Neutral Citation Number: [2007] IEHC 35

THE HIGH COURT

Record Number: 2006 No. 120 Ext.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

ROGER MICHAEL GARDENER

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 6th day of February 2007

The surrender of the respondent is sought so that he can be prosecuted for offences of rape and indecent assault alleged to have been committed between 25th October 1987 and 26th October 1989, as well as two further offences of acting so as to pervert the course of justice between the 7th August 2000 and 9th September 2000, and of conspiracy to commit arson between the 7th August 2000 and the 18th August 2000.

The European arrest warrant on foot of which his surrender is sought issued on the 18th August 2006. It was endorsed for execution here by order of the High Court dated 19th September 2006, and the respondent was arrested thereafter on the 4th October 2006, following which on the 5th October 2006 he was brought before the High Court as required, whereupon he was remanded in custody from time to time until this application was heard on the 24th January 2007.

No issue is raised as to the identity of the respondent, and the Court is in any event satisfied from the affidavit of the arresting officer, Garda Anthony Linehan that the person before the Court is the person in respect of which the European arrest warrant has been issued.

It is also not contested that the offences of which the respondent is charged in England correspond to offences in this State. In any event the Court is satisfied in that regard the acts set forth in the warrant would give rise to the offences here of rape, and sexual assault, as well as attempting to pervert the course of justice contrary to Common Law, and of arson contrary to s. 2 of the Criminal Damage Act, 1991. The minimum gravity requirement in respect of all of these offences is satisfied. Since no trial has yet occurred, no undertaking is required under s. 45 of the European Arrest Warrant Act, 2003, as amended. I am satisfied that there is no reason under sections 21A, 22, 23 or 24 of the Act to refuse surrender, and, subject to dealing with two submissions made by Ronan Munro BL on the respondent's behalf, that the surrender of the respondent is not prohibited under Part III of the Act or the Framework Decision. Subject to addressing those submissions, the Court is satisfied that an order of surrender must be made.

Respondent's objections to surrender

1. Delay

The respondent has sworn no affidavit in support of his contention that the passage of time since the date of these alleged offences is so long that he cannot receive a fair trial or a trial within a reasonable time. He has submitted no particular manner in which his ability to defend himself against these charges has been prejudiced. He relies on a presumed prejudice resulting from the length of the delay in seeking his surrender, and emphasises that there has been no explanation for the delay which has happened.

The domestic warrant on foot of which the European arrest warrant was issued is stated to be dated 11th August 2006, but it appears clear that the first occasion on which the Court issued a bench warrant due to the absence of the respondent was on the 4th June 2001. The allegations of delay relate only to the offences of rape and indecent assault, and not to the charge of arson and attempting to pervert the course of justice.

In aid of his submissions, Mr Munro refers also to the lack of specificity in the charges as set forth in the warrant, and he submits that this compounds the difficulties presented by the delay itself, since the respondent does not know precisely when these offences are supposed to have happened, since the warrant refers to them occurring between dates 25th October 1987 and 26th October 1989. He also states that the authorities clearly knew since 2001 that the respondent was in this country, since there is a statement within the warrant itself to this effect. He submits that where the complainant herself delayed in reporting these offences to the police, those police were under an even greater obligation to proceed without further delay to seek surrender and prosecute the offences. He submits that the test to be applied is whether there is a real risk of an unfair trial. But he does not accept that establishing actual prejudice is a pre-requisite to a finding such a real risk, and that the recent case-law, such as *PM v. DPP* [2006] 2 ILRM 361, and *H. v. DPP*, unreported, Supreme Court, 31st July 2006 do not preclude a finding of presumed prejudice in the absence of actual prejudice being identified. He submits that all the circumstances of the case must be considered, but concedes that all the circumstances includes the fact that no actual prejudice has been identified and established by the respondent.

The Court is satisfied first of all that the only delay which ought to be even considered in this case is blameworthy prosecutorial delay. While there has been complainant delay, there has been no evidence provided by the respondent to attempt to establish a real risk that he would not obtain a fair trial, as would be required under the test to be applied in such cases arising from the judgment of the Chief Justice in *H v. DPP* [supra]. In relation to prosecutorial delay, Mr Munro has submitted that prejudice is not an absolute requirement and that prejudice may still be presumed in such a case, even in the absence of any evidence by the respondent of actual prejudice. I cannot agree with such a benign view. The judgment most helpful to the question of prosecutorial delay is that of Kearns J. in *PM v. DPP* [supra]. He has stated by way of conclusion at p.373 of his judgment:

> "In conclusion, however, on this issue, I am satisfied that where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief."

Those interests are those identified by Powell J. speaking for a unanimous United States Supreme Court in *Barker v. Wingo* 407 U.S. 514, (1972), namely the right to prevent oppressive pre-trial incarceration, the right to minimize anxiety and concern to the accused, and finally the right to limit the possibility that the defence will be impaired. It is important to note that it is the applicant who must establish first of all the blameworthy delay by the prosecutor, and also that one of these rights has been interfered with. Without any evidence by the respondent in this case, the respondent cannot have discharged the onus upon him, and the Court cannot but find that the point of objection fails.

Mr Munro also submits that this Court should exercise its powers under s. 20 of the Act to itself seek out from the requesting state the reasons why these delays took place, since otherwise this Court cannot analyse the delay and arrive at conclusions as to its

impact on the respondent's rights to a fair and expeditious trial. But I cannot accept this proposition. The respondent must discharge the onus upon him in relation to an objection on grounds of delay.

2. Adverse publicity
Mr Munro stated that this was not a ground of objection by itself, but should be added into the scales when the balancing exercise was being undertaken by the Court in relation to whether the balance of justice between the respondent's right to an expeditious trial, and that of society in having serious crime prosecuted. Since I have concluded that the absence of evidence precludes the Court from even entering upon that balancing exercise, there is little point in looking at the fairly modest amount of newspaper coverage some years ago which was exhibited by the respondent in an affidavit sworn earlier in these proceedings in support of an unsuccessful application for discovery. However, for completion sake, I should say that this reportage and material is nowhere near the sort of material which could give rise to the ort of prejudice which might be considered. Given the fact that it dates back in any event almost four years, a fade factor will already have occurred in order to remove any real risk of unfairness or a prejudiced jury.

I am satisfied that all the requirements of the Act and the Framework Decision are fulfilled, so that the Court is required to make the order sought herein. I therefore make the order sought.