Neutral citation number: [2009] IEHC 381

THE HIGH COURT

2009 66 EXT

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

MACIEJ WAWRZYNIAK

RESPONDENT

JUDGMENT of Mr. Justice Michael Peart delivered on the 30th day of July, 2009

The surrender of the respondent is sought by a judicial authority in Poland under a European arrest warrant which issued there on 14th February, 2007. That warrant was endorsed for execution here by the High Court on 17th April, 2007, and he was duly arrested on foot of same on 4th May, 2007, and brought before the court as required by s. 13 of the European Arrest Warrant Act 2003, as amended ("the Act").

He was remanded on bail at that time, pending the hearing of the application for his surrender and the delay which has occurred since his arrest is due to the fact that at some point he failed to appear in court as required, and the court issued a bench warrant on foot of which he was arrested in more recent times and brought back to the court, from where he was held in custody, pending the hearing of this application for his surrender.

No issue is raised in relation to the identity of the respondent, and I am satisfied, in any event, from the affidavit evidence of Sergeant Tom Malone, that the person who he arrested and who is before the court is the person in respect of whom this European arrest warrant has been issued.

Surrender is sought so that the respondent can serve a sentence of two years' imprisonment which was imposed upon him on 22nd January, 2004, for two offences which are set forth in the warrant. This aggregate sentence covers both offences, but further information provided to the Central Authority here has informed the court that a sentence of ten months was imposed in respect of one of the offences, and a sentence of one year and six months was imposed on the other. However, under certain articles of the Polish Criminal Code, these two sentences were "*joined into an aggregate penalty of 2 years' imprisonment*". While each sentence imposed satisfies the minimum gravity requirement of four months imprisonment, the fact that they have been converted into a single two-year sentence has relevance to some submissions made by Remy Farrell on the respondent's behalf.

Firstly, it is submitted that this court cannot be certain that as a result of this aggregation, at least four months thereof is attributable to the offence which attracted the ten month sentence initially.

Secondly, in the event that it is not possible for correspondence/double criminality to be established in respect of that offence, the aggregate nature of the offence makes it impossible to know how much of the sentence is attributable to the remaining offence, and hence, it is submitted, this court would not be able to order surrender at all. In that regard, the judgment in *Minister for Justice, Equality and Law Reform v. Ferenca,* Unreported, Supreme Court, 31st July, 2008, is relied upon, and I will come to these submissions.

The offences

1. The first offence is described in the warrant as being one of "*tormenting and causing light bodily harm*" contrary to articles 207 and 157 of the penal code and "*in connection with article 11.2 of the penal code".*

The facts giving rise to this offence are set forth as follows:

> *"In the period between January 2002 and 13th January 2003, in Swarzedz he tormented, both physically and mentally, his spouse Katerina Wawrzyniak by hitting her with his hand and fist on her face and used language which is commonly considered offensive.*
>
> *On the 27th October, 2002, he hit her head with his and also hit her face and her head with his hand causing bruises to her face and left hand and thus impaired the functioning of her bodily organs for a period shorter than seven days."*

All these different actions i.e. assaults and using offensive language, are treated as a single offence of tormenting. I will come to the submissions relating to correspondence in due course.

Additional information explains that under Article 11(1) and (2) of the penal code, "the same act can constitute only one criminal act". If the act shows the attributes specified in two or more criminal statute laws, the court sentences for one offence on the basis of all the concurring legal regulations. While this concept is foreign to Irish law, it seems to mean that where more than one criminal act is committed during criminal conduct, it must be treated as a single offence and will be sentenced as one offence. However, nothing in particular turns on what precise meaning should be given to this provision.

2. The second offence is one of rape, and has been marked in paragraph E.1 of the warrant as being an offence in respect of which correspondence/double criminality does not require to be verified. The facts in respect of this offence are set out as follows:

> *"On 1st January 2003, in Swarzedz, he caused Katerina Wawrzyniak's left yoke-bone to fracture which impaired the functioning of her bodily organs for a period longer than seven days and used force to have sexual intercourse with her."*

Again, there are two acts set forth in this description, but a single offence of rape has been sentenced.

Subject to reaching conclusions in relation to the issues raised in Amended Points of Objection filed, I am satisfied that there is no reason under sections 21A, 22, 23 or 24 of the Act, to refuse to order surrender, and, further, that the respondent's surrender is not prohibited by any provision of Part III of the Act or the Framework Decision.

Points of objection relied upon

Correspondence re: 'tormenting'

> *"In the period between January 2002 and 13th January 2003, in Swarzedz, he tormented, both physically and mentally, his spouse, Katerina Wawrzyniak, by hitting her with his hand and fist on her face and used language which is commonly considered offensive.*
>
> *On the 27th October, 2002, he hit her head with his and also hit her face and her head with his hand causing bruises to her face and left hand and thus impaired the functioning of her bodily organs for a period shorter than seven days."*

I have already set forth the facts leading to the offence referred to in the warrant as tormenting. There are a number of different actions which together have resulted in a conviction for one such offence, and furthermore, these actions have not taken place simply on one date or occasion, but firstly, over a period from January 2002 and January 2003, and secondly, on 27th October 2002.

Mr Farrell submits that there is no offence in this State which can possibly correspond to the offence of tormenting. He suggests that "tormenting" is the offence and that what follows is simply a description of what form that tormenting took.

Lisa Dempsey B.L., for the applicant, on the other hand, submits that it is not the 'label' given to the offence in the issuing State which must be looked at i.e. tormenting, but rather, as mandated by s. 5 of the Act, see what precise acts are alleged which give rise to the offence in the issuing state and consider then whether those acts "*would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State".*

Ms. Dempsey submits that when one looks at the various acts giving rise to the tormenting offence in the issuing state, it is clear that the acts in question would give rise at least to an offence of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997. In that regard, she refers to the fact that the facts in the warrant include that he tormented both physically and mentally and that he did this by, inter alia, hitting her face and by the use of offensive language. Ms. Dempsey submits that the physical element of assault is fulfilled by the hitting actions, and that the mental element of the tormenting is made up of the use of offensive language. She refers also to the fact that for the purpose of the s. 3 assault causing harm offence, "*harm"* is defined in s. 2 of the Act as "*harm to body or mind and includes pain and unconsciousness*".

Ms. Dempsey has referred to the recent judgment of Denham J. in *Minister for Justice, Equality and Law Reform v. Dolny*, Unreported, Supreme Court, 18th June, 2009, where the offence at issue in relation to correspondence was one of assault causing harm, and urges that the court should adopt the sort of broad approach to the facts described in the warrant in order to conclude if those acts would constitute an offence here for the purpose of s. 5 of the Act, and that it does not have to be the same offence as that for which he was convicted *i.e. 'tormenting'*.

Conclusion on correspondence

The reason behind the rule regarding correspondence in extradition matters is so that the requested state can make sure that a person whose surrender is sought does not face prosecution for or a sentence to be served in respect of an act or acts which is not an offence in the requested state. I am of the view that if one looks at the description of the tormenting offence in this warrant a person here, including me, would clearly recognise the acts said to have given rise to the 'tormenting' as being criminal acts under Irish law, such as s. 3 assault. I think that it is also relevant to draw attention to the way in which s. 5 is worded. The court by reference to that section looks at the facts contained in the warrant and if any one or more of those acts would constitute "an offence" in this State that is sufficient. It does not have to be "*the offence*" i.e. the same offence as that committed in the issuing State.

I am satisfied that correspondence is made out in respect of an offence under s. 3 of the Offences Against the Person Act, 1997, as submitted by Ms. Dempsey.

It follows, therefore, that the court is not required to consider the difficulty which may have arisen because of the composite or aggregated nature of the sentence imposed in respect of the two offences.

Non-implementation of Article 26 of the Framework Decision

The issue raised under this heading is that which was the subject of part of my judgment in the *Minister for Justice, Equality and Law Reform v. Horvath*, which is currently under appeal to the Supreme Court. It arises from the fact that there is no provision in the Act to require or make provision for the transmission by the Central Authority or the court of details to the issuing judicial authority as to the amount of time which a respondent may have spent in custody on foot of the European arrest warrant, and this is said to constitute a failure to properly implement the Framework Decision and constitute a ground to prohibit surrender as, it is submitted, it deprives a respondent of the benefit of Article 26 whereby a person is entitled to have that period of detention deducted from any sentence he may have to serve upon surrender to the issuing state. I have rejected the argument in Horvath, and I have no reason in the present case to reach a different conclusion.

I will, for all these reasons, make the order sought for the surrender of the respondent pursuant to the provisions of s. 16(1) of the Act and for his committal to prison pending the implementation of that surrender.