Neutral Citation: [2009] IEHC 159

THE HIGH COURT

2009 3 Ext

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

ANTHONY JOHN HILL

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 3rd day of April 2009:

The surrender of the respondent is sought by a judicial authority in the United Kingdom on foot of a European arrest warrant which issued there on the 23rd December 2008.That warrant was endorsed for execution here by the High Court on the 10th February 2009, and on the same date the respondent was duly arrested by Sgt. Seán Fallon and, as required by s. 13 of the European Arrest Warrant Act, 2003, as amended, was brought before the High Court, from where he has been remanded from time to time pending the hearing of the present application for his surrender.

His surrender is sought so that he can be prosecuted for an alleged offence which is described in the warrant as "*doing an act tending or intended to pervert the course of public justice*", contrary to Common Law. Minimum gravity is satisfied in relation to that offence since it carries a possible sentence of life imprisonment. It is alleged that the respondent posted from Ireland two packages containing a DVD to the foreman of a jury and the presiding judge at a trial of persons relating to the bombings in London on 7th July 2005, and that the DVDs in question contained material tending or intended to pervert the course of justice. I set out the detail the alleged offence more fully later in my judgment when considering the issue raised as to correspondence.

That offence is one for which correspondence with an offence in this jurisdiction must be established, as it is not an offence marked in the warrant as coming within the categories of offence set forth in Article 2.2 of the Framework Decision.

No undertaking is required under s. 45 of the Act since no prosecution has yet occurred.

I am satisfied that his surrender need not be refused by virtue of any provision contained in sections 21A, 22, 23 or 24 of the Act, and, subject to reaching a conclusion in relation to the points of objection raised by the respondent, I am satisfied that his surrender is not prohibited by any provision of Part III of the Act or the Framework Decision.

Points of Objection:

1. Surrender would be a breach of constitutional/Convention rights namely Freedom of thought, expression, and religion:

The respondent has sworn no affidavit in support of this point of objection. Nevertheless, it has been stated by Mr Kelly in his submissions, that this DVD contains the respondent's opinion in relation to matters the subject of the trial of the persons concerned in relation to their involvement in the London bombings. In that regard I should refer to an averment in the affidavit of Sgt. Seán Fallon, who arrested the respondent herein, that having arrested the respondent he asked him if he knew what this warrant was about, to which the respondent replied "*I sent them, I believe these men to be innocent*". While Mr Kelly accepts that the right to express views and opinions is not an absolute right, nevertheless the DVD contains no exhortation to a jury or the trial judge to find the accused persons innocent, but rather simply expresses an honest belief or opinion held by the respondent. He submits that it would be an unreasonable abridgment or curtailment of the respondent's right to express his views in this way for him to be surrendered, and that his surrender should be prohibited under Part III of the Act and the Framework Decision. He refers to the statement in the Framework Decision that fundamental rights are respected therein.

Mr Farrell on the other hand submits that sending opinions and views in any form, or a DVD as in the present case which represents or advances those views, to a trial judge and jury in an effort to influence the outcome of a trial cannot possibly constitute a protected right, no matter how sincerely held such an opinion is held.

There is no possible merit in this point of objection. It goes without saying that in certain circumstances and with proportionate restrictions, every citizen of, and other person in, this State enjoys freedom to express his views, religious or otherwise. But it is clearly recognised that this is not an absolute right to say what one wishes in all situations and to whom one chooses in all circumstances. Certain offences can be committed by the expression of certain extreme views, opinions and statements. Equally an expression or statement of opinion, which may not be considered to be extreme, but which is communicated to certain persons with a criminal intent or an objective which is contrary to law is an offence. Such expressions are prohibited by law, and it includes any statement or communication made to or with a jury foreman or a trial judge which is intended or designed or likely to influence the outcome of a trial. To so provide by law is a reasonable restriction on the freedom of expression. There is no basis in this case for the surrender of the respondent being prohibited on this ground.

2. The offence was committed outside the issuing state:

Mr Kelly submits also that, even if the material was such as to tend to or was intended to pervert the course of justice, it was an offence which was not committed in the United Kingdom, and that accordingly it is an offence which comes within s. 44 of the Act, namely one for which surrender may not be ordered since it is an offence which, in the words of s. 44 of the Act

> *"……was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."*

The conclusion which I reach in relation to this point of objection is closely linked to issue of correspondence itself, and I will deal with both issues by way of conclusion when dealing with correspondence.

3. Correspondence not established:

As I have said, the offence is of "*doing an act tending or intended to pervert the course of public justice*", contrary to Common Law.

The warrant states in a "brief summary" of the offence that it concerns the sending of two packages sent to Kingston Crown Court addressed to the foreman of the jury and the presiding judge during the course of a trial of offences against persons alleged to have been involved in assisting some other persons who were involved in the London bombings on the 7th July 2005. It states also that subsequent investigations revealed that similar packages were sent to the homes of relatives of persons who died as a result of those bombs. The warrant sets out in considerable detail in relation to the general background to the alleged offence, including that the packages alleged to have been sent to the Foreman of the jury and to the presiding judge was delivered "*via standard post*" and "*apparently originated in the Republic of Ireland*". These packages have been forensically examined by the police, and these examinations have shown, according to the warrant, that the respondent's fingerprints appear thereon. As I have said, there is considerable further detail contained in the warrant and it is unnecessary to set it all out in exhaustive detail.

It is submitted by Remy Farrell BL for the applicant that what the respondent is alleged to have done as described in the warrant was done here, it would give rise to the very same offence as that contained in the warrant, namely an offence of perverting the course of justice contrary to Common Law. In other words if the respondent had from outside this State sent packages of material to a jury foreman and trial judge in this State, he would commit the offence, since the material so posted tended and was intended to influence or bear upon the jury and the judge in some way in furtherance of the respondent's belief that the accused persons are innocent of the charges which they were at that time being tried for.

Kieran Kelly BL for the respondent has submitted that what the respondent is alleged to have done is simply to have posted from Ireland two packages to the foreman and to the judge in question in the United Kingdom. He refers to the fact that in the warrant it is stated that in fact these packages were **intercepted by court staff before they reached the intended recipients**, and Mr Kelly submits that if the respondent were to post such a package to a foreman and a judge in this State from, say, the United Kingdom, such an act could not constitute an attempt to pervert the course of justice here, the more so where the packages were not in fact received by the intended persons. He suggests that it can be no offence here simply to post material in a post-box with no end result achieved.

Mr Kelly also submits that before this Court can be satisfied that correspondence is established, this Court would need to **view the contents** of the DVD which was posted since the Court would have to be satisfied that the contents of the DVD are such as would have the capacity to constitute a perverting of justice. A copy of the DVD has been given to the Court in case I considered that I should view it.

The warrant provides some information as to the contents of the video as follows:

> *"The thrust of the video is that the UK government and security services conspired to cause explosions in Central London on 7th July 2005 and that the 7/7 bombers were innocent individuals duped into participating in what they thought was a training exercise. The makers of the video drew heavily on a BBC Panorama documentary that was broadcast on the 16th May 2004 entitled 'London under Attack', in which they sought to put Britain's emergency plans to the test and reveal if London was prepared for a terrorist attack."*

No affidavit or other evidence has been adduced on this application by the respondent to disagree with this general description of what is contained on the DVD. I am entitled to accept this general description of what is contained therein. I have chosen not to view the DVD. To do so would be to run the risk of entering upon the merits of the prosecution case against the respondent. That is inappropriate. It is unnecessary to do so for the purpose of considering the issue of correspondence. The DVD quite obviously contains material which is believed by the respondent to be at least relevant to the subject matter of the charges before the Crown Court in the issuing state, otherwise he would not have sent it in the first place.

A necessary ingredient for the offence is that the act has the tendency to and was intended to pervert justice. Archbold, 2006 edition at paragraph 28-18 refers to this, and states:

> *"An act done with the intention of perverting the course of justice is not enough; the act must also have that tendency. To establish a tendency or a possibility, the prosecution do not have to prove that the tendency or possibility in fact materialised; there must be a possibility that what the accused has done "without more" might lead to injustice"*

Archbold at paragraph 28-15 states:

"Any approach to a jury, or any member of it, to discuss a case, or express views about it, may amount to an attempt to pervert the course of justice".

Footnoted to that remark is a case of *R. v. Mickleburgh* [1995] 1 Cr. App.R.297, and at page 304 of that judgment, it appears that this statement, is quoted directly from the judgment in the case delivered by Lord Taylor C.J.

If the respondent had sent to the foreman and the trial judge a DVD containing a film of, say, Bambi, Watership Down or even 101 Dalmatians, under a belief that those persons might appreciate some relaxing entertainment during, for example, the jury deliberations, such material might not be regarded reasonably as having the capacity to influence the outcome of the trial, and may not therefore constitute a criminal offence, unless of course the offences being tried had as their background some animal rights activity. The DVD in the present case is not so regarded by the issuing judicial authority as being so benign. It is clearly felt that, at least in the mind of the respondent, it had some bearing on the background to the offences which were being prosecuted at the trial in question. In such circumstances, and accepting the issuing judicial authority's uncontested description of the "thrust" of the DVD contents, I am satisfied that both tendency and intention are satisfied in relation to the offence in this case.

The principal issue to be determined is whether there is an offence in this State which corresponds to the act by the respondent of sending the DVD from this country to the foreman and the trial judge in the United Kingdom. More specifically, this Court must be satisfied that if the respondent, from abroad, posted a DVD such as this one, to a foreman of a jury here and a trial judge here who were engaged upon a trial of an offence here of the kind being tried in the United Kingdom, would commit the offence of perverting the course of justice contrary to Common Law. Clearly such a Common Law offence exists here. The only question is whether such an offence is committed here if the posting was to be done from outside this country and where the package did not reach its intended recipient.

Mr Farrell has referred to Archbold, 2006 edition at para. 28-1 where it states in relation to the common law offence of perverting the course of justice:

"It is a common law misdemeanour to pervert the course of justice ….. The offence is committed where a person or persons:

(a) acts or embarks upon a course of conduct,

(b) which has a tendency to, and

(c) is intended to pervert,

(d) the course of justice….

A positive act is required. Inaction, for example, failing to respond to a summons, is insufficient to constitute an offence".

Mr Farrell has submitted that this is not an inchoate offence, but a substantive offence. He refers to para. 28-19 of Archbold where it refers to the fact that the offence is sometimes referred to misleadingly as attempting to pervert the course of justice, but in truth it not an inchoate attempt offence. That paragraph states in this regard:

"However, the word "attempt" is convenient for use in a case where it cannot be proved that the course of justice was actually perverted. A jury should be directed to assess the conduct of the accused in terms of proximity to an ultimate offence; they should be left to consider the tendency of the conduct and the intention of the accused."

Mr Farrell submits in relation to the offence for which the respondent's surrender is sought it is of no relevance that the packages did not reach their intended recipients, and that once the packages containing the DVD was posted the offence was committed, and that for the purpose of correspondence with the same offence in this State the same applies. He submits also that the fact that the package was not posted in the issuing state but from this State does not remove the offence from correspondence, and that it would be an offence in this State for a person to post from another country such material to a foreman and judge here, since the intended effect would be in this State – in other words that it would be a trial process here which was intended to be interfered with.

I have been unable to find during my researches any discussion or precedent related to an extra-territorial act by a person constituting an offence of perverting the course of justice in the state in which the charge is laid. But there have been a number of cases in which the same issue has arisen in connection with an offence of conspiracy to commit an offence, where that conspiracy was entered into outside the United Kingdom. I will refer to just two, namely *Reg. v. Doot* (H.L.(E) [1973] AC.807, and *DPP v. Stonehouse* [1978] AC. 55.

In *Doot*, the accused persons had conspired in either Belgium or Morocco to secretly import an illegal drug into England from Morocco, and to then transport it across England and over to Canada and into the United States of America. As Lord Pearson stated at p.825 "*that was an agreement to break the law of England by illegal importation of dangerous drugs, and therefore it was, if and in so far as English law applied to it, a conspiracy*". After entering the United Kingdom in furtherance of this conspiracy the accused were arrested and charged with conspiracy to import dangerous drugs. The trial judge concluded that he had jurisdiction to try these offences even though the agreement constituting the conspiracy was entered into outside England, and the accused were convicted. The Court of Appeal quashed the convictions having taken a different view, but certified a point of law of general importance for determination in the House of Lords, where it concluded that the English courts had jurisdiction to try the offences if the evidence showed that the conspiracy, whenever and wherever formed, was still in existence when the accused were in England; and that in that case the acts of the accused persons in England sufficed to establish the continuing existence of the conspiracy and that their convictions had been correct and should be restored. In his speech Lord Wilberforce referred to the issue at p. 817 in the following terms:

"…… Since [the conspiracy offence] is (if at all) a common law offence, the question must be decided upon

principle and authority.

> *In the search for a principle, the requirement of territoriality does not in itself provide an answer. To many simple situations, where all relevant elements occur in this country, or conversely, occur abroad, it may do so. But there are many 'crimes'…… the elements of which cannot be so simply located. They may originate in one country, be continued in another, produce effects in a third. Some constituent fact, the posting or receipt of a letter, the firing of a shot, the falsification of a document, may take place in one country, the other necessary elements in another…….*
>
> *In my opinion, the key to a decision for or against the offence charged can be found in an answer to the question why the common law treats certain actions as crimes. And one answer must certainly be because the actions in question are a threat to the Queen's peace, or, as we would now perhaps say, to society. Judged by this test, there is every reason for, and none that I can see against, the prosecution. Conspiracies are intended to be carried into effect, and one reason why, in addition to individual prosecution of each participant, conspiracy charges are brought is because criminal action organised and executed, in concert is more dangerous than an individual breach of the law. Why then refrain from prosecution where the relevant concert was, initially, formed outside the United Kingdom?"*

Lord Dilhorne at pp. 822-823 expressed the view that while a conspiracy is completed with the agreement itself, nevertheless *"… a conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry out the design. It would be highly unreal to say that the conspiracy to carry out the Gunpowder Plot was completed when the conspirators met and agreed the plot at Catesby."*

He went on:

> *"If it is, as in my opinion it is, a continuing offence then the courts of England, in my view, have jurisdiction to try the offence, if, and only if, the evidence suffices to show that the conspiracy whenever and wherever it was formed was in existence when the accused were in England."*

He concluded at p. 825 by stating:

> *"The conclusion to which I have come …… is that though the offence of conspiracy is complete when the agreement to do the unlawful act is made and it is not necessary for the prosecution to do more than prove the making of such an agreement, a conspiracy does not end with the making of the agreement. It continues so long as the parties to the agreement intend to carry it out…… ."*

Lord Pearson in his speech was of the same view as to the continuing nature of the conspiracy from the making of the agreement, its performance or implementation and its discharge and termination. He concluded that "*accordingly, having regard to the special nature of the offence of conspiracy to commit crime in England is, in my opinion, an offence against the common law even when entered into abroad, certainly if acts in furtherance of the conspiracy are done in this country. There can in such circumstances be no doubt that the conspiracy is in fact as well as in theory a real threat to the Queen's peace.*"

In *Stonehouse*, the defendant having insured his life in England for the benefit of his wife, fabricated the appearance of his death by drowning abroad. He was charged in England with attempting to obtain in England property by deception. He was convicted, and on appeal it was held unanimously that the charge was justiciable in England since the basis of the jurisdiction in a case of obtaining property by deception was, not that the defendant had done some physical act in England but that his acts, wherever they were done, had caused the obtaining of the property in England from the person to whom it belonged, and the principle covered the inchoate offence of attempting to obtain the property. It was held also that the acts of the defendant abroad were sufficiently proximate to the complete offence of obtaining property by deception to be capable in law of constituting an attempt to commit the offence.

In his speech, Lord Dilhorne refers to a distinction between a "conduct crime" such as blackmail, and a "result crime" such as obtaining money by deception. He was of the view that there is long-standing authority to the effect that in a 'result crime' the English courts have jurisdiction to try the offence if the described consequence of the conduct of the accused which is part of the definition of the crime took place in England. He concluded by stating at p. 67:

> *"If in order to found the jurisdiction it were necessary to prove that something had been actually caused to happen in England by the acts done by the offender abroad a qualified answer to the certified question would be called for. I do not think it is necessary. So I would answer the question with an unqualified 'Yes'."*

That certified question was:

> *"whether the offence of attempting …. to obtain property in England by deception, the final act alleged to constitute the offence of attempt having occurred outside the jurisdiction of the English courts, is triable in an English court, all the remaining acts necessary to constitute the completed offence being intended to take place in England".*

In their book *Criminal Law* [Butterworths Ireland 1999], the authors Charleton, McDermott and Bolger state at para. 4.51 under the heading 'Jurisdiction' as follows:

> *"Jurisdiction of the criminal courts is territorial ….. . If a person abroad initiates an offence, part of the essential elements of which take place within Ireland, he is amenable to our jurisdiction. There is an attempt triable within Ireland despite all of the acts of the accused being perpetrated abroad if those acts have an effect here: DPP v.*

Stonehouse. On another view, it is immaterial that no effect occurs within the jurisdiction provided what the accused does is an act sufficiently proximate to the commission of an offence in Ireland."

In the present case the respondent posted his packages from Ireland with the intention that they have an effect in England by the intended recipients receiving them in England, namely that the course of justice be perverted. While the authorities to which I have referred have involved offences of a different kind, they are similar in principle to that for which the respondent is charged in the United Kingdom. That offence can be seen as a 'result offence' where the intended result was to be achieved in the United Kingdom even though the act which commenced the offence was done abroad (i.e. Ireland). It is a continuing offence, since the intention behind the posting of the packages was that they be received in England by those intended to be affected in some way by their receipt. I see no reason why as a matter of principle that common law offence should not be considered as triable in the jurisdiction where that result or effect was intended to be achieved.

It follows in my view that as such the offence with which the respondent is charged in the issuing state is not one for which his surrender is prohibited by s. 44 of the Act, since it is not an offence which by virtue of having been committed outside the issuing state would not be triable in this jurisdiction if it had been committed here.

It is also clear that the offence corresponds to an offence here under common law for the purpose of s.5 of the Act. I am satisfied that if a person posted from England a package containing the DVD described in the warrant to this State intending that it be received by a jury foreman and a trial judge involved in the trial of persons for offences in question in this case, such a person would have committed an offence in this State, since it is this State where the intended effect of the DVD was intended to occur.

For all these reasons I am satisfied that this Court is required to make the order sought for the surrender of the respondent to the authorities in the United Kingdom, and I will so order.

I will conclude by referring to the fact that since I heard this case on the 19th March 2009 I have been the recipient of seven packages, none of which I have opened, but some of which clearly contained a DVD, and others some paper material, and all of which contained on the envelope or package information indicating that they related to this case. I have no doubt whatever that the DVD enclosed was either the same or similar in content to that which was handed into court on this application, but which I have chosen not to view. I have passed these envelopes and packages unopened to the authorities here. From recollection these packages and envelopes were posted from Finland, the United States of America and Qatar. It is also the case that another judge who had an earlier involvement with this case following the arrest of the respondent received similar material by post. It is certainly open to the inference that the persons who sent this material have some connection to this respondent, especially since the packages were addressed to me at Court 11, the High Court, Four Courts, Dublin. How else would the sender have known the particular court in which I am sitting. I want to express my disapproval of these actions by whoever is involved in the strongest possible terms, it being clearly an attempt to in some way influence my decision on this application. It will be a matter for the relevant personnel in An Garda Siochana and/or the Director of Public Prosecutions to decide what, if any, further action should be taken in relation to same.