



JUSTICE UPDATE

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ADMISSIBILITY OF PRIOR STATEMENTS AS EVIDENCE BEFORE THE SPSC

On 18th October, in the case of Alarico Mesquita and others (Case 28/2003), the Special Panel for Serious Crimes (SPSC) unanimously decided to admit as evidence a previous statement given by the accused to an investigator. Judge Pereira, Judge Rapoza and Judge Schmid composed the Panel.

This decision comes after a decision issued in October in the case of Francisco Pereira a.k.a Siku Gagu (Case No. 34/2003), in which the Special Panel by majority excluded from the list of evidence a previous statement given by the accused to an investigator. Judge Florit, Judge Helder and Judge Rapoza, the latter having presented a separate dissenting opinion, composed the Panel.

Before the decisions in Alarico Mesquita and Siku Gagu, the SPSC had already decided on whether or not previous statements can be admitted as evidence during trial proceedings. Generally speaking, civil law systems tend not to admit such statements while the common law system takes the opposite view. The Transitional Rules of Criminal Procedure (TRCP, Regulation 2000/30) contain attributes of both the civil law and the common law systems and their interpretation as to this issue has split evenly the opinions of international and Timorese judges. In deciding whether or not to admit previous statements the main considerations of the SPSC have been to guarantee the accused his right to silence while acting in compliance with the Rules of Evidence of the TRCP.

The decision of whether or not to admit the accused's previous statements is a crucial one in cases in which the accused gave the statement during the investigating proceedings – whether before the police, an investigator or an investigating judge – and chose to remain silent during trial. The admission of the statement in such cases can have substantial weight on the Panel's decision of either acquitting or convicting the accused.

The right to silence

Whenever the Panel has decided to exclude from the list of substantive evidence the statement of the accused, it has invariably considered that admitting the statement would amount to a violation of the right to silence of the accused.

According to Section 6.2 (a) TRCP, the suspect shall be informed immediately upon arrest of the right to remain silent and that if he chooses to do so that silence will not be interpreted as an admission.

Section 6.3 (h) further provides that the Public Prosecutor shall inform the accused at all stages of the right not to be compelled to testify against himself or to admit guilt, and that if he chooses not to speak in the proceeding, such silence will not be held against him or her in the determination of innocence or guilt.

Finally, the accused is given the right to remain silent during trial proceedings. Section 30.4 imposes on the Court the duty to remind the accused of his right to silence.

The interpretation of the content of the right to silence has differed greatly throughout the SPSC case-law. Decisions not admitting previous statements as evidence are based on the grounds that to admit those statements would be a violation of the right to silence that the accused enjoys during trial proceedings. In *Anigio de Oliveira* (Case No. 07/2001) the Panel, composed of judges from civil law systems, excluded from evidence a previous statement although the accused had given it before the investigating judge. The Panel considered that to admit that statement when the accused has chosen to remain silent in trial would amount to a suppression of that right and would make the defendant a subject of evidence against himself.

In the more recent decision of *Siku Gagu*, the Panel also excluded the statement of the accused from evidence at trial on the grounds that such would amount to a violation of his right to silence. However, this panel draw a distinction between statements given before the investigating judge from those given to other entities. The Panel considered Section 29A and 33.4 TRCP limit the declarations of the accused that can be admissible to those given before an investigating judge. In the present case the statement had been given to an investigator and therefore it could not be admitted as evidence. It is interesting to note that if the Panel had adopted this view in *Anigio de Oliveira*, the statement of the accused would have been admitted as evidence.

Rules of evidence

In *Damiao da Costa Nunes* (Case No. 01/2003), a case decided after *Anigio de Oliveira* and before *Siku Gagu*, the Panel, composed by judges from common law system countries, decided to admit the prior statement of the accused as evidence at trial. The Panel considered that acting according to the discretion given by Section 34.1 of the Rules of Evidence the Court may admit any evidence that it deems relevant and has probative value and therefore it may admit previous statements.

A similar approach was adopted by Judge Rapoza in his dissenting opinion in *Siku Gagu*. According to Judge Rapoza, and pursuant to Section 34.1, a defendant's prior statement to an investigator may be considered as evidence. However, admissible statements must fulfil certain requirements. Section 34.2 states that evidence that casts doubts as to its reliability or that would seriously damage the integrity of the proceedings shall not be admitted. In order to establish whether or not a statement is reliable (and therefore whether or not it is admissible) the Court must satisfy itself that the defendant gave the statement after being informed of his right to silence and of his understanding of the nature of the right and that the defendant knowingly and voluntarily waived it. If a statement fails to fulfil these requirements it cannot be admitted as evidence because its reliability is jeopardised. In cases in which the Court

considers the statement to be admissible, the defendant still enjoys the right to remain silent during trial proceedings. “The purpose of the right to silence is to protect a person from being compelled to make a statement against his will.” Therefore by admitting as evidence a prior statement given voluntarily there is no compulsion. The defendant’s right to silence is not so broad as to exclude from evidence a previous statement given to an investigator. The purpose of Section 6.2 (a), in requiring the defendant to be informed of his right to silence immediately upon arrest, is to guarantee that if he chooses to remain silent, that silence will not be used as evidence against him, and not to imply that if he chooses to give a statement that will also not be used against him. An *a contrario* interpretation of this provision strongly indicates that if the defendant chooses to give a statement that admission can be used as evidence in trial. In sum, if the Court is satisfied that the statement was given voluntarily it can, pursuant Section 34.1 and without denying the defendant the right to silence, admit it as evidence, if the Court considers it to be relevant and to have probative value.

The decision in Alarico Mesquita followed this interpretation of the law. The accused had given a statement to an investigator and chosen to remain silent in trial. The Court considered itself satisfied that the statement was reliable through the testimony of the interpreter that had been present when the statement was given, and admitted the statement as evidence acting in accordance with Section 34.2 TRCP.