

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

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DEFENCE MOTION TO EXCLUDE THE MINUTES OF DETENTION  
REVIEW HEARING HELD ON 25 NOVEMBER 2002

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For the Office of the Prosecutor :  
Charles Nsabimana

For the Defence Lawyers Unit:  
Sebastian Appenah

**SCU Registry**  
**Received on**  
7 / 10 / 04  
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 following 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 :

- Minutes of the Detention Review Hearing held on 25 November 2002 .

(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 a copy of the " Minutes of a Detention Review Hearing " held on 25 November 2002 and a translation thereof , on the legal representatives of the accused.
4. At the Preliminary Hearing held on 13 September 2004 , the prosecutor moved to have these documents 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 , strenuously objects to the admission of this document as evidence supporting the indictment.

(B) DEFENCE SUBMISSIONS

The Defence submissions fall into two categories - those concerning disclosure generally , and submissions of a more specific nature focusing on the document in question.

## General Submissions

6. The TRCP governs the issue of the presentation of an indictment upon completion of an investigation.<sup>1</sup> More particularly, it requires the prosecutor to present to the court, together with the indictment, *a list describing the evidence that supports the indictment.*<sup>2</sup>
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.<sup>3</sup> (emphasis added)
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.<sup>4</sup>
11. However, in the instant matter, the defence has reason to believe that the documents sought to be included by the prosecutor as evidence in support of the Indictment have 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 25 November 2002 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. As such, if the prosecution intended relying upon it as supporting material or including it as part of the evidence, 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.
14. Consequently, for the reasons stated in paragraph 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

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

<sup>2</sup> Sec. 24.2, supra

<sup>3</sup> Sec. 24.4, supra

<sup>4</sup> Sec. 24.7, supra

it now considered and admitted as supporting material to the indictment and evidence . It is worth noting that in respect of the Minutes of the Detention Review Hearing , the prosecutor of record in this matter was also the prosecutor at that hearing and accordingly cannot claim a lack of knowledge of the existence of these minutes. (emphasis added)

15. Non-compliance with the rules must not be condoned by the court. The only appropriate sanction for showing disregard for the rules and the rights of the accused in the present context is for the court to prohibit the prosecution from introducing the Minutes as supporting material to the indictment and to exclude them from evidence.

#### Specific Submissions

16. RE: Minutes of Detention Review Hearing dated 25 November 2004
  - 16.1 Ex-facie these minutes, the accused appeared before the Investigating Judge in a matter related to the alleged killing of a certain Domingos Colo (and not the matter currently before the court). It was found that there was insufficient evidence to support this contention .  
  
However , detention was ordered on the basis that the accused , in the words of the Investigating Judge, had " confessed " to the killing of an unknown person .
  - 16.2 We submit that reference to an alleged killing in the record of the proceedings referred to above cannot be construed as a reference to the current matter . Admission of these Minutes , even at the level of material in support of the indictment , would be extremely prejudicial to the accused , and would , in our view violate his right to be presumed innocent and the right to a fair trial , while admission at the level of evidence would seriously damage the integrity of the proceedings
  - 16.3 The TRCP provide that *(T)he court may exclude any evidence if its probative value is substantially outweighed by its prejudicial effect ... and (N)o evidence shall be admitted ...if its admission is antithetical to, and would seriously damage the integrity of the proceedings ...*<sup>5</sup>
17. Admission of these Minutes , at any level , would certainly be extremely prejudicial to the accused and have a negative effect on the integrity of the proceedings .
18. Consequently, in the light of the above general and specific submissions, in order to ensure that the fair trial rights of the accused are respected and that the integrity of the proceedings is preserved , the Minutes of the Detention Review Hearing must be excluded.

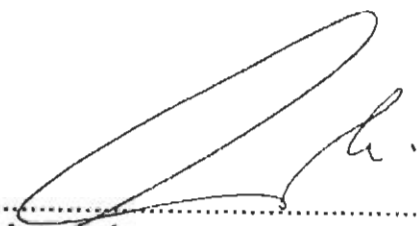
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<sup>5</sup> Section 34.2 , supra

(C) RELIEF REQUESTED

WHEREFORE the Defence prays for an order excluding the Minutes of the Detention Review Hearing held on 25 November 2002 from the evidence the prosecutor intends to rely upon in the presentation of his case .

Dated this 4<sup>th</sup> day of October 2004



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Sebastian Appenah  
Counsel for Mateus Lao aka Ena Poto