Adam Taracha

ON THE ADEQUATE APPLICATION OF ARTICLE 393 § 1 SENTENCE 1 OF THE CPC TOWARDS MATERIAL OBTAINED AS A RESULT OF SURVEILLANCE OPERATIONS

Low-key detection actions (surveillance operations) provide law enforcement agencies with essential information that cannot be acquired in another way. Because of that, it seems understandable that their direct use in the criminal proceeding is desirable. For many years, however, there has been a dominating opinion and a practical criminal proceeding rule, according to which the use of that operational knowledge was only possible with the application of adequate procedures (e.g. an interrogation, a search etc.) in accordance with all the rules of evidence law. It was called 'transformation' ('processing') of operational actions into criminal procedure actions[1]. The change of the rule resulted from the adoption of the regulations in the so-called policing acts of 1990[2] and amendments to the Acts of 1995[3], which directly point out situations when surveillance material may be used in the criminal proceeding. In the literature on this issue, there are also opinions about the admissibility of surveillance results in the criminal proceeding without the need to 'transform' them.[4] However, they do not

[1] See, inter alia, J. Widacki, *Kryminalistyka. cz. I* [Forensic science, Part I], Katowice 1980, p. 143; M. Kulicki, *Kryminalistyka. Zagadnienia wybrane* [Forensic science, Selected issues], Toruń 1988, pp. 73–83; T. Hanausek, *Kryminalistyka. Zarys wykładu* [Forensic science, Lecture outline], Kraków 1996, pp. 96–97; A. Bulsiewicz, A. Lach, *Procesowe i pozaprocesowe uzyskiwanie billingu telefonicznego* [Procedural and extra-procedural acquisition of telephone billings], [in:] *Procesowo-kryminalistyczne czynności dowodowe. Materialy pokonferencyjne* [Evidence acquisition activities in criminal proceeding – conference material], (ed.) M. Lisiecki, M. Zajder, Szczytno 2003, p. 20; A. Żebrowski, *Czynności operacyjno-rozpoznawcze, Regulacje prawne* [Surveillance operations, Legal regulations], Kraków 2000, p. 17.

[2] Acts on the Minister of the Interior, on the Police and on the Office of State Protection of 6 April 1990 (Journal of Laws No. 30, items 179, 180 and 181) and Act on the Border Guard of 12 October 1990 (Journal of Laws No. 78, item 462).

[3] Act of 21 July 1995 amending Act on the Minister of the Interior, on the Police, on the Office of State Protection, on the Border Guard and some other acts (Journal of Laws No. 104, item 515).

[4] A. Taracha, *Wykorzystanie informacji uzyskanych w wyniku czynności operacyjno-rozpoznawczych w procesie karnym* [Use of information obtained as a result of surveillance operations in the criminal proceeding], [in:] *Nowa kodyfikacja karna. Kodeks postępowania karnego. Zagadnienia węzłowe* [New criminal codification, Criminal Procedure Code, Key issues], Warszawa 1997, pp. 129–143; T. Grzegorczyk,

end the controversy over the scope and ways of introducing the material to the criminal proceeding.

The fact that neither the policing acts after the amendments of 1995 nor the CPC determine how to introduce such evidence to the criminal proceeding undoubtedly does not help to solve the problem[5]. The issue is much broader in character because it would be very difficult (even at present) to point out a provision of the CPC regulating the area directly with respect to not only surveillance operations but to all material evidence and documents collected before the start of a trial in general. The way of introducing evidence to a trial based on the prosecutor's decision on 'the inclusion in the evidence material' is based more on the rule of practice than on any specific legal norm.

The change in this area resulted from the amendments to the policing legislation in 2001–2003[6], when a rule was introduced that with respect to material collected as a result of surveillance operations such as operational control (tapping), a control buy and a controlled delivery, the provisions of Article 393 § 1 sentence 1 of the CPC are applied in the court proceeding. S. Waltoś approved of this change highlighting that only the introduction of the provision allows for the use of information obtained as a result of unconventional investigative methods[7] and recognised them as probably the optimum solution[8]. In another statement, he assessed the same provision in a more critical way raising the fact that based on the provision, police officers' notes may be read during a trial, which would violate the ban on substituting testimonies and explanations with written documents and notes[9].

It is difficult to agree with the opinions of S. Waldoś. The regulation in the policing law creating a possibility of using in court the documents developed during police operations should be recognised as really right. The regulation should undoubtedly be included in the Criminal Procedure Code and not in the policing law. The provisions of the CPC are the ones that regulate the course of the criminal proceeding. Thus, if the legislator had wanted the material (docu-

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Wykorzystywanie i przekształcanie materiałów operacyjnych w materiał dowodowy w postępowaniu karnym [Use and transformation of surveillance operational material into evidence in criminal proceeding], [in:] *Przestępczość zorganizowana* [Organised criminality], (ed.) E.W. Pływaczewski, Zakamycze 2005, pp. 221–231.

[5] S. Waltoś drew attention to this circumstance (S. Waltoś, *Śledztwo to odpowiedzialność* [Investigation is responsibility], Gazeta Wyborcza of 18 January 1996, p. 5).

[6] See amendments to Act on the Border Guard of 11 April 2001 (Journal of Laws No. 45, item 498), amendments to Act on the Police of 27 July 2001 (Journal of Law No. 100, item 1084), amendments to Act of 24 August 2001 on the Military Police and other military organs keeping order (Journal of Laws No. 123, item 1353), Act on the Internal Security Agency and the Intelligence Agency of 24 May 2002 (Journal of Laws No. 74, item 676) and Act of 9 July 2003 on the Military Intelligence Agencies (Journal of Laws No. 139, item 1326).

[7] S. Waltoś, *Wizja procesu karnego XXI wieku* [Vision of a criminal trial of the 21st century], Prok. i Pr. 2002, No. 1, p. 15.

[8] S. Waltoś, *Proces karny. Zarys system* [Criminal trial. System outline], Warszawa 2003, p. 398.

[9] *Ibid.*, p. 372.

ments) obtained as a result of surveillance operations to be presented during a trial in accordance with other rules than other evidence, an adequate provision of the CPC should stipulate that. In the current legal state, the situation is a little complicated because the provision of Article 393 § 1 sentence 1 of the CPC regulating the proceeding before court is to be adequately applied in the proceeding when it concerns material collected during police operations. And the policing law (e.g. Article 19 (15), Article 19a (7) and Article 19b (5) of the Act on the Police) creates this undoubtedly strange configuration.

The issue of the use of information obtained as a result of surveillance operations and recognised as unconventional investigative methods (operational control, a controlled buy, a controlled submission or receipt of financial benefits and a controlled delivery) in the criminal proceeding concentrates on determining whether they constitute material evidence or documentary evidence.

Undoubtedly, part of the material – such as money and other assets obtained as a result of a controlled bribery and narcotics or other objects the possession of or trafficking in which is forbidden and which were seized during such operations as a controlled buy or a controlled delivery – will be classified as material evidence (in its strict meaning). The material will be introduced to the criminal proceeding in accordance with Article 395 of the CPC (it will be examined).

On the other hand, other material often constitutes information recorded on a digital data storage device (in the past a magnetic or VHS tape). This kind of information in the form of a recording of the course of a criminal act (the recording of the sound, the picture, or the sound and the picture) will be of special importance. The decision determining the character of the evidence obtained as a result of the above-mentioned surveillance operations will be a key problem to be solved. Should it be classified as material evidence, which is introduced to the criminal proceeding in accordance with Article 395 of the CPC or as documentary evidence, which is introduced to the criminal proceeding in accordance with Article 393 § 1 sentence 1 of the CPC?

Evidence that is a recording of the picture (a photograph, a silent film, another recording of the picture, e.g. a VHS tape without the sound track) should be classified as material evidence and examined. As T. Nowak rightly notices, the idea of classifying this evidence as documentary evidence may be rejected straight away because it lacks "basic characteristic features differentiating documents from objects – the recording of human thoughts on a given object. A picture and a film do not constitute an illustration of a person's thought but the features of a place and a thing, i.e. the features of objects as well as human actions"[10]. Also

[10] T. Nowak, *Dowód z dokumentu w polskim procesie karnym* [Documentary evidence in the Polish criminal proceeding], Poznań 1994, p. 148.

Z. Kegel points out that "a photograph and a film are not a recorded thought, an inscription or a note, but only an illustration of objects (things)"[11].

It seems that the standpoint should not raise any doubts. However, K.J. Jakubski believes that the recording of a certain state of things in the form of a photograph or a film should not be the reason for excluding this kind of data storage device from the group of documentary evidence. In his opinion, it is essential that the choice of a place, time and circumstances of the recording depends on the will of a person being the equipment operator and the recorded picture in the form of a photograph or a film is many times more communicative than a classic written description[12].

The view that the picture in the form of a photograph or a film (without the sound) may be classified as documentary evidence is absolutely unacceptable. If we followed K.J. Jakubski's point of view that a picture is often a storage device of more contents than a written document (which is of course possible), material evidence would disappear from the criminal proceeding because every human product has certain contents.

It seems that there is a more difficult problem with the recording of the sound or the picture and the sound. Determining in what cases the evidence should be classified as material evidence and in what cases as documentary evidence is essential. Material evidence is introduced to the criminal proceeding without any restrictions and is based on the decision of the proceeding organ to include the given material in the evidence. Documentary evidence may be introduced to the criminal proceeding when it meets a series of requirements (similar to the restrictions with regard to personal evidence).

In the Polish literature on criminal proceeding, S. Śliwiński's opinion prevailed for many years. According to it, a document was treated as material evidence only in a situation when its physical and chemical features were examined. However, when its conceptual contents were examined, it was treated as documentary evidence[13].

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[11] Z. Kegel, *Dowód z ekspertyzy pismoznawczej...* [Evidence of graphology expert examination…], p. 38; S. Kalinowski also believes that, according to the provisions of criminal procedure law, the statement of thoughts or the author's will in the written form is a document. The form of recording and the type of material used to record the statement is not important. (S. Kalinowski, *Dowody, postępowanie dowodowe* [Evidence, hearing of evidence], Warszawa 1971, p. 14).

[12] K.J. Jakubski, *Komputerowy nośnik informacji jako dokument w polskim procesie karnym* [Computer information storage device], Przegl. Pol. 1997, no. 3, p. 12. K. Dudka follows the opinion of K.J. Jakubski justifying the classification of a magnetic tape as documentary evidence (which should be read according to Article 393 § 3 of the CPC). See K. Dudka, *Podsłuch prywatny i dziennikarski a proces karny* [Personal and journalistic tapping vs. criminal proceeding], [in:] *Problemy stosowania prawa sądowego, Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi* [Application of court procedure law. Book presented to Professor Edward Skrętowicz], (ed.) I. Nowikowski, Lublin 2007, pp. 104–119.

[13] S. Śliwiński, *Polski proces karny przed sądem powszechnym* [Polish criminal trial before a common court], Warszawa 1948, p. 678 and the following; T. Nowak, *Dowód z dokumentu w polskim procesie karnym* [Documentary evidence in the Polish criminal proceeding], Poznań 1994, p. 139 and literature cited there; K. Kalita, *Taśma magnetofonowa jako dowód rzeczowy w postępowaniu karnym* [Magnetic tape as mate-

Concerning the use of conceptual contents of a document in the criminal proceeding, the ruling of the Supreme Court of 10 March 1961 (III K 49/61)[14] was absolutely a breakthrough decision. The Supreme Court stated in this ruling that the magnetic tape on which the course of crime was recorded should be treated as material evidence (and thus the evidence should be examined), also when it concerns the perception of the conceptual contents recorded on the tape[15]. The Supreme Court emphasised that the magnetic tape as a proof of crime commission (material evidence) cannot be subject to restrictions referred to in criminal procedure law that limit other evidence (especially personal evidence) and regulate its use (hearing of evidence) in the course of the whole criminal proceeding[16]. Discussing the ruling, M. Cieślak stated that the classification of a magnetic tape with the recorded course of crime commission as material evidence does not raise any doubts[17]. The documents being the object of crime (e.g. processing or forgery) and recording the course of crime (defamation, insult etc.) will be treated as material evidence, not documentary evidence, and must be examined (not just read). Inter alia R. Kmiecik[18], A. Taracha[19], D. Karczmarska[20],

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rial evidence in the criminal proceeding], Problemy Kryminalistyki 1963, no. 42 p. 218; P. Szustakiewicz, *Dokumenty z postępowania kontrolnego jako dowody w postępowaniu karnym* [Audit documents as evidence in the criminal proceeding], Kontrola Państwowa 1998, no. 5, p. 35 and the following; K. Marszał, *op. cit.*, p. 283.

[14] Ruling of the Supreme Court of 10 March 1961, III K 49/61, OSN – Izba Karna 1962, no 1, item 8, pp. 22–25.

[15] The case concerned the sermon given by Father Józef Tadeusz Osiadło, a monk of the Order of Saint Paul the First Hermit in Leśna Podlaska during a church fair held there on 5 June 1960. The Voivodeship Court in Lublin sentenced Józef Tadeusz Osiadło on 20 October (file reference no. IV K 239/60), in accordance with Article 8 § 1 and Article 13 of the Decree of 5 August 1949 on the protection of the freedom of religion, in connection with Article 47 § 2 of the CC and Article 52 § 3 of the CC for three years' imprisonment and the forfeiture of rights for three years for misusing the freedom of religion for purposes hostile towards the Polish People's Republic by providing false information during his sermon at the church fair on the persecution of the Church and Church institutions in Poland and accusing the worshipers of taking passive role in the situation, and calling them to fight against that persecution. Evidence material was a secret recording made by an officer of the Security Service of the Ministry of the Interior.

[16] L. Schaff used a similar argument earlier (*Dowód z taśmy magnetofonowej w polskim procesie karnym* [Evidence from the magnetic tape in the Polish criminal proceeding], Problemy Kryminalistyki 1959, no. 17, pp. 28–29), whose opinion was cited in the discussed Supreme Court judgement.

[17] M. Cieślak, *Przegląd orzecznictwa SN (Prawo karne procesowe – 1963)*, Nowe Prawo 1964, no. 11, p. 1083.

[18] R. Kmiecik, *Oględziny w procesie karnym. Niektóre zagadnienia formalno-dowodowe* [Examination in the criminal proceeding. Some formal and evidence-related issues], Annales UMCS, sec. G, vol. XXXI, Lublin 1984, p. 92.

[19] A. Taracha, *Dokument jako dowód rzeczowy* [Document as material evidence], [in:] *Kryminalistyka wobec sprawy sądowej. Księga pamiątkowa ku czci Profesora Zdzisława Kegla* [Forensic science vs. a trial. Book in honour of Professor Zdzisław Kegel], Wrocław 2005, pp. 527–536.

[20] D. Karczmarska rightly highlights that electronic recording acquires the features of material evidence when it can be attributed the meaning of a 'trail' of an action the accused is charged with even if this 'trail' contained conceptual contents, e.g. such a trail (in case of insult) is the recording of an insulting utterance preserved on a information storage device. The use of such evidence shall take the form of examination, not reading. The contents of the information are part of the same crime and thus constitute an object of evidence and not the source of evidence, which is the electronic recording alone.

and partially W. Daszkiewicz[21] present such an opinion. The standpoint that such documents should be examined during the criminal proceeding (Article 395 of the CPC) also when it concerns their conceptual contents (when they constitute the recording of events *tempore criminis*) and not just read (in accordance with Article 393 § 1 of the CPC) has not been questioned in the literature on this issue so far (for over fifty years).

On the other hand, other documents collected by the Police and other law enforcement officers and by means of operational control, police entrapment (a controlled buy and a controlled bribery) and a controlled delivery should be introduced to the criminal proceeding in the same way as any other official documents provided their contents do not substitute testimonies and explanations or reports on actions, which require such recording. Thus, the adequate application of Article 393 § 1 sentence 1 of the CPC is not necessary here because the provision should be applied directly. It might be stated with no risk that the introduction of an expression "adequate application of Article 393 § 1 sentence 1 of the CPC" to the policing legislation (the provisions on operational control, police entrapment and a controlled delivery) is absolutely useless. The lack of reference to this provision of the CPC does not hamper the introduction of documents developed in the course of surveillance operations to the criminal proceeding provided they do not substitute testimonies or explanations. Article 393 § 1 of the CPC directly allows for reading these documents at trial and this constitutes sufficient grounds. If the prosecutor had been given the documents together with a motion to initiate the proceeding (as the material to be included in the material evidence), the part of the provision of Article 393 § 1 sentence 1 of the CPC that lays down the possibility of reading "all official documents submitted in the preparatory proceeding" would be grounds for reading them. For other documents that were not submitted in the preparatory proceeding but during the court proceeding – Article 393 § 1 sentence 1 *in fine* of the CPC with regard to reading documents submitted "in another proceeding referred to in the statute" might be grounds for reading them. The provision of Article 393 § 1 sentence 1 *in fine* provides strong grounds for reading official documents. Another proceeding may certainly mean such a surveillance operation as operational control, a controlled buy, a controlled bribery or a controlled delivery[22].

See D. Karczmarska (reviewer), A. Lach, *Dowody elektroniczne w procesie karnym* [Electronic evidence in the criminal proceeding], Toruń 2004, Palestra 2005, p. 267.

[21] W. Daszkiewicz, *Przegląd orzecznictwa SN* [Court rulings review] (Prawo karne procesowe [Criminal procedure law] – 1962), Państwo i Prawo 1964, no. 5–6, pp. 877–879.

[22] It is not the only case when the policing legislation with no need at all refers to the CPC. We have a similar situation in Article 15 (1) point 2 and 4 of Act on the Police, which authorises police officers to make an arrest and a search in the mode laid down in the CPC. The lack of such provisions in Act on the Police does not mean that the Police may not perform such actions. The provisions of the CPC are sufficient because they define the Police as an agency preparing the criminal proceeding (Article 311 and Article 325a of the CPC), thus authorised to conduct procedural actions, including an arrest and

It is true that the documents collected in such a proceeding should be given to the prosecutor together with a motion to initiate the criminal proceeding but if this had not been done either before the initiation or during the preparatory proceeding, the provision of Article 393 § 1 sentence 1 *in fine* provides an opportunity to correct the error at the stage of the court proceeding. It must be remembered, however, that reading these documents is possible only unless another provision of the CPC clearly forbids it[23].

The provisions of the policing acts with regard to the adequate application of Article 393 § 1 sentence 1 of the CPC to the material collected during operational control, entrapment and a controlled delivery do not constitute grounds for reading police officers' notes because the provisions of the policing acts do not repeal the provisions of the CPC that forbid to substitute testimonies and explanations with the contents of documents and notes (Article 174 of the CPC) and the ban on reading notes concerning actions that are required to be reported (Article 393 § 1 sentence 2 of the CPC)[24]. The ban referred to in Article 393 § 1 sentence 2 of the CPC also covers notes that have features of "official documents"[25]. Due to the same reason, it does not seem possible to read officers' notes concerning surveillance interception of correspondence or delivery (performed within operational control). There is no doubt that these are actions that, in accordance with the CPC, must be reported (Article 143 § 3 point 7).

A. Gaberle is of a similar opinion and states that operational control is not performed as part of trial, thus actions performed in its course are recorded in the form of officers' notes (they cannot be written official reports on). Thus, the introduction of the material concerning such actions (consisting in surveillance interception of correspondence and delivery as well as recordings of communications) as requiring writing official reports (Article 143 § 1 point 7 of the CPC) faces essential difficulties. According to this author, "Article 19 (15) sentence 2 of Act on the Police, which lays down that the provision of Article 393

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a search. These provisions constitute real grounds for the conduction of these procedures by the Police, and not Article 15 (1) point 2 and 4 of Act on the Police.

[23] The Court of Appeal in Lublin in the sentence of 3 October 2005 rightly states that the adequate application of the provision of Article 393 § 1 sentence one of the CPC cannot provide for a possibility of reading such documents that were developed in the form that is in conflict with the provisions of the CPC. Thus, in case of such forms of documenting operations as cipher texts, surveillance messages or tapping scripts, it is obvious that reading them directly in the course of trial would mean avoiding evidentiary restrictions and the provisions regulating the form of evidentiary procedures.

[24] A different opinion is presented by D. Karczmarska, *Notatka urzędowa w procesie karnym i w postępowaniu w sprawach o wykroczenia* [Official note in the criminal proceeding in petty offences cases], [in:] *Oblicza współczesnej kryminalistyki, Księga jubileuszowa Profesora Huberta Kołeckiego* [Contemporary forensic science nature. Professor Hubert Kołecki jubilee book], (ed.) E. Gruza, Warszawa 2013, pp. 128–132; D. Szumiło-Kulczycka, *Czynności operacyjno-rozpoznawcze i ich relacje do procesu karnego* [Surveillance operations and their relationship with the criminal proceeding], Warszawa 2012, pp. 185–187.

[25] See R. Kmiecik, *Dokumenty prywatne i ich „prywatne gromadzenie" w sprawach karnych* [Private documents and 'private retention' of them in criminal cases], Państwo i Prawo 2004, no. 5, p. 14.

§ 1 sentence 1 of the CPC with regard to material collected in the course of operational control must be adequately applied in the court proceeding, is only a seeming solution because the provision does not repeal the bans on evidence that are referred to in Article 174 of the CPC and Article 393 § 1 sentence 2 of the CPC"[26].

On the other hand, with regard to S. Waldoś's opinion that only the indication made by the policing law provision that Article 393 § 1 sentence 1 of the CPC is adequately applied to the material collected as a result of some surveillance operations allows for the introduction of the material to trial, it is necessary to point out that the provision refers only to reading official documents. However, most of the material obtained as a result of operational control, a controlled buy and a controlled delivery, which allow for the initiation of the criminal proceeding, will constitute either the material evidence in the strict sense of the term (assets, narcotics etc.) or a recording of the course of crime (e.g. the handing of a bribe, an order to commit crime or pass information in order to hamper the criminal proceeding). Thus, the material will be classified as material evidence, to which Article 393 of the CPC is not applied.

M. Chrabkowski negates the possibility of admitting any material obtained as a result of operational control as material evidence and states that the only way to introduce this material to the criminal proceeding is the adequate application of Article 391 § 1 sentence 1 of the CPC. He believes the opinion that there is a possibility to apply Article 395 of the CPC (regarding material evidence) to the material resulting from operational control is wrong and in conflict with the provision of Article 19 (15) of Act on the Police (allowing for the adequate application of Article 391 § 1 sentence 1 of the CPC – A.T.)[27]. The author seems not to notice that operational control can result in obtaining not only documents but also material evidence, and the mode and way of reading evidence in the criminal proceeding depends on the CPC (see Article 1 of the CPC) and not the policing legislation. D. Miszczak rightly notices that while all kinds of magnetic recordings collected during operational control and preserving trails of crime (other than memories) may be directly used as evidence on trail in accordance with Article 395 of the CPC (as material evidence subject to examination – A.T.) or with the use of an appropriate phonoscopy expert analysis, officers' notes and other official documents similar in character developed during operational control with respect to the current CPC do not have such grounds. In the author's opinion, the regulations of the CPC are detailed in character because of the nature of the Act, which – as a 'code' – is to lay down possibly most complete

[26] A. Gaberle, *Dowody w sądowym procesie karnym* [Evidence in the criminal proceeding in court], Kraków 2007, p. 331.

[27] M. Chrabkowski, *Wykorzystanie materiałów kontroli operacyjnej w postępowaniu przygotowawczym* [Use of material obtained as a result of operational control in the preparatory proceeding], Szczytno 2009, p. 188.

norms of the criminal procedure matters. Cases of conflict between the provisions of the Act and the norms of the policing acts, which do not regulate the criminal proceeding (operational control is not part of the criminal proceeding) should be solved in accordance with the rule: "*lex specialis derogat legi generali*" or "*lex posteriol generali non derogat legi priori speciali*"[28].

M. Chrabowski, however, believes that the deletion of the sentence 2 of the provision of Article 393 1 of the CPC by the legislator (in Article 19 (15) of Act on the Police – A.T.) results in non-application of a ban on the substitution of the contents of documents and notes for testimonies and explanations (Article 174 of the CPC) and the ban on reading notes concerning actions that require writing an official report[29]. This standpoint cannot be accepted. Such interpretation of "the deletion of sentence 2 of the provision of Article 393 1 of the CPC" is in conflict with all the rules of interpreting law. If the legislator's intention had really been "non-application" of restrictions resulting from the provision, after having directly laid down that the material obtained during operational control are subject to the provision of Article 391 § 1 sentence 1 of the CPC, he would have had to add a phrase that "Article 391 § 1 sentence 2 of the CPC is not applicable". The lack of any statement made by the legislator in the policing legislation with regard to Article 391 § 1 sentence 2 of the CPC means that the provision is applied directly and with no restrictions towards the material obtained during operational control. The adoption of M. Chrabkowski's unjustified opinion would change the application of one of the basic principles of the criminal proceeding – the principle of directness – in a considerable way.

An example of the use of the so-called telephone billing in a criminal proceeding best illustrates the importance of a decision whether the material (documents) obtained as a result of surveillance operations constitutes material evidence or documentary evidence. Polish law allows for the acquisition of communications data in two ways: in a procedural way (Article 217 of the CPC) and with the use of surveillance operations[30]. While the use of communications traffic information (data) obtained in a procedural way does not raise any doubts, the possibility of introducing traffic data obtained with the use of surveillance methods to the criminal proceeding is continually the subject matter for dispute.

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[28] D. Miszczak, *Dopuszczalność i sposoby wykorzystania w postępowaniu karnym „dokumentów sprawozdawczych" sporządzonych w toku kontroli operacyjnej* [Admissibility of 'reporting documents' developed in the course of operational control and ways of using them in the criminal proceeding], (discussion article), Wojskowy Przegląd Prawniczy 2008, no. 3, p. 18.

[29] M. Chrabkowski, *Wykorzystanie materiałów kontroli operacyjnej w postępowaniu przygotowawczym* [Use of operational control material in the criminal proceeding], Szczytno 2009, p. 188.

[30] See Article 20c of Act on the Police, Article 28 of Act on the Internal Security Agency and the Intelligence Agency, Article 10b of Act on the Border Guard, Article 30 of Act on the Military Police and military policing agencies, Article 36b of Act on fiscal control, Article 32 of Act on the Military Counterintelligence Service and the Military Intelligence Service, Article 18 of Act on the Central Anti-Corruption Bureau.

According to A. Bulsiewicz and A. Lach, the acquisition of telephone billings is possible with the use of surveillance operations but they can only be used as information to obtain other evidence in a procedural way (i.e. by the procedural 'transformation' of surveillance findings). The authors believe that such a billing cannot be used directly during the trial. They draw the conclusion from the contents of Article 20c (1) of Act on the Police, which lays down that communications traffic information may be used "only in order to prevent or detect crime" contrary to Article 19 of Act on the Police, which clearly speaks about "preserving evidence"[31]. It is difficult to agree with that standpoint because the possibility of using evidence in the criminal proceeding is subject to the provisions of the CPC, not of the policing acts. Legally obtained evidence may be introduced to the criminal proceeding directly (in accordance with Article 395 of the CPC) without the need to transform it in a procedural way[32].

On the other hand, K. Boratyńska asks a question whether billing data obtained with the use of surveillance operations methods may be directly introduced to the criminal proceeding in accordance with Article 393 § 1 of the CPC. She highlights that the legislator did not make reference in Article 20c of Act on the Police to Article 393 § 1 sentence 1 of the CPC. Assuming the legislator's rationality, it must have been done on purpose. The author believes that the regulation is a result of the diversity of entities that take decisions to launch operational control and procedural acquisition of traffic data (a court in case of operational control and the Police in case of a communications traffic billing – A.T.). Moreover, she highlights that in accordance with the policing legislation, the obtained billing data are to serve the purpose of preventing or detecting crime and not preserving evidence. In her opinion, such a restriction certainly results in practical limitations; nevertheless, billing data obtained with the use of surveillance methods will be an impulse to acquire evidence in a procedural way, i.e. after the initiation of the criminal proceeding[33]. Thus, the author deprives billing data obtained with the use of surveillance methods of the evidential value during the trial and classifies them as "information on evidence"[34].

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[31] A. Bulsiewicz, A. Lach, *Procesowe i pozaprocesowe uzyskiwanie billingu telefonicznego* [Procedural and non-procedural acquisition of telephone billings], [in:] *Procesowo-kryminalistyczne czynności dowodowe. Materialy pokonferencyjne* [Criminal proceeding evidential procedures. Conference material], (ed.) M. Lisiecki, M. Zajder, Szczytno 2003, p. 20.

[32] Thus, the decision whether the telephone billing should be classified as material evidence or documentary evidence will be a basic issue.

[33] K. Boratyńska, *Wokół problematyki związanej z wykorzystaniem dowodowym materiałów operacyjnych* [Around the issue connected with the evidential use of operational material], [in:] *Praktyczne elementy zwalczania przestępczości zorganizowanej i terroryzmu. Nowoczesne technologie i praca operacyjna* [Practical elements of fighting against organised crime and terrorism. Modern technologies and operational work], (ed.) L. Paprzycki and Z. Rau, Warszawa 2009, p. 151.

[34] That means information indicating the existing sources of evidence, from which, after the use of adequate procedures, evidential means may be obtained.

The whole reasoning presented by K. Boratyńska should be recognised as an abortive attempt. While analysing the possibility of introducing billing data obtained with the use of surveillance methods (Article 20c of Act on the Police) to the criminal proceeding in accordance with Article 393 § 1 sentence 1 of the CPC, K. Boratyńska erroneously classifies such evidence as documentary evidence (only such evidence is subject to Article 393 of the CPC – A.T.). There is no doubt, however, that billing data should be recognised as material evidence, which in the criminal proceeding is used (proved) in the course of examination (Article 395 of the CPC), and not by reading (Article 393 of the CPC). The difference in the classification of a telephone billing as material evidence and not documentary evidence is very important from the practical point of view because material evidence is not subject to restrictions laid down for documentary evidence (Article 174 of the CPC and Articles 391–393 of the CPC).

In the literature on the subject matter, it is assumed that a document as evidence from the criminal proceeding perspective has 'conceptual' contents contained in every object and recorded on it graphically (or in another, e.g. magnetic way), which may be important evidence in the criminal proceeding and is not excluded as evidence in the light of restrictions and evidentiary rules[35]. The document alone (treated as an object or another information storage device), where there are contents, is a source of evidence[36].

A telephone traffic billing comes into being as a result of automatic registration of telephone connections (time, place etc.), which takes place without human participation, thus it would be difficult to find "the preservation of human thought" in it[37]. Thus, it is the recording of some facts, events that consist in given human activeness demonstrated in the performance of a simple mechanical activity (one subscriber's connection or an attempt to make a connection with another user of the network), and not his verbalised thought (utterance)[38].

The arguments for the classification of 'a billing print-out' as material evidence and not documentary evidence are the same as those that exclude from a concept

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[35] R. Kmiecik, [in:] *Prawo dowodowe* [Evidence law], (ed.) R. Kmiecik, Warszawa 2008, p. 159.

[36] As Z. Kegel rightly states, because a document as a source of evidence must be classified as material evidence source, such sources should be divided into documents, i.e. material evidence with conceptual contents (which other objects do not contain) recorded with the use of writing, and other material evidence (which do not contain writing element). Z. Kegel, *Dowód z ekspertyzy pismoznawczej w polskim procesie karnym* [Evidence from graphology expert opinion in the Polish criminal proceeding], Wrocław–Warszawa–Kraków–Gdańsk 1973, p. 36.

[37] There is no doubt that billing data should be classified as strictly transmission data, i.e. ones generated automatically by the system. See more: A. Adamski, *Retencja danych o ruchu telekomunikacyjnym – polskie rozwiązania i europejskie dylematy* [Retention of communications data – Polish solutions and European dilemas], Przegląd Prawa i Administracji, vol. LXX, Wrocław 2005, p. 179.

[38] According to the definition laid down in Article 1d of the Convention on Cybercrime of the Council of Europe, 'traffic data' are all the data processed electronically, related to the transfer of information with the use of telecommunication systems that are generated by that system and constitute an element of the communication process, indicating the communication's origin, destination, route, time, date, size, duration or type of underlying service.

of a document (in a procedural sense) the evidence that is only a recording of a picture (a photograph, a silent film or another form of recording picture, e.g. a magnetic tape without the recording of the sound), which should be classified as material evidence and examined[39]. It seems that such a standpoint should not raise doubts. As a result, the information included in the telephone billing can be excluded from the group of documents. Traffic data, a series of figures (sometimes also iconographic signs or names of telephone companies), are nothing but a mechanical registration of human activities (in the form of information, inter alia, about time and place of the conducted telephone conversations or attempts to conduct them) and not the preservation of human thoughts.

It must be remembered that a document is a certain type of material evidence (material evidence *sui generis*)[40]. The opinion was already expressed in the first Polish criminal code. The Criminal Procedure Code of 1928, after the provisions regulating the reading of documents during the trial (Article 339–342), laid down in Article 343 of the CPC that "other evidence, provided the size and features of an object are not an obstacle, shall be brought to the court room and presented to the judges and the parties"[41]. The conceptual contents are an essential but insufficient condition for classifying a given object as documentary evidence and not material evidence[42]. Because of that, in accordance with the Polish criminal procedure, a communications billing printout should be classified as material evidence and not documentary evidence. In conclusion, it must be stated that

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[39] The opinion dates back to the interwar period. Based on the CPC of 1928, the Supreme Court in the judgement of 13 June 1930 (file SN no. II 2 K. 184/30) stated that the legislator, failing to lay down a definition of a document in the CPC, refers to legal concepts commonly recognised in theory and law interpretation. According to the Supreme Court, a document in the strict sense of the term is "an object in which by means of writing (graphically) human thought, as it were human *vox mortua*, is materialised". Zbiór Orzeczeń Sądu Najwyższego, Orzeczenia Izby Drugiej (Karnej) [Collection of judgements of the Supreme Court, Judgements of the Criminal (Penal) Chamber], Warszawa 1930, item 99, p. 19.

[40] M. Cieślak (*Zagadnienia dowodowe w procesie karnym* [Evidence related issues in the criminal proceeding], vol. I, Warszawa 1955, p. 72) classifies as material evidence the one, the source of which are things *sensu largo* (contents of documents and features of places or objects in their strict sense). Also see Z. Kegel, *Dowód z ekspertyzy pismoznawczej…* [Evidence of graphology expert opinion…], p. 36; T. Nowak, *Dowód z dokumentu...* [Documentary evidence…], pp. 38–42; W. Daszkiewicz, *Proces karny. Część ogólna* [Criminal proceeding. General issues], Warszawa–Poznań 1994, p. 277.

[41] This suggests that the legislator clearly located a document in material evidence, not personal evidence, treating it as *sui generis* material evidence that is different from others because of it conceptual contents. The grounds for distinguishing this category of evidence (within other material evidence – A.T.) are not the quantity of its contents, nor the form of device used for recording it, but the fact that it is conceptual contents.

[42] It should be noticed that, in the procedural sense, a document as 'documentary evidence' might be understood in a narrower way than from the forensic or criminal-material point of view. It may happen that an object with conceptual contents will be – in procedural sense – classified as material evidence and examined, and not as documentary evidence (evidential documents) and it may even be when the perception will concern conceptual contents and not physical features of the document. To find more about a document as material evidence see A. Taracha, *Dokument jako dowód rzeczowy* [Document as material evidence], [in:] *Kryminalistyka wobec prawdy sądowej. Księga pamiątkowa ku czci Profesora Zdzisława Kegla* [Forensic science vs. court truth. Book in honour of Professor Zdzisław Kegel], Wrocław 2005, pp. 527–536 and literature cited there.

the direct introduction to the criminal proceeding (of the use) of information included in the telephone billing and obtained with the use of surveillance operations cannot be analysed from the perspective of the adequate application of Article 393 § 1 sentence 1 of the CPC because the provision refers to proving documentary evidence and not material evidence.

The Supreme Court expressed similar doubts (as K. Boratyńska) towards the possibility of introducing material obtained as a result of surveillance operations to the criminal proceeding in case the provisions of the policing law do not include a statement about an adequate application of Article 393 § 1 sentence 1 of the CPC. In its judgement of 19 March 2014, the Supreme Court states: "*Nota bene*, it must be highlighted that with respect to material obtained with the use of the so-called video-surveillance, i.e. an action referred to in Article 14 (1) point 6 of Act on the Central Anti-Corruption Bureau, the legislator did not decide to introduce it to the trial 'directly' as was done in connection with the actions referred to in Article 17 (15) or Article 19 (5) of the above-mentioned Act. Thus, a conclusion might be drawn from that 'lack' that the issue of whether this material and what part of the material and under which regulations might be used 'directly', and what material should be 'transformed' so that it might become evidence that should be used, remains an open question"[43]. The answer seems to be simple – Article 395 of the CPC shall constitute grounds for the introduction of that material to the criminal proceeding (all material that is a recording of the picture and with the recording of the sound, provided it is a recording of the course of crime) and thus, there is no need for a procedural 'transformation' of the material. If it is possible to use the material recording the course of crime (also the sound if the crime was committed 'verbally') obtained independently of the criminal proceeding by a natural person as material evidence, such evidence obtained by authorised law enforcement officers should be admissible too.

There is no doubt that introducing the material obtained as a result of surveillance operations to the criminal proceeding, it is first of all necessary to determine whether it will constitute material evidence or documentary evidence. Depending on that decision, either Article 395 of the CPC or Article 393 § 1 of the CPC will constitute grounds for the introduction of the material to the criminal proceeding. Material evidence should include this part of material obtained as a result of surveillance operations that recorded the course of crime (also a recording of the sound). The adjudication practice used so far, in which the only grounds for the introduction of material obtained as a result of unconventional investigative methods are found in Article 393 § 1 sentence 1 of the CPC, should be treated as mistaken because a big part of that material will constitute material evidence, which will be introduced to the criminal proceeding in accordance with Article 395 of the CPC.

[43] Ruling of the Supreme Court of 19 March 2014, II KK 265/13.

ON THE ADEQUATE APPLICATION OF ARTICLE 393 § 1 SENTENCE 1 OF THE CPC TOWARDS MATERIAL OBTAINED AS A RESULT OF SURVEILLANCE OPERATIONS

Summary

The author discusses the issue of evidential features of surveillance operations, focusing on legal grounds for the introduction of the results of these actions to the criminal proceeding. He is critical about the conception of adequate application of Article 393 sentence 1 of the CPC adopted in the policing legislation with respect to the material obtained as a result of such surveillance operations as operational control, entrapment and a controlled delivery. The author presents an opinion that a big part of the material obtained as a result of surveillance operations constitute material evidence that should be introduced to the criminal proceeding in accordance with Article 395 of the CPC. He believes that the courts' adjudication practice in which Article 393 § 1 sentence 1 of the CPC used to be the only grounds for the introduction of the material obtained as a result of the so-called unconventional investigative methods is erroneous.

O ODPOWIEDNIM STOSOWANIU ART. 393 § 1 ZD. 1 K.P.K. W STOSUNKU DO MATERIAŁÓW UZYSKANYCH W WYNIKU CZYNNOŚCI OPERACYJNO-ROZPOZNAWCZYCH

Streszczenie

Autor omawia problematykę prawnodowodową czynności operacyjno-rozpoznawczych, koncentrując się na podstawach prawnych wprowadzania wyników tych czynności do procesu karnego. Krytycznie ocenia przyjętą w ustawodawstwie policyjnym konstrukcję odpowiedniego stosowania art. 393 zdanie pierwsze k.p.k. do materiałów uzyskanych w wyniku takich czynności operacyjno-rozpoznawczych, jak: kontrola operacyjna, prowokacja policyjna i przesyłka niejawnie nadzorowana. Prezentuje pogląd, że znaczna część materiałów uzyskanych w wyniku tych czynności operacyjno-rozpoznawczych stanowią dowody rzeczowe, które powinny być wprowadzane do procesu karnego na podstawie art. 395 k.p.k. Dotychczasową praktykę orzeczniczą, w której jako jedyną podstawę wprowadzenia materiałów uzyskanych w wyniku tzw. niekonwencjonalnych metod śledczych sądy stosują, art. 393 § 1 zdanie pierwsze k.p.k. uważa za błędną.

DE L'APPLICATION CONVENABLE DE L'ART.393 § 1 PH.1 DU CODE DE LA PROCÉDURE PÉNALE PAR RAPPORT AUX MATÉRIAUX DES ACTIVITÉS OPÉRATIONNELLES ET INDICATIVES

Résumé

L'auteur parle de la problématique législative et démonstrative des activités opérationnelles et indicatives, et il se concentre sur les bases juridiques de l'introduction des résultats de ces activités au procès pénal. Il critique la construction acceptée par la jurisprudence policière de l'application convenable de l'art.393 ph.1 du code de la procédure pénale aux matériaux ramassés après les activités opérationnelles et indicatives comme le contrôle opérationnel, la provocation policière et l'envoi surveillé clandestinement. Il présente l'idée que la plupart des matériaux ramassée grâce aux activités opérationnelles et indicatives est constituée par des preuves qui devraient être introduits au procès pénal à la base de l'art.395 du code de la procédure pénale. Et l'auteur trouve la pratique actuelle de jurisprudence comme fautive surtout quand les tribunaux appliquent l'art.393 § 1 ph.1 du code de la procédure pénale comme base unique pour introduire des matériaux ramassés après quelques méthodes non conventionnelles d'enquête.

О СООТВЕТСТВУЮЩЕМ ПРИМЕНЕНИИ СТ. 393 П. 1 ФР. 1 УПК В ОТНОШЕНИИ МАТЕРИАЛОВ, ПОЛУЧЕННЫХ В РЕЗУЛЬТАТЕ ОПЕРАТИВНО-ОПОЗНАВАТЕЛЬНОЙ ДЕЯТЕЛЬНОСТИ

Резюме

Автор рассматривает доказательно-правовую проблематику оперативно-опознавательной деятельности, концентрируясь на правовых основах введения результатов этой деятельности в уголовный процесс. Подвергает критической оценке принятую в полицейском законодательстве систему соответствующего применения ст. 393 (первая фраза) УПК в отношении материалов, полученных вследствие следующей оперативно-опознавательной деятельности: оперативный контроль, полицейская провокация и негласно контролируемая посылка. Представлена точка зрения, что значительную часть материалов, полученных в результате данной оперативно-опознавательной деятельности, представляют вещественные доказательства, которые должны быть введены в уголовный процесс на основе ст. 395 УПК. Прежняя судебная практика, в которой в качестве единственного основания для введения материалов, полученных в результате так называемых нетрадиционных следственных методов, применяется судами ст. 393 п. 1 (первая фраза).