



Justice Update 9
10 – 18 March 2005

SUAI AND OECUSSI DISTRICT COURTS

1. SUAI DISTRICT COURT RECOMMENCES

On 10 March the Suai District Court (which has jurisdiction over Suai, Maliana, Ainaro and Same) commenced operating in Suai holding, and finalizing, two trials over two days (a rape case and an assault case). The court has operated from Dili District Court for the last two years. The international judge for the court, Judge Sandra Silvestre, has scheduled four or five hearings a month up until May (Judge Silvestre is also assigned to handle cases in the Oecussi and Dili District Courts). JSMP congratulates Judge Silvestre for doing her best to settle cases quickly, despite numerous technical obstacles.¹

1.1 Rape case: two defendants sentenced to two years and six months and one year and six months imprisonment respectively (Case No. 41/04)

On 10 March 2005, the Suai District Court issued a decision against two defendants in a rape case which occurred on 24 September 2004. The international judge presiding over the hearing handed down a sentence of 3 years and 6 months for the first defendant (reduced to two years and six months because the victim was not completely unconscious), and 1 year and 6 months for the second defendant.

The indictment charged the accused with Article 285 (rape) of the Indonesian Criminal Code and as subsidiary (secondary) charges with Article 286 (sex without consent because the women is unconscious or helpless) and Article 290.1 (obscene acts with someone who is unconscious or helpless).

The judge decided that the first defendant did not commit rape under Article 285 because no force or serious threat was used in order to have sex with the accused. The judge did, however, decide that the subsidiary charge of Article 286 applied because the victim was ill and weak (although not completely unconscious) when the defendant had sex with her.

The judge also did not find the second defendant guilty of rape under Article 285, but decided that he had committed an offence under Article 299 (abortion) because he had rubbed oil in the victim's vagina (his daughter) to prevent her becoming pregnant when he found out that the first defendant had had sex with her.

Moreover, although in the written decision the judge referred to the subsidiary charge, during the hearing the judge stated that the subsidiary charge was not needed to supplement the primary charge. JSMP's monitors were confused by this argument, as it is clear that the purpose of the subsidiary charge is to provide back up, that is, a means by which the Prosecutor may still argue for a conviction for a lesser

¹ For more on this issue see JSMP's press release 15 March 2005 "Suai District Court Functioning Again"

offence. We were therefore pleased to see that in the written decision, although the judge found that the elements of the crime of rape under Article 285 (the primary charge) were not established on the evidence, the elements of the crime of sex without consent under Article 286 (the subsidiary charge) were established.

JSMP is concerned about a number of matters in this case, including the offences applied by the judge, especially for the second defendant, and the length of the sentence handed down against both defendants. These concerns are discussed in details in JSMP's upcoming report "Analysis of Decisions in Cases Involving Women: June 2004 – March 2005". We wish only to note here that the victim is a minor and that she is still suffering severe trauma, and that the maximum penalty for a crime under Article 286 is nine years imprisonment.

2. OECUSSI DISTRICT COURT RECOMMENCES

On 15 March 2005, the Oecussi District Court recommenced its operations for 2005, holding five trial hearings over four days. The hearings held over a four day period were presided over by an international judge who was supported by two court clerks; one international and one national. According to information received from the international judge, the Oecussi court will continue to operate one or two weeks per month up until May. JSMP welcomes this plan as it will facilitate the attendance of witnesses, victims and defendants in trials (we note that until now Oecussi Court has often operated from Dili District Court).

The hearings held by the Oecussi District Court over this four day period saw the sentencing of defendants in a number of different cases for offences of rape, assault, murder and maltreatment.

2.1 Case of Deprivation of Liberty: defendants granted conditional release for a period of one year (Case No: 17/03)

In this case the three defendants admitted striking, kicking and tying up the victim to a piece of wood on 25 June 2004, for three days and two nights before the victim was released by police. The defendants claimed that they carried out these actions at the request of the local community as the victim had on many occasions stolen cattle. Based on the available facts, the Public Prosecutor charged them with, and the judge found them guilty of, Article 333(1) (unlawful deprivation of liberty) of the Indonesian Penal Code which carries a maximum sentence of 8 years.

In sentencing the accused to conditional release for one year, the Judge took into consideration that the three defendants had no prior record and that they did not carry out these actions on their own accord but rather because they were ordered to do so by the local community.

JSMP welcomes this decision, however, in our view the sentences handed down were too light in comparison with the seriousness of the crime committed. JSMP believes that if the sentence delivered is not proportional to the seriousness of the crime committed by the defendant then the threat of punishment by the formal justice system will not be a disincentive to the future commission of this crime by others. This especially applies when one of the defendants is a community leader – in this case one of the

defendants was the Chief of the Village. Such a light penalty could also lead the victim and their family to lose faith in the formal justice system.

2.2 Rape case: defendant sentenced to three years imprisonment (Case No. 07/2004).

JSMP welcomes the 16 March 2005 decision in a case of rape where the defendant was sentenced to three years imprisonment.

The defendant was brought up and looked after by the victim and the victim considered the defendant as her adopted son. The victim said that the defendant threatened her with a knife and covered her mouth and raped her once in May 2001. The defendant admitted to the offence. The Prosecutor charged the accused with offences under Article 285 (rape) and 289 (obscene acts with use of force) of the Indonesian Penal Code. The Prosecutor originally requested a penalty of 9 years.

The judge found the accused guilty of rape under Article 285 of the Indonesian Penal Code, and considered the fact the victim was the defendant's adopted mother to be an aggravating circumstance. She sentenced him to four years imprisonment but reduced the sentence to three years because the accused had confessed.

JSMP welcomes the fact that the court applied Section 34.3 (in sexual assault cases the victim's testimony does not need to be corroborated) of UNTAET Regulation 30/2000 as amended by UNTAET Regulation 25/2001. The judge did not refer to any medical evidence. JSMP is not clear as to whether or not a medical examination of the victim was ever carried out.

Issues raised in this case will also be discussed further in JSMP's upcoming report "Analysis of Decisions in Cases Involving Women: June 2004 – March 2005".

2.3 Case involving a minor traffic accident withdrawn by the victims (Case No. 08/20004)

A minor traffic accident occurred on the 16 November 2003. According to the indictment, on 16 November 2003 the defendant was driving several people in a vehicle from the church to a picnic. While traveling towards its destination the vehicle flipped over and as a consequence 27 people suffered light injuries and four others were treated at the hospital.

The victims requested the Public Prosecutor to withdraw their case because they (the victims) had already reached a settlement via traditional means and were in possession of a written joint agreement. Moreover the victims said that they wanted to withdraw their case because the defendant had showed concern for them while they were being treated in hospital. At this request the Public Prosecutor asked the judge to dismiss the case from the formal justice system.

The judge said that in some cases like this, where the victim wanted to withdraw the case, it was permissible. The judge therefore allowed the prosecution to withdraw the indictment. The judge did not cite any legal basis for this decision, nor did she issue a written decision to this effect.

2.4 Maltreatment case: 3 defendants granted conditional release for 6 months (Case No. 11/004)

The three defendants admitted they had beaten the victim for stealing a female goat. The victim rejected their accusation and claimed that he was drunk at the time as a result of drinking palm wine. According to the victim: after drinking he went to Tiokole. When he reached Oit Asu, he suddenly saw a goat that appeared to be a ghost. Therefore he approached the goat and held its neck and threw it on the ground causing the goat to bleat loudly. After that the defendants ran towards the victim and beat and kicked him. Although the victim asked them to stop the beating the defendants continued to beat and kick him causing him to urinate and defecate.

As all the defendants admitted beating and kicking the victim the Prosecutor charged them under Articles 351.1 (maltreatment) and 55 (participation in punishable acts) of the Indonesian Penal Code which carries a maximum sentence of 2 years and 8 months. The judge decided to grant conditional release for 6 months, as the defendants had no prior record and were polite during the trial and admitted their mistake.

JSMP agrees that before any decision is issued a judge must consider general factors, such as the behavior of the defendants during the trial and their prior record, however most importantly the judge should look at the evidence in the case against them and the seriousness of that case. In JSMP's view, the seriousness of the crime committed in this case warranted a harsher penalty than that delivered by the judge.

2.5 Murder: defendant sentenced to 5 years imprisonment (Case No. 13/2004)

According to the indictment, on 21 April 2001, the defendant murdered the victim by cutting his throat with a machete and dragged his body into the bushes, after stealing 50.000 Rp from the victim's bag. At the scene of the crime, the accused allegedly ate a small part of the victim's ear and tongue. On 29 April 2001, the accused placed the victim's body near the Bimalasi river. The corpse was found by the local people. The Prosecutor charged the defendant with murder under Article 338 of the Indonesian Penal Code.

The accused pleaded not guilty. According to the Defence, the confession of the accused was extracted, at the police station, through torture during the interrogation. After been beaten with an iron stick and threatened by the Police Commander, the defendant, truly frightened by the police, confessed to having committed the crime. According to the accused's statement in court, he only met the victim (who was drunk) near the Bimalasi river, and went straight home. On his way home, he warned two people, who were just passing by, that the victim had fallen, near to the Bimalasi river, because he was drunk. The Police Commander, stated that he had heard the confession from the accused. According to that confession, the defendant had murdered the victim thinking that the victim would be carrying a considerable amount of money with him. Instead, he only found 50.000 Rp. According to the Police Commander's testimony, this money was later found at the accused's residence as well as the murder weapon. According to the Police Commander, the accused declared that one of his uncles had told him that after killing someone, one should always eat a piece of the victim's ear and tongue so that the killer won't "be drunk or faint under the power of the victim's blood". This would explain the mutilations allegedly carried out by the accused, said the commander. After being questioned by the international judge on the abusive interrogation methods, the Police Commander confirmed having conducted the

investigations related to this case and the interrogation of the suspect and witnesses, but denied promptly having beaten or threatened the defendant. or anyone else.

The witnesses called by the Prosecution stated that, on 27 April, he found the accused running, very nervous and breathless, with a machete in his hand, and that he had told them that they could find the victim, lying drunk, near Ribeira de Bamalasi. Despite that information, they couldn't find the victim in the place the defendant indicated. On the other hand, the two Defence witnesses stated that they too were suspects of having murdered the victim and one of them said he also had been brutally beaten and threatened by the Police Commander during the interrogation. According to the witness's testimony, he was repeatedly punched on the face, neck, back and chest. By the time the interrogation ended, his eyes were covered with blood and the witness passed out due to pain inflicted. He was so frightened that defecated and urinated while the interrogation was taking place. Still, he did not confess to be the author of the crime, "my hands are clean" he said.

In the final allegations, the Prosecution stated that during the trial strong evidence was produced against the accused before the court and, therefore, the accused should be sentenced to a seven years imprisonment penalty, under Article 338 of the Indonesian Penal Code. The Defence concluded saying that there was not sufficient evidence to convict the accused (namely, no direct witness), and that the first person suspected of having committed the crime was not the defendant, but one of the witnesses called by the Defence. Moreover, the guilty confession was extracted from the accused through torture (as confirmed by the Defence witness and contradicting the testimony of the Police Commander). Therefore, the defendant should be acquitted of all charges.

2.5.1. The Final Decision

After twenty minutes deliberation, the international judge handed down a decision finding the accused guilty as charged, and convicted the accused to five years imprisonment, pursuant to Article 338 of the Indonesia Penal Code. According to the written decision, the court decided that there was sufficient evidence to consider the accused guilty of murder "without any doubt", because "the accused confessed to the police to having killed the victim and did it in a detailed way. Before the court, he denied it, stating that only confessed because he was threatened by the Police Commander with a black stick, that he would be beaten if he didn't confess." According to the court, "it is possible that the accused had been threatened by the commander or other police official. Yet, we cannot believe that was the reason for the confession. On the contrary, he confessed because he killed the victim and the confession was told with such detail as only the perpetrator could know." Still quoting the court's decision, "although the defence witness was beaten by the police, not only threatened, but truly beaten to the point he defecated and urinated in his pants, still he did not confess to the crime. This shows that the accused confessed to the police not only due to the threat but because it was true, otherwise, as was the case of the two defence witnesses, he could have been accused, threatened and even beaten and he would not have confessed."

2.5.2 Confession at all cost

During the trial and while addressing the court, the accused persistently pleaded his innocence, stating that his confession was extracted, during the interrogation, under beatings and constant threats perpetrated by the Oecussi Police Commander. Furthermore, the testimony of the defence witness matched the statement

of the accused, confirming that he too was severely beaten and threatened. Both testimonies were rich in detail and impressive in the way they were described (by words, sounds and gestures) before the court. According to the written decision, the court explicitly recognized (more than once) that both accused and one of the witnesses were threatened and beaten by the Police Commander during the interrogation, and that it was under those circumstances that the accused confessed. Nonetheless, in violation of international standards for a fair trial, the “confession” was accepted as the main evidence in this case.

Torture or any kind of cruel or inhuman treatment is absolutely prohibited under international law and cannot be justified under any circumstances. According to Article 5 of the Universal Declaration and Article 7 of the ICCPR no one may be subject to torture or to cruel, inhuman or degrading treatment or punishment, according to. The United Nations has condemned torture as a denial of the purposes of its charter and as a violation of the human rights and fundamental freedoms proclaimed by the Universal Declaration of Human Rights. The right to a fair trial cannot be realized if the accused is tortured or ill-treated. This right is also prohibited by domestic law in effect in Timor Leste. This right is particularly important to people deprived of their liberty.

The right to remain silent under police questioning and the privilege against self incrimination are generally recognized international standards and have been deemed to be implicit in two internationally protected rights: the right to be presumed innocent and the right not to be compelled to testify or confess guilt². This right of an accused to silence is sustained even when suspected of the worst possible crimes as expressly recognized in Article 55.2 b ICC Statute.

Accordingly, all law enforcement officials are prohibited from inflicting, instigating or even tolerating torture or other cruel, inhuman or degrading treatment. Even the fact they were ordered to do so by their superiors may not be used as a justification. Actually, they are bound by international standards to disobey such orders and to report them³. The fact that a person is considered dangerous does not justify torture, because no circumstances may be used to justify torture or other cruel, inhuman or degrading treatment or punishment⁴. The Committee Against Torture has stated that even the application of “moderate physical pressure” as an authorize mode of interrogation of detainees “is completely unacceptable”. No one charged with a criminal offence may be compelled to confess guilt. This probation is in line with the presumption of innocence, which places the burden of proof on the prosecution, and with the prohibition against torture and other cruel, inhuman or degrading treatment (Art. 14.3 g ICCPR and 67.1 g ICC Statute). As a result, all evidences, including confessions by the accused, elicited as a result of torture must not be used in any proceedings (except those brought against perpetrators). Therefore, any evidence made as a result of torture is inadmissible in evidence (art.15 CAT). These standards apply not only to statements made by the accused but also made by any witness and lie at the heart of a fair procedure.

Regardless of the innocence or guilt of the accused in this case, JSMP thinks the court should have struck down the confession, ruling that any confession extracted through torture is not legitimate and legal. Therefore, the accused’s statement should have been excluded as evidence, because a confession extracted through torture is never reliable. Evidence obtained under torture is dismissed from consideration in the

² Human Rights Committee General Comment 13, par.15.

³ Article 2.3 of the Convention Against Torture (CAT), articles 5 and 8 of the Code of Conduct for Law Enforcement Officials (CCLEO).

⁴ Article 2.2 of the CAT, article 3 of the Declaration Against Torture, article 5 of the CCLEO.

courts of every democratic system. Furthermore, all allegations that statements have been extracted through torture must be promptly and impartially examined by the competent authorities, including judges (Art. 13 and 16 of CAT). If an accused, during the course of proceedings, alleges that he has been compelled to make a statement or to confess guilt, the judge should have authority to consider such an allegation at any stage.

In this case, the court's dismissive attitude towards torture could lead to a lack of accountability for torture. Confessions obtained under alleged torture by a police commander will generate an atmosphere of fear and intimidation which will taint the peoples trust in the law enforcement agents. If the police officers who carried out the alleged torture remain on the force with impunity, and the prosecutors who are aware of the alleged torture but prosecute people on that basis, and the courts continue to convict torture victims basing their convictions on alleged confessions, the conditions for torture will persist. All allegations of human rights violations should be immediately and effectively investigated.

3. EFFICIENCY OF HEARINGS

JSMP praises the international judge for the Suai and Oecussi District Courts for the level of efficiency achieved in conducting hearings whereby almost every hearing was held on time in accordance with the existing schedule. Also JSMP observed good cooperation between the judge, prosecutor and public defender in facilitating the needs of all parties. JSMP hopes that these work practices can be continued in the future.

Also, from a case management perspective, it is encouraging that the judge is reaching decisions so quickly in the Suai and Oecussi District Courts, as this saves all the parties to the case repeated trips to the court. However JSMP is concerned that often decisions in these cases are being written in 15 – 20 minutes (while the parties wait), as often the decisions do not contain a detailed analysis of the facts, or the law, or factors to consider in sentencing. This can result in decisions of lesser quality. In JSMP's view, sufficient time is needed to analyze each case in order to guarantee the quality of decisions. We believe it would not adversely affect the efficiency of the court, and would allow more time for the judge to consider the facts in greater detail, if decisions were not handed down until the judge's subsequent visit to each of the courts.

4. THE NEW OECUSSI COURTHOUSE AND THE LACK OF FACILITIES

JSMP observed that progress has been achieved in the construction of a new court house in Oecussi that is cleaner and of a better standard. However, the provision of facilities for the new courthouse still remains a major obstacle that needs to be attended to. Based on JSMP's observations, although the courtroom is quite good in comparison with the old courthouse, the lack of chairs meant that visitors to the court were forced to sit on the floor or stand up. JSMP is aware of the difficulties involved in providing adequate materials to the court, however, if this problem is not resolved there is concern that it will disrupt trial processes in the future. In addition, it will be difficult for visitors to the court to attend hearings.

Apart from the lack of chairs, the Oecussi courthouse does not have a place to store case files. Consequently, all case files and important documents have to be sent back to Dili. JSMP understands that

this option has been pursued due to a lack of facilities. Also as judges, prosecutors and lawyers are all in Dili the integrity of documents is guaranteed. However, it would be better if filing facilities were provided in the Oecussi court so that the aforementioned documents could not only be secure but also easy to access.