CASE CITATION:
Sygn. akt I KZP 2/10

NAME AND LEVEL OF COURT:
Sąd Najwyższy – Izba Karna w Warszawie (Supreme Court – Criminal Chamber in Warsaw)

DATE OF DECISION: **25 March 2010**

Authority to intercept telephone communications; admissibility of the records in other proceedings; refusal to give opinion on this subject because of lack of relevance

Ref. Act I KZP 2/10

PROVISION

On 25 March 2010

Supreme Court – Criminal Chamber in Warsaw meeting composed of:

The President: Judge SN Ewa Strużyna (Rapporteur)

Referee: SSN Michał Laskowski

SSN Jarosław Matras

Recorder: Łukasz Majewski

with the participation of the National Prosecution Service prosecutor Alexander Herzog

against Kamil K., Łukasz T., Wiesław D., Bogumił J. and Michał L.

accused of committing crimes referred to in Article 258 § 1 and 2 k.k. and Article 43 paragraph 1 and 3 of the Act of 24 April 1997 on preventing drug addiction, after hearing the case on the basis of the Article 441 § 1 ccp. by the decision of T Regional Court of 15 January 2010, ref. Act IX Kz 397/09, issues requiring legal interpretation of the Basic Law:

"Does the use of Article 237 § 2 ccp. to rule on the subsequent agreement to conduct a control and consolidation of discussions, regarding the use of materials obtained as a result of the interception initially authorized by the court, but going beyond the subjective and objective boundaries of this control, require strict compliance of the time limits set out in that provision: to present a suitable application for subsequent agreement and to issue the consent, and alternatively when does the time limit begin to present an application for subsequent permission and what are the consequences of the breach of the deadlines specified in Article 237 § 2 ccp.?

decided

to refuse to adopt the resolution.

JUSTIFICATION

The legal issue presented to the Supreme Court was formulated on the basis of the following procedural situation.

In the course of the investigation conducted by the District Prosecutor's Office in T. (ref. Act V Ds. 4/03), in the case of taking part in an organized crime group in the illicit trade of drugs, i.e. offences under Article 258 § 1 k.k. and Article 43 § 1 and 3 of the Act of 27 April 1997 on counteracting drug addiction (Journal of Laws No. 75, item. 468, as amended.). Regional Court in T. – at the request of the prosecutor – issued, on the basis of Article 237 § 1 and 3, paragraphs 13 and 14, and § 4 ccp. and Articles 239 ccp. and Article 329 § 1 of the Code of Criminal Procedure, the six provisions concerning the control and consolidation of the conversations conducted by telephone:

- dated 10 April 2003, regarding the telephone calls by Kamil K. made from mobile telephone number [...] and by Wiesław D. from telephone number [...] (202 k file);

- On 23 April 2003 concerning the telephone calls by Wiesław D, telephone number [...] (216 k file);

- On 30 April 2003 concerning the calls by Kamil K. [...] telephone number (223 k file);

- On 22 May 2003 on calls conducted by Kamil K. [...] telephone number (229 k file);

- On 17 June 2003 concerning the telephone calls by Kamil K. telephone number [...] and calls by Wiesław D telephone number [...] (233 k file);

- On 5 August 2003 concerning the calls by Kamil K. telephone number [...] and calls by Wiesław D telephone number [...] (305 k file).

In the content of the provisions, the Regional Court pointed out that they relate to the control and consolidation of the telephone calls by Kamil K. and D. Wiesław made form the listed telephone numbers, and the action concerns "incoming and outgoing" calls – in the context of the investigation concerning the marketing of a significant amount of narcotics by an organized criminal group. In support of these decisions, the court stated that the evidence gathered and the findings of the operational police show that a significant role in this group was performed by Kamil and Wiesław K. D.

The recorded and reproduced (in accordance with Article 237 § 6 cpc) telephone conversations conducted from the telephones mentioned in the provisions of the District Court, constituted one of the cornerstones to charge the suspects, then bring an indictment for the crime provided for in Article 258 § 1 k.k. and Article 43 paragraph 1 and 3 of the Act of 24 April 1997 on counteracting drug addiction, to Kamil K., Wiesław D. and 9 other people.

By the decision dated 23 July 2009 (file no II K 687/05), the Regional Court in T. committed the prosecutor, in accordance with Article 397 § 1 of the Code of Criminal Procedure, to present within one month the proposal provided for in Article 237 § 2 of Code of Criminal Procedure, i.e. for the authorization to use in the subsequent process the telephone conversations recorded on the basis of the above mentioned provisions, in relation to accused Michał D., Bogumił J., Artur K., Michał L., Natalia M., Dariusz P., Zbigniew R., Henryk S. and T. Łukasz, as well as the use of the telephone calls of Kamil K. – registered under the provisions of the control of D. Wiesław as well as the use of the recorded telephone calls of Wiesław D. – registered under the provisions of the control of conversations of Kamil K.

On 3 August 2009, the prosecutor's request to this effect was submitted to the District Court in T.

By the decision of 25 September 2009, the Regional Court in T, indicating Article 237 § 2 ccp. and Article 237 § 3 paragraph 13 and 14 of the Code of Criminal Procedure as a basis of its ruling, issued a "subsequent agreement for the use for the purpose of the trial the incoming and outgoing telephone calls made by the defendants: Łukasz T., Henryk S., Bogumił J., Zbigniew R., Michał L, Artur K., Natalia M., Michał D. and Dariusz P." registered under the above provisions of this Court. In the support of the decision, the Regional Court stated that since the order issued earlier concern, as trustees of mobile telephones, Kamil K. and Wiesław D., and did not include the other defendants, there is a "need to broaden the personal control." In the Regional Court's view issuing the subsequent agreement is justified by an analogy to Article Paragraph 19. 3 (of the Police Act) and Article 237 § 2 ccp.

Thus, the Regional Court decided to give "subsequent agreement use in the process" conversations of Kamil K., registered under the provisions of the control and consolidation of calls by Wiesław D, and the conversations of Wiesław D. registered under the provisions of control and consolidation of calls made by Kamil K.

The defence counsel of the accused Wiesław D., and Łukasz T., and Michał L., and J. Bogumił, appealed against the above mentioned decision. According to the applicants, the time limits determined in Article 237 § 2 ccp cannot be extended. Therefore the interception should have ceased and the materials obtained should have been destroyed. Additionally, according to the legal article that is quoted, the subsequent agreement can only be given at the pre-trial phase and not at a later stage of the proceedings.

T. Regional Court, hearing the complaint, formulated the legal question quoted at the outset and transmitted it to the Supreme Court for decision.

The Prosecutor from the State Prosecutor's Office presented the proposal to the Supreme Court, and requested a denial of passing the resolution. According to the author of the National Prosecutor's request, providing the basic interpretation of Article 237 § 2 of

Code of Criminal Procedure, and in particular the reference to the nature of the dates indicated in this provision, would be justified if, indeed, the institution of a subsequent agreement for the consolidation and control of the telephone conversations, referred to in Article 237 § 2 ccp., was significant for the case mentioned.

This institution, as indicated in the proposal, in principle applies to the situation in which there are urgent reasons to request an order to intercept communications, and a prosecutor must, within three days, apply to the court for the approval of the decision. The court should give its decision within 5 days of the receipt of the application. The Regional Court and the District Court apparently confused the issue of the legality of giving an order to intercept somebody's telephone, i.e. meeting the formal requirements set out in Article 237 Code of Criminal Procedure, with the issue of the possibility of using evidence obtained from the interception under the provisions of the Code of Criminal Procedure.

In the proposal of the National Prosecutor's Office, it was stressed that, since the reason for ordering the interception, which follows directly from Article 237 § 1 of the Code of Criminal Procedure, is to "detect and obtain evidence for the ongoing proceedings", then, if the control and consolidation of the telephone calls met the formal requirements, the issue of using the record depends solely on the evaluation of the court whether they are relevant to the ongoing criminal proceedings or not.

In this case, the control and consolidation of the telephone calls included both the outgoing calls and incoming calls to the mobile telephones used by Kamil K. and Wiesław D. In the course of the investigation, the prosecutor had consistently opted for including in the range of control other media used by these persons. Since in principle at least two persons must participate in each call, it is clear that the record of the content of the incoming and outgoing calls must include statements of all callers as well. The statement that, in this case, only the recorded telephone calls of the persons listed in the ordinance authorizing the interception can be used as evidence, is not eligible. The absurdity of such an assumption is indeed shown in the case, namely in the Regional Court issuing, "a subsequent agreement to the use in the trial", the telephone calls by Kamil K., registered under the provisions of the control and recording of telephone calls by Wiesław D and the telephone calls by Wiesław D, registered on the basis of the provisions of the control and recording of telephone calls by Kamil K., despite the fact that earlier, in relation to each of these persons, an appropriate directive, approving the control and consolidation of both the incoming and outgoing telephone calls, was issued. In consequence of this assumption it would be necessary to issue separate "subsequent agreements" to use as evidence each of recorded telephone calls, since the other caller is a person not listed in the ordinance.

The Supreme Court then held.

The legal issue presented to the Supreme Court to resolve, does not meet the requirements set out in Article 441 § 1 ccp.

The institution called questions of law addressed to the Supreme Court, is an exception to the principle of the independence of the court of criminal jurisdiction and is limited to the issues (legal issues) emerging "while recognizing the appeal". In the jurisprudence of the Supreme Court, it is consistently assumed that an effective legal question needs to meet three conditions, namely, it must be a question of "legal" nature, requiring "a substantial interpretation of the law" and emerging "while hearing the appeal".

The third condition, namely the requirement for the emergence of the legal issue when hearing the appeal, means that the issue needs to be linked to a particular case in such a way that, the adjudication of the legal question would determine the adjudication of the appeal lodged in the particular case. However, at this point it is necessary to make a stipulation, expressed both in numerous verdicts and in writing, that an "interpretation of the Basic Law" in terms of Article 441 § 1 of the Code of Criminal Procedure, means the dismissal of doubts as to the legal issues, allowing a proper settlement of the particular case, but is not synonymous with an indication of how to adjudicate on that case. However, there must be a relation between the situation occurring in the proceedings of the case and the legal question. Additionally, the clarification of the doubts formulated in the question is necessary to adjudicate on case.

The question of law formulated by the District Court does not meet the last requirement. In the case under examination, there were no such doubts, as the District Court decided, when hearing the complaints lodged

against the order of the Regional Court of 25 September 2009 (file no II K 687/05) to issue a "subsequent consent" to use in the process the telephone calls recorded as a result of the interception provided for in Article 237 § 1 ccp..

The analysis of the substantive reasons of the decision of the District Court indicates that beyond the range of the interest of this court was the question whether it was significant for the case to judge on the subsequent agreement. The District Court did not consider whether there was in the process, a situation resulting from the process of collecting the evidence justifying the suspicion about the crime committed, ordered by the court, under Article 237 § 1 of the Code of Criminal Procedure, about the control and consolidation of the telephone calls made by the persons listed in the decision, which would form a basis for taking a decision according to the procedure provided for in Article 237 § 2 of the Code of Criminal Procedure.

The circumstances of the case prove that the evidence justifying the suspicion about the crime committed in the case involving crimes against Article 237 § 3 of the Code of Criminal Procedure, for which the Regional Court chose to express their views on the subsequent agreement, were not obtained through the application of the procedure provided for in Article 237 § 2 of the Code of Criminal Procedure, all the more, by the interception provided for in the Act on the Police. The analysis of the circumstances of the case does not indicate that the subject of the proceedings consisted of the evidence obtained against persons other than those included by the legal interception process, the scope of which was marked by the provisions of the court, or the evidence of crimes other than those which were meant to be detected by the applied interception. Also, from the order of the District Court, it is not clear whether the phrase "the control originally legalized by the court" refers to the checks provided for in Article 237 § 1 of the Code of Criminal Procedure, or how the statement "going beyond the question of the subjective limits of that control," regarding the results of the control, should be interpreted.

For these reasons, the answer to the doubts of the District Court as to the nature of the limits provided for in Article 237 § 2 of Code of Criminal Procedure, is not, in the realities of this case, of any relevance to the findings in relation to the complaints that are lodged.

In this case, the control and consolidation of the content of telephone conversations was ordered on the basis of the decision of the court, taken at the request of the prosecutor and after the initiation of the proceedings, therefore under the conditions provided for in Article 237 § 1 ccp. During the investigation, conducted in the case regarding the participation in the organized crime group in the illicit trade of narcotics, namely the offences specified in Article 258 § 1 of Code of Criminal Procedure and Article 43 paragraphs 1 and 2 of the Act of 24 April 1997 on Counteracting Drug Addiction, the procurator repeatedly appealed to the court to order control and consolidation of the contents of telephone conversations "in order to detect and obtain the evidence" for the ongoing proceedings, and the court in this regard based its decisions on Article 237 § 1 and 3, paragraphs 13 and 14 of the Code of Criminal Procedure. In the orders subsequently issued, the court indicated by name, the persons whose conversations – conducted with telephones listed in the provisions by their numbers– were to be subject to scrutiny, and their contents recorded. There is therefore no doubt that the telephone interception, ordered by the court after the initiation of preliminary proceedings in the case and for the offences listed in the directory enclosed, contained in Article 3 of the Code of Criminal Procedure § 237, was of a procedural nature provided for in Article 237 § 1 ccp.

The process of interception, when used in accordance with Article 237 Code of Criminal Procedure, is to "detect and obtain evidence for the proceedings or prevent the new crimes". Effective fulfilment of the processing tasks, to which this institution was established, follows, as is clear from the wording of § 1 of the provision, by control and consolidation of "the content of telephone conversations". Given the wording cited, it would be unjustified to assume that the laws adopted allow the control of statements of only one of the participants in the conversation, i.e., the statements only of the person who has been cited by the court in its order issued on the basis of Article 237 § 1 and 3 of the Code of Criminal Procedure. Such an interpretation would lead to an absurd situation in which in order to use the statements of such a caller, it would be necessary to obtain a separate subsequent agreement for each of the participants of the telephone call. Undoubtedly, the prosecutor is right, pointing out the fact, that in this case, the rules regarding interception

were illogically interpreted, which was reflected in the publication by the Regional Court – by analogy to Article 19, paragraph 3 of the Police Act and the Articles. 237 § 2 of Code of Criminal Procedure – of the subsequent agreement on using the telephone calls of the two persons listed in the separate provisions in the trial and included in the interception process under Article 23 7 § 1 Code of Criminal Procedure. The court gave its permission probably for the reason that in the particular provisions, each person was identified separately as making calls from the telephones listed by their numbers.

The wording of Article 237 § 1 Code of Criminal Procedure makes it clear that the purpose under that provision of the process of interception is to "detect and obtain evidence for the proceedings". **Thus, in a situation where the use of the interception meets the formal requirements, i.e. the decree of the control and consolidation of the contents of telephone calls is issued – after the initiation of preliminary proceedings – by the court, and the ongoing proceedings or well-founded fear of committing a new crime concerns an offence listed in the catalogue enclosed in Article 237 § 3 of the Code of Criminal Procedure, then the issue of the use in the ongoing criminal proceedings, the content consolidated in the interception process, depends solely on the court's assessment of whether they are relevant to this proceeding.**

Otherwise, namely when – according to the judgement of the court – the consolidated records are not relevant to criminal proceedings, the court orders them to be destroyed (Article 238 § 3 of cpc.). However, completely unauthorized, would be to recognize that in such a situation the assessment of the significance or the lack of suitability of the consolidated records to the criminal proceedings, should be expressed in the granting or refusal of any "subsequent consent".

The institution of a subsequent consent of the court to order an investigation and consolidation of telephone conversations is provided for in Article 237 § 2 cpc. This provision allows, also during the preparatory proceedings, to order a control and consolidation of telephone calls by the prosecutor, but only "in cases of urgency". As a condition of using the evidence obtained in such circumstances, it was provided in Articles 23 7 § 2 ccp. that the prosecutor must appeal to the court within 3 days in order to obtain the approval of his decision and then must obtain the court's approval of this decision within 5 days. The amendment of Article 237 § 2 of the Code of Criminal Procedure, imposing on the court an obligation to hear the request of the Prosecutor within five days, and also imposing an obligation on the prosecutor to apply to the court in order to obtain its approval of the decision within three days, took place in 2003 (an amendment introduced by the Act of 10 January 2003 to amend the Code of Criminal Procedure Law, the Law Rules for implementing the Code of Criminal Procedure, Law on Witness Protection and the Law on Classified Information Acts. Laws No. 17, item. 155). These periods can be calculated under the terms provided for in Article 123 ccp and, the current version of the regulation, clearly shows how they should be counted. It seems justified to calculate the expiry of the three-day time limit, defined in the article, from the moment of the order of the interception issued by the prosecutor, and the five-day deadline on the possible acceptance of that order by the court, from the moment the request is received by the court.

Both in the judicial practice as well as in the literature there are no controversies regarding the nature of the periods referred to in Article 237 § 2 ccp.

The Supreme Court ruled, regarding the nature of the period given for the evaluation of the decision of the prosecutor by a court, in its Judgement of 3 December 2008, V CC 195/08 (OSNKW 2009, z. 2, pos. 17) that "the approval by the court of the order of the prosecutor, referred to in Article 237 § 2 of the Code of Criminal Procedure, but with an infringement of the time limit indicated in this provision to decide on such an approval, does not make the control and the consolidation of telephone calls illegal after the deadline and does not have the effects specified in Articles. 238 § 3 in fine, Code of Criminal Procedure, which apply only to the order of the court, regarding the court's refusal to approve the earlier order of the prosecutor to make such a control, and regardless of whether the refusal occurred before or after the expiry, of this period."

The members of the Supreme Court adjudicating in this case share this view. The content of the Code of Criminal Procedure does not indicate that the time limits of 3 and 5 days set out in Article 237 § 2 ccp. were of a different nature than the indicative, and certainly not of imperative or mandatory nature. The warranty considerations, however, oblige the prosecutor to strictly comply with the statutory deadline to submit to the court the application for the approval of his decision. In case of failure to comply with the obligation

to appeal to the court, the interception should be immediately stopped and the materials obtained destroyed – as in the case where persecutor's decision is not approved by the court. In the literature, it is generally assumed that, as the provisions of Chapter 26 of the Code of Criminal Procedure do not specify the effect in case of an event when the court does not pronounce its decision in the time limit, i.e. if the court failed to approve the decision of the prosecutor within five days, the interception is still legal and, if approved after that time limit, will be effective.

This view has more supporters among legal scholars (cf. T. Grzegorczyk, Code of Criminal Procedure, Commentary, 2008, p. 520; M. Klejnowska, Accused as a personal source of information about crime, 2004, p. 157; K. Dudek, Control and interception of correspondence in Polish criminal procedure, 1998, p. 69; K. Eichstaedt, Court operations in the preparatory proceedings in the Polish criminal law, 2008, p. 48), than the view that in case the court does not meet the five-day time limit to approve the decision of the persecutor, then the interception should be stopped (cf. P. Hofmański, E. Sadzik, K. Zgryzek, Code of Criminal Procedure, commentary, 2004, Vol I, p. 968-969).

Therefore, it is justified to claim that the court's decision to approve the order of the persecutor issued after 5 days of receipt of the application to the court, does not result in the ineffectiveness of the interception ordered by the prosecutor, on the basis of Articles 23 paragraph 7 § 2 of Code of Criminal Procedure, and the material consolidated may be used as a valuable evidence.

However, these observations are, in relation to the present case, only of marginal character, since in the light of the quoted circumstances the settlement of the legal issue formulated by the District Court is not relevant in the assessment of the situation occurring in the process.

For all these reasons, the Supreme Court decided as quoted at the outset.

The editor thanks Edyta Sieminska for checking and correcting the translation of this judgment.

Commentary

The decision of the Supreme Court not to give its opinion was based on procedural ground, but nevertheless the court in passing expressed its position on the problem raised.

The uncertainties existed since the decision of the Supreme Court from 26 April 2007 (I KZP 6/07, published in OSNKW 2007, nr 5, poz. 37). In decision I KZP 6/07, the Supreme Court indicated that when the materials from interception are to be used in relation to persons or crimes not indicated in the court order authorising the interception (but crimes listed in article 237 § 3 ccp), the subsequent permission of the court on such use is necessary. It often happens in situations when new participants in the crime are found and charged, or new charges may be brought against the suspects on the base of the records. In the view of the Supreme Court, article 237 § 2 ccp shall be applied in such situations accordingly. Scholars and practitioners commented on the view of the Supreme Court widely in Poland. Some accepted the view, others criticized it. Undoubtedly while expressing the view the Supreme Court had in mind the procedural guarantees and avoidance of uncontrolled (unlawful) interceptions, but the legal basis for the view were weak, and the Supreme Court crossed the line between interpretation of the law and its creation, which is strictly observed in civil law countries.

The view of the Supreme Court in case 6/07 generated some important problems. One of them is the time for the subsequent permission. According to Article 237 § 2 ccp, the time limit for the public prosecutor to apply for the court decision on interception is 3 days. In most cases, where subsequent permission is sought, it is not possible to obey the time limit. Normally, after the conversations are recorded it takes months for analysis and further investigations of new crimes and new suspects. Therefore the problem was, if the time limit is to be obeyed and if so, how it should be counted (from which moment).

In the opinion of the judges of the Supreme Court in this case, the subsequent permission was not necessary, and it is for the trial court to decide if the records are of relevance to the proceedings. This view was also taken by the author in his commentary to the decision in case 6/07 (see A. Lach, B. Sitkiewicz, Glosa do postanowienia Sądu Najwyższego z dnia 26 kwietnia 2007 r., sygn. I KZP 6/07, Prokuratura i Prawo 2007, nr 10, p. 146 – 152). It is supported by interpretation of article 237 § 2 ccp and lack of reasons to apply for the subsequent permission each time a new participant of the crime or new crime is discovered. Of course, there is some risk of unlawful use of interception, but it does not seem that the subsequent permission could be an

effective remedy against it. Moreover, if such permission is necessary in the criminal procedure, it is the role of the parliament to change the ccp and introduce the requirement. The initiative to do it was taken by the Ministry of Justice, but the act has not been adopted yet.

Commentary by Dr Arkadiusz Lach, who is a member of the editorial board