



## **JUSTICE UPDATE**

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### **Dili District**

#### **Court Hearing regarding the Lawfulness of Arrest and Detention.**

On 4 October 2004 a hearing on the lawfulness of arrest and detention (pre-trial hearing) was held at the Dili District Court. The hearing was presided over by an international judge who was assisted by an interpreter, a Timorese Prosecutor and lawyer were also present.

The case was one regarding physical assault, based on article 351.1 and 2 of the Indonesian Penal Code. In this case it is alleged that an elderly man, aged 45 was assaulted by four men, all of whom were present as accused at the public hearing. JSMP did not observe the opening of the hearing in order to determine whether the hearing was declared open due to a request from any of the accused based section 20.2 of UNTAET Regulation 2000/30 ( as amended by UNTAET 2001/25).

- **The role of the interpreter in the hearing**

The hearing was held in two languages: Portuguese and Tetun. The judge who presided in the case, comes from Brazil and spoke Portuguese to the parties, which was then translated by an interpreter, who was present at the hearing specifically for this role. JSMP observed that the process of interpreting generally proceeded smoothly and it was evident that the interpreter was sufficiently competent in both languages used in the hearing. Nevertheless JSMP did observe on a number of occasions that the prosecutor acted as an interpreter and on a number of occasions explained to the judge what had been asked and said by the victim during the course of his examination. This also occurred when the judge read the summary of what occurred in the hearing to the court in Portuguese, it was not translated by the interpreter but explained by the Prosecutor. In JSMP's opinion it is very important for the judge to ensure that information throughout the hearing is known and understood well by all sides and that each party in the hearing act according to their function as directed by the law.

JSMP is of the opinion that these things may occur if the judge does not direct the parties clearly as to their role in the hearing and ensure that parties do not encroach on the legal role of others. In addition, the lawyer can also have an active role in asking the judge to control these aspects of the hearing to ensure its smooth running. JSMP observed that in the hearing the lawyer did raise objections to some of the

questions from the prosecutor to the accused but did not object to the prosecutor interpreting.

- **Damages and the presumption of innocence.**

During the hearing, the judge and prosecutor inquired about the resolution of the matter within the context of the informal mediation between the families involved. JSMP observed that the suspects and accused agreed to resolve the matters in customary way (during the hearing) but JSMP is not sure whether this resolution was intended by both parties to be the finalisation of the court process. Nevertheless it was noted in the record of the hearing that the accused were required to pay to the victim, on the basis of the informal agreement reached in court, \$US 200 for damage to the house and further compensation for injuries to the victim.

UNTAET Regulation 2000/30 (as amended by UNTAET Regulation 2001/25) outlines the procedures and competencies of the investigating judges and limits to their role in the context of a pre-trial hearing. In accordance with that regulation, the purpose of the pre-trial hearing is to review the lawfulness of arrest and detention of the suspect. Further, the function of the investigating judge to ensure that the rights of the suspects and the victim are upheld in accordance with the applicable criminal procedure code. In the same regulation, section 20.6 mentions three possibilities which can be decided in the hearing, namely: verify the arrest and order detention, order conditional release and release without condition.

In JSMP's opinion, the investigating judge, as proscribed by the regulations mentioned above, is not in a position to determine or sentence a punishment at the pre-trial hearing- that is the role of the trial judge. JSMP is worried that this decision by the judge, that both sides agree to reach a decision in an informal manner- resulting in compensation in a criminal matter, can give the impression that the accused have already been determined to be guilty before there is a decision by trial judge. In addition, the hearing record which details the provision of damages at the investigating judge stage of proceedings has the potential to violate the basic legal standard of the presumption of innocence. This is due to the fact that before there has been a decision regarding their guilt by a judge who has the lawful competence to do so they have had an order of damages against them.

In order that such situations do not occur as detailed above, JSMP is of the opinion that investigating judges should be careful not to act outside their competency and try to act clearly within those procedures established in law. These aspects are important to ensure that the process of examination at this level is done properly and is done as provided by the applicable law.

JSMP understands that in the context of formal justice (especially with regard to criminal offences) the interaction with the traditional law is complex and difficult to clarify. Although the resolution of cases between families (where the parties use adat/ or applicable traditions to resolve conflicts) plays an important role in the resolution of local disputes and also as a mechanism of social control in East Timor however the question of how far traditional agreements and adat can be considered in the formal justice system is a difficult problem.

Nevertheless JSMP is of the opinion that resolution of matters in a traditional way can only be noted down as a factor ( admission) in the pre-trial process as mention ( which possibly) is important information to be considered by the trial judges if the person is found guilty, in consideration in sentencing the accused.

## **Special Panel for Serious Crimes**

### **FRANCISCO PEREIRA/ SIKU GAGU**

Francisco Pereira aka Siku Gagu is currently on trial before the Special Panel for Serious Crimes (“SPSC”) charged with murder and persecution as crimes against humanity. The Panel consists of Judge Francesco Florit, as presiding judge, Judge Philippe Rapoza and Judge Helder Viana. Nearly all prosecution and defence witnesses have been heard and the parties’ closing statements are expected to be delivered in the near future.

The Prosecution have in recent weeks made a number of applications for various documents and statements of the defendant to be admitted into evidence. The SPSC’s decisions in respect of two of these applications are of interest for both their legal reasoning and their implications. Firstly, the Prosecution filed a motion requesting the statement of the serious crimes investigator that had questioned the accused in 2000 to be admitted as evidence. It also requested the SPSC to admit as evidence the statement of a witness that was based on what the accused had allegedly told him. Secondly, the Prosecution sought the admission of statements and a taped transcript relating to evidence given by the defendant to a CAVR officer prior to the issue of the indictment. The material allegedly contains statements which incriminate the defendant in relation to the crime with which he is charged.

### **The decision of the majority**

The Prosecution’s motion sought to have admitted as evidence the statement given by the accused to the investigator as well as the statement of a witness based on information he allegedly obtained from the accused. The Defence objected to both alleging that the admission of such evidence would amount to a violation of the accused’s right to remain silent during trial.

### **The statement given to the investigator**

The SPSC decided not to admit the statement given to the investigator as evidence. The Panel applied section 33. 4 of UNTAET Regulation 2000/30 according to which statements made before an Investigating Judge can be admitted as evidence as long as the admission of guilt fulfils the requirements of section 29A. According to the Panel, section 29A limits the declarations of the accused that can be admitted as evidence to those made before a judge. Hence if the accused chose to be silent at the trial stage, the statement he has given to the investigator cannot be admitted as evidence.

The SPSC considered section 29A to be the only provision under UNTAET law that allows for a statement of the accused to be admitted as evidence. Accordingly, evidentiary weight cannot be attributed to any statement given in circumstances which do not comply with the requirements of section 29A . The Panel further concluded that since the statement of the accused is not admissible, neither is the testimony of the investigator on the content of such statement.

#### The statement of a witness

The SPSC considered it was important to distinguish between information one has obtained in an official capacity – such as the statement the accused gave to the investigator - and information received outside an official context, that is, information that someone, for whatever reason, has received from the accused and that may constitute a confession. In such cases, since the law does not provide any limitations, there is no reason to exclude the admission of these statements.

In conclusion, the SPSC excluded the testimony of the investigator as evidence because it was information obtained in an official capacity and admitted the evidence provided by the witness's statement because it was information obtained in an unofficial capacity.

#### **The dissenting opinion**

Judge Rapoza presented a partially dissenting opinion from the Panel's decision. This decision dissents from the majority only as to the probative value of the statement given to the investigator. As to the statements based on information provided to other persons by the accused, Judge Rapoza agreed with the majority that they are admissible.

#### The statement given to the investigator

According to section 34.1 of the Rules of Procedure, “the court may admit and consider any evidence that it deems relevant and has enough probative value”, a provision sufficiently broad to permit the use of previous statements of the accused in court. Judge Rapoza pointed out that this had also been the decision of the SPSC in the case of *Prosecutor v. Damiao da Costa Nunes*.

It is recognized that there are restrictions as to what may be considered as evidence under section 34.1, but at no point is the use of a statement excluded. In fact, the only circumstance in which the use of prior statement is limited is when there are substantial doubts as to the reliability of the statement (section 34.2). Accordingly, in this case, before using the statement of the accused it is necessary to ensure its reliability and that the rights of the defendant are being respected.

In the present case, the rights of the accused have been respected. Since the previous statement was given voluntarily, to admit it as evidence does not violate the accused's right to silence nor does it amount to a waiver of that right. Nevertheless, an accused who chooses to be silent in trial is not immune from the consequences of a previous statement. The right to be silent in trial is not so broad as to require the

exclusion of evidence from previous statements that were voluntarily given to an investigator.

Section 33.4 does not impose a strict rule that excludes from evidence at trial all previous statements the accused may have given to an investigator. By way of comparison, this procedure is expressly adopted in article 357 of the Code of Criminal Procedure of Portugal but there is no such provision in UNTAET Regulations.

Furthermore, Section 6.2 of the UNTAET Rules of Criminal Procedure provides that when a person is arrested he is to be informed that he has the right to remain silent and that that silence does not amount to an admission of guilt, thus implying that if he was to make an admission, such an admission could be used as evidence in court. Judge Rapoza concluded therefore, contrary to the majority, that the admission of the statement given by the accused to the investigator as evidence is lawful.

### The statement given to the CAVR

In another application to the SPSC the Prosecution applied for documentary and taped evidence of the defendant's interview with a CAVR officer to be admitted into evidence. The material allegedly contains statements which incriminate the defendant in relation to the crimes which with he was charged. According to Pereira's lawyer, her client had chosen to exercise his right to silence during the course of the trial and the admission of the CAVR statements would effectively deny him that right. Following the reasoning of the above decision, it was submitted by the defence that the CAVR process involved a truth-seeking investigation as governed by UNTAET Regulation 2001/10 ("the Regulation") similar to that of any criminal investigation and the statements should not, therefore, be admitted.

It was decided by the SPSC that the arguments of the defence were wrong on two grounds. In rejecting one of these grounds of defence, the SPSC stated that a "Miranda-like warning and the presence of Counsel are not required for a deposition before the commission by a deponent."

It appeared to be critical to the reasoning of the SPSC, in deciding that the statements were admissible, that:

"The CAVR cannot compel a person to undergo the reconciliation process: it is a voluntary decision to give a deposition before the CAVR. The deponent is not confronted [in this process]...with the question of whether he wants to answer or whether to keep silent".

The conclusions of the SPSC appear to be based on the assumption that the defendant gave his evidence under the CAVR's 'Community Reconciliation Process' ("CRP"), which is governed by Part IV of the Regulation. However, the defendant's statement was in fact provided to the CAVR in the exercise of its 'Truth Seeking' function, which is subject to Part III of the Regulation. This situation is therefore governed by the truth seeking provisions of Part III and not the CRP provisions under Part IV.

The truth seeking and CRP functions of the CAVR have significantly different purposes and consequences and so the rights to which persons are entitled under Part III and Part IV of the Regulation are also different. In JSMP's interpretation of Part III of the Regulations, the fact that the defendant's statement was given under the CAVR's truth seeking function required the CAVR to provide him with Counsel. Section 18.3 states: "If in the opinion of the Commission there is a significant possibility that a person will incriminate him or herself in evidence given to the Commission it shall ensure that such person is represented by a legal representative, unless such person declines to be so represented." The defendant indicated to the CAVR that he wanted to give information about his involvement in a murder and JSMP believes that this should have alerted the CAVR to the significant possibility that the defendant would incriminate himself. Therefore, in the event that the accused did not refuse legal counsel, such counsel should have been provided. It is also important to note that the defendant's rights under this article, in contrast to other provisions in Part III, are not conditional on the person having been "invited or required" to provide information to the truth seeking function of the CAVR. Although the SPSC referred to the relevant provisions of Part III in its decision, it does not appear to have attached sufficient weight to the requirements of section 18.3.

With due respect, JSMP therefore believes that the SPSC has erred in its reasoning that the presence of Counsel for the defendant in giving his statement to the defendant was not required in this case.