



JUDICIAL SYSTEM MONITORING PROGRAMME PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

JUSTICE UPDATE
Period: August 2007

Defendant in case of alleged corruption ordered to pay a fine to the state

Introduction

On 14 August 2007, the Oecusse District Court handed down a decision in a case of alleged corruption involving the defendant Marcos Seo. A hearing to announce the final decision was presided over by a Panel of Judges comprising Victor P (international judge), Antonio Helder do Carmo and Constancio Basmerry (national judges). The Public Prosecution Unit was represented by Domingos Bareto and the defendant was represented by his legal advisor João Ndun, from FFSO.

Before handing down its decision in this trial, the Panel of Judges first read out an interlocutory judgment relating to the court's decision to amend the indictment. This explained the Panel felt that the facts in evidence clearly and convincingly demonstrated that the defendant had committed an act of fraud pursuant to Article 378 of the Indonesian Penal Code¹, though this charge was not originally contained in the prosecutor's indictment.

After giving its interlocutory judgment, the Panel gave the prosecutor and the defence an opportunity to give their opinions on the inclusion of this charge. Both parties stated that they assented to the amendment, and the Panel continued to its announcement of the final decision in the trial. The Panel first summarized the personal particulars of the defendant and the crime alleged in the indictment. It detailed evidence established at trial, distinguishing between facts that had been proved and those that remained unproved.

In the original indictment, No. 01/GIG/APTL/05, dated 09 December 2005, the defendant was accused with having committed criminal acts in violation of the following Articles: suspected corruption pursuant to Articles 418 and 419 (2) of the Indonesian Penal Code; misuse of authority pursuant to Articles 421 and 423 of the Indonesian Penal Code; falsification of documents pursuant to Article 263 of the Indonesian Penal Code; and using government owned facilities for personal interests pursuant to Article 415 of the Indonesian Penal Code. This indictment was drafted by international prosecutor Sandra Pontes.

¹ The Indonesian Penal Code is still applicable in this jurisdiction, as the Timor-Leste Penal Code is still being drafted.

Court Decision

The defendant was charged and convicted for violating Articles 418 and 378 of the Indonesian Penal Code. Article 418 was included in the original indictment, and relates specifically to state officials accepting gifts or promises relating to their authority or position. The Panel also found it had also been established that the defendant's actions violated Article 378 on fraud. However, the Court determined the remaining five charges had not been proved.

The Court stated it had been legitimately and convincingly proved that the defendant violated Articles 418 and 378 of the Indonesian Penal Code and imposed a single sentence on the defendant, ordering him to pay compensation to the value of US\$50 per month for three years (totaling US\$ 1,800) to the Oecusse regional hospital, as well as US\$15 for court costs. If the defendant fails to adhere to the conditions of this sentence, he shall serve one year in prison.

The Court may, under Articles 65 and 66 of the Indonesian Penal Code, issue a single penalty for more than one offence, and hand down a suspended sentence of 1 year imprisonment, to be served by the defendant if he commits another criminal act within a three year period. After consulting the prosecution and defence, JSMP can confirm that both parties accepted the Court's decision and will not lodge an appeal.

Legal Analysis

The following analysis considers only the applicable provisions of law and is not intended to reflect on the validity of the decision as issued by the Court.

Regarding the defendant's conviction on charges of fraud and of improperly accepting gifts or promises,² the important terms for consideration here are the *authority* and *position* of the defendant. The defendant was a public official, holding the position of deputy chief of the Oecusse health service. The facts relate to the rehabilitation and tendering process for buildings belonging to the health service. Tenders are subject to a Ministry of Finance procurement process. In other words, even though the buildings to be constructed were located in the district, the tendering process was centralised. As such, the authority and position of the defendant had no direct relationship with the tendering process.

Based on monitoring conducted at the Oecusse District Court by Leonidio Marques, a Legal Researcher from JSMP, it can be reported that this charge was

² More detailed provisions are contained in the Indonesian Penal Code, R. Soesilo, 1996, Politeia Bogor

laid against the defendant because he received several gifts in the form of money from local businesspeople who wished to participate in the tender.

In its decision on the fraud charge, the Panel stated that on a range of occasions the defendant persuaded local businesspeople to give him money in fraudulent circumstances, claiming to be acting on behalf of the health service and signing off on a rehabilitation project for a clinic to be funded by the Irish government.

As indicated, this latter charge was not originally entered into the indictment by the Public Prosecutor, but included by amendment of the Court. JSMP believes that this addition is allowable under Articles 273(1) and 275(1) and (2) of the Timor Leste Criminal Procedure Code. These Articles give the Court authority to make substantial amendments to an indictment.

The sentence issued by the Court was made pursuant to Article 281(3)b and Article 284(1) of the Timor Leste Criminal Procedure Code on payment of compensation.

Conclusion

JSMP notes some confusion about the use of Article 418 of the Indonesian Code to encompass both criminal acts of fraud, and of corruption.³ Under existing legal provisions, corruption encompasses the following: violation of a law or regulation or arbitrary use of authority that results in a loss to the state, for the purposes of self-enrichment and nepotism. This would appear to constitute a quite specific charge, and examination of witness testimony and documentary evidence suggest it may not have been independently proved in this instance. This raises doubts over the use and extent of Article 418.

Recommendations

JSMP notes the importance of Courts explaining the applicable law, especially where differing bodies of law are used. Additionally, JSMP urges the Prosecution Unit to speedily those cases of alleged corruption still pending.

³ *ibid*

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