

REPUBLICA DEMOCRATICA DE TIMOR LESTE



DISTRICT COURT OF DILI

SCU Registry
Received on

11 / 03 / 04

V. K. K. K.

Before the Special Panel for Serious Crimes

Case No 10 / 2003

THE DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

v

MATEUS LAO aka ENA POTO

DEFENCE REPLY TO PROSECUTION RESPONSE DATED 20 OCTOBER
2004 TO DEFENCE MOTION FOR FURTHER DISCOVERY

For the Office of the Prosecutor :
Charles Nsabimana

For the Defence Lawyers Unit:
Sebastian Appenah

TO THE SPECIAL PANEL FOR SERIOUS CRIMES AND THE PROSECUTOR :

The Defence replies as follows to the Prosecution Response dated 20 October 2004 :

Re: paragraphs 6 to 8 of the Prosecution Response

Tape recordings

1. The prosecution has , in its response to the specific request of the defence for discovery of the items listed under sub-paragraph 5. 6 , failed to address the issue on the existence or otherwise of the requested items .

Other information and materials

2. No response on the request for discovery of the items specifically listed under sub-paragraphs 5. 7 to 5. 13 of the defence motion has been furnished by the prosecutor. He has completely avoided responding to the issues raised and has instead responded on how , in his subjective opinion , a decision was arrived at to justify filing an indictment against the accused. This issue has not been raised by the defence in its motion , and is accordingly totally irrelevant for purposes of the motion before the court.

3. The information and materials requested under sub-paragraphs 5. 7 to 5. 13 is relevant and material to the case against the accused and falls under the extensive disclosure obligations imposed upon prosecution authorities to " ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients " ¹, and to perform prosecutorial duties subject to the constitutionally imposed criteria of " *legality, objectivity and impartiality.* " ²

The prosecutor has adopted a strategy of selective prosecution in this case. Augustinho Sufa was initially interviewed as a suspect in this case and gave an extremely incriminating statement concerning his role in this and another matter. Logic dictates that this interview could only have taken place after the prosecution had received certain information from a person or persons concerning Augustinho Sufa in respect of this particular case . All information , including the investigation file, relating to this former suspect, now a prosecution witness , must , in the interests of the proper administration of justice therefore be put before the court by way of disclosure.

4. The prosecution's failure to address and respond to the defence request for disclosure of such information and materials , particularly if it could be of assistance to the defence for purposes of impeachment , and of value to the court in determining the reliability of evidence , causes substantial prejudice to the accused in that such failure affects the accused's right to a fair trial. Furthermore, non-disclosure could materially affect the outcome of the proceedings in that potentially vital information contained in the investigation file

¹ UN Principles on the Role of Lawyers, Principle 21

² RDTL Constitution , Section 132.3

which could shed a different light on the case , could , with respect , be suppressed.

5. Strict compliance with disclosure obligations is essential to a fair trial. To sidestep the issue as the prosecution has done here, does not serve the fair and proper administration of justice . The court is duty bound to compel the prosecution to respond to the issues raised by, and to provide , the defence with all the information and materials asked for in terms of sub-paragraphs 5. 7 to 5. 13 of the defence motion and to place the entire investigation file before the court .

Re: paragraphs paragraphs 9 to 11

Complete Report on the Indonesian Commission on Human Rights Violations

6. The fact that the document in question constitutes an " executive summary " renders it incomplete and unreliable . The summary focuses only on certain incidents in certain areas of East Timor and is in fact totally silent on Oecusse . In the absence of the complete report being placed before the court , one is entitled to conclude that this commission focused only on incidents in regions of the country mentioned in the report and not Oecusse .
7. To attribute general and specific findings by the commission in respect of other parts of the country, in the clear absence of any specific findings in relation to Oecusse in this summary , would be manifestly unfair. Reliance cannot be placed on , and conclusions cannot be drawn from , a summary of a document without the complete version being made available to the defence and the court for inspection.
8. In the absence of disclosure and inspection of the full and complete report, to accept the argument by the prosecutor that : the " executive summary " is " so self explanatory and so clear and precise " ; that admission of documentary evidence in other cases amounts to " jurisprudence of the Special Panels ... and cannot be challenged by the Defence " ; and that judicial notice should be taken of the contents of this document , would be contrary to the interests of the fair and proper administration of justice.

For the court to be able to attach any weight to the executive summary , and for the defence to evaluate any findings contained therein in the context of this particular case, disclosure of the full and complete report for inspection by the court and defence is necessary.

In the event of the complete report not being in the possession of the prosecution, the prosecutor is requested to inform the court of the source of this executive summary and how it came to be in the possession of the prosecution; and why the court is being asked to consider what, in our view , would amount to a highly questionable document , as evidence in support of an essential element of the offence charged in the indictment.

Re: paragraphs 12 to 14

Crime Scene Report, Exhumation/Autopsy Report, Photographs

9. The defence notes that given the nature of charge being brought against the accused , potentially valuable evidence has not been properly secured by the prosecution . This is extremely disturbing as one of the fundamentals of police investigations into alleged killings is the acquisition and subsequent securing of evidence , particularly forensic evidence, which would have a bearing on issues of guilt or innocence in any given case.
10. The prosecution has responded that forensic work at the time was undertaken by military personnel , implying that they may have been unskilled in required procedures, and that most of the items , without specifying which items were in fact handed over, relating to the period 5 April 2000 to 19 April 2000 were not properly handed over , and for this reason is unable to discover the items requested under sub-headings 5. 1 to 5. 5 by the defence.
11. Given the background to the incidents and the sensitive nature of the work , it is , in our opinion , highly unlikely that unskilled personnel , at all material times acting under the direction and control of the prosecution, would have been assigned to carry out exhumations and autopsies and that evidence and documentation would not have been secured.
12. The defence notes from the prosecution response that an exhumation was carried out during the period 5 to 12 April 2000, and an autopsy was held on 19 April 2000. From what source has this information been obtained ? These details must, in our view, have been obtained from some documentary source. In the absence of proof to the contrary, which the prosecution has not offered, the defence has reason to believe that these details could have been obtained from the documents the defence is requesting the prosecution to disclose.

Conclusion

13. The defence , with respect, is of the view that this matter has not met the standard of a full, fair and impartial investigation. On this basis the defence , in the interests of the proper administration of justice , seeks disclosure of the items and materials listed in sub-paragraphs 5.1 to 5. 13 of its original motion.

Wherefore , the Defence prays that the prosecution response be rejected and that the relief prayed for in the defence founding motion be granted.

DATED THIS 2ND DAY OF NOVEMBER 2004



.....
Sebastian Appenah
Counsel for Mateus Lao aka Ena Poto