Neutral Citation Number: [2007] IEHC 78

THE HIGH COURT

Record Number: 2006 No. 54 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

LAIMONAS MACHEVICIUS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 20th February 2007

The surrender of the respondent is sought by the authorities in Lithuania so that he can serve a sentence of one year and three hundred and fifty six days imprisonment imposed upon him following his conviction for the offences set forth the warrant on the 22nd June 2004. This conviction and sentence occurred in the absence of the respondent who had failed to attend his trial fixed for the 21st June 2004. The warrant states that a sister of the respondent had been served with notice of previous court dates on the 7th January 2004 and the 23rd January 2004, but goes on to state that "the summons to the hearing of 21 June 2004 have not been served because the accused was not found". These circumstances are of relevance in view of one of the points of objection relating to the respondent's entitlement to a re-trial if surrendered. I shall return to that objection and others in due course.

The European arrest warrant was received in this State in August 2005, and was endorsed for execution here following an application in that regard under s. 13 of the European Arrest Warrant Act, 2003, as amended, on the 8th June 2006, the respondent was arrested on foot of same on the 15th September 2006 and brought before the High Court as required where he was remanded in custody from time to time until the hearing of the present application under s. 16(1) of the Act for his surrender.

Another fact relevant to an objection raised on this application is that the respondent is presently held in custody here in any event on a charge of murder. In the event of the present application for surrender being successful, the applicant will seek an order of postponement in respect of surrender under s. 18(3) of the Act. The respondent makes a point about that which I will come to shortly.

Correspondence

The offence described in the warrant and in respect of which the respondent has been convicted and sentenced in absentia is one somewhat unusually (as far as Irish law is concerned) described as being one of "arbitrariness". This is not a term easily understood. But the warrant describes what the respondent is alleged to have done in order to have committed that offence, and the Court's task as far as correspondence is concerned is to be satisfied as to what the respondent did in the issuing state, and then be satisfied that if the same was done in this State it would amount to an offence here as well. It does not have to be the same offence, but simply some offence under Irish law.

The act of the respondent is set forth in the translated warrant as follows:

> "On 19 September 2003, at about 9pm in Dziugo Street in Telsiai, [the respondent] acting together with the person not identified during the investigation, and threatening to use physical violence against [victim], i.e. to drive him to the forest and break his legs with an iron bar, without observing the procedure prescribed by law, arbitrarily pursued the right to recover a mobile phone NOKIA 8210 or LTL 400 for the lost mobile phone."

This translation is somewhat unclear, but Mr Thomas O'Connell SC for the applicant submits that the meaning is that the respondent threatened the victim that he would drive him to a forest and break his legs with an iron bar if the victim did not return the respondent's mobile phone to him or give him LTL 400 for the lost phone. Mr John O'Kelly SC does not disagree that this is what the facts alleged mean. Mr O'Connell submits that if such act was committed in this State it would give rise to an offence under s. 5(1) of the Non-Fatal Offences Against the Person Act, 1997, which provides as follows:

> "5.—(1) A person who, without lawful excuse, makes to another a threat, by any means intending the other to believe it will be carried out, to kill or cause harm to that other or a third person shall be guilty of an offence."

Mr O'Kelly on the other hands submits that this offence does not correspond, in the sense that what is alleged to have happened in the warrant does not have the necessary ingredients. He refers to the fact that the warrant makes reference to seeking back the mobile phone "without observing the procedure prescribed by law". Mr O'Kelly submits that the s. 5 offence has an essential ingredient which must be proved namely that the person uttering the threat intended that it be believed, and that what the facts in the warrant allege is simply that he uttered the threat without going through the proper channels to recover his phone, and that the facts are silent as to the respondent intending that the threat be believed. In other words, if the act committed in Lithuania which does not include anything about the respondent intending that the threat be believed, was done here he could not be convicted of the offence under s. 5 of the Non-Fatal Offences Against the Person Act, 1997, and therefore there is no correspondence.

Mr O'Kelly submits also that the s. 5 offence requires that there be no lawful excuse for uttering the threat, and that from the facts set forth in the warrant it seems probable that the phone whose recovery was being sought was the respondent's own phone and that perhaps that can be seen to mean that there was a lawful excuse for the threat.

In my view correspondence is made out in this case. What the recitation of facts in the warrant amounts to in my view is that without, as Mr O'Kelly puts it, going through the proper channels i.e. going to the police or pursuing a legal remedy, he sought to receiver his mobile phone or the value of it by issuing a threat that he would drive the victim to a forest and break both of his legs with an iron bar. In my view the element in the Irish offence of "intending the other to believe it" is so obviously part of the facts alleged that nothing further is required. It is perfectly obvious without anything being explicitly stated that the sort of threat which was issued was one intended to be believed. Equally, I cannot consider that simply because the phone in question may have been the respondent's own phone, would not be a lawful excuse for issuing such a threat. What the facts amount to as set forth in the warrant is that the respondent took the law into his own hands and decided to get back his phone by issuing this threat. If the respondent did the same thing in this State, it must follow that it would be an offence under s. 5 of the 1997 Act, since he would have without any lawful excuse issued the threat which was clearly intended to be believed. It seems to me that all the ingredients of the Irish offence are contained in the facts as asserted in the warrant and in respect of which the respondent has been convicted in his absence.

For completion I should state that the minimum gravity requirement in the case of a sentence imposed in absentia is satisfied since that which has been imposed exceeds a period of four months' imprisonment.

Trial and conviction in absentia
Two separate objections are made arising out of the fact that the respondent was absent from his trial and sentence.

The first is that the undertaking that the respondent will be retried for the offence or be given an opportunity of a re-trial, as referred to in s. 45 of the Act, has not been provided. The second point raised is that since the respondent faces in this State a charge of murder, he will, if convicted, be sentenced to life imprisonment, and that a knock-on effect of that sentence is that any re-trial which he must be offered upon his surrender having completed this sentence, will be a trial which would take place perhaps twenty years after the offence has been committed, and that would be an unfair trial and one to which the respondent must not be exposed if his constitutional rights to a trial with reasonable expedition is not to be breached.

I will deal with these two points separately.

1. The undertaking under s. 45 of the Act
The Lithuanian authorities have set out, in respect of a person who had not been summoned to appear or otherwise informed of the date of trial, what are described as "the following legal guarantees after surrender.."

> "…Article 313 of the Code of Criminal procedure of the Republic of Lithuania provides for a 20 days period to appeal against the judgment of the court. The convicted person who was not personally present when passing the judgment of conviction shall have the right to file an appeal even after the expiry of the time limit prescribed for lodging appeals, as well as state that he will be present at the appeal hearing of the case. In case the execution of the judgment has already commenced, the court with authority to hear the case under the appeal procedure may, of its own initiative or upon the request of the accused or his/her defence counsel, pass a ruling to stay the execution of the judgment (paragraph 1 of Article 438 of the Code of Criminal Procedure of the Lithuanian Republic).
>
> After receiving the appeal of the convicted person who was not personally present when hearing the case at first instance, the court of appeal must once again conduct those actions of investigating evidence which were carried out by the court of first instance, on which the judgment of conviction was based, if the convicted person objects to the assessment of evidence in his/her appeal (paragraph 3 of Article 438 of the Code of Criminal Procedure of the Republic of Lithuania).

Mr O'Kelly makes the point that this law speaks of an appeal and not a re-trial, and that this cannot amount to a guarantee of a re-hearing, or be a substitute for an undertaking such as the one specified in the clear provisions of s. 45 of the Act. Mr O'Connell submits however that there is nothing shown by the respondent to suggest that the appeal is not one, as very often in this jurisdiction in relation to appeals from the District Court to the Circuit Court, an appeal by way of re-hearing.

The existence of the specified statutory provision is sufficient to constitute an undertaking for the purpose of the section which is giving effect to Article 5 of the Framework Decision which speaks of "an assurance deemed adequate to guarantee the person ….that he or she will have an opportunity to apply for a re-trial…..".

There is no requirement that such a re-trial be a first instance re-trial with the potential of an appeal thereafter. What the Framework Decision requires is that the person has an opportunity upon surrender to be tried again in his presence. The Code referred to provides specifically that if the person is unhappy with the assessment of the evidence by the judge who dealt with the hearing in absentia, he can require the appeal court to "once again conduct those actions of investigating evidence which were carried out by the court of first instance".

This statement in the warrant of the "legal guarantee" provided by Articles 313 and 438 of the Code of Criminal Procedure of the Republic of Lithuania must constitute a sufficient undertaking for the purpose of fulfilling the objective stated in the Framework Decision, and to interpret it in this way does not in my view do so 'contra legem'.

It is also to be borne in mind that s. 4A of the Act as inserted by s. 69 of the 2005 Act, provides:

> "4A.- It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown. "

The respondent has not even attempted to demonstrate by way of an affidavit from any Lithuanian lawyer that the appeal spoken of in Articles 313 and 438 of the Code of Criminal Procedure is not one by way of re-hearing. He has not therefore attempted to rebut the presumption that if surrendered the respondent will be afforded the re-trial referred to in the Framework Decision to which Lithuania has signed upon its accession to the European Union. This point must fail.

2. Re-trial after conclusion of any life sentence which may be imposed for murder here
The respondent currently faces a charge of murder before the central Criminal Court. If convicted he will receive a mandatory life sentence as required by law. If an order of surrender is made on the present application, the applicant will seek an order for postponement of surrender until after the respondent is no longer required to serve any part of that life sentence. That has the potential to result in a situation where the re-trial on the European arrest warrant offence may not take place until perhaps twenty years after the date of its commission. Mr O'Kelly submits that such prospect if it were to come to pass would amount to an unconstitutionality, and that the respondent's right to a fair trial under the Constitution, which includes a right to a trial within a reasonable time, is a right which should be protected and vindicated now by refusing to order surrender.

In my view the Court cannot indulge in any speculation as to what may or may not happen in the future. The provision of a re-trial upon surrender is in ease of a person who has not attended for his trial in the first instance. If that person's own actions in another state give rise to a situation where his re-trial is delayed because of those actions, then it is certainly arguable that he cannot plead that in aid of an assertion that his right to an expeditious trial has been compromised. I do not consider that the Court is required to refuse surrender on this ground of objection. The Court has been given power to postpone surrender pending the completion of any sentence imposed here, and the Act is silent as to the length of any such sentence. It cannot be presumed that any trial after the postponement had come to an end will be unfair. Mr O'Connell has pointed out also that there is no challenge to the constitutionality of that section. I reject it as a ground of objection.

Conclusion
I am satisfied that the person before the Court is the person in respect of whom the European arrest warrant has been issued. No issue is raised in any event in that regard. I am satisfied that the offence of which he was convicted corresponds to an offence in this jurisdiction, and is of the required gravity. I am also satisfied that what is stated in the warrant in relation to the respondent's

right to a re-trial is sufficient to comply with the concept of an undertaking referred to in s. 45 of the Act, as amended. I am further satisfied that there is nothing in sections 21A, 22, 23, or 24 of the Act to require refusal of surrender, and also that his surrender is not prohibited under Part III or the Framework Decision. Being satisfied of these matters, the Court is required to order surrender pursuant to s. 16(1) of the Act and the Court so orders.