



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

**TRIBUNAL DISTRIAL de DILI
SECÇÃO CRIMES GRAVES**

**DISTRICT COURT of DILI
SPECIAL PANEL for SERIOUS CRIMES**

Case 18 a / 2003

Before:
Judge Brigitte schmid

The General Prosecutor
versus
Aprecio Guterres

Decision on the Motion to withdraw the Indictment against Aprecio Guterres without prejudice pursuant to Sec. 27.2 of UNTAET Reg. 30/2000 and the Motion to cause the Court to refrain from conducting a Preliminary Hearing.

For the Prosecutor :
Marek Michon

For the Defence:
Alan Gutman

I. Procedural Background

1. The indictment, filed by the prosecution on 10 July 2003, named as an accused (among 57 others) **Aprecio Mali Dao**. The indictment was registered as case by file No 18/2003.

After a person who gave his name as **Aprecio Guterres** was arrested on 21 April 2004, a Hearing on the Request for Pre-Trial Detention was held on 27 April 2004. The accused was present and assisted by his Defence Counsel **Ms. Pamela Reusch**. In the course of this hearing the indictment was handed over to the accused and his lawyer by the Court, and was thoroughly discussed.

2. The prosecution filed an application requesting that the Special Panel issue an order granting leave to amend the Indictment by changing (among other things) the name of the accused from **Aprecio Mali Dao** to **Aprecio Guterres**. The arrested person was released on certain restrictive conditions by the Court of Appeal on 9 June 2004
3. On 15 June 2004 the Special Panel issued a Court Order severing the indictment against **Aprecio Mali Dao** from Case No. 18/2003, renumbering his case as 18 a/2003, and requesting the Prosecution to supply the Defence with all material required by Sec. 24.1 (e), 24.4 and 24.5 Reg. 2000/30, and in view of Sec. 29.2 (e) Reg. 2000/30 to specify any evidence or name any witnesses it intends to present and to briefly state the facts for which any witnesses are to be called.
4. The prosecution on 18 June 2004 filed a new Indictment against **Aprecio Guterres a.k.a. Mau Buti**, charging him with the Crime Against Humanity of Murder, as mentioned in the Indictment dated 10 July 2003, also naming the victims.
5. On 21 June 2004 the Special Panels issued a Court Order, postponing the Preliminary Hearing which had been scheduled for 25 June 2004 sine die, and giving leave to the defence to respond to the Indictment dated 18 June 2004.
6. On 5 July 2004 the Special by Court Decision considered the Indictment dated 18 June 2004 as a new Indictment, of which a translation into Tetum had to be delivered to the defence until Friday, 16 July 2004. Among other dispositions the Court informed the defence that the 45 day period to respond to the Indictment would start on the day, when the translation of the Indictment into Tetum will be delivered to the defense.

The indictment dated 18 June 2004 was served to the defence by the prosecution on 18 June 2004, the translation into Tetum on 16 July 2004.

The defence in several motions requested the transmission of evidentiary material by the prosecution, such as the complete investigative file, and the disclosure of the complete Report by the Indonesian Commission on Human Rights Violations.

Court Decision dated 2 November 2004 dismissed the request.

The Preliminary Hearing was set for 5 November 2004.

Motion to withdraw the Indictment against Aprecio Guterres without prejudice pursuant to Section 27.2 of UNTAET Reg.30/2000.

On 4 November 2004 the prosecution requested, "in the Interests of justice", that the Special Panels allow the prosecution to withdraw the indictment 18a/2003 against Aprecio Guterres pursuant to Sec. 54.2 of UNTAET Reg.No.30/2000 and Art. 144 (1) and (2) of the Indonesian Code of Criminal procedure.

The prosecution contends that all trials before the Special Panels for Serious Crimes have to be completed by 20 May 2005. The prosecution argues as follows:

"In order to comply with this instruction, for the past several months the prosecution has refrained from filing cases that could result in new trials, as it is estimated that it could not be certain that any trials in addition to those now pending could be completed by May 2005. However, the prosecution believes that it has one indictment ready for a case in which the conduct of the accused in that case, Fransisco Pedro, is more egregious than the conduct alleged in the pending case against Guterres. Further, the prosecution estimates that the court time needed to complete the trial of Fransisco Pedro would be less than that required to try Guterres., thus assisting the court in completing all trials before May. If the Special Panels allows the Prosecution to withdraw the charges against Guterres, the prosecution will then file the new indictment against Fransisco Pedro."

The defence agrees with the prosecutor's submission that they have the absolute authority to withdraw an indictment according to Sec.19.A.7 of the Transitional Rules of Criminal Procedure (TRCP) without limiting any time period. In areas that are not covered by the UNTAET Regulations Indonesian Law applies which is quite clear that the prosecutor at all times maintains the authority to withdraw an indictment.

Defence's oral motion on 5 November 2004 to refrain from any Hearing until the new indictment will formally be served by the Court Registrar.

The defence, having raised the issue of being served with the indictment before, contests that the defence never has been served with an indictment in this case, and therefore the case is without jurisdiction. Sec. 26.2 TRCP requires that the registrar of the court has to ensure that a notification is promptly served upon the accused and his or her legal representative. The notification shall include a copy of the indictment and the date upon which it was received by the court, and shall inform the accused and legal representative that the defence has the right to submit a response to the indictment within forty-five days of receipt of the indictment.

The prosecution did not respond to this motion.

II. Discussion

Regarding the Prosecution's motion to withdraw the indictment

The Prosecution requests that the Special Panels allow withdrawal of the indictment 18a/2003 against Aprecio Guterres pursuant to Sec. 54.2 to Reg.No. 30/2000 and Art. 144 (1) and (2) Indonesian Code of Criminal Procedure.

However, the Prosecutor's discretion in the investigation of criminal cases and in the decision to file charges against a defendant ends as soon as the written indictment of the suspect is presented to the Court, Sec. 24.1 TRCP (as amended), and the case is filed with the Court Registry, assigned with a number and the case file is forwarded by the Registry to the Panel of Judges or to an individual Judge, Sec. 26.1 TRCP (as amended). The fact that from then on the indictment is subject only to the jurisdiction of the Court is reflected in Sec. 32.1 TRCP (as amended), which stipulates : "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."

Therefore, after the written indictment is presented to the Court, only the Court has the authority with respect to the charges to approve the amendment of an indictment.

The Regulations are silent in relation to the procedure in relation of a withdrawal of an indictment. Yet, when an even less substantive action the mere amendment of an indictment requires the approval of the Court, the more so the withdrawal of an entire indictment necessarily must require the approval of the Court.

The Special Panels have already dealt with this issue in the past, as in the "Decision on the Petition of the Public Prosecutor to withdraw an Indictment" in Case No 15/2001 (Public Prosecutor v. Antonio Lemos) and in the

"Decision on the Motion of the Prosecutor General to Review and Amend the Indictment" in Case No. 05/2003 (Public Prosecutor v. Wiranto and others). In these instances the Court took the stance that as the Prosecutor is bound to seek the Court's permission in relation to the amendment of the indictment it logically follows that the more substantive action of withdrawal should also require the permission of the Court.

Amendment of an indictment can only take place with leave of the Court "if the Court determines that the evidence at trial establishes qualification of the crime or crimes which is different than that which appears on the indictment"(Sec. 32.2 TCRP (as amended)). The same grounds must be valid in case of withdrawal of an entire indictment. ✓✓

The prosecutor's motion does not establish any such grounds. The prosecution refers to United Nations Security Council Resolution 1543, par.8, which requires that all trials before the Special Panels be completed by 20 May 2005. The prosecution intends to meet that requirement by withdrawal of the present indictment for the benefit of a new indictment concerning a different defendant and different criminal offences.

The case file of Francisco Pedro, Case No. 01/2001, already contains two pending indictments dated 31 January 2002 and 7 May 2003, there the request to withdraw the indictments could arise being followed by the issuance of a new indictment. It seems doubtful, if there the withdrawals would be approved.

Also, the actions intended by the prosecution would most likely lead to the result that the present case could not be finished within the lifespan of the Special Panels.

Given, the defendant's guilt in the pending case cannot be proven, he could claim the right to be acquitted. This very right would be violated by an approved withdrawal of the indictment. What the prosecution requests, amounts to exchanging one accused for another just because he seems "more egregious", which makes amockery of justice and shows a cynical disregard for the victims and their relatives. In the interest of justice it must be considered frivolous to choose the " more egregious " case to be tried.

Regarding the Defence's motion to refrain from any Hearing until the indictment will formally be served by the Court Registrar

Sec. 26.1 Reg 2000/30 (as amended) stipulates that " upon receipt of the indictment by the Court , the case file shall be registered by the Registry of the Court" [...].

The Registrar then shall ensure that a notification is promptly served upon the accused and his or her legal representative (Sec. 26.2 Reg. 2000/30 (as amended) [...]).

The former Defence counsel and the accused received the indictment dated 10 July 2003 in the course of the Detention Hearing on 27 April 2004. The file in this context does not show if the notification included – apart from a copy of the indictment - the date upon which it was received by the Court, and informed the accused and legal representative that the defence has the right to submit a response to the indictment within 45 days of receipt of the indictment by the Court (Sec. 26.2 Reg 2000/30). However no objection was raised at the time.

The question is how the new indictment dated 18 June 2004 should be served.

Sec. 26 Reg. 2000/30 means the line of action on receipt and notification at the very beginning of the Court procedure ("the case file shall be registered ..."). The Regulation is silent upon the issue of the receipt of a new indictment once the file has been registered.

The Court takes the view that the new indictment after the registration of the file needs not be served as stipulated in Sec. 26.2 Reg. 2000/30 by the Court. In the present case the new indictment was presented because the name of the accused person was not correct. The statements of facts, the charges and the victims including the evidence materials remained the same.

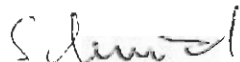
The file and the former proceedings as are for instance the arrest warrant, the Detention Hearing and previous decisions though based on the former indictment remain valid. The defence never contested their validity.

The defence did not deny that the new indictment in English and, according to Court Decision dated 5 July 2004, the translation into Tetum was delivered directly by the prosecution. The date by the prosecution was given as 16 July 2004. The period of 45 days to respond to the indictment therefore started, as the Court in favour of the accused ruled (to protect his rights), on 16 July 2004.

III. Disposition

For the foregoing reasons the Court dismisses the motions.

Dili, 19 November 2004



Brigitte Schmid, Judge of the Special Panels for Serious Crimes