Neutral Citation Number: [2007] IEHC 25

THE HIGH COURT

Record Number: 2006 No. 106 Ext.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
J. R.

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 16th day of January 2007

1. The European arrest warrant herein was duly endorsed for execution here by the High Court on the 23rd August 2006, and on the 9th October 2006 the respondent was arrested here on foot of same and brought before the High Court immediately thereafter where a date was fixed for hearing and the respondent was remanded, at first in custody but later on bail, pending the hearing of the present application.

2. No issue was raised then or at the present hearing as to the identity of the respondent and the Court is satisfied, as it is required to be before making the order sought, that the person before the Court is the person in respect of whom the European arrest warrant has been issued.

3. The respondent's surrender is sought so that he can be returned for sentencing following a conviction rendered in absentia at Southampton Crown Court on the 14th February 2006. The facts and circumstances of that offence are not relevant to any issue raised, and for the purpose of correspondence, the offence of causing grievous bodily harm has been marked on the warrant as being one of those categories of offences for which, as provided in Article 2.2 of the Framework Decision and the European Arrest Warrant Act, 2003, double criminality is not required to be verified.

4. The offence occurred on the 25th June 2005, whereupon the respondent was arrested that day, and on the 27th June 2005 he was released on bail to appear at Southampton Crown Court. He was afforded legal aid and solicitors were appointed to represent him. On the 16th September 2005 he attended the same court for a plea and case management hearing. On that date he offered a plea of guilty to causing grievous bodily harm, which was refused, and he pleaded not guilty to the charge of causing grievous bodily harm with intent to cause grievous bodily harm. In his presence the trial date was fixed for the 13th February 2006. It appears that on the same date, the 16th September 2005, the respondent's Counsel applied for a variation in bail terms to facilitate the respondent's return to Ireland, but this was refused.

5. That application was renewed on the 20th October 2005 and was again refused. The respondent has sworn an affidavit for the purpose of this application in which he has stated that shortly after that date he returned in any event to Ireland so that he could work. He had by this action breached the conditions of his bail which included a signing on condition, although he goes on to state that his mother contacted the police in England by telephone to inform them that he no longer resided in England and of his address in Ireland.

6. A Bench warrant was issued by Southampton Crown Court on the 3rd February 2006 in view of the breach of his bail conditions. The respondent has averred that he was never aware that such a warrant had been issued.

7. His case was called on the 13th February 2006, but was put back to the following day. There is no affidavit sworn by the respondent's solicitor in England, but the respondent has sworn an affidavit on the 14th December 2006 in which he states that he has been advised by those solicitors that on the 13th February 2006 he was represented in Court by Counsel instructed by them, and that the trial judge decided that the case should proceed in his absence. He states also that he has been informed by those solicitors that Counsel indicated to the judge that he had no instructions and would not be able to continue in the absence of the respondent, and that both he and his instructing solicitor would be professionally embarrassed if the trial was to proceed in the respondent's absence. He states that he was informed that the judge thereupon revoked legal aid and that his solicitor came off record, the judge indicating that he would appoint other lawyers to represent him at trial, and he adjourned the trial to the following day the 14th February 2006. He goes on to state in this affidavit that he understands from his solicitors that in fact those same solicitors were re-appointed by the Court on the 14th February 2006, who instructed a different Counsel. He denies that he ever spoke to that other Counsel on the telephone on the 14th February 2006 and told him that he wished to change his plea to one of guilty of the offence of causing grievous bodily harm with intent to cause grievous bodily harm, and that he does not recall having any conversation on that date or any other date with that Counsel.

8. In this affidavit he goes on to state that he has been advised by his solicitors that during the trial the evidence of prosecution witnesses was not challenged, that while a closing speech was made to the jury by the prosecution, no speech was made on his behalf, and that the jury returned a verdict of guilty. He complains that his "defence" was never put before the jury, and that in such circumstances there was never any chance that he might be acquitted. He reiterates that he has a defence and that he has no objection to returning to England, in custody if necessary, provided that he is afforded a retrial. No undertaking to offer a retrial is being provided by the UK authorities, since at all times the respondent was aware of the date of his trial. The respondent on the other hand avers that he was never made aware that if he failed to turn up for his trial on the 13th February 2006 that it might proceed in his absence.

9. The matters averred to in the respondent's affidavit are hearsay, and must be viewed in that light.

10. It is submitted that the manner in which the trial proceeded in the respondent's absence on the 13th and 14th February 2006 constitutes a breach of his constitutional right to a fair trial and to a breach of his rights under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, that it does not constitute a trial "in due course of law", and that the decision by the trial judge to proceed with the trial in the respondent's absence was made arbitrarily and without any or any sufficient regard to the principles outlined by the Court of Appeal in *R. v. Hayward* [2001] QB. 862 and further considered in *R. v. Jones* [2003] 1 AC. 1.

11. Relying on the judgment of Walsh J. in *Ellis v. O'Dea* [1989] I.R. 530, John Byrne BL, on the respondent's behalf, submits that the manner ion which the trial of the respondent was allowed to proceed in the absence of the respondent would not be constitutionally permissible in this country and would not happen, and that accordingly the respondent should not be surrendered as to do so would be to expose him to an unconstitutionality. He refers to the judgment of Walsh J. at p. 537, where that learned judge stated:

> "… It goes without saying therefore that no person within this jurisdiction may be removed by order of a court or otherwise out of this jurisdiction, where these rights must be protected, to another jurisdiction if to do so would be to expose him to practices or procedures which if exercised within this State would amount to infringements of his constitutional right to fair and just procedures…."

12. Mr Byrne has referred to the judgment of Murphy J. in *Lawlor v. District Judge Hogan* [1993] ILRM 606 in support of his submission that what occurred in England in reliance on the Hayward case and Jones case referred to, could not properly occur here. He emphasises that the respondent was never aware that if he did not appear at his trial that it might proceed in his absence. He has submitted that the judgment in *Lawlor* mandates that in such a case as this a bench warrant would have to be issued.

13. Remy Farrell BL for the applicant has urged that the Court cannot be expected to examine the procedures adopted by the trial judge in England, and that even if there is some distinction between how the absence of an accused person is dealt with in that jurisdiction and how it is dealt with here, that is not a matter which causes the trial to have been other than a fair trial, since it is inevitable that there will be differences in the criminal procedures and arrangements in other jurisdictions. He instanced that absence of jury trials in many other jurisdictions of the European Union. He submits that all the requirements of the Act and the Framework Decision have been met by the requesting authority and that the Court is therefore required to make the order sought.

Conclusions:
14. I do not agree with Mr Byrne's submission that *Lawlor* is authority for any proposition that where a person absents himself from his trial, that trial cannot proceed in his absence, and that a bench warrant must issue. In *Lawlor* the accused was convicted in the District Court in his absence in respect of an offence which was an indictable offence. It was held, *inter alia*, by the learned judge that in the absence of the accused the District Judge could not have had a proper basis for forming the opinion that the offence was a minor one, and that accordingly the District Judge proceeded with the trial in the absence of the accused without jurisdiction. That is a very different situation to the present one.

15. In fact at page 610 of his judgment in *Lawlor*, the learned judge states:

> "(3) If a trial judge is satisfied that the accused has consciously decided to absent himself from the trial (at a time when his presence is not essential to enable some particular procedure to be complied with) then the trial judge would be entitled in his discretion to proceed with the trial in the absence of the accused."

16. He instanced the arraignment of the accused as an occasion at which it would be essential for the accused to be present. In *Lawlor*, he was of the view that the presence of the accused was essential to enable the District Judge to inform the accused of his right to have the matter tried by a jury and to enable the accused to form a view as to whether he would object to being tried summarily. But he refers quite clearly to the discretion which a trial judge has as to whether to proceed or not with the trial in the absence of an accused.

17. In the present case, the respondent would clearly have to have been present for his arraignment, but it is clear from his own sworn evidence that he was present for that plea hearing and when the date for trial was thereafter fixed. There is no merit in the argument based on the assertion that the respondent was not aware that if he did not turn up for trial on the 13th February 2006 it might proceed in his absence. If he did not know it is reasonable to state that he ought to have known, or made it his business to find out, and it is relevant to refer to the fact that he was legally represented at all times. I do not accept that the suggestion that he was entitled to assume that the trial would be adjourned to await his return to England, whenever that might occur. While any accused person has undoubtedly the fundamental constitutional right to be present at his trial, he may choose to absent himself and abandon that right. I cannot disagree with what Lord Bingham has stated in *R. v. Jones* [supra] in this regard at p. 12, as follows:

> "……one who voluntarily chooses not to exercise a right cannot be heard to complain that he has lost the benefits which he might have expected to enjoy had he exercised it. ……If he voluntarily chooses not to exercise his right to appear, he cannot impugn the fairness of the trial on the ground that it followed a course different from that which it would have followed had he been present and represented."

18. That is precisely what the respondent seeks to urge in the present application, except of course that he was, albeit in a limited way, legally represented at his trial. But he chose to not be present, and, as I have stated already, I cannot accept that he was unaware that the trial might proceed in his absence.

19. I see no reason to consider that the exercise of the undoubted discretion vested in the trial judge to proceed in the absence of the respondent in favour of proceeding with the trial has breached the respondent's right to a trial in due course of law under the Constitution or his Article 6 rights under the Convention. Lord Bingham in his speech has referred at p. 11 thereof to the fact that the European Court of Human Rights has never in its jurisprudence found a breach of the Convention where a defendant, fully informed of a forthcoming trial, has voluntarily chosen not to attend and the trial has continued. He instances several such cases. The respondent's Convention rights have not been breached.

20. This Court cannot act as some sort of appeal from the decision of the trial judge in England to exercise his discretion in any particular way. The Framework Decision, given effect to in the way that it has been by the European Arrest Warrant Act, 2003, as amended, requires that the Courts here respect and have confidence in the laws and procedures of other designated member States of the European Union, as well as the decisions of members of their judiciary. Many of those countries have laws and procedures which are very different to those with which we in this country are familiar. As it happens, the history of this country and the United Kingdom has resulted in many of the laws and procedures in existence being almost identical. Where not identical, they are readily recognizable and easy to understand. The mutual trust and confidence in the legal systems and decisions of courts in the United Kingdom are perhaps more easily relied upon because of those common historical links and the understanding which Courts here have of the Common Law. Beyond these islands, laws and procedures can be very different, and less easily understood from afar. But the Framework Decision has been introduced for that very reason, namely to overcome the difficulties sometimes presented in the past in understanding the different systems operating abroad, and which in turn were seen as having led to delay and perhaps refusal to order extradition. One of the mechanisms to achieve this is the presumption, based on a high level of mutual respect and confidence, required to be made that all such designated states have legal systems in place at the time of accession to EU membership which meet a certain threshold of acceptability, so that it must be presumed that any trial which either will take place or has taken place is a fair trial. A respondent who seeks to rebut that presumption has a very heavy onus to discharge, and it will be only in a very exceptional case that surrender will be refused on a fair trial ground. This is not such a case.

21. I am satisfied that there is no reason arising under sections 21A, 22, 23 or 24 to refuse to order surrender. I am also satisfied that the surrender of the respondent is not prohibited by Part III of the Act or the Framework Decision. I am satisfied that no undertaking

under s. 45 of the Act is required in the present case.

22. I therefore make the order sought under s. 16(1) of the Act, and order accordingly.