



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

DILI DISTRICT COURT

THE SPECIAL PANELS FOR SERIOUS CRIMES

Before:

Judge Phillip Rapoza

CASE NO. 05/2003

DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

-AGAINST-

WIRANTO, and others

**Decision on the Motion of the Prosecutor General to
Review and Amend the Indictment**

For the Prosecution:

Prosecutor General Longuinhos Monteiro

Procedural History

1. On 24 February 2003, Deputy General Prosecutor (DGP) filed an indictment with the Court Registry serving the Special Panels for Serious Crimes. The indictment charged Wiranto and others with crimes against humanity in the form of murder, deportation, and persecution. On the same date, the DGP also filed a Request for Warrants of Arrest for all the defendants named in the indictment.
2. On 25 June 2003, the Court dismissed the Request for Warrants of Arrest on the ground that the DGP had not presented to the Court a description of the evidence supporting the indictment, as required by Section 24.2 of the Transitional Rules of Criminal Procedure, UNTAET Regulation 2000/30, as amended (hereinafter "TRCP").
3. On 26 June 2003, the DGP filed a new Request for Warrants of Arrest for all defendants named in the indictment.
4. Between 26 June 2003 and 17 September 2003, the DGP filed 17 volumes of documentation in support of the charges. The material was contained in a total of 34 binders amounting to over 13,000 pages and including statements from over 1500 witnesses.
5. On 7 November 2003, the Special Panels issued an arrest warrant for the defendant Yayat Sudrajat.
6. On 28 January 2004, the DGP filed a Motion to Request a Warrant Application Hearing in the case of defendant Wiranto.
7. On 18 February 2004, the Special Panels denied the DGP's Motion to Request a Warrant Application Hearing. The Court noted, *inter alia*, that there is no provision in the TRCP for a public hearing on the issue of whether an arrest warrant should issue. The Court allowed the prosecution an additional 30 days within which to file any further material in support of the request for an arrest warrant.
8. On 18 March and 19 March 2004, the DGP filed 4 additional volumes of material arranged in 5 binders, containing an additional 2000 pages of documentation in support of the charges against Wiranto. The prosecution also filed a brief in support of the request for issuance of an arrest warrant for the defendant Wiranto.
9. On 10 May 2004, the Special Panels issued an arrest warrant for the defendant Wiranto.
10. On 11 May 2004, the Prosecutor General filed a motion asking for the opportunity to review and amend the indictment against Wiranto. The motion was filed pursuant to TRCP Secs 27.1 and 32.1.

Statement of the issue

The Prosecutor General has filed a Motion requesting that the Special Panels allow him to “review the filed indictment and file an amended indictment after removing the defects when found.”¹

The Prosecutor General has presented his motion pursuant to TRCP Sec. 27.1, which permits the filing of preliminary motions prior to trial. Among those referenced in the rule are preliminary motions that “allege defects in the form of the indictment” See TRCP Sec. 27.1(a).

The Prosecutor General also invokes TRCP Sec. 32.1, which states that “[a]fter the indictment has been presented and prior to the commencement of the trial, the Public Prosecutor may amend the indictment only with leave of the Court” (emphasis added).

The issue before the Court is whether the Prosecutor General has sufficiently supported his motion. Accordingly, the Court must consider whether the motion adequately describes the alleged defects in the indictment and whether it proposes specific, appropriate amendments to correct those alleged defects.

Discussion

- 1) After the Public Prosecutor files an indictment with the Court Registry, it cannot be amended or withdrawn without the permission of the Court.

The Public Prosecutor has significant discretion in the investigation of criminal cases and in the decision to file charges against a defendant. The TRCP establish that the Public Prosecutor shall direct criminal investigations (Sec. 7.2) and shall be “the only authority empowered to issue an indictment” (Sec. 7.1). Upon completion of the criminal investigation, “if the result so warrants, the Public Prosecutor shall present a written indictment of the suspect” to the Court. TRCP Sec. 24.1.

The case is then filed with the Court Registry, assigned a number, and “the case file shall be forwarded by the Registry to the Panel of Judges or to an individual judge.” TRCP Sec. 26.1. From that point on, the indictment is subject to the jurisdiction of the Court and not the discretion of the Public Prosecutor. This fact is reflected in the provision cited by the Prosecutor General in his motion: “After the indictment has been presented and prior to the commencement of the trial, the Public Prosecutor may amend the indictment only with leave of the Court” TRCP Sec. 32.1 (emphasis added).

¹ The motion fails to state what action the Prosecutor General seeks to perform under the term “review.” As the motion seeks both to “review” the current indictment and to file an amended indictment, the Court takes those two operations (reviewing and filing) as aspects of the same amendment process. To put it more simply, the preparation of any proposed amendment would first require a review of the current indictment. It is in that limited sense that the Court considers the term “review.”

Accordingly, when the Public Prosecutor presents a written indictment to the Court, his discretion with respect to the charges passes to the Court itself, which alone is vested with the authority to approve the amendment of an indictment. Similarly, the jurisprudence of the Special Panels establishes that the withdrawal of an indictment, an even more drastic action than mere amendment, necessarily requires the permission of the Court. See Public Prosecutor v. Antonio Lemos, No. 15/2001, "Decision on the Petition of the Public Prosecutor to Withdraw the Indictment." 30 September 2002.

2) The motion of the Prosecutor General does not describe the alleged defects in the indictment.

The Prosecutor General has presented his motion pursuant to TRCP Sec. 27.1, which permits the filing of a preliminary motion prior to trial. In pertinent part, the rule allows the filing of preliminary motions that "allege defects in the form of the indictment" See TRCP Sec. 27.1(a).

The motion, however, does not specify the alleged defects in the indictment. Rather, the motion merely alludes to a "feeling that there might be some defects in the filed indictment."² Similarly, the motion asks the Court to allow the Prosecutor General to file an amended indictment to remove any purported defects "when found."

The motion is thus insufficient in its present form, as it does not allege what defects, if any, are present in the indictment. This is a prerequisite for filing a motion under TRCP Sec. 27.1, which requires that the Prosecutor state the alleged defects that are subject to his motion to amend.

It is not sufficient for the moving party to state, as he does here, that he has a "feeling" that the indictment may be defective and that the defects have not yet been "found."

3) The motion of the Prosecutor General does not describe the proposed amendments for which he seeks approval.

As previously noted, the Prosecutor General asks the Court to allow him to file an amended indictment to remove alleged defects "when found." In this form, not only does the motion fail to identify the alleged defects, but it also fails to present the amended indictment for which approval is sought. Clearly, the Court cannot rule on

² More specifically, the motion suggests that since a trial has not yet commenced, "this points to a feeling that there might be some defects in the filed indictment." The delay in the trial is not attributable to any alleged defects in the indictment. Simply put, the trial of the defendants has not yet begun because none of the accused are in the Court's custody. Two warrants of arrest have issued, but neither has been served and the defendants are still at large. As to the timing of the remaining warrants, the Court refers to the number of accused, the nature of the accusations, the need to review the facts as to each defendant and the fact that the DGP has submitted over 15,000 pages of documentation to be examined.

an amendment, the contents of which have not been revealed. Nor can it approve an amended indictment that it has never seen.

The motion is thus insufficient in its present form in that it does not specify what amendments it seeks to make to the indictment. This is a prerequisite for filing a motion under TRCP Sec. 32.1, which requires that the Prosecutor state the amendments that he is asking the Court to approve.

Allowance of the motion in its current form would permit the Prosecutor to file a completely revised indictment without first disclosing its contents to the Court.

Conclusion

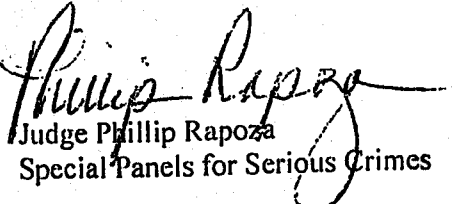
The motion in its present form is not sufficiently supported. This fact flows from the failure of the motion to allege specific defects and to propose specific amendments. In the circumstances, it is impossible to establish the need for amendments that have not been filed for alleged defects that have not been identified. Consequently, the motion fails to articulate an adequate basis for this Court to grant the requested relief.

Accordingly, the motion must be denied because:

1. it fails to describe the alleged defects in the indictment in violation of TRCP Sec. 27.1(a); and
2. it fails to describe the proposed amendment(s) for which it seeks the Court's approval in violation of TRCP Sec. 32.1.

DECISION

For the reasons stated above, the Motion to Review and Amend the Indictment is denied.


Judge Phillip Rapoza
Special Panels for Serious Crimes

Date: 17 May 2004

(The original of the above decision was rendered in English, which shall be the authoritative version.)