



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA MONITORIZASAUN SISTEMA JUDISIÁRIU

Justice Update
7 July 2017

**Preference for the application of Article 154 and Article 145 of the
Penal Code
in cases characterized as domestic violence
(Commemorating seven years since the implementation of the Law
Against Domestic Violence)**

Introduction

The 7th July of this year will mark seven years since the Law Against Domestic Violence (LADV)¹ was implemented. Since the implementation of the LADV some progress has been made, especially in terms of acknowledging and confirming that domestic violence is a public crime² and more cases have been brought before the courts in comparison with previous years, before the LADV came into force.

The LADV establishes a legal framework for effectively processing cases of domestic violence through the formal justice system, as well as providing relevant measures to deter and prevent domestic violence and to provide legal aid to victims.

Despite significant progress, there is still confusion relating to the most relevant and appropriate articles that should be applied in cases involving domestic violence characterized as physical violence in practice. JSMP has observed that in most crimes involving domestic violence prosecutors charge offenders with simple offences against physical integrity pursuant to Article 145 of the Penal Code (PC).³

¹ Law No. 7/2010. 21 June.

² Article 36 of the LADV.

³ Law No. 19/2009. 8 April.

JSMP observed positive progress on 13 June 2016, when the Dili District Court issued a very progressive decision in a case of domestic violence.⁴ In that case, the prosecutor charged the offender with Article 154 of the PC and the court considered Article 154 of the PC to be the most relevant article, even though there was no evidence of repetition, which is what is normally considered in practice. This has been the only case of its type during this seven year period. This shows that Article 154 of the PC does not require evidence of repetition. This problem has been caused by a lack of attention and assessment of the relevant facts before charges are laid and the courts have also failed to interpret the article correctly before making decisions.

Provisions on crimes of domestic violence

Article 35 of the Law Against Domestic Violence defines crimes of domestic violence as offences referred to as specific types of crimes in the Penal Code. These crimes include the following:

- a) Mistreatment of a disabled person (Article 153 of the PC), Mistreatment of a spouse (Article 154), Mistreatment of a minor (Article 155) and Aggravation due to results (Article 156); and
- b) Homicide (Article 138), Aggravated Homicide (Article 139), Termination of Pregnancy (Article 141), Simple offences against physical integrity (Article 145), Serious offences against physical integrity (Article 146), Torture (Article 167), Sexual coercion (Article 171), Rape (Article 172), Child Prostitution (Article 175), Sexual abuse of a minor (Article 177), Sexual acts with an adolescent (Article 178) and Sexual abuse of a person incapable of resistance (Article 179).

These crimes constitute as domestic violence if they are committed in a family context or are of a 'family' nature as set out in Articles 2 and 3 of the Law Against Domestic Violence.

⁴ JSMP Press Release: http://jsmp.tl/wp-content/uploads/2016/01/PrdesizaunmaustratusbakónjujeWCJU_TETUM.pdf

Article 35 (a) of the LADV clearly mentions the specific articles that apply in cases of domestic violence and Article 35 (b) mentions the other relevant offences that could potentially occur in a 'family' context.

Trends in how articles are applied in cases of domestic violence

There is a common perception (interpretation) in judicial practice (principally between public prosecutors and judicial magistrates) that article 154 of the PC is only applicable when there is evidence of repeated crimes. There is also the perception that even when cases of domestic violence are extremely serious in terms of the type of offence and the manner it was committed, if the act does not have serious effects, for example the victim does not suffer a serious injury or physical disability, then the Public Prosecution Service will only charge the offender with Article 145 of the PC. As a consequence of this perception there is a trend in practice to formulate the wrong legal grounds to form the basis of the charges of the public prosecutor and the decision of the judicial authorities.

Justification was provided in JSMP's report titled “The Law Against Domestic Violence – Three Years of implementation and obstacles” that demonstrated that in 71 percent (71%)⁵ of domestic violence cases the offenders were charged with simple offences against physical integrity pursuant to Article 145 of the PC.

JSMP's report titled “Overview of the Justice Sector 2016” also found that in most cases of domestic violence Article 145 of the PC was applied. From a total of 421 domestic violence cases observed by JSMP in 2016, in 85 percent (85%) Article 145 of the PC was applied and in 11 percent (11%) Article 154 of the PC was applied.⁶

Analysis of two concrete cases

The following two cases demonstrate shortcomings and serious concerns about many other cases relating the application of the correct articles and those relevant to cases of domestic violence.

⁵ http://jsmp.tl/wp-content/uploads/2012/05/FINAL_Tetun.pdf

⁶ Overview of the Justice Sector 2016: http://jsmp.tl/wp-content/uploads/2012/05/OJS-2016-Final_Tetun-Version_26-April-2017.pdf - page 18

These two cases are summarised as follows:

Case 1 (Case No. 0006/14.MMNTB)

The public prosecutor alleged that on 19 November 2015, at 12.00 midday, the defendant took a piece of wood and struck the victim twice on the head causing the victim to lose consciousness and fall to the ground. When the victim regained consciousness and tried to flee so she could tell the police, the defendant again beat the victim four times on the back, twice on the shoulder and twice on the knee. As a consequence of these acts the victim received treatment at the Baguia Health Centre.

The public prosecutor alleged that the defendant violated Article 145 of the Penal Code on simple offences against physical integrity as well as Article 35 (b) of the Law Against Domestic Violence.

Case 2 (Case No. 72/14/TDD)

The public prosecutor alleged that on 15 November 2013, at 09:00pm, the defendant took a piece of pipe and struck the victim above the eye, and took an axe and struck the victim on the buttocks and slashed the victim on the stomach. These acts caused the victim to suffer swelling above the eye and buttocks as well as an injury to the victim's stomach. This incident occurred when the defendant asked the victim to go with him to find the home of the Village Chief to resolve a problem involving their daughter, but the victim did not want to.

The public prosecutor alleged that the defendant violated Article 145 of the Penal Code on simple offences against physical integrity as well as Article 35 (b) of the Law Against Domestic Violence.

In these two cases the public prosecution service alleged that the defendant violated Article 145 of the Penal Code on simple offences against physical integrity that carries a maximum penalty of three years in prison or a fine as well as Articles 2, 3 and 35 of the Law Against Domestic Violence.

JSMP believes that these two crimes fulfil the elements of a number of more serious crimes – such as the mistreatment of a spouse or attempted homicide or serious offences against physical integrity. In these two cases the defendants demonstrated an *intent* to endanger the victim's life. The means or objects used by the defendants to execute these crimes show a strong indication that the defendants intended to cause harm or potentially could have caused serious harm to the victim's life or at the very least the defendants were aware of the potential consequences. In addition, the defendants targeted specific areas that could cause the victims to lose their life. In fact, the Public Prosecution Service should have ensured that the charges corresponded with the facts relating to these crimes.

Requirements of Article 154 of the Penal Code

JSMP believes that Article 154 of the PC does not specifically require evidence of repetition to allow the application of mistreatment of a spouse. Article 154 of the PC only requires that the defendant intended to cause physical or mental harm, or inflicted cruel treatment on a spouse or a de facto. This article specifically applies to cases of domestic violence against spouses. Violence against a spouse should be considered as cruel and inhumane treatment, and therefore the law should provide adequate protection.

Before deciding if Article 154 or Article 145 of the PC is more relevant and appropriate within the scope of domestic violence committed against a spouse, it is crucial that the prosecutor carefully considers the circumstances and facts associated in such cases. This will avoid the common perception that Article 145 of the PC is normally applied in cases of domestic violence.

Article 42 of the PC on concordance of provisions provides guidance to prosecutors on how to prepare charges in situations where more than one legal provision can be applied to a crime. Pursuant to the following rules:

- a) The specific provision shall apply with prejudice to the general provision
- b) The main provision takes precedence over the subsidiary provision
- c) The broadest and most complex provision applies

Pursuant to Article 42 of the PC, it is apparent that Article 154 of the PC on mistreatment of a spouse is (a) more specific; and (c) broader and more complex, in cases of domestic violence involving violence against a spouse. Article 154 of the PC is more specific than Article 145 of the PC because it can only apply to spousal relationships. Article 154 of the PC is broader and more complex because it is not limited to physical violence, but it also includes psychological violence and other forms of cruel treatment.

The State is also obliged under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to take all necessary measures to eliminate gender based violence, including domestic violence. This means that public prosecutors, who represent the State in all penal actions, must select the article that truly reflects the gravity of domestic violence, and carries a severe penalty.

Charging a defendant under Article 154 on mistreatment of a spouse will allow the court to apply a more appropriate penalty against the defendant. Article 145 of the PC provides an abstract penalty of up to 3 years or a fine, whilst Article 154 of the PC provides an abstract penalty of between 2 and 6 years in prison.

Conclusion

The charges should reflect the gravity of the crime committed by the defendant and should correspond with the most appropriate article in the Penal Code and the relevant rules of criminal procedure. The charges should correspond with the type of crime committed by the defendant, and will help the court make the right decision and facilitate prompt and fair proceedings. Careful reconsideration of charges will contribute to a higher quality of decisions that will guarantee justice for the community and will have a deterrent effect.

JSMP believes that carefully considered charges can ensure that the courts will draft appropriate sentences based on the nature, gravity and complexity of each crime.

Recommendations

1. The Public Prosecution Service should develop legal guidelines on how to draft charges in cases of domestic violence. These guidelines need to clarify that violence does not need to be repetitive to charge a defendant with mistreatment of a spouse pursuant to Article 154 of the PC.
2. The Public Prosecution Service needs to ensure that in cases of domestic violence that occur between a wife and husband the charges must adhere to the elements of Article 42 of the PC and prosecutors need to select the article that is more specific, broader and complex, such as Article 154 of the PC.

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