Neutral Citation Number: [2007] IEHC 342

THE HIGH COURT

Record Number: 2006 No. 20 Ext.

BETWEEN

ATTORNEY GENERAL

APPLICANT

AND
SIMON MURPHY

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 17th day of October 2007

1. Extradition arrangements between this State and the United States of America exist by virtue of the treaty in that regard done at Washington on 13th July 1983 ("the Washington Treaty"). Part II of the Extradition Act, 1965 was applied to this treaty by Statutory Instrument 474 of 2000.

2. An order for the extradition of the respondent to the United States of America pursuant to the Washington Treaty is sought by the applicant following the receipt here of a diplomatic note dated 29th July 2004 which made a Request for his extradition. Further information was sought and obtained following upon that Request, and ultimately on the 6th February, 2006 the Minister for Justice, Equality and Law Reform under section 26(1) of the Extradition Act, 1965 as amended ("the Act") certified that he had received this Request, and, as provided for by section 26 of the Act made an application to the High Court for a warrant of arrest in respect of the respondent. That warrant issued on the 14th February, 2006, and the respondent was duly arrested on foot of same on the 7th March 2006 and was produced before the High Court on the following day the 8th March 2006 as required by section 26 of the Act, and was remanded from time to time pending the hearing of this application.

3. I should mention at the outset the fact that the warrant of arrest recites that the respondent was convicted in the United States of America on eight separate offences and these are listed. This is an error. Nothing turns on the error, although Dr Forde has submitted that the warrant was invalid as a result. But it is accepted by all parties that he was convicted on only one charge of sexual assault to which he had pleaded guilty. His surrender is sought so that he can be returned for sentencing, having failed to appear on the date fixed for his sentencing hearing.

4. I am satisfied that the Request for extradition in this case is supported, as required by section 25 of the Act, by the documentation set forth in that section. There is no need to set out that documentation in any detail.

5. Section 29 (1)of the Act provides as follows:

> "(1) Where a person is before the High Court under section 26 or 27 and the Court is satisfied that
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> (a) the extradition of that person has been duly requested, and
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> (b) this Part applies in relation to a requesting country, and
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> (c) extradition of the person claimed is not prohibited by this Part or by the relevant extradition provisions, and
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> (d) the documents required to support a request for extradition under section 25 have been produced,
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> the Court shall make an order committing that person to a prison (or, if he is not more than 21 years of age, to a remand institution) there to await the order of the Minister for his extradition."

6. There is no issue raised on this application as to whether the offence in respect of which the respondent pleaded guilty in the United States of America corresponds to an offence in this country. It is not in dispute that the respondent has been convicted in the United States of one offence of sexual abuse in the first degree contrary to Article 130. 65 of the Penal Law of New York.

7. Section 10 of the Act sets out how correspondence is established and without going into the details of the factual background to the offence of which the respondent was convicted in the United States, I am completely satisfied that the underlying facts would, if committed in this jurisdiction on the date on which the request for extradition has been made, constitute an offence under Irish law of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act, 1990.

8. Subject to dealing with the objections which have been put forward by Dr Michael Forde SC on the respondent's behalf , I am satisfied that this court is obliged to make the order sought.

Points of Objection

9. Firstly, Dr Forde has submitted that the warrant of arrest issued by this Court was invalid because it recites 8 offences against the respondent instead of simply the one offence to which he pleaded guilty. I accept that, for whatever reason, an error was made when that warrant was prepared, but, as I have already stated, nothing turns upon that error and I am satisfied that the error in the warrant itself does not make the respondent's arrest upon it unlawful. It is also noteworthy that no application for release under Article 40 of the Constitution was ever made on the respondent's behalf following his arrest on foot of the warrant. The respondent was not in any way prejudiced, and was at all times aware that his extradition was being sought so that he could be sentenced for the one offence in respect of which he pleaded guilty.

10. Secondly, it is submitted that there has been a delay on the part of the United States authorities in seeking him since they were aware of his presence in Ireland since the 9th February 1999. This delay of some seven years is submitted to constitute an unreasonable and unexplained delay. Dr Forde has submitted that it would be oppressive and unfair to now extradite the respondent. I cannot accept that this ground of objection has been made out. No prejudice of any kind has been asserted. This is not even a case where after such a period of delay the respondent faces the prospect of a trial, since he has already pleaded guilty to the single offence in respect of which sentence must still be passed. There can be no room for doubt but that the respondent left the United States of America before his sentence hearing, and any delay which has occurred has been the result of that departure.

11. Thirdly, the respondent seeks to avoid an order for his extradition on the basis that the prison conditions which he will face if sentenced upon his return are such as to breach his constitutional rights. This submission is largely based upon the respondent's

state of health. The Court is aware that after his arrest here on foot of the warrant issued by this Court, the respondent underwent heart by-pass surgery. However, there is no evidence other than that he has recovered satisfactorily from that surgery and is doing well. That is not disputed. However some evidence in the form of an affidavit by John Boston, a director of the prisoners' rights project of the New York City Legal Aid Society seeks to suggest that conditions in jails in the City of New York are less than satisfactory. Mr Boston states in his affidavit that he has received a number of complaints from prisoners who state that they do not actually receive the special diets which they have been prescribed by medical personnel and that staff in these jails have been unreceptive to their complaints. He also suggests that as far as any exercise programme is concerned, the respondent will, if sent to one of these jails, be on his own, and with only one hour per day out of his cell for recreation purposes five days per week. Mr Boston makes statements of a general nature to the effect that he finds that the jail and medical care system is resistant to continuing courses of treatment begun before a prisoner enters the system, or carrying out medical advice previously given. He indicates in his affidavit that his organisation receives many complaints from prisoners about the failure to carry out treatment which has been prescribed for them. There is no need to set out in detail everything which Mr Boston states. It is sufficient perhaps to say that in a general way he is of the view that inmates' medical conditions are not properly looked after and that there are risks to health resulting from that state of affairs. In answer to those allegations, an affidavit has been filed by Lester Wright, who is the deputy Commissioner/Chief Medical Officer for the New York State Department of Correctional services. He is responsible for supervising and monitoring all medical services for inmates in the New York State Department of corrections. Again, without setting out in detail everything which he states, he can be seen to set out in detail the facilities which are available to all types of inmates. He states that he has reviewed the affidavits of Dr Mark Walsh who is the medical attendant of the respondent in this country, and he states that it is his understanding that the respondent suffers from hypertension and angina, that he recently had a triple coronary artery bypass grafting operation, and that he has developed severe cellulites in his left calf. He also states that it is his understanding that Dr Walsh has recommended that the respondent should participate in a cardiac rehabilitation programme and that he received treatment for severe cellulites, including high doses of antibiotics and pain relieving medications. He goes on to state that the healthcare system operated in prisons under his control is designed to care for any and all medical needs of inmates including those suffering from conditions outlined in respect of the respondent. He goes further and says that the healthcare system has vascular surgeons and cardiologists under contract and that they perform operations like that which was performed on the respondent, namely triple coronary artery bypass grafting operations. That system also, according to his affidavit, has physicians, nurses and medical specialists who can provide treatment for severe cellulites and can devise and implement a cardiac rehabilitation programme for the respondent. In his opinion the health care system operated by the New York State Department of Correctional services is fully able to provide appropriate medical treatment and care for the respondent's medical needs.

12. I am not satisfied that the respondent has discharged the very heavy onus which is upon him to demonstrate that in his particular case, and not simply in some a general sense, the prison conditions in which he is likely to be held after sentencing are not such as will adequately protect his right to bodily health and integrity. The uncontroverted evidence is that, while in the past he suffered from very serious coronary problems, these have largely resolved by virtue of the surgery which has been carried out and that his recovery has been satisfactory. In such circumstances, I have no evidence that his condition is in any way unusual or life threatening, and I have no reason to doubt Mr Wright's evidence that there is adequate medical staff and attention available to the respondent should he need it during any period of imprisonment.

13. The fourth ground of objection put forward on behalf of the respondent arises from the fact that as part of a plea bargaining process, the respondent offered a plea of guilty to one of the charges which were the subject of the indictment in the United States, and in respect of which he is now sought to be extradited for sentencing. It is suggested that the plea-bargaining regime which exists in the United States of America and in which in the respondent participated, is not a regime which would be constitutionally accepted in this State, and that it would therefore constitute a breach of the Respondent's constitutional rights to fair procedures if he were extradited back to the United States on foot of this request so that he could be sentenced in accordance with the indications given to him at the time he agreed to plead guilty to that one offence.

14. It is suggested also that the nature of the plea-bargaining regime to which the respondent submitted is an oppressive and unfair regime, and that the respondent felt under pressure to participate in it. The respondent has submitted an affidavit sworn by Ward Oliver, who is a New York attorney. He has sworn an affidavit setting out the general nature of the plea-bargaining regime about which the respondent complains and describes how it works and expresses views about it. There is no need to set out everything in the affidavit which he has sworn, but his conclusion is that the system in New York City has created a highly-pressurised environment for the individual who has been accused of a crime. He states that because the criminal justice system depends on a plea bargaining in order to function, there is a systemic pressure on accused persons to plead guilty. He goes on to say that generally speaking most defendants understand that if they are convicted after a trial they are likely to receive a much stiffer sentence than that being offered in the plea-bargaining. He believes that this situation can result in situations where even innocent individuals feel compelled to plead guilty.

15. The applicant has put forward an affidavit which has been sworn by Robert Holdman in support of the Request for extradition. During the course of that affidavit he describes the nature of the plea bargaining process that was engaged upon by the respondent and which resulted in a plea of guilty to a single offence of sexual abuse in the first degree and that the respondent agreed to serve the sentence of three years' imprisonment. He describes the plea of guilty as having been voluntarily given and that certain terms and conditions were agreed to by the respondent also. Those terms were:

> (1) that the respondent would forfeit his right to a jury trial, the right to confront and cross-examine witnesses at trial, the right to remain silent at trial, the right to testify, the right to call witnesses or putting in defences.
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> (2) the respondent's guilty plea would be considered and treated under law to have the same legal effect as a conviction after a trial.
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> (3) the maximum possible sentence would have been seven years, but the respondent would be promised only a three-year sentence in consideration of his plea.
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> (4) the respondent would face the possibility of receiving the maximum seven-year sentence should he be re-arrested before sentencing or should he not present himself on his future sentencing date.
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> (5) that the respondent would not be permitted to withdraw his guilty plea should he violate any of the above stated conditions.

16. A transcript of that the court hearing at which and the guilty plea was given by the respondent has been exhibited by Mr Holdman in his affidavit. The court has read that transcript and is completely satisfied from what is contained therein that the Respondent entered into the plea bargaining process voluntarily and with the benefit of advice from his lawyers. There can be no room for doubt

about that from the Transcript itself. That hearing took place on 18th June 1998 and sentencing was put back until 31st August 1998, pending which the respondent was allowed a continuation of his bail. He failed to attend on 31st August 1998 as required.

17. It follows that I am satisfied that in this case there is no question but that the respondent voluntarily and while having the benefit of the advice from his own lawyers entered upon a plea-bargaining procedure. This court is entitled to assume, and there is no evidence to the contrary other than the respondent's own general assertion, that he did so in the interests of achieving a lesser sentence than if he went to trial on all the charges and was convicted. This Court cannot accept that this process was engaged upon by the respondent under some sort of oppression or duress, as submitted.

18. Dr Forde has however grounded this Objection to extradition also on the basis that to order the extradition of the respondent would be to send him back to a sentencing hearing which has resulted from a plea-bargaining regime, which would not be constitutionally acceptable here, and that therefore such an extradition order would breach his constitutional rights, and that this is impermissible. Dr Forde has submitted also that it is clear that the situation is that the respondent will not be able to resile from his guilty plea. The applicant however has submitted that it has not been proven that under the rules of procedure applicable in the US Court, it is not possible to make an application to the court to change the plea of guilty to the single charge to a plea of not guilty to all the charges, and thereafter proceed to trial.

19. The principal submission made in this regard by the respondent is that it would breach the respondent's constitutional rights to be required to return to the US Court for sentencing where that follows upon a plea of guilty as a result of his participation in the plea-bargaining process in June 1998.

20. In support of his submissions Dr Forde as referred to a number of academic articles in which the learned authors take a critical stance in relation to plea-bargaining. I do not propose to set forth the arguments made against such a regime, in spite of the fact that it is interesting to note the views expressed. He has also referred, *inter alia*, to the judgment of Keane CJ in *The People (at the suit of the Director of Public Prosecutions) v. Heeney*, unreported, Supreme Court, 5th April, 2001. That was a case in which the Court of Criminal Appeal had increased a sentence on the grounds that the sentencing judge had imposed an unduly lenient sentence. The Chief Justice's judgment sets out some comments made by Mrs Justice McGuinness in her judgment in the Court of Criminal Appeal in which she described as undesirable a meeting which had taken place in the trial court between the learned trial judge and counsel both for the DPP and for the accused. This was a meeting following which the accused changed his plea of not guilty to a plea of guilty. It would appear that at this meeting the trial judge indicated the level of sentence which he would impose in the event of a plea of guilty being announced. The Court of Criminal Appeal in due course certified that its decision involved points of law of exceptional public importance. One of these points was whether the Court of Criminal Appeal should have regard to the fact that in a particular case discussions had taken place in chambers prior to the trial between the trial judge and counsel for the prosecution and defence, following which the accused changed his plea to a plea of guilty. In his judgment in the Supreme Court, Chief Justice Keane stated as follows:

> "While the form of procedure adopted in this and other cases has been described as plea bargaining, that appears to me to be a misnomer. Thus, any indication that a trial judge might give us to what sentence he might impose in the event of a plea of guilty would have to be subject to the proviso, express or implied, that he or she might reach a different view depending on the evidence which he or she subsequently heard in open court. As for counsel for the prosecution, while his or her presence is obviously essential if any discussions are going to take place with the judge before the trial, it would not be part of his or her function to enter into any form of a bargain with counsel for the defence as to the appropriate sentence. It must also be emphasised that, while discussions in chambers between judge and counsel are occasionally desirable in the interests of judgment, in general, under Article 34.1 of the Constitution, justice must be administered in public. There can thus be no question, in my view, of any form of bargaining being entered into in private which would determine in advance the sentence to be imposed by the court. Accordingly, I would agree with the view of the Court of Criminal Appeal that the procedure adopted in this case and in other cases, although it obviously did not amount to any form of plea bargain and was doubtless, as in other cases, prompted by the best motives, is undesirable and has properly been discontinued by the DPP."

21. Essentially Dr Forde has submitted that in this case what happened in relation to the plea-bargaining did not happen in public, that the process of plea-bargaining is a coercion on the respondent, and that it would be impermissible in this jurisdiction. Accordingly, he submits that the respondent ought not to be extradited in order to be sentenced pursuant to such a regime. Anthony Collins SC has, on the other hand, submitted that before there could be any question of a refusal of extradition, it would have to be clearly established that there would be a breach of some fundamental right. In so far as Dr Forde has placed his argument on the ground that what happened did not happen in a public open court, Mr Collins has pointed to the fact that even in this jurisdiction there are circumstances in which the Oireachtas has prescribed by statute certain situations in which justice may be administered other than in public. He submits therefore that this is not an unqualified right here, and that if another jurisdiction, such as the United States of America permits such a situation to exist in relation to plea-bargaining, this is not such a breach of a fundamental right as would justify this Court refusing to extradite him. Mr Collins also stresses the fact that the reading of the transcript to which I have already referred clearly shows that there was no question of the respondent's will being overborne by coercion, and that the respondent, fully advised, freely and knowingly entered upon a process which was calculated by him to be in his own interests.

22. As I have already stated, I am completely satisfied that that the respondent freely and without coercion entered upon what has been described as the plea-bargaining process whereby he decided to enter a plea of guilty on the single charge of sexual abuse in the first degree in the knowledge that by doing so he would receive a sentence of three years, rather than run the risk that upon possible conviction on more than one charge, he would receive a higher sentence.

23. It is true that plea-bargaining is a recognised feature of criminal procedure in some other jurisdictions, including the United States of America. It is true also that such a common- place procedure has its critics, and that it has been discouraged here not least in the comments of Chief Justice Keane in the case to which I have referred. On the other hand, while there is no plea-bargaining regime formally in place or engaged upon here, it is well- known and accepted that where an accused person enters a guilty plea at an early stage, a lesser sentence will be achieved than would be the case where sentence is imposed on conviction following a trial. Indeed, if no reduction in sentence was apparent in the sentence passed following the entry of such a guilty plea, it would in all probability be corrected upon appeal to the Court of Criminal Appeal.

24. Several different interests are served well here, as no doubt they are in the United States of America or other jurisdictions in which a plea-bargaining regime is recognised and accepted, where an accused person is aware that an incentive exists to plead guilty, namely that a reduced sentence will in all probability be imposed - save of course where a mandatory life sentence is the only sentence which can be imposed. Those interests include in some cases the fact that the victim will not be required to go through the experience of having to give evidence and be cross examined upon that evidence. Another interest that is well served in this respect

is the administration of justice by the saving in court time, and the time of the jurors who would otherwise be required to hear all the evidence and reach a verdict.

25. I mention these matters in order to at least dilute to some extent the emphasis placed by the respondent upon the nature of the plea-bargaining regime upon which he engaged in the United States. One difference of course between what exists in the United States and the situation in this jurisdiction is that here there is no direct involvement between counsel for the prosecution and defence and the court itself in arriving at an agreement as to what sentence will be imposed on a guilty plea. Everything which happens here will happen in open court and in public. I am not however satisfied that by ordering the extradition of the respondent to the United States of America so that he can attend the sentencing court, the court is doing something which will result in a breach of any fundamental right to which the respondent is entitled to protection from this Court by refusing to extradite him.

26. It is worth mentioning also that the criminal justice system in many other jurisdictions with whom this country has extradition arrangements in place whether by way of bilateral treaty or as a result of this country's participation in the European arrest warrant, will differ in significant ways. For example, in some others jurisdictions, there is no constitutional or other right to a trial by jury. That is not to say that because that system exists, the surrender or extradition of a person to face trial before a judge or panel of judges would amount to such a fundamental breach of constitutional rights as to warrant a refusal of extradition or surrender. There are many other examples of differences between the various jurisdictions in the manner in which criminal trials are conducted, but that is not to say that such systems fail to meet a minimum standard of fairness. In the absence of some very exceptional a feature of another country's criminal procedures which is likely to infringe constitutionally a protected fundamental right here, this Court ought to respect the right and entitlement of another sovereign state to have in place a system for the administration of criminal justice which it considers fair and appropriate. The comity of nations and comity of courts require this. It would take some truly exceptional circumstance to warrant a refusal of extradition on a ground such as this.

27. Accordingly, I am satisfied that in this case an order of extradition should be made so that the respondent can be returned to the United States of America in accordance with the Request made in that regard. I will accordingly make the appropriate order.