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Corruption trial involving the former Minister of Justice Luçia Lobato and the right to a fair trial

Introduction

Corruption is a very serious crime because it has a direct impact on the public interest, harms national development and is the largest obstacle that impedes social and economic development. Corruption results in widespread poverty because it results in losses to the State Budget and violates the civil and economic rights of every citizen.

Therefore when a person is charged with corruption there is always a protracted debate and strong reaction to this issue, especially when the case involves a high ranking state official who is supposed to be a role model for the country.

One such case has been observed by JSMP, which is an interesting case involving the former Minister of Justice of the Parliamentary Majority Alliance government. As this case has a massive impact on the public interest, JSMP believes that it is worthy of observation and deep analysis from the outset through to its conclusion. This includes a precise description of the related processes in their proper order, as well as correcting public perceptions about this case, and the examination of efforts and successful strategies pursued by the defense and prosecution, as well as the developing polemic about issues of ordinary appeals and extraordinary appeals, the issue of “*habeas corpus*”, the composition of judges at the Court of Appeal and Supreme Court, as well as JSMP’s opinion on this case.

This case stimulated widespread public debate when a member of the panel of judges was accused of being involved in a misuse of authority¹ regarding the decision issued in response to a “*habeas corpus*” review that was requested by the team of public defenders to the Court of Appeal. Although in the end the allegation was still only an allegation (it became part of public discourse) or in other words it was merely a slinging match because no concrete steps were taken to follow up the matter or investigate the facts relating to this allegation.

¹Refer to JSMP Press Release: 8 April 2013 – Lawyer for Lúcia Lobato accuses judge member of the Court of Appeal of misuse of authority.

Also, the involvement of the Office of the Public Defender did not escape the attention of the public because this institution was established to serve those who do not have sufficient economic means. The efforts of the public defenders, who used all of the available legal mechanisms and resources have been the subject of a separate debate in the public arena because such strategies and efforts are very rarely applied in cases that involve ordinary citizens.

JSMP believes that these issues have a direct link with the principles of a fair trial which are imposed on each legal institution (court) as well as Timor-Leste, which is a nation that adheres to the rule of law and is obliged to integrate, adhere and apply international standards as part of its national legal system in all cases brought before the courts to ensure justice.

Trial Process

In April 2012 the Dili District Court started the trial of a case involving the defendants Lucia Maria Brandão Freitas Lobato and António de Araújo Freitas, who was the Head of the Department of Procurement in the Ministry of Justice.

The Dili District Court as the Court of First Instance decided this case and sentenced the defendant Lucia Maria Brandão Freitas Lobato to 5 years imprisonment and acquitted the defendant António de Araújo from all charges.

After hearing the decision from the Court of First Instance, the parties, namely the Public Prosecutor and the team of public defenders representing the defendants, lodged appeals to the Court of Appeal. After evaluating and examining the request for an appeal lodged by each party the Court of Appeal confirmed the decision from the Court of First Instance and maintained the sentence of 5 years imprisonment against the defendant Lucia Lobato. In addition, the Court of Appeal also sentenced the defendant António Freitas de Araújo to 5 years imprisonment and ordered him to pay a fine of US\$ 52,250.

After hearing this decision the defense was unhappy and lodged an extraordinary appeal to the Supreme Court, of which the functions and duties are actually carried out by the Court of Appeal. In addition, the defense also lodged a request for “*Habeas Corpus*” in relation to the detention order issued against the defendant Lucia Lobato that was later rejected by the Supreme Court.

The defense continued to pursue every avenue including detecting and alleging abnormalities and suspected misuse of authority involving a member of the panel of judges who ruled on the appeal lodged by the defense to the Court of Appeal. These facts were announced to the public via a press conference.

Substance of the charges made by the Public Prosecutor

In the first charge, heard in Case No. 580/C.Ord/2011/TDD, the Public Prosecutor alleged that the defendant Lucia Lobato in her capacity as the Minister of Justice together with her husband Américo Lopes and the defendant Antonio Freitas, who was the President of the Bid Committee, colluded to award a tender to the WASUPA company for the provision of uniforms to prison guards without the knowledge of other members of the Bid Committee. The defendant also falsified the signature of the other members of the Bid Committee in order to award the tender to the WASUPA Company.

The second charge was heard in Case No. 622/C.Ord/2011/TDD, whereby the Public Prosecutor alleged that the defendants colluded to select the Zorro Construction Ltd Company as the winner of the tender for the construction of a Civil Registration Office in Lautem District because the Director of this company had a good relationship with the leaders of the Social Democrat Party (PSD), even though the Bid Committee did not recommend Zorro Construction Ltd as the winner of the tender.

The defendant Lucia Lobato also selected other companies in the Districts of Aileu and Manufahi even though these companies submitted proposals that did not properly reflect the total estimated expenditure. A study carried out by the Architecture Civil Engineering Consultant Ltd Company (*ARCVIL*) was used as a reference by the Office of Public Works in 2007 and calculated that the total cost of these offices would be US \$167,502.

The Public Prosecutor also alleged that the defendant Lucia Lobato as the Minister of Justice decided to allocate a budget of US\$ 200,000 for each office (Manatuto, Lospalos, Oecusse, Ermera, Aileu, Covalima, Baucau and Same) without consulting/seeking advice from the relevant directorate and ignored all of the existing technical studies, without going through any process and without a legitimate basis. These actions violated all the regulations issued by the government regarding procurement and the provision of goods. These actions also caused the State to lose US \$67,745 from its budget.

In relation to these acts the Public Prosecutor charged the defendant Lucia Lobato for violating Article 274 of the Penal Code on the crime of mismanagement as well as Article 301 of the Penal Code on aggravation, also for violating Article 297 of the Penal Code on abuse of power, and Article 299 of the Penal Code on the crime of economic involvement in business.

The Public Prosecutor also charged the defendant Antonio Freitas de Araújo with the crime of abuse of power and falsification of documents in accordance with Article 263 of the Indonesian Penal Code (or Article 304 of the Timor-Leste Penal Code) and the crime of intentional mismanagement in accordance with Article 274 of the Timor-Leste Penal Code.

Court summons

The court summoned the defendants to attend a hearing on 14 March 2012, however the hearing did not take place because the National Parliament failed to remove the legal immunity of Lucia

Lobato as the Minister of Justice. On 20 March 2012 the National Parliament managed to pass Resolution No. 87/II in accordance with Article 113(1) of the Constitution and definitively removed the immunity of the defendant Lucia Lobato from her position as Minister of Justice.²

The trial took place between 24 – 27 April 2012, then continued between 23–25, 28 May 2012 and on 30 May 2012 the court heard final recommendations. It is estimated that the court heard testimony from 27 witnesses over nine days.

During the examination of evidence the witness Jose Belo, who is a journalist with the weekly newspaper *Tempo Semanal*, chose to remain silent in accordance with Article 126 of the Criminal Procedure Code.³

Other witnesses appeared in their respective capacities, namely as owners of the companies, officials from the Ministry of Justice and members of the Bid Committee who were tasked to evaluate the bids for the aforementioned tender.

During the trial the defendant Lucia Lobato and the defendant Antonio Freitas testified that they were not directly involved in logistical matters, the procurement of uniforms, calculating totals and other matters relating to the construction of the aforementioned offices.

The defendant Lucia Lobato testified that she only signed the documents presented based on the defendant as the president of the Bid Committee. In addition, the defendant Luçia Lobato also testified that she chose the company that submitted the higher bid because she favored quality.

The defendant António Freitas explained that he put forward the names of the aforementioned companies because they were eligible to win the aforementioned tender.

On 30 May 2012 the public prosecutor made final recommendations to the court. In the final recommendations the public prosecutor maintained the substance of the original charges and requested for the court to sentence the defendant Luçia Lobato to 12 years imprisonment and the defendant Antonio Freitas de Araújo to 9 years imprisonment.

The public prosecutor also requested for the court to sentence the defendants to pay compensation to the State of US\$ 67,745 as set out in Article 72 (1,2,3,4) of the Criminal Procedure Code and Article 103 of the Penal Code.

Decision of the Court of First Instance

² JSMP Thematic Report: 'Parliamentary Privileges and Immunity – How can we ensure equality before the law? (June 2012) : <www.jsmp.tl>

³ Article 126.1 of the Criminal Procedure Code on Professional Secrecy states that "Church or religious ministers, lawyers, medical doctors, journalists, members of credit institutions and other persons allowed or required by law to maintain professional secrecy may refuse to give a deposition on facts covered by that secrecy".

On 8 June 2012 the Dili District Court read out its decision against the defendant Lúcia Lobato and the defendant António Freitas. In this decision the defendant Lúcia Lobato was sentenced to 5 years imprisonment for the crime of economic involvement in business and was ordered to pay compensation of US\$ 4,350 (to be shared with the defendant Antonio Freitas de Araujo), and ordered to pay court costs of US \$ 300 and she was acquitted from the other charges (mismanagement and abuse of power). Meanwhile, the defendant Antonio Freitas de Araujo was acquitted from all charges, however he was ordered to pay compensation of US \$ 4,350 to be shared with the defendant Luçia Lobato as mentioned above.

Ordinary appeal process

On 17 July 2012 the public prosecutor and public defender both lodged an appeal to the Court of Appeal after accepting the written decision. Then approximately five months later on 12 December 2012 the Court of Appeal issued a decision on the appeal lodged by the parties with the Court of Appeal. The Court of Appeal as the court of second instance decided to confirm the decision issued by the court of first instance against the defendant Luçia Lobato.

However, the defendant Antonio Freitas who had previously been acquitted at the level of appeal was sentenced by the Court of Appeal to 5 years imprisonment after being found guilty of committing the crime of mismanagement in relation to the tender for the construction of offices in 8 districts and was ordered to pay compensation of US\$ 50,000 (including the compensation that was ordered by the Court of First Instance).

After accepting the decision of the Court of Appeal, the Public Prosecutor immediately lodged a request to detain the defendant/convicted person Luçia Lobato to ensure that the defendant did not abscond overseas. On 28 December 2012 the police arrested the defendant (the convicted person) Luçia Lobato and placed her in the cells at the Caicoli Police Station. Then on 29 December 2012 the Dili District Court conducted a hearing to decide on the request from the public prosecutor.

The court decided to apply Proof of Identity and Residence measures in accordance with Article 186 of the Criminal Procedure Code, including confiscating her passport and ordering the Department of Immigration to cancel any trips overseas.

Extraordinary appeal process

On 13 December 2012 the team of lawyers representing the convicted person Luçia Lobato, informed the Court of Appeal of its intention to lodge an extraordinary appeal against the decision of the Court of Appeal.

In accordance with procedural law there are two types of extraordinary appeal, namely for a review, or for the establishment of jurisprudence (Article 314 of the Criminal Procedure Code).

In the notice of appeal the team of lawyers informed the Supreme Court that they would be requesting a review of the decision issued by the Court of Appeal pursuant to Article 315 of the Criminal Procedure Code (namely the grounds for a review and the requirements to accept the request for a review).

However on 14 December 2012 the Court of Appeal issued a decision in response to the team of lawyers and stated that they did not have strong grounds to request and extraordinary appeal, even though the Court of Appeal had not yet received the substantiating claims and grounds underpinning the request for an extraordinary appeal.

On 16 January 2013 after the judicial recess the team of lawyers submitted a request for an extraordinary appeal to the Court of Appeal that was also functioning as the Supreme Court. On 18 January 2013 the Supreme Court issued a decision that rejected the request for an extraordinary appeal submitted by the team of lawyers on the basis that the team of lawyers did not indicate the grounds for the review as necessary conditions set out in Article 315 of the Criminal Procedure Code.

After receiving the decision the team of public defenders immediately responded with the argument that the decision was not legitimate in accordance with Article 103.1 (a) of the Criminal Procedure Code regarding irreparable nullities due to fact that the judges constituting the court were the same people, both at the level of ordinary appeal and extraordinary appeal.

In this request the team of public defenders requested for new judges to be appointed at the level of Supreme Court because the judges who had issued the decision at the level of ordinary appeal were also sitting on the panel that made the same decision at the level of Supreme Court.

Analysis and opinion of JSMP

JSMP believes that the Timor-Leste Criminal Procedure Code does not clearly specify about the composition of judges at the levels of ordinary appeal and extraordinary appeal. However JSMP believes that the same composition of judges at the levels of ordinary appeal and extraordinary appeal will have a negative impact on the principles of a fair and impartial trial. The public can perceive that the decisions were not neutral and unfair because the decision of the court regarding the extraordinary appeal was issued by the same judges.

JSMP doubts that the same judges could neutrally amend their own decision. JSMP also believes that the same composition of judges at different instances would find it very difficult to avoid a conflict of interest in the case they were deciding. These doubts were visible whilst the procedure was taking place. For example, JSMP noted that the Court of Appeal only needed two days to review and decide on the substance of the extraordinary appeal submitted by the team of public defenders.

The Indonesian Criminal Procedure Code contains 2 articles that clearly deal with the composition of judges at the levels of ordinary appeal and extraordinary appeal. Article 239 (3) stated that if the judge who decides a case at the court of first instance is then promoted to the Court of Appeal, he/she is not allowed to handle the same case at the appeal level.

In addition Article 251 (3) stated that that when a judge has handled a case at the Court of First Instance or at the appeal level, and is then appointed as a judge or court clerk at the Supreme Court, he/she can not carry out his functions as a judge or court clerk at the level of extraordinary appeal in the same case.

JSMP believes that the Indonesian Criminal Procedure Code is clearer than the Timor-Leste Criminal Procedure Code regarding the composition of judges involved in the same case.

According to JSMP even though the Timor-Leste Criminal Procedure Code does not contain clear provisions on the compositions of judges at the appeal level, ideally the judges should realize the fundamental impediment stopping them from sitting on the same panel in the same case. This is the general practice and a wise judge should voluntarily submit a request outlining the impediment they face when appointed as a member of a panel of judges in the same case that they were previously involved in.

Or in addition, judges sitting at the district court and the Court of Appeal do not have authority according to the law to correct the decision of another judge, including the judge administrator of the court who is the chief justice of the courts. Therefore, the hierarchy of courts was established and operates to correct decisions made by courts at an inferior level.

Although the public defenders objected to the courts decision to dismiss the request, the execution of the sentence was carried out. The execution of the sentence was carried out by the Dili District Court in accordance with Article 326 of the Criminal Procedure Code (executive competence). Thus the Dili District Court issued an order for the convicted person Luçia Lobato to be taken to Gleno prison on 22 January 2013, and the convicted person Antonio Freitas de Araujo was taken to Becora prison on 23 January 2013.

Proses Habeas Corpus

On 22 January 2013 the team of public defenders representing the convicted person Luçia Lobato requested for the Court of Appeal that was also functioning as the Supreme Court in Timor-Leste to decide on the issue of *habeas corpus* as set out in Article 205 of the Criminal Procedure Code because the detention order against their client was illegal.

On 30 January 2013 a panel of judges comprising the president of the Court of Appeal, Claudio de Jesus Ximenes, together with Jose Luis da Goia, and Maria Natercia Gusmão Pereira issued a

decision on the request for *habeas corpus*. This decision rejected the request for *habeas corpus* from the applicant Lucia Lobato without ordering the applicant to pay court costs.

There was a difference of opinion between the President of the Court of Appeal, Cláudio Ximenes, and the other two judges regarding this decision. The president of the Court of Appeal believed that the convicted person could not be detained because the request for an extraordinary appeal was still being dealt with and this means that the decision of the Court of Appeal could not be considered as a decision carrying the full force of the law. However, the other two judges felt that the detention was legal and refused the request for habeas corpus. Based on this decision the convicted person Luçia Lobato had to serve her sentence in jail.

Allegation regardingan abuse of power on behalf of the panel of judges

On 15 April 2013 the team of lawyers represented by José Camões invited the print and electronic media to Hotel Timor to announce a Press Release alleging that one of the members from the Panel of Judges from the Court of Appeal and one of the members of the National Parliament were involved in influencing the decision at the appeal level.

The Press Release stimulated wider debate because the MP and President of the Court of Appeal started to attack and accuse each other. However, there was no appropriate process or steps to be followed up to thoroughly investigate this allegation.

JSMP already appealed for the establishment of an independent fact finding team comprising representatives from the court, the Public Prosecution Service, and other independent organisations to investigate the allegation and take the process to court to be decided, however until now there has been no result.

JSMP believes that the allegations relating to the misconduct of a judge is a very serious allegation. Therefore, JSMP believes that it is really important to establish an independent investigative team to examine the facts relating to this allegation. This is really important to avoid undermining public trust in the judicial institutions that are still undergoing institutional improvement.

Observations and recommendations for the future

JSMP observed that during the trial process, from the outset up until there was a decision carrying the full force of the law, the parties engaged any every effort possible. This included efforts by the parties to use all legal strategies and resources available to defend and protect the legal interests in this case.

However, JSMP also found several inconsistencies that have the potential to undermine the legal interests in this case as well as the generally harming the justice system which is still in a stage of development.

1. On the composition of the panel

According to JSMP even though the Criminal Procedure Code does not provide a clear definition on the composition of a panel of judges, the same composition of judges has the potential to create significant doubt in the public mind in relation to the principle of impartiality and objectivity of the court including the principle of a fair trial which is a fundamental principle that binds all courts.

Article 39 and 40 of the Criminal Procedure Code sets out the grounds for disqualification and strong reasons to call into question a judge's impartiality, which should be sufficient for a judge to declare that he/she is facing an impediment when appointed to a panel of judges in the same case.

JSMP believes that it's very difficult for a judge to correct his/her own decision in a neutral fashion. JSMP also feels that it is strange when the Court of Appeal only needs two days to decide on the request for an extraordinary appeal submitted by the team of public defenders.

JSMP believes that the issue of the composition of the judges regarding ordinary appeals and extraordinary appeals as a serious issue to ensure the quality of a decision and has the potential to undermine the principle of a fair trial.

JSMP agrees that every individual that commits a criminal act must be given a punishment proportional to the severity of the act. However, JSMP encourages the judicial actors to ensure that each process is conducted in accordance with principles regarding best practice.

2. *Social status of the convicted person and the role of the public defender*

With the social status of being the former Minister of Justice, the convicted person Luçia Lobato has options and adequate financial resources to not require legal representation by public defenders.

JSMP believes that as a defendant she has the legitimate right to choose a lawyer based on her own conscience and with regard to the expertise and qualifications that the lawyer possesses, however JSMP believes that institutionally speaking public defenders must be aware that they are bound by Article 6 of Government Regulation No. 38/2008 that prevents them from providing free legal assistance to the defendant.

3. Efforts and strategies used by the team of public defenders

JSMP was very pleased to see the team of public defenders engaging in every effort to utilize all of the available legal channels and resources to defend the legal interests of their client. This is a very positive step forward and reflects the role and behavior that is appropriate for a professional lawyer. JSMP believes that every individual who is charged with a crime has the absolute right

to receive legal representation from a top quality lawyer or team of lawyers. Because this is part of the right to a fair trial and good quality legal representation.

Unfortunately, JSMP also notes that such efforts and strategies are rarely found in cases involving ordinary citizens. JSMP often receives complaints from community members that lawyers do not communicate with them intensively and properly, and that lawyers do not discuss their cases in detail before the charges are heard in court and they don't explain the options/choices or possibilities regarding their likelihood of being acquitted or convicted.

JSMP hopes that in the future these types of efforts and strategies are also applied in cases involving ordinary citizens, and that they provide good quality and proper legal representation and that they ensure that all of the processes are conducted in a way that reflects (represents) the best interests of their clients.

Recommendations

- We request for the Court of Appeal which is also functioning as the Supreme Court to interpret the provisions of the procedural law and establish jurisprudence when the rules are unclear, including the issue of the composition of panels at the appeal level.
- We request for the Ministry of Justice to establish and operate the Supreme Court to prevent the same confusion arising in the future, especially to protect the legitimate legal interest of all citizens regarding a fair trial.
- To prevent public confusion and doubt, and in particular to protect the independence and credibility of the court in the future, JSMP requests for the panel of judges to be brave enough to state that they are facing an impediment if they realize that their involvement will influence and damage the credibility of the final decision handed down in the aforementioned case.
- We request for public defenders to manage their involvement in specific cases and ensure that the interests of justice for ordinary citizens is the main priority and that the same efforts and strategies are also applied in cases involving ordinary citizens.
- We request for the competent authorities to value every court decision because they prevail over the decisions made by other State institutions.

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