



210
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REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

DILI DISTRICT COURT

THE SPECIAL PANELS FOR SERIOUS CRIMES

Before:
Judge Phillip Rapoza

CASE NO. 12/2003

DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

-AGAINST-

DOMINGOS AMATI AND FRANCISCO MATOS

Decision on the Defendants'
Motion on Defects in the Indictment

For the Prosecutor:
Wambui Ngunya

For the Defence:
Ana Beatriz Sanchez
Jed Abad
Holger Hembach

201
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Background

The Defendants are named in an indictment in which each is charged with the murder of Antonio Pinto Soares on or about 5 September 1999 in the town of Hera. In Section IV, "Criminal Responsibility," the indictment states that "the accused are charged with individual criminal responsibility in this indictment." It goes on to state that "Each accused is responsible under Section 14 UNTAET Regulation 2000/15" if he does any of the acts specified in Section 14 (a) through (d), each of which is reproduced verbatim in the indictment.

The Defendants have filed a written motion citing alleged defects in the indictment and stating that: (1) Section 14 applies only to criminal responsibility for conduct charged as crimes against humanity and not as murders under either Article 340 or Article 338 of the Indonesian Penal Code; and (2) If Section 14 does apply to charges brought pursuant to Article 340 or Article 338, then the Prosecutor must allege a specific mode of individual criminal responsibility under Section 14.

The Prosecutor filed a Response to the Defendants' motion and a hearing was conducted before a single judge of the Special Panels for Serious Crimes.

Applicable Law

1. The motion of the Defendants is made pursuant to UNTAET Regulation 2000/30, the Transitional Rules of Criminal Procedure (TRCP) Section 27.1. That rule permits the filing of preliminary motions prior to the commencement of trial that "allege defects in the form of the indictment." TRCP Section 27.1(a).
2. TRCP Sections 4 to 9 set out the crimes over which the Special Panels for Serious Crimes have jurisdiction. These include, *inter alia*, crimes against humanity (Section 5) and murder (Section 8).
3. TRCP Section 8 specifies that, with respect to murder, "the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply." The applicable Penal Code referred to in Section 8 is the Indonesian Penal Code, which defines murder in Articles 340 (with premeditation) and 338 (without premeditation).¹
4. TRCP Section 14 sets out the basis for an individual's criminal responsibility. The Section is reproduced in the margin in its entirety.²

¹ At the pre-trial conference on 16 September 2004, counsel for all parties agreed that although the indictment alleges murder solely under Article 340, in light of the ruling of the Court of Appeals in *Deputy General Prosecutor v. Domingos Amati and Francisco Matos* (Case No. 50/2003. Dated 9 December 2003), the matter shall proceed to trial as a murder charged under Article 338, being a lesser included offense of the crime charged. See TRCP Section 32.4.

² 14.1 *The Panels shall have jurisdiction over natural persons pursuant to the present regulation.*

14.2 *A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation.*

14.3 *In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:*

Discussion

The Application of Section 14 of UNTAET Regulation 2000/15 to Murder

The Defendants' motion states that Section 14 of UNTAET Regulation (U.R.) 2000/15 ("Individual Criminal Responsibility") "deals with the nature of criminal responsibility and conduct necessary for Crimes Against Humanity." (Motion on Defects in the Indictment, Par. 1) Moreover, it contends that Section 14 "does not apply" to the crime of murder, whether brought under Article 340 or 338. These assertions are put forward in the motion without legal support. Moreover, at the hearing counsel did not supply any authority for the cited propositions.

The Defendants position with respect to Section 14 and the scope of its application is without merit. Indeed, it conflicts with a plain reading of the regulation itself, which states: "A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation." Section 14.2 of U.R. 2000/15. Moreover in Section 14.3, which enumerates the various modes of individual responsibility under the regulation, it is stated that Section 14.3 applies to "a crime within the jurisdiction of the panels."

It is undisputed by the Defendants that murder is "a crime within the jurisdiction of the panels." See Section 8 of U.R. 2000/15. Consequently, the provisions of Section 14 apply to indictments alleging that offence and a defendant so charged "shall be individually responsible and liable for punishment in accordance with the present

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- (a) *commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;*
 - (b) *orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;*
 - (c) *for the purpose of facilitating the commission of such a crime, aids, abets or otherwise in its commission or its attempted commission, including providing the means for its commission;*
 - (d) *in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:*
 - (i) *be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or*
 - (ii) *be made in the knowledge of the intention of the group to commit the crime;*
 - (e) *in respect of the crime of genocide, directly and publicly incites others to commit genocide*
 - (f) *attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.*

regulation.” See Section 14 of U.R. 2000/15. The regulation contains absolutely no exception in the case of murder, nor is there any language in the provision that even remotely suggests that Section 14 applies solely to crimes against humanity.

2/3
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Moreover, if the Defendants are correct that Section 14 of U.R. 2000/15 “does not apply” to the crime of murder, then the responsibility for that offence can only be asserted under Section 16 of U.R. 2000/15 (“Responsibility of commanders and other superiors”). Such a reading of the regulation leads to a legal cul-de-sac in that Section 16, by its own terms, applies only to “serious criminal offences referred to in Sections 4 to 7” (genocide, crimes against humanity, war crimes and torture). Thus, if the Defendants are correct that Section 14 “does not apply,” the consequence would be that murder cannot be prosecuted at all, either on the basis of individual responsibility under Section 14 or command responsibility as provided in Section 16.

As the interpretation of Section 14 urged by the Defendants leads to this incongruous result, it must be rejected. It remains that Section 14 is applicable to the crime of murder, just as it is applicable to any other crime over which the Special Panels has jurisdiction.

The sufficiency of the indictment

The Defendants claim that the indictment is defective because it fails to specify the particular subsection of Sec. 14.3 of UNTAET Reg. 2000/15 that describes their individual criminal responsibility. Their motion contends that “the prosecution must specify exactly what conduct the accused is being charged with under Section 14 of the Regulation 2000/15.”

The Special Panel previously considered this claim in the case of Deputy General Prosecutor v. Abilio Mendes Correia (Case No. 19/2001). In that case a single justice of the court denied the defendant’s request to dismiss the indictment against him. The court stated:

In citing Section 14 generally, the indictment is not ‘insufficient’ as that term is legally understood. An ‘insufficient’ indictment would be one that fails to indicate whether a person’s criminal responsibility is individual (TRCP Sec. 14) or as a commander or superior (TRCP Sec. 16). In the present case, the defendant is informed in each count that he is alleged to be individually responsible as described in Sec. 14 of UNTAET Reg. 2000/15. That is the crucial allegation that must be made. Although the Prosecutor could have chosen to further specify the basis for the defendant’s individual criminal responsibility with reference to a particular subsection of the regulation, it is not required that he do so.

The subsections of TRCP Sec. 14.3 are not elements of an offence that must be specifically articulated. Rather, they merely describe the forms of conduct that are incorporated within the concept of individual criminal responsibility set out in TRCP Sec. 14. An indictment is not defective should it fail to specify a particular subsection of TRCP Sec. 14, and individual criminal responsibility can be demonstrated by evidence satisfying any of the subsections in TRCP Sec. 14.3.

Consequently, proof that a person conducted himself as described in any one of the subsections in TRCP Sec. 14.3 will be sufficient to establish individual criminal responsibility on the count involved.³

217
7

The Special Panels have recently ruled on the issue in the case of Deputy General Prosecutor v. Anton Lelan Sufa, et al. (Case No. 4/2003). In that the defendants moved the court to reject the indictment on the ground that it failed to provide them adequate notice of the charges. The Court, in denying that request, concluded that it was not necessary for the indictment to specify upon which category of individual responsibility the prosecution intended to rely: “[T]he panel in its present composition and its majority does not regard this as compulsory, rather as a voluntary requirement.” The decision went on to state that “it will often be difficult to ascertain at the investigational stage the precise category of individual responsibility to be taken into account, and will often only be possible to clarify this during the taking of evidence before the Court.”

The facts giving rise to the charges against the Defendants in the present case are contained in the indictment at Section III, “Statement of Facts.” Those facts are related in sufficient detail to allow the Defendants to identify the basis for the criminal charges against them. Section IV of the indictment asserts the defendants’ criminal responsibility to have been individual, as opposed to command, responsibility and the relevant provisions of Sec. 14.3 of UNTAET Reg. 2000/15 are set out.


Conclusion

The indictment in its present form is sufficient and provides the Defendants with adequate factual and legal notice of the charges against them.

ORDER

Accordingly, the Court orders that the Defendants’ Motion on Defects in the Indictment be denied.

So Ordered.



Judge Phillip Rapoza
Special Panels for Serious Crimes

Date: 11 November 2004

(The original of the above decision was rendered in English, which shall be the authoritative version.)

³ Deputy Prosecutor General for Serious Crimes v. Abilio Mendes Correia, (Case No. 19/2001), “Decision on Defendant’s Second Challenge to the Indictment” (2 March 2004).