



JUSTICE UPDATE

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Dili District

JUDGE ISSUES DECISION WITHOUT A RECOMMENDATION OF SENTENCE FROM THE PROSECUTOR

JSMP monitored a murder trial held in the Dili District Court on the 16 November 2004. This case was one in which a 16 year old youth was indicted for murder. JSMP understands that this case had been reassigned from a national judge to an international judge, and during the prior handling of the case the prosecutor had not yet presented the allegations to the court.

The Reassignment of the Case

At the commencement of the hearing, JSMP observed that the Prosecutor explained to the judge about the level of progress reached in this case before it was reassigned. The Prosecutor said that the final allegations had been presented to the court and the parties were awaiting the judge's decision. The new judge explained the reassignment of the case to the parties and the visitors in the court room. The judge stated that this case was reassigned by Claudio Ximenes and gave several reasons why the case was reassigned, one consideration being that the defendant was currently in detention.

The defendant is a minor

Based on documents tendered to the court during the trial, the defendant is currently aged 16. JSMP received information that when the incident occurred the defendant was aged 15. JSMP observed that the lawyer for the defendant made a request to the judge to close the hearing to the public and for trial proceedings to be conducted in line with trial procedures for minors. Nevertheless, the presiding judge continued the hearing as per normal (open to the public). JSMP believes that even in the absence of a request from the defence, the judge is obliged to close the hearing in cases where the defendant is below 18 years of age.

The rules governing minors are found in UNTAET Regulation No 30/2000 as amended by UNTAET Regulation No.25/2001. Article 45 of the aforementioned Regulation states that a person under the age of 18 is deemed a minor. Although the defendant is in an age group that can be held legally accountable, the regulation on rules of procedure places strict limitations on proceedings for minors, as distinct from adults. JSMP does not understand why the judge did not grant the request of the defence and continued with the hearing as per normal. Section 45.5 of the Criminal Procedure Code states that where the defendant is a minor the hearing must not be

open to the public. The same article states that no information that may lead to the identification of the minor may be published.

Another relevant issue is the type of sentence that may be handed down to minors. A principle firmly established under international law and UNTAET Regulation No 25/2001 states that measures to restrict the freedom of minors shall only be handed down by a court as a matter of last instance. In this case, the defendant was found guilty (as discussed below) and was sentenced to 3 years imprisonment. The actions of the defendant were categorized as serious so that imprisonment could be considered appropriate in this case, however, the judge is still obliged to consider other options.

The absence of final allegations from the Prosecutor

Nevertheless, the pertinent issue in this case is that the Prosecutor was not able to present final allegations. JSMP observed that although the judge asked the prosecutor and defence about witnesses to be presented no witnesses were brought forward in that hearing. The defendant confessed to committing his actions during the hearing, which meant the questioning process was redirected towards guaranteeing the validity of the defendant's confession pursuant to Article 29A in accordance with the UNTAET rules of criminal procedure. The hearing then proceeded to the stage when usually the prosecutor and the defence present their respective closing arguments- the final allegations from the Prosecutor and response from the defence council. Although the prosecutor was initially given an opportunity to present his final allegations, JSMP observed that that the prosecutor was unable to do so. It appears that there was a misunderstanding between the prosecutor and the judge when the prosecutor attempted to give his final allegations and he was stopped by the judge, however JSMP believes that the misunderstanding may have been caused by a problem with the translation. Another possibility is that the judge believed that the national judge who previously presided over the case had heard and accepted the final allegations. However the information JSMP received was that before the trial was reassigned the Prosecutor had not yet presented his final allegations. JSMP proposes that to try and avoid misunderstandings arising during proceedings it is necessary for the interpreters to have a basic understanding of law and legal interpreter training to ensure more effective interpretation that will be of greater benefit to all parties to a trial.

In JSMP's opinion, the provision of final allegations by the prosecutor has a critical role after the examination phase of a trial has been completed. The final allegations from the Prosecutor, in principle, should contain the factual elements and the legal grounds pursuant to charges presented. The defence presents their final argument in defence based on the recommendation given by the prosecutor. However, in this case a decision was issued in the following hearing, without allegations from the prosecutor, and the defendant was sentenced to 3 years imprisonment.

In JSMP's opinion, the UNTAET criminal procedure regulations clearly provides that the prosecutor and defence council should be given an opportunity to provide a final statement to the court. Such a statement is necessary to ensure that all relevant information has been presented to the court, necessary to prove the charge, and that the defendant has a right to reply to the allegations made. The presiding judge

should control proceedings to ensure that these necessary elements of the hearing occur.

CRIMINAL CASE NO. 09/2004

On 16 November a Panel of three international judges re-commenced the trial of five men accused (under Article 285 of the Indonesian Penal Code) of raping an 18 year old girl. The alleged rape took place in October 2003.

Problems with re-hearing Evidence

The trial had previously been held before a three member East Timorese panel on 15 and 21 July 2004. On those dates the court had heard evidence from the five accused and the victim. It is JSMP's understanding that the judges had been awaiting the final indictment from the Prosecutor before making their decision in the case. With the arrival of the international judges however, all ongoing cases have been reassigned (as reported in JSMP's Justice Update No. 7/2004), even cases such as this which were near completion. In this case, as in others which have now been taken over by international judges, the trial is starting again from the beginning. A new Timorese Public Defender and new Timorese Prosecutor have also been assigned to the case.

Although JSMP welcomes the important contribution of the international judges in working through the existing backlog of cases, JSMP is concerned that victims and accused may be put through unnecessary trauma because they are having to re-give their evidence. This may be particularly traumatic for victims of violent crimes.

Problems with Translation

During the hearing on 16 November JSMP was concerned that not all of the trial proceedings were being translated from Portuguese into Tetum for the Prosecutor and Public Defender to understand. At one stage, the presiding judge was questioning one of the accused in Portuguese and when the Prosecutor asked for a translation into Tetum the presiding judge and another member of the panel told him that since he had undertaken a course in Portuguese he should be able to understand. The Prosecutor explained that the Portuguese language course had only been of one month duration, and had unfortunately not adequately prepared him to fully understand legal Portuguese. At this stage in proceedings the presiding judge then congratulated the accused on his good spoken Portuguese. The judge still refused to have the questions and answers translated into Tetum. The Prosecutor then threatened to leave the court room, as he said there was little point in his presence if he could not understand proceedings. The judge then agreed to provide a summary of the questions and answers in Tetum.

JSMP wishes to emphasize to the court the importance of full and proper translations into a language that all the court actors and parties to the case can understand. In order for the Prosecution and Defence to properly establish their arguments it is imperative that they be able to comprehend all of the facts and testimony presented

before the court. It is also a fundamental right of the accused under Article 14.3(a) of the International Covenant on Civil and Political Rights that he/she be fully informed, in a language which he/she understands, of the charge against him.

Limitations placed on the Role of the Prosecutor and the Defence

During the hearing on 16 November, and again on 19 November JSMP was also concerned by the presiding judge's refusal to allow the Prosecutor and the Public Defender to ask the questions they wished to ask. The judge said he would not allow the questions to be asked because he thought he had already asked similar questions and he was satisfied with the answers. He did not, however, disallow the questions for any reasons of law. JSMP believes that the Prosecutor and Defence lawyer should be allowed to ask the questions they think are necessary to establish their arguments in the final indictment and defence statement (as long as such questions are lawful and comply with the rules of evidence). The international judges may have introduced a new system by which they are exercising greater control over the mode and order of questioning witnesses (as the judge is entitled to do under Section 26 of UNTAET Regulation 25/2001. In JSMP's opinion it would be useful if the international judges would discuss this new system with the Timorese Prosecutors and defence lawyers so that all court actors are familiar with the court's new operating procedures.

The judge would also not allow the Prosecutor or Public Defender to ask the questions to the accused. He insisted that after the translator had translated the questions to the Portuguese judges that she (the translator) ask the question to the accused. JSMP is concerned that such behaviour confuses the roles of the court actors, as one of the major functions of the Prosecutor and the Defence lawyer is as advocates (this involves asking questions directly to the witnesses and gauging their response). In order to work as a Prosecutor or Public Defender in Timor Leste it is necessary to have studied law and passed a Prosecutor or Public Defender exam.