# COURT OF APPEAL

Proceeding No. 29/04
Dili District Court
Report No. 40 C.A.

The Judges of the Court of Appeal have agreed as follows:

I. In proceeding no. 06/C.G./2002/TD.DIL of the Special Panel for Serious Crimes, Dili District Court, the distinguished Prosecutor appeals to the Court of Appeal against that Panel's decision to acquit the defendant Paulino de Jesus, charged with having committed crimes against humanity (one count of murder and one count of attempted murder), which are provided for and punishable under Sections 5 and 8 of UNTAET Regulation No. 2000/15 as well as under Sections 55 and 340 of the Indonesian Penal Code.

The Prosecutor alleges that the Special Panel was wrong in not convicting the defendant since, in the Prosecutor's opinion, and contrary to that first-instance Court's decision, there are more than sufficient grounds to convict the defendant. In fact, two witnesses have testified that it was the defendant who shot Juvita Saldanha with the intent of killing her and that it was the same defendant who stabbed Lucinda Saldanha who subsequently died from the wounds. Thus, the appellant (the Public Prosecution) is of the opinion that the Special Panel for Serious Crimes was wrong in its analysis of the facts and, consequently, in its application of the law.

The Prosecutor concludes by appealing the Court of Appeal to overturn the decision of the Dili District Court (Special Panel for Serious Crimes) and, therefore, to convict defendant Paulino de Jesus who should be found guilty of crimes against humanity on one count of murder and on one count of attempted murder. The corresponding penalty, which is that of imprisonment, should therefore be imposed upon the defendant.

The defendant, through his distinguished defence lawyer, presented his allegations, as per folios 274 to 276, where he maintains that the decision of the first-instance Court should be upheld and that the appeal should therefore be dismissed.

***

II. The hearing was held pursuant to Section 41 of UNTAET Regulation No. 2000/30, as amended by UNTAET Regulation No. 2001/25, where both the distinguished Public Prosecutor and the Defence Lawyer addressed the Court.

**III. It behooves the Court of Appeal to decide upon the following:**

As it has already been referred to above, the authorship of the murder of victim Lucinda Saldanha and of the attempted murder of victim Juvita Saldanha have been imputed to the defendant, both of which constitute a crime against humanity.

The Special Panel for Serious Crimes pronounced its decision as contained on folios 779 to 798 where it acquit defendant Paulino de Jesus since, according to that Panel's opinion, it was not proven that the defendant was indeed the author of the murder of Lucinda Saldanha or that he was the author of the attempted murder of Juvita Saldanha.

The Special Panel for Serious Crimes acquitted the defendant because it was of the opinion that the depositions given by the parents of victim Lucinda Saldanha (witnesses Juvita Saldanha and Dinis Cardoso) did not constitute sufficient grounds to convince the Panel otherwise since there were some contradictions in their depositions given in August 2000 and May 2002 and that, because of those contradictions, their depositions, in which they claimed that it was defendant Paulino who stabbed the back of their daughter Lucinda with a knife causing her to die, must not be given much weight. The Panel of the Court under appeal further adds that when witness Juvita was heard by Fokupers (a women's organisation that provides support to victims of violence) soon after the occurrence of the facts, Juvita did not mention that the defendant was the murderer of her daughter.

Moreover, the Court under appeal proved that, on 10 September, the defendant travelled along with his family from Bobonaro to Atambua, in Indonesia. That conclusion was drawn from the depositions given by witnesses Maria Soares and Luzia S. Jesus (daughters of the defendant), Joao da Conceicao (brother-in-law of the defendant) and Giriamuna Muniz (mother-in-law of the defendant).

But has the Court under appeal made a proper assessment of the evidence?

Let us consider it.
The ruling of the Special Panel for Serious Crimes under appeal is set forth on folios 780 to 798 of the proceedings. It can be concluded from reading the said decision that the reason that led the Panel not to consider the allegations that defendant Paulino de Jesus did indeed commit the acts imputed to him in the indictment as proven are the contradictions (or merely apparent contradictions) contained in the various depositions given by Dinis Cardoso and Juvita Saldanha during the different periods in which they were heard and testified (vide folios 792 to 796 of the present proceedings). Furthermore, the said Panel based its ruling on the fact of the defence having proven that defendant Paulino was in Atambua on 10 September 1999 (vide folios 787 and 788 of the present proceedings).

We do not, however, agree with nor do we understand how the Special Panel for Serious Crimes under appeal can admit that defendant Paulino was [in Atambua][1] but, at the same time, does not find him to be the author of the acts imputed to him and described by witnesses Dinis and Juvita (vide folio 792 of the present proceedings). In fact, both of the above-mentioned witnesses (Dinis and Juvita) were the parents of the deceased Lucinda Saldanha and they testified most clearly and persuasively during the trial that defendant Paulino de Jesus was in Lourba in the afternoon of 10 September 1999 and that he stabbed their daughter Lucinda in the back causing her to die and that he (the defendant) saw Pedro Mau shoot Juvita with the intention of killing her but [the bullet]

[1] NB: The original text is inconsistent.

hit her on the leg instead. The above-mentioned witnesses further testified that Paulino de Jesus was a TNI soldier and that he had gone to Lourba along with other militias and soldiers with the intent of killing everyone in that village whom they knew were pro-East Timor independence supporters, which was the case of Dinis Cardoso, Juvita Saldanha and their daughter.

The depositions given by witnesses Marques Henriques and Lourenco Martins further attest to the presence of the defendant in Lourba, as is clearly referred to on folio 792 of the decision under appeal, which is established on folios 364 to 374, for the second time, and on folios 353 to 359 of Volume II, for the first time.

Moreover, the Special Panel for Serious Crimes was wrong in finding that the depositions given by witnesses Dinis Cardoso and Juvita Saldanha did not constitute sufficient grounds to consider the charges imputed to defendant Paulino de Jesus as proven. In fact, the depositions given by these two witnesses are set out on folios 391 to 399 and on folios 340 to 353, which are followed by folio 339 of Volume II of the present proceedings due to an oversight by the Court Clerk.

In effect, in their statements the said witnesses are clear and categorical in affirming that it was the defendant who stabbed Lucinda with a knife and that the defendant was with Pedro Mau when the latter shot Juvita, hitting her on one leg but with the intent of killing her.

Finally, we should further add that the lady who wrote the Fokupers' report was heard stating at an examining and trial hearing that she herself had written a summary of the conversation she held with Juvita. She stated that the said summary was written afterwards and that she could not recall whether Juvita had mentioned who had killed her daughter Lucinda or whether that particular question was asked of Juvita (vide folios 659 to 665 of Volume III). For this reason, the finding of the Special Panel for Serious Crimes is odd when it states that this possible discrepancy leads the Special Panel to find that the [allegations of the] crimes perpetrated by the defendant were unproven (vide folio 796 of Volume IV).

For all the above-mentioned reasons, this Court of Appeal is of the opinion that it should overturn the decision under appeal and that it should consider the following facts as proven:

- *In 1999, the population of Timor-Leste in general and of Lourba village in particular was victim of intense violence perpetrated against persons and property. This violence was unleashed and perpetrated by Indonesian soldiers and militias (groups of local civilians who were pro-autonomy supporters).*
- *These groups of soldiers and militias perpetrated generalised attacks against anybody, irrespective of age, suspected of backing the independence of Timor-Leste. These attacks were extended to the property of pro-independence supporters, which were systematically destroyed, burnt down and looted.*
- *On 10 September 1999, the village of Lourba in the District of Bobonaro, was one of the villages that underwent an attack by Indonesian soldiers and militias who burnt down countless houses as*

*well as killed and injured several persons, from among whom were victims Lucinda Saldanha and Juvita Saldanha of the present proceedings.*

- *In September 1999, defendant Paulino de Jesus was a member of TNI "Tentara Nasional Indonesia"(Indonesian National Defence Forces) and was operating in the District of Bobonaro, namely in Lourba.*
- *On 10 September 1999, the defendant, accompanied by other soldiers (namely by Pedro Mau and Sabino) as well as by various militias, went to the village of Lourba in Bobonaro in a convoy of vehicles.*
- *They arrived in Lourba at approximately 18:00 hours.*
- *Upon their arrival the people from the said village started to run away.*
- *At that time, Dinis Cardoso, Juvita Saldanha (his wife), and Lucinda Saldanha (their daughter) ran to the back of their house to hide.*
- *In the meantime soldiers Pedro Mau and Sabino seized Lucinda Saldanha and defendant Paulino de Jesus stabbed her in the back with a knife while the said soldiers seized her.*
- *Lucinda died immediately as a result of the stabbing.*
- *Immediately afterwards, the said Pedro Mau shot Juvita Saldanha with the intent of killing her, but [the bullet] hit her on the leg instead.*
- *Defendant Paulino de Jesus knew that Pedro Mau wanted to kill Juvita Saldanha and consented to such intent.*
- *Defendant Paulino knew that the intent of the TNI and of the Indonesia-backed militias was to kill all those who were pro-East Timor independence supporters.*
- *The victims, Lucinda Saldanha and Juvita Saldanha, were pro-East Timor independence supporters.*

***

**Charges not proven.**

Nothing else was proven, including the allegations according to which:

- *The defendant was not in Lourba, which is where Lucinda was mortally attacked and Juvita was attacked.*
- *The defendant was in Atambua on that date and at that time.*

***

**IV – Let us now consider the applicable law.**

A – The Applicable Law

When applying the law to the concrete case, the first role of the Court and of the judges is to find out which law governs the case under review. To answer to this question, the judges must find out what the Constitution, Parliamentary Laws and Government Decree-Laws of the Democratic Republic of Timor-Leste say.

Section 165 of the Constitution on the law that must be applied in the Democratic Republic of Timor-Leste states that the: *"[l]aws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein."*

In order to comply with this constitutional precept, we must find out which *"laws and regulations [were] in force in East Timor"* when the Constitution of the country entered into effect on 20 May 2002.

It is our opinion that UNTAET Regulation No. 1999/1 of 27 November was in force on 20 May 2002, and that its Section 3.1 states that:

*"Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfillment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator."*

In light of the provisions of Section 3.1 of UNTAET Regulation No. 1999/1:

1. The judges must find out whether the concrete case before the Court is regulated by a Parliamentary Law or by a Government Decree-Law. Whichever law exists, it is that law that must be applied.
2. In the absence of a Parliamentary Law or of a Government Decree-Law, the judges must find out whether the concrete case is regulated by an UNTAET Regulation. If that is the case, that regulation must be applied.
3. In the absence of a Parliamentary Law, a Government Decree-Law or an UNTAET Regulation, the Court must apply the law that was in force in Timor-Leste prior to 25 October 1999. And for that, the Court must find out which "*laws applied in East Timor prior to 25 October 1999*."

Finding out which "*laws applied in East Timor prior to 25 October 1999*" is a question of interpretation of the law. It is a matter of finding out to which law the abstract legislator was referring to when using the expression "*the laws applied in East Timor prior to 25 October 1999*." As such, this question must be settled through the rules of interpretation of the law.

Up until now it has been understood that by the expression "*the laws applied in East Timor prior to 25 October 1999*" employed in UNTAET Regulation No. 1999/1, the legislator wanted to allude to the Indonesian legislation.

Though we have already vindicated that that should not be the applicable law, this problem has been overcome with the publication of Law No. 10/2003 of 20 November 2003, which settled the question of the interpretation of Section 1 of Law No. 2/2002 of 7 August, which stipulates in its Section 1 that: *"[u]nder the terms of the provision of section 1 of Law No. 2/2002, of 7 August, applicable legislation in East Timor on 19 May 2002 means all Indonesian laws applied and that were in force "de facto" in East Timor prior to 25 October 1999, as provided for by UNTAET Regulation No. 1999/1."*

<u>B- The Appeal Lodged by the Public Prosecution</u>

We already know that the Special Panel for Serious Crimes was of the opinion that there were no sufficient grounds to convict the defendant and that, for that reason, it decided to acquit him.

As we have already mentioned above, this Court of Appeal is of the opinion that the above-mentioned facts have been proven.

Let us now consider which criminal legal framework to apply to the facts established and perpetrated by defendant Paulino de Jesus.

Section 5 of UNTAET Regulation No. 2000/15 of 6 June tells us of the circumstances in which a crime against humanity is considered to have been committed and Section 8 of the same Regulation stipulates that: *"[f]or the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply."* And that is the Indonesian legislation, which was "de facto" in effect in Timor-Leste prior to 25 October 1999.

Let us consider it.

As it has already been mentioned above, it has been proven that defendant Paulino de Jesus was a member of the TNI (Indonesian military) and that on 10 September 1999 he went to Lourba together with other soldiers and several militias. Then, at approximately 18:30 hours, the defendant stabbed Lucinda Saldanha in her back using a knife, causing her to die immediately. Afterwards, a so-called Pedro Mau shot Juvita Saldanha with the intent of killing her. The defendant was well cognisant of Pedro Mau's intention and consented to it. Juvita Saldanha did not die only because [the bullet] hit one of her legs. In 1999, in August and September in particular, the population of Timor-Leste in general and of Lourba village in particular was victim of intense violence perpetrated against persons and property. This violence was unleashed and perpetrated by Indonesian soldiers and militias (groups of local civilians who were pro-autonomy supporters). These groups of soldiers and militias perpetrated generalised attacks against anybody, irrespective of age, suspected of backing the independence of Timor-Leste. These attacks were extended to the property of pro-independence supporters, which were systematically destroyed, burnt down and looted. On 10 September 1999, the village of Lourba in the District of Bobonaro was one of the villages that underwent an attack by Indonesian soldiers and militias who burnt down countless houses as well as killed and injured several persons, from among whom were victims Lucinda Saldanha and Juvita Saldanha of the present proceedings. Defendant Paulino knew that the intent of the TNI and of the Indonesia-backed militias was to seize and kill all those who were pro-East Timor independence supporters. The victims, Lucinda Saldanha and Juvita Saldanha, were pro-East Timor independence supporters.

In light of the facts taken as proved, we are led to conclude that both crimes were committed, that of consummated murder and that of attempted murder, since we understand premeditation as *"cold-bloodedness"* in the *"reflexion of the means employed"* or in the persistence to kill *"for more than twenty-four hours."*[2]

---

[2] In this sense, vide Maria Fernanda Palma, *op. cit.*, p. 66 and following. Also vide *"Comentário Conimbricense,"* cited Tome, p. 39. To specify these concepts vide Figueiredo Dias' opinion published on CJ, Year XII (1987), Tome IV, p. 50 and following.

To that end, there is always a particularly strong criminal desire from the moment in which the commission of a crime was meditated upon until the moment it is actually executed, so that the perpetrator did not act emotionally or on the spur-of-the-moment, thereby revealing a major disconformity with the legal precept of not putting an end to the life of another person.

In jurisprudence we find that cold-bloodedness is *"a calm or undisturbed reflexion in the perpetrator's assuming the decision to kill"* (Ac. STJ of 1986/Jun./28, in BMJ 358/260) and that *"it materialises in a resolution, tenacity and irrevocability of the decision made"* (Ac. R.E. of 1985/Oct./10, in BMJ 352/450) or that it results from a *"cold-blooded behaviour, insensitivity, indifference, calmness or undisturbed reflexion in assuming the decision to kill"* (Ac. STJ of 1990/Jun./06, in CJ III/19).

With regards the two murders, one consummated and one attempted, we have that the defendant travelled from Bobonaro to Lourba with the intent to kill whoever was a pro-independence supporter. In addition to that, the young lady Lucinda was seized by the defendant's two other mates while he stabbed her back with a knife. This act undoubtedly reveals a strong intent to kill and translates that cold-bloodedness in killing.

The same cold-bloodedness can also be verified in relation to the shot that Pedro Mau fired against Juvita Saldanha, who was running away completely unprotected.

Against the above-mentioned background, we conclude that the defendant acted with particular vileness since he perpetrated the murder in conjunction with other soldiers and because of political hatred – because the victims and other persons were pro-independence supporters who backed the proponents of that cause. He also acted with particular wickedness because the other soldiers were seizing victim Lucinda while the defendant stabbed her in the back with a knife, after which she ended up dying.

Additionally, the defendant saw Pedro Mau shoot Juvita Saldanha with the intent of killing her and consented to such purpose. Juvita did not die only because of circumstances independent of the of the defendant's will.

Thus, in order for one to be a co-author in this crime of attempted murder, it suffices for the execution of the criminal plan, which, in this case, consisted in going to Lourba to kill whoever was a pro-independence supporter, to be manifestly foreseeable that such an attempted murder could occur even if the perpetrator is a third person. The fact is that, according to the law, whoever executes an act, either by him or herself or through others, or whoever partakes in its direct execution, by consent or together with other(s), or whoever feloniously orders another person to execute an act, so long as there is execution or the beginning of an execution, is punishable as the author of the crime.

For this reason, the co-author, who does not have a role of direct execution of the autonomous crime, but who has another role in an execution that we can denominate as a parallel execution, "submits" his or her deceitfulness in the execution of the autonomous crime in the sense that if the latter has complete control over this criminal act, which was an expected outcome and which is in conformity with the same outcome,

the former also shares the control over the criminal act, which is what happened to defendant Paulino in relation to the acts perpetrated by Pedro Mau.

In light of the facts, we have that:

- The defendant is the author of the crime of the attempted murder of Juvita Saldanha pursuant to Sections 53, 56 and 340 of the Indonesian Penal Code, which establishes that whoever executes the act by him or herself or through others, but also whoever directly partakes in its execution, by consent or together with other(s), shall be punishable as the author of a crime. The defendant, who carried a knife and other weapons, was part of a group of soldiers accompanying the militias who went to Lourba with the intent to kill whoever they would find there, which they did in a concerted manner amongst them and which led to the attempted murder of Juvita Saldanha, [perpetrated by Pedro Mau but with the defendant's consent].[3]
- The defendant is the author of the murder of Lucinda Saldanha, which is a crime provided for and punishable under Section 340 of the Indonesian Penal Code carrying a penalty of up to 20 years of imprisonment.

Moreover, Section 5.1 of UNTAET Regulation No. 2000/15 of 6 June stipulates that:

*"For the purposes of the present regulation, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:*
*(a) Murder;*
*(b) …"*

As it has already been previously mentioned, the defendant committed the murder of Lucinda Saldanha and the attempted murder of Juvita Saldanha, both of who were supporters of the pro-East Timor independence group. The defendant, along with other militiamen, was the author of the murder and of the attempted murder of the above-mentioned persons in September 1999.

The defendant knew that he was assisting in the perpetration of those acts and [yet] he wanted to be an accomplice. These and other deaths provoked had as a purpose the killing of the pro-East Timor independence supporters, which was an objective with which the defendant was cognisant of, agreed to and assisted in the perpetration of the above-mentioned murder and attempted murder after having been informed that the victim was a pro-East Timor independence supporter.

The conduct of the defendant thus constitutes a crime against humanity.

**V – Penalty Scale**

Once the penal typification of the defendant's conduct has been made, it is necessary to fix the corresponding penalty for the crime committed.

---

[3] NB: The original text is contradictory and inconsistent.

When determining the concrete penalty to be applied we must take into account the value protected by the violated precept, which in the case of murder is the human life: the most precious good any person possesses.

In other words, we have two main rules to determine the criteria [to be applied] for the concrete penalty: the first is fault, which is the foundation for the realisation of the penalty, and the second criteria to bear in mind is the effects of the penalty in the future life of the defendant in society as well as the need for society to safeguard itself against the defendant, thereby maintaining the trust of the community in safeguarding the corresponding legal precept that was violated.

In light of this, we may say that in this act the penalty serves primarily, on the one hand, towards the fair retribution of the crime committed as well as of the blame (retributive function). On the other hand, and at the same level, the penalty further contributes towards the social reintegration of the defendants, which seeks not to damage their social situation more than what is strictly necessary (positive special preventive function) as Kohlrausch has alluded to when stating that "in determining the penalty, the Court must primarily consider which means are necessary for the accused to lead a normal life again in accordance with the law" (vide "Mitt IKV Neue Folge", t. 3, p.7, cited by H.-H. Jescheck, in "Penal Law Treaty," Vol. II, p. 1195).

However, we are also of the opinion that in this case the penalty must enable society to safeguard itself against these types of defendants (positive special preventive function) as well as to neutralise, as much as possible, the effect of the criminal offence committed, which will undoubtedly become a negative example for the community and which will simultaneously contribute towards the strengthening of the community's legal consciousness, and which will seek to satisfy the sentiment of justice of the world surrounding the defendant, which, in this case, has been particularly felt (general preventive function).

In the other circumstances that existed prior to, during, and after the commission of the crime and which influence the determination of the type and severity of the penalty to be applied, we have the following favourable and unfavourable aspects.

- The favourable aspects are inexistent since the defendant did not confess the facts nor did he show any sign of regret.
- The unfavourable aspects correspond to the degree of illegality, which is quite high, to the type of fraud committed, which is direct, as well as to the consequences of their conduct, which go beyond the outcomes of the respective crimes, namely, how others view the occurrence of those deaths and the cold-bloodedness with which they were perpetrated by defendant Paulino.

The manner in which the plan was executed was quite brutal because both the defendant and his mates overpowered the victims. The degree of illegality of the crime committed is high and the degree of felony that accompanied its execution is intense. In

perpetrating the crimes the defendant acted deliberately, freely and consciously although being a member of the TNI and having the support of the militias.

The corresponding criminal penalty to apply to the crime of murder committed is that of imprisonment for up to 20 years (See Section 340 of the Indonesian Penal Code).

As for the crime of attempted murder the penalty is that of imprisonment for up to a maximum of 13 years and 4 months.

No attenuating factors found in favour of the defendant were proven since he has always denied having perpetrated the crimes.

Thus, it is our opinion that the penalty of 10 (ten) years of imprisonment for the commission of the crime of murder (provided for and punishable by Section 340 of the Indonesian Penal Code) and of 5 (five) years of imprisonment for the commission of the crime of [attempted?] murder (provided for and punishable by Sections 53, 56 and 340 of the Indonesian Penal Code) are appropriate for the defendant.

In view of the provision of Section 5 of UNTAET Regulation No. 2000/15 of 6 June, *"[f]or the purposes of the present regulation, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack,"* which are namely that of murder or of attempted murder.

In light of that, in committing such acts, the defendant will have committed a crime against humanity.

**VI – Decision**

Against the above-mentioned background, the Court of Appeal decides to **sustain the appeal** lodged by the Public Prosecution thereby **overturning the decision** appealed and finding the defendant, **Paulino de Jesus**, guilty as the author **of one crime of murder and of one attempted murder,** provided for and punishable under Sections 53, 56 and 340 of the Indonesian Penal Code, which are conform to the crime **against humanity in its form** as pursuant to Section 5 of UNTAET Regulation No. 2000/15 of 6 June, and **convicting the defendant to 12 (twelve) years of imprisonment for the commission of the above-mentioned crimes.**

The period of preventive detention to which the defendant has been subjected to in the present proceedings will be discounted from the above-mentioned penalty – cf. Section 42.5 of UNTAET Regulation No. 2000/30.

***

No costs are to be incurred.

***

The present proceedings are to be immediately forwarded to the Special Panel for Serious Crimes for the issuance of the required warrants of arrest for the defendant to

serve the sentence. (UNTAET Regulation No. 2000/30, as amended by UNTAET Regulation No. 2001/25 of 14 September).

Dili, 4 November 2004

The Judges of the Court of Appeal

[Signed]
Claudio de Jesus Ximenes

Jose Maria Calvario Antunes (Rapporteur)
[Signed]

Jacinta Correia da Costa
[Signed]