



Number: KPŽ 32/05
Sarajevo, 24 November 2005

The Court of Bosnia and Herzegovina, Section I, Appellate Division, Panel consisting of Judge Hilmo Vučinić, as the Presiding Judge, and Judge Finn Lynghjem and Judge Pietro Spera, as members of the Panel, with participation of Legal Officer Dženana Deljkić as the court reporter, in the criminal case against the Accused Abduladhim Maktouf for criminal offense of War Crimes against Civilians, in violation of Article 173 (1) (e), in conjunction with Article 31 of the Criminal Code of Bosnia and Herzegovina (hereinafter: CC of B-H), having decided upon the Appeal by the Defense against the Verdict of the Court of Bosnia and Herzegovina, reference number K-127/04, of 1 July 2005, after a public session held from 8 to 10 November 2005 in the presence of Mr. Peter Tinsley, for the Prosecutor's Office of Bosnia and Herzegovina, the Accused Abduladhim Maktouf and his Defense Attorneys Ismet Mehić and Bajro Čilić, Attorneys-at-Law from Sarajevo, and Adil Lozo, Attorney-at-Law from Travnik, on 24 November 2005 rendered the following

DECISION

whereby the Appeal by the Defense Attorneys of the Accused is being partially accepted, the Verdict of the Court of B-H number K- 127/04 of 1 July 2005 is being revoked and hearing before the Appellate Panel is being scheduled.

Reasoning

By the Verdict of the Court of B-H, Sarajevo, number K-127/04 of 1 July 2005, the Accused Abduladhim Maktouf was pronounced guilty because "on or about 19 October 1993, in Travnik, Bosnia and Herzegovina, during the war in Central Bosnia, contrary to Article 3 (1) (b) of the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, as a member of the Army of Bosnia and Herzegovina, [he] intentionally helped Abu Džafer and other members of the Al Mujahid Unit abduct the following Croat civilians, Ivo Fišić, Kazimir Pobrić and Ivan Rajković, by driving his green Volkswagen van to the building called Amerikanka at Hadži Ali Bega Hasanpašića Str. in Travnik around 2000 hrs." The Court sentenced him to imprisonment for a term of five (5) years.

The Defense Attorneys filed an Appeal against the Verdict for essential violations of the provisions of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: CPC of B-H), violations of the provisions of the CC of B-H, incorrectly and incompletely established facts, erroneous decision on the sentence and erroneous decisions on claims under property law. The Defense Attorneys of the Accused moved the Appellate Panel of the Court of B-H to render a decision, pursuant to Article 314 of the CPC of B-H, whereby

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it would accept the Appeal and revise the first-instance Verdict by acquitting the Accused on all counts of the Indictment.

The Prosecutor's Office of B-H also filed an Appeal against the above-mentioned Verdict insofar as it concerned the sentence.

At a public session of the Appellate Panel, held from 8 to 10 November 2005, the Accused and his Defense Attorneys and the Prosecutor explained the allegations from their respective Appeals and their respective answers to the appeal of the other party.

The Appellate Panel reviewed the Verdict insofar as it was contested by the Appeal and rendered a decision as quoted in the enacting clause of this Decision, for the following reasons:

In the Appeal the Defense Attorneys of the Accused contest the decisive fact that the Accused participated in the abduction of three Croats on the evening concerned.

The first-instance Panel founded its conclusion on participation of the Accused in the event mostly on the testimony of the witnesses for the Prosecution, Ivo Fišić and "the Witness", as direct participants in the event. The first-instance Panel founded its conclusion to a far lesser extent on the other presented evidence, such as the testimonies of Ahmed El Haj Ahmed, Husein Delić, Ifeta Kalušić, Hasib Kalušić, Tonka Rajković and Božidar Rajković, which pieces of evidence are indirect evidence by nature.

It is a fact that "the Witness" participated in the commission of the criminal act that the Accused is charged with as an accessory and that "the Witness" has not been prosecuted and tried so far, although the event took place in 1993. Therefore, this Panel cannot rule out the existence of a de facto agreement between the Prosecutor's Office of B-H and "the Witness". In addition to this, the testimony of witness Ivo Fišić is inconsistent and contradictory to his previous statements on participation of the Accused in the event concerned.

These very circumstances that concern the testimonies of "the Witness" and Ivo Fišić as eye-witnesses should have urged the first-instance Panel to make an additional effort to establish the decisive fact concerning the participation of the Accused in the criminal act. This is particularly important in a situation when there is no other piece of direct evidence that a first-instance court could use to establish the facts correctly. The Constitutional Court of Bosnia and Herzegovina used analogous legal reasoning in its Decision of 22 April 2005 in the case number AP 661/0 concerning the use at trial of evidence obtained from an accomplice who had an agreement with the prosecutor in charge for the sake of testifying.

Accordingly, the Appellate Panel is in doubt whether the first-instance Panel made a conclusion that is entirely corroborated by all the pieces of evidence that could justify the result of the first-instance Panel's deliberation.

In accordance with the foregoing, and in view of the provision of Article 315 (1) (b) of the CPC of B-H, the Appellate Panel of the Court of B-H hereby revokes the first-instance verdict and schedules a hearing before the Appellate Division Panel before which



evidence presented in the first-instance proceedings will be repeated, as necessary, and new evidence possibly presented, with the goal of establishing the facts correctly and completely.

**PRESIDING JUDGE
JUDGE Hilmo Vučinić**

I hereby confirm that this document is a true translation of the original written in Bosnian/Croatian/Serbian.

*Sarajevo, 30 November 2005
Edina Neretljak
Certified Court Interpreter for English Language*

Edina Neretljak

