Neutral Citation Number: [2009] IEHC 120

THE HIGH COURT

2008 39 Ext.

Between

The Minister for Justice, Equality and Law Reform

Applicant

And

Tomasz Fil

Respondent

Judgment of Mr Justice Michael Peart delivered on the 13th day of March 2009

The surrender of the respondent is sought by a judicial authority in Poland under a European arrest warrant which issued there on the 21st August 2007.That warrant was endorsed by the High Court for execution here on the 20th February 2008, and the respondent was duly arrested on foot of same on the 10th November 2008. On the following day, he was brought before the High Court as required by the provisions of s. 13 of the European Arrest Warrant Act, 2003, as amended, and has been remanded from time to time thereafter pending the hearing of this application for an order for his surrender.

There is no issue raised as to the respondent's identity and I am satisfied from the affidavit evidence of the arresting Garda officer, Sgt, Kirwan, that the person who is before the Court is the person in respect of whom this European arrest warrant has been issued.

The surrender of the respondent is sought so that he can serve a sentence of imprisonment which was imposed upon him on the 9th April 2002 following his conviction in respect of an offence contrary to Article 279 (1) of the Polish Penal Code, details of which are set out in the warrant. Additional information from the judicial authority describes that offence as one of "burglary". That sentence was at first suspended for a probationary period of three years. However, according to certain additional information furnished to the Central Authority here by letter dated 28th January 2008, the conditions of suspension were infringed by the respondents and on the 28th July 2004 the suspension was lifted and the Court ordered that the sentence be served. However it was learned that the respondent had gone abroad, and it was subsequently established that he was in this country. It appears from further additional information contained in a letter dated 5th February 2009 that the respondent was aware of the conditions of suspension, and that he breached them by firstly not making restitution to the injured party, and also by committing another offence during the period in question.

The sentence of one year's imprisonment meets the minimum gravity requirement.

No undertaking is required under s. 45 of the Act as the respondent was present at his conviction and sentence.

The offence for which he was convicted is one in respect of which correspondence or double criminality must be established before this Court may order his surrender, and I will come to that. The only issue pursued on this application relates to that issue.

I am satisfied that there is no reason to refuse to order surrender by virtue of sections 21A, 22, 23 or 24 of the Act, and I am satisfied, subject to reaching a conclusion in relation to correspondence, that surrender is not prohibited by any provision of Part III of the Act or by the Framework Decision.

Correspondence
The offence for which the respondent was convicted and sentenced is set forth in the warrant as follows:

> *"On some unspecified days in the month of November 2001 at ……., acting together and under arrangement with Lukasz Fil and a juvenile of known identity, as a perpetrator of a series of offences, they four times broke into the fuel tank of a KRAS truck with the registration no. RK 04591 using a master key to unlock the vehicle's safety device; afterwards, they would steal diesel oil in the amount of c.15 litres at a time, worth in total of c. PLN 150.00, thus acting to the detriment of the company ….. in Krosno."*

Three candidate offences for correspondence are put forward by the applicant -firstly an offence of theft under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the 2001 Act"), secondly an offence of handling stolen property contrary to s. 17 of that Act, and thirdly, an offence of conspiracy to commit theft contrary to Common Law.

I am not satisfied that the acts of the respondent set forth in the warrant meet the requirements of the second candidate offence namely a handling offence.

The issue to be determined is whether these acts meet the requirements of a s. 4 theft offence and therefore also an offence of conspiracy to commit theft contrary to Common Law.

Section 4 theft
The relevant provisions of Section 4 of the 2001 Act provide as follows:

> *"4. – (1) Subject to section 5, a person shall be guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it.*
>
> *(2) For the purposes of this section a person does not appropriate property without the consent of its owner if –*
>
> *(a)the person believes that he or she has the owner's consent, or would have the owner's consent if the owner knew of the appropriation of the property and the circumstances in which it was appropriated, or*

(b) (except where the property came to a person as trustee or personal representative) he or she appropriates the property in the belief that the owner cannot be discovered by taking reasonable steps.

But consent obtained by deception or intimidation is not consent for those purposes."

S.4 (5) of that Act provides:

"(5) In this section –

"appropriates" in relation to property means usurps or adversely interferes with the proprietary rights of the owner of the property;

"depriving" means temporarily or permanently depriving."

John Fitzgerald BL for the respondent submits that there are four elements required to be present for this offence, namely dishonest intention, appropriation as defined by s. 4 (5) of the Act, the absence of the owner's consent, and depriving the owner of the property either temporarily or permanently. He concedes that the use of the word "steal" in the description of the offence meets the concept of appropriation for the offence but he submits that the facts as disclosed are insufficient to establish dishonest intent, the absence of consent, or an intention to deprive the owner of the diesel oil either temporarily or permanently.

Mr Fitzgerald has referred to the judgment of O'Dalaigh CJ in *State (Furlong) v. Kelly* [1971] IR. 132 as well as that of Walsh J. in *Wyatt v. McLoughlin* [1974] IR. 378, as to the necessity for a warrant to contain essential facts and information to establish that the acts of the respondent would if committed here constitute an offence here. He submits, of course correctly, that simply because the issuing judicial authority has stated that the Polish offence in this case is one of burglary cannot mean that the acts of the respondent constitute the Irish offence of burglary. In so far as he submits that the warrant in this case does not refer to any dishonest intent on the part of the respondent or that the consent of the owner was absent, Mr Fitzgerald submits that this Court should not simply infer these elements for the purpose of being satisfied as to correspondence. In that regard he has referred to my judgment in *Minister for Justice, Equality and Law Reform v. Dunkova*, unreported, High Court, 30th May 2008 where at page 14 thereof I found in that case that in order to be satisfied as to correspondence with a s.4 theft offence I would have to "*read into the facts words which are absent from the certified translation of the warrant provided*" and that "*the Court cannot do that*". He urges that the same approach should be adopted in the present case. In the same vein, Mr Fitzgerald refers to what I stated in this regard also in my judgment in *Minister for Justice, Equality and Law Reform v. Wroblewski,* unreported, High Court, 9th July 2008 at pages 8 and 9 thereof. In the two latter cases I was unable to find sufficient in the facts set forth in the warrant to find that the offences corresponded with a s. 4 theft offence.

In addition, the Court has been referred to the judgment of Fennelly J. in *Attorney General v. Scott Dyer* [2004] 1 IR. 40. That was a case where the offences were referred to in the warrant by the requesting state as "criminal fraud". The offences in this jurisdiction which were put forward as corresponding offences here each required that there be "intent to defraud" as an ingredient for the offences here. That allegation was absent from the warrant and it was sought to fill this lacuna by an affidavit from a lawyer in Jersey, the requesting state, in which he stated, inter alia, that under Jersey law it was not necessary to set out the requisite *mens rea* in the indictment, and that he attempted also to establish that the element of "intent to defraud" is something which the prosecution must prove as part of establishing that the defendant had deliberately made a false representation with the intention and consequence of causing actual prejudice to someone and actual benefit to himself or another. Fennelly J. in his judgment concluded that nothing, whether in the warrant or the lawyer's affidavit indicated that the defendant was charged with any offence for which "intent to defraud" was an essential ingredient, and therefore that this offence did not correspond. Mr Fitzgerald relies upon this judgment in support of his arguments that in the present case also there is nothing in the warrant to indicate dishonest intent, the absence of consent, or an intention to deprive the owner of the diesel oil either temporarily or permanently, as being necessary ingredients for the Polish offence for which the respondent was convicted, and that correspondence is therefore absent.

Siobhán Ní Chúlacháin BL for the applicant submits that there are sufficient facts within the description of the offence in the warrant for the Court to be satisfied that the ingredients of a s. 4 theft offence are met in this case. She has referred to the judgment of Geoghegan J. in *Myles v. Sreenan* [1999] 4 IR. 294, where at page 299 he stated:

"[For the purposes of correspondence] I simply have to read the particulars in the warrant and form a view as to whether they constitute an offence in Irish law. Having applied that exercise, I am absolutely satisfied that there is correspondence in this case. It is quite clear from the dicta of Henchy J. [Hanlon v. Fleming [1981] IR. 489 at p. 495] that a mere imperfection in draftsmanship would not be sufficient to defeat the warrant. One must read the warrant as a whole and if on <u>any reasonable interpretation of the particulars as given</u> they are intended to convey a set of facts which would be an offence in Ireland there is sufficient correspondence. I do not find it necessary, therefore, to consider whether, as a matter of perfect draftsmanship, a word such as "dishonestly" ought to have been inserted in para. 2 because I am satisfied that upon reading the whole charge under the heading "alleged offence" it is perfectly obvious that dishonesty is what is alleged…..". (my emphasis)

Ms. Ní Chúlacháin submits that the facts in the present warrant "<u>on any reasonable interpretation of the particulars as given</u>" satisfy the requirements of the s. 4 theft offence, even if the words used do not mirror preciously how such a charge would be laid in an indictment here. She refers also to my judgment in *Minister for Justice, Equality and Law Reform v. Mazurkiewicz*, unreported, High Court, 17th December 2008. In that case the respondent's surrender was sought for prosecution in respect of an offence, the facts of which were described in the warrant as involving the mugging of the victim, use of violence and stealing a wallet and a mobile phone. In that case it was contended by the respondent that the description of that offence in the warrant failed to disclose features which would be necessary to ground the corresponding offence here of robbery contrary to s. 14 of the 2001 Act, and in particular, dishonest intention, lack of consent of the victim, and intention to deprive the victim of the property. In that case I concluded the matter as follows at page 4 as follows:

"Taking the adapted version of s.14 which I have just set forth it is clear to me by reference to the description of the acts of the respondent contained in the warrant that he is alleged in the warrant to have, without any claim of right made in good faith, interfered with the proprietary rights of the owner of the property, without the consent of the owner, without his consent and with the intention of depriving the owner of the property of it, and used force at the time against the owner in order to do so. This is not a case in which the issuing judicial authority has stated that the respondent simply "took" the property as occurred in the case of Minister for Justice, Equality and Law reform v. Dunkova, unreported, High Court, 30th May 2008, or Minister for Justice, Equality and Law Reform v. Wroblewski, unreported, High Court, 9th July 2008. The word "took" is neutral as to intention of motive when given its ordinary

meaning. The use of the word "stole" in the present warrant is not neutral in that sense. I accept that the use of the word "stole" is not itself sufficient to constitute stealing under Irish law, but it is sufficient, because it is by reference to its ordinary meaning, to provide a context in which the facts contained in the warrant can be read. The facts clearly show that the respondent cannot have had any claim of right made in good faith. The facts clearly show that the consent of the victim was absent, and that the respondent intended to deprive the owner of the property. The facts clearly show the use of force when the property was robbed. These facts are sufficient to make the offence correspond to the offence here under s. 14 of the 2001 Act. The fact that the issuing judicial authority has not used the word "dishonestly" in the warrant does not matter. The same applies in relation to the absence of the word "appropriates" from the warrant."

Ms Ní Chúlacháin submits that in the same way, the facts alleged in the present warrant must be seen as sufficient to infer or include these elements of the offence under s. 4 of the 2001 Act, since the description of the actions of the respondent include the breaking into fuel tanks with the use of a master key, the stealing of diesel fuel and the detriment to a named person.

Conclusion
The facts in respect of which the respondent was convicted are very clearly stated. The warrant does not for example use the neutral word "took" in respect of the diesel fuel, such as was used in the *Dunkova* case or the case of *Wroblewski* already referred to. The use of the word "steal" is itself significant, and in that regard I refer again to what was stated by Geoghegan J. in *Myles v. Sreenan* [supra], and I refer to a further passage from the judgment of Fennelly J. in *Attorney General v. Scott Dyer* [supra]. Having carried out an extensive review and consideration of the authorities, including those to which Mr Fitzgerald has referred, and stated the following at page 50:

"The result seems to me to be the following. Normally words used in an extradition warrant will be given their ordinary meaning. This enables the courts to give effect, without resort to extrinsic evidence, to extradition requests where words such as "steal", "rob", and "murder" are used. It is possible that such words have different meanings in the law of the requesting state, but, in the absence of anything like that, the courts will examine correspondence by attributing to such words, when used in the warrant, the meaning that they would have in Irish law."

In the present case the respondent is described as having stolen diesel. The circumstances in which this occurred as described in the warrant leave no room for doubt that the consent of the victim was absent, and there is no room for any suggestion that the respondent comes within any of the matters referred to in s. 4 (2) of the Act which might serve to show that he comes within the exceptions set forth therein. There is no room for doubt in my view either that the respondent appropriated the goods as defined in s. 4 (5) namely *"usurps or adversely interferes with the proprietary rights of the owner of the property".* Similarly it is quite clear that there was an intention to deprive the owner of the goods either temporarily of permanently. In my view the Court is entitled to look at the facts as set forth in the warrant and conclude "on any reasonable interpretation" thereof that the respondent did acts which if done in this State would amount to the offence under s. 4 of the 2001 Act.

In these circumstances I am satisfied that correspondence is established with that offence.

Accordingly the Court is required to make the order for surrender which is sought on this application, and I will so order.