



No. X- KRŽ- 07/431

Sarajevo, 2 October 2008

The Court of Bosnia and Herzegovina, sitting as the Panel of the Appellate Division of Section I for War Crimes, consisting of Judge Dragomir Vukoje, as Presiding Judge, and Judges Robert Carolan and Hilmo Vučinić, as the Panel members, with the participation of Legal Officer Željka Marenić, as the records-taker, in the criminal case against the accused Suad Kapić a.k.a. Hodža, charged with the criminal offense of War Crimes Against Prisoners of War, in violation of Article 175(1)a) of the Criminal Code of Bosnia and Herzegovina (hereinafter referred to as the CC BiH) in conjunction with Article 180(1) of the CC BiH, ruling on the Prosecutor's Office of Bosnia and Herzegovina Appeal No. KT-RZ 225/07 of 19 June 2008, filed from the Court of Bosnia and Herzegovina Verdict No. X-KR-07/431 of 29 April 2008, at the session held on 2 October 2008 in the presence of the Prosecutor of the Prosecutor's Office of BiH, rendered the following

## DECISION

The Prosecutor's Office of Bosnia and Herzegovina **Appeal is hereby granted**, and the Court of Bosnia and Herzegovina Verdict No. X-KR-07/431 of 29 April 2008 is **revoked**, and a new main trial is scheduled before the Panel of the Court of Bosnia and Herzegovina Appellate Division of Section I for War Crimes.

## Reasons

By the Court of Bosnia and Herzegovina (hereinafter referred to as the Court of BiH) Verdict No. X-KR-07/431 of 29 April 2008, the accused Suad Kapić a.k.a. Hodža was acquitted, pursuant to Article 284 c) of the Criminal Procedure Code of Bosnia and Herzegovina, of the charges that he committed the criminal offense of War Crimes Against Prisoners of War, in violation of Article 175(1) a), in conjunction with Article 180(1) of the CC BiH by the actions described in the enactment clause of the Verdict.

Pursuant to Article 189(1) of the CPC BiH, it was ruled that the costs of the criminal proceedings would be borne by the budget, while the injured parties Rajko Čuković, Mirko Šućur, and Ljiljana Mudrinić were referred to a civil action with their respective damage claims, as well as other injured parties with other potential damage claims in accordance with Article 198(3) of the CPC BiH.

The Prosecutor's Office of BiH filed in a timely manner the appeal contesting the Verdict for the erroneously and incompletely established state of facts, as set forth under 299(1) of the CPC BiH, and the essential violation of the Criminal Procedure Code as set forth under Article 297(1) of the CPC BiH, and it moved the Court's Appellate Division Panel to grant the appeal, revoke the first-instance Verdict and hold another main trial.

The Defense counsel has filed a response to the appeal, moving the Panel to dismiss the appeal as unfounded and uphold the Court of BiH Verdict of 24 April 2008.

At the session of the Appellate division Panel, held in accordance with Article 304 of the CPC BiH, the Prosecutor presented the appeal and the Defense presented the response to the appeal, during which both parties entirely maintained their arguments and motions.

Having examined the contested Verdict within the appeal grounds, the Appellate Panel rendered its decision as stated in the enactment clause of Decision, for the following reasons:

In reference to the Prosecutor's Office appeal allegation which may be interpreted as objection against the erroneously and incompletely established state of facts, the Appellate Panel holds that it is well-founded.

**It is the position of this Panel that the first-instance Panel failed in this specific case to evaluate the presented evidence in accordance with Article 281(2) of the CPC BiH, especially the evidence by witnesses, and bring them into their mutual correlation and the context of the nature of the criminal offense, whose features were the subject of witness testimonies, the lapse of time, and the circumstances and the mode of commission.**

The first-instance Court rendered the decision to acquit the accused Suad Kapić of the charges that he committed the criminal offense of War Crimes Against Prisoners of War in violation of Article 175(1(a) of the CC BiH in conjunction with Article 180(1) of the same Code, as stated in the Verdict, intentionally evaluating every single piece of evidence individually and in connection with other evidence, based on which the conclusion was drawn that it could not be concluded, beyond any reasonable doubt, that the critical event had taken place in the manner described in the description of facts laid down in the Indictment.

Simultaneously, the first-instance Court based its decision predominantly on the evidence by witness Mile Šolaja, whose testimony was, as stated in the contested Verdict, contradictory to the testimony by the witnesses Dragan Stupar and Milovan Mastikosa in the part surrounding the manner of sustaining the injuries and wounds on the part of the four killed victims.

Thus, it was first stated in relation to the witnesses Stupar and Mastikosa that they described the critical event differently. However, there is no correlation established between those testimonies as to try to explain in which key details they differ from one another that would ultimately result in the conclusion that their testimonies are unreliable. In fact, the Verdict included parts of their testimonies without them being evaluated, individually or in their mutual relation. As it was presented in the first-instance Verdict, these pieces of evidence speak more of their compatibility, rather than differences in key facts, as correctly noted in the Prosecutor's Office appeal. Finally, the Verdict per se concluded that "though there were certain discrepancies between the evidence by survivors in relation to the shots that followed the first burst of fire, which were directed at the killed Radovan Mudrinić, both

survivors stated that three captives were killed after the first burst of fire, and finally all four of them were killed from firearms“.

Holding that these testimonies are contradictory to the testimony by witness Mile Šolaja, the first-instance Court gave full credence to this witness. This first-instance Court also included some part of his testimony in the Verdict, but it failed to correlate it with the testimonies by Stupar and Mastikosa and it failed to explain why it holds that those witnesses, though eye-witnesses, were not telling the truth.

The witness Šolaja stated that all four mortal remains of the killed had numerous stab wounds all over their bodies, which were inflicted pre and post mortem. In addition to the stab wounds in the area of their hearts, all mortal remains had cuts on the throat, and the wounds in their heads inflicted by firearms, while some of them had wounds inflicted by small-caliber weapons, which was the conclusion of this witness based on the fact that there was no exit wound.

First-instance Court justified the credence given to the testimony by this witness by the fact that he served the JNA, that he is a medical doctor by military specialty, that he was a member of the 6<sup>th</sup> Krajina Brigade since the beginning of the conflict, and that he specialized in emergency medicine.

The conclusion is drawn from this that doctor Šolaja definitely possessed the professional knowledge and experience based on which the facts pertaining to the cause of injuries on the killed people, he observed during the physical examination of their bodies, may be presented in an objective and professional manner. Along with this, the first-instance Verdict concluded even more than the witness himself stated (more than the witness could objectively know or present). So, doctor Šolaja is very clear when he stated in his testimony that he could not tell which wounds were lethal (this was not mentioned in the Verdict), and that could not be established, in his opinion, based on the mere physical examination of bodies. Moreover, the witness also stated that Mudrinić had a wound in the region of his chests, which was inflicted by a bullet. It is a fact that the witness stated this, as he himself said, based on his recollection of events, but it is also a fact that his entire testimony was given based on the recollection of events, given that no official records pertaining to the physical examination of mortal remains have ever been made. The contested Verdict did not say a word on this, nor did it evaluate this evidence (it did not include it in its entirety) by its content, individually or in mutual relation with other pieces of evidence, primarily the evidence by witnesses Stupar and Mastikosa.

The first-instance Panel also accepted the evidence by this witness in relation to facts that some wounds on the victims were inflicted by small-caliber weapons. First of all, Šolaja was heard as a witness, not an expert witness, so his testimony on this matter is questionable, irrespective of the fact that he served the JNA, that he was a medical doctor by military specialty, and even more so because the witness himself stated that he was not skilled with weapons so as to be able to say that he had some relevant experience. Moreover, the Findings and the Opinion on the wounds inflicted on those killed and the type of weapons used to inflict those wounds could be given only by forensic experts who

specialized in certain disciplines, which in this case are court experts in forensic medicine and forensic experts in ballistics.

Furthermore, the contested Verdict also included the testimonies by protected witness S1, who completely altered the evidence at the main trial as compared to the statement given during the investigation, telling that he could not really remember everything he had stated during the investigation and that he was afraid during the witness examination because they threatened him in Cazin that they would handcuff him (the witness did not state if anyone threatened him during his investigative witness examination in the Prosecutor's Office of BiH on 7 September 2007).

In relation to this witness, the first-instance Court concluded that as a result of a series of contradictions and contradictory statements, it could not give credence to him, and even his original statement was not corroborated by any other evidence in this case, while the Court at the same time neglected the testimony by the survivors Dragan Stupar and Milovan Mastikosa, and it failed to establish the link between their testimonies and evaluate the content of testimonies in all their essential elements.

It arises from the explanation given above, that due to the omission by the first-instance Court to completely and correctly evaluate all the presented evidence, the correctness of the state of facts found in the first-instance Verdict was seriously jeopardized, as justifiably noted in the Prosecutor's Office appeal, so that the Appellate Panel, pursuant to Article 315(1)b) of the CPC BiH revoked the first-instance Verdict and scheduled a new main trial before the Court of BiH to present the evidence, previously presented in the course of the first-instance proceedings, and new evidence, if necessary.

Considering that the first-instance Verdict was revoked, the Appellate Panel did not enter into a detailed analysis of other appeal grounds, but it rather limited itself, pursuant to Article 316 of the CPC BiH, to present brief reasons related to the revocation.

**Records-taker:**  
Marenić Željka

**Presiding Judge**  
Judge:  
Vukoje Dragomir

**LEGAL REMEDY NOTE:**

An appeal from this decision shall not be admissible.

*I hereby confirm that this document is a true translation of the original written in Bosnian/Serb/Croat.  
Sarajevo, 07.11.2008  
Certified Court Interpreter for English*