

PROSECUTOR V. MIODRAG MARKOVIĆ
Case No. S 1 1 K 003426 10 Krž (reference X-KR-10/948)
Court of Bosnia and Herzegovina
Appellate Division Verdict
September 27, 2011

Judges:

Judge Mirko Božović, Presiding Judge
Judge Hilmo Vučinić
Judge Phillip Weiner

Prosecution:

Božidarka Dodik

Defense:

Svetlana Lazić

Gender Keyword(s): Corroboration; Credibility or Character of the Victim; Rape

Procedural History: On June 10, 2010, the Prosecutor of Bosnia and Herzegovina indicted Miodrag Marković under Article 173(1)(e) of the Criminal Code of Bosnia and Herzegovina¹ (CC of BiH), which prohibits the war crime of “[c]oercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape).”² On June 17, 2010, the indictment was confirmed.³ On April 15, 2011, the Court of Bosnia and Herzegovina (Court of BiH) found Marković guilty under individual criminal responsibility for committing rape as a war crime (¶ 1). The conviction was based on evidence produced at trial that on July 11, 1992, Marković raped witness Z1 during the war in Bosnia and Herzegovina while he was a member of the armed forces of the Army of Republika Srpska (¶ 44). The First Instance Panel sentenced Marković to seven years of imprisonment (*id.*). Marković appealed on several grounds, claiming that the First Instance Panel committed essential violations of criminal procedure, erroneously and incompletely established the facts in the verdict, and erred in its decision on the sanction (p. 1). On September 27, 2011, the Appellate Panel heard the appeal and released its verdict, which is digested here.

Disposition: The Appellate Panel finds the appeal filed by the Defense unfounded and upholds the First Instance verdict in its entirety (p. 1).

¹ *Prosecutor v. Miodrag Marković*, First Instance Verdict (available in Bosnian only) p. 1.

² Criminal Code of Bosnia and Herzegovina, “Official Gazette” of Bosnia and Herzegovina, 3/G3, 32/G3, 36/G3, 26/G4, 63/G4, 13/G5, 48/G5, 46/G6, 76/G6, 29/G7, 32/G7, 53/G7, 76/G7, 15/G8, 58/G8, 12/G9, 16/G9, 93/G9.

³ *Prosecutor v. Miodrag Marković*, Case Information, available at:
<http://www.sudbih.gov.ba/?opcija=predmeti&id=305&završen=1&jezik=e>

Key Gender-Based Holdings:

CORROBORATION:

- On appeal, Marković argued that the First Instance Panel erred by convicting him solely on the victim’s testimony (¶ 71). In response, the Appellate Panel first emphasizes that the reliance by the First Instance Panel on the victim’s statement alone does not automatically invalidate Marković’s conviction (¶ 72). Indeed, while the Appellate Panel acknowledges that the Court of BiH does not strictly follow the doctrine of *stare decisis*, it nonetheless references several previous cases heard by the Court of BiH in which convictions were based on the testimony of one witness (*id.*). For instance, the Panel discusses the *Pinčić* First Instance verdict,⁴ in which the panel convicted the accused based solely on the testimony of the victim of the alleged rape (*id.*). The Appellate Panel also cites the *Mejakić* Appellate Panel’s finding that “[e]vidence that is lawful, authentic and credible, may be considered sufficient to convict an accused even where its source is a single witness”⁵ (*id.*). It goes on to explain that the First Instance Panel in *Mejakić* convicted Mejakić based solely on the victim’s testimony and observed that there was no reason not to credit a sole witness’s testimony as long as that testimony is consistent with other witnesses’ testimony concerning “the decisive facts” of the event at issue (*id.*). The Appellate Panel also notes that this approach is consistent with jurisprudence from the International Criminal Tribunal for Rwanda as well as that of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (¶¶ 73-74). In particular, the Appellate Panel cites the *Tadić* case,⁶ in which the ICTY “affirmed the legality of conviction of persons charged with a serious violation of international law based on the statement of a single witness” because of the quality of the victim’s testimony (*id.*). The Appellate Panel also looks to the ICTY’s findings in the *Kupreškić*⁷ case, in which the Appeals Chamber noted that courts must be cautious of basing a conviction on the testimony of one witness, especially on the issue of the identification of the accused, but nonetheless found that “the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence” (¶ 75). The Appellate Panel then explains that the proper test for the evaluation made by the Trial Panel is that of “reasonableness or well-foundedness” (¶ 76). The Appellate Panel notes that this test was applied by the ICTY Appeals Chamber in *Kupreškić*, which held that a reasonable Trial Chamber must carefully evaluate identification evidence and assess the specific issues it presents on a case-by-case basis before it accepts such evidence as the sole basis for a conviction and it must

⁴ *Prosecutor v. Pinčić*, X-KR-08/502, First Instance Verdict, November 28, 2008, pp. 40-41.

⁵ *Prosecutor v. Mejakić et al.*, X-KR/06/200, Second-Instance Verdict, 16 Feb. 2009, Para 47.

⁶ *Prosecutor v. Dusko Tadić*, Trial Chamber Judgment, May 7, 1997, ¶ 260. See also, ¶¶ 536-539.

⁷ *Prosecutor v. Kupreškić*, Appellate Chamber Judgment, October 23, 2001, ¶ 33, 38. See also *Kordić and Čerkez*, Appellate Chamber Judgment, December 17, 2004, ¶ 274 (finding that “A Trial Chamber may thus convict an accused on the basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness. Any appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question”), which was also cited by the Appellate Panel.”).

carefully articulate its reasoning, including all of the factors weighing for and against the reliability of the evidence (*id.*). Applying this standard, the Appellate Panel concludes that the First Instance Panel in Marković “acted reasonably” and carefully evaluated witness Z1’s evidence regarding the rape she suffered and the identity of the perpetrator (¶ 77). The First Instance Panel gave its reasons for finding witness Z1’s evidence reliable, including the fact that her testimony was “credible, consistent, [and] logical” and the fact that certain details were corroborated by other witnesses, all of which supported giving full credence to the evidence (*id.*). Other witnesses testified that they had clearly seen Marković immediately prior to the rape and a neighbor had identified the man as Marković (*id.*). Furthermore, the victim told her mother about the rape and her mother reported it, after which the police took the victim to a check point where she recognized Marković, who was trying to hide his face (*id.*). The Appellate Panel finds that, having taken into account the corroboration of events that took place immediately before the rape, as well as other factors including the coherence of witness Z1’s testimony, the First Panel acted properly in evaluating the evidence (¶ 78). Under these circumstances, the Appellate Panel finds that the First Instance Panel was justified in convicting Marković solely on the victim’s testimony (¶ 79). In reaching this conclusion, the Appellate Panel “notes that rape is often committed in front of a rather small number of people or none at all” and acknowledges that, due to the nature of the crime, often the victim is the only person in a position to identify the perpetrator and testify about the offense (*id.*). The Appellate Panel finds that in this case, the First Instance Panel properly took this fact into consideration when deciding how much weight to give witness Z1’s testimony (*id.*).

CREDIBILITY OR CHARACTER OF THE VICTIM:

- In its assessment of Marković’s argument on appeal that the First Instance Panel erred in relying solely on the victim’s testimony to convict him of rape as a war crime against a civilian, the Appellate Panel addresses the issue of the victim’s credibility (¶¶ 80-84). The Appellate Panel finds that the Trial Panel “properly dismissed minor inconsistencies” between the victim’s testimony and her statements to the Prosecutor’s Office (¶ 80). In support of this holding, the Appellate Panel cites the ICTY’s finding in the *Furundžija* Trial Chamber judgment⁸ that “survivors of such traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times” (*id.*). The *Furundžija* Trial Chamber recognized that it was not reasonable to expect such witnesses to recall “every single element of a complicated and traumatic sequence of events” and noted that, in some circumstances, certain inconsistencies may reflect the witness’s truthfulness by indicating that the witness was not influenced by others (*id.*).⁹ In Marković’s case, the Appellate Panel agrees with this position, finding that inconsistencies regarding the date and time of the rape were not to be given much weight (*id.*). The Appellate Panel concludes that the First Instance Panel could have found that the only reasonable

⁸ *Prosecutor v. Furundžija*, Trial Chamber Judgment, December 10, 1998, ¶ 113.

⁹ See *id.*

conclusion to be drawn from the evidence is that Marković perpetrated the rape (¶ 81). The Appellate Panel therefore dismisses the Defense’s allegations about this error of fact (*id.*). Furthermore, the Appellate Panel notes it “could have serious doubts” about the credibility of Marković’s testimony, which the Appellate Panel finds “contradictory and unconvincing” (¶ 82).

RAPE

- On appeal, Marković made several arguments on various grounds, many of which relate directly to his conviction of rape as a war crime against a civilian at trial.
 - First, Marković argued that the First Instance Panel violated his right to a defense under Article 297(1)(d) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH)¹⁰ by denying his motion to present expert evidence regarding his mental capacity and mental health at the time he perpetrated the rape (¶ 22). Specifically, the Defense submitted that Marković’s “frequent state of inebriation, allegedly reduced intellectual capacity, [and] unstable and changeable behavior” may have affected his “ability to understand the significance of the offence and control his actions” (¶ 23). Thus, the Defense sought to offer evidence of these traits through an expert witness, but the First Instance panel denied the request (¶¶ 22-24). The Appellate Panel notes that such a request for expert evidence regarding the defendant’s mental capacity at the time the criminal offense of rape was perpetrated is admitted only in cases in which it is not disputed that the defendant committed the criminal offense¹¹ (¶ 27). In the present case, the Defense argued at trial that Marković had not committed the rape (*id.*). Additionally, the Appellate Panel finds that there was nothing to indicate to the First Instance Panel that Marković suffered from a reduced intellectual capacity, as evidenced by the fact that Marković spoke eloquently at trial and had served in a capacity in the military that indicates a certain level of skill and competence inconsistent with the Defense’s suggestion that Marković suffered from diminished intellectual abilities (¶¶ 25-26). Thus, the Appellate Panel finds that the Defense failed to prove that the First Instance Panel’s decision not to hear the evidence by an expert witness regarding Marković’s mental condition at the time of the rape violated Article 297(1)(d) of the CPC of BiH and dismisses this argument (¶ 28).
 - Marković also argued that the First Instance Panel did not properly take into account Defense evidence challenging the relationship between the

¹⁰ See Criminal Procedure Code of Bosnia and Herzegovina, “Official Gazette” of Bosnia and Herzegovina, 3/G3, 32/G3, 36/G3, 26/G4, 63/G4, 13/G5, 48/G5, 46/G6, 76/G6, 29/G7, 32/G7, 53/G7, 76/G7, 15/G8, 58/G8, 12/G9, 16/G9, 93/G9). Art. 297(1)(d) (providing that it is “an essential violation of the provisions of criminal procedure” “if the right to defense was violated”).

¹¹ See *id.* The Appellate Panel cites Article 110(3) of the Criminal Procedure Code of Bosnia and Herzegovina. This article provides that “Should experts establish that the mental condition of the suspect or accused is disturbed, they shall define the nature, type, degree and duration of the disorder and shall furnish their opinion concerning the type of influence this mental state has had and still has on the comprehension and actions of the suspect or the accused as well as concerning whether and in what degree the disturbance of his mental state existed at the time when the criminal offense was committed.” *Id.* Art. 110(3).

rape and witness Z1's symptoms of trauma (¶ 29). The Appellate Panel notes that witness Z1's symptoms of trauma and the possible connection of this trauma with the perpetration of the rape "is ultimately irrelevant to the conclusion on the guilt of the Accused" (¶ 31). The Appellate Panel notes that Article 173(1)(e) of the CC of BiH,¹² the crime with which Marković was charged, does not include any mention of the effects of the perpetration of the criminal offense of rape on its victim as an element (*id.*). The effects of the crime on the victim are thus relevant only to the issue of sentencing (*id.*). The Appellate Panel therefore dismisses this argument as unfounded (¶ 32).

- Marković also submitted on appeal that the First Instance Panel "did not provide adequate reasons for its findings on particular decisive facts," a challenge that may be raised on appeal pursuant to Article 297(1)(k) of the CPC of BiH¹³ (¶ 41). Specifically, Marković argued that in its verdict, the First Instance Panel referred to the victim's testimony and the testimony of her relatives, but did not refer to Defense witnesses who refuted the Prosecution's evidence of the rape by testifying that they had not seen visible injuries on the victim after the alleged rape nor did they see the victim upset or crying (¶¶ 37, 64). The Defense argued that its evidence cast doubt on the victim's testimony and on the existence of the elements of rape (¶ 39). The Appellate Panel finds that the Defense has failed to demonstrate specific omissions it claims the First Instance Panel made and has failed to identify which parts of the verdict it claims to be contradictory (¶¶ 38, 41). The Appellate Panel finds that the First Instance Panel "reviewed all facts with equal attention, not overlooking a single fact that would be important for adjudication" and concludes that the First Instance Panel's methodology in reaching its verdict satisfied Article 14 of the CPC of BiH,¹⁴ which requires the Court to consider evidence from the Prosecution and Defense equally (¶ 42).
- Marković also argued on appeal that the First Instance Panel erred in convicting him of rape as a war crime in the absence of documentary evidence of the crime (¶ 62). The Defense points to the fact that the victim testified that she had been examined by the gynecology department of the

¹² See *supra* footnote 2 and accompanying text.

¹³ Article 297(1)(k) provides it is an essential violation of the provisions of criminal procedure "if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts." Criminal Procedure Code of Bosnia and Herzegovina, "Official Gazette" of Bosnia and Herzegovina, 3/G3, 32/G3, 36/G3, 26/G4, 63/G4, 13/G5, 48/G5, 46/G6, 76/G6, 29/G7, 32/G7, 53/G7, 76/G7, 15/G8, 58/G8, 12/G9, 16/G9, 93/G9). Art. 297(1)(k).

¹⁴ Article 14 provides for "Equality of Arms" between the Prosecution and the Defense, stating: "(1) The Court shall treat the parties and the defence attorney equally and shall provide each with equal opportunities to access evidence and to present evidence at the main trial.

(2) The Court, the Prosecutor and other bodies participating in the proceedings are bound to study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused." Criminal Procedure Code of Bosnia and Herzegovina, "Official Gazette" of Bosnia and Herzegovina, 3/G3, 32/G3, 36/G3, 26/G4, 63/G4, 13/G5, 48/G5, 46/G6, 76/G6, 29/G7, 32/G7, 53/G7, 76/G7, 15/G8, 58/G8, 12/G9, 16/G9, 93/G9). Art. 14.

Doboj Hospital, but the hospital refuted this claim (*id.*). The Appellate Panel responds to this argument by noting that it is a “general procedural principle that... proof of the perpetration of an offense cannot be subjected to a specific calculation formula” (¶ 66). The Appellate Panel remarks that the principle of “free evaluation of the evidence” emphasizes that evidence is to be evaluated by its weight and quality, not its “quantity, multitude or nature” (*id.*). The Appellate Panel concludes that a First Instance Panel “may rely fully on the evidence in the form of witness statements” when determining the existence or non-existence of facts (¶ 67). The Appellate Panel notes that the First Instance Panel based its conviction on evidence, including testimony from the victim, her relatives, other eyewitnesses, and a report on the rape made on the day after it occurred, as well as a statement by the police officer who received the complaint, who confirmed its authenticity (*id.*). The Appellate Panel finds that the First Instance verdict provided “clear, acceptable and sufficient conclusions on the evaluation of the evidence and value of each individual piece of evidence, as well as the correlation between those individual pieces of evidence and the final conclusion made by the Panel” (¶ 68). With regard to the lack of other physical evidence such as the victim’s torn up shirt or evidence of her injuries, the Appellate Panel observes that the potential collection of such evidence was entrusted at the time to the same military and police structures to which Marković belonged during the war, thus it cannot be expected that a proper investigation of the crime would have taken place (¶ 69). With regard to the missing documentation of the victim’s examination in the hospital in Doboj, the Appellate Panel recalls testimony from the victim’s mother that the examination was superficial and that during the visit, the doctor remarked that the victim’s case did not amount to a forced rape because “it is not a rape when there is one [perpetrator], but when there are 5 of them” (¶ 70). The Appellate Panel concludes that this indicates that the doctor did not offer proper and professional treatment to the victim, which explains the lack of documentary evidence of the visit (*id.*). In a related argument, Marković also submitted on appeal that the First Instance Panel erred in convicting him based solely on the victim’s testimony, which is discussed above under “Corroboration.”

Other Issues:

SENTENCING:

- Marković argued on appeal that the First Instance Panel failed to take into consideration numerous extenuating circumstances when determining his sentence (¶ 90). These include the fact that Marković had no prior convictions and the fact that he is the only one in his family that is employed, creating financial difficulty for his family while he is incarcerated (*id.*). However, the Appellate Panel disagrees with the Defense and finds that the First Instance Panel correctly

considered all of the circumstances (¶ 92). The Appellate Panel notes that the First Instance Panel properly noted in its verdict that the criminal offense of rape “inevitably has [a] serious impact on the victim” and cited evidence provided by an expert witnesses for the Prosecution that demonstrated the effects of the rape on the victim (*id.*). The Appellate Panel thus denies Marković’s appeal and finds that the sentence imposed on Marković “is commensurate with the degree of his criminal responsibility, his contribution and [the] gravity of the perpetrated criminal offense” and that it will achieve the purpose of punishment under Article 39 of the CC of BiH¹⁵ (*id.*).

¹⁵ Article 39 provides that “The purpose of punishment is: a) To express the community's condemnation of a perpetrated criminal offence; b) To deter the perpetrator from perpetrating criminal offences in the future; c) To deter others from perpetrating criminal offences; and d) To increase the consciousness of citizens of the danger of criminal offences and of the fairness of punishing perpetrators.” Criminal Code of Bosnia and Herzegovina, “Official Gazette” of Bosnia and Herzegovina, 3/G3, 32/G3, 36/G3, 26/G4, 63/G4, 13/G5, 48/G5, 46/G6, 76/G6, 29/G7, 32/G7, 53/G7, 76/G7, 15/G8, 58/G8, 12/G9, 16/G9, 93/G9, Art. 39.