

SUD BOSNE I HERCEGOVINE



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	Krivodolno odjeljenje / Апелационо одјелјење / Kriminalno odjeljenje / Криминално одјелјење / Одјел I и Одјел II / Одјел I и Одјел II
	Одјел за судску управу / Одјел за судску управу
	X-KRŽ/05/04

PRISJEDOD BOSK. 919

Number: KRŽ 05/04
Sarajevo, 5 January 2007

Court of Bosnia and Herzegovina, the Panel of the Appellate Division of the Section I for War Crimes, comprised of judges Azra Miletić, as the President of the Panel, Finn Lynghjem and Jose Ricardo Juan de Prada, as Panel members, with legal officer Lejla Fadilpašić as the minutes keeper, in the criminal case against the accused Boban Šimšić, for the criminal offence of Crimes against Humanity under Article 172 paragraph 1 item h) in conjunction with items a), d), e), f), g), i), and k), of the Criminal Code of Bosnia and Herzegovina (CC BiH), deciding upon appeals of the Prosecutor's Office of Bosnia and Herzegovina (Prosecutor's Office of BiH), number KT-RZ-2/05 dated 5 September 2006 and the defense attorney of the Accused, attorney Veljko Čivša, lodged against the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/04 dated 11 July 2006, at the session held with the attendance of the prosecutor of the Prosecutor's Office of BiH, Ibro Bulić, the accused Boban Šimšić and his defense attorney Veljko Čivša on 5 January 2007 rendered the following:

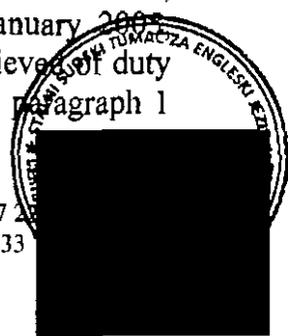
DECISION

The appeals of the Prosecutor's Office of Bosnia and Herzegovina and the defense attorney of the accused Boban Šimšić shall be honored and the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/04 of 11 July 2006 **revoked in the convicting and acquitting parts**, and in that regard, the main trial shall be held before the Panel of the Appellate Division of the Section I of the Court of Bosnia and Herzegovina for War Crimes.

REASONS FOR DECISION

In the Verdict of the Court of Bosnia and Herzegovina (Court of BiH) number X-KR-05/04 dated 11 July 2006, the accused Boban Šimšić was found guilty to the effect that by the actions described in the operative part of the said Verdict, under counts 1 and 2, he committed the criminal offence of Crimes against Humanity under Article 172 CC BiH item i) (count 1 of the operative part), and item g) (under count 2 of the operative part), all in conjunction with Article 31 CC BiH.

The first instance Court convicted the Accused to the sentence of imprisonment of five (5) years for the aforesaid criminal offence, and pursuant to Article 56 CC BiH, the Accused was credited the time he spent in custody as of 24 January 2007 whereas in pursuance of Article 188 paragraph 4 CPC BiH, he was relieved of duty to reimburse the costs of the proceedings, and pursuant to Article 198 paragraph 1



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CPC, the injured parties were instructed to take civil action to pursue their claims under property law.

Under the same Verdict the Accused was acquitted of charges that in the manner described under counts 1.b); 2.; 3.; 4.a); 4.c); 5.; 5.a); 5.c); 5.d); 5.f); 5.g); 5.h) of the acquitting part of the Verdict he committed the criminal offence of Crimes against Humanity under Article 172 paragraph 1 item h) in conjunction with items a), d), e), f), g), k) CC BiH, whereas pursuant to Article 283 item c) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH) the verdict dismissing the charges was rendered with reference to counts 1.a) and 4.b) of the Indictment, after the Prosecutor's Office of BiH had abandoned them at the main trial.

The Prosecutor's Office duly lodged an appeal from the convicting and acquitting parts of the said Verdict, on all appellate grounds, and moved the Appellate Panel to honor the appeal and modify the contested Verdict, so as to find the Accused guilty on all counts he was charged under in the amended indictment and sentence the Accused pursuant to the Law.

The defense attorney of the Accused also duly appealed due to essential violations of the criminal procedure, the violations of the criminal code and erroneously and incompletely established state of facts, moving the Appellate Panel to revoke the contested Verdict in its entirety and order the main trial to be held, or to modify the Verdict, so as to acquit the Accused of charges.

Both the Prosecutor's Office of BiH and the defense attorney of the Accused delivered responses to appeals to the Court. In the responses they argued that the appellate arguments of the adverse party were unfounded and moved the Appellate Panel to refuse them accordingly.

At the session of the Appellate Panel held pursuant to Article 304 CPC BiH, both parties presented their appeals and responses thereto and entirely maintained the appellate arguments and proposals.

Having reviewed the contested Verdict in view of the appellate arguments, the Appellate Panel decided as in the operative part for the following reasons:

With reference to the appellate arguments of both parties pertaining to the convicting part of the Verdict, which can be summarized as an objection that an essential violation of the criminal procedure pursuant to Article 297 paragraph 1 item k) CPC was made in counts 1 and 2 (in the first instance Verdict marked as 5b) and 5e) in order to reflect the Indictment) of the contested Verdict, since the operative part of the contested Verdict does not present facts and circumstances constituting actus reus accessory as defined under Article 31 CC BiH, which is required pursuant to Article 285 paragraph 1 item a) CPC BiH, and the explanation of the Verdict does not provide valid reasons for such finding, which makes the operative part of the

incomprehensible and the explanation does not contain valid reasons regarding that decisive fact, the Appellate Panel concludes that with reference to count 1 of the convicting part of the Verdict, an essential violation of the criminal procedure pursuant to Article 297 paragraph 1 item k) CPC BiH, was committed.

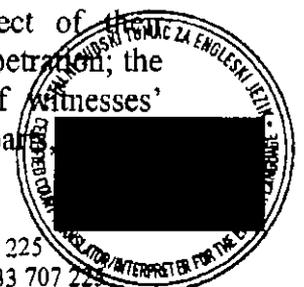
Pursuant to Article 31 paragraph 2 CC BiH, the following in particular is considered as helping in the perpetration of the criminal offence: giving advice or instructions as to how to perpetrate a criminal offence, supplying the perpetrator with tools for perpetrating the criminal offence, removing obstacles to the perpetration of criminal offence and promising, prior to the perpetration of the criminal offence to conceal the existence of the criminal offence, to hide the perpetrator, the tools, used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence.

Proceeding from this, the first-instance Court was obligated to mention the activity that the accused undertook as an accessory and to refer to those activities in the factual description of the Verdict, because only saying that the accused helped the perpetration of the offence is not sufficient. **The factual description of the offence in the operative part of the Verdict, by which the accused has been found guilty as an accessory** in perpetration of specific criminal offence, has to include facts and circumstances from which it ensues that the accused was aware of both offence and perpetrator and that by his acts he supports the perpetrator's offence; the first-instance Court failed to do that.

The Appellate Panel also finds founded the appeal arguments about a substantial violation of the criminal procedure under Article 297 (1) (k) of the CPC of BiH, that is, the arguments that the Verdict is contradictory to the given reasons and thereby incomprehensible.

To wit, the first-instance Court had a duty in terms of Article 290 (7) of the CPC of BiH to specifically and completely state in the reasoning of the contested Verdict which facts and on what grounds the Court found to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, and it should have mentioned the reasons which guided the Court in ruling on legal matters and especially in ascertaining whether the criminal offence was committed and whether the accused was criminally responsible.

The Appellate Panel is of the opinion that in this specific case, the first-instance Court failed to evaluate the presented evidence in the fashion prescribed by Article 281 (2) of the CPC of BiH, which particularly refers to the testimonies of witnesses that have to be brought into mutual relation but also put in the context of the nature of the criminal offence the qualification of which was the subject of the testimonies, the time distance, the circumstances and the manner of perpetration; the Court also failed to give valid reasons for which certain parts of witnesses' testimonies from the main trial were accepted as valid unlike the other parts



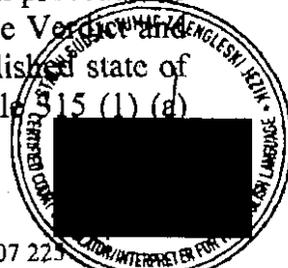
reasons that were given seem to be contradictory. It is particularly noted that the criteria applied in the course of evaluation of validity of evidence and testimonies of the witnesses injured parties were incongruous which was legitimately noted in the appeals.

Furthermore, the Prosecutor legitimately noted in his appeal that the first-instance Court found majority of witness testimonies inconsistent by allowing the witnesses to be presented with their prior statements which had not been taken in accordance with the law that was applicable at the time when the witnesses gave their statement, although the provisions of Article 261 and Article 262 of the CPC of BiH are clear that the witnesses should be examined directly before the Court and that, exceptionally, prior statements of witnesses given in the investigative phase (in this specific case – the Prosecutor’s investigation) might be used in the cross examination pursuant to Article 273 (1) of the CPC of BiH, that is, statements they gave to an investigative judge if witnesses were examined prior to 1 March 2003 in line with the then valid procedural law.

Thus, when evaluating the testimonies of witnesses Rusmira Bulatović, Fatima Poljo, Hasan Bajramović, Nail Ramić, Kada Spahić, Nail Ahmetagić, Šefko Šehić and Razija Hurem, on which the convicting part of the Verdict was based, on page 31 of the Verdict the first-instance Court concluded the following: “The Court finds that all the inconsistencies noticed in the statements of the prosecution witnesses pertaining to this part of the event which was factually described in the Indictment, only corroborate a different perception of each witness in regard to how they registered those events with their senses and interpreted the idea of the observed reality after a considerable lapse of time.”

On the other hand, on page 43 explaining one of the offences for which the accused was acquitted, the first-instance Court finds the following with regard to the same witness Nail Ramić: “the Trial Panel could not but take into account that Nail’s credibility was prejudiced by the inconsistencies of his testimony. His explicitly negative and dissuasive attitude was visible during the cross-examination, when that witness gave confusing answers and often observations, unlike more cooperative answers given during the direct examination... the Trial Panel notes that in his narration dominant parts are those resulting from his reflection and inference...” This model was applied in the evaluation of testimonies of the majority of examined witnesses which is legitimately noted in the appeals filed by the Prosecutor and the defense attorney for the accused and, therefore, it ensues that the operative part of the contested Verdict is discrepant with its reasons based on such evaluation of evidence.

Bearing in mind that the established substantial violation of the criminal procedure is a major violation that requires mandatory revoking of the first-instance Verdict and that the said flaws give rise to suspicion in the propriety of the established state of facts, the Appellate Panel honored the appeals and, pursuant to Article 15 (1) (a)



and (b) of the CPC of BiH, revoked the first-instance Verdict in its convicting and acquitting part and ordered the trial before the Appellate Panel of the Court of BiH.

The retrial will see the elimination of substantial violations of the criminal procedure, repeated presentation of already presented evidence and if need be, along with the evaluation of the appeal arguments, presentation of other pieces of evidence as well.

Bearing in mind that both convicting and acquitting parts of the first-instance Verdict were revoked, the Appellate Panel did not go into a thorough analysis of the appeal arguments but acted in line with Article 316 of the CPC of BiH and presented only brief reasons for revoking.

Minutes-taker
Lejla Fadilpašić

Presiding Judge
Azra Miletić

Legal remedy: This Decision is not a subject to appeal.

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

Sarajevo, 10 January 2006

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Certified Court Interpreter for English language



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