

PROSECUTOR V. SLAVKO LALOVIĆ
Case No. S 1 1 K 002590 10 Kri
Court of Bosnia & Herzegovina
First Instance Verdict
August 29, 2011

Judges:

Zoran Božić
Mira Smajlović
Enida Hadžomerović

Prosecution:

Mirko Lečić

Defense:

Žiko Krunić

Gender Keyword(s): Coercion; Consent; Corroboration; Penis; Protective Measures; Rape; Vagina

Procedural History: On September 30, 2010, the Prosecutor of Bosnia and Herzegovina indicted Slavko Lalović, charging him with accessory liability for rape as a war crime against civilians as well as three counts of inhuman treatment and applying intimidation and terror as war crimes against civilians (p. 2, ¶ 94). The rape charge was supported by evidence that in August of 1992, in his capacity as a security guard in a prison established to unlawfully detain civilians in the Miladin Radojević Elementary School in Kalinovik, he “allowed two soldiers of the Republika Srpska Army (VRS) to enter, knowing they would commit violence against the prisoners, including rape, [and] these two soldiers raped detainee ‘S4’” (p.3). The charges of inhuman treatment were supported, in part, by evidence that, also in his capacity as a security guard at Miladin Radojević Elementary School, Lalović deprived the detainees of water and denied them access to a toilet, “telling them to urinate in their hands” (*id.*). In addition, Lalović was charged with intimidating the detainees by threatening to kill their children while holding a gun in his hand and demanding valuables from them (*id.*). The last count of inhuman treatment as a war crime against civilians was based on allegations that Lalović forced three women to run on wet, slippery floors causing one of them—who was four months pregnant—to fall and sustain bodily injuries (p. 4). On October 7, 2010, the Court partially confirmed the indictment (p. 2). On November 2, 2010, Lalović pleaded not guilty at the plea hearing (p. 5). On June 9, 2011, the Prosecutor amended the indictment, partially amending the factual description of the offenses charged and changing the legal qualification to specify accessory liability for the rape charge only and liability as a direct perpetrator for the remaining charges of inhuman treatment and applying intimidation and terror (p. 5; ¶¶ 7, 63-74). On August 22, 2011, the First Instance Panel rendered its verdict on the case, which it publicly announced on August 29, 2011 (p. 5). The First Instance verdict is digested here.

Disposition: The First Instance Panel finds Lalović guilty of aiding and abetting rape as a war crime against civilians and of directly committing the war crimes against civilians of inhuman treatment and intimidation as war crimes against civilians (pp. 2-3). The Panel acquits Lalović of one count of inhuman treatment of detainees based on allegations that he abused three detained women by forcing them to run on a wet floor, causing one of them to fall and sustain bodily injuries (p. 4). The Panel sentences Lalović to five years of imprisonment (*id.*).

Key Gender-Based Holdings:

COERCION:

- In assessing the charge against Lalović of rape as a war crime against civilians detailed under “Rape” below, the First Instance Panel considers Article 173(1)(e) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), which defines rape as “[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...”¹ In applying this provision to the case at hand, the First Instance Panel finds that “[c]oercion as [an] element of the criminal offense of rape implies absence of voluntary consent” (¶ 148). In defining coercion in this way, the Panel cites the International Criminal Tribunal for the Former Yugoslavia Trial Chamber Judgment in the *Kunarac* case.² Drawing further on the Elements of Crimes for the offense of rape at the International Criminal Court (ICC),³ the Panel elaborates on this aspect of the definition, providing that “coercion” is proven when the evidence demonstrates that “the assault is committed by force, threat of force or coercion, such as fear of violence, duress, detention, psychological oppression, abuse of power against the aggrieved or another person, taking advantage of violent environment, or an assault is committed against a person who could not give a genuine consent” (¶ 148). The issue of coercion was not central in the case against Lalović and not analyzed further, as Lalović did not deny that two soldiers had raped witness S4 and the First Instance Panel finds beyond a reasonable doubt that this occurred (¶¶ 149, 154).

CORROBORATION:

- The Panel acknowledges that witness S4 is the only one who testified at the trial about the act of rape committed by two soldiers because she was alone with the soldiers in the room where the rape took place (¶152). Nonetheless, the Panel notes that “the victim’s account was clear, detailed and convincing” and not questionable in any way (*id.*). The Panel notes further that other witnesses corroborated some aspects of witness S4’s testimony as they were detained in the same classroom with witness S4 and saw witness S4 when she was returned to the classroom, “clearly upset and physically exhausted” and bearing traces of blood (¶ 153). The Panel notes further that Lalović never contested the fact that witness S4 was raped but only denied his role in the assault (¶154). The Panel finds beyond a reasonable doubt that two soldiers raped S4 as she described (¶ 149).

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).

² See *Prosecutor v. Kunarac*, Trial Chamber Judgment, February 22, 2001, ¶ 460.

³ International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Article 7(1)(g)-I(1).

PENIS:

- As noted under “Rape” below, the Panel notes in its definition of rape that “[s]exual intercourse or an equivalent sexual act consists of an assault on the body of a person by the perpetrator, resulting in the penetration, however slight, of any part of [the] victim’s body, that is, penetration of the vagina or anus of the aggrieved party by the penis of the perpetrator or any other object or any other part of the body” (¶ 147). In her testimony about being raped by the first soldier, witness S4 stated that the soldier penetrated her body vaginally and anally and forced her to put his penis in her mouth (¶ 151).

PROTECTIVE MEASURES

- Upon the Prosecutor’s motion, the First Instance Panel granted several protective measures to several Prosecution witnesses, including witness S4, who testified that she was raped by two paramilitary soldiers (¶¶ 46-49). These measures included giving this and other witnesses pseudonyms to protect their identities (¶ 46). The Panel ordered additional measures⁴ for witness S4 requested by the Prosecutor, including allowing her to testify from another room, using image distortion, and instituting a ban on publishing photographs or other images of the witness in the public or on video streaming (¶ 48). The Panel found that these measures were warranted, acknowledging that, given the substance of her testimony, the witness was putting her safety and the safety of her family at risk (*id.*). The Panel notes that the Defense did not object to providing these additional measures to witness S4 (¶ 49). The First Instance Panel also excluded the public from the courtroom during the hearing to decide on the Prosecutor’s motion to order these additional measures (¶ 62).

RAPE:

- The Prosecutor charged Lalović with one count of rape as a war crime against civilians (¶ 132). The indictment alleged that in August of 1992, in his capacity as a reserve police officer acting as a guard at the Miladin Radojević Elementary School in Kalinovik, where civilians were being unlawfully detained, Lalović permitted two soldiers of the VRS to enter the premises, knowing they would commit violence against the prisoners, including rape (*id.*). This was contrary to his duty to protect the civilians and to prevent unauthorized soldiers from entering when he knew they were committing violent acts against the detainees (*id.*). On the date in question, two soldiers whom Lalović had

⁴ The Panel ordered these measures pursuant to Article 13 of the “Law on Protection of Witnesses Under Threat and Vulnerable Witnesses” which provides that:

(1) In exceptional circumstances, where there is a justified fear that if some or all of the personal details of the witness are released it would seriously endanger the personal security of a witness or his family, and the danger would persist after the testimony is given, the Court may, either ex officio or upon the motion of the parties or the defense attorney, decide that the personal details of the witness shall remain confidential for such period as may be determined to be necessary, but in any event not exceeding thirty years, following upon the day the decision became final.

(2) The Court may, after hearing the parties and the defense attorney, decide that the identity of the witness is not disclosed by allowing the witness to testify behind a screen or utilizing electronic distortion of the voice of the witness or the image of the witness, or both the image and the voice, by using technical means for transferring image and sound.

(3) The Court may, at any time, revoke the decision from paragraph 1 of this Article, either ex officio or upon the motion of the parties or the defense attorney.

“Official Gazette” of Bosnia and Herzegovina, 3/03, 21/03, 61/04, 55/051, Art. 13.

allowed into the school raped the detainee witness S4 in an upper story room of the school (*id.*). The Prosecutor alleged that Lalović thus aided and abetted the commission of the criminal offense of rape under Article 173(1)(e) (*id.*).⁵ The First Instance Panel notes that as a reserve police officer, Lalović had several duties stipulated under Bosnian law, including “preventing the perpetration of criminal offenses [and] protecting [the] personal safety of people and citizens” (¶ 135). The Panel finds that during July and August 1992, unauthorized soldiers committed many atrocities at the school and these acts must have occurred with the acquiescence or at least knowledge of the guards as there was only one entrance to the school, which was where Lalović and his fellow guards were posted (¶ 138). Several witnesses testified that Lalović had been present and had witnessed themselves and others being taken to parts of the school by soldiers where they were raped, evidencing Lalović’s knowledge that women and girls at the school were being raped (¶ 139). Lalović himself confirmed that he was aware of rapes committed on school premises (¶ 140). At trial, Lalović argued that he was not able to prevent soldiers from entering the school to harass and commit violent acts against the civilians (¶ 142). Other guards testified that at times they were unable to stop these soldiers from entering the school and would ask for back up from the police station, which did not always arrive in time to prevent rapes and murders from occurring (¶ 141). Lalović testified that he lacked the rank necessary to have access to radio communication and the authority to request back up, an argument the First Instance Panel does not accept (¶¶ 143-45).

- The Panel examines the elements of rape under Article 173(1)(e) of the CC of BiH, finding that this provision requires the following elements to be proven:
 - “- sexual intercourse or an equivalent sexual act,
 - coercing 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” (¶ 146).The Panel notes further that “[s]exual intercourse or an equivalent sexual act consists of an assault on the body of a person by the perpetrator, resulting in the penetration, however slight, of any part of [the] victim’s body, that is, penetration of the vagina or anus of the aggrieved party by the penis of the perpetrator or any other object or any other part of the body” (¶ 147). The Panel cites the ICC’s Elements of Crimes for rape as well as jurisprudence from several international criminal tribunals as support for this definition (*id.*).⁶
- Applying this definition to the facts of the case, the Panel recalls the testimony of witness S4 that in August of 1992, during her captivity at Miladin Radojević Elementary School, a group of soldiers entered the room where she was being held (¶ 151). The soldiers were accompanied by Lalović and another guard (*id.*). Other witnesses confirmed that they saw witness S4 being taken out of the room where they were all being detained (*id.*). One of the soldiers stated that he and

⁵ 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) (prohibiting war crimes against civilians including “[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...”).

⁶ International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Article 7(1)(g)-I(1). *See also Prosecutor v. Kunarac*, Trial Chamber Judgment, February 22, 2001, ¶ 460; *Prosecutor v. Kunarac*, Appeals Chamber Judgment, June 12, 2002, ¶¶ 127-28.

Lalović and the other guard were neighbors, at which point witness S4 recognized the soldier because he and witness S4's husband were from the same village (*id.*). The next night, the same soldier came to the room and called witness S4 to come out of the room (*id.*). Witness S4 came out of the room with her minor daughter but was told to leave her daughter in the room, which she did (*id.*). Another witness who had been detained in the same room corroborated this part of witness S4's testimony (*id.*). Witness S4 testified that the soldier then took her to another classroom, which he opened with a key, and raped her there (*id.*). Witness S4 described the rape in detail, recalling that the soldier told her if she did not undress, he would kill her children and that he then penetrated her body vaginally and anally and forced witness S4 to put his penis in her mouth (*id.*). Witness S4 testified that she pleaded with the soldier not to harm her and the soldier ignored her pleas and told her he would kill her children if she told anyone about what had happened (*id.*). Then the soldier left and another soldier she did not know entered the room and raped her (*id.*). As a result of the rapes, witness S4 experienced severe physical pain and saw blood on the floor (*id.*). As discussed under "Corroboration" above, the Panel acknowledged that witness S4 was the only one to testify about the act of rape by the two soldiers since she had been alone in the room where the rape occurred (§ 152). However, the Panel finds that witness S4's testimony "was clear, detailed and convincing" and not questionable in any way, and that parts of her testimony were corroborated by other witnesses who saw her being taken out of the classroom and returned to the classroom (§§ 152-53). Additionally, one of these witnesses testified that witness S4 had told her that she had been raped after she was returned to the classroom where they were both being detained (*id.*). Lalović never contested the fact that witness S4 was raped but only his alleged role in the crime, discussed in more detail below under "Mode of Liability" (§ 154). The Panel finds beyond a reasonable doubt that two soldiers raped witness S4 and that Lalović did not prevent these soldiers from entering the school, "but rather enabled them to enter," thus the Panel finds he participated in the crime of rape by aiding and abetting in its commission (§§ 149, 161).

VAGINA

- As noted under "Rape" above, the Panel notes in its definition of rape that "[s]exual intercourse or an equivalent sexual act consists of an assault on the body of a person by the perpetrator, resulting in the penetration, however slight, of any part of [the] victim's body, that is, penetration of the vagina or anus of the aggrieved party by the penis of the perpetrator or any other object or any other part of the body" (§ 147). In her testimony about the rape, witness S4 stated that the soldiers penetrated her vaginally (§ 151).

Other Issues:

MODE OF LIABILITY:

- In addition to the charges for direct perpetration of inhuman treatment and applying intimidation and terror Prosecutor charged Lalović with aiding and abetting rape as a war

crime against civilians under accessory liability (p. 2). Lalović did not contest that witness S4 was raped but denied that he had any involvement in the crime (¶ 154). The Panel notes that Article 31 of the CC of BiH⁷ defines the responsibility of an accessory by providing that:

Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced.

...The following, in particular, shall be considered as aiding and abetting in the perpetration of a criminal offence: giving advice or instructions as to how to perpetrate a criminal offence, supplying the perpetrator with the means for perpetrating the criminal offence, removing obstacles to the perpetration of criminal offence, and promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the means used for perpetrating the criminal offence, traces of the criminal offence, or the goods acquired by the perpetration of the criminal offence (¶ 155).

The Panel observes that aiding and abetting requires a direct intent to help with the commission of a criminal offense and a knowledge that the accused is providing such help; the accused “must be aware that by his actions he is aiding the commission of an impermissible act by another person” and he must be aware of the basic elements of the offenses the perpetrator intends to commit (¶ 156). The accused does not have to be aware of all of the details of the offense to be committed, however (*id.*). The Panel finds beyond a reasonable doubt Lalović’s participation in the rapes “consisted of removing obstacles to the perpetration of the criminal offense” (¶ 157). Noting that the guards had a duty to protect the detained civilians and act as an obstacle to others who sought to mistreat them, the Panel finds that Lalović failed to fulfill this obligation and contributed to the commission of the rape by not preventing the two soldiers from entering the school and raping witness S4 (*id.*). In so doing, Lalović acted as an accessory (*id.*). The Panel points to evidence supporting this conclusion, including evidence that Lalović was at the school on the night in question (which he denied); testimony by witness Milan Lalović stating that Slavko Lalović was present at the school with a soldier entering the school the night that witness S4 was raped; and Lalović’s own statements to investigators on June 7, 2011, in which he bragged about the rape saying, “see what a neighbor can do to a neighbor” (¶¶ 159-60). Based on this evidence, the Panel finds beyond any doubt that despite his awareness that the soldiers would commit violent acts, including rapes, Lalović did not prevent the soldiers from entering the school “but rather enabled them to enter, which is why the Court qualifies his participation in the commission of the criminal offense of rape as aiding and abetting” (¶¶ 161-62).

⁷ 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. 31.

SENTENCING:

- In determining Lalović's sentence, the Panel notes that the rape charge was the gravest crime of which Lalović was found guilty and that for this charge, he was convicted as an accessory and not as the direct perpetrator of the crime (¶ 202). This led the Panel to reduce Lalović's sentence to five years, which is below the legal minimum prescribed, as Article 31 of the CC of BiH (cited above) specifically provides that conviction under this mode of liability can result in a reduced sentence (*id.*).