



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-05-88-T
Date: 23 June 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. John Hocking

Decision of: 23 June 2009

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON BOROVIČANIN MOTION FOR
RECONSIDERATION OF ORAL DECISIONS**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Vinko Pandurević

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seised of the “Borovčanin Motion for Reconsideration of Oral Decisions Concerning Scope of Re-Examination of Witness Janc”, filed by Borovčanin on 8 May 2009 (“Motion”).

A. Submissions of the Parties

2. In oral decisions rendered on 5 May 2009, the Trial Chamber overruled two objections of Borovčanin, with regard to the admissibility of Ex. P04529, “Declaration of Tomasz Blaszczyk regarding Kravica warehouse measurements with 2 sketches and 1 photo attached,” dated 4 May 2009, as well as the scope of the Prosecution’s ability to pose questions to Dušan Janc, whom the Prosecution had called after re-opening its case.¹

1. The Borovčanin Motion

3. Borovčanin requests the Trial Chamber to reconsider its oral decisions. He argues that in no way did his cross-examination open the door to questions of re-examination concerning the dimensions of the Kravica Warehouse, nor did any other Defence team’s cross-examination.² Borovčanin argues that in one oral decision, the Trial Chamber suggested that the scope of reopening can be widened during cross-examination, provided there is no objection, and submits that he cannot be estopped from objecting merely because he had not done so to the first in a series of questions that went beyond the scope of reopening.³ Furthermore, he submits that Ex. P04529 is in fact a statement, subject to Rule 92 *bis* and as such is inadmissible as it is not in the form prescribed by Rule 92 *bis* and cannot be admitted without a Prosecution motion for reopening to recall Blaszczyk.⁴ Lastly, he asserts that recent Appeals Chamber decisions on the mode of disclosure support the view that Ex. P04529 should not be admitted as this does not conform to the requirements of fairness.⁵

¹ T. 33699, 33712 (5 May 2009). *See* Motion, para. 2

² Motion, paras. 5, 9–14.

³ *Ibid.*, paras. 15–19.

⁴ *Ibid.*, paras. 20–22.

⁵ *Ibid.*, para. 23. *See Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009; *Prosecutor v. Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008.

2. Prosecution Response

4. The Prosecution filed the “Prosecution Response to Borovčanin Motion for Reconsideration of Oral Decisions Concerning Scope of Re-Examination of Witness Janc” (“Prosecution Response”) on 21 May 2009. It submits that Borovčanin has neither demonstrated any error in reasoning of the Trial Chamber in its oral decision overruling his objections to the re-examination of Janc concerning Kravica Warehouse, nor established circumstances justifying reconsideration to prevent injustice.⁶ Furthermore, the Motion adds nothing new to Borovčanin’s oral arguments before the Trial Chamber except for its reference to Rule 92 *bis* and the reference to the recent Appeals Chamber decisions, which are inapposite to this case.⁷ Lastly, the Motion does not show how the admission of Ex. P04529 created an injustice to Borovčanin.⁸

3. Borovčanin Reply

5. On 22 May 2009, Borovčanin sought leave to file a reply and filed the “Borovčanin Reply to Prosecution Response to Motion for Reconsideration of Oral Decisions Concerning Re-Examination of Witness Janc” (“Borovčanin Reply”). Borovčanin submits that the Prosecution cites no authority against the jurisprudence of this Tribunal that only Rule 92 *bis* governs statements prepared by, or with the assistance of a party to the proceedings, that the Prosecution’s interpretation of the scope of Borovčanin’s cross-examination is unrealistic, and that it fails to address whether the scope of reopening restricts the scope of re-examination.⁹ He argues further that neither prejudice nor injustice are prerequisites for reconsideration.¹⁰

B. Law and Discussion

6. Reconsideration of a decision is permitted in exceptional cases “if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.”¹¹ In the latter case, the

⁶ Prosecution Response, paras. 1, 4–15.

⁷ *Ibid.*, paras. 9, 13

⁸ *Ibid.*, para. 14, 16.

⁹ Borovčanin Reply, paras. 2–10.

¹⁰ *Ibid.*, para. 11.

¹¹ Decision Denying Motion for a *Subpoena Duces Tecum* Compelling Momir Nikolić to Disclose his Personal Notes, 10 January 2008, p. 4; Decision on Defence Motion Requesting Reconsideration or Certification of Decision Admitting Exhibits with Testimony of Witness 168, 20 July 2007, pp. 4–5 and note 26. *See also* *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’appelant en reconsidération de la décision du 4 avril 2006 en raison d’une erreur matérielle”, 14 June 2006, para. 2 (stating the standard of the Appeals Chamber of both ICTY and ICTR for reconsideration of interlocutory appeals decisions).

party arguing for a reconsideration must satisfy the Trial Chamber that there are circumstances justifying reconsideration to prevent injustice.¹²

7. As Borovčanin himself concedes, the sketch which is part of Ex. P04529 “[...] is of no great importance to the Borovčanin Defence case.”¹³ With regard to the scope of reopening or rebuttal evidence, the Trial Chamber rejects the suggestion that its oral decision implied that “the scope of reopening can be widened during cross-examination, provided that there is no objection.”¹⁴

8. Furthermore, the Trial Chamber is not persuaded that recent Appeals Chamber decisions cited by Borovčanin are relevant to the issue before it and justify the reconsideration of its admission of Ex. P04529. The Appeals Chamber decisions held that “[...] where the accused opposes the admission of evidence during cross-examination due to an alleged breach of his right to a fair trial, a Trial Chamber must consider how it intends to strike the appropriate balance between the need to ensure the rights of the accused and its decision to admit such evidence.”¹⁵ The admission of Ex. P04529 does not come close to prejudicing Borovčanin’s right to a fair trial because (i) the purpose of its admission by the Prosecution is clearly linked to the evidence given by witness Janc, who testified about the secondary grave in Glogova, which in the Prosecution’s case is inextricably linked to the Kravica Warehouse, (ii) in the light of the evidence on the trial record, Ex. P04529’s subject-matter—the measurements of the Kravica Warehouse— has a very limited nature and scope, and (iii) as the Borovčanin Defence itself admits the sketch included in Ex. P04529 is unimportant, and Tomasz Balszczyk’s declaration attached to it, merely confirms the sketch. The Trial Chamber is therefore not convinced that there exists any real risk of prejudice caused to Borovčanin by its admission. As a result, the Trial Chamber does not see any clear errors of reasoning in its oral decisions. Even less does it find a necessity to reconsider them to prevent an injustice happening.

¹² Decision Denying Motion for a *Subpoena Duces Tecum* Compelling Momir Nikolić to Disclose his Personal Notes, 10 January 2008, p. 4; Decision on Defence Motion Requesting Reconsideration or Certification of Decision Admitting Exhibits with Testimony of Witness 168, 20 July 2007, p. 5 and note 27. *See also Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2 (considering that for an appellant to succeed in requesting reconsideration of an Appeals Chamber decision, “he must satisfy the Appeals Chamber of the existence of a clear error of reasoning in the Decision, or of particular circumstances justifying its reconsideration in order to avoid injustice”).

¹³ *See Borovčanin Motion*, para. 2.

¹⁴ *See Borovčanin Motion*, para. 15.

¹⁵ *See Borovčanin Motion*, para. 23; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008 at para. 22; *Prosecutor v. Jadranko Prlić, et al.*, Case No. IT-04-74-AR73.14, Decision on the Interlocutory Appeal against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009, para. 25.

C. Disposition

9. For the foregoing reasons, the Trial Chamber hereby

GRANTS Borovčanin leave to file a reply, and

DENIES the Motion.

Done in English and French, the English text being authoritative.



Carmel Agius

Presiding Judge

Dated this twenty-third day of June 2009

At The Hague

The Netherlands

[Seal of the Tribunal]