

THE HIGH COURT

Record Number: 2007 No. 106 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
JOHN WARD

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 4th day of March 2008

1. The applicant seeks an order for the surrender of the respondent to the United Kingdom pursuant to a European arrest warrant which issued from a judicial authority there on the 18th March 2007. That warrant was endorsed for execution here by the High Court on the 20th June 2007, and the respondent was duly arrested on foot of same on the 3rd October 2007, and, as required by the provisions of s. 13 of the European Arrest Warrant Act, 2003, as amended ("the Act"), was brought before the High Court immediately thereafter, and was remanded from time to time pending the hearing of this application.

2. No issue is raised by the respondent as to his identity, and the Court is in any event satisfied from the affidavit evidence of Sgt. James Kirwan, the arresting officer, that the person arrested by him and brought before the Court is the person in respect of whom this warrant has been issued.

3. The surrender of the respondent is sought so that he can be prosecuted in the issuing State for two offences set forth in the warrant as (1) perverting the course of justice, and (2) causing death by dangerous driving.

4. These offences are said to arise following a road traffic accident on the 10th September 2006 on Ashtown New road, Clayton, Manchester, England as a result of which one person was injured and another was killed. The facts set forth in the warrant in relation to this incident state:

"On 21 August 2006 John Ward and Paul Tyler (co-accused) arrived at the home address of Ashley Voice in England where Mr Ward purchased a Ford Iveco recovery truck registration number A688KCC for £500 cash from Mr Voice. On the instruction of Mr Ward, Mr Voice completed the logbook in the name of John Ford. Mr Ward left Mr Voice's home in the recovery truck while Mr Tyler left in a red transit van.

At 21.55 hours on Sunday 10 September 2006, Mr Ward was driving a red transit van registration number YC04 VUA on Ashtown New Road, Clayton, Manchester, England. He was stationary at a pedestrian crossing observing a red light. Two pedestrians, Ms. Jane Hughes and Mr Jim Pollard attempted to use the crossing when the recovery truck registration A688KCC, being driven by Mr Tyler, clipped the rear of the red transit van, crossed over the pedestrian markings and collided with Ms. Hughes and Mr Pollard.

Mr Pollard was catapulted into the centre of the carriageway. Ms. Hughes took the full force of the impact and was knocked to the ground. She remained underneath the recovery truck. The truck further collided with a parked vehicle before coming to a stop. Mr Tyler alighted the truck and fled the scene on foot. As a result of the collision, Ms. Hughes then 57 years old, suffered head injuries that proved fatal at the scene. Mr Pollard suffered minor injuries. There were 5 vehicles involved in the collision.

Mr Ward provided a full statement to the police constable at the scene. Mr Ward did not mention at that time that he was the owner of the recovery truck or that he could identify the driver.

The recovery truck underwent a full VOSA examination and was found to have numerous defects with the steering and braking systems. It was also found to have defective tyres."

5. The charge of perverting the course of justice arises according to this statement because of the failure of the respondent to state that he was the owner of the recovery truck and because he failed to tell the police at the scene that he could identify the driver of that truck.

6. The charge of causing death by dangerous driving arises on the basis that he caused Mr Tyler to drive a vehicle dangerously since he knew that the said vehicle had defective steering and braking systems.

7. The respondent has objected to his surrender, *inter alia*, on the basis that there is no correspondence made out in relation to either of these offences by reference to the facts disclosed in the warrant. I will come to those submissions in due course. The applicant has submitted an affidavit to the Court sworn by Police Constable Owens who was the officer who spoke to the respondent at the scene and took a statement from him. That affidavit provides some additional information which is not contained in the warrant itself.

8. Dr Michael Forde SC on behalf of the respondent has made a submission that this Court should not have regard to the contents of that affidavit on the basis that the Court must judge the question of correspondence only by reference to the facts set forth in the warrant, and in any event that the affidavit itself is inadmissible on this application since it is not apparent from the affidavit that it has been provided to the applicant by the issuing judicial authority, and has simply been provided by a police constable in the Greater Manchester Area of his own accord. I will address that submission also in due course.

9. Subject to addressing these submissions and the objections put forward by the respondent, I am satisfied that the requirements of the Act and the Framework Decision have been complied with, and that there is no reason under sections 21A, 22, 23 or 24 of the Act to refuse to surrender the respondent, and that his surrender is not prohibited by any provision of Part 3 of the Act, or the Framework Decision.

Admissibility of the affidavit of Police Constable Peter Owens

10. Dr Forde has submitted that the Court should not have any regard to the contents of this affidavit for the purpose of establishing correspondence, because there is no evidence that it has been provided by the judicial authority. He submits that by virtue of s. 5 of the Act, the constituents of the offence must be gleaned only from what is contained in the warrant in order to examine whether if those facts were proved in this jurisdiction an offence would be committed here. He refers also to s. 11 of the Act in support of his

submission that the affidavit is inadmissible. He submits that it is clear from this section that all necessary information must be contained in the warrant itself, and that the section provides that only where "it is not practicable" for all the information to be contained in the warrant itself that it can be provided in a separate document. In that regard, section 2A (as inserted) provides:

" (2A)-- If it is not practicable for any of the information to which subsection (1A) applies to be specified in the European arrest warrant it may be specified in a separate document."

11. He submits that not only was it impracticable for all the information, including that contained in the affidavit of PC Owens, to be included in the warrant, but also that in any event there is nothing either on or in that affidavit to suggest that it was furnished by the judicial authority that issued the warrant. Even if the affidavit is found to be admissible on this application, he submits that it should be disregarded since it seeks to establish a prima facie case against the respondent in respect of the offences, and that to do so is contrary to the spirit and intention of the Framework Decision, namely to simplify the system of surrender and remove complexities found to have been present under previous arrangements.

12. In response, Remy Farrell, BL for the applicant, has submitted first of all that this objection regarding the admissibility of the affidavit has not been raised in the Points of Objection filed in this case even though the affidavit in question was furnished to the respondent's solicitors prior to the delivery of those Points of Objection, and that to raise the point for the first time on the hearing of this application ought not to be permitted. Nevertheless, he submits in any event that the Act contemplates the provision of additional information where same is deemed necessary either by the High Court itself or the Central Authority, and that this information may be provided by affidavit. In this regard he has referred to the provisions of s. 20 of the Act which provide as relevant:

"20.—(1) In proceedings to which this Act applies the High Court may, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate to provide it with such additional documentation or information as it may specify, within such period as it may specify,

(2) The Central Authority in the State may, if of the opinion that the documentation or information provided to it under this Act is not sufficient to enable it or the High Court to perform functions under this Act, require the issuing judicial authority or the issuing State, as may be appropriate to provide it with such additional documentation or information as it may specify, within such period as it may specify.

(3) In proceedings under this Act, evidence as to any matter to which such proceedings relate may be given by affidavit or by a statement in writing that purports to have been sworn—

(a) by the deponent in a place other than the State, and

(b) in the presence of a person duly authorised under the law of the place concerned to attest to the swearing of such a statement by a deponent,

howsoever such a statement is described under the law of that place.

(4) "

13. He relies also on the provisions of s. 11 already referred to as being indicative of the fact that the legislative scheme envisages the provision of information in a document separate from the warrant itself, albeit that it is stated that this can be done where it has not been practicable to include the information in the warrant itself.

14. First of all, in answer to Dr Forde's submission that the affidavit does not appear on its face to have emanated from a judicial authority, I would say that this submission is fanciful. The Court can be completely satisfied that the affidavit has not simply arrived 'out of the blue' so to speak, or through some extraordinary chance or coincidence. Quite clearly it was provided at the behest of the judicial authority on whose instructions the Central Authority here is operating on this application. No other possibility exists.

15. Secondly, I am satisfied that if the Central Authority or indeed the High Court is of the view that some further detail in relation to the act or omission by the respondent giving rise to the offence in the issuing State is required to be provided to the Court for the purpose of enabling this Court to satisfy itself that the act or omission alleged would if committed here constitute an offence in this State, the Central Authority or the High Court can seek that information from the issuing judicial authority. Under s. 38 of the Act this Court must be satisfied that "the offence corresponds to an offence under the law of the State", and s. 5 of the Act simply provides that the offence specified in the warrant so corresponds "where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."

16. The statutory scheme is one based on mutual cooperation between Member States and is based on mutual trust and confidence between Member States. To conclude that this Court could not even seek further information on any matter from the requesting judicial authority in order to satisfy itself as to the facts underlying the offence referred to in the warrant and in order to comply with its obligation to surrender, simply on the basis that information which is available from the issuing authority could not be sought because of a very narrow interpretation of section 5, would run contrary to the purpose and objective of the Framework Decision. There is nothing in the Act which precludes this Court from seeking further information. In fact the contrary is the case given the provisions of s. 11 and s. 20 to which I have referred, and it could not be seen as '*contra legem*' to interpret s. 5 in this way so as to conform with the purpose and objective of the Framework Decision.

Correspondence

Offence 1: Perverting the course of justice

17. Looking at the facts contained in the warrant itself, it is alleged against the respondent that in this regard he failed to inform the police when making his statement in the immediate aftermath of this incident that he himself was the owner of the recovery truck which injured one pedestrian and killed the other, and also that he was able to identify the driver of that vehicle who had fled the scene. Paragraph (e) of the warrant also contains information which, if proven, makes it clear not only that the respondent was the owner of that vehicle but also that he knew who was driving the recovery vehicle when this incident occurred. It is specifically stated

in that paragraph that Mr Tyler was driving the recovery vehicle at the time, and that he fled the scene, and that it was the same Mr Tyler who was with the respondent when the vehicle was purchased from Mr Voice on the 21st August 2006. The affidavit of PC Owens gives some further details as to the nature of the conversation which PC Owens had with the respondent in the aftermath of the incident and when the statement was made by the respondent. But in my view it is unnecessary to rely on the contents of that affidavit in order to be satisfied that the facts alleged against the respondent would, if committed in this jurisdiction, constitute an offence here.

18. Dr Forde has submitted that the facts in the warrant, unadorned by anything further contained in the said affidavit, merely allege that the respondent failed to provide full information, rather than that he made a positive statement that was misleading or false, and that such a failure to provide information cannot support as charge that he perverted the course of justice. Mr Farrell has submitted to the contrary, namely that it is clear that what is alleged is that by failing to give information that he himself owned the recovery vehicle and that he knew who was driving it at the time, which he clearly had knowledge of, the respondent committed the positive act of misleading the police in their investigations. He submits that if the respondent misled an investigating Garda in the same manner in this jurisdiction, he would commit an offence here of perverting the course of justice contrary to common law.

19. Dr Forde has referred to Archbold, 2000 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".

20. He submits that there is no positive act alleged against the respondent in the warrant, and merely that he failed to give some information.

21. He has referred also to para 28-6 where under the heading "Obstructing the police" it is stated:

"Deliberate and intentional action taken with a view to frustrating statutory procedures required of the police can amount to the offence [of perverting the course of justice]".

22. Again, Dr Forde has submitted that the word "action" used in this paragraph means a positive act rather than an omission to do something such as providing information, as in this case.

23. In his response, Mr Farrell has referred the Court to another passage at paragraph 28-7 of Archbold under the heading "Assisting others to evade arrest":

"A person who does an act to assist another to evade lawful arrest with knowledge that the other is wanted by the police as a suspect, is guilty of attempting to pervert the course of justice."

24. I am satisfied that the action alleged against the respondent in this regard, namely that he provided a misleading statement by withholding information which he had as to the ownership of the vehicle and the identity of the driver, in circumstances where he had been asked to provide a statement, is to be interpreted as a positive act of concealment of information, so as to come within the ambit of the common law offence of perverting the course of justice. That allegation is to be distinguished from a situation where a person might observe an accident involving a vehicle being driven by someone he knows, and who simply goes home without making contact with the police in order to make himself available as a witness. That is a failure to do something which he could have done, but lacks the necessary positive element which is present in a situation where he is interviewed by the police and in making a statement fails to give information which he has as to the owner of the vehicle and the identity of the driver. There is in my view a positive act of concealment intended to conceal his own involvement and intended also to impede the police in their task of tracing the driver. There can be no doubt in my mind that if this happened in this State an offence of perverting the course of justice would be committed, if the facts were proved.

25. I have stayed away from the contents of PC Owens's affidavit, just in case I am incorrect in concluding that the scheme of the Act and the Framework Decision does not permit further facts and clarification of what exactly the respondent said or did not say when making his statement to be gleaned from that affidavit. Correspondence is made out in respect of this offence by reference to the facts contained in the warrant itself.

Offence 2: Causing death by causing another to drive a mechanically propelled vehicle dangerously

26. The facts appearing in the warrant itself in relation to this offence are that the respondent had purchased this recovery vehicle from Mr Voice on the 21st August 2006 for the sum of £500 cash, and that following the incident on the 10th September 2006 when it was driven by Mr Tyler the vehicle was subjected to "a full VOSA examination and was found to have numerous defects with the steering and braking systems and defective tyres." It is alleged therefore that the respondent was the owner of the vehicle, and that as such he caused Mr Tyler to drive the vehicle dangerously given the dangerous condition of the vehicle. In that way, it is alleged that the respondent caused another to drive dangerously.

27. Mr Farrell has submitted that if this was done by the respondent in this State he would be guilty of an offence by virtue of the provisions of s. 53 of the Road Traffic Act, 1961, as amended ("the 1961 Act"), and the provisions of s. 7 (1) of the Criminal Law Act, 1997 ("the 1997 Act").

28. Section 53 (1) (as amended by s. 51 of the Road Traffic Act, 1968), and (2) of the 1961 Act provide:

"(1) A person shall not drive a vehicle in a public place in a manner which, having regard to all the circumstances of the case (including the condition of the vehicle, the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected then to be therein) is dangerous to the public,

(2) A person who contravenes subsection (1) of this section shall be guilty of an offence and --

(a) in case the contravention causes death or serious bodily harm to another person, he shall be liable on conviction on indictment to penal servitude for any term not exceeding five years". (my emphasis)

29. Section 7 (1) of the 1997 Act provides;

"A person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender." My emphasis)

30. Mr Farrell submits that where this respondent was the owner of the vehicle, and that by reference to the "condition of the vehicle", he can be seen as having counselled or procured the commission by Mr Tyler of the indictable offence of dangerous driving causing death, and that correspondence is thereby made out for the purpose of s. 5 of the Act.

31. Dr Forde on the other hand submits that there is nothing alleged against the respondent in the warrant as to the condition of the vehicle, and that all that appears therefrom is that a subsequent examination of the vehicle revealed defects in the vehicle. I take that submission to mean that there is nothing alleged against the respondent as to his knowledge of the existence of those defects.

32. In my view, there is nothing in the warrant to indicate that it is being alleged against the respondent that he was aware of the defects which were found to exist in this vehicle. It would be necessary to infer that knowledge from the fact that the vehicle was purchased for the sum of £500 cash, and in my view that is not something which can be reasonably inferred from that fact alone. In my view it would be necessary for the defendant to have been aware of the defects before he could be found guilty of the offence of counselling or procuring the dangerous driving of this vehicle by Mr Tyler resulting from the defective condition of the vehicle. Accordingly the facts contained in the warrant would not, if done in this jurisdiction, constitute an offence under s. 53 of the Act taken in conjunction with s. 7(1) of the 1997 Act.

33. However, Mr Farrell has also put forward another candidate for correspondence, namely an offence under s. 54 (2) of the 1961 Act which provides:

"(2) Where a mechanically propelled vehicle is driven in a public place while there is a defect affecting the vehicle which the owner thereof knows of or could have discovered by the exercise of ordinary care and which is such that the vehicle is, when in motion, a danger to the public, such owner shall be guilty of an offence."

34. Subsection (4) of that section provides that a person guilty of an offence under subsection (2) *"shall be liable on summary conviction to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for any term not exceeding three months or to both such fine and such imprisonment."*

35. In my view, even though the s. 54 offence is only a summary offence, it is nevertheless "an offence under the law of the State" as specified in s. 5 of the Act. In my view also, the facts evident from the warrant itself are such as to give rise to such an offence here, since the respondent is said to be the owner of the recovery vehicle, and the defects in that vehicle are such that the respondent *"could have discovered by the exercise of ordinary care"*, and are manifestly *"such that the vehicle is, when in motion, a danger to the public"*. It does not matter for the purpose of s. 5 of the Act that the corresponding offence here is a summary offence. The section does not limit correspondence to an indictable offence in this State. Correspondence is therefore established to an offence here.

36. That is sufficient to dispose of the principal objections put forward by the respondent against his surrender. But I should refer also to the fact that in his points of objection, the respondent has pleaded that it would be a breach of his Constitutional rights and therefore a bar to surrender under s. 38 of the Act, for him to be surrendered for an offence arising from his failure to provide information to the police which would incriminate him. Mr Farrell has submitted that the statement which the respondent gave was not what he describes as "a compelled statement" such that he had a right not to incriminate himself, and that this statement was simply a witness statement, and as such his rights under the Constitution were not infringed. I agree with that submission.

37. For completion, Dr Forde has also raised objection on the basis that the Act is repugnant to the Constitution since the Framework Decision to which the Act purports to give effect never secured the prior approval of both Houses of the Oireachtas as required by Article 29.4.8 of the Constitution. I have already rejected that argument in my judgment in the Sulej and Puta cases, and I have no reason to reach a different conclusion in the present case. Those cases are presently under appeal to the Supreme Court and no judgment has yet been delivered by that Court.

38. I am therefore satisfied that the Court is required to make the order sought for the surrender of the respondent to the issuing state and I will so order.