

Bosna i Hercegovina

Босна и Херцеговина



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

Case No. S1 1 K 005379 16 Kžk 2

Judgment delivered on: 10 February 2016

Before the Panel composed of:

Judge Dragomir Vukoje, PhD, presiding

Judge Redžib Begić, Panel member

Judge Mirza Jusufović, Panel member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

SULJO KARAJIĆ

SECOND-INSTANCE JUDGMENT

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

Vesna Ilić

Counsel for the convicted person Suljo Karajić:

Hasan Veladžić, attorney-at-law

Kraljice Jelene br. 88, 71 000 Sarajevo, Bosna i Hercegovina, Tel: 033 707 100, Faks: 033 707 155

Краљице Јелене бр. 88, 71 000 Сарајево, Босна и Херцеговина, Тел: 033 707 100, Факс: 033 707 155

Number: S1 1 K 005379 16 Kžk 2
Sarajevo, 10 February 2016

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting as an Appellate Division Panel composed of Judge Dragomir Vukoje, PHD, presiding, and judges Redžib Begić and Mirza Jusufović, members, with the participation of legal advisor Medina Džerahović as the record-taker, in the criminal case against the convicted person Suljo Karajić for the criminal offense of War Crimes against Prisoners of War in violation of Article 175 Subparagraphs (a) and (b) of the Criminal Code of Bosnia and Herzegovina (CC BiH) and War Crimes against Civilians in violation of Article 173 Paragraph 1 Subparagraphs (c) and (e) of the CC BiH, in conjunction with Article 180 Paragraph 1, all in conjunction with Article 29 of the CC BiH, with regard to the Decision of the Constitutional Court of Bosnia and Herzegovina AP-3939/12 of 10 November 2015 revoking the Judgment of the Court of Bosnia and Herzegovina S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011 in the part pertaining to the application of a more lenient criminal code, having held an open session in the presence of Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Vesna Ilić, convicted person Suljo Karajić and his counsel Hasan Veladžić, on 10 February 2016 delivered the following

J U D G M E N T

Judgment of the Court of Bosnia and Herzegovina S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011 **is reversed** in the part pertaining to the application of substantive law and the decision on the punishment, and the acts for which Suljo Karajić was found guilty under sections 3 (a, b, c, d, e, f and g), 6, 7, 8 and 9 of the enacting clause of the judgment are legally qualified as the criminal offense of War Crime against the Civilian Population in violation of Article 142 Paragraph 1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia as the law that was adopted on the basis of the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88
Telefon: 033 707 100, 707 596; Fax: 033 707 155

and the Criminal Code of the SFRY^[1], while the acts under sections 1, 2, 4 and 5 of the enacting clause of the judgment are qualified as the criminal offense of War Crime against Prisoners of War in violation of Article 144 of the adopted CC SFRY, all in conjunction with Article 22 thereof; and this Panel, on the basis of the cited statutory provisions as well as Articles 33, 38 and 41 of the adopted CC SFRY,

For the criminal offense of War Crime against the Civilian Population in violation of Article 142 Paragraph 1 of the adopted CC SFRY, imposes on the convicted person a sentence of imprisonment for a term of six (6) years.

For the criminal offense of War Crime against Prisoners of War in violation of Article 144 of the adopted CC SFRY, imposes on the convicted person a sentence of imprisonment for a term of eight (8) years.

And, by applying Article 48 of the adopted CC SFRY,

IMPOSED

A COMPOUND SENTENCE OF IMPRISONMENT FOR A TERM OF

12 (TWELVE) YEARS

Pursuant to Article 50 Paragraph 1 of the CC SFRY, the period of time that the convicted person spent in custody awaiting trial from 17 October 2007 until 24 September 2012, as well as serving a sentence under the final Judgment of the Court of Bosnia and Herzegovina S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011 from 24 September 2012 onwards, shall be credited towards the sentence of imprisonment.

Judgment of the Court of Bosnia and Herzegovina S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011 shall otherwise remain unaffected.

^[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 a Republic law during an imminent threat of war or in time of war (*Official Gazette of RBiH* 6/92) and the Law on Confirmation of Decree Laws (*Official Gazette of RBiH* 13/94).

Reasoning

I. PROCEDURAL HISTORY

1. By Judgment of the Court of Bosnia and Herzegovina (Court of BiH) X-KR-07/336 of 13 April 2010, the accused Suljo Karajić was found guilty that he, by the acts described in detail in sections 1, 2, 5 and 6 of the enacting clause of the referenced judgment, committed the criminal offense of War Crime against Prisoners of War in violation of Article 175(1)(a) and (b) of the CC BiH, and under sections 3 (c, d, f, h), 7, 8 and 9 the criminal offense of War Crime against Civilians in violation of Article 173(1)(c) and (e) of the CC BiH, in conjunction with Article 180(1) of the CC BiH, all in conjunction with Article 29 of the CC BiH. On the basis of Article 285(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), in conjunction with Articles 39, 40 and 42 of the CC BiH, for the criminal offense of War Crime against Prisoners of War in violation of Article 175(1)(a) and (b) of the CC BiH, the Court imposed on the accused a sentence of imprisonment for a term of 14 (fourteen) years, and for the criminal offense of War Crime against Civilians in violation of Article 173(1)(c) and (e) of the CC BiH a sentence of imprisonment for a term of 11 (eleven) years; by applying Article 53 of the CC BiH a compound sentence of imprisonment for a term of 18 (eighteen) years was imposed on the accused, with the time that the accused spent in pretrial custody being credited towards the imposed sentence of imprisonment.

2. By the same judgment, on the basis of Article 284(c) of the CPC BiH, the accused was acquitted of the charges of committing the criminal acts described in detail in sections 3. a), b), e), g), i), 4 and 10 of the Judgment (i.e. the Indictment).

3. Panel of the Appellate Division of the Court of Bosnia and Herzegovina (hereinafter: the Panel or the Appellate Panel) issued Decision S1 1 K 00537911 Kžk (re: X-KRŽ-07/336) of 24 February 2011, granting the respective appeals of the Prosecutor's Office of Bosnia and Herzegovina and counsel for the accused Suljo Karajić, revoking First-Instance Judgment of the Court of BiH X-KR-07/336 of 13 April 2010 and ordering a trial before the Appellate Panel of Section I for War Crimes of the Court of BiH.

4. In retrial, the Appellate Panel delivered a Second-Instance Judgment S1 1 K

005379 11 Kžk (re: X-KRŽ-07/336) od 28 November 2011, finding the then accused Suljo Karajić guilty that he, by the acts described in sections 3 (a, b, c, d, e, f and g), 6, 7, 8 and 9 of the convicting part of the enacting clause of the judgment, committed the criminal offense of War Crime against Civilians in violation of Article 173(1)(c) and (e) of the CC BiH, and by the acts described in sections 1, 2, 4 and 5, the criminal offense of War Crime against Prisoners of War in violation of Article 175(a) and (b) of the CC BiH, and imposing on the accused a compound sentence of imprisonment for a term of 18 (eighteen) years. By the same judgment, the accused was acquitted of the charges that he committed the acts described in detail in sections 1(a-b) and 2 of the acquitting part of the enacting clause of the judgment.

5. Having considered the appeal of convicted person Suljo Karajić (the appellant) filed by his counsel Hasan Veladžić, the Constitutional Court of Bosnia and Herzegovina (the Constitutional Court) adopted Decision AP-3939/12 of 10 November 2015, granting the appeal in part, finding a violation 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 (hereinafter: the ECHR), and revoking Judgment of the Court of BiH S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011 in the part pertaining to **the application of the more lenient criminal code**. In the decision the Constitutional Court of BiH noted that the revoking of Judgment of the Court of BiH S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011, in the part as stated, was without prejudice to the appellant's deprivation of liberty or pretrial custody, which fall within the exclusive jurisdiction of the Court of BiH. The case was referred back to the Court of BiH to adopt a new decision relative to the imposition of a punishment in accordance with Article II(2) of the Constitution of BiH and Article 7(1) of the ECHR as a matter of urgency.

6. The same decision dismissed as ill-founded the appeal of Suljo Karajić filed against the referenced judgment of the Court of BiH in relation to Article II(3)(e) of the Constitution of BiH and Article 6(1) and 3(b) and (d) of the ECHR as well as a violation of the right of appeal under Article 2 of Protocol No. 7 to the ECHR.

7. Decision of the Constitutional Court of BiH AP-3939/12 of 10 November 2015 was communicated to the Court of BiH on 18 January 2016.

8. Acting in compliance with the obligation ensuing from the decision in

question, and with a view to implementing the decision as promptly as possible, the Appellate Panel held an open session on 10 February 2016, attended by Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Vesna Ilić, convicted person Suljo Karajić and his counsel Hasan Veladžić.

9. The Prosecutor submitted that she opposed the application of the adopted CC SFRY and that the CC BiH should be applied in light of the gravity of the criminal offense and the ensuing consequences, maintaining the legal qualification given in the Indictment and the Second-Instance Judgment.

10. Attorney Hasan Veladžić, counsel for the convicted person Suljo Karajić, contended that the application of the CC SFRY as a more lenient law in relation to his client in the present case was no longer disputable after the decision of the Constitutional Court of BiH, petitioning the Appellate Panel of the Court of BiH to adopt a decision in that regard.

II. PROCEDURAL SITUATION FOLLOWING THE ADOPTION OF THE DECISION OF THE CONSTITUTIONAL COURT OF BIH

11. Prior to engaging in the procedure of adoption of a new decision in terms of punishment in accordance with Article II(2) of the Constitution of BiH and Article 7(1) of the ECHR, as instructed by the decision of the Constitutional Court of BiH, this Panel finds that it is necessary to briefly reflect on the procedural situation following the revoking of the Second-Instance Judgment of the Court of BiH S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011 in the part as stated above.

12. Specifically, in its decision the Constitutional Court of BiH was explicit about the other submissions of the appellant-convicted person Suljo Karajić, holding that the appellant's arguments contesting the judgment of the Court of BiH on the grounds of, among other things, a violation of Article II(3)(e) of the Constitution of BiH and Article 6(1) and (3)(b) and (d) of the ECHR, are ill-founded. Para. 64 of the reasoning of the Decision of the Constitutional Court of BiH provides in explicit terms:

„There is no violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) and (3)(b) and (d) of the European Convention in a situation when the Constitutional Court determined

from the reasoning of the impugned decision that the Court offered valid reasons on which it based its decision to apply relevant substantive law. In addition, the appellant was given time and opportunity to prepare his defense and examine witnesses, but he failed to do so.”

13. In light of the reasoning of the Constitutional Court of BiH, it is clear that in the case in question the Constitutional Court of BiH did not call into question the judgment of the Court of BiH in terms of the existence of the criminal offense or the guilt of convicted person Karajić for the acts with respect to which the Appellate Panel of the Court of BiH that adopted the impugned judgment established his guilt¹.

14. That being said, the Appellate Panel of the Court of BiH, having received the decision of the Constitutional Court of BiH, faced a situation not regulated by procedural law, as the CPC BiH does not contain provisions allowing the possibility of revoking a judgment and referring a case for retrial.² In particular, the CPC BiH does not contain provisions to be applied in the event of a decision of the Constitutional Court of BiH revoking a second-instance judgment in the part pertaining to “the application of a more lenient law”, with the issue of guilt not being disputable, as is the case here. Therefore, this Panel, proceeding primarily from the fact that the Constitutional Court of BiH ordered the Court of BiH to adopt a new decision in terms of the punishment as a matter of urgency, made efforts to find the most efficient way to address this situation.

15. The Appellate Panel has found that the most efficient course of action in the present situation would be to apply Article 314 of the CPC BiH, providing that *“by honoring an appeal, the Panel of the Appellate Division shall render a judgment revising the judgment of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the judgment of the first instance and that in view of the state of facts established, a different judgment must be rendered when the law is properly applied.”* Namely, this Panel was mindful of the fact that when an appellate panel finds that a trial panel erred in applying the law but is convinced that the trial panel established the facts properly, the appellate panel will revise the judgment by applying the proper law and, if

¹ Which is the reason why the Constitutional Court of BiH revoked Judgment of the Court of BiH S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011 only in the part pertaining to the application of the more lenient criminal code.

² Article 315 of the CPC BiH regulates the requirements of revoking a first-instance judgment, with the Appellate Panel conducting the trial by itself.

needed, determine an appropriate punishment as prescribed by Articles 314 and 308 of the CPC BiH.

16. Despite the fact that there is no appeal in the present case that needs to be examined, this Panel took into consideration the fact that the Constitutional Court of BiH determined in its Decision that the Appellate Panel of the Court of BiH erred in applying the law, with such a decision being adopted by an appellate panel in regular procedure if such a complaint is raised. In this connection, the Constitutional Court of BiH, addressing the other arguments by the appellant as well, found no other procedural violations in the impugned judgment. Consequently, the decision of the Constitutional Court of BiH indicates that the Constitutional Court does not call into question and is satisfied with the facts as established by the Appellate Panel of the Court of BiH in Judgment S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011. As a result, in this Panel's view, the situation is similar to the procedural situation regulated by Article 314 of the CPC BiH, so this Panel, in the absence of a strict statutory provision regulating the procedure in a situation such as the one in the present case, found that it would be most appropriate and efficient – for the purpose of issuing a new decision addressing the violation found by the decision of the Constitutional Court (binding on this Court) in an emergency procedure, as ordered by the Constitutional Court in its decision – to revise Judgment of the Court of BiH S1 1 K 005379 11 Kžk (re: X-KRŽ-07/336) of 28 November 2011 as determined in the enacting clause of this judgment.

17. In view of the decision of the Constitutional Court of BiH and for the purpose of its implementation, the Appellate Panel of the Court of BiH has ruled as stated in the enacting clause for the following reasons:

III. APPLICATION OF THE LAW

18. The Appellate Panel examined the issue of application of substantive law in the present case in the procedure of adoption of the prior judgment (revoked by the aforementioned Decision of the Constitutional Court of BiH in the part pertaining to the application of a more lenient criminal code). Having conducted a comparative analysis of the provisions of Articles 173 and 175 of the CC BiH in relation to the provisions of Articles 142 and 144 of the adopted CC SFRY, primarily from the aspect of punishments prescribed by the two criminal codes for the criminal offenses of War Crime against

Civilians and War Crime against Prisoners of War, the Panel concluded that the CC BiH as the code that entered into force after the commission of the offense the accused is charged with was more favorable to the accused compared to the adopted CC SFRY that was in effect at the time of commission of the criminal offense. The prior judgment offered detailed arguments in support of that conclusion and they will not be reiterated at this point.

19. However, as those arguments were clearly not accepted by the Constitutional Court of BiH, following the view in the Constitutional Court's Decision revoking this Court's judgment in that part (according to which the CC SFRY was more lenient for the accused), and that the retroactive application of the CC BiH was done to the accused's detriment in terms of the imposed punishment, this Panel found that the adopted CC SFRY as the law that was in effect at the time of commission of the criminal offense needs to be applied to the case in question. Consequently, this Panel dismissed the Prosecutor's contentions presented at the session of the Appellate Panel that it is justified to apply the applicable criminal code (i.e. CC BiH) to the present case.

IV. DECISION ON THE PUNISHMENT

20. Taking into consideration that in the case at hand the Panel decided that it was justified to apply the adopted CC SFRY, the same Code is applied in the procedure of meting out a punishment. In doing so, the Panel was under obligation to observe the range of punishments prescribed by Articles 142 and 144 of the adopted CC SFRY for the criminal offense of which Suljo Karajić was found guilty, in line with the provisions laying down general principles in fixing punishment (Article 41 of the adopted CC SFRY). To that end, the Panel was mindful of the fact that both the criminal offense of War Crime against the Civilian Population in violation of Article 142 of the adopted CC SFRY and the criminal offense of War Crime against Prisoners of War in violation of Article 144 of the adopted CC SFRY are each punishable with a sentence of imprisonment for not less than five (5) years or by the death penalty. Furthermore, when meting out the punishment, the Panel gave special consideration to all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances).

21. With regard to the aggravating circumstances on the part of the convicted person Suljo Karajić, the Panel took into account that when committing the criminal acts the

accused demonstrated dogged persistence and high-intensity quantity of criminal energy over helpless victims (including civilians), which resulted in serious consequences, as well as the plurality of the committed criminal acts. The violent nature of the actions of the accused that in some cases reached the threshold of cruel treatment (the episode when naked men of mature age were splashed with cold water during the winter and beaten up with poles) struck terror into the hearts of many. Many victims confirmed during their testimony in this case that that fear was still present, indicating the seriousness of the committed criminal acts.

22. Regarding the extenuating circumstances, the Panel took into account circumstances before and after the fact, the accused's personality and his family situation. Specifically, the convicted person grew up in a socially and emotionally unstable environment, he himself suffered serious injuries and damage to his health during the war (and continues to suffer owing to an injury to his oral cavity), he is a family man, father of two children, and has no prior convictions. Furthermore, the convicted person behaved with proper decorum during the trial. This fact, on its own, is neutral as all persons have a duty to behave appropriately during criminal proceedings. However, the Panel linked this fact to the fact that it was very difficult for the accused to appear before the court and address the Panel due to the pain and discomfort caused by the injury to his oral cavity during the war. This did not prevent the accused from behaving with dignity the entire time, and the Panel assessed those facts as extenuating circumstances in their totality.

23. In view of the aforesaid, and bearing in mind the statutory limits on the punishment for the criminal offense in question, the purpose of punishment, and the circumstances bearing on the magnitude of punishment, in particular: the degree of criminal responsibility of the convicted person, the motives for which the act was committed, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the accused's personal situation (including his impaired health), and, finally, his good behavior while serving the sentence, this Panel has found that the sentences of imprisonment for 6 and 8 years respectively and the compound sentence of imprisonment for a term of 12 (twelve) years for the committed criminal acts are proportionate to all the circumstances and the personality of the convicted person as the offender and that they would meet the purpose of punishment in its entirety (specific and general deterrence alike).

24. By imposing the punishment of this type and severity, the Panel finds that trial and punishment for such acts must show that not only that the crimes committed during the war would not be tolerated but also that the criminal justice system is the right way to recognize a crime and end a cycle of personal retaliation. Reconciliation is not something that is ordered by a court of law or imposed by a punishment. However, a punishment that entirely fits the gravity of an act may contribute to reconciliation by responding to such an act with a law and not violence, the goal being that the wish for revenge, present in an individual or a community, be replaced with an understanding that justice has been served in a way that contributes to reconciliation.

25. Based on the foregoing, the impugned judgment is revised in the part pertaining to the decision on punishment, while the time that the accused spent in custody awaiting trial as well as the time spent serving a prior sentence in this case shall be credited towards the punishment.

26. For all these reasons, the Appellate Panel has ruled as stated in the enacting clause of this judgment.

RECORD-TAKER:

Medina Džerahović

PRESIDING JUDGE

Dragomir Vukoje, PhD

LEGAL REMEDY: No appeal is allowed against this judgment.