

THE HIGH COURT

2008 74 EXT

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

JAROSLAW NOWAKOWSKI

RESPONDENT

Judgment of Mr. Justice Michael Peart delivered on the 17th day of December 2008:

The surrender of the respondent is sought by a judicial authority in Poland under a European arrest warrant which issued there on the 24th October, 2007. It was endorsed for execution here by the High Court on the 16th April, 2008, and in due course on the 21st May, 2008 the respondent was arrested and brought before the High Court as required by s. 13 of the European Arrest Warrant Act 2003, as amended ("the Act").

The respondent's surrender is sought so that he can serve sentences of imprisonment imposed upon him in respect of twelve offences which are set forth in the warrant. I will set out these offences in due course, as the issue pursued by the respondent by way of objection to surrender is essentially one of correspondence in relation to some of the offences.

Given the length of sentence imposed in respect of each offence, minimum gravity is satisfied.

No issue arises in relation to an undertaking under s. 45 of the Act since the information provided by the issuing judicial authority is sufficient to indicate that the respondent was properly notified of the date, time and place of his trial. No issue is pursued in this regard by the respondent although his Points of Objection, when filed, contained an objection in relation to the lack of such an undertaking.

No issue arises in relation to the identity of the respondent, and I am satisfied from the affidavit evidence of the arresting Garda officer, Sgt. Martin O'Neill, that the person who he arrested here on the 21st May 2008 and who is now before the Court is the person in respect of whom this warrant has been issued.

No issue has been raised under sections 21A, 22, 23 or 24 of the Act, and I am satisfied that there is no reason under these sections to refuse to order surrender.

I am also satisfied, subject to addressing the issue of correspondence, that there is no reason why surrender is prohibited under any provision of Part III of the Act or the Framework Decision.

The offences:

The twelve offences referred to in the warrant are comprised in four separate files.

File 548/04 refers to 7 offences for which the respondent was sentenced to a term of 2 years imprisonment. These offences can be loosely stated to be of theft, burglary, supply of drugs, forgery of a bus pass. I will describe these in more detail in due course.

File 262/05 refers to 2 offences, being one of stealing, and one of "*possession of marijuana in his blood*".

File 563/04 refers to 2 offences, being one handling stolen goods, and one of "*hiding driving licence ...issued to [victim] acting thus to his detriment*".

File 282/06 refers to 1 offence of theft.

Correspondence: theft - s. 4 of the 2001 Act:

Section 4 defines the offence of theft as follows:

"4.—(1) *Subject to section 5, a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it.*" (my emphasis)

Section 4(5) provides that a person "appropriates" property if he "*usurps or adversely interferes with the proprietary rights of the owner of the property*".

It is worth referring also to the provisions of s. 4(2) of the Act which excludes two situations from the definition of "appropriates" – firstly where "*the person believes that he or she has the owner's consent ...*" and secondly where "*... he or she appropriates the property in the belief that the owner cannot be discovered by taking reasonable steps*".

Section 2 defines "dishonestly" as meaning "*without a claim of right made in good faith*".

It seems to me that, taking account of the definitions of "dishonestly" and "appropriates", s. 4 can be read as follows:

"4.—(1) **A person is guilty of theft if he or she [without a claim of right made in good faith,**

usurps or adversely interferes with the proprietary rights of the owner of the property], without the consent of its owner and with the intention of depriving its owner of it".

Six of the twelve offences for which the respondent was convicted are submitted by the applicant to be offences under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the 2001 Act"). Each of these offences must be looked individually for the purpose of examining correspondence with an offence under s. 4.

The first four such offences are the subject of **file 548/04** referred to above.

1. 9th September 2003:

This offence as set out in the warrant states that the respondent *"having previously opened the door with the original key, entered the locker room in the Gorzowski Sports Club ... took in order to appropriate [the goods set forth] to the detriment of [the various owners thereof]."*

2. June 2003:

This offence as set forth in the warrant states that the respondent *"having broken up a padlock on the cellar door in the house at entered the cellar and took a mountain bike worth 300 PLN to appropriate it to the detriment of [the owner]."*

3. 9th July 2003:

This offence as set forth in the warrant states that the respondent *"on the premises of the [sports centre] took in order to appropriate two backpacks with their contents to the detriment of [named person]."*

4. July – August 2003:

This offence as set forth in the warrant states that the respondent *"at Kladowa, in the town watering place took a 3410 Nokia mobile phone from Michal Wilman's backpack thus acting to the detriment of Irena Wilma, telephone owner".*

5. 31 January 2005:

Under **file 262/05** the following offence of theft is stated in terms that the respondent *"in EIE jeweller's shop stole a gold bracelet valued 2150 PLN acting to the detriment of Elzbieta Furmaniak".*

6. 24th November 2005:

Under **file 282/06** the following offence of theft is stated in terms that the respondent on this date *"from the premises of a jeweller's workshop took with a view to appropriate gold jewellery it being 12 bracelets, and 2 chains causing a loss of 2000 PLN to the detriment of Marian Mazmierczak".*

John Fitzgerald B.L. for the respondent submits that the necessary ingredients of dishonesty as defined, appropriation as defined, absence of consent of the owner, and intention to deprive the owner of the property either temporarily or permanently are absent from the facts disclosed in respect of all these offences in the warrant. Mr. Kennedy on the applicant's behalf contends to the contrary.

Taking the adapted version of the s. 4 offence as described above, I am satisfied that all the necessary ingredients for a s. 4 offence are present by reference to the ordinary meaning to be given to words appearing in the warrant and to the context in which they are used. In respect of each offence, the absence of claim made in good faith is obvious from the context in which the actions of the respondent took place. To find the contrary would be absurd in my view. The phrase *"taking with a view to appropriate"* is sufficient to meet the requirement that he usurped or adversely interfered with the proprietary rights of the owner, and that this occurred in the absence of the consent of the owner. The use of the phrase *"to the detriment"* in all the offences is sufficient to indicate an intention to deprive the owner of the goods in question. In this way all the necessary ingredients are contained in the description of these offences, so that correspondence with a s. 4 offence is established.

The forgery offence – s. 25 of the 2001 Act:

This is one of the offences the subject of file 548/04. It is described as follows:

"In September 2003 ... in order to use it as genuine, forged the monthly bus pass No. 006866, previously stolen from ... replacing the holder's photo with his own."

Mr. Kennedy submits that these facts would give rise to an offence here under s. 25 of the 2001 Act which provides:

"25.-- A person is guilty of forgery if he or she makes a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, to the prejudice of that person or any other person."

Mr. Fitzgerald submits that the facts in the warrant in relation to this offence fall short of establishing this s. 25 offence of forgery. I am of the view, however, that the facts disclosed clearly show that the respondent made a false instrument i.e. a bus pass for himself, by replacing the owner's photograph with one of his own. He is said to have done this *"in order to use it as genuine"*. That it seems to me is sufficient to cover the remaining ingredient necessary for this offence, namely that he did so *"with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, to the prejudice of that person or any other person."*

For this offence under s. 25 it is unnecessary that the respondent is not said to have actually used the false bus pass. That would be possibly an offence under s. 26 of the 2001 Act. It suffices that he created the false bus pass in the manner stated, and with the intention that it should be used "as genuine".

Correspondence is therefore established in respect of forgery under s. 25 of the 2001 Act.

Handling stolen goods offence – s. 17 of the 2001 Act:

This is one of the offences the subject of file 563/04. It is described as follows:

"On 10 July 2004 in ... bought from Maciej Kazubowski an XTRCM Mountain bike worth 300 PLN from theft, although he might have thought on the basis of the attendant circumstances that it had been obtained in an unlawful activity whereby he acted to the detriment of its owner Teresa Wojnarowska".

Section 17(1) and (2) of the 2001 Act provide:

"(1) A person is guilty of handling stolen property if (otherwise than in the course of stealing) he or she, knowing that the property was stolen or being reckless as to whether it was stolen, dishonestly –

(a) receives or arranges to receive it, or

(b) undertakes, or assists in, its retention, removal, disposal or realisation by or for the benefit of another person, or arranges to do so.

(2) Where a person –

(a) receives or arranges to receive property, or

(b) undertakes, or assists in, its retention, removal, disposal or realisation by or for the benefit of another person, or arranges to do so,

in such circumstances that it is reasonable to conclude that the person either knew that the property was stolen or was reckless as to whether it was stolen, he or she shall be taken for the purpose of this section to have so known or to have been so reckless, unless the court or the jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he or she so knew or was so reckless."

It is by reference to subsection (1) (a) and (b) above that correspondence can be established on the facts disclosed for this offence from the information contained in the warrant. It is stated in the details of the offence that he bought this mountain bike "from theft" even though he might have thought from the circumstances that it had been stolen. That is a fair summation of the facts as disclosed from the translation of those details. In other words, he bought it in circumstances where it is reasonable to conclude that he knew that it had been stolen. In my view that is sufficient for that offence to correspond with an offence under s. 17 of the 2001 Act.

Hiding a driving licence:

This offence is under file reference 563/04, and is stated in the warrant as having been committed by the respondent on the 13th August, 2004. The facts disclosed for this offence do not in my view correspond to any offence in this State, and the respondent cannot therefore be surrendered to serve any sentence which may have been imposed in respect thereof. In respect of the two offences referred to under this file reference he received two years imprisonment a composite sentence for both offences. Each offence attracts a penalty of up to two years imprisonment. This Court does not know anything except that for this offence and that of handling stolen goods he received a two year sentence. It is possible that this period of imprisonment was imposed for the handling offence, but the fact is that the two year period covers both offences. This Court cannot say if any portion of that sentence is in respect of the concealing offence, or whether the latter was taken into account in some way.

The 3 drugs related offences:

The first thing to be mentioned is that the issuing judicial authority has ticked the box in the list of Article 2.2 offences for "illicit trafficking in narcotic drugs and psychotropic substances". On the other hand, paragraph E.2 of the warrant under the heading "*Full description of offences not covered by section E1 above*", sets forth details of two of the drugs offences, i.e. offences 5 and 7 under file 548/04, which means that neither of those offences is covered by Article 2.2 of the Framework Decision.

That is confusing, but the Court must proceed on the basis that neither is covered by Article 2.2. I will proceed therefore on the basis that correspondence must be established in respect of these two offences.

The remaining drugs offence which is No 2 under file 262/05 is the only one which has not been included in paragraph E.2, and can therefore be the only one which has been included under the ticked category under Article 2.2 and therefore one in respect of which double criminality is not required to be verified. That offence states:

"On 31 January 2005 ... in contravention to the provisions of the Drug Abuse Enforcement Law was in possession of marihuana in his blood".

Paragraph E.3 of the warrant states that this is an offence under Article 45.1 of the Drug Abuse Enforcement Law, and that it is punishable by "*deprivation of liberty for a term of up to 3 years*".

Section 38 of the Act, giving effect to the minimum gravity requirement for an Article 2.2 offence to be ticked in the box in the warrant states that such an offence can be indicated if "*it is an offence to which paragraph 2 of Article 2 of the Framework Decision applies or is an offence that consists of conduct specified in that paragraph, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years*".

In my view the fact that this marked offence carries a penalty "up to 3 years" under Polish law is sufficient to come within the gravity referred to in s. 37 of the Act as "*a maximum of not less than 3 years*", and is therefore an offence in respect of which double criminality is not required to be verified.

That leaves the remaining offences 5 and 7 under file 548/04, to which I have referred above, as being offences for which double criminality is required to be established.

Offence 5 – file 548/04:

This offence is stated as follows in the warrant:

"In the period from June to September 2003 ... several times gave against no payment intoxicants, that is amphetamine, to ... by sharing with him the intoxicants he had bought for himself or for others to use them together."

This offence in my view corresponds to an offence under s. 15 of the Misuse of Drugs Act, 1977 which provides:

"15. — (1) Any person who has in his possession, whether lawfully or not, a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 of this Act, shall be guilty of an offence."

Section 1 of the same Act defines "supply" as including "giving without payment".

It seems clear to me that the reference to the respondent "sharing" the drugs, that he had himself bought, with the other person is sufficient to indicate that he had them in his possession when he gave them to the other person.

Offence 7 – file 548/04:

This offence is stated as follows in the warrant:

"In August 2003 in ... during a techno party, in contravention of the provisions of the law and in order to gain a material benefit gave intoxicants to three anonymous persons, in total 15 tablets of ecstasy, selling each for 15 PLN."

I am satisfied that the ingredients of the s. 15 offence are met also for this offence. He clearly had the drugs in his possession when he gave them to another person at this party by selling them at the price stated.

I am satisfied for the reasons which I have given above that the Court is required to make the order sought for the surrender of the respondent to Poland, so that he can serve the sentences of imprisonment imposed upon him, save the period of two years imposed in respect of the 2 offences the subject File 563/04, namely one of handling stolen goods, and one of "hiding driving licence ... issued to [victim] acting thus to his detriment". I have found that the handling offence corresponds, but that the other offence does not. However, in circumstances where a single sentence was imposed for these two offences, it is impossible to say how much is applicable to the handling offence, and therefore, whether minimum gravity is met in respect of the handling offence. I cannot divide the sentence and must refuse surrender in respect of those two offences for which a single sentence was imposed.