



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

TRIBUNAL DISTRITAL de DILI

SECÇÃO CRIMES GRAVES

Case No. **9**/2002

Date: 8/12/2003

Original: English

Before:

Judge Dora Martins De Morais

Judge Antonio Helder Viera do Carmo

Judge Francesco Florit, presiding and rapporteur

Case no : 9/2002

Registrar: Joao Naro

Judgement of: 8/12/2003

The Prosecutor

V.

Carlos Soares also known as Carman

JUDGEMENT

The Office of the Public Prosecutor:

Ms. Lyne Decarie

Counsel of the accused

Ms. Maria Rocheteau

INTRODUCTION

The trial of Carlos Soares a.k.a. Carman -approximately 33 years old, farmer, residing in Aitura sub-village, Estado village, Ermera sub-district, Ermera District - before the Special Panel for the Trial of Serious Crimes in the District Court of Dili (hereafter the "Special Panel") started on the 6th October 2003 and ended today, the 8th December 2003, with the rendering of the decision.

After considering all the evidence presented during the trial and the written and oral statements from the defense and from the Office of the Public Prosecutor (hereafter the "Public Prosecutor"), the Special Panel renders its judgement.

PROCEDURAL BACKGROUND

On 24th September 2002, the Public Prosecutor filed before the District Court of Dili a written indictment (in English) against the accused, charging him with a count of murder.

Copies of statements of several witnesses and copies of statements of the accused himself were attached to the indictment. Pictures of the witnesses were also attached.

The Court clerk provided notification of the receipt of the indictment to the accused and to the parties pursuant to Sect. 26.1 and 26.2 of UNTAET Reg. 2000/30 (as amended).

The trial started on the 6th October 2003. In the course of the trial the accused and six witnesses were heard.

After the adjournment of the hearing for the delivery of the final statements, the acquisition of the autopsy report on the remains of the victim took place. The examination of this document imposed the necessity of hearing two expert witnesses. Following a court order, the weapon allegedly used in the execution of the crime was collected.

At the end of the trial, the Parties made their closing statements.

After delivering the conviction, the hearing was then postponed to the present date for the final written decision.

Interpreters for English, Portuguese and Tetum assisted every act before the Court, where needed.

FACTS OF THE CASE

According to the description made by the Prosecutor, the facts of the case can briefly be outlined as follow.

On 19 September 1999 the accused and two other people (at the time members of Falintil) were mandated to reach the sub-village of Aitura, in order to observe and pacify the population of the village, scared by the possible return of the militia.

On the way to the village, Graciano Mau Mario (the victim) joined the group.

In the course of the walk, for reasons and with modalities that are not fully illustrated in the indictment, Carlos Soares wounded the victim with his spear, causing the victim's death.

FINDING OF FACTS

The simple fact of the death of Graciano Mau Mario has been described in two radically different ways by the two Parties in the course of the closing statements: the Prosecutor naturally tried to elucidate that the act of stabbing the victim to death had the connotations of a murder, while the Defense Counsel strived to justify the behavior of his client as an act of self-defense, a reaction to an aggression coming from the victim himself.

This Court thinks that many homogeneous elements concur to give weight to the version of the Prosecution and regards the attempt of the Defense as insufficient to raise a reasonable doubt regarding the guilt of Carlos Soares.

Indeed, while the thesis of the Prosecution appears to be grounded on testimonies that find corroboration within and between themselves, the Defense Counsel founded her line of defense on the scarce elements of the statement of the accused and (in part) the declaration of one of the expert witnesses.

The number of corroborating witnesses and consistency of their testimonies presented by the Prosecution regarding the location and nature of the wounds to Graciano Mau Mario impressed the Court. Of the two interpretations of the facts (the spear entering from the left-hand side/back and coming out in the front from the lower belly of the victim or the strike of the spear entering the belly from in front), only the Prosecution's version finds support in the testimonies of the witnesses. The Court believes that Graciano Mau Mario was stabbed in the left-hand side/back and that the spear passed through his body, exiting from his lower belly.

If it is impossible to give the precise location of the point of entry of the spear, never the less from the descriptions given by Bendita Margarita Lermos and Alfonso Asunção Dos Santos and Domingos Soares the Court has sufficient indication of the where the blade of the spear entered the body. Bendita Margarita Lermos demonstrated to the Court the place where she saw the victim's wound, at a point that is described in the transcript as "the witness touches at the left side of the back below the armpit." Alfonso Asunção Dos Santos was less precise, although he testified to seeing two wounds, "one at the back and one at the front." These two testimonies find corroboration in the testimony of the only eye-witness of the act of stabbing, Domingos Soares. This witness was repeatedly asked by the Court to re-enact the act of stabbing and did so by raising his joined hands above his head as if holding a spear and

pointing it in a position which was described by the Presiding Judge, as “The witness is on the left-hand side of the interpreter ... Holding the spear that is virtually pointed to the left-hand side of the body of the victim, slightly on the back”.

The final confirmation of this version is found in the words of the dying victim, who -when asked by the witness Alfonso Asunção Dos Santos about his injuries- said “Carman has already stabbed me. I don’t know [why] because he stabbed me from behind.”

Alfonso Asunção Dos Santos referred to a front wound, from which “his lungs and intestines were coming out.” Later, he referred to intestines “protruding out” and, even more precisely, “not the actual intestine had come out but the dirt of the intestine had come out and part of his lungs were also protruding.” The detail of the lung is hardly credible although the Court does not expect from this witness detailed scientific testimony, although the detail of “the dirt of the intestine” is very relevant. It shows that the wound in the front was an exit wound. Equally importantly, the precision and vividness of this detail gives credibility to the testimony because it is not something likely to be invented. The information came out at the second stage of questioning on this issue, when the witness felt the obligation to be more precise in his testimony. This shows his intention to be accurate, adding reliability to his words.

The Court acknowledges that the testimony of the forensic pathologist apparently contradicts this interpretation. However, the Court considers the opinion of the physician was not conclusive against it. Indeed, the pathologist was invited by the Defence Counsel to express, in terms of possibility, the respective likelihood of the two main versions of events (the third option, the spear passing through the shoulder blade has never really emerged as a credible possibility and is discounted here). The pathologist placed greater weight on the version of the spear entering the soft tissues of the belly from the front (as argued by the Defence Counsel) than the version in which the spear passes through the ribs and exits in the front without breaking ribs or leaving any noticeable marks on them. The Court notes that this witness did not exclude the Prosecution’s version of events. He admitted that it was a possibility.

Further, this witness stated that the act of striking a spear through a body from behind and then withdrawing the spear would likely have broken or marked the bones. But, if breakage is excluded (according to the result of the autopsy) it is hardly possible to say anything about the presence of marks on the bones at the time of death because the condition of the bone is now greatly eroded. In this respect as well, the testimony of the witness was too theoretical and speculative to be conclusive.

In general, the Defence Counsel did not contest the Prosecution’s witnesses on grounds of credibility. Rather, there has been an assertion that the witnesses were under the influence of the version of events given by the victim as he was dying and that from his words that he had been stabbed from behind, sprung the biased reconstruction of events. If the Court has correctly understood a passage of the closing statement of the learned Defence, when she said that the Timorese culture was (in good faith) prone to influence in the case of such dramatic events, this influence may cause a deformation of the truth. The Court considers that such an opinion, while interesting, appears not to be sufficiently supported by expert evidence such as from a sociologist or cultural expert. Further, such a general interpretation should be applied to the concrete facts of this case. If this process is done, the Court observes

an inconsistency because the witness Alfonso had the immediate possibility to confirm the version of events related by the victim by seeing the two wounds (one entry wound behind and one exit wound in the lower belly). Further, this line of reasoning of the Defence offers no explanation as to why the victim would say he was struck from behind in the first place. It does not say where the idea originated from and why the victim should have lied.

In addition, the credibility of the Prosecution witnesses could not be challenged by the fact that some of them were related to the victim. They were also related to the accused. In the context of East Timor, this is not a general ground to disqualify a witness.

The defence of self-defence came to light for the first time in the course of the interview of the accused of 13.8.2002. The version of self-defence, which was confirmed by the declaration of the accused to the Court, depicts Graciano Mau Mario as pulling out his catana and trying to strike the accused: "he ran forth, he pulled out a machete... I was here... and he gave it like this and it missed... Then I defended with the spear. I did not know that it was going to get him... He all of a sudden pulled this catana and tried to kill me but he missed and that is why I defended." In a later representation of the episode, the accused said that the act of aggression by Graciano Mau Mario came from his side and that the accused himself, walking a metre in front of the victim, stabbed backwards with the spear, without looking. The Court cannot help but notice the contradiction between the two versions- the attack from the front and the aggression from the side/back- and that they don't find corroboration in the testimony of the only eye-witness to the events.

The Court found Domingos Soares to be a credible and reliable witness. His testimony was rich in details that were reasonable and when confronted with different versions given by the witness Alfonso Dos Santos (on the relative position between the men present at the time of the killing or by his own possibly contradictory testimony to the investigators), was able to give an acceptable explanation to clarify these positions. Furthermore, his testimony regarding the point of entrance of the spear was confirmed by the testimonies of Bendita Margarita Lermos and Alfonso Asunçao Dos Santos.

Domingos Soares, who was walking behind Graciano Mau Mario and Carlos Soares, and saw the actual act of spearing the victim, testified that "Carlos was walking slightly behind Graciano approximately two or three feet away when Carlos without any reason raised his spear and thrust it on the back left side of Graciano which surprised the man." To the question of the Prosecutor, "Do you remember if Graciano did anything before Carlos stabbed him?", the witness replied "Nothing". Indeed, there was no evidence before the Court that the victim struck the accused with a machete. Furthermore, this witness repeatedly confirmed his surprise to the act of stabbing, stating that at that time, he thought that Carlos Soares was making the stabbing motion in jest. He testified "And I saw him holding the spear over the shoulder and I thought he was just playing but then I saw he did it for real... I thought that Carlos was playing." The Court accepts that some lines later, under the repeated questioning of the Defence Counsel, the witness contradicts himself because he admits that, had something happened, he was not able to see; this appears as an unsolvable ambiguity which can be due to difficult translation (it could possibly mean here either "was not able, I didn't have the chance" or "it was impossible" or simply "I did not see") or to misunderstanding. What remains is the sense of surprise of the witness for seeing Carlos Soares hitting the victim without any plausible reasons.

The Court acknowledges that a catana was carried by Graciano Mau Mario and that this weapon was bought by the accused to the Falentil *posto* when he reported the incident. Nonetheless, Domingos Soares testified that Graciano was carrying a machete in his right hand “in a normal manner” and there is no evidence at all of an aggressive usage of it by the victim.

What is more, the defence of self-defence does not correspond to the perception of the facts of the same accused at the time when the killing occurred. On this point the Court heard two witnesses: Abilio Ximenes and Angelino Brites. The two high-ranking Falintil members received in the immediate aftermath of the events the version of the accused. According to the testimony of Abilio Ximenes:

Abilio Ximenes: Carlos answered like this “The three of us went there and we meet, we meet with Mau Graci” and Mau Graci said words like this: “We saw people making fire in Hulolo”. Carman said “your forces is the one that went and burned, we have seen the fire, our forces are the one that have started the fire, don’t be afraid”, and than Graciano answer that “the spears and the machete shove it up your back side, shove up your body” and that’s why Carman killed.

Judge Florit: Did Carlos Soares, when he reported to you the death of Mr. Graciano Mau Mario, say that he had to *self-defense*? ...when he came back to report of the death of Graciano Mau Mario didn’t he say: “I struck him, because he assaulted me or because I had to defend me”?

Abilio Ximenes: He killed because he was a ... a... because of the words that the other one said about putting those guns, those weapons up his back side and ... because of that he killed and Carman also, Carman also told against Mau Graci that this weapon is what we have and he said “if these things now have no value then no worry about it and than he killed.”

According to the testimony of Angelino Brites:

Angelino Brites: Then I asked him what happened there. Then he said that: “Now I was there and Graciano Mau Mario said that yesterday and the day before I had a spear and machete and told me to shove up my bum. Then he said now that militia has passed through, you come for a walk with a sharp instrument. With this he said that he was ashamed and that is why he killed Graciano Mau Mario”.

This testimony shows that the origin of the stabbing lies in the insult given by Graciano Mau Mario to Carlos Soares and is not characterised as a situation of aggression requiring an act of self-defence.

If the accused had acted in self-defence, would not it be more likely that he would report the fact that he had acted out of self-defence, rather than (as he did) justifying his actions by mentioning the insult? And would not that have stuck in the memory of the witnesses as being more impressive?

But the truth also emerges through the words of the accused who, at the onset of his statement before the Court, referred (unasked) to the “darkness in my mind: my six brothers

also had all died. With this I was so sad about the death of my brothers who were from inside my house". This refers to the state of mind of the accused at the moment of the incident and reveals the confusion and disorder he felt. It is also a state of mind that is not related to the issue of self-defence but is a logical explanation of a disproportionate reaction to an insult and the eventual result (the death of the victim).

In conclusion, this Court thinks that the representation of the facts that the Defence Counsel outlined (from page 3 to page 6) in the closing statement is -as far as the self-defence issue is concerned- based on a self-referential vision of the facts that lacks reference to or scrutiny of the witnesses brought by the Prosecution. The *falta de argumentação* in the closing statements of the Defence Counsel derives from assuming facts that should have been justified and explained, rather than taken as granted. It is insufficient to explain why the self-defence could be established if, firstly, the facts that constitute it are not proven.

The Court thinks that there is no need to further illustrate other reasons of perplexity for the version of the self-defence (which, for example, appears hardly compatible with the relative position of the victim behind and the accused in front, showing the back to the victim; or is not in line with the representation of a strike made by the accused so unconsciously and instinctively that he was not able to say whether he had attained the body of the aggressor).

LEGAL FINDINGS

The justification of self-defence is void of factual foundations (the unlawful aggression has not been proven); accordingly, there is no need to examine its juridical implications.

The act of killing of Graciano Mau Mario by Carlos Soares Carman is a simple murder, as described in Section 8 UNTAET Reg. 2000/15 and Article 338 of the Indonesian Penal Code.

While it appear superfluous to analyze the material elements of the act, the mental element can be briefly identified as a *dolus impetus* which is a form of the will characterized by the rapid insurgence of the determination to act, immediately followed by the execution of the deliberation. It is a state of mind in which the will to act, having arisen, does not find a psychological counterthrust nor resistance; the drive which prompts the will is then immediately and violently satisfied only by the execution of the action.

In the given case there was will and there was intention, which supported the unfolding of all the action, from the onset to the end.

For this reason the Court can not follow the suggestion of the Defence Counsel who introduced, if only at the stage of the pleas of mitigation (i.e. too late, since the Court, with the conviction, had already given its juridical qualification of the facts), the argument of the qualification of the facts as maltreatment followed by death. In the afore-mentioned crime, the intention covers only the injury or harm and the responsibility for what follows (death) is then conferred on the accused provided that there is a link of causality between the action and the death, accompanied by a mental element which is not an intention (to kill). With such a weapon and having struck the victim in such a manner, the Court cannot conclude that his intention was simply to wound.

SENTENCING POLICY

While the maximum imprisonment for the intentional homicide is established by Article 338 of the IPC (to which is made reference Section 10.1 a UNTAET Reg. 2000/15: “for the crime referred to in section 8 [murder] and 9 of the present regulation, the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor shall apply”) as fifteen years, the guidance provided by the law for the judge to determine the penalty in practice is found in Section 10.2 of UNTAET Reg. 2000/15, where it is stated that “in imposing the sentences the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person”.

Given the kind of crime, on the gravity of the offence there is not much to state, since the taking of someone’s life is not subject to variations of intensity; what can and does vary is the intensity of the intention to kill (ranging from the weak *dolus eventualis* to premeditation through a variety of different nuances of will). In the majority of the developed legal systems, the level of intensity of the will is taken as one of the means to measure the retribution of the penalty, for the obvious consideration that with the rise of the intensity of the criminal will, the wickedness of the personality of the accused rises as well.

In application of the same rule, it can be noticed that the *dolus impetus* which qualify the action of stabbing in the present case, is not evidence of an intense criminal personality, rather of a personality which can not restrict itself and that is therefore unable to place a psychological barrier between the insurgence of the deliberation and the execution. Many words could be spent on this profile that is generally taken as a typical feature of the Timorese culture, as a consequence of its fragility. Although the risk of entering into commonplaces and banalities induces the Court to refrain from this exercise, which, at the end of the day, would be of scarce utility for the decision. What is worth noticing is that the absence of a previous criminal record of the accused and the circumstance that he was (up to the time of the murder, at least) a respected member of his community, exclude a particularly criminal personality. The act, inexplicable to a cold mind and even to the countryman who was following Carlos Soares to Aitura (Domingos Soares: “I thought he was just playing but then I saw he did it for real...”), came out of the blue, abruptly annihilating both the rationality of Carlos Soares and the life of Graciano Mau Mario. A desire to kill lasted only for few seconds, immediately followed by rethinking and pacification of the mind, if not remorse (Carlos Soares: “Entao apa, hau oho lui tiha ona ne [Now, father, it is too late, I’ve already killed him]”).

To try and understand an act that is otherwise difficult to accept, for the fragility of the motive that is at the basis of it, it appears proper to examine the main argument in mitigation introduced by the Defence Counsel: the mental condition of the accused at the time of the fact, as a consequence of the death of many close relatives (Carlo Soares called them brothers, and they were six) by militia forces, only one or two days before the death of Graciano Mau Mario.

On this issue, the Court relies on the words of the Defence Counsel, who has indicated three witnesses to support her statement and the declaration of the accused himself. They clearly depicted the desperate story of the family of the accused, culled by the raid of the militia

flagellating the area on the 16th, 17th and 18th September 2003. During those incursions many lives were taken and the villages destroyed.

It is acceptable that the sense of grief, of sadness and of loneliness for the sudden loss of many relatives and of all the belongings created a condition of mental obfuscation or confusion which, if not enough to justify the murder or to support an acceptable reprisal to a verbal provocation, diminishes the responsibility of the accused and explain why he was not ready to resist his compulsion to strike. The words used by Graciano Mau Mario wounded Carlos Soares and were sufficient to provoke the deadly reaction not so much because they were insulting but because they were humiliating. If read properly, they invoked the responsibility of Carlos Soares for the death of his six brothers two days before.

Angelino Brites refers the words used by the accused:

“Graciano Mau Mario said (to me) that yesterday and the day before I (Carlos Soares) had a spear and machete and told me to shove up my bum. Then he said now that militia has passed through, you come for a walk with a sharp instrument.”

Abilio Ximenes:

“Carman also told against Mau Graci that this weapon is what we have and he said “if these things now have no value then no worry about it and than he killed.”

The context is quite clear: Carman replied by saying “if these things have no value than no worry” (i.e. if they are unable to do harm than you, Graciano, don’t have to be worried by them) because Graciano had complained: “why do you come now, “for a walk with a sharp instrument”, while you should have been here yesterday and the day before to protect people (and your brothers amongst them) from the militia?; now your weapon are useless” (have no value). While it is interesting to notice the shift in meaning in the Tetum expression for “no value” (which for Graciano meant ‘useless’ and that Carlos used as ‘incapable to do harm’) there is no doubt that the accusation was perceived by Carlos as questioning his capacity to defend his family. Angelino Brites testified “Then he (Graciano) said now that militia has passed through, you come for a walk with a sharp instrument. With this he (Carlos Soares) said that he was *ashamed* and that is why he killed Graciano Mau Mario” (*italics added*). The word “ashamed” is different from “insulted” or “offended”, it is the sense of personal inadequacy for something that could have been done by the accused (two days before, protecting his people) and had not been done. It refers to a sense of guilt, a guilt which was not fair to be put on the shoulders of Carlos Soares (who could not have reasonably resisted the action of the militia against his family), but that questioned his honour toward his family.

This is the key to understand an act that, otherwise, appears incongruously disproportionate. Of course all this does not amount to provocation in the meaning common to common law lawyers (i.e. a defence to reduce the charge from murder to manslaughter) but amounts to a diminishing circumstance, as generally considered in civil law countries.

Other circumstances (hardship of life of the accused at the time, family conditions, his illiteracy) do not amount to autonomous reasons for further mitigation since they do not have a significant inference on the way in which the murderous determination arose and was brought to execution.

The punishment for a crime which, in line with precedent decisions of the Panel and of the Court of Appeal, would deserve a penalty of six years and an half is therefore reduced to four years and an half, cutting almost one third of the term in jail.

The order pursuant to Section 10.3 UNTAET Reg. 15/2000, section 42.5 UNTAET Reg.30/2000 and Section 33 of Indonesian Penal Code (deduction of pre-trial detention) is detailed in the final part of the present decision, by law.

Having considered all the evidence, and the arguments of the parties, the Special Panel for Serious Crimes issues the following decision:

1.

The accused is found guilty of the crime of murder of Graciano Mau Mario, committed on the 19th September 1999 in the sub-village of Aitura, sub-district of Ermera, district of Ermera, in violation of UNTAET Reg.2000/15, Section 8 and Article 338 of the Indonesian Penal Code;

2.

In punishment of this crime, the Special Panel sentences Carlos Soares to an imprisonment of four years and six months in jail.

3.

The spear or *dima* used in the crime will be kept by the office of the clerk of the Court until the end of the appeals or the expiring of the terms to appeal. Afterwards, it will be disposed of in the most appropriate manner.

4.

According to Section 10.3 of U.R. 15/2000, Section 42.5 of U.R. 30/2000 and Article 33 of Indonesian Penal Code, the Special Panel deducts the time spent in detention by Carlos Soares a.k.a. Carman due to orders by East Timorese Courts.

The accused Carlos Soares was arrested on 11 July 2002. He was released on 18 October 2002. Therefore he was under detention for 3 months and 7 days.

Accordingly, previous detention shall be deducted from the sentence today imposed, together with such additional time he may serve pending the determination of any final appeal.

5.

Pursuant to Sections 42.1 and 42.5 of UR-2000/30, the convicted shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.

The sentence shall be executed immediately, provided this disposition as a warrant of arrest.

The Defense has the right to file a notice of appeal within 10 from the day of the notification to her of the final written decision and a written appeal statement within the following 30 days (Sect. 40.2 and 40.3 UR-2000/30).

This Decision was rendered and delivered on the 8th December 2003 in the building of the Court of Appeal of Dili by

Judge Dora Martin De Moraes

Judge Antonio Helder Viana do Carmo

Judge Francesco Florit, presiding and rapporteur