

CASE NOTE: SLOVENIA

CASE CITATION:

I Ips 7/2009

NAME AND LEVEL OF COURT:

Supreme Court of the Republic of Slovenia

DATE OF DECISION:

4 June 2009***Mobile telephone and SIM card; data of the incoming and outgoing calls of the appellants telephone number and of the base stations; whether illegally obtained evidence*****Facts**

The appellant S.V. and others were convicted by the first instance criminal court for continuing to commit the criminal offence of crossing the border of the Republic of Slovenia in accordance with the second and third paragraph of article 311 of the Penal Code of the Republic of Slovenia. S.V. was sentenced to three years and ten months imprisonment and a fine of 1,250 EUR. The court seized his two mobile telephones and a SIM card (Subscriber Identity Module). The court of the second instance dismissed the appeal of plaintiff's counsel as unfounded, affirmed the judgement of the court of the first instance and exempted S.V. from paying legal charges.

Counsel for S.V. filed a request for protection of legality against the final judgement, due to a material violation of the procedural provisions of the criminal procedure in accordance with the provisions of article 371, paragraph 1, subparagraphs 8 and 11 of the Criminal Procedure Act (CPA) and proposed to the Supreme Court that the judgement of the first instance court be varied in such a manner as to acquit the person convicted of the charge, to reverse the judgements, and to reinstate the case to the first instance court.

The grounds for the request for protection of legality are set out in Article 371 (1) (8, 11) of the CPA:

8) če se sodba opira na dokaz, ki je bil pridobljen s kršitvijo z ustavo določenih človekovih pravic in temeljnih svoboščin ali na dokaz, na katerega se po določbah tega zakona sodba ne more opirati, ali na dokaz, ki je bil pridobljen na podlagi takega nedovoljenega dokaza

8) where the judgement rests on evidence obtained in

violation of constitutionally granted human rights and fundamental freedoms, or on evidence on which, under the provisions of this Act, a judgement may not rest, or on evidence obtained on the basis of such inadmissible evidence.

11) če je izrek sodbe nerazumljiv, če nasprotuje sam sebi ali razlogom sodbe; ali če sodba sploh nima razlogov ali če v njej niso navedeni razlogi o odločilnih dejstvih ali so ti razlogi popolnoma nejasni ali v precejšnji meri s seboj v nasprotju; ali če je o odločilnih dejstvih precejšnje nasprotje med tem, kar se navaja v razlogih sodbe o vsebini listin ali zapisnikov o izpovedbah v postopku, in med samimi temi listinami oziroma zapisniki.

11) where the operative part of the judgement is incomprehensible or contradictory in itself or in contradiction with the reasons of the judgement; where the judgement lacks grounds altogether or reasons relating to crucial facts are not indicated or are completely vague or considerably inconsistent in themselves; or where there is considerable discrepancy between the statement of grounds relating to the content of documents or the records of statements given in the course of proceedings on the one hand and these documents or records themselves on the other.

The Supreme Court public prosecutor M.V. believed that the request for the protection of legality was unfounded, and he suggested the Supreme Court should dismiss it. The Supreme Court sent the Supreme Court public prosecutor's answer to the appellant, who had not stated his opinion, and to his counsel, who stated that he confirmed the grounds of appeal set out in the request for protection of legality. The request for protection of legality indicated that the data regarding the base stations and repeaters for mobile telephony, which was the basis for the judgement of conviction, represented illegally obtained evidence and therefore

represented a violation of the following articles of the Slovene Constitution:

35. člen

(varstvo pravic zasebnosti in osebnostnih pravic)

Zagotovljena je nedotakljivost človekove telesne in duševne celovitosti, njegove zasebnosti ter osebnostnih pravic.

Article 35

(Protection of the Rights to Privacy and Personality Rights)

The inviolability of the physical and mental integrity of every person and his privacy and personality rights shall be guaranteed.

38. člen

(varstvo osebnih podatkov)

Zagotovljeno je varstvo osebnih podatkov. Prepovedana je uporaba osebnih podatkov v nasprotju z namenom njihovega zbiranja.

Zbiranje, obdelovanje, namen uporabe, nadzor in varstvo tajnosti osebnih podatkov določa zakon.

Vsakdo ima pravico seznaniti se z zbranimi osebnimi podatki, ki se nanašajo nanj, in pravico do sodnega varstva ob njihovi zlorabi.

Article 38

(Protection of Personal Data)

The protection of personal data shall be guaranteed. The use of personal data contrary to the purpose for which it was collected is prohibited.

The collection, processing, designated use, supervision, and protection of the confidentiality of personal data shall be provided by law.

Everyone has the right of access to the collected personal data that relates to him and the right to

judicial protection in the event of any abuse of such data.

According to the appellant, mobile telephone operators should not save data regarding the movements of the mobile telephone (and by implication, the movements of individuals), nor should they record such details to enable the movements of the mobile telephone to be linked to the owner. In this case, the mobile telephone operator saved the data of the movements of S.V.'s mobile telephone for the month of September 2003. However, the injunctions of the first instance court were dated 13 October 2003 and 21 November 2003, which was later than the time when the operator began to record the data on the movements of the mobile telephone. The appellant argued that this action was in violation of his human rights and fundamental freedoms.

Decision of the Supreme Court

The court of the second instance concluded that the first instance court legally obtained data of the incoming and outgoing calls of the appellants telephone number and of the base stations based on articles 166(1), 142(1), 143(1) of the CPA; therefore this did not represent illegally obtained evidence. The Supreme Court confirmed the conclusion of the court of the second instance, and added that it had already decided this matter in the similar case in judgements No. I Ips 292/2004 and I Ips 264/2005 of 16 March 2006. In the cited judgements, the Supreme Court explained that confidentiality and secrecy according to the provision of article 128(1) of the Telecommunications Act (Official Gazette RS, No. 30/2001, 'ZTel-1') referred to the content of the messages transferred through the telecommunication networks or when using telecommunication services; to the facts and circumstances in which the messages were transferred; to the fact whether someone was or had been involved at this process, and to the facts and circumstances of the unsuccessful attempts of connecting a call. Mobile telephone operators are, according to the provisions of article 130(1) of the Telecommunications Act and in connection with the CPA, obliged to report to the court information regarding their customers, messages, circumstances and facts of the telecommunications for individual cases in a methodical way, including the scope and the duration as determined in the competent court's injunction.

The mere automatic mechanical record of the call

does not encroach upon the constitutionally provided right to privacy, it can only be violated in the case of illegal data processing. Acquiring the records of connections made to and from a telephone based on an order from a court does not invade the secrecy of conversations or the privacy of the person using the mobile telephone, unless such information is not connected with person's presence at the specific place or specific time in connection with the execution of criminal offences. Encroaching on a person's freedom of communicating (article 37 of the Slovene Constitution) is admissible if it is determined by law, or by order of a court, if the time of the encroachment is explicitly limited, if it is necessary for the course of criminal proceedings, or for the safety of the state.

In this case, the investigating judge issued an order to the mobile telephone operators for the gathering of information regarding incoming and outgoing telephone calls for certain telephone numbers, and mobile telephone base station reports for a defined period, together with information regarding ownership and customers, in accordance with the provisions of article 150 of the CPA (OJ RS, No.116/2003). The order explained that this encroachment was necessary for the clarification of the facts and circumstances of the crimes under investigation. All the provisions for obtaining the information had been met. The Supreme Court established that information relating to the calls and base station reports did not represent inadmissible evidence and therefore there was no material violation of the criminal procedural provisions.

The appellant indicated that conclusion issued by the investigating judge was based on records of telephone calls obtained according to an order of the Zagreb (Croatia) County Court. These records were inadmissible evidence, since they were obtained according to the order of a foreign court. The Supreme Court determined that the appellant did not specifically explain why this evidence from a foreign court should be inadmissible and as such violated the law. The court rejected this argument. The Supreme Court did not reach a decision on the alleged violations of the provisions of the CPA and Penal Code; it refused the request for the protection of legality based on article 425 of the CPA as unfounded.

Commentary

The decision of the Constitutional Court in case Up-106/05 of 2 October 2008 regarding the acquisition of

data from a SIM card set the basis for the future treatment of the encroachment of the privacy of communication by state authorities. The encroachment of privacy is admissible only if it is determined by law, by a court, if the time of encroachment is explicitly limited and if it is necessary for the course of the criminal proceedings or for the safety of the state. The privacy of communications covers the content of the message. When using a mobile telephone, however, the content of the conversation and the other data connected to the conversation is the subject of legal protection. The Constitutional Court additionally supported its decision by the practice of the European Court of Human Rights (ECHR). The case of *Malone v United Kingdom* (1985) 7 E.H.R.R. 14 determined that where a person was led to understand that there was an expectation of privacy, and telephone calls were subsequently intercepted, there was a breach of rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In the present case, a judge ordered the communications data to be obtained, which meant the request for the protection of legality was not founded, since the investigating judge issued the injunction for the appellants SIM card. In the future, the regulations concerning the seizure (especially CPA) of electronic devices, such as computers, handheld PCs and mobile telephones that can also be used for communications will have to be adjusted to modern techniques. When applying the provisions of article 37 of the Constitution of the Republic of Slovenia, which provides a high degree of protection of the right of the privacy of communication, it is also necessary to distinguish between types of information and the source the data is coming from. Memory cards of modern mobile telephones save a range of types of data that has no connection to communications, such as photographs and music. For this type of data, it is necessary to apply standards relating to PC disks and drives.

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