CASE TRANSLATION: THE NETHERLANDS

CASE CITATION:
Gerechtshof 's Gravenhage 9 maart 2011 LJN: BP7080

NAME AND LEVEL OF COURT:
Gerechtshof te 's-Gravenhage meervoudige kamer voor strafzaken (Appeals Court at The Hague, Criminal Bench)

DOSSIER NUMBER: **22-002281-10**

DATE OF DECISION: **9 March 2011**

MEMBERS OF THE COURT:
Mr G. J. W. van Oven, Mr G. Knobbout and Mr J. W. Wabeke

REGISTRAR:
Mr A. Vasak

Threats to kill posted on web site; accused posted comments by using the connection of a third party via wi fi without permission; whether using the computer of a third party without permission is an offence in Dutch law; electronic evidence

Summary:

1. The suspect issued a threat with a posting on a website open to all. The posting was the announcement of a shooting at the Maerlant College in The Hague. The defendant did so in the knowledge of the recent past where there have been tragic shootings at schools around the world which had been reported by the media and a great deal of attention was paid to such events, and two days after a shooting at a school that had taken place in Germany. The posting of the suspect was read by several people and experienced as a threat, as evidenced by the declaration by the Rector of the Maerlant College and one of the responses on the website. Penalty: 120 hours community service.

2. The suspect is acquitted of the allegation of computer intrusion. The court notes that as a matter of fact the defendant gained access to the router [X], but he could only use the wireless internet connection that [X] owned. The accused had no access to secure data in the computer that [X] owned, that computer being a computerized work under article 80sexies of the Criminal Code. The conduct is therefore of an entirely different order than that which is punishable under article 138a of the Criminal Code. In light of this, the court considers that the use of a (possibly protected) internet connection of another, which is what the alleged act of the defendant comes down to, does not prejudice that person in any interest protected by article 138a, first paragraph of the Criminal Code. This behaviour may be socially undesirable in that a third person might freely "piggyback" on an internet connection paid for by the legitimate user, so that internet bandwidth might be lost, such action is not relevant to the criminal law.

CONTRADICTION

Appeals Court at The Hague

Criminal bench

Judgement

handed down at the appeal against the verdict of the court in The Hague on 2 April 2010 in criminal proceedings against the accused:

[Suspect]

born [birth place] on [birth] 1985,

[Address].

Examination of the case

This ruling was delivered following the investigation at the hearing in the first instance and the examination at the hearing on appeal of this court on 23 February 2011.

The court has considered the application of the Advocate-General and what has been put forward by and on behalf of the defendant.

Course of the proceedings

In the first instance, the suspect is acquitted of the

charges.

The prosecutor appealed against the acquittal.

Indictment

The suspect is accused of:

1.
He on or about 12 and/or 13 March 2009 threatened Hague teachers and/or students of the College Maerlant, at least one or more person(s) that attended the College Maerlant, with criminal acts directed against life, at least with aggravated assault, in that the accused intentionally posted in a threatening way (via a computer) on a public website (www.4chan.org) the following: "Tomorrow I'll go and kill some peeps from my old school, the college Maerlant in The Hague" (morgen zal ik een aantal mensen van mijn oude school, het Maerlant college in Den Haag doden/vermoorden), at least words of similar threatening nature and purpose;

2.
He at one or more times in the period from 1 February 2009 to 13 March 2009 in The Hague intentionally and unlawfully intruded in one or more automated works, namely a computer and/or router and/or a (secure) wireless internet connection (of provider Planet/KPN belonging to [X]), or in a part thereof, at the occasion of which he breached the security of another computer, in any case gaining access by technical means, using a false key, namely the unauthorized use of the code and/or password of [X] and or by assuming a false identity.

The sentence which is the subject of the appeal

The sentence cannot be upheld because the appeals court does not agree with it.

Opinion of the Advocate General

The Advocate General has concluded that the facts indicted in 1 and 2 are proven.

Regarding the indictment under 1., he argues that the threat was addressed at the College Maerlant in The Hague, and as is apparent from the subsequent acts is clearly seen as a threat by the police and the rector of the College Maerlant. The threat was immediate, specific and plausible. The wording of the message was such that the defendant had done everything to make his threats effective.

According to the Advocate-General, there is conditional intent. Even if an expression is meant as a joke, this can result in a condemnation for criminal threat. The warning that is posted on the website www.4chan.org makes this no different. The warning cannot guarantee that no true messages are posted, and despite the warnings, at least one visitor to the site felt called upon to bring the case to light. The subsequent operations indicate that there is a criminal threat under article 285 of the Penal Code. With regard to the indictment under 2, the Advocate-General states that a router is covered by the concept of a computerized work, within the meaning of article 80sexies of the Criminal Code, since a router is an item in which information is stored, processed and transferred.

Position of the defence

On behalf of the accused and in accordance with the submitted paper, advocates argued that the accused should be acquitted under 1 and 2. Essentially, counsel argued that in view of the circumstances under which the posting was placed, the context of the website where the post is inserted, the warning text visible on the forum of the website and the statement of the accused on the character of the site, it cannot be proven that the defendant knowingly accepted the considerable risk that with the person reporting the crime the reasonable fear could come to exist that he might lose his life.

Furthermore, counsel argued that given the very small chance that the person reporting the crime would (indirectly) be informed of the contents of the post, it cannot be proven that the accused consciously accepted the substantial risk that the person reporting the crime would be informed of the content of the posting.

Regarding the second indictment against the appellant, counsel argues that by the use of a (secure) internet wi fi connection, the woman

reporting the crime was not prejudiced in any interest protected by the provisions of article 138a, first paragraph, of the Criminal Code. In the alternative, counsel submits that the use of a router to obtain access to the internet is not covered by a computerized work, pursuant to article 80sexies of the Criminal Code.

Acquittal under 2 in respect of the offence made against the appellant

The court finds that, however much the conduct of the accused is perceived as undesirable, the legislature apparently has decided not to criminalize such conduct.

According to article 138a, first paragraph of the Penal Code, an offence is committed when a person enters a computerized work (or a portion thereof) without authority. As is apparent from the wording of article 80sexies of the Criminal Code, in which a computerized work is defined, and the accompanying Explanatory Memorandum (Papers II 1998/99, 26 671, No. 3, p. 44) there is only an offence committed when a device is intended for – in a cumulative way – storage, processing and transfer of data. A device that is only devoted to data transfer and/or storage therefore falls outside the statutory definition.

The court notes that a router is a switching device at the nodes of a network such as the internet. A router maintains and stores a password or user ID and only takes care of sending data to the appropriate destination at the direction of the user of the router.

Therefore, the router does not perform the cumulative functions as enshrined in article 80sexies of the Criminal Code.

In addition, the court has also taken note of the following. The legislature, as the legislative history shows, wanted with (the introduction of) article 138a, first paragraph of the Penal Code ('intrusion') to protect the person "that by (taking) actual security (measures) has made it clear that he wants to protect his data against prying eyes" (Papers II 1989/90, 21 551, No. 3, p. 15).

The court notes that the defendant as a matter of fact has gained access to the router of [X], but could only use the wireless internet connection of [X]. The accused has not gained access to secure data in the computer of [X], being a computerized work under article 80sexies of the Criminal Code. The conduct is therefore of an entirely different order than the one that is punishable under article 138a of the Criminal Code. In light of this, the court considers that with the use of a (possibly protected) internet connection of another, that is what the indicted acts of the defendant come down to, that person is not prejudiced in any interest protected under article 138a, first paragraph of the Code Criminal. This behaviour may be socially undesirable to the extent that third persons use an internet connection for free by "piggybacking" on a connection paid for by the legitimate user, and internet bandwidth might be lost, but such actions are not relevant to the criminal law.

In the opinion of the court, taking note of the above, it is not legally and convincingly proven that the accused is guilty as charged under item 2, so the accused must be acquitted.

By the court based on legal evidence established facts and circumstances

Facts

Based on the documents in the file and the investigation at the trial that followed the court assumes the following facts and circumstances. On Friday, 13 March 2009 around 15.20 hours through The Hague Hospitality Center of the municipality, the police received an e-mail containing the announcement that a citizen of the United States called [name] on website www.4chan.org had read a message with, among others, the following:

> "Tomorrow I'll go and kill some peeps from my old school, the Maerlant college in The Hague. I have made arrangements already in the school, so I will be able to make a good getaway. I parked two vehicles next to both of the exits and have been studying the building plans."
>
> (Vertaald: Morgen zal ik een aantal personen van mijn oude school, het Maerlant College in Den Haag doden. Ik heb in de school al voorbereidingen

getroffen, zodat ik in staat ben te vluchten. Ik heb twee voertuigen in de buurt van beide uitgangen geparkeerd en ik heb de plattegrond van het gebouw bestudeerd.)

"It will be all over the news soon:)"

(Vertaald: Het zal snel op het nieuws zijn, gevolgd door een smiley-teken.)

"post ending on 13 will decide which people I will kill (as in only niggers/girls/blonds/guys/hot/ugly/etc)"

(Vertaald: het bericht eindigend op 13 zal beslissen welke personen ik zal doden (als in alleen negers /meisjes/blondines/jongens/lekker/lelijk/etc.))

Following this message, the police began an investigation and the police immediately secured the Maerlant College inconspicuously with police units. After everyone had left the school, the security around 17:00 was lifted/ended. On Saturday 14 March 2009, the police informed [Rector], head master/rector of the College Maerlant, about the message.

On Friday 13 March 2009, in response to a request made to KPN to reveal the IP address of the computer from which the message was sent, the IP address became known. It was an IP address registered in the name Mrs [X], residing at [address]. [X] declared on 14 March 2009 to the police that she uses a secured wireless connection with a router of the brand Speedtouch 51EB02. [X] and her friend have not handed the security code to third parties. [X] also indicated no knowledge of the message placed on web site www.4chan.org.

In the lower room at [X] a router with five MAC addresses were found. Two of the MAC addresses were found to belong to the laptop and desktop computer of [X]. The three remaining MAC addresses could not be matched to this hardware.

Further examination then revealed that a former student of the College Maerlant called [Z], lived within the range of the router of [X]. In his house after entering on Sunday, 15 March 2009 around 11.25 hours, no computer suitable for internet use was found, but an X-BOX game console was found. Next to it was a note on which was written in pen: Speedtouch 51EB02, ww: 772D87781E. This is the data of the router in the home of [X].

In response to a query [Z] declared that he had obtained the note with the details from his neighbour [Y]. He had obtained this data also from his neighbour [defendant] because his own internet connection was bad sometimes.

On Sunday, 15 March 2009 around 11.41 pm the police entered the house of the defendant at [address], where the suspect was arrested. An Apple-branded computer, type iBook, was found and seized in the house. Both before the police and during the investigation hearing on appeal, the appellant confessed that the message on the website www.4chan.org was placed by him using his neighbour's internet connection. This confession is confirmed with other evidence: the MAC address of his iBook was found in the router of [X]. On the computer of a suspect, a temporary file with the contents of the issued message appeared to be present/was found.

Opinion of the court

For the criminal offence of a threat aimed against a life, it is required first that the statements of the accused were of such a nature and made in such conditions that they put the person to whom they are addressed in reasonable fear that they might lose their life. The court notes that the wording in the above posting on www.4chan.org is threatening in nature. The notice must also be seen against the background that just two days before a tragedy had occurred at a German school in Winnenden in which 16 people were killed. Furthermore, in recent years there have been previous incidents involving the use of weapons in schools that has led to much commotion in society. The appellant posted his message under these conditions. In addition, the Rector of the College Maerlant in his report stated that it was felt as a threat.

The court does not accept the position of the appellant that everyone recognized that the message was a joke from the start. The message posted by the

appellant led to the following reaction on www.4chan.org:

> "Authorities have been alerted.
>
> Regardless of whether or not you were serious, you will be prosecuted."

Although the site contains the following warning: 'The stories and information posted here are artistic Works of fiction and falsehood. Only a fool would take anything posted here as fact,' there is no guarantee that no serious messages could be placed on the site. Previous school shootings have been announced in advance via the internet, and this is usually done anonymously and through sites where the author of the message is difficult to determine. From the above response, posted shortly after the posting made by the appellant, it appears that not all readers understood the message as a joke. That there were people who responded by recognising it as a joke, does not lead us to different conclusion.

Second, a criminal threat requires that the (conditional) intent of the appellant was to direct the threat. At the police station early in the morning on Friday, 13 March 2009 the appellant consciously uploaded the message on the forum www.4chan.org after he had become inspired by previous posts in this forum with a similar content. The appellant further stated that "the objective of 4chan is for people to shock, it's a kind of internet outlet. There you can drop things without consequences. It's all fictional bullshit that everyone drops there." He assumed that he could issue a better message than the previous two, said the suspect. The appellant further stated that at the time of placing the message he had given thought to the possible consequences, such as causing fear in people.

The question in this context that needs to be answered is whether it can be established that the appellant nevertheless knowingly accepted the considerable risk that people would feel threatened by his posting. This not only requires that the appellant was aware of the significant risk that people might feel threatened at the time of posting his message on the internet, but at that particular time he knowingly accepted such a risk. Certain behaviours can, according to the Supreme Court in its ruling of 8 April 2008 (LJN BC 5982) in respect of their external appearance, focus so much on a specific effect that – absent contra-indications – it cannot be other than that the suspect accepted the considerable risk of the effect/consequence In the opinion of the court this the case here, which is considered as follows.

The appellant had posted his comments two days after a school shooting in German Winnenden and he had been specific by naming a date, place and even a school existing in that place where the shooting would take place. He has declared to have known that the earlier school shootings had been announced on the internet, that actually took place and that resulted in unrest in society. The appellant, at the police and the hearing on appeal, also stated that he was aware of the very recent school shooting in Winnenden and that, when on this forum www.4chan.org messages were posted, he placed his posting. The appellant further stated that he had placed his posting because of the great shock value of a school shooting.

The appellant knew what effect the shooting in Germany had on the (entire) society. Nevertheless, the appellant posted his comments and neither modified or removed it later.

The appellant argues before the hearing of the appeal that the group of persons joining the relevant forum where the posting was placed could be considered a "community" that was aware of the presumed nonsense of the content posted in the forum. The court however found that – as evidenced by the statement of the accused at the hearing on appeal – the "community" is not a closed group and that the forum is accessible to everyone. The court therefore believes that even if a majority of visitors think that it was a joke, – given the open access to the forum – the significant risk exists that a visitor reading the posting could take them seriously.

With respect to the likelihood that persons involved in the Maerlant College would feel threatened after reading the post, the court considers that, given the circumstances that the appellant consciously posted comments on a universally accessible website, he accepted the considerable risk that a reader would find the post to be so threatening that they would

inform the college Maerlant directly or would inform the (Dutch) police after which the parties would be warned, which is what occurred.

Given the seriousness of terms used and the nature of the chosen medium and the conditions as stated above, the court considers that the appellant knowingly accepted the considerable risk that the declarant could reasonably fear that he could be killed.

Proven Statement

The court considers legally and convincingly proven that the accused committed the act indicted under 1 which needs to be understood as follows:

He on 13 March 2009 in The Hague threatened a person at the College Maerlant with any crime directed against life, where the accused intentionally wrote (via a computer) on a public website (www.4chan.org) the following threatening text: "Tomorrow I'll go and kill some peeps from my old school, the college Maerlant in The Hague" (morgen zal ik een aantal mensen van mijn oude school, het Maerlant college in Den Haag doden/vermoorden).

What has been charged in addition or in another way, has not been proven. The appellant must be acquitted of that.

Insofar as in the indictment language and/or spelling mistakes were made these have been corrected in the finding of fact. As is apparent from the proceedings at the hearing, this has not prejudiced the defendant in his defence.

Proof

The court bases its belief that the appellant has committed the proven facts and circumstances in evidence, and providing cause for the finding of fact.

Criminality of the proven facts

The proven facts amount to:

The threat of a crime against life.

Criminal liability

There is no plausible circumstance that excludes the criminality of the suspect. The suspect is punishable.

Motivation of the punishment imposed

The Advocate General has requested that the sentence under appeal will be set aside and that the defendant in respect of the offences 1 and 2 will be sentenced to community service for a period of 180 hours, alternatively 90 days detention.

The court has to impose punishment on the basis of the seriousness of the offence and the circumstances under which it was committed and on the basis of the person and the personal circumstances of the accused, as shown during the investigation hearing.

In addition, the court has specifically considered the following. The suspect posted a threat on a website open to all. The posting was the announcement of a shooting at the Maerlant College in The Hague. The appellant did so knowing that in the recent past tragic shootings had occurred at schools around the world which had arisen much attention through the media, and such two days after a school shooting had taken place in Germany. At the German school, 16 people died including the perpetrator. The fact also caused much unrest in the Netherlands. The posting by the suspect was read by several people and experienced as threatening, as evidenced by the declaration of the Rector of the College and one of the responses on the website. The police also took the post so seriously that they quietly secured Maerlant College with police units. A large number of people were deployed as soon as possible to find out who had written the post in order to eliminate the threat. Neighbours of the suspect were wrongly identified as potential suspects and they were affected by the experience.

The court – having considered everything – holds the view that a completely unconditional penalty in the form of community service of a duration mentioned below is an adequate and necessary reaction.

Applicable laws

The court has considered articles 9, 22c, 22d and 285

of the Penal Code as they applied at the time of the proven facts.

DECISION

The court:

Sets aside the sentence under appeal and does right again.

Declares unproven that the accused committed the offense indicted under 2 and acquits the accused from that.

Declares proven that the accused committed the offence charged under 1, as described above.

Declares unproven whatever has been indicted in addition or in another way and acquits the accused of that.

Specifies that the proven facts result in the above-mentioned criminal offence.

Explains the appellant liable in respect of the proven facts.

Orders the appellant to be sentenced to a penalty in the form of community service for a period of 120 (one hundred twenty) hours, to be replaced by imprisonment for a term of 60 (sixty) days in the event that community service is not properly performed.

Provides that the period which the appellant spent on remand before the implementation of this ruling will be deducted according to the standard of two hours community service for each day spent in custody, if that time has not already been deducted from another sentence.

This ruling was given by Mr. G. J. W. van Oven, Mr. G. Knobbout and Mr J. W. Wabeke, in the presence of the Registrar, Mr. A. Vasak.

It was delivered at the public hearing of the court of 9 March 2011.

Thanks to Dr Maurice Schellekens for help with this translation.

