

Bosna i Hercegovina

Босна и Херцеговина



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

Case No. S1 1 K 003336 15 Krž 4
Delivered on: 18 September 2015

Before the Appellate Panel composed of Judges:

Redžib Begić, Presiding
Tihomir Lukes, Reporting Judge
Senadin Begtašević, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA
v.
SENTENCED PERSON VELIBOR BOGDANOVIĆ

REVISED SECOND INSTANCE VERDICT

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:
Ms. Slavica Terzić

Counsel for the sentenced person Velibor Bogdanović:
Ms. Nada Dalipagić, Attorney

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Number: S1 1 K 003336 15 Krž 4
Sarajevo, 18 September 2015

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting in the Panel of the Appellate Division of Section I for War Crimes, comprised of Judge Redžib Begić, as the Panel President, and Judges Tihomir Lukes and Senadin Begtašević, as members of the Panel, with the participation of Legal Advisor Medina Džerahović as the Minutes-taker, in the criminal matter against the sentenced person Velibor Bogdanović, for the criminal offense of War Crimes against Civilians under Article 173(1)(e) of the Criminal Code of BiH (CC BiH), as read with Article 180(1) of the CC BiH, all in connection with Article 29 of the Criminal Code of Bosnia and Herzegovina, deciding pursuant to the Decision of the Constitutional Court of Bosnia and Herzegovina, number AP-3227/12 of 21 July 2015, revoking the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 003336 11 Krž 3 of 21 June 2012, in the part pertaining to the application of the more lenient law, having held a public session of the Appellate Panel in the presence of Ms. Slavica Terzić, Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, and Ms. Nada Dalipagić, Defense Attorney for the sentenced person, in the absence of the duly notified sentenced person, Velibor Bogdanović, on 18 September 2015, issued the following:

V E R D I C T

The Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 003336 11 Krž 3 of 21 June 2012 is hereby **revised** in the part pertaining to the application of substantive law and the sentencing, so the acts of which Velibor Bogdanović was found guilty under the Trial Verdict are now legally qualified as the criminal offense of War Crimes against Civilians under Article 142(1) of the Criminal Code of the Socialist Federative Republic of Yugoslavia, which was adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of SFRY, in connection with Article 22 of the same Code, and Velibor Bogdanović is sentenced to imprisonment for a term of 5 (five) years for the said criminal offense, pursuant to the referenced statutory provision, as well as Articles 33, 38(1) and 41(1) of the Criminal Code of the Socialist Federative Republic of Yugoslavia.

The Verdict of the Court of Bosnia and Herzegovina, No. S1 1 K 003336 11 Krž 3 of 21 June 2012, shall remain unrevised in its remaining part.

REASONING

I. PROCEDURAL HISTORY

1. Under the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 003336 10 Kri of 29 August 2011, the then accused Velibor Bogdanović was found guilty of having committed, by the acts described in the Operative Part of the Verdict, the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e), as read with Article 180(1) and Article 29 of the Criminal Code of Bosnia and Herzegovina (CC BiH), for which he received, pursuant to Article 285(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), and applying Articles 39, 40, 42 and 49 of the CC BiH, a prison sentence for a term of 6 (six) years. Pursuant to Article 188(2) and (4) of the CPC BiH, the Accused was relieved of the obligation to reimburse the costs of the criminal proceedings, which will be paid from within the budget appropriations of the Court. Pursuant to Article 198(2) of the CPC BiH, all the injured parties were instructed that they may pursue their possible claims under property law in a civil action.

2. In deciding upon the appeals filed by the BiH Prosecutor's Office and Ms. Nada Dalipagić, Defense Counsel for the then accused Velibor Bogdanović, the Appellate Division Panel delivered a Verdict No. S1 1 K 003336 11 Krž 3 of 21 June 2012 refusing the referenced appeals as ill-founded and upholding the Trial Verdict No. S1 1 K 003336 10 Kri of 29 August 2011.

3. Having acted upon the appeal filed by the sentenced person Velibor Bogdanović, the Constitutional Court of Bosnia and Herzegovina (the Constitutional Court of BiH), on 21 July 2015, delivered a Decision number AP-3227/12, revoking the Verdict of the Court of BiH No. S1 1 K 003336 11 Krž 3 of 21 June 2012 in the part pertaining to the application of the more lenient law. The referenced Decision noted that the revocation of the Verdict of the Court of BiH, No. S1 1 K 003336 11 Krž 3 of 21 June 2012, in the referenced part, shall in no way affect the Applicant's deprivation of liberty, apprehension and imprisonment, which exclusively fall under the jurisdiction of the Court of BiH. Under the same Decision, the Constitutional Court dismissed as ill-founded the appeal filed by Velibor Bogdanović from the Verdicts of the Court of BiH No. S1 1 K 003336 11 Krž 3 of 21 June 2012 and No. S1 1 K 003336 10 Kri of 29 August 2011 in relation to Article II/3.e) of the Constitution of Bosnia and Herzegovina and Article 6(1), (2) and (3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) – the right to a fair trial.

4. The case was referred back to the Court of BiH, which is under obligation to render a new decision, as a matter of urgency, pursuant to Article II/2 of the Constitutional Court of BiH and Article 7(1) of the ECHR, and to notify the Constitutional Court of BiH, within 3 (three) month period after the delivery of the Decision, about the measures undertaken

to execute the referenced Decision.

5. The Decision of the Constitutional Court of BiH, number AP-3227/12 of 21 July 2015 was forwarded to the Court of BiH on 28 August 2015.

6. In acting pursuant to the obligation transpiring from the referenced Decision, and with the aim to implement it promptly, on 18 September 2015, the Appellate Panel held a public session, which was attended by Ms. Slavica Terzić, Prosecutor of the BiH Prosecutor's Office, Ms. Nada Dalipagić, Counsel for the sentenced person Bogdanović, while duly notified sentenced person, Velibor Bogdanović, did not attend the session.

7. Counsel Dalipagić insisted on the application of the provisions of the CC SFRY, which was adopted pursuant to the Law on the Application of the Criminal Code of BiH and the Criminal Code of the SFRY (the adopted CC SFRY)¹. Counsel also argued that the sentenced person should have received a far more lenient sentence, since the purpose of punishment would be achieved even with such a lesser sentence. At the same time, Counsel highlighted that the sentenced person has three children and an unemployed wife.

8. The Prosecution also argued that the provisions of the adopted CC SFRY should apply, but that the length of sentence should not be changed considering that it was properly meted out, and that it is proportionate with the committed criminal offense.

II. PROCEDURAL SITUATION AFTER THE DECISION OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

9. The Appellate Panel has held that it is necessary, prior to providing the reasons for a new decision in relation to the application of the Criminal Code and the sentencing pursuant to Article II/2 of the Constitution of BiH and Article 7(1) of the ECHR, as ordered under the referenced Decision of the Constitutional Court of BiH, to present brief reasons for the procedural situation it faced after the revocation of the second instance Verdict of the Court of BiH, No. S1 1 K 003336 11 Krž 3 of 21 June 2012, in the part as already mentioned above.

10. Specifically, the Constitutional Court of BiH explicitly concluded in its Decision that the other objections advanced by the Applicant, sentenced person Velibor Bogdanović, contesting the Verdict of the Court of BiH, *inter alia*, for violations of Article II/3.e) of the

¹ Decree with a Force of Law relative to the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federative Republic of Yugoslavia Adopted as a Republic Law at the Time of Immediate Danger of War or During the State of War (Official Gazette of the RBiH, No. 6/92) and the Law relative to the Confirmation of Decrees with a Force of Law (Official Gazette of the RBiH, No. 13/94).

Constitution of BiH and Article 6(1), (2) and (3)(d) of the ECHR, are ill-founded. The reasoning of the referenced Decision of the Constitutional Court stated the following:

“53. In view of the foregoing, the Constitutional Court has held that the contested Decisions contain no elements which would point to the arbitrariness in the establishment and evaluation of the facts, and that the provided reasons completely satisfy the requirements of the right to a fair trial set forth in Article 6 of the European Convention. The Constitutional Court has held that, by acting in the referenced way, the regular Courts have complied with the rules governing the equality of arms in the proceedings before the court, and have not, in any way, brought the Applicant in a less favorable position in relation to the Prosecution during the proceedings. Also, the Applicant’s right to the procedural guarantees set forth in Article 6(3)(d) of the European Convention and the principle of presumption of innocence were not violated either.

54. Therefore, the Constitutional Court has found that, in the concrete case, there is no violation of the Applicant’s right under Article II/3.e) of the Constitution of BiH and Article 6(1), (2) and (3)(d) of the European Convention.”

11. In view of such a reasoning provided by the Constitutional Court of BiH, it is clear that, in the concrete case, the Constitutional Court did not question the proper nature of the Verdict of the Court of BiH in the part pertaining to the existence of the criminal offense and the guilt of sentenced person Velibor Bogdanović for the acts of which the final Verdict of the Court of BiH found him guilty.² As it further ensues from para. 66 of the Decision, the Constitutional Court of BiH explicitly stated the following:

“... with the view to protect the Applicant’s constitutional rights, it suffices to revoke the contested Verdict of the Court of BiH No. S1 1 K 003336 11 Krž 3 of 21 June 2012 and refer the case back to the Court of BiH to render a new decision regarding the sentencing pursuant to Article 7(1) of the European Convention.”

12. Having received the Decision of the Constitutional Court of BiH, the Appellate Panel faced a specific situation which is not regulated by the procedural law, since the CPC BiH does not recognize a possibility that a second instance verdict be revoked, not even in part, and referred back to the Court for a new decision.³ The CPC BiH particularly contains no provisions to act upon if a second instance verdict is revoked by a decision of the Constitutional Court of BiH, in the part pertaining to the “application of the more lenient law”, when the issue of guilt is undisputed, as is the situation in the concrete case. Therefore, starting primarily from the fact that the Constitutional Court of BiH ordered the Court of BiH to deliver a new decision in relation to the sentencing, as a matter of urgency, the Appellate Panel made efforts to identify the most efficient way to act in such a situation.

² This is the reason for the Constitutional Court of BiH to revoke the Verdict of the Court of BiH, No. S1 1 K 003336 11 Krž 3 of 21 June 2012 only in the part pertaining to the application of the more lenient law.

³ Except in cases prescribed in Article 317a. of the CPC BiH, which does not apply to the concrete case.

13. The Appellate Panel has held that, from the perspective of procedural law in the concrete case, there are no appeals to be the subject of decision, and that appeals from the first instance verdict can be possibly mentioned exclusively as a reminder for the procedural history. Therefore, the Panel took into account the fact that the Constitutional Court of BiH's Decision concluded that the Panel of the Appellate Division of the Court of BiH misapplied the law, but did not find any procedural violations in the contested Verdict. More specifically, it ensues from the referenced Decision that the Constitutional Court BiH is satisfied with the accuracy of the state of facts established in the Trial Verdict of the Court of BiH, in which part the Verdict was upheld, and became final under the Verdict of the Court of BiH No. S1 1 K 003336 11 Krž 3 of 21 June 2012, since it was not revoked by the referenced constitutional Decision.

14. In view of the foregoing, and in the absence of any explicit legal provision regulating the way of acting in a situation which occurred in the concrete case, the Appellate Panel has held that, in order to deliver a new decision remedying the violation found by the Decision of the Constitutional Court, which is binding on this Court, and as a matter of urgency as ordered, it would be most functional and efficient to revise the Verdict of the Court of BiH No. S1 1 K 003336 11 Krž 3 of 21 June 2012, in the way as stated in the Operative Part of the Verdict.

15. Pursuant to the Decision of the Constitutional Court of BiH, and with the purpose of its implementation, the Appellate Panel of the Court of BiH rendered the decision as stated in the Operative Part of the Verdict for the reasons that follow:

III. APPLICABLE LAW

16. In delivering its earlier Verdict, which was revoked in the referenced part by the above referred Decision of the Constitutional Court of BiH, the Appellate Panel has reviewed the complaints advanced in relation to the application of the Criminal Code in this case. Having made a comparative analysis of Article 173 of the CC BiH and Article 142 of the adopted CC SFRY, primarily from the aspect of sentences prescribed in the two laws for the criminal offense of War Crimes against Civilians, which is criminalized by the referenced laws, the Panel concluded that the application of the CC BiH, which entered into force after the commission of the crime charged against the Accused, was more favorable to the then Accused, as opposed to the adopted CC SFRY, which was in effect at the time when the crime was committed. Accordingly, the Panel at the time dismissed the Defense's complaints advanced in that regard and upheld the findings of the Trial Panel, having provided a line of arguments which will not be repeated here.

17. However, the Constitutional Court of BiH obviously did not accept such a line of arguments. Having referred to the reasoning of the contested Verdict of the Court of BiH with regard to the application of the CC BiH, as the more lenient law, the Constitutional

Court of BiH concluded the following:

“65. Bearing in mind that, pursuant to the CC SFRY, a minimum sentence is imprisonment for a term of five years, and ten years pursuant to the CC BiH, and the fact that, by applying the provisions of the CC BiH, the Applicant received a sentence lower than the one prescribed by the law, there is no doubt that, in the circumstances pertaining to the concrete case, the CC SFRY is the more lenient law regardless of the fact that, given the prescribed magnitude of prison sentence, it does not mean that the Applicant would have received a lesser prison sentence had the CC SFRY been applied to his case. It is of crucial importance that the Applicant could have received a lesser punishment had the referenced law been applied (see Maktouf and Damjanović, para. 70).”

18. Having acted in accordance with the view presented in the referenced Constitutional Court’s Decision, under which the Verdict of this Court was revoked with regard to the application of the more lenient law, pursuant to which the adopted CC SFRY is the more lenient law for the then Accused, and the CC BiH retroactively applied to the prejudice of the Accused, the Appellate Panel concluded that the CC SFRY, as the law which was in effect at the time when the criminal offense was committed, should apply to the concrete case.

19. Therefore, bearing in mind the above presented views of the Constitutional Court, the Appellate Panel qualified the acts of sentenced person Velibor Bogdanović as War Crimes against Civilians under Article 142(1) of the CC SFRY, as read with Article 22 of the same Code.

IV. SENTENCING

20. Considering the Panel’s conclusion that it is justified to apply the adopted CC SFRY to the concrete case, the referenced law had to be applied also in fixing the sentence for the criminal offense of which sentenced person Velibor Bogdanović was found guilty.

21. In deciding on sentence, the Appellate Panel was under obligation to remain within the magnitude of punishments prescribed in Article 142 of the adopted CC SFRY for the criminal offense of which Velibor Bogdanović is found guilty, and pursuant to the provisions providing for the general standards for fixing the punishment (Article 41 of the adopted CC SFRY), being mindful of the purpose of punishment set forth in Article 33 of the adopted CC SFRY. In this regard, the Panel bore in mind that the sentence prescribed for the criminal offense of War Crimes against Civilian Population in Article 142 of the adopted CC SFRY is imprisonment for a term not less than 5 (five) years, or the death penalty. The Appellate Panel notes that the CC SFRY also provided for an option of imposing a prison sentence for a term of 20 years in cases where the capital punishment was prescribed. In addition, in fixing the punishment, the Panel was particularly mindful of the circumstances which may affect rendering a more or less stringent sentence

(extenuating and aggravating circumstances).

22. Therefore, in fixing the sentence for the sentenced person, the Panel has primarily relied on the referenced statutory minimum and maximum sentences prescribed for the criminal offense at issue, being also mindful of all the circumstances which, in the concrete case, affect rendering a less or more lenient sentence (extenuating and aggravating circumstances).

23. In terms of the aggravating circumstances, the Panel took into account that the consequences of the crime of rape are severe, that such an act grossly violates the most intimate sphere of a woman's-victim's life, and that this is a typical act of violence. Therefore, the judicial bodies should adequately punish the perpetrators of such acts. In addition, the criminal offense of unlawful imprisonment of civilian-injured party Salko Zerem by sentenced person Bogdanović, in the concrete case, is also a severe criminal offense considering that, at the critical time, the injured party belonged to the category of persons protected by the Geneva Convention. Velibor Bogdanović abused the fact that he was a member of the HVO, who caused fear in civilian Muslims, and who committed crimes, which is an aggravating circumstance.

24. As to the extenuating circumstances, the Panel notes that the sentenced person is married, father of three children, that he was age 22 at the time when he committed the crime, and that he has committed no criminal offense since the war. The Panel particularly took into account that, pursuant to the injured party's statement, the sentenced person approached her after the war, apologized to her for what he had done to her and offered her his assistance.

25. In view of all the foregoing, and bearing in mind the legally prescribed limits of punishment for the criminal offense at issue, the purpose of punishment, and all the circumstances which can affect fixing a more or less stringent sentence, and particularly the degree of criminal responsibility, motives for which the crime was committed, the degree of danger or violation to the protected value, the circumstances under which the crime was committed and Velibor Bogdanović's personal circumstances, the Panel has concluded that the prison sentence of five years for the committed criminal offense is adequate/proportionate with all these circumstances and the perpetrator's personality, and that the purpose of punishment, both special and general deterrence, will be fully achieved by the sentence imposed.

26. According to the Panel, Counsel's view that a far lesser prison sentence would be adequate, was ill-founded. Specifically, Counsel's arguments regarding the personal and family circumstances of the sentenced person do not suffice to justify a lesser sentence, by which the purpose of punishment could not be achieved either. Given the foregoing, any reduction of the sentence below the statutory minimum would be unjustifiable. Also, the Panel notes that it is important to mention the following, considering the specific situation of resentencing by the other law application. Specifically, the punishment cannot be expressed by way of simple mathematics and a possible sentence within the statutory range between 5 and 15 years, or 20 years. Such a method would not amount to the

individualization of punishment by which all the principles of the criminal procedure would be satisfied and which would be compliant with Article 33 of the CC SFRY, which means it would not serve the purpose of punishment. In view of all the foregoing, and in fixing the punishment, the Appellate Panel was aware of the need to render its decision in compliance with the aim of public condemnation of such a serious crime, but at the same time it was also mindful of the above referenced extenuating circumstances.

27. In view of all the foregoing, the Appellate Verdict had to be revised also with regard to the decision on sentence, and a decision was made as stated in the Operative Part of the Verdict.

MINUTES-TAKER:

Legal Advisor

Medina Džerahović

PANEL PRESIDENT

JUDGE

Redžib Begić

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