

Municipal Court of Prishtinë/Priština

P Nr. 2397/09

14 April 2010

IN THE NAME OF THE PEOPLE

The EULEX Judge Francesco Florit, with the assistance of court recorder Jacqueline Ryan in the criminal case against the defendants:

Plamen Dimitrov, born 8 April 1978 in Sofia, Bulgaria, father's name Ivan, residing in Mladost street – 1, BL 36, ET2 Sofia, Bulgaria, Bulgarian national, in detention since 18 September 2009;

Martin Ivanov, born 8 January 1984 in Sofia, Bulgaria, father's name Kiril, residing in Mladost street, B36 V9, second floor, Sofia, Bulgaria, Bulgarian national, in detention since 18 September 2009;

Charged with the summary indictment filed with the Municipal Court of Prishtinë/Priština on 21 December 2009 and amended orally on 14 April 2010 for committing the criminal offence of

Attempted Intrusion into Computer System in Co-perpetration, pursuant to Article 264 (1) and Article 20 and 23 of the Criminal Code of Kosovo;

after the public main trial held on 19 February 2010, 3 March 2010, 31 March 2010 and 14 April 2010 in the presence of the Public Prosecutor Haki Gecaj, the Accused Plamen Dimitrov and Martin Ivanov and their Defence Counsels Osman Havolli and Vahid Halili, the representative of the injured party, Pro Credit Bank, Tomë Gashi, publicly announces on 14 April 2010 the following:

JUDGMENT

The defendants **Plamen Dimitrov** and **Martin Ivanov**, with personal data as above,

are found guilty of the criminal act of **Attempted Intrusion into Computer System in Co-perpetration**, pursuant to Article 264 (1) and Article 20 and 23 of the Criminal Code of Kosovo;

Because:

On 18th of September 2009 the defendants in co-perpetration around 18:40 hrs in the Bill Clinton street in Prishtinë/Priština with the intent to obtain unlawful material benefit, have attempted to enter in the computer system of the Pro-Credit Bank and Raiffeisen Bank in Kosovo. Specifically, they prepared themselves with modified mini camera to be placed in the ATM in order to discover the p.i.n. codes of bank cards so that, coupled with the data of the bank cards, they could duplicate the cards with the intent to make unlawful withdrawals form the bank accounts of clients of the banks; while in the proximity to the ATM of Pro Credit and Raiffeisen Bank they were apprehended by the police and the accused Martin Ivanov was found in the possession of a specially modified mini camera while other electronic devices were found in their hotel room in the Hotel Plaza in Prishtinë/Priština.

For this reason, pursuant to article 38, 65 and article 264 paragraph 1 of the Criminal Code of Kosovo

The defendant Plamen Dimitrov is sentenced

to imprisonment of one (1) year and six (6) months

The defendant Martin Ivanov is sentenced

to imprisonment of one (1) year and six (6) months;

The time spent by the accused in detention on remand from 18 September 2009 until the judgment becomes final will be counted as part of the imprisonment sentence pursuant to Article 73 of the CCK.

Based on article 54 paragraph 2, item 9 of the CCK, the two accused will be expelled from the territory of Kosovo once they have integrally served their punishment.

Reasoning

Procedural History

The Municipal Public Prosecutor of Pristina, filed a summary indictment PP. Nr. 3286-9/2009, on 21 December 2009 charging the defendants with the criminal offence of **Intrusion into Computer System in Co-perpetration**, pursuant to Article 264 (1) and Article 23 of the Criminal Code of Kosovo.

On 29 December 2009 the defendants requested that EULEX judges take over the case. On 11 February 2010, the President of the Assembly of EULEX judges assigned the case to the EULEX judges of the District Court of Pristina.

The trial against the defendants commenced on 19 February 2010 and continued on 3 March 2010 when it had to be further postponed due to the absence of some of the numerous injured parties who had not been yet completely identified and notified.

The trial continued on 23 March 2010. After the verification of the regularity of the notification to all parties, the legal representative of the Pro Credit Bank Mr. Tomë Gashi handed to the court an authorization letter from the bank. After reading the summary indictment, the court heard the following injured parties as witnesses: Haxhi Arifi, Skender Misimi, Naser Sahiti and Sevdije Canolli. On the same session the court heard also the testimony of Kosovo Police officers Zijadin Isaku and Avdush Jashari. Eventually, in the course of the same session, the Public Prosecutor handed over to the court the police report dated 29 September 2009 signed by Officer Avdush Jashari.

The trial continued on 31 March 2010. In order to receive more detailed information on some aspects of the case, the court heard again the witnesses Zijadin Isaku and Avdush Jashari (on the outcome of the expertise requested from forensic institute abroad and on technical examination of the programs installed on the computer seized to the accused). In the course of the hearing, the computer and the other electronic devices which had being seized on the 18 September 2009 were showed in Court.

On the same session the court questioned the defendants Plamen Dimitrov and Martin Ivanov.

The main trial continued on 14 April 2010 with the closing speeches of the prosecutor, the legal representative of the Pro Credit Bank and of defence lawyers of the defendants, Mr Osman Havolli and Mr Vahid Halili. The court also heard the final statements of the defendants Plamen Dimitrov and Martin Ivanov.

In the course of his final speech, the Municipal Public Prosecutor amended the summary indictment, changing the criminal qualification to **Attempted Intrusion into Computer System in Co-perpetration**, pursuant to Article 264 (1) and Article 20 and 23 of the Criminal Code of Kosovo.

At the end of the same session, the court publicly announced the judgment.

Factual findings

The court heard the testimonies of the injured parties mentioned above. The testimonies provided the court with a general picture of the events but did not provide direct evidence involving the defendants since the injured parties were only victims of the crime and they did not have information that would be useful to establish the criminal responsibility for the commission of the crime by the two defendants.

The court also heard the testimony of police officers Zijadin Isaku and Avdush Jashari.

From their statements it emerged that following a police operation named "BANKAT", conducted due to the high volume of complaints received regarding unlawful withdrawals from the bank accounts of various banks Kosovo wide, on 18 September 2009 around 18:40 hrs the police received information of the suspicious behaviour of two individuals. As a result, the defendants were arrested by Kosovo Police in the "Bill Clinton" street in Pristina in the vicinity of the Pro Credit Bank ATM machine.

The following items were found in the possession of the defendants and in the Hotel Plaza room: a computer laptop SONY with serial no. C2004E7P; two mini cameras modified hand made, one of the mini cameras with serial no. ESH08-BU38; 3G USB Modem, serial no. X020X-8BNBG1-1; USB capacity 2G, serial no. 30996-001; spare computer cables; various credit cards; cash in the amount of 3.055,00 euro and some loose change in Levi.

Martin Ivanov was found with the one of the two modified mini camera in his possession when apprehended by the police.

The following programs were found on the computer laptop: Data Doctor's Data Wiper; Magnetic Stripe Card Reader/ Writer; PGP (Pretty Good Privacy) Encryption. 2 photographs (depicting ATM Key pad) and video recordings were found in the computer and in the memory of the one of the mini cameras.

Officer Zijadin Isaku further explained that he is an investigator of the Kosovo Police, engaged in investigations on computer crime. On the day of the arrest of the defendants, he was called to provide his services. He explained to the court that the seized items are not of common use and that they are specifically utilized for crimes related to "cloning" of bank card and unlawful withdrawals from bank accounts. The witness testified that one of the modified mini cameras had adhesive tape (double sided) on it, which suggests that it was built to be attached to ATM machines. The officer explained to the court that these mini cameras have their own batteries and recording eye and that they are built in such a manner that when placed in an ATM they are not visible. The officer further testified that all the data from the laptop of the defendants was put in an external hard-disc which was sent to a specialized centre abroad but that no reply had been received.

Officer Avdush Jashari testified that he is a member of Kosovo Police since 1 July 2002, working as IT expert and examiner of electronic equipments. He testified that in the laptop seized to the defendants he found two computer programs, one called Magnetic Stripe Card Reader/ Writer and the other called PGP (Pretty Good Privacy).

The Magnetic Stripe Card Reader/ Writer program, it was explained, is used to reproduce bank cards (so called 'cloning').

The PGP program is software used for encryption of information. The data and the files in the laptop were protected by a password; Kosovo Police does not have the software

to access it or de-code (reveal) the password. In absence of the password the content of the files could not be seen. The witness could recall that there were two (2) photos of ATM key pad and some video recording which was given to the investigator.

Defendant Plamen Dimitrov testified, upon questioning, that his sole purpose of coming to Kosovo, in different occasions, was to purchase cigarettes in bulk so he could then sale them in Bulgaria, as he had noticed in a first visit that the cigarettes were much cheaper in Kosovo. He testified that he knew the defendant Martin Ivanov for at least 15 years, since they live in the same building, and they are friends. Prior to their leaving Bulgaria, a man named Petar gave him a black computer bag with a laptop, a battery charger, with 3 spare cables, a case with a 3G modem, 2 plastic supports, with built-in cameras and electronic device, one USB memory stick and small plastic bag with electronic spare parts. This bag was to be given to a person in front of the Grand Hotel in Pristina. To do it, Plamen had to call Petar and describe his outfit; then Petar would contact the person in Pristina and would convey the description to the person who was to pick up the bag. The delivery did not take place as the defendants were arrested prior to it. The defendants prior to crossing the Bulgarian border had examined the black bag and they found the mini cameras which they initially believed to be bombs; after calling Petar, they were assured that the devices were surveillance cameras for a friend that had a bar in Pristina and needed to oversee his staff.

Defendant Martin Ivanov testified upon questioning that he knows Plamen Dimitrov for a long time and they are friends. The idea to come to Kosovo for cigarettes had come from Plamen as he had been before in Kosovo and discovered that cigarettes were much cheaper in Kosovo. The testimony regarding their two visits to Kosovo was identical to the one given by Plamen. However, Martin Ivanov stated that he did not know Petar and that the black bag was Plamen's business and he had no interest on the matter.

The statements of the witnesses (victims and police officers) have never been contested by the parties. They reflect different aspects of the events described in the indictment. The victims, of course, only concentrate on the withdrawal of money from their bank account and on the modality through which they came to know about it. The police officers on the other hand, explained how the investigation in the case took place and on the procedural steps taken by the police and the prosecutor.

The witnesses' statements are credible and are not subject to much contestation. They are complete and detailed. Moreover, they find integral confirmation in the documentation available in the dossier.

The same can not be said in relation to the declaration given by the defendants in the course of their examination.

The reason that the defendants had come to Kosovo to buy cigarettes in bulk, this being the sole purpose of their visit, is just not credible.

At least on two visits they returned to Bulgaria without buying anything. They had undertaken a long journey in two cars (on one occasion) and returned empty handed without even buying the lawful amount to, at least, ease the expenses incurred. They made no attempts to establish a business contact, giving the explanation that cigarettes were so cheap in Kosovo that they considered purchasing in bulk from street vendors. This is not a credible explanation for two businessmen who wanted to profit from this venture.

In the end, the justifications given by the defendants are inconsistent, unproven and incongruous. They can not be taken by the Court as a logic base for the decision.

Legal Findings

The trial of the two accused started on the base of one charge but ended with a different one.

Initially, the Prosecutor prosecuted the two defendants for the intrusion in the computer system of a bank and for the withdrawal of money at the damage of more than thirty people but at the end of the trial the Prosecutor has amended the charge to attempted intrusion.

This happened because the Prosecutor realized, in the development of the trial, that the facts were partially different from those that his colleague had described in the indictment and that the original charge had not a realistic chance to be confirmed.

In other words, Mr. Haki Gecaj opined that the elements offered by the witnesses' testimonies and the *dossier* documents (police reports, scientific police activities, computer and other electronic devices seized and analyzed, motions and reports from the injured parties) indicated a different reconstruction of the fact from the one originally devised.

Mr. Haki Gecaj was right.

The testimonies of Haxhi Arifi, Skender Misimi, Naser Sahiti and Sevdije Canolli have indeed confirmed that the injured parties (amongst whom the witnesses just mentioned) suffered an attack against their respective bank account which resulted in economic losses of different amounts through unpermitted withdrawals perpetrated around the middle of September 2009 from different locations in Bulgaria and in Canada.

And the accused were indeed found in the possession of instruments that undoubtedly lead to the conclusion of an exclusive usage for the illegal intrusion in the electronic system of a bank.

But the testimonies given in Court (and the other elements collected by the investigating Public Prosecutor, Ms.) were not enough to establish that the withdrawals listed in the indictment had been done from the accused or from someone connected to them, acting on the bases of data collected by the two accused. In a way, it can be said that the Prosecutor who has initially investigated the case applied the principle *post hoc, ergo propter hoc* (Latin for "after this, therefore because of this"). Or, said in a more prosaic language, that she came to the conclusion that because the two accused were arrested immediately after the execution of the illicit withdrawals and, in addition, the arrested were from Bulgaria (Country evidently connected with some of the illicit withdrawals executed from Bulgaria) there had to be a causal link, a connection which was enough to establish the criminal responsibility of the two accused.

It is true that the Prosecutor tried to have the computer which was seized to the accused analyzed by the forensic police in Kosovo (testimony of police officer Avdush Jashari) and abroad (Zijadin Isaku). But, against the impossibility to analyze the entirety of the information stored in the computer and given the refusal of the accused to cooperate, it is not clear how it was possible to establish that the withdrawal listed in the initial indictment were made by the two accused and not, for example, by other criminals operating in Kosovo approximately at the same time.

In the file there is no indication of the mental process followed by the Prosecutor, who has not only the burden to show that a crime was committed, but also to indicate the element on which the responsibility of the accused is based.

A possible explanation of the initiative of the Prosecutor against the accused, once they were discovered and arrested with the electronic devices for the reproduction of cards, can be found in the words of Zijadin Isaku. He remembered that at the time of the events (mid September 2009), many attacks had started to be launched against the electronic systems of different banks around Kosovo. However, after the first reports, the majority of credit institutions, possibly worried for the spreading of the news about the vulnerability of their electronic systems amongst their clients, renounced to file motions to prosecute the author(s) of such attacks against them. Only Pro Credit Bank insisted and pursued it in Court, giving to the Prosecutor the practical possibility to prosecute the two accused (article 264.3 CCK foresees that 'criminal prosecution for the offence provided for in the present article shall be initiated following a motion'). Waiting the result of the analysis of the computer (which, if positive, would have confirmed the charge) and given the time constraints imposed on her by the decision of the Supreme Court of Kosovo on the detention (with the requalification of the crime and the need to prosecute by summary indictment), the Prosecutor was left with no choice but to initiate the trial, without the certainty that the computer contained sufficient information to establish that the illicit withdrawals registered in the few days preceding the arrest of the two accused could have been referred to them.

In any case, the unfolding of the trial has revealed that the violation initially prospected could not be proved for the exposed reasons. Therefore, at the hearing 14 April, the Prosecutor based on article 376 KCCP amended the indictment in order to reflect the attempted commission of the crime, on the assumption that the seizure of the electronic devices on the accused on the evening of the 18 September 2009 was sufficient to establish their criminal responsibility at least for the attempt to commit the crime of intrusion into computer system.

As said above, the Prosecutor was right.

The accused (specifically, Martin Ivanov) when apprehended by the police on 18 September 2010 in the close proximity of the automatic machine of the Pro Credit Bank, were found in the possession of one of the two modified mini-camera.

It must be understood that the so called mini-camera consists in a complex and sophisticated device, a self-contained apparatus assembled within a plastic support and provided with a memory and a battery. The camera support is dissimulated in the ATM and is able to record images which are stored for a long time and which are subsequently used for the creation of clones of the original cards.

The explanations given by the defendants for the detention of such device (and of the others devices found and seized in the accommodation of the defendants in a hotel of the city of Pristina) were just ridiculous. They come out with an untenable story of a request made by a Petar (surname unknown, needless to say...) to bring them to someone whom should have been contacted subsequently and should have been met in front of the Hotel Grand in Pristina.

As said before, it doesn't take much to confute the story. Suffice it to say that it is completely absurd and that it resembles, in its entirety, the stories that are heard, around the world, by the judges of any Country from defendants without any better justification. This same judge has heard analogous unbelievable defences from defendants in Italy, in Portugal, in East Timor, in England, whenever he had the chance to exercise his official functions or to study law in those Countries.

How it comes that one drives from Bulgaria to Kosovo by chance (just for a trip with her fiancée or to smuggle packs of cigarettes) and then he accept to transport suspicious computer devices?; how it comes that Plamen and Martin accepted to deliver the suspicious stuff in Kosovo to someone unknown to them, on the simple request of someone known as Petar? It is simply insulting for the intelligence of the judge and of common people that the defendants try to sell these absurd versions to an experienced judge.

The absence of corroborating evidence, the circumstances of the arrest (close to an ATM, in suspicious behaviour –see police report), the general allegations of the presence of the defendants in Kosovo (in order to smuggle cigarettes to Bulgaria – such

a risk for few euro!) make the justifications given by the accused in the course of their examination not credible.

So, what was the reason for the detention of the cameras and of a computer supplied with software for the reproduction of credit cards?

The answer is obvious.

The defendants were trying to place the device, in order to perpetrate the intrusion into the computer system of the bank.

It is not possible to state more. Given the behaviour of the defendants in Court (who gave just an incredible version) the investigation has started with the arrest of the defendants and the seizure of suspicious goods and has practically finished with it.

Is this sufficient to establish the criminal responsibility of the defendants? Is the possession of suspicious goods, specifically built for illicit use, enough by itself to constitute an attempt?

The Court thinks so. The legal provision of article 20 CCK foresees that it can be included as attempt any intentional 'immediate action towards the commission of an offence and the action is not completed or the element of the intended offence are not fulfilled'.

The act of driving from Bulgaria to Kosovo with sophisticated devices for the purpose of committing a crime, constitute the action in the terms requested by article 20 CCK. The action required a discrete level of technical training, the capacity to find the proper location and the probable coordination with other co-perpetrators leaving abroad. All this shows that the criminal activity organized by the defendants was complex in nature, so that it can be concluded that when the defendants were found in Pristina, in Ruga Bill Clinton, the plan they had devised or contributed to devise was already in the stage of the execution. In this sense, it was not a generic idea, something still to be developed, but it was a plan put in practice. Their action, in other words, was an immediate precursor of the crime (as requested by article 20 CCK), it was a crucial step towards the completion of the criminal violation. It was of course intentional, since the orchestration of such a complex crime can not be done by chance.

The maximum sentence for the violation of article 264 CCK is imprisonment of five years, which is above the threshold foreseen by article 20 CCK for the punishable attempt (at least three years). The attempt is therefore admissible.

In the concrete case, for the attempt to commit the crime of intrusion in the computer system reference can be made to article 264.1, 20 and 23 CCK.

Considering the rule of leniency foreseen by article 20 paragraph 3 CCK, the punishment will be determined in the measure of one year and six months of imprisonment.

Both defendants deserve the same punishment, since it is not possible to distinguish their criminal responsibility. They acted jointly and supported reciprocally; when discovered, they coordinated a fake version, so refusing to explain the real context of their criminal activity.

The measure of the punishment is proportionate to the damage that the two defendants were aimed to cause to the victims. Coming from abroad to intrude in other people's bank account, it is easy to believe that they didn't have the intention to limit themselves to pick up from the bank account of just one or few clients of the bank, but they would have harvested the pin codes and the data of the credit cards for some time before starting to reproduce the credit cards, so to create a vast damage (and a correspondent illicit advantage for themselves).

One year and an half is sufficient to dissuade the defendants and eventual acolytes from the commission of further criminal activity. In addition to that, the relatively young age of the two defendants weighs in their favour in the determination of the penalty.

The time spent by the accused in detention on remand from 18 September 2009 until the judgment becomes final will be counted as part of the imprisonment sentence pursuant to Article 73 of the CCK.

Based on article 54 paragraph 2, item 9 of the CCK, the two accused will be expelled from the territory of Kosovo once they have integrally served their punishment, as per request of the Prosecutor.

The two defendants can not be released immediately: the possibility to have the decision execute on them is clearly linked to the permanence of the detention imposed on them. Should they be released, they would obviously leave the Country and seek shelter in Bulgaria, from where an extradition procedure would have to be started.

A last point, in relation to the injured party.

The damages suffered by the Pro Credit bank has been listed as 13, 557. 55 Euro. The Bank has listed some 32 injured parties that were reimbursed for the losses they suffered.

However, the charge was changed in the course of the trial, as seen, from a committed intrusion to an attempted intrusion.

Of course, if attempted intrusion is mentioned, it means that the intrusion has not yet taken place. Consequently, there can not have been a damage, yet.

The Pro Credit Bank has compensated the damages suffered by her clients. This is not contested. However, there is no evidence in this trial that the damage was caused by the two defendants.

For this reason, the request of the representative of the credit institution must be rejected.

CONFISCATION

Pursuant to article 60 of the CCP and 489 of the KCCP the computer (laptop), the modified mini cameras and the 3.055,00 euro are confiscated. The electronic devices will be destroyed after this decision has become final. The money will be forwarded to the Kosovo Budget once the decision is final.

COST

Pursuant to Article 102 paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP) the convicted persons shall pay the costs of the proceedings in the amount of two hundred (200) Euros.

Court recorder

Jacqueline Ryan



EULEX Judge

Francesco Florit



LEGAL REMEDY:

Pursuant to Article 473 paragraph 3 of the Kosovo Code of Criminal Procedure (KCCP), an appeal may be filed against this verdict within eight (8) days of the service of the written verdict.