

UNITED NATIONS



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East Timorese Transitional Administration

DILI DISTRICT COURT

SPECIAL PANEL for SERIOUS CRIMES

Case No.02 C.G.2000

Date: 1/03/2000

Original: English

IN THE TRIAL CHAMBER

Before:

Judge Sylver Ntukamazina, Presiding

Judge Luca L. Ferrero, Rapporteur

Judge Maria Natercia Gusmao Pereira

Registrar: José Manuel Simoes.

Judgment of: February 27, 2001

THE PROSECUTOR

v.

Julio FERNANDEZ

JUDGEMENT

The Office of the Public Prosecutor:

Ms. Brenda Sue Thornton and Mr. Antonino Goncalves.

Counsel of the accused:

Canxio Xavier, Olga Barreto Nunes, Joao Riberio and Siphosami Malunga.

INTRODUCTION

The trial of Julio Fernandez before the Special Panel of Dili District Court, for the Prosecution of Persons Responsible for Serious Criminal Offences (hereafter “Special Panel”), commenced on 10/01/2001 and came to a close on 1/03/2001.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Deputy General Prosecutor for Serious Crimes (hereafter “Public Prosecutor”) and the Defence for the accused, the Trial Chamber,

HEREBY RENDERS ITS JUDGEMENT.

A. THE SPECIAL PANEL

The Special Panel was established, within the District Court in Dili, pursuant to Section (hereafter “Sect.”) 10 of UNTAET Regulation (hereafter “U.R.”) No. 2000/11, in order to exercise jurisdiction with respect to the following serious criminal offences: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, as specified in Sections 4 to 9 of U. R. 2000/15.

B. PROCEDURAL BACKGROUND

- 1) Julio Fernandez, born in Hatolia, district of Ermera, on 27.06.1970, was arrested on 5.05.00 by CIVPOL pursuant to the Indonesian Code of Criminal Procedure, The Court did not find on file any document about the detention and the extension of detention pursuant to Sections 19 and 20 of regulation 2000/30 on transitional rule of Criminal Procedure.
- 2) On 16 November 2000, the Public Prosecutor presented a written indictment (both in English and in Bahasa Indonesia), with a charge of murder against Julio Fernandez, at Dili District Court. The case file was registered by the Registry of the Court and forwarded to this Special Panel. The Registrar also provided notification of the receipt of the indictment to the accused and to his legal representative, pursuant to Sect. 26 U.R. 2000/30.

- 3) The preliminary hearing was held on 10 January 2001. The accused made a statement about the charge. The Public Prosecutor presented the evidence for the trial and asked for the extension of the detention of Julio Fernandez. The Special Panel deemed that the statement of the accused could not be considered as an admission of guilt “because Julio FERNADES did not agree totally with the charge and it was clear that there had not been sufficient consultation with the defence”. As the order of detention of Julio FERNANDES had expired on 19.11.2000, the Special Panel ordered his release and set the date of trial as 6.02.2001.
- 4) On 11.01.2001 the Public Prosecutor filed a request for continuation of detention of Julio Fernandez (and other 19 accused). On 12.01.2001 the Special Panel issued a warrant of arrest.
- 5) On 16.01.2001 Julio Fernandez was arrested in Gleno.
- 6) On 17.01.2001 the Public Prosecutor filed a request for a review hearing. The hearing was held in Becora Prison on 19.01.2001 and, after both the Parties made the respective requests (Public Prosecutor for detention and defence for release), the Special Panel, “considering that there were reasonable grounds to believe that witnesses and victims could be pressured or manipulated”, confirmed the arrest and ordered the detention of Julio Fernandez until the first day of the trial.
- 7) On 23.01.2001 the Public Prosecutor filed a confidential submission containing a list of witnesses to be called at the trial and a list of the evidence to be submitted at the trial. On 6.02.2001, before the trial, another similar list was filed by the Public Prosecutor.
- 8) The trial was held on 6.02.2001. The Public Prosecutor read the indictment to the public. The defence submitted a written statement signed by the accused; Judge Maria Natercia read out the statement given (in Bahasa Indonesia) by the accused during the preliminary hearing on 10.01.2001, then Julio Fernandez made an oral statement and was questioned by the Court and by the parties. The witnesses A, B and C were questioned. The Public Prosecutor, with the consent of the defence to use them as evidence, submitted the statements of witnesses D, E, F, G,

H, I, J. The Public

Prosecutor also submitted photographs of the grave and of the exhumation of the victim Americo de Jesus Martins, the report of post mortem examination with photographs and the report of the forensic anthropologist. The Court closed the presentation and hearing of evidence and then asked the Public Prosecutor to make her closing statement. The defence and the accused made their closing statements.

- 9) The Special Panel set then the date of 27 February 2001 to release the written decision and decided to extend the detention of Julio Fernandez until that day.
- 10) On 14 February 2001, the Court of Appeal annulled the warrant of arrest issued on 12.01.2001 and ordered the release of the accused.
- 11) On 27.02.01 the Court postponed the hearing to the 1.03.01

C. APPLICABLE LAW

- 1) As specified in UNTAET Regulations No. 1/1999, No.11/2000 and No. 15/2000, the Special Panel shall apply:
- 2) UNTAET Regulations and directives;
- 3) Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
- 4) The law applied in East Timor prior 25.10.1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as they do not conflict with the internationally recognized human rights standards, the fulfillment of the mandate given to UNTAET under the UNITED NATION SECURITY COUNCIL RESOLUTION 1272 (1999), or UNTAET Regulations or directives.
- 5) Therefore, the Court will apply U.R. No. 2000/15, the Penal Code of Indonesia (hereafter C.P.I.) and U.R. No.2000/30 on Transitional Rules of Criminal Procedure.

D. THE FACTS

Factual allegations of the case.

- 1) The Prosecutor's factual allegations may briefly be set out as follows. The Public Prosecutor alleged that Julio Fernandez was a FALINTIL member. After the ballot on 30 August 1999 he fled to the mountains. When Darah Merah Militia withdrew from the Ermera District and moved to West Timor, the accused, together with the population, returned to their homes. On 26 September unidentified villagers captured Americo de Jesus Martins and brought him to a house close to the military compound in Gleno village. He was placed on a chair with his hands tied behind his back and seriously maltreated by the crowd: both of his ears were cut off and he was struck with a machete on one arm. Julio Fernandez arrived on the scene. He questioned Americo on whether he was a member of the militia, who his commander was and why he hadn't left to West Timor. After Americo answered the questions Julio Fernandez stabbed him twice with a knife. He died immediately. The Public Prosecutor submits that the accused took the life of Americo with deliberate intent and premeditation and that the alleged acts constitute the crime of murder, as recognized in Sect. 8 of U. R. N.2000/15 and article 340 of the Penal Code of Indonesia.
- 2) The Defence admitted that Julio Fernandez stabbed twice Americo, that the victim was tied, beaten and suffering and that the crowd was shouting "kill him, kill him". The defence contended that the accused is not guilty of the alleged crime. The Defence submitted that Americo might have been killed after Julio Fernandez stabbed him, because there is no evidence that the wounds inflicted by the accused caused his death. The Defence challenged the criminal responsibility of the accused asserting that the conduct had been caused by duress resulting from the threat of imminent death coming from the crowd.

Factual findings.

- 3) Most of the factual allegations made by the Public Prosecutor are undisputed because the accused himself acknowledged these facts:

Julio Fernandez was a FALINTIL member since 1991. He was the commander of a platoon and was a well known and respected member of the community in Gleno. On the 26 September he returned to Ermera, coming back from the mountains to which he had fled with other members of the community to escape from militia attacks and to avoid displacement to West Timor. When Julio Fernandez arrived in Gleno village, somebody (unknown) took revenge on a member of the Militia who did not escape to West Timor because he could not secure a place for himself and his family on the last truck that was leaving from Gleno. When Julio Fernandez saw him it was the first time, the man was sitting on a chair, his hands tied behind his back, he had been already seriously beaten and maltreated. Both his ears had been cut off and his face was bleeding. Someone had struck him on the arm with a machete.

Julio Fernandez didn't know him before.

The man was surrounded by a crowd screaming that he was a militia member and ought to be killed. Julio Fernandez approached the man and asked him if he was a militia member, who his commander was and why he didn't go to Atambua. The man said he was a member of the Darah Merah militia group, that his leaders were Zeca Lucas, Hilario and Evaristo and that he couldn't go to West Timor because there was no transportation. The crowd continued shouting: kill him, kill him! Finally Julio Fernandez stabbed the man twice with a knife, once on the right side of the chest and once on the back, near his collarbone. The man fell off the chair dead and Julio Fernandez ordered those present to bury him.

- 4) There is considerable other evidence to corroborate the statement of the accused.

Witnesses D and E saw a lot of people gathered in Gleno village, near the market. They said that the crowd was surrounding the victim. C testified that the crowd was very angry, armed with machetes and knives, shouting "kill him, kill him!". The situation was very tense and out of control.

Witness C confirmed that Americo had his hands tied behind his back, that he was sitting on a chair and that he had been maltreated.

The witnesses testified also that, at one point, the crowd was saying that the militia man had been killed.

A stated that her husband was taken from his house on the morning of 26 September 1999, but she couldn't recognize anybody of them because she was in another room. She also stated that her family couldn't go to West Timor because Americo was pushed out of the truck.

- 5) There is no doubt that the dead body, examined by the experts, was that of Americo de Jesus Martins. Three of the witnesses (E,F and G) knew him as a friend, recognized his dead body and helped others to bury him. The witness B showed the place where he was buried to the investigators. B gave a description of the zinc sheet that he was wrapped in (see photos of the exhumation). The clothes and the personal belongings described by the aforementioned witness and by A correspond to those reported by the experts (see photos and report of the exhumation).

- 6) There is evidence to prove, beyond reasonable doubt, that the two stab wounds inflicted by Julio Fernandez were the cause of Americo's death.

Firstly the accused himself acknowledged that, after the second stabbing motion, Americo felt down from the chair dead. He was so sure that the wounds were fatal that he ordered others to bury the body.

The results of the two expert reports confirmed this statement. The post-mortem examination revealed a fracture near the vertebral border that appears consistent with a cut directed right to left and a fracture in the right antero-lateral seventh rib. According to the expert, both injuries correlate with the cuts found on the shirt (see photographs) and can be referred to stab wounds.

A third fracture, to the distal third of the right humerus, wedge shaped, with a partially detached bone fragment, can be related to the machete strike acknowledged by the accused and by the witness Flaviano Lemos.

Even though the forensic pathologist wrote that "the cause of death is sharp force injuries of the trunk and the right upper extremity", the Special Panel (as *peritus peritorum*) believes that a wound to the humerus could not be fatal in the short term and that, therefore, the

cause of death was the two wounds to the trunk inflicted by Julio Fernandez.

This opinion is confirmed by the evidence that, after being struck on the upper arm with the machete, Americo was alive and was able to talk to Julio Fernandez and to the witness C.

E. THE LAW

- 1) On the evidence on record, the Special Panel finds that proves, beyond any reasonable doubt, that the essential elements of murder are met: the perpetrator, the deliberate intent, the premeditation and take somebody's life.
- 2) The accused desired and intended to kill the victim because he was a militia member, The people from Ermera district had escaped to the mountains to avoid attacks, killings and displacements to West Timor. On 26 September 1999 these people returned and found most of their properties burnt and destroyed. These people were asking him to execute the member of the Militia and the accused desired to kill that man, if a militia member (deliberate intent). Julio Fernandez questioned the victim as to whether he was a militia member and, after hearing the response, he decided to kill him (premeditation). Then stabbed twice the victim in the upper body with a knife (takes life).
- 3) The Special Panel deems it inappropriate to qualify the crime with the lesser offence of manslaughter. According to the C.P.I. (applicable as mentioned above), which derives from the Dutch Penal Code, the difference between murder (art. 340) and manslaughter (art.338) is premeditation.
Premeditation, according to Indonesian jurisprudence and the interpretation of murder in different countries, does not necessarily imply a long-term planning of the conduct. It's enough to have thought about acting and to have decided whether to take the life of the victim or to withdraw from that intention. The time for the decision can be very short (i.e. minutes or seconds), but what is important is that nothing exceptional interferes with the decision.
Julio Fernandez approached Americo, questioned him, listened to his answers, decided to kill him and then stabbed him twice. He was sure the victim was dead, ordered he be buried and walked away.

It was not an instinctive reaction to a very peculiar situation, but a decision reached by reasoning, after which followed the conduct.

- 4) The defence alleged that, if the conduct of the accused was the cause of Americo's death, Julio Fernandez should not be criminally responsible because of duress.

According to article 49 of C.P.I. "not punishable shall be the person who commits an act necessitated by the defence of his own or another one's body, chastity or property against direct or immediate threatening unlawful assault".

U.R 2000/15 lessens the applicability of duress. Sect.19.1.d) provides that "the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that persons or another person, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be made by other person or constituted by other circumstances beyond that person's control".

The Special Panel believes that there is no evidence of a serious threat of imminent death or bodily harm against the accused.

The behavior of Julio Fernandez was not likely to be caused or conditioned by threat. While the crowd was shouting "he is a Militia member, kill him, kill him!", the accused approached Americo, questioned him about his belonging to the Militia, the names of his commander and the reason he didn't go to West Timor. The accused even stated that, if he realized that the man, who had his hands tied behind his back and was sitting on a chair, beaten and bleeding, was not a militia member he would have walked away.

The witnesses stated (and the accused agreed) that Julio Fernandez was a member of FALINTIL, highly considered and respected in the community.

The Special Panel believes that the crowd did not threaten Julio Fernandez, but called him in order to take revenge on the militia man and to punish him in an "official" way, through a FALINTIL member.

The same happened to the witness C, who was a member of the C.N.R.T. and highly considered and respected in the community like Julio Fernandez. The crowd asked him to kill Americo, but he was able to refuse and to walk away.

The Special Panel believes that if the accused had decided to walk away, the crowd would have surely blamed and insulted him but not threatened his life.

Finally there were more than two option for Julio Fernandez. It was also open to the accused, as a FALINTIL member, to have decided to take Americo into his custody and to hand him to the authorities. Had he made this choice it is unlikely that the accused would have been threatened by the crowd, since his decision would more likely have been supported by the majority.

It is also relevant to underline that, before the hearing on 6.02.2001, Julio Fernandez had never mentioned that he had felt threatened by the crowd and that had caused his conduct. On 10.01.2001 he simply acknowledged that he killed Americo because he was a FALINTIL member with a duty to keep law and order in community.

Duress is clearly the defense of the very last moment.

F. VERDICT

For the aforementioned reasons, the Special Panel is satisfied that the Public Prosecutor has proved the case against the accused beyond reasonable doubt and therefore finds Julio Fernandez guilty of murder, as a violation of Sect. 8 U.R. 2000/15 and article 340 C.P.I.

G. SENTENCING

- 1) Pursuant to these findings of guilt, the Special Panel will proceed to sentence Julio Fernandez, in order to determine the appropriate penalty.
- 2) According to the applicable law, in particular Article 340 of the C.P.I., the penalties that the Special Panel could impose on a person convicted of murder are capital punishment, life imprisonment or a maximum of 20 years of detention. U.R. No. 1999/1, Sect. 3.3, excludes the capital punishment and U.R. No. 15/2000, Sect. 10, excludes life imprisonment by providing that it has to be for a specified numbers of years, which may not exceed a maximum of 25 years.
- 3) Both the parties did not submit any aggravating or mitigating circumstances.

- 4) The Public Prosecutor did not give any specific recommendation for the length of sentence.

Aggravating circumstances.

- 5) Julio Fernandez was a FALINTIL since 1991 and was a platoon commander. He acknowledged that, as a FALINTIL member, he knew that there was an order not to kill militia members. Therefore the murder of Americo de Jesus Martins, besides violating the law, is also a breach in FALINTIL rules.
- 6) When killed, Americo, had his hands tied behind his back, was sitting on a chair, defenseless, bleeding and suffering from serious maltreatment and injuries. He should have inspired pity not violence.

Mitigating circumstances.

- 7) The historical situation in East Timor, in September 1999, was very peculiar: the people voted for independence from Indonesia through a democratic ballot. However, before and after the result, suffered from killings, maltreatment, threat, systematic displacements, burning and destruction of premises. After the majority of militia and the Tentara Nasional Indonesia (T.N.I.) left, the East Timorese went back to a place where almost all property was destroyed. The feeling of the people toward militia members was hate and revenge.
- 8) On the very day of the crime a large crowd gathered around the victim, who had been beaten and seriously maltreated. When Julio Fernandez arrived, the atmosphere was very tense and, even if the accused had not been threatened and was not under duress (as above said), he was certainly under pressure.
- 9) The special Panel bears in mind that the accused is married with children (however this may be said of many accused persons and cannot be given any significant weight in a case of this gravity), has no previous conviction and is highly regarded and respected in the community.

Sentencing policy

- 10) According to Sect. 10 U.R. 2000/15, for the crimes referred to in Sect. 8 of the aforementioned regulation “the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor (i.e. the C.P.I.) shall apply”. “In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person”.
- 11) In this case, more than others, the punishment is also a contribution to reconciliation and to deter such crimes even in the hard times during which they occurred. Julio Fernandez could not be acquitted from the charge of murder because he killed a militia member immediately after the rampages suffered by East Timor civilian population. That situation can only be deemed relevant in determining the penalty.
In fact the persons found guilty to a crime is sentenced to a punishment not only because he broke the law (*punitur quia peccatur*) but also to deter himself and others to break the law (*punitur ne peccetur*).

H. DISPOSITION

For the foregoing reasons, having considered all the evidence and the arguments of the parties, the transitional rules of Criminal Procedure, the Special Panel finds and imposes sentence as follows:

With respect to the accused Julio Fernandez:

GUILTY for the charge of murder, in violation of Sect. 8 of UNTAET Regulation 2000/15 and Article 340 of the Penal Code of Indonesia;
In punishment of the above mentioned crime, sentences Julio Fernandez to an imprisonment of seven years

Orders Julio Fernandez to pay the costs of the criminal procedure.

Credit for time served

According to Sect. 10.3 U.R. 15/2000, Sect. 42.5 U.R. 30/2000 and article 33 Of C.P.I. the Special Panel deducts the time spent in detention by Julio Fernandez, due an order of an East Timorese Court. Julio Fernandez was arrested on 5.05.00 released on 11.01.01, arrested on 16.01.00 and released on 15.02.01.

Accordingly, 9 months and 8 days shall be deducted from the sentence today imposed, together with such additional time he may serve pending the determination of any final appeal.

Enforcement of sentences

Pursuant to sect. 42.5 U.R. 30/2000, the convicted shall be imprisoned and shall spend the duration of the penalty in East Timor.

The Special Panel informs Julio Fernandez that he is entitled to file a Notice of Appeal to this decision within 10 days and to file the written appeal statement within the following 30 days.

The sentence shall be executed immediately. The Special Panel informs that is the responsibility of the Public Prosecutor to notify the decision to the competent authorities.

The Special Panel orders the Registrar to give a copy of the written decision to each party and to the prison manager.

Done in English and Bahasa Indonesia, the English text being authoritative.

Dili, March 1, 2001

Judge Sylver Ntukamazina, Presiding

Judge Luca L. Ferrero, Rapporteur

Judge Maria Natercia Gusmao Pereira