

COURT OF APPEAL

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**Before Judges of the Court of Appeals:**

**Judge Claudio de Jesus Ximenes, .....Chief**

**Judge Jose Maria Calvario.....Member**

**Judge Jacinta C. da Costa.....Reporter**

**Case No 40/03**

**By the name of**

**Beny Ludji as the Appellant/party applying for appeal**

**Against**

**General Prosecutor as the Respondent/party appealed**

The Panel of Judges of the High Court have received the appeal case documents including reading the appeal submitted by the Lawyer for the Appellant which in this matter is Mr. Alan Gutman dated 2 July 2003 that mainly reject the decision from the special panel of judges Dili District Court dated 20 June 2003 against his client by the name of Beny Ludji.

**Court Decision**

1. The party requesting is accused Beny Ludji. The request for this appeal was made by the appellant against a decision of the special panel of judges dated 20 June 2003 where the Chief of the Panel decided to extend the initial detention period of the accused until the final decision. The appellant requests the High Court to: cancel all Judicial acts and Detention decisions that were announced on 20 June 2003, ordering the immediate release of Beny Ludji or the conditional release of Beny Ludji based on the appeal reasons as described in the appeal. The Respondent in this matter is the General Prosecutor supporting the decision of the Special Panel Judges Dili District Court.
2. The High Court has held a hearing on 11 August 2003 and has heard both parties where the essence of the two parties, Appellant stays with his appeal and also the Respondent stays against the appeal that has been submitted to the court.
3. This court does not agree to the grounds for appeal in this matter. We agree that the first Level Court has decided on this case in the period determined by law. Thus, the Decision of the Chief of Judge Panel of the Special Panel dated 20 June 2003 is legal. Described below is why this appeal is rejected.
4. In reality the process of arrest and detention of the accused Beny Ludji is described as follows:
  - That Beny Ludji was arrested on Friday 4 April 2003 due to illegally entering into East Timor Territory;
  - That on Monday 7 April 2003 the accused was taken to the serious crimes prosecution office by PNTL, and at the same time a request for

an arrest warrant was made and that warrant was issued on the same day by the investigating judge;

- On Thursday 10 April 2003, an extension of detention was issued by the investigating judge that the accused be detained in Becora prison for 30 days;
- On Friday 9 May 2003, the investigating judge for serious crimes ordered that the process of detention on the accused was continued for 30 days and this warrant of detention ended on 6 June 2003;
- Then the indictment against the accused was submitted to the Court to be tried.

5. The grounds put forward by the appellant in this appeal are as follows firstly that the Chief of Panel of Judges failed to adopt the opposition of the Defence that the Court has no jurisdiction to try the case of Beny Ludji because the arrest of Beny Ludji was implemented illegally and there has been a violation of Beny Ludji's fundamental rights. Thus, the appellant puts forward that it is an act that violated the rights of the accused, due to this the prosecutor is not allowed to take the accused in front of the investigating judge and finally the court has not jurisdiction to hear this case.

The general prosecutor in his response submitted that the chief of panel is right to decide to have jurisdiction in this case. *Because the arrest and detention of the accused is an act based on law (Prosecutor opposition to appeal dated 3 July 2003 regarding the matter of accused Beny Ludji's arrest page 2-5).*

In his decision, the chief judge put forth that the facts for consideration in deciding the status of the accused:

*After reading and evaluating all the arguments submitted by the prosecutor regarding the request to extend temporary detention of the accused and from the legal representative of the accused regarding the freedom of his client, the court took a number of important points that were thought relevant to making a decision regarding the status of accused which is as follows:*

*The accused beforehand was contained in the list of people wanted by the authorities in Timor Loro Sa'e, due to their involvement in the criminal violation actions following the Referendum which represents initial evidence which should be respected.*

*It was not just this that supported the process of arrest and detention however there was other evidence that was judged by the court that the evidence stated a truth regarding the incident of murder or the victim Guido Alves Correia such as the eye witness directly witnessed the criminal incident.*

*Apart from this, the accused entered the territory of Timor Leste without official documents.*

Based on the facts described above by the Prosecutor in opposition to the appeal regarding the arrest of the accused and the decision by the Chief of Special Panel, thus the high Court is of the opinion that the ground of the appellant in this appeal are rejected and state that the special panel has jurisdiction over this case because the

arrest which was carried out by the PKF on Beny Ludji was legal because it was based on UN Security Council Resolution No 1410 (2000) that was adopted on 7 May 2000 which gave the mandate to UNMISSET which in this matter is PKF in UNMISSET to implement its mandate in Timor Leste including the mandate for external security and Customs/Border Control. That the accused Beny Ludji was arrested on the Timor Leste side of the Tactical Control Line. And at that time examined by PKF, the accused did not have any identity documents, and he had a number of cards that showed his involvement as an Aitarak 'commander company A' member along with a permission card to use an M-16. Due to this on the same day he was handed over to the PNTL/UNPOL then taken to the Prosecution office and by the prosecutor he was brought before the investigating judge and after the indictment was complete he was taken before the Special Panel.

6. Then in the second grounds for the appeal, the appellant submitted that the Chief of Panel failed to implement the law that exists and that this represents a big violation with the continuation of retroactive detention of Beny Ludji until the final decision.

*Regarding this matter the Prosecutor responded in his response to the appeal that the application to extend detention was carried out in accordance with the time determined as the request from the defence to reject the continuation of the detention of the accused was carried out in accordance with the time determined. Thus, the decision of the chief of panel to extend the detention was based on law and the decision to detain the accused until the final judgement is legal.*

The High Court is of the opinion that the decision from the chief of the special panel dated 20 June 2003 was not a retroactive decision and did not violate the rights of the accused because based on article 20.10 and article 20.12 of UNTAET Regulation No. 30/2000 as amended by Regulation No 25/2001 as the legal grounds for the decision. Described in the determination of Article 20.10 that the suspect can be in pre-trial detention for a period no longer than six months from the date of arrest. Thus, the extension of the detention can be carried out with a time limit of a maximum of six months. But in certain circumstances with consideration of the condition of Timor Leste, in complex cases and crimes with a sentence of 10 or more years, on the request of the prosecutor, the judge handling the matter of initial detention could implement an extension of detention more than 6 months as is described in Article 20.12 of this regulation. Thus in this case the detention of the accused is still within the time limit determined by law that is the 6 month period that is determined in Article 20.10 and in certain conditions that are related to the condition in Timor Leste and the sentence of this matter where the accused is indicted for a jail sentence of more than 10 years on the request of the prosecution thus the initial detention can be extended for more than 6 months as determined in Article 20.12 of this regulation.

The High Court considers that in this case, Beny Ludji was arrested and detained in April 2003 and on 4 June 2003, the case was submitted before the judge of the Special Panel of Dili District Court. With the accusation that the accused fulfilled the requirements of a crime against humanity in the form of his involvement in the murder of Guido Alves Correia in Mascarinhas Dili, in 1999. Thus on 20 June 2003 the chief of panel handling the case issued a decision to extend the preventative detention of the accused Beny Ludji until the final decision. This decision was not a retroactive decision and did not violate the rights of the accused because the judge

who handled this matter decided on it still within the time limit determined by law as stated in the Criminal Procedure Code.

In this case the first decision that validated the initial detention of accused Beny Ludji was issued on 10 April 2003, has not yet been amended. The decision of 20 June 2003 was just to confirm the matters that had been decided on 10 April 2003 and to extend the situation until the final decision based on article 20.12 Regulation 30/2000. The decision of the initial detention on 10 April 2003 is valid for 6 months, except if it has been amended. In reality, it has not passed 6 months since 10 April 2003. Due to this the decision on 20 June 2003 that stated the accused remain in initial detention is legal and in situations where it is necessary the initial detention of the accused can be extended more than 6 months as described in Article 20.12 of this regulation. Thus, the grounds of the appellant must be sidelined.

7. In the third grounds the appellant also raised the problem regarding that the request for a hearing to release the accused Beny Ludji was not immediately answered by the chief of panel that according to him the chief of panel committed a violation of the accused rights, for a fair trial based on article 2.1 UNTAET Regulation No. 30/2000.

The Prosecutor also responded this to that the *decision to see whether or not the grounds to detain a person in initial detention is not to be seen in determining the criminal charges against a person. The prosecutor submitted that there were no requirements determined by law in Regulation 30/2000 that states the accused has the right to be heard in relation with the decision for detention. Article 20.9 Regulation 30/2000 as an example looks more towards the review of the detention of a suspect every month by the investigating judge.*

According the opinion of the High Court that in this matter the appeal brings forth two different issues that is the issue regarding the extension of initial detention and the review of initial detention extension within 30 days due to this there needs to be an explanation of the two issues.

It is clear that a review of the initial detention is done every 30 days as intended in Article 20.9 of the Criminal Procedure Code, UNTAET Regulation 30/2000 as amended by Regulation 25/2001 that a judge only has the obligation to review the initial detention period every 30 days if there are new facts or evidence that supports an act of changing limits or freedom of the suspect/accused.

While the initial detention extension can be done within 6 months as is described in Article 20.10 or more than 6 months as described in Article 20.11 and 20.12 Regulation 30/2000 as amended by Regulation 25/2001.

Therefore, in this case although it was past 30 days before the extension of the initial detention this does not mean that accused Beny Ludji was in illegal detention. Because seeing the date of the arrest until the decision of 20 June 2003 was issued the accused had not been detained for 6 months.

Besides this it is known that there is no legal determination, that makes a judge whether it be an investigating judge or a panel of judges handling the matter of initial detention have to review the initial detention of a suspect/accused via a trial or

hearing open to the public, that must have the parties in attendance. Thus there was no violation of the accused rights regarding a fair trial as intended in Article 2.1 Regulation 30/2000 that was put forward by the appellant because this article is more intended for an actual trial of the case not just to see whether there are strong grounds or not for a person to be detained in initial detention. Due to this, the reason of the appellant has no grounds and is rejected.

8. Then in the fourth grounds the appellant puts forward that the chief of the panel has committed a violation by basing his decision on non-information and facts when the material was submitted as evidence by one of the parties and has committed a violation of the accused right to be presumed innocent.

*In the response, the prosecutor submitted that the panel of judges has the right to assess all materials submitted by the prosecutor or defence to reach a decision regarding the detention of an accused, including applications and evidence in the form of witness statements and other documents supporting the application. That this application and the indictment were submitted on 4 June 2003 and the evidence of the indictment was transferred together with the indictment. The Chief of panel in this case was needed based on article 20.8 Regulation 30/2000 to reach a decision whether or not there were reasonable grounds to detain the accused.*

The High Court assessed that the decision of the chief of the Special Panel has grounds because it has been considered based on all facts and evidence submitted by the two parties before a decision was reached and in his decision had provided reasons as to why the reasons of the prosecutor relating to the need for detention based on article 20.7 and 20.8 could be accepted as is described as follows;

*After reading and assessing all the arguments submitted by the prosecution regarding the application for extension of temporary detention of the accused as well as from the legal representative of the accused regarding the release of his client, the judge has taken a number of points it considers relevant to reach a decision regarding the continuation of the accused status as follows:*

*The accused beforehand was contained in the list of people wanted by the authorities in Timor Loro Sa'e, due to their involvement in the criminal violation actions following the Referendum which represents initial evidence which should be respected.*

It was not just this that supported the process of arrest and detention however there was other evidence that was judged by the court that the evidence stated a truth regarding the incident of murder or the victim Guido Alves Correia such as the eye witness directly witnessed the criminal incident.

Apart from this, the accused entered the territory of Timor Leste without official documents.

The prosecutors argument that states that if the accused is released the quite a big risk of him fleeing. This is enough reason because the accused entered into Timor Loro Sa'e without good intentions, they are foreign nationals, with permanent domicile in West Timor, still holds a valid/active militia member card.

Besides that the Chief judge of the Special panel who is trying this matter points also to the different conditions that *in West Timor and Timor Loro Sa'e at this moment is*

*open without any obstacles for communication and this is proven that the accused could freely enter the Territory of Timor Loro and finally be arrested by the PKF due to the reasons mentioned above.*

Due to this, the court has approved Article 20.7 and 20.8, which was used by the Prosecutor as reasons or grounds to continue the detention.

The High Court is of the opinion that the chief judge has reached a decision based on the facts that exist, that were submitted by the prosecutor and the Defence before him. Due to this it can not be concluded that the Chief Judge has made a decision that assumes the guilt of the accused but that the judge handling this matter based his decision to detain the accused in initial detention with the facts that have the elements that the accused committed the crime of murder against Guido Alves Correia in Mascarihas Dili, and entered the Territory of Timor Leste illegally and as a national with permanent residence in West Timor and due to this there is a strong worry that the accused will flee to escape legal actions. Based on the evidence that exists this represents a strong reason that has fulfilled the requirements in article 20.7 and 20.8 Regulation 30/2000 to continue to detain Beny Ludji in initial detention. Thus the Court states that the decision has been based on facts that exist and the Chief judges of the Special Panel did not commit a violation of the accused rights to be presumed innocent, thus the reason of the appellant is rejected.

9. Aside from this, the appellant also made an issue of abuse against the accused at the police. This according to the assessment of the High Court that the reason of the appellant can not be considered by this court because the attack against the accused at the police has no relation with the extension of initial detention of Beny Ludji. The accused has the right to appeal against the facts that exist however this matter is in another case. This appeal it is only talking about the initial detention and not the abuse. Thus, the reason of the appellant is rejected.
10. Based on a number of reasons and the consideration as described above, the Panel of Judges of the High Court decide that the appellants reasons to appeal in this matter are rejected by this court and the decision of the panel of Judges of the Special Panel Dili District Court dated 20 June 2003 are confirmed/upheld and it is stated the appellant is free of case fees.

**Dili, 12 September 2003-09-14**

**Claudio de Jesus Ximenes**

**Jose Maria Calvario Antunes**

**Jacinta Correia da Costa.**