

HIGHER COURT IN BELGRADE
WAR CRIMES DEPARTMENT
27/03/2013

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REPUBLIC OF SERBIA
APPELLATE COURT IN BELGRADE
Kž1 Po2 5/12

On January 18, 2013-04-02
Belgrade
9 Nemanjina Street

RECEIVED AT THE WAR CRIMES
DEPARTMENT
No. KTRZ 5/06
DATE 28-03-2013
AT _____ O'CLOCK

AUTHORIZED PERSON'S SIGNATURE

THE APPELLATE COURT IN BELGRADE War Crimes Department, in the panel made up of Judge Radmila Dragičević-Dičić as the president of the panel and Judges Sonja Manojlović, Sretko Janković, MA, Omer Hadžiomerović and Miodrag Majić, PhD, as members of the panel, with the participation of senior judicial associate Mirjana Janković-Nedić as the court reporter, in criminal proceedings against **defendant Sreten Popović and others**, for the criminal offense of aiding in war crimes against prisoners of war referred to in Article 144 of the Criminal Code of Yugoslavia in connection with Article 24 of the Criminal Code of Yugoslavia, deciding on the appeal of the War Crimes Prosecutor against the May 9, 2012 judgment No. K-Po2.No.51/2010 of the Belgrade Higher Court War Crimes Department, in the panel session held on January 18, 2013 in the presence of War Crimes Prosecutor Dragoljub Stanković, has adopted the following

J U D G M E N T

The appeal of the war crimes prosecutor is **REJECTED** as **unfounded** and the May 9, 2012 judgment of the Belgrade Higher Court War Crimes Department No. K-Po2.No.51/2010 is **UPHELD**.

S u b s t a n t i a t i o n

In the May 9, 2012 Belgrade Higher Court War Crimes Department judgment No. K-Po2.No.51/2010, in accordance with Article 423 item 2 of the CPC, defendants Sreten Popović and Miloš Stojanović were acquitted of the charge that they had committed the criminal offense of aiding in war crimes against prisoners of war referred to in Article 144 of the Criminal Code of Yugoslavia, in connection with Article 24 of the Criminal Code of Yugoslavia. In the same judgment, in accordance with Article 258 paragraph 3 of the CPC, victim Fatos Bytyqi was referred to civil proceedings in order to realize his restitution claim and under Article 265 paragraph 1 of the CPC it was decided that the costs of criminal proceedings should be borne by the court budget.

The war crimes prosecutor filed an appeal against this judgment quoting a substantive violation of provisions of criminal procedure and incorrect finding of fact and proposed that the Appellate Court in Belgrade, in the sense of Article 455 paragraph 1 item 3 and paragraph 2 of the CPC, grant the appeal and revise the first instance judgment, without proposing how the judgment should be revised.

In his motion Ktr.Z.No.5/06 of October 9, 2012, the war crimes prosecutor proposed that the Appellate Court grant the appeal by revising the first instance judgment.

The War Crimes Department of the Appellate Court in Belgrade held a panel session in the presence of War Crimes Prosecutor Dragoljub Stanković, reviewed the case file and, after reviewing the claims and proposals from the appeal, opinion of the war crimes prosecutor and substantiation of the appeal provided by the war crimes prosecutor, and after reviewing the first instance judgment in terms of grounds, crimes and directions presented in the appeal, made the decision quoted in the summary of the judgment on the basis of Article 451 paragraph 1 of the CPC.

The appeal of the war crimes prosecutor challenges the first instance judgment because of a substantive violation of provisions of criminal procedure referred to in Article 438 paragraph 2 item 2 of the CPC and says that the reasons for the judgment are vague and contradictory to the summary, in view of the fact that summary of the first instance court judgment says that the defendants is acquitted under Article 423 paragraph 1 item 2 of the CPC, that is, because of a lack of evidence, and says in several places in the substantiation of the judgment that it has been established in the evidentiary proceedings that the defendants' actions did not contain the elements of the criminal offense they were charged with.

In connection with this, the appeal further says that in the substantiation of the judgment the first instance court presented legal, rather than factual conclusions that the criminal offense the defendants were charged with had been committed neither during an armed conflict nor in connection with the relevant armed conflict, that the victims could not have the prisoner of war status in the sense of international conventions, that there was nothing unlawful in the defendants' actions and concluded that the defendants had acted in accordance with the lawful and regular orders of their superiors. It is also said that the presented evidence does not indicate that the issued orders were unlawful and that therefore the actions undertaken by defendants were not unlawful because they were in accordance with these orders and that in the concrete case, the crime was not premeditated by the defendants. The prosecutor believes that these reasons provided by the first instance court clearly show that the first instance court has concluded that the actions undertaken by the defendants did not represent the actions of commission of any crime, which all makes the judgment incomprehensible and reasons for the judgment contradictory.

According to the Appellate Court, the claims in the appeal are described as unfounded, because the summary of the judgment, in which under Article 423 paragraph 1 item 2 of the CPC defendants Sreten Popović and Miloš Stojanović are acquitted of the charge that they

committed the criminal offense of aiding in war crimes against prisoners of war referred to in Article 144 of the Criminal Code of Yugoslavia, in connection with Article 24 of the Criminal Code of Yugoslavia is in accordance with the reasons for the judgment; the substantiation of the judgment provides clear, sufficient and argued reasons for the legal basis on which the defendants were acquitted and they do not contain any vague, illogical or controversial points, including those listed in the war crimes prosecutor's appeal.

Challenging the first instance judgment because of the incorrect and incomplete finding of fact, the appeal of the war crimes prosecutor challenges the court assessment of the presented evidence and therefore also the factual and legal conclusions of the first instance court that it has not been proven that the defendants committed the criminal offense they are charged with, that is that there is no evidence that the defendant's actions were taken during the armed conflict, or in its context, and that therefore the victims do not have the prisoner of war status. The appeal reiterates the claims presented throughout the proceedings and presents its own assessment of the presented evidence regarding these issues, different from the one provided by the first instance court in the substantiation of the judgment.

According to the assessment of the Appellate Court in Belgrade, the first instance court has correctly determined that it has not been proven that the Bytyqi brothers had the prisoner of war status. Namely, on the basis of evidence presented at the trial, it was determined beyond doubt that the Bytyqi brothers had not been members of any military or police units when they were deprived of liberty, nor were they performing any military or police tasks or carrying arms, military or police uniforms when they were deprived of liberty (on the contrary, they were wearing civilian clothes – T-shirts, shirts, pants, jeans), and the war crimes prosecution's claim from the appeal that they were fighters who came under the authority of the enemy could not be accepted. Also, according to the finding of the Appellate Court in Belgrade, when the Bytyqi brothers were deprived of liberty, there was

no armed conflict, because the Military and Technical Agreement between international security forces (KFOR), on one side, and the FRY Government and the Republic of Serbia (so-called Kumanovo agreement) was concluded on June 9, 1999, envisioning the cessation of armed conflicts and gradual withdrawal of FRY armed forces from the territory of Kosovo and Metohija. The agreement was enforced and there were no armed conflicts in the period from its conclusion to the full withdrawal of FRY armed forces. Even if there were individual incidents in which weapons were used in some situations, this does not mean that there were armed conflicts. Namely, according to Article 1 paragraph 2 of Protocol II, isolated and sporadic acts of violence and other similar acts are not regarded as an armed conflict. Therefore the War Crimes Prosecution's position is unacceptable that the armed conflict in the territory of Kosovo and Metohija ended on June 26, 1999, when the FRY parliament decision on the cessation of the state of war took effect, or on June 20, 1999, when the withdrawal of FRY armed forces from the territory of Kosovo and Metohija ended. Therefore, the position of the War Crimes Prosecutor's Office is also unacceptable that the Bytyqi brothers were deprived of liberty in connection with the armed conflict or in close connection with the armed conflict, as it was correctly concluded by the first instance court. Based on the statements of witnesses Vaxhit Minushi, Miroslav Mitrović and Ramadan Minushi, who were in touch with the Bytyqi brothers on that day, the court determined that the Bytyqi brothers on June 26, 1999, as civilians, with an intention to help two families to get out of Kosovo and Metohija safely, had crossed the administrative border of Kosovo and Metohija by mistake, because they did not know the ground. On this basis, according to the assessment of this court, it can be concluded unequivocally that they were not in any combat or armed operation or military operation, and that their mission was completely humane and well intended, as it was correctly concluded by the first instance court.

Also, based on the statements of several witnesses as well as the files of the Misdemeanor Authority in Kuršumljija and other evidence, it was determined beyond any doubt that they had been deprived of liberty

only because of a misdemeanor – illegal crossing of the administrative border and lack of appropriate personal documents (travel documents), which is why a prison sentence was imposed on them, their further stay in the FRY was cancelled and entry into the FRY territory banned until July 11, 2001, which clearly shows that state authorities have never treated the Bytyqi brothers as prisoners of war. Therefore, international conventions on prisoners of war could not be applied on them, i.e. it has not been proven that they belonged to any category of persons referred to in Article 4 of the Third Geneva Convention.

It has not been proven that the Bytyqi brothers had the prisoner of war status even on July 8, 1999, when they were taken from the District prison in Prokuplje by defendants Stojanović and witnesses Stamenković and Nikolić, and they did not have this status even after their transportation to Petrovo Selo, where they were handed over to defendant Popović. So none of the official persons, starting from the those who participated in the deprivation of liberty of the Bytyqi brothers, persons who participated in their punishment for this misdemeanor, person who ordered their takeover from the District Prison in Prokuplje and transfer to Petrovo Selo to unidentified members of the police who took them over from defendant Popović at the training center in Petrovo Selo, have mentioned that the Bytyqi brothers had the prisoner of war status. Therefore, as the Bytyqi brothers did not have the prisoner of war status it has not been proven that defendants Popović and Stojanović committed the criminal offense of aiding in war crimes against prisoners of war, referred to in Article 144 of the Criminal Code of Yugoslavia, in connection with Article 23 of the Criminal Code of Yugoslavia, of which they have been charged in the War Crimes Prosecutor's Office's indictment.

Since the first instance court has, primarily, correctly determined that it has not been proven that the Bytyqi brothers had the POW status and that it has not been proven that they were deprived of liberty during an armed conflict or in close connection with an armed conflict, according to the assessment of this court, the first instance court has

needlessly explained the facts that refer to the actions of defendants Popović and Stojanović towards the Bytyqi brothers (in connection with their transfer from Prokuplje to Petrovo Selo, regarding conditions in the room where they were placed at the Petrovo Selo training center etc.), i.e. whether their treatment of the Bytyqi brothers was in contravention with the provisions of the Third Geneva Convention that regulates the treatment of POWs.

Such an analysis of actions of defendants Popović and Stojanović may be justified only by the possible need to determine whether their actions contained elements of another criminal offense. In connection with this, the first instance court concluded rightly that it had not been proven that defendants Popović and Stojanović had helped unidentified police members to kill the Bytyqi brothers, since the defendants could not even know that the unidentified police officers who took over the Bytyqi brothers in Petrovo Selo would kill them. Namely, the first instance court rightly concluded that the defendants »could only assume that the victims will be deported, because they are foreign nationals,« as it was said on page 34 of the first instance judgment. Therefore, there is no evidence that the defendants had possibly committed the criminal offense of murder referred to in Article 47 paragraph 2 item 6 of the Criminal Code of the Republic of Serbia in connection with Article 24 of the Criminal Code of Yugoslavia. On the other hand, if the actions of the defendants possibly contained significant characteristics of another criminal offense, such as the unlawful deprivation of liberty, abuse and torture, etc., the characteristics of these criminal offenses are not present in the description of facts in the War Crimes Prosecutor's Office indictment, and even if such elements of these criminal offense were contained in the description of facts, it would be evident that the absolute statute of limitations of criminal prosecution has expired.

Since the first instance court has concluded correctly that it has not been proven that the defendants have committed the criminal offense of war crimes against prisoners of war referred to in Article 144 of the Criminal Code of Yugoslavia, in connection with Article 24 of the

Criminal Code of Yugoslavia, it has correctly acquitted them under Article 423 item 2 of the Criminal Procedure Code.

In view of the fact that the appeal of the War Crimes Prosecutor's Office has not brought into doubt the correctness and lawfulness of the first instance judgment, the War Crimes Department of the Appellate Court in Belgrade has made the decision quoted in the summary of the judgment.

Court reporter
Mirjana Janković-Nedić

Panel president – Judge
Radmila Dragičević-Dičić

That the certified copy of the decision is correct certifies
Court Clerk
Svetlana Antić

Republic of Serbia
APPELLATE COURT IN BELGRADE
XIV
BELGRADE