



Case number: X-KRŽ-09/847

Date: Delivered 14 June 2011
 Sent out 11 July 2011

Before the Panel: Judge Azra Miletić, Presiding
 Judge Tihomir Lukes, Reporting
 Judge Carol Peralta, Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

ĆERIM NOVALIĆ

SECOND INSTANCE VERDICT

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

Sanja Jukić

Defence Counsel for the Accused:

Ismet Mehić

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IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Appellate Division Panel, Judge Azra Miletić, as the Presiding Judge, and Judge Tihomir Lukes and Judge Carol Peralta, as the Panel members, with the participation of Legal Advisor-Assistant Neira Kožo, as the record-taker, in the criminal case of the Accused Ćerim Novalić, charged with the criminal offence of War Crimes against Civilians in violation of Article 173(1)(e), as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), having decided on the Appeals filed by the Prosecutor's Office of Bosnia and Herzegovina, the Defence Counsel for the Accused Ćerim Novalić, Attorney Ismet Mehić, and the Accused Ćerim Novalić, from the Verdict of this Court No. X-KR-09/847 of 21 May 2010, following a session of the Panel held in the presence of Sanja Jukić, Prosecutor of the Prosecutor's Office of BiH, the Accused Ćerim Novalić and his Defence Counsel Ismet Mehić, on 14 June 2011 rendered the following:

VERDICT

The Appeal by the Prosecutor's Office of Bosnia and Herzegovina is hereby upheld, the Appeal by the Defence Counsel for the Accused Ćerim Novalić is hereby partially upheld, and the Verdict of the Court of BiH, No. X-KR-09/847 of 21 May 2010, **revised** with regard to the application of the Criminal Code by qualifying the offence of which the Accused Ćerim Novalić was found guilty as the criminal offence of War Crimes against Civilians in violation of Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC of SFRY) that was adopted pursuant to the Law on Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the SFRY, and with regard to the decision on sanction, by sentencing the Accused pursuant to the referenced Code and Articles 38 and 41 of the CC of SFRY to the sentence of imprisonment for a term of 8 (eight) years and 6 (six) months.

Pursuant to Article 50 of the CC of SFRY, the time the Accused will have spent in custody from 21 May 2010 until the committal to sentence pursuant to this Verdict shall be credited to the sentence imposed on him.

As to its remaining part, the First Instance Verdict shall stay unaltered.

REASONING

I. PROCEDURAL HISTORY

A. FIRST INSTANCE VERDICT

1. By the Verdict of the Court of Bosnia and Herzegovina (the Court), No: X-KR-09/847 of 21 May 2010, the Accused Ćerim Novalić was found guilty of having committed, in the manner described in paragraph I of the operative part of the Verdict, the criminal offence of War Crimes against Civilians in violation of Article 173(1)(e), as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC of BiH).
2. Pursuant to Articles 39, 42, 48, 49 and 50 of the CC of BiH, the Court sentenced the Accused Ćerim Novalić to imprisonment for a term of 7 (seven) years.
3. Pursuant to Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH), the Accused was fully relieved of the duty to reimburse the costs of the criminal proceedings, which shall be borne by the Court.
4. Pursuant to Article 198(2) of the CPC of BiH, the aggrieved party Borka Šaran was instructed to pursue her claims under property law in a civil action

B. APPEALS

5. The Prosecutor's Office of Bosnia and Herzegovina (the Prosecution) filed an Appeal from the First Instance Verdict on the grounds of the decision as to the sanction, and moved the Court to impose a lengthier sentence on the Accused Ćerim Novalić.
6. The Defence Counsel for the Accused, Attorney Ismet Mehić, appealed the First Instance Verdict on the grounds of: essential violation of the provisions of criminal procedure, erroneously or incompletely established state of facts, violation of the Criminal Code and decision as to the sanction, and moved the Appellate Panel to revise the contested Verdict and acquit the Accused of the charges, or revoke the contested Verdict, order a hearing before the Appellate Panel at which the Prosecution and the Defence would present their evidence, and thereupon render an acquittal.

7. The Accused Ćerim Novalić personally filed an Appeal on the grounds of: essential violation of the provisions of criminal procedure (Article 296(a) and Article 297(1)(k) of the CPC of BiH), erroneously or incompletely established state of facts (Article 296(c) and Article 299(1) of the CPC of BiH), violation of the substantive regulation (Article 296(b) and Article 298(d) of the CPC of BiH), violation of Article 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), and Articles 5, 6 and 7, as well as Article 14 – prohibition of discrimination, and violation of Article II/3(d) of the Constitution of Bosnia and Herzegovina. The Accused moved the Appellate Panel to uphold the Appeal, revoke the Verdict and remand the case for retrial.

8. The Appellate Panel notes that the Appeal of the Accused lacks the reasoning corroborating the above-referenced allegations.

9. The Defence Counsel for the Accused Ćerim Novalić, Attorney Ismet Mehić, filed a response to the Prosecution Appeal moving the Panel to refuse it as unfounded.

10. The Prosecution filed a response to the Appeal by the Defence Counsel, moving the Appellate Panel of the Court of B-H to uphold the First Instance Verdict.

11. At a session of the Panel held on 14 June 2011, pursuant to Article 304 of the CPC of BiH, the parties and the Defence Counsel reiterated the arguments presented in their written Appeals.

12. The Defence Counsel also stressed that, should the Defence Appeal be granted, the contested Verdict revoked and a hearing before the Appellate Panel scheduled, the Defence intended to summon witness Osman Novalić to give additional evidence, and Nedim Mangić, investigator from Konjic, to testify about the circumstance that the rape was committed by another person from Konjic.

II. GENERAL ISSUES

13. The Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC of BiH, before reasoning every appeal claim an Appellant is obliged to include in the Appeal both the legal grounds for contesting the Verdict and the reasoning behind the Appeal.

14. Given that the Appellate Panel shall review the verdict only insofar as it is contested by the appeal, pursuant to Article 306 of the CPC of BiH, it is a duty of an Appellant to draft the appeal in such a way that it may serve as a basis for reviewing the verdict.

15. In that respect, an Appellant must specify the appeal grounds on the basis of which he contests the Verdict, specify which part of the Verdict, piece of evidence or proceedings of the Court he contests, and indicate a clear and well-argued reasoning with which he corroborates the appeal.

16. Referring to appeal grounds in general terms only and arguing the alleged irregularities in the first instance proceedings without specifying which appeal grounds the Appellant refers to, do not constitute a valid basis for reviewing the First Instance Verdict, due to which the Appellate Panel refused the uncorroborated and unclear appeal arguments as unfounded.

III. GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC OF BIH: ESSENTIAL VIOLATIONS OF THE PROVISIONS OF THE CRIMINAL PROCEDURE

A. STANDARDS OF REVIEW

17. Pursuant to Article 296 of the CPC of BiH, a verdict may be contested on the grounds of an essential violation of the provisions of criminal procedure. The essential violations of the provisions of criminal procedure are defined in Article 297 of the CPC of BiH.¹

¹ Article 297 **Essential Violations of the Criminal Procedure Provisions:** (1) The following constitute an essential violation of the provisions of criminal procedure: a) if the Court was improperly composed in its membership or if a judge participated in pronouncing the verdict who did not participate in the main trial or who was disqualified from trying the case by a final decision; b) if a judge who should have been disqualified participated in the main trial; c) if the main trial was held in the absence of a person whose presence at the main trial was required by law, or if in the main trial the defendant, defence attorney or the injured party, in spite of his petition was denied the use of his own language at the main trial and the opportunity to follow the course of the main trial in his language; d) if the right to defence was violated; e) if the public was unlawfully excluded from the main trial; f) if the Court violated the rules of criminal procedure on the question of whether there existed an approval of the competent authority; g) if the Court reached a verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction; h) if, in its verdict, the Court did not entirely resolve the contents of the charge; i) if the verdict is based on evidence that may not be used as the basis of a verdict under the provisions of this Code; j) if the charge has been exceeded; k) if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts. (2) There is also a substantial violation of the principles of criminal procedure if the Court has not applied or has improperly applied some provisions of this Code or during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict.

18. As to the gravity and significance of the procedure violations, the CPC of BiH differentiates between those violations which, if established, give rise to an irrefutable assumption that they have affected the validity of the pronounced Verdict (absolutely essential violations), and such violations regarding which it is up to the Court to assess, in each specific case, whether they have or could have affected the validity of the Verdict (relatively essential violations).

19. Absolute essential violations of the CPC of BiH are listed in Article 297(1) Sub-paragraphs (a)-(k) of the CPC of BiH.

20. Should the Appellate Panel establish an essential violation of the provisions of the criminal procedure, the Panel must revoke the first instance verdict pursuant to Article 315(1)(a) of the CPC of BiH, except in the cases set forth under Article 314(1) of the CPC of BiH.²

21. Unlike the absolute violations, relatively essential violations are not specified in the law. These violations arise if during the main trial or in rendering a verdict the Court did not apply a provision of the law or the Court applied the provision incorrectly, which affected or might have affected a lawful and proper rendering of the verdict.

22. 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.

B. APPEAL OF THE DEFENCE COUNSEL FOR THE ACCUSED ĆERIM NOVALIĆ

² Article 314 **Revision of the First Instance Verdict:** (1) By honoring an appeal, the Panel of the Appellate Division shall render a verdict revising the verdict of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance and that in view of the state of the facts established, a different verdict must be rendered when the law is properly applied, according to the state of the facts and in the case of violations as per Article 297(1)(f), (g) and (j) of this Code.

1. Sub-ground One: Article 297(1)(d) of the CPC of BiH – The Defence argues that the right to a defence was violated

(a) The Appellate Panel is satisfied that the right to a defence was not violated and dismisses the arguments of the Defence Counsel's Appeal as unfounded.

23. According to Article 297(1)(d) of the CPC of BiH, violation of the right to a defence is one of the essential violations of the criminal procedure provisions. This implies that rules of the procedure were not applied, or they were misapplied to the detriment of the Accused by denying his right to a defence.

(i) Appeal arguments of the Defence Counsel for the Accused

a. Biased trial

24. The Defence emphasizes that the right of the Accused to a defence has been violated because the Court was biased when conducting the main trial. Therefore, the Defence requests that the Appellate Panel listen carefully through the course of the main trial, that is, review the transcripts³.

25. The Defence believes that at Defence Counsel's insistence that the Court should warn witness Borka Šaran to answer the question, and the clear refusal of the Court to do so, the Court actually demonstrated its bias in the case. Throughout the proceedings, and the Defence Counsel so noted for the record too, the Court also obstructed the defence by preventing the Defence Counsel from conducting a cross examination and carrying out defence strategy⁴.

i. Findings of the Appellate Panel

26. The Appellate Panel concludes that the arguments of the Defence Counsel for the Accused are unfounded and that the Trial Panel was right to restrict the cross-examination of witness Borka Šaran in the manner stipulated in Articles 262(3)⁵, 263⁶ and 264⁷ of the CPC of BiH.

³ Appeal of the Defence Counsel, p. 8.

⁴ Appeal of the Defence Counsel, p. 5.

⁵ Article 262 (3) of the CPC of BiH **Direct Examination, Cross-examination and Re-direct Examination of Witnesses:** "The judge or the presiding judge shall exercise an appropriate control over the manner and order of the examination of witnesses and the presentation of evidence so that the examination of and presentation of evidence is effective to ascertain the truth, to avoid loss of time and to protect the witnesses from harassment and confusion."

⁶ Article 263 of the CPC of BiH **Forbidden Questions:** "(1) The judge or the presiding judge shall forbid the

27. In the course of the cross-examination of the aggrieved party Borka Šaran, the Defence Counsel stated for the record several times⁸ that the Presiding Judge did not allow him to ask questions and that he, thus, disturbed his examination concept. However, the Defence Counsel did not raise this issue for once in the appropriate manner in the proceedings conducted before the Trial Panel, that is, he did not request a disqualification of the Presiding Judge or a Panel member, which he could have done if he really considered the Court to be biased and the Accused's procedural rights thus jeopardized. The Defence Counsel also failed to indicate in what sense the defence concept was disturbed, that is, how such conduct of the First Instance Panel caused a gross violation of the Accused's right to a defence.

28. Having reviewed the transcripts from the trial, the Appellate Panel concluded that the Presiding Judge of the Trial Panel conducted the main trial impartially and took care at every moment during the examination of the aggrieved party that only a fair, level-headed, patient and peaceful communication with a rape victim may contribute to finding the truth, because of the information, that is, details that most often only the victim and the perpetrator are aware of. Also particularly important for a victim of that offence is that further victimization is reduced and avoided in that way. In other words, the quality of the obtained information and its usability depend on the victim's mental and physical state at the time of testifying.

29. It should also be taken into account that a rape victim is hurt both physically and mentally and in a special emotional state marked by mixed feelings of shame, fear, confusion, self-accusation, anxiety and uncertainty. This condition of a victim constitutes a barrier of a kind and very often hinders successful communication, so the Defence Counsel's somewhat aggressive approach when he put questions to the aggrieved party, some of which were confusing, did not contribute to clarifying all details related to the offence his client was charged with, which the

inadmissible or the repetition of irrelevant questions as well as answers to such questions. (2) If the judge or the presiding judge finds that the circumstances that a party and the defence attorney wish to prove are irrelevant to the case or that the presented evidence is unnecessary, the judge or the presiding judge shall reject the presentation of such evidence."

⁷ Article 264 of the CPC of BiH **Special Evidentiary Rules When Dealing With Cases of Sexual Misconduct**: "(1) It shall not be allowed to ask an injured party about any sexual experiences prior to the commission of the criminal offence in question. No evidence offered to show the injured party's involvement in any previous sexual experience, behaviour, or sexual orientation shall be admissible. (2) Notwithstanding Paragraph 1 of this Article, evidence offered to prove that semen, medical documents on injuries or any other physical evidence may stem from a person other than the accused, is admissible. (3) In the case of the criminal offence against humanity and values protected by the international law, the consent of the victim may not be used in a favour of the defence. (4) Before admitting evidence pursuant to this Article, the Court must conduct an appropriate hearing *in camera*. (5) The motion, supporting documents and the record of the hearing must be sealed in a separate envelope, unless the Court orders otherwise."

⁸ Transcript of 30 March 2010, pp. 12, 13 and 22.

Presiding Judge noticed in time and prevented with a view to a comprehensive examination of the case and efficient conduct of the main trial.

30. For the foregoing reasons the Appellate Panel does not consider the Defence Counsel's appeal arguments to be well-founded.

b. Evidence of the Defence (curettage)

31. The Defence Counsel argues in the Appeal that the Court violated the right of the accused to a defence, as well as other provisions of the CPC of B-H governing the presentation of evidence, when it absolutely disregarded the importance of the Defence evidence about the time when the aggrieved party Borka Šaran allegedly went to have a curettage in the Konjic Hospital. In that regard the Court evaluated the witness statements and documentary evidence of the Defence and found them redundant and unnecessary⁹.

32. The Defence Counsel's Appeal reads that during the main trial the Defence successfully proved that there was no abortion, which is indicated by documentation – protocol log book, as well as by the testimony of doctor Sead Jusufbegović and nurse Mina Zahirović, and that the Court simply decided not to evaluate the mentioned evidence at all, since the factual substance of the Indictment has no mention of pregnancy resulting from rape¹⁰.

i. Findings of the Appellate Panel

33. Having reviewed the referenced appeal argument, the Appellate Panel concluded that the contested Verdict did not violate the methodological approach in establishing and studying decisive facts laid down in Article 14 of the CPC of BiH, which concerns the standard of *equality of arms*, given that it studied all facts with equal attention, not disregarding a single one that was of importance for adjudication. Therefore, this Panel considers the appeal argument concerning the disregard for the Defence evidence, that is, the facts in favour of the Accused, to be arbitrary and unfounded.

34. The Appellate Panel considers that the Trial Panel is in the best position to assess the credibility of witnesses, which the Panel indeed did and provided adequate reasons in that respect. Consequently, the Appellate Panel concludes that the Trial Panel properly evaluated the evidence by the Defence witnesses and that the Trial Panel's conclusion on the credibility of the Defence witnesses was sufficiently corroborated and well-founded.

⁹ Appeal of the Defence Counsel, p. 8.

¹⁰ Appeal of the Defence Counsel, p. 4.

35. In other words, this Panel considers as accurate and sufficient the argument from the contested Verdict that the factual substance of the Indictment has no mention of pregnancy resulting from rape, for which reason the Trial Panel justifiably concluded that it was not a relevant fact that should be established and reasoned in particular, hence it did not provide an evaluation of evidence related to these circumstances.

36. It is necessary to stress in that respect that there must be a correspondence between the Indictment and the Verdict, since the Court renders a decision only about the acts that the Prosecutor has charged the Accused with. Therefore, the Indictment determines the subject of deliberation and the contents of the Verdict.

37. The Appellate Panel, therefore, concludes that the Trial Panel fully resolved the subject matter of the Indictment, and that dealing with the issue of the aggrieved party Borka Šaran's pregnancy would mean exceeding the charges, lead to an absolutely essential violation of the criminal procedure provisions, and would certainly be to the detriment of the Accused Ćerim Novalić.

38. The fact that the Trial Panel did not evaluate the evidence in the manner that would have played into the hands of the Defence does not make the First Instance Verdict defective and incomplete, but clear and focused on important elements of the criminal offence that the Accused was tried for. Also, if the Trial Panel found that established were the facts to the detriment of the Accused, that is, that lead to the conclusion that the charges in the Indictment were proven, that does not inherently constitute the grounds to conclude that parties to the proceedings enjoyed different treatment.

39. Consequently, this Panel concludes that the Trial Panel established with certainty that the adduced Prosecution evidence on the referenced circumstances clearly indicates that in September 1992 the aggrieved party Borka Šaran was raped by the Accused Ćerim Novalić in the manner indicated in the factual description of the first instance Verdict, which the Defence evidence did not call into question.

2. Sub-Ground Two: Article 297(1)(i) of the CPC of BiH: The Defence argues that the Verdict is based on evidence that may not be used as the basis of a verdict under this Code

(a) The Appellate Panel concludes that the validity of the adduced evidence (Official Note of Trebinje CSB [Public Security Centre], SNB [National Security Service] Sector, of 13 November 1992, certified by the Hague seal (T-9)) has not been contested in the appeal arguments, that is, this exhibit constitutes valid evidence pursuant to Article 273(3) of the CPC of BiH. This Panel, therefore, refused as unfounded the appeal arguments of the Defence in this part.

(i) Appeal arguments of the Defence Counsel for the Accused

40. The Defence also pointed to the existence of an essential violation, reflected in the fact that the Verdict is based on evidence that may not be used as a basis of a verdict. The Appeal reads that one can see from the reasoning of the Verdict that on several occasions the Court invoked the Official Note dated 13 November 1992, which the Court admitted into the case file as a documentary exhibit, using as evidence the fact from that Official Note that the Accused Ćerim Novalić raped the aggrieved party Borka Šaran. The Defence does not understand in which manner the Official Note was admitted into the case file, as neither the Prosecution nor the Defence proffered the document as evidence. The Court did not even allow the possibility for the Defence to comment on this exhibit. Accordingly, the Defence considers the operative part of the Verdict to be incomprehensible, that is, contradictory to the provided grounds – evidence.¹¹

a. Findings of the Appellate Panel

41. After a detailed and comprehensive analysis of the operative part of the contested Verdict, the Appellate Panel concluded that it was sufficiently clear and comprehensible and that the reasons contained in the reasoning thereof are not contradictory. In other words, the Appellate Panel considers that the form and the contents of the Verdict are in conformity with the provisions of the procedural law and that there was no violation of the law in that respect, either.

42. With respect to the referenced Official Note, the Appellate Panel has established that the Prosecution introduced it in the case file as its exhibit on 20 April 2010, marked as T-9¹², and that

¹¹ Appeal of the Defence Counsel, p. 9.

¹² Transcript of 20 April 2011, p. 56.

the Defence Counsel used it when examining the aggrieved party Borka Šaran¹³, whereby he unambiguously demonstrated that he was delivered that exhibit in due time and that he considered it lawful and credible.

43. It should be stressed that it was inappropriate for the Defence Counsel to contest certain facts from the first instance proceedings by resorting to untruth, whereby he demonstrated contempt of this Court.

44. Therefore, having made the necessary verifications, this Panel concluded that Exhibit T-9 was lawful and that the Trial Panel's decision to refer to it in the contested Verdict when identifying the criminal offence perpetrator was well-founded, which leads to the conclusion that the Defence Counsel's appeal arguments are unfounded.

IV. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC OF BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

A. STANDARDS OF REVIEW

45. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness.

46. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.

47. In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

¹³ Transcript of 30 March 2010, pp. 38-40.

48. The Appellate Panel may substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous".

49. The Constitutional Court of Bosnia and Herzegovina, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.¹⁴ However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

B. APPEAL OF THE DEFENCE COUNSEL FOR THE ACCUSED ĆERIM NOVALIĆ

1. Sub-Ground One: Direct knowledge of the criminal offence

(a) The Appellate Panel is satisfied that the First Instance Panel properly and completely established the state of facts in the contested Verdict.

(i) Appeal arguments of the Defence Counsel for the Accused

50. The Defence states that witness Stanko Šaran is actually not a witness who has direct knowledge about the manner in which the rape was committed. Along these lines, the position taken by the Court that the witness has direct knowledge about the offence as well as about the perpetrator cannot be accepted. All that he could state about the offence is indirect knowledge, that is, what he subsequently heard from his wife. During the investigation as well as at the main trial, the aggrieved party Borka Šaran, who is the only one that has direct knowledge about the manner in

¹⁴ M.Š., AP-661/04 (Constitutional Court of BiH), *Decision on Admissibility and Merits*, 22 April 2005, para. 36.

which the rape was committed, also provided very little information about the manner in which the offence was perpetrated, and even this little information provided was actually very contradictory¹⁵.

51. As for other witnesses examined before the Prosecutor's Office of BiH and the Court, the Defence stresses that they only conveyed the information-knowledge that they received from the aggrieved party and that none of them offered a single piece of information that would have a status of "direct knowledge" about the existence of the criminal offence and the perpetrator.¹⁶

a. Findings of the Appellate Panel

52. It is primarily necessary to stress that the criminal offence in the instant case is one of the offences that are most difficult to prove given the fact that most often no witnesses are involved, the injuries to the victim are not noticed in time or the offence is not reported in time. A great problem is the fact that the majority of rapes happen in closed quarters, places where there are no eyewitnesses and where, in the majority of the cases, only the perpetrator and the victim of the offence are present.

53. The Defence Counsel's claim that witness Stanko Šaran (the husband of the aggrieved party) does not have direct knowledge of the perpetrated offence is ill-founded given that he could follow a large part of the events before and after the act of rape, which is knowledge that was very important for the trial Panel to create a whole picture of the relevant event, evaluating the other evidence too.

54. In other words, witness Stanko Šaran was involved in the whole event given the fact that the Accused Ćerim Novalić, who came armed together with another unidentified soldier and entered his house, ordered him to go down, together with his wife Borka Šaran, to the unfinished basement, so that they would make sure that the Šarans were not hiding one "Dako" and Milan Magazin. So, while the unidentified soldier stayed with Stanko Šaran, they ordered Borka Šaran to go to the upper floor of the house where her underage children and her sick bed-ridden mother-in-law were, and in one of the rooms there Ćerim Novalić forced her to sexual intercourse by the use of force and threats, whereupon, together with the unidentified soldier, he left the house and went away from the scene. When entering the house the witness saw the aggrieved party Borka, his wife, crying in the living room and on that occasion she told him that the soldier pushed her onto a couch in the living room and raped her there.

¹⁵ Appeal of the Defence Counsel, p. 3.

¹⁶ Appeal of the Defence Counsel, p. 3.

55. The Trial Panel established all decisive facts on the basis of the evidence given by the aggrieved party Borka Šaran, Stanko Šaran, Smiljana Magazin and Danilo Šaran, that are consistent in important matters and that in their totality indicate that the event happened exactly in the manner described in the operative part of the contested Verdict.

2. Sub-Ground Two: Identity of perpetrator

(i) Appeal arguments of the Defence Counsel for the Accused

a. Unknown woman

56. With respect to the incontestable establishing of the identity of the perpetrator, that is, the act of alleged rape, the Defence argues that there was only one way to adduce another evidence, in addition to the aggrieved party Borka Šaran's statement, that the aggrieved party herself indicated -- an examination of a certain woman with whom the aggrieved party verified the identity of the Accused Ćerim Novalić during the line-up of troops. In the opinion of the Defence, by adducing such evidence, that is, examining that woman, the doubts related to the existence of the criminal offence and the perpetrator would be considerably reduced. However, witness Borka Šaran did not want to reveal that woman's identity at the main trial, allegedly for her safety. Given such attitude towards the Court and the unwillingness to cooperate by violating law and the oath taken, the question arises as to whether that woman exists at all. This fact also casts doubt on the truthfulness of Borka Šaran's testimony about the relevant incident¹⁷.

i. Findings of the Appellate Panel

57. Having reviewed the transcripts of the trial, the Appellate Panel concludes that the appeal arguments of the Defence Counsel are unfounded and that the Trial Panel justifiably fully trusted the statement of witness – aggrieved party Borka Šaran, as in it she fully confirmed the Prosecution allegations and categorically and consistently identified the Accused Ćerim Novalić as the person who raped her.

58. In her statement the aggrieved party mentioned an unknown woman, who is not unknown to her. When they came across a group of soldiers, the woman confirmed to her that the person at

¹⁷ Appeal of the Defence Counsel, p. 5.

which the aggrieved party pointed was Ćerim Novalić, only so that she could be absolutely sure that the name of the rape perpetrator was Ćerim Novalić¹⁸.

59. This Panel considers that during her evidence the aggrieved party described in detail when and how she recognized Ćerim Novalić as the person who came to her house and raped her. The witness stated: *"We were standing and they were standing, there were some troops and he was among them, and I explained to her as we were watching, is that Ćerim Novalić, she said yes. And I kept silent about it. She asked me a hundred times afterward why I had asked her that question, [but] I never wanted to admit it."*¹⁹

60. Therefore, revealing the identity of the referenced woman was not of decisive importance, given that the recognition of the Accused by that woman would only serve the achieving of absolute certainty of the aggrieved party about the identity of the perpetrator and that the aggrieved party justifiably did not want to reveal that woman's full name solely because of her safety.

b. Identification in the courtroom

61. The Defence stresses that the Court stated that the aggrieved party Borka Šaran, during her evidence before the Court, identified the Accused Ćerim Novalić as the person who raped her, pointing at him in the courtroom. By accepting such identification as the evidence of guilt, the Court sets a new precedent in the case law with respect to this kind of proof, although the case law has taken a clear stance that the identification of the perpetrator in the courtroom is unacceptable. The element of proof is witness testimony and not the identification in the courtroom. Identification is only a measure to determine witness credibility. However, if the action of identification is performed only in the courtroom, then the purpose of establishing the credibility of the testimony is questionable as well as the reasoning the Court thereof²⁰.

i. Findings of the Appellate Panel

62. Given the fact that witness – aggrieved party Borka Šaran was sure about the identity of the Accused from the very beginning, the identification of the Accused Ćerim Novalić in the courtroom was not of decisive importance and represents a component part of the witness' testimony. In addition to this, the other evidence was also adduced with the aim of establishing the identity of the perpetrator of the offence concerned.

¹⁸ Transcript of 23 March 2010, pp. 12, 17 and 18; Transcript of 30 March 2010, pp. 16. i 17.

¹⁹ Transcript of 23 March 2010, p. 12.

²⁰ Appeal of the Defence Counsel, p. 6.

63. The contested Verdict reads as follows in that respect: *"In the course of her testimony, the aggrieved party Borka Šaran recognized the accused Ćerim Novalić as the person who had raped her by pointing to him in the courtroom. Her recognition was very convincing and utterly confident."*²¹

64. The foregoing is confirmed by the aggrieved party Borka Šaran, who testified that she recognized the Accused on the evening concerned immediately after his arrival in front of her house, pointing out that the night was clear, thus she was able to clearly see the face of the Accused under the moonlight, whom she immediately recognized. She also said that she was looking the Accused Ćerim Novalić in his face for a long time while the rape incident was going on from a very close distance, which leads to a conclusion that she had an opportunity to see and recognize the person who committed the rape, especially as she knew him from before.

65. The evidence of the aggrieved party was also confirmed by witnesses Smiljana Magazin, Danilo Šaran and Amir Masleša, given that they consistently stated that there was moonlight on the night concerned and that visibility was good.

66. That the aggrieved party knew immediately after the rape who had raped her, but that she did not want to reveal that person's identity, was also confirmed by the evidence by Defence witnesses Amir Masleša and Osman Novalić. So, the aggrieved party knew from the very beginning who raped her, but as she feared for her personal and her family's safety, she did not tell anyone that the Accused Ćerim Novalić was the one who committed the rape.

67. The Appellate Panel, therefore, states that the Trial Panel's inferences regarding the identity of the rapist are correct and well-corroborated, while the Defence Counsel's averments are unfounded.

c. Witness Midhat Pirkić a.k.a. Pirke

68. The Defence argues that, as for the perpetration of the offence, identification of the perpetrator, that is, his alibi, the Court also erred when it did not accept the testimony of witness Midhat Pirkić and documentary exhibits that this witness referred to. The Defence poses a question

²¹ The First Instance Verdict, p. 32.

as to which exhibit established that on the relevant day the Accused Ćerim Novalić abandoned his official duties in Konjic and went to Džepi and perpetrated the offence as charged²².

i. Findings of the Appellate Panel

69. First of all, at the relevant time witness Midhat Pirkić was the Commander of the A-004 Sabotage and Reconnaissance Unit, which was within the Territorial Defence HQ in Konjic and which had the code name of *Akrepi*. The witness said that in this unit there were three or four soldiers from the Local Community of Džepi, including the Accused Ćerim Novalić, who was in the fire support section issued with a light machine gun. According to the witness, in 1992, the unit was based on the premises of the *Konjic Motel*. The major part of the unit underwent a 45-day training outside Konjic as of late August 1992, during which time the Accused Ćerim Novalić provided security to the *Motel* in Konjic, which was done in shifts. Witness Pirkić stated that the soldiers used to return from the training every day around 21.00, 22.00 hrs, and the Trial Panel established that it was the time when the relevant incident took place.

70. Contrary to the appeal allegations, the Trial Panel also evaluated the evidence found by witness Pirkić, that is, a document drafted personally by the witness, a List of Soldiers and Commanding Officers for the Training dated 24 August 1992, as it corresponds with the Order of the Army of BiH, Konjic Municipal Staff, of 19 August 1992, in which the Accused Ćerim Novalić is referred to as the person in charge of security.

71. Although the Defence Counsel states in the Appeal that witness Midhat Pirkić's statement is in favour of the Accused and confirms that the Accused was on duty at the relevant time, the Appellate Panel, just like the Trial Panel, did not evaluate this witness' statement in that respect, given the fact that the witness stressed he had no information as to whether the Accused Ćerim Novalić was staying continually in the *Motel* in Konjic in that period.

72. The Appellate Panel therefore concludes that it does not follow from the referenced evidence that the Accused Ćerim Novalić was on duty in the *Motel* in Konjic at the relevant time which would have ruled out a possibility that he was at the aggrieved party's house at that time. Based on the foregoing, this Panel does not consider the appeal allegations of the Defence Counsel to be well-founded.

²² Appeal of the Defence Counsel, p. 6.

3. Sub-Ground Three: Contradictory statements of the aggrieved party

(i) Appeal arguments of the Defence Counsel for the Accused

73. When it comes to the discrepancies in the statements the aggrieved party gave during the investigation, at the main trial she either claimed that the investigative bodies "wrote something different from what she was saying", although the records had been read out to her and she had signed them, or she justified everything with fear and mental blockade²³.

74. The Defence emphasizes that no circumstance indicates that anyone, that is, the Accused or any of his family members, army comrades or anyone else in any manner undertook any action against the aggrieved party that might have caused fear and insecurity with the aggrieved party. If the aggrieved party was afraid or if she still feels afraid, she then definitely had the opportunity to be protected in accordance with witness protection regulations. She was also offered such protection, even at the main trial, but she refused it and publicly testified before the Court without fear. In accordance with the foregoing, the Defence believes that for some reason known to her and in order to conceal sexual relationship with another person, of which witnesses Amir Masleša and Osman Novalić testified, or to conceal someone who really participated in the referenced incident because of potential threats or some other interest, the aggrieved party "made up" that the Accused was the perpetrator²⁴.

a. Findings of the Appellate Panel

75. The Appellate Panel is of the opinion that the discrepancies in Borka Šaran's previous statements and her evidence at the main trial related to the identification of the perpetrator are not of such nature so as to call into question the credibility and truthfulness of her evidence.

76. In that respect it is necessary to place her statement in the context of the time when the relevant incident happened, that is, the fact that the witness survived an extremely traumatic experience in her own home. Therefore, given the foregoing, she cannot be reasonably expected to testify about all details with absolute precision.

77. The aggrieved party clarified several times during the examination how she had felt when giving statements: *"That was the first one for me. People took me by surprise when they came. They put questions to me. I could not talk from crying, from pain. They put questions to me. I had a*

²³ Appeal of the Defence Counsel, p. 6.

²⁴ Appeal of the Defence Counsel, p. 7.

mental blockade, I was so confused that I did not know, as that was the first time for me. I didn't, didn't realize at all what they were asking me, what it was all about. They introduced themselves to me, all that, but I was so confused that I could not talk properly, at that time, at that time Bradina also fell, I think on the 25th, in May, and I had such a tremendous mental blockade that I really did not know and I was so dizzy."²⁵

78. It is certainly important to take into account the fact that from the first encounter with the Accused the witness knew who he was, irrespective of the fact that she did not share that information with others until one moment in 2009 when she told her husband the name of her rapist. For that reason, the inconsistencies in the statements are not of such nature so as to challenge the truthfulness of the whole evidence.

79. In the opinion of the Appellate Panel, the aggrieved party absolutely justifiably hid the perpetrator's identity because she feared for the safety of her husband, her underage children and her own. In other words, that is exactly what the aggrieved party stated before the Court: *"For my and my husband's safety, as my husband and I when we, when it became possible to go to the Federation, we had there, we still do, we had property there. And we went there often, especially he, that is why I feared, since he did not know it, my first husband; in order to avoid someone telling him something there or he telling someone something, and because of that safety I did not tell it, but I said it in this penultimate statement, both to my husband and in the statement, that is when he learned it.*"²⁶

80. Based on the foregoing, the Appellate Panel infers that witness Borka Šaran's statement is credible and authentic and that the Defence appeal allegations are unfounded.

²⁵ Transcript of 23 March 2010, p. 23.

²⁶ Transcript of 23 March 2010, p. 26.

V. GROUNDS OF APPEAL UNDER ARTICLE 298 OF THE CPC OF BIH: VIOLATIONS OF THE CRIMINAL CODE

A. STANDARDS OF REVIEW

81. An appellant alleging an error of law must, as said, identify, at least, the alleged error, present arguments in support of his claim, and explain how the error affects the decision resulting in its unlawfulness.

82. Where an error of law arises from the application in the Verdict of a wrong legal standard, the Appellate Panel may articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not only corrects a legal error, but also applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond any reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.

83. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Verdict in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314 and 308 of the CPC of BiH.

B. APPEAL OF THE DEFENCE COUNSEL FOR THE ACCUSED ČERIM NOVALIĆ

(a) The Appellate Panel is satisfied that the Defence appeal allegations regarding the misapplication of the CC B-H are well-founded.

84. Violation of the criminal code under Article 298(d) of the CPC of BiH occurred if the court applied the properly established state of facts under the wrong legal provision, or if it applied the law that could not have been applied or the law that should have been applied, but in a wrong manner.

(i) Appeal arguments of the Defence Counsel for the Accused

85. The Defence Appeal reads that the rule of applicability of the law is stipulated in Article 4 of the CC BiH, Paragraph (1), reading that the law that was in effect at the time when the criminal

offence was perpetrated shall apply to the perpetrator of the criminal offence. According to the Defence Counsel, that excludes a retroactive application of this Code, save for exceptional situations, if the potentially amended Code is more lenient to the perpetrator. However, the Court completely ruled out this provision and applied Article 4a), which was subsequently included in the Code. The Defence considers that this position of the Court is wrong, especially in view of the fact that a much lengthier sentence is set forth for the criminal offence the Accused is charged with than the one envisaged by the CC of SFRY, in effect at the time of the perpetration of the offence concerned²⁷.

a. Findings of the Appellate Panel

86. The contested Verdict states erroneously that in the instant case the CC of BiH is the law more lenient to the perpetrator, of which the Defence Counsel justifiably warned.

87. In other words, the Court resolves the issue of which law is more lenient to the perpetrator in each specific case by comparing the substantive law in effect at the relevant time and the new law(s).

88. Comparison of different law texts may provide a certain answer only in case a new law decriminalized something that was considered a criminal offence under the old law, as the new law is obviously more lenient in such case. In all other cases, when a criminal offence is punishable by both laws, it is necessary to establish all circumstances that may be relevant to the choice of a more lenient law. These circumstances primarily relate to the provisions on the sentences and their meting out, that is, reduction, cautionary measures, potential accessory punishments, new measures that are substitutes to punishment, security measures, legal consequences of the sentencing verdict, as well as the provisions related to criminal prosecution, whether the new law envisages a basis to rule out unlawfulness, guilt or punishability, and so on.

89. In other words, depending on the specific circumstances, one and the same law may turn out to be more lenient in one situation and more stringent in another. Therefore, in a situation when several laws may be applied, it is necessary to evaluate under which law the perpetrator stands better chances for a more favourable outcome.

90. First of all, with respect to the application of substantive law, the Court is obliged to subsume the acts of the Accused under the legal standard that defines them most precisely, hence

²⁷ Appeal of the Defence Counsel, pp. 9-10.

the Trial Panel, having decided to apply the CC of BiH, qualified the acts of the Accused Ćerim Novalić as War Crimes against Civilians, in violation of Article 173(1)(e), as read with Article 180(1) of the CC of BiH.

91. The principle of *tempus regit actum* arises from Articles 3, 4 and 4a) of the CC of BiH, meaning that it is a rule that the law that was in effect at the time the offence was perpetrated shall primarily apply to the offence perpetrator.

92. However, it is possible to deviate from this principle only in the interest of the accused person, that is, if the law has been amended after the perpetration so that the amended law is more lenient to the perpetrator.

93. So, it is possible to deviate from the principle of application of a more lenient law only in the cases set forth in Article 4a) of the CC of BiH, that is, if the application of a more lenient law would prejudice the trial and punishment of any person for any act that was criminal according to the general principles of international law, that is, which constitutes a violation of the standards that enjoy general support of all nations and are of general importance, that is, which are considered to be or represent universal civilization achievements of modern criminal law, in a situation when such act was not criminal in the national, that is, internal criminal legislation at the time it was committed.

94. In the instant case, the law that was in effect at the time of perpetration, identically as the law currently in effect, set forth War Crimes against Civilians committed by rape as a criminal offence (Article 142(1) of the CC of SFRY and Article 173(1)(e) of the CC of BiH). Therefore, the Appellate Panel considers that there exist legal conditions for trial and punishment of the perpetrator under both laws.

95. Further evaluation as to which law is more lenient to the perpetrator is made by comparing the respective sentences they set forth, and it should, therefore, be stressed that the criminal offence of War Crimes against Civilians in violation of Article 173 of the CC of BiH carries a sentence of imprisonment of not less than ten years or a long-term imprisonment, whereas the criminal offence of War Crimes against Civilians in violation of Article 142(1) of the CC of SFRY carries the sentence of imprisonment of not less than five years or the death penalty.

96. Since the evaluation of a more lenient law is a factual issue, that is, when evaluating all circumstances of the given case it is necessary to bear in mind that when meting out the punishment the Trial Panel took into account all aggravating and extenuating circumstances and sentenced the

Accused Ćerim Novalić to imprisonment for a term of 7 (seven) years, that is, a punishment below the statutory minimum. This means that the Trial Panel's intention was to punish the Accused more leniently.

97. Based on the foregoing, the Appellate Panel concludes that the CC of BiH is not more lenient to the perpetrator with respect to the statutory minimal punishment, as it stipulates a higher punishment minimum for the referenced offence (ten years).

98. Having made a comparison of the referenced punishments, the Appellate Panel considers that the adopted CC of SFRY, as the law in effect at the time of the perpetration, is the law that must be applied, pursuant to Article 4 of the CC of BiH. Therefore, based on the proper application of law, the Panel revised the contested Verdict in the manner as indicated in the operative part.

VI. DECISION ON CRIMINAL SANCTION

A. STANDARDS OF REVIEW UNDER ARTICLE 300 OF THE CPC OF BiH

99. The decision on sentence may be appealed on two distinct grounds, as provided in Article 300 of the CPC of BiH.

100. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.

101. Alternatively, the appellant may challenge the decision on sentence on the grounds that the Trial Panel misused its discretion in determining the appropriate sentence. The Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion.

102. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly.

103. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

B. PROSECUTION APPEAL

(a) The Appellate Panel considers that the sentence in the first instance proceedings was not meted out properly and that the Prosecution Appeal is well-founded in this respect. Given that the Defence Counsel also appealed the decision on the sanction, but failed to provide the reasoning for it, pursuant to Article 308 of the CPC of BiH (Extended Effect of the Appeal), the Appellate Panel also reviewed the Defence Appeal and concluded it was unfounded in this part.

(i) Appeal Arguments of the Prosecution

104. The Prosecution emphasizes that the imposed sanction is not commensurate to the gravity of the perpetrated criminal offence, the level of the criminal liability of the Accused, motives and circumstances under which the criminal offence was perpetrated and the ensuing consequences, and that the sanction will not attain the purpose of punishment²⁸.

a. Findings of the Appellate Panel

105. Pursuant to Article 48 of the CC of BiH, the Trial Panel took into account all the circumstances bearing on the magnitude of punishment, in particular the degree of criminal liability of the Accused, the motives for perpetrating the offence, the degree of danger or injury to the protected object and the circumstances in which the offence was perpetrated. It also took into account the past conduct of the perpetrator, his personal situation and his conduct in the course of

the criminal proceedings. Therefore, the Trial Panel took into account both the extenuating and the aggravating circumstances for the Accused Ćerim Novalić.

106. In that respect, the Trial Panel considered as aggravating the facts that the instant case concerns a criminal offence with grave consequences for the aggrieved party Borka Šaran and that the Accused acted with direct intent when committing the offence he is charged with. The contested Verdict regards as extenuating circumstances the fact that the Accused was only 20 (a young adult) at the relevant time, that he had no prior conviction, that he behaved with decorum before the Court, as well as his personal situation.

107. The Trial Panel considered all the referenced extenuating circumstances as particularly extenuating and, therefore, pronounced the sentence of imprisonment for a term of 7 (seven) years to the Accused Ćerim Novalić, which is below the statutory minimum.

108. Having reviewed the Prosecution appeal arguments, the Appellate Panel concluded they were well-founded and that the Trial Panel in the instant case underestimated the aggravating circumstances for the Accused.

109. It should not be forgotten that rape is one of the gravest sexual offences which perpetrators use for the attainment of different goals such as intimidation, degradation, humiliation, discrimination, punishment, and control or destruction of a person, and that it is strictly forbidden in war. This follows from the provisions of treaty law, namely, the 1949 Geneva Conventions, the Additional Protocol I and the Additional Protocol II from 1977.

110. Rape constitutes an extremely brutal manner of violating a woman's (victim's) most intimate sphere of life and assaulting not only her sexual, but her full integrity as well. In other words, it is a typical act of violence. It constitutes a grave violation of the victim's personality, the victim's autonomy, mental and bodily integrity, self-control and self-esteem. It is not rare that the collateral victims are many other persons, such as family members, relatives, friends, acquaintances, and others.

111. In the opinion of the Appellate Panel, the Accused Ćerim Novalić committed the rape in an extremely humiliating manner, as he committed it in the house of the aggrieved party and especially as her underage children and bed-ridden mother-in-law were in an adjacent room and her severely ill husband in the basement.

²⁸ Prosecution Appeal, p. 2.

112. Asked by the Prosecutor how she felt after the rape, the aggrieved party said the following before the Court: *"In pain, sad, humiliated, disgusted. I cannot explain the humiliation I suffered, the shame, the sickness that I have re-lived all these years. Everything that has happened to me so far, everything has been a part of it. He should be ashamed of what he did, as, after all, we were neighbours."*²⁹

113. In other words, the aggrieved party gave an objective and truthful account of everything she experienced and survived, which was confirmed by her explanation why she did not resist during the rape: *"I did not resist at all, I did not dare, I was afraid, I was not aware what was happening to me. He set off and I told him – Don't kill my Stanko. We will not, Stanko will come to you now"* ³⁰. She thereby demonstrated that she had no intention or motive of incriminating the Accused on non-existing grounds.

114. What should also not be disregarded is the fact that this criminal offence caused fear and anxiety with the other Serb inhabitants of Džepi at the time concerned. One of the ensuing consequences of the criminal offence is that the aggrieved party and her family abandoned their home and moved to Hum, just like the other Serbs, in order to feel safe.

115. The Appellate Panel too finds the same extenuating circumstances on the part of the Accused, but does not regard them to be particularly extenuating, as the Trial Panel erroneously did in the contested Verdict.

116. Therefore, operating within the punishment range for the offence in violation of Article 142(1) of the CC of SFRY, and being mindful of Articles 38 and 41 of the CC of SFRY, this Panel pronounced the sentence of imprisonment for a term of 8 (eight) years and 6 (six) months, as it considers it to be commensurate to the degree of criminal liability of the Accused, the motives for perpetrating the offence, the circumstances in which the offence was perpetrated, the degree of danger or injury to the protected object and the ensuing consequences, and serving the purpose of general and special deterrence.

117. Therefore, in the opinion of the Appellate Panel, the sentence of imprisonment for a term of 8 (eight) years and 6 (six) months imposed on the Accused Ćerim Novalić is adequate, purposeful and just.

²⁹ Transcript of 23 March 2010, p. 57.

³⁰ Transcript of 23 March 2010, p. 13.

VII. CUSTODY

118. After the pronouncement of the first instance Verdict, the Accused Ćerim Novalić was ordered into custody pursuant to the Decision of the Court of BiH, No. X-KR-09/847 of 21 May 2010, and ordered into extended custody pursuant to the Decision of this Panel, No. X-KRŽ-09/847 of 15 February 2011, so that it may last no longer than 6 (six) months, that is, until 15 August 2011.

119. Given that the Appellate Panel sentenced the Accused to imprisonment for a term of 8 (eight) years and 6 (six) months, pursuant to Article 50 of the CC of SFRY, the time the Accused will have spent in custody from 21 May 2010 until the committal to sentence pursuant to this Verdict shall be credited to the sentence imposed on him.

120. Finally, it is necessary to note that the Appellate Panel did not review the Trial Panel's decision on the costs of the criminal proceedings and claims under property law given that the Appeals did not allege irregularities in that respect. Therefore, that part of the Verdict has become legally binding with the expiry of the statutory deadline for appeal.

121. Based on the foregoing and pursuant to Article 314(1) of the CPC of BiH, the decision was rendered as quoted in the operative part of the Verdict.

Record-taker:

PRESIDENT OF THE PANEL

Neira Kožo

JUDGE

Azra Miletić

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