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No. KPŽ- 47/05
Sarajevo, July 4, 2006

The Court of Bosnia and Herzegovina, Section II for Organized Crime, Economic Crime and Corruption, in the Panel of the Appellate Division composed of Judges Nedžad Popovac as the President of the Panel, and Azra Miletić and Jose Ricardo Juan de Prada as members of the Panel, with the participation of Legal Officer Emir Neradin as a record-taker, in the criminal case against the accused Ante Jelavić, for the criminal offence of Abuse of Office or Official Authority under Article 358 of the Criminal Code of the Federation of Bosnia and Herzegovina and other, deciding upon the appeals lodged by the defense counsel for the accused Ante Jelavić and the Prosecutor's Office of Bosnia and Herzegovina respectively, against the Verdict of this Court no. KPV-10/04 dated November 4, 2005, at the session of the Panel held on July 4, 2006, passed the following

VERDICT

The Appeal lodged by the defense counsel for the accused Ante Jelavić is hereby **granted** and the Verdict of the Court of BiH no. KPV 10/04 dated November 4, 2005, revised in the section dismissing charges in counts 4, 13, 14, 16, 17 and 18 of the Indictment of the Prosecutor's Office of BiH, Kt no. 25/04, **refusing** the charges against the accused Ante Jelavić that by the actions described in the listed counts of the Indictment he committed the criminal offences of Abuse of Office or Official Authority under Article 358, Embezzlement under Article 359 and Lack of Commitment in Office under Article 366 of the Criminal Code of the Federation of Bosnia and Herzegovina, **revoking the part of the first-instance Verdict convicting the accused and scheduling a main trial before the Panel of the Appellate Division.** Other parts of the first-instance Verdict remain unchanged.

Reasoning

The Indictment of the Prosecutor's Office of BiH no. Kt. 25/04, confirmed by the Preliminary Hearing Judge on May 19, 2004 and amended with the submission of the Prosecutor's Office of BiH of December 16, 2005, charged the accused Ante Jelavić with criminal offences of Abuse of Office or Official Authority under Article 358, Paragraph 3, Embezzlement under Article 359, Lack of Commitment in Office under Article 366 and Tax Evasion under Article 272 of the Criminal Code of the Federation of Bosnia and Herzegovina (CC of FBiH).

The Verdict of the Court of Bosnia and Herzegovina, no. KPV- 10/04 dated November 4, 2005, dismissed the charges under counts 4, 13, 14, 16, 17 and 18 of the Indictment, pursuant to Article 283, Paragraph c) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH) and acquitted the accused of charges under counts 22, 23 and 24, pursuant to Article 284, Paragraph c) of the CPC of BiH. The same Verdict found the accused guilty of continued criminal offence of Abuse of Office or Official Authority under Article 358 Paragraph 2 of the CC of the FBiH in relation to Counts 1, 2, 3, 7, 8, 9, 19, 20 and 21 of the Indictment, due to which, pursuant to the provisions of Article 54 of the CC of the FBiH, he was punished by a compound sentence of 10

years of imprisonment. In accordance with Article 56 of the CC of the FBiH, the time that the accused had spent in custody between January 24 and May 9, 2005 was credited towards the imposed sentence and it was ordered that the accused be immediately put in custody and start serving his sentence in the prison determined by the competent ministry of Bosnia and Herzegovina. By the mentioned verdict, the accused was obliged to cover the expenses of his defense and expenses of the proceedings, except for the expenses relative to the portions of the Indictment of which he was acquitted, pursuant to Article 188 Paragraph 2 of the CPC of BiH, which were to be covered from the budget. Bosnia and Herzegovina, as an injured party, was advised to instigate a civil procedure in order to realize its property claim.

Both the BiH Prosecutor's Office and the attorney Dragan Barbarić, defense counsel for the accused Ante Jelavić, have duly lodged appeals against this Verdict within a statutory deadline.

The BiH Prosecutor's Office lodged its appeal due to the decision on the criminal sanction, and proposed that the Panel of the Appellate Division passes a Verdict revising the first-instance Verdict and imposing a more severe imprisonment punishment in relation to the one imposed by the first-instance Panel. In the explanation of its appeal the Prosecutor's Office of BiH stated that the punishment imposed by the first-instance Panel was not adequate to achieve the purpose of punishment foreseen in Article 39 of the CC of BiH and that it was not in accordance with the principles for meting out punishments under Article 48 of the CC of BiH. The Appeal particularly underlined that the compound sentence of 10 years of imprisonment imposed on the accused did not reflect the aggravating circumstances, specifically the degree of criminal liability, the motives out of which the offence was committed, the degree of danger to the protected object and circumstances under which the offence was committed.

The defense counsel lodged his Appeal due to the essential violations of criminal procedure provisions, violation of criminal law, erroneously and incompletely established facts and the decision on the imposed punishment. The defense counsel proposed that the first-instance Verdict be revoked and that a main trial be scheduled for the presentation of all pieces of evidence that were presented during the first-instance proceedings. In the explanation thereto, it was stated that the contested Verdict convicted the accused of the continued criminal offence of abuse of office or official authority under Article 358, Paragraph 2, of the CC of the FBiH in conjunction with Counts 1, 2, 3, 7, 8, 9, 19, 20 and 21. However, the criminal offence of Abuse of Office or Official Authority was exclusively referred to in Counts 1, 7 and 19 of the Indictment, while Counts 2, 8 and 20 referred to the criminal offence of Embezzlement under Article 359 of the CC of the FBiH and Counts 3, 9 and 21 to the criminal offence of Lack of Commitment in Office under Article 366 of the CC of the FBiH, which is why the Court should have passed a verdict of acquittal in reference to counts 2, 3, 8, 9, 20 and 21. It was also stated that the Court, in reference to Counts 4, 13, 14, 16, 17 and 18 of the Indictment, instead of passing a verdict dismissing the charges, should have passed a verdict refusing these counts of the indictment due to the fact that they were withdrawn by the prosecutor.

The defense counsel in his Appeal especially emphasized that on several occasions during the proceedings he objected to the Indictment of the Prosecutor's Office of BiH being incomprehensive, imprecise and in contravention of standards foreseen by the CPC of BiH in relation to the subjective and objective identity of the Indictment. The Indictment does not contain a factual description of acts comprising the perpetration of the criminal offence so that for every individual event, without the act of perpetration having been described, the accused person was charged of having committed three criminal offences without any clear indication as to whether he was being indicted as a perpetrator, co-perpetrator, accessory or instigator of the criminal offences alleged against him. Having relied on such an Indictment, the first-instance



Verdict is also incomprehensive as it does not have an operative part, with the reasons of the Verdict being incomprehensive and not referring to the decisive facts, which constituted an essential violation of the provisions of the CPC under Article 297 Paragraph 1 Item k).

Furthermore, the Court failed to resolve all counts of the Indictment, whereby they also violated the provisions of subparagraph (h) of the said regulation, as well as subparagraph (i), since they based their Verdict on evidence that may not be used as the basis of a verdict when they used the statement of the suspect who pleaded his right to remain silent at the main trial.

In their response to the Appeal, received by this Court on 25 January 2006, the Prosecutor's Office of BiH contested the allegations of the Appeal filed by the Defense Counsel for the accused because they are of the opinion that the first-instance court correctly established the facts of the case and found the defendant guilty, which is why there is no reason to revoke the first-instance Verdict.

At the session of the Appellate Division Panel held on 4 July 2006 and attended by Drew Engel, Prosecutor of the Prosecutor's Office of BiH, and attorney Barbarić Dragan, Defense Counsel for the accused, while the accused was not in attendance although he was duly notified, the Prosecutor of the Prosecutor's Office of BiH maintained the allegations from his Appeal and pointed out that, according to the Appeal, the actions of perpetration of the criminal offence represent separate actions undertaken on different locations and at different time periods, which is why this is not the case of a continued criminal offence but rather of a number of criminal offences in concurrence and moved the Court to revise the first-instance Verdict, stressing that there was no need to revoke it.

The Defense Counsel for the accused stated that he entirely maintained the allegations from his written Appeal, especially pointing out that the Verdict is a result of multiple violations of the provisions of criminal proceedings and that, as such, it is untenable in the section finding the accused guilty. In its response to the Appeal by the BiH Prosecutor's Office, he challenged the Appeal and proposed that it be refused as unfounded.

Having reviewed the contested Verdict against the Appeal, in terms of Article 306 of the CPC BiH, the Appellate Division Panel decided as in the operative part, for the following reasons.

Reviewing the contested Verdict against the allegations made by the Defense Counsel for the accused, this Panel found that the objection of the Defense Counsel for the accused is founded in suggesting that when the Prosecutor's Office of BiH dropped Counts 4, 13, 14, 16, 17 and 18 of the Indictment against the defendant after the main trial had started, pursuant to Article 283 (1) (c) of the BiH CPC, the first-instance court should have passed a verdict dismissing the charges and not reject the charges for the those counts of the Indictment. Based on that reason and pursuant to Article 314 (1) of the BiH CPC, granting the appeal, the Panel revised the first-instance Verdict in this section by refusing the charge against the accused Ante Jelavić that he committed the criminal offence with which he is charged by acts described under Counts 4, 13, 14, 16, 17 and 18 of the Indictment.

Although the Defense Counsel for the accused filed the Appeal without specifying in the introductory part of his Appeal the sections of the first-instance Verdict to which it refers, having examined the Appeal, and bearing in mind the reasoning of the Appeal which clearly shows that the appeal does not contest the acquittal section of the first-instance Verdict, the Panel is satisfied that the appeal does not refer to the acquittal section of the first-instance verdict. Given that Article 306 of the BiH CPC stipulates that the first-instance verdict shall be reviewed only insofar



as it is contested by the Appeal, and bearing in mind that the appeal filed by the Prosecutor's Office of BiH also does not contest the first-instance Verdict in the acquittal section, the Panel has decided that the first-instance Verdict, in its section acquitting the accused of the charges of criminal actions described under counts 22, 23 and 24 of the Indictment issued by the Prosecutor's Office of BiH, shall remain unchanged.

Reviewing the first-instance Verdict in its conviction section and against the objections from the appeal filed by the Defense Counsel for the accused according to which the first-instance court has committed multiple violations of the criminal procedure provisions, the Panel has assessed that the objection from the Appeal filed by the Defense Counsel is founded and that the contested Verdict resulted in essential violations of criminal procedure provisions stipulated under Article 297 (1) (k) and (h) of the BiH CPC.

Article 290 of the BiH CPC prescribes the contents of a written verdict and especially the contents of the operative part of a verdict, and that the Court shall specifically and completely state which facts and on what grounds the Court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, and the reasons guiding the Court in ruling on legal matters and especially in ascertaining whether the criminal offence was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act. Article 285 (1) of the BiH CPC prescribes that a guilty verdict must include facts and circumstances that constitute elements of the criminal offence and those on which the application of a particular provision of the Criminal Code depends.

Having looked into the contested Verdict, the Panel has established that the Verdict lacks factual description of the offence (facts and circumstances that constitute elements of the criminal offence), which renders the operative part of the Verdict incomprehensible and therefore it cannot be reviewed. Mere reference to certain counts of the Indictment is not sufficient, but the operative part of the first-instance verdict must include factual basis rendering concrete the action of the accused representing a criminal offence, which again is clear, specific and complete and comprising all elements of the criminal offence. Acting contrary to this, the first-instance court has committed an essential violation of the provisions of criminal procedure stipulated under Article 297 (1) (k) of the BiH CPC, which was rightfully pointed out by the Defense Counsel in his Appeal.

In addition to that, also founded is the objection from the Appeal filed by the Defense Counsel for the accused according to which the first-instance court in their Verdict committed an essential violation of the provisions of criminal procedure stipulated under Article 297 (1) (h) of the BiH CPC, i.e. that in its Verdict, the Court did not entirely resolve the contents of the charge. Namely, comparing the Indictment of the Prosecutor's Office of BiH Ref. number KT-25/04, confirmed on 19 May 2004 and amended by the submission of the Prosecutor's Office of BiH dated 16 December 2005, with the contested Verdict, it is clear that the contested Verdict does not contain the ruling on Counts 10, 11 and 12 of the said Indictment, which according to this Panel represents the cited essential violation of the provisions of the BiH CPC.

Since the first-instance court committed essential violations of the provisions of the criminal procedure, which pursuant to Article 315 (1) (a) of the BiH CPC call for mandatory revocation of the verdict, granting the appeal filed by the Defense Counsel for the accused, the Panel revoked the conviction of the contested verdict and scheduled a trial in relation to that section.

The new proceedings, which shall be conducted with due observation of the provisions of the BiH CPC applicable to the main hearing before the first-instance panel, shall remedy the committed violations of the provisions of criminal procedure, present evidence that has already been presented and, if necessary, other evidence as well.

Given that the first-instance Verdict has been revoked in its conviction section and a trial before the Appellate Division Panel scheduled, the Appeal filed by the Prosecutor's Office of BiH, which only relates to the ruling on the criminal sanction, could not have been reviewed.

Based on the foregoing and pursuant to Article 310 (1) and (2) in conjunction with Article 314 (1) and Article 315 (1) (a) of the BiH CPC, the Panel has ruled as set out in the operative part herewith.

MINUTES-TAKER
Emir Neradin

PRESIDING JUDGE
Nedžad Popovac

I hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian.

Sarajevo, 19.7.2006
Branislav Banjac
Certified Court Interpreter for English

