza (*folios* 120/122). **Joao da Conceição**, a brother-in-law of the accused, stated that he had also travelled to Atambua with the accused and his family. He said that Paulino returned to Bobonaro on the following day, that is on 11 September (*folios* 90/91). The account of Mrs. Giriamuna Muniz, mother-in-law of the accused, is of the same content (*folios* 104/109). All accounts are uniform in stating that Paulino spent the night in Atambua on 10 September and only returned to Bobonaro on the following day.

Mrs. **Filismina da Conceição** was also heard in court (*folios* 148/156). She worked with Fokuper, a private organisation which gave and continues to give support to women victims of the violence occurred in Timor-Leste in 1999. Months after these facts occurred, Mrs. Juvita was assisted by that organisation on several occasions, and, in her accounts of that time, she did not mention the name of the defendant Paulino as being one of the soldiers or one of the militias who attacked her family.

The authorship of the crime is not proven

The evidence contained in the records did not convince this Panel that it is the defendant, Paulino de Jesus, who is the author of the stabbing that pierced through the victim, Lucinda, killing her, nor was this Panel convinced that the defendant was with Pedro Mau when the latter fired a shot at Juvita.

After a thorough analysis of all the probative elements contained in these records, it was the understanding of the Panel that there is no solid and clear evidence with regard to the

authorship of the crimes imputed to the accused, Paulino de Jesus.

In fact, after the long and thorough pre-sentencing investigation, the majority of the judges continued having insurmountable doubt, which does not allow the recognition that it was the defendant who was the author of the crimes of homicide against Lucinda Saldanha and of attempted homicide against Juvita Saldanha. It is not known for sure whether Paulino was present in that location, at the time the events occurred, and, if he was present, one cannot be certain that he would have been the author of the stabbing that killed Lucinda.

In proceeding with this trial, one does not dismiss that all of the facts dealt with here were too painful and traumatic to all of the parties involved. On 10 September 1999, the village of Lourba, like other places in Timor-Leste, was the stage of scenes of horror and desperation. Houses were burnt down. And several members of the Dinis Cardoso and Juvita Saldanha family were killed, in addition to their daughter, Lucinda. Juvita Saldanha and others were wounded and succeeded, by luck, in getting out of there alive.

It is also a well-known fact that, after the reestablishment of peace in Timor-Leste, the Maubere people have been longing for and seeking justice in order to, at least, placate so much pain that marked its recent history.

It is, however, essential to keep in mind that for a democratic State, which upholds the respect for human rights as one of its constitutional principles, the interest that guides a criminal proceeding is both the verification of the culpability of the accused as well as the irrefutable proof of the innocence of the same. And, for this reason, in any criminal trial, especially when it comes to sentencing the defendant, everything must be presented with clarity, with certitude and with absolute transparency. Any doubts that may appear to be insurmountable must be treated in favour of the accused, because it is too risky,

if not unlawful and unjust, the sentencing based on feeble, uncertain and contradictory evidence, even if they are subtle.

It is indisputable that, at the time of the facts related to this proceeding, atrocities and heinous crimes which destroyed many lives and which violated the most fundamental rights of the Timorese people were committed in Timor-Leste. But, neither the horror nor the atrocities that victimised this brave people can remove from the judge the conviction that the doubt, in a criminal proceeding, must be decided *pro libertate*, for, as it has already been concluded by a Brazilian court: "a punished criminal is an example for the delinquents, whereas a convicted innocent constitutes a concern for all the people of good-will" (Decisions of the Criminal Jurisdiction Court, Sao Paulo, Brazil, Jutacrim Magazine No. 3/460).

Analysis of the evidence and conclusion

In the case under trial, it has been proven that Paulino de Jesus was a TNI soldier who participated in several operations carried out in the fateful days of September 1999 when the Timorese population, through despicable and atrocious violence, was punished for exercising its fundamental rights of wanting to live in peace and of opting for independence.

However, with regard to the action committed against the population of Lourba on 10 September 1999, and particularly with respect to the death of the young girl, Lucinda, or with respect to the shot that hit Juvita, there is no clear certainty that it was the accused, Paulino, who was the author.

The defense succeeded in proving that, on 10 September, Paulino travelled from Bobonaro to Atambua, in Indonesia, accompanied by his family. However, given the proximity of the locations in question, it does not reveal to be impossible for Paulino to have returned to Bobonaro, right in the early afternoon and to have gone until Lourba with a group of soldiers and militias. This assumption is so much so that it can be gauged from the depositions of Marques Henriques and Lourenço

Martins, who claim to have seen Paulino with the group who went to Lourba in the afternoon of 10 September.

However, even so, even if it is accepted that Paulino was in Lourba, the evidence presented by the prosecution, in its totality, does not allow the acceptance of the authorship of the crimes imputed to him.

In analysing every piece of evidence contained in the records, one cannot ignore the contradictory data obtained in the investigative phase. If it is true that one cannot pass a sentence on the basis of such contradictory data, one cannot nevertheless ignore them and not confront them with the evidence produced under the adversarial system. It is, therefore, of a strict character, the recognition that the existence of such evidence undermines the thesis of the prosecution, in a fatal way, and distorts the data brought to trial.

There is contradictory data in the different statements made by the victim Juvita and her husband Dinis during the investigations. The witness, Dinis Cardoso, was heard on three different occasions, that is, on 23 August 2000, on 11 and on 24 May 2002. The victim, Juvita Saldanha, in turn, was heard for the first time on 18 August 2000. After that, she was heard on 24 May of the same year.

When they were heard for the first time (in 2000), both Dinis and Juvita did not mention the accused as being the author of the death of their daughter, Lucinda.

Dinis stated that Pedro Mau and Sabino seized Lucinda. Juvita tried to intervene in favour of her daughter. Pedro shot her and, even though she was wounded, she ran away. Pedro Mau then stabbed Lucinda in the back (*folio* 12 in Tetum and *folio* 14 in English).

Juvita, in turn, asserted that Pedro Mau shot her while she was trying to save her daughter and, she ran away when she became wounded without having seen what had happened to her child. It was only later that she went back to see what had

happened to her daughter and to the rest of her family (*folios* 25/26 in English and *folios* 28/29 in Tetum).

In his second deposition (which took place on 11 May 2002), **Dinis** declares that Pedro shot Juvita and that, even though she was wounded, she did not fall on the ground, but ran away. He states that, after that, Paulino stabbed Lucinda in the back (*folio* 08).

Days later, after his second deposition (on 25 May 2000), **Dinis** rendered new statements, denying part of the content of his first deposition, especially concerning who would have been the author of the stabbing that killed Lucinda. On the same date, **Juvita** was heard once again and gave a deposition in which the content was entirely similar to the deposition that her husband had given days before, on 11 May 2000.

In the trial, they declared having seen, perfectly well, the action that they ascribe to the accused, Paulino. Although the action took place at around 18:30 hours, they claim having seen everything with the help of the lights emitted by the houses that were on fire. Such version of the events sounds unconvincing, since, according to what they said, they were approximately 30 metres away from their house, alongside of the stream that passes through there (*folio* 22). There is contradictory data with regard to the weapon the defendant used. During the investigative phase, **Dinis** said that the accused was carrying a long knife (*folio* 08) with which he succeeded in piercing through Lucinda's body. In the trial, he stated that the soldiers used small knives (*folio* 18). Juvita stated the same thing (*folio* 49).

Also, there are contradictions in the statements made by Mr. Dinis when he described that he was hiding underneath a zinc sheet from where he saw the facts taking place. During the investigative phase, he stated that he was ten metres away from the site where his daughter was killed (*folio* 14). He later confirmed such information and said that the distance was of only four metres (*folio* 01). In the trial, he twice stated (*folio* 18 of the annex) that he was 30 metres away from the site where his

daughter was killed. He considered that to be a stroke of luck because, otherwise, he could also have been killed.

During the investigation, **Juvita** said that she had tried to give the soldiers a few material goods so that they would not do anything to her daughter, whereas in trial she stated that it was only after her daughter was stabbed that she had made such a request to the soldiers in order to save her own life (*folio 47*).

Juvita also stated, during the investigative phase, that firstly she was shot and then she ran away, and it was only later that she came to find out about what had happened to her daughter. During the trial, she initially declared that she was shot after her daughter was stabbed. But, eventually, in the same deposition, she ended up confirming what she had said during the investigative phase, that is, that she was shot, ran away to escape, and only later found out that her daughter had been killed (*folio 52*).

Such contradictions give room to the conclusion that **Juvita** and **Dinis** did not see exactly how the facts took place. They were also victims of the criminal act and, given the state of desperation and fear in which all of them found themselves in, it is possible to understand the difficulty in reconstructing the facts. They both confirmed that, during the investigations, they were shown one single photo in which they recognised **Paulino de Jesus**.

It is to be observed that, as the investigations progressed, all of the accounts were detailed, and that some information was repeated and others were altered.

In addition, the information contained in the records, brought up by the defense, concerning the statements made by **Mrs. Juvita** in **Fokuper**, wherein she omitted the name of the accused while describing the facts, cannot be dismissed. The documents presented reveal that **Mrs. Juvita**, who was still affected by the emotional trauma she had experienced, was heard several times by people who worked at **Fokuper** and that she did not mention the name of the accused, **Paulino de Jesus**, as being

one of the aggressors. It is a fact that in the trial, when she was heard again to clarify this question, she declared that she mentioned the name of the accused to Fokuper. However, such assertion raises doubts because she was heard several times and the person who gathered her depositions did not fail to write down the names she had mentioned, which among them were the names of Pedro Mau and Sabino. It is unlikely that, in investigating such serious facts, such institution would have failed by not writing down the exact name of the accused that would have been the author of the death of the young girl, Lucinda. And, on the other hand, it sounds strange that Mrs. Juvita, although under the tragic psychological effects resulting from the violence she experienced, did not leave out the names of Pedro Mau and Sabino, but did omit the name of the accused, Paulino. Such behaviour raises doubt. After all, under the effect of the pain, she could have said nothing or remember nothing. However, she declared that Pedro Mau and Sabino were at the site and stated that it was the first one who killed her daughter.

Thus, the set of evidence contained in the records does not prove with transparency and certainty the authorship of the facts imputed to the defendant. Other documentary evidence contained in the records prove the tragic facts that took place in Timor-Leste, in 1999, especially in the preceding and succeeding days of the popular consultation and in the confirmation of its result. The facts, however, do not clarify anything about the authorship of the crimes imputed to the defendant, Paulino de Jesus.

Having stated that, the Panel analysed the evidence presented and deemed that the authorship of the crimes imputed to the defendant were not sufficiently corroborated and, therefore, in accordance with the provisions of Section 39.1 of UNTAET Regulation No. 2000/30, as amended by UNTAET Regulation No. 2001/25, ACQUITS Paulino de Jesus.

The release order of the accused has already been determined and fulfilled in the course of the reading of the provision of the decision of acquittal, in the last hearing.

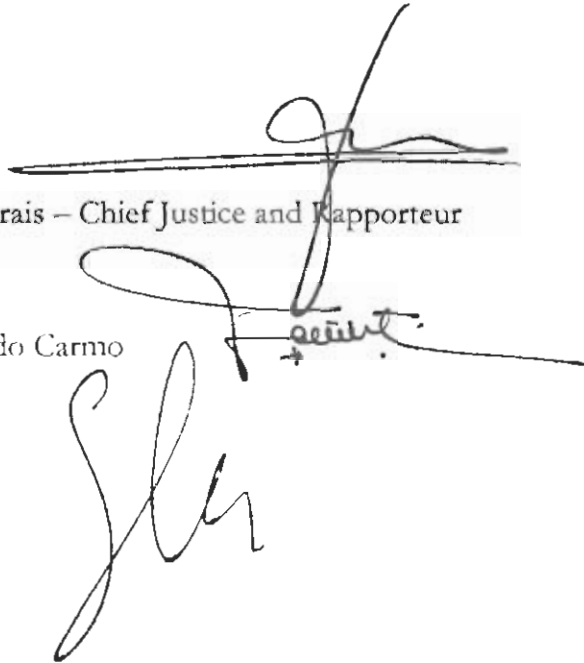
On this date, the Panel considers this decision as published and the parties, who will receive a copy of it, are hereby notified. The period for filing a possible appeal is to be observed from this day onward (Section 40.2, UNTAET Regulation No. 2001/25).

Dili, 26 January 2004

Dora A. Martins de Morais – Chief Justice and Rapporteur

Antonio Helder Viana do Carmo

Francesco Florit

The image shows three handwritten signatures in black ink. The top signature is for Dora A. Martins de Morais, the middle one for Antonio Helder Viana do Carmo, and the bottom one for Francesco Florit. The signatures are written in a cursive, flowing style.

Translation for reference only

DISSENTING OPINION

I hereby present the reasons for my dissenting opinion with regards to the final decision of the Panel in the case nr. 06/2002 that acquitted the accused Paulino de Jesus of the charges presented in the proceedings.

Therefore I substantiate and decide --

I have a dissenting opinion as far as the production of evidence presented before the court is concerned, especially with regards to the evidence presented by the defense that failed to meet the burden of proof.

It is certain that Article 36.3 of the Regulation nr. 2001/25 permits that the Court in extraordinary cases may accept witness evidence that consists merely of declarations or that has been obtained through video conference or other means deemed adequate.

Nevertheless, Article 34.2 of the above Regulation anticipates that the Court shall not accept as object of evidence the type of evidence "whose probative value is substantially inferior to its prejudicial impact..."

Therefore, with reference to the above exposed I consider the evidence submitted in the record, i.e. the document written by Fokupers referring to the hearings of the victim and the eye witness, Juvenita Saldanha not acceptable. I do not consider it possible to accept documents of this nature as fundamental evidence reasonable enough to base an absolute decision on.

Therefore I present my dissenting opinion to the Panel, respecting the majority decision.

Dili, 19 January, 2004

(Signed)

Antonio Helder V. do Carmo, Judge Member

Original in Portuguese which is the authoritative version