Neutral Citation Number: [2009] IEHC 341

THE HIGH COURT

Record Number: 2009 16 EXT

Between:

The Minister for Justice, Equality and Law Reform

Applicant

And

Arunas Zukauskas

Respondent

Judgment of Mr Justice Michael Peart delivered on the 2nd day of July 2009:

The surrender of the respondent is sought by a judicial authority in Lithuania under a European arrest warrant which issued there on the 20th March 2008. That warrant was endorsed for execution by the High Court on the 28th January 2009, and in due course on the 23rd March 2009 the respondent was arrested on foot of same and brought before the High Court forthwith as required by s. 13 of the European Arrest Warrant Act, 2003, as amended ("the Act").

I am satisfied from the affidavit evidence of Sergeant Martin O'Neill filed on this application that the person who he arrested on that date and who is before the Court is the person in respect of whom this warrant has been issued.

Surrender is sought so that the respondent can face prosecution for a single offence which can be described as an assault. I will come to the details thereof in due course. An issue arises as to whether the facts contained in the warrant are sufficient to correspond to an offence in this State under the provisions of s. 5 of the Act. The offence for which his surrender is sought meets the minimum gravity requirement in the issuing state since it carries a potential maximum punishment of three years imprisonment.

There is no reason appearing on this application why surrender should be refused under any of the provisions of sections 21A, 22, 23 or 24 of the Act. No issue has been raised to the contrary.

Subject to addressing the issue raised as to correspondence, surrender is not prohibited by any provision contained in Part III of the Act, or the Framework Decision.

Correspondence:
The facts alleged to constitute the offence for which surrender is sought are set out as follows in the warrant:

> *"[the respondent] on 12 August 2006 at approximately 21.00, being alcohol intoxicated, in Pagerve village, Birzu district, in the veranda of the house belonging to Tabita Ausma Timukiene and in the courtyard intentionally punched at least twice Stanislovas Karitonas at the face and once at the head causing him to suffer bruises of soft tissue of the face and broken left mandibular ramus i.e. he intentionally injured the victim causing him minor health impairment. [The respondent] is accused of committing a criminal act specified in part 1 art. 138 of the Criminal Code of the Republic of Lithuania." (my emphasis)*

Ronán Kennedy BL for the applicant has submitted that if these alleged acts were done in this State an offence would be committed under either of s. 2 or s. 3 of the Non-Fatal Offences Against the Person Act, 1997. Section 2 thereof provides:

> *"2. (1) A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly –*
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> *(a) directly or indirectly applies force to or causes an impact on the body of another, or*
>
> *(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,*
>
> *without the consent of the other.*
>
> *(2) ……*
>
> *(3) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is unacceptable to the other person."*

Section 3 (1) of the Act provides:

> *"3. -- (1) A person who assaults another causing him or her harm shall be guilty of an offence."*

"Harm" for the purpose of section 3 is defined in section 1 as "*harm to body or mind and includes pain and*

unconsciousness".

Mr Kennedy has not submitted that the facts of this case could come within the offence under s. 4 of that Act of causing "intentionally or recklessly causing serious harm"(my emphasis). In that regard, "serious harm" is defined as *"injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ."*

John Byrne BL for the respondent submits that the facts of the alleged offence fall short of satisfying all the ingredients necessary for an offence of assault of an offence of assault causing harm. In particular he refers to the necessity to allege that what occurred in the incident occurred *"without the consent of the other"* as provided in s. 2(1) of the Act. He submits therefore that in order to convict a person in this State for such an offence it would have to be established that the assault or the assault causing harm in circumstances where the 'victim' did not consent. There is no such direct allegation contained in the recitation of the facts in the warrant, and he submits that this is fatal to the issue of correspondence, and that this Court must not simply infer from the facts in the warrant that the victim had not given consent.

Mr Byrne has referred to the judgment of Murnaghan J. in the Supreme Court in *Mason v. Leavy* [1952] IR. 40. This judgment arose out of a Case Stated by the Circuit Court judge to the Supreme Court, inter alia, as to whether an open yard constituted "a premises" within the meaning of the Rent Restriction Act, 1946 or "a tenement" as defined in the Landlord and Tenant Act, 1931. The context of that case is, of course, very different to the present case, but nevertheless at page 47, Murnaghan J. stated:

> *"Where a statute such as the Rent Restriction Act, 1946, defines its own terms and makes what has been called its own dictionary, a Court should not depart from the definitions given by the statute and the meanings assigned to the words used in the statute…… ."*

The general submission is made also that a penal statute should be strictly construed.

In further support of his submission, Mr Byrne has referred to the judgment of James J. in *Fagan v. Metropolitan Police Commissioner* [1969] 1 QB. 439 at 444, where it is stated:

> *"An assault is any act which intentionally – or possibly recklessly – causes another person to apprehend immediate and unlawful personal violence. Although 'assault' is an independent crime and is treated as such, for practical purposes today 'assault' is generally synonymous with the term 'battery' and is a term used to mean the actual intended use of unlawful force to another person <u>without his consent</u>". (my emphasis)*

Mr Byrne has relied also upon the judgment of Fennelly J. in *The Attorney General v. Scott Dyer* [2004] 1 IR. 40. In that case the judicial authorities in Jersey sought the extradition of the respondent so that he could be prosecuted for a large number of offences described in the warrants as criminal fraud and an attempt to commit criminal fraud. The offences in this jurisdiction with which these offences were submitted to correspond each required that the acts complained were committed "with intent to defraud". It was accepted by the applicant in that case that the specimen for an indictment for such charges in this State contains the words "with intent to defraud". Those words, or indeed any equivalent form of words, were not contained in the Jersey warrants, and in those circumstances it was sought to fill the gap, as it were, by an affidavit from a Jersey advocate setting out what was required to be proven in Jersey in order to achieve a conviction for criminal fraud. That affidavit contained the following averment:

> *"The elements in Jersey law that the prosecution must prove in order to establish criminal fraud are as follows:-*
>
> *It is necessary to show that the defendant had deliberately made a false representation with the intention and consequence of causing thereby actual prejudice to someone and actual benefit to himself or another. Jersey law is clear that the intent to defraud is defined in this manner…… There is no requirement in Jersey law to set out the requisite mens rea in the indictment."*

Having reviewed a number of well-known Irish authorities on the question of how correspondence should be examined, Fennelly J. concluded at page 49:

> *"In the present case, the approach so consistently laid down in these authorities runs into the difficulty that the absence of any allegation of "intent to defraud" would appear to render the warrants deficient for the purposes of extradition".*

He went on to state:

> *"If such an allegation [intent to defraud] had been made on the face of the warrant it is indisputable that the warrant would have sufficed. The effect of Mr St. John O'Connell's evidence is that, in the law of Jersey, a charge of committing the offence of criminal fraud, carries with it the necessary implication that the accused person is alleged to have had the intent to defraud or to cause actual prejudice.*
>
> *The fact is, however, that none of the warrants use the expression 'criminal fraud'. Nor does Mr St. John O'Connell anywhere in his affidavit refer to the actual warrants at issue in this case. His evidence goes no further than to explain the offence of 'criminal fraud'. There is therefore a missing link. None of the documents, either singly or collectively, demonstrate that the respondent is charged with an offence of which intent to defraud is an element.*
>
> *I would add that it would have been very simple to supply the missing link. Either the warrants could have described the offences as being 'criminal fraud' or Mr St. John O'Connell could have referred to the warrants and explained that they related to charges of criminal fraud. Indeed, it seems to me that there cold have been a third alternative. The warrants could have alleged 'intent to defraud' or, according to the preferred Jersey formulation,*

'intent to cause actual prejudice". This has sometimes been described as 'dressing up'. That is to say that a warrant might contain an allegation of fact whose proof, though not necessary according to the law of the requesting jurisdiction, would ensure its acceptance for the purposes of extradition from this jurisdiction …… In my view, there would be no objection to the inclusion of an allegation of fact, not necessary to prove in the requesting jurisdiction, so long as it corresponded to the facts actually to be proved. There is no reason to suspect that the courts of friendly jurisdictions with whom our State has entered into reciprocal extradition arrangements would act other than in good faith. It would not, of course, be necessary to go so far in the present case, since it is clear that the inclusion of the words 'with intent to defraud' or to 'cause actual prejudice' in the Jersey warrant would be merely to state something that must be proved according to that law.

However, in the absence of any allegation, either express or to be implied, of intent to defraud, I do not believe the warrants in the present case satisfy the requirements of Part III of the Extradition Act, 1965 in respect of correspondence of offences."(my emphasis)

Mr Byrne has referred also to judgments of this Court in *Minister for Justice, Equality and Law Reform v. Wroblewsky,* unreported, High Court, 9th July 2008, and *Minister for Justice, Equality and Law Reform v. Dunkova,* unreported, High Court, 30th May 2008. In each of these cases, a theft type offence was the subject of the warrant, but the issuing judicial authority had in the warrant used the verb "took" or "took away" to describe the alleged appropriation of property, and I concluded that it was not possible, for the purpose of showing correspondence with an offence of theft under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, to infer anything else from the facts in the warrant, and that the Court was restricted to what was contained in the description of the facts alleged. In each case, reference was made to the said judgment of Fennelly J. in *Attorney General v. Scott Dyer*. In the present case there is considerably more in the nature of facts alleged than in those cases, nevertheless there must be some constraint upon this Court in inferring too much from those facts in order to fill any gap as far as correspondence is concerned.

Mr Kennedy has referred to my decision in *Minister for Justice, Equality and Law Reform v. Hahui*, unreported, High Court, 18th July 2008 where from the circumstances in which a robbery occurred in the stairwell of a block of flats and where before robbing a leather handbag with a large quantity of money, the respondent had struck the victims with what was described as a "contusive tool", knocked him down and made off with the goods. In such circumstances, even though there was no specific allegation of dishonest intent actually contained in the warrant, and no statement that this all occurred without the consent of the owner of the property (both such elements being necessary for correspondence with a robbery offence here) I concluded as follows:

"Without reading words into the contents of the offence as stated in the warrant, this Court is nevertheless entitled to adopt a realistic approach to the establishment of correspondence and look at all the circumstances of the offence as contained in the warrant. It is quite clear that the respondent was convicted on facts which include the striking of the victim with an implement referred to as a contusive tool, knocking him to the ground, and taking from him a leather handbag containing a large amount of money. On that set of facts, it is fanciful to suggest that this may have occurred with the consent of the victim. These circumstances themselves, clear from the warrant, demonstrate alack of consent and dishonest intent of the respondent. In my view there is no room for argument that the absence of any reference to dishonesty or lack of consent is fatal to the issue of correspondence, given the circumstances of the crime."

Mr Kennedy urges this Court to adopt a similar realistic approach in relation to the inferring a lack of consent by the victim in this case to his being intentionally punched twice in the face and once in the head while on the veranda of the house referred to, thereby causing him to sustain a broken mandibular ramus – i.e. a broken jaw. He urges the Court not to allow the speculation indulged in by Mr Byrne that the description of the facts in the warrant would be consistent with a number of consensual situations out on a veranda which happened to result in the injury described. He submits that it is crystal clear from the facts in the warrant that what occurred on the veranda was other than by consent, and that, as in *Hahui*, this Court should allow that element to be inferred. Mr Byrne on the other hand submits that this Court cannot simply supply by inference what was described by Fennelly J. in *Attorney General v. Scott Dyer* as "the missing link" from the contents of the warrant, and that if there was no consent the issuing judicial authority could very easily have said so therein.

Mr Kennedy submits that what the respondent is asking this Court to do is to speculate that consent may have been given by the victim to these injuries, and that it is not incumbent upon the issuing judicial authority to rule out all possible defences to the charge when setting out a description of what is alleged the respondent did. He submits that if an indictment was prepared in this State on the set of facts contained in the warrant it would simply recite the alleged facts which give rise to an offence which is contrary to s. 2 or s.3 of the 1997 Act. He suggests that it would not specifically state that what was done by the accused was done without the consent of the victim. He refers to the judgment of Geoghegan J. in *Myles v. Sreenan* [1999] 4 IR 294 where he stated at page 299:

"… a mere imperfection in draftsmanship would not be sufficient to defeat the warrant. One must read the warrant as a whole and if on any reasonable interpretation of the particulars as given 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 entire charge under the heading "alleged offence" it is perfectly obvious that dishonesty is what is alleged".

He urges the Court to adopt a similar approach when reading the facts of this warrant and deciding if an assault would have been committed here on the same facts, even though there is no specific reference to the injuries having been inflicted without the consent of the victim. Mr Kennedy has also referred to paragraph (5) of the Preamble to the Framework Decision which states that "the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures". He submits that in deference to this aspiration this Court should not take a too literal approach to the question of correspondence where from the facts in the warrant it is clear that what occurred was not with the consent of the victim, even if these words are absent from the

recitation of facts.

Conclusion:
One issue to be determined in this case is whether for the offence to correspond to an offence of assault contrary to s. 2 of the 1997 Act it is essential that the warrant contains a specific allegation that on the occasion in question the victim did not give his consent to being assaulted or whether that absence of consent may be implied from the nature of the injury sustained and the circumstances as described.

Another issue in relation to the s. 2 offence is whether there is enough in the warrant to satisfy the requirement that what occurred did so "without lawful excuse". In that regard the provisions of s.18 of the Act are relevant since it provides a number of circumstances in which the use of reasonable force does not constitute an offence.

Another issue to be determined is whether for the offence to correspond to an offence of assault causing harm contrary to s. 3 of that Act the element of absence of consent is not required to be proven by the prosecution, since absence of consent is not contained in that section as an ingredient. If it is nonetheless it is an ingredient by reference to how 'assault' is described in s. 2, again the question will arise as to whether absence of consent can be implied from the facts and circumstances outlined in the warrant, as with the s. 2 offence, and whether there is enough in the warrant to indicate that the event comes within any of the exceptions provided for in s. 18 of the Act.

The two sections create distinct offences. If the elements of "without lawful excuse" and "without the consent of the other" as provided for as. 2 assault are to be included as necessary elements also for the s. 3 offence, then the remaining distinction is simply that in relation to the former it is not necessary that harm be inflicted, the latter resulting in a greater potential penalty upon conviction.

There is some discussion of these two offences contained in *Criminal Law,* Charleton, McDermott, Bolger, Butterworths,1999 at paras. 9.83 – 9.92. Having referred in para. 9.85 to the mental element (i.e "intentionally or recklessly" applying force or causing an impact on the body of a person) which is provided in s. 2, and having referred in para. 9.86 to the requirement in s. 2 that it be "without lawful excuse" (by reference to the exceptions in s. 18), the learned authors proceed in para. 9.92 to consider the separate offence under s. 3 of assault causing harm, describing it as "this new offence". They state:

> *"This offence replaces the offence of occasioning bodily harm contrary to s. 47 of the Offences Against the Person Act 1861; discussed at para [9.57]. On one interpretation of s. 3 there is no extra mental element required in order to turn an assault into an assault causing harm; it is the level of harm which is actually caused that determines which offence has been committed. This construction of s. 3 may be open to challenge because there is a large disparity in the sentencing options under s 2 and s 3. Assault carries a maximum penalty of six months' imprisonment, whereas s 3 carries a maximum term of five years when tried on indictment. Returning to first principles it seems obvious that where one offence is differentiated from another by the addition of an external element and a significantly increased penalty, the legislature is presumed to have intended that a mental element, in the form of either intention or recklessness is required for the proof of that aggravating factor. However, at common law, liability was strict in that regard ……. The existence of the aggravating factor and the difference both in penalty and social stigma which results from a conviction required that a mental element should also apply to the factor that differentiates this offence from the offence of ordinary assault. In consequence the accused must, it is submitted, either intend to cause harm to the victim or proceed with either an intentional or reckless assault foreseeing the risk of that harm and ignoring same by culpably proceeding with his actions.*

Before considering these questions further, I should refer to my judgment in *Minister for Justice, Equality and Law Reform v. Dolny,* unreported, High Court, 23rd October 2008, where it was necessary to consider these matters albeit in relation to different facts described in that warrant as follows:

> *"On 20th June 2004 in ……., acting together and in collaboration with …, he beat … by hitting him on the face and head with his fists, thereby causing injury to his body in the form of a contused wound in the left suborbital area and a contused wound in the area of the right supercillary ridge – thus exposing him to the direct danger of sustaining grievous detriment to his health."*

Similar submissions regarding the lack of any allegation that this occurred without the consent of the victim and without lawful excuse were made. In my said judgment I stated:

> *"In my view this submission is wrong. The offences created respectively by s. 2 and s.3 of the 1997 Act are distinct and different offences. An assault under s. 2 requires for its commission that the person assaulted did not consent to being assaulted, as well as that the assault be inflicted without lawful excuse and intentionally or recklessly. The section is clear in that regard. But the separate and distinct offence of 'assault causing harm' in s. 3 contains no such requirements. It is a separate offence, and it is not the case that s. 2 is intended to define the concept of "assault" for all purposes of the Act. There is no definition of assault contained in s. 1 of the 1997 Act, or elsewhere therein.*
>
> *Section 3 provides for a free-standing offence of 'assault causing harm' as opposed to a simple assault. In order to be guilty of this offence a person must have carried out an assault and must have caused 'harm' as defined in s. 1 of the 1997 Act. In such an offence it is not part of the offence that it occurs without the consent of the victim. That is clear from the plain meaning of the words used in the section. In s. 3, the word 'assault' is not used as a term of art by reference to the provisions of s. 2, or by reference to any statutory definition of that word. The Concise Oxford Dictionary definition of 'assault' is "a violent physical or verbal attack". That is the meaning to be given to the word 'assault' for the purpose of the s. 3 offence."*

Following the making of the order for surrender in that case the respondent lodged an appeal to the Supreme Court. Since the hearing of the present case, judgment has been delivered by the Supreme Court, and the judgment of Denham J. with whom Kearns and Macken JJ agreed, has referred specifically to the above passage, and has affirmed the approach taken in this passage to correspondence. Having referred to the judgment of Henchy J. in *Wilson v. Sheehan* [1979] I.R. 423 at

429 where he stated that the correct rule is that the words used to identify the specified offence "should be given their ordinary or popular meaning unless they are used in a context which suggests that they have a special meaning", Denham J. has concluded:

> *"I have no doubt that the acts alleged, beating the named person by hitting him on the face and head with fists, thereby causing injury to his body, are ordinary words which describe acts which would constitute an offence if committed in this jurisdiction. I would affirm the finding of the learned High Court judge on this issue also."*

It is clear that it is appropriate that the warrant should not be parsed and analysed as if it was an indictment, and that a common-sense approach should be adopted in the search for the reasonable interpretation referred to by Geoghegan J. in Myles v. Sreenan [supra]. Such an approach forces the conclusion that the facts as disclosed in the warrant in the present case and as set forth in detail above show correspondence with an offence of assault and an offence causing harm in this State by reference to the ordinary or popular meaning to be given to words such as *"intentionally punched at least twice… at the face and once at the head causing him to suffer bruises of soft tissue at the face and broken left mandibular ramus",* and *"he intentionally injured the victim".*

Matters such as the question of the victim not having consented to the infliction of these injuries, or that there was no lawful excuse, may well be matters which the prosecution may prove in some way, or may be inferred from the facts, or may be dealt with by way of any defence put forward by the respondent at his trial, but the mere fact that it is not covered by a specific statement in a European arrest warrant that there was no consent cannot be a sufficient impediment to a finding of correspondence when the facts as known from the warrant are such as appear in the present case. The words used in the present warrant are, to use the words of Denham J. at the conclusion of her judgment in *Dolny* above " *ordinary words which describe acts which would constitute an offence if committed in this jurisdiction".*

For all these reasons I am satisfied that the Court is required to make the order for surrender sought, and I will so order.