



Number: X-KRŽ-07/330
Sarajevo, 26 March 2009

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the panel of the Appellate Division consisting of judges Azra Miletić, as the presiding judge, and Almiro Rodrigues and Dragomir Vukoje, as the panel members, with the participation of the legal advisor Lejla Fadilpašić as the record-taker, in the criminal case against the accused Zdravko Mihaljević, for the criminal offense of crimes against humanity in violation of Article 172, paragraph 1, sub-paragraph h), as read with sub-paragraphs a), e), f), i) and k) of the Criminal Code of Bosnia and Herzegovina (hereinafter: the CC of BiH), deciding upon the appeal of the Prosecutor's Office of BiH number KT-RZ- 44/07 of 18 June 2008 from the Verdict of the Court of Bosnia and Herzegovina number X-KR-07/330 of 16 April 2008, at the session held in the presence of the prosecutor of the Prosecutor's Office of BiH, Slavica Terzić, the accused Zdravko Mihaljević and his defense counsel, attorney Dušan Tomić, on 26 March 2009 issued the following:

DECISION

The appeal of the Prosecutor's Office of Bosnia and Herzegovina is **hereby granted** and the Verdict of the Court of Bosnia and Herzegovina number X-KR-07/330 of 16 April 2008 is **revoked**. A new trial shall be held before the panel of the Appellate Division of Section I for War Crimes of the Court of Bosnia and Herzegovina.

R e a s o n i n g

By the Verdict of this Court number X-KR-07/330 of 16 April 2008, the accused Zdravko Mihaljević was acquitted of charges that by his actions described in the operative part of the Verdict he committed the criminal offence of Crimes Against Humanity in violation of Article 172, paragraph 1, sub-paragraph h), as read with sub-paragraphs a), e), f), i) and k) of the CC of BiH.

Pursuant to Article 189, paragraph 1 of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the CPC of BH), the accused was relieved of his duty to pay the costs of the criminal proceedings, while the injured parties were referred to take civil action to pursue their property claims under Article 198, paragraph 3 of the same Code.

The Verdict was timely appealed by the prosecutor of the Prosecutor's Office of BiH, Appeal number KT-RZ-44/07 of 18 June 2008, on the grounds of essential violations of the provisions of criminal procedure under Article 297, paragraph 1, sub-paragraphs i) and k), and the erroneously and incompletely established state of facts under Article 299 of the CPC of BH, moving the Court to grant the appeal, revoke the Verdict and order a retrial before the panel of the Appellate Division of the Court of BiH.

Defense counsel for the accused, attorney Dušan Tomić, filed a response to the appeal with the Court moving the Court to reject the appeal as untimely.

At the session of the panel of the Appellate Division, held pursuant to Article 304 of the CPC of BH, the prosecutor gave a brief presentation of her appeal and defense counsel of his response and both fully maintained the reasons and proposals outlined in their respective submissions.

The accused joined the presentation of his defense counsel.

Having reviewed the contested Verdict, in the part contested by the appeal, and having inspected the case file, the appellate panel decided as stated in the operative part of this decision for the following reasons.

In line with the provisions of the CPC of BH, the appellate panel first considered the grievances of the appeal regarding the essential violations of the provisions of criminal procedure under Article 297, paragraph 1, sub-paragraphs i) and k) of the CPC of BH and concluded that the grievances were unfounded.

The appeal argued that the first instance Verdict was based on evidence on which it could not be based under the CPC of BH (grounds of appeal set out in Article 297, paragraph 1, sub-paragraph i) of the CPC of BH) because the first instance panel accepted as evidence the earlier statements of witnesses which, as argued by the prosecution, were not taken in line with the then applicable procedural laws. In that regard, the appeal contested the lawfulness of the statements of witness B recorded by the Kreševo Public Security Station on 9 February 1994 and Witness Avdija Bajraktarević dated 23 and 14 May 1996, the statement of witness A number 329/96 recorded by AID and the summary report of AID (compilation of witness statements).

Article 273, paragraph 1 of the CPC of BH prescribes that the statements recorded in the course of an investigation are admissible as evidence at the main trial and may be used in the course of the examination in chief or cross examination, rebuttal or rejoinder, after which such statements are adduced as evidence. In that case, a person can be given an opportunity to explain or deny his/her previous statement.

The statements referred to in the quoted provision are earlier statements provided during an investigation conducted by the prosecutor, in line with the applicable procedural laws, and not all statements that a witness gave to different authorities. Moreover, the CPC currently in force and the one which was in force at the time when the statements were recorded, clearly defined the manner in which witnesses are to be examined, the warnings that must be issued to a witness on the occasion of his/her examination and the mandatory elements of a written statement.

In this case, the statement of witness B recorded by the Kreševo Public Security Station on 9 February 1994, statement of witness A number 329/96 recorded by AID and the summary report of AID, among other things, were prepared without issuing prior warnings and instructions to the witnesses about their rights and obligations, without acquainting the witnesses with the capacity of the persons who recorded the statements and without informing the witnesses about the case in which the proceedings were being conducted, which implies that these statements were not recorded with a view of proving the criminal offence in the course of the specific criminal proceedings.

For this reason, the appellate panel finds that the relevant statements should not have been considered as “statements from the investigation” referred to in Article 273, paragraph 1 of the CPC BH, and their content should not have been presented to the witness during his examination as his earlier statements, in the manner in which it was done during the first instance proceedings.

However, official and other notes are admissible as documentary evidence considering that such documents are not inherently unlawful. If the Court in this case finds these documents to be relevant, they may be adduced as evidence and evaluated individually and in correlation with all other adduced evidence. The Court will decide on the probative value of these documents having taken into consideration all other pieces of evidence to be presented during the proceedings.

In view of the above mentioned, the appellate panel finds that the statements contested by the appeal are not inherently unlawful. However, these statements were incorrectly used in this case because they were treated as statements from the investigation, which they were not.

Article 297, paragraph 2 of the CPC of BiH prescribes that an essential violation of the provisions of the criminal procedure is committed even when the Court, in the course of the main trial or while rendering its Verdict, has failed to apply or has incorrectly applied any provisions of this law and such conduct influenced or could have influenced the lawful and proper rendering of the Verdict.

It follows that the first instance panel, in the course of the main trial, incorrectly applied the provision set forth in Article 273, paragraph 1 of the CPC of BH.

However, mindful of the manner in which the first instance panel evaluated the witness statements, that is, the fact that the contested Verdict was not based on the content of those earlier statements, the appellate panel concludes that such conduct of the first instance panel did not have any bearing on the lawful and proper rendering of the Verdict.

The mentioned statements were only listed in the reasoning of the Verdict and the first instance panel did not refer to their content at all, which implies that these statements did not significantly affect the evaluation of the testimonies of the mentioned witnesses who had testified at the main trial.

For this reason, the appellate panel finds unfounded the grievance regarding the essential violation of the provisions of the CPC under Article 297, paragraph 1), sub-paragraph i) of the CPC of BH, and that the incorrect application of Article 273, paragraph 1 of the CPC of BH did not have any effect on the lawful and proper evaluation of the witness statements. The appellate grievance is therefore refused as unfounded.

In the context of the appellate grievance under Article 297, paragraph 1, sub-paragraph i), the prosecutor similarly argued that the statements of witness Avdija Bajraktarević of 23 and 14 May 1996 before the ICTY could not be accepted as evidence in accordance with the Law on transfer of cases from the ICTY to the Prosecutor's Office of BiH and the use of evidence obtained by the ICTY in the proceedings before the courts in BiH, but failed to explain the grounds which led the prosecutor to conclude that those were the pieces of evidence that the first instance Verdict could not be based upon, in other words, without explaining the manner in which the first instance panel acted erroneously in relation to the mentioned evidence. Considering that this grievance was presented arbitrarily, the appellate panel was not able to review it.

The appeal further contended that an essential violation of the provisions of the CPC of BH under Article 297, paragraph 1, sub-paragraph k) was also committed because the first instance panel evaluated as additional prosecution evidence the letter of standard marking for Zravko Mihaljević – Hague document number 003808/GB/MAL/RR 46a of 15 February 2000, Order OG-2 OZ SB of 27 May 1993 and the list of members of the *Ban Josip Jelačić* Brigade Intervention Unit of 4 May 1993, which made the operative part of the Verdict incomprehensible and contradictory to itself and its reasoning.

The appellate panel finds this grievance unfounded too, because all evidence presented in the course of any proceedings is evaluated in the same manner, that is, individually and in correlation with other evidence, be it presented during the first stage of the evidentiary proceedings or as additional evidence. Neither the law nor the contested Verdict makes any difference between the probative value of the prosecution evidence presented at the beginning of the evidentiary proceedings and the additional evidence. Therefore, the appellate panel concludes that the incorrect marking of evidence did not amount to an essential violation of the provisions of criminal procedure, as unfoundedly argued in the appeal.

Prosecutor further submitted that the same violation (under Article 297, paragraph 1, sub-paragraph k) of the CPC of BH) was committed in relation to the Record on examination of witness C by the Prosecutor's Office of BiH and the Record on examination of Witness C before the ICTY of 8 May 1998 and 6 March 2000 because, according to the appeal, the Verdict did not provide a reasoning concerning these pieces of evidence or did not cite the reasons concerning the decisive facts.

The appellate panel finds the appellate grievance in relation to this part of the contested Verdict unfounded as well.

First, it is necessary to differentiate between the essential violation of the provisions of criminal procedure under Article 297, paragraph 1, sub-paragraph k), in the sense that the contested Verdict lacks reasoning or does not cite the reasons concerning the decisive facts and the appellate ground under Article 299 of the CPC BiH which deals with the erroneously or incompletely established state of facts.

In this case, the first instance panel evaluated all presented evidence and rendered its conclusions on the decisive facts concerning the existence of the criminal offence and the criminal liability of the accused. In that sense, the panel separately presented its evaluation of the evidence it found to be decisive and most significant for the rendering of its decision.

It is necessary to emphasize that the panel was not obliged to separately and thoroughly comment on every single piece of evidence in the reasoning of the Verdict and to explain each piece of evidence individually. The panel had a duty, in line with Article 290 (especially paragraph 7 thereof) to present all facts clearly and completely and to explain why it had found those facts to be proven or not proven, to evaluate the authenticity of contradictory evidence in particular, and to cite the reasons that guided the panel in the process of addressing legal issues and especially when deciding on the existence of the criminal offence and the accused person's liability. It follows from the reasoning of the contested Verdict that the first instance panel acted in the described manner. The fact that the prosecutor did not agree with the conclusions of the first instance panel does not mean that the Verdict lacked reasoning or the reasons concerning decisive facts, in other words, that an essential violation of the provisions of criminal procedure was committed under Article 297, paragraph 1, sub-paragraph k) of the CPC of BiH, as unfoundedly argued in the appeal.

Further on, the allegation of the appellant that the prosecution was never given the opportunity to state its position about the findings and opinion of the expert witness- specialist in plastic and reconstructive surgery, is considered by the appellate panel to be across-the-board and unfounded because the prosecutor, as a party to the proceedings, had the opportunity to state her opinion about this piece of evidence through the application of the relevant legal instruments, that is to say, by timely proposing her rebuttal evidence or by asking for an adjournment so she could prepare for this evidence adequately.

However, having reviewed the first instance Verdict in terms of the appellate grievance that the state of facts was erroneously or incompletely established, under Article 290, paragraph 1 of the CPC of BH, the appellate panel finds it to be founded, because the manner in which the first instance panel evaluated the presented evidence and the conclusions it reached thereafter, were not of such quality so as to exclude any other conclusion, bearing in mind the content of the presented evidence, leaving doubt about the accuracy of the established state of facts.

The prosecutor in her appeal reasonably suggested that the first instance panel failed to evaluate the testimony of witness C as a whole because it did not adequately review his other statements which were adduced as evidence, causing this panel to doubt the accuracy of the established state of facts. The presence of the accused at the critical place and time is a decisive fact which needed to be established and, considering that the first instance panel had at its disposal several statements of witness C, the doubt this witness introduced about these and other decisive facts in his testimony at the main trial before this Court should have been assessed by the first instance panel with a far greater attention than it was done in the contested Verdict.

The testimony of witness C at the main trial should have been brought into connection with other presented evidence, especially the earlier statements of witness C in which he incriminated the accused nicknamed Pijuk, in no uncertain terms, and stated that he knew the accused from before from Kiseljak.

The appeal justifiably addressed the same issue concerning the evaluation and the conclusions of the first instance panel about the confrontation of testimonies of witnesses C and A in the relevant part. The first instance panel concluded that, among other things, the testimony of witness A regarding the removal of the mask by the accused in front of the café bar *Fortuna* was entirely in contradiction with the testimony of witness C, who stated that the masked person stayed behind in the village of Tulica and did not follow them to Lepenica. The first instance panel did not give appropriate weight to the statement made by witness A that there was an attempt to influence him prior to his testimony before the Court of BiH, on which occasion he was asked to express some doubt about his testimony, even though this type of confusing testimony was exactly the pattern of behavior of witness C only during his testimony before the Court of BiH.

The first instance Verdict, as correctly submitted in the appeal, only touched upon the testimony of witness A, neglecting the mentioned facts and the fact that witness A, throughout the proceedings, remained consistent with his testimony. The first instance Verdict incorrectly interpreted the content of the testimony of this witness, namely, that the witness knew the accused based on what witness C had told him (who had some doubts about the identity of the accused), because the witness pointed out several times that he knew the accused from before and that he recognized him by his appearance and his voice and the tattoo on his arm, and finally when he removed the mask in front of the café bar in Lepenica, and that he only partially confirmed his conclusion about the identity of the accused with what witness C and

witness Vlatko Trogrlić had told him. The letter told the witness at the time of the incident to go and report to Pijuk (p. 17 of the transcript from the main trial of 29 August 2007).

Having analyzed the testimony of the defense witnesses and the relevant documentary evidence about the accused person's official capacity at the time covered by the Indictment, the prosecutor submitted that the first instance panel incorrectly established the fact concerning the membership of the accused or his capacity as the commander of the Special Purposes Unit *Maturice* at the relevant time.

The appellate panel holds that the first instance panel did not provide a clear and convincing reasoning to support this factual finding, that is to say, it failed to evaluate the evidence adduced in this regard in its correlation with other evidence.

The Court should have referred to the documentary evidence supporting this fact and relate it to the testimonies of defense witnesses Tibor Prajo, witness D and the accused himself (who was also heard as a witness) and to adequately analyze the inconsistencies between these testimonies. This fact might have been significant in the context of other evidence, documentary evidence in particular, for the assessment of the accused person's liability. For this reason, the appeal justifiably raised doubt as to the accuracy of the established state of facts.

The appellate grievance of the prosecutor that the panel erroneously evaluated the relevancy of the testimony of the proposed witness Haris Adrović is founded because this witness was proposed to be heard about the behavioral pattern of the accused, as an important fact, and not about the objective effect of the offence, as explained by the first instance panel. Therefore, the appellate panel also has doubts about the accuracy of the conclusion concerning the necessity of presentation of this piece of evidence in view of this appellate grievance.

Bearing in mind the foregoing, the appellate panel grants the appeal of the Prosecutor's Office of BiH and revokes the first instance Verdict in terms of Article 315, paragraph 1, subparagraph b) of the CPC of BiH, ordering a retrial before the appellate panel of the Court of BiH. In the course of the new proceedings, the previously presented evidence shall be adduced anew as well as any new evidence, if required.

RECORD-TAKER
Lejla Fadilpašić

PRESIDENT OF THE PANEL
JUDGE
Azra Miletić

Legal Remedy: No appeal lies from this Decision.

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

Sarajevo, 12 May 2009

Mersiha Džajić, Certified Court Interpreter for the English language
