

THE HIGH COURT

[2010 No. 39 Ext]

[2010 No. 201 Ext]

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

MAREK MARCISZEWSKI

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 18th day of January 2011:

The surrender of the respondent is sought on foot of two separate European arrest warrants which issued in Poland on 18th August 2009 ("the first warrant") and on the 16th November 2009 ("the second warrant") respectively. The first warrant was endorsed for execution on the 19th May 2010 and the second warrant was endorsed for execution on the 17th February 2010.

The respondent was arrested on foot of both warrants on the 14th June 2010 and was brought before the High Court on the same date.

No issue is raised as to the identity of the respondent and I am satisfied in any event from the affidavit of Sgt. Sean Fallon who arrested him that the person who is before the Court is the person in respect of whom these warrants were issued is the person named in each warrant.

The first warrant – 18th August 2009:

This warrant relates to two offences each of which is said by the applicant to correspond to an offence in this State to an offence of making a gain or causing a loss by deception contrary to section 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001").

The first offence according to the facts contained in paragraph E of the warrants, as translated in the English language version of the warrant alleges that "acting with intent, jointly and in cooperation with other person (sic) referring to having influences in the District Police Warszawa VI he undertook to settle profitably the case of a vehicle ... stoppage which had become from an offence staying in the disposal of Pawel Nizinski, for the property benefit in the amount of 2000 zloty received from Pawel Nizinski, property benefit of 200 zloty received from Grzegorz Korytowski and commanding Pawel Nizinski to grant property benefit of 20,000 zloty."

This translation is by no means perfect. A more clearly understood translation of this paragraph has been provided and it translates the paragraph as follows:

"In the period of summer-spring 2005 in Warsaw acting to commit a pre-meditated act, in conspiracy with another person alluding to influences at District Police Headquarters Warszawa VI, he undertook to mediate in achieving an advantageous resolution of the case referring to a retention of a Toyota Corolla Verso obtained through a crime – the car being held by Pawel Nizinski for a material profit amounting to 2000 PLN received from Pawel Nizinski, a material profit amounting to 200 PLN received from Grzegorz Korytowski and a demanded material profit amounting to 20,000 PLN from Pawel Nizinski."

The second offence in this warrant is almost identically worded but in respect of a different vehicle and a different sum of money. There is no need to set out that offence in any more detail. Each offence is the same as far as the question of correspondence is concerned.

A letter dated 12th April 2010 from the issuing judicial authority describes this offences as follows:

"[the respondent] referring to have influences at District Police Station Warszawa VI, undertook to mediate in profitable settlement of a case related to kept vehicles Toyota Corolla Verso and Volvo XC 70 coming from a crime and he received property benefit in return. Referring to his influences at District Police Station Warszawa [the respondent] took an amount of 500 zloty from Pawel Nizinski and then he asked for additional 2 thousand zloty."

The phrases "referring to having influences" and "alluding to influences" can be translated also as "claiming to have influence".

As I have said, the candidate offence for correspondence under the laws of this State is the offence created by section 6 of the Act of 2001, which provides:

"6. – (1) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing a loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence." (my emphasis)

Mr Colgan for the respondent submits that for these two offences to correspond to the candidate offence the warrant must show not only that what was done was done dishonestly but that there was a deception. He submits that these elements are absent in respect of each offence. He submits that it would be necessary to allege that he did not have the influence which he claimed to have in order to achieve a favourable outcome to the proceedings, if the necessary element of deception is to be satisfied in spite of the efforts to provide a better translation of the paragraphs in question in the warrant.

It is relevant to state that section 2 (2) provides a definition for deception for the purposes of the Act of 2001 in the following way:

"2. – (2) For the purposes of this Act a person deceives if he or she –

- (a) creates or reinforces a false impression, including a false impression as to law, value or intention or other state of mind,
- (b) prevents another person from acquiring information which would affect that person's judgement of a transaction, or
- (c) fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship." (my emphasis)

It is paragraph (a) which is relevant in the present case and not paragraphs (b) or (c). It is clear that in so far as the respondent may have claimed to be able to influence matters, this must be a false claim – in other words that he in fact had no such influence. It is this element which is said to be absent from the facts alleged against the respondent in this warrant.

The letter dated 12th April 2010 gives some detail of the offence under the Polish Penal Code, article 230.1 already referred to. That letter explains that the offence is committed by "whoever, referring to have influences at any state institution ... or causing belief of having such influences, undertakes to mediate in the case settlement for property benefit or private benefit or its promise in return."

There appears to be no element of deception necessary for the Polish offence, and no deception is alleged in the warrant. The offence is committed whenever a person claims to have such influence, whether he has such influence or not.

In such circumstances it seems to me that an essential ingredient for the corresponding offence under section 6 of the Act of 2001 is not disclosed in the warrant or any additional information provided. It is not permissible to simply infer from these facts that the respondent falsely gave the impression that he had such influence where in fact he did not, no matter how unlikely it may be that he had such a capacity to influence matters with the police. Therefore the offence in my view does not correspond to the section 6 deception offence put forward by the applicant for correspondence.

I invited the parties to make further submissions in relation to the question whether the facts disclosed in this particular warrant would be sufficient to disclose an offence of perverting the course of justice, since it seems to allege that the respondent, in exchange for sums of money, offered to mediate favourably or "sort" a case at the Police station involving some vehicle which was stolen. I have heard those submissions, but am satisfied that it is not possible to understand clearly enough from the facts contained in the warrant exactly what is alleged occurred in this case, and to reach a conclusion that the alleged offence corresponds to that of perverting the course of justice. It is unclear whether any prosecution was underway, or in what circumstances the vehicle in question was in the police station. The Court would need more information as to exactly what is alleged in this case.

The second warrant – 16th November 2009:

This warrant relates to one offence set forth in the second warrant as follows:

"In the period from January 2005 to April 2006 in Warsaw and in Suwalki, with an advance intent, in short intervals of time, jointly and in co-operation with [named person] he obstructed penal proceedings against Jaroslaw Rams in such a way that, for Jaroslaw Rams to use medical documents confirming untruth as to his health condition at the court in execution proceedings, he eased such offence in such a way that he had helped Jaroslaw Rams to get to know [named person], who then helped to get such documents contacting the person in question with Tomaz Damski – a doctor at Independent Health Institution ... and induced the doctor to confirm the untruth. Moreover, he participated four times in transfer of documents confirming untruth and medical certificates received from Tomasz Dabski and other doctors to Jaroslaw Rams."

A further translation of this warrant has been provided also which describes the offence somewhat differently and as follows:

" In the period from January 2006 until April 2006, in Warsaw and Suwalki, acting to commit a pre-meditated act and in short intervals of time, in conspiracy with [named person] he obstructed penal proceedings of the District Court in Suwalki and of the Provincial Court in Suwalki ... against Jaroslaw Rams in such a manner that – for Jaroslaw Rams to use medical documents confirming untruth as to his health before court in an enforcement proceedings – he introduced Jaroslaw Rams to [named person] who then facilitated the obtaining of such documents by contacting Jaroslaw Rams with Tomasz Damski – a doctor of the Independent Healthcare Institution ... - and induced the doctor to confirm untruth. [The respondent] further intermediated four times in the transfer of documents confirming untruth and medical certificates received from Tomasz Damski and other doctors to Jaroslaw Rams."

It is submitted by Siobhán Ní Chúlacháin BL for the applicant that this offence corresponds to an offence here of conspiracy to pervert the course of justice contrary to Common Law. It is submitted that the facts disclosed show that the respondent acted in a premeditated way, that he obstructed the penal proceedings, and then describes how that was done, namely by introducing the accused person to a person who in turn introduced that person to a doctor who was then induced to provide a false medical certificates. That is a reasonable summary of what is alleged to have occurred.

Mr Colgan for the respondent on the other hand, while accepting that falsifying evidence would be an offence of perverting the course of justice, submits that the warrant implicates the respondent only in so far as he introduced Rams to somebody else who in turn facilitated the obtaining of the false medical evidence by introducing Rams to a doctor. It is submitted that if the respondent acted in that way in this State he would not commit an offence of perverting the course of justice.

I am satisfied that the warrant discloses that the respondent obstructed the course of justice in a premeditated way – in other words it is shown that the respondent by doing what he did intended that the course of justice would be perverted, and that he was part of that course of conduct by introducing the accused person, Rams, to another person with the intention that the ultimate aim of perverting the course of justice would be achieved.

That is sufficient in my view to establish that if he did here what he is alleged to have done in Poland an offence here would be committed. The introduction of the accused person to the other person was a positive act intended to pervert the course of justice, and in that regard I refer to Archbold, 8th ed. At page 2561 where it is stated:

"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 public justice....

A positive act, whether of concealment or distortion, is required. Inaction is insufficient

An attempt or incitement or conspiracy to pervert the course of justice is likewise indictable."

Authority is cited for the above statements.

I am satisfied that the offence contained this warrant corresponds to an offence in this State.

There is no reason to refuse to order surrender on this warrant under the provisions of sections 21A, 22, 23 or 24 of the Act of 2003, and I am satisfied also that surrender is not prohibited by any provision of Part III of the Act or the Framework Decision.

I will therefore make an order for the surrender of the respondent for the purposes of being prosecuted in respect of the one offence referred to in the European arrest warrant dated 16th November 2009, and for his committal to prison until that surrender takes place within the permitted time-limits.