

UNITED NATIONS



NATIONS UNIES

ETTA

East Timorese Transitional Administration

DILI DISTRICT COURT

SPECIAL PANEL for SERIOUS CRIMES

Case No. 11 /CG/2000

Date : 9/05/2001

Original : English

IN THE TRIAL CHAMBER

Before :

**LUCA L. FERRERO, PRESIDING JUDGE
MARIA NATERCIA GUSMAO PEREIRA, JUDGE RAPPOREUR
SYLVER NTUKAMAZINA, JUDGE**

Court Clerk : Jose Manuel Simoes

Decision made : 9 May 2001

THE PROSECUTOR

V

LEONARDUS KASA

JUDGEMENT

The Office of the Public Prosecutor:

Ms. Donna Daleo

Counsel of the accused:

Mr. Joao Ribeiro

Ms. Marcia Maria Sarmento

INTRODUCTION

The trial of Leonardus Kasa, age 28, married, farmer, born 27 January 1974 in the village of Tabolo, Subdistrict of Salele, District of Kovalima, before the Panel for Serious Crimes in the District Court of Dili, responsible for the handling of serious criminal offences (hereafter: "Special Panel"), commenced on 14/02/2001 and concludes today the 9th May 2001 with the decision on the jurisdiction of the Special Panel to try this case.

After considering all the evidence presented during the trial, and the written and oral statements from the office of the Prosecutor General (hereafter: the Public Prosecutor"), the Defendant and the Defense for the Defendant, the Special Panel,

HEREBY RENDERS ITS JUDGEMENT.

A. THE SPECIAL PANEL

The Special Panels were 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

Leonardus Kasa was arrested and detained on 21 January 2000 by CIVPOL, pursuant to the Indonesian Criminal Procedure Code. The Court did not find on file any document about the detention and the extension of detention.

On the 12.12.2000, the Public Prosecutor presented a written indictment (in English) with a charge of rape against the Defendant Leonardus Kasa, to the Dili District Court. The case file was registered by the Clerk of the Court and forwarded to this Special Panel. The Court Clerk also provided notification of the receipt of the indictment to the accused (on 12.01.2001) and to his Defense (20.12.2000), pursuant to Sect. 26.1 and 26.2 U.R. 2000/30.

On the 13.02.2001 the Public Prosecutor submitted a request for amendment of the indictment: the changes in the indictment concerned some new evidence found during further investigations. Attached to request were the copies of all the statements of the witnesses.

The Preliminary Hearing commenced on the 14th February 2001. The Court checked if the Defendant had read the indictment, or if the indictment had been read to him, and asked if he understood the nature of the charges, his right to be represented by a legal advisor, his right to remain silent, to plead guilty or not guilty to the crime committed as provided in Sect. 30.4 U.R. No 30/2000. The Defence said that the accused is a member of the LAKSAUR militia in March 1999, but during that period he did not commit any crime against persons. When he went to West Timor he was not a militia member any more. The sexual relationship with Maria da Costa was not against her will, but both of the partners

agreed. When the accused came back to East Timor, he had been maltreated by the victim's husband in order to force him to admit the alleged crime.

The Defence also said that, if there was mutual attraction, the crime should be more appropriately classified as adultery rather than rape. As adultery cannot be considered as a serious crime, the Special Panel could not have the competence to try this case. The Defence also added that the crime of rape, allegedly committed by the Defendant, occurred in West Timor or outside the territory of East Timor, therefore the competence to try this case should be considered before conducting the main trial.

Requested to make a statement about the charge, the accused stated that he was not guilty because he did not force the victim.

The Public Prosecutor recalled the request of amendment of indictment and asked for the motion of the Defence to be rejected. Then the Public Prosecutor requested an extension of detention until the next hearing, in order to avoid that Leonardus Kasa could abscond. The Special Panel asked the Public Prosecutor for the documentation in relation to the detention of the suspect. The Public Prosecutor submitted the last order of detention.

The Defence responded that there was no ground for the extension of detention.

The Special Panel deemed that the motions concerning the jurisdiction were relevant and had to be decided according to the charge of rape and not of adultery. The Special Panel also stated that detention had expired on 11.02.2001 and that there were not sufficient ground for the required extension of detention (in fact the accused was arrested in his village).

On the 22nd February 2001 the hearing was adjourned.

On the 6th March 2001 the Public Prosecutor asked the Special Panel for an order preventing the Defendant from approaching the victim's family, referring the victim's husband complains (a copy of the husband's statement was submitted). The Special Panel asked to the accused about the contacts with the victim's family, but he denied.

The Special Panel, decided to strictly forbid the accused any contact with the victim and her family.

Finally the hearing was postponed to the 26.04.2001 and again to the 9.05.2001 to read the written decision.

C. APPLICABLE LAW

As specified in UNTAET Regulations No. 1/1999, No.11/2000 and No. 15/2000, the Special Panel for Serious Crimes shall apply:

UNTAET Regulations and directives;

Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;

Pursuant to Sect. 3 UNTAET Regulation No. 1/1999, The law applied in East Timor prior to 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 NATIONS SECURITY COUNCIL RESOLUTION 1272 (1999), or UNTAET Regulations or directives.

D. FACTUAL AND LEGAL ALLEGATIONS ABOUT THE CASE

The Prosecutor's factual allegations may briefly be set out as follows. The Public Prosecutor alleged that, on or about the 10 September 1999, in the Village of Betun, West Timor, Indonesia, Leonardus Kasa, an East Timorese citizen forced a lady, namely Maria da Costa, an East Timorese citizen, to have sex with him outside of marriage.

Since the very beginning, the (former) Public Prosecutor (Raimund Sauter) was aware that the issue of jurisdiction was relevant. In fact, together with the indictment, he submitted the following motion:

“Since the crime (*of rape*) was committed outside East Timor and since it does not belong to the crimes listed under Sect. 10.1 (a), (b), (c) and (f) of U.R. 2000/11 as specified in Sect. 4 to 7 of U.R. 2000/15 for which the Special Panel of the District Court of Dili shall have “universal jurisdiction” the jurisdiction of the Special Panel might be questionable. However I am of the opinion that the jurisdiction of the Special Panel for Serious Crimes is given. Pursuant to Sect.3 of U.R. 1999/1 the Penal Code of Indonesia is applicable in East Timor. Article 5, paragraph 1, sub-paragraph 2 IPC provides that the Indonesian statutory penal provision are applicable to an Indonesian National who outside Indonesia commits an act deemed by the Indonesia Statutory penal provisions to be a crime on which punishment is imposed by the law of the country where it has been committed. Under the prevailing circumstances this provision cannot be applied directly. It has to be applied *mutatis mutandis*. Read with regard to the given situation is stated that a criminal act committed by an East Timorese National outside East Timor is falling under the jurisdiction of East Timor Courts provided that the act is punishable under East Timor law and the *lex loci actus*.

These requisites are given in this case. There is no conflict between Article 5, paragraph 1, sub-paragraph 2 IPC and Sect. 2.1 of U.R. 2000/15 existing since the *ratio legis* of the provision is to extend the jurisdiction of the Special Panel for Serious Crimes of the District Court of Dili not to limit it in cases where jurisdiction otherwise would exist with regard to the provisions of the IPC”.

The Defense, on the other hand, stated that the Defendant Leonardus Kasa did not rape the victim Maria da Costa as the victim herself at that time agreed to comply with the invitation. Before going to West Timor they had engaged in sexual relations as husband and wife on several occasion.

The Defense requested to the Special Panel that it was not appropriate for the Special Panel to try this case as the Defendant did not commit the rape of the victim as there was no element of coercion, but rather an element of mutual attraction and the crime should be more appropriately classified as Adultery (not classified as a serious crime). According to the Defense the Special Panel does not have the competence to try this case. The Defense also added that the rape that the Defendant allegedly committed occurred in West Timor or outside the territory of East Timor, therefore the competence to try this case should be considered before conducting the main trial.

E. THE LAW

The Public Prosecutor alleged that the crime had occurred in the village of Betun, which is located outside of the territory of East Timor. The Defence agreed on these allegations. Since it is undisputed that the crime occurred outside the East Timorese territory, the

Special Panel has to decide which is the applicable law and whether the matter falls within the jurisdiction of an East Timorese Court and, finally, if the jurisdiction belongs to this Special Panel or to an Ordinary Panel.

There are four *criteria* to determine the applicability of national criminal law to crimes that occurred out of the country: *a*) universality (or total extraterritoriality), *b*) territoriality, *c*) active personality (or nationality, or personal *status*) of the perpetrator and *d*) defence.

- a) According to the principle of universality, the judge of the country of arrest (*judex deprehensionis*) could apply the national criminal to all human beings; it doesn't matter which nationality they are from nor in which country the crime had been committed.
- b) Territoriality means that the national criminal law is applicable to the crimes that occurred inside the territory of the state, whether the perpetrator is a citizen or a foreigner or a stateless person.
- c) The principle of active personality implies that the applicable law is that of the state to which the perpetrator belongs, regardless of the law of the place in which the crime occurred.
- d) According to the principle of defence, the applicable law is that of the state the interests of which were infringed by the crime (principle of state defence) or is that of the person whose rights were infringed by the crime (principle of individual defence or passive personality).

Modern states usually don't adopt a single principle. They rather choose a combination between territoriality and other principles.

It can be said that the kind of combination depends to the international relations of the state. Totalitarian states, for example, don't trust in other judicial systems and therefore adopt the principle of active personality applying national criminal law to all their citizens, wherever they commit a crime (i.e. U.S.S.R. codes of 1922 and 1960, Bulgarian Code, Romanian Code, etc.).

Indonesia adopted the principle of territoriality: article 2 of C.P.I. states that "the Indonesian statutory provisions are applicable to any persons who is guilty of a punishable act within Indonesia". However this principle has been deeply derogated.

Article 4 provides many cases in which Indonesian penal provision are applicable to any person who, outside Indonesia, commits (the described) crimes against the state (principle of state defence). Articles 5, 7 and 8 describe many cases in which Indonesian law is applicable to crimes committed abroad by Indonesian citizen (principle of active personality).

These departures from the principle of territoriality are restricted by the exceptions recognized in international law (art.9 C.P.I.).

According to art. 86 of C.P.P.I. "if a person commits a criminal offense abroad which can be judged by the law of the Republic of Indonesia, the Jakarta Court of justice shall be the competent one to judge the case".

That means the Jurisdiction of an Indonesian Court when the crime occurred in Indonesia (art. 2 C.P.I.), when it occurred abroad and the Indonesian Statute of criminal law (art. 4, 5, and 7 C.P.I.) is applicable (art. 4, 5, and 7 C.P.I.) and when it occurred abroad and the Indonesian Statute of criminal law could be applicable but is not, because of an international law is derogating (art. 9 C.P.I.).

On the contrary, East Timor, in this phase of United Nation transitional administration, chose to adopt the principle of territoriality with very few exceptions.

Sect. 5 of U.R. 2000/11 provides that, “in exercising jurisdiction, the courts in East Timor shall apply the law of East Timor as promulgated by Sect. 3.1 of U.R. 1999/1. Courts shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the offence is based is consistent with Sect. 3.1 of U.R. 1999/1 or any other UNTAET regulations”.

The only departures from that principle are provided as follow:

- a) According to Sect. 2.2 of U.R. n. 2000/15 universal jurisdiction for the crimes of genocide, war crimes, crimes against humanity and torture, as described in Sect. 4 to 7 of the aforementioned regulation;
- b) According to Sect. 11.4 of U.R. 2000/30 an East Timorese court has jurisdiction over the crimes committed on a vessel or aircraft registered in East Timor.

This means that, even when the Indonesian criminal law is applicable, the East Timorese Courts have jurisdiction only on the crimes occurred (*locus commissi delicti*) in East Timor, with only exception of the cases mentioned above, under letter a) and b). In the case *sub a*) the jurisdiction belongs (exclusively) to The Special Panel for Serious Crimes of Dili District Court, in the case *sub b*) the jurisdiction belongs to Dili District Court.

For these are the rules, the Special Panel deems that East Timorese courts and the Special Panel of Dili District Court itself doesn't have jurisdiction upon a crime of rape committed in West Timor before the 25 of October 1999 for the following reasons.

- 1) Chapter I of Book I (and especially art.5) of C.P.I. cannot be applied in East Timor. In fact, according to Sect.3 of U.R. 1999/1, Indonesian law can be applied only until replaced by UNTAET regulation and the Special Panel believes that the UNTAET regulations mentioned above (Sect. 5 of U.R. 2000/11, Sect. 2.2 of U.R. n. 2000/15 and Sect. 11.4 of U.R. 2000/30) did replace the rules about the applicability of the national criminal law to crimes committed outside of the East Timorese territory.
- 2) They are no longer applicable because Sect. 5 of U.R. 2000/11 provides that, “courts shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the offence is based is consistent with Sect. 3.1 of U.R. 1999/1 or any other UNTAET regulations”. As already said above, the U.N.T.A.E.T. chose the principle of territoriality with very few exceptions. This choice could be said mandatory for a transitional administration empowered by the United Nations Security Council, which has also the mandate of administration of justice. How could such a temporary and “neutral” administration have jurisdiction for crimes committed out of the territory administrated? Only in the very few cases (above mentioned) provided by the Regulation. The crimes of genocide, war crimes, torture and crimes against humanity (*crimina juris gentium*) deserve universal jurisdiction due international customary laws and (more recently) international laws. That means that the aforementioned Indonesian rules are no longer applicable because they are not consistent with UNTAET Regulation and the principles of the UNITED NATION mandate.
- 3) Even if applicable as a general rule, Indonesian law on jurisdiction cannot be applied to rape and murder (*lex specialis derogat lex generalis*). Sect. 2.2 and 2.3 explicitly state that the East Timorese Courts have not universal jurisdiction upon these crimes. That is “courts shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999” only upon the crimes of genocide, war crimes, torture and crimes against humanity.
- 4) According to art.9 of C.P.I., the applicability of art. 5 is restricted by the exception recognized in the international law. On April the 5th 2000, UNTAET and Indonesia

signed a “Memorandum of Understanding” about “legal, judicial and human rights related matters”. Since in this rule nothing has been said about the crimes committed on the Indonesian territory, the Special Panel deems that East Timorese jurisdiction cannot go beyond the provision of Sect. 2 of U.R. 2000/15.

- 5) As last, that suggested by the Public Prosecutor, is not the application of art. 5 C.P.I. to the case, pursuant to Sect.3 of U.R. 1999/1. In fact art.5 C.P.I. rules about the applicability of Indonesian criminal law on a crime committed outside the state and, subsequently, art. 86 C.P.P.I. provides the jurisdiction of the Indonesian Court in Jakarta. The substitution of the word Indonesia with East Timor in article 5 means an analogical application of the same rule valid in Indonesia to East Timor. This kind of interpretation is not admissible. According to the principles of applicability of law, analogy is possible only when there is a lack in the applicable law. This is not the case: East Timorese regulations give a complete set of rules about jurisdiction.

At the end of the aforementioned grounds, the Special Panel deems that the applicable criminal law to case is Sect.9 U.R. 2000/15 and art.285 C.P.I., however only Indonesia has the jurisdiction on the case.

The Special Panel believes the opportunity to be more precise about the meaning of lack of jurisdiction.

It does not mean that the alleged crime of rape had not been committed nor that Leonardus Kasa is acquitted from the charge of rape.

It means that no East Timorese Court, according to the laws in force at the present time, could try this case.

An Indonesian Court could try it or an East Timorese Court in the future might try it, if the rules about jurisdiction will be changed.

F. DECISION

After considering and examining the aforementioned grounds, the Special Panel hereby decides that:

Pursuant to Sections 2.1, 2.2, 2.3, and 2.4 UNTAET Regulation 15/2000 the Special Panel for Serious Crimes within the District Court of Dili does not have the jurisdiction to try this case

The substitutive measure issued on 6.03.2001 has no longer effect.

Pursuant to Section 40.2 and 42.3 UNTAET Regulation No. 30/2000, the Special Panel informs Leonardus Kasa and the Public Prosecutor that they are 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.

This decision is effective immediately.

The Special Panel orders the Court Clerk to give a copy of the written decision to the Public Prosecutor and the Defendant/Public Defender.

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

This Judgement was rendered and delivered on the 26th April 2001 in the District Court of Dili by:

Judge Luca L. Ferrero, Presiding
Judge Maria Natercia, Rapporteur
Judge Sylver Ntukamazina

Clerk: Jose Manuel Simoes