Neutral Citation Number: [2010] IEHC 212

THE HIGH COURT

2009 62 Ext

Between:

Attorney General

Applicant

And

Rory P. Doyle aka David West

Respondent

Judgment of Mr Justice Michael Peart delivered on the 21st day of January 2010:

By diplomatic note dated 30th January 2009 a Request for the extradition of the respondent has been made by the United States of America to the Department of Foreign Affairs.

Part II of the Extradition Act, 1965 as amended ("the Act") was applied in respect of the United States of America by S.I. 474 of 2000.

As provided for by s. 26(1)(a) of the Act, the Minister for Justice, Equality and Law Reform issued a Certificate certifying that such a Request had been received, following which an application was made by the Applicant for a warrant of arrest in respect of the respondent.

That application was duly granted by the High Court on the 11th March 2009, and the respondent was duly arrested here on the 30th March 2009 by Sgt. Sgt. Sean Fallon who immediately thereafter on that date brought him before the High Court. The respondent has been remanded from time to time thereafter on bail pending the hearing of the application for his extradition to the United States of America.

No issue is raised on this application as to the formalities to be attended to by the applicant and/or any other government department prior to his arrest, or indeed in relation to the arrest itself. In any event I am satisfied that all the documentation required under s. 25 of the Act, and otherwise, to be produced to the High Court before a warrant of arrest may be issued were duly produced, and that same are properly before the Court now on the hearing of this application. As no issue to the contrary has been raised, I do not propose to set out that documentation in any detail.

The extradition of the respondent is sought so that he can face trial in the United States in respect of four charges.

The first charge is one described as "Lewd or Lascivious Behaviour" in violation of Florida State Statute Section 800.04 (5).

The second and third charges are ones described as "Handling and Fondling a girl under the age of 16 years" in violation of Florida Statute Section 800.04 (1).

The fourth charge is of failing to appear for his trial on the above charges on the date fixed for trial, namely the 6th November 2001.

A full statement setting out the factual basis for these charges is contained in the documentation which accompanied the Request for his extradition, as well as copies as to the relevant Florida Statute laws relating to these offences.

Following the failure of the respondent to appear at his trial on the 6th November 2001, a warrant, referred to as a Capias warrant, was issued in relation to the first three above charges, and on the 30th November 2001 a further Capias warrant was issued for his arrest in respect of the charge of failing to appear. An issue has been raised by Conor Devally SC for the respondent in relation to whether these warrants are properly signed in accordance with Florida law as they have been signed not by a Court Clerk as such, but by a Deputy Court Clerk. However, I am completely satisfied that a Deputy Court Clerk is duly authorized to sign such documents by virtue of the provisions of Florida Statute 34.032 a copy of which has been exhibited by James A. Hellickson in his affidavit sworn on the 9th November 2009.

From a documentary point of view, I am satisfied that this application is in order. But three issues have been raised by Mr Devally on the respondent 's behalf, and it is necessary to reach conclusions in relation thereto before deciding if the order sought for the respondent's extradition may be granted.

1. Correspondence:

(a) The sexual offences:

Alleged facts:

It is alleged that between September 1994 and February 1995, CP, a girl then aged between 12 and 13 years spent the night at the respondent's house, and that while she was asleep he entered her room and rubbed her leg and vaginal area with his hand, and rubbed her breasts.

It is further alleged that in August 1995 CP, then aged 13 years, again spent the night at the respondent's house, and that while she was asleep the respondent entered the room where she was sleeping and began rubbing his hand on her leg and her vagina, and that

he put his hand under her T-shirt and rubbed her breasts, and that when she awoke he left the room.

It is alleged also that on the 17th July 2000 GSC, a girl who was then aged 8 years, spent the night in the respondent's house and that during the night while GSC was asleep the respondent entered the room where she was sleeping and pulled her underwear aside with one hand and began rubbing her vagina with his other hand.

It is submitted by Anthony Collins SC for the applicant that these alleged acts by the respondent would, if committed in this State, constitute offences of sexual assault contrary to s. 2 of the Criminal Law (Rape) Amendment Act, 1990. That section provides:

> *"2.—(1) The offence of indecent assault upon any male person and the offence of indecent assault upon any female person shall be known as sexual assault.*
>
> *(2) A person guilty of sexual assault shall be liable on conviction on indictment to imprisonment for a term not exceeding 5 years.*
>
> *(3) Sexual assault shall be a felony."*

In fact, as clarified in *SOC v. Governor of Curragh Prison* [2002] 1 I.R. 66, the offence of sexual assault remains a Common Law offence, since s. 2 of the 1990 Act simply renamed the offence as sexual assault from indecent assault, and provided for a maximum penalty. Sexual assault is an assault accompanied by circumstances of indecency. That is the essence of the offence to which the first three offences alleged against the respondent are said by the applicant herein to correspond. At first glance there seems to be little to raise against such a submission when one looks at the facts giving rise to these offences as contained in the Request. It is alleged in respect of each victim that the respondent entered the room in which each girl was asleep and that he did to them certain things which can be easily seen as non-consensual assault, given that the girls are stated to have been asleep at the time, and such actions are clearly capable of being regarded as accompanied by circumstances of indecency.

Section 10 of the Extradition Act, 1965 as amended provides *inter alia* that a corresponding offence is "*an act that, if committed in the state, on the day on which the request for extradition is made would constitute an offence*".

According to that brief definition, it would seem that the facts alleged against the respondent would constitute offences here of sexual assault, and that correspondence is therefore made out.

However, Conor Devally SC seeks to satisfy the Court that the applicant is putting forward a candidate for a corresponding offence, which, in circumstances where the alleged victims were aged eight and twelve/thirteen respectively, would be found here to be unconstitutional if it were the case that if prosecuted here for such offences and either the prosecution was not required to show *mens rea* as to age, or the accused was not permitted to raise a defence that he honestly believed or was reasonably led to believe that the victims were of an age where they could consent to sexual activity. He refers to the fact that, as disclosed in the copy of the relevant Florida statute creating these offences, it is not open to an accused under Florida law, where the alleged victims are under the age of 16 years, to deny knowledge of age, plead that their age was misrepresented to him, or that he had a *bona fide* belief of the victim's age. Mr Devally has submitted that if such a defence was excluded under Irish law, it would be found to be unconstitutional, in the same way as s. 1 (1) of the Criminal Law (Amendment) Act, 1935 was found to be unconstitutional by the Supreme Court in *CC and PG v. Ireland* [2006] I.R. 1.

In the case of *PG*, Geoghegan J. was satisfied in relation to the s. 2 offence of sexual assault that *mens rea* relating to age remained one of the elements to be proved by the prosecution in such an offence, given the different legal provenance of that offence compared to that of the s. 1 (1) offence. But, as I have said, in circumstances where in Florida that defence is not open to an accused such as the respondent, the offence would be unconstitutional here if the same exclusion of the age defence was provided for in the statute, or was otherwise not available to an accused.

It is in such circumstances that Mr Devally submits that correspondence cannot be established by reference to an unconstitutional offence.

The affidavit of James A. Hellickson sworn on the 15th December 2008 sets out the elements required to be established by the prosecution in relation to these offences. Firstly, it will establish that in the case of GSC that she was under the age of 12 years of age (she was 8 at the time), and in the case of CP that she was under the age of 16 (she was 12/13 at the time). Secondly, it will establish in the case of GSC that the respondent intentionally touched her genital area in a lewd or lascivious manner, and in the case of CP that he handled and fondled her in a lewd, lascivious and indecent manner. Thirdly it will prove that on the dates of these offences the respondent was over the age of 18 years. Each of these elements must be proved beyond a reasonable doubt.

In this State, in order to convict a person for of the offence of sexual assault, the prosecution would have to establish fewer elements beyond a reasonable doubt. The age of the victim is not something which is relevant as to whether an offence is committed. Neither is the age of the perpetrator of relevance once he/she exceeds the age at which the law presumes a person to be incapable of committing a crime. What must be established beyond a reasonable doubt is simply that an assault was committed and that it was accompanied by circumstances of indecency. Essentially, the offence is the same. What is different between the Florida offence is that in Florida it is no defence for an accused to show that he was unaware of the age of the victim, that he had been misled as to age by the victim, or that he *bona fide* believed that she was over the age in question. Such a defence is available in this State.

I am not required, for the purpose of correspondence to find not only that the offence corresponds but also that the same defences are available in both the requesting state and this state. That is not what s. 10 requires. The Court is required to look at the acts alleged against the respondent and decide if those acts, if proven to be committed here, would constitute an offence – not necessarily the same offence. Such an exercise ensures that a person is not extradited to another state to face a trial for an offence which is not known to the law here. The fact that the laws relating to the offence are not identical, or that the prosecution and trial may not appear to be as fair or the same as the system of prosecution and trial here does not speak to correspondence. Neither in my view does the fact that in the requesting state there is not available to an accused person a defence which is available here. That is not relevant to the question of correspondence in this case. It seems to me that to so find is consistent with the established jurisprudence in relation to correspondence starting with *State (Furlong) v. Kelly* [1971] I.R. 132 and going forward to the judgment of Fennelly J. in *Attorney General v. Scott Dyer* [2004] 1 I.R. 40.

I cannot help remarking on the unlikelihood of the respondent realistically being in a position to avail of an age-related defence if same was open to him in Florida. It must be borne in mind that it is also disclosed by Mr Hellickson in his affidavit that GSC was only 8 years of age and CP either 12 or 13 on the dates on which these offences are alleged to have been committed. In addition, CP is the young

sister of his wife and had known the respondent prior to the date of the alleged offence, and GSC was the 8 year old friend of one of the respondent's daughters who was 6 at that time. The respondent has filed no affidavit whatsoever in which he might have at least put age *mens rea* in issue. It seems to me that this feature of the factual background is relevant to my finding, at least for the purpose of this case, that what is important for the purpose of establishing correspondence is what is required to be proven by the prosecution and to ensure that there is no element or ingredient of the Irish offence which is not required to be proven for the purpose of a conviction in the requesting state. The fact that there is not available to any person accused in Florida of these offences a defence which might be mounted in this State, if it could be on the facts, is not relevant, the more so because on the facts such a defence would not avail this respondent in any event.

I am satisfied that correspondence is established in respect of these three offences.

The absence of an age defence under Florida law could on the other hand for some future respondent speak to the question of whether such a respondent, if extradited, would be exposed to a trial process which would breach what we, here, would regard as his constitutional rights. That is a different issue, and one, in my view, which is not open to the respondent to argue in this case. In fairness, he has not sought to do so. He would in my view, given what I have said about his likely knowledge of the ages of these alleged victims, lack the necessary *locus standi* to argue a breach of constitutional rights in circumstances where he has not put forward any factual basis for his being personally adversely affected. Such a lack of standing would be consistent with the principles set forth by Henchy J. in *Cahill v. Sutton* [1980] I.R. 269.

(b) Failure to appear offence:

Alleged facts:

These facts are simple. The trial judge set a trial date for 6th November 2001. The respondent and his lawyer were duly notified of the date. The respondent was on bail pending his trial, but did not appear at the court on the 6th November 2001 and this was a breach of his bail conditions. Mr Hellickson has sworn that the prosecution must prove beyond a reasonable doubt that the respondent had been released from jail on bail (a purpose of which was to ensure the appearance of the respondent at his trial), and that the respondent "wilfully" failed to appear as required. The respondent has filed no affidavit so this Court is unaware if there was any particular reason why he did not appear, other than a wish to abscond rather than attend his trial.

Mr Collins has submitted that the offence of failure to appear which the respondent has been charged with would correspond to an offence in this State contrary to s.13 (1) of the Criminal Justice Act, 1984. Sections 13 (1) and (2) thereof provide:

> *"13.—(1) If a person who has been released on bail in criminal proceedings fails to appear before a court in accordance with his recognisance, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding twelve months or to both.*
>
> *(2) It shall be a defence in any proceedings for an offence under subsection (1) for the accused to show that he had a reasonable excuse for not so appearing."*

The Florida statute providing for the offence there of failure to appear contains no provision equivalent to (2) above whereby the accused person may seek to put forward a reasonable excuse for not appearing at his trial. Mr Devally submits that in such circumstances that there is no correspondence given that the Irish offence is in effect one of failing without reasonable excuse to appear in accordance with a recognizance.

Firstly, the use of the word "wilfully" in the Florida statute connotes in my view that it would have to be established by the prosecution that he deliberately absented himself from his trial. 'Wilfully' is consistent with that deliberateness and suggests to me that it is open to an accused by way of defence to show that it was not a wilful absenting of himself from his trial or at least create a reasonable doubt in the mind of the jury.

But, secondly, as I concluded in relation to the other offences above, what may or may not be open by way of defence does not speak to the question of correspondence. It is a question of discovering what facts would have to be proven beyond a reasonable doubt by the prosecution and comparing those with what would have to be so proven in this State to secure a conviction on the corresponding offence.

Correspondence is established in respect of this offence.

2. Prison conditions in Florida:

The respondent is submitting that because of the nature of the offences with which he is charged, he will if convicted and sentenced to a term of imprisonment, be within a category of prisoner liable to be the victim of serious and violent treatment at the hands of both the inmates and the staff at whatever prison he is required to serve any sentence imposed upon him, and that to extradite him and thereby expose him to that prospect would be to breach his constitutional rights to bodily integrity.

This point of objection is not raised in a specific way in the Points of Objection which were filed on this application. However, since there is no requirement on a Part II application for extradition, that should not prevent the respondent from putting it forward appropriately. In pursuit of that aim, this respondent has brought before the Court an unsigned copy of an opinion in the form of a "declaration" made a former prison officer of many years experience, namely Ronald D. McAndrew. It is a ten page document, eight of which are taken up by a recitation of Mr McAndrew's qualifications, career biography and experience, as well as an extensive list of cases in which his advice has been sought as a consultant. It is the final two pages in which he expresses his views and his fears for the respondent should be imprisoned in relation to these alleged offences.

Mr McAndrew states, *inter alia*, that during his career working in Florida prisons he personally observed and it is his view that certain categories of prisoner, including "*alleged sex offenders where children are involved …… are most likely subjected to horrific treatment by other inmates who hold power*". He goes on to say that in his professional opinion "*an inmate with a high profile case that would be recognised by the most dominating inmates would be firstly blackmailed for money, drugs, outside influence and/or*

sexual favours (rape). Failing to comply with the demands of those dominating often results in beatings, rape, humiliation or being forced to request protective confinement". He feels that the respondent is such a person, and goes on to say that if such a prisoner should ask the prison authorities for some special protection from this kind of attention, that itself can lead to what he calls "*retaliation by staff*".

Mr Devally correctly recognises, as he must, that the onus upon a respondent seeking to establish that a breach of constitutional or human right such that extradition should not be ordered is a high one, and that cogent evidence to support such a submission must be adduced. That much is clear from the judgment of the Chief Justice in *Attorney General v. Skripakova*, ex tempore, unreported, Supreme Court, 24th April 2006, and in *Minister for Justice, Equality and Law Reform v. Brennan,* unreported, Supreme Court, …… .

Mr Hellickson has filed an affidavit in response to what Mr McAndrew has stated but I do not propose to set out what he says, since, in my view, what is stated by Mr McAndrew falls lamentably short of what would be required to be established for this submission to succeed. It is entirely speculative. That is not to doubt Mr McAndrew's experience or indeed his *bona fides.* But what he says is so general as to not avail this respondent.

It must also be borne in mind that there is no evidence of what prison or other correctional centre the respondent would be placed if convicted and sentenced.

Cases such as *Attorney General v. POC*, and *Finucane v. McMahon* [1990] 1 I.R. 165 where extradition was refused, are cases where there was cogent and convincing evidence of future probability that constitutional rights would be breached upon extradition. That is in stark contrast to what has to be regarded as mere generalised speculation by Mr McAndrew, albeit speculation based on his experience as a prison officer at various and high levels within the Florida prison service. It is insufficient to discharge the heavy onus upon the respondent in this regard. In that regard, I refer to what I stated in *Attorney General v. Russell*, (Unreported, High Court, 23rd May 2006) as to the heavy onus on a respondent to establish a real risk of a threat to life, bodily integrity and personal safety.

3. The nature and duration of sentence likely to be imposed:

It is submitted on behalf of the respondent that the sentencing regime which the respondent would face if convicted of these offences is harsh and arbitrary and does not permit mitigating factors to be taken into account when an appropriate sentence is being calculated according to a points system which operates under the sentencing guidelines in operation.

It is also suggested also that one of the principles of sentencing, namely rehabilitation, is not taken into account. For these reasons it is submitted that it is a regime that this Court should not expose the respondent to by ordering his extradition.

In support of this submission, the respondent has obtained an opinion from a criminal trial lawyer practising in Clearwater, Florida. That opinion is contained in a letter dated 2nd December 2009 which is signed by its author, David Parry, and it has been notarised. I have accepted the contents of this document *de bene esse*, since it is not in proper affidavit form. Relevant to this submission is the following statement:

> *"Florida has a very rigid structure which has evolved over the past twenty (20) year. The legislature has consistently stripped the Courts of their sentencing discretion. As a result of this trend, Florida is now governed by the Florida Criminal Punishment Code. The Criminal Punishment Code establishes a point system for an individual's prior record. Based upon the charges which Mr West is facing, he scores mandatory prison of not less than thirteen (13) years to the maximum sentence of sixty (60) years in prison. There are no statutory mitigating factors which apply to Mr West, therefore, he would be subject to a mandatory sentence of imprisonment if found guilty of the charges he is facing in Florida. Prisoners in Florida are required to serve at least 85% of any prison term which is imposed by the Court. Florida has no provision in law for early release or parole."*

In so far as the respondent is submitting that there is no rehabilitative content in the sentence served, the respondent refers to the provisions of what has become known as "the Jimmy Ryce Act" which introduces a possible post-sentence regime of incarceration in the event that at the conclusion of the sentence itself a person found to be a continuing threat to children or is otherwise regarded as a sexual predator can be detained for treatment and rehabilitation. I will come to the detail of that statute in more detail when addressing the final submission below.

Apart from the implications of the Jimmy Ryce Act, the respondent points to the fact that Mr Parry has opined that a mandatory minimum sentence for the respondent would be 13 years in the event that he is convicted on these offences. Mr Devally contrasts that prospect with the maximum sentence provided for the same offence in this State, and in that regard he suggests that the alleged behaviour of the respondent giving rise to these offences is at the lower end of the scale and that a sentence of considerably less than the maximum of five years would be likely to be imposed here, and that in such circumstances a sentence of 13 years under Florida law is so harsh as to be regarded here as a disproportionate and therefore an unlawful sentence, which if imposed at first instance would certainly be ameliorated on any appeal. He has suggested that a sentence of 13 years in this State would be reserved for perhaps a case of rape, or multiple rapes, accompanied by a high degree of violence, in other words rape at the higher end of the scale.

Mr Devally also relies, in relation to harshness and lack of proportionality, on the possibility that having served his sentence of 13 years, the respondent may under the Jimmy Ryce Act be required to remain in detention for an indeterminate period thereafter if he is found to remain a predatory risk upon release, and that such an indeterminate period of detention is an unlawful sentence and one to which this Court ought not to expose the respondent by ordering his extradition.

Mr Devally has also submitted that the sentencing regime in Florida does not permit the sentencing judge to take account of a fact, as it would here, that any sentence being served by a person in a foreign country away from family and friends is a more severe sentence than one served by a national of that country. This adds, in his submission, to the harshness of any sentence which the respondent may have to serve.

Mr Devally has referred to the judgment of this Court in *Attorney General v. Blake*, (Unreported, High Court, 16th November 2006) where a mandatory sentence of six years for the offence in that case was considered to be one to which the respondents ought not to be exposed to by ordering their surrender.

Mr Collins has in response to these submissions referred firstly to the undoubted fact that the respondent has pleaded not guilty to

these offences and that he could be found not guilty, in which case he has nothing to fear from any sentencing regime which exists in Florida. He submits also that the respondent cannot simply ignore, as he has done, the existence in the requesting State of a plea-bargain regime, and that he would have the option of engaging with that.

It is further submitted that again the respondent is engaging in mere speculation as to what sentence would be imposed in the event of his being convicted for these offences. It is submitted that the letter from Mr Parry as to the likely sentence to be imposed is of little evidential value given that it is not in the form of an affidavit. In so far as the Blake case has been referred to by Mr Devally, Mr Collins has pointed to the fact that in the latter case the evidence as to the likely sentence was much more clearly evidenced. He refers to the averment of Mr Hellickson in his second affidavit sworn herein on the 9th November 2009 in which at paragraph 5 he gives details of the maximum sentence which these offences attract, and submits that Mr Parry has shown no evidential basis for his opinion that a sentence of 13 years is likely to be imposed. It is a fact that Mr Party has not exhibited or otherwise produced a copy of any relevant sentencing guideline, statutory or otherwise which may operate in Florida as stated by Mr Parry in his letter.

Mr Collins submits that this Court should not be concerned with the length of any sentence which might be imposed in the event of conviction, and that this is a matter entirely for the sentencing judge, and the fact, even if it be the case, that a sentence which appears harsh or ling compared to one that might be imposed here for the same offences is not something which should move this Court to refuse to order surrender. Mr Collins has referred to the conclusion of the Chief Justice in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 when he stated:

> *"The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to principles and procedures which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that surrender should be refused under s. 37 (2) of the Act."*

In my view, this is not a case where this Court should concern itself with the sentencing regime in Florida in so far as it has been described at all by Mr Parry. What Mr Parry has provided lacks any specificity even if one overlooks the somewhat informal manner in which his view has been conveyed. A Court must be careful in accepting such material at face value. To take just one example, I note that Mr Parry states in his letter that *"there are no statutory mitigating factors which apply to Mr West."* The impression given is that a mandatory-type sentence of 13 years will be required to be imposed on the respondent if convicted, and that the judge retains no discretion to reduce below that level of sentence. Just taking that at face value would be wrong, since even a cursory look at the Florida Criminal Punishment Code reveals that it is permissible for a sentencing judge to impose a sentence below what a calculation might indicate as the required sentence in certain circumstances. I refer to the following extract which through my own efforts, given the *sui generis* and 'inquiry' nature of extradition proceedings, I have obtained:

> *"30. Departures*
>
> *Any downward departure from the lowest permissible sentence, as calculated according to the total sentence points pursuant to section 921.0024, Florida Statutes, is prohibited unless there are circumstances or factors that reasonably justify the downward departure. Mitigating circumstances or factors that can be considered include, but are not limited to, those listed in subsection 921.0026(2), Florida Statutes, and attached in* ***Appendix D****.*
>
> *If a sentencing judge imposes a sentence that is below the lowest permissible sentence, it is a departure sentence and must be accompanied by a written statement by the sentencing court delineating the reasons for the departure, filed within 7 days after the date of sentencing. A written transcription of orally stated reasons for departure articulated at the time sentence was imposed is sufficient if it is filed by the court within 7 days after the date of sentencing. The sentencing judge may also list the written reasons for departure in the space provided on the Criminal Punishment Code scoresheet.*
>
> *The written statement delineating the reasons for departure must be made a part of the record. The written statement, if it is a separate document, must accompany the scoresheet required to be provided to the Department of Corrections pursuant to section 921.0024(6), Florida Statutes.*
>
> *The imposition of a sentence below the lowest permissible sentence is subject to appellate review under Chapter 924, but the extent of the downward departure is not subject to appellate review.*
>
> ***APPENDIX D***
>
> ***NON-EXCLUSIVE FACTORS TO SUPPORT DEPARTURE***
>
> ***REASONS FOR DEPARTURE - MITIGATING CIRCUMSTANCES***
>
> • *The departure results from a legitimate, uncoerced plea bargain.*
>
> • *The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.*
>
> • *The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.*
>
> • *The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment.*
>
> • *The need for payment of restitution to the victim outweighs the need for a prison sentence.*
>
> • *The victim was an initiator, willing participant, aggressor, or provoker of the incident.*
>
> • *The defendant acted under extreme duress or under the domination of another person.*
>
> • *Before the identity of the defendant was determined, the victim was substantially compensated.*

- *The defendant cooperated with the state to resolve the current offense or any other offense.*

- *The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.*

- *At the time of the offense the defendant was too young to appreciate the consequences of the offense.*

- *The defendant is to be sentenced as a youthful offender."* (my emphasis)

I have set out these provisions only to demonstrate that if a submission is being made as to the likelihood of a particular mandatory sentence and that no mitigating factors can be taken into account or do not apply, as has been suggested by Mr Parry, that must be clearly and firmly based on evidence, and not simply speculated about in a loose fashion. The above sample extract from the applicable Code shows clearly that mitigating circumstances can be taken into account by a judge in order to impose a sentence below the level arrived at by reference to the points criteria required under the Code. It is specifically provided therein that the list of matters which can be considered by way of mitigation "include but are not limited to" those matters referred to in Appendix D. Even within the matters set forth in Appendix D there are clearly matters which could potentially be relevant to the respondent. It seems to me at first glance, for instance, to be far from clear that the respondent cannot make a submission that, for example, the fact that he will be serving the sentence in a foreign prison is something which should be taken into account in assessing an appropriate sentence for him, if convicted.

Sentencing guidelines such as that in Florida are usually very detailed, and even complicated, and difficult for somebody not familiar with them to follow and come up with a reliable guess as to a sentence which any judge might have to impose. These are necessarily matters which are within the competence and jurisdiction of the local sentencing judge, and it is inappropriate for a judge in a requested state, save in the very clearest and most exceptional type of case, to arrive at a conclusion as to the length of sentence likely to be imposed. In that regard, I should say that the decision in Blake, which has been referred to, was such an exceptional case and one where the available evidence made it clear at the time that a mandatory six year sentence had to be imposed. That case is confined to its own very particular facts and cannot serve as any precedent in other cases, such as the present one.

But in any case, simply because a sentence may be imposed in Florida which is higher than an appropriate sentence for the same offences were they committed in this State, even much higher, is not something which should require extradition to be refused. Again, the situation which emerged in Blake was totally unique and exceptional and cannot be of any precedent value.

In so far as the respondent submits that the sentence does not take account of the principle of rehabilitation and that it concentrates only on the punitive and deterrent principles, that is not something which can form the basis of a finding that any sentence thus imposed is one which is unlawful such that extradition should not be ordered. Again, I can usefully refer to the statement by Murray C.J. in *Minister for Justice, Equality and Law Reform v. Brennan* already set forth in this regard.

4. The anticipated application of 'The Jimmy Ryce Act' in the event of conviction and sentence:

This Act provides for a civil commitment procedure for the long-term care and treatment of sexually violent predators. The definition section defines "a sexually violent offence" as including the three sexual offences which the respondent faces, and "a sexually violent predator" as:

> *"any person who (a) has been convicted of a sexually violent offence, and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment."*

It appears from the statute that where a person's sentence has not less than 545 days to run, the prison authority gives notice to relevant persons of the intended release date so that arrangements can be made for assessment by a multi-disciplinary team as to whether the person comes within the definition of a "*sexually violent predator*". Where such an assessment and recommendation is made, the state attorney may file a petition to have the person so declared to be sexually violent predator, and if the judge determines, following an adversarial hearing based on a balance of probability, that there is probable cause to believe that the person is a sexually violent predator, the judge will order that the person remain in custody and be immediately transferred to an appropriate secure facility at the end of the sentence itself. An appeal can be taken against such a determination.

The statute is very detailed and I do not propose to set out all the provisions even in summary form, except to say that it provides that a review of the person's mental condition shall be carried out once every twelve months or more frequently if the court so directs. That hearing will determine whether probable cause exists "*to believe that the person's condition has so changed that it is safe for the person to be at large and that the person will not engage in acts of sexual violence if discharged".*

There is also specific provision for application for release by way of *habeas corpus* application.

It is submitted that this regime is a type of preventive detention which would be seen here as an unconstitutional deprivation of liberty, rendering a sentence imposed by a court for a determined period to become a potentially indeterminate sentence.

It is submitted also that the existence of this procedure reinforces the respondent's contention that the sentencing regime in Florida respects only the punitive and deterrent principles of sentencing and not the objective of rehabilitation.

It is submitted also that the possibility that the respondent might be required to spend longer than the duration of his sentence in detention amounts to a double jeopardy risk, given that according to the Act itself much of the assessment of whether or not the person is a sexually violent predator depends on the crimes for which his sentence was imposed. Mr Devally has also referred to the fact that the issue of whether the person is someone whose further detention is required is determined by a civil standard of proof and not the higher criminal standard of proof.

Mr Collins has referred to the fact that Mr Hellickson has expressed the view in any event that the respondent, given the facts of this case, is unlikely to become the subject of detention at the end of his term of imprisonment if one was to be imposed. However, I do not propose to place any reliance on that view, since the Act speaks in the present tense as far as whether at the end of the term of imprisonment the person suffers from a mental illness or abnormality such as to make it likely that he will re-offend. In that regard I highlight the fact that the definition of a "sexually violent predator" is as set forth already as "*any person who (a) has been*

convicted of a sexually violent offence, and (b) ***suffers*** *from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment."*

In other words, it is at or near the time for release that it is considered whether the person poses a risk, and not at the present time.

Mr Collins has referred to the fact that the statute makes it clear that the procedure is a civil procedure and not a criminal one. He submits that there can be no question of considering that the respondent is exposed to a double jeopardy, and certainly that there can be no question that such a procedure could be seen as infringing the rule of specialty. It is submitted that any detention under this Jimmy Ryce procedure is not the result of any criminal determination, even though only a convicted person is within the definition of a sexually violent predator, but rather as a result of a determination by a civil court as a result of an entirely separate and distinct procedure. It is further submitted that the purpose of such further detention is not punitive, but rather to ensure the protection of the community at large, as well as the appropriate care and treatment of the person concerned.

I am entirely satisfied that the existence of a possibility that at the conclusion of any sentence which may be imposed on the respondent the Jimmy Ryce procedure may be invoked and a determination made as to whether or not he should be further detained for the purposes of the Act is not a regime which amounts to a double jeopardy or even a breach of the rule of specialty. I cannot regard a procedure which aims to assist a qualifying person, albeit that it serves a preventative purpose in the interest of the wider community, as one which breaches any constitutional right of the respondent.

One must take into account the nature of the assessment, its adversarial nature, the right to appeal, the right to apply for release, and the requirement that a review take place at least once in every twelve months. There are reasonable mechanisms in place to ensure that a person's rights to fair procedures and right to liberty are safeguarded. It is not to be seen in the light proposed by the respondent.

In my view the Court is required to make the order for extradition which is sought on this application, and I will so order.