



**Number: X-KŽ-06/223**  
**Sarajevo, 30 March 2007**

**IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, Section II for Organized Crime, Economic Crime and Corruption, the Panel composed of judges Azra Miletić as Presiding Judge, Dragomir Vukoje and Venceslav Ilić as members of the Panel with participation of Legal Advisor Željka Marenčić, as the Record-Keeper, in the criminal case against the accused Husmir Čović for the criminal offence of Smuggling of Persons in violation of Article 189(3) of the Criminal Code of Bosnia and Herzegovina (hereinafter: CC BiH), as read with Article 26 of the same Code ruling on the Appeals of the Prosecutor's Office of Bosnia and Herzegovina and the Accused Husmir Čović filed by his Defense Counsel Husein Mušić, Attorney from Prijedor, filed from the Verdict of this Court number X-K-06/223 dated 1 December 2006, at the session of the Panel held on 30 March 2007 passed the following:

**VERDICT**

The Appeals by the Prosecutor's Office of Bosnia and Herzegovina and the Accused Husein Čović filed by his Defense Counsel are hereby dismissed as unfounded and the Verdict of the Court number X-K-06/223 dated 1 December 2006 is hereby confirmed.

**Reasoning**

The first-instance Verdict found Husmir Čović guilty of the criminal offence of Smuggling of Persons in violation of Article 189(3) of the CC BiH as read with Article 26 of the same Code and sentenced him to imprisonment for a term of 2 (two) years and 6 (six) months, while on the basis of Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH) he was relieved of duty to reimburse costs of the criminal proceedings. Pursuant to Article 284(c) of the CPC BiH he was acquitted of charges for the criminal offence of Associating for the Purpose of Perpetrating Criminal Offences in violation of Article 249(2) as read with Paragraph (1) of the CC BiH.

This Verdict was appealed within the statutory deadline by the Prosecutor's Office of BiH (hereinafter: the Prosecutor) and by the Accused through his Defense Counsel.

The Prosecutor contests the Verdict due to an essential violation of the Criminal Code under Article 298(1)(a) of the CPC BiH, due to erroneously or incompletely established facts under Article 299(1) of the CPC BiH and due to the decision on the sentence and submits that the Appellate Panel uphold the Appeal and revise the acquitting part the Trial Verdict in the manner that they find the Accused guilty of the criminal offence in violation of Article 249(2) as read with Paragraph (1) of the CC BiH, and impose on him the sentence of imprisonment for a term of 6 (six) months for this charge and taking the already imposed sentence of 2 (two) years and 6 (six) months for the criminal offence in violation of Article 189(3) of the CC BiH as read with Article 26 of the same Code as already determined and applying Article 53 of the CC BiH sentence the accused to the single sentence of imprisonment for a term of 3 (three) years.

Defense Counsel contests the Verdict due to an essential violation of provisions of the criminal procedure, violation of the Criminal Code, erroneously and incompletely established facts and the decision on the sentence and submits that the Appellate Panel uphold the appeal by way of reversing the Trial Verdict and acquitting the accused of the charges.

No written responses to the Appeals were filed.

Pursuant to Article 304 of the CPC BiH the Appellate Panel held a public session which was attended by the Prosecutor, the Accused Husmir Čović with his Defense Counsel Attorney Husein Mušić. On that occasion the parties to the proceedings and Defense Counsel maintained their appellate arguments and submissions, while Defense Counsel for the Accused indicated that if the Panel does not uphold his Appeal it should impose a more lenient sentence on the Accused.

In the closed part of the session this Panel reviewed the contested Verdict within the scope of the appellate grounds as defined under Article 306 of the CPC BiH and adjudicated as in the Operative Part hereof for the following reasons:

According to the finding of the Appellate Panel concerning the convicting part of the Verdict, based on the results of the evidence presented at the main trial and the facts established on it invoked in the reasons of the Verdict the Trial Panel consistently found that on 22 October 2005, for the purpose of acquiring material gain in the location of Gata, the Municipality of Cazin, together with Čović Fadil, the Accused Husmir Čović took over four persons, nationals of the Republic of Albania, and then attempting to transfer them from BiH to the Republic of Croatia in passenger car "Mazda 626", license plates number 990-K-242, which was driven by Fadil and that

while performing those actions, they were detected by the authorized officials of the Police Station Cazin, Enes Kličić and Mehmed Kapić and then that Husmir Čović, with the intention of avoiding the pursuit by the authorized official persons, ordered Fadil to drive as fast as possible, and driving at the speed unadjusted to the road conditions he skidded off the road together with all the persons in the vehicle, whereby the lives and security of the mentioned persons were jeopardized. Still escaping the pursuit by the authorized official persons, the accused fled from the scene together with Fadil leaving behind the mentioned foreign nationals.

The Trial Panel correctly found that the described actions of the accused Husmir Čović incorporated all statutory elements of the criminal offence of Smuggling of Persons in violation of Article 189(3) as read with Article 26 of the CC BiH and correctly found him guilty thereof.

Consequently, according to the Appellate Panel the grounds for appeal of the accused filed by his Defense Counsel that the Trial Panel in this case erroneously and incompletely established the facts and misapplied the criminal code on them are unfounded.

This Appeal as well does not contest the facts structured in the Operative Part of the contested Verdict except for the participation of the accused in the described event. Thus the Appeal states that in the identification procedure none of the four Albanian nationals identified the Accused as the individual who had taken them over in the location of Gata next to a creek on the relevant occasion which can be seen from the Identification Record. The witness Edis Vilić stated that he did not indentified the individual who had run by him and who had had a dark complexion. The accused was not identified by Munir Škrgić because his face had been turned away from him and he had spoken on the phone. Likewise, concerning the testimonies of the police officers the Appeal says that they did not tell the truth because they had never interviewed the accused, nor had they known him. In addition the Appeal contends that the Accused Fadil Čović's defense was to shift all blame on Husmir Čović. To corroborate this, the Appeal asserts that their families have been at odds since the recent war. The Appeal also suggests that Fadil's defense does not look like a defense but rather a confession coerced by intimidation, that it is not logical that Husmir gave orders to Fadil during the ride given that Fadil is older and stronger than Husmir, unlike Husmir Fadil had a car, and it comes out that Husmir is to be blamed because the car skidded off the road and jeopardized lives of passengers though it was Fadil who drove the car. For these reasons, according to the Appeal the state of facts found by the Trial Panel is deficiently established. In addition, Defense Counsel's Appeal cautions that that there was no room to apply Article 273(2) of the CPC BiH and to read the Record of Fadil Čović who had died in the meantime and who due to his death had not been in a position to clarify or deny his statement, he was neither cross-examined by the Defense, consequently according to the Appeal

this is unlawful evidence on which the contested Verdict could not have been based which resulted in the essential violations of the criminal procedure provisions.

According to the finding of this Panel the above presented appeal's reasoning and consequently the assertion that the Trial Verdict is based on unlawful evidence is erroneous. Actually, when the Trial Panel accepted the statement of Fadil Čović that he gave to the State Border Service Unit in Velika Kladuša on 1 December 2005 as evidence and read it pursuant to Article 273 of the CPC BiH which is an exception from the imminent presentation of evidence because in this case the requirement under Paragraph (2) of this Article was met since Fadil Čović had died in the meantime – one cannot see where the Trial Court violated the law. The more so as the contents of the Record unequivocally show that now deceased Fadil was interviewed after he was duly advised of his procedural rights pursuant to Article 78(2) of the CPC BiH, that in the end of his statement he declared that he had no objections to the conduct of the SBS officers. Additionally, with regard to the circumstances of the interview of Fadil Čović the Trial Panel heard the witnesses Rejhan Raković and Ekrem Družanović who confirmed that when the statement of the suspect Fadil had been taken on the official premises of SBS in Velika Kladuša Zeljko Mladenko and Record-Keeper Fikreta Smajić had been present, that Fadil had given his statement voluntarily, and as far as the objection of Defense Counsel that Fadil allegedly stated that the investigators had intimidated him and treated him in a deceitful manner is concerned, the witness Družanović was explicit stating that it was not true. Defense Counsel invoked the same circumstance at the public secession of the Panel contending that at the arraignment held before the Preliminary Hearing Judge of this Court Fadil stated that he had been threatened by official persons. To check these allegations the Panel listened to the audio recording of the hearing dated 29 June 2006 only to be satisfied that Fadil Čović stated on that occasion that he had been threatened by Husmir's father and Husmir himself but not by the official persons. Accordingly, as the interview of the suspect Fadil was carried out pursuant to Article 219 of the CPC BiH which authorizes official persons to collect necessary statements from individuals, and that on that occasion the authorized officials applied Article 78 of the same Code as well as Article 86 of the CPC BiH the Trial Panel was correct in using the Record of Questioning of the suspect Fadil Čović as evidence in the criminal proceedings. Consequently, the appellate contentions that this is an unlawful piece of evidence on which the Verdict could not have been based remained without success.

Being aware of the significance of the statement of Fadil Čović Defense Counsel's Appeal attempted to deprive this testimony of the validity of lawful evidence in the light of the previously discussed though very important issue related to the lawfulness of evidence under Article 10 of the CPC BiH and as it was demonstrated the Trial Verdict successfully resolved this issue. In addition, the Appeal attempted to undermine the validity of this evidence from another aspect establishing the theory that Fadil Čović wanted to shift his responsibility to the accused Husmir. However,

this theory of the Appeal does not find the necessary footing within the context of controlling and subsidiary evidence that considered by the Trial Panel in terms of its internal and external consistencies assisted the Trial Panel to draw an irrefutable conclusion that the charges in the factual part of the Trial Verdict were proved.

The convicting part of the factual findings of the Verdict is essentially structured on the basis of the statement of Fadil Čović, but not that statement only, there are also the consistent testimonies of police officers Enes Kličić and Mehmed Kapić who pursued the accused Husmir and Fadil who was at the wheel of *the Mazda* vehicle on the relevant occasion. These police officers were heard as witnesses are specific asserting that they had indentified Husmir as a passenger in Fadil's car but also when he had been running past the house of Munir Škrgić. The appeal admittedly does not suggest a single reason why the police officers would falsely incriminate the accused in the way as it was correctly found by the Trial Verdict.

Munir Škrgić, heard as a witness, stated in his evidence that the individual who had been running with a cell phone and talking looked like Husmir to him, but that he had not been able to see him fully because of the position of his face. If one takes into account Škrgić's evidence that the police officer had persistently called the individual running ahead of him to freeze, that this individual held a cell phone on his right side and said that he was running because he was followed by the police, that the witness Škrgić previously described the car which sped past his yard, he even said that it had been of a "mouse-grey" color, that he had noticed that there had been no rear license plate, which was also consistently stated by the police officers and Fadil Čović – it is then clear that the witness Škrgić had a well-preserved perception of the accused's identity too, though until that point in time he had been aware only of his physical appearance. Certain aloofness of his main trial testimony concerning the identity of the accused should not be assigned to his uncertainty as much as to the psychological aspect of testifying in a courtroom in which the accused is present. Again, this Panel has nothing to add to the assessment of probative value of the statement of Fadil Čović on the 7<sup>th</sup> page of the Trial Verdict reasoning, because it is also the opinion of this Panel that Fadil Čović described convincingly and in details that he had been contacted via cell phone by the accused Husmir who had suggested him to give him a ride with his car in order to go and pick up the Albanian nationals which had been accepted by Fadil whereupon he stated that Husmir had waited for him in a pre-arranged location and that after that they had proceeded towards the location where the Albanians were, that they had seen the police who had been checking a van near the gas station, that Husmir had told him to turn his head away and to put his hand over his face so that the police would not recognize them, that some 15 minutes later they had arrived in Gata, that Husmir had got out of the vehicle gone away and brought four Albanians who had sat in the back seat and Husmir had sat next to him, told him to drive as fast as he could towards Tržačke Raštele, that he had spotted that the police officers had started pursuing them in a *Niva* vehicle, that he had suggested to Husmir to pull over, but

swearing he had told him to drive on as fast as he could, and he had kept telling him that even after they took a turn to the gravel road when he had been driving approximately 100 km/h, and that on a curve they had skidded off the road into a ditch, that Husmir had told him after they had gotten off to run, not to surrender to the police or to tell that they had been together. Accordingly, in relation to this section of the developments as well as in relation to what ensued, Fadil Čović recounts the very event thoroughly and chronologically the way it objectively happened. By doing so he does not challenge his participation in the incident either, consequently the question arises why Fadil would want to shift the responsibility onto the accused Husmir and in what sense. Even though the witness Vilić did not recognize the accused when he was fleeing, the witness saw this individual holding a cell phone, which is also corroborated by the witness Škrgić. The witness Vilić being a minor adds that the individual who ran by him threatened that he must not tell anyone where he had fled to. Accordingly, there are too many details in the testimonies of the named witnesses which indicate that the account of Fadil Čović is true and which fit into the factual structure of the incident the way Fadil interprets it, for the Court to have doubts about the entirety of his evidence including the description of the actions actually undertaken by the Accused.

The Appeal also endeavors to strip this action by the accused of the significance of the key element of the qualified form under Article 189(3) of the CC BiH. By doing so it contends that the police officers who followed the *Mazda* car in their police vehicle are to be blamed for the car accident but not the accused. It is clear that the accused cannot be acquitted of criminal liability based on this twisted logic since the driver Fadil, when he realized that they were tailed by the police, should have pulled over which he failed to do, because according to his evidence the accused did not let him do that but ordered him to speed up on several occasions. The outcome of this inconsiderate speeding of 100 km/h obviously not adjusted to the conditions and state of the road, full of sand, in the overburdened vehicle, was that he skidded off the road and thus the lives and limb of passengers, four foreign nationals, were jeopardized. Accordingly, being satisfied that in the described manner the life and security of the individuals subject of smuggling were brought at risk, the Trial Panel correctly found in the actions of the accused the key elements of the qualified form of the criminal offence in violation of Paragraph (1) of the referred Article and in addition it is unequivocal that that these qualifying circumstances were encompassed by his intent.

The contested Verdict correctly and entirely found all these important elements of the factual basis and cannot be objected in that part and least of all in the manner the Appeal by Defense Counsel does it.

These are actually contentions that cannot have any foundation in the analysis of the contents of the contested Verdict taken as a whole. The analysis shows that the operative part does not lack clarity, that there are no mutual inconsistencies between

the operative part and reasoning or between the individual parts of the reasoning , or the reasoning and the case record, and that contrary to the appellate contentions the methodology of finding or examining decisive facts defined in Article 14 of the CPC (equality of arms) was not violated either because the contested Verdict carefully examined with equal attention both the inculpatory and exculpatory facts. What the other interpretation of the fact that the Trial Panel passed the acquittal of the accused Husmir in terms of the commission of the criminal offense in violation of Article 249(2) as read with Paragraph (1) of the CC BiH could be.

Reviewing the decision on the sentence in the light of appellate contentions of Defense Counsel for the accused, this Court is satisfied that the imprisonment sentence for a term of 2 (two) years and 6 (six) months imposed on the accused by the contested Verdict for the committed criminal offense is correctly meted out both in terms of the type and length. Accordingly, the Trial Panel assessed all circumstances which are relevant for the length of a sentence pursuant to Article 48 of the CC BiH including the extenuating ones such as the young age of the accused as the perpetrator, and aggravating such as the persistence in the crime perpetration. This persistence is not only manifested in the fact that the accused ordered Fadil Čović not to pull over when the police signaled them to and to proceed driving the vehicle at a high speed, but also in the fact that after the car had skidded off the road he continued running ahead of the police, and even more that he threatened on the witness Esad Vilić's life if he says that he fled as well as to Fadil Čović not to say that he was with him. After the perpetration of the crime, together with his father the accused threatened Fadil to recount his statement he had given to the authorized official persons (due to these threats Fadil Čović addressed SBS unit in Velika Kladuša for the sake of his protection). Those are all circumstances which in the opinion of this Panel as well justify the length of the sentence, and clarify why the Trial Panel did not exercises the statutory option to reduce the punishment since this remained an attempted crime only. It is this type and length of punishment that will be able to achieve general and specific purpose of punishment as set forth in Article 39 of the CC BiH. The contrasting contentions of the Appeal are therefore unacceptable.

Consequently, the Appeal's contentions by Defense Counsel for the accused relative to the factual and legal basis of the contested Verdict are not founded and thus the Appeal of the accused filed through his Defense Counsel was to be dismissed and the Trial Panel Verdict confirmed.

As far the acquitting part of the Trial Verdict is concerned which acquitted the accused Husmir Čović of the charges of the criminal offense of Associating for the Purpose of Perpetrating Criminal Offences in violation of Article 249(2) as read with Paragraph (1) of the CC BiH, it was appealed by the Prosecutor within the due deadline. In the reasoning of the Appeal the Prosecutor alleges that the Court erroneously and incompletely established the state of facts since it was found beyond

any reasonable doubt that the smuggled persons crossed the route from Albania via the territories of Montenegro and BiH, all the way up to Kladuša aimed at illegal crossing to the Republic of Croatia, all being organized by mutually connected individuals who were carrying out the undertaken commitment of transferring them to the precisely designated location, the location of Gata, left them there and called the individual who would take them over there, and this individual was surely the accused Husmir Čović.

Reviewing this appellate ground, unlike the Appeal this Panel is satisfied that the Trial Panel made a correct finding on lack of evidence that the accused Husmir Čović committed the criminal offense in violation of Article 249(2) as read with Paragraph (1) of the CC BiH.

As a key element of this crime it is necessary that the accused is a member of a group of people or an association of at least three or more individuals which is organized for the purpose of perpetration of criminal offenses scheduled in the code of Bosnia and Herzegovina. No evidence was presented in the evidentiary procedure which would confirm with certainty that an organized group of people existed as required by the referred provision of law. Having reviewed all presented evidence the Panel was truly unable to determine either the number or the identity of individuals who might potentially be the members of such a group of people or an association, even less that it did not come to existence spontaneously but that it was formed for the purpose of a direct perpetration of the criminal offense. In addition, no piece of evidence was presented that would confirm beyond reasonable doubt that the accused Husmir Čović knowingly and willingly became a member of such an organization whose criminal goals were known to him.

The contentions presented by the Prosecutor in his Appeal in terms of arrival of the smuggled persons from Albania to the location of Gata in BiH and how many representatives could or must have participated in their transport are in this Panel's opinion speculations and assumptions because no individual was named who would in addition to Husmir Čović and Fadil Čović have participated in transporting of the smuggled persons, and it is certain that the court cannot base its decision on assumptions which have certain degree of likelihood but neither individually nor comprehensively they prove beyond reasonable doubt the existence of all key elements of the crime.

With regard to this the Prosecutor's appellate grounds in terms of erroneously and incompletely established state of facts were to be refused, and therefore the ground relative to the misapplication of the Criminal Code cannot be upheld since the Trial Panel correctly applied the Criminal Code through a correct assessment of the presented evidence.

Based on the foregoing, the Appeals filed by the Prosecutor and the accused Husmir Čović filed through his Defense Counsel were to be dismissed as unfounded and the Trial Verdict was to be confirmed based on Article 313 of the CPC BiH.

Record-keeper  
Željka Marenčić  
*/signature affixed/*

Presiding Judge  
Azra Miletić  
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