

Bosna i Hercegovina

Босна и Херцеговина



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

Case No.: S1 1 K 003426 15 Krž 2

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**Before the Panel of Judges composed of: Mirko Božović, Presiding
Hilmo Vučinić, member
Redžib Begić, member**

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MIODRAG MARKOVIĆ

SECOND INSTANCE VERDICT

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

Mr. Vladimir Simović

Counsel for the sentenced person Miodrag Marković:

Ms. Svjetlana Lazić, Attorney

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No: S1 1 K 003426 15 Krž 2
Sarajevo, 9 April 2015

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting in the Panel of the Appellate Division of the Court comprised of Judge Mirko Božović, as the Panel President, and Judges Hilmo Vučinić and Redžib Begić, as members of the Panel, with the participation of Legal Advisor Dženana Deljkić-Blagojević, as the Minutes-taker, in the criminal matter against the sentenced person Miodrag Marković, for the criminal offense of War Crimes against Civilians under Article 173(1)(e) of the Criminal Code of BiH (CC BiH), as read with Article 180(1) of the CC BiH, pursuant to the Decision of the Constitutional Court of Bosnia and Herzegovina, number AP - 929/12 of 17 March 2015, revoking the Verdict of the Court of Bosnia and Herzegovina No. **S 1 1 K 003426 10 KrI (with reference to No. X-KRŽ-07/442) of 27 September 2011** in the part pertaining to the application of the more lenient law, having held a public session of the Appellate Panel in the presence of the Prosecutor of the BiH Prosecutor's Office, Mr. Vladimir Simović, the sentenced person Miodrag Marković and his Defense Attorney, Ms. Svjetlana Lazić, on 9 April 2015 issued the following:

VERDICT

The Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 003426 11 Krž of 27 September 2011 is hereby **revised** in the part pertaining to the application of substantive law and the decision on sentence, thus legally qualifying the acts of which Miodrag Marković is found guilty under the Court's Trial Verdict as the criminal offense of War Crimes against Civilians under Article 142(1) of the Criminal Code of the Socialistic Federative Republic of Yugoslavia, which was adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of SFRY^[1], and sentencing him for the said criminal offense, pursuant to the

^[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 Socialistic Federative Republic of Yugoslavia, which was adopted as the Republic law at the times of imminent danger of war or at the time of war (Official Gazette of the

referenced statutory provision, as well as Articles 33, 38 and 41 of the adopted CC SFRY, to imprisonment for a term of 6 (six) years.

Pursuant to Article 50(1) of the adopted CC SFRY, the time the sentenced person spent both in custody and serving the prison sentence, running from 15 April 2011 onwards, shall be credited towards the prison sentence imposed.

As to its remaining part, the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 003426 11 Krž of 27 September 2011 shall remain unrevised.

R e a s o n i n g

I. PROCEDURAL HISTORY

1. Under the Verdict of the Court of Bosnia and Herzegovina (the Court of BiH) number S1 1 K 003426 10 Krl (X-KR-10/948) of 15 April 2011, the Accused Miodrag Marković was found guilty of having committed the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e), as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC BiH), by the acts described in the Operative Part of the Verdict. The First Instance Panel sentenced the Accused to imprisonment for a term of 7(seven) years for the mentioned criminal offense.

2. The Accused's Counsel filed an appeal from the referenced Verdict. Under its Verdict No. S1 1 K 003426 11 Krž of 27 September 2011, the Court of BiH dismissed the appeal as ill-founded in its entirety, and upheld the Trial Verdict.

3. Having acted upon the appeal filed by Ms. Svjetlana Lazić, Counsel for the sentenced person Marković, the Constitutional Court of Bosnia and Herzegovina (the Constitutional Court of BiH), on 17 March 2015 delivered a decision number AP – 929/12 granting the referenced appeal, in part, and finding violations of Article II/2 of the Constitution of Bosnia and Herzegovina and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), and revoking the

RBiH, No. 6/92) and the Law on the Confirmation of Decrees with the Force of Law (Official Gazette of

Verdict of the Court of BiH No. S1 1 K 003426 11 Krž of 27 September 2011 in the part pertaining to the application of the more lenient law.

4. In the referenced Decision, the Constitutional Court of BiH noted that the revocation of the Verdict of the Court of BiH, in the part as stated above, shall in no way affect the Applicant's deprivation of liberty, apprehension and imprisonment, which exclusively falls under the jurisdiction of the Court of BiH. The case was referred back to the Court of BiH, which shall, as a matter of urgency, render a new decision in relation to the sentencing, pursuant to Article II/2 of the Constitution of BiH and Article 7(1) of the ECHR.

5. The same Decision dismissed, as ill-founded, the appeal filed by Miodrag Marković from the same Verdict of the Court of BiH in relation to Article II/3.e) of the Constitution of BiH, Article 5 and Article 6 of the ECHR and Article 1 of Protocol 12 to the European Convention.

6. The referenced Decision of the Constitutional Court of BiH was forwarded to the Court of BiH on 31 March 2015.

7. In acting pursuant to the obligation transpiring from the referenced Decision of the Constitutional Court of BiH, and with a view to implementing it as a matter of urgency, on 9 April 2015 the Appellate Panel held a public session, which was attended by the Prosecutor of the BiH Prosecutor's Office, the sentenced person Miodrag Marković and his Attorney, Ms. Svjetlana Lazić.

8. The Prosecutor submitted that he would leave to the Court of BiH to decide on the application of the appropriate Criminal Code. If the Court, in meting out the punishment, nevertheless applies the CC SFRY, the Prosecutor moved the Court not to apply any reduction of sentence for the perpetrator below the statutory prescribed minimum, and to take account of all the aggravating circumstances on the part of the sentenced person relating to the offense he had committed. Particularly relevant are the facts that, at the time when the war crime of rape was committed, the injured party was very young, that the sentenced person used the fire weapon as the means of duress, and that he has still expressed no remorse for the offense committed.

BiH, No. 13/94);

9. Counsel for the sentenced person Marković submitted that the CC SFRY is the more lenient law which the Court should apply to the sentenced person Marković. Counsel moved the Appellate Panel of the Court of BiH to impose on the sentenced person, for the acts of which he is found guilty, a sentence taking into account the particularly extenuating circumstances on the part of the sentenced person, among which she highlighted the fact that the sentenced person has an ill son, that he is in a difficult financial situation because no member of his family has any employment, that due to the incident-related allegations at the time of the crime commission he was reassigned from the police duties to military ones, that he has been practically already punished, and that he has been serving the sentence for four years, during which period his conduct was exemplary.

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

10. Prior to the delivering of a new decision in relation to the sentencing, pursuant to Article II/2 of the Constitution of BiH and Article 7(1) of the ECHR, as ordered under the referenced Decision of the Constitutional Court of BiH, the Panel deems it necessary to provide brief reasons regarding the procedural situation it has faced after the Second Instance Verdict revocation in the part as indicated above.

11. Specifically, in its Decision, the Constitutional Court of BiH explicitly dealt with the remaining complaints advanced by the sentenced person Marković, finding that the Applicant's complaints contesting the Verdict of the Court of BiH, *inter alia*, for the violations of Article II/3.e) of the Constitution of BiH and Article 6 of the ECHR, are ill-founded. The reasoning of the Constitutional Court of BiH's Decision explicitly stated the following:

"The Constitutional Court of BiH finds that the Applicant's right to a fair trial under Article II/3e of the Constitution of BiH and Article 6 of the ECHR has not been violated, since there is nothing in the circumstances pertaining to the concrete case pointing to a conclusion that the Court of BiH was arbitrary in the remaining parts of the contested decisions, in relation to the Applicant's other unreasonable complaints."

12. Given the foregoing reasoning of the Constitutional Court of BiH, it is clear that, in the concrete case, the Constitutional Court of BiH did not bring into question the proper nature of the Verdict of the Court of BiH in the part pertaining to the existence of the criminal offense and the guilt of the sentenced person Marković, for the acts of which the

Court of BiH found him guilty.

13. Considering the foregoing, and upon receiving the Constitutional Court of BiH's Decision, the Appellate Division Panel of the Court of BiH faced a situation practically unregulated by the procedural law, since the CPC BiH contains no provisions providing for any possibility to revoke a verdict and refer the case for a new trial.¹ In particular, the CPC BiH contains no provisions regulating the course of action in a situation where a second instance verdict has been revoked under the decision of the Constitutional Court of BiH in the part of the decision on "the application of the more lenient law", when the issue of guilt is not disputed at all, as is the situation in the concrete case. Therefore, starting from the fact that the Constitutional Court of BiH has ordered the Court of BiH to deliver a new decision in relation to the sentencing part, as a matter of urgency, the Panel tried to find the most efficient way to act in such a situation.

14. The Appellate Panel concluded that, in the concrete situation, it is most efficient to act pursuant to Article 314 of the CPC BiH, which provides that "*By honoring an appeal, the Panel of the Appellate Panel 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.*" The Panel took into account that, after concluding that the Trial Panel misapplied the law, but is satisfied with the accuracy of the state of facts established by the Trial Panel, the Appellate Panel will revise the verdict in the light of the proper application of the law, and as needed, mete out the appropriate sentence, as provided for in Article 314 and Article 308 of the CPC BiH.

15. Despite the fact that, in the concrete case, there is no appeal which would be a subject of decision, the Panel took into account the fact that the Constitutional Court of BiH found in its Decision that the Panel of the Appellate Division of the Court of BiH misapplied the law, which is a decision that the Appellate Panel can issue in the regular proceeding when such an appellate complaint exists. Also, in deciding on the Applicant's remaining complaints, the Constitutional Court of BiH *finds no arbitrariness in establishing and evaluating the facts, or any other violations of the procedure in the contested Verdict.* Therefore, it transpires from the Constitutional Court of BiH's decision that the

¹ Article 315 of the CPC BiH governs the requirements for revoking the first instance verdict, where the Appellate Panel itself shall hold the trial.

Constitutional Court of BiH is satisfied with the accuracy of the finding of facts established by the Trial Panel of the Court of BiH in its Verdict rendered in the case of the sentenced person Marković No. S1 1 K 003426 10 Krl (X-KR-10/948) of 15 April 2011, and upheld by the Appellate Panel of the Court of BiH on appeal. Thus, in the Panel's view, the factual situation is similar to the procedural situation regulated in Article 314 of the CPC BiH. Therefore, in the absence of a strict statutory provision which would regulate the course of action in the situation which occurred in the concrete case, the Panel concluded that, with a view to rendering a new decision, as a matter of urgency, and remedying the violation found in the Decision of the Constitutional Court, which is binding on the Court of BiH, it is most functional and most efficient to revise the Verdict of the Court of BiH in the way as stated in the Operative Part of the Verdict.

16. Starting from the Constitutional Court of BiH's Decision, and with the view to implementing it, the Appellate Panel of the Court of BiH rendered the decision, as stated in the operative Part herein, for the reasons that follow:

III. APPLICABLE LAW

17. In rendering its original Verdict, revoked by the referenced Decision of the Constitutional Court of BiH in the part pertaining to the application of the more lenient law, the Appellate Panel dealt with the issue of substantive law application in the present case. Having made a comparative analysis of Article 173 of the CC BiH and Article 142 of the adopted CC SFRY, primarily from the aspect of sentences prescribes under these two laws for the criminal offense of War Crimes against Civilians, the Panel concluded that the application of the CC BiH was more favorable for the then Accused, which entered into force after the commission of the crime charged against the Accused, as opposed to the adopted CC SFRY, which was effective at the time of the commission the crime at issue. The Appellate Panel provided a comprehensive line of arguments for such a conclusion in its original Verdict, and will not repeat it herein.

18. It is obvious, however, that the Constitutional Court of BiH did not accept such an argumentation in its Decision revoking the original Verdict of the Appellate Court in this part and noting that the adopted CC SFRY is the more lenient law to the then Accused. Thus, relying on the standards of the application of the appropriate Criminal Code provided by the Constitutional Court of BiH, the Panel concluded that the adopted CC SFRY should apply in the concrete case as the law that was in effect at the time when the criminal

offense was committed.

IV. SENTENCING

19. Bearing in mind that the Panel deemed justified the application of the adopted CC SFRY to the concrete case, the referenced law also had to be applied to the punishment fixing procedure. The Panel was under obligation to consider the magnitude of the sentences prescribed in Article 142 of the adopted CC SFRY for the criminal offense of which the sentenced person Marković was found guilty, pursuant to the provisions prescribing the general standards in fixing the punishment (Article 41 of the adopted CC SFRY).

20. In this regard, the Panel took into account that the sentence prescribed for the criminal offense of War Crimes against Civilians under Article 142 of the adopted SFRY was a prison sentence not less than 5 (five) years or the death penalty. Also, in fixing the punishment pursuant to Article 41 of the adopted CC SFRY, the Panel paid special attention to all the circumstances which may affect rendering a more or less stringent sentence (extenuating and aggravating circumstances).

21. Among the extenuating circumstances, the Panel took into account the sentenced person's family situation and the fact that he is a father of three children, one of whom is seriously ill, the sentenced person's difficult financial situation and indigence, and the fact that he has no prior convictions. Therefore, these are the same extenuating circumstances which the Trial Panel also took into account in rendering the Trial Verdict. The Trial Panel found that these extenuating circumstances, in their entirety, were extraordinary, by their character, which justified the reduction of sentence below the limits prescribed by the CC BiH, which was applied in the Trial Verdict.

22. The Appellate Panel notes that the reduction of sentence in the Trial Verdict was functional considering the magnitude of punishment prescribed for this criminal offense pursuant to the CC BiH, and the fact that the imposed prison sentence for a term of 7 (seven) years, by which the purpose of punishment is being achieved, could be imposed only provided that the provision on the court's reduction of sentence is applied (Article 49, item b) of the CC BiH).

23. By accepting the Trial Panel's position, in the concrete procedural situation, that all the referenced circumstances pertaining to the sentenced person, in their entirety, are

extraordinary extenuating circumstances by their nature, the Panel concluded that, given that the injured party Z-1 was a minor at the time of the crime commission and that the commission of the crime affected her mental health in consequence, the purpose of punishment, primarily the general deterrence, would not be achieved to the necessary extent by a sentence reduced below the statutory minimum.

24. Specifically, Article 42 of the CC SFRY provides that the court may reduce the punishment below the minimum limit prescribed by the law, but only if both of the cumulative requirements have been satisfied: when the court finds that extraordinary extenuating circumstances exist and that the aims of punishment may be attained by the lesser punishment. According to the Panel, the first requirement, but not the other, has been satisfied, wherefore the Panel concludes that the application of Article 42(2) of the adopted CC SFRY and fixing the punishment below the statutory limit are not justified.

25. Unlike the original Trial Verdict, where the Court took into account the sentencing framework of the then applied CC BiH², and where the extraordinary extenuating circumstances resulted in imposing the sentence below the statutory prescribed minimum, the Panel in such a situation deemed that, by the then imposed sentence of 7 (seven) years, which could be imposed only by reducing the punishment, the purpose of punishment prescribed by the law would be achieved.

26. In view of all the foregoing, and considering the statutory limits of punishment for the criminal offense at issue, the purpose of punishment and all the circumstances which may affect the imposing of a more or less stringent sentence (the degree of criminal responsibility of the sentenced person, motives for which the offense was committed, the degree of danger to or violation of the protected value, the circumstances under which the offense was committed, and the personal circumstances of the sentenced person), the Panel concluded that the prison sentence for a term of 6 (six) years for the committed criminal offense is proportionate with all the circumstances and the sentenced person's personality, and that it will fully achieve the purpose of punishment, both special and general deterrence, as prescribed in Article 33 of the adopted CC SFRY.

27. In view of all the foregoing, the contested Verdict had to be revised, not only with regard to the application of substantive law, but also with regard to the sentencing.

Pursuant to Article 50(1) of the adopted CC SFRY, the time the sentenced person spent in custody, as well as in serving the previously imposed sentence in the case, running from 15 April 2011 as the day when he was deprived of liberty, shall be credited towards the sentence imposed.

28. For all the foregoing reasons, the Appellate Panel decided as stated in the Operative Part of the Verdict.

**PANEL PRESIDENT
JUDGE**

RECORD-TAKER:

Dženana Deljković Blagojević

Mirko Božović

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

² Article 173 of the CC BiH prescribes a prison sentence not less than ten years or a long-term imprisonment.