Neutral Citation No. [2011] IEHC 374

THE HIGH COURT

2011 32 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003,

AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

- AND -

ROBERT ORLOWSKI

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 7th day of October, 2011

Introduction

The respondent in this case is the subject of a European arrest warrant dated the 14th of January 2009 on foot of which the state of Poland has sought his rendition for the purpose of having him serve out the balance of six months remaining to be served of a composite sentence of three years imprisonment imposed upon him by the District Court in Kutno on the 5th of November 2001 in respect of four offences as more particularly set out in part E of the warrant.

The said European arrest warrant was indorsed by the High Court for execution in this jurisdiction on the 26th of January 2011, and it was duly executed when the respondent was arrested by Garda John Butler at Newbridge, Co Kildare on the 17th of April 2011, following which he was brought before the High Court in the normal way in compliance with s.13 of the European Arrest Warrant Act 2003 (hereinafter the Act of 2003) and an initial notional date was duly fixed for the purposes of a s.16 surrender hearing. The matter was then adjourned from time to time until Points of Objection were filed and it was ready to receive an actual hearing date. The Court duly fixed the 6th of October 2011 as the actual hearing date and on that date (i.e. yesterday's date) the matter duly came on for hearing before me. At the conclusion of the hearing I indicated that I was not satisfied as to correspondence in respect of one of the four offences covered by the warrant, and that since that matter was not severable by virtue of a composite sentence having been imposed it would not be possible for the Court to surrender the respondent in the circumstances of the case. I indicated that I would give more detailed reasons for my decision in a reserved judgment to be delivered on today's date and I now do so.

The correspondence point

The respondent had contended in his Points of Objection that correspondence could not be demonstrated with the second of the four offences particularised in part E of the warrant. The particulars as set out in the warrant in relation to that offence were:

> "Act II – on 4 May 1992 in Lêczna, the Province of Lubelskie, he abused verbally police officers: Ryszard Gomula, Mieczyslaw Orkonia, Waldemar Cura, Piotr Jasielski, Piotr Kostyra, Tadeusz Lawnik, Robert Jureczko while and in conjunction with doing their duties."

There was also additional information supplied by the issuing judicial authority, viz the Regional Court in LódŸ to this Court at the request of the applicant in his role as the Irish Central Authority, which additional information is contained in a letter dated 27th of September 2011 from the Head of the Enforcement Section, No 4 Criminal Department, District Court for Lublin-West. Only the first paragraph of that letter is relevant to the issue with which the court is presently concerned, and it is in the following terms:

> "In reply to your letter dated 20 September, 2011, please be informed that the convict, Robert Orlowski, was wanted as a fugitive from a young offenders institution together with other fugitives – Jacek Chmielewski and Grzegorz Arciemieñ. In connection with the information that they were staying in Krystyna Bojarska's flat in Lêezna, measures were taken to apprehend the above named persons. When it was attempted to arrest convict Robert Orlowski in the said flat, he resisted and hit police officer Ryszard Gomula with a stool in the head and so inflicted on the victim a contused wound of superciliary arch, causing bodily dysfunction for less than 7 days. Why he was being led out of the flat the convict insulted all of the attending police officers with abusive words. He insulted the police officers not only in the flat, but after being led out of the flat and on the way to the police car. The convict directed at the police officers such words as 'fuckers' , 'sons -of – bitches', 'fucking cops'. The sentence in the case in question was not challenged by the convict, who chose not to exercise the right of appeal."

Counsel for the applicant, Ms Tara Burns B.L., invited the Court to find correspondence with the offence of using or engaging in, in a public place, threatening and abusive or insulting words or behaviour was intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned, contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994 (hereinafter the Act of 1994).

In reply to this suggestion, counsel for the respondent Mr John Fitzgerald, B.L., made the following submissions. He submitted first that the facts as disclosed in the warrant and additional information do not establish that the incident occurred in a public place. Secondly, he submitted that the facts as disclosed do not indicate that what was done was done with intent to provoke a breach of the peace, or being reckless as to whether a breach of the peace might be occasioned. Counsel developed this second point by suggesting that as the police were there to keep the peace they were not realistically going to be provoked by insults and abusive words, and the facts as disclosed do not establish that there was anyone else present who might have been provoked into breaching the peace. He submitted that it was not enough that the abusive words and insults were themselves a breach of the peace. They had to be uttered with the intent either to provoke another or others to commit a breach the peace, alternatively recklessly in terms

of whether a breach of the peace might be occasioned. According to Mr Fitzgerald, it cannot be inferred that the respondent intended to provoke another or others, or that he behaved recklessly in terms of whether a breach of the peace might be occasioned, if there was nobody present to hear his abuse and insults, and to witness his behaviour, apart from the police who were there specifically to keep the peace.

In support of his arguments, counsel for the respondent referred the Court to two cases, *viz Marsh v Arscott* [1982] Crim L.R. 211, which is a decision of High Court of England and Wales sitting as a Divisional Court, and also *Thorpe v The Director of Public Prosecutions* [2007] 1 I.R. 502.

Marsh v Arscott concerned the application of s. 5(a) of the UK Public Order Act 1936, as amended, which is in almost identical terms to s. 6 of the Act of 1994. S.5(a) provides:

> "any person who in any public place ... (a) uses threatening, abusive or insulting words or behaviour ... with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence."

The facts of *Marsh* were that at 11:30 PM one Saturday night, the defendant was found by police officers slumped over the bonnet of a car parked in a shop car park. The police are anxious to establish his identity and asked him questions. The defendant was uncooperative, abusive and insulting. He told them that he was the owner of the property and asked them to leave. A computer check revealed the car was registered in the defendant's wife's name. The police remained despite the defendant's repeated request that they should leave. Eventually, he took off his coat, became extremely aggressive, both in manner and speech, threatens the police and poked and pushed one of them in the chest. Whereupon he was arrested and charged with contravening s.5 of the Public Order Act 1936 is amended. The whole incident had taken place on the defendant's property and no member of the general public had been present. The justices were of opinion that the car park was "a public place for the purposes of the Public Order Act 1936, as amended, but the police duty to preserve the peace prevented an offence from being committed where no member of the public was present." Accordingly, they upheld a submission of no case to answer and dismissed the charge. The prosecutor appealed and the matter came before the High Court sitting as a two judge Divisional Court. The High Court dismissed the appeal. In doing so it held that regardless of who was acting lawfully and who was acting unlawfully in the circumstances of the case there was, at the time of the incident, a breach of the peace. However that did not mean an offence was committed against s. 5 of the Public Order Act 1936, because the phrase "whereby a breach of the peace is likely to be occasioned" in that section indicated that Parliament was concerned with cause and effect, i.e. with conduct which is likely to bring about a breach of the peace and not with conduct which is in itself a breach of the peace and no more. In the course of giving the main judgment in the case McCullough J (with whom Donaldson J agreed) stated:

> "Were this the law every common assault occurring in a public place would also be an offence against the section. Many such assaults will in fact be likely to lead very quickly to a breach of the peace, and these will be within the section; but, without more it is not enough that conduct which is threatening, abusive or insulting is of itself a breach of the peace.
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> In the circumstances here, assuming the defendant had been acting unlawfully in using threatening words and behaviour, no breach of the peace was likely to have been occasioned. No other person was likely to have broken the peace, and all that the police were likely to do was arrest him, as they did."

In *Thorpe v The Director of Public Prosecutions*, the facts of which were very different, Murphy J was concerned with a consultative case stated which sought the opinion of the High Court as to whether breach of the peace contrary to common law was an offence known to the law in this jurisdiction. However, in dealing with this issue he quoted with approval the following passage from a judgment of the Court of Criminal Appeal in 1932 in a case of *Attorney General v Cunningham* [1932] I.R. 28 where O'Byrne J. stated at p. 33 to 34:-

> "In order to constitute a breach of the peace an act must be such as to cause reasonable alarm and apprehension to members of the public, and it seems to us that this is the substantial element of the offence. There is nothing of the charge as framed to allege, nor is there anything in the finding of the jury to show, that there was any person in the vicinity who could be alarmed by the firing…In the circumstances the Court is of the opinion that count 4 of the indictment does not contain a statement of the offence of having committed a breach of the peace … [W]e must not be taken as deciding that the accused could not have been properly convicted on an indictment aptly framed. On the contrary, having regard to the finding of the jury that the accused did fire a shot into the house, and to the clear and uncontradicted evidence that there were persons in the house at the time, we consider that a jury not only might but must, unless it acted perversely, find the accused guilty of having committed a breach of the peace."

Ms Burns B.L., on behalf of the applicant, submitted to the Court that the facts as disclosed in the European arrest warrant, and in the additional information to which I have referred, provide a sufficient basis for the drawing of the inferences (a) that at least part of the incident occurred in a public place, and (b) that the respondent intended to provoke a breach of the peace, or was reckless as to whether a breach of the peace was occasioned. While the first inference might possibly be drawn on the facts as disclosed, I cannot agree that the second inference is capable of being drawn on the same facts.

It seems to this Court that there is an insufficient basis for the drawing of the second inference which counsel for the applicant invites the Court to draw in circumstances where there is simply no evidence that anybody was there, apart from the police, to witness the respondent's abusive and insulting words and behaviour. There is, accordingly, no basis for believing that there was an intention to cause alarm and apprehension to a member of the public or to believe that the respondent acted recklessly in that regard. .

The Court was therefore not satisfied in the circumstances that the offence described in the European arrest warrant, and in the additional information, corresponds with the offence in Irish law created by s. 6 of the 1994 Act. As a composite sentence had been imposed in respect of the four offences covered in the warrant severance was not possible and accordingly the Court has had no option but to refuse to surrender the respondent.