



Court of Bosnia and Herzegovina

Case number: S1 1 K 014243 14 Krž

Session held on: 6 February 2014

Written copy sent on: 28 February 2014

Appellate Panel:

Mirko Božović, Presiding Judge

Mirza Jusufović, Judge

Tihomir Lukes, Judge

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v. the Accused

Osman Brkan

APPELLATE VERDICT

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:

Sanja Jukić

Defense Counsel for the Accused Osman Brkan:

Attorney Dušan Tomić

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88

Telefon: 033 707 100, 707 596; Fax: 033 707 155

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Sarajevo, 6 February 2014

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, Judge Mirko Božović as the Presiding Judge and Judges Mirza Jusufović and Tihomir Lukes as members of the Appellate Division Panel, with the participation of Legal Advisor - Assistant Igor Dubak as the record-taker, in the criminal case of the Accused Osman Brkan charged with the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), as read with Article 29 of the CC of BiH, deciding upon the Appeal of the Prosecutor's Office of Bosnia and Herzegovina against the Court of BiH Verdict No. S1 1 K 014243 13 Kri of 6 December 2013, having held an Appellate Panel session in the presence of Sanja Jukić, Prosecutor of the Prosecutor's Office of BiH, the Accused Osman Brkan and his Defense Counsel Dušan Tomić, on 6 February 2014 rendered the following

V E R D I C T

The Appeal filed by the Prosecutor's Office of BiH is hereby dismissed as unfounded, and the Verdict No. S1 1 K 014243 13 Kri rendered by the Court of Bosnia and Herzegovina on 6 December 2013 is upheld.

R e a s o n i n g

I. PROCEDURAL HISTORY

1. Under the Trial Verdict No. S1 1 K 014243 13 Kri rendered by the Court of Bosnia and Herzegovina on 6 December 2013, the Accused Osman Brkan was acquitted pursuant to Article 284(c) of the CPC od BiH of the charges that, by the acts described in

the Operative Part of the Verdict, he committed the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) of the CC of BiH, as read with Article 29 of the same Code.

2. Under the same Verdict, pursuant to Article 189(1) of the Criminal Procedure Code of BiH, the Accused Osman Brkan was relieved of the duty to pay the costs of the criminal proceeding, which would be paid from the budget appropriations of the court. Pursuant to Article 198(3) of the CPC BiH, the aggrieved parties were instructed to take civil action to pursue their potential claims under property law.

II. APPEAL

3. The Prosecutor's Office of Bosnia and Herzegovina appealed the Verdict pursuant to Article 299(1) of the CPC of BiH on the ground of erroneously and incompletely established facts, and moved the Appellate Division Panel to uphold the Appeal, revoke the appealed Verdict and schedule a trial.

4. The Prosecution argues in the Appeal that the Trial Panel erred while evaluating the evidence by finding the testimony of witness Šeho Macić unreliable, particularly because this witness gave evidence about the criminal offense which carries a lengthy prison sentence and testified to the detriment of his longtime neighbor and colleague. According to the Appeal, when evaluating this testimony, the Trial Panel ignored the fact that both the witness and the Accused come from the same place – the village of Grušća in the Konjic Municipality, which is around 30 km far from Konjic, whose inhabitants are not only neighbours, but all of them are relatives, so that such a testimony to the detriment of one of the villagers basically leads to ostracism by the community. In addition, the Panel disregarded the fact that the witness is a father of two children who very often stay in the village of Grušća, where the Accused and his extended family live.

5. The Appeal further alleges that the reliability of this testimony is additionally substantiated by the fact that the witness did not ask for any protection measures, and despite all the stated circumstances, he testified under his full name, he never requested closing the trial for the public, nor did he ask for any other form of protection.

6. Finally, the Appeal alleges the incompletely established account of facts by the Trial

Panel in the appealed Verdict, since the Panel concluded that witness Šeho Macić was a suspect in this case only on the basis of the Report on the committed criminal offense, and that such a testimony of his was an attempt to protect himself. The Appeal opposes this conclusion as unacceptable, since a report on the committed criminal offense provides only initial information about a certain incident.

7. Attorney Dušan Tomić, Defense Counsel for the Accused Osman Brkan, responded to the Appeal by submitting that the Prosecution's appellate allegations were entirely unsubstantiated, and moved the court to dismiss the Appeal as unfounded and uphold the Trial Verdict.

8. In accordance with the provisions of Article 304 of the CPC of BiH, at a session of the Appellate Panel held on 6 February 2014, the Prosecutor briefly presented the allegations of the Appeal and the proposals therein as submitted in the written form. Dušan Tomić, Defense Counsel for the Accused Osman Brkan, on the other hand, responded to the Prosecution's appellate allegations by finding them unsupported, and moved the court to dismiss the Prosecution Appeal as unfounded and uphold the Trial Verdict. The Accused Brkan entirely supported his Defense Counsel.

9. Pursuant to Article 306 of the CPC of BiH, the Appellate Panel examined the appealed Verdict insofar as it is contested by the Appeal and the proposals therein, and decided as stated in the Operative Part of the Verdict for the reasons as explained below.

III. ERRONEOUSLY AND INCOMPLETELY ESTABLISHED FACTS

10. In challenging the appealed Verdict on the ground of the erroneously and incompletely established facts, the Prosecution Appeal seeks to refute the conclusion of the Trial Panel about the unreliability of witness Šeho Macić's testimony and its dismissal.

11. This is *de facto* the only witness and at the same the only piece of evidence in this case that directly incriminates the Accused Brkan as the perpetrator of the relevant criminal offense. According to what the witness said at the main trial, he personally saw

the Accused Brkan on the relevant occasion firing an unspecified number of bullets from his rifle at old women: Ana Kuljanin, Danica Kuljanin, Cvijeta Kilibarda and Jelka Kilibarda (the witness said: *“he was mowing down the old women with his weapon”*). Since the Appeal did not at all refute the other facts established in the appealed Verdict – the attack on the Blace village, the fact that the stated individuals were indeed killed on 13 June 1992 and so on, the Appellate Panel will examine the contested Verdict to the extent necessary to determine whether the Trial Panel reached the correct conclusion about the reliability of witness Šeho Macić’s testimony and its admissibility/inadmissibility, given that the final conclusion about Osman Brkan’s culpability directly depended on this specific piece of evidence.

12. As this was the only piece of evidence which directly incriminated the Accused Brkan as the perpetrator of the relevant criminal offense, the credibility and reliability of the testimony of witness Šeho Macić had to be thoroughly examined. His testimony had to be carefully analyzed, then correlated with other presented evidence and evaluated accordingly, especially taking into account the testimony of other witnesses who gave direct and/or indirect accounts of this incident. Also, the Court had to assess the circumstances that preceded this testimony and other circumstances important for reaching a decision to (not) accept his testimony as credible and accurate.

13. The Trial Panel finally found that the testimony of this witness was deficient and insufficiently convincing to produce a conclusion about the culpability of the Accused Osman Brkan. In reaching this conclusion, the Trial Panel took into account that the witness, when examined by the SIPA, did not say that Osman Brkan had fired at the old ladies, more precisely, he kept silent about those facts. In addition, this witness wanted witness Nurko Fišić to say to the SIPA that he (Šeho Macić) was with him (Nurko Fišić) on the relevant occasion, i.e. that he did not go to the house in which the crime took place. The Trial Panel also bore in mind the documentary evidence (SIPA Report on the committed criminal offense) which showed that Šeho Macić himself was suspected of committing the crimes in Blace on the relevant occasion, and the fact that his testimony about the involvement of Osman Brkan was not corroborated by any other piece of evidence presented during the main trial.

14. The Prosecution Appeal challenged this conclusion reached by the Trial Panel by

arguing that the reliability of this witness testimony was supported by the facts to which the Court did not attribute sufficient weight - the witness (Šeho Macić) testified in this case to the detriment of his longtime neighbor and colleague, and that both the witness and the Accused come from the same place – the village of Grušća in the Konjic Municipality, which is around 30 km far from Konjic, whose inhabitants are not only neighbours, but all of them are relatives, so that such a testimony to the detriment of one of the villagers basically leads to ostracism by the community. In addition, the Panel disregarded the fact that the witness is a father of two children who very often stay in the village of Grušća, where the Accused and his extended family live. The Appeal further alleges that the reliability of this testimony is additionally substantiated by the fact that the witness did not ask for any protection measures, and despite all the stated circumstances, he testified under his full name, he never requested closing the trial for the public, nor did he ask for any other form of protection.

15. The above stated circumstances and averments of the Appeal indeed appear to be logic and raise a completely reasonable question asked in the Appeal: why would anyone make so groundless accusations against his neighbor and colleague and blame him for the commission of such a serious crime, with no justified reason whatsoever if that person did not actually commit the crime, and in particular knowing that such a testimony may lead to ostracism by the community and possibly cause other inconveniences to him and to his family. However, there are several possible answers to this question, including a very logic one submitted in the Prosecution Appeal – this is a testimony given by an honest man who, notwithstanding the consequences, could not hide the real truth about the killing of the four women of Serbian ethnicity in the village of Blace, where he himself happened to be at that time.

16. However, there is a number of facts and reasons in this case which were correctly noted and evaluated by the Trial Panel that cast doubt on the reliability of witness Šeho Macić's testimony as to the involvement of the Accused Osman Brkan in the acts of perpetration of the relevant criminal offense. In the opinion of the Trial Panel, they had such weight that the testimony of witness Šeho Macić, in absence of other corroborating evidence, could not be taken as the only basis to conclude beyond any reasonable doubt that the Accused Osman Brkan was guilty of the death of the old women. Therefore, there is no doubt that the crime was committed, but it could not be established beyond any

reasonable doubt (the standard imposed under the CPC of BiH that must be satisfied to render a verdict of conviction) that, in addition to Ibro Macić, the Accused Brkan also fired, as the Indictment alleged.

17. It indisputably followed from the presented evidence that a number of individuals – soldiers from the same unit – participated in the events that either preceded or immediately followed the commission of the relevant criminal offense. Those people were examined during the proceeding, but some of them attempted to conceal any involvement or participation on their part in the commission of the criminal offense, either by incriminating others or by exerting various threats¹. There were others, on the other hand, who claimed they were completely unaware of the incident at the time of its perpetration or shortly afterwards. With this in mind, the testimony of witnesses who testified about the participation of certain individuals in the acts of perpetration of the criminal offense had to be very carefully examined due to a realistic danger that some individuals would shift the responsibility to others in order to exonerate themselves. In addition, according to the SIPA Report on the committed criminal offense, almost all members of the unit who were at the relevant site at relevant time were co-perpetrators, which is a fact that certainly affected the testimony of many of those individuals.

18. In this context, it had to be taken into account that, according to the presented evidence, witness Šeho Macić was inside the house on the relevant occasion when the old women were killed. However, the witness kept silent about that fact when giving statement to the SIPA, as the appealed Verdict correctly noted. When giving the statement, as the witness himself admitted at the main trial, he did not say a word which would indicate that Osman Brkan was the perpetrator of the relevant criminal offense. When explaining at the main trial why he kept silent about that at that time, whereas he directly identified the Accused at the main trial as the person whom he had seen when he entered the room from a distance of around one meter “mowing down the old ladies”, witness Šeho Macić said “he feared for his life”. However, shortly after he came home, he decided to call the prosecutor and tell her everything he knew since he could not have it on his conscience any longer.

¹ Sections 97 and 98 of the appealed Verdict.

19. In the opinion of this Panel, fear is a natural feeling in such and similar situations. According to witness Šeho Macić, he was afraid when he was examined by SIPA, however, when he testified at the main trial, he did not mention a single circumstance which could eradicate his alleged feeling of fear so swiftly that he decided to call the prosecutor shortly afterwards to tell her the “truth” about the relevant incident, the “truth” which is almost diametrically opposed to his earlier statement given to SIPA. Naturally, fear is not a lasting category, nevertheless, its cessation requires time or alteration of the existing circumstances or development of new circumstances (for instance, change of residence, death of persons who posed a threat, and so on).

20. In its reasoning, the Appeal underlines the honesty of this witness which made him tell the prosecutor the truth because he could not have it on his conscience any longer. However, this averment is undermined by the fact that the witness had known the truth about the participation of the Accused Osman Brkan in the relevant incident before he told it at the main trial (what he claimed to be the truth, not what he told the SIPA), but he had nevertheless lived with it on his conscience for years (since 13 June 1992). Throughout that time, he never showed any intention to tell the truth about the relevant incident and to clear his conscience, quite the opposite, he attempted to sell the untruth. This conclusion follows from the fact that he wanted witness Nurko Fišić to tell the SIPA that he (Šeho Macić) was not at all in the house in which the old women were killed, thus, if he indeed told the truth at the main trial, as he resolutely claims, that means that he wanted the witness to tell untruth.

21. When testifying at the main trial, witness Nurko Fišić was clear in stating that Šeho Macić wanted him not to tell the SIPA that he (Šeho Macić) was in the house in which the old women were killed, but to say that he stayed with him (Nurko Fišić), however Nurko Fišić did not want to do that. The Prosecution entirely failed to dispute those allegations made by witness Nurko Fišić, nor did they provide any reasonable explanation as to why would Šeho Macić attempt to exert such influence on witness Nurko Fišić. In the opinion of this Panel, the foregoing shows the intention of witness Šeho Macić to minimize the role he himself played in the events in the village of Blace and his aim to portray the events differently from how they had actually happened, due to his fear of potential prosecution, as the Trial Panel correctly established.

22. Such a conduct and actions taken by witness Šeho Macić additionally undermine his credibility. In such a situation, when the witness firmly stated at the main trial that the Accused Osman Brkan had fired at the old women (*“mowing down the old women with his weapon”*), the Panel needed other corroborating evidence to be able to accept the testimony given by witness Šeho Macić at the main trial as unbiased and truthful, as alleged in the Appeal, and to render a decision about the culpability of the Accused Osman Brkan beyond any reasonable doubt.

23. However, it is clear that the testimony of this witness is entirely unsubstantiated, either by documentary or by subjective evidence. None of the heard witnesses gave either direct or indirect information about the involvement of the Accused Osman Brkan in the relevant acts. Furthermore, the adduced documentary evidence did not implicate Osman Brkan as the perpetrator of the relevant criminal offense.

24. In addition, it has to be noted that some portions of witness Šeho Macić’s testimony stand in opposition to the testimony of other witnesses and to the chain of events described in the Operative Part of the Verdict, and/or to the account of facts stated in the Indictment.

25. Witness Nurko Fišić confronts the testimony of witness Šeho Macić by denying he had gone together with Šeho Macić to the house where the old women were staying on the relevant occasion. Moreover, contrary to witness Šeho Macić’s allegations, witness Nurko Fišić stated that Šeho Macić himself had gone to the house where the old women were killed together with Salko Macić, Halil Macić, Ibro Macić, Ramo Brkan and Mirsad Fišić a.k.a. Kolumbo. Also, it follows from the testimony of other witnesses: Hamdija Fišić and Zajko Fišić, even Salko Macić - Šeho Macić’s brother, that Šeho Macić had left with the group of other co-combatants, not with Nurko Fišić.

26. In addition, witness Salko Macić confronts his brother’s averment by stating that Ibro Macić was the first one who fired, then the deceased Halil Macić, while he did not even mention the Accused Osman Brkan. Notwithstanding that it followed from the testimony of witness Salko Macić that it was not the Accused who fired after Ibro Macić, but a completely different person, the Prosecutor did not raise any objections whatsoever nor did he otherwise dispute that allegation.

27. It is also important to note that, in addition to Šeho Macić, there were other witnesses in this case who incriminated their co-combatants (Ibro Macić and Mirsad Fišić a.k.a. Kolumbo), but they too testified without any protection measures and did not ask for the exclusion of the public. Therefore, the fact that Šeho Macić did not request any protection measures, as it is emphasized in the Appeal, does not represent any exception whatsoever, nor does it bear such weight as attributed to it in the Appeal.

28. As for the fact that the Trial Panel erroneously stated in the Reasoning of the appealed Verdict that witness Šeho Macić was also a suspect in this case, this is not considered to be a decisive fact that the Court was bound to establish in order to decide about the culpability of the Accused Osman Brkan. The testimony of witness Šeho Macić was evaluated by the Trial Panel on the basis of a number of other facts and circumstances, which were substantiated in the Reasoning of the appealed Verdict by clear and coherent reasons, that are upheld by this Panel. Therefore, the incorrect reference to this witness as one of the suspects does not amount to such an omission which would result in a revocation of the Verdict on the grounds of an erroneously and incompletely established account of facts.

29. Such reference made by the Trial Panel was viewed in the context of witness Šeho Macić's understanding that he too was under investigation for his presence in the village of Blace on the relevant occasion. Regardless of his status as a suspect, the witness must have been aware of that fact. This is corroborated by his attempts to minimize his participation in the events in Blace by exerting influence on witness Nurko Fišić, as already explained.

30. Based on the foregoing, the Appellate Panel is satisfied that the Trial Panel correctly concluded that the presented evidence failed to prove beyond any reasonable doubt that it was the Accused Osman Brkan who fired at the old women immediately after Ibro Macić. Faced with such evidence, the Court was bound to apply the *in dubio pro reo principle* which foresees that a doubt with respect to the existence of facts composing characteristics of a criminal offense or on which depend an application of certain provisions of criminal legislation shall be decided by the Court with a verdict and in a manner that is the most favorable for accused. Therefore, the decision made by the Trial Panel to apply the provisions of Article 284(c) of the CPC of BiH and acquit the Accused

Osman Brkan is valid and based on law, while the BiH Prosecution Appeal is unfounded.

31. Based on the above, pursuant to Article 310, as read with Article 313 of the CPC of BiH, it is decided as stated in the Operative Part of the Verdict.

Record-taker

Igor Dubak

PRESIDING JUDGE

Mirko Božović

LEGAL REMEDY: No appeal lies from this Verdict.