CASE TRANSLATION: POLAND

CASE CITATION:
Sygn. akt I KZP 39/08

NAME AND LEVEL OF COURT:
Sąd Najwyższy Rzeczypospolitej Polskiej (Polish Supreme Court)

DATE OF DECISION:
26 March 2009

Electronic document; secure electronic signature (digital signature); criminal procedure; Ustawa z dnia 18 września 2001 r. o podpisie elektronicznym (Law of 2001.09.18 on electronic signature); legal effect

Case reference number I KZP 39/08

COURT RULING

Date: March 26, 2009

The Supreme Court consisting of:

Presiding judge: Judge of the Supreme Court Wiesław Kozielewicz
Judge of the Supreme Court Dariusz Święcicki (reporting judge)
Judge of the Court of Appeals assigned to the Supreme Court Eugeniusz Wildowicz

Court reporter: Łukasz Majewski
with the participation of the Public Prosecutor of the State Prosecutor's Office Wincenty Grzeszczyk

in the case of Piotr B.
having examined in the Penal Chamber at a hearing, of the case reference number IV.1.Waz 502/08, forwarded for consideration by the Regional Court in K., on the basis of the article 441 § 1 of the code of penal procedure by virtue of the decision as of December 11, 2008, of a legal issue requiring a basic interpretation of an Act

> "Does the sending of a procedural writ to a court – an appeal in a form of an electronic document provided with a safe electronic signature verified by the valid qualified certificate referred to in art. 3 point 2 of the Act of September 18, 2001 on electronic signature ((Journal of Laws 2001, vol. 130, item 1450 with amendments) comply with the formal request of an appeal as a procedural writ in view of the wording of art. 5 par 2 of the aforementioned Act, resulting from art. 105 § 1 of the Petty Offences Procedure Code and art. 119 § 1 of the Code of Penal Procedure in conjunction with article 38 § 1 of the Petty Offences Procedure Code".

has decided to refuse to answer the above mentioned legal question

BASIS

The legal issue presented to the Supreme Court has emerged from the following procedural situation:

The District Court [...] in K, X Magistrate's Division, upon the judgement of September 3, 2008, found Piotr B. guilty of misdemeanor offences committed under art. 90 of the petty offences code and art. 65 § 2 of the petty offences code, and under the provisions of art. 9 § 2 of the petty offences code imposed the penalty of fine of 300 PLN. On September 5, the defendant filed a motion to prepare and serve the judgement's basis regarding what took place on October 7, 2008. On October 14, 2008, a document in electronic form addressed to the Regional Court in K. through the intermediary action of the District Court, pointing out Piotr B. as the author, containing the case reference number, date of October 14, 2008 and an indication, that it was the appeal of the sentence "as it was passed as a result of numerous offences", arrived in the electronic mailbox of the District Court [...] in K. It resulted from the official acknowledgement of receipt of the submission, that the document sent in an electronic form was provided with

a safe electronic signature verified by the valid qualified certificate in accordance with the requirement of the Act of September 18, 2001 regarding electronic signature ((Journal of Laws, vol. 130, item 1450 with amendments). The contents of that document in the form of an electronic print-out have been included in the files of the case. On October 23, 2008, the Chairperson of the Magistrate's Division of the District Court [...] in K, having found that the appeal met the formal requirements, ordered its acceptance and subsequently the files were sent to the Regional Court in K. On November 25, 2008, an authorized judge of the Regional Court issued an order on determining an appeal hearing. During that hearing, the Regional Court in K. began to entertain doubts which it decided to pass on to the Supreme Court, and formulated the legal question set out above. On the basis of the decision, attention was paid to the fact that, apart from a formal defect in the appeal in the absence of the demands of a complainant, a controversial point in the opinion of the Court was the issue as to whether the filing of an appeal in the form of an electronic document satisfies the requirements resulting from art. 105 § 1 of the petty offences procedure code of a written form of that appeal remedy, and that, compared to the contents of art. 119 § 1 of the code of penal procedure in conjunction with art. 38 § 1 of the petty offences procedure code. Therefore the Regional Court, noting the necessity to require the complainant to remove the formal defect in the appeal by specifying his demands, also considered the grounds justifying ordering him to produce the missing written form of an appeal remedy. As the Regional Court discovered, that only when the Supreme Court decides on a legal issue would it be possible to define the factual scope of the formal defects of the appeal, and thus requiring the defendant to remove them. However, in the opinion of the Regional Court, there were no doubts that in the light of art. 105 § 1 of the petty offences procedure code there existed the requirement of retaining a written form of an appeal, as well as, according to art. 119 § 1 of the code of penal procedure, the need arose to personally sign the appeal, with the exception pointed out in article 119 § 2 of the code of penal procedure. In the opinion of the Regional Court, the contents of art. 5 paragraph 2 of the Act on electronic signature raised doubts in respect of interpretation, namely whether this rule covered the scope of its regulation proceedings in petty offence cases due to provisions of art. 105 § 1 of the petty offences procedure code and art. 119 § 1 of the code of penal procedure.

The Public Prosecutor of the State Prosecutor's Office filed a motion to refuse to answer the legal question on the grounds of non-fulfillment of the prerequisites from art. 441 § 1 of the code of penal procedure.

The Court considered the following:

The opinion of the Public Prosecutor of the State Prosecutor's Office was justified, because in the case under consideration the conditions to respond to the legal question posed were not met. There was no need to repeat the prerequisites presented in the doctrine and jurisprudence of the Supreme Court, from the fulfillment of which the preliminary rulling depended on (see: R.A. Stefański, Institution of legal questions to the Supreme Court in penal cases, Cracow 2001, page 252 and following). For the purposes of this case, it is sufficient to recall that one of them is the existence of the relationship between the legal question posed and the decision of the court of appeal in a particular case. In other words, the content of the court's decision has to depend on the answer provided in connection with the appeal remedy to be considered. So, a legal question cannot apply to a legal problem that arose while considering an appeal remedy and be aimed at explaining doubts, even justified ones but not connected with the subject matter of the settlement (cf. R.A. Stefański, Instytucja..., op.cit., pp. 352-362 and also justification of the decision of the Supreme Court of July 26, 2007, I KZP 20/07, OSNKW 2007, vol 9, item, 63). The legal question of the Regional Court in K. does not satisfy the indicated requirement. In the current legal situation of the proceedings, the Court did not consider an appeal remedy brought against the procedural decision on the refusal to approve the appeal (art. 429 of the code of penal procedure in conjunction with article 109 § 2 of the petty offences procedure code) or to leave it without its consideration (article 430 of the code of penal procedure in conjunction with article 109 § 2 of the petty offences procedure code), but began to entertain doubts whether, on account of drawing up the appeal in the form of an electronic document, it was accepted reasonably and then sent to the appeal proceedings. Thus the legal question posed concerns the issue, the explanation of which has no influence on the factual consideration of the appeal, but is connected with the form of lodging of an appeal remedy. Therefore, the Supreme Court refused to answer the legal question.

Nevertheless, noting the importance for the judicial experience of the problem that has been raised, certain remarks have to be made. From the contents of the question and its rationale, the issue concerns the opportunity to lodge procedural writs through e-mail both in penal and petty offences procedure provisions of which are applied in petty offences cases (art. 1 § 2 of the petty offences procedure code). In the case under consideration, it concerns the filing of the appeal. This problem arose in connection with the coming into force of the Act of September 18, 2001 on electronic signature (Journal of Laws No 130, item 1450 – in short a.e.s), as article 5 paragraph 2 of that Act introduces what is called the rule of equivalence, according to which a document in an electronic form provided with a safe electronic signature verified by a valid qualified certificate has the same legal effects as a document provided with somebody's personal signature, unless separate regulations provide otherwise. An electronic signature is the data in an electronic form that together with other data has been attached to or with which they are logically related, and are used to identify a person providing an electronic signature (art. 3 point 1 of a.e.s), while a safe electronic signature should fulfill the conditions specified in art. 3 point 2a-c of a.e.s. It is pointed out in publications, that an electronic signature may, apart from legal applications, also be used in pleadings, but restrictions concerning the replacement of traditional documents by documents signed with a safe electronic signature may result from the lack of opportunities to apply the electronic form due to the ban resulting from special regulations or from the lack of appropriate regulations (cf. R. Podpłofski, P.Popis, Eectronic Signature. Commentary, Warsaw 2004, pp. 167-169, J. Janowski, Electronic signature in legal transactions, Warsaw 2007, p.269 and next ones, J. Rzymowski, M. Kamiński, Electronic signature, Commentary, Łódź 2992, pp. 19-21). Restrictions resulting from special provisions were introduced by the law-maker, for example in art. 125 par. 2 of the code of civil procedure. However, restrictions caused by the lack of appropriate provisions are connected with the obligation to implement the provisions of the act on electronic signature, that the law-maker imposed on the public authority in article 58 item 2 of the act on electronic signature, as by May 1, 2008 these authorities should make it possible for the recipients of certification services to lodge applications and motions as well as other activities in an electronic form in cases, when the provisions of law require them to be lodged in a specified form or in accordance with a determined pattern. In civil procedure, even before the entering into force of the act on electronic signature, a regulation was introduced that the procedural letter should be filed on official forms or electronic IT carriers only when a special provision shall so provide (art. 125 § 2 of the code of civil procedure in the wording granted under the act of May 24, 2000 on the change to the act - Code of civil procedure (...) – Journal of Laws no 48, item 554). In the subsequent amendments to that provision (act of September 4, 2008 on the change to acts in order to standardize the IT terminology – Journal of Laws no 171, item 1056 and the act of January 9, 2009 on the change to the act - Code of civil procedure and some other acts – Journal of Laws no 26, item 156), so at the time when the act on electronic signature was binding and effective, the law-maker did not change the rule that a procedural writ might be lodged electronically when a special provision permits to do so. However, he introduced a condition that such a writ should be provided with a safe electronic signature within the meaning of the art. 3 item 1 of the act on electronic signature (art. 126 § 5 of the code of civil procedure – added by virtue of the act of January 9, 2009). Similarly, in the code of the administrative procedure, before the act on electronic signature became valid and binding, in art. 63 § 1 of the code of administrative procedure (after the amendment in the act dated December 29, 1998 on the change of some acts as a result of implementation of the systemic reform of the State – Journal of Laws no 162 item 1126) the opportunity to file applications through e-mail was introduced, where by virtue of the act of February 17, 2005 on the computerization of activities of entities performing public tasks (Journal of Laws No 64, item 565) to art. 63 paragraph 3a was added according to which, an application lodged in the form of an electronic document should be provided with a safe electronic signature verified by the valid qualified certificate in accordance with the principles stipulated in the provisions on an electronic signature (§ 3a item 1). Similar regulation in the proceedings before administrative courts (act of August 30, 2002, Law on proceedings before administrative courts – Journal of Laws No 153, item 1270 with amendments) were not introduced. Therefore, in the case law of the administrative courts, the opinion was expressed that in the court and administrative proceedings, a party cannot effectively lodge a procedural writ electronically (see decision of the Supreme Administrative Court of September 10, 2008, I OZ 673/08, Lex no 460225).

In petty offences procedures, a law-maker allows for the delivery of a letter through e-mail (art. 132 § 3 of the code of penal procedure in conjunction with art. 38 § 1 of the petty offences procedure code – this regulation was introduced by the act of January 10, 2003 on the change of the act (...) – Journal of Laws No 17, item 155). However, the regulations concerning deliveries included in chapter 15 of the code of penal procedure (applied to petty offences procedure in art. 38 § 1 of the petty offences procedure code) are addressed to procedural authorities and not to parties, so they do not refer to the rules of lodging litigation letters by a party (see justification of the resolution of the Supreme Court of January 20, 2005, I KZP 28/04, OSNKW 2005, vol, 1 item 1).

Moreover it should be noted, that the act of February 17, 2005 on the computerization of activities of entities performing public functions (Journal of Laws No 64, item 565) also covering courts within its subjective scope (art. 2 par. 1 item 1), imposes the requirement of providing opportunities for the exchange of electronic documents related to the arrangement of issues remaining within the scope of activities of a public entity with the use of information carriers of data or means of electronic communication (art. 16 par. 1 of the act). Such an obligation is realized among others by access to the electronic mailbox (see the ordinance of the Prime Minister of September 29, 2005 concerning technical and organizational conditions of delivering electronic documents to public entities – Journal of Laws no 200 ite, 1651). It should, however, be considered that the electronic form of exchange of documents (art. 1 item 6 of the act) does not refer to procedural activities in court proceedings, as the term "exchange of information" related to the arrangement of issues should be associated with the activities of the court administration and not with procedural ones, in that procedural laws do not use the term "information". So it should be assumed that the term "court" applied in that act means a court in the organizational and systemic meaning, and not in the procedural meaning (see G. Szpor, Cz. Martysz, K. Wojsyk, Act on computerization of activities of performing public tasks. Commentary, Warsaw 2007, p. 16).

It results from the specification of legal acts as presented concerning the issue under consideration, that in spite of the introduction, by the act on electronic signature, of the rule of equivalence of legal effects of electronic documents with traditional ones (art. 5 item 2 of the act on electronic signature), the law-maker has decided that the issues of admissibility to lodge procedural writs electronically is regulated separately in the procedural acts, which also introduces the requirement to use electronic signatures. There are no regulations in the code of procedure in cases of petty offences, nor in the code of penal procedure. In proceedings in cases of petty offence, in accordance with art. 116 of the code of penal procedure in conjunction with art. 38 § 1 of the petty offences procedure code, parties have to make procedural declarations in writing or orally to the minutes. Appeals and complaints are lodged in writing, but complaints may also be lodged orally to the minutes of the court session or sitting (art. 105 § 1 and the art. 108 of the petty offences procedure code) where a procedural writ should bear a signature of the person lodging it (art 119 § 1 item 4 of the code of penal procedure in conjunction with art. 38 § 1 of the petty offences procedure code). The contents of these provisions leads to an unambiguous conclusion, that an appeal has to have a form of a written document provided with handwritten signature of a person drawing it up (see reasons of the resolution of the Supreme Court of December 20, 2006, I KZP 29/06, OSNKW 2007, vol, 1 item 1). So, in the current legal circumstances it should be assumed, following the directive of the external systemic interpretation of ensuring coherence of the legal system within the scope of approved legal solutions, that the lack both in the petty offences procedure code as well as in the code of penal procedure of appropriate regulations concerning the lodging of procedural writs electronically, constitutes an axiological gap what should be interpreted as a negative regulation (see L. Morawski, Interpretation in courts' jurisprudence. Commentary, Toruń 2002, p. 193). The act on electronic signature regulates a completely new area in Polish law that is technically advanced, so the introduction of new solutions included in the law to individual procedures requires an appropriate preparation. Therefore, the law-maker, in spite of the contents of art. 5 item 2 of the act on electronic signature, points out the scope of the application of an electronic document only by way of additional separate legal acts. In the petty offences procedure, as well as in penal procedure, there is a difference between what the law ought to be, as opposed to what the law is, and this issue requires regulation (see K. Woźniewski, gloss to the resolution of the Supreme Court of December 20, 2006, I KZP 29/06,

Gdańskie Studia Prawnicze 2007, no 4, p. 149 and following).

Summing up the foregoing deliberations, the opinion should be expressed that the procedural declaration of a party sent in a form of an electronic document in accordance with the provisions of the act of September 18, 2001 on electronic signature (Journal of Laws no 130 item 1450 with amendments) does not produce a legal effect in the form of lodging an appeal, as both in the petty offences procedure as well as in penal procedure, such a form of legal action has not been stipulated. From the contents of art. 105 § 1 of the petty offences procedure code and art. 116 of the code of penal procedure in conjunction with art. 38 § 1 of the petty offences procedure code, an appeal can only be lodged exclusively in writing, and as far as procedural writs are concerned, art. 120 § 1 of the code of penal procedure is applied. So, when a party has lodged an appeal in the form of an electronic document, there are no grounds to appeal in the absence of the lack of the written form. Another form of appealing against the judgment applied by the party cannot be regarded as lodging of the appeal (see T. Grzegorczyk, Commentary to the Code of Penal Procedure., Warsaw 2008, p. 905, W. Grzeszczyk, Commentary to the Code of Penal Procedure., Warsaw 2008, p. 437, S. Zabłocki [in:] Commentary to the Code of Penal Procedure., 2nd edition, edited by R.A. Stefański, S. Zabłocki, vol. III, Warsaw 2004, p. 42). However, the opportunity to contend for the restoration of a term to lodge an appeal because of an erroneous opinion on the effectiveness of a legal transaction performed in a form different than that legally required, is a separate issue (art. 126 § 1 of the code of penal procedure in conjunction with art. 38 § 1 of the petty offences procedure code).

Considering the above, the Supreme Court has decided, as set forth, the dispositive part of the decision.[1]

Commentary

The Supreme Court expressed an opinion that despite the wording of article 5 section 2 of the 2001 Act, which equates a secure electronic signature with handwritten signature, the appeal was not acceptable:

Art. 5.

2. Dane w postaci elektronicznej opatrzone bezpiecznym podpisem elektronicznym weryfikowanym przy pomocy ważnego kwalifikowanego certyfikatu są równoważne pod względem skutków prawnych dokumentom opatrzonym podpisami własnoręcznymi, chyba że przepisy odrębne stanowią inaczej.

Article 5

2. The electronic data signed with a secure electronic signature verified with the use of a valid qualified certificate shall have legal effects equivalent to documents signed with a hand-written signature, unless separate provisions provide otherwise.

The use of an electronic signature in criminal procedure is not possible because there are no relevant regulations in place. This was treated by the Supreme Court as a legal gap, which indicated the intent of the legislator not to permit the use of electronic signatures in criminal proceedings. Where an appeal is sent electronically as it was in this case, it is without any legal effect and no further steps are to be taken.

In this case, the Supreme Court refused to answer the question referred by a lower court on procedural grounds, but nevertheless expressed its opinion. The opinion may raise doubts, because according to the decision, and despite the wording of article 5 of the 2001 act, a separate regulation concerning electronic signature is required for every procedure. This seems to be in contrary with the rule of equivalency contained in art 5. Moreover, even if the above mentioned point of view of the Supreme Court is correct, it is disputable on the grounds that the sender of an appeal in electronic form should be able to correct the appeal within seven days (see the commentary to case I KZP 29/06 in Volume 5 (2008) 147 - 148 in respect of a previous ruling of the Supreme Court concerning an appeal sent by facsimile transmission). In this case the Supreme Court expressed different opinion than in the case decided in 2006 which concerned an appeal sent by facsimile transmission.

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

[1] *Judgments or decisions in Poland have two parts: the ruling (część dyspozytywna) and the reasons (część motywacyjna). The dispositive part of the decision is what the court decided in the case.*