

THE HIGH COURT

2007 164 EXT

Between:

Minister for Justice, Equality and Law Reform

Applicant

and

JRM

Respondent

Judgment of Mr Justice Michael Peart delivered on the 16th day of December 2009:

Before the Court is an application for an order postponing the surrender of the respondent on foot of a European arrest warrant, pursuant to an order for his surrender which was made by the High Court on the 28th November 2007.

An appeal against that order was rejected by the Supreme Court on the 3rd February 2009, following which it ordered a postponement of surrender until the date of the respondent's conviction or acquittal on an offence set forth in the said Supreme Court Order as being one of "an offence contrary to section 246(1) and (2) of the Children Act 2001" that being one set forth in that order as "wilfully assaulting, ill-treating, neglecting, abandoning or exposing a child in a manner likely to cause unnecessary suffering contrary to section 246 (1) and (2) of the Children Act 2001 in proceedings entitled DPP at the suit of Sergeant Thomas Harte v. J. R. M. pending before Dublin District Court".

The order went on to state that in the event that the respondent was convicted and sentenced for this offence, the surrender order would be postponed until such time as the respondent is no longer required to serve any part of any term of imprisonment consequent upon said conviction.

In the light of submissions made on the respondent's behalf by Kieran Kelly BL it is worth stating at this point that the order of postponement made by the Supreme Court does not refer to any particular charge sheet, charge sheet number or Bill number referable to this offence. It refers only to the offence for which he is facing prosecution.

An affidavit of Anthony Doyle, an Executive Officer in the Department of Justice, Equality and Law Reform, sworn in support of the present application, sets out the background which I have described. It goes on to state that it was a few days before the date of the said Supreme Court Order, namely on the 31st January 2009, that the respondent was charged with the said offence and in that regard he has exhibited a copy of Charge Sheet number **8476499**. That charge sheet charges the offence in the following way:

"On a date unknown between 19/05/2006 and 28/09/2007 at a place or places unknown within the State, in the [sic], being a person having custody/charge/care of a child, namely S. A. M. did wilfully assault, ill-treat, neglect, abandon, expose the said child in a manner to cause unnecessary suffering to the child's health or seriously to affect her well being, contrary to section 246 (1) and (2) of the Children Act, 2001."

Mr Doyle then avers that the Gardaí later took directions from the Director of Public Prosecutions to charge the respondent with further offences contrary to s. 246 of the Children Act 2001, as well as one charge of rape. He goes on to state that the five cruelty charges relate to five of the respondent's children, including the said S. A. M., and that the rape charge relates to her also. These six charge sheets are exhibited, one of which is charge sheet number **8907492**, and it is averred that this charge sheet relates to the same offence as that which is the subject of charge sheet number 8476499. There are two differences between the two charge sheets. Firstly, in the later charge sheet number 8907492, the date of the offence is stated as "between 01/12/2006 and 28/09/2009 [sic]", whereas the date in the first charge sheet was "on a date unknown between 19/05/2006 and 28/09/2007". It is safe to conclude that the reference to "2009" in the dates on the later charge sheet is an error and should read "2007", and presumably will be the subject of an application to amend at some stage. That feature is not the subject of any submission relevant to the present application, but I just refer to it for the sake of completeness. The second difference is that instead of stating that the offence occurred "at a place or places unknown" as appears on the first charge sheet, it is stated in the later sheet as having occurred "at *Athy Kildare*".

Mr Doyle states that the offence contained in charge sheet number 8907492 is the same offence which is the subject of the Supreme Court's order for postponement of surrender.

It appears that on the 27th May 2009 charge sheet number 847499 was 'struck out' and the respondent was charged in respect of the six offences referred to above, which includes that which was the subject of charge sheet number **8907492**. He has subsequently been sent forward for trial on these offences which are the subject now of Bill Number CCC 43/2009, and the date for trial is set for the 12th April 2010.

The applicant now seeks an order for the postponement of surrender on foot of the order made on the 28th November 2007 until the respondent has either been acquitted in respect of these offences or, if convicted and sentenced to a term of imprisonment, until such time as he is no longer required to serve any part of such sentence consequent upon conviction.

A net point arises on the submissions made by Mr Kelly on the respondent's behalf.

It is submitted that the period of postponement of surrender granted by the Supreme Court came to an end when charge sheet number 8476499 was struck out at the District Court on the 27th May 2009, and that accordingly the order for surrender took effect on that date, with the result that surrender was required to be implemented not later than ten days thereafter, and that if the

applicant wished to have surrender postponed pending the disposal of these new charges, such an application should have been made within ten days from the 27th May 2009.

It is submitted that the order for surrender has lapsed, and that since surrender may not now be effected on foot of same, it therefore cannot now be the subject of a further order for postponement, since s. 18 of the Act provides for postponement of an order in respect of "a person to whom an order under section 15 or 16 applies" (my emphasis).

Section 16(5) of the European Arrest Warrant Act 2001, as amended provides:

"(5) Subject to subsection (6), subsection (7) and section 18, a person to whom an order for the time being in force under this section applies shall be surrendered to the issuing state not later than 10 days after-

(a) the order takes effect in accordance with subsection (3) [inserted by section 76(d) of the Criminal Justice (Terrorist Offences) Act 2005], or

(b) such date (being a date that falls after the expiration of that period) as may be agreed by the Central Authority in the State and the issuing state."

On the 27th May 2009, being the date on which charge sheet number 8476499 was struck out at the District Court, section 16 (7) of the Act provided (i.e. prior to its recent amendment by s. 12 (e) of the Criminal Justice (Miscellaneous Provisions) Act 2009) for the release of a person whose surrender has not been implemented within the prescribed time in the following terms:

"(7) A person (to whom an order for the time being in force under this section applies) who is not surrendered to the issuing state in accordance with subsection (5), shall be released from custody immediately upon the expiration of the 10 days referred to in that subsection unless, upon such expiration, proceedings referred to in subsection (6) are pending."

Section 18 (3) of the Act [as substituted by s. 13 of the Criminal Justice (Miscellaneous Provisions) Act, 2009] provides:

"(3) Subject to section 19, where a person to whom an order under section 15 or 16 applies -

(a) is being proceeded against for an offence in the State, or

(b) (i) has been sentenced to a term of imprisonment for an offence of which he or she was convicted in the State, and

(ii) is required to serve all or part of that term of imprisonment,

the High Court may direct the postponement of that person's surrender to the issuing state until -

(I) in the case of a person who is being proceeded against for an offence, the date of the final determination of those proceedings (where he or she is not required to serve a term of imprisonment), or

(II) in the case of a person who is required to serve all or part of a term of imprisonment, the date on which he or she is no longer required to serve any part of that term of imprisonment." (my emphasis)

In support of his submission that the surrender order expired ten days after the 27th May 2009, Mr Kelly has referred to the judgment of Fennelly J. in *Ó Fallúin v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 414 wherein it was stated at p. 420:

"28. I return to the words of subs. (7). It mandates the release of the applicant. That mandatory obligation is qualified only in the case that Article 40 proceedings are in being. Section 16(7) ordains release unless such proceedings are in existence and s. 18(5) prohibits surrender until they are disposed of. ... I am satisfied that the applicant was entitled to be released from custody immediately upon the expiry of the period of ten days after the coming into effect of the High Court, i.e. 25 days after it was made."

He has referred also to the judgment of McGuinness J. in *Kennelly v. Cronin* [2002] 4 I.R. 292 in support of his submission that the 'strike out' of charge sheet 8476499 on the 27th May 2009 constitutes a disposal of that charge thereby bringing it within the concept of an acquittal in the context of the postponement order made by the Supreme Court. That judgment arose from a case stated from the Circuit Court which sought an opinion, *inter alia*, as to whether a recognizance entered into by the respondents in that case expired when the charge sheet was struck out by the District Judge. The facts of that case are very different from the present case. In *Kennelly v. Cronin*, the situation was that the respondents had signed recognizances in relation to the remand on bail in respect of the first named respondent, to appear on a certain date to which, on a peremptory basis, the case against him been adjourned for a Book of Evidence. On that date the first named respondent and his sureties were in court. The case was called and the Book of Evidence was not served or available in court. Accordingly, the District Judge, as he had previously made clear he would do, struck out the charge against the first named respondent. However; it appears that later in the same day, the matter was mentioned again by the prosecution in the presence of the first named respondent and with his agreement the same charge sheet was re-entered, and his bail was continued. The independent sureties were not required to enter new recognizances and were not in fact present in court when the case was re-entered and were therefore unaware that their obligations under their recognizances had been revived. The first named respondent in due course breached his bail, and an application was granted in the District Court for estreatment of monies from the independent sureties.

The Supreme Court, on a case stated by the Circuit Court Judge on appeal, held, *inter alia*, that the striking of the case on the day in question was a disposal of the case, and that this had the effect of bringing to an end the sureties' obligations on foot of their recognizances, and that since they were unaware that these obligations had been revived at the later mentioning of the case, they could not be pursued further in relation those recognizances following a later breach of bail by the first named respondent.

In this regard, McGuinness J. refers to the striking out of the charges as "a *due disposal of the charges against him according to law*". Mr Kelly submits that when charge sheet number 8476499 in the present case was struck out, even though it was replaced with other charge sheets, this was a disposal of that charge, and that it brought to an end to the period of postponement of surrender, and served to commence the period of ten days for surrender to take place.

Mr Kelly submits that the charge for which surrender was postponed was 'disposed of' on the 27th May 2009, and that, thereafter,

once the surrender was not effected in accordance with the provisions of s. 16 of the Act, the order of surrender no longer 'applies' to the respondent, and accordingly no order can now be made under s. 18 of the Act. That essentially is his submission.

Conclusion:

I drew attention at the outset of this judgment that the terms of the postponement granted by the order of the Supreme Court was until "*the date of the respondent's conviction or acquittal for the said offence of*", and it is set forth in that order. While the charge sheet in respect of that offence was struck out at the District Court on the 27th May 2009, it was replaced by another charge sheet in respect of the same offence, even though by then the date for the offence was somewhat refined from the wider date range contained in the earlier sheet, and a location was inserted. In my view, the striking out of the earlier charge sheet did not amount to an acquittal in respect of the offence itself. In that regard, I note what is said by McGuinness J. in her judgment. Having concluded at p. 302 that the striking out of the charge was "*a due disposal of the charges*" and that the accused "*left court a free man and went to his home*", she went on to state:

"The next step was that later in the day, the accused was arrested at his home on new charges (relating to the same offences and brought before the District Court. The new charges formed a new complaint to the District Court; one presumes that the normal procedure would have been to remand him on these charges and to order the preparation and service of a book of evidence. It is clear that if this course were followed, bail orders and recognizances connected to the original charges would not apply. Since a charge of murder was involved, under s. 29 of the Criminal Procedure Act, 1967 the District Court could not have granted bail. It would have been necessary to remand in custody unless and until he was granted bail by the High Court."

It was in such circumstances that on application in this regard by the accused person, the District Judge re-entered the original charge sheet and continued the bail that had pertained in relation to that charge sheet in respect of the same offence.

It is quite clear in my view that *Kennelly v. Cronin* is not authority for the submission made by Mr Kelly in this case that the striking out of the original charge sheet was not a disposal of the case in the sense of it being an acquittal in respect of the offence of murder in question. In the same way, in the present case, the fact that charge sheet number 8476499 was struck out on 27th May 2009 did not operate as an acquittal for the offence in question. As such, the Supreme Court's postponement order did not lapse or cease to operate since he had not on that date been acquitted or convicted in respect of that offence.

It follows that the underlying order for surrender still applied to the applicant after that date, since the postponement still was effective.

It follows also therefore that strictly speaking, it is unnecessary for a further postponement order to be obtained now in respect of the offence which was the subject of the struck out charge sheet, and there is certainly no reason why a postponement order cannot now be made in respect of the other offences which have now been charged on other charge sheets besides charge sheet number **8907492**, since the respondent is a person to whom an order for surrender made pursuant to s. 16 of the Act applies.

I will therefore make the order sought, pursuant to s. 18 of the Act, as amended, for the postponement of the respondent's surrender until the final determination of the charges against him which are now the subject of Bill Number CCC 43/2009, and in the event of his being sentenced to a term of imprisonment following a conviction, then until he is no longer required to serve any part of any such sentence.