



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

Justice Update

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Prosecutor's Indictment Weak: Defendants Fully Acquitted in Fatu-Ahi Case

Introduction

On 17 September 2010 the Dili District Court read out its decision to acquit the defendants in Case No.233/C.ord/2007/TDD. This case relates to an attack and shooting involving 12 defendants in Fatu-Ahi which occurred on 23 May 2006.

The Court read out its decision which started with a summary of the trial findings, witness testimony and the testimony of the defendants. The court then drew its conclusions from the entire trial process that lasted approximately five months. The decision was read out in two languages, namely Portuguese and Tetum, by the presiding judge Antonino Gonçalves S.H, accompanied by judge Deolindo dos Santos S.H and judge João Felgar (international). The reading out of the decision took approximately 20 minutes.

The decision of the Dili District Court included consideration of the facts that were proven and not proven during the trial process. In accordance with the facts established by a panel of judges who tested the evidence throughout, the final decision was read out with the purpose of revealing who was found guilty or not guilty in accordance with the law.

This Justice Update comprises several sections, the first section provides an analysis of the trial process, the second section relates to the charges of the prosecution, the third section relates to the defence provided by the defendants' lawyers, the fourth section relates to the decision of the court, and the final section includes the views and recommendations of JSMP on the entire trial process. Several of these sections are punctuated with JSMP's views on issues of importance that require careful consideration and comprehensive analysis.

A. Trial of Fatu-Ahi Case relating to an incident that occurred on 23 May 2006

1. The entire trial process

For five months JSMP monitored the trial of this case which relates to an attack and shooting that occurred in Fatu-Ahi on 23 May 2006. The trial started on 3 May 2010 and ended on 17 September 2010. This was one of the many cases that occurred as the result

of the military crisis that had its origins in suspected discrimination within the F-FDTL. The trial began with the Public Prosecutor charging 28 people for their suspected involvement in the attack and shooting that occurred in Fatu-Ahi on 23 May 2006. One of the 28 defendants was absent because he was receiving treatment overseas. Nevertheless the prosecution and defence requested for the court to continue with the trial. A request was made to hold a separate trial for the absent defendant after he returns from his medical treatment overseas.

Pursuant to Article 258 of the Timor Leste Criminal Procedure Code the trial could continue because the defendant was represented by his lawyer. In this case the defendant was represented by Pedro de Andrade¹ from the Public Defenders Office. According to Article 258 of the aforementioned Criminal Procedure Code:

“Where a defendant is practically unable to appear at the hearing due to advanced age, serious disease or residence overseas, he or she may request or agree that the hearing be held in his or her absence, in which case the defendant shall be represented by his or her defender for all possible purposes”.

Therefore the trial of this case continued with the other 27 defendants.

The first hearing was held on 3 May 2010. This hearing was scheduled for the reading out of the indictment by the Public Prosecutor and the identification of the 27 defendants who attended the hearing.

The second hearing was held on 4 May 2010. The court asked four witnesses from a F-FDTL unit to provide testimony about the attack and shooting that occurred in Fatu-Ahi.

The four witnesses said that they did not see the defendants when the incident occurred. They claimed that they found out information from someone else that an attack and shooting had already taken place or was taking place in Fatu-Ahi. One point of interest from this hearing was the fact that the witness MK lodged an objection against the public prosecutor² which was made to the presiding judge and the witness asked for the prosecutor to ensure that the investigative process did not purely focus on specific distances from the scene of the crime.

The witness MK urged the court to endeavor to reveal who were the brains behind the Fatu-Ahi incident. This witness believed that it was important for the public to know who were the perpetrators behind the incident and especially to ensure that the image of the court as a legal institution was not damaged in the eyes of the general community.

Through its monitoring JSMP noted that in each hearing that involved members of F-FDTL as witnesses certain things occurred that should have been avoided to respect the

¹ Pedro de Andrade is an international lawyer employed by the Public Defenders Office in the Dili District Court.

² As set out in Article 48 (1) of the Timor Leste Criminal Procedure Code which states that the Public Prosecutor plays a key role in criminal investigations and is responsible for the investigative process.

honor of the court. In the written law³ as well as its practical application, any person summoned by the court as a witness shall, in accordance with his capacity as a witness, state what he saw, heard and knows. In this context a witness is not authorized to act outside of his capacity. In particular, a witness is not allowed to raise an objection to the presiding judge, unless there are certain issues undermining his rights and interests as a witness.

JSMP believes that outside of the trial process such behavior is relatively normally and is common amongst citizens. However, JSMP believes that when an individual is acting in his capacity as a witness such behavior does not reflect his position or the intention of the law, as well as general rules about the role of a witness in a criminal trial.

Therefore, JSMP appeals to everyone to uphold the authority of the court in all circumstances. The judges also have to protect the credibility and honor of the court by demonstrating their authority as enshrined in the law. Judges have authority pursuant to the law to take whatever measures necessary to oblige everyone to respect the court. This includes preventing a witness from acting outside of his capacity and if necessary ordering the witness to be quiet or to leave the court room if the witness fails to obey a court instruction.

In addition, JSMP also noted that each time a witness from the F-FDTL appeared in court the examination process was unable to progress smoothly. Especially in this case, the witnesses who were summoned did not provide accurate testimony and tried to avoid the questions of the prosecutor or judge by referring to the testimony given by their superiors and mentioned that their testimony matches what was stated by other witnesses, namely their commanders.

The third hearing took place on 17 May 2010. In this hearing the court continued with the examination of testimony from four witnesses who were attacked at the scene of the crime. These four witnesses were also from F-FDTL. The four witnesses (FRL and others) said that when the incident occurred they only heard the voice of a person yelling out that he was Major Alfredo Reinado Alves (deceased) together with his men.⁴

The fourth hearing was held on 30 June 2010. The trial proceeded with the reading out of charges by the Public Prosecutor against the 27 defendants. The public prosecutor only charged 12 of the 27 defendants as he believed they were directly involved in the attack and shooting together with the deceased Major Alfredo Reinado Alves. Based on the testimony of the defendants and the witnesses summoned it was determined that there was insufficient evidence against the other 15 defendants. Based on testimony provided

³ Article 119 of the Timor-Leste Criminal Procedure Code deals with the witness testimony and its limitations, namely that “A witness may be questioned about the facts of which he or she may be directly aware and constitute elements of proof”. JSMP does not believe that this article includes any wording that would enable a witness to make suggestions, or pressure the court to do one thing or another. Also, Article 123 of the Timor-Leste Criminal Procedure Code also deals with the general obligations of witnesses.

⁴ Strangely the panel in charge of the trial did not cross-check all of the witness testimony. In order to make sure that a trial is as fair as possible the judges should use their own initiative to cross-check all testimony.

by the defendants, which was corroborated by the witnesses, the aforementioned 15 defendants were in other locations such as Gleno, Aileu, Same, Suai and Ainaro when the incident in Fatu-Ahi occurred.

The fifth hearing was scheduled for 17 August 2010. The court intended to reveal new facts in the trial, however the hearing did not take place because all of the courts in Timor Leste were in recess. Therefore the trial was adjourned until 17 September 2010.⁵

JSMP once again notes that there was something strange about the scheduling of this hearing. The judges and the court staff knew, or should have known, that every year from mid August until mid September there is a judicial recess. The question is, why did the judges choose 17 August as the date for the continuation of the trial?

JSMP is suspicious that the trial scheduled was just a way or strategy of the court to avoid criticism and complaints from the public reaction. Because JSMP assume that in fact the judges who presided over the panel was aware that on 17th August is a holiday for all judicial actors; therefore according to JSMP that the postponement of the trial should not happened in this way.

2. Charges of the Public Prosecutor

The defendants were charged with perpetrating the attack and shooting that occurred in Fatu-Ahi on 23 May 2006. The defendants were identified as SR, AdCP, RAM, GJ, MdA, JG, AL, Ad, IMd, JS, PRG and FA. Based on the statements of witnesses and the defendants themselves during investigations and the preliminary trial, they were at the scene when the attack took place. However the defendants said that they were there in their capacity as members of the military and only following the orders of their superior (commander) to secure the area, not to conduct an attack as stated in the charges against them.

Therefore the Public Prosecutor concluded with certainty that there was strong suspicion that the aforementioned twelve defendants were directly involved in the attack and shooting against F-FDTL members and PNTL members in Fatu-Ahi.

The Public Prosecutor charged the defendants with the following crimes:

1. The defendants were accused of being involved in criminal acts in violation of **Articles 55, 108 and 338 of the Indonesian Penal Code.**
2. The defendants were accused of violating **UNTAET Regulation No. 05/2001, Section 4.4.7** on the use of firearms, ammunition and explosives to disturb with the public order.

⁵ See the Newspaper '*Diario Nasionál*', 17 August 2010, p.14.

3. The Public Prosecutor also charged the defendants with *Article 190 of the Timor-Leste Penal Code*, for participating collectively in a crime committed against another person.⁶

During the trial the public prosecutor maintained his stance that the charges made against the defendants were based on the legal facts revealed during the trial. The public prosecutor believed that the actions of the defendants are categorized as serious crimes and therefore they should be charged with multiple counts, because he believed that the defendants violated several articles of the criminal law.

Based on the crimes committed by the defendants the public prosecutor asked the court to find them guilty for violating the criminal law due to their involvement in the Fatu-Ahi case. However, when the public prosecutor made his oral recommendation of sentence he requested for the court to sentence the defendants to 5 months of home detention.

It is interesting to examine this process, particularly in regards to the consistency of the public prosecutor. Perhaps others may be able to justify or explain the stance of the public prosecutor, but JSMP finds his final recommendation of sentence to be strange, in comparison with the previous charges he brought against the defendants. JSMP noted that the articles charged by the public prosecution carry penalties up to 15 years. However, the question is, how or why would a public prosecutor ask for the court to sentence the defendants to home detention for just five months?⁷ JSMP believes that questions should be raised about the public prosecutor's commitment in revealing the perpetrators behind this event.

3. Defence

In response to the various criminal acts charged by the public prosecutor, the lawyer representing the defendants, José Pedro Camões S.H, rejected all of the charges made by the public prosecutor against his clients AdC and Cs who were named as perpetrators of the attack and shooting in Fatu-Ahi, because the charges were not supported by evidence and were only based on witness testimony claiming that the name AdC was mentioned by (the deceased) Major Alfredo Reinado Alves when the attack occurred.

The lawyer for the defendants also took issue with the fact that more evidence should have been presented to demonstrate the involvement of the defendants. For example, evidence that the defendants were witnessed to have been directly participating in the aforementioned incident.

This was also the case with charges made by the public prosecutor against other defendants, because the public prosecutor had only made general accusations without

⁶ See JSMP Press Release, dated 2 April 2008.

⁷ Articles 108 and 338 of the Indonesian Penal Code carry sentences of fifteen (15) years or more, in addition to Article 55 of the Indonesian Penal Code, Section 4.4.7 of UNTAET Regulation which carries a sentence of five (5) years, and Article 190 of the Timor-Leste Penal Code which carries a sentence of five (5) years imprisonment .

presenting evidence such as ballistic examinations or the weapons used in the shooting and the attack. In cases like this it is very common to present ballistic examination of the bullets, or confirmation of the type of weapon used, who fired the weapon etc. This evidence can reveal legal facts that corroborate each other and must be established in order to declare that the defendants truly were the ones who fired shots when the attack took place.

On these grounds the lawyer for the defendants José Pedro Camões asked the Court to avoid convicting someone based on a fanciful charge alone, because issues of law or legal discussion in court are focused on evidence, including precise testimony that must be tested for its veracity and accuracy.

These arguments were strengthened by the public defender Afonso Roberto Prado. In his capacity of legal representative of the defendants, he requested for the Court not to find the defendants guilty purely based on testimony that was general in nature. He went on to say that the public prosecutor did not have sufficient grounds and legal facts, and was relying on the testimony of victims and defendants to ask the court to find the defendants guilty. The public prosecutor should have presented evidence obtained during the entire process - both the investigative stage and the trial stage.⁸

B. Court's Decision in Fatu-Ahi Case⁹

On 17 September 2010 the Dili District Court read out its decision and its final conclusions in regards to the five month trial of the Fatu-Ahi incident that occurred on 23 May 2006, as explained above.

The final decision read out by the Dili District Court mentioned the Court's final conclusions based on the entire trial, as well as the testimony of defendants and witness in the Fatu-Ahi case.

With reference to the five month trial, the Court finally concluded that there was no accurate evidence to support the public prosecutor's charges against the defendants. The Court concluded that the charges put forward by the public prosecutor on 30 June 2010 did not mention any aggravating circumstances and only recommended for the court to sentence the defendants to five months home detention in accordance with Article 190 (1) of the Timor-Leste Penal Code.¹⁰ With reference to these facts that were unconvincing in nature, the panel of judges decided to acquit the defendants in the Fatu-Ahi case.¹¹

1 . Decision on the charges that were not established

⁸ See JSMP Case Analysis, June 30, 2010

⁹ Based on information obtained by JSMP, until now neither the prosecution or the defence have received a written version of the decision in the Fatu-Ahi case.

¹⁰ This article states "Any person who participates in a public riot, during which violence is collectively committed against persons or property, is punishable with up to 1 year imprisonment or a fine, if no heavier penalty for participation in the crime committed is applicable".

¹¹ See JSMP Press Release, Fatu-Ahi Case, September 2010

Based on the evidence examined throughout the trial and with reference to the testimony of witnesses and defendants, it is evident that all of the evidence presented during the trial tended to mitigate the actions of the defendants. For this reason the panel of judges concluded that there was insufficient evidence for the court to convict the defendants.

JSMP noted that the public prosecutor charged the defendants with articles of the Indonesian Penal Code, UNTAET Regulations and also the Timor-Leste Penal Code. Each article carried a different sentence, ranging from 15 years to one year, which were substituted with a recommendation for a period of home detention.

In their conclusions the judges found that the crimes charged by the public prosecutor, namely Article 108 (1,2,3) of the Indonesian Penal Code had not been proven. The Court's decision was based on the fact that during the trial no witness said that they were rebels, but rather they were all active members of the F-FDTL who were carrying out their duties by conducting a patrol to secure Dili and its surrounding areas, at a time when conditions were not favorable. This patrol and their efforts to maintain security were carried out based on orders given by their superior (commander). There was no intent to rebel against anyone, including the state.

In regards to the charge of illegally using firearms, the Court was of the opinion that this was also not proven. In their considerations, the judges found that the defendants were members of the F-FDTL at that time and they had ventured out from their unit at the request of their superior (commander) to carry out a patrol/provide security. Therefore there was no intention or purpose of conducting an attack or shooting against any party, as had been alleged.

The Court also concluded that when the incident occurred the leader of the defendants, Major Alfredo Reinado Alves, ordered them to fire. So the person who should be held responsible for the entire incident in Fatu-Ahi was Major Alfredo Reinado Alves because he was the one who gave the order, not the defendants. Thus, the court could not prove any intention behind their actions, because a member of the military must always be ready whenever and wherever to carry out an act ordered by his superior (commander).

In addition, the charge made pursuant to Article 338 of the Indonesian Penal Code¹² was also not proven. In their considerations, the judges acknowledged that the incident did result in the loss of life, however the trial did not reveal who was the perpetrator and there was no evidence to demonstrate that a particular bullet was fired from a particular gun or the type of gun.

Based on these considerations the Court could not convict any of the defendants purely on the basis of general suspicion or assumption, even though they were at the scene of the crime. The defendants were not at the scene of the crime because they wanted to be, but

¹² Article 338 of the Indonesian Penal Code states that: *“The person with deliberate intent takes the life of another person, shall, being guilty of manslaughter, be punished by a maximum imprisonment of fifteen years”*.

because of an order given by Major Alfredo Reinado Alves (deceased) who was the commander in charge. Therefore none of the defendants were found guilty of the prosecutor's charges relating to the alleged attack and shooting.

C. JSMP Monitoring

In accordance with monitoring conducted by JSMP the witnesses summoned by the court included 8 members of F-FDTL and one civilian, however he was a former member of the military (petitioner), and there was one other civilian who gave testimony during the trial. The witnesses summoned all testified that they did not see the incident with their own eyes, and the defendants also testified that when the incident occurred some of the defendants were in Suai, Same, Aileu, Ermera and Ainaro.

JSMP understands that each case has its own special characteristics and difficulties in terms of evidence. However in this case, analysis of the charges made by the prosecutor, the defence and consideration of the facts of the trial, show that the prosecutor did not try hard enough to reveal and prove who were the perpetrators of the Fatu-Ahi case. Also the charges and the witnesses presented did not support the prosecution. JSMP also believes that assigning a single prosecutor to this trial was not proportional. JSMP believes that in a case as complex and high profile as the Fatu-Ahi case, or the other cases that occurred in the context of the 2006-2008 crisis, team work is required, but based on JSMP monitoring these cases have only been handled by single prosecutors.

JSMP understands that although the Criminal Procedure Code does not oblige the prosecution to send a team to court, which applies equally to the defence, JSMP believes that in certain cases the Office of the Prosecutor General should consider such an option in the interests of proportionality and productivity.

JSMP also notes that the witnesses presented by the public prosecutor did not manage to support the charges. None of the witnesses summoned supported the charges. The prosecutor should be more precise and selective when presenting witnesses.

D. Suggestions and Recommendations

JSMP understands that the parties have done everything possible to reveal the truth in the aforementioned case and provide justice for the victims. However JSMP believes that the following points should be given careful consideration in future trials:

- *The parties summoned to appear as witnesses before the court*
 1. JSMP welcomes the presence of witnesses who were summoned to provide a contribution towards revealing the truth in the Fatu-Ahi Case. However JSMP is really concerned with the behavior of witnesses who often did not show respect for court actors;

2. JSMP also recommends that in the future for cases involving the military and/or police, they should be asked to remove all of their military attire so that the court actors will be able to conduct the trial more effectively without psychological pressure.

- *For the Public Prosecutor*

1. JSMP hopes that in the future the public prosecutor will increase the quality of the investigative process and evidence gathering. In particular the public prosecutor should be more creative and productive in gathering evidence and presenting witnesses to further the cause of the prosecution.
2. JSMP recommends for the public prosecutor to consider the importance of teamwork in large and complex cases. JSMP recommends the involvement of national prosecutors to assist with consultation on certain matters as well as dealing with technical aspects of evidence which requires a team effort.
3. JSMP requests for the public prosecutor to protect the honor and credibility of the Prosecution Service by being consistent with the selection of articles in the indictment and the final recommendation of sentence given orally to the court.

- *For the Court*

JSMP understands that sometimes in certain situations, and especially in post conflict nations like Timor-Leste, it is politically, socially and psychologically very difficult to achieve a process that upholds the principles of due process in the same way that is commonly done in countries that have a well established democracy and legal culture. However, JSMP maintains that the courts should be capable of fulfilling their institutional obligation to uphold the law in Timor-Leste. JSMP believes that the authority of the law must be upheld through hard work and the professionalism of the institutions that are mandated with this task. Therefore, JSMP makes the following recommendations for the court:

1. In future, the Court must be more thorough and seek to protect its honor and credibility to ensure that all necessary measures are taken in accordance with the law, against any person appearing as a witness before the court.
2. JSMP requests for the court to exercise its authority to prevent any witness from acting outside of his capacity, for example: making suggestions or lecturing the court. Especially when such witnesses have not cooperated properly, because JSMP believes that witnesses are summoned only to give testimony about legal facts about what they saw, heard or felt. A witness should not give instructions to the court to do this or that, because this is the responsibility of the court, not the witness.
3. The Court must feel secure and free from any sort of pressure in order to carry out its duties. If these conditions are not available, the court can ask to adjourn the trial until the conditions are met. If necessary, JSMP recommends for the court to use its authority in accordance with the law to issue coercive measures to suppress those who are not displaying respect to the court. This step is a last resort to

protect and guarantee the honor and integrity of the court, if other persuasive efforts or approaches have been ignored by the public

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