

BOSNA I HERCEGOVINA



БОСНА И ХЕРЦЕГОВИНА

SUD BOSNE I HERCEGOVINE  
СУД БОСНЕ И ХЕРЦЕГОВИНЕ

---

Docket number: S1 1 K 014977 18 Krž 2

Date: 8 May 2018

---

The Appellate Panel composed of: Judge Dr. Dragomir Vukoje, presiding  
Judge Tihomir Lukes, member  
Judge Senadin Begtašević, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

NASER ORIĆ AND SABAHUDIN MUHIĆ

---

SECOND-INSTANCE DECISION

---

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

Miroslav Janjić

**Defense counsel for the accused Naser Orić:**

Attorney Lejla Čović

**Defense counsel for the accused Sabahudin Muhić:**

Attorney Sabina Mehić

## TABLE OF CONTENTS

<b>SECOND-INSTANCE DECISION.....</b>	<b>1</b>
<b>D E C I S I O N .....</b>	<b>3</b>
<b>REASONING .....</b>	<b>3</b>
<b>I. PROCEDURAL HISTORY.....</b>	<b>3</b>
A. TRIAL JUDGMENT .....	3
B. THE APPEAL AND RESPONSES TO THE APPEAL.....	4
C. SESSION OF THE APPELLATE PANEL.....	4
<b>II. GENERAL CONSIDERATIONS.....</b>	<b>7</b>
<b>III. ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS .....</b>	<b>8</b>
A. STANDARDS OF REVIEW .....	8
B. ESSENTIAL VIOLATION OF CRIMINAL PROCEDURE PROVISIONS UNDER ARTICLE 297(1)(I) OF THE CPC BIH .....	10
1. Appeal filed by Prosecution.....	10
2. Appellate Panel's findings .....	10

**Docket number: S1 1 K 014977 18 Krž 2**

**Sarajevo, 8 May 2018**

The Court of Bosnia and Herzegovina, in the Appellate Division Panel composed of Judge Dr. Dragomir Vukoje, as Judge President, and judges Tihomir Lukes and Senadin Begtašević as the Panel members, with the participation of legal advisor Neira Tatlić as the minutes-taker, in the criminal case against the accused Naser Orić and Sabahudin Muhić, concerning the criminal offense of War Crimes against Prisoners of War under Article 144 of the Criminal Code of the Socialist Federative Republic of Yugoslavia (CC SFRY), as read with Article 22 of the same Code, deciding on the appeal filed by the BiH Prosecutor's Office from the Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 014977 15 Kri of 9 October 2017, having held a session of the Panel in the presence of the Prosecutor for the BiH Prosecutor's Office, Miroslav Janjić, the accused Naser Orić and his defense counsel Lejla Čović, and the accused Sabahudin Muhić and his defense counsel Sabin Mehić, pursuant to Article 310(1), as read with Article 315(1)a), of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), on 8 May 2018 issued the decision as follows.

## **DECISION**

**The appeal** filed by the BiH Prosecutor's Office **is granted**, the judgment issued by the Court of Bosnia and Herzegovina, No. S1 1 K 014977 15 Kri of 9 October 2017, **is revoked**, and a retrial is ordered before the Appellate Division Panel of the Court of Bosnia and Herzegovina.

## **REASONING**

### **I. PROCEDURAL HISTORY**

#### **A. TRIAL JUDGMENT**

1. The Trial Judgment delivered by the Court of Bosnia and Herzegovina (hereinafter: the Court of BiH), No. S1 1 K 014977 15 Kri of 9 October 2017, pursuant to Article 284)c) of the CPC BiH, acquitted the accused Naser Orić and Sabahudin Muhić of the charges,

specifically that the accused Naser Orić, by the actions described in Count 1 of the Indictment, committed the criminal offense of War Crimes against Prisoners of War under Article 144 of the adopted CC SFRY, and that the accused Naser Orić and Sabahudin Muhić, by the actions described in Counts 2 and 3 of the Indictment, committed the criminal offense of War Crimes against Prisoners of War under Article 144 of the CC SFRY, as read with Article 22 of the same Code.

2. Pursuant to Article 189(1) of the CPC BiH, the accused are relieved of the obligation to reimburse the costs of criminal proceedings.

3. Pursuant to Article 198(3) of the CPC BiH, the injured party Jelica Ilić was advised to pursue her property claim in civil proceedings.

#### **B. THE APPEAL AND RESPONSES TO THE APPEAL**

4. The Prosecutor's Office of Bosnia and Herzegovina (hereinafter: the Prosecutor/Prosecution) has filed an appeal from the trial judgment on the grounds of essential violations of criminal procedure provisions, and incorrectly or incompletely established facts, moving the Appellate Division Panel of the Court of BiH (hereinafter: the Appellate Panel) to grant the appeal, revoke the trial judgment in its entirety, and hold a retrial.

5. Defense counsel for the accused have filed with the Court their respective responses to the Prosecutor's appeal, both moving the Appellate Panel to dismiss the appeal as ill-founded and uphold the trial judgment.

#### **C. SESSION OF THE APPELLATE PANEL**

6. The Appellate Panel held a session on 8 May 2018, in terms of Article 304 of the CPC BiH, at which the Prosecutor said he filed his appeal on the grounds of essential violations of criminal procedure provisions, and incorrectly and incompletely established facts. The Prosecutor argues that the challenged judgment is unique in case law, since the Trial Panel based its decision also on the statement given by witness O1 during the investigation, which was an official note, which ultimately resulted in an essential violation of criminal procedure provisions under Article 297(1)k) of the CPC BiH. He went on to say that there was an essential violation of criminal procedure provisions under Article 297(1)i)

of the CPC BiH, since the judgment is based on a piece of non-existent evidence that was not adduced at the trial. He also argued that the pronouncement of the judgment and the written copy thereof are completely different. The written judgment noted that, under the case law of the Hague Tribunal, the Court would not evaluate each piece of evidence individually and in mutual correlation, all of which ultimately led to incorrectly and incompletely established facts. The Prosecutor argues that the trial judgment erred in stating that there was only one witness statement on which to base a judgment, whereas in the case at hand there are multiple congruent witness statements. Since the pronouncement and the written copy of the judgment are not identical, the prosecutor raised the issue as to which judgment to appeal, the one pronounced or the written copy? In his public pronouncement of the judgment, the judge presiding repeatedly compared witness O1 statements with the official note dated 3 September, whereas the written copy says that that is against the law and that the given official note would not be taken into consideration. In that regards, he cites Paragraph 90 of the written copy, which says that the Court did not take the official notes into consideration, which is in contravention of the public pronouncement, if one listens to an audio recording, at 14 minutes and 20 seconds. The Prosecutor argues that the adversarial principle and the principle of directness have been violated, which resulted in a violation of Article 297(1)i) of the CPC BiH. Also, the challenged judgment is incomprehensible, and contradictory in Paragraphs 90 and 92, since Paragraph 90 states that the Court has compared the testimony given by protected witness O1 and Radivoje Ostojić, or rather the testimony and the official notes, while Paragraph 92 states that such a practice would be in violation of the law. The Prosecutor also pointed out that the authors of the disputable official note were not heard at the trial. Besides, the Prosecutor noted the unanimous position of the Trial Panel that the Court would not act under the procedural law, but under the rules of the Hague Tribunal. In its presentation, the Prosecutor noted that Paragraph 123 refers to one witness only, whereas Paragraphs 124 and 126 state other witnesses as well, which, according to the Prosecutor, points to the contradictory nature of the judgment, which also renders it incomprehensible. He went on to say that the Court has addressed some peripheral details in its evaluation of witness statements, such as those given by witness O1 and Ibran Mustafić, while ignoring the fact that O1's close family members were killed, that he himself was wounded twice, that he survived the Srebrenica ordeal, but could not specify the noise one hears when a man's throat is slit, 25 years after the fact. Contrary to Court's findings, the Prosecutor argued that the respective evidence given by witnesses Stojanka Savić and Dr. Vesna Ivanović is not identical, and that the evidence given by

witness O1 is consistent with the evidence given by witnesses Ilić and Jeremić. The Prosecutor also argued that witness Ibran Mustafić gave evidence identical to that provided in his book, that he has been subjected to relevant expertise and was found to be fit to testify, with the above-average intelligence. He said in his testimony that the accused Naser Orić had told him in his apartment he had stabbed Judge Slobodan Ilić in the eye by his bayonet.

7. Counsel for the accused Naser Orić completely stood by her written response to the appeal, indicating that the Prosecution's appeal is confusing, incomprehensive and that the arguments, in whole, are based on the so called „non-existent evidence“. In this regard, Counsel highlighted that it is not a non-existent evidence, that this evidence exists in the case record as Defense's Exhibit O1-5, that is, an official note concerning the testimony of the protected witness O1. The Defense submitted that the enacting clause of the publicly announced Judgment must be identical to its written copy, that all the time the Prosecutor actually refers to the reasoning, not the enacting close of the Judgment. Indisputably, the enacting clause of the contested Judgment is identical to the announced Judgment. Counsel also emphasized that the Trial Panel did not evaluate the referenced evidence in terms of its contents, that the Prosecutor did not object, at the main trial, to the presentation of this evidence, and that the defense obtained it from the Prosecution. The Defense submitted that it is not clear to which Count of the Indictment the appellate grievances are related, that the Judgment is not based on an official note, and that the witness O1's testimony contradicts the other witnesses' testimony. The Prosecutor disregards that the Trial Panel did have an opportunity to evaluate the credibility and authenticity of witness O1, who is a repeat offender, who did not tell the truth about his membership in the Army BiH, considering that he was not a member of the units which took part in the actions included in the factual description of the Indictment. The Defense submits that there is no piece of evidence proving that the accused Naser Orić indeed killed Slobodan Ilić, and that the Defense did not contest the testimony of witnesses-members of the RS Army, since they are consistent and contrary to the witness O1's testimony. To this effect, Counsel pointed to the evidence given by Milomir Lazarević and Milan Jeremić, who had heard Naser Orić speaking via megaphone, which the witness O1 did not mention in his testimony. In addition, Jelica Ilić, the spouse of the injured party Slobodan Ilić, described her husband differently from the witness O1. Counsel particularly highlighted that the Trial Panel ordered an expert evaluation of witness Ibran Mustafić due to his improper conduct at the main trial. The Defense ultimately submitted that the expert

witness Kešetović stated in his findings that, due to the lack of soft tissue, it could not be determined whether the referenced injuries were inflicted upon the victim during his life or after his death; if they were inflicted while the victim was alive, could they have then caused the victim's death? Also, it was not determined if they were caused by a blunt object or ammunition. All the foregoing indicates that the expert witness's finding is contrary to the witness O1's testimony.

8. The accused Naser Orić accepted his Counsel's arguments and had nothing to add thereto.

9. Counsel for the accused Sabahudin Muhić briefly presented her comments laid out in her response to the Prosecution's appeal and highlighted that the Prosecution did not address her client in the factual part and that she would only respond to legal issues. Specifically, Counsel submitted that it is not the enacting clause of the Trial Judgment the Prosecution has a problem with, but rather its reasoning, while Article 297(1)(k) of the CPC BiH addresses the matter of wording of judgments. Counsel also submitted that a written judgment is always being appealed rather than its oral announcement, and that the procedural law does not provide for an essential violation of Article 290 of the CPC BiH. The Defense's view is that the Prosecution failed to properly point to either a violation of Article 290(1) of the CPC BiH or the results of the referenced deficiencies. Counsel repeated that the disputable official note is not a non-existent evidence, as indicated by the Prosecution. In addition, the defense emphasized that the Trial Panel comprehensively indicated the standards of adjudication.

10. The accused Sabahudin Muhić accepted Counsel's arguments and had nothing to add thereto.

11. Having reviewed the contested Judgment within the grounds and arguments of the appeal, pursuant to Article 306 of the CPC BiH, the Appellate Panel decided as stated in the enacting clause for the reasons that follow:

## **II. GENERAL CONSIDERATIONS**

12. Prior to providing reasons for each appellate ground individually, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC BiH, the applicant should include in his/her appeal both the grounds for contesting the judgment and the reasoning

behind the appeal.

13. 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.

14. In that respect, the appellant must specify the grounds on the basis of which he contests the judgment, specify which section of the verdict, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

15. 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.

### **III. ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS**

#### **A. STANDARDS OF REVIEW**

16. A Judgment may, pursuant to Article 296 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 of the CPC BiH.

17. With respect to the gravity and importance of the procedure violations, the CPC BiH distinguishes between the violations which, if found to exist, create an irrefutable presumption that they have adversely affected the validity of the verdict (absolutely essential violations) and the violations where the Court has discretion to evaluate, on a case-to-case basis, whether a found procedure violation affected or could have negatively affected the rendering of a proper verdict (relatively essential violations).

18. Absolutely essential violations of the CPC BiH are specified in Article 297(1)(a) through (k). If the Appellate Panel has found any essential violations of the criminal procedure provisions, it shall revoke the first instance judgment, pursuant to Article 315(1)(a) of the CPC, except in cases provided for in Article 314(1) of the CPC BiH.

19. Unlike absolutely essential violations, relatively essential violations are not specified in the law, but rather exist in situations where the court, during the main trial or in the rendering of the judgment, did not apply or improperly applied a provision of the criminal



procedure code, but only if this affected or could have affected the rendering of a lawful and proper judgment.

20. In relation to the assumption that a procedure violation could have negatively affected the rendering of a lawful and proper judgment, it will not suffice that the appellant merely claims that, hypothetically, a procedure violation could have negatively affected the rendering of a lawful and proper judgment, but the Appellate Panel shall conclude that there is a violation of the criminal procedure provisions only if the appellant showed that it is substantial in nature, and that it cannot be concluded that the referenced violation did not adversely affected the rendering of a lawful and proper judgment. Specifically, when the Appellate Panel considers that the rendered judgment is lawful and proper regardless of the procedure violation of such a nature, the Appellate Panel will conclude that there is no violation of Article 297(2) of the CPC BiH.

\*\*\*\*\*

21. First of all, the Appellate Panel notes that the goal of criminal proceedings is to legally regulate the actions of the Court, parties to and other participants in the proceedings, all with a view to determining whether a person has committed a crime or not and, if they have, to impose on them an appropriate criminal sanction for the committed crime in legal proceedings. In order for those activities to be lawful and properly implemented, the law stipulates rules ensuring that no innocent person is convicted and that a criminal sanction be imposed on the perpetrator of a crime under the conditions laid down in a criminal code defining crimes and in legal proceedings. If such actions are carried out in violation of the prescribed rules of procedure, i.e. if procedural forms are not respected in cases defined by law, that would amount to an essential violation of criminal procedure provisions.

22. In that respect, the Prosecution's Appeal raises a valid argument that the Trial Panel committed an essential violation of criminal procedure provisions under Article 297(1)(i) of the CPC BiH, as the judgment is based on evidence on which a judgment cannot be based under the provisions of the procedural law. For those reasons, the committed violation to which the appeal referred resulted in the judgment being revoked.

**B. ESSENTIAL VIOLATION OF CRIMINAL PROCEDURE PROVISIONS UNDER  
ARTICLE 297(1)(I) OF THE CPC BIH**

**1. Appeal filed by Prosecution**

23. The Prosecution argued in the appeal that the Trial Panel did not see the statement of protected witness O1 dated 3 September 2003 in a courtroom of the Court of BiH, but it did base the announcement of the acquittal thereon, i.e. the Panel used that non-existing piece of evidence to link it to the other evidence presented at the trial. In that way, in addition to violations of the principles of direct presentation of evidence and adversarial procedure, the announcement of the judgment included an absolutely essential violation of Article 297(1)(i) of the CPC BiH, because the judgment is based on the evidence that cannot serve as the basis of a judgment under the CPC BiH.

24. In the Prosecutor's view, the aforementioned ensues from the fact that the Trial Panel stated in paragraph 101 that *"The Court may consider a fact to be established on the basis of evidence assessment once it is satisfied of its existence; that needs to ensue from evidence presented at trial, and when the panel can have no more doubts in that regard"*. In other words, the Panel indicated in the announced judgment that it used evidence that did not exist physically and was not presented at the trial, and by linking that piece of evidence with the other evidence actually adduced at the trial, the Panel committed an absolutely essential violation of criminal procedure provisions.

25. It is further alleged in the appeal that the Trial Panel not only committed an essential violation of criminal procedure provisions defined by case law (Judgment of the Appellate Division of the Court of BiH S1 2 K 012891 15 Kž dated 7 April 2016, para 32) by using the official note dated 3 September 2003 as a witness statement dated 3 September 2003, but also used the official note that was not the original or a certified photocopy (and its authors were not examined at the trial) as a basis of the judgment although that piece of evidence should not have been used in that regard under the CPC BiH.

**2. Appellate Panel's findings**

26. Article 297(1)(i) of the CPC BiH provides that there is an essential violation of provisions of criminal procedure if the judgment is based on evidence that may not be

used as the basis of a judgment under the provisions of the CPC BiH. According to the cited statutory provision, the use of a piece of inadmissible evidence for a judgment is sufficient for a finding that there has been an essential violation of criminal procedure provisions under the referenced subparagraph.

27. Prosecutor argued in the appeal that the Trial Panel committed the cited essential violation of criminal procedure provisions, having based the impugned judgment on evidence that cannot serve as the basis of a judgment under the provisions of criminal procedure law. In that respect, it was pointed out that the Trial Panel based the judgment on Exhibits O1-5 and O1-14: the official notes on interviews conducted by authorized officials with witnesses O1 and Radivoje Ostojić with reference to the charges.

28. The issue of evidence on which a court's decision cannot be based occupies one of focal points in our criminal procedural law and it is part of the provision on essential violation of criminal procedure provisions under Article 297(1)(i) of the CPC BiH, which reads that a Court will commit (absolute) essential violation of criminal procedure provisions if the judgment is based on evidence on which a judgment cannot be based under the provisions of this Code. Along those lines, the existence of legally inadmissible evidence always has an adverse effect on the rendering of a lawful and proper judgment, and a mere confirmation of their existence – regardless of whether it benefits or is detrimental to an accused and regardless of whether it is reliable, true or credible – implies (has as a consequence) invalid criminal proceedings and judgment delivered.

29. Having said that, if parties (in this case, Prosecution) adduce arguments regarding the admissibility of evidence during a trial, the Court is under obligation to be mindful of that and has an obligation to rule on such arguments. However, the Trial Panel, although obliged, failed to take any action in that regard.

30. In this connection, the Constitutional Court of Bosnia and Herzegovina notes that according to the established case law of the European Court and the Constitutional Court, Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms obliges the courts, *inter alia*, to provide reasons for their judgments, but cannot be understood as requiring a detailed answer to all the questions put and all the arguments advanced<sup>1</sup>. The extent to which this duty applies may vary

---

<sup>1</sup> See Constitutional Court, decisions U 62/01 dated 5 April 2002 and AP 352/04 dated 23 March 2005.

according to the nature of the decision<sup>2</sup>. The European Court and the Constitutional Court have pointed out in many of their decisions that domestic courts have a certain margin of appreciation when choosing arguments and evidence in a particular case, but at the same time they are obligated to justify their activities by giving clear and understandable reasons for their decisions.<sup>3</sup> In the case in question, a Court's decision is missing and the impugned judgment does not contain any reasons, let alone clear and understandable reasons for the decision, as required by the standards established by the case law of the courts mentioned above.

31. In contrast, the Trial Panel accepted the official notes and admitted them into evidence despite the fact that they were uncertified photocopies of notes made by internal affairs organs. Those documents, from the formal point of view, also have deficiencies in terms of their authenticity and as such cannot be used as evidence; consequently, they cannot be used in the criminal proceedings because they are not lawful. The provision of paragraph 2 of Article 233 of the CPC BiH also confirms that unlawful evidence must be excluded<sup>4</sup>.

32. Besides, Article 274 (Records on Evidence) of the CPC BiH defines what is considered a document. Specifically, paragraph 2 of the cited article provides: *“To prove the content of writing, recording or photograph, the original writing, recording or photograph is required, unless otherwise stipulated by this Code.”* The subsequent paragraph (3) provides: *“Notwithstanding Paragraph 2 of this Article, a certified copy of the original may be used as evidence or the copy verified as unchanged with respect to the original.”*

33. In the case in question, none of the aforementioned statutory requirements to regard the said official notes as lawful evidence have been met.

34. Notwithstanding the aforesaid, the Trial Panel admitted the official notes as evidence, and the Defense presented them as its evidence when putting questions to

---

<sup>2</sup> See European Court of Human Rights, *Ruiz Torija v. Spain*, Judgment, 9 December 1994, Series A No. 303-A, para 29.

<sup>3</sup> See European Court of Human Rights, *Suominen v. Finland*, Judgment, 1 July 2003, Application No. 37801/97, para 36, and, *mutatis mutandis*, Constitutional Court, Decision AP 5/05, 14 March 2006.

<sup>4</sup> „(2) If the preliminary hearing judge accepts the motion from paragraph (1)(d) of this Article he shall decide that such evidence is removed from the case file and returned to the Prosecutor.“

Prosecution witnesses O1 and Radivoje Ostojić in support of Defense's case and in spite of Prosecutor's objections raised at the trial.

35. Determination of legally inadmissible evidence limits free evaluation of evidence (the principle invoked by the Trial Panel), but it also creates preconditions for rendering a proper judgment based on law, which is the ultimate goal of criminal proceedings.

36. The Trial Judgment contains the following position on the issue of evaluation of lawfulness of evidence in paragraph 91: *„...it would not be proper, in relation to the tendered official notes, to start from the assumption that any official note compiled by an authorized official is automatically unlawful evidence that cannot be used in criminal proceedings.“*

37. Conversely, the Appellate Panel will quote the reasoning of the Supreme Court of the Federation of Bosnia and Herzegovina, whose fragments were interpreted in the contested Judgment, in order to point at all the criteria that must be complied with in order to use an official note as lawful evidence. The complete reasoning reads as follows: *“It ensues from the foregoing that there do not exist special formal rules for evaluation of lawfulness of individual, specifically determined exhibits, but the Court, in application of the referenced provision, shall evaluate the lawfulness of each specific piece of evidence with respect to the circumstances of a given case. It would not be proper to start from the assumption that any official note compiled by an authorized official automatically constitutes illegal evidence that cannot be used in criminal proceedings. In that respect it should be recalled that compiling official notes as part of duties performed by internal affairs bodies represents a routine method of their work regulated by appropriate rules relating to that service. Therefore, an official note represents a document that under certain conditions can, as any other document, be used in criminal proceedings for the purpose of establishing relevant facts. However, such note shall not constitute valid evidence if it contains statements of certain persons that participate in criminal proceedings, including a suspect or accused, as in such cases the persons who gave those statements had not been advised about their rights and obligations they are entitled to under criminal procedure code, thereby the use of such statements as evidence would undoubtedly constitute a violation of their rights, as well as an essential violation of procedural law provisions. On the other hand, if the note concerns an act of official person as part of his routine duties, then there is no obstacle for it to be used as evidence in criminal proceedings (naturally, if it complies with the formal requirements that it is an*

*original or a certified copy, that it is signed by the persons who compiled it). Consequently, the Prosecutor argues without any grounds whatsoever that the relevant official note the Trial Panel adduced as evidence of the Court automatically constitutes illegal evidence.*<sup>5</sup>

38. Paragraph 92 of the Trial Judgment reads that the referenced exhibits (Official Notes) were not used within the meaning of Article 273(1) of the CPC B-H, that is, as statements given during the investigation, since the Official Notes contain a summary/interpretation of statements of individuals (witnesses O1 and Radivoje Ostojić), who were not advised of their rights and obligations they are entitled to in accordance with the provisions of the Criminal Procedure Code. As a result, the Trial Panel *“did not use the referenced official notes as evidence in terms of their contents when rendering the decision”*.

39. In that respect, the Appellate Panel also concludes that statements given before police bodies and referred to in official notes cannot be considered statements given in investigation within the meaning of Article 273(1) of the CPC B-H.

40. The foregoing indicates that the Trial Panel was aware of the defects of the referenced official notes from the aspect of their lawfulness and that they were not authentic documents, and that, once it admitted them in the case file, the Panel tried to convalidate them indirectly with a rhetoric statement that is not substantiated in the conducted evidentiary proceedings. The Trial Panel did not evaluate them in terms of their contents, that is, it tried to unilaterally reduce their significance in the previously described manner.

41. With such assessment the Appellate Panel was mindful of the fact that this issue had repercussions on the Trial Panel’s final conclusions about the credibility of the evidence given by witness O1. According to paragraph 127, the Trial Panel made every effort to evaluate the evidence given by Witness O1 in full, *“including both the substance of the evidence given at the main trial as well as its consistency with his prior statements.”* In paragraph 171, the Trial Panel concluded that the evidence given by witness O1, as the key witness, about the circumstances referred to in Count 1 of the Indictment, could not

---

<sup>5</sup> Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, No. 09 0 K 015925 13 Kž 6, 31 October 2013, pp. 2-3.

constitute a reliable factual basis on which it would be possible to establish beyond reasonable doubt the guilt of the Accused Naser Orić for the killing of Slobodan Ilić.

42. Therefore, if the Defense used the referenced official notes as a pattern when examining this witness and witness Radivoje Ostojić, which the Trial Judgment also states, although those notes compiled by the internal affairs bodies did not contain procedural guarantees or forms (which the referenced bodies were not obliged to provide), their answers as witnesses at the main trial represent the factual statements that are a part of their full evidence that the Trial Panel refers to. Thereby, an unlawful use of the official notes cannot be removed and it is likewise not possible in any way to unilaterally remove them once they have been admitted into the body of evidence, not even by the averment of the Trial Panel that it did not evaluate them in terms of their contents. Even if this were correct, it is a fact that the Trial Panel members were informed of and thereby contaminated by their contents as legally invalid evidence, given that strict procedural rules govern witness examination, and the consequence of non-compliance with these rules is that a lawful adjudication cannot be based on the evidence adduced in such way, even if indirectly.

43. The quality of such conclusion cannot be influenced by the Trial Panel's averments in paragraph 91 of the Trial Judgment that compiling official notes as part of duties performed by internal affairs bodies represents a routine method of their work (which this Appellate Panel does not find disputable, either). What is relevant in that respect is the fact that the exhibits compiled in this way cannot be treated as evidence whose use at the main trial, as the central phase of the criminal proceedings, would make such exhibits legal, but on which an adjudication can never be based either directly or indirectly (as in the case at hand).

44. The use of non-valid evidence when rendering a judgment suffices for an inference that there exists an essential violation of the criminal procedure provisions, the consequence of which is revocation of the Trial Judgment if the violation is argued in an appeal. This has happened in the case at hand, given that the Prosecution appeal argued the unlawfulness of the referenced evidence.

45. Given that the manner of presentation of evidence is strictly stipulated by the Criminal Procedure Code and that, as a result of the violation, such evidence shall be removed from the case file as unlawful evidence, the Appellate Panel will remove from the

case file Exhibits O1-5 and O1-14.

46. Pursuant to Article 316 of the CPC B-H, this Decision contains only brief reasons for the revoking of the Trial Judgment. The Appellate Panel did not evaluate the other grounds for appeal and appeal grievances.

47. In a re-trial, the relevant essential violation of the criminal procedure provisions shall be removed, the adduced relevant evidence shall be adduced again, and, after evaluation of the other appeal grievances, other evidence will be adduced if needed, whereupon the Appellate Panel will be able to render a new judgment based on law.

48. Based on all foregoing reasons and pursuant to Article 310(1), as read with Article 315(1)(a) of the CPC B-H, the Appellate Panel rendered a decision as stated in the enacting clause of this Decision.

**RECORD TAKER**

**Legal advisor**

Neira Tatlić

**PRESIDING JUDGE**

**JUDGE**

Dr. Dragomir Vukoje

**LEGAL REMEDY:** No appeal lies from this Decision.