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SUD BOSNE I HERCEGOVINE

Number: KRŽ 05/49
Sarajevo, 29 September 2006



REVOKA DOKUMENTA 498

The Court of Bosnia and Herzegovina, the Appellate Division Panel of Section I for War Crimes, composed of Judge Azra Miletić as the Presiding Judge and Judges Finn Lynghjem and Jose Ricardo Juan de Prada as Panel members, with the participation of legal officer Lejla Fadilpašić as the record-taker, in the criminal case against the accused Nedo Samardžić, for the criminal offence of Crimes against Humanity in violation of Article 172 (1) items a), d), e), g), h), i) and k) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), deciding on the appeals of the Prosecutor's Office of Bosnia and Herzegovina (hereinafter: the Prosecutor's Office of BiH) number KT-RZ-89/05 dated 14 June 2006 and the defense counsel for the accused, attorneys Milan Vujin and Slaviša Prodanović, filed against the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/49 dated 7 April 2006, at the session held in the presence of the Prosecutor of the Prosecutor's Office of BiH, Behaija Krnjić, the accused Neđo Samardžić and his defense attorney Slaviša Prodanović, on 29 September 2006, issued the following:

DECISION

The appeals filed by the Prosecutor's Office of Bosnia and Herzegovina and the Defense Attorneys for the accused Neđo Samardžić are hereby granted, and the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/49 dated 7 April 2006 is hereby **revoked in both its convicting and acquitting parts**, and the main trial in this part is to be held before the Appellate Division Panel of Section I for War Crimes.

REASONING

By the Verdict of the Court of Bosnia and Herzegovina (Court of BiH) number X-KR-05/49 dated 7 April 2006, the accused Neđo Samardžić was found guilty of the criminal offence of Crimes against Humanity in violation of Article 172 of the CC of BiH, committed in a manner described under the enactment clause of the said Verdict, under Counts 1 through 4, to wit: under Counts 1 and 2 - Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law defined in Article 172(1) item e) of the CC of BiH, and under Counts 3 and 4 - Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape) and aiding and abetting in keeping women in sexual slavery defined in Article 172(1) item g) of the CC of BiH in conjunction with Article 31 thereof. For the above-mentioned criminal offence, the first-instance Court imposed on the accused a punishment of imprisonment for a term of twelve (12) years, took as already established the part of the unserved punishment of imprisonment for a term of one (1) year, ten (10) months and twenty four (24) days under the Judgment of the Higher Court in Mostar no. K-33/90 dated 22 June 1990 and sentenced him to a



compound punishment of imprisonment for a term of thirteen (13) years and four (4) months.

Pursuant to Article 56 of the CC of BiH, the time that the accused spent in custody was counted as part of the imprisonment sentence, whilst pursuant to Article 188 (4) of the CPC of BiH he was relieved of the obligation to reimburse the costs of proceedings.

By the same Verdict the accused was acquitted of the charges that he, in the manner described under Counts 1 through 6 of the acquitting part of the Verdict, committed the criminal offense of War Crimes against Humanity in violation of Article 172(1)(a), (d), (e), (g), (h), (i) and (k) of the CC of BiH, whilst pursuant to Article 283(c) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH) in relation to Counts 1 through 4, the Court rendered the verdict dismissing the charges in that part, after the Prosecutor's Office withdrew those Counts at the main trial.

The Prosecutor's Office of BiH has filed an appeal within the prescribed time-limit against the convicting and acquitting parts of the Verdict on all appeal grounds, proposing to the Appellate Panel to grant the appeal and modify the challenged Verdict by finding the accused guilty on all Counts he is charged with under the Amended Indictment, and to consequently impose on him a punishment of a long-term imprisonment, or to revoke the challenged Verdict in its entirety and order a retrial before the Appellate Panel of the Court of BiH.

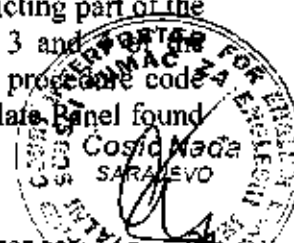
The defense attorneys for the accused too have filed their appeals within the legally prescribed time-limit, due to an essential violation of the provisions of the criminal procedure code, violation of the provisions of the criminal code, incorrectly and incompletely established facts and the decision on criminal legal sanction, proposing that the Appellate Panel revokes the challenged Verdict in its entirety and order a retrial, or modify the Verdict by acquitting the accused of the charges.

Both the Prosecutor's Office of BiH and the defense attorneys for the accused submitted with the Court their responses to the appeals, wherein both parties found the above-mentioned appeal allegations unfounded, proposing to the Appellate Panel to refuse the respective appeals as unfounded.

At the session of the Appellate Panel, held on 27 September 2006 for the purpose of Article 304 of the CPC of BiH, both parties provided a brief reasoning of their respective appeals and responses to those, maintaining in entirety their previously stated appeal allegations and proposals.

The Appellate Panel reviewed the challenged verdict within the limits of the allegations stated in the appeals and issued the decision as stated in the enactment clause, for the following reasons:

As for the appeal allegations of the both parties referring to the convicting part of the Verdict, which essentially come down to the objection that under items 3 and 4 of the challenged Verdict an essential violation of the provisions of the criminal procedure code has been made in violation of Article 297(1) item k) of the CPC, the Appellate Panel found



the objections to be justified, as the enactment clause of the challenged Verdict does not provide facts and circumstances that constitute the elements of Accessory for the purpose of Article 31 of the CC of BiH, as required under Article 285(1) item a) of the CPC of BiH, nor does the reasoning of the Verdict provide any grounds for such findings, which makes the enactment clause itself incomprehensible, and the reasoning does not contain any reasons on that decisive fact, based on which the Appellate Panel found that an essential violation of the provisions of the criminal procedure code has been made with respect to the items of the convicting part of the Verdict in violation of Article 297(1) item k) of the CPC of BiH.

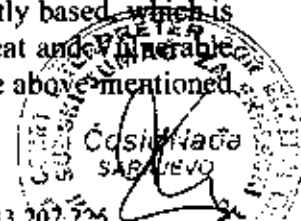
The appeal allegations of the Prosecutor are also justified when alleging that the first-instance court, with respect to items 1 and 2 of the convicting part of the Verdict, after failing to provide a factual description in relation to the participation of the accused in the forcible taking away of Grbo Sulejman, Grbo Said, Grbo Mustafa and Softić Šučerija, failed to provide in the reasoning of the Verdict adequate grounds for such decision, and in particular that it did not take into consideration whether some other kind of accessory existed in such acts of the accused in the commission of the criminal offence in violation of Article 172(2) item i) of the CC of BiH.

Considering the appeal allegations wherein the Prosecutor's Office points to the incorrectly or incompletely established facts, in as much as the acquitting part of the Verdict is concerned, the Appellate Panel finds those allegations to be justified as well.

Namely, in the reasoning of the appealed Verdict the first-instance Panel was obliged, pursuant to Article 290(7) of the CPC of BiH, to specifically and completely state which facts and on what grounds it finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence and the reasons guiding the Panel in ruling on certain legal matters, especially in ascertaining whether the criminal offense was committed and whether the accused was criminally responsible.

The Appellate Panel finds that in this specific case, the first-instance Court failed to evaluate the evidence presented in a manner prescribed under Article 281 (2) of the CPC of BiH, particularly testimonies of the witnesses, to bring those into mutual connection as well as within the context of the character of the criminal offence on whose elements the witnesses testified, the lapse of time, the circumstances and the manner of their perpetration. The Panel also failed to provide an adequate reasoning as to why it had accepted as credible certain parts of testimonies given by the witnesses who were heard at the main trial, whereas it denied credibility to other parts of their testimonies, which was, for example, the case with the testimony of the witness with the pseudonym "K", the fact which is justifiably pointed at by the Prosecutor's Office of BiH in its appeal. Therefore, this Court finds that there is also a doubt with respect to the correctness of the facts established by the first-instance Verdict.

This conclusion is also reinforced by the position presented in the challenged Verdict, whereby the testimony of the witness marked with the pseudonym „G” was evaluated as the testimony on which the Verdict could not be predominantly based, which is contrary to Article 23 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses. However, the Prosecutor's appeal justifiably points out that the above-mentioned



witness testified directly at the main trial, that she was cross-examined by the Defense and that regardless of the fact that she enjoyed certain protective measures during her testimony, as prescribed by the above-mentioned law, she did not have the status of a protected witness in the light of the provisions under Articles 14 - 22 of the given Law, in the case of which, pursuant to Article 21 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, the record of her statement would only be read at the main trial, so the Court in such a case would not be able to base its decision on such a statement exclusively, therefore there is a suspicion that facts were incorrectly established in this part as well.

Having in mind the essential violation of criminal procedure provisions and the above-given deficiencies referring to the incorrectly established facts, the Appellate Panel granted the appeals, and pursuant to Article 315(1) items a), b) of the CPC of BiH, revoked the first-instance verdict in both its convicting and acquitting parts, and decided that the main trial is to be held before the Appellate Panel of the Court of BiH.

In the repeated proceedings all essential violations of the provisions of the criminal procedure code will be removed, the already presented evidence shall be presented again, and as necessary, while evaluating other appeal allegations, other evidence shall be presented as well.

Having in mind that both the convicting and the acquitting parts of the first-instance Verdict were revoked, the Appellate Panel did not go into a more detailed analysis of other appeal allegations, it has rather limited itself to presenting only brief reasons for revocation of the Verdict, pursuant to Article 316 of the CPC of BiH.

Record-taker:

Lejla Fadilpašić
[hand signature affixed]

Presiding Judge
Judge:

Azra Miletić
[hand signature affixed]

Legal remedy: No appeal shall be allowed against this decision.

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

Sarajevo, 5 October 2006

Nada Čosić

Certified Court Interpreter for the English Language

