



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 09-Apr-2012, 14:02
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Case File/Dossier N°. 001/18-07-2007-ECCC/SC

Before: Judge KONG Srim, President
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge SIN Rith
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

Greffiers: SEA Mao, Christopher RYAN,
PHAN Theoun, Paolo LOBBA

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APPEAL JUDGEMENT

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

Accused

KAING Guek Eav *alias*
'DUCH'

Lawyers for the Accused

KAR Savuth
KANG Ritheary

Lawyers for Civil Parties

Group 1

TY Srinna
Karim KHAN
Alain WERNER
Brianna McGONIGLE

Lawyers for Civil Parties

Group 2

KONG Pisey
HONG Kimsuon
YUNG Phanit
Silke STUDZINSKY

Lawyers for Civil Parties

Group 3

KIM Mengkhy
MOCH Sovannary
Martine JACQUIN
Annie DELAHAIE
Philippe CANONNE
Elizabeth RABESANDRATANA
Fabienne TRUSSES-NAPROUS
Christine MARTINEAU

14. Errors of law may be alleged against a conviction or acquittal. When a party raises such an allegation, the Supreme Court Chamber, as the final arbiter of the law applicable before the ECCC, is bound in principle to determine whether an error of law was in fact committed on a substantive or procedural issue.³⁴ The Supreme Court Chamber reviews the Trial Chamber's findings on questions of law to determine whether they are correct, not merely whether they are reasonable.³⁵ This standard of correctness means that the Supreme Court Chamber decides whether the Trial Chamber established the content of the applicable legal norms based in the appropriate sources of law and by employing rules of interpretation pertinent to those sources of law. The Supreme Court Chamber also assesses whether the result reached is precise and unambiguous.

15. The appellate powers of the Supreme Court Chamber are exercised within the limits of the issues appealed. Defence, Co-Prosecutors, or Civil Parties alleging an error of law must identify the alleged error, present arguments in support of the allegation, and explain how the error invalidates the trial judgement.³⁶ However, the burden of proof on appeal is not absolute with regard to errors of law. Even if the party's arguments are insufficient to support the contention of an error of law, the Supreme Court Chamber may find other reasons and come to the same conclusion, holding that there is an error of law.³⁷ In order to make a determination as to the issue on appeal, the Supreme Court Chamber also reviews those legal findings of the Trial Chamber which constitute necessary predicates for the impugned decision. In exceptional circumstances, the Supreme Court Chamber may raise questions *ex proprio motu*³⁸ or hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the ECCC's jurisprudence.³⁹

³⁴ *Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003, ("Krnojelac Appeal Judgement"), para. 10.

³⁵ *Krnojelac* Appeal Judgement, para. 10.

³⁶ Internal Rule 105(3).

³⁷ *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, "Judgement", Appeals Chamber, 19 May 2010, ("Boškoski and Tarčulovski Appeal Judgement"), para. 10; *Kambanda v. Prosecutor*, ICTR-97-23-A, "Judgement", Appeals Chamber, 19 October 2000, ("Kambanda Appeal Judgment"), para. 98.

³⁸ *Krnojelac* Appeal Judgement, para. 6; 2007 Code of Criminal Procedure, Arts 405-406, 440-441.

³⁹ *Galić* Appeal Judgement, para. 6.

16. Where the Supreme Court Chamber finds an error of law in a trial judgement arising from the application of the wrong legal standard by the Trial Chamber, the Supreme Court Chamber will determine the correct legal standard and review the relevant factual findings of the Trial Chamber. In so doing, the Supreme Court Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced on the relevant standard of proof as to the factual finding challenged by a party before that finding is confirmed on appeal.⁴⁰ The Supreme Court Chamber may amend a decision of the Trial Chamber only if it identifies an error of law “invalidating the judgment or decision.”⁴¹ Consequently, not every error of law justifies a reversal or revision of a decision of the Trial Chamber. Where the Co-Prosecutors or Civil Parties allege an error of law in their appeals against an acquittal, the Supreme Chamber may only modify the findings of law of the Trial Chamber if the Supreme Court Chamber considers the trial judgement erroneous, but cannot modify the disposition of the Trial Chamber judgement.⁴² Decisions of the Supreme Court Chamber are final and binding on all parties in the case.

17. Similar to errors of law, an error of fact may be alleged against a conviction or acquittal. The Supreme Court Chamber applies the standard of reasonableness in reviewing an impugned finding of fact, not whether the finding is correct. In determining whether or not a Trial Chamber’s finding of fact was one that no reasonable trier of fact could have reached, the Supreme Court Chamber “will not lightly disturb findings of fact by a Trial Chamber.”⁴³ The Supreme Court Chamber agrees with the following general approach to the factual findings of the Trial Chamber as articulated by the ICTY Appeals Chamber:

Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is “wholly

⁴⁰ *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, “Judgement”, Appeals Chamber, 9 May 2007, (“*Blagojević and Jokić* Appeal Judgement”), para. 8.

⁴¹ Internal Rule 104(1)(a).

⁴² Internal Rule 110(4).

⁴³ *Prosecutor v. Furundžija*, IT-95-17/1, “Judgement”, Appeals Chamber, 21 July 2000, (“*Furundžija* Appeal Judgement”), para. 37.

erroneous” may the Appeals Chamber substitute its own finding for that of the Trial Chamber.

[...].

The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness’ testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber’s duty to provide a reasoned opinion [...].⁴⁴

18. Considering that the guilt of an accused must be established at trial beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice must be evaluated in the context of what the appellant seeks to demonstrate. This is somewhat different for an appeal by the Co-Prosecutors against acquittal than with an appeal by the Defence against conviction. An appeal against a conviction must show that the Trial Chamber’s factual errors create a reasonable doubt as to an accused’s guilt. An appeal against an acquittal must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused’s guilt has been eliminated.⁴⁵ However, in case of an appeal by the Co-Prosecutors or Civil Parties against an acquittal, the Supreme Chamber may only modify the findings of fact of the Trial Chamber if it considers the judgement erroneous, and cannot modify the disposition of the Trial Chamber’s judgement.⁴⁶

19. Irrespective of which party alleges an error of fact, only those facts occasioning a miscarriage of justice may result in the Supreme Court Chamber overturning the Trial Chamber’s judgement in whole or in part. A miscarriage of justice is defined as “[a] grossly unfair outcome in judicial proceedings.”⁴⁷ For the error of fact to be one that occasioned a miscarriage of justice, it must have been

⁴⁴ *Prosecutor v. Kupreškić et al.*, IT-95-16-A, “Appeal Judgement”, Appeals Chamber, 23 October 2001, (“*Kupreškić Appeal Judgement*”), paras 30, 32.

⁴⁵ *Prosecutor v. Bagilishema*, ICTR-95-1A, “Judgement”, Appeals Chamber, 3 July 2002, (“*Bagilishema Appeal Judgement*”), para. 14.

⁴⁶ Internal Rule 110(4).

⁴⁷ *Furundžija Appeal Judgement*, para. 37, citing Black’s Law Dictionary, 7th ed., 1999.

“critical to the verdict reached.”⁴⁸ A party must demonstrate how the error of fact has actually occasioned a miscarriage of justice.

20. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber’s rejection of them constituted such an error as to warrant the intervention of the Supreme Court Chamber. Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Supreme Court Chamber and need not be considered on the merits. In order for the Supreme Court Chamber to assess a party’s arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the trial judgement to which the challenge(s) is being made.⁴⁹ Further, the Supreme Court Chamber “cannot be expected to consider a party’s submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.”⁵⁰ The Supreme Court Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing. The Supreme Court Chamber may dismiss arguments that are evidently unfounded without providing detailed reasoning.

⁴⁸ *Kupreškić* Appeal Judgement, para. 29.

⁴⁹ Internal Rule 105(4).

⁵⁰ *Prosecutor v. Stakić*, IT-97-24-A, “Judgement”, Appeals Chamber, 22 March 2006, (“*Stakić* Appeal Judgement”), para. 12.

Cambodia, and the elements of crimes against humanity in 1975-1979.³⁹¹ Unlike the criminalisation of rape in municipal law, all categories of crimes against humanity under international criminal law require chapeau elements that link them to the broader context in which the crimes occurred. Consequently, proscriptions against rape at the municipal level are insufficient to show the emergence of rape as a category of crimes against humanity by recourse to the general principles of law recognised by the community of nations.³⁹² Patterns of criminalisation on the municipal level, on the other hand, might help clarify the definition of rape as a crime against humanity, specifically the *actus reus* and *mens rea*, once the existence of rape as a crime against humanity has already been established under municipal or international law.³⁹³

183. Given this lack of support under international and municipal law for the existence of rape as a distinct crime against humanity during the ECCC's temporal jurisdiction, the Supreme Court Chamber finds that the Trial Chamber erred in law in concluding that the rape that occurred at S-21 constituted rape as a crime against humanity prohibited under customary international law. Accordingly, the Supreme Court Chamber rejects this part of Ground 2 of the Co-Prosecutors' Appeal, which argues that the Trial Chamber erred in failing to cumulatively convict the Accused for rape and torture as distinct crimes against humanity for the rape that took place at S-21.

³⁹¹ There is a notable exception to the municipal silence during 1975-1979 on rape's criminalisation as a crime against humanity. In its 1973 International Crimes (Tribunal) Act, Bangladesh provided for the jurisdiction of a Tribunal established under the Act as including "Crimes against Humanity," defined therein to include "namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, *rape* or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious ground," although no prosecutions actually took place pursuant to this law. Bangladesh International Crimes (Tribunal) Act of 1973 (Act No. XIX of 1973), Sec. 3(2)(a) (emphasis added).

³⁹² See PTC Jurisdiction Decision, para. 153 (on the inappropriateness of importing municipal crimes into the international criminal legal order). As an example to illustrate how opposite reasoning would lead to erroneous conclusions, the Supreme Court Chamber considers the ancient and universal criminalisation of theft or murder which, pursuant to the logic of importation, would give rise to an international crime.

³⁹³ *Furundžija* Trial Judgement, para. 177 ("to arrive at an accurate definition of rape based on the criminal law principle of specificity [...] it is necessary to look for principles of criminal law common to the major legal systems of the world"); *Kunarac* Trial Judgement, paras 439-460.

rights violations in several international treaties and declarations.⁴³⁸ Thus, this widespread recognition by the community of States of the gravity of torture contributed to the foreseeability of criminal prosecution for such conduct as a crime against humanity.

3. Conclusion

213. The Supreme Court Chamber finds that the Trial Chamber erred in holding that rape was a distinct crime against humanity under customary international law from 1975-1979. Accordingly, the Trial Chamber erred in subsuming rape as a distinct crime against humanity under the crime against humanity of torture. However, the Trial Chamber did not err in concluding that an instance of rape was covered by the definition of torture that existed under customary international law by 1975, as articulated in the 1975 Declaration Against Torture. Furthermore, given that rape as a crime against humanity had not yet crystallised at the time, the Trial Chamber did not err when it did not cumulatively convict the Accused for torture and rape as separate crimes against humanity.

214. Therefore, on the basis of the foregoing, the Supreme Court Chamber dismisses this part of Ground 2 of the Co-Prosecutors' Appeal.

E. Persecution as a Crime Against Humanity from 1975-1979

215. In response to the specific issues raised in the Co-Prosecutors' Appeal concerning the Accused's conviction for persecution as a crime against humanity, the Supreme Court Chamber turns to consider whether, in line with the principle of legality, persecution existed as a distinct crime against humanity under international law during the ECCC's temporal jurisdiction. If so, the Chamber will then determine the crime's requisite elements under its definition, as they stood from 1975-1979. As noted previously, persecution on political, racial or religious grounds is clearly listed as an underlying crime against humanity in Article 5 of the ECCC Law.⁴³⁹

⁴³⁸ The Supreme Court Chamber notes that Article 7 of the 1975 Declaration on Torture went so far as to call on all States to "ensure that all acts of torture as defined in article 1 are offences under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture." 1975 Declaration on Torture, Art. 7.

⁴³⁹ ECCC Law, Art. 5.