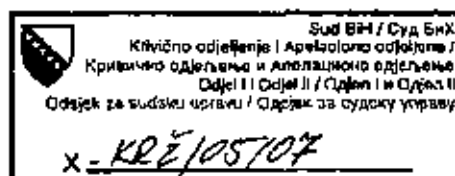




Number: X-KRŽ-05/07
Sarajevo, 27 April 2007



PREVOD DOK. 600

The Court of Bosnia and Herzegovina, sitting in the Panel of the Appellate Division of the Section I for War Crimes composed of Judge Azra Miletić, as the Presiding Judge, and Judge Finn Lynghjem and Judge Jose Ricardo Juan de Prada, as members of the Panel, with participation of Legal Adviser Željka Marenčić, as record-taker, in the criminal case against the Accused, Marko Samardžija, for the criminal offense of Crimes against Humanity in violation of Article 172 (1) a), in conjunction with Article 180 (1) of the Criminal Code of Bosnia and Herzegovina (CC B-H), having decided upon the respective Appeals of the Prosecutor's Office of Bosnia and Herzegovina No. KT-RZ-4/05, the Defense Counsel for the Accused, Attorney Zlatko Knežević, and the Accused, filed against the Verdict of the Court of Bosnia and Herzegovina No. X-KR-05/07 of 3 November 2006, at a session held in the presence of the Accused, his Defense Counsel, Attorney Zlatko Knežević, and Vesna Ilić, Prosecutor for the Prosecutor's Office of B-H, on 27 April 2007 rendered the following:

DECISION

The respective Appeals of the Accused, Marko Samardžija, and his Defense Counsel, Attorney Zlatko Knežević, are hereby partially upheld, hence the Verdict of the Court of B-H No. X-KR-05/07 of 3 November 2006 is hereby **revoked and a trial is scheduled** before the Appellate Panel of the Section I for War Crimes of the Court of B-H.

Reasoning

By the Verdict of the Court of B-H No. X-KR-05/07 of 3 November 2006 the Accused, Marko Samardžija, was found guilty of having committed the criminal offense of Crimes against Humanity in violation of Article 172 (1) a) in conjunction with individual criminal responsibility in violation of Article 180 (1) of CC B-H, by the acts described in the enacting clause of the Verdict.

The first instance Panel sentenced him for the aforementioned criminal offense to long term imprisonment of 26 years, toward which the time he spent in custody as of 21 March 2005 was credited, pursuant to Article 56 of CC B-H. Pursuant to Article 188 (4) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC B-H), the Accused was relieved of the duty to reimburse the costs of criminal proceedings, while, pursuant to Article 198 (2) of CPC B-H, the injured parties were referred to take civil action with their claims under property law.

The Prosecutor for the Prosecutor's Office of B-H, the Defense Counsel for the Accused, Attorney Zlatko Knežević, and the Accused filed Appeals against the Verdict concerned.

The Prosecutor's Office of B-H filed the Appeal on the grounds of essential violations of the criminal procedure provisions, referred to in Article 297 (1) h) and k) of CPC B-H, incorrectly and incompletely established facts, referred to in Article 299 CPC B-H, and the decision on the sentence, referred to in Article 300 (1) of CPC B-H, and moved the Appellate Panel of the Section I for War Crimes of the Court of B-H to revise the contested Verdict and sentence the Accused to imprisonment longer than the 26 years he has been sentenced to.

The Defense Counsel for the Accused filed the Appeal on all appeal grounds provided for in Article 296 of CPC B-H and moved the Appellate Panel to revise the contested Verdict and acquit the Accused of criminal responsibility or to revoke the contested Verdict and schedule a retrial. It can be concluded from the contents of the Appeal filed by the Accused that it has been filed on the grounds of incorrectly and incompletely established facts. He proposed that the Accused be acquitted of the criminal offense he was charged with and that the true perpetrators and their order-issuing authorities be punished.

The Prosecutor's Office submitted the response to the Appeal of the Defense Counsel stating that the arguments for the appeal of the Defense were unfounded.

At a session of the Appellate Panel held on 27 April 2007, pursuant to Article 304 of CPC B-H, both parties briefly presented their Appeals and the respective responses to the Appeals and fully reiterated the presented arguments and proposals.

After having reviewed the Verdict insofar as it was contested by the Appeals, the Appellate Panel rendered the decision as quoted in the enacting clause for the following reasons:

The first instance Court found Marko Samardžija guilty of the criminal offense of Crimes against Humanity in violation of Article 172 (1) a) of CC B-H in conjunction with Article 31 and 180 of CC B-H. Accessory as a form of complicity includes the acts enabling the commission of a criminal offense by other person, that is, the acts supporting the other person in the commission of a criminal offense. In order for these acts to represent accessory acts they must contribute to the commission of the criminal offense and have certain significance in the commission thereof but not necessarily to play a decisive role in the commission of the criminal offense, so the offense may also be committed by omission to act as the so-called psychological accessory. In the specific case, the acts of the Accused, as indicated by the Indictment and the contested Verdict, would correspond to the acts of accessory as provided for in Article 31 of CC B-H, since the very act of bringing the Bosniak civilians could be characterized as removal of the obstacles to the commission of the criminal offense, staying with the soldiers in the course of the killing and mistreating of the civilians may be classified as psychological accessory if it served the reinforcing of the will of the principal perpetrator, and the subsequent transportation of the dead bodies could be regarded as elimination of the traces of the criminal offense, if it follows from the results of the evidence procedure.

However, accessory is an intentional supporting of other person's criminal offense and, as a rule, it is committed with direct intent, since its objective is the commission of criminal offense (however, indirect intent is sufficient). The intent consists of the knowledge that assistance is provided to a certain perpetrator in the commission of a certain criminal

offense -- the accessory must primarily be aware that with his acts he is assisting in the commission of an illicit act of other person -- and of the essential elements of the criminal offense. The accessory does not have to be aware of details, but he must be aware of the act that the perpetrator intends to commit.

The first instance Court drew its conclusion on this kind of complicity of the Accused in the commission of the criminal offense from the fact that the Accused had attended the meeting held on 9 July 1992 in the Lovac facility when the order for further actions, that is, the operation that was to be carried out on 10 July 1992, was issued verbally as well; in particular from the fact that "the cleansing of the terrain" of the able-bodied Bosniak men and weapons was ordered, according to the contested Verdict; and the fact that their bringing was conducted in such a way that armed soldiers deprived them of liberty and brought them in front of the school, the goal of which was their physical liquidation and taking to the camp in Manjača, which is also corroborated by the fact that only men between 18 and 60, that is, able-bodied men were brought in. The first instance Court draws such conclusions from the contents of the written order of the commander of the 17th Light Infantry Brigade as well as the testimonies of the witnesses, the surviving injured parties, and the eyewitnesses to the bringing of the able-bodied men. Therefore, the first instance Court established that the Accused knew of the murderous intentions of the perpetrators of this act and that he aided them in the commission thereof in the manner described.

However, according to the text of the written *Order for further actions of the Command, military postcode 2207 Ključ, No. 03-135 of 9 July 1992*, it is not possible to draw a conclusion beyond reasonable doubt that the order to kill the civilians of the indicated regions arises from it (Paragraph 4, *Combat Security*: "... To have at the ready in each unit the forces for blocking and destroying the infiltrated sabotage-terrorist and reconnaissance groups."). Paragraph 3.b) clearly reads: "To undertake all measures, actions and procedures with the objective of protecting our units and prevent significant information leakage. To apply wartime movement regime, isolate unwanted persons and apprehend them to the authorities in charge, confiscate all kinds of armament, combat equipment, ammunition and materiel." Paragraph 5., *Morale*, reads: "To inform every combatant about the objective of the operation, tasks of the units and neighbors and the manner of the execution of the task. I prohibit torching and destroying the houses except when needed in the course of combat operations."

When establishing the true objective of the operation the first instance Verdict implies that the "cleansing of the terrain" is cleansing of the terrain of able-bodied Bosniak men, but it is not clear what serves as basis for the conclusion of the first instance Court that the "cleansing" means liquidation of such persons. It is equally not clear how the aforementioned and the other evidence could serve as basis to the first instance Court to establish that the Accused had knowledge of it. In other words, such belief does not follow either from the Order or the testimonies of the heard witnesses, in particular the Defense witnesses, including witness [REDACTED] to whose statement the contested Verdict refers and who said that the "cleansing" means "apprehension of able-bodied men for the purpose of taking them to camp", as that had happened before as well.

The accuracy of establishing this decisive fact is also called into question by the statements of witnesses [REDACTED] who were deprived of liberty by the Accused and

his soldiers and taken to the yard of the primary school in Biljani on the day concerned. Testifying about the actions of the Accused, the witnesses did not claim that the Accused entered the school or participated in their subsequent taking out for the purpose of liquidation. They also stated that Sanica Police Chief Milan Tomić had decided about the civilians inside the school. The witnesses for the Defense, in particular [REDACTED] also testified about the behavior and actions of the Accused during the events inside and in front of the school. The aforementioned witnesses entirely confirmed the defense of the Accused that he had been surprised by the behavior toward the civilians brought and himself and that for that reason he had contacted his superior, Battalion Commander Kevac. Witness [REDACTED] also confirmed the assertion of the Accused that he had left Biljani on a bicycle. The contested Verdict did not provide an opinion about this matter and did not evaluate the aforementioned arguments with respect to all the important contents, individually and in correlation with the other evidence. These facts represent decisive facts for establishing the Accused's awareness and knowledge of the perpetrators' intentions to kill as an important element of the criminal offense that the Accused has been found guilty of, all of this raising serious doubts as to whether the facts were established correctly, as the Appeal of the Defense Counsel for the Accused justifiably indicates.

Based on the foregoing, pursuant to Article 315 (1) b) of CPC B-H, the Appellate Panel rendered a decision partially upholding the respective Appeals of the Accused, Marko Samardžija, and his Defense Counsel, revoked the first instance Verdict and scheduled a trial before the Court of B-H at which the evidence presented in the course of the first instance proceedings will be repeated.

Record-taker:
Željka Marenčić

Presiding Judge:
Judge Azra Miletić

LEGAL REMEDY: No appeal shall be permissible against this Decision.

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

Sarajevo, 25 May 2007

[REDACTED]
Certified Court Interpreter for English Language