

THE HIGH COURT

2008 119 Ext

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Applicant

AND

KEVIN BARRY

Respondent

Judgment of Mr Justice Michael Peart delivered on the 11th day of December 2009:

The surrender of the respondent is sought by a judicial authority in the United Kingdom on foot of a European Arrest Warrant which issued there on 29th May 2009. That warrant was endorsed here for execution by order dated 18th June 2009, and in due course on 14th September 2009 the respondent was duly arrested and brought before the court, as required by section 13 of the European Arrest Warrant Act 2003, as amended.

His surrender is sought so that he can be prosecuted in the United Kingdom for one offence which is set out in the warrant. That offence is one of sexual assault and the details of the offence are set out in detail in the warrant.

No issue was raised as to the identity of the respondent but I am satisfied in any event from the affidavit evidence of the arresting Garda that the person who he arrested on 14 September 2009 and brought before the court is the person in respect of whom this warrant has been issued.

Subject to reaching a conclusion in relation to the single issue raised in relation to correspondence, there is no reason to refuse to make an order for surrender by virtue of any of the provisions of sections 21A, 22, 23 or 24 of the European Arrest Warrant Act, 2003, and neither is there any reason why his surrender is prohibited under Part III of the Act or the Framework Decision.

Correspondence:

Ronan Kennedy BL for the applicant has submitted that the acts alleged against the respondent, as described in the warrant, would, if done in this jurisdiction, correspond to an offence of sexual assault contrary to section 2 of the Criminal Law Rape Amendment Act 1990. Kieran Kelly BL for the respondent accepts that the facts disclosed in the warrant constitute indecent circumstances, but he raises the question of whether the facts disclose an assault upon the victim. He refers in particular to the fact that it would appear from the warrant that under United Kingdom law there is a conclusive presumption that the victim, a female of 23 years of age but with a mental age of eight years, is incapable of giving consent to sexual activity.

The warrant contains quite a detailed description of the facts giving rise to this alleged offence and the events leading up to it. The events leading up to it are not particularly relevant to the facts directly touching upon the alleged offence itself. It appears that the victim met with the respondent in a pub and they both got a taxi back to his flat. It would appear that she agreed to this.

The warrant goes on to state as follows:

"When they arrived back in the flat, Barry asked Sharon if she wanted to go and run a bath. Sharon did this and wants it was run, took her clothes off and got into the bath.

A few moments later Harry entered the bathroom naked and got into the bath with Sharon. Sharon did not like Barry with her so got out of the bath, got dried and dressed. Sharon then went back into the living room and sat down on the couch which she described as being a dirty green colour.

According to what WPC Kennan was told, a few minutes later Barry walked into the living room naked. Sharon said she saw Barry's penis (which she describes as willie) which was big, but described as hanging down not a right. Barry did not say anything but sat on the couch next to Sharon. He then moved his head towards hers and down near her neck, and then started to kiss her. Barry then grabbed hold of her arms and pinned her to the couch and continued to kiss her. He then moved one arm, keeping her pinned down with his other arm and with his free arm grabbed hold of her tracksuit bottoms ripping them to expose her knickers. Sharon managed to wriggle free and eventually saw that it was 2.00 AM and knew it was time to go home, so she left the flat and returned to her care home.

Later that day, Sharon informed staff at the care home that a male had sexually assaulted her, the previous night. As a result of this Sharon's support worker [name] is made a report to the police."

Mr Kelly submits that these facts, which are those relevant to the alleged offence itself, are capable of being construed as vigorous consensual sexual activity, but that it does not describe an assault, which requires an absence of consent before it constitutes the offence identified as the corresponding offence in this jurisdiction. Again, Mr Kelly has referred to the fact that it would appear that the United Kingdom offence infers or presumes a lack of consent where it appears that a person lacks the mental capacity.

Mr Kennedy on the other hand submits that it is not necessary on the facts as disclosed in the warrant to rely on any inference of consent or presumption of consent, since in his view there is sufficient in the warrant to make it quite clear that what occurred was without the victim's consent, and I have set out the relevant passage from the description of the alleged offence above. Mr Kennedy's submits that a jury could very well take a view as to whether there was consent or not but that this court on an

application for surrender cannot decide that matter. Mr Kennedy submits that absence of consent is explicit from the passage which I have quoted above and that it is clear from this that what is alleged to have occurred occurred without consent or lawful excuse, in circumstances that are indecent on any reasonable meaning attached to that word, and that it is alleged that the respondent intended to commit the act. He submits that it is not relevant to this court's consideration of correspondence to reach a conclusion as to whether or not any presumption that the victim lacked capacity to consent will be relied upon at any trial.

I am satisfied that the passage which I have set out above from the description of the offence contained in the warrant is more than sufficient to require a conclusion that those actions and behaviour by the respondent, as alleged, would be sufficient in this jurisdiction to constitute the offence which Mr Kennedy has identified as a corresponding offence for the purpose of section 5 of the European Arrest Warrant Act, 2003, as amended. The Court is entitled to take a common-sense approach to the facts as disclosed. It is not necessary that the Court adopt a view of the facts which may be more favourable to the respondent simply because a possible defence may be open to him at trial that there was consent. The facts disclosed state, inter alia, as already set forth:

"He then moved one arm, keeping her pinned down with his other arm and with his free arm grabbed hold of her tracksuit bottoms ripping them to expose her knickers. Sharon managed to wriggle free and eventually saw that it was 2.00 AM and knew it was time to go home, so she left the flat and returned to her care home". (my emphasis)

For the purpose of establishing correspondence this description is more than sufficient to constitute an assault, and the facts as disclosed are more than sufficient to constitute circumstances of indecency.

In the circumstances, I am satisfied that an order for surrender must be made and I will so order.