

**Number: X-KRŽ-06/243****Sarajevo, 21 August 2009**

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel of the Appellate Division, presided over by Judge Mirza Jusufović, and Judge Mitja Kozamernik and Judge Tihomir Lukes, as the panel members, including Legal Officer Nevena Aličehajić as a record-keeper, in the criminal case against the Accused Sreten Lazarević et al., on the count of War Crimes Against Civilians in violation of Article 173(1)(c) in conjunction with Article 29 in relation of the Accused Sreten Lazarević, in conjunction with Article 31 and Article 180(2) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), deciding on respective appeals filed by defence counsels from the Verdict of the Court of Bosnia and Herzegovina No. X-KR-06/243 dated 29 September 2008, at a hearing attended by the Prosecutor of the Prosecutor's Office of BiH, Božidarka Dodik, the accused Sreten Lazarević, Dragan Stanojević, Mile Marković and Slobodan Ostojić, and their defence counsels, attorneys Radivoje Lazarević, Miloš Perić, Nenad Rubež and Miodrag Lj. Stojanović, held on 21 August 2009, issued the following:

D E C I S I O N

To grant the appeals filed by attorney Radivoje Lazarević, Defence Counsel for the Accused Sreten Lazarević, attorney Miloš Perić, Defence Counsel for the Accused Dragan Stanojević, attorney Nenad Rubež, Defence Counsel for the Accused Mile Marković and attorney Miodrag Lj. Stojanović, Defence Counsel for the Accused Slobodan Ostojić,

r e v e r s e

the Verdict of the Court of Bosnia and Herzegovina No. X-KR-06/243 dated 29 September 2008

in its convicting part

and schedule a hearing before the Appellate Panel of Section I for War Crimes of the Court of Bosnia and Herzegovina.

R e a s o n i n g

The Verdict of the Court of Bosnia and Herzegovina (the Court of BiH), No. X-KR-06/243 dated 29 September 2008, found that the accused Sreten Lazarević, Dragan Stanojević, Mile Marković and Slobodan Ostojić committed the acts described in the operative part of the Verdict and are therefore guilty of War Crimes Against Civilians referred to in Article 173(1)(c) in conjunction with Article 29 of the CC of BiH, and in



relation to Sreten Lazarević also in conjunction with Article 31 of the CC of BiH, and Article 180(2) of the CC of BiH

Pursuant to Article 285 of the Criminal Procedure Code of BiH (CPC of BiH), in applying Article 39, 42, 48 of the CC of BiH, the Trial Panel of the Court of BiH has sentenced the Accused Sreten Lazarević to 10 (ten) years of imprisonment, and in applying Article 39, 42, 48 and 50 of the CC of BiH, the Accused Dragan Stanojević to 7 (seven) years in prison, and the accused Mile Marković and Slobodan Ostojić to 5 years respectively.

Under the same Verdict, the Accused Sreten Lazarević was acquitted of charges that he committed the criminal offence of War Crimes Against Civilians referred to in Article 173(1)(c) of the CC of BiH, in the manner as described under Item 1 (1.5.) of the acquitting part of the verdict; the Accused Mile Marković was acquitted of charges that he committed the criminal offence of War Crimes Against Civilians referred to in Article 173(1)(c) of the CC of BiH in conjunction with Article 29 of the CC of BiH, in the manner as described under Item 2(3.2.) of the acquitting part of the Verdict, and the Accused Slobodan Ostojić that he committed the criminal offence of War Crimes Against Civilians referred to in Article 173(1)(c) of the CC of BiH in conjunction with Article 29 of the CC of BiH in the manner as described under Item 3 (4.1.) of the acquitting part of the Verdict.

Pursuant to Article 283(1)(b) of the CPC of BiH, the charges were dismissed in relation to the acts described under I, sub-items 3 and 7.c, II sub-items 2 and 3, considering that the Prosecutor dropped the cited charges during the main trial.

Pursuant to Article 188(4) of the CPC of BiH, the accused were relieved of the duty to reimburse the costs of the criminal proceedings, while in terms of Article 198(2), the victims with their claims under property law were referred to civil action.

Within the legal deadline, defence counsels for the accused filed appeals from the first-instance verdict, contesting the verdict only in its convicting part, which part is presented to the Appellate Panel for consideration, while the first instance verdict is final in its acquitting and dismissing parts.

In respective appeals filed from the first-instance verdict by the Accused Sreten Lazarević through his Defence Counsel Radivoje Lazarević, the Accused Dragan Stanojević through his Defence Counsel Miloš Perić, the Accused Slobodan Ostojić through his Defence Counsel Miodrag Lj. Stojanović due to essential violations of the criminal procedure provisions, violations of the Criminal Code, erroneously and incompletely established state of the facts and the ruling on the sentence, while the Accused Mile Marković filed an appeal through his Defence Counsel Nenad Rubež on the grounds of violations of criminal procedure provisions and the erroneously established state of facts, the Appellate Panel was moved to revise the first-instance verdict and acquit the accused of charges or revoke the verdict and schedule a hearing to be held before the Appellate Panel.



The Prosecutor's Office did not appeal the first-instance verdict, but in its response to the appeals filed by the accused through their defence counsels, the Prosecution noted that all grievances are ungrounded, and moved the Court to refuse the appeals in their entirety as unfounded and uphold the first-instance verdict.

At the session of the Appellate Panel, pursuant to Article 304 of the CPC of BiH, the defence briefly presented its complaints, and the prosecutor presented her responses, and both maintained the presented reasons and motions in their entirety.

Having reviewed the appeals following the grievances, as stipulated under Article 306 of the CPC of BiH, the Appellate Panel decided as stated in the operative part on the grounds as follows.

The Appellate Panel finds that respective appeals of defence counsels for the accused are grounded, that the Trial Panel had established the state of facts incorrectly and erroneously, and that the contested verdict contains erroneous inferences on decisive facts, in addition to major violations of the criminal procedure provisions as referred to in Article 297(1)(k) of the CPC of BiH, considering that certain parts of the verdict lack reasoning, or in fact do not cite reasons for decisive facts. In fact, the evidence presented in trial, according to the Appellate Panel, were not evaluated in the manner prescribed under Article 281(2) of the CPC of BiH. Especially, the Trial Panel failed to evaluate the contradicting evidence and elaborate on the reasons to give credence to certain evidence, all of which casts doubt regarding the accuracy of facts, and makes the first instance verdict deficient.

In elaborating on the deficiencies in the established state of facts, as deemed by the Appellate Panel, the attention will be first turned to the issue of command responsibility of the Accused Sreten Lazarević. To wit, the Accused was found guilty of acts which he allegedly committed as deputy warden of the prison in the Misdemeanour Court and *Novi Izvor*.

A number of prosecution witnesses were heard in this regard, and it is true that most of them stated that Sreten Lazarević was the deputy warden, but none of these witnesses, other than the victim Ramis Smajlović, could say how they came to learn this, except for imprecise statements such as "concluded so based on the conduct of the accused" or "heard so from other detainees". Ramis Smajlović is the only one who stated that the information regarding the accused Sreten Lazarević being the deputy warden to Sredo Vuković also came from detainees, namely, Fadil Smajlović, but as the appeal rightfully pointed, in trial, this witness did not know whether Sredoje had a deputy or not.

Camp Warden Sredo Vuković could certainly be deemed the key witness in this regard, for whom the witnesses-victims who had spent certain time in these detention facilities had only words of praise. The Trial Panel paid a great deal of attention to the statement of this witness, and moreover founded this segment of the first instance verdict largely on his testimony. However, in evaluating the testimony of Sredo Vuković in the context of the grievances, the Appellate Panel found that the complaint noting that the Trial



Panel was selective in its evaluation of this testimony was grounded, as it indeed drew sentences out of the testimony and context to corroborate the arbitrary inferences outlined in the contested decision. Accordingly, the first instance verdict reads that “Sredo Vuković maintained that he was the Warden of both detention facilities during the Indictment period and that the accused Lazarević was his Deputy”.¹ As accurately noted in the appeal, the Trial Panel took this sentence from the context, that is, the statement made by Sredo Vuković on 6 December 2005, which was his investigative statement admitted as documentary evidence, while disregarding the fact that the statement refers to prison in the Secondary Vocational School in Karakaj and the Military Farm *Ekonomija*, not the detention facilities in the Misdemeanour Court and the *Novi izvor*, alleged under the Indictment.

Furthermore, the Trial Panel failed to review the evidence of this witness given in the course of investigation in relation to his main trial testimony on 1 July 2008, when the witness specifically stated, in evidence in chief and in cross, that Sreten Lazarević was an ordinary guard, that neither he or anyone else authorised him to stand in for the warden, and also denied making any such statements in the course of investigation, adding that he did not read his statement prior to signing it.

Furthermore, another inference in relation to the Accused that goes against the state of facts established at the main trial is that he “provided a police baton to the perpetrator to dispose with” (pg.53) in beating Ramis Smajlović (item I.1. of the trial verdict). The Verdict does not pinpoint the evidence based on which such inference of the Trial Panel could be made, nor could the Appellate Panel, following a detailed analysis of testimonies, find such piece of evidence, and therefore found that this inference of the Trial Panel is ungrounded.

Furthermore, the Appellate Panel was not convinced with the inference of the Trial Panel regarding the liability of Sreten Lazarević for the acts described under Item I.2 of the trial judgement. Submissions of the defence were justified in noting that the responsibility of Sreten Lazarević is based on the testimony of Ahmet Omerović, who was the only one to testify that Sreten took Sejfo out of the room in which they were placed, while no other witness mentioned Sreten in that role, while Fadil Smajlović even testified that Sejfo was taken out of the building but guards had nothing to do with that incident.

Based on all the foregoing, the Appellate Panel finds that the status of the Accused Sreten Lazarević in terms of command responsibility is questionable to such an extent that it brings about the necessity to re-summon the witnesses to testify in retrial about the same circumstances. This is the only way to eliminate the present deficiencies and establish the state of facts correctly and in entirety.

Furthermore, the Appellate Panel found that the state of facts in the contested Verdict was incomplete in relation to charges against Dragan Stanojević, Mile Marković and

¹ - the first instance Verdict X-KR-06/243 Lazarević et al. dated 29 September 2008, pg. 47



Slobodan Ostojić, as justly pointed out in respective appeals of defence counsels for these accused.

Allegedly by opening the detention premises, Dragan Stanojević enabled unidentified soldiers to beat the detained civilians, and Fahrudin Memić in particular. Heavy beating of Fahrudin Memić and other detained civilians is a decisive fact that need to be proven in order to even address the responsibility of the Accused Dragan Stanojević. However, the tendered medical documentation for Fahrudin Memić, dated about 15 days after he left the prison, should contain data on the consequences of heavy beating, provided that the beating did indeed take place, as such consequences could not have completely vanished over such a short period of time, which is not the case presently, as rightfully noted in the appeal filed by the Accused Stanojević.

Therefore, the following derives from the trial Verdict: Fahrudin Memić had spent around 45 days in the prison, and in his words, he was beaten at least 40 times and was beaten every time when Dragan Stanojević would open the door to the room in which the detainees were placed, while at the same time Dragan Stanojević was frequently outside the detention facility as he would take the prisoners out for labour, and in addition, medical documentation for Fahrudin Memić does not show traces of beating.

The defence for the Accused Dragan Stanojević is accurate in its arguments that the Trial Panel failed to correlate the testimony of Fahrudin Memić with documentary evidence such as medical documentation of this witness, and also the evidence of other witnesses who testified that Dragan Stanojević was a guard who would frequently take detainees out for labour where he would treat them in a fair and protective manner. Should the argument on multiple beatings of this detainee be accurate, then such claim should be reasoned by determining the identity of those who were allegedly beating him in groups, and also the time periods, the manner of beating, whether the beating was carried out by the same or different groups of persons, the consequences of beatings and the number of times the Accused was present during such acts, including his share and role in it, and thereby remove all doubts in terms of the state of facts that was established otherwise.

The Appellate Panel finds that the appeal of the Accused Mile Marković is also grounded in the part contesting the first-instance verdict on the grounds of the incorrectly or incompletely established state of facts. As rightfully pointed by the Defence Counsel, the conclusion regarding the liability of the Accused Marković is based on the evidence of one witness alone, without any corroboration to it in either subjective or material evidence. Nurija Nuhanović, a victim subjected to beatings which allegedly included the participation of Mile Marković and Sreten Lazarević, is the only witness who gave evidence in this regard.

Moreover, the appeal rightfully pointed to a whole series of testimonies by former detainees who gave positive accounts about the Accused Mile Marković, meaning, the evidence which contradict the testimony of Nurija Nuhanović, and which was not evaluated in the contested verdict, although Article 290(7) of the CPC of BiH mandates



that the Trial Panel is to evaluate the contradicting evidence. Therefore, the Appellate Panel found that the inferences on decisive facts were not drawn with such certainty that would exclude the possibility of any other conclusions.

The Appellate Panel wishes to emphasise that a testimony of a single witness may be convincing and sufficient to the degree to allow for a certain decisive fact to be determined, but in the concrete case, when it comes to the prison or detention, accommodating simultaneously a great number of persons, whereby at least two persons severely beat four detainees on the same floor where other detainees are placed as well, it raises doubts with the Appellate Panel in terms of the accuracy of the established state of facts, given the inevitable question how it was possible that no one else present would hear or see something to corroborate the testimony of this witness.

In the opinion of the Appellate Panel, it is for the same reasons that the role and participation of the Accused Sreten Lazarević in this beating is also questionable.

Defence Counsel for the Accused Slobodan Ostojić rightfully pointed that the Accused was found guilty for his participation in the beating of Ramis Smajlović and Admir Hadžiavdić although in their statements given in the investigation none of the two victims said a word about Slobodan Ostojić as a partaker in these acts. Quite the contrary, in his prior statement from the investigation, the witness Admir Hadžiavdić mentioned Dragan Stanojević, known as Veliki Dragan, as a person doing the beating together with Mali Dragan, therefore the question arises what was the evidence gathered in the investigation guiding the Prosecutor insomuch as to charge Slobodan Ostojić with the cited acts.

The Appellate Panel finds that the inference of the Trial Panel, founded solely on the evidence of witnesses during the main trial, is not convincing, for the Trial Panel failed to offer plausible reasons in support of such inferences. In addition, the duty of the Trial Panel in finding the Accused Slobodan Ostojić guilty was to determine the manner in which this Accused was beating the two victims, especially bearing in mind their prior statement from the investigation which shows that Mali Dragan had the greatest part in the beating.

As for Sreten Lazarević, his role in the beating of the two witnesses is based on the principle of command responsibility as he allegedly was present while Ramis Smajlović and Admir Hadžiavdić were being beaten, yet did not prevent it. Considering that the Appellate Panel had already expressed doubts as to the actual capacity of Sreten Lazarević as deputy warden in the Misdemeanour Court and *Novi izvor*, any further reasoning on the justified nature of grievances as regards the role of Sreten Lazarević in beating Ramis Smajlović and Admir Hadžiavdić would be redundant at this point.

It ensues from the foregoing that the Trial Panel had incompletely, and to a certain extent erroneously, established the state of facts, and did not pay due diligence to each and every piece of evidence, individually but also in their correlation. Further, the Verdict lacks reasoning, or in fact reasons on decisive facts. In line with the foregoing,



the Appellate Panel concluded that the Trial Panel had erroneously and incompletely established the state of facts in terms of Article 299(1) of the CPC of BiH, and also essentially violated the criminal procedure provisions referred to in Article 297(1)(k) of the CPC of BiH.

Based on the foregoing reasons, the Appellate Panel granted the appeals filed by the accused, and pursuant to Article 315(1)(b) of the CPC of BiH revoked the first-instance verdict and scheduled a hearing before the Appellate Panel of the Court of BiH. Testimonies of witnesses who are deemed relevant by the Appellate Panel will be heard and read at the hearing, including the re-summoning of witnesses who need to be heard additionally as deemed necessary by the Appellate Panel, including the presentation of new evidence that would assist the Appellate Panel to correctly and completely establish the state of facts, and therefore decide on the legal qualifications of the established state of facts, that is, whether the acts of the accused constitute inhumane treatment in terms of Article 173(1)(c) of the CC of BiH, that is, whether they committed the criminal offence in question and whether they are responsible for it.

Considering that the trial verdict was revoked, the Appellate Panel did not address the overall analysis of the remaining grievances, but instead, pursuant to Article 316 of the CPC of BiH, the Panel limited itself to presenting a brief reasoning to revoke the first-instance verdict.

RECORD-KEEPER:**Nevena Aličehajić****PRESIDING JUDGE
JUDGE****Mirza Jusufović**

LEGAL REMEDY: No appeal lies from the Decision.