



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

JUSTICE UPDATE

Period: December 2006

Issue: 16/2006

POSTPONEMENT OF THE TRIAL OF ROGERIO LOBATO

1. FACTUAL BACKGROUND

1.1. Postponement of the Proceedings

On 30 November 2006 the Dili District Court¹ commenced hearing the case against Rogério Tiago de Fátima Lobato, and his co-accused Francisco Salsinha, Francisco Xavier Viegas and Marcos Piedade.² The indictment³ in the case has still not been made public, however information released by the Prosecutor-General's Office⁴ indicates that the indictment includes allegations of homicide, the misappropriation of public property, misuse of public funds and the unauthorised importation or use of firearms to disturb public order.⁵

Presiding over the hearing were Judges Antoninho Goncalves (Timor-Leste), Teresa do Rosario (Brazil) and Ivo Nelson de Caires Rosa Batista (Portugal).

However, due to the absence of Marcos Piedade (commonly known as "Labadai") at the Court of Appeal building at the time scheduled for the hearing, the hearing was postponed until 9.30am on 9 January 2007. This step was taken in accordance with the Criminal Procedure Code⁶ which states that the absence of procedural participants before the hearing has started may result in a postponement of proceedings when and as determined by law.⁷ The code expounds that the defendant's presence at the hearing is compulsory,⁸ and

¹ Although the Dili District Court is hearing the case, the hearing itself was moved to the Court of Appeal building. The reason given for this move was to increase security.

² Represented by Pedro Andrade, Paulo dos Remedios and Nelson de Carvalho. The prosecutors working on the case are Felismino Cardoso and Bernardo Ferrandes.

³ Indictment issued on 20 September 2006.

⁴ Notice issued on 21 September 2006.

⁵ For information on the facts and proceedings leading up to the trial (including information on Lobato's arrest, first judicial questioning, and the issue of the indictment) please refer to *Progress to Date in the Cases of Rogerio Lobato and Mari Alkitiri*, JSMP Report, September 2006 (available on the JSMP website: www.jsmp.minihub.org).

⁶ Decree-Law No.13/2005 Approving the Criminal Procedure Code.

⁷ Article 251(2) Criminal Procedure Code.

⁸ Article 253(1) Criminal Procedure Code.

where the defendant fails to appear at the hearing, having been duly notified, the hearing shall be postponed before proofs begin to be presented.⁹

1.2. Reason for Absence

There are various conflicting and unconfirmed reports accounting for Labadai's absence at the proceedings on 30 November 2006. According to information issued by the Office of the Prosecutor-General,¹⁰ Labadai's absence was the result of a "miscommunication" between the PNTL, and UNPol and international forces operating in Dili.

To protect their personal safety *en route* to the Court of Appeal, it is claimed that both Labadai and Vicente da Conceição (a key witness in the trial, commonly known as "Rai Los") presented requests for security to state authorities in the week prior to the scheduled proceedings.¹¹ In the name of the state, such security was organised and co-ordinated by the Prosecutor-General.¹² It was intended that the Liquiça District PNTL would accompany the two men from Railako and Liquiça respectively to the Prosecutor-General's office in Dili, where UNPol and international forces would assume official responsibility for their security and transport to the Court of Appeal, while the PNTL would withdraw back to their base.

Therefore, according to the Prosecutor-General, from the time that the Liquiça District PNTL withdrew to their base, responsibility for the safe delivery of Labadai and Rai Los to the Court of Appeal was handed over to international security. In letters of notification written by Labadai and Rai Los,¹³ it is charged that they waited for a car and security to take them from the Office of the Prosecutor-General to the Court, but such security did not come.

However, contrary to the information provided by the Office of the Prosecutor-General, UNPol claims that it was never notified to provide any such protection and that the only security plan it was involved in was to provide security around the Court of Appeal building, which it duly did.¹⁴

In the light of these conflicting reports it remains uncertain what security-related measures were taken in order to assist Labadai's and Rai Los' attendance at the hearing. It is also unclear what the source was of the miscommunication or other problem which led to the failure of the security plans. The only certain fact is that

⁹ Article 256(1) Criminal Procedure Code.

¹⁰ A written statement was issued to the President, Prime Minister and Parliament on Tuesday 5 December and a copy distributed to JSMP.

¹¹ JSMP has in fact been provided with a copy (by the Prosecutor-General) of a letter written by Rai Los dated 23 November 2006 addressed to the Prosecutor-General (and copied to the President of the Republic and the Prime Minister) requesting that Australian Police be provided to accompany him from his home in Liquiça to Dili and back.

¹² Statement issued by the Prosecutor-General on 5 December 2006.

¹³ Issued to the Prosecutor-General on 5 December 2006.

¹⁴ Email received by JSMP from UNPol Spokeswoman.

after being escorted to Dili by the PNTL, Labadai and Rai Los were reluctant to travel from the Office of the Prosecutor-General to the Court of Appeal without a security escort and as such, failed to attend.

2. LEGAL ISSUES RELATING TO THE ATTENDANCE OF DEFENDANTS AT TRIAL

The Criminal Procedure Code outlines the rights and duties of defendants in criminal proceedings. It also sets out which institutions have responsibility for addressing various issues during the course of a criminal proceeding. Relevant provisions include those providing for restrictive and property-guarantee measures to be imposed on defendants, and those which explain the procedures to be applied in the event of a defendant's absence at trial.

2.1. Restrictive Measures

Restrictive and property-guarantee measures may be imposed on a defendant as provided by law.¹⁵ The ostensible purpose of such measures is to ensure the defendant's attendance at trial and prevent the defendant from interfering with evidence or otherwise hampering the trial process.¹⁶ A mandatory minimum restrictive measure, the obligation to provide proof of identity and residence, is imposed by the Code of Criminal Procedure on *all* defendants in criminal proceedings,¹⁷ however if necessary a court may impose other restrictive measures such as bail, house arrest or pre-trial detention.¹⁸ It is assumed that following his identification as a defendant in the concerned proceedings, Labadai was required to provide proof of identity and residence.¹⁹

¹⁵ See generally the Criminal Procedure Code Title VI, Chapter I regarding Restrictive and Property-Guarantee Measures.

¹⁶ This can be deduced from article 183 of the Criminal Procedure Code which provides the general requirements for the imposition of restrictive measures, being that there are reasonable grounds for suspecting that the defendant may flee, disrupt the trial, pursue criminal activity, or cause disturbances to public order.

¹⁷ As required by Articles 61(d), 184(1) and 186(1) of the Criminal Procedure Code.

¹⁸ See Criminal Procedure Code Title VI, Chapter II, Section I.

¹⁹ Note that more substantial restrictions were placed on Rogerio Lobato – for more information refer to *Progress to Date in the Cases of Rogerio Lobato and Mari Alkitiri*, JSMP Report, September 2006, p6.

Article 186(2)²⁰ of the Criminal Procedure Code governs the operation of this minimum restrictive measure. Importantly, it requires that a defendant be warned of the consequences of a failure to fulfil his or her obligations as a defendant under the Criminal Procedure Code. This warning is usually provided during the initial questioning of a suspect, which JSMP was not permitted to attend in this case. However no suggestion has been made by any party that Labadai was not warned of his obligations as a defendant in accordance with the Criminal Procedure Code

2.2. Defendants' Obligations

The obligations of defendants to criminal proceedings are outlined in article 61 of the Criminal Procedure Code. Most relevant in the present case is article 61(b) which imposes an obligation on all defendants to appear before the competent authorities when summoned regularly. JSMP has previously discussed the ambiguities involved in this sub-article: chiefly that no definition is given of the 'competent authorities', or detail provided as to what is required for a regular summons.²¹ However JSMP considers that as long as Labadai was properly informed of the trial date and his obligation to attend, his failure to appear at the trial on 30 November 2006 constituted a breach of this obligation.

The consequences flowing from a breach of a defendant's obligations are not expressly stated in the Criminal Procedure Code. There is potential scope for the operation of Article 90 (regarding action to be taken pursuant to absences from procedural acts) although the application of article 256 is more relevant in the circumstances (see 2.3 below).

2.3. Implications of a defendant's absence under the Criminal Procedure Code

Article 256 of the Criminal Procedure Code, as mentioned above, provides that where the defendant fails to appear at the hearing, having been duly notified, the hearing shall be postponed. In such circumstances, article 256(2) allows the defendant five days in which to justify his or her absence, with a failure to do so

²⁰ Article 186(2) of the Criminal Procedure Code provides:

"Provision of proof of identity and residence by a defendant means:

- (a) truthfully providing his or her full identification, home and office address, and the address at which notices can be served to him or her in the course of the proceeding;*
- (b) being warned that he or she must appear before the competent authority or to remain at the disposal of the latter as required by law or when notified for that purpose;*
- (c) being warned that he or she must report any change of residence or of the address at which he or she may be contacted, where the defendant changes residence or is absent from it for more than fifteen days;*
- (d) being warned that failure to comply with the paragraphs (b) and (c) legitimises the defender to represent him or her in any procedural acts he or she had the right to attend or was required to do so, and also legitimises public notification of the date set for the trial hearing foreseen in Article 257 and the holding of the hearing in his or her absence even if the defendant has justified any absence prior to the hearing.*

²¹ *Progress to Date in the Cases of Rogerio Lobato and Mari Alkatiri*, JSMP Report, September 2006, p17.

resulting in the imposition of a fine and the issuance of an arrest warrant in order to ensure the defendant's presence at the hearing on the reset date.²² Where the defendant justifies his or her absence, he or she is to be given notice of the reset date, but in the event that the defendant fails to appear on the reset date the trial shall be held in absentia.²³

Within the permissible five-day period following the initial proceedings, Labadai issued a statement to the Prosecutor-General and the media outlining the reasons for his absence (outlined above). Unfortunately the Criminal Procedure Code does not state what reasons given by an absent defendant may be taken as sufficient to "justify" such an absence at trial. Presumably the Code does not intend that any reason given would necessarily be sufficient. However it appears that Labadai's fear for his personal security has been considered sufficient to "justify" his absence from the proceedings on 30 November 2006. As such, article 256(2) will not apply and no further restrictive measures should be imposed on the defendant pending the proceedings on the reset date of 9 January 2007. It is important to note that the other defendants involved in the proceedings will continue to be subject to the restrictive measures imposed on them prior to the 30 November proceedings.

The obligation now lies with the defendant to ensure his attendance at the postponed proceedings. Should Labadai fail to attend the newly scheduled trial, it may be held in his absence – most likely to his detriment – with the only representation provided, for all possible purposes, by his appointed defender.²⁴

2.4. Need for amendment of the Criminal Procedure Code

As explained above, the Criminal Procedure Code places responsibility on the defendant in a criminal proceeding to appear at court for a trial when properly summonsed.

However, where a defendant has special needs which must be addressed in order to assure his or her attendance at trial, it remains unclear which public institution has responsibility for assisting. Such special needs, as in the present case, may be security related (this is likely to be increasingly common in the context of the present unrest) or it may be a more standard matter such as the need for transportation. At the present time, the Criminal Procedure Code does not deal with the question of which institution has responsibility for addressing such needs. JSMP believes that this issue must be addressed.

This is an issue which also has implications for other participants in the trial process, such as witnesses and victims. In a significant number of the cases which JSMP has monitored during 2006, trial hearings have been postponed due to the absence of a defendant, victim or witness. JSMP therefore believes that

²² Article 256(2) Criminal Procedure Code.

²³ Article 256(3) Criminal Procedure Code.

²⁴ Article 256(3) Criminal Procedure Code.

changes to the law and to practice are necessary so that it is clear who has legal responsibility for ensuring the attendance of trial participants, and to establish practical systems to make sure attendance occurs in practice.

3. THE PROTECTION OF TRIAL PARTICIPANTS

3.1. Need for further security measures

JSMP recognises and commends the strong security presence at the Court of Appeal on 30 November 2006.²⁵ JSMP believes, however, that there is a need to provide broader measures of protection to those involved in court proceedings.

At present, valuable witness protection laws are being developed by the UN Human Rights Unit. Given the current security situation in which the population is divided along varied political and social lines and the security of all participants in proceedings is uncertain, JSMP recommends that protection must be made capable of extending under the new law not only to witnesses and victims but also to defendants who are not in pre-trial detention and have a reasonable fear for their safety. As highlighted by the postponement of the Lobato case, this is necessary to ensure that hearings proceed in an expeditious manner.

3.2. Need for Timely Proceedings

In the light of the current political and social climate and the high public profile of the Lobato trial JSMP believes it is imperative that this case in particular should be conducted in a timely and transparent manner. Timorese society continues to suffer as a result of the absence of accountability for, and the lack of publicly-available, accurate information regarding those actions which triggered the political crisis in April and May 2006. It is therefore essential that all efforts – particularly those relating to the security of those involved in the proceedings – be proficiently coordinated to ensure the timely realisation of the trial.

Defendants also have a considerable interest in the prompt determination of proceedings. Delays incur further legal costs and the inconvenience of remaining subject to the restrictive measures imposed under the Criminal Procedure Code (outlined in section 4.1).²⁶ Further, and perhaps of greater concern, is the continuing unresolved criminal responsibility of the defendants and the implications of this on the personal and professional lives of those concerned. Undetermined culpability invariably exposes the reputations and standing of

²⁵ Security measures taken comprised both civil security officers and international troops manning road blocks and metal detectors at the gates to the Court of Appeal, various patrols and posts around the courthouse, and security inside the court to facilitate the orderly admission of people into, and their behaviour inside the courtroom.

²⁶ Labadai is subject only to minimum restrictive measures which do not appear to pose any particular inconvenience. Lobato on the other hand, must now remain under house arrest until 9 January 2007 which is a considerably greater restriction on freedom of personal movement and autonomy.

those involved to continuing suspicion and criticism – not only in the workplace, but also in family and community circles.

4. RECOMMENDATIONS AND CONCLUSIONS

As such, JSMP calls for continuing cooperation between Timorese and international stakeholders with the capacity to assist in facilitating the implementation of additional security measures. Steps must be taken to ensure that such easily preventable “miscommunications” as impeded Labadai’s and Rai Los’ presence at the hearing on 30 November do not reoccur.

At present, it is ultimately the responsibility of the defendant under the Criminal Procedure Code to ensure his or her attendance at proceedings. JSMP believes that systems should be in place to ensure that security is provided if and when requested – particularly where a reasonable fear for personal security exists. JSMP further believes that amendments to the law – either through the new witness protection legislation that is to be created or through amendments to the Criminal Procedure Code itself – should be made to address the question of institutional responsibility for the general protection of all trial participants and for their attendance at trial.

Specifically, JSMP recommends that responsibility for coordinating the security of court actors both prior to, *en route* to and from, and during proceedings, be made the responsibility of one party alone. Such allocation of responsibility would simplify the organisation and implementation of security measures and delineate accountability for their operation. At present, the administrative branch at the Dili District Court is perhaps best placed to assume this role in a managerial capacity,²⁷ assisted on the operational level by the UNPol. Ideally, such responsibility would ultimately be transferred to a specialised faction of PNTL operating from the courts once their internal screening process has been completed.²⁸

With these issues in mind, JSMP recommends that the Council of Coordination for the Justice Sector undertake or commission an investigation into the events on 30 November 2006 – not to clarify accountability or to place blame on any party, but rather to identify the weaknesses in the system in order that they might be rectified to prevent further such situations.

The Timorese justice system continues to experience adverse delays in proceedings for a variety of reasons from lack of evidence to the absence of trial

²⁷ Article 8, Criminal Procedure Code relates to relevant Cooperation between Authorities:

1. *Every public authority is obliged to cooperate with the courts in the administration of criminal justice, as and when requested.*

²⁸ Article 52(2) concerns relevant General Police Powers:

2. *It is also incumbent upon the police to assist, upon request, judicial authorities in achieving the goal of the proceeding, particularly the Public Prosecution Service during the inquiry.*

participants.²⁹ Such setbacks continue to erode the people of Timor-Leste's confidence in the functions and merit of the judiciary. Action must be taken to ensure that such easily-avoided obstacles do not unjustifiably obstruct proper and expeditious proceedings. Without effective judicial systems, there is little respect for the rule of law and little perception of accountability and justice – vital factors to returning peace and stability to Timor Leste.

²⁹ The substantial build up in the courts is illustrated by information published on the website of the Ministry of Justice, available at <http://www.mj.gov.tl/stats/>. At the end of October 2005 in the Dili District Court alone, there were 748 cases pending trial and 346 cases upon which a decision had not yet been made.