Neutral Citation Number: [2010] IEHC 196

THE HIGH COURT

2007 196 Ext

Between:

The Minister for Justice, Equality and Law Reform

Applicant

And

John Renner Dillon

Respondent

Judgment of Mr Justice Michael Peart delivered on the 25th day of January 2010:

A judicial authority in the United Kingdom has sought consent of the High Court to the prosecution of the respondent for an offence, other than that for which his surrender was ordered on foot of a European arrest warrant on the 16th January 2008, pursuant to the provisions of s. 15 of the European Arrest Warrant Act, 2003, as amended ("the Act"), the respondent having voluntarily consented to his surrender.

No reference was made to this other earlier offence in the warrant, and the rule of specialty applies.

Having been surrendered to the United Kingdom pursuant to the said order, the respondent on the 3rd June 2008 chose to plead guilty to the offence of rape for which surrender was ordered. That offence had been committed on the 13th October 2002.

A sentence of nine years imprisonment was imposed on the 22nd July 2008, and the respondent is currently serving that sentence.

The offence for which the United Kingdom authorities now wish to prosecute the respondent is an offence of rape allegedly committed in 1982 ("the 1982 offence") when he was aged 16 years. What gives rise to the interesting issue on this present application is that following a trial in 1983 in respect of this offence, the respondent was acquitted by a jury. It appears now that in more recent times fresh evidence, namely recently acquired DNA evidence which was not available at his trial in 1983, has made it possible for the investigators to link the respondent to the 1982 offence, and it is desired now to quash the acquittal so that the respondent can tried again for that offence.

Under the provisions of s. 76 (1) of the Criminal Justice Act, 2003 the Director of Public Prosecutions in the United Kingdom may now appeal an acquittal. If that application is successful the acquittal will be quashed, and a retrial will be ordered.

The DPP has brought such an application to the Court of Appeal on the 12th February 2009. In addition, the respondent has been charged again with the 1982 offence on the 19th February 2009.

On the 25th June 2009 the Court of Appeal heard submissions from both sides on the application to quash the acquittal. I have had the opportunity to see a copy of the approved judgment of the Court of Appeal delivered following its consideration of these submissions, and it appears that the Court of Appeal has adjourned the application to quash the acquittal pending the result of the present application for the High Court's consent under s. 22 of the Act.

The Court of Appeal is of the view, *inter alia*, that the step taken by the DPP of bringing the application to quash the acquittal.. and the charging of the respondent again with the 1982 offence prior to having obtained the consent of the High Court may themselves amount to a breach of the rule of specialty. Whatever about there being some doubt as to whether those actions breach specialty, the Court of Appeal was in no doubt that it would certainly be a breach of the rule of specialty if it was to grant the application to quash the acquittal and order a retrial.

It is clear from the content of the approved judgment that aside from these concerns, the Court of Appeal is entirely satisfied that it should quash the acquittal, and order a new trial. The Court has adjourned the application, rather than strike it out, so that consent from this Court may be sought, since the relevant legislation under which the application to quash is made in the United Kingdom specifies that only one such application may be made. The striking out or dismissal of the application on grounds of prematurity would therefore be fatal to any chance of putting the respondent on trial again for the 1982 offence.

Since the order has not yet been made by the Court of Appeal to quash the acquittal, it still exists and has all the appearance therefore of a final order at this point in time. The respondent is submitting on the present application that this Court has no jurisdiction to give its consent to the prosecution of the respondent for the 1982 offence, in view of s. 22 (8) of the Act which provides:

> *"(8) The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part III or the Framework Decision (including the recitals thereto) be surrendered under this Act. "*

One of the sections within Part III of the Act is Section 41 which provides:

> *"A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a member state ".*

One can immediately see the difficulty which at first glance this provision presents on this application, since the acquittal is a "*final judgment ... given in ... a member state*", and at the present time has not been quashed or set aside.

Section 41 of the Act gives effect to Article 3.2 of the Framework Decision which states as follows:

> *"Article 3:* ***Grounds for mandatory non-execution of the European arrest warrant****:*
>
> *The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:*
>
> *1. … … …*
>
> *2. if the executing judicial authority is informed that the requested person has been* ***finally judged by a Member State in respect of the same acts*** *provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;*
>
> *3. … … …"*

The dilemma for the UK Court is of course that it would be a breach of the rule of specialty, as provided for by s. 146 of the UK's Extradition Act 2003, to clear the s. 41 potential obstacle out of the way by quashing the acquittal and ordering a retrial in advance of consent being obtained.

Clearly this Article and Section 41 of the Act are intended to protect a person, whose surrender is sought, from exposure to what is commonly known as 'double jeopardy' i.e. from being exposed to the possibility that he/she would be put on trial again for an offence for which he has already been either acquitted or convicted, and being possibly punished twice for the same offence

But one question is whether it was ever intended that this Article or s. 41 of the Act should prevent a retrial for an offence, upon the quashing of a previous acquittal or previous conviction in the issuing member state as in this case. I imagine not, since in such circumstances a person will not end up being punished twice for the same offence. What he or she faces is simply a second trial. There is nothing in principle wrong or unlawful about that. It happens all the time upon the quashing of a conviction, followed by a retrial.

But the section says what it says. In that regard it is worth stating the obvious perhaps, namely that in the present case the issuing state might and could have had the previous acquittal quashed before ever issuing the European arrest warrant for the later offence and under which the respondent consented to his surrender. In such circumstances the issuing judicial authority could have sought his surrender under a European arrest warrant not only for the 2002 offence, as they did, but also for the purposes of his retrial in respect of the 1982 offence. No difficulty would the have arisen presumably.

Another question will be whether the references to "*final judgment*" in s. 41 and *'finally judged*' in Article 3 include the acquittal in the present case, where it may be quashed under available procedures for a prosecutor's appeal in the issuing state, or at least where this Court has firm evidence that it will be quashed if consent can be given. Does it remain a final order only until such time as it is quashed under available procedures?

Yet another will be to consider if there are distinctions to be drawn between the concept of *'double jeopardy'* and the principle often referred to as *'ne bis in idem'*, and if so whether any such distinctions touch upon or assist in giving a correct interpretation of Article 3.2 and s. 41 of the Act.

The Court of Appeal was alerted to the terms of s. 41 of the Act. In that regard the Lord Chief Justice stated:

> *"Notwithstanding Mr Smith's argument we are not convinced that, if an application were made to the High Court in Dublin for the necessary consent to this proposed trial, it would necessarily and inevitably apply the principle against double jeopardy as currently enforced in the Republic without reflecting on the new statutory arrangements within this jurisdiction which permit the quashing of an acquittal and the ordering of a new trial. That, of course, is a matter, first for the prosecution to consider, and, second for the decision of the High Court in Dublin. "*

Legal submissions:

For the respondent, Giollaiosa O Lideadha SC has submitted that as long as the acquittal of the respondent subsists it must be seen only as a final judgment, and that this Court has no jurisdiction to give its consent to the prosecution of the respondent.

He refers to the fact, as seems to appear from the judgment of the Court of Appeal referred to, that in fact it was the Central Authority here which has drawn the attention of the UK authorities to the provisions of s. 41 of the Act, and I presume that by so referring, Mr O Lideadha intends to draw an inference that the Central Authority believes that there is a difficulty for this Court to give its consent.

He submits that there is nothing in s. 41 of the Act or the Framework Decision to suggest that the reference to "*finally judged*" is confined to cases where there has been a conviction and sentence imposed. It applies equally, in his submission, to an acquittal, and the fact that there may be a jurisdiction to seek to quash a conviction or an acquittal does not alter its character as a final order.

Remy Farrell BL for the applicant has suggested an interpretation of s. 41 which would, if correct, enable the Court to give its consent should it consider it otherwise appropriate to do so.

It is submitted that the wording of the section does not, and cannot have been intended, to mean that a person may not be prosecuted a second time in the same state in circumstances where an acquittal is quashed. Mr Farrell submits that Article 3 of the Framework Decision, and therefore s. 41 of the Act is not addressed to the question of double jeopardy at the hands of the same court as acquitted or convicted on the first occasion, but rather to the mischief which would result from a situation where a person was either convicted or acquitted of an offence in one Member State and having travelled to another Member State was sought to be prosecuted again in that other Member State for the same offence or for an offence consisting in whole or in part of the same facts.

He submits that this is the context in which s. 41 must be read, especially given that the Act gives effect to a Framework Decision establishing arrangements between all Member States. He suggests that a provision such as s. 41 and Article 3 of the Framework Decision are part of ensuring free movement of persons within the European Union, without them running the risk of facing prosecution

for the same offence in different jurisdictions, in circumstances where such offence may have trans-national elements. Such a situation can undoubtedly arise in relation to certain drugs offences which are committed across borders.

Turning to the wording of s. 41 itself in this regard, Mr Farrell draws attention to the fact that the section refers to being proceeded against "in the issuing state" but then goes on to refer to a final judgment given "in the State or a member state". He suggests that even though the section refers to "or a member state" this could not sensibly be taken to include the issuing member state, and should be read as if the words "other than the issuing state" were added. This in his submission makes it clear that the section, and the provisions of Article 3, are directed at the prevention of a second trial for the same offence in another Member State, and that it could never have been intended to prevent a retrial in the issuing state in the event that the first acquittal or conviction was quashed and a retrial ordered.

In this way, Mr Farrell submits that it is not necessary for the Court to decide that the phrase "final order" does not include an acquittal which can be quashed and which will be quashed if consent can be given, as the words of the section can be interpreted in a way which excludes from its ambit the situation under consideration on this application, since the first acquittal was in the issuing state itself.

He suggests that the concept of double jeopardy is somewhat different to that of *ne bis in idem,* and that it is the latter which is the subject of Article 3 and hence s. 41 of the Act, and which is aimed at preventing the trial of a person in two or more different Member States for the same offence. The principle of double jeopardy is a principle of longstanding which founds the *autrefois convict* or *autrefois acquit* pleas by way of defence at trial, and applies where a person has already been finally tried and convicted or finally tried and acquitted in the same state. But it is submitted that it has never been the situation that the double jeopardy principle prevented a person from being retried for an offence following a quashing of a conviction and the ordering of a retrial, and in more recent times from being retried following the quashing of an acquittal.

Conclusion:

A literal interpretation of s. 41 of the Act in my view prevents this Court from ordering surrender where the respondent has been finally adjudged, either by way of conviction or by acquittal, either in the issuing member state or another member state, in respect of the same offence, or acts either in whole or in part which comprise that offence. Since such an interpretation is consistent with the principle that a person may not be punished twice for the same offence in the state where he has been already been convicted, which I shall refer to as double jeopardy, and since it is also consistent with what I believe is the true intention of Article 3 of the Framework Decision, namely, as Mr Farrell submitted, that where a person has been punished or acquitted for an offence in one member state, and moves to another member state, that other member state may not attempt to put him/her on trial again and punish him again for the same offence, where that offence had some trans-national elements. That is conveniently referred to as the *ne bis in idem* principle, though I do not want to be taken as concluding that there is in fact that distinction between that principle and that of double jeopardy.

I would not wish to hold that s. 41 has no application at all in relation to what I have referred to as double jeopardy, as the right which it seeks to protect is one which can be appropriately read into Article 3 of the Framework Decision, since no court deciding an application for surrender could feel able to order surrender where it has become clear that the respondent has already been finally tried and convicted or finally acquitted for the offence. It is perfectly logical and sensible that a prohibition on surrender in such circumstances should be provided for, given the almost universal nature of the right to protection from double jeopardy. It is a right, together that which 1 have referred to as *ne bis in idem,* protected by Article 50 of the Charter on Fundamental Rights, done at Nice, 7th December 2000 (2000/C 364/01) which provides:

> *"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law. "*

The resolution of the question arising on this application is to be found in the meaning to be given to "finally judged" or "final order". While obviously an acquittal or a conviction can be considered a final order, that is not the end of the matter. I must interpret s. 41 of the Act in conformity with the aims and objectives of the Framework Decision under the well-known principles of conforming interpretation stated by the European Court of Justice in *Pupino* (see (Case C-105/03) *Criminal proceedings against Pupino* [2005] ECR 1-5285), provided that to do so is not *contra legem*. As Fennelly J. stated in his judgment in the Supreme Court in *Minister for Justice, Equality and Law Reform v. Stapleton*:

> *"It is clearly established that this Court is obliged to interpret provisions of the 2003 Act, so, far as possible, in the light of and so as not to be in conflict with provisions of the Framework Decision (see (Case C-105103) Criminal proceedings against Pupino [2005] ECR 1-5285.) The corner stone of the entire system is, of course, the principle of mutual recognition of the judicial decisions and mutual trust of the legal systems of the other Member States."* (my emphasis)

In my view there is nothing in the Framework Decision which indicates that one objective of that instrument is to protect a person, whose surrender is sought by an issuing state, from being surrendered for the purpose of being tried for an offence in respect of which he has been already acquitted in that issuing member state, and where it is beyond doubt that such a trial will not take place until the earlier acquittal has been quashed and a retrial ordered in accordance with the procedures available in the issuing state.. In such a circumstance it is perfectly clear that the surrendered person is not faced with double jeopardy. He will not be tried again in the face of an extant acquittal for the same offence. That mutual trust in the legal system of the United Kingdom referred to by Fennelly J. above mandates that this Court presumes, and may safely do so if I may say so, that the respondent will not be exposed to a double jeopardy.

Where a person is convicted of an offence, and appeals successfully against that conviction and is ordered by an appeal court to be retried for the same offence, it cannot possibly be said that the accused is exposed to a double jeopardy; yet until that conviction was quashed it exists as a "final order". But it was never a final order in the sense of one that could never be set aside, as the convicted person has a right of appeal.

In the same way in the present case, the acquittal for the 1982 offence was a "final order", but given the jurisdiction to set aside an acquittal at the suit of the DPP in the United Kingdom, it is not necessarily a final order for all time and in all circumstances, since under certain circumstances, such as the emergence later of fresh and compelling evidence, it may be set aside and quashed.

What makes it abundantly clear that there is no question of double jeopardy arising in this case is that if for example the respondent had not come to Ireland, and had remained in the United Kingdom, the DPP there would upon obtaining an order quashing the acquittal and ordering a retrial, have been free to have the respondent tried again for that same offence without in any way offending against

the respondent's right not to be tried again and punished for the same offence in respect of which he was acquitted.

There cannot therefore be any breach of principle involved in this Court making an order for surrender where the result of so doing does not, will not and indeed cannot expose the respondent to double jeopardy as explained above.

It follows that Article 3 of the Framework Decision must be seen as not requiring that surrender be refused in the circumstances where the issuing state has yet to, but undoubtedly will, quash the acquittal in accordance with its own laws to which respect must be given by this Court, and where it thereafter wishes to prosecute the respondent for the same offence for which he had been acquitted. It follows that, unless to do so would be to arrive at an interpretation of s. 41 of the Act which would be *contra legem*, this Court should interpret the reference to "final judgment" in that provision as not including a final judgment which can be quashed by a prosecutor's appeal, particularly in circumstances where this Court has very clear and uncontrovertible evidence that the Court of Appeal in London will quash the acquittal and order a retrial, if it can be satisfied that to do so does not infringe the rule of specialty. It is not necessary in my view that the acquittal must be already quashed before this Court can give its consent, provided of course that the Court is satisfied that procedures exist for the quashing of the acquittal, and that such an order will as a matter of probability be obtained. The mutual trust and confidence which underpins the surrender arrangements between Member States means that this Court can presume safely that no abuse of process or breach of the terms of the Framework Decision will result from the fact that this Court exercises its discretion in favour of giving its consent, where that consent is permitted by national legislation.

It follows in my view that this Court can exercise its discretion to give its consent to the prosecution of the respondent in respect of the 1982 offence, since I am satisfied, for the reasons stated within, that the offence concerned is not *"an offence for which a person could not by virtue of Part III or the Framework Decision (including the recitals thereto) be surrendered under this Act"* as referred to in s. 22 (8) of the Act, and all the other matters of which the Court is required to be satisfied before consent may be given have been satisfied.

I will give the consent sought and order accordingly.