



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

JUSTICE UPDATE
Period: March 2007
Edition: 05 March 2007

THE COURT NEEDS WITNESS TESTIMONY TO ESTABLISH THE MATERIAL FACTS

1. Introduction

In legal discourse a witness is a person who can provide testimony to support the investigation, prosecution and trial of a case, based on what the witness heard, saw or experienced. Witness testimony is a piece of evidence in a criminal case in the form of a statement made by a witness about a criminal event that the witness heard, saw or experienced, including justification about that knowledge.¹

2. The examination of witness testimony was conducted on Tuesday 30 January 2007

The Dili District Court, represented by a panel of judges consisting of Judge Ivo Rosa, Judge Teresa do Rosário and Judge Antonino, continued hearing witness testimony at the Timor Leste Court of Appeal. The prosecution unit was represented by prosecutors Bernardo C. Fernandes and Felismino Cardoso. Also present were defence lawyers Paulo dos Remedios, Francisco Nicolau, Nelson de Carvalho and Benevides C. Barros. The examination of witness testimony was also attended by the defendant.

3. Witnesses who are related to a defendant

In accordance with the court's schedule, the hearing of witness testimony was conducted on 30 January 2007, whereby 6 witnesses were to be examined, namely Aguio Pereira, Gregório dos Santos, Adriano Corte Real, Jose Reis and

¹ Refer to Article 1(26-27) of the Indonesian Criminal Procedure Code (Law No. 8/1981 on The Criminal Procedure Code)

Luis Lobato. However the only witnesses to appear at the hearing were Gregório dos Santos and Luis Lobato.

The witnesses were asked by the court if they were related to the defendant, and the witness Luis Lobato stated that he was in fact related by family to the defendant Rogerio Tiago Lobato. The defendant Rogerio Tiago Lobato is the cousin of the witness Luis Lobato.

This gives rise to an important question: *can a witness who is related to the defendant give testimony before the court? Also, what juridical responsibilities are imposed on a witness who fails to attend a scheduled hearing?*

JSMP (*Judicial System Monitoring Program*) has examined the applicable law in Timor Leste, namely the Criminal Procedure Code (CPC) as well as UNTAET Regulation No.25/2001 on the Transitional Rules of Criminal Procedure to reveal any issues of legality relating to the two questions posed above. However JSMP was unable to find any relevant provisions.

Article 122(1) of the Criminal Procedure Code (CPC) only sets out the following obligations on a person to act as a witness:

Any person who is not impeded to do so on grounds of a mental disorder is eligible to serve as a witness and may only refuse to do so in the cases stated in the law.

Whereas Article 125 (1) of the CPC sets out the following grounds for lawful refusal to give a deposition:

The persons below may refuse to give a deposition as witnesses:

- a) progenitors, siblings, descendants, relatives up to the second degree, adopters, adoptees, and the spouse of the defendant;*
- b) a person who has been married to the defendant or who cohabits, or has cohabited, with the latter in a relationship similar to that of spouses, in relation to facts that have occurred during marriage or cohabitation.*

In consideration of the two aforementioned articles, JSMP believes that any person notified by the court to appear as a witness in a hearing is henceforth obliged to appear before the court. This section of the criminal procedure code provides an opportunity to a witness to give testimony in a hearing without being restricted by certain provisions.

Article 125(1) of the CPC indicates that a witness who is related to the defendant in a hearing is entitled to refuse to give testimony. However this article does not clearly state that a witness can refuse to give testimony when the witness is related to the defendant. Article 35(2) of UNTAET Regulation No.25/2001 also sets out the same provisions for witnesses.

4. Relevance of the witness testimony in the case against the defendant

Since the beginning of the trial of the case against Rogerio Lobato JSMP has observed that a large number of witnesses have been presented by both parties. JSMP praises these witnesses for appearing before the court. Their presence is a positive step forward in facilitating the trial. The testimony already presented/pending before the court is aimed at assisting the court to seek and find material facts in relation to the criminal acts that the defendant is accused of committing. However, JSMP also believes that the number of witnesses presented is excessive. Moreover, the witnesses who appeared before the court gave testimony that was not relevant to the criminal case under consideration by the court. Some of the witnesses who appeared throughout the trial just harped on and on about other issues intended to contradict the other witnesses who had already provided testimony.

It is necessary to remember that witness testimony presented in court is only one type of evidence. Chapter II, of the CPC, which sets out the rules of Evidence, specifically states in Article 116 that:

- 1) *Any evidence that is not prohibited by law is admissible in a criminal case.*
- 2) *Evidence in a criminal case includes, namely:*
 - a) *statements made by the accused;*
 - b) *statements made by the aggrieved party;*
 - c) *witness testimonies;*
 - d) *admission of guilt;*
 - e) *expert evidence;*
 - f) *documentary evidence;*
 - g) *confrontation of witnesses;*
 - h) *search of the crime scene;*
 - i) *reconstruction of the facts.*

JSMP also organized a press conference² to discuss the fact that the defence for the defendant Lobato and co-accused called a large number of leaders to act as witnesses in the case relating to the arming of civilians in Timor Leste. The final witness presented was Brigadier General Taur Matan Ruak who appeared in a

² Refer to JSMP Press Release dated 23 January 2007 entitled “The majority of well known leaders within the government of Timor Leste were presented as witnesses for the defendant Rogerio F.T.Lobato. This Press Release is available on our website: www.jsmp.minihub.org. This Press Release is available in Indonesian, Tetun and English.

hearing on 13 February 2007, which was held at the Timor Leste Court of Appeal.³

5. The testimonies of several independent witnesses

A fair percentage of people believe that the testimony of several witnesses should be sufficient to prove the charges against a defendant. However others have differing opinions on this issue. JSMP believes that the former view is incorrect, because even when a witness who is summoned to provide testimony before the court actually passes the minimum 'quantitative' requirement for the rules of evidence, there is no certainty that his/her testimony is adequate from a 'qualitative' perspective in order to be considered as a legitimate piece of evidence to prove the guilt of the defendant. There is no point in presenting a large number of witnesses if from a 'qualitative' perspective their testimonies are independent and possess no common threads that could be used to establish the truth about an incident or event. It is a complete waste of time to call witness after witness to provide testimony before the court if their testimonies are independent and are not linked to one another.⁴

Therefore, JSMP believes that before a number of independent testimonies about a certain event or circumstance can be used as legitimate evidence, it is necessary to demonstrate a 'link' between those testimonies.⁵

6. Maximum number of witnesses according to the Civil Procedure Code (CPC)⁶

Article 563 of the Civil Procedure Code states that each party is allowed to present no more than 10 (ten) witnesses. Also, Article 564 of the Civil

³ Refer to a report on the JSMP Press Conference held on 14 February 2007 entitled "Taur Matan Ruak is the final witness in the case of arming civilians in Timor Leste". This document is available in English, Tetun and Indonesian on our website: www.jsmp.minihub.org

⁴ M. Yahya Harahap, S.H., Mei 1985, Pembahasan Permasalahan dan Penerapan KUHAP (Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali) (Discussion on Issues relating to the Criminal Procedure Code and its Application, Trial, Appeal, Higher Court Appeals and Reviews), Jakarta, p 289.

⁵ Ibid p 290.

⁶ The Civil Code in Portuguese is called the *Código Processo Civil*. An equivalent translation into Indonesian would be the *Kitab Undang-Undang Hukum Acara Perdata* (Civil Procedure Code). This Civil Procedure Code entered into force as the applicable Civil Procedure Code in Timor Leste on 21 February 2006 by means of Government Regulation No.1/2006.

Procedure Code emphasizes that no more than 3 (three) witnesses can be presented to establish a particular fact, not including witnesses who in the course of providing testimony claim to have no knowledge. Article 256 (1) of the Civil Procedure Code sets out a similar provision.⁷

After considering relevant articles of the law on civil procedure, JSMP believes that in the case of the defendant Rogerio Tiago Lobato and co-accused, both parties, and the defence in particular, presented a large number of witnesses in excess of the provisions set out in the Civil Procedure Code.

Perhaps you the respected readers will ask: “*This Justice Update discusses trial procedures for criminal cases. Why are trial procedures in civil cases at all relevant?*”

It is necessary to clarify that although the focus of our discussion is on criminal procedural law, JSMP believes that this law does not stand alone. JSMP is of the opinion that in certain matters criminal procedural law and civil procedural law compliment each other (meaning that the two are dependent on one another). For example, the presentation of witnesses, submission of lists of witnesses to be summoned, replacement of witnesses as notified by the court through a request made by the defence or prosecution, etc. Therefore in the case of the defendant Rogerio Lobato and co-accused, JSMP has referred to civil procedure law as applied to the presentation of witnesses, with the purpose of using it a comparative reference for the two procedural laws (or formal laws) discussed above.

7. The presence of witnesses in the court room⁸

On 25 January 2007, JSMP published a justice update entitled: “*The court conducts a hearing for other witnesses whose testimony is to be examined in the courtroom.*” This JSMP Justice Update was issued pursuant to Article 263 of the Criminal Procedure Code:

- a) *While proof is being produced, every person who is to make statements is kept away from the courtroom and without access to any information about what is happening inside the courtroom.*
- b) *It is the responsibility of the court clerk to ensure that sub-article*

⁷ Article 256 (1) of the Civil Procedure Code states that “a party may not produce more than 3 witnesses for a particular fact, and the maximum number of witnesses for either party shall be 8.”

⁸ Refer to JSMP Justice Update published on 25 January 2007. This Justice Update is entitled *The court conducts a hearing for other witnesses whose testimony is to be examined in the courtroom*. This justice update is available in Indonesian, Tetun and English on our website: www.jsmp.minihub.org

263.1 is complied with before and after the production of proof begins.

The aforementioned *Justice Update* was issued because while monitoring the case of the defendant Lobato and co-accused, JSMP observed that there were several witnesses who had been duly notified by the court to present their testimony during the trial, were actually present in the court room when other witnesses were providing testimony to the court.

8. Conclusion

Based on the aforementioned analysis, we can conclude that:

- Examination of the existing laws in Timor Leste reveals that there are no laws prohibiting a person who is related to the defendant from providing testimony in a trial.
- In regards to the relevance of witness statements to the criminal case against the defendant and the number of witnesses summoned, JSMP observed that a large number of witnesses were presented which exceeded the relevant provisions of the civil law.⁹ Moreover, a number of witnesses who were presented provided testimony that had no relation to the case against the defendant. Several witnesses presented did not actually provide testimony for the case against the defendant, but in fact harped on a number of unrelated issues which was intended to contradict the testimony of other witnesses who had already/were going to provide testimony to the court in relation to the criminal matter under investigation.
- Of the recommendations provided, JSMP observed that the court actors addressed the issue of the presence of witnesses in the court room. JSMP believes that this a positive step forward for the justice system in Timor Leste. JSMP hopes that the court actors will be able to

⁹ 30 witnesses were presented by the legal team representing Rogerio Tiago Lobato and co-accused. From that total, only 14 witnesses were presented in the trial to submit their testimony. 8 witnesses did not appear or were not presented. Another 8 witnesses did not give testimony at the request of the defence to adjourn a hearing scheduled for the examination of the witness Pe. Geovani de Souza on 12 February 2007. JSMP organized a Press Conference in relation to the adjournment of the hearing scheduled for examination of the aforementioned witnesses on 13 February 2007. The title of the Press Conference was: "*Court adjourns hearing for the examination of the witness Pe. Geovani and others in the case of Rogerio Lobato and co-accused*". The relevant document is available at our website: www.jsmp.minihub.org

maintain such practices in the future in order to improve and perfect the judicial system and the application of the law and human rights in Timor Leste.

- JSMP observed that during the trial of the defendant who was accused of arming civilians, the witnesses generally displayed a cooperative attitude towards the court. However the safety of the witnesses was not guaranteed. This means that there is no specific provision of law that provides for the protection of witnesses. JSMP noted that until now witness safety has not been given serious consideration and witnesses appeared uncomfortable when providing testimony as they were concerned about threats made against them. For this reason, a specific provision of law is required to provide protection to witnesses.

9. Recommendations

- The current legislation does not contain a law that prohibits a person who is related to the defendant from providing witness testimony in a trial. However JSMP believes that to preserve the impartiality and objectivity of witnesses, it would be better for such witnesses to decline to provide testimony, even though the Timor Leste Criminal Procedure Code does not obligate a witness who is related to the defendant from refusing to act as a witness in a trial.
- The number of witnesses presented to the court was excessive. JSMP recommends that the parties emphasize the quality of witness statements rather than the quantity. JSMP believes that although the parties may have presented an adequate number of witnesses from a quantitative perspective, there is no certainty that the quality of such witnesses was able to convince the court to give weight to their statements. It is fair to say that the court only relies on witness statements that reflect impartiality and objectivity to draw its conclusions on the material facts in a case before it. It is also necessary to recall that witness testimony is only one type of evidence available to a judge in deciding a case. In addition to witness testimony, other evidence and exhibits are permissible, as set out in sub-section 8, to assist the court to deduce the material facts in a case

before handing down a decision against the defendant that carries the full force of the law.

- JSMP notes that some progress has been made in regards to the presence of witnesses in the court room who have been duly notified by the court to appear in court for the purpose of providing witness testimony in a trial. The police have been able to examine the list of witnesses scheduled to appear before the court at the entry point to the courthouse. The panel of judges has reminded witnesses present in the court room to leave the court room before the examination of other witnesses takes place. JSMP hopes that such a practice can be continued and improved to prevent any acts that could be considered contrary of the applicable law in Timor Leste.
- JSMP is aware that the government, via the Ministry of Justice, has submitted a draft law on the protection of witnesses to the Council of Ministers for debate. Based on information received by JSMP, the aforementioned draft law has been prepared since 18 January 2007. JSMP recommends for the government (in this case the council of ministers) to give serious consideration to a law on the protection of witnesses, so that witnesses can freely and comfortably provide statements on what they know about a case. Guaranteeing the safety of witnesses is vital for facilitating and improving the judicial process in Timor Leste.

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