

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Case No. S1 1 K 002735 16 Krž 4

Delivered on: 28 January 2016

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Before the Panel of Judges composed of:

Mirko Božović, Presiding

Redžib Begić, member

Tihomir Lukes, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MLADEN MILIĆ

SECOND INSTANCE VERDICT

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

Mr. Dževad Muratbegović

Counsel for the sentenced person Mladen Milić:

Mr. Simo Tošić, Attorney

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CONTENTS

| | |
|--|---|
| I. PROCEDURAL HISTORY..... | 4 |
| II. PROCEDURAL SITUATION AFTER THE DECISION OF THE CONSTITUTIONAL COURT OF BIH..... | 6 |
| III. APPLICABLE LAW..... | 7 |
| IV. SENTENCING..... | 9 |

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War crimes, sitting in the Appellate Division Panel composed of judges Mirko Božović, as the Presiding, and Redžib Begić and Tihomir Lukes, as members of the Panel, with the participation of legal officer Selena Beba, as the Minutes taker, in the criminal matter against the sentenced person Mladen Milić, for the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina (the CC BiH), as read with Article 180(1) and Article 31 of the Criminal Code of Bosnia and Herzegovina, in relation to the Decision of the Constitutional Court of Bosnia and Herzegovina, No. AP-3312/12 of 27 November 2015, revoking the Verdict of the Court of Bosnia and Herzegovina, No. S 1 1 K 002735 12 Krž3 of 23 April 2012, in the part concerning the substantive law application in relation to the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH, having held a public session of the Appellate Division Panel in the presence of Mr. Dževad Muratbegović, Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, the sentenced person Mladen Milić and his Defense Attorney, Mr. Simo Tošić, on 28 January 2016, delivered the following:

VERDICT

The Verdict of the Court of Bosnia and Herzegovina, No. S 1 1 K 002735 12 Krž3 of 23 April is hereby **revised** in the part concerning the application of substantive law and the sentencing, and the acts of which Mladen Milić was found guilty under the Trial Verdict are now legally qualified as the criminal offense of War Crimes against Civilians under Article 142(1) of the Criminal Code of the Socialistic Federative Republic Yugoslavia, which was adopted based on the Law on Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the SFRY¹, as read with Article 24 of the same Code, for which the Panel sentenced him, pursuant to the referenced legal provisions, as well as Articles 33, 38 and 41 of the CC SFRY, to imprisonment for a term of **7 (seven) years**. Pursuant to Article 50(1) of the CC SFRY, the time the sentenced person spent in custody, running from 8 September 2010 to 7 October 2010, and from 28 October 2011 onwards, as well as in serving the prison sentence received under the final Verdict of the Court of BiH, No. S1 1 K 002735 11 Krl of 28 October 2011 onwards, shall be credited towards the sentence imposed.

¹ Decree with the force of law relative to the application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialistic Federative Republic of Yugoslavia that was adopted as a republic law at the time of immediate war danger or the state of war (Official Gazette of the RBiH, No. 6/92) and the Law on the Confirmation of Decrees with the Force of Law (Official Gazette of the RBiH, No. 13/94)- hereinafter: the adopted CC SFRY.

The Verdict of the Court of BiH, No. S 1 1 K 002735 12 Krž3 of 23 April 2012, shall remain unrevised in its remaining part.

R e a s o n i n g

I. PROCEDURAL HISTORY

1. Under the Verdict No. S 1 1 K 002735 11 Krl of 28 October 2011, the Court of BiH found the then accused Ljubiša Vranješ and Mladen Milić guilty of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC, as read with Article 180(1) of the CC BiH, and sentenced them to imprisonment for a term of 10 (ten) years each.

2. In deciding upon the appeals filed by the Prosecution BiH, the accused Ljubiša Vranješ and his Counsel, and Counsel for the then accused Mladen Milić, the Appellate Panel of Section I for War Crimes of the Court of BiH delivered a second instance Verdict No. S1 1 K 002735 12 Krž3 of 23 April 2012, dismissing as ill-founded the appeal filed by the BiH Prosecution, granting in part both the appeal filed by the accused Ljubiša Vranješ and his Counsel, and the appeal filed by Counsel for the accused Mladen Milić, and revised the Verdict of the Court of BiH No. S1 1 K 002735 11 Krl of 28 October 2011 with regard to the legal qualification of the offense and the sentencing, by legally qualifying the acts of the Accused of which the referenced Verdict found them guilty as the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH, as read with Article 180(1) of the CC BiH and Article 31 of the CC BiH, and imposed on them prison sentences for a term of 8 (eight) years each, while the Trial Verdict remained unrevised in its remaining part.

3. Having acted upon the application filed by the sentenced person Mladen Milić, the Constitutional Court of Bosnia and Herzegovina (the Constitutional Court of BiH), on 27 November 2015 issued a Decision No. AP-3312/12 granting the referenced application, in part, finding a violation of the right to a fair trial under Article II/3.e) of the Constitution of BiH and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), and revoked the Verdict of the Court of BiH, No. S 1 1 K 002735 12 Krž3 of 23 April 2012, in the part pertaining to the application of substantive law in relation to the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH. The Decision of the Constitutional Court of BiH noted that the Court of BiH violated the applicant's right under Article II/3.e) of the Constitution of BiH and Article 6(1) of the ECHR because no explanation was provided, in relation to the application of Article 173 of the CC BiH, which of the two laws, CC BiH or the CC SFRY, provides for a more lenient punishment for the criminal offense of War Crimes against Civilians, and because in applying the substantive law the Court failed to determine the more lenient law from the aspect of minimum prescribed sentence.

4. The Decision of the Constitutional Court of BiH noted that the revoking of the Court of BiH's Verdict No. S 1 1 K 002735 12 Krž₄ of 23 April 2012, in the part as stated above,

shall in no way affect the applicant's deprivation of liberty, apprehension and custody, which are exclusively 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, issue a new decision, pursuant to the standards of the referenced Decision of the Constitutional Court of BiH, and pursuant to Article II/3.e of the Constitution of BiH and Article 6(1) of the ECHR.

5. The same Decision dismissed as ill-founded the appeal filed by Mladen Milić, from the referenced Verdicts of the Court of BiH, No. S 1 1 K 002735 12 Krž3 of 23 April 2012 and No. S 1 1 K 002735 11 Krl of 28 October 2011 in relation to all other aspects of the right to a fair trial under Article II/3.e) of the Constitution of BiH and Article 6(1) and (2) of the ECHR. The Court of BiH was ordered to notify the Constitutional Court of BiH, within a 3 (three) month deadline, about the measures undertaken to implement its Decision.

6. The Decision of the Constitutional Court of BiH, No. AP- 3312/12 of 27 November 2015, was submitted to the Court of BiH on 5 January 2016.

7. Having acted in compliance with the obligations under the referenced Decision of the Constitutional Court of BiH, No. AP- 3312/12 of 27 November 2015, with the aim of its prompt implementation, the Appellate Panel held, on 28 January 2016, a public session of the Appellate Division, which was attended by Mr. Dževad Muratbegović, Prosecutor of the BiH Prosecutor's Office, the sentenced person Mladen Milić and his Counsel, Mr. Simo Tošić.

8. The Prosecutor fully stood by the Indictment issued on 10 November 2010, as amended on 14 September 2011. The Prosecutor moved the Panel of the Appellate Division of the Court of BiH to qualify the acts of which Mladen Milić was found guilty pursuant to the CC SFRY, and accordingly impose on him a prison sentence within the limits prescribed by the referenced law, without reducing the punishment below the statutory minimum prescribed for the criminal offense at issue, finding that the requirements to do so were not satisfied.

9. Mr. Simo Tošić, Defense Attorney for the sentenced person Mladen Milić, submitted with regard to the application of the more lenient law that, in the concrete case, the CC SFRY is the more lenient law, since a prison sentence of five years is, as a special minimum punishment, prescribed for the criminal offense of War Crimes against Civilians under Article 142 of the CC SFRY. Counsel further submitted that the Verdict No. S 1 1 K 002735 12 Krž3 of 23 April 2012 imposed on the sentenced person a prison sentence below the statutory minimum pursuant to the CC BiH, and that, therefore, the punishment should be reduced again in the concrete case, that is, a prison sentence less than five years should be imposed, in accordance with the CC SFRY, which should in fact result in the sentenced person's release. Counsel ultimately submitted that the sentenced person caused no problems in serving his sentence hitherto, and that his sentence serving was even terminated once.

10. The sentenced person Mladen Milić primarily stood by his Counsel's arguments, expressed his remorse for the fact that the Grgić brothers were deprived of their lives, and extended his condolences to the Grgić₅ family. He further submitted that, regardless

of the fact that he deprived no person of his life, he felt guilty because on the critical day he was a driver on duty, who drove the Grgić brothers to the critical site. The sentenced person submitted that he would have prevented the incident had he only been aware of the intent to deprive them of their lives, particularly because he had known one of the brothers, and socialized together with him before the war. The sentenced person petitioned the Panel acting in the case to impose on him a sentence pursuant to the CC SFRY's provisions, and to take into account all the extenuating circumstances, the degree of guilt, his past life and personal situation. Ultimately, the sentenced person stated that he has been serving the sentence pursuant to the relevant regulations, that he had accepted labor engagement already when he started serving his sentence, for which the instructors praised him, concluding that in the process of his rehabilitation the purpose of punishment was completely achieved.

II. PROCEDURAL SITUATION AFTER THE DECISION OF THE CONSTITUTIONAL COURT

11. Prior to the issuance of new decision relating to the sentencing, pursuant to Article II/3 e) of the Constitution of BiH and Article 6(1) of the ECHR, as ordered under the referenced Decision, the Panel has held it necessary to provide a summary of the reasons for the procedural situation it faced following the revocation of the second instance Verdict of the Court of BiH, No. S 1 1 K 002735 12 Krž3 of 23 April 2012, in the part as indicated above.

12. The Decision of the Constitutional Court of BiH explicitly adjudicated the remaining complaints advanced by the applicant-sentenced person Mladen Milić, and found that the Applicant's complaints are ill-founded. The reasoning of the Decision of the Constitutional Court of BiH explicitly stated the following:

"The Constitutional Court has noted that there is no violation of the right to a fair trial under Article II/3.e) of the Constitution of BiH and Article 6(1) and (2) of the ECHR since nothing in the challenged decision points to arbitrariness in the determining and evaluating of the facts in relation to the establishment of the applicant's criminal liability, or to the violation of the principle of *in dubio pro reo*. During the entire criminal proceedings, the applicant was provided with expert assistance, and nothing brought him into a less favorable position in relation to the Prosecution."

13. Considering such an explanation 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 Verdict of the Court of Bosnia and Herzegovina in the part relating to the existent criminal offense of War Crimes against Civilians and the guilt of the sentenced person Mladen Milić for the acts of which the Panel of the Appellate Division of the Court of BiH found him guilty.

14. In view of the foregoing, having received the Decision of the Constitutional

Court of BiH, the Panel of the Appellate Division of the Court of BiH faced a situation unregulated by the procedural law, since the CPC BiH contains no provisions providing for any options to revoke a verdict and refer the case back for a new trial.² In particular, the CPC BiH contains no provisions to comply with in a situation when a second instance judgment is revoked by the decision of the Constitutional Court of BiH only in the part of the decision relating to the substantive law application, and when the issue of guilt is undisputable, such as in the concrete case. Therefore, considering the fact that the Constitutional Court of BiH has ordered the Court of BiH to render a new decision as a matter of urgency, in relation to the sentencing, the Panel has made efforts to determine the most efficient way to act in such a situation.

15. The Appellate Panel has concluded that, in the concrete situation, it should act pursuant to Article 314 of the CPC BiH, that is, revise, in part, the second instance Verdict in relation to the application of substantive law, and, accordingly, re-examine the decision on sentence too.

16. Even though there is no appeal in the concrete case as a subject of adjudication, the Panel took into account that the Decision of the Constitutional Court of BiH revoked the second instance Verdict in the part pertaining to the application of substantive law, which would be decided upon by the Appellate Panel in the appellate proceedings, which may, pursuant to Article 314(1) of the CPC, revise the first instance verdict, if it finds a violation of the Criminal Code in that respect. This is exactly the situation this Panel has faced in the concrete case. Therefore, in the absence of any strict legal provision regulating the acting in such a situation, the Appellate Panel has acted as stated in the Operative Part of the Verdict.

III. APPLICABLE LAW

17. In rendering its previous Verdict, that was revoked by the referenced Decision of the Constitutional Court of BiH in the part concerning the application of substantive law, the Appellate Panel accepted the comprehensive line of arguments provided in the Trial Verdict No. S1 1 K 002735 11 Krl of 28 October 2011 regarding the substantive law application, namely the application of the CC BiH, and will not repeat it at this point. Bearing in mind that the Appellate Panel reviews the Verdict only insofar as contested by the appellate complaints, pursuant to Article 306 of the CPC BiH, namely that the decision of the Appellate Panel is limited solely on the issues raised and explained by the parties in their respective appeals, and that the appeals did not address the issue of application of the more lenient law to the criminal offense of War Crimes against Civilians, the Appellate Panel did not address the referenced issue either.

² Article 315 of the CPC BiH regulates the requirements for the trial verdict revocation, when the Appellate Panel solely conducts the hearing.

18. However, since the Constitutional Court of BiH obviously did not accept such arguments, and therefore revoked by its Decision the previous Verdict of this Court in the part pertaining to the substantive law application, because neither the Trial Panel nor the Appellate Panel of the Court acting in the case provided any explanation as to which of the two laws, CC BiH or the CC SFRY, provides for a more lenient punishment for the criminal offense of War Crimes against Civilians, the Appellate Panel had to evaluate the referenced issue from the aspect of the minimum punishment prescribed by the law.

19. As a rule, pursuant to Article 4(1) of the CC BiH, the law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense. Article 4(2) of the CC BiH provides for an exception from the foregoing: *“If the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall be applied.”*

20. Pursuant to the CC SFRY³, as the law that was in effect at the time when the offense was perpetrated, the sentenced prescribed for the criminal offense of War Crimes against Civilians is imprisonment of not less than five years, while for the same criminal offense the CC BiH⁴ prescribes imprisonment of not less than ten years. A comparative analysis of the two referenced laws from the aspect of prescribed punishments, pursuant to Article 4(2) of the CPC BiH, has showed that the CC BiH, as the subsequent law, is not more lenient to the sentenced person as the perpetrator of the criminal offense, wherefore the acts of the sentenced person of which the Trial Verdict found him guilty should have been qualified as the criminal offense of War Crimes against Civilians under Article 142(1) of the CC SFRY, as the law that was in effect at the time when the criminal offense was committed.

21. Since the previous Verdict of the Appellate Panel found the sentenced person guilty of aiding the commission of the criminal offense, and accordingly applied Article 31 of the CC BiH, providing that an aider may receive a more lenient punishment, and considering that the law applicable to the concrete case has been changed, the sentenced person's

³ Article 142(1) of the CC SFRY: “Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack against civilian population settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people’s health; an indiscriminate attack without selecting a target by which civilian population gets hurt; that civilian population be subject to killings, torture, inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violations of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishments, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy’s army or in its intelligence service or administration; forcible labor, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.”

⁴ Article 173(1)(c) of the CC BiH: „Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts: Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

acts, found to be aiding in character, were qualified pursuant to Article 24 of the CC SFRY, which provides for this form of complicity.

22. Therefore, bearing in mind the principles set under the Constitutional Court of BiH's Decision, the Appellate Panel qualified the acts of the sentenced person Mladen Milić as the criminal offense of War Crimes against Civilians under Article 142(1) of the CC SFRY, as read with Article 24 of the same Code.

IV. SENTENCING

23. Bearing in mind that, in the concrete case, the Panel has concluded that the application of the adopted CC SFRY is justified, the CC SFRY had to be applied to the sentencing too. The Panel had to take into account the magnitude of sentences prescribed under Article 142(1) of the adopted CC SFRY for the criminal offense of which Mladen Milić was found guilty, in compliance with the provisions regulating the general principles in fixing punishment (Article 41 of the adopted CC SFRY). In this regard, the Panel took into account that the punishment prescribed for the criminal offense of War Crimes against Civilians under Article 142 of the adopted CC SFRY is imprisonment of not less than 5 (five) years or the death penalty. The Appellate Panel has noted that the CC SFRY also provided for optional imposing of a 20-year prison sentence in cases where the death penalty was prescribed. In fixing the punishment, the Panel has paid special attention to all the circumstances which may affect rendering a less or more stringent punishment (extenuating and aggravating circumstances), and to the option of reduced punishment.

24. Prior convictions on the part of the sentenced person Mladen Milić were considered as an aggravating circumstance.

25. Among the extenuating circumstances, the facts that the sentenced person is a family man, father of two minors, one of whom is ill according to the sentenced person, were taken into account. The Panel has particularly taken into account the fact that the sentenced person expressed his remorse and condolences to the killed persons' family, as well as his proper conduct and contributions during the prison sentence serving.

26. Article 42 of the CC SFRY, to the contents of which Counsel particularly referred at the public session of the Appellate Panel held in relation to the Decision of the Constitutional Court of BiH, No. AP-3312/12 of 27 November 2015, provides for the following:

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

- (1) when provided by statute that the offender's punishment may be Reduced;
- (2) ...”.

27. Even though, in its previous verdict, the Appellate Panel, at the time, imposed on the sentenced person Mladen Milić a punishment below the limit of ten years prescribed by the statute, that is, imprisonment for a term of 8 (eight) years, considering all the

extenuating circumstances in the context of legal option to impose a more lenient punishment to aiders, this Panel did not impose on the sentenced person a punishment less than five years, that is, below this special minimum punishment prescribed for the criminal offense at issue under the CC SFRY, because the circumstances pertaining to the concrete case indicate that such a punishment would be an inadequate sentence by which the purpose of sentencing could not be achieved.

28. Considering the specific situation of repeated sentencing by the application of another law, the Panel has held it important to note that a punishment cannot be expressed merely mathematically, or by determining the proportion between the previously imposed sentence and an optional sentence within the statutory magnitude between 5-15 years, or 20 years, in relation to the statutory option to impose a more lenient sentence when the acts are qualified as aiding. Such a method would not amount to individualization of sentence which would satisfy all the principles of the criminal proceedings, and which would be in compliance with Article 33 of the CC SFRY, namely it would not serve the purpose of punishment. In view of all the foregoing, and in fixing the punishment, the Appellate Panel was aware of the need to render its decision pursuant to the aim of validating the gravity of the concrete criminal offense, while respecting at the same time all other circumstances, both extenuating and aggravating.

29. Considering the foregoing, as well as the statutory limits of punishments for the criminal offense at issue, the purpose of punishment, and all other circumstances that can affect rendering a more or less stringent sentence, particularly the degree of criminal responsibility of the sentenced person, the degree of danger or violation to the protected value, the circumstances under which the act was committed and the personal circumstances of the sentenced person, the Panel concluded that a prison sentence of seven years for the committed criminal offense is adequate to all the circumstances and the personality of the sentenced person as the perpetrator, and that the purpose of punishment will be completely achieved by the sentence imposed pursuant to Article 33 of the CC SFRY.

30. In view of the foregoing, the challenged second instance Verdict had to be revised with regard to the sentencing too, and the decision made as stated in the Operative Part of the Verdict.

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

MINUTES-TAKER:

Selena Beba

PRESIDING JUDGE

Mirko Božović

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