



COURT OF BOSNIA AND HERZEGOVINA

Case No: S1 1 K 013419 14 Krž

Pronounced on: 6 March 2014

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Before the Panel composed of: Judge Mirko Božović, Presiding

Judge Senadin Begtašević, Reporting Judge

Judge Dragomir Vukoje (LL.M.), Panel member

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Goran Damjanović and Zoran Damjanović

SECOND INSTANCE VERDICT

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

Vesna Ilić

Defense Counsel for the Accused Goran Damjanović

Attorney Senad Kreho

Defense Counsel for the Accused Zoran Damjanović

Attorney Fahrija Karkin

Number: S1 1 K 013419 14 Krž

Sarajevo, 6 March 2014

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting on the Panel of the Appellate Division¹ composed of Judge Mirko Božović as the Presiding Judge and Judges Senadin Begtašević and Dragomir Vukoje (LL.M.) as the Panel members, with the participation of Legal Advisor Bojan Avramović as the record-keeper, in the criminal case against the Accused Goran Damjanović and Zoran Damjanović charged with the criminal offense of War Crimes Against Civilians under Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia (the CC of SFRY), in conjunction with Article 22 of the same Code that was adopted based on the Law on Application of the Criminal Code of BiH and the Criminal Code of SFRY, deciding on the Appeals from the Verdict of this Court No. S1 1 K 013419 13 Krl of 13 December 2013, filed by the Prosecutor's Office of Bosnia and Herzegovina, No. T20 0 KTRZ 0007929 13 2 of 31 December 2013, and by Defense Counsel for the Accused Goran Damjanović and Zoran Damjanović, attorneys Senad Kreho and Fahrija Karkin, of 9 January 2014 and 6 January 2014 respectively, having held a public session, in the presence of Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Vesna Ilić, the Accused Goran Damjanović and his Defense Counsel, attorney Senad Kreho, and the Accused Zoran Damjanović, in the absence of his properly summoned Defense Counsel, attorney Fahrija Karkin, pursuant to Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC of BiH), on 6 March 2014 rendered the following

VERDICT

The Appeal from the Verdict of the Court of Bosnia and Herzegovina, No. S1 1 K 013419 13 Krl of 13 December 2013, filed by the Prosecutor's Office of Bosnia and Herzegovina, No. T20 0 KTRZ 0007929 13 2 of 31 December 2013, and the Appeals filed by Defense Counsel for the Accused Goran Damjanović and Zoran Damjanović, attorneys Senad Kreho and Fahrija Karkin, of 9 January 2014 and 6 January 2014 respectively, **are dismissed as unfounded.**

¹ Hereinafter: the Appellate Panel/Panel.

R e a s o n i n g

I. PROCEDURAL HISTORY

A. FIRST INSTANCE VERDICT

1. Under the Verdict of the Court of Bosnia and Herzegovina, No. S1 1 K 013419 13 Krl of 13 December 2013, after the Trial Panel conducted the reopened proceedings and after the Verdicts of this Court No. X-KR-05/107 of 18 June 2007 and X-KRŽ-05/107 of 19 November 2007 have been set aside in the part that concerns the application of criminal code, the Accused Goran Damjanović and Zoran Damjanović were found guilty that by the acts described in Section 1 of the operative part of the Verdict No. X-KR-05/107 of 18 June 2007, they committed the criminal offense of War Crimes Against Civilians under Article 142(1) of the CC of SFRY, in conjunction with Article 22 of the same Code that was adopted based on the Law on Application of the Criminal Code of the Republic of BiH and the Criminal Code of SFRY. By applying the above legal regulations and pursuant to Articles 33, 34, 38 and 41 of the CC of SFRY, the Court sentenced the Accused Goran Damjanović to imprisonment for a term of six (6) years and six (6) months, and the Accused Zoran Damjanović to imprisonment for a term of six (6) years.

2. Pursuant to Article 333(3) of the CPC of BiH, the time the Accused Goran Damjanović spent in custody from 26 April 2006 to 18 January 2007 and the time serving the sentence from 24 February 2008 to 12 October 2013, and for the Accused Zoran Damjanović the time he spent in custody from 26 April 2006 to 22 June 2007 and the time serving the sentence from 30 January 2008 to 12 October 2013, was credited towards the sentence.

3. Under the contested Verdict, it was decided that the Verdicts of this Court nos. X-KR-05/107 of 18 June 2007 and X-KRŽ-05/107 of 19 November 2007 shall stay in force.

B. APPEALS

4. The Prosecutor's Office of BiH and the Accused Goran Damjanović and Zoran Damjanović, through their Defense Counsel, attorneys Senad Kreho and Fahrija Karkin, filed appeals from the above-mentioned Verdict within the statutory deadline.

5. The Prosecution appealed the decision on criminal sanction by invoking Article 300 of the CPC of BiH. The Prosecution moved the Appellate Panel of the Court of BiH to grant

the Appeal as well-founded, revise the contested Verdict and impose on the Accused Goran Damjanović and Zoran Damjanović a longer sentence of imprisonment than the one imposed on them by the contested Verdict.

6. Defense Counsel for the Accused Goran Damjanović appealed the decision on criminal sanction, moving the Appellate Panel to grant the Appeal, revise the contested Verdict and impose on the Accused Goran Damjanović a more lenient punishment in light of provisions on mitigation of the sentence, that is, a sentence below the minimum level permitted by the Code.

7. Defense Counsel for the Accused Zoran Damjanović appealed the Verdict on the same ground, moving the Appellate Panel of the Court of BiH to grant the Appeal and revise the contested Verdict in the part that concerns the decision on criminal sanction by imposing on the Accused Zoran Damjanović a sentence of imprisonment for a shorter duration, that is, a sentence of imprisonment that corresponds to the minimum prescribed for that criminal offense.

8. Defense Counsel responded to the Appeal filed by the Prosecutor's Office of BiH, moving the Appellate Panel to dismiss it as unfounded.

9. At the session of the Appellate Panel held on 6 March 2014, pursuant to Article 304 of the CPC of BiH, the appellants maintained their grounds of appeal and the allegations presented in their appellate briefs.

II. GENERAL CONSIDERATIONS

10. Prior to providing reasoning for individual grounds of appeal, the Appellate Panel notes that pursuant to Article 295(1)(b) and (c) of the CPC of BiH the appellant must include in the appeal both the legal grounds for contesting the verdict and the reasoning behind the appeal.

11. Since pursuant to Article 306 of the CPC of BiH², the Appellate Panel reviews the Verdict only within the limits of the grounds of the appeal, the appellant is obliged to draft the appeal in such a manner that it can serve as a basis for reviewing the Verdict.

12. A mere general indication of the grounds of appeal, like indicating the alleged irregularities in the course of the first instance proceedings without specifying the ground of appeal that the appellant invokes, does not constitute a valid ground to review the first instance verdict, in which cases the Appellate Panel dismisses as unfounded all unreasoned and unclear grounds of appeal.

III. SENTENCING

STANDARDS OF APPELLATE REVIEW

13. Prior to turning to concrete grounds of appeal, the Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion.

14. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

15. The Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only

² Article 306 of the CPC of BiH (Limits in Reviewing the Verdict): „The Panel of the Appellate Division shall review the verdict only insofar as it is contested by the appeal.“

reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.

1. Prosecution's Appeal

16. The Prosecution submits that the sentence of imprisonment for the term of 6 years and 6 months for the Accused Goran Damjanović and 6 years for the Accused Zoran Damjanović, given all the circumstances of the case – acts of the Accused, the manner of commission and consequences of the committed criminal offense, does not reflect unequivocal condemnation of the crime, nor is it proportionate to the gravity of the offense. The Prosecution argues that the Accused should be sentenced to a longer term of imprisonment than the one imposed on them by the contested Verdict. According to the Prosecution, aggravating circumstances on the part of the Accused were not properly evaluated, while the fact that they had no prior convictions is not relevant in the present case since they could not have been convicted of this particular offense due to the specific nature of the offense.

2. Appeal by the Defense for the Accused Goran Damjanović

17. The Defense submits that the criminal sanction was meted out contrary to general rules for sentencing. In support of their allegations the Defense invokes the following mitigating circumstances: his family situation and the role of the Accused in the commission of the criminal offense, or rather its consequences that are not a result of his acts only, but of a number of other individuals. Accordingly, the Defense argues that the mitigating circumstances properly established in the contested Verdict, in combination with those indicated in the Appeal, constitute particularly mitigating circumstances, which justifies the application of provisions on mitigation of the sentence.

3. Appeal by the Defense for the Accused Zoran Damjanović

18. The Defense submits that the sentence imposed on the Accused Zoran Damjanović is too stringent and that a sentence of imprisonment towards the special minimum prescribed by the Code would achieve the purpose of sentencing. In support of their claims, the Defense states that the Accused Zoran Damjanović has been in prison for

more than five years and that the purpose of punishment has been met. Moreover, the Defense argues that additional time has elapsed since the commission of the offense, which the Court, as the Defense argues, should have taken into consideration. The Defense also points to good conduct of the Accused before the Court. In particular, the Defense contests the Trial Panel's conclusion with respect to the existence of aggravating circumstances on the part of the Accused given that, in the view of the Defense, they constitute elements of the criminal offense and as such should not have been evaluated in that context. On the other hand, the Defense submits that the Trial Panel failed to attach due importance to the mitigating circumstances.

4. Findings of the Appellate Panel

19. In reviewing the decision on criminal sanction within the limits of the grounds of the appeal, the Appellate Panel is satisfied that the Trial Panel has taken into account all circumstances, both aggravating and mitigating, in accordance with Article 41 of the CC of SFRY and Article 48 of the CC of BiH. The Appellate Panel was particularly mindful of the degree of criminal responsibility of the Accused, motives for the commission of the criminal offense, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the past conduct of the offenders, their personal situation and their conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offenders.

20. Furthermore, contrary to the allegations of both the Prosecution and the Defense, the Appellate Panel is satisfied that the Trial Panel adequately evaluated all aggravating and mitigating circumstances, taking into account all subjective and objective factors relating to the criminal offense and its perpetrators. Accordingly, the Appellate Panel supports the Trial Panel's conclusion that the sentences of imprisonment for the term of six (6) years and six (6) months to the Accused Goran Damjanović and six (6) years to the Accused Zoran Damjanović are proportionate to the gravity of the criminal offense of which the Accused have been found guilty, the degree of injury caused to the protected object by the commission of this offense and the personality of the offenders. In light of the above, the sentences imposed on the Accused will meet general and special purpose of deterrence prescribed under Article 33 of the CC of SFRY. Arguments of the Prosecution and Defense appeals are thus dismissed as unfounded.

21. The Trial Panel considered as mitigating the fact that both of the Accused are family men, that they have no prior convictions and that they conducted themselves fairly during the proceedings.

22. In the context of consequences of the committed offense, the Trial Panel considered as aggravating the degree of criminal responsibility of the Accused. The Appellate Panel holds that the Trial Panel correctly made a connection between specific acts of the Accused and the manner of commission of the offense.

23. Accordingly, the Appellate Panel is satisfied that the Trial Panel gave a clear explanation of the causal link between the criminal offense and the consequence. By doing so, the Trial Panel ultimately met the standard of adequate evaluation of the relevant circumstances, which is required for proper sentencing of an accused person.

24. The Trial Panel is thus considered to have taken into account 'all the circumstances bearing on the magnitude of punishment'. It correctly used its discretion in weighing the aggravating and mitigating circumstances, having concluded that all the circumstances taken into account justify the sentences imposed on the Accused.

25. With respect to the Prosecution's submission that the Trial Panel should not have considered as mitigating the fact that they had no prior convictions since they could not have been convicted of this particular offense (of which they have been found guilty now) due to its specific nature, the Appellate Panel accepts that it is logical, but on the other hand it should be noted that the lack of prior convictions is always considered in mitigation of the sentence as much as having prior convictions is believed to aggravate the offense. The weight to be attached to these circumstances and the extent to which they will have influence on the type and length of a sentence is decided by the Court on a case by case basis.

26. As for the Prosecution's argument that the Trial Panel failed to evaluate properly the established aggravating circumstances in light of the consequences of the acts of the Accused that are reflected in the violated psycho-physical integrity of the aggrieved parties and the degradation of their personal dignity and self-respect, the Appellate Panel considers it unfounded given that these circumstances constitute elements of the criminal offense and that they could not, *per se*, be considered as aggravating circumstances for the sentencing purposes. Had the Trial Panel done so, it would have evaluated these circumstances twice: once as an element of the criminal offense and the

second time as a relevant factor for deciding on sentence. Further, the Appellate Panel could not accept the Prosecution's argument that the Trial Panel failed to consider as aggravating the fact that the Accused did not apologize for their conduct since the absence of an apology is not a relevant fact in the context of aggravating circumstances. The Trial Panel did not consider the absence of apology in the manner advocated by the Prosecution, which is fully supported by this Panel too. This circumstance could be considered only in mitigation of the sentence, that is, had the Accused apologized for their conduct, and not in any way as an argument to their detriment.

27. Furthermore, the Appellate Panel holds that the Defense gives too much importance not only to the mitigating circumstances established by the Trial Panel, but also other mitigating circumstances alleged in their appeals. The Appellate Panel concludes that they do not constitute particularly mitigating circumstances that would justify a sentence below the legally prescribed minimum for the Accused Goran Damjanović and the sentence at the lowest possible level allowed under relevant provisions on reduction of punishment for the Accused Zoran Damjanović, as proposed by their Defense Counsel.

28. The Defense for the Accused Goran Damjanović particularly stressed the fact that the Accused is a father of one, now a person of full age and currently a regular student, and that he lives in the same household with his unemployed wife and mother, in support of which the Defense furnished the certificate from the East Ilidža Employment Bureau of 8 October 2013 confirming that his wife is unemployed, certificate of regular student enrolment for Velibor Damjanović of 11 November 2013 and the household list of 10 October 2013. These facts, in the view of this Panel, do not have the importance the Defense attaches to them in their Appeal and they cannot, either by themselves or in connection with other mitigating circumstances evaluated by the Trial Panel, result in the mitigation of the sentence imposed on the Accused.

29. As for the argument of the Defense Counsel for the Accused Goran Damjanović that the Trial Panel failed to evaluate the most important mitigating circumstance, the one identified by the ECtHR in its judgment in the *Maktouf and Damjanović* case pertaining to the fact that the Accused's acts did not result in 'any loss of life', the Appellate Panel recalls that the essence of the ECtHR's judgment concerns resolving the dilemma with respect to the issue of applicable law, that is, the application of 'a more lenient law' in the concrete cases of these two applicants, rather than constituting general rules for sentencing.

30. Finally, addressing the Court at the public session to hear the appeals, the Defense for the Accused Goran Damjanović hinted at the unequal treatment of the Accused related to sentencing, arguing that the perpetrators who were found guilty by this Court in relation to incidents similar to the one involving his client had received far more lenient sentences. In this respect, the Appellate Panel notes that each case and each perpetrator are specific, and that in each concrete case it is necessary to take into account all the factual circumstances related both to the incident and the perpetrator. The verdicts rendered in other cases cannot be of decisive importance for rendering a verdict in the present case, but they can potentially serve merely as a controlling factor.

31. In light of all the foregoing, the Appellate Panel concludes that both the Prosecution and Defense appeals challenging the decision on criminal sanction are unfounded.

RECORD-KEEPER

Legal advisor

Bojan Avramović

PRESIDING JUDGE

Mirko Božović

NOTE ON LEGAL REMEDY: No appeal lies from this Verdict.