



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

**TRIBUNAL DISTRIITAL de DILI
SECÇÃO CRIMES GRAVES**

DISTRICT COURT of DILI

SPECIAL PANEL for SERIOUS CRIMES

Case No. 10 /2003

Date: 3 December 2004

Original: English

**Before :Judge Brigitte Schmid, Presiding
Judge Samith de Silva
Judge Maria Pereira**

Registrar: Joao Naro

The Prosecutor

v.

Mateus Lao a.k.a. Ena Poto

JUDGEMENT

Public Prosecutor: Mr. Charles Nsabimana

Defence Counsel: Mr. Sebastian Appenah

A. THE SPECIAL PANELS

1. The Special Panels for Serious Crimes within the District Court of Dili in East Timor (hereinafter: Special Panel) were established within the District Court of Dili pursuant to Sec. 10 UNTAET Regulation (hereafter "Reg.") 2000/11 as amended by Reg. 2001/25, in order to exercise jurisdiction over the criminal offences (inter alia) of Crimes against Humanity, as specified in Sec. 5 Reg. 2000/15.

All Reg. referred to in this judgement, have been upheld, after East Timor was recognized as independent on 20 May 2002, by Section 165 of the Constitution of the Democratic Republic of East Timor, which came into force the same day.

2. According to Sec. 3 Reg. 2000/15 the Special Panel shall apply foremost

- the law of East Timor as promulgated by Sec. Reg. 1999/1, which are " the laws applied in East Timor prior to 25 October 1999,**
- subsequent UNTAET Regulations,**
- subsequent laws of democratically established institutions of East Timor.**

3. The Special Panel has held that "the laws applied in East Timor prior to 25 October 1999" are Indonesian laws (Prosecutor v. Joao Sarmiento and Domingos Mendonca, Decision, 24 July 2003). This opinion was confirmed by Law No.10/2003 published on 10 December 2003.

B. PROCEDURAL BACKGROUND

4. On 28 February the Public Prosecutor before the Special Panel filed a written Indictment in English against the accused charging him with the Crime against Humanity of Murder, according to Sec. 5.1 (a) of UNTAET Reg.2000/15.

The Court Clerk provided a notification of the receipt of the indictment by the Defence Counsel on 11 March 2003 pursuant to Sec. 26 Reg. 2000/30.

The case was assigned to the present Presiding Judge on 18 June 2004.

The Preliminary Hearing was held on 13 September 2004 according to Sec29 Reg.2000/15.

The trial hearing commenced on 10 November 2004 and ended on 16 November 2004 when the Disposition of the Decision was rendered.

Interpreters for English, Tetum and Baikeno assisted before the Court.

C. FACTUAL FINDINGS

1. Account of the proven facts (according to Sec. 39.3 (c) Reg. 2000/30)

The District of Oecussi is an enclave of East Timor. It is about 43 kms distant from the rest of East Timor. It is landlocked on three sides by the Indonesian territory of West Timor; the Selat Ombai Sea is to the north. The District of Oecussi, is divided into four Subdistricts, namely Pantemakassar A and B, Nitibe Oesilo and Passabe.

The Sakunar militia operated within the District of Oecussi from approximately April to October 1999. Gabriel Kolo was the chief of Abani village in Passabe Subdistrict and also commander of the Sakunar militia in that village, Andre Ulan was a "babinsa" (military commander on village level).

Mateus Lao a.k.a Ena Poto was a member of the Sakunar militia in Naetuna village, Passabe Subdistrict.

Yosef Maknaun, his pregnant wife and their 4 children lived in Kiobiselo village, Nitibe Subdistrict.

Following the attack on the village of Kiobiselo on 8 September 1999 by the Sakunar militia, Yosef Maknaun and his family started to flee to West Timor to seek refuge on 9 September 1999.

Yosef Maknaun and his wife, were carrying 2 children each.

Yosef Maknaun wore a chocolate brown T-shirt and a cotton Tais (Sarong) which was white and orange on the bottom with a kind of fringe, and white in the middle. Under the Tais he wore chocolate brown shorts; on his shoulder he carried a long sleeved shirt.

On their way, at a crossroad near a dried creek bed, at Sassi on the Oecussi/West Timor border, they came across a large number of Sakunar militia members including Gabriel Kolo, Andre Ulan, Liberatus Maunu, Mateus Taboe, Alexio Sipa, Agostinho Sipa, the accused and 3 more men unknown by name. The militia there was composed of ten groups, of 10 members each. The militia members including the accused, whose heads were tied with red and white headbands, were armed with machetes and swords. Gabriel Kolo, Andre Ulan, Mateus Taboe and Liberatus Maunu additionally were holding guns.

The militia, including the accused, approached the family, ordered Yosef Maknaun to drop the children and forced him to go with them. Yosef Maknaun took his bag to hand it over to his wife, dropped the children and was taken away by the militia. He was then dragged away by Liberatus Maunu and handed over to the accused.

The wife with their children had to continue their way to Mainabau.

Once the wife and children were out of sight, Yosef Maknaun on orders by Gabriel Kolo and Andre Ulan to kill him, was first hacked with a machete on his shoulder by the accused. Yosef Maknaun started to run away, was chased by Andre Ulan, Gabriel Kolo and Liberatus Maunu and the other militia men, and fell. When they caught up with him after app. 4.1 meters, the accused hacked Yosef Maknaun's face with his machete. Liberatus Mauno stabbed him in the side. After that the militia men ran away.

Yosef Maknaun died of his injuries.

The body of Yosef Maknaun was left unburied.

Some time in October 1999 the victim's brother recovered the remains to bury them.

The accused knew that neither he nor the other militia members of his group were entitled to arrest, detain and inflict bodily harm on perceived or real supporters of Independence.

The acts and omissions by the accused and the acts of his co- militia members were part of a widespread attack by the Indonesian military on the civilian population of East Timor to terrorize those civilians who resisted the Indonesian occupation and wanted independence. This context was known to the accused.

2. Factual grounds (according to Sec. 39.3 (d) Reg.2000/30)

a) The above account of the proven facts is based on the following :

The evidence for the systematic attack on the civilian population to intimidate supporters of independence from Indonesia after the announcement of the popular consultation on 4 September 1999 and the Sakunar militia operating within the district of Oecussi is based on historical facts which can be ascertained from history books (ct. for example James Dunn, East Timor 3rd edition 2003 page 352). Supplementary use was made of the Executive Summary Report of the Indonesian Commission on Human Rights Violation in East Timor, January 2000, Identical Letters dated 31 January 2000, from the Secretary General addressed to the President of the General Assembly – A/54/726,S/2000/59 Note by the Secretary General on the Situation of Human Right in East Timor – A/54/660, Commission on Human Rights Fifty-Sixth Session Agenda, Items 9 and 14 (c)- E/CN.4/2000/83/Add.3,

Report on Human Rights Violations During 1999 in Oecussi District.

The account of the accused being a member of the Sakunar militia in Passabe, the arrest, the separation from his family and subsequent injuring and killing of Yosef Maknaun on or about 9 September 1999 on the border of Oecussi and West Timor close to Nainaban in West Timor is based on the testimony given before the Court by Paulina Foni, Agustinho Sipa and Armando Tanes which insofar seemed credible and in the main issues consistent with each other. The testimony of the witnesses is perfectly consistent for the involvement of the accused in the killing of Yosef Maknaun .

It is corroborated by the statement made by the accused himself before the Investigating Judge.

The identity of Yosef Maknaun with the human remains found by Armando Tanes is established by the parts of garments secured on the scene, which consist with the clothes Paulina Foni described as her husband's.

The identity of the victim further corroborated by the clothes found near the victim's incomplete skeleton according to Autopsy/Anthropologist's report for presumed body of Yosef Maknaun dated 19 April 2000.

In the Minutes of Detention Hearing dated 25 November 2002, which are admitted into evidence pursuant to Sec. 33.4 Reg. 2000/30, the accused admitted that he was a militia member and that he struck the victim twice using a machete. He provided the circumstances of the killing of a victim whose name was unknown to him. Those circumstances are identical with those described by Paulina Foni and Agustinho Sipa.

b) The claims made by the Defence proved unfounded:

The person who was killed by the accused was Yosef Maknaun . Even though the Report on Human Rights Violations in Oecussi District lists at least 63 other persons killed around the same time at the same location, Yosef Maknaun has been identified as the victim beyond any reasonable doubt.

The injuries described by witness Agustinho Sipa were appropriate to cause the victim's death.

D. LEGAL GROUNDS (acc. to Sec. 39.4 (d) Reg.2000/30)

1. As mentioned above the Court is convinced that Yosef Maknaun died after the militia had left the crime scene of the inflicted injuries. The amount and the severity of injuries were a substantial cause for the victim's death.

The accused knew that the wounds were likely to cause the death of Yosef Maknaun.

He also knew that these acts were part of a systematic attack on the civilian population .

The accused therefore committed the Crime against Humanity of Murder under customary International Criminal Law as recognized by Art. 6 (c) Nuremberg Charter, Art. 5 (c) Tokyo Charter, Art. 5 (a) ICTY Statute, Art. 3 (a) ICTR Statute and Art. 7 .1 (a) ICC Statute and pursuant to Sec. 5.1 (a) Reg. 2000/15.

The accused committed the crime jointly with other persons (Sec. 14.3 (a) Reg. 2000/15).

2. Sentencing

a) Mitigating circumstances :

The accused has no previous criminal conviction.

He is a married man with young children.

The Special Panel has further taken into account the general circumstances in 1999 in East Timor, when the militia could impose violence upon the civilian population unhindered.

The accused was ordered by the militia leaders to kill the victim Yosef Maknaun; this order cannot be considered as grounds to exclude criminal responsibility, according to Sec. 21 Reg. 2000/15. The Special Panel nevertheless takes in account that a considerable pressure was exerted on the accused to act against the victim, as the militia leaders made a threat against himself and his family.

However, it cannot be assumed that the conduct which constituted the crime has been caused by duress resulting from a threat of imminent death or continuing or imminent serious bodily harm against the accused (according to Sec. 19.1 (d) Reg 2000/15). The witness Agostinho Sipa before his testimony in this trial never mentioned any allegation contending a gun being held at the back of the accused with the words "when you don't kill him, you will be killed "

The accused himself in his Detention Review Hearing dated 25 November 2002 never raised this allegation. So there is no reasonable proof that any threat of death has been imposed on the accused.

b) Aggravating circumstances

Yosef Maknaun was taken away from his family after being ordered to drop his 2 children he was carrying. His pregnant wife with their 4 children had to continue her way without him, not knowing what would happen to him.

The victim did not belong to any political group. He was walking peacefully with his family, when he was illegally arrested. He was unarmed.

The victim was chased and injured several times with severe cruelty.

The seriously hacked victim was left helplessly to die.

b) Sentencing policy

According to Sec.10.1 (a) Reg. 2000/15 , for the crime referred to in Sec.5.1 (a) of the aforementioned Regulation , the Panel had recourse to the general practise in the courts of East Timor and in the International Tribunals , and took into account the individual circumstances of the accused and the gravity of his offence, and all the aggravating and mitigating circumstances.

The penalty imposed on the accused found guilty by the Panel is intended, on the one hand, as retribution against the accused, whose crime must be seen to be punished. On the other hand it is intended as deterrence, namely to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate such serious violations of law and human rights.

The additional requirement for deterrence concerning serious crimes committed in East Timor in 1999 is to avoid impunity and thereby to promote national reconciliation and the restoration of peace .

In favour of the accused as an Oecussi resident, the court did not order the immediate imprisonment to give him the opportunity to settle his matters beforehand.

E. Disposition

For the abovementioned reasons the Court on 16 November 2004 convicts and sentences as follows :

1. The accused is guilty of

the Crime against Humanity of Murder according to Sec. 5.1 (a) Reg. 2000/15 committed against Yosef Maknaun and is sentenced to 8 years of imprisonment.

2. The accused has to bear the cost of the proceedings.

3. The accused is ordered according to Sec. 42.6 Reg. 2000/30 to commence his prison term on Tuesday, 14 December 2004.

Rendered and delivered on 3 December 2004

Judge Brigitte Schmid, Presiding

Brigitte Schmid

Judge Samith de Silva

Samith de Silva

Judge Maria Pereira

Maria Pereira

(To be translated into Tetum, the English text being authoritative)