

PROSECUTOR V. BOSILJKO MARKOVIĆ AND OSTONJA MARKOVIĆ

K000303805K

The Court of Bosnia and Herzegovina

Criminal Division Verdict

June 24, 2015

Judges:

Šaban Maksumić

Vesna Jesenković

Staniša Gluhajić

Prosecution:

Olivera Đurić

Defense:

Nebojša Pantić

Zoran Bubić

Gender Keywords:

Coercion; Consent; Inhumane Treatment; Protective Measures; Rape

Procedural History: On April 30, 2014, the Prosecutor of Bosnia and Herzegovina (BiH) filed an indictment against Bosiljko Marković and Ostonja Marković, which was confirmed on June 24, 2015 (pp. 6-7). The indictment charged Bosiljko Marković and Ostonja Marković with war crimes against civilians in violation of Article 173(1)(e) of the Criminal Code of Bosnia and Herzegovina (CC BiH), which at the time of the indictment prohibited “[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) . . . ”¹ in violation of the rules of international law during armed conflict or times of war (p. 7). These charges were supported by allegations that on June 28, 1991, Bosiljko Marković and Ostonja Marković “as members of the Army of Republika Srpska – Kotor Varoš Brigade,” were present at the abduction of minor S-4, aged 14 at the time, who was allegedly forced into a van by Predrag Cicmanović, and raped by Cicmanović inside the van as well as by both of the accused, who repeatedly took turns raping her (p. 5). On August 26, 2014, the trial began (p. 7). This is a digest of the resulting verdict of June 24, 2015 (p. 1).

Disposition: The Panel finds the defendants Bosiljko Marković and Ostonja Marković guilty of rape as a war crime against a civilian under in violation of Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia² (CC SFRY) (p. 5). The Panel applies the CC

¹ 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. 173(1)(e). This provision was amended in 2015 to remove the language “[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”. See Criminal Code of Bosnia and Herzegovina, “BiH Official gazette 3/03 with amendments to the Law as published in ‘Official Gazette of BiH’” no. 32/03, 37/03 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, Art. 173(1)(e).

²The Criminal Code of the Socialist Federal Republic of Yugoslavia, adopted by the SFRJ Assembly at the session of the Federal Council held on September 28, 1976; declared by

SFRY instead of the Criminal Code of Bosnia and Herzegovina (CC BiH), finding that the CC SFRY is more lenient to the defendant and was in effect at the time the acts were committed (¶¶ 59-61). The Panel sentences both defendants to 10 years of imprisonment (p. 6). Additionally, the Panel orders the defendants to “compensate the injured party-protected witness ‘S-4,’ jointly and severally, by way of non-pecuniary damage compensation, with the amount of KM 26,500.00 as follows:

- For mental pain caused by violations of liberty or personal rights in the amount of KM 20,000.00;
- For mental pain due to diminished quality of life, the amount of KM 6.500,00” (*id.*).

Key Gender-Based Holdings:

COERCION:

- The Prosecutor charged Bosiljko Marković and Ostonja Marković with war crimes against civilians for the unlawful treatment of a civilian protected witness in violation of Article 173(1)(e) of the CC BiH, which at the time of the indictment prohibited “[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).”³ In interpreting the definition of rape under international law and the element of coercion within that definition, the Panel cites jurisprudence from the International Criminal Tribunal for the former Yugoslavia (ICTY)⁴ defining sexual violence – including rape – as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” (¶ 213). The Panel also looks to the *Kunarac* Trial Chamber judgment,⁵ and its interpretation of the *Furundzija* Trial Chamber’s definition of rape, in which the ICTY surveyed several jurisdictions’ definitions of rape and determined that while each of those jurisdictions “require an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless” (¶ 214). Finally, the Trial Panel notes that the

a decree of the President of the Republic on September 28, 1976; published in the Official Gazette SFRJ No. 44 of October 8, 1976; a correction was made in the Official Gazette SFRJ No. 36 of July 15, 1977; took effect on July 1, 1977. Art. 142(1) provides in relevant part: “Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.”

³ 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. 173(1)(e). This provision was amended in 2015 to remove the language “[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”. See Criminal Code of Bosnia and Herzegovina, “BiH Official gazette 3/03 with amendments to the Law as published in ‘Official Gazette of BiH’” no. 32/03, 37/03 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, Art. 173(1)(e).

⁴ *Kvočka et al.* (ICTY Trial Chamber), Judgment of 2 December 2001, paras 175 and 180 (citing the definitions of rape established by the International Criminal Tribunal for Rwanda in *Akayesu* [ICTR Trial Chamber], September 2, 1998, para. 688).

⁵ *Kunarac, et al.*, (ICTY Trial Chamber) Judgment of February 22, 2001, para. 441 (citing *Prosecutor v Furundzija*, [ICTY Trial Chamber] Judgment of December 10, 1998, para. 180).

Kunarac Trial Chamber judgment⁶ established several factors to determine whether sexual activity amounted to rape, including:

- the sexual activity is accompanied by force or threat of force to the victim or a third party;
 - the sexual activity is accompanied by force or a variety of other specified circumstances that made the victim particularly vulnerable or negated her ability to make an informed refusal; or
 - the sexual activity occurs without the consent of the victim” (¶ 214).
- The Panel explains further that in the *Kunarac* case,⁷ the ICTY Appeals Chamber noted “in the majority of cases involving war crimes or crimes against humanity, the circumstances will be almost universally coercive, and will thereby exclude the possibility of consent” (¶ 216). The Panel also notes that in *Kunarac*, the Appeals Chamber held that the Prosecutor is not required to prove resistance on the part of the victim to evidence lack of consent (*id.*).⁸ The Panel also cites the *Gacumbitsi* case⁹ from the International Criminal Tribunal for Rwanda (ICTR), which held that “the Prosecution can prove non-consent by proving the existence of coercive circumstances under which meaningful consent is not possible,” (¶ 217). To prove non-consent, the Prosecutor does not have “to introduce evidence of force,” but instead “the Trial Chamber is free to infer non-consent existed due to the circumstances such as genocide or the detention of the victim.” (*id.*)
 - In applying this definition and assessing whether the sexual intercourse between both of the accused and S-4 was coerced, the Panel notes the surrounding circumstances within which the sexual intercourse between S-4 and both of the accused occurred, including the fact that the accused “accepted all the acts undertaken by the Predrag Cicmanović”; they enabled Cicmanović to force S-4 into sexual intercourse by being present as armed and uniformed adult men in the van, creating a situation in which S-4 could not leave; one of the accused held a pistol against S-4’s head; and they personally took part in coercing the victim into sexual intercourse and other similar sexual acts, “during which time they clearly expressed their intention by saying ‘it’s my turn now,’ disregarding even the fact that the young girl was in such a condition that she lost consciousness,”; additionally, they slapped S-4 and pulled her hair (¶ 219). The Panel also finds, in concluding that both of the accused possessed the requisite *mens rea* for rape, “bearing in mind all the circumstances surrounding the acts committed against the injured party, particularly the brutality and intensity of ill-treatment, as well as other circumstances” (¶ 221). The Panel convicts Bosiljko Marković and Ostonja Marković of rape as a war crime against a civilian under the CC SFRY (pp. 3-4).

CONSENT:

⁶ *Kunarac, et al.*, (ICTY Trial Chamber) Judgment of February 22, 2001, para. 442.

⁷ *Kunarac et al.*, (ICTY Appeals Chamber), Judgment of June 22, 2002, para. 130.

⁸ *Id.* Para. 128..

⁹ *Gacumbitsi* (ICTR Appeals Chamber) Judgment of para. 152-55.

- As discussed under “Coercion” above, the Trial Panel applies the definition of rape and the interpretation of consent established by ICTY and ICTR jurisprudence, noting the *Kunarac* Trial Chamber judgment¹⁰ that found that “the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim” (¶ 211). The Panel notes further that the *Kunarac* Judgment defines “force” in this context as a situation in which “sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances” (¶ 212). The Panel elaborates that in the *Furundžija* case,¹¹ the ICTY held that “any form of detention denies the option of consent for sexual penetration” (¶ 216). Finally, the Panel states that “[t]he *mens rea* required for the crime of rape is the intention to effect sexual penetration, and the knowledge that it occurs without the consent of the victim.
- Recalling the circumstances in which the sexual intercourse between S-4 and both of the accused occurred, which is described above under “Coercion,” the Panel finds that both of the accused forced S-4 into sexual intercourse and other similar sexual acts (¶ 219). Thus, the Trial Panel finds the accused guilty of rape (¶ 222).

INHUMANE TREATMENT:

- The Panel notes that the CC SFRY does not define inhumane treatment but looks to jurisprudence from international tribunals as well as the Court of Bosnia and Herzegovina’s case law to determine that inhumane treatment means “an intentional act or omission, that is, an act which is, objectively speaking, intentional rather than accidental, which causes severe mental or physical suffering and which is a serious infringement upon human dignity or integrity” (¶ 209).
- The Panel concludes that in examining all of the established facts, the actions of the accused “resulted in the consequences which, by their intensity, duration, and the fact that a minor girl was affected, may qualify as the acts of inhumane treatment” while at the same time, the acts qualify as rape (¶ 210). The Panel thus finds that “having acted with the direct intent, knowingly and willingly, being aware of the character of the undertaken acts...violated the injured party’s physical integrity, inflicted on her severe mental suffering and pain, outrages upon her human dignity, which is strictly prohibited under Common Article 3 of the IV Geneva Convention, namely that they raped her and treated her inhumanely in terms of Article 142(1) of the adopted CC SFRY” (¶ 222).

PROTECTIVE MEASURES:

- In addition to referring to the victim of the rapes described above by the pseudonym S-4, the Panel excluded the public from the main trial during S-4’s testimony (¶ 4). The Panel ordered this measure after finding that “the exclusion of the public [was] justified with

¹⁰ *Kunarac, et al.*, (ICTY Trial Chamber) Judgment of February 22, 2001, para. 441 (citing Prosecutor v Furundžija, [ICTY Trial Chamber] Judgment of December 10, 1998, para. 460.

¹¹ *Furundžija* (ICTY Trial Chamber) Judgment of December 10, 1998, para. 271.

the aim to protect the private life of the witness” (*id.*). The Panel also excluded the public during testimony provided by witness A.A. that would have revealed information about S-4 (¶ 5). The Panel determined that S-4 was a “vulnerable witness” qualifying for the protection of her personal details, due to the fact that “this witness was seriously psychologically traumatized due to the circumstances in which the crime covered by the Indictment was committed” (¶ 7).

RAPE:

- As discussed in “Coercion,” and “Consent,” above, the Panel notes that rape is not defined by the CC SFRY; thus, the Panel looked to jurisprudence from the ICTY, the ICTR and customary international law to define this offense (¶ 210). The Panel derives the definition from the ICTY case of *Kunarac, et al.*,¹² as “the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim” (¶ 211). For this purpose, consent must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances (¶ 212). The Panel notes that any form of captivity vitiates consent and that evidence of the resistance of the victim is not required to show lack of consent (¶ 216). “The *mens rea* required for the crime of rape is the intention to effect sexual penetration, and the knowledge that it occurs without the consent of the victim” (¶ 215).
- The Panel finds the accused guilty of rape because they personally took part in coercing S-4 into sexual intercourse by penetrating the victim with their sexual organs and by penetrating the victim’s mouth with their sexual organs (¶ 219).

Other Issues

COMPENSATION:

- S-4 sought monetary compensation from the two accused (¶ 53). Counsel representing S-4 described the results of the rapes on S-4 (¶ 52). Recalling the evidence presented at trial that S-4 was “brutally raped by several soldiers when she was only age 14,” S-4’s counsel submitted that this has resulted in S-4 experiencing “enormous fear, severe physical and mental pain and suffering, the consequence of which is a prolonged impaired state of her health with permanent consequences” (*id.*). The Panel also received an evaluation by a forensic expert that described the “mental pain and fear the victim had suffered as well as the victim’s diminished general capacity to live her life” (*id.*). S-4 sought damages under property law, requesting the Panel to order the accused to “compensate her, jointly and severally, by paying to her KM 40,000 of non-pecuniary damages due to mental and physical pain she suffered, the fear arising from the unlawful deprivation of her liberty, violations of her personal rights, dignity and morale by torture, inhumane and degrading ill-treatment and mental pain due to diminished general quality of life” (¶ 53). S-4 specifically identified the following types of damage: “the amount of KM 6,000 for the suffered fear; the amount of KM 20,000 for mental and physical pain, violation of the

¹² *Kunarac, et al.*, (ICTY Trial Chamber) Judgment of February 22, 2001, para. 460.

personal rights, dignity and morale by torture, inhumane and degrading treatment, and the amount of KM 14,000 for psychological pain for diminished general quality of life” (*id.*). Counsel for S-4 argued that pursuing compensation for such non-pecuniary damages under property law “resulting from the suffered fear, physical pain and permanent mental pain” is permitted by several provisions including Article 3 the European Convention for the Protection of Human Rights and Fundamental Freedoms, which stipulates that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”, as well as the European Convention on Compensation of Victims of Violent Crimes and the general rules and Laws on Obligations for damage resulting from the commission of crime (*id.*). Counsel for S-4 notes that pursuing the claim under property law within the context of the criminal proceedings prevents S-4 from having to disclose her identity (§ 56).

- The Panel notes that the forensic expert opinion showed that S-4 experienced an “acute stressful reaction to the incident at issue” which led to post-traumatic stress disorder (PTSD) (§ 237). The symptoms of PTSD that S-4 experience include “intrusive thoughts, hyper-incident and avoidance phenomena” (*id.*). The expert concluded that S-4’s “general quality of life has been permanently diminished by 12% as a result of the suffered trauma and the above referenced symptoms” (*id.*). The Panel is convinced of the effects of the incident on S-4 based on her testimony, and while it acknowledges that she has benefitted from the support she has received, the Panel notes that this “cannot diminish all the monstrosities of the trauma she had been through. This is so considering the fact that, as a girl age 14 and on the eve of her sexual maturity, she became a victim of such a severe criminal offense, and that this trauma has indelibly and irrevocably deprived her of her dreams as a young girl about her future and trust into people, and changed her life forever” (§ 238). The Panel concludes that S-4’s claim is reasonable based on the expert evaluations, medical documentation, and the fact that S-4 satisfies all of the diagnostic criteria for PTSD (§ 239). The Panel finds that as a result of the rapes, S-4 “suffered severe mental pain during the period of several hours until she was brought back home, medium-intensity mental pain over a six-month period and permanent mental pain of mild intensity. The injured party suffered severe fear over a several-hour period until she returned home, medium-intensity fear over a two-month period, and permanent, mild-intensity fear related to the PTSD symptoms. As a consequence of the critical incident, the Panel finds that the injured party’s general quality of life is permanently diminished and amounts to 12%” (§ 240). The Panel holds that S-4 should be compensated non-pecuniary damages for the “mental pain” and a “violation of personal liberty” and considers “the intensity and duration of the injured party’s mental pain,” including the fact that S-4 will experience permanent “lower-intensity mental pains” and the fact that as a result of the rapes, S-4 was unable to complete secondary school (§ 242). The Panel decides “a fair compensation for this type of non-pecuniary damage is KM 20,000.00, to which a fair compensation for the mental pain due to diminished quality of life may be added in the amount of KM 6,500.00” for a total amount of KM 26,500.00 (§§ 242, 244).