

THE HIGH COURT

2009 256 Ext

Between:

The Minister for Justice, Equality and Law Reform

Applicant

And

Alan Majewski

Respondent

Judgment of Mr Justice Michael Peart delivered on the 15th day of June 2010:

The surrender of the respondent is sought by a judicial authority in Poland so that he can serve a sentence of imprisonment of ten months which was imposed upon him on the 27th November 2003 in respect of one offence. That warrant was endorsed for execution here by order of this Court on the 14th October 2009, and he was duly arrested on foot of same on the 12th January 2010, following which he was, as required, brought before the High Court from where he has been remanded from time to time thereafter pending the hearing of this application.

That sentence of imprisonment was suspended for a period of three years, but the suspension was lifted on the 17th November 2006 due to the failure of the respondent to comply with certain conditions. Minimum gravity is satisfied by reason of the length of sentence imposed, albeit suspended at the time of imposition.

No issue arises as to the identity of the respondent, and I am satisfied in any event from the affidavit of the arresting officer, Garda Padraic Jennings, that the person who he arrested and brought before the High Court on the 12th January 2010 is the person in respect of whom this European arrest warrant has been issued.

Correspondence needs to be established in relation to the particular offence for which the respondent was convicted, and I will come to that shortly as an issue is raised in relation to correspondence.

Another issue raised is under section 10 (d) of the European Arrest Warrant Act, 2001 by which the respondent contends that he did not 'flee' Poland before he served the sentence imposed on him. It is submitted that this issue is still open for argument in view of the fact that the amendment to section 10 which was effected by the 2009 Act, and which has removed the requirement to show that a respondent 'fled' the issuing state, operates only in respect of European arrest warrants which have issued in the requesting state after the 25th August 2009, being the date upon which that Act came into force.

Subject to addressing these two issues, I am satisfied that there is no reason to refuse to order surrender under sections 21A, 22, 23 or 24 of the Act, and that his surrender is not prohibited by any provision of Part III of the Act or the Framework Decision.

Correspondence:

The description of the offence as contained in the warrant is as follows:

"On 13th May 2001 in Poznan he aided a minor whose identity was established in stealing a Scott mountain bike worth PLN 200 to the detriment of [named person] by allowing him, along with another person whose identity was established, to reach the place where the crime took place i.e. for an offence under article 18 (3) of the Polish Penal Code in conjunction with article 278 (1) of the Polish Penal Code."

It is submitted for the applicant that if this act was done in this State it would give rise to an offence of aiding and abetting the commission of an indictable offence contrary to section 7 (1) of the Criminal Law Act, 1997 which provides:

"7. - (1) Any 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."

Counsel for the respondent has submitted that while the warrant gives some detail as to the manner in which the respondent is said to have Assisted in the commission of the offence under Polish law, there is nothing in the facts set out in the warrant, besides the use of the word 'stealing', to indicate the nature of the underlying offence, and it is submitted that there is insufficient in the warrant to show that the 'stealing' was such as to correspond to an offence of theft here contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. In that regard it is pointed out that in order to establish an offence of theft under s. 4 of the 2001 Act, the prosecution must show that the act was done dishonestly, without the consent of the owner and with the intention of depriving the owner of the goods in question.

Ms Burns on the other hand has referred to the judgment of Geoghegan J. in *Minister for Justice, Equality and Law Reform v. Sas*, (Unreported, High Court, 18th March 2010). That was a case in which an offence of theft was described in the warrant by the use of the word "stole" and nothing more. This Court found that the mere use of the word "stole" was insufficient. However, Geoghegan J. took a different view, stating as follows

"I cannot agree that the use of the word "stole" is not all important. For the purposes of interpreting the warrant "stole" must be given its popular meaning. In adopting this exercise, special refinements of definition for the purposes of an Irish prosecution as contained in the Irish Act are irrelevant. The word "stole" in the warrant must be given its normal popular meaning. Furthermore, the very word "stole" implies in itself the existence of mens rea. The words "realising his deliberate intention" contained in the warrant in relation to the first offence actually express the mens rea

but I do not think that it is necessary. As to the sufficiency of the word "stole" alone, it will always depend on the context and the general nature of the offence. As a matter of common sense interpretation in this case, it is obvious that on many occasions the appellant stole petrol without paying for it and was convicted. That set of facts, if applied in Ireland, would clearly constitute an offence under section 4 (1) of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The word "stole" necessarily implies intention to deprive the owner of the goods in question against the owner's will. Again, in this particular case this consequence is in reality expressly stated by the words "to the detriment of BP Orion Koszalin". There was clearly correspondence as required by the Act and the Framework Document. I would, therefore, allow the cross-appeal in respect of that offence and order the surrender of the appellant accordingly."

The learned judge went on to comment that this conclusion was fully supported by authority and in particular the judgment of Fennelly J. in *Attorney General v. Dyer* [2004] 1 I.R. 40.

It is clear therefore that in the present case the respondent assisted the person in question in "stealing" a mountain bike. We know no more about the act of theft itself, but according to what has been stated by Geoghegan J. in *Sas*, it is clear that the use of the word "stealing" is sufficient given its ordinary usage and meaning. In these circumstances, I am satisfied that there is correspondence established with the section 7 aiding and abetting offence identified by Ms. Duffy for the applicant.

The second issue raised by the respondent is that he did not 'flee' Poland when he left that country in order to come to Ireland. It is necessary to consider the relevant circumstances and the nature of the sentence imposed and the conditions attached to the suspension of sentence, and his own averments in relation thereto.

The respondent was convicted in November 2003. The warrant states that this verdict became valid on the 9th April 2004. A ten month sentence was imposed which was "suspended for a period of three years' probation" according to the warrant itself. Additional information has been provided by the Polish authority in the form of a copy of a court decision dated 17th November 2006 by which the suspended sentence was activated. That document provides further information as to the obligations on the respondent during that probation period.

Before looking at that ruling, I will refer to what the respondent has stated in his grounding affidavit which was sworn on the 24th March 2010. He states that he was present in court when that sentence was imposed upon him on the 9th April 2004, and that the ten month sentence was suspended on condition that he remain under the supervision of the probation service. He goes on to state that prior to travelling to Ireland he spoke to his probation officer and informed her of his intention of travelling to Ireland in order to seek employment, and then states: "*My probation officer at no stage expressed concern about my plans to travel to Ireland*", and also that he specifically recalls his probation officer telling him that travelling to Ireland was not a breach of his probation supervision "*where I had informed the probation service prior to my travelling to Ireland*". He says no more about this aspect of the case.

After the Central Authority received the respondent's points of objection and grounding affidavit, the issuing judicial authority was asked to comment on these matters. In its reply dated 15th April 2010, the Judicial authority enclosed a copy of the District Court's Ruling dated 17th November 2006 by which the suspension was lifted and stated also "*We can also confirm that the a/m convict did not inform the court that he was travelling to Ireland*". Given what is stated in response to this by the judicial authority I just note the reference to his having informed the probation officer of his plans and not the court itself.

Under a paragraph in the said Ruling headed "Grounds for Ruling" the following appears:

"On 27th November 2003, the District Court in Poznan, court ref. VI K 206/03 sentenced [the respondent] for an offence under article 278 (1) of the Polish Code to a penalty of 10 months' imprisonment, the execution of which was conditionally suspended for a period of 3 years probation, and placed him under the supervision of a probation officer. According to the probation files, the convict claimed that he was looking for a job while speaking to his probation officer, but wasn't interested in the jobs which were proposed by the probation officer. He wasn't even interested what kind of job the probation officer had in mind for him. The final meeting between the probation officer and the convict took place on 8.03.2006; the convict informed the probation officer that was [sic] planning on travelling to Ireland. The probation officer instructed the convict that he was under the obligation to inform the court of his plans, but the convict failed to do so. On 22.04.2006, while speaking to the convict's father, the probation officer found out that the convict had left the country. The probation officer asked the convict to state his current place of residence and his planned date of return to Poland, but so far he has not received any answer. In the opinion of this court, such behaviour on the part of the convict can only be seen as an attempt to evade probation."

Pursuant to article 75 (2) of the Polish Penal Code, the Court may order the execution of the penalty of imprisonment, if during the period of probation the convict evades probation and in the case at hand the convict has additionally disregarded the duties imposed on him in connection with placing him on probation. The convict has left the country without informing the authorities of the purpose of his travel and current place of residence. Therefore the Court has ordered the issuing of an arrest warrant in respect of the convict, and suspended the executive proceedings until the convict is apprehended." (my emphasis)

In response to what is contained above, the respondent has sworn a replying affidavit in which he has referred to these "Grounds for Ruling" and stated "*The facts are as averred to in my affidavit sworn on the 24th March 2010*". Nothing more is said by him.

The respondent has attempted to rely upon a conflict of evidence as he sees things, because he disagrees that by leaving he was in breach of probation conditions, since he advised the probation officer of his plans to come to Ireland. However, I do not believe that there is any real conflict in the evidence. The respondent has stated that he made his probation officer aware of his plan to come to Ireland. But it is clear from the material adduced by the judicial authority that informing his probation officer is not really the point, and that it is the Court itself which would need to have been informed. It is agreed in the Grounds of Ruling that the respondent told his probation officer of his intention to come to Ireland, but it is stated also that his probation officer informed him that he was obliged to inform the Court but he failed to do that. I have underlined the relevant part of the Ruling in that regard above. This Court is entitled to have regard to what is stated by the judicial authority in response to what the respondent himself has stated. It may well be that the respondent's subjective intention in coming to this country was to seek employment here and improve his life, but, as has been stated in other cases, the respondent's evidence in that regard, while indicative of a subjective intention or state of mind, cannot in every situation trump other more objective evidence of what conditions were imposed and what breaches occurred. The material adduced by the judicial authority can serve to identify these facts in order to provide an objective perspective for this Court's consideration of whether or not the respondent comes within the provisions of s. 10 (d) of the Act.

I am satisfied to accept, including by reference to the respondent's own averments, that he informed the probation officer in question

of his intention to leave Poland and travel to Ireland in search of work. But I must accept also that no specific details of those plans were given to the probation officer, in relation to, say, when he was travelling and at what address he was going to reside. It is possible that if those details had been provided even to the probation officer the latter would have felt in a position to continue to keep in contact with the respondent and be assured that all was in order, but the fact of the matter is that these details were not provided, and further, in any event, that the respondent was informed that he must inform the District Court, and not simply the probation officer, that he intended to leave. I appreciate that the respondent has averred in effect that he was not told that he had to inform the court, and that he was told by that probation officer that he would not be breaching his probation conditions by travelling to Ireland, but the judicial authority disagrees and is firmly of the view that he was in breach of the conditions of his suspended sentence in the ways described. That view must in the present case prevail over what is averred to by the respondent. He has not sought to adduce any objective evidence which might cast some real doubt upon what is stated by the judicial authority. That would be necessary if this Court is to ignore and disregard what is stated by that judicial authority to this Court for the purpose of the present application.

I am satisfied that the respondent fled from Poland in the sense that when he left he was in breach of the known conditions of his probation. He ought to have informed the Court of his intentions, and I am satisfied that he was informed of the need to do so by his probation officer. It must in these circumstances be concluded that by travelling to this State when he did he was evading justice in Poland, and that for the purposes of s. 10 (d) of the Act, he 'fled' to this country.

For these reasons, I am satisfied that the order for surrender must be made, and I will so order.