Bosna i Hercegovina **Босна и Херцеговина**

Sud Bosne i Hercegovine

Суд Босна и Херцеговине

Case No. S1 1 K 005151 19 Krž

Date: 9 July 2019

Before the Trial Panel composed of:

Judge Dr. Miloš Babić, Presiding

Judge Hilmo Vučinić, Panel member

Judge Amela Huskić, Panel member

The case of

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Milomir Davidović

JUDGMENT

Prosecutor, Prosecutor's Office of Bosnia and Herzegovina:

Mersudin Pružan

Defense Counsel for the Accused Milomir Davidović:

Slaviša Prodanović, attorney from Foča

No. S1 1 K 005151 19 Krž
Sarajevo, 9 July 2019

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Appellate Division of Section I for War Crimes, sitting in the Panel composed of Judge Dr. Miloš Babić, as the judge presiding, and judges Hilmo Vučinić and Amela Huskić as the Panel members, with the participation of legal advisor Dženana Deljkić Blagojević as the record taker, in the criminal case against the accused Milomir Davidović concerning the criminal offense of Crimes against Humanity under Article 172(1)g) as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CCBiH), ruling on the appeal filed by the accused Milomir Davidović and his defense counsel, attorney Slaviša Prodanović, having held a public session in accordance with Article 304 of the Criminal procedure Code of Bosnia and Herzegovina (CPCBiH), attended by the Prosecutor from the BiH Prosecutor's Office, the accused Davidović and his defense counsel, on 9 July 2019 delivered the judgment that follows.

J U D G M E N T

The appeal filed by defense counsel for the accused Milomir Davidović and the appeal filed by the accused Milomir Davidović personally **ARE DISMISSED** as ill-founded, so the Judgment delivered by the Court of BiH No. **S1 1 K 005151 18 Kri** of 27 February 2019 is hereby upheld.

R E A S O N I N G

PROCEDURAL HISTORY

1. The Judgment delivered by the Court of Bosnia and Herzegovina No. S1 1 K 005151 18 Kri of 27 February 2019 found the accused Milomir Davidović guilty that by the acts described in Section I of the Judgment he committed the criminal offense of Crimes against Humanity under Article 172(1)g) as read with Article 180(1) CC BiH, for which he

was sentenced to 7 (seven) years of imprisonment. Under Section III of the Judgment the accused was acquitted of the charges concerning the acts described in the operative part of the challenged judgment, whereby he would have committed the criminal offense of Crimes against Humanity under Article 172(1)g) as read with Article 180(1) CC BiH.

2. Pursuant to Article 198(2) CPC BiH, partly granted was the redress claim made by the aggrieved party „S1“, so the accused Milomir Davidović is under an obligation to pay to the aggrieved party „S1“, as compensation for non-material damage, the amount of 10,000.00 KM, on the grounds of the suffered fear, physical and mental pain on account of violation of freedom, dignity, moral and personal rights the amount of 6,000.00 KM, and on the grounds of mental pain caused by reduced vital activity the amount of 4,000.00 KM, all with the default interest rate as of the day of adjudication, within 30 days of the day when the judgment becomes final, under threat of enforcement. The aggrieved party „S1“ is advised to pursue in civil proceedings her redress claim beyond the amount adjudicated.

3. In relation to the conviction, in terms of Article 188(1) CPC BiH, the accused Milomir Davidović shall cover the costs of the criminal proceeding, whose amount the Court will determine in a special decision, having obtained the necessary data, while in relation to the acquittal, under Article 189(1) CPC BiH, the accused is relieved of the obligation to cover the costs of the criminal proceeding, which will be borne by the Court’s budget appropriations.

THE APPEALS

4. The accused’s defense counsel, attorney Slaviša Prodanović, filed an appeal from the judgment on the grounds of essential violation of criminal procedure (Article 297 CPC BiH), violation of criminal code (Article 298 CPC BiH), incorrectly and incompletely established facts (Article 299 CPC BiH), the sentencing decision and redress claim (Article 300 CPC BiH), moving the Appellate Division Panel of the Court of Bosnia and Herzegovina to revoke the trial judgment and hold a retrial.

5. The accused Davidović himself also filed an appeal, contesting the judgment on the grounds of incorrectly established facts (Article 299 CPC BiH), the sentencing decision and redress claim (Article 300 CPC BiH).

RESPONSE TO THE APPEALS

6. The Prosecutor has submitted responses to the appeals, arguing that both are ill-founded, and moved the Appellate Division Panel to dismiss the appeals as such, and uphold the trial judgment.

7. The Appellate Division Panel held a public session in the case on 9 July 2019, at which defense counsel, the accused and the Prosecution all stood by their written appeals and response in their entirety.

GENERAL CONSIDERATIONS

8. Prior to providing reasons for each appellate ground individually, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC BiH, the appellant should include in his/her appeal both the grounds for contesting the judgment and the reasoning behind the appeal.

9. Since the Appellate Panel shall review the judgment only insofar as it is contested by the appeal, pursuant to Article 306 of the CPC BiH, the appellant shall draft the appeal in the way that it can serve as a ground for reviewing the judgment. In that respect, the appellant must specify the grounds on the basis of which he contests the judgment, specify which section of the judgment, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

10. Mere arbitrary indication of the appellate grounds, and of the alleged irregularities in the course of the trial proceedings, without specifying the ground to which the applicant refers is not a valid ground for reviewing the Trial Judgment. Therefore, the Appellate

Panel has *prima facie* dismissed as ill-founded the unreasoned and unclear appellate complaints.

GROUNDS OF APPEAL UNDER ARTICLE 297 CPC BIH (ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE)

11. Essential violations of criminal procedure, as a ground of appeal, are defined in Article 297 CPC BiH, and are listed in Paragraph 1, Subparagraphs a) through k), of this Article.

12. With respect to the gravity and importance of the procedure violations, the CPC BiH distinguishes between the violations which, if found to exist, create an irrefutable presumption that they have adversely affected the validity of the verdict (absolutely essential violations) and the violations where the Court has discretion to evaluate, on a case-to-case basis, whether a found procedure violation affected or could have negatively affected the rendering of a proper verdict (relatively essential violations).

13. Unlike absolute violations, relatively essential violations are not specified in the law, but rather exist if the Court, during the main trial or in the rendering of a judgment, did not apply or improperly applied a provision of the law, which affected or could have affected the rendering of a lawful and proper judgment (Article 297(2) CPC BiH).

14. If the Panel finds any of the substantial violations of the criminal procedure provisions, it shall, pursuant to Article 315(1)(a) of the CPC BiH, revoke the trial judgment, except in the cases provided for in Article 314(1) of the CPC BiH.

1. <u>Grounds of appeal under Article 297(1)d) CPC BiH</u>

15. The Defense objects that the Trial Panel has violated the accused's right to a defense because it refused to introduce into evidence the transcript of testimony of the aggrieved party "S1", given before the ICTY, which is an exculpatory piece of evidence in relation to the accused. The Defense argues that the aggrieved party S1 testified before the ICTY in the case of Kunarac *et al*., and that her testimony lasted for three days, during

which she never mentioned the accused as a person who had raped her, and she mentioned more than 40 names.

16. In relation to this grounds of appeal, which the Defense has also raised during the trial, the Trial Panel explained why it did not accept the transcript as evidence. This Panel upholds the reasons presented in the trial judgment. The Panel notes that during the proceedings the Defense did not point at any discrepancies with regard to the witness accounts of the one and the same event, but only that she did not mention the accused at all. The witness explained this by saying that she had not mentioned the accused Davidović because during that trial she focused specifically on the persons who were accused at that trial.

17. The Panel holds that by this grievance the Defense did not reasonably point to any violation of the right to a defense in the case at hand, given that nobody contested the fact that the witness did not mention the accused during her testimony before the ICTY, which would be proven by this piece of evidence, and in the Panel's opinion the witness herself has provided an acceptable explanation. One must be mindful of the fact that witness S1 is a victim of multiple rape, so that it was not to be expected that she should mention each and every name. The fact is, however, that during her testimony before the ICTY she was never really asked about the accused, so it is obvious that the witness - the aggrieved party S1 – did not talk about him at all in terms of confirming or denying his participation in the incriminating acts.

18. Besides, Article 5 of the Law on the Transfer of Cases from the International Criminal Tribunal for the former Yugoslavia and the Use of Evidence Collected from the International Criminal Tribunal for the former Yugoslavia in Cases before the Courts in BiH provides that the court may admit as evidence a transcript of a witness statement given before the ICTY, which implies that it does not have to do so, if it has been satisfied that such a piece of evidence bears no significance for ruling in the case at hand. Article 263(2) CPC BiH provides that if the court finds that the circumstances that a party and defense counsel are trying to prove are irrelevant to the case or that the proposed evidence is unnecessary, the court shall deny the presentation of such evidence. The Appellate Panel notes that the Trial Panel had already, while ruling on Defense's motion, admitted as evidence Exhibit O1, which is the aggrieved party S1's statement to the ICTY in 1995, in

which the aggrieved party S1 does not mention the accused among the participants in her rape. Also, in examining the aggrieved party S1, defense counsel showed her the statement she had given to the ICTY in 2000 in the case of Kunarac *et al*., so that the aggrieved party commented on those circumstances. Therefore, the fact that the aggrieved party S1 did not mention the accused in that statement was known to the Trial Panel, and the fact was as such taken into consideration by the Trial Panel during the evaluation of all adduced evidence, especially during the evaluation of the evidence given by the aggrieved party S1 in relation to the other adduced evidence, on which the Trial Panel provided its arguments.

19. Therefore, the grounds of appeal challenging the Trial Panel's decision with regard to the decision not to use the submitted evidence are ill-founded.

B. GROUNDS OF APPEAL UNDER ARTICLE 297(1)K) CPC BIH

20. In his appeal, defense counsel argues that the Trial Court has made an essential violation by failing to provide reasons on the decisive facts in the reasoning of the judgment. The Defense notes that the Court based its decision on the accused's guilt exclusively on the statement given by the aggrieved party S1, while ignoring the statements the Trial Court finds to be corroborating, all of them given by persons who said that they either did not know the accused (S2, S9) or could not remember that there was a person nicknamed "Liči" (S7, S8). Therefore, the Defense points to the Court's omission to elaborate on the indirect knowledge that led it to conclude that the accused committed the above acts.

21. Also, the Defense cites Exhibit O-1 – the aggrieved party's statement she gave to ICTY investigators in 1995, in which there is no mention of the accused.

22. In relation to this ground of appeal, the Appellate Panel finds it useful to cite a position widely accepted by national and international case law in sexual violence cases, which is that the mere testimony of a victim is sufficient for conviction, on condition that the

Panel finds the victim's testimony to be credible and consistent in decisive elements.[1] The Trial Judgment provides an acceptable explanation regarding the testimony of the aggrieved party S1 before the ICTY, while in all her subsequent statements the aggrieved party S1 was consistent in describing the events in the "Lepa Brena" building, in which the accused had taken part as well.

23. The Trial Panel provides a detailed reasoning with regard to the acceptability of the aggrieved party S1's testimony. Also, the Trial Panel evaluated the remaining adduced evidence in relation to the aggrieved party S1's testimony, and concluded that it corroborates her testimony in relation to the accused's participation in the act of rape. The accused himself and the witness Dragan Zelenović, in their investigative statements, which the Trial Panel admitted as evidence, confirm they were in an apartment in the "Lepa Brena" building, as well as details related to dressing S4 into a uniform. This practically corroborated the aggrieved party S1's testimony with regard to the events in the apartment of the given building.

24. Also, analyzing Trial Panel's conclusions to evaluate the statements of the above mentioned witnesses (S2, S9, S7, S8) as indirect evidence, the Appellate Panel notes that those statements did not serve to prove the very acts of the accused against the aggrieved party, but a decisive fact that the accused was taken outside and raped, and in the sense that her testimony is reliable. None of the above witnesses the Defense indicated has testified about the accused's identity, which the Defense erroneously tries to argue under this ground of appeal. Those witnesses testified about what they themselves had suffered, including that they too had been taken to the building that was also known as "Lepa Brena."

25. Witness Spomenka Kovač spoke about the accused's identity and his nickname. She first met the accused Davidović while he was working as a waiter at the Fontana café (within the Social Cafeteria), while right before the war he was a warehouse manager in the Maglić shop inside the "Lepa Brena" building. The witness Snježana Rašević, a salesperson by profession, says that before the war she worked in the Maglić shop

[1] ICTY, Duško Tadić case, Trial Judgment, 7 May 1997, para. 537; ICTR, Akayesu case, paras 134 and 135; Court of

downtown. She knew Davidović since childhood, first as a coach, and then one period they also worked together; she recognized him in the courtroom. Both witnesses confirmed that they knew the accused's nickname was "Liči."

26. Therefore, according to the Appellate Panel, the Trial Judgment has provided sufficient reasoning with regard to all decisive facts for establishing the accused's criminal responsibility. By the raised grounds of appeal, the Defense actually voices its negative attitude regarding the conclusions made in the Trial Judgment, which is why the Defense's objection that the Trial Judgment did not provide reasons on decisive facts is ill-founded.

GROUNDS OF APPEAL UNDER ARTICLE 298 CPC BIH: VIOLATIONS OF THE CRIMINAL CODE

C. STANDARDS OF REVIEW

27. An appellant alleging an error of law must, as said, identify, at least, the alleged error, present arguments in support of its claim, and explain how the error affects the decision resulting in its unlawfulness.

28. Where an error of law arises from the application in the Judgment of a wrong legal standard, the Appellate Panel may articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not only corrects a legal error, but also applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond any reasonable doubt as to the factual finding challenged by the Defense before that finding is confirmed on appeal.

29. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Judgment in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314 and 308 of the CPC of BiH.

BiH, Judgment No. S1 1 K 007209 13 Krž dated 5 November 2013.

D. GROUNDS OF APPEAL CONCERNING THE RETROACTIVE APPLICATION OF THE CRIMINAL CODE

30. The Defense objects to the application of the CC BiH as the law that was applied in this case, claiming that the CC SFRY should have applied instead since it was the law in effect at the time when the criminal offense was allegedly perpetrated. The Defense further argues that the elements of the criminal offense the accused has been charged with, as well as its *actus reus*, have already been defined in Article 142(1) CC SFRY, so that it would be more appropriate to apply the CC SFRY. The Defense believes that the Court has erroneously applied the CC BiH to the detriment of the accused, thus violating the principle of legality and the principle of time constraints regarding applicability.

31. The Appellate Panel finds the above grievances to be ill-founded. First of all, the criminal offense of Crimes against Humanity, under Article 172(1) CC BiH, was not as such prescribed by the criminal code that was in force at the time (CC SFRY).

32. It is beyond doubt that, according to the principle of legality, no punishment or any other criminal sanctions may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which no punishment has been prescribed by law[2].

33. The Trial Panel properly notes that what is described above is exactly the situation in this case, for this is an incrimination that includes a violation of the rule of international law. At the incriminating time, the criminal offense of Crimes against Humanity constituted a criminal offense both from the aspect of customary international law as well as from the aspect of the principles of international law.

34. Such a proceeding is identical to case law of the European Court of Human Rights (ECtHR) where they examined the requirements of the principle of legality under Article 7 ECHR, which never brought into question punishment for the offenses committed during a

[2] Article 3 CC BiH: *„(1) Criminal offences and criminal sanctions shall be prescribed only by law. (2) No punishment or any other criminal sanctions may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which no punishment has been prescribed by law.“*

period when no such proceeding was prescribed as a criminal offense, because at the time the offense beyond a doubt constituted a criminal offense under international law.[3]

35. Also, citing other cases in which the law that was in effect at the time of perpetration was applied is not a relevant or well-founded complaint, especially because the Defense is referring to cases that do not pertain to the criminal offense of Crimes against Humanity under Article 172 CC BiH.

36. In the context of the above, the Appellate Panel notes that the ECtHR Chamber in Strasbourg issued a decision on 10 June 2012 in the case of convicted person Boban Šimšić, rejecting his complaint as ill-founded. The relevant part of the Judgment reads as follows:

> *"*The Court observes that the present applicant was convicted in 2007 of persecution as a crime against humanity with regard to acts which had taken place in 1992. While the impugned acts had not constituted a crime against humanity under domestic law until the entry into force of the 2003 Criminal Code, it is evident from the documents cited in paragraph 8-13 above that the impugned acts constituted, at the time when they were committed, a crime against humanity under international law. In that regard, it is noted that all the constituent elements of a crime against humanity were satisfied in this case: the impugned acts were committed within the context of a widespread and systematic attack targeting a civilian population and the applicant was aware of that attack (contrast Korbely, cited above, §§ 83-85*)".*

37. Also, the ECtHR Judgment in the Maktouf/Damjanović case dated 18 July 2013 affirms the identical position: "Some crimes, notably crimes against humanity, were introduced into national law in 2003. The State Court and the Entity courts therefore have no other option but to apply the 2003 Criminal Code in such cases."[4]

38. Finally, such a position has also been upheld by the BiH Constitutional Court in several of its decisions while deliberating on the issue. Thus in its recent decision in the

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[3] Kolk and Kislyiy v. Estonia, No 23052/04, and No 24018/04 ECHR 2006/I
Penart v. Estonia, No 14685/04 ECHR 2006-I

case of *Dragan Marinković, AP – 2457/17 dated 17 July 2019,* rejecting the appellation, *inter alia* also in the part related to the criminal offense of Crimes against Humanity, citing the ECtHR case Konov v. Latvia, Paragraph 47 of the Decision, the Court said:

"*Since international law does not provide sufficiently clear sanctions for war crimes, in the appellant's case the Court of BiH was only able to apply the 2003 CC BiH as the meritorious national legislation with regard to both the criminal offense and the punishment it carries, since the CC SFRY, as the law that was in effect at the time of commission of the criminal offense, did not include the given criminal offense, nor a punishment it would carry."*

39. Reviewing the arguments presented in the impugned judgment, the Panel finds that they are justifiable and correct, since neither the description nor the essential elements of the criminal offense of War Crimes against Civilians under Article 142(1) CC SFRY, to which the Defense points in its appeal, and of the criminal offense of Crimes against Humanity under Article 172(1)g) CC BiH, match. The Trial Court correctly had in mind that although Crimes against Humanity was not included in the CC SFRY as a criminal offense at the time of commission of the incriminating acts, the offense nonetheless constitutes a crime under international law, which the Trial Court duly pointed out in Paragraph 99, properly citing the current ECtHR case law.

40. That is why the Panel dismissed as ill-founded the grounds of appeal claiming there was a violation of Article 298 CPC BiH.

GROUNDS OF APPEAL UNDER ARTICLE 299 CPC BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

E. STANDARDS OF REVIEW

41. In the context of this ground of appeal, the Appellate Division Panel notes that a judgment may be challenged on the grounds of incorrectly or incompletely established

[4] Paragraph 55 of the Judgment.

facts, meaning when the court has incorrectly established a decisive fact, or has not established it at all, or when new evidence or facts so indicate, all in conformity with Article 299 CPC BiH.

42. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed.

43. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel. The Appellate Panel may substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous."

1. Accused Davidović's appeal

44. The accused has filed an appeal from the judgment on the grounds of incorrectly and incompletely established facts. The accused denies that he ever knew of the existence of a widespread and systematic attack, or that he knew that the target of the attack was civilian population, or that his acts constituted part of that attack. He supports the above with the claim that when the attack began he was at home, and that everything he learned during that period he learned from gossips spreading in the town.

45. When it comes to the very participation in the act of rape against the aggrieved party S1, the accused denies his guilt concerning the charges from the Indictment issued by the BiH Prosecutor's Office. To that end, the accused is citing the testimony of the witnesses Husein Mandžo, Zoran Glodić, Spomenka Kovač, Snježana Rašević, and another Bosniak female witness, none of whom, he claims, confirmed that he was at the *Lepa Brena* building on the critical occasion.

46. Also, the accused claims that the process against him was staged, that he has never been at the *Lepa Brena* building, except in the warehouse where he worked, that he has never entered the apartment in which the aggrieved party claims to have been raped. The accused also argues that during the investigation he said he had been in the apartment used by Dragan Zelenović, but claims he gave the statement at Zelenović's request, which the Prosecutor and the aggrieved party S1 then used for staging allegations against him. He also contests parts of the judgment in which the judgment refers to the testimony of witnesses S2, S9, S7 and S8, who all confirmed that the aggrieved party was raped, yet the accused claims that their testimony does not confirm his own participation.

47. When it comes to the conclusion regarding the part of general elements the accused challenges, the Panel notes that the Trial Court provided detailed arguments with regard to the established general elements of the criminal offense of Crimes against Humanity in Paragraphs 103 through 177, that in that sense it had adduced evidence by hearing the witnesses and by admitting documentary evidence and facts established by the ICT in the *Kunarac* case and in the *Tadić* case*,* which prove a widespread and systematic attack on Foča, as well the objective of the attack and knowledge and awareness of the accused of the existence of such attack, which were conclusions that in his appeal the accused did not challenge in a quality manner.

48. It follows from Exhibits T 14, T 16 and T17 that at the critical period the accused Davidović was a VRS member. The Trial also took into account those periods when the accused was under labor obligation in Foča, and on sick-leave. Also provided were arguments that by living and staying in Foča the accused must have been in the know of the facts concerning the events against the Bosniak people that lived there. The accused himself said during his testimony that he knew what was going on in Foča, and that he himself had helped some of his acquaintances (paragraphs 174 and 175). Given the above, the Panel has concluded that the Trial Court had provided acceptable arguments on the accused's knowledge and awareness, which pertained to the attack on the Bosniak population in Foča during the critical period, and that the Trial Judgment did not err in establishing the facts about that.

49. A consequence of the widespread and systematic attack in the territory of Foča municipality is the capturing of a number of Bosniak women and their detention in inhumane and degrading conditions. The women, including the aggrieved party S1, were continually taken out of the detention facility and exposed to multiple rape by Republika Srpska soldiers. In one such act the accused participated himself. Therefore, the rape of the aggrieved party S1 and other women stands in direct connection with the consequences of the widespread and systematic attack carried out in the territory of Foča municipality, which is why the accused's participation in the act of raping the aggrieved party S1 constitutes part of the attack, which, in turn, renders ill-founded the accused's claim that he did not know of the attack and that his actions constituted part thereof.

50. Also, when it comes to challenging the Trial Court's conclusion on the accused's participation in the very act of rape committed against the aggrieved party S1 and the claim that none of the examined witnesses mentioned the accused, the Panel notes that the witnesses the accused mentions in his appeal did not even testify about the circumstances of the rape of the aggrieved party S1, but about the circumstances concerning the accused's identity (Snježana Rašević) and that he worked as a waiter and warehouse manager in the *Maglić* store in the *Lepa Brena* building (Spomenka Kovač). Witnesses S2, S7, S8 and S9 also did not testify about the accused, but about the fact that the aggrieved party S1 had, together with several other female inmates, been taken out of the High School Center and raped on a daily basis, and described what the women went through at the time. However, they did not even testify about the accused's presence on the critical occasion at the apartment referred to by the aggrieved party S1, so one could not have expected them at all to either confirm or deny the accused's participation.

51. With reference to the accused Davidović's "staged trial" claim, the Panel notes that the Trial Judgment was rendered based on the evidence adduced in the proceeding against the accused. Also, the appeal did not bring into question the clear and detailed analysis of evidence conducted by the Trial Panel in its evaluation of evidence given by the aggrieved party S1, as well as all other evidence proving the credibility of her testimony. The Panel has carefully analyzed her testimony and found that the witness testified convincingly about the critical event, wherein all her previous statements fully reflect her credibility, for in all statements she had given she kept referring to the accused *Liči* as one of the persons who had raped her in an apartment located in the *Lepa Brena*

building. The Panel was first of all mindful of her diary she kept before 2000 (Exhibit T2) in which, listing the names of persons who raped her during the critical period, under No. 6 she lists the accused Liči, as well as her statements given in 2002 (Exhibit T3) and 2006 (Exhibit T-4), in which she was adamant that it was exactly the accused who committed the act he has been charged with in this case.

52. The thesis about a "staged trial" is ill-founded taking into account the acquitting part of the Trial Judgment. If the intention of the aggrieved party S1 had been to have the accused found guilty at all cost, then she would not have left any doubt or insecurity as to whether the accused raped her in the context of the second act of rape, at the abandoned house in Gornje Polje. Conversely, the aggrieved party S1 was honest in her testimony related to all events in the territory of the Foča municipality, and the acquitting part of the Trial Judgment is a direct result of her testimony. Also, apart from the mere claim that this was a "staged trial," the accused did not provide any credible and logical explanation as to why he himself would be a victim of the "staged trial."

53. It should be borne on mind that during the investigation the accused himself has admitted to have stayed in the said apartment in the *Lepa Brena* building, in which the aggrieved party S1 was raped, even though he later on at the trial and in his appeal denied having ever given such a statement, claiming that Dragan Zelenović had made him do it. This Panel too finds that the accused did not provide a logical explanation as to why he would let someone else make him do anything, when he had originally said that he was in the apartment with all those persons, knowing that the mentioned person has been convicted by the ICTY for a prohibited act of rape during the war, in the territory of the Foča municipality.

54. Consequently, having reviewed all grounds of appeal cited by the accused, the Panel finds that those are entirely ill-founded.

2. Appeal filed by defense counsel for the accused

55. Concerning the appeal filed by defense counsel for the accused, the Defense notes that the Trial Panel incorrectly established the facts in the case because its conclusion on the accused Davidović's guilt was based exclusively on witness S1 statement, whereas

her testimony is not of such quality so as to base a decision on. According to the appeal, this leaves a doubt as to the events she testified about, which concern the accused Davidović.

56. The Defense voiced its concern regarding the testimony by noting the fact that the accused, while testifying before the ICTY in the case of Kunarac *et al*., not once mentioned the accused Davidović. In a statement she gave to the BiH Prosecutor's Office on 10 April 2017, she said the accused had raped her in the Gornje Polje neighborhood and in the *Lepa Brena* building, but during cross-examination she said she was not sure whether she had been raped inside the house, but was certain that she had been raped in an apartment by Miki Živanović, Liči and Zelja. Also during cross-examination, the aggrieved party S1 was shown her statement she gave in 1995, in which she did not mention him. All this shows that this witness's testimony may not suffice to make a decision on the accused's guilt.

57. The Panel has, however, found that these grievances by the Defense were ill-founded and that the Trial Judgment has correctly and completely established all facts when it found that, based on the adduced evidence, it was proven beyond a reasonable doubt that the accused committed the criminal offense in the manner described in its Operative Part.

58. First of all, when it comes to the objection that the aggrieved party S1, while testifying before the ICTY, did not mention the accused as a person who raped her, the Panel concludes that the Trial Court had analyzed in detail the testimony she gave to ICTY investigators in 1995 and took that into account while evaluating the credibility of the testimony she gave before the Court of BiH in the present case. Thus, in Paragraph 207, the Judgment states that in her 1995 statement she indeed did not mention the accused as one of the persons who had raped her at the critical occasion. However, the Panel noted that the aggrieved party S1 explained this during the trial, by saying that while giving her statement she mostly focused on the names of persons in connection with whose acts she gave the statement in the first place. Taking into account that the aggrieved party S1 is a victim of multiple rape, describing that "as far as she could remember" she had been raped "by some 70 soldiers," her claim that at the moment when she was giving her statement she was not able to recall all the names she could identify as perpetrators is

completely logical and credible. It was also stated that, according to the Trial Judgment, which the Defense never really questioned at all, in all of her subsequent statements (in 2002 and 2006)[5], and before the proceedings were initiated against the accused, the witness - the aggrieved party S1 always mentioned Liči as one of the persons who had raped her. The Panel notes that the diary she kept during the critical period was also admitted into evidence (Exhibit T-2), in which the accused's nickname is mentioned under No. 6 on a list of persons she identified as those who had raped her during that period.

59. The accused's Defense also tried to bring into question the credibility of this evidence by bringing into question the time when the aggrieved party had made it. However, in her main trial testimony the witness confirmed that that was indeed her diary she kept during the first four months of detention, in which she wrote the names of persons who had raped her. The Panel does not find her testimony about that to be unconvincing and unreliable, as the Defense tried to impute.

60. The Panel was also mindful of Defense's objection in which they argue that the Trial Panel should have proceeded under the *in dubio pro rea* principle in the given case, since witness S1's statement is not convincing, and concluded that the objection is ill-founded. The Trial Court has conducted a comprehensive analysis of all decisive facts, from which this Panel too could see that the conclusion that the accused indeed committed the criminal offense in the manner described in the Indictment is the only possible conclusion to which all the adduced evidence pointed in their entirety.

61. That the Trial Court was consistent in its evaluation and assessment of probative value of the statements given by the aggrieved party S1 is shown by the fact that the Court did not find the accused's guilt when it comes to the acts of rape committed against the aggrieved party S1 in the house at Gornje polje, nor the rape of the aggrieved party S4. The Trial Panel has objectively assessed the certainty with which the accused talked about the events, and since it found that her testimony in that part is not such as to constitute a basis on which to reach a conclusion beyond a reasonable doubt, the Trial Panel has made a conclusion on the accused's guilt solely in the part in which doubt was completely

[5] Exhibit T-3 and Exhibit T-4.

excluded. That supports the conclusion that the *beyond reasonable doubt* standard was fully and properly applied in the evaluation of the testimony given by the witness S1 as the only direct evidence of incrimination of which the accused was found guilty.

62. Given all the above, the appeals grievances pertaining to the sub-grounds of appeal regarding the correctness and completeness of the established facts did not bring into question the Trial Panel's complete and detailed conclusions, so the grievances are dismissed as ill-founded.

GROUNDS OF APPEAL UNDER ARTICLE 300 CPC BIH: SENTENCING

F. STANDARDS OF REVIEW

63. The decision on sentence may be appealed on two distinct grounds, as provided in Article 300 of the CPC of BiH.

64. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment.

65. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.

66. Alternatively, the appellant may challenge the decision on sentence on the grounds that the Trial Panel misused its discretion in determining the appropriate sentence. The Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight

given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion

67. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly

68. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

69. In their appeals, the accused's defense counsel and the accused himself challenged the Trial Judgment with regard to sentencing and redress claim. However, neither of the appeals offers any arguments in terms of the correctness of the sentence meted out against the accused, but only that the defense opposes the imposed sentence and the awarded redress claim, arguing against the conviction on a general basis. Yet, since both the accused and his defense counsel challenged the Trial Judgment on the grounds of incorrectly or incompletely established facts, pursuant to Article 308 CPC BiH (extended effect of appeal) the Panel has reviewed the sentencing decision.

70. The Panel believes that the Trial Panel has comprehensively evaluated all facts important for sentencing, and has properly factored in the established extenuating circumstances, as well as the fact that there were no aggravating ones, which is why it ultimately imposed a more lenient sentence, below the 10 years of legal threshold, finding that the more lenient sentence would achieve the purpose of punishment. The Panel concurs with such a conclusion, believing that such a sentence would fully meet the purpose of punishment.

71. Regarding the redress claim, the appeals do not point to concrete injury, so the Panel finds that the decision was made lawfully, with a correct evaluation of circumstances

of the case and a correct application of statutory provisions, listed in detail in the section of the Trial Judgment pertaining to the aggrieved party S1's redress claim.

72. The appeals filed by the Defense and the accused himself challenge the convicting part of the Trial Judgment only. Since the Trial Judgment was not challenged in its acquitting part, pursuant to Article 178(1) CPC BiH that part of the Trial Judgment has become final.

73. In line with the above, having found that the grounds on which the Judgment was challenged in the appeals did not exist, it was decided as stated in the operative part of the Judgment, pursuant to Article 313, as read with Article 310 CPC BiH.

JUDGE PRESIDING

Record-taker:
Legal Advisor
Dženana Deljkić Blagojević

Dr. Miloš Babić

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