



**Sud Bosne i Hercegovine
Суд Босне и Херцеговине
Court of Bosnia and Herzegovina**

Case No: S1 1 K 017861 14 Kžk (Ref. X-KRŽ-08/489)

Date of delivery: 17 December 2014

Written copy sent on: 19 December 2013

Appellate Panel:

Judge Hilmo Vučinić, Presiding Judge

Judge Tihomir Lukes, Member

Judge Azra Miletić, Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

ANTE KOVAĆ

SECOND INSTANCE VERDICT

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

Mirko Lečić

Defense Counsel for the convicted Ante Kovać:

Attorney Dušan Tomić

No: S1 1 K 017861 14 Kžk (Ref: X-KRŽ-08/489)

Sarajevo, 17 December 2014

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting on the Panel of the Appellate Division composed of Judge Hilmo Vučinić, as the Presiding Judge, and Judges Tihomir Lukes and Azra Miletić, as members of the Panel, with the participation of Legal Advisor Nevena Aličehajić as the record-taker, in the criminal case of Ante Kovać, convicted of the criminal offense of War Crimes against Civilians, in violation of Article 173(1)(e) and (f) of the Criminal Code of Bosnia and Herzegovina (CC BiH), as read with Article 180(1) of the CC of BiH, in view of the Decision No: AP-1751/11 of 6 November 2014 issued by the Constitutional Court of Bosnia and Herzegovina, under which the Court of BiH Verdict No: X-KRŽ-08/489 of 12 November 2010 was revoked in the part relevant to the application of a more lenient law, having held a public hearing before the Appellate Division Panel in the presence of Mirko Lečić, Prosecutor of the Prosecutor's Office of BiH, the convicted Ante Kovać and his Defense Counsel, attorney Dušan Tomić, on 17 December 2014 rendered the following:

V E R D I C T

The Verdict No: X-KRŽ-08/489 of 12 November 2010 rendered by the Court of Bosnia and Herzegovina **is hereby revised** in the part relevant to the application of substantive law and in its sentencing part, so that the offenses of which Ante Kovać was found guilty under the stated Verdict are hereby defined as the criminal offense of War Crimes against Civilians in violation of Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia which was adopted under the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia.¹ Based on the above stated legal provision and Articles 33, 38

¹ Decree Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia adopted as the Republican law at the time of

and 41 of the Criminal Code of SFRY, the Court sentences Ante Kovać to a prison term of 8 (eight) years for the stated criminal offense. Pursuant to Article 50(1) of the CC of SFRY, the time Ante Kovać spent in custody from 30 January 2008 to 25 February 2011, and the time he spent serving his sentence under the final Verdict of this Court No: X-KRŽ-08/489 from 25 February 2011 onwards, shall be credited towards the imposed prison sentence.

The Verdict of the Court of Bosnia and Herzegovina No: X-KRŽ-08/489 dated 12 November 2010 is hereby upheld in its remaining part.

R e a s o n i n g

I. PROCEDURAL HISTORY

1. Under the Verdict No: X-KR-08/489 of 10 July 2009 rendered by the Court of Bosnia and Herzegovina, the then Accused Ante Kovać was found guilty of the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e) and f) of the CC of BiH and sentenced to a prison term of 13 (thirteen) years.

2. Defense Counsel for the convicted Kovać appealed the Verdict, and the Appellate Panel of Section I for War Crimes of the Court of BiH issued the Decision No: X-KRŽ-08/489 dated 4 March 2014, revoked the Trial Verdict and scheduled a trial before the Appellate Division Panel.

3. In a reopened proceeding, the Appellate Division Panel rendered the Second Instance Verdict No: X-KRŽ-08/489 dated 12 November 2010, found the then Accused Ante Kovać guilty of the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e) and (f) of the CC of BiH and sentenced him to a prison term of 9 (nine) years.

4. Acting upon the Appeal filed by attorney Dušan Tomić, Defense Counsel for the convicted Ante Kovać, the Constitutional Court of Bosnia and Herzegovina (Constitutional Court of BiH) issued the Decision No: Ap-1751/11 on 6 November 2014, partly upheld the Appeal by finding the violation of Article II/2 of the Constitution of Bosnia and Herzegovina

imminent threat of war or state of war (Official Gazette of RBiH No: 6/92) and the Law Enacting Decree Laws (Official Gazette of RBiH No: 13/94) - hereinafter: the adopted CC of SFRY.

and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and revoked the Verdict No: X-KRŽ-08/489 dated 12 November 2010 issued by the Court of Bosnia and Herzegovina in the part relevant to the **application of a more lenient law**. As it is stated in the Decision of the Constitutional Court of BiH, the revocation of the Court of BiH Verdict No: X-KRŽ-08/489 of 12 November 2010 in its part as stated above, had no bearing whatsoever on the Appellant's deprivation of liberty, his custody and detention, which remained within the exclusive jurisdiction of the Court BiH. The case was referred back to the Court of BiH, whose obligation was to issue, under an urgent procedure, a new decision with regard to the sanction, in accordance with Article II/2 of the Constitution of BiH and Article 7(1) of the ECHR.

5. The same Decision dismissed as unfounded Ante Kovač's Appeal from the Court of BiH Verdict No: X-KRŽ-08/489 dated 12 November 2010 on the grounds of violations of Article II/3.e) of the Constitution of BiH and Articles 6(1) and (3)(d) of the ECHR and of his right to appeal guaranteed under Article 2 of Protocol 7 to the ECHR. The Constitutional Court also dismissed as unfounded Ante Kovač's Appeal against the Decision No: X-KRŽ-08/498 of 10 May 2011 issued by the Court of BiH, and Decision No: X-KRŽ-08/498 of 18 March 2011 with regard to Article 2 of Protocol 7 to the ECHR. Also, the Court of BiH was to inform the Constitutional Court of BiH about the measures aimed at the implementation of the Decision within 3 (three) months from the date of receipt thereof.

6. The Decision issued by the Constitutional Court of BiH No: AP-1751/11 of 6 November 2014 was delivered to the Court of Bosnia and Herzegovina on 10 December 2014.

7. Fulfilling its obligation arising from the Constitutional Court of BiH Decision No: AP-1751/11 of 6 November 2014, and aiming at its urgent implementation, the Appellate Panel held a public session on 17 December 2014, in the presence of Mirko Lečić, Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, the convicted Ante Kovač and his Defense Counsel, attorney Dušan Tomić.

8. In light of the Decision of the Constitutional Court of BiH, the Prosecutor did not oppose the application of the CC of SFRY in this case, as the law which was in force at the

time the criminal offense was perpetrated, and he moved the Court of BiH Appellate Division Panel to define the offenses of which Ante Kovać was found guilty in line with the CC of SFRY and impose on him a prison sentence foreseen under that law – ranging from 5 to 20 years of imprisonment.

9. According to Defense Counsel for the convicted Ante Kovać, attorney Dušan Tomić, the Decision of the Constitutional Court of BiH left no doubt that the CC of SFRY, as the more lenient law, should apply to his defendant, and he moved the Appellate Panel of the Court of BiH to render a verdict and impose on Ante Kovać the sentence foreseen under that law for the criminal offenses of which he was found guilty. Counsel further stated that, under the Verdict No: X-KRŽ-08/489 of 12 November 2010, Kovać was sentenced to a prison term of 9 (nine) years, one year less than the statutory minimum. He argued that, in view of all the particularly extenuating circumstances in this case, which were taken into account in the Verdict No: X-KRŽ-08/489 of 12 November 2010, Ante Kovać should be sentenced to a prison term of 4 (four) years. Finally, Counsel reflected upon the case law of the Court of BiH and other courts in similar cases and submitted that the offences committed by Kovać, considering their gravity and consequences (no death was caused), were such that the imposed sentence should in no case exceed 6 (six) years.

II. PROCEDURAL SITUATION AFTER THE DECISION OF THE CONSTITUTIONAL COURT OF BIH

10. Prior to rendering a new decision on sanction in accordance with Article II/2 of the Constitution of BiH and Article 7(1) of the ECHR, as required by the Decision of the Constitutional Court of BiH, this Panel finds it necessary to briefly explain the procedural situation it faced after the partial revocation of the Second Instance Verdict No: X-KRŽ-08/489 dated 12 November 2010 issued by the Court of BiH.

11. In its Decision, the Constitutional Court of BiH was explicit about other objections raised by the Appellant - convicted Ante Kovać, and dismissed as unfounded his alleged violations of Article II/3.e) of the Constitution of BiH and Articles 6(1) and (3)(d) of the ECHR, on whose grounds, *inter alia*, he appealed the Court of BiH Verdict. The Constitutional Court of BiH reasoned their Decision by expressly stating that:

“In the opinion of the Constitutional Court, the appealed decisions contain

no indications whatsoever that the facts were established and evaluated arbitrarily, quite the opposite, the reasoning therein entirely satisfies the standards of a fair trial prescribed by Article 6 of the ECHR. The Constitutional Court is satisfied that regular courts adhered to the equality of arms principle and, throughout the proceeding, they never did anything to place the Appellant in an unfavorable position in relation to the Prosecution. In addition, there was no violation of the Appellant's procedural rights guaranteed under Article 6(3)(d) of the ECHR."

12. Such reasoning provided by the Constitutional Court of BiH clearly shows that the Constitutional Court of BiH did not question the validity of the Court of BiH Verdict in the part relevant to the existence of the criminal offense and the culpability of the convicted Kovać for the offenses of which the Court of BiH Appellate Division Panel found him guilty under the appealed Verdict².

13. Upon receiving the Decision of the Constitutional Court of BiH, the Court of BiH Appellate Division Panel was faced with a situation not defined by procedural law, given that the CPC of BiH contains no provisions that foresee the possibility of revoking a verdict and referring it back for retrial.³ Specifically, the CPC of BiH does not define the procedure to be applied in case when a second instance verdict is revoked by a decision of the Constitutional Court of BiH in the part thereof relevant to the "application of a more lenient law", when there is no doubt whatsoever about the culpability, as is the case here. Considering that the Constitutional Court of BiH imposed the obligation on the Court of BiH to issue a new decision on the sanction under an urgent procedure, this Panel sought to find the most efficient modality for resolving this situation.

14. In the opinion of the Appellate Panel, the most viable solution to this situation was to apply the provision of Article 314 of the CPC of BiH, which reads: „by honoring an appeal, the Panel of the Appellate Division shall render a verdict revising the verdict of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance and that in view of the state of the facts established, a different verdict must be rendered when the law is properly applied.” This Panel resorted to Articles 314 and 308 of the CPC of BiH, which prescribe that if the Appellate Panel deems that the Trial Panel erred in applying the law, but is satisfied that decisive facts have been

² This is the reason why the Constitutional Court of BiH revoked the Verdict No: X-KRŽ- 08/489 of 12 November 2010 issued by the Court of BiH only in the part relevant to the application of a more lenient law.

³ Revocation of the first instance verdict is defined under Article 315 of the CPC of BiH, which provides that the Appellate Panel itself should hold a trial.

correctly ascertained in the verdict of the first instance, the Appellate Panel shall render a verdict revising the verdict of the first instance with regard to the applicable law and, as necessary, only mete out an appropriate sanction.

15. Although there is no appeal here to be decided upon, this Panel has relied on the Decision of the Constitutional Court of BiH, which found that the Appellate Division Panel of the Court of BiH incorrectly applied the law, and when such an objection is raised in the appeal, the Appellate Panel is entitled to issue a decision in a regular procedure. However, having examined other Appellant's objections, the Constitutional Court of BiH found nothing in the appealed Verdict which would indicate *that the facts were established and evaluated arbitrarily, nor did they find any other procedural violations*. Therefore, the Decision of the Constitutional Court of BiH does not question the correctness of the facts established under the Verdict No: X-KRŽ-08/489 of 12 November 2014 rendered by the Appellate Division Panel of the Court of Bosnia and Herzegovina, quite the opposite, it shows the conviction of the Constitutional Court of BiH that the facts were correctly established in that Verdict. Therefore, in the opinion of this Panel, the described situation is similar to the procedural situation defined under Article 314 of the CPC of BiH, so that, in the absence of a clear legal provision which would govern the procedure to be applied in the situation which occurred in this specific case, the Panel resorted to this Article as the most efficient and effective solution to the problem, in order to make a new decision which will remedy the violation found under the binding Decision of the Constitutional Court, and urgently revise the Verdict No: X-KRŽ-08/489 dated 12 November 2014 issued by the Court of BiH in the manner as stated in the Operative Part of this Verdict.

16. With the aim of implementing the Decision of the Constitutional Court of BiH, the Appellate Panel of the Court of BiH has decided as stated in the Operative Part herein due to the reasons as follows:

III. APPLICABLE LAW

17. When rendering the previous Verdict, which was revoked by the Decision of the Constitutional Court of BiH in the part relevant to the application of a more lenient law, the Appellate Panel examined the issue of applicable substantive law in this case. Having compared the provisions of Article 173 of the CC of BiH and Article 142 of the adopted CC of SFRY, primarily with regard to the sanctions foreseen for the criminal offense of War

Crimes against Civilians which is codified under those Articles, the Appellate Panel concluded that the CC of BiH, which entered into force after the commission of the criminal offense charged against the then Accused Kovać, was more lenient than the CC of SFRY, which was in force at the time of perpetration of the criminal offense. Such a conclusion was exhaustively reasoned in the previous Verdict and it will not be repeated here.

18. However, the Constitutional Court of BiH obviously did not accept that reasoning and revoked the previous Verdict of this Court in the part relevant to the applicable law. Guided by the position stated in the Decision of the Constitutional Court that the CC of SFRY was more lenient to the then Accused Kovać and that the retroactive application of the CC of BiH would be detrimental to the Accused with regard to the criminal sanction, the Appellate Panel concluded that the adopted CC of SFRY should apply in this case as the law which was in force at the time of perpetration of the criminal offense.

IV. SENTENCING

19. Having concluded that the application of the adopted CC of SFRY in this case was justified, the Panel had to apply the same law when deciding about the sanction and mete out the sanction within the range prescribed under Article 142 of the adopted CC of SFRY for the criminal offense of which Ante Kovać was found guilty, in line with the provisions which lay down general principles in fixing punishment (Article 41 of the adopted CC of SFRY). To that end, the Panel took into account that the criminal offense of War Crimes against civilians, codified under Article 142 of the adopted CC of SFRY, foresees a prison term of 5 (five) years as a minimum, or the death penalty. In addition, when meting out the sentence, the Panel paid special attention to all the circumstances that could affect the extent of the punishment (extenuating and aggravating circumstances).

20. The Panel found no aggravating circumstances on the part of the convicted Ante Kovać.

21. The Panel weighed as the mitigating circumstances the facts that the convicted Kovać was a family man, father of three children, and not burdened by previous criminal convictions. His deteriorated health was also seen as an extenuating circumstance, same as the fact that no witness, other than A, B and D, who were detained on the premises of the *Radnički univerzitet*, SDK and the Cinema Hall, filed property or indemnity claims against the Accused. Furthermore, several witnesses testified that the Accused had

treated them properly, moreover, he had even assisted some of them to leave Vitez and cross to territory controlled by the Army of RBiH. Other witnesses described his fair treatment when he allowed them to go home to have a bath after digging trenches. In the opinion of the Panel, all these circumstances cumulatively amounted to particularly mitigating circumstances.

22. At a session held by the Appellate Panel following the Decision No: AP1751/11 dated 6 November 2014 issued by the Constitutional Court of BiH, Defense Counsel specifically referred to Article 42 of the CC of SFRY, which provides:

“The court may set the punishment below the limit prescribed by statute, or impose a milder type of punishment:

(1)...

(2) when it finds that such extenuating circumstances exist which indicate that the aims of punishment may be attained by a lesser punishment.”

23. The Appellate Panel is satisfied that all the circumstances on the part of the convicted Kovać cumulatively amount to particularly extenuating circumstances. On the other hand, the Panel holds that a reduced punishment, below the statutory minimum, would not satisfy the purpose of both special and general deterrence given the nature of the offenses of which Ante Kovać was found guilty (one of them being the rape of witness A, which constitutes a most serious attack on human dignity), persistence in their commission and their duration (offenses charged under Section 1 of the Operative Part of the Verdict were perpetrated continually over a period of two months). Article 42 of the CC of SFRY allows imposing a reduced punishment, below the statutory minimum, but only on condition that both requirements therein have been cumulatively met: when it is found that such particularly extenuating circumstances exist, and when the aim of punishment may be attained by a lesser punishment. In the opinion of this Panel, the first requirement has been met in this case, as opposed to the second one, therefore the application of the provisions of Article 42(2) of the CC of SFRY is not justified, nor is imposing a sentence below the statutory minimum.

24. This stands in opposition to the previous Verdict in which the Panel applied the range of sanctions foreseen in the then applied CC of BiH⁴ and, finding the existence of

⁴ Article 173 of the CC of BiH foresees imprisonment for a term not less than ten years or long-term imprisonment.

particularly extenuating circumstances on the part of the Accused, rendered the sentence below the statutory minimum. In that situation, the Panel held that the imposed sentence of 9 (nine) years, which could be imposed only as a result of mitigation, would achieve the purpose of punishment prescribed by the law.

25. Taking into account the above stated, the range of sanctions foreseen for this criminal offense, the purpose of punishment, all the circumstances bearing on the magnitude of punishment, and in particular the degree of criminal liability, the motives for perpetrating the offence, the degree of danger or injury to the protected object, the circumstances in which the offence was perpetrated, the personal situation of the convicted person, including his deteriorated health, the Panel concluded that a prison term of 8 years for the committed criminal offense is proportionate to all the stated circumstances and the personality of the convicted person as the perpetrator, and that it will entirely serve the purpose of not only special, but also general deterrence.

26. Therefore, the appealed Verdict had to be revised in its sanctioning part as well so as to reflect everything stated above. The time the convicted Kovać spent in custody is credited towards his prison sentence, so is the time he spent serving his earlier imposed sentence in this case.

27. Based on the foregoing, the Appellate Panel rendered the Decision as stated in the Operative Part of the Verdict.

RECORD-TAKER:

Nevena Aličehajić

PRESIDING JUDGE

Hilmo Vučinić

LEGAL REMEDY: No appeal lies from this Verdict.