

REPUBLICA DEMOCRATICA DE TIMOR LESTE

DISTRICT COURT OF DILI



Before the Special Panel for Serious Crimes

Case No 10 / 2003

THE DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

V

MATEUS LAO aka ENA POTO

DEFENCE MOTION TO EXCLUDE REPORT ON HUMAN RIGHTS
VIOLATIONS DURING 1999 IN OECUSSI DISTRICT DATED
NOVEMBER 2001

For the Office of the Prosecutor:
Charles Nsabimana

For the Defence Lawyers Unit:
Sebastian Appenah

SCU Registry
Received on
11 / 10 / 04
Julia
Rogerio N-C

TO THE SPECIAL PANEL FOR SERIOUS CRIMES AND THE PROSECUTOR :

Pursuant to the provisions of Section 27. 2 of the TRCP the defence moves for an order to exclude the undermentioned document, for the reasons set forth hereunder, from the list of evidence upon which the prosecutor seeks to rely in the presentation of his case and as supporting material to the indictment:

- Report on Human Rights Violations during 1999 in Oecussi District

(A) INTRODUCTION

1. On 28 February 2003 , the prosecution filed with the Special Panel for Serious Crimes , and served upon the legal representatives of the accused , an Indictment charging the accused with one count of Murder as a Crime against Humanity.
2. Annex " A " to this Indictment contained a " List of Evidence " upon which the prosecution purported to rely in the presentation of its case. This list contained , inter alia, the names and dates of statements from certain witnesses and suspect interviews (numbered 1 to 6 in said list) , as well as the titles of certain reports (listed as 7 to 11 therein).
3. By way of a Transfer of Material dated 8 July 2004 , the Prosecutor served an unsigned copy of a report entitled " Report on Human Rights Violations During ,999 Oecussi District " dated November 2001, on the legal representatives of the accused.
4. At the Preliminary Hearing held on 13 September 2004 , the prosecutor moved to have this document admitted as evidence in support of the indictment . The defence noted an objection thereto and indicated to the court that it would file a motion to this effect. The court granted the defence until 11 October 2004 to file this and other Motions .
5. Accordingly , the defence , for the reasons set forth hereunder , strongly objects to the admission of this Report as evidence supporting the indictment.

(B) DEFENCE SUBMISSIONS

The defence submissions fall into two categories - those of a general nature which deal with disclosure requirements , and those of a more specific nature focusing on the particular document sought to be admitted as evidence.

General Submissions

6. The TRCP governs the issue of the presentation of an indictment upon completion of an investigation.¹ More particularly, requires the prosecutor to present to the court, together with the indictment, *a list describing the evidence that supports the indictment.*²
7. Furthermore, the TRCP imposes a mandatory duty upon the prosecution to make available to the accused or his legal representative, upon presentation of the indictment to the court, certain documentary evidence, statements and information.³
8. For purposes of this motion the defence refers the court to the provisions of Section 24.4(a) of the TRCP which requires the prosecutor to make available to the accused and his legal representative *copies of all documentary evidence intended to be offered by the prosecution at trial*. Compliance with this requirement must, therefore, take place upon presentation of the indictment.
9. Presentation and filing of an Indictment signals completion of the investigation into a case. At this point the prosecution decides what evidence, in its possession at that point in time, to present to the court in support of the Indictment.
10. Qualifying material coming into the possession of the prosecutor at a later stage must immediately be made available to accused and his legal representative.⁴
11. However, in the instant matter, the defence has reason to believe that the Report sought to be included by the prosecutor as evidence in support of the indictment has been in the possession, custody or control of the prosecution, prior to the presentation of the Indictment herein.
12. The document in question is dated November 2001 and, in the absence of compelling evidence to the contrary the only reasonable inference that can be drawn is that it has been, at all material times prior to the presentation of the indictment, in the possession, control or custody of the prosecution. Consequently, if the prosecution intended relying upon it as supporting material, it should have been filed at the appropriate time in compliance with the rules and not sixteen months later.
13. The prosecution has an obligation to exercise due diligence in the preparation of its case and to ensure that all evidence on which it seeks to rely is placed before the court timeously. Moreover, the interests of justice demand that the entire case against an accused be made known to him at the earliest opportunity.

¹ Sec. 24, UNTAET Regulation, 2000/30, as amended

² Sec. 24.2, supra

³ Sec. 24.4, supra

⁴ Sec. 24.7, supra

14. Consequently , for the reasons stated in paragraphs 12 , the prosecutor cannot claim the protection of the provisions of Section 24. 7 , or claim that despite due diligence the document in question was not available to the prosecution at the time the indictment was issued , as a possible justification for his attempt to have the report in question now considered and admitted as supporting material to the indictment.
15. Non-compliance with the rules demands sanctions from the court. The only appropriate sanction for showing disregard for the rules in the present context is for the court to prohibit the prosecution from introducing the report as evidence and to exclude the document as supporting material to the indictment.

Specific Submissions

16. RE: Report on Human Rights Violations 1999 Oecussi District

- 16.1 In addition to the general submissions in paragraphs 6 to 15 above, for the prosecution to succeed to have this report admitted as supporting material to the indictment , it has to provide compelling evidence to the effect that the material in question could not have been discovered before the indictment was issued and, therefore , was not in its possession, custody or control when the indictment was issued . The onus in this regard falls on the prosecution. It has failed to offer any explanation in this regard.
- 16.2 In any event the Rules⁵ are clear and must be given a strict interpretation. The prosecution is precluded from introducing this document to support the indictment at this late stage.

Furthermore , any request to have this report, in the context of this case , to be admitted and regarded as evidence should be rejected for the following reasons :

- 16.2.1 The report, in our view , is an internal working document , intended for use by the UNTAET Human Rights Office , was not contemplated for use in judicial proceedings , and is inherently unreliable .

The document is an unsigned copy by a person who was not a contemporaneous witness to the issues reported upon , raising doubts as to its reliability , and contains information which would need to be tested in court.

A party seeking to have any evidence admitted has to provide some foundation as a basis for the admission of such evidence. No such foundation has been laid by the

⁵ Section 24. 4(a), supra

prosecutor herein. Instead, the prosecutor seeks the blanket admission of the document in question .

16. 2. 2 Being primarily anecdotal in nature , it is based upon multiple levels of hearsay . If it was intended to be the product of a fact-finding exercise, it fails to specify the procedures used in gathering the information contained therein , as well as the methodology used in analyzing and interpreting such information.

16. 2. 3 Consequently, the reliability of the information gathering mechanisms and the means by which conclusions are reached are open to criticism. In the absence of clearly defined research methodology this report falls short of the basic standard for admissibility , that of reliability ,

Since there is no basis to test the validity of the research in order to assess the plausibility of the conclusions contained in the document , it amounts to no more than an internal memorandum , as opposed to an authoritative report .

16. 2. 4 While the reliability of evidence does not, of itself, constitute a separate condition of admissibility it provides the basis for findings of relevance and probative value. The probative value of evidence is therefore based upon an assessment of its reliability .

16. 2. 5 Accordingly, in order for this document to be admissible as evidence, the prosecutor must first prove that it meets with the standards of relevance and probative value . In other words , the burden of proving the reliability of the document rests on the prosecution . If the document fails the test of reliability , it cannot be either relevant or of probative value , and , as such , is inadmissible .

16. 2. 6 The starting point in the discharge of this burden is establishing the authenticity of the document in question . The authenticity of the document and its contents are pivotal to the establishment of the credibility and reliability of the documentary evidence sought to be relied upon. Such authenticity must be established through reference to all relevant factors , which include its content, its purported use , and some form of secondary evidence . This , we submit , can only be established through oral testimony which has to be subjected to cross-examination. In the instant case, the prosecution has failed to satisfy these requirements.

16. 2. 7 It has been held that the " mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts. Factors such as

*authenticity and proof of authorship will naturally assume the greatest importance in the ... assessment of the weight to be attached to individual pieces of evidence ."*⁶

16. 2. 8 However, we submit, that for the court to be able attach the appropriate weight to factors concerning authenticity and authorship , the only avenue open to it would be to hear oral evidence on these aspects.

The Indonesian Law of Criminal Procedure requires that for documents to pass the test of validity and admissibility they have to be "strengthened by an oath"⁷, and "must have a connection with the contents of the other means of legal proof"⁸, which is categorized as , inter alia, "the testimony of a witness"⁹ " the testimony of an expert"¹⁰, and "a document,"¹¹

Clearly then, under the applicable subsidiary law , documents must be validated and supported by testimony under oath.

16. 2. 9 If the author of the document is not called to testify as to its purported use, contents and authenticity ,then ,we submit, the document must of necessity be excluded. It is worth noting that the TRCP require that " *evidence must be presented in the most direct manner possible ...*".¹² This implies that the principle of the " orality of evidence" prevails.

The probative value of this document by necessity will therefore be affected by the fact that it has not been subjected to scrutiny by way of cross-examination , and it would be substantially outweighed by the need to ensure a fair trial .

16. 2. 10 Consequently , taking into account the general and specific submissions made herein , to admit the document in question would amount to depriving the accused of the fundamental right to cross-examine a potentially important witness on the contents of a document which the prosecution seeks to rely upon in the proof of a specific element of the case against the accused . This would be manifestly unjust and impact upon the need to ensure a fair trial.

⁶ Delalic et al, ICTY, Decision of 19 Jan 1998, para. 20

⁷ Law of the Republic of Indonesia . No. 8 of 1981. Concerning the Law of Criminal Procedure, Article 187

⁸ Article 187(d), supra

⁹ Article 184(a), supra

¹⁰ Article 184(b), supra

¹¹ Article 184(c),supra

¹² Section 33. 3

17. We accordingly submit that for these reasons , in addition to the general submissions contained in paragraphs 6 to 15 of this Motion , the report in question must be excluded .

(C) RELIEF REQUESTED

WHEREFORE the Defence prays for an order excluding the Report on Human Rights Violations in 1999 in Oecussi District , as supporting material to the indictment and from the evidence the prosecutor intends to rely upon in the presentation of his case .

Dated this 8th day of October 2004



.....
Sebastian Appenah
Counsel for Mateus Lao aka Ena Poto