COURT OF APPEAL

Case No. 46/04

The Court of Appeal sitting as a Panel of Judges hereby issues the following decision:

I. Case No. 272/VII/2004

An appeal was lodged with the Court of Appeal by the Dili District Prosecution Unit against a decision issued by an investigating judge from the Dili District Court not to place the defendant Alberto Antonio de Oliveira Pires in pre-trial detention. The applicant (Office of the Public Prosecutor) requested for the Court of Appeal to annul the decision issued by the Investigating Judge on 09/07/2004 not to place the defendant in pre-trial detention.

The Applicant claimed that the defendant should have been placed in pre-trial detention because he had committed a crime in violation of Articles 154 and 155 of the Indonesian Penal Code and it was reasonable to suspect that if not detained the defendant may repeat his actions and upset the community.

The respondent Alberto Antonio de Oliveira Pires did not make any written representations to the court.

II. Analysis and Decision of the Court of Appeal

In response to this appeal the Court of Appeal analyzed and decided the following:

a) if anything in the case file proves that the defendant committed an act categorized as a crime under Articles 154 and 155 of the Indonesian Penal Code or any other crime provided for in the law;
b) if there were reasons to believe that were the suspect not placed in pre-trial detention he would have repeated his actions and upset the community.

In the case file the Court of Appeal found evidence that indicated that:

a) The defendant, as the chairperson of the '*Partido da Mobilizacao Nacional*' signed documents included in the case file (pages 9 to 22).
b) In these documents the defendant wrote statements against the Prime Minister Mari Alkatiri and his Government;
c) In one letter to the United Nations Secretary General the defendant wrote:

"We demand that this illegal government be dismissed, for it came into being as a result of the transformation of the Constituent Assembly into a National Parliament without calling a General Election as required by the Constitution …

… the people of this country continue to live in poverty because of the corruption and bribes in relation to the Timor Gap for which Mari Alkatiri cannot be held accountable, international investment has been impeded by the lack of appropriate laws, threats have

been made through the media, newspapers, television and radios and other factors that are related to the survival of the nation.

The threats made by Minister of the Interior Rogerio Tiago Lobato to bring in forces from other countries to illegally keep them in power …

PMN and the People of Timor-Leste will not accept threats from thieves that are trying to protect themselves in their illegal government.

…

[We demand to be] immediately liberated from this putchist Government that is corrupt and led by thieves – Mari Alkatiri, Indonesian, the greatest thief of the century who [got] bribes from the Timor Gap worth 2.5 million dollars.

Rogerio Tiago Lobato, the greatest thief and smuggler who swallowed diamonds in Angola to trade them in Portugal (what kind of stomach does he have?!). But he did so many things that he ended up being arrested and sentenced to 10 years in prison in Angola.

Should we put our people, our homeland, in the hands of these thieves? No, no and no" (pages 15 to 20).

d) The defendant wrote the following statement in another document:

"UNITED WITH THE PEOPLE AND THE CONSTITUTION OF RDTL – WE DEMAND:

1. Total reform in line with Article 93 (Election and composition) of the RDTL Constitution.
2. Mari Alkatiri to leave because we don't want him!
3. Mari Alkatiri and his lackeys to leave!
4. Mari Alkatiri, you thief, where is the 2.5 million that you stole?
5. Mari Alkatiri – the devil teaches how to steal, not how to hide.

Get out now, there is no time left to think it over (page 21)

e) The defendant also said that "The current government is a putchist government, a communist government", "Mary Alkatiri is stealing oil";

f) In a declaration made to police the defendant confirmed that he did in fact write these statements and had made these comments; he explained that his party wanted the Alkatiri government to step down, and they wanted to establish a National Salvation Government to conduct parliamentary elections.

In his decision the investigating judge explained the provisions of law that permit a judge to place a person in pre-trial detention, and he wrote the following:

“After carefully weighing up the facts and evidence the investigating judge hereby decides that any person who publicly gives expression to feelings of hostility, hatred or contempt against the government can be charged under Article 154 of the Indonesian Penal Code, and any person who disseminates, openly demonstrates or puts up a writing where feelings of hostility, hatred or contempt against the government, with intent to give publicity to the contents or to enhance the publicity thereof, can be charged under 155 of the Indonesian Penal Code.

For this reason the Investigating judge hereby decides:

a. To impose restrictive measures on the suspect Alberto Antonio Luis de Oliveira Pires (65) obliging the suspect to report to the Dili District Police once a month for a period of six months starting in July 2004 and expiring in January 2005…

b. If the suspect repeats such actions or violates this decision then the suspect shall be held accountable in accordance with the law.”

However, the Court of Appeal believes that the actions of the suspect mentioned by the investigating judge, and the actions of the suspect as evidenced in the case file do not constitute a crime as prescribed in Article 154 and 155 of the Indonesian Penal Code.

Article 154 of the Indonesian Penal Code states:

“The person who publicly gives expression to feelings of hostility, hatred or contempt against the government of Indonesia shall be punished by a maximum imprisonment of seven years or a maximum fine of three hundred rupiahs”.

Article 155 of the Indonesian Penal Code states:

(1) “Any person who disseminates, openly demonstrates or puts up a writing where feelings of hostility, hatred or contempt against the government of Indonesia, with intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of four years and six months or a maximum fine of three hundred rupiahs”.

(2) “If the offender commits the crime in his profession or during the commission of the crime five years have not yet elapsed since an earlier conviction on account of a similar crime has become final, he may be released from the exercise of said profession”.

After examining the actions of the defendant described above, the Court of Appeal concludes that the defendant wrote statements against the Prime Minister Mari Alkatiri and his government; the defendant wrote statements against those people who were currently serving as Prime Minister and ministers in government of Timor Leste. Based on evidence contained in the case file, we can conclude that the defendant did not write

statements against the government of Timor Leste itself, but rather against Mari Alkatiri who was serving as the Prime Minister and those who he selected to serve as ministers. The term “government” mentioned in Articles 154 and 155 refer to the actual government itself, of which Mari Alkatiri was the Prime Minister and others were serving as ministers.

When drafting these two articles the aim of the legislators was to protect the government from people wanting to destroy the state, regardless of those who at any particular time are serving as Prime Ministers or ministers.

Evidence contained in the case file shows that the defendant wanted to expel Mari Alkatiri and his people from the Government. The evidence does not show that the defendant wanted to destroy the State of Timor Leste and the Government of Timor Leste. The evidence shows that the defendant wanted to State of Timor Leste and the Government of Timor Leste to remain in existence, as long as Mari Alkatiri and his people do not serve in the Government, and as long as others are serving as Prime Minister or Minister.

The Court of Appeal believes that the defendant wished to express the political aspirations of his party, as opposed to the politics of the Prime Minister Mari Alkatiri.

We are all aware that Timor Leste is a state based on the rule of law and democracy. Therefore each citizen or political organization has the right to express an opinion about political solutions presented by the Government or Parliament, or on decisions issued by the courts; each citizen or political organization has the right to present their political programs, or oppose the political programs being implemented by the Government or Parliament; each political organization has the right to ask the people to choose its programs and elect them into the government, in accordance with the provisions of the law and the Constitution.

However, no person has the right to make defamatory or slanderous remarks, or wrongly accuse the Prime Minister, a judge or an ordinary citizen or ruin their reputation gratuitously.

Article 36 of the Timor Leste Constitution states that every individual has the right to honor, good name and reputation, protection of his or her public image and privacy of his or her personal and family life.

The Court of Appeal believes that the actions of the defendant fall under the provisions contained in Articles 310 to 321 of the Indonesian Penal Code, in relation to the following writings produced by the defendant:

“the people of this country continue to live in poverty because of the corruption and bribes in the Timor Gap for which Mari Alkatiri cannot be held accountable”; “PMN and the People of Timor-Leste will not accept threats from thieves that are trying to protect themselves in their illegal government”, “[We demand to be] immediately liberated from

this putchist Government that is corrupt and led by thieves – Mari Alkatiri, Indonesian, the greatest thief of the century who [got] bribes from the Timor Gap worth 2.5 million dollars", "Rogerio Tiago Lobato, the greatest thief and smuggler", ""Mari Alkatiri, you thief, where is the 2.5 million that you stole?", "Mary Alkatiri – the devil teaches how to steal, not how to hide".

In relation to the above statement, Article 310 of the Indonesian Penal Code states that:

"(1) The person who intentionally harms someone's honour by charging him with a certain fact, with the obvious intent to give publicity thereof, shall being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of three hundred Rupiahs.

(2) If this takes place by means of writings or portraits disseminated, openly demonstrated or put up, the principal shall, being guilty of libel, be punished by a maximum imprisonment of one year and four months or a maximum fine of three hundred Rupiahs.

(3) Neither slander nor libel shall exist as far as the principal obviously has acted in the general interest or for a necessary defence."

Article 316 of the Indonesian Penal Code states that:

"The punishment laid down in the foregoing articles of this chapter may be enhanced by one third, if the defamation is committed against an official during or on the subject of the legal exercise of his office";

Article 318 of the Indonesian Penal Code states that:

"(1) Any person who with deliberate intent by some act falsely cast suspicion upon another person of having committed a punishable act, shall, being guilty of calumnious insinuation, be punished by a maximum imprisonment of four years.

(2) Deprivation of the rights mentioned in Article 35 firs to thirdly may be pronounced".

Article 319 of the Indonesian Penal Code states that:

"Defamation, punishable under this chapter, shall not be prosecuted except upon complaint by the person against whom the crime has been committed, except in the case of Article 316".

In the present circumstances the actions of the defendant fall under the provisions of Article 316 and 319, and also the provisions of 318; therefore the Office of the Public Prosecutor can prosecute this crime, even though the aggrieved person did not submit a criminal complaint against the defendant.

Does UNTAET Executive Order No. 200/02 revoke Articles 310 to 321 of the Indonesian Penal Code?

"Effective immediately, the conduct defined in Chapter XVI (Defamation) of the Indonesian Penal Code, comprising articles 310 through 321, is of non-criminal nature in East Timor. Under no circumstance may said articles be the basis for criminal charges by the Public Prosecutor. Persons allegedly defamed shall be limited to civil actions and only to the extent that such remedies may be provided in a future UNTAET Regulation. This Executive Order shall apply to all pending proceedings in East Timor, regardless of the time of any alleged offense".

The term "*Ordem Executiva*" is a literal translation into Portuguese from the English term "Executive Order". In an American dictionary on juridical terms this following explanation is provided: "Executive Order – n. a President's or Governor's declaration which has the force of law, usually based on existing statutory powers, and requiring no action by the Congress or state legislature" (http://dictionary.law.com).

An executive order is one thing, a law is another. This executive order is an order which was issued by an organ that, according to the law, is vested with executive powers, when it exercises its executive powers. A law is issued by an organ that has the competence to issue laws, when it exercises its legislative power. The Indonesian Penal Code is a law that pursuant to UNTAET Regulation 1999/1 shall be applied in Timor Leste until such time Timor Leste has its own Criminal Code.

UN Security Council Resolution 1272 states that UNTAET (United Nations Transitional Administration in East Timor) was established by the Security Council to exercise legislative and executive power as well as the power to administer justice.

Article 1.1 of UNTAET Regulation 1991/1 states that "All legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator. In exercising these functions the Transitional Administrator shall consult and cooperate closely with representatives of the East Timorese people".

Therefore only the Transitional Administrator of UNTAET has legislative, executive and judicial power combined. During the UNTAET period, the Transitional Administrator used his legislative powers to issue regulations (= laws) and used his executive powers to issue executive orders or directives.

However, even though the Transitional Administrator was vested with legislative and executive powers, the executive order that he issued does not have the force of a regulation and a regulation does not have the force of an executive order. These two instruments have different effects and purposes. When the Transitional Administrator issued a regulation he used his legislative power, when the Transitional Administrator issued a executive order he used his executive power.

In accordance with general principles of law that that are acknowledged in all countries, particularly those that adhere to the rule of law, an executive order issued by an executive organ does not have the authority to supersede or invalidate a law that was enacted by a legislative organ. A law has the authority to supersede or invalidate another law; and a subsidiary piece of legislation in accordance with the principle of hierarchy of laws can not supersede or invalidate a superior piece of legislation.

Therefore the Transitional Administrator's Executive Order 2000/2 does not have the authority to supersede or invalidate Article 310 to 321 of the Indonesian Penal Code which according to UNTAET Regulation 1999/1 shall apply in Timor Leste. Articles 310 to 321 of the Indonesian Penal Code continue to apply in Timor Lest; if any person commits an act that falls under the provisions of the aforementioned articles then the Office of the Public Prosecutor has the power to prosecute this person as set out in this code.

The actions of the defendant fall under the provisions contained in Articles 310 to 321, as explained above. Is the court allowed to place the defendant in pre-trial detention?

As stated by the Court of Appeal on many occasions, UNTAET Regulation 2000/30 on the Transitional Rules of Criminal Procedure, dated 25 September, as amended by UNTAET Regulation 2001/25 dated 12 September, established that the an investigating judge can place a defendant in pre-trial detention when there are reasons to believe:
(a) that a crime has been committed;
(b) the defendant was the perpetrator; and
(c) such detention is necessary, otherwise:
(1) the suspect will flee to avoid criminal proceedings;
(2) evidence may be tainted, lost, destroyed or falsified;
(3) witnesses or victims may be pressured, manipulated or their safety endangered; or
(4) the suspect will continue to commit offences or poses a danger to public safety or security (Articles 20.7 and 20.8 of UNTAET Regulation 2000/30).

These are the legal grounds that permit an investigating judge to place a defendant in pre-trial detention. An investigating judge may not put a person in pre-trial detention if the aforementioned grounds are not established. A person placed in pre-trial detention has not been convicted, and therefore in accordance with the law this person is considered innocent. The Constitution and the law only allow a judge to place a suspect in pre-trial detention if the benefit of applying these measures in the public interest is greater than the harm that may be imposed on the suspect placed in pre-trial detention; the Constitution and the law do not provide for the application of pre-trial detention if there is no significant need to protect the public interest.

In this case the evidence contained in the case file does not provide the judge with sufficient facts to establish grounds for placing the suspect in pre-trial detention. There is no evidence to show that the Investigating Judge needs to place the suspect in pre-trial detention, because otherwise the suspect may flee to avoid criminal proceedings, or that evidence may be tainted, lost, destroyed or falsified, or witnesses or victims may be

pressured, manipulated or their safety endangered, or the suspect poses a danger to public safety or security.

The evidence contained in the case file indicates that the suspect may repeat his actions. However there is no evidence to show that the judge needs to actually place the defendant in pre-trial detention to prevent him from repeating these actions.

The Investigating judge was correct in his decision about the restrictive measures applicable to the suspect, even though the judge identified the criminal offences applicable to the actions of the suspect.

Therefore, based on other grounds, the Court of Appeal is obliged to find in favor of the investigative judge that this appeal was made against.

Even though the appeal lodged by the Office of the Public Prosecutor is rejected, the Court of Appeal does not order the appellant to pay court costs, as Article 2.1 of Decree-Law 15/2003 (Code of Court Costs) provides exemption from court costs to certain entities.

III. Conclusion

Based on the reasons outlined above the Court of Appeal sitting as a Panel of Judges finds in favor of the decision issued by the Investigative Judge that this appeal was made against.

Dili, 15 September 2004

Panel of Judges from the Court of Appeal

(signed)
Claudio de Jesus Ximenes – Presiding Judge and Rapporteur

(signed)
Jose Maria Calvario Antunes

(signed)
Jacinta Correia da Costa