

COURT OF APPEAL

Case no. 95/CO/2008/TR

The judges making up the Court of Appeal meet in a closed session.

Report:

The defendant Adérito da Costa Ximenes Neto was convicted, by judgement pronounced on 14 October 2008, as the perpetrator of a false identity crime set out and punishable pursuant to article 228 of the Criminal Code and sentenced to 6 months imprisonment, suspended for a period of 12 months.

The defendant has appealed against this decision.

The reasons presented close with the following conclusions (transcription):

1-The object of the Letter of Suspension of 27 August 2008 was not fulfilled as the Commander General of the PNTL (Timor-Leste National Police) was strongly against this Letter of Suspension as he considered that it contained a number of irregularities. And the General Commander of the PNTL, through the Deputy General Commander of the administration area, once again handed over the gun to the plaintiff for such plaintiff to be able to continue to perform his duties which does not mean that the defendant did not intend to comply with the letter of suspension but because he received an order;

2-On 26 September 2008, the UNPOL Commissioner issued a second letter of suspension, which the defendant received on 1 October 2008. The defendant then handed over his gun, seal and then the key to his vehicle and SIM card to the Deputy Commander of the District of Baucau and which on the first day the Deputy commander of the District of Baucau did not receive, giving the reason that there had not yet been an appointment.

3-From 1 October to 9 October 2008, the defendant signed no official document which would have meant violation of article 228 of the Criminal Code, being considered an act carried out against the law;

4-On 9 October 2008, the defendant put on his PNTL uniform and went to the Baucau District Police Station to receive the Letter of Appointment from the Bacau District Deputy Commander for the position of Bacau District Interim Commander. It was at this time that the UNPOL and the GNR arrested the defendant inside the PNTL station when the defendant was wearing the PNTL uniform in the PNTL station. He committed no act against article 228 of the Criminal Code concerning the undue wearing of a PNTL uniform. Article 228 of the Criminal Code applies to all citizens who unduly wear a PNTL uniform. The defendant received a suspension and is awaiting investigation, but according to the accusation from the Public Prosecutor's Officer against defendant Adérito da Costa Ximenes Neto, and according to the remark we have already quoted :

a) the letter of suspension that the interim UNPOL commandant issued to suspend the defendant Adérito da Costa Ximenes Neto, has no legitimacy because it corresponds to the spirit of article 26 no. 1 of PNTL Disciplinary Regulations which implies: a) verbal reprimand; written reprimand; b) fine up to 30 days; d) suspension from 20 days to 120 days;

b) The letter of suspension, issued by the interim UNPOL Commander, does not comply with the rules set out in the supplementary agreement, in article 13.3 to 13.5 AS;

c) The letter of suspension, issued by the interim UNPOL Commander, to suspend the defendant from his duties, only took into account article 5 of the Supplementary Agreement and, besides this, the Interim UNPOL Commissioner, failed to or did not comply with the entirety of the contents laid out in the Supplementary Agreement nor in the PNTL Regiment or article 26, no. 1 of the PNTL Disciplinary Regulations mentioned above by the defendant. This has legitimacy and has the value of national sovereign law according to Democratic Rule of Law;

d) The letter of suspension, issued by the interim UNPOL Commander against the defendant Adérito da Costa Ximenes Neto, is not valid due to the position that this defendant holds as, in accordance with the supplementary agreement, only the Interim PNTL Commissioner can make this decision and in order to do so the Commissioner would have to take into account the spirit of all rules and regulations;

e) With reference to the points mentioned above by the defendant, the Interim PNTL Commissioner showed his disagreement with the letter issued by the Interim UNPOL Commissioner and in turn the Interim PNTL Commissioner issued an official letter number Gab1/555/x/2008;

f) The defendant, Adérito da Costa Ximenes Neto, in the fulfilment of the Letter of Appointment issued by his hierarchical superior, Mr Henrique da Costa, dated 8 October 2008, ceased to carry out his post as Baucau District Commander as of 10/10/2008;

g) Should action be pursued or not, depending on whether the information concerning the PNTL is consistent with the accusation of the Public Prosecutor pursuant to article 228 of the Criminal Code?

He concludes by saying that there are no legal grounds nor proof that he had committed a crime set out and punishable by article 228 of the Criminal Code and that the decision should be considered null and void.

This appeal was admitted by means of an order on page 78.

The Public Prosecutor's Office responded to the grounds submitted and concluded to uphold the disputed decision.

In light of what is in the records, the session referred to in article 306, no. 1 of the Code of Criminal Procedure was thereby held.

The following is to be decided upon:

Normally, the scope of the appeal is defined by the conclusions which the plaintiff draws up and based on the corresponding grounds, without prejudice to those matters which are known on an unofficial basis, namely how to ascertain the existence of errors and faults as listed in number 2 of article 229 of the Code of Criminal Procedure.

It can be concluded from the (confusing) conclusions of the appeal documents submitted that the plaintiff considers there are no elements which would constitute a crime set out and punishable by article 228 of the Criminal Code given the suspension order is illegal as it was given in breach of the rules included in the above mentioned supplementary agreement and there is no subjective element of crime as the plaintiff did not act with the intention of performing the duties of

the Baucau District PNTL Commander.

These are the issues that shall be resolved.

FOUNDATIONS

The Court of Appeal considered the following de facto matter as proven (transcription)

1-The defendant was arrested in flagrante delicto at the Baucau police station on the morning of 9 October, 2008;

2-On 27 August 2008, the defendant was duly notified of the order of suspension which he was given upon completion of the disciplinary process against him through which it was discovered that there were practices carried out in violation of human rights.

3-Police Commissioner Juan Carlos Arévalo suspended the defendant based on the Supplementary Policing Agreement of 1 December 2006, section 5.5.1 whereby it states: that the Police Commissioner shall act as General Commander of the PNTL, being therefore invested with all the powers and authority conferred to the General Commander of the PNTL, obviously following all legal provisions in force in Timor-Leste;

4-The defendant signed the suspension order on 28 August 2008, handing over his gun to the UNPOL head of staff, John Scott in the presence of the PNTL Commander inspector Afonso de Jesus;

5-By order of Police inspector Henrique da Costa, dated 28 August 2008 with the following contents” Entrega pistola Comandante Distrito de Baucau nian atu nia servisu, tamba comandante Geral da PNTL la aseita ho suspensaun nebé fó sai;

6-From this order he went to the Logistics Director/armory, as set out on page 10 of the records, where a model of a Glock 19 gun, number EPF 962 was handed over;

7-The gun was handed over by Mr Miguel de Deus, army head;

8-The second suspension order was issued on 26 September 2008, the defendant was once again notified and signed it;

9-The suspension order issued against the defendant was given by Police commissioner Mr Juan Carlos Arévalo;

10-On 8 October 2008 the appointment order was issued by Police inspector Henrique da Costa stating that the defendant had to prepare documents and equipment as mentioned on page 07 of the records for the newly appointed post;

11-The defendant continued to sign official documents and wear his uniform after the date of suspension (even after he had been once again notified of the suspension order on 01/10/2008);

12-The defendant freely, voluntarily and consciously acted with the intention to continue to maintain his position as interim Commander, knowing that he was acting against the law.

The merit of the appeal shall be appraised.

The defendant was accused and convicted as perpetrator of a crime set out and punishable by article 228 of the Criminal Code.

This crime has the following wording in the English language (given that there is no version in any of the official languages of Timor-Leste): *any person who with deliberate intent wears distinguishing marks or performs an act belonging to an office that he does not hold or from which he has been suspended shall be punished by maximum imprisonment of two years or a maximum fine of three hundred rupiahs*".

In accordance with this norm, the elements constitute the charge in question, an action translated in the wearing of marks specific to a given office or practice of acts, by the agent, after having been duly suspended from his office. The subjective element consists in the intention, by the defendant, to wear marks or hold an office even though he was aware of the contents of the suspension order.

In the case at hand, from the facts considered proven it can be stated that the defendant is a PNTL agent, that he was suspended, following a disciplinary process, from the performance of his duties by decision taken by the Commissioner of UNPOL, the defendant being notified of this on 27 August 2008. Furthermore, the order given by the UNPOL Commissioner was given under the terms set out in accordance with the Supplementary Policing Agreement of 1 December 2006, written down on page 12 of the records.

Therefore, it should be ascertained whether the suspension order issued to the defendant is legal and whether it was issued by a person entitled to do so.

It is set out in the records that the order given by the UNPOL Commissioner was done so pursuant to the Supplementary Policing Agreement of 1 December 2006, more specifically, in article 5.5.1. of this Agreement signed on 1 December 2006, following the United Nations Security Council Resolution number 1714 of 25 August 2006, by the Prime Minister of Timor-Leste and the Special Representative of the Secretary General of the United Nations, through which the powers conferred to the General Commander of the PNTL are conferred to the Police Commissioner.

The legal nature of the above mentioned supplementary agreement shall now be ascertained.

According to article 2 no. 2 of the Constitution: the state is subject to the constitution and laws, which signifies a clear affirmation of the principle of constitutionality and legality. Therefore, under penalty of unconstitutionality or illegality, every act shall be carried out only by those entitled to do so, shall comply with the applicable rules and follow the process set out in the constitution, and its contents shall respect the provisions and principles laid out in the constitution.

The constitution does not define what these legal acts are which comprise the Timor-Leste legal framework, nor does it define the principle of hierarchy of sources, nor the principle of typical laws, nor has it established a norm concerning normative sources and the effects of constitutionally typified normative acts. We therefore do not have a concrete norm constitutionally binding the legislator as to the production of norms, this task having been left to the regular state legislator.

In turn, the regular state legislator, through Law 1/2002 of 7 August, expressly set out these legislative and normative acts.

According to article 5 no. 1 set of the aforementioned Law, the acts to which the current law refers are published in the Official Journal of the Republic, under penalty of juridical inefficiency.

In accordance with number 2 para. b) of the above mentioned norm, international agreements, treaties and conventions are published in the 1st series of the Official Journal of the Republic.

Article 9 of the Constitution states that:

1-The Timorese juridical order adopts the principles of general international law.

2-The norms included in international conventions, treaties and agreements are in force in the internal juridical order by means of their approval, ratification and accession by the respective competent authorities and once published in the Official Journal of the Republic.

Thus, the documents attached to the records, drawn up in the English language and called “supplementary agreement” may possibly be in line with an international treaty. In effect, an international treaty is a concordance of the wills of two subjects of international law, formally drawn up in a written text, the purpose of which is to produce juridical effects. In other words, the treaty is a means by which subjects of international law – mainly national States and international organisations – set out mutual rights and obligations.

Only what is known as conventional law is recognised to subjects of international law. Generally only national States and international organisations are entitled to sign treaties.

The document in question was signed between the State of Timor-Leste, by its Head of Government, and by an international organisation – the United Nations. The signing constitutes the act whereby the text of the treaty is certified but which does not render it obligatory for the parties. In effect, in accordance with the constitutional system of Timor-Leste, a subsequent and additional act is necessary, called ratification and promulgation, or in other words, in order for it to come into force in domestic law the Constitution requires that the treaty be submitted to the appraisal of the legislative power (National Parliament) – arts. 85 para. a), 9 no. 2 and 95 no. 3 para f) of the Constitution of Timor-Leste (CRDTL). Furthermore, its juridical efficiency can only be brought about through its publication in the Official Journal of the Republic.

In consideration of the above and given that the document in question was not submitted to the legislative power for ratification, nor was it the object of promulgation nor of publication, the document even though it is an international instrument, it is of a non-binding nature, and is therefore an instrument of a merely political and administrative nature, and as such entails no legal obligations, with *erga omnes* effects.

Thus, it shall be concluded that the decision pronounced by the Commissioner of UNPOL, under the terms of the above mentioned instrument, has no legal basis as it was issued by an entity not legitimately entitled to do so, resulting in the fact that the suspension order notified to the defendant is not capable of producing effects.

The suspension order is illegal due to the absence of one of the legal requirements included in the charge against the defendant.

Given the above, the defendant shall be absolved.

Any remaining issues raised by the plaintiff shall thus be settled.

Provision

Under these terms, the defendant shall be absolved as the objective element of the crime set out and punishable by article 228 of the Criminal Code has not been fulfilled.

No costs

Notify

Dili, 9 December 2008

Court of Appeal Judges

(Illegible signature)

Ivo Nelson de Caires Batista Rosa
(Rapporteur)

(Illegible signature)

José Luís da Goia

(Illegible signature)

Antonino Gonçalves