

  
**UNITED NATIONS**      **NATIONS UNIES**  
**ETPA**  
**East Timor Public Administration**  
**DISTRICT COURT of DILI**  
**SPECIAL PANEL for SERIOUS CRIMES**

Before:

Judge Sylver Ntukamazina, Presiding  
Judge Benfeito Mosso Ramos  
Judge Maria Natercia Gusmao Perreira

**Case No.04/2001**

The Public Prosecutor

Versus

Joao Franca da Silva alias Jhoni Franca,  
Jose Cardoso Ferreira alias Muzhino  
Sabino Gouveia Lete

**DECISION ON THE REQUEST OF THE PROSECUTOR FOR  
LEAVE TO FURTHER AMEND THE INDICTMENT**

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**For the Prosecutor:**  
Essa M. Fall  
Shyamala Allegendra

**For the Defense**  
Gilberto Sembrano

### **Procedural background:**

- 1 On the 5 February 2001, the Prosecutor filed the original indictment against the accused persons. On the 27<sup>th</sup> April 2001, during the preliminary hearing, the Court asked the Public Prosecutor to amend the indictment, what he did on 25 May 2001 by filing an amended indictment.
- 2 On 20 February 2002, the PP filed an application for leave to further amend the indictment against the above-mentioned accused persons, pursuant to Section 32 of UNTAET Regulation 2000/30. The Public Prosecutor requested also upon granting leave to further amend the indictment, to deem the indictment further amended in the terms described below.
- 3 This application was reiterated during the trial hearing on the 4<sup>th</sup> March 2002, where the Prosecutors explained the content of their motion to further amend the indictment.
- 4 During the same hearing, the Defense Counsel of the third accused Sabino Gouveia Leite opposed the application on several grounds.
- 5 The Prosecutors responded orally to the Defense submissions and on 20 March 2002, they submitted their written response to the submissions of the defense.

### **Submissions of the parties**

- 6 The PP submitted a request for leave to amend the indictment with respect to the factual allegations against the third accused Sabino Gouveia Leite. The Prosecution requested to be allowed to insert two paragraphs in the indictment. The first paragraph was to be inserted immediately after paragraph 28, in the following terms: "*28 bis. Sabino Gouveia Leite provided information to the KMP militia regarding the identities of civilians who supported independence of East Timor or Falantil or have relations with members of Falintil, so that they will be arrested, interrogated and detained by the KMP militia*". The second paragraph was to insert immediately after paragraph 60 as follows: *60A. Sabino Gouveia Leite provided*

*information to the KMP militia that victim A, Victim B and Victim C provided food for Falintil."*

- 7 The reasons submitted by the Prosecution for the proposed amendment are: (1) to ensure that the statement of facts are in tandem with the charges; (2) to ensure that the statement of facts support the charges contained in the indictment; (3) to comply with the requirements of Section 24.1.c. by providing precise statement of facts upon which the accusation is based; (4) and to clarify the participation of the accused person in the crimes charged against him in the indictment.
- 8 The defense opposes to the application for leave to amend the indictment for the following reasons: (1) the amendment sought is too late; (2) the amendment sought unjustly penalizes and prejudices the accused; (3) the paragraphs sought to be inserted do not support any of the grounds invoked in the application as they are out of context and out of place (for paragraphs 28-30) and is a mere generalization that does not even allege any specific nor approximate details of time, date and location (paragraph 60 A). Therefore, the defense requested the Special panel to dismiss the application to further amend the indictment and thereby disallowing the insertion of proposed paragraphs 28 bis and 60 A.
- 9 In their response, the prosecutors rejected one by one the submissions of the defense. They then requested that the Special Panel dismisses the submissions and claims of the defense for lack of merit, and to grant the application of the Prosecution to further amend the indictment in the terms specified in the application.

**Relevant provisions of the law with respect to the amendment of the indictment.**

- 10 With respect to an amendment of the indictment, Section 32 of UNTAET Regulation 2000/30 as amended by Regulation 2001/25 provides that: "32.1 *After the indictment has been presented and prior to the commencement of the trial, the Public Prosecutor may amend the indictment only with leave of the Court.* 32.2 *After the trial has begun and prior to final decision in the case, the Court may, at the request of the prosecutor, allow amendment of*

*the indictment if the Court determines that the evidence at trial establishes qualification of the crime or crimes which is different than that which appears in the indictment. The accused and his or her legal representative have the right to be immediately informed by the Court of the new qualification of the criminal offence for which he or she may be convicted.*

*32.3 In circumstances defined in Sections 32.1 or 32.2 of the present regulation, the accused, if he or she so requests, must be granted a delay in the proceedings to prepare his or her defense with respect to any new matters alleged, and to propose and examine new evidence.*

**Whether or not the indictment was submitted prior to the trial**

- 11 The first issue to be analyzed by this Court in the present case is to determine whether or not the amendment sought was submitted prior to the commencement of the trial or after the trial has begun.
- 12 It is true that, as submitted by the Prosecution, Section 32 UNTAET Regulation 2000/30 allows an application for leave to amend an indictment at any time before the court makes its final decision. However, the same section distinguishes in its two first paragraphs (points 1&2) the conditions upon which leave to amend the indictment can granted by the Court.
- 13 This Court disagree with the Prosecutors when they say as a general principle that " A trial commences with the delivery of opening statements by the prosecutor and the counsel for the accused in which they explain their respective positions and outline the evidence that they expect to present to support their cases. The commencement of the trial has to be sought in Section 30.2 UNTAET Regulation 2000/30 which says: " 30.2 On the date and time determined in accordance with Section 29.3 of the present regulation, the competent judge shall call upon the parties, shall verify their identities; shall enter such information into the record and shall declare the trial open."
- 14 In the present case, the trial was declared open on 8 February 2002. The prosecutors submitted the application for leave to amend the indictment on 19 February 2002. It is therefore clear that, as the

defense submitted, when the request for amendment was filled, the trial has already been opened.

- 15 It is true that, because of some motions submitted just after the trial was declared opened, the Court did not start yet with the presentation of evidence. In a normal situation, after the opening of the trial, the Court should have gone directly to the presentation of evidence. In the present case, the Court had to deal first with motion raised and applications filled by the parties and did not yet proceed, pursuant to Section 33 UNTAET Regulation 2000/30, to the presentation and hearing of evidence. The hearing of evidence started on 27 March 2002, when the accused persons were asked to make any statement. However, that does not change the beginning of the trial pursuant to Section 30.2 UNTAET Regulation 2000/30 stated above.
- 16 Since the trial has already begun, this Court will apply Section 32.2, which obliges the Court to allow the amendment of the indictment, if the Court determines that the evidence at trial establishes qualification of the crime or crimes which is different than that which appears in the indictment.
- 17 However, the amendments sought by the Prosecutors are minor amendments and do not have any material effect on substance of the present indictment. They do not affect the nature of the charges against the accused. The Court is of the opinion that such an amendment seeking an expansion of facts in order to support the existing charges is not really an amendment but a clarification of facts. The Court refers to the case relied upon by both parties where the Trial Chamber in its decision on the first amendment of the Musema<sup>1</sup> indictment found that: "*an expansion of the facts adduced in support of existing counts does not in the opinion of the Tribunal represent an amendment of the indictment but rather further particulars which emerge during various stages of the trial against the accused.*"
- 18 The amendment sought is bringing minor changes in the way the facts have been alleged without any significant alteration of the existing indictment, as decided already decided by the ICTY, in the case the

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<sup>1</sup> ICTR, *Prosecutor v. Alfred MUSEMA*, Decision of 18 November 1998.

Prosecutor vs. Milosevic<sup>2</sup> when it says "...and there are a few minor changes in the way certain facts have been alleged. None of these alterations are significant. There have been no deletions of significance made to the original indictment".

- 19 This nature of the amendment sought distinguishes the present case from the Musema case referred to by the Defense. In the Musema case, the amendment was to add a new count<sup>3</sup>. This means to say that after all the relevant witnesses testified, the Prosecutor added a new charge based on those testimonies. In the present case, the proposed amendment is not to include a new charge, but to seek expansions of the facts adduced in support of existing counts.
- 20 The Court is of the opinion that such an amendment seeking to further articulate and provide better particulars regarding the manner in which the crimes already charged in the indictment were committed, cannot be refused to the prosecution. They can be contradicted by the defense and analyzed by the Court in its final findings.
- 21 This Court will go then one by one to other issues raised by the parties, mainly the fact the amendment sought is too late; the fact that the amendment sought unjustly penalizes and prejudices the accused; and the fact that the amendment sought is not supported by facts or evidence and is out of context and that the amendment sought would confuse the accused.

**With respect to the fact that the request for amendment is filed too late**

- 22 The defense submitted that more than one year after the amended indictment was filed, more than 9 months after the amended indictment was submitted, and at the time the trial has started, the Prosecutor is seeking to amend the indictment. The Defense did not show why the amendment is too late, considering that the law allows the prosecution to amend the indictment at any moment prior to the final decision with leave of the Court. The defense only referred to the Appeals chamber of the ICTR in the case of Alfred MUSEMA<sup>4</sup> in order to support his contention in saying that: " *the Appeals Chamber*

<sup>2</sup> *Decision on Application to Amend Indictment and on Confirmation of Amended Indictment.*

<sup>3</sup> *ICTR, Prosecutor v. Musema, Trial Chamber Decision, paragraph 27, page 2.*

<sup>4</sup> *ICTR-96-13-A, Appeals Chamber, Alfred Musema Vs The Prosecutor*

*of the International Criminal tribunal for Rwanda held in the case of Alfred MUSEMA (ICTR-96-13-A) that an amendment of the indictment more than three months after the witness' statements were obtained by the Prosecutor was already late"*

- 23 As **already** underlined by this Court in the paragraph 12, the prosecution has the rights to amend the indictment at any time with leave of the Court. Only the conditions of granting amendments differ considering **the timing** of the amendment sought (amendment submitted prior or after the commencement of the trial).
- 24 It is true that, as submitted by the Prosecution, the issue of amendment was not central in the Musema Case before the Appeal Chamber<sup>5</sup>. However the statements made by the appeal chamber reflect its findings on that issue, and can be referred to by this Court in the case it deems them relevant to the issue raised in the present case. Of course, the Court will take into account, what distinguish the Musema case from the present case.
- 25 With respect to the timing of the amendment, this Court agrees with the Prosecutor that Musema Case is different from the present case. In Musema case<sup>6</sup>, the amendments impeached by the Appeals Chamber were amendments that were introduced after the trial had already commenced and all the witnesses on whose statements the Prosecutor intended to rely upon in support of the new count had already testified. The timing of the amendment in the MUSEMA case was such that the defense could not adequately cross examine the witnesses for the Prosecution as at the time the witnesses gave their testimony the charge was different from the one he was subsequently convicted of.
- 26 In this case, the presentation of evidence has not yet commenced and no witness has testified yet. The accused persons can adequately cross- examines the Prosecution witnesses, as they are yet to testify.

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<sup>5</sup> ICTR-96-13-A, Appeals Chamber, Alfred Musema Vs The Prosecutor

<sup>6</sup> ICTR, Trial Chamber, the Prosecutor vs Musema, page 2.

**With respect to the fact that the amendment sought is not supported by facts or evidence and is out of context and that the amendment sought would confuse the accused.**

- 27 The Court agrees with the Defense that the proposed amendment to be inserted after paragraph 28 speaks of generalization, whereas paragraph 28 to 30 speak of the specific incidents concerning Benedito da Costa, Amelia Belo and their children. However, the facts that the allegations of the Public Prosecutor in that paragraph is of relevance not only to the detention of Bendito Da Costa and Amelia Belo but is relevant also to all the other victims of detention, could not be an obstacle for the defense to understand the charges against the accused Sabino Gouveia Leite, for the detentions of persons named in paragraphs 28 to 30 as well as the other persons named in paragraphs 31 to 48.
- 28 It is true that all the imperfections of form have not been detected in the indictment, for example with respect to the style, the way some sentences are couched and the possibility to put together some similar counts in order to have less counts with the same charges. The irregularities of forms raised with the amendment sought relating to the context and generalization can also be found in other parts of the indictment. In paragraph 47, 48 & 49 for example it is question of release of Bendito da Costa and others in a paragraph relating to the detention of Aurea Cardoso. However, such an imperfection of form does not put any obstacle for the accused to understand the indictment and then for the continuation of the trial.
- 29 The court considers the amendment sought by the Prosecution as an effort to clarify the participation of the acused Sabino Gouveia leite. It is obvious, as the defense underlined that the idea of doing it is an after thought. Otherwise, the Prosecution should have done it earlier. The Prosecution remembered to do it after the submission of the original indictment and previous amendment of that indictment. The court realizes from the statements already on the file that the witnesses Bendito da Costa, Aurea Cardoso and Jose Gouveia Leite have made specific reference to Sabino Gouveia Leite in relation to Count 1 (against Jose Cardoso @ Mouzhino), Count 14 (in relation to Joao Franca Da Silva @Jhoni Franca) and Count 22 (in relation to Sabino Gouveia Leite). It is Obvious that the Prosecution forgot to do

it previously, first in its original indictment, and after in its amended indictment.

- 30 This Court shall therefore admits the submissions of the new allegations of facts which are of the nature to clarify and to state clearly the facts supporting the charges against the accused. The Defense will have an opportunity to challenge those facts with respect to their shortcomings, and the Court would analyze their probative value later, during its final findings.
- 31 It is true that the amendment proposed in paragraph 60A does not allege any specific nor approximate details of time, date and location. The Court realizes that the Prosecution should have made such a clarification of the facts in order for the defense to verify and challenge them. The accused was already charged in count 24 of the indictment with respect to the offences the Prosecution is still trying to clarify with the submission of those new allegations of facts. Since those facts are supporting an existing charge in the indictment, it is still the duty of the Public prosecutor to prove those facts with all the required clarifications. The right of the defense to challenge them remains specifically in the case the prosecution is not able to clarify its submissions.
- 32 The Court finds also that the amendment sought is supported by the statements already on file in which the witnesses Victim A, Victim B and Victim C refer to those facts in relation to Count 4 (against Jose Cardoso @ Mouzhino), Count 17 (in relation to Joao Franca Da Silva @Jhoni Franca) and Count 24 (in relation to Sabino Gouveia Leite)).

**With respect to the fact that the amendments sought are of the nature to prejudice and penalize the accused**

- 33 The Court agrees with the defense that the accused has some rights as provided by Section 6 of UNTAET Regulation 2000/30. These rights include as underlined by the defense the right to be informed in detail of the nature and cause of the charges against him (6.b), the right to have adequate time and facilities for the preparation of his defense (6.d), and the right to be tried without undue delay (6.f).

- 34 With respect to the right to be informed in detail of the nature and cause of charges, the Court is of the opinion that it is what the prosecution is requiring to do, to present an indictment in a form so that the accused understands the nature and substance of the charges against him and the facts supporting the charges. The right of the accused to a fair trial includes that there be sufficient certainty and clarity in the charges framed against him and to enable an adequate defense to be presented on his behalf.
- 35 Furthermore, there is no additional charge against the accused. The court refer to the trial Chamber decision in the ICTY case of prosecutor v. Jelusic<sup>7</sup> where the court stated: *Considering therefore that the right of the accused to be informed as quickly as possible of the charges brought against him at the date of his arrest would not be affected insofar as there will be no additional charges, "*
- 36 With respect to the right to have enough time and facilities for the preparation of his defense, it is underlined by the defense that the amendment sought will violate the rights of the accused, especially at the time when the defense team has already done its investigations in Lolotoe. He referred again to Musema case to say that the later the request for amendment the more likely it is to penalize the accused. The Appeals chamber of the ICTR stated: *"It further stated that the Trial Chamber must be particularly vigilant in respecting the fundamental rights of the accused before it authorizes an amendment to the indictment. The Trial chamber must ask itself if the amendment unjustly penalizes the accused in the conduct of his defense, and must keep in mind the fact that the later the request for amendment, the more likely it is to penalizes the accused<sup>8</sup>."*
- 37 The Court is of the opinion that the right of the accused to have adequate time for the preparation of his defense will not be prejudiced by the amendment sought, because if necessary and requested the court will grant additional time to the defense to prepare the case. With respect to that issue, Section 32.3 UNTAET Regulation is clear. In the case the amendment of an indictment is granted by the Court, it allow that the accused, if he so requests, to be granted a delay in the

<sup>7</sup> ICTY, Prosecutor v. Goran Jelusic and Ranko Celic, decision of 12 May 2002, paragraph 2, p.2

<sup>8</sup> ICTY-96-13-A, Alfred Musema Vs Prosecutor,

proceedings to prepare his defense with respect to any new matters alleged, and to propose and examine new evidence.

38 In relation to the right to be tried without undue delay, this Court does not see any violation of the rights of the accused since there is no additional charge to the existing indictment. There are only new facts to support the existing indictment. This Court is of the opinion that the need for a good administration of justice and the requirement of a fair and a expeditious trial leads to grant leave to the prosecution to bring facts especially at the moment the Court is going to start hearing the evidence.

39 Definitely, and considering the previous paragraphs, there was nothing raised by the Defense in its submission to show that the accused will be prejudiced by the amendments sought in the present case.

40 For all those reasons;

#### **The Court**

41 Grants leave to the Prosecution to amend the indictment

42 **Decided** that the proposed amendment be part of the **indictment**

43 **Says that** the probative value of the prosecution's allegations will be **analyzed** with the factual findings of the Court.

Dili, March 27, 2002

Judge Sylver Ntukamazina, Presiding  
Judge Benfeito Mosso Ramos  
Judge Maria Natercia Gusmao Perreira