Bosnia and Herzegovina

Court of Bosnia and Herzegovina

Case No. S1 1 K 013517 14 Krž

Pronounced on: **25 February 2015**
Written copy issued on: **12 March 2015**

Before the Panel composed of:

Judge Mirko Božović, Presiding
Judge Redžib Begić
Judge Mirza Jusufović

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA
v.
THE ACCUSED ABDULADHIM MAKTOUF

SECOND INSTANCE VERDICT

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

Slavica Terzić

Defense Counsel for the Accused Abduladhim Maktouf:

Attorney Adil Lozo

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Number: S1 1 K 013517 14 Krž
Sarajevo, 25 February 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 Mirko Božović as the Presiding Judge and Judges Redžib Begić and Mirza Jusufović as the Panel members, with the participation of Legal Advisor Nevena Aličehajić as the Record-taker, in the criminal case against the Accused Abduladhim Maktouf charged with the criminal offense of War Crimes Against the Civilian Population under Article 142(1) 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, in conjunction with Article 24 of the same Code, deciding on the Appeal from the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 013517 13 KrI dated 11 July 2014 filed by Defense Counsel for the Accused Abduladhim Maktouf, attorney Adil Lozo, following the public session of the panel of the Appellate Division attended by Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Slavica Terzić, the Accused Abduladhim Maktouf and his Defense Counsel, attorney Adil Lozo, on 25 February 2015 rendered the verdict as follows.

VERDICT

The Appeal by the Defense for the Accused Abduladhim Maktouf **is partially granted,** and accordingly the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 013517 13 KrI dated 11 July 2014 **is revised** in the part thereof in which two earlier verdicts of the Court have been partially set aside, as well as with respect to the decision on sentence contained therein, in such a way that **the Verdict of the Court of Bosnia and Herzegovina No. KPŽ-32/05 dated 4 April 2006 is partially set aside** and the Accused Abduladhim Maktouf **is sentenced** for the criminal offense qualified in the contested Verdict as War Crimes Against the Civilian Population under 142(1) 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, in conjunction with Article 24 of the same Code, of which he had been found guilty in the partially set aside verdict, with the Court having applied Articles 33, 34, 38, 41, 42(1) and 43(1)(1) of the above noted Code, **to imprisonment for the term of three (3) years**, with the time the Accused Maktouf spent in custody from 11 June 2004 until 4 May 2006 and the time he spent

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serving the sentence from 4 May 2006 until 12 June 2009 credited towards the sentence imposed on him in accordance with Article 50 of the same Code.

The rest of the contested Verdict shall remain unchanged.

Reasoning

1. Under the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 013517 13 KrI dated 11 July 2014, the verdicts of this Court Nos. X-127/04 dated 1 July 2005 and KPŽ-32/05 dated 4 April 2006 have been partially set aside in the part concerning the applicable law, in such a way that the acts of which the Accused Abduladhim Maktouf had been found guilty under the Verdict No. KPŽ-32/05 dated 4 April 2006 were legally qualified as the criminal offense of War Crime Against the Civilian Population under Article 142(1) 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] (hereinafter: the adopted CC of SFRY), in conjunction with Article 24 of the same Code (aiding and abetting), as well as with respect to the decision on sentence, and accordingly the Accused Abduladhim Maktouf was sentenced to imprisonment for the term of five (5) years based on the above noted code and with the Court having applied Articles 33, 34, 38 and 41 of the adopted CC of SFRY. As stated in the operative part of the contested Verdict, the verdicts of the Court of Bosnia and Herzegovina Nos. X-127/04 dated 1 July 2005 and KPŽ-32/05 dated 4 April 2006 remained in force. Furthermore, based on Article 50 of the adopted CC of SFRY, it was decided that the time the Accused Abduladhim Maktouf spent in custody from 11 June 2004 until 4 May 2006 and the time he spent serving the sentence from 4 May 2006 until 12 June 2009 would be credited towards the sentence imposed on him in the contested Verdict.

2. Defense Counsel for the Accused Abduladhim Maktouf, attorney Adil Lozo, filed the appeal from this Verdict within the statutory deadline on the grounds of essential violation of the criminal procedure provisions and the decision on criminal sanction, moving the panel of the Appellate Division to grant the appeal, revoke the contested Verdict in its entirety and order that violations of the criminal procedure provisions be removed in the reopened proceedings before the panel of the Appellate Division, or alternatively to revise the contested Verdict in the part on sentencing by imposing on the Accused Abduladhim Maktouf imprisonment for the term of one year for the committed criminal offense.

[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 RBIH, no. 6/92) and the Law on Confirmation of Decrees With the Force of Law (Official Gazette of RBIH, No. 13/94).

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3. The Prosecution responded to the Defense appeal, stating that the grounds for appeal are unfounded and that hence the Appellate Panel should dismiss the appeal as unfounded.

4. In accordance with Article 304 of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC of BiH), a public session of the Appellate Panel was held on 25 February 2015 in the presence of the duly summoned parties and Defense Counsel for the Accused Maktouf.

5. The Defense addressed the Panel maintaining all arguments from its appellate brief.

6. The Prosecution responded by moving the Panel to dismiss the appeal as unfounded.

7. Having reviewed the contested Verdict within the grounds raised on appeal, the Appellate Panel decided as stated in the operative part for the reasons noted below.

8. Primarily, the Defense correctly, in the view of this Panel, points out in its appeal that the first-instance panel created a contradiction in the contested Verdict because it stated in the operative part of its verdict that the Verdict of the Court of Bosnia and Herzegovina No. X-127/04 dated 1 July 2005 was to stay in force although, as stated in the reasoning of the contested Verdict, this verdict had been revoked by the decision dated 23 November 2005, and subsequently, following a retrial, the Appellate Panel of the Court of BiH rendered a new decision, that is, Verdict No. KPŽ-32/05 dated 4 April 2006. Therefore, having found the Defense objection to be sound in this part, this Panel removed the said deficiency of the first-instance verdict by deciding as stated in the operative part of the present Verdict.

9. Moreover, the Defense submits in its appeal that they entirely accept the substance of the decision of the European Court of Human Rights (hereinafter: the ECtHR) in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina* rendered upon applications nos. 2312/08 and 34179/08 dated 18 July 2013, in which the ECtHR found a violation of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) resulting from the retroactive application of the 2003 CC of BiH, instead of the adopted 1976 CC of SFRY. In its decision the ECtHR concluded that *"... since there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerns the sentencing, it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention..."* In its decision the ECtHR, as acknowledged by the Defense too, did not bring into question the existence of a criminal offense or criminal responsibility of the Accused Maktouf for the offense of which he had been found guilty under the above noted final decision of the Court of BiH. Still, the Defense argues that the first-instance panel committed an essential violation of the criminal procedure provisions by conducting the main trial "only formally", that is, by not allowing the Defense to propose and present evidence, which, in the Defense's view, would have been of relevance to the Panel's proper decision on sentencing. In this

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context, the Defense submits that the First-Instance Panel erred when it refused to hear from the Defense in relation to the evidence it planned to present in the reopened proceedings. By denying this Defense motion, so the Defense argued, the Panel that rendered the contested decision effectively denied itself the opportunity to directly hear evidence from a certain “witness”, who the Defense claimed was the organizer and direct perpetrator of the incident of which the Accused Maktouf had been found guilty, as well as evidence from witnesses Ivo Fišić, Kazimir Pobrić and Salko Beba, including other evidence presented in the earlier course of the proceedings that might be of relevance to decision on the length of sentence. It is on account of the above argumentation, as the Defense claims, that the principle of immediate presentation of evidence has been violated, as well as Article 6 of the ECHR, because the Panel, so the Defense argued, that was not cognizant of evidence presented back in 2005 and 2006 decided on the length of sentence.

10. The Appellate Panel dismisses the arguments alleging an essential violation of the criminal procedure provisions as unfounded.

11. This Panel primarily notes that by objecting on the grounds of essential violation of the criminal procedure provisions, the Defense assumes a contradictory position because it has acknowledged its complete acceptance of the ECtHR's decision thereby not questioning the existence of guilt of the Accused Maktouf for the acts described in the final Verdict of the Court of Bosnia and Herzegovina No. KPŽ-32/05 dated 4 April 2006, while pointing to an alleged violation of the principle of imminent presentation of evidence because, allegedly, at the time of making its decision, the First-Instance Panel did not have insight into evidence based on which the said verdict was rendered, and arguing that the Defense was prevented from presenting new evidence. It is true that the Defense states that the evidence relates to establishing some circumstances that are of relevance to the decision on sentence. However, considering the part of the appeal in which the Defense provides more detail as to the circumstances with respect to which evidence would be presented, it is obvious that it relates to the circumstances surrounding the commission of the criminal offense. It is stated in the appeal that one of the witnesses (referred to as “witness”) was going to inform the Court that it was he who planned, organized and participated in the abduction of civilians, that witness Ivo Fišić was going to talk about circumstances concerning the potential responsibility of the “witness” and other persons who took him away from his apartment, witness Kazimir Pobrić was going to testify about how the Accused Maktouf set him free and drove him to Travnik on the third day of his captivity, while witness Salko Beba was going to testify how the prosecutor, who was seized of the case at the time, requested of him to falsely testify against Abduladhim Maktouf threatening him that he could lose his administrative job.

12. In the reopened criminal proceedings – with the reopening resulting from the above noted decision of the ECtHR – given that the existence of the offense and guilt of the Accused had not been questioned, the first-instance panel had to limit itself in making a contested decision to the issues of applicable law and the decision on sentence, in which process it was bound by all factual findings and conclusions from the Verdict of this Court No. KPŽ-32/05 dated 4 April 2006. Since the circumstances relevant to the decision on

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sentence stem from the factual findings related to the commission of the criminal offense and criminal responsibility of the Accused Maktouf, which have already been established in the final Verdict No. KPŽ-32/05 dated 4 April 2006, the first-instance panel that rendered the contested Verdict was bound by these findings. Contrary to the Defense claims, the Defense had the opportunity in the reopened proceedings to present new documentary evidence in relation to the length of the sentence, which is why this Panel holds that the First-Instance Panel was right when it refused the Defense motion to hear the above-mentioned witnesses. It is for this reason that this Panel holds that the Defense arguments claiming that the First-Instance Panel's refusal to hear this evidence violated the principle of direct presentation of evidence and the right to a fair trial guaranteed under Article 6 of the ECHR have no merit. Therefore, this Panel concludes that the Defense allegations claiming that the First-Instance Panel committed an essential violation of the criminal procedure provisions are unfounded.

13. Having reviewed the Defense objections with respect to the decision on sentence on the other hand, this Panel holds that the Defense is right in arguing that the sentence imposed by the First-Instance Panel in the contested Verdict is too harsh considering all the circumstances of the participation of the Accused Maktouf in the commission of the criminal offense, as well as the mitigating circumstances found in relation to the Accused Maktouf by the First-Instance Panel. In reaching this conclusion, this Panel was primarily mindful of the fact that the Accused Maktouf had been found guilty of aiding and abetting in the commission of the criminal offense and that Article 24 of the adopted CC of SFRY prescribes that an aider and abettor may receive a more lenient punishment, as well as of Article 42(1) of the same Code, which prescribes as one of the bases for mitigation of sentence the cases in which the law stipulates that a perpetrator of a criminal offense may receive a more lenient punishment. It is exactly this fact, in connection with other mitigating circumstances, such as the fact that the Accused Maktouf is a family man, that he is a father of four children, one of whom is a minor, that he has no prior convictions, his fair conduct during the entire proceedings, as well as his contribution in the return of the aggrieved party Kazimir Pobrić from the camp where he was detained, to Travnik – which are all circumstances pointed out by the Defense in their appeal – that warrants a conclusion that in the present case, contrary to the position taken in the contested Verdict, the accused Maktouf should have been sentenced below the minimum level of five years imprisonment, which is the minimum sentence prescribed in the adopted CC of SFRY for the criminal offense of which the Accused Maktouf has been found guilty.

14. Deciding on the length of sentence to be imposed on the Accused Maktouf for the committed criminal offense, this Panel was mindful of the above noted mitigating circumstances that have been properly found to exist in relation to the Accused Maktouf, and that have been evaluated as such by the First-Instance Panel too. However, with respect to the aggravating circumstances established by the First-Instance Panel in relation to the Accused Maktouf, this Panel finds that some of those aggravating circumstances have not been properly established. It follows from the reasoning of the contested Verdict that the First-Instance Panel considered as aggravating the circumstance that the abducted persons were unarmed and placed *hors de combat,* and that they had a civilian status, as well as the intent of the Accused Maktouf in the

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commission of the criminal offense. The civilian status of the aggrieved parties is an essential element of the criminal offense of which the Accused Maktouf has been found guilty, while acting with intent is a requirement for finding an aider and abettor guilty, which is why these circumstances could not have been evaluated for the second time as aggravating circumstances in meting out a sentence.

15. In light of all the above, this Panel finds that imprisonment for the term of three (3) years is adequate in view of the nature and gravity of the criminal offense, the degree of criminal responsibility of the Accused Maktouf and the purpose of punishment set forth in Article 33 of the adopted CC of SFRY.

16. Based on all the above noted reasons and pursuant to Article 314(1) of the CPC of BiH, this Panel partially granted the Defense appeal and revised the first-instance Verdict in the manner stated in the operative part of this Verdict.

RECORD-TAKER: **PRESIDING JUDGE**

Nevena Aličehajić **Mirko Božović**

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

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