



SPECIAL PANELS FOR SERIOUS CRIMES - WEEKLY SUMMARY
17-21 March 2003

Scheduled Cases

No	Criminal Case Name	Criminal Case Number
1	The General Prosecutor v Jose Cardoso Ferreira (the Lolotoe case)	4/2001

NB: Selected indictments and case summaries are available on JSMP's website: www.jsmp.minihub.org – from the front page follow the 'Trial' links to the case information page.

Issues this week included: adequacy of witness statement summaries; right of defence to make an opening statement; prohibition of photography in court; translation difficulties; prohibition on accused speaking to witnesses; ruling on whether a former prosecution translator could appear as a defence witness; warning witness of right not to incriminate himself; advising witness who was a relative to the accused that she need not testify; closure of trial to public for rape charge testimony; scope of legal professional privilege and whether a defence witness can be asked by the prosecution about dealings with the defence lawyer.

The following information – only a partial account of portions of the proceedings - is not an official record of the court and has not been reviewed or approved by the court.

I. Criminal Case 4/2001 General Prosecutor v Jose Cardoso Ferreira (the Lolotoe case)

Monday, 17 March 2003 Heard by Judges Sylver Ntukamazina (presiding), Maria Natercia Gusmão Pereira and Benfeito Mosso Ramos. The hearing was open to the public. Jose Cardoso Ferreira, alias Mouzinho, the alleged former commander of the Kaer Metin Merah Putih militia in Bobonaro District, has pleaded not guilty to charges of crimes against humanity under UNTAET Regulation 2000/15, specifically murder, torture, rape, severe deprivation of physical liberty in violation of fundamental rules of international law, and other inhumane acts of similar character intentionally causing great suffering or serious injury to body or mental or physical health (a charge of persecution was dropped by prosecutors in February 2003). The accused, who has been in detention since 19 May 2000, was present at the hearing, sitting between his counsel and a defence interpreter.

[Witnesses received translating assistance when giving evidence; but exchanges on legal issues, such as objections to questions, were generally not translated for witnesses. Transcriber in place and proceedings video recorded.]

In the morning session, the prosecution complained that the defence had not given sufficient indication before defence witnesses were to appear about what evidence they were to give in court. The defence said he had adequately summarised the evidence to be presented in documents already filed. He went on to note the general nature of evidence that various witnesses were to give: for example, that one witness would testify about a meeting he had with the accused; that another would testify that she had seen Victim A, B and C - alleged to have been raped and had their liberty deprived by Jose Cardoso and others in the Indonesian town of Atambua in 1999 - "walking around,...shopping,...free". The defence argued in general that while the accused had strong rights to know in advance the evidence to be presented against him, the prosecution did not have similar matching rights.

The prosecution said that it was not satisfied with the defense just summarising orally the evidence before the witness appeared, and wanted better advance documents. "We cannot continue the trial trying to guess what the witnesses will say in court," the prosecutor said. If, for example, a witness was to state that she had seen alleged victims of imprisonment shopping, that was information the prosecution needed in advance.

After the judges conferred, Judge Ntukamazina said the defence's documents were "not a perfect summary" but the issue would not be allowed to delay proceedings and the defence would be required to give a summary of evidence before each witness testified. The prosecution said he had no choice but to ask for an adjournment, but ultimately did not pursue this.

Judge Ntukamazina directed the defence to call its first witness. The defence said the witness would testify that he met Jose Cardoso in the town of Maliana, where the accused "surrendered his firearm" to the witness, gave money to the resistance movement FALINTIL and expressed a wish to escape to the forest with the resistance movement. The prosecution said the defence was testifying and the information should have been contained in the document about defence witnesses discussed earlier, but Judge Ntukamazina said the defence was merely summarising the evidence to come.

The defence asked for an opportunity to make an opening address for the defence case, just as the prosecution had made over a year ago. The prosecution queried what rule of procedure the defence was citing to make the address, with the defence replying that he could ask the same question with regard to the prosecution's earlier opening address. The judges conferred and allowed the defence to make an address. The prosecution asked if he would be allowed to respond to the address but the issue was not discussed further.

The defence said for the past year the court had heard allegations that the accused had committed certain crimes and until now the defence had not had its chance to give its side of the story. The defence said it intended to challenge the evidence presented by the prosecution and at the end of the defence case "there will be

reasonable doubt that the accused committed the crimes alleged.” He said that independent witnesses would testify of the accused’s innocence and the circumstances in which the accused found himself in Lolotoe.

The defence said the court had heard evidence that the accused wanted to kill all pro-independence supporters and was very strong “pro-autonomy” (supporting East Timor staying a part of the Republic of Indonesia). In the next few days the court would hear evidence that since 1996 the accused had been working for independence and that joining the militia was to infiltrate the powerful institution of the TNI (Tentara Nasional Indonesia, the Indonesian army) to soften the force of the TNI on the people of Lolotoe.

He said the court would hear evidence that the accused was a good man and that had the Kaer Metin Merah Putih (Hold the Red and White Flame) militia not been in Lolotoe and had Jose Cardoso not been the commander, worse things would have happened there.

“You will hear evidence regarding why the crimes alleged occurred. You will hear that on 16 May three TNI were killed in an ambush ...That after that there was an operation by TNI...the TNI sent soldiers from Maliana...and sent 17 trucks of militia to go and find the perpetrators of this attack.

“You will hear evidence that in response to this attack many people were detained by the TNI. Lots of people were beaten and tortured by Dadarus Merah Putih (another militia group). Hundreds of people were detained in schools. You will hear that in the villages people were tortured by DMP and the village was burnt.

“You will see that Jose Cardoso was a victim of the circumstance, of the situation. An unsophisticated farmer who wanted independence the same as other Timorese but he knew that the authorities would stop at nothing...He played his part in independence by trying to save his own people.

“He was a commander by name. You will hear that he had no real power. You will hear evidence that there were two factions in KMMP. There was a pro-independence faction and a pro-autonomy faction. We will [bring] evidence that the pro-autonomy faction was not lead by Jose Cardoso. He was afraid of them...they shot at each other...and they tried to kill him...You will hear evidence that the pro-autonomy faction...were (sic) the destroyers.

“Why do we lead this evidence? Because Jose Cardoso is charged with command responsibility...At the end of the defence case you will see that he had no control. The situation had broken down and he even feared for his own life.”

The defence further said the court would hear evidence that in August 1999, before East Timor’s Popular Consultation or independence ballot, Jose Cardoso “surrendered” to Agustino Perreira, who would be called as a witness, but Mr Perreira had told the accused to keep his weapon, to not escape to the forest, and to “go back and protect your people because if you leave the militia...the problem will be worse”.

The defence said that the court would hear that the accused (charged with four counts of imprisonment as crimes against humanity) did not force anyone to go to Atambua. "He gave people the choice", the defence said. The court would hear evidence from witnesses that Jose Cardoso was instructed to bring back all the Timorese he went with to West Timor: "That he took people to Atambua to save them and he brought back everyone...He led them out and he led them back."

Referring to alleged murders in the town of Sibi, defence counsel said he would bring evidence that the accused was not in Sibi at the time of the deaths, that he did not know that people would be killed, and that "even if he knew, he could not have been able to stop it...Because the people who did the killing...he could not even touch. He was afraid of those people."

Counsel said Jose Cardoso was not in the town of Raimea at the time when it was alleged that he had murdered Antonio Franca and Augusto Noronha there.

Counsel concluded by saying that at the end of the evidence the court would have heard "a tragic story" of someone who had taken on the burden of saving his people.

"You will see from the evidence that Jose Cardoso is a good man who is extremely sorry for what happened in Lolotoe but he believes he did his best to save his people," concluded the defence.

Counsel then submitted that he was merely making a summary of the case and there was nothing to respond to. The prosecution stated that "this is a court of law and the proceedings are to be conducted fairly and fairness requires that if you give one party the opportunity to say something you should give the other a chance to respond". The court allowed the prosecution to reply to the defence's opening statement.

The prosecution stated that the court would find out that it was "fashionable" for many people to say that they were members of the clandestine movement. The defence protested that such statements should be confined to a closing address, and that there was no basis for the prosecution's claim.

At this point a member of the gallery took a photo. The presiding judge called the person to the bar of the court and told the person that she could not use the photo without permission of the court.

The prosecution continued, saying that the court would realise that Jose Cardoso was "a terrible man". He said the defence was "trying to sell to the court a fanciful theory that the accused was a plant in the TNI. That is a theory that will never sell in this court. The prosecution witnesses were able to show that (the accused) belonged to a line of supporters of Indonesia".

Responding to objections from the defence, the presiding judge asked the prosecutor to confine himself to replying to the defence's opening statement without making any "conclusions". The prosecution ended his response and the first witness was called..

The defence stated that the witness Agustino Perreira spoke Indonesian and an Indonesian translator was present. The judge asked whether the witness spoke

Indonesian and he replied that he did but he preferred Tetum, so a Tetum translator was installed. The judge asked the witness his date and place of birth, occupation, marital status and wife's name, number of children, parents' names, occupation and address. He then administered an oath and began questioning the witness.

The judge asked the witness what he was doing in 1999. The witness said he was responsible for clandestine work and conducting work that had to do with Independence. He said he helped people who had no food and freed people from dangerous areas. The witness said the group was called San Antonio. The judge asked the witness if he knew any other members of San Antonio and the witness said no, because group members did clandestine work on their own. The defence interjected to say that his client thought there was a problem with the translation of the word "member". The translator sought to clarify the word "member" in Tetum and Portuguese, but the prosecution objected to the defence's interjection and the defence agreed to defer the issue to when he examined the witness.

The judge asked the witness what the accused was doing in 1999. The witness said he thought it was something good, but he did not know. The witness said that he saw Jose Cardoso bring Lolotoe-area people back from Atambua to Maliana.

Defence counsel asked Mr Perreira about when he joined the clandestine movement, where he worked and the names of his commanders. Counsel asked if the witness had any proof to show that he was a member of the clandestine movement and to show it to the court. The witness presented an ID card, which was shown to the judge and the prosecution. The prosecutor argued that the card showed no date of issue, only expiry in December 2000, and that it must be entered as evidence. The defence said the card was presented as evidence that the witness was a member of FALINTIL, but the prosecutor objected that it did not show that the witness was a member of FALINTIL at the time in question. The judge said submissions on the probative value of the evidence could be made later.

Responding to further questions from the defence, the witness said that he knew the accused very well and that he had told him that if the government caught him, he should go with it, but not destroy the people. The defence asked the witness to confirm that he had said if the government caught the accused, he should work with it. The prosecution objected that the word used by the witness was "go". The transcriber was asked to read the transcript back and said that the word used was go. Defence counsel asked the witness whether he had told people to work with the government. He said he told people that if the government caught them they should work with the government "because it is a tight situation. But I did not tell (the accused) to destroy people. Up until now if he destroyed people I don't know."

The witness said he was Jose Cardoso's leader and that Cardoso had two responsibilities: collaborating to get food for FALINTIL; and seeking out information from the Indonesian military. "And when he came to us we told him to go back and continue his work, but don't destroy the population... The situation forced him to do it because at that moment it was war and he was caught...and because of all this I just recommended that when you go, do not destroy them, just take them and bring them back".

After the lunch recess the defence complained to the court that the prosecutor had said “stop being silly” to him. The judge told both counsel not to be personal. The prosecutor complained that the accused was communicating with witnesses: “Again today immediately after the court rose the accused person went straight to the witness and spoke to him. It was only when the matter was brought to my attention that I stopped them...I do not know what they spoke about but it is most inappropriate,” he said. The judge reminded the parties that the rule of the court is that it is forbidden to speak to a witness once the witness has begun his or her testimony. When asked, the accused said he told the witness just to speak up and say whatever he wanted. The witness said he didn’t hear what the accused said. The judge said if a party wanted to address a witness once the witness had begun testimony, it must be done through the court. Upon a request from the prosecutor, the judge warned the accused not to speak to witnesses.

The prosecutor asked Mr Perreira his age and when he had joined the clandestine movement. The witness said he already answered these questions, but the prosecutor asked him to answer them again. The prosecutor asked questions about when the witness became a “member” of the clandestine movement, with the word member appearing to be a source of confusion or disagreement. At one point the judge told the witness “the question is clear. If the question is clear, please answer the question; if you don’t understand the question, please ask”. At times the judge took over questioning or rephrased questions from the prosecution; and the defence counsel intervened to note that there appeared to be confusion over the term member and that the witness appeared to be saying that he took part in clandestine activities before he became a “member”.

After questioning about the witness’ school days, the prosecutor said the witness had earlier told the court that he was active in the clandestine movement when his later evidence was that he was also at school and was not a member of the clandestine movement. The prosecutor said, “do you want the court to believe you?” The judge took over questioning, saying: “You said you were operating in Bobonaro, Suai and Ainaro. But you were at school and juveniles were not allowed to be part of FALINTIL...So how were you able to do both operations and at the same time be at school when juveniles were not allowed to be members of the clandestine?” The witness answered, “in the morning I would go to school. When we finished school we would go to do our work. Many times we did not want to go to school because we wanted to help our country”.

There was then discussions between the two opposing counsel on the terms work and operations. The Timorese judge, Maria Natercia Gusmao Perreira, sought to clarify the issue with the witness, using the Indonesian word “operasi”. There was more discussion between the two counsel, and the judge asked the witness what he meant by “operations”. The exchange continued (approximate, in part):

Witness: To do operations is taking food and also taking notes and information...from the bush to members.

Judge: It was only members or persons who were becoming members who did this work?

W: I would like to mention to you that at that difficult time the clandestine [movement] would use women and children to do that difficult work.

Prosecutor: So at that time the clandestine were just using anyone to help them?

W: I don't understand the question.

P: I'll move on to other questions. You told the court you were a member of FALINTIL.

W: I have shown evidence and proof to the court.

P: When did you become a member of FALINTIL?

W I have shown you the cards of when I was FALINTIL and now I am a civil servant...

J: Could you please tell us exactly when you were a member of FALINTIL

W: What examples can I give you?

J: Can you remember the month or date?

W: FALINTIL is a long process

J: We understand it was a long process...When did you [start] becoming a member of FALINTIL?

W: FALINTIL started gathering people in 1975...

J: You personally, can you remember when you joined FALINTIL?

W We were all together

The translator gave the answer twice, with one answer including the year 1999. The prosecutor questioned whether the answer included the word 1999. Questioning continued.

W: We were in a camp in Remezio in 1999

P: Did you become a member of FALINTIL in 1999?

The defence objected to the question. The prosecutor rephrased it.

P: You said you set up camp in Remezio in 1999. Was it at that time that you became a member?

W: We were all gathered together in Remezio

P: Was that the time you became a member of FALINTIL?

W: that was when all the people from FALINTIL were together

P: Is that when you became a member of FALINTIL?

W: People that did clandestine work became members of FALINTIL

P: When did you become a member of FALINTIL?

W: A member or an element?

P: Which were you?

W: I was an element. I have already said that.

The judge intervened to ask questions, concluding with the question: "I want you to think about the answer you want to give to this question from the court. Were you ever a member of FALINTIL?"

W: As I have said before, FALINTIL people had gathered in Remezio.

Prosecutor: We have asked eight questions now and he has basically given the same answer.

Defence: I'd just like to explain what the interpreter said and have it put on the record – that the only people who gathered in Remezio were members of FALINTIL.

Questioning continued.

Judge: So you were a member of FALINTIL.

W: Yes

J: So were you a member of FALINTIL before gathering in Remezio.

W: As I have mentioned before, members of clandestine and FALINTIL were gathering in Remezio.

Counsel for both sides sought to press arguments. The judge continued.

Judge: I want to ask you for the last time and I want you to respond clearly and decisively...You told this court that all members of FALINTIL gathered at Remezio...Did you join FALINTIL at that time, or before that time, or after that time? The question definitely is, when did you join FALINTIL? Please respond to the question.

W: I have mentioned before that members of clandestine and FALINTIL gathered there and I was an element of FALINTIL

Prosecutor: what is the difference between a member...and an element...?

W: I have mentioned before a member of clandestine and a member of FALINTIL are the same thing and working together.

P: The question is what is the difference between a member of FALINTIL and an element of FALINTIL?

W: as to my knowledge, an element of FALINTIL is like he is in FALINTIL. As to my knowledge, to what I have known.

The prosecution continued cross examination through the afternoon, on issues such as whether the witness had possessed a gun, on who appointed the witness as a member of the clandestine movement and when this happened, and about the witness' first meeting with the accused, when the witness was 16 years old.

Witness: At that time we were together and at first I spoke with him and I said if you get caught don't tell everything, don't tell all the things about the people of East Timor.

Prosecutor: Was that the time you told him to go with the government and not to harm people?

W: That was the time that I told him that if you get caught, if they give you work you can do the work, but don't destroy people

P: how old were you at the time?

W: Sixteen.

P: You were 16 years at the time?

W: Yes

The prosecutor continued.

P: At the time was Jose Cardoso a member of the clandestine?

W I can answer this. At the time, as soon as I was admitted to the house, if I was accepted to the house, he was a member of the clandestine.

P: Are you saying he became a member of the clandestine, only because you slept at his house?

W: No, it's not like this. I went there [with an] intention to organise people for the clandestine and I put him on my list.

P: Was he appointed a member of the clandestine?

W: I asked him, he said yes, and I appointed him.

Replying to further questions, the witness said he met Jose Cardoso twice: first in 1989 and then in 1999. To clarify whether the witness had met Jose Cardoso at any time between 1990 and 1999, the judge asked the witness whether he had met the accused in the years 1990, 1991, 1992, and so on, to 1999, receiving nine “no” answers and one “yes” reply for 1999. Among further questions, the prosecution asked whether FALINTIL members protected other FALINTIL members, with the witness replying yes. The prosecution then asked whether FALINTIL members would shoot fellow members. The witness replied that he did not know and the defence counsel said, “I can’t see the relevance (of that question) and neither does the witness”. The prosecution said he wished to test the witness, but the defence further objected to the questions. The prosecutor asked whether the witness would attack other members of FALINTIL, but the presiding judge ruled the question inadmissible.

The prosecutor then asked the witness “do you know why you are here?” – a question to which the defence objected. The witness replied that he was there because Jose Cardoso had been his “element”. The prosecutor later asked whether in 1999, Jose Cardoso had told him anything about crimes being committed by the militia. The witness said he met with Jose Cardoso in 1999 for only one or two minutes. The prosecutor asked, “if you knew at the time that he had beaten and tortured people, would you have let him go?” but the judge ruled the question inadmissible and dismissed it as a leading question. The prosecutor further asked whether the witness would protect elements of his group if they had committed crimes. The witness said he told them not to commit any crimes but if they had, they would have to take responsibility. The defence objected to the question as being irrelevant. The judge asked the witness whether, when he met Jose Cardoso, he knew about the crimes committed in Lolotoe. The witness said he did not. The prosecution confirmed that the witness had met Jose Cardoso again in 2000 when the accused was in a cell, but the witness said he did not know why the accused was in a cell. The prosecution then asked whether the witness knew why the accused was in court.

Witness: I don’t know very well. I only know that there was a problem and I was asked to come here...I just know that I was called to be a witness in 2001...

Prosecutor: You still don’t know what your member for 10 years has done.

Re-examining his witness, the defence asked whether the only way Mr Perreira communicated with his “members” was by meeting them. The prosecution objected to the question on the grounds that this was not an issue raised in earlier examination. The defence argued that he had “a right” to show that the witness communicated with the accused in other ways, either by letter or sending messages. The judge noted that the defence was seeking to prove that there was communication between the two over the 10 years between 1989 and 1999. The prosecutor said the defence should have sought such evidence in the examination in chief, but the presiding judge said the question related to matters raised and would be allowed. The defence asked whether formal meetings were the only method of communicating with members of the clandestine movement. The judge took over questioning, saying “we have to save time” and asked what methods there were for communication between clandestine movement members. The witness said, “people to people”. The defence resumed asking questions and confirmed with the witness

that communication occurred other than through meetings; and that over the period in question the witness had communicated with the accused “through colleagues, giving messages through colleagues to talk to him because we did not meet face to face”.

After some further questions the court was adjourned in the early evening until the following day.

Tuesday, 18 March 2003 In the morning session the defence questioned witness Antonio Leto (spelling unconfirmed). The witness testified that he and the accused gave money to an earlier witness, Agustino Perreira, who was presumed to have used the money to buy food and clothes for the clandestine cause.

In cross examination the prosecution asked the witness if he had any relationship with the accused. He said no, but after further questions agreed that the accused was his wife’s cousin. He said that he didn’t see the relationship between the accused and his wife as important. The prosecution asked whether the witness became a member of the clandestine movement at the same time as Jose Cardoso and how the witness became a member of the clandestine movement. After the defence objected to the prosecution’s questions the presiding judge took over questioning for a period on the same issue. Responding to further questions from the prosecution, the witness spoke of joining the militia in 1999. According to the translator, the witness said “we were forced to choose to become militia because if there weren’t any militia in the villages then who was going to defend our villages?” The defence objected to the translation, with the presiding judge eventually asking the Timorese judge Maria Natercia Gusmao Perreira to assist. Judge Natercia asked the witness to answer the question, stating that the translator had made a mistake. He said, “in the sub-district if the militia weren’t formed then the other regions wanted to attack the sub district of Lolotoe”.

The witness went on to say he knew the accused was the militia leader in Lolotoe after Jhoni Franca stepped down, and was questioned about his knowledge of the San Antonio clandestine group. The prosecution asked further questions about meeting Agustino Perreira and Jose Cardoso in 1999. At one point when the presiding judge questioned the relevance of his question, the prosecutor actively asked the translator not to translate a brief exchange with the bench, where the prosecutor said he thought it appeared from the witness’ testimony that there was something not right. At a further point the defence also sought to interject, asking to be allowed to be heard before a question already asked in English was translated to the witness.

The translator withdrew, citing tiredness, and the new translator was appointed and asked by the judge to speak more loudly after a few questions. As the court adjourned for the lunch break the judge told the witness “not to speak about the testimony you are giving to this court” during the break.

The court resumed with the prosecution expressing concerns that the accused was gesticulating to witness with nods and head shaking and that this constituted attempts to tamper with the witness. The defence replied to the allegations. The presiding judge said the court would be vigilant on the issue.

The prosecution proceeded with questions on a meeting the witness said he attended between Agustino Perreira and the accused where the accused sought to hand his gun to Agustino Perreira. At one point the witness was asked how far away he was from the accused at the meeting and replied three kilometres. The judge said he may not have understood the question and upon being asked again said about one metre.

The witness said Jose Cardoso was threatened after the referendum: "he was threatened because the army always followed him".

Prosecutor: Can you explain how he was threatened?

Witness: He went first but five or six soldiers always followed him with guns like this...

P: Can you please stand...How did the army follow him?

W: He went first and then four or five men followed him...

P: Did they have their weapons pointed at him?

W: Yes...

P: And how many times did you see that?

W: Only once.

P: Where was that?

W: in Lolotoe

P: Where exactly...?

W: In the city

P: You told the court that they were always following him; now you're telling the court that you saw it only once.

W: Yes

The witness was further questioned on whether he knew various alleged victims and incidents of militia violence in his area. He said he saw some incidents from far away and could not personally identify people who were there.

In the early evening proceedings were adjourned to the following day.

Wednesday, 19 March 2003 During the morning session, the parties made submissions on whether a particular witness would be allowed to give evidence. (The witness was not in the box.) At one point the defence orally cited the case of the

Attorney General v Kanan Banana towards his propositions. The prosecution replied that the case was irrelevant and not submitted to the court. The presiding judge said the matter could be decided later and directed the calling of further witnesses. The defence said his next witness was at home as the defence had not expected that the court would get through the witnesses as quickly as they had. The court was adjourned for about 2 hours to 2 p.m.

Court resumed at 2.40 pm hearing the evidence of Januario da Costa. The judge asked the witness whether he knew the names of the "good" militia. The witness replied Kaer Metin Merah Putih (the militia allegedly led by Jose Cardoso).

Witness: "Their activities were to save the people and sometimes when people wanted to harm them they stopped people harming them"

Judge: So it is your testimony that KMMP was saving people...?

W: Yes

J: Why was the other group from Maliana [hurting] people?

W: Because those groups did not want independence.

J: What about the other group KMMP?

W: They did their work but their intentions were to save the people, not to harm the people.

Judge: What about KMMP, was it for or against independence?

W: They were together, they wanted independence, but they had to follow the orders of the other side.

The witness testified that Jose Cardoso had been a member of the San Antonio group and had helped with money and information and helping "brothers" when people were looking for them. Asked by the judge if the accused had continued to help San Antonio after he joined the militia, the witness said he was frightened but was connected to San Antonio in hiding and that in the militia he was "working but he was offering himself to save the people not to harm them". The witness said when some people had been trying to harm other people, the accused had been "in between" trying to talk about the future; that some of the people seeking to do harm were from Jose Cardoso's militia group but they "didn't want to listen to him".

Judge: Did you know his rank in the militia group?

Witness: He was a second commander but some people did not want to believe him.

J: ...You told the court that some militia leaders were listening to him and some were not. How do you know that?

W Because I was there and I saw it and I was frightened.

The witness also answered questions about some people obeying the accused's orders and some not.

Examined by the defence, the witness said that one occasion Jose Cardoso told individuals from Maliana who were beating people in Levos to stop, and that the accused sought medical help for a victim. The defence asked the witness whether the accused ordered him to go to Atambua, but the prosecution objected to the question. The defence rephrased the question to ask whether the witness was given a choice to stay. He said he was and that he had told the accused that he had to stay with his children.

In cross examination, the witness said he had himself become a member of the KMMP militia because he was frightened. Asked when he joined the militia, he said, "to save each other the whole people entered the militia". Asked again when he joined the militia he said, "at the time it was hot and we had to join". Asked the date, he said 1999. The witness further said that he joined the militia because he was afraid of the Dadarus Merah Putih militia from Maliana, that he joined "just to cover up", and that he was directed to join by a man from Maliana. He said he joined KMMP in particular because the accused was there and the accused was "family" and a fellow member of the clandestine. At one point, questioning stopped to tend to the electronic recording system. The witness gave further testimony about militia operations in Levos.

After a 10 minute break the prosecutor began cross examination. He asked about the witness' testimony that the accused told militia and the Indonesian military from Maliana that they should leave the area. Among other testimony, the witness gave evidence about the accused attending a visit to Levos of Maliana militia in 1999, where the accused was said to be wearing a military shirt and carrying a gun "but he didn't shoot anyone" and was said to have been using the gun to protect people. The prosecution asked who led the militia to Levos. The defence objected to the question. The prosecution then asked whether the KMMP militia members that came to Levos had a leader. The witness said that the head of the militia was the Indonesian military but that Jose Cardoso brought them to Levos. The witness gave further testimony about the process of joining the militia and how he had stayed in Levos to protect the youth. There were a number of questions to establish whether the youth were also members of the militia.

The prosecutor asked if the witness knew a David Alfonso. The witness said he knew the name but not what the person did. The defence said he had not heard the name before and questioned its relevance. During discussion between parties and the bench the prosecutor said it appeared that Levos was not attacked "because of the personalities involved". The defence said, "whose theory is that? Is that part of the allegation?" The defence said if there was an allegation that he had only called witnesses who were members of the KMMP or clandestine movement then such an allegation was designed to prejudice the hearing and should be struck out. Amidst further discussion, the prosecutor said, "these people were involved in militia activities. They have been brought here to testify that Jose Cardoso was involved in clandestine activities and they [and family relations] were members of KMMP". The judge said the probative value of evidence would be assessed, and questioning

proceeded with further questions on the unidentified David Alfonso, said by the witness to be the accused's father in law.

The witness said he left the militia after Jose Cardoso left for Lolotoe, and that the accused had taken the population "to the other side" [appearing to be a reference to West Timor] with the accused saying that "to save them they had to go". The witness said he saw the accused in September 1999 taking people to Atambua in West Timor, and that "he was the one that was fully in charge, he was the one that was ordering the people...He would give orders...He was looking after the people".

Prosecutor: When you saw him on 14th September, was he also with the members of his militia?

Witness: Yes, they were ready to go to Atambua

P: You told the court that you saw the military always following Jose Cardoso...

W: ...they wouldn't give him time to speak to the people

...

P: you told the court that you had a conversation with him at that time

W: Yes

P: no more questions

Defence: You told the court that the military did not allow Jose Cardoso to speak with the people. Did they prevent him from speaking to a group of people or to individuals?

W: At the time they wouldn't let him but he would make clandestine work to slowly tell ...each one to go home and tell the families to follow Jose Cardoso to go over to the other side

D:...He discreetly informed other people...

[Prosecutor objects to question]

D: Did he do this openly or secretly?

W: Because the military was watching, he told them secretly so that the people could follow him and be saved

Further testimony from the witness included that Jose Cardoso knew that the youth who joined KMMP wanted independence for East Timor; and knew that some militia members in Levos were members of the clandestine movement.

At the conclusion of questions the judge dismissed the witness, saying, "You may go back to your village...I would like you not to talk to other persons who are still to give their testimony."

In the afternoon session the presiding judge delivered the court's ruling on whether the proposed witness Domingos Simao could give testimony. He said the first issue arising was whether the particular witness for the defence was disqualified. He said that on this matter it was clear that the translator for the prosecution did not enjoy a form of legal privilege that would prevent him from testifying. Section 35.3 of UNTAET Regulation 2001/25 lists those professions that enjoy a legal privilege that before this court may only testify with the consent of the accused. "This issue does not fall within this section. It is clear that the court has the power to hear this witness."

The judge said the second question arising related to Section 34.2 of Regulation 2001/25, which states, among other matters, that the court may exclude any evidence if its probative value is substantially outweighed by its prejudicial effect, and that no evidence shall be admitted that has been obtained by methods that cast doubt on its reliability or 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.

The judge said the court believed that admitting the evidence of the witness raised issues of concern. "As the witness worked as a translator with the prosecution he has acquired a significant and detailed knowledge of the facts through his involvement with the prosecution case."

"This court does not wish to encourage, in the absence of compelling reasons, the practice of calling those working with the tribunal to give evidence." Such practice, if common, would be antithetical to the integrity of proceedings before the court.

Among other matters, the judge also said there were reasons to doubt the reliability of this particular witness, with concerns about whether his evidence would be uncontaminated from other witnesses' points of view or from previous involvement in the prosecution case.

The judge said that because the court maintained serious doubts about the reliability of the witness the court disqualified him from testifying.

Responding to earlier submissions from the defence about the physical nature of the area in which the crimes are alleged to have taken place, the court requested that the public defender submit a map as evidence. The defence said "we would like at this point to make a request that we would like to visit the crime scene at any date convenient to the court. We believe that a visit to the crime scene would satisfy the needs of the defence so that the court appreciates the exact physical conditions on the ground." The prosecutor made no submissions on this request and the presiding judge said the matter would be decided later.

The judge named three witnesses to appear the next day and the defence said it would ensure that they attended. Court was adjourned to the following day.

Thursday, 20 March 2003 The morning session featured the testimony of defence witness Filipe Alfonso (spelling not confirmed). The prosecution asked the witness if he knew a number of different people, including at times whether they were members

of the militia; and questions about a Mr Caetano (a killed TNI member referred to in the indictment). The witness said he joined the San Antonio clandestine group in 1995 and knew that, like all other members of the group, Jose Cardoso had a mark on his arm to show he was a member, given to him by "Agustino who was here yesterday". The witness was asked to show his mark to the court and the judges. The defence described the mark orally, to be read into the court record, as four marks at the top and two at the bottom.

At one point the Timorese judge Maria Natercia Gusmao Perreira provided a retranslation of evidence to go into the record about how many people attended a ceremony – 712 - and whether they were soldiers or militia. The record and whether the judge's correction had been properly entered were discussed. In the course of answering questions the witness said that he had become a member of the militia at the ceremony. He later said he had responded to a call from the-then militia leader Jose Cardoso and felt obligated to go because the witness was a member of the clandestine movement. The prosecutor asked whether the accused asked the witness to go "as a clandestine member", which was objected to by the defence. After discussion the judge directed the translator to translate the question and the witness replied that the accused "didn't actually ask [me as] a member of the clandestine movement; he asked me as a member".

Prosecutor: As a member of what?

Witness: As a member of the militia

The prosecutor then asked: "At the time he was a commander of the militia and he told you to go as a member of the militia. You told the court that you were obliged to go. When you were told to go, were you ordered to go?" - but the defence objected half way through the translation of the question to the witness. Questioning continued about whether and in what way the witness was ordered by the accused to do things.

At one point the prosecutor asked how many people in Jose Cardoso's group were called [the witness' name] Filipe. The witness said 110 and the court gallery laughed. When the judge asked how many people with the name Filipe were members of the militia, the witness said 712. The judge asked the same question again and the witness replied "Filipe - only me myself".

The witness was asked whether he knew of certain people, including Adao Manuel (named as a victim in the indictment). The witness said Adao was from one village and Manuel from another.

Prosecutor: How many people do you know called Adao Manuel?

Witness: Two people

P: Do you know one person whose name is Adao Manuel?

W: I know Adao and Manuel only

The witness said he had visited Jose Cardoso twice in prison. The defence objected to the prosecutor's statement to the judges that he wanted to inspect the visitor's register at the prison. The judge said the prosecutor could submit the dates to the court if he wanted.

After the judge suspended proceedings for 15 minutes, the prosecutor asked the witness whether he had participated in a particular militia operation. The defence objected and a discussion began about the right against self incrimination. The proceedings continued:

Prosecutor: Have you ever beaten any people while you were a member of the militia?

[The defendant asks that the witness be told that he need not answer the question and the judge advises the witness of this]

P: Have you ever beaten anybody while you were a member of the militia?

Judge: Do you want to respond to the question?

W: I don't want to answer the question

P: Did you participate in an arrest of anyone at Sabino Gouveia Leite's house?

[The defence asks for the witness to be warned again. The prosecutor said that the witness had been informed of his rights already but the defence submitted that it must be done before each question. The judge said that after each question the witness would be asked if he wants to respond.]

Prosecutor: As the court wishes. Did you participate in an arrest of anyone at Sabino Gouveia Leite's house?

[translator advises need not answer]

[Pause]

Judge: Do you want to respond?

Witness: No.

P: Did you participate in the torture of Jose Gouveia Leite?

[advised by translator]

J: Do you want to respond?

[The defence submits that the witness should be told that he does not have to respond, not just asked if he wants to respond.]

P: Did you participate in the torture of Mario Goncalves?

[warned]

J: You have the right not to respond. Do you want to respond? Do you want to respond?

W: No

P: Did you participate in the arrest and torture of Benfeito da Costa?

[warned]

W: I don't want to respond

The defence objected to a further question from the prosecutor about how the witness knew there were two groups in the KMMP militia. The prosecutor said the witness may or may not want to answer and his demeanour could be judged. The defence protested that the witness was "an unsophisticated and uneducated man". The court then began a discussion (untranslated) of the right not to respond. The presiding judge referred to section 49.3 of the Transitional Rules of Criminal Procedure on contempt. The prosecution noted that the court could send a witness to prison for failing to answer a question, while the defence noted that this section should be read in conjunction with Section 35 on witnesses. At the discussion's conclusion the presiding judge said to the witness: "Please respond to the question from the prosecution. If you know or don't know".

The witness said he knew there were two groups because he was in the militia when it became two; that one group was led by another man, Blasso Osoro (spelling unconfirmed) and those people were pro autonomy. "And I already knew that, because Mauzinho (the accused) had many members of his family who were pro-independence and they [certain militia members] didn't believe him any more".

The witness gave further testimony, in essence, that some members of the militia no longer followed him and that there were two factions in the group. At one point there was uncertainty in the translation from the translator then assisting the witness ("Jose Cardoso said don't do things recklessly and carelessly, don't do anything randomly"), so that another translator sitting in the court offered another version of the translated phrase ("don't do anything without thinking first").

The witness also gave evidence that he and his family were to leave his village for West Timor because he was afraid of the Indonesian military, but most afraid of Blasso Osoro's group. In further questioning about militia operations, the defence asked for and the judge told the witness that he was not obliged to answer the questions.

Later in the afternoon the judges discussed whether to adjourn but decided to continue. The translator asked for a break but there were no other translators in the court and so the translator was asked to continue. Court subsequently adjourned for three minutes. Then during further testimony, the transcribers began to change over but the presiding judge directed them to wait. There was at one point some confusion

about whether a translated question had already been answered. The defence objected to a question half way through its translation, but the judge asked it again. The witness gave further evidence about issues including two factions in the KMMP militia and said that Jose Cardoso became the KMMP leader “to protect his relatives from his village”. Court proceeded until after 6.45 pm.

Friday 21 March In the morning session the witness, Luizina Cardoso (spelling unconfirmed), was advised that she need not testify as she was the accused’s sister, but agreed to proceed. The judge and then the defence questioned the witness about being in a shop in Atambua. The judge then closed the court to the general public, although the judge allowed parties such as court officers and monitors to remain. The witness then gave evidence relating to alleged rape and imprisonment offences against persons named as victim A, B and C in the indictment.

At one point the prosecution asked the court to tell the accused “not to nod at the witness”. The defence asked what was wrong with the accused nodding, but the presiding judge cautioned the accused not to give any sign or try to communicate in any way with the witness and said the court would monitor the issue.

After receiving certain answers the prosecutor told the judges that she was pursuing certain questions because she wanted to know if the witness had had any prior preparation – a suggestion strongly objected to by the defence. The prosecutor eventually asked the witness why she had come to court and what had the defence counsel asked her. The defence objected that such questions bordered on interference with legal professional privilege. The judge said the issue was whether the witness had spoken to the defence counsel.

The prosecutor said the issues included the witness’ credibility and that legal professional privilege was only “solicitor/client”. The prosecutor said that the witness appeared to have come to court with “unusual legal knowledge”, giving answers that appeared to go to the legal elements of rape.

The defence said that if the witness was asked about dealings with him, then he would have to give evidence as well; but he need not under the Transitional Rules of Criminal Procedure. The defence said it had had to investigate towards the elements of the charges and therefore asked questions like “were they under security?” [the accused was charged with imprisonment] but did not direct the witness.

The prosecution said that there were important elements in the witness’ testimony “to suggest that she...was selected to come and say certain things and it is important to know how she came here”. The prosecution said that the court had allowed evidence before on communications in the investigation process, between counsel and witnesses outside court; and that privilege was only between lawyer and client. The prosecution asked the defence to cite law for the proposition that there is protection in this case.

The defence said it was a certain principle of law that all information acquired by the defence in the preparation of the case was confidential. “That is a settled point.” The defence said the prosecution must give all information but the defence was in a different situation. The prosecution again asked for authority, which the defence

offered to submit. The judge said he wanted basic provisions and international law. The defence cited authority including the statute of the International Criminal Tribunal for Yugoslavia, the statute of the Sierra Leone criminal tribunal, East Timor's Constitution and the *Tadic* case. "What I asked her, how I asked her, we are now going too deep." The defence also added that the witness could not be compelled to incriminate the accused as she was a relative in the first degree.

The judge said the court would adjourn to consider the issues raised and resume at 2pm. In the afternoon session the court ruled that legal professional privilege only applied between lawyers and clients and therefore the witness could be questioned on communications with the defence lawyer. The witness gave further evidence in the afternoon.

(ends)