



THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE

DILI DISTRICT COURT

THE SPECIAL PANELS FOR SERIOUS CRIMES

Before:

Judge Francesco Florit

Judge Phillip Rapoza

Judge Antonio Helder Viana do Carmo

CASE NO. 34/2003

DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

-AGAINST-

FRANCISCO PEREIRA, AKA SIKU GAGU

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**Dissenting Opinion on the Defendant's Oral Motion  
to Exclude Statement of the Accused**

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**For the Prosecutor:**

Shyamala Alagendra

**For the Defendant:**

Maria Rocheteau

Hsiao Leung Gooi

## **Background**

At the trial of the above matter, the Prosecutor offered in evidence a prior statement of the Defendant taken by an investigator for the Serious Crimes Unit. The Defendant made an oral motion pursuant to Section 27.2 of UNTAET Regulation 2000/30 to exclude the statement from use at trial. Following argument by the parties, the Panel took the matter under advisement.

On 17 September 2004, a majority of the Panel (Florit, Carmo) allowed the Defendant's motion to exclude his prior statement. The Presiding Judge (Florit) orally announced the Panel's decision and the basis for its determination. The following written dissenting opinion was entered and summarized on the record by the minority (Rapoza).

## **Dissenting Opinion**

I respectfully decline to join the majority decision for the following reasons:

**A. A defendant's prior statement to an investigator may be considered as evidence at trial if the defendant gave the statement after knowingly and voluntarily waiving his right to remain silent.**

1. UNTAET Regulation 2000/30, the Transitional Rules of Criminal Procedure, (TRCP) Section 34.1 ("Rules of Evidence") states that "[t]he Court may admit and consider any evidence that it deems is relevant and has probative value with regard to issues in dispute" (emphasis added).

This provision is sufficiently broad to permit the use of a prior statement of a defendant at trial. See for example, "*Decision on the motion of the Prosecution to admit into evidence the suspect's statement made on 21 August 2002*," (Dated 26 November 2003) in the case of Prosecutor v. Damiao da Costa Nunes (Case No. 01/2003). In that case another panel of this court (Pereira, Ntukamazina, Blunk) decided "[t]o admit the suspect's statement made on 21 August 2002 into evidence according to Section 34.1 of the Rules of Evidence (Regulation 2000/30)."

2. TRCP Section 34.2 sets out several restrictions on what may be considered as evidence: "The Court may exclude any evidence if its probative value [1] is substantially outweighed by its prejudicial effect, or [2] is unnecessarily cumulative with other evidence. [3] No evidence shall be admitted if obtained by methods that cast substantial doubt on its reliability or [4] if its admission is antithetical to, and would seriously damage the integrity of the proceedings, including, without limitation, evidence obtained through torture, coercion or threats to moral or physical integrity."

These restrictions do not apply to a prior statement of a defendant except in circumstances where the Court determines that the rights of the defendant were not respected, to the point that either (1) there is substantial doubt as to the reliability of the statement or (2) its admission “would seriously damage the integrity of the proceedings.” Ibid.

3. In determining whether a statement is “reliable” or would “seriously damage the integrity of the proceedings” within the meaning of TRCP Section 34.2, the Court must consider the provisions of TRCP Section 6, which describes the rights of a defendant upon arrest (TRCP Section 6.2) and the rights of a defendant “at every stage of the proceedings” (TRCP Section 6.3).

These rights, which must be respected, include the following: (1) “the right to remain silent and not to admit guilt, and that silence will not be interpreted as an admission;” (TRCP Section 6.2[a]) and (2) “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.” (TRCP Section 6.3[h]). These rights are re-emphasized in TRCP Section 30.4, where it states that the Court “shall remind the accused of his or her right to remain silent.”

4. Accordingly, the Court must determine whether an investigator who took a statement from a defendant respected his right to remain silent. To do this, the Court must decide whether a defendant made the statement after voluntarily waiving his right to remain silent, understanding the nature of that right. If the defendant’s rights were respected in this way, then the statement can be considered “reliable” and not a danger to the integrity of the proceedings under TRCP Section 34.2. In those circumstances, the statement may be considered as evidence.
5. The admissibility of a defendant’s prior statement is further supported by TRCP Section 6.2(a), which states that when a person is arrested, he is entitled to know that he has “the right to remain silent and not to admit guilt, and that silence will not be interpreted as an admission.” An admission is a statement by a person that can be considered as evidence against him at trial. See Barron’s Law Dictionary (New York, 1984) at p. 12: “Admissions. [I]n criminal law, the voluntary acknowledgement that certain facts do exist or are true . . . admissions are insufficient to be considered a confession of guilt, although they are generally admissible against a defendant.”

The purpose of Section 6.2(a) is to ensure that a person, once arrested, is informed that if he chooses to remain silent, his silence will not be used as evidence against him at trial. Moreover, it implies that if he were to make an admission (which his silence is not), then his admission could be considered as evidence at trial. By ensuring that silence is not treated as an admission, Section 6.2(a) strongly

supports the view that an admission, if actually made, could be used as evidence at trial.

**B. A defendant's prior statement to an investigator that is otherwise admissible may be considered as evidence at trial even if the defendant elects to remain silent during the proceedings against him.**

I do not agree with the majority's view that the introduction in evidence of the Defendant's prior statement would violate his right to remain silent at trial.

It is clear that if the Defendant chose voluntarily to speak to an investigator on a previous occasion (which we have not yet determined), that fact would not amount to a waiver of his right to remain silent at trial and he may assert that right despite his previous statement. Nonetheless, a defendant who elects to maintain his silence at trial is not insulated from the consequences of his previous voluntary statement. Accordingly, even though his right to assert his silence at trial must be respected, his previous voluntary statement to an investigator may still be used as evidence. The defendant's right to maintain his silence at trial is not so broad as to require the exclusion from evidence of a previous statement knowingly and voluntarily given to an investigator.

In the present case the majority essentially follows the ruling of another panel of this Court in the case of Prosecutor v. Anigio de Oliveira (Case No. 07/2001). In that case the Panel (Luis, Ramos, Carmo) excluded from evidence at trial statements of the defendant even though they previously had been made before the Investigating Judge. See "*Sentença*" (Final written decision. 27 March 2002) at p. 9. The Panel excluded such statements from evidence on the grounds that the defendant's right to silence at trial is absolute.

The Panel reasoned, wrongly I believe, that by allowing the defendant's statements at earlier stages of the proceedings to be used as evidence at trial, the Court would be transforming the defendant into a source of evidence against himself, even though he had asserted his right to silence at trial ("*A entender-se que o Tribunal pode valorar as declarações anteriores do arguido mesmo quando ele exerce o seu 'direito ao silêncio,' estaríamos a sonegar o mesmo direito e a transformar or arguido num sujeito de prova quando está no exercício desse mesmo direito.*")<sup>1</sup> Ibid. While acknowledging that TRCP Section 33.4 allows statements by the accused before an Investigating Judge to be used as evidence at trial, the Panel concluded that the provision permits the use of such statements only in cases where the defendant also waives his right to silence at trial. See *Sentença* at pp. 8-9.

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<sup>1</sup>"If we were to accept that the Court can weigh previous statements of the defendant even when he exercises the 'right to silence' [at trial], we would be denying that same right and transforming the defendant into a source of proof against himself at the same time that he is exercising that same right [of silence.]"

Although it was within the sound discretion of the Court in Anigio de Oliveira to admit or exclude the defendant's statement to the Investigating Judge, I conclude that it was an abuse of that discretion for the Panel to base its exclusion on the defendant's exercise of his right to silence at trial.

The right to silence is important because it protects a person's right not to be forced to incriminate himself. Thus, the right prevents the state from compelling a person to make a statement or to testify against his will. Accordingly, a person has the right to remain silent not only when confronted by the police, but also at trial. See TRCP Section 6.2(a) and (h).

In those cases where a police officer fails to respect a defendant's right to silence, the remedy is to prevent the police from deriving any benefit from the resulting statement. Consequently, any statement made in violation of a defendant's right to remain silent may not be used either for investigative purposes or at trial. In this way a defendant's right to silence, although not respected at the outset, is vindicated in the end.

Nonetheless, although a defendant has the right to remain silent, he may also waive that right and speak voluntarily to the police. When a person understands that he has the right to maintain his silence but freely chooses to speak, the element of compulsion is removed.

The Panel in Anigio de Oliveira did not distinguish between prior statements that are compelled and those that are voluntary. Rather, according to the Panel, any prior statement of a defendant, even those that are voluntary, must be excluded at trial if he later chooses to remain silent during those proceedings. This application of the right to silence is overbroad. While the defendant undoubtedly has the right to assert his silence at trial despite his previous statement, it does not follow that his previous voluntary statement should be discarded from consideration at trial.

As previously noted, the purpose of the right to silence is to protect a person from being compelled to make a statement against his will. That objective is not advanced if a voluntary statement is excluded at trial. This is so because at the time that such a statement was made, the defendant waived his right to remain silent and spoke without being forced to do so. The fact that the same defendant may subsequently decide to assert his silence must be respected, but there is no compulsion involved in the use of his previous voluntary statement as evidence at trial.

The principle that a defendant should not be compelled to speak is not bolstered by the exclusion of his previous voluntary statement from evidence, even when he elects to remain silent at trial. As the prior statement has already been made, there is no element of compulsion in its later use. The defendant may prefer not to be confronted with his own words, but should that happen at trial, it remains that he is not being compelled to do anything at that moment.

To apply the right to silence retroactively to a statement that was voluntary at the time it was made does not promote the policy against compulsion. The right to silence should not be interpreted to include the right to avoid the consequences of one's own voluntary statement, especially where the purpose of the right to silence is not advanced in the process.

The Panel in Anigio de Oliveira also broadly stated that in no circumstances should a defendant be the source of evidence against himself when he has asserted the right to silence at trial. To the contrary, there is no "right" not to be the source of evidence against oneself that is any broader than the right to remain silent.

A defendant may legitimately find himself confronted at trial with various forms of evidence of which he is the source or which he cooperated in producing. These could include statements made by the defendant in a public place that were overheard by passersby or statements of the defendant to a friend who later agrees to testify against him. Similarly, a defendant could voluntarily provide to investigators items such as private documents or he could provide objects to the police during a consensual search of his home. In each of these instances, the defendant would be the "source" of the evidence against him. Nonetheless, no legal right of the defendant would be violated if such evidence were to be admitted at his trial, even if he chose to remain silent at that stage.

In sum, where the Panel in Anigio de Oliveira wrongly decided the issue of the scope and applicability of the defendant's right to remain silent, that ruling should not be extended even further, as the majority does here, to pre-trial statements made by a defendant to an investigator.

**C. The provisions of TRCP Section 33.4 do not require that a defendant's prior statement to an investigator that is otherwise admissible must be excluded from evidence at trial.**

1. TRCP Section 33.4 provides as follows: "A statement or confession made by the accused before an Investigating Judge may be admitted as evidence, if the Court finds that any admission of guilt contained in such a statement was made in compliance with the provisions of Section 29A."

I do not agree with the majority when it asserts that the language of TRCP Section 33.4 serves to exclude from evidence at trial previous statements by a defendant to an investigator. Nor do I read the provision as suggesting that no other statements of the accused may be admitted in evidence other than those made before an Investigating Judge. My reasoning is as follows:

- a. First, the provision in question appears in TRCP Section 33 ("Presentation of Evidence"), which regulates the order of proof at trial and the manner in

which it will be presented. The following section, TRCP Section 34 (“Rules of Evidence”) actually sets out the rules by which evidence may be admitted or excluded, along with the rationale supporting such actions. The appearance of the provision in TRCP Section 33 thus suggests that it relates to the manner or order of proof at trial and should not be taken as reflecting an exception to the rules of evidence that follow.

- b. Second, the wording of TRCP Section 33.4 goes no further than to permit the introduction at trial of evidence from an earlier court proceeding. The terms of the provision do not address, much less exclude, other types of evidence, including statements by a defendant. The section serves a specific and limited purpose and does not purport, directly or by implication, to determine the admissibility of evidence outside its scope.
- c. Third, statements made before an Investigating Judge are given special attention throughout the rules because they are made in the courtroom, although not at trial. Consequently, such statements are unique as they may have evidentiary value, even though they did not arise during the course of the trial

Such statements are singled out at several points in the rules for specific treatment: (1) TRCP Section 20.5 states that when a suspect makes an admission of guilt before an Investigating Judge, the judge “shall proceed as provided in Section 29A”; (2) TRCP Section 29A states that “[w]hen the accused makes an admission of guilt in any proceedings before the Investigating Judge,” the said judge shall determine whether the admission is knowingly and voluntarily made; and (3) TRCP Section 33.4 provides, apparently in cases where the Investigating Judges did not proceed under Section 29A, that the admission of an accused “may be admitted as evidence” where the case goes to trial.

Accordingly, TRCP Section 33.4 does nothing more than describe how statements by the defendant before the Investigating Judge may be treated at trial where they have not already resulted in proceedings on an admission of guilt under TRCP Section 29A.

2. Unlike the majority, I do not read TRCP Section 33.4 as imposing a rule as strict as that found in Portuguese criminal procedure, in which any prior statement to the police by a defendant is explicitly excluded from use at trial unless the rules specifically provide otherwise. Although such a strict rule of exclusion is contained in the Portuguese Código de Processo Penal (CPP), there is no similar provision in the Transitional Rules of Criminal Procedure.

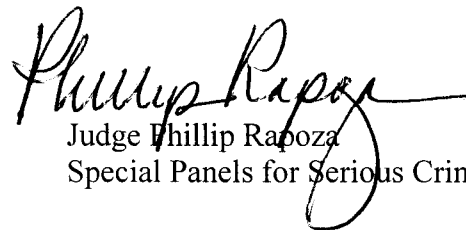
CPP Artigo 357 specifically provides that the use at trial of “statements previously made by the defendant is only permitted” (emphasis added) in the enumerated circumstances, including (a) certain instances in which the request is

made by the defendant, and (b) those in which the statement was made before a judge and where its use is necessary to clarify factual issues at trial and no other mode of clarification is available. Similarly, CPP Artigo 356 states that agents of the police may not testify to the contents of a statement that is not otherwise admissible in evidence. It is clear that the Transitional Rules do not specify such restrictions.

TRCP Section 33.4 is limited to providing for the admission in evidence at trial of prior statements of a defendant before an Investigating Judge. It does not refer in any manner to the exclusion of any other type of statement by a defendant. In this respect it is very different from CPP Artigos 356 and 357, both of which explicitly and unmistakably provide for the exclusion of all statements by the defendant other than those permitted by the rules. It would be inappropriate to conclude that TRCP Section 33.4 has the same strict exclusionary effect as CPP Artigos 356 and 357 even though it does not contain comparable language providing for such an exclusion.

### **Conclusion**

For the reasons stated above, I would deny the defendant's oral motion to exclude his statement and allow the Prosecutor to offer the statement in evidence, but only if the Prosecutor can satisfy the Court that the Defendant waived his right to silence knowingly and voluntarily and that his rights were otherwise respected when the statement was made.

  
Judge Phillip Rapoza  
Special Panels for Serious Crimes

Date: 17 September 2004

*(The original of the above dissent was rendered in English, which shall be the authoritative version.)*