

**No: X-KRŽ-08/489****Sarajevo, 4 March 2010**

The Court of Bosnia and Herzegovina, Section I for War Crimes, Judge Tihomir Lukes, as the presiding judge and judges Hilmo Vučinić and Carol Peralta, as the Appellate Panel members, with the participation of Nevena Aličehajić as the record-taker, in the criminal case of the accused Ante Kovać, charged with the criminal offence of War Crimes against Civilians in violation of Article 173(1)(e) and (f) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 180(1) of the CC of BiH, deciding on the Appeal filed by the Defence Counsel for the accused Ante Kovać, attorney Dušan Tomić, in which he disputes the Verdict No: X-KR-08/489 rendered by the Court of Bosnia and Herzegovina on 10 July 2010, having held a hearing in the presence of the prosecutor of the Prosecutor's Office of BiH, Mirko Lečić, the accused Ante Kovać and his Defence Counsel, attorney Dušan Tomić, on 4 March 2010 rendered the following:

DECISION

The Appeal filed by the Defence Counsel for the accused Ante Kovać, attorney Dušan Tomić, **is hereby upheld** so that the Verdict No. X-KR-08/489 of 10 July 2010 **is hereby revoked** and a retrial is ordered before the Appellate Division Panel of Section I for War Crimes of the Court of Bosnia and Herzegovina.

Reasoning

Under the Court of BiH Verdict No. X-KR-08/489 of 10 July 2009, the accused Ante Kovać was found guilty of the criminal offence of War Crimes against Civilians in violation of Article 173(1)(e) and (f) of the CC of BiH, in conjunction with Article 180(1) of the CC of BiH, by perpetrating the acts described under Sections I, II and III of the first instance Verdict. Pursuant to Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: CPC of BiH), as read with the provisions of Articles 39, 42 and 48 of the CC of BiH, the Court found the accused guilty and sentenced him to a prison sentence of 13 (thirteen) years.

Pursuant to Article 56 of the CC of BiH, the time spent in custody under the Decision issued by the Court of BiH as of 30 January 2008 will be credited towards the imposed prison sentence.

In accordance with Article 188(1) of the CPC of BiH, the accused will reimburse the costs of the criminal proceedings in the amount determined by the Court under a separate decision.



The Defence Counsel for the accused Ante Kovać, attorney Dušan Tomić, appealed the Verdict within the statutory deadline on the grounds of grave violations of the criminal procedure, the erroneously and incompletely established account of facts and violations of the Criminal Code. The attorney moved the Appellate Panel of the Court of BiH to uphold the Appeal, revoke the first instance Verdict and order a retrial before the Appellate Division Panel.

The Prosecution did not appeal the first instance Verdict, however, in the Response to the Appeal, they submitted that all the allegations of the Appeal were ill-grounded and/or that the First Instance Panel did not violate the right to defence of the accused, or the right to equality of arms, or any of the provisions of the criminal procedure set forth under Article 297(2) of the CPC of BiH. According to the Prosecution, the resumption of the main trial after the expiry of the statutory 30 days did not affect the lawful and proper rendering of the Verdict. Also, even though it was the obligation of the Defence, they failed to explain in their Appeal how the ill-application of Article 251(2) of the CPC of BiH could affect the lawful and proper rendering of the Verdict. The Prosecution further argued that the trial Panel properly and completely established the account of facts and properly applied the substantive law, so that they moved the Appellate Panel of the Court of BiH to dismiss the Appeal as unfounded and uphold the first instance Verdict.

Pursuant to Article 304 of the CPC of BiH, at the session held by the Appellate Panel, the Defence briefly presented the allegations of the Appeal, the Prosecutor responded and both parties entirely maintained their argumentation and proposals.

The accused fully agreed with his Defence Counsel.

Having examined the disputed Verdict within the allegations of the Appeal, as set forth under Article 306 of the CPC of BiH, the Appellate Panel decided as stated in the Enacting Clause of the Verdict on the grounds as follows.

The Appellate Panel finds the appellate averments to be well-founded, and agrees that, as alleged in the Appeal, the First Instance Panel gravely violated the criminal procedure provisions under Article 297(2) of the CPC of BiH. The First Instance Panel failed to apply the provisions of Article 251(2) of the CPC of BiH and resumed the main trial notwithstanding that the deadline of 30 days expired, thereby affecting the lawful and proper issuing of the Verdict, as it is correctly indicated in the Appeal.

Article 251(2) of the CPC of BiH provides that: *“The main trial that has been adjourned must recommence from the beginning if the composition of the Panel has changed or if the adjournment lasted longer than 30 days. However, with the consent of the parties and the defence attorney, the Panel may decide that in such a case the witnesses and experts not be examined again and that no new crime scene investigation be conducted, but that the minutes of the crime scene investigation and*



the testimony of the witnesses and experts given at the prior main trial be used instead.”

The position taken by the Trial Panel in the first instance Verdict was to make difference between the *adjournment* and *failure to hold* the trial within 30 days. The Trial Panel held that in this specific case, the provisions of Article 251(2) of the CPC of BiH did not apply with regard to the adjourned time period being longer than 30 days, since hearings were indeed scheduled within the statutory deadline. However, the hearing scheduled for April 23, 2009, was not held since both the accused and his defence counsel were unable to appear before the court, which resulted in the expiry of the statutory deadline of 30 days between two consecutive hearings. Therefore, the Panel was not responsible for the delay. As it is stated in the contested Verdict, the purpose of Article 250(1) of the CPC of BiH is to protect the rights of the accused. Nevertheless, the Trial Panel holds that a renewed trial would considerably lengthen the proceedings and that it would not in any way be in the interest of the accused. Notwithstanding that 35 days passed between the two main trial hearings, the trial Panel found that it did not affect a proper and lawful rendering of the Verdict and that the resumption of the main trial in no way violated the rights of the accused, quite the opposite, the resumption of the main trial was aimed at its timely completion.

The Appellate Panel finds that the First Instance Panel was justified in concluding that the legislator defined the provisions of Article 251(2) of the CPC of BiH precisely to protect the rights and interests of the accused and that the stated provision was intended to guarantee an efficient conduct of the criminal proceedings. Nevertheless, the Panel holds that the trial Panel had no right to violate the law under the pretext of conducting an efficient proceeding.

When examining this allegation of the Appeal, the Appellate Panel has first addressed the obligation of having a non-interrupted main trial and/or if it is not possible to ensure a continuity of the main trial, the adjourned parts thereof have to make one whole. It follows from Article 251(2) of the CPC of BiH that the main trial that has been adjourned longer than 30 days must start anew, given that the adjourned and resumed parts do not make one whole any longer. Therefore, since the legislator nowhere mentions the reasons for the adjournment, it can be concluded that it is irrelevant who is responsible for the adjournment – the court, the parties to the proceedings or the defence counsel, or whether the reasons for the adjournment were justified or not. Thus, regardless of the reasons for the adjournment, it is the responsibility of the Trial Panel to start the main trial anew if more than 30 days passed between the hearings.

It stems from the foregoing that the First Instance Panel was not justified in concluding that there was a difference between the *adjournment* and *failure to hold the trial*. Actually, there is a difference in theory, but not in practice, given that Article 251(2) of the CPC of BiH imposes the obligation on the court and/or



President of the Panel to start the trial anew if the adjournment lasted longer than 30 days in view of the legal consequences arising from the adjournment or failure to hold the trial.

The First Instance Panel wrongly opined that Article 251(2) of the CPC of BiH did not apply, since the Trial Panel scheduled a hearing for April 23, 2009, but neither the accused nor his Defence Counsel appeared before the court. As opposed to this conclusion, the Appellate Panel holds that regardless of the fact that the mentioned hearing was scheduled, the relevant legal requirements for its holding were not satisfied, so that the continuity and/or the whole of the main trial were not preserved. In the Commentary on the Law on Criminal Procedure, Prof. Dr. Branko Petrić notes: “It cannot be considered that a deadline of one month has been met if the scheduled resumption of the main trial was postponed again since the public prosecutor, accused, witness or expert witness, scheduled to be heard at the main trial failed to appear before the court and if after the opening of the new hearing, a decision was made only to adjourn the main trial.”¹

The Appellate Panel has taken into account that the legislator itself modified the provision under Article 251(2) of the CPC of BiH that was in force before the most recent amendments to the CPC of BiH, which strictly defined that the main trial must start anew if the adjournment lasted longer than 30 days and that all the evidence has to be presented again. However, the law in force prescribes that “*with the consent of the parties and the defence attorney, the Panel may decide that in such a case the witnesses and experts not be examined again ...*” Therefore, in situations when the statutory deadline of 30 days has expired, the Court left it to the panels to decide if they will examine the witnesses and experts again and investigate the crime scene, on condition that the consent of the parties has been previously obtained. However, not only that the Trial Panel in this specific case failed to seek the consent of the parties, but they entirely ignored the objection raised by the attorney Tomić at the hearing held on 14 May 2009, who indicated that the main trial should recommence since the deadline of 30 days has expired, thereby acting directly in contravention of the stated legal provision.

In the Verdict, the First Instance Panel addressed the objection raised by the Defence at the hearing held on 14 May 2009 and stated that the attorney failed to provide any reasonable explanation as to why he failed to raise the objection at the hearing held on 5 May 2009, when the main trial continued after 35 days. The Appellate Panel holds that the Court is responsible to ensure the legality of criminal proceedings and that it was the responsibility of the Court to proceed in accordance with the provisions of Article 251(2) of the CPC of BiH, irrespective of the objection raised by the Defence. Thus, the Court should have recommenced the main trial and/or ask the parties and the Defence to state their position about the future presentation of

¹ Commentary on the Law on Criminal Procedure, Third Amended Edition, II Volume, “Official Gazette of SFRY”, prof.dr. Branko Petrić, page 73



evidence. The Trial Panel reasoned their decision in the first instance Verdict by stating that the Defence Counsel failed to explain why he did not indicate that the deadline of 30 days expired at the hearing when the main trial continued. Nonetheless, this explanation is irrelevant, since it is the Court that is in charge of the main trial, the President of the Panel more specifically and no such discretionary right is left to the parties and the Defence.

It stems from everything the foregoing that the First Instance Panel failed to apply Article 251(2) of the CPC of BiH during the main trial. Given that the main trial recommenced after more than 30 days, the continuity of the main trial was not ensured, therefore, this Panel holds that the evidence presented before the adjournment did not have the necessary continuity, so that pursuant to Article 281(1) of the CPC of BiH, no Verdict could be grounded on such evidence. In the Appellate Panel's opinion, the failure of the First Instance Panel to apply Article 251(2) of the CPC of BiH affected the lawful and proper rendering of the Verdict, which amounts to the grave violation of Article 297(2) of the CPC of BiH, which again is a reason for the revocation of the Verdict on the grounds of Article 315(1)(a) of the CPC of BiH.

The Appellate Panel will reopen the proceedings and remedy the grave violations of the criminal procedure provisions, present anew the already adduced evidence and, if necessary, having examined other allegations of the Appeal, present new evidence as well.

Having found that the First Instance Panel gravely violated the criminal procedure provisions, the Appellate Panel has not examined other allegations of the Appeal, but outlined only brief reasons for revoking the Verdict pursuant to Article 316 of the CPC of BiH.

RECORD-TAKER

Nevena Aličehajić

PRESIDING JUDGE

Tihomir Lukes

LEGAL REMEDY: No appeal may be filed to contest this Decision.