Bosnia and Herzegovina

Court of Bosnia and Herzegovina

Case No. S1 1 K 017791 14 Krž (Ref: X-KRŽ-07/386)

Pronounced on: 19 January 2015

Before the Panel composed of:

Judge Redžib Begić, Presiding

Judge Dragomir Vukoje

Judge Tihomir Lukes

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MILORAD TRBIĆ

SECOND INSTANCE VERDICT

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

Džermin Pašić

Defense Counsel for the convicted Milorad Trbić:

Attorney Dalibor Pejaković

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Number: S1 1 K 017791 14 Krž (Ref: X-KRŽ-07/386)
Sarajevo, 19 January 2015

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the panel of the Appellate Division composed of Judge Redžib Begić as the Presiding Judge and Judges Dragomir Vukoje and Tihomir Lukes as the panel members, with the participation of legal advisor Medina Džerahović as the record-taker, in the criminal case against Milorad Trbić convicted of the criminal offense of Genocide under Article 171(a), (b), (c) and (d) of the Criminal Code of Bosnia and Herzegovina (the CC of B-H), in conjunction with Article 180(1) and Article 29 of the same Code, following the Decision of the Constitutional Court of Bosnia and Herzegovina No. AP-1240/11 dated 6 November 2014 that quashed the Verdict of the Court of Bosnia and Herzegovina No. X-KRŽ-07/386 dated 21 October 2010 in the part that concerns the application of the more lenient criminal code, following a public session of the panel of the Appellate Division attended by Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Džermin Pašić, the convicted person Milorad Trbić and his Defense Counsel, attorney Dalibor Pejaković, on 19 January 2015 rendered the verdict as follows.

VERDICT

The Verdict of the Court of Bosnia and Herzegovina No. X-KRŽ-07/386 dated 21 October 2010 **is revised** in the part concerning the application of the criminal code and the decision on sentence, and accordingly the acts of which Milorad Trbić was found guilty in the first-instance Verdict are legally qualified as the criminal offense of Genocide under Article 141 of the Criminal Code of the Socialist Federal Republic of Yugoslavia that was adopted based on 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], in conjunction with Article 22 (co-perpetration) of the same Code, for which criminal offense this Panel, based on the above noted provisions of the Code, and having applied Articles 33, 38 and 41 of the CC of SFRY, sentences him to imprisonment for the term of twenty (20) years, with the time the convicted Trbić spent in custody from 7 April 2005 until 14 January 2011 and the time he spent serving the sentence upon the final Verdict of the Court of Bosnia and Herzegovina, No. X-KR-07/386 dated 16 October 2009, from 14 January 2011 onwards, credited towards his sentence of imprisonment in accordance with Article 50 of the CC of SFRY.

In the remaining part the Verdict of the Court of Bosnia and Herzegovina No. X-KRŽ-07/386 dated 21 October 2010 shall remain unchanged.

Reasoning

I. PROCEDURAL HISTORY

1. Under the Verdict of the Court of Bosnia and Herzegovina No. X-KR-07/386 dated 16 October 2009, the then accused Milorad Trbić was found guilty that by the acts described in detail in paragraphs 1.a) - h) of the operative part of the Verdict, he committed the criminal offense of Genocide under Article 171 of the CC of B-H, a) killing members of the group and b) causing serious bodily or mental harm to members of the group, all in conjunction with Article 180(1) of the CC of B-H, and sentenced to thirty (30) years long-time imprisonment, with the time he spent in custody credited towards his sentence of imprisonment.

2. Pursuant to Article 188(4) of the CPC of B-H, in relation to the convicting part of the Verdict the accused Trbić was relieved of the duty to reimburse the costs of the criminal proceedings, which were born by the budget of the Court, while pursuant to Article 198(2)

[1] Decree with the force of 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 that was adopted as the republic code in the period of imminent threat of war or during the state of war (Official Gazette of RB-H, no. 6/92) and the Law on confirmation of decrees with the force of law (Official Gazette of RB-H, No. 13/94); hereinafter: the adopted CC of SFRY.

of the CPC of B-H, all aggrieved parties were referred to take civil action with their claims as filed or to be filed under property law.

3. Under the same Verdict, the accused Trbić was acquitted of the charges that by acts described in paragraphs 1, 2 and 3 of the acquitting part of the Verdict he committed the criminal offense of Genocide under Article 171 of the CC BiH, whereby he would have perpetrated acts specified in this article, a) killing members of the group, b) causing serious bodily or mental harm to members of the group, c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and d) imposing measures intended to prevent births within the group, all in conjunction with Article 180(1) and Article 29 of the CC of B-H.

4. Pursuant to Article 189(1) of the CPC of B-H, the costs of the criminal proceedings and remunerations related to the acquitting part of the Verdict were paid from budget appropriations, while pursuant to Article 198(3) of the CPC of B-H all aggrieved parties were referred to take civil action with their claims as filed or to be filed under property law.

5. Deciding on the appeals by the Prosecutor of the Prosecutor's Office of B-H, the then Defense Counsel for the accused Trbić, attorney Milan D. Trbojević, and the aggrieved parties Šuhra Omerović, Nurija Hurić, Mejra Hurić, Naza Hadžić, Mustafa Hadžić, Enver Hadžić and Habib Sinanović, the Appellate Panel of Section I for War Crimes of the Court of B-H, by its Verdict No. X-KRŽ-07/386 dated 21 October 2010, dismissed all these appeals as unfounded and upheld the first-instance Verdict of the Court of B-H No. X-KR-07/386 dated 16 October 2009.

6. Acting upon the appeal of the sentenced person Milorad Trbić, represented by attorney Milan Trbojević, the Constitutional Court of Bosnia and Herzegovina (the Constitutional Court of B-H), on 6 November 2014, rendered Decision No. AP-1240/11 partially granting the appeal in question on account of having established a violation of Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR), and proceeding to quash the Verdict of the Court of Bosnia and Herzegovina No. X-KRŽ- 07/386 dated 21 October 2010 in the part concerning **the application of the more lenient criminal code.** In its decision, the Constitutional Court of B-H noted that the quashing of the Verdict of the Court of B-H No. X-KRŽ-07/386 dated 21 October 2010, in the part as explained above, would in no way affect the appellant's deprivation of liberty or

remand in custody, which is exclusively within the remit of the Court of B-H. In the same Decision, the Constitutional Court dismissed as unfounded the appeal from the said Verdict of the Court of B-H in relation to Article II(3)(e) of the Constitution of B-H and Article 6(1) and (3)(a) of the ECHR.

7. The case was referred back to the Court of B-H, which was obligated to conduct an expedited proceeding and render a new decision, with respect to sentencing, in line with Article II(2) of the Constitution of B-H and Article 7(1) of the ECHR, and to inform the Constitutional Court of B-H, within three (3) months from the day when the Decision was received, of the measures taken to execute this decision.

8. The Decision of the Constitutional Court of B-H No. AP-1240/11 dated 6 November 2014 was delivered to the Court of Bosnia and Herzegovina on 2 December 2014.

9. Acting in accordance with the obligation stemming from the Decision of the Constitutional Court of B-H in question and with the aim of executing the decision as urgently as possible, the Appellate Panel held a public hearing on 19 January 2015 attended by Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Džermin Pašić, the sentenced person Milorad Trbić and his Defense Counsel, attorney Dalibor Pejaković.

10. The Prosecution maintained all its arguments and motions presented in its appeal from the first-instance Verdict of the Court of B-H filed on 28 May 2010.

11. Defense Counsel for the sentenced person Milorad Trbić, attorney Dalibor Pejaković, stood by the arguments raised in the appeal dated 29 May 2010 filed by his predecessor, attorney Milan Trbojević, with a special note that at this stage of the proceedings following the quashing of the final verdict, the accused is still serving his sentence, which is why the Defense moved the Appellate Panel to release him pending its verdict, provided that there is a possibility for his release.

12. The sentenced person Trbić agreed with the presentation by his Defense Counsel, adding that the Court violated his right to a fair trial given that in the process of making its decisions the court must not be under any pressure or influence, which, according to him, was not the case here, and stating that he was not present at any of the places where Muslims from Srebrenica were captured or executed, nor did he know of their capture and execution. Finally, the sentenced person Trbić said that in its verdict the Court of B-H

convicted him of the gravest criminal offense, which he did not commit, and convinced of his innocence he asked the court to acquit him of the charges concerning the criminal offense in question.

II. PROCEDURAL SITUATION FOLLOWING THE DECISION OF THE CONSTITUTIONAL COURT OF B-H

13. Before providing reasons for rendering a new decision with respect to sentencing, in line with Article II(2) of the Constitution of B-H and Article 7(1) of the ECHR, as ordered by the above noted decision of the Constitutional Court of B-H, this Panel finds it necessary to briefly comment on the procedural-legal situation it has found itself in following the quashing of the second-instance Verdict of the Court of Bosnia and Herzegovina No. X-KRŽ-07/386 dated 21 October 2010, in the part as explained above.

14. In its decision the Constitutional Court of B-H explicitly ruled on other objections raised by the appellant, the sentenced person Milorad Trbić, having concluded that the appellant's objections contesting the said verdict of the Court of Bosnia and Herzegovina, *inter alia*, on the grounds of alleged violation of Article II(3)(e) of the Constitution of B-H and Article 6(1) and (3)(a) of the ECHR, are unfounded. In the reasoning of the Constitutional Court's decision (para. 68), it is explicitly stated:

> "The Constitutional Court concludes that the appellant's right to a fair trial, referred to in Article II(3)(e) of the Constitution of B-H and Article 6(1) and (3)(a) of the ECHR, was not violated, as there is nothing in the circumstances of the present case that would lead to the conclusion that the Court based its decision on the evidence that it should not have based it on, or that it failed to evaluate the evidence carefully and conscientiously, thus calling into question the established state of the facts, and, finally, that it failed to explain its decision, that is, that the proceedings as a whole were not fair."

15. In light of this reasoning by the Constitutional Court of B-H, it is clear that in this concrete case it did not question the validity of the second-instance Verdict of the Court of Bosnia and Herzegovina with respect to the existence of the criminal offense and guilt of

the sentenced person Milorad Trbić.[2] This is evident from para. 65 of the Constitutional Court's Decision:

> "The Constitutional Court holds that in order to protect the appellant's constitutional rights it is sufficient to quash the contested Verdict of the Appellate Division of the Court of B-H No. X-KRŽ-07/386 of 21 October 2010 and remand the case back to the Court of B-H to render *a new decision on the sentence* in accordance with Article 7(1) of the ECHR." (emphasis added)

16. In view of the above, upon receiving the decision of the Constitutional Court, the panel of the Appellate Division of the Court of B-H found itself in a procedurally unregulated situation because relevant provisions of the CPC of B-H do not foresee a situation of quashing the second-instance verdict in one part, while upholding or revising the remainder of the first-instance verdict.[3] In particular, the CPC of B-H does not foresee a situation in which the Constitutional Court quashes the second-instance verdict in the part concerning "the application of the more lenient code", without questioning the issue of guilt, which is the situation in the present case. Therefore, mindful of the fact that the Constitutional Court of B-H ordered the Court of B-H to render a new decision with respect to sentencing in expedited proceedings, this Panel tried to find the most efficient way to act in this situation.

17. The Appellate Panel is of the view that from the procedural-legal aspect there are no appeals to rule on, and that the appeals from the first-instance Verdict were mentioned at this Panel's hearing exclusively as a reminder of the earlier course of the proceedings. Therefore, this Panel was mindful of the fact that in its decision the Constitutional Court found that the Panel of the Appellate Division of the Court of B-H erred in application of the law, without finding any procedural deficiencies in the contested verdict. More specifically, it follows from the Constitutional Court's decision that it is satisfied that the First-Instance Panel of the Court of B-H correctly established the state of facts, in which part it was upheld and became final with the rendering of the second-instance Verdict of the Court of B-H No. X-KRŽ-07/386 dated 21 October 2010 given that it has not been quashed in this part by the decision of the Constitutional Court of B-H.

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[2] This is the reason why the Constitutional Court of B-H quashed the Verdict of the Court of B-H No. X-KRŽ-07/386 dated 21 October 2010 only in the part concerning the application of the more lenient criminal code.
[3] Article 315 of the CPC of B-H prescribes conditions for quashing the first-instance verdict, in which case the Appellate Panel holds a retrial.

18. In view of all the foregoing and the fact that there is no specific provision in the law regulating the kind of situation that arose in the present case, the Appellate Panel found that the most efficient way to render a new decision that would remove the violation found by the Constitutional Court, which is binding in nature for this Court, and to do so in an expedited proceeding as ordered by the decision in question, was to revise the Verdict of the Court of B-H No. X-KRŽ- 07/386 dated 21 October 2010 in the manner stated in the operative part of this Verdict.

19. For the purpose of implementing the decision of the Constitutional Court of B-H, the Appellate Panel of the Court of B-H decided as stated in the operative part for the reasons noted below.

III. APPLICABLE LAW

20. In the process of rendering the earlier appellate verdict, which the BiH Constitutional Court subsequently quashed in the part concerning the application of the more lenient criminal code, the Appellate Panel considered the issue of applicable criminal code in the present case. It concluded that in the first-instance (contested) Verdict, having conducted a comparative analysis of relevant genocide provisions in the two codes, namely Article 171 of the CC of B-H and Article 141 of the adopted CC of SFRY[4], the First-Instance Panel correctly concluded that the application of the CC of B-H was more favorable for the accused Trbić – with this code entering into force after the commission of the criminal offense charged against the accused Trbić – compared to the adopted CC of SFRY that was in force at the time of the commission of the criminal offense. In this context, the Appellate Panel noted that in deciding on this issue the Trial Panel correctly established that the sentence to be imposed on the accused gravitated towards the maximum prescribed in the law, with the Trial Panel providing detailed argumentation for taking such a position.

[4] Genocide (Article 141 of the CC of SFRY): „Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its physical destruction in whole or in part, or that measures be imposed intended to prevent births within the group, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.“

21. The Constitutional Court of B-H, however, obviously did not accept this argumentation as evidenced in paras. 58 and 63 of its decision:

> "Based on the referenced case-law, the Constitutional Court points that under the contested Verdict the appellant was found guilty of and sentenced for having committed the criminal offense of Genocide in violation of Article 171 of the CC B-H. The Constitutional Court observes that a definition of the criminal offense of Genocide is identical in both Article 141 of the CC SFRY, applicable at the time of the commission of the referenced criminal offense (in 1995), and Article 171 of the CC B-H, applied retroactively in the case at hand. It, therefore, follows from the foregoing that the appellant was found guilty of the criminal offense which, as such, *constituted a criminal offense at the time of the commission* (within the meaning of the first sentence of Article 7(1) of the ECHR) and that this fact, in terms of guarantees referred to in the second sentence of Article 7(1) of the ECHR, implies the obligation of the Constitutional Court to examine that *a heavier penalty shall not be imposed than the one that was applicable at the time of the commission."*... (para 58.)
>
> "… Comparing the prison sentence of 20 years (as the maximum penalty for the given crime under the CC SFRY) with the sentence of long-term imprisonment of 45 years (as the maximum penalty for the given crime under the CC B-H), the Constitutional Court holds that it is beyond any doubt that the CC SFRY is more lenient to the appellant in the instant case. Therefore, given the fact that it was possible to impose the maximum penalty of 20 years in prison on the appellant according to the CC SFRY, whereas the long-term sentence of 30 years in prison was imposed on him in accordance with the CC B-H, the Constitutional Court holds that the CC B-H was retroactively applied to the detriment of the appellant with respect to sentencing, which is contrary to Article 7 of the ECHR" (para 63.)

22. In light of this position from the Constitutional Court's decision based on which the earlier verdict of this court was quashed – with this position indicating that the more lenient code for the then accused Trbić was the adopted CC of SFRY, and that the retroactive application of the CC of B-H was to the detriment of the accused with respect to sentencing, this Panel concluded that the code to be applied in the present case is the adopted CC of SFRY as the code in force at the time of the commission of the criminal offense. Therefore, the acts of which Milorad Trbić was found guilty under the first-instance Verdict are legally qualified as the criminal offense of Genocide under Article 141 of the

CC of SFRY.

23. In deciding on the mode of participation of the sentenced person Trbić, the Panel established that in the commission of the incriminating acts described in detail in the operative part of the first-instance Verdict, whose commission was not questioned by the Constitutional Court, the sentenced person Trbić acted as a co-perpetrator, in light of which this Panel applied Article 22 of the CC of SFRY.

24. Article 22 of the CC of SFRY (co-perpetration) prescribes:

> "If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act."

25. The general prerequisite for co-perpetration, as a joint commission of crime, is that there is a joint decision to commit a criminal act: each perpetrator decides to commit a crime, they each decide to commit the crime together with others, but the contribution itself is such that, within a joint decision to commit the crime and within the division of roles, it constitutes an important element in the planning process to execute the crime. The focus is on the joint commission of the crime which is being realized through a joint participation in the act of commission itself, or in some other way.

26. The Panel found that the sentenced person Trbić, together with other persons, participated in the acts of commission or that, in some other way, together with these same persons, he committed the incriminating acts, with his contribution being of such nature as to be categorized as co-perpetration. Therefore, in light of the fact that essential factual findings have been proven, the Panel concludes that the sentenced person Trbić substantially, and in relation to some acts decisively, contributed to the commission of the criminal offense, as required by Article 22 of the CC of SFRY.

27. The objective of the common plan was to capture, detain, summarily execute all able bodied Bosniak males from the Srebrenica enclave, who were brought into the Zvornik Brigade zone of responsibility. This is the plan that Milorad Trbić joined in on and desired its implementation. The extent of his participation as well as the evidence as to his intent compels the Panel to find that the accused was an actor who joins into the plan himself sharing the plan with the key players in the VRS Security Organ, and who commits the criminal offense of Genocide in his own interest. The sentenced person Trbić knew of

the criminal plan and its prohibited consequences, but he desired their occurrence, that is, he willed the commission of the criminal offense, thereby acting with direct intent.

IV. DECISION ON SENTENCE

28. In deciding on the sentence, the Panel relied on general rules for meting out a sentence contained in Article 41 of the CC of SFRY, as well as the purpose of punishment prescribed in Article 33 of the CC of SFRY, and in doing so it first determined, pursuant to Article 41(1) of the CC of SFRY, the range of punishment prescribed for the criminal offense in question, in particular the maximum level prescribed in the law, given that in its verdict that was subsequently quashed by the Constitutional Court of B-H, the Second-Instance Panel upheld the sentence of 30 years long-term imprisonment imposed on the sentenced person Milorad Trbić in the first-instance verdict.

29. Moreover, in deciding on the sentence to be imposed on the sentenced person Trbić this Panel was mindful of the general rules on the type and length of punishment, the purpose of punishment and, in particular, the degree of criminal responsibility of the accused, the circumstances in which the act was committed, the degree of danger or injury to the protected object, the past conduct of the offender, his personal situation, his conduct after the commission of the criminal act and the motive from which it was committed, that is, circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances).

30. In this context, the Panel was mindful of the fact that the criminal offense of Genocide under Article 141 of the adopted CC of SFRY carries a minimum of five (5) years imprisonment or the death penalty, which according to the position taken by the Constitutional Court in its decision has been eliminated from the penal system (para. 62 of the decision), so that now the maximum sentence prescribed in the law for this criminal offense is twenty (20) years imprisonment, as clearly stated in paragraph 63:

> "... given the fact that it was possible to impose *the maximum penalty of 20 years in prison on the appellant according to the CC SFRY*, whereas the long-term sentence of 30 years in prison was imposed on him in accordance with the CC B-H..." (emphasis added)

31. This Panel was also mindful of the fact that, under Article 38 of the CC of SFRY, there is no possibility of meting out an imprisonment sentence from within the range from

15 to 20 years.

32. Acting upon the Constitutional Court's decision, which it was bound to follow and which explicitly determined that the maximum sentence that can be meted out for the criminal offense of Genocide is twenty (20) years imprisonment, and having evaluated all mitigating and aggravating circumstances which it finds to have been correctly established in the first-instance Verdict of this Court No. X-KR-07/386 dated 16 October 2009, this Panel holds that the adequate sentence for the sentenced person Milorad Trbić is the one that corresponds to the above noted maximum criminal sanction allowed under the applicable criminal code.

33. In view of all the foregoing, this Panel revised the contested Verdict with respect to the decision on sentence as explained above, with the time the sentenced person Trbić spent in custody and serving the earlier sentence imposed on him in the present case credited towards his sentence of imprisonment.

34. Based on all reasons noted above, the Appellate Panel decided as stated in the operative part of this Verdict.

RECORD-TAKER:	**PRESIDING JUDGE**
Medina Džerahović	**Redžib Begić**

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