

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine

Суд Босне и Херцеговине

Docket number: S1 1K 010315 17 Krž 11

Date of delivery: 5 December 2017

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Before the Appellate Panel composed of:

Judge Dr. Miloš Babić, presiding

Judge Mirko Božović, member

Judge Mirza Jusufović, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.
the accused

OSTOJA STANIŠIĆ AND MARKO MILOŠEVIĆ

SECOND-INSTANCE JUDGMENT

Prosecutor, Prosecutor's Office of Bosnia and Herzegovina: Predrag Tomić

Defense counsel for the accused Ostoja Stanišić: attorney Miloš Perić
attorney Nenad Rubež

Defense counsel for the accused Marko Milošević: attorney Petko Pavlović
attorney Radivoje Lazarević

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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 Judge Dr. Miloš Babić, as Judge Presiding, and judges Mirko Božović and Mirza Jusufović, as the Panel members, with the participation of legal advisor-assistant Nedim Muminović, as the minutes taker, in the criminal case against the accused Ostoja Stanišić and Marko Milošević, concerning the criminal offense of Genocide under Article 171)a) and b) of the Criminal Code of Bosnia and Herzegovina (CC BiH), as read with Article 180(1) and Article 31 of the same Code, regarding the appeals filed by the Prosecutor's Office of Bosnia and Herzegovina, by the accused Ostoja Stanišić, and the appeals filed by defense counsel for the accused Ostoja Stanišić, attorneys Miloš Perić and Nenad Rubež, in the presence of the Prosecutor for the BiH Prosecutor's Office, Predrag Tomić, the accused Ostoja Stanišić and his defense counsel, attorneys Miloš Perić and Nenad Rubež, and the accused Marko Milošević, and his attorneys Petko Pavlović and Radivoje Lazarević, at the session held on 5 December 2017 issued the judgment that follows.

JUDGMENT

I Dismissing as ill-founded the appeal filed by the BiH Prosecutor's Office, and upholding the trial judgment of the Court of Bosnia and Herzegovina No. S1 1K 010315 12 Krl, of 31 March 2017, in its acquitting part in relation to the accused Marko Milošević.

II Granting the appeal filed by the accused Ostoja Stanišić, as well as the appeal filed by his defense counsel, attorneys Miloš Perić and Nenad Rubež, and revoking the trial judgment of Court of Bosnia and Herzegovina No. S1 1K 010315 12 Krl, of 31 March 2017, in its sentencing part.

R e a s o n i n g

I – PROCEDURAL HISTORY

1. The trial judgment of the Court of Bosnia and Herzegovina, No. S1 1K 010315 12 Krl of 31 March 2017, found the accused Ostoja Stanišić guilty that by the actions described in the operative part of the judgment he committed the criminal offense of Genocide under Article 141 of the CC SFRY as read with Article 24 of the same Code, so that pursuant to Article 285 of the CPC BiH, with the application of Articles 33, 34, 38 and 41 of the CC SFRY, he was sentenced to 11 years of imprisonment.
2. Under the same judgment, pursuant to Article 50 of the CC SFRY, the time the accused spent in pre-trial custody from 21 June 2012 to 12 April 2013 was credited towards his sentence of imprisonment.
3. The judgment acquitted the accused Marko Milošević of the charges that he committed the criminal offense of Genocide under Article 171)a) and b) of the CC BiH as read with Article 180(1) and Article 31 of the same Code.
4. Pursuant to Article 188(4) and Article 189(1) of the CPC BiH, the Judgment relieved the accused of the obligation to reimburse the costs of the criminal proceedings.
5. Pursuant to Article 198(2) and (3) of the CPC BiH, the victims have been instructed to pursue their compensation claim in civil proceedings.

II – THE APPEALS AND RESPONSES TO THE APPEALS

6. The BiH Prosecutor's Office filed a timely appeal from the judgment, specifically the acquitting part thereof, on the grounds of essential violations of criminal procedure under Article 297(1)k) of the CPC BiH, violation of the Criminal Code under Article 298 of the CPC BiH, and incorrectly and incompletely established facts under Article 299 of the CPC BiH, moving the Appellate Panel to grant the appeal and revoke the judgment in this part, and order a retrial. Also, the BiH Prosecutor's Office appealed the convicting part of the judgment on the grounds of sentencing and decision on costs of the criminal proceedings, moving the Court to impose on the accused Ostoja Stanišić a lengthier sentence of imprisonment, and

reverse the decision on the costs by imposing the obligation on him to reimburse the costs of the criminal proceeding.

7. Defense counsel for the accused Ostoja Stanišić, attorneys Miloš Perić and Nenad Rubež, jointly appealed the judgment on the grounds of essential violations of criminal procedure, incorrectly and incompletely established facts, violation of the Criminal Code, and the sentencing decision, moving the Appellate Panel to reverse the challenged judgment and acquit the accused of all charges, or revoke the judgment and order a retrial before the Appellate Panel.

8. The accused Ostoja Stanišić (in person) also appealed the judgment, moving the Appellate Panel to grant the appeal, reverse the challenged judgment and acquit the accused of all charges, or revoke the judgment and order a retrial before the Appellate Panel.

9. The Prosecution submitted their response to the appeal filed by defense counsel for the accused Stanišić, as well as that filed by the accused Stanišić himself, with an identical motion for the Appellate Panel to dismiss both appeals as ill-founded.

10. Defense counsel for the accused Ostoja Stanišić, attorney Miloš Perić, also submitted his response to Prosecutor's appeal, moving the Appellate Panel to dismiss it as ill-founded.

11. Defense counsel for the accused Marko Milošević, attorney Petko Pavlović, also submitted his response to Prosecutor's appeal, moving the Appellate Panel to dismiss it as ill-founded.

III – PANEL'S SESSION

12. Pursuant to Article 304 of the CPC BiH, on 5 December 2017, the Appellate Division Panel held a public session, which was attended by the Prosecutor Predrag Tomić, the accused Ostoja Stanišić and his defense counsel, attorneys Miloš Perić and Nenad Rubež, and the accused Marko Milošević, attorneys Petko Pavlović and Radivoje Lazarević. At the session, the Prosecutor Predrag Tomić said he fully stood by his appeal. Defense counsel for the accused Stanišić, attorney Miloš Perić, orally presented his appeal, and said he too fully stood by the appeals grievances, while the accused joined his arguments, saying he also stood by the appeal he had filed in person.

13. Finally, the Prosecutor orally responded to the appeals and, commenting on defense's appeals, moved that they be dismissed as ill-founded in their entirety.

14. Defense counsel for the accused Ostoja Stanišić, attorney Miloš Perić, as well as defense counsel for the accused Marko Milošević, attorney Petko Pavlović, also briefly presented their responses to the Prosecutor's appeal, moving the Appellate Panel to dismiss the Prosecutor's appeal as ill-founded.

IV – GENERAL CONSIDERATIONS

15. Before providing its reasoning for each individual grounds of appeal, the Appellate Panel notes it was appellant's obligation to state in the appeal, pursuant to Article 295(1), Subparagraphs b) and c), of the CPC BiH, both the legal grounds for challenging the appeal and the reasoning by which to substantiate the well-foundedness of such complaint.

16. Since the Appellate Panel shall review the judgment only insofar as it is contested by the appeal, pursuant to Article 306 of the CPC BiH, the appellant shall draft the appeal in the way that it can serve as a ground for reviewing the judgment. In that respect, the appellant must specify the grounds on the basis of which he/she contests the judgment, specify which section of the judgment, piece of evidence or proceedings of the Court he/she contests, and adduce clear and substantiated reasons in support of the appeal.

17. Mere arbitrary indication of the appellate grounds, and of the alleged irregularities in the course of the trial proceedings, without specifying the ground to which the applicant refers is not a valid ground for reviewing the Trial Judgment. Therefore, the Appellate Panel *prima facie* dismissed as ill-founded the unreasoned and unclear appellate complaints.

V – APPEAL FILED BY PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

i. Prosecutor's appeals grievances in relation to acquittal

18. The Prosecutor argues that the Trial Panel properly found that the acts of aiding and abetting in the commission of the criminal offense of Genocide carried out by the 6th Battalion included participation in providing reception and guarding of the detainees, their transport, hiding the corpses of those killed, and removing the traces of blood and corpses of the slain detainees. Beside numerous members of the 6th Battalion, also participating in the

commission of those acts of aiding and abetting was the accused Marko Milošević, as deputy commander of the sentenced person Ostoja Stanišić. The *actus reus* of aiding and abetting on the part of Marko Milošević consists of the actions or omissions aimed at aiding and abetting his immediate supervising officer - Commander Stanišić, knowing full well that in that way he was aiding and abetting the chief perpetrators of Genocide by his direct presence at the sites where acts of aiding and abetting were carried out by members of the 6th Battalion, by encouraging and providing moral support to members of the 6th Battalion to take preparatory activities for the final commission of the criminal offense of Genocide, which had a considerable impact on the commission of the criminal offense in the case at hand. Regarding *mens rea* on the part of Marko Milošević, based on the evidence adduced at the trial, the Court was able to determine that the accused Marko Milošević knew and was aware of the genocidal intent on the part of the chief perpetrators, which means he was aware of the ultimate destiny of hundreds of prisoners, and that it was with that knowledge and that awareness that he took the actions that helped the commission of Genocide.

19. The Prosecutor went on to say that the Court should have established whether the accused Marko Milošević knew that the prisoners would be killed based on a series of events that took place following the arrival of prisoners, the overall torture and attacks on the lives of prisoners, as well as the usual pattern of systematic mass killings, one after another, in the territory of the Zvornik municipality.

20. The Prosecutor argues that in the Reasoning of Acquittal in relation to Marko Milošević the Court did not fully establish the facts ensuing from the evidence presented at the main trial, and that based on such established facts it drew erroneous conclusions, reducing its basic reason for the acquittal to the fact that in the situation at hand Commander Stanišić did not delegate his powers to him, nor was Commander Stanišić absent during that time so as to be replaced by his deputy during such absence.

21. The appeal further argues that the Court, based on the adduced evidence, correctly established the fact that the accused Marko Milošević, at the time of critical events, performed the duty of deputy Commander of the 6th Battalion, that members of the 6th Battalion, whose names were not specified, received and provided security for the prisoners held at the Home on 14 and 15 July 1995, as well as in the New School in Petkovci, while the orders for their engagement, deployment for the purpose of securing the facility, removing the traces and the loading of dead bodies were issued by the accused Ostoja Stanišić. In the case at hand, the Court incompletely established the state of facts on the part of the accused

Marko Milošević, by failing to state the reasons why the accused Marko Milošević possibly did not participate in those actions of aiding and abetting, which renders the operative part of the judgment incomprehensible and contradictory to the reasons. Although the Court finds that Battalion Commander's scope of responsibility includes assisting the Commander, the Court fails to establish whether Marko Milošević, according to the evidence adduced, assisted Commander Stanišić in any activities, or whether he was perhaps a mere by-stander who silently watched the intense events in the atmosphere of the stench of death, blood and shooting. The Court was also supposed to correctly draw a conclusion that the accused Marko Milošević, just like Stanišić, was actively involved in and informed about the prisoners issue ever since the moment when he learned (as was found in the conviction) that some of the prisoners would be brought to Petkovci and accommodated in the New School.

22. The Prosecutor argues that the Court accepted expert witness Butler's findings in which he presents his position that deputy commander operates as another person in charge of battalion, and that in case commander is killed or prevented or is not there for some other reason, deputy commander takes his role. The Court errs in concluding that defense expert witness' report should be accepted in claiming that in case of presence of battalion commander and his deputy it is exclusively the commander that runs the command post, while his deputy is in charge of assignments falling under his area of responsibility and commander's instructions; due to the fact that they were both present there during the critical event, the sentenced person - Commander Stanišić was exclusively accountable as the chief commander, but the Court erred in ignoring the fact that even in such a situation, when both commander and his deputy are present, deputy commander performs duties from within his scope of responsibilities and commander's instructions, with deputy commander's duties being to help the commander in discharging his duties.

23. The Prosecutor argues it would be correct to conclude that there is a broad scope of actions and procedures deputy commander may take in such a situation in helping the commander in his activities. The Conviction found Commander Stanišić guilty for his activities at the critical time, which were considered to amount to aiding and abetting in the commission of the criminal offense of Genocide, so one could logically conclude that by helping Commander Stanišić by way of carrying out accessory activities in the commission of Genocide, Marko Milošević too, as deputy commander, aided and abetted the commission of the criminal offense of Genocide.

24. Further, the Prosecutor believes that on the way to its erroneous conclusion about Marko Milošević's liability the Court considered the fact whether the sentenced person – Commander Ostoja Stanišić – delegated certain duties onto his deputy Marko Milošević, and concluded that no such delegation of authority had taken place, hence Milošević cannot be liable. Although the Court finds that at the time of the critical events Commander Stanišić gave the accused Marko Milošević the assignment to go to the new school and meet with Beara, as one of the main perpetrators of Genocide, the Court erred in concluding that it was but a transfer of information the sentenced person Stanišić sent to Beara.

25. Finally, the appeal argues that by analyzing the evidence on Marko Milošević's guilt the Court ignored part of the evidence given by witness SM-110, who claimed that on the critical day Ostoja Stanišić and Marko Milošević, during most part of the day, were in the immediate vicinity of the Home and New School, controlling and overseeing the prisoners' arrival, detention and evacuation to the place of killing, confirming that several prisoners were killed that day at the new school. The witness has also heard that Ostoja Stanišić and Marko Milošević had offered to the residents of the village of Petkovci and the soldiers of the 6th Battalion to freely shoot at the prisoners.

ii. Appellate Panel's conclusions

26. First of all, the Appellate Panel notes that the Prosecutor's appeal in relation to the acquittal, although filed on the grounds of essential violation of criminal procedure under Article 297(1)k) of the CPC BiH, violation of the criminal code under Article 298 of the CPC BiH, and on the grounds of erroneously and incompletely established facts under Article 299 of the CPC BiH, was considered by the Panel in the context of erroneously and incompletely established facts under Article 299 of the CPC BiH, since that primarily ensues from the content of the appeal.

27. The Panel finds the Prosecutor's appeals grievances to be ill-founded.

28. Contrary to the arguments raised in Prosecutor's appeal, the first-instance panel has properly established the accused Stanišić's role in the incriminating event by linking it with his responsibilities as Deputy Commander of the 6th Battalion of the Zvornik Brigade.

29. In that context, the Panel has properly considered primarily documentary Exhibit T-237 (Rules of Battalion), expert witness Butler's report, as well as the report made by expert

witness Božidar Forca, according to which the accused Milošević was second-in-command in the Battalion, whose role is activated only in the absence of battalion commander, which means that he assumed commander's duties only in the situations when commander is dead or prevented from discharging them, by taking over his responsibilities and by running the command post.

30. In that regard, the same could be said for situations when battalion commander himself is present at the command post, but on the other hand no evidence was presented that the accused Stanišić had delegated any tasks or duties onto his deputy, which would have been a prerequisite on which to build the accountability of the accused Milošević also in the presence of his superior officer Stanišić. Therefore, as properly found in the first-instance judgment, by analyzing the foregoing evidence, in commander's presence, deputy is bound by his instructions and assignments, but the commander still remains responsible for commanding the battalion, so there is no room to raise the issue of deputy commander's responsibility in this case.

31. Also contrary to the appeal, although the Appellate Panel also does not find it disputable that individual members of the 6th Battalion were present at and around Home and New School on 14 and 15 July 1995, as well as the accused Milošević on 14 July 1995, in the afternoon hours, in Petkovci, when detainees were brought to Home and New School, in the case at hand the accused's accountability does not consist of his mere presence there, but his duties and responsibilities he had as Deputy Battalion Commander, wherein the Panel properly considered both his formal role and his *de facto* duties and actions in the case at hand. In that regard, there is no evidence that Battalion Commander had delegated any duties onto him, and that no action of the accused Milošević ensues from the presented evidence based on which to conclude that he factually assisted the accused Stanišić in the treatment of detainees. In that context, the first-instance panel properly found there is no proof that the accused Milošević gave any particular assignments or orders to anyone, or that he received any reports in that regard from which to draw a conclusion on the accused Milošević's accountability as Deputy Battalion Commander. Therefore, contrary to Prosecutor's arguments, although it is beyond a doubt that no powers were delegated to the accused Milošević as Deputy Commander, the first-instance panel has also considered other actions of the accused in terms of his assistance to the accused Stanišić, and properly found that it does not follow from the evidence adduced that the accused Milošević undertook any incriminating action, meaning such an action that would beg the conclusion regarding his guilt.

32. The Appellate Panel notes that in his appeal the Prosecutor insists on the issue of the accused Milošević's accountability on the grounds of his helping the accused Stanišić, meaning that he was aiding and abetting the commission of a criminal offense. However, reading the facts of the amended indictment one may clearly see that it does not at all describe the manner in which the accused Milošević helped the accused Stanišić, meaning his actions of aiding and abetting were not described in the manner suggested by the appeal, from which one would be able to conclude that his actions were significant in committing the criminal offense. Therefore, on the basis of the factual description presented this way, one could not draw any conclusion regarding his actions of aiding and abetting, since the mere reference to his role, without specifying the actions of aiding and abetting, does not suffice for the court to draw a different conclusion with regard to his responsibility, due to which the appeal is thus dismissed as ill-founded.

VI – APPEALS FILED BY THE ACCUSED AND DEFENSE FOR THE ACCUSED OSTOJA STANIŠIĆ

ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE UNDER ARTICLE 297(1)K) OF THE CPC BIH

i. General considerations

33. A Judgment may, pursuant to Article 297 of the CPC of BiH, be contested mainly on the grounds of an essential violation of the provisions of criminal procedure, which is always established in the cases specified in Article 297(1).

34. A substantial violation of provisions of criminal procedure is also established when the Trial Panel during the trial or in reaching the judgment failed to notice or incorrectly applied a provision of the Criminal Procedure Code, but only if it affected or might have affected the rendering of a lawful and correct judgment.

35. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper verdict, it is not sufficient for the appellant to simply assert that the procedural violation could have *hypothetically* affected the rendering of a lawful or proper verdict. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the Appellant shows that it is of substantial character and impossible to conclude that the alleged violation did not affect the rendering of

a lawful or proper verdict. That is, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC of BiH was not violated.

36. The Appellate Panel will review any appeal on the basis of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH through a *prima facie* analysis of the judgment. The Appellate Panel will examine whether, on its face, the wording is incomprehensible, internally contradictory or contradicted the grounds, or has no grounds at all or did not cite reasons concerning the decisive facts. The Appellate Panel will not consider whether the Trial Panel committed an error of fact or law as part of the analysis, but will only ensure that the judgment formally contains all necessary elements for a well-reasoned and comprehensible judgment.

37. The Appellate Panel further notes that the appellant must establish that the alleged formal error invalidates the Judgment. A non-essential violation does not invalidate the conclusion and reasoning of the Trial Panel and thus will not result in the revocation of the Judgment.

38. The Appellate Panel recalls that Article 297(1)(k) of the CPC of BiH is not a valid ground of appeal to contest the accuracy of facts established or not established by the Trial Panel. An error on establishing some decisive fact (incorrectly or incompletely established state of facts) under Article 299(1) of the CPC of BiH is the appropriate ground to contest the Judgment where the accuracy of the facts established or not established by the Trial Panel is contested. Appellants should confine appeals pursuant to Article 297(1)(k) to the formal character of the Judgment and should raise alleged errors of fact under Article 299

ii. Arguments presented in the appeal filed by defense counsel for the accused Ostoja Stanišić and in the appeal filed by the accused Ostoja Stanišić himself

39. Defense counsel for the accused Stanišić, *inter alia*, states in his appeal that Article 24(2) of the CC SFRY stipulates that the following, in particular, shall be considered as aiding: the promise, prior to the commission of the offense, to conceal the existence of the criminal offense, to hide the offender, the means to commit the crime, its traces, or goods gained through the commission of a criminal offense. It was not established during the criminal proceedings against Ostoja Stanišić that he gave any promise to the principal perpetrators on the forms of aiding referred to in the foregoing legal provision. The appeal argues that it cannot be seen from the reasoning attached to the trial judgment whether this

decisive fact was a subject of assessment at all, or whether any reasons were provided for the fact, which amounts to an essential violation of criminal procedure provisions.

40. The appeal also argues that the accused Stanišić was not a member of the JCE, did not know about the genocidal intention and principal perpetrators' plan, did not tell his soldiers to accommodate and guard the prisoners, and he did not, for the purpose of concealing, order that the traces of blood and corpses be removed. The measures concerning the removal of traces of blood and corpses, as confirmed by numerous witnesses, were taken at the request of Petkovci residents, because of the foul smell and in order to offset possible contagion, while there is no evidence that Stanišić promised so beforehand to the perpetrators, which is why the elements listed under Article 24(2) of the CC SFRY were not satisfied for those actions to be considered aiding and abetting in Genocide.

41. In his own appeal, the accused Stanišić also raised an objection on the same issue, arguing that it is not clear from the trial judgment exactly which actions were actually taken, and which can be subsumed under aiding and abetting, bearing in mind that an action may be qualified as aiding only if promised beforehand. Also, the accused argues in his appeal that the term 'under promise' means perpetrator's subjective attitude towards the act, and that an accessory is guilty within the bounds of his intent.

i. Appellate Panel's decision

42. Article 290 of the CPC BiH provides for the contents of a judgment, as a judicial decision, by which an issue is resolved on merits. Paragraph (7) of this Article stipulates that *"the Court shall specifically and completely state which facts and on what grounds the Court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, the reasons why the Court did not sustain the various motions of the parties, the reasons why the Court decided not to directly examine the witness or expert whose testimony was read, and the reasons guiding the Court in ruling on legal matters and especially in ascertaining whether the criminal offense was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act."* This legal provision serves as a guarantee that the court will provide reasons in relation to all those facts and issues that were disputable in a certain proceeding, in such a manner that all parties to the proceeding can clearly see the course of decision making, which is to say the path the court took to reach certain conclusions. In this manner, the CPC BiH offers protection from arbitrary decision-making, and provides guarantees with regard to exercising the right to a fair trial. The right to a reasoned judicial

decision is one of the basic postulates within the right to a fair trial, so although it does not constitute an integral part of Article 6 of the European Convention on Human Rights and Fundamental Freedoms¹, it has been recognized through the case law of the European Court of Human Rights² as a fundamental right of the subjects of criminal proceedings³. The Constitutional Court of Bosnia and Herzegovina⁴ has also held that „[...] *An element of a fair trial [...] is the requirement that any judicial decision must state reasons it is based on.*”⁵

43. Exactly because of this, any judgment whose reasoning does not contain reasons on decisive facts and which does not provide an explanation regarding the issues raised before the court, does not meet the right to a fair trial standard. Through the provisions laid down in Article 297(1)k), the CPC BiH offers protection to all parties to the proceeding and gives a possibility to contest a judgment on the grounds of not containing adequate reasoning, or reasons on decisive facts.

44. In the case at hand, the accused Stanišić and his defense counsel well-foundedly argue that the challenged judgment contains certain omissions with regard to certain legal relevant issues, on which the existence of Accessory After the Fact under Article 24 of the CC BiH depends. Consequently, the Appellate Panel, having analyzed defense’s grounds of appeal, concluded that the offered reasoning of the challenged judgment does not provide a review of the actions taken by the accused Stanišić regarding his acts as an accessory after the fact, that is, after the killing of the captives, based on which one could draw a conclusion on his actions, and from which it ensues beyond a doubt that he had promised in advance to cover up the (previously committed) criminal offense, based on which to establish his clear contribution to the commission of the given criminal offense.

45. Article 24(2) of the Criminal Code of the Socialist Federative Republic of Yugoslavia reads as follows:

The following, in particular, shall be considered as aiding: the giving of instructions or counselling about how to commit a criminal act, the supply of tools and resources for the crime, the removal of obstacles to the commission of a crime, as well as the promise, prior to the commission of the act, to conceal the existence of the criminal act, to hide the offender, the means to commit the crime, its traces, or goods gained through the commission of a criminal act.

¹ Hereinafter: the ECHR.

² Hereinafter: the European Court.

³ European Court judgment, *Van der Hurk v. the Netherlands*, 19 April 1994; *Balani v. Spain*, Judgment, 9 December 1994.

⁴ Hereinafter: the BiH Constitutional Court.

⁵ BiH Constitutional Court, Decision No. AP-1401/05, 12 September 2006.

46. Therefore, bearing in mind the given legal provision, and by analyzing Defense's appeal's grievances, the Appellate Panel concludes that the first-instance judgment did not address the existence of facts and circumstances from which it would beyond a doubt ensue that there was a promise given beforehand by the accused (in a direct or indirect manner) that the accused, upon the completion of the criminal offense, would help the perpetrators in terms of concealing the body, or removing the traces of blood of the slain captives. According to the foregoing definition of accessory under Article 24(2) of the CC SFRY, accessory in the commission of the criminal offense (*inter alia*) particularly includes *a promise, prior to the commission of the act, to conceal the existence of the criminal act*, which, during the analysis of the factual description of the amended indictment, apart from other acts, is also charged against the accused. Accessory after the fact, defined in this way, also implies the establishment and reasoning of the existence of such a promise, which may be manifested verbally, non-verbally, directly or indirectly.

47. The Appellate Panel notes that the content of the judgment, both its operative part and reasoning, must be such that it can clearly be seen from them what are the specific actions the accused took in perpetrating the criminal offense, which satisfy the elements of the given criminal offense, which means that each circumstance pertaining to the elements of the criminal offense must be stated clearly, so it is suitable for decision making and review. Especially when it comes to a criminal offense committed by multiple persons, or aiding and abetting in a criminal offense, their actions must be sufficiently elaborated so as to be taken as a basis for the application of a relevant institute of criminal substantive law.

48. In the case at hand, when it comes to the accused's acts of accessory after the murder of captives, which means after the fact, it does not suffice to merely refer in the reasoning to certain provisions of criminal law without specifying and determining the circumstances and facts from which to draw a conclusion that there existed a sort of promise (direct or indirect) to help the perpetrators in concealing the traces of the criminal offense, which means after the fact.

49. Therefore, in the case at hand, the Trial Panel failed to state the accused's specific actions from which to draw a conclusion on the beforehand given promise to conceal the traces of the criminal offense in order to be able to treat the accused as an accessory to the commission of the criminal offense, specifically accessory after the fact. The accused's participation in helping the perpetrators after the killing of captives was not reasoned at all,

especially not the manner from which it could be established that there indeed was a promise given beforehand, which is of great significance in the process of crime commission.

50. Even though the defense contested the accessory after the fact theory in its appeals related to essential violations of the CPC BiH (in terms of contradiction between the operative part and the reasoning), and violations of criminal law, according to the Appellate Panel all the above means that the contested judgment lacks proper reasons on decisive facts, so in that context the Panel concluded that in that way there was essential violation of criminal procedure under Article 297(1)k) of the CPC BiH.

51. Due to the above established violations, which under the foregoing provisions of the criminal procedural law result in the revocation of the trial judgment, the Appellate Panel did not analyze any other grievances from the defense's appeal and the accused's personal appeal, and essentially also the appeal filed by the Prosecutor, which pertains to the decision on criminal sanction, since that would amount to a prejudice to the outcome of retrial, but has, in accordance with Article 316 of the CPC BiH, limited itself merely to present brief reasons for revocation.

52. In reopened proceedings, the court shall remedy the noticed essential violations of criminal procedure, re-adduced the already adduced relevant evidence, and with an evaluation of other appeal grievances, if necessary, adduce other evidence, after which the court will be in a position to deliver a new judgment, based on the law.

53. Accordingly, pursuant to Article 310(1) and (2), as read with Article 315 of the CPC BiH, its was decided as stated in the Operative Part of this Judgment.

RECORD-TAKER

Legal advisor-assistant

Nedim Muminović

JUDGE PRESIDING

Dr. Miloš Babić

LEGAL REMEDY NOTE: No appeal lies from this judgment.