

THE HIGH COURT

Record Number: 2006 No. 64 Ext

BETWEEN

THE ATTORNEY GENERAL

APPLICANT

**AND
M. P. Q.**

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 13th day of December 2006

1. This is an application for the extradition of the respondent to Jersey, Channel Islands under Part II of the Extradition Act, 1965, as amended ("the Act"). He is wanted by that jurisdiction to face a charge of rape alleged to have been committed in 2004. The alleged victim is a lady with whom the respondent had a consensual relationship for some time, and which is alleged to have been ended by her some thirty six hours prior to the alleged offence.

2. The applicant has in May 2006 received a Request for extradition dated May 2005 from the British Embassy.

3. As required by s. 26 of the Act the Minister, following receipt of the said Request, has certified that such a Request had been made. That Certificate is dated June 2006.

4. Thereafter, as provided for in s. 26(1)(b) of the Act, an application was made for a Warrant for the arrest of the respondent who was known to be living and working in this State under an assumed name. That Warrant duly issued, and on the 3rd July 2006 the respondent was arrested in Co. Cork by Sgt. A. L. of Crime Branch, Garda Headquarters, Dublin, following which the respondent was brought before the High Court. He was remanded on bail from time to time pending the hearing of the present application under s. 29 of the Act.

5. No issue arises as to the designation of Jersey for the purpose of Part II of the Act. Neither is there any issue or controversy about the respondent being the person in respect of which the Request for extradition has been received.

6. Giollaíosa Ó Lideadha SC raises four issues by way of objection. Briefly stated these are as follows:

1. That the Request for extradition which the Minister has certified that he has received from Jersey is not a Request which has been "communicated by a diplomatic agent" to the Minister in accordance with the provisions of s. 23 of the Act set out below, and that the extradition has not been "duly requested" for the purposes of s. 29(1) of the Act.

2. That the affidavits supporting the Request for extradition have not been properly sworn, there being no evidence that the Notary Public before whom they have been sworn is a person authorised to administer oaths in Jersey.

3. That the domestic warrant is dated 22nd December 2004 and that there is no evidence that same is still within the meaning of a warrant of arrest "immediately enforceable" and therefore fails to satisfy the requirement of s. 25(1)(a) of the Act.

4. That the respondent is prejudiced by the delay of the prosecution in Jersey in seeking his extradition.

7. I shall deal with these issues in the above order:

1. That the Request for extradition which the Minister has certified that he has received from Jersey is not a Request which has been "communicated by a diplomatic agent" to the Minister in accordance with the provisions of s. 23 of the Act set out below, and that the extradition has not been "duly requested" for the purposes of s. 29(1) of the Act.

Section 29 of the Act provides for the circumstances in which the High Court may make an order for the committal of the requested person to a prison "*there to await the order of the Minister for his extradition.*" That section provides:

"29. (1) *Where a person is before the High Court under section 26 or 27 and the Court is satisfied that –*

(a) the extradition of that person has been duly requested, and

(b) this Part applies in relation to the requesting country, and

(c) extradition of the person claimed is not prohibited by this part or by the relevant extradition provisions, and

(d) the documents required to support a request for extradition under section 25 have been produced,

the Court shall make an order committing that person to a prison (or, if he is not more than twenty-one years of age, to a remand institution) there to await the order of the Minister for his extradition."(my emphasis)

Section 23 of the Act provides:

"23.—*A request for the extradition of any person shall be made in writing and shall be communicated by –*

(a) a diplomatic agent of the requesting country, accredited to the State, or

(b) by any other means provided in the relevant extradition provisions."

(my emphasis)

"The term "diplomatic agent" is defined in s. 3 as meaning "an *ambassador extraordinary* and plenipotentiary, envoy extraordinary and minister plenipotentiary or *chargé d'affaires*". (my emphasis)

Mr Ó Lideadha on behalf of the respondent submits that in this case the "request" for extradition was not communicated by the British "ambassador" but from "The British Embassy". There is a seal of the embassy on the request, but nowhere is there any reference to or signature by the ambassador or any other person who might come within the definition of "diplomatic agent" in s. 23 aforesaid. In the respondent's submission, the consequence of this error is that, contrary to the requirement in s. 29(1)(a) of the Act, the Court cannot be satisfied that the Request for extradition "*has been duly requested*", and that the Minister's Certificate dated 21st June 2006 is not correct when it states that he has "received a request duly made by Jersey in accordance with Part II of the Extradition Act, 1965".

It is of course important to refer to the rebuttable presumption contained in s. 26 (5) of the Act (as inserted by s. 7 of the Extradition (Amendment) Act, 1994, which provides as follows:

26. -- (5) A person arrested under a warrant issued under this section shall be brought as soon as may be before a judge of the High Court.

(6) Where a person has been arrested under a warrant issued under this section, then, in any proceedings it shall be presumed, unless the contrary is proved, that a request for the extradition of the person has been duly made and has been duly received by the Minister." (my emphasis)

The Minister's Certificate states that he has received a request "duly made by Jersey..." which has been "duly communicated by the Embassy of the United Kingdom ...".

Mr Ó Lideadha submits that the statute being a penal statute must be strictly construed, and interpreted by means of the plain and ordinary meaning of the words used by the legislature in order to give expression to its intention. That meaning in his submission is perfectly clear, and that it is required by Part II of the Act that a request be communicated to the Minister not by "the Embassy" but by the ambassador himself/herself or some other person who comes within the definition of a "diplomatic agent" as defined by s. 3 of the Act, and that "The Embassy" is not a person and cannot possibly come within the definition.

Patrick McGrath BL for the applicant submits that the wording of the presumption is clear, and that no evidence has been adduced by the respondent to rebut the presumption that the request has been duly received, and therefore the contrary has not "been proved".

In *O'Rourke v. Governor of Cloverhill Prison*, unreported, Supreme Court, 13th May 2004, Denham J. considered the meaning to be given to the word "produced" as appearing in s. 50 of the European Arrest Warrant Act, 2003, being a transitional provision in respect of warrants issued prior to the coming into force of that Act. The section required that such a warrant must have been "produced" to the Commissioner of An Garda Síochána for endorsement before the 1st January 2004. The evidence in the case was that the warrant was received in the office of the Commissioner before that date but that same had not been actually endorsed by him until the 3rd January 2004. The decision hinged on the meaning to be given to the word "produced", that word not being specifically defined in the Act.

In her judgment, Denham J. relied upon the dictionary definition of the word and that this meaning meant that the warrant must have been brought forward to the Commissioner for his consideration, and that it would be going too far to say that it had been produced to the Commissioner by it having been received by somebody in his office. She stated:

"Thus the plain words of the section require that the production be to the person designated. This is consistent with the importance of the duty of considering the warrant for endorsement as to whether a person be delivered out of the jurisdiction."

She continued:

"There was no evidence that the warrants were produced to the Commissioner, or any of the persons who, under the Act of 1965, are designated persons, to carry out the function described in s. 43, prior to 1st January, 2004. The evidence was that the warrants had been received in the Extradition Unit in Garda Headquarters. Essentially, the court was requested to infer that there had been "production" of the warrants. However, only the designated persons are enabled to carry out the functions set out in s. 43 and there was no evidence of even receipt by those persons in 2003. Whatever about considering inferring receipt by designated persons in such circumstances, the court must address the issue of "production" for the purposes of s. 43 of the Act of 1965. Receipt of the warrants by non-designated persons is so far removed from the concept of production of the warrants to a designated person that I am satisfied it may not be inferred. It would be a step too far from the clear words of the statute."

By analogy, it can be said that the communication of the request by "the embassy" is so far removed from the concept of communication by the person designated by the section, that it may not be inferred and would be a step too far.

It seems clear that where the letter from "The Embassy" makes no reference to it being from the ambassador, or any of the other potential appropriate persons in the embassy, it is necessary to conclude by a strict interpretation and by reference to the plain and ordinary meaning to be given to the words used in the section, that there has not been compliance with the requirement regarding the communication of the request to the Minister. Section 23(a) specifies clearly by whom the request is to be communicated, and this has not been done. Regarding the presumption, it is a rebuttable presumption. If the respondent can prove the contrary to the presumption, he may do so. Mr McGrath has submitted that no evidence has been adduced and that therefore the presumption has not been rebutted. In my view the documents produced by the applicant, not the respondent, make the position so clear that no further proof is required. The presumption is rebutted by the document itself on its face. I suggest that the only evidence possible would be for the respondent to ask the British ambassador to swear an affidavit to the effect that he/she did not sign the note dated May 2005 and the note dated May 2006. In my view that is an unreasonable burden to impose upon the respondent in order to rebut the presumption, where the face of the document makes the position clear. It is not to reverse the presumption and turn it into a presumption the other way.

2. That affidavits supporting the Request for extradition have not been properly sworn, there being no evidence that the Notary Public before whom they have been sworn is a person authorised to administer oaths in Jersey.

Section 7B. – (1) In proceedings under this Act, evidence as to any matter to which such proceedings relate may be

given by affidavit or by a statement in writing that purports to have been sworn –

(a) by the deponent in a place other than the State, and

(b) in the presence of a person duly authorised under the law of the place concerned to attest to the swearing of such a statement by a deponent, howsoever such a statement is described under the law of that place.

(2) ”

The affidavits referred to contain a jurat at the end thereof which states that the affidavit has been “sworn” in Jersey before a “Steven Charles Kilvington Pallot” and there is a red seal attached which bears his name and the words “Notary Public”. The point made by the respondent is that nowhere is it stated that Mr Pallot is authorised to “*attest to the swearing of such a statement by a deponent, howsoever such a statement is described under the law of that place.*” The powers of a Notary Public are not set forth. However, it is important to note that these two affidavits are part of a bound bundle of documents making up the request from the Attorney General of Jersey. That bundle of documents is bound together with pink ribbon and bears on the front page thereof the Seal of the Attorney general of Jersey.

Of relevance to that submission are the provisions of section 37 of the Act (inserted by s. 17 of the Extradition (European Union Conventions) Act, 2001) as follows:

“37.—(1) In proceedings to which this Part applies, a document supporting a request for extradition from a requesting country (other than a Convention country) shall be received in evidence without further proof if it purports—

(a) to be signed by a judge, magistrate or officer of the requesting country, and

(b) to be certified by being sealed with the seal of a minister of state, ministry, department of state or such other person as performs in that country functions the same as or similar to those performed by the Minister under this Act, as may be appropriate, and judicial notice shall be taken of such seal.

(2) ...

(3) ... ” (my emphasis)

In my view, the bundle of documents bound together with ribbon and bearing the seal of the Attorney General in Jersey contains the documentation in support of the request. That bundle conforms with the requirements of section 37. It is signed by “an officer” namely the Attorney General, and bears his seal. No further proof is required.

Even if I am wrong about that matter, I would not be prepared to hold that the Court requires proof that an affidavit can be sworn in Jersey before a Notary Public. A notary public is a position so widely known and recognised, certainly in legal circles, that this Court is entitled to take judicial notice of the fact that the person before whom these two affidavits have been sworn in Jersey is a person empowered to administer oaths.

3. That the domestic warrant is dated December 2004 and that there is no evidence that same is still within the meaning of a warrant of arrest “immediately enforceable” and therefore fails to satisfy the requirement of s. 25(1)(a) of the Act.

The respondent submits also that there is nothing amongst the documentation supplied to support this request that the warrant issued in Jersey for the arrest of the respondent is “immediately enforceable” and issued in accordance with the laws of the requesting country as required by s. 25(1) of the Act. Mr O Lideadha submits that when the Minister certified that the request had been made in accordance with the statute, he would need to have had before him some evidence that the warrant issued in Jersey in December 2004 was still enforceable after so long, so that it was a warrant “immediately enforceable” as required by the terms of s. 25 of the Act.

Section 25 (1) provides:

(1) (a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or, as the case may be, of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting country;

(b) a statement of each offence for which extradition is requested specifying, as accurately as possible, the time and place of commission, its legal description and a reference to the relevant provisions of the law of the requesting country;

(c) a copy of the relevant enactments of the requesting country or, where this is not possible, a statement of the relevant law;

(d) as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality, and

(e) any other document required under the relevant extradition provisions.”

(my emphasis)

McGrath on the other hand submits that in extradition matters the Court should operate on the basis that Jersey acts in good faith, and that the Court is entitled to presume that the warrant on foot of which the extradition of the respondent is requested is lawful and therefore still extant as far as being immediately enforceable is concerned. He points to the fact that the respondent has produced no evidence to the contrary and until that is done this Court should proceed on the basis suggested. I agree. This ground of objection must fail.

4. That the respondent is prejudiced by the delay of the prosecution in Jersey in seeking his extradition.

respondent's affidavit states that he moved to Jersey in March 2003 and that in March 2004 (mistakenly stated in para. 4 of his affidavit as 2003) he was arrested and interviewed by the police and detained for questioning about a suspected rape of the named victim. He says that he made a formal statement in which he admitted having consensual sexual intercourse with the complainant and was released without charge. He says that he was not told by the police that he was going to be charged with any offence, and that he was not told that he could not leave Jersey. He returned to Ireland some days later and resided in Co. Cork, and he says that he immediately told Sergeant G. that he had returned to Ireland and where he was residing.

states that from March 2004 until the July 2006 when he was arrested his whereabouts were known or easily ascertainable by the police in Jersey and the Gardai here.

He says that he was "seriously affected by the allegations of rape" and that it was continually on his mind when he returned to this country. It goes on to state that after "a period of time" he felt that it was "reasonable to conclude that a decision had been made not to proceed with the matter". He submits that by being extradited at this stage he will be denied a right to a speedy trial, and that he has been prejudiced by the delay in that his capacity to defend himself has been irreparably diminished.

A chronology of events is as follows. The offence is alleged to have been committed in March 2004, and the respondent was interviewed shortly thereafter. He left almost immediately thereafter and came back to Ireland where he is from. The Jersey police commenced their investigation, including by obtaining DNA analysis of samples and a copy of the respondent's DNA profile. The DNA analysis is dated November 2004. The Opinion of lawyers was obtained by the prosecution in September 2004 and it was concluded that there was sufficient evidence to warrant charging the respondent with rape. A warrant was obtained in December 2004. Mr C.E. W. of the Attorney General's office in Jersey, and Det. C. H. both swore affidavits to support the request for extradition in January 2005, and May 2005 the first Diplomatic Note was delivered by the British Embassy in Dublin to the Minister for Foreign Affairs. The Request itself by the Attorney General of Jersey is dated May 2005. This is about thirteen months after the date of the alleged offence. It appears that further information was sought by that Minister following the receipt of the note, and that information was furnished some twelve months later by further diplomatic note dated 23rd May 2006 in the form of a further affidavit of Mr W. sworn on the 5th May 2006.

Thereafter the Minister for Justice, Equality and Law Reform certified receipt of the request in June 2006, followed by the issue of the warrant for the arrest here of the respondent and his arrest on foot of same in July 2006.

The only delay of any significance is the delay between the request for further information by the Minister for Foreign Affairs and its receipt on the 23rd May 2006. The total of that period is twelve months. It is reasonable to allow some time in any event for the provision of the information sought. Perhaps this could have been attended to more speedily. The Court does not know what, if any, particular difficulty arise. But in any event the delay cannot be regarded as lengthy, and even if the trial of the respondent were to take place even twelve months from today, the time since the date of the alleged offence would not be that unusual, and in the absence of any evidence as to real prejudice to the respondent, this Court cannot conclude that there is a real risk that any trial of the respondent would be unfair.

The anxiety which the respondent states that he suffered, and his discovery that his expectation that the matter was not being proceeded with was unfounded, cannot be regarded as a sufficient prejudice in the circumstances of this case. There is nothing exceptional about these factors. The authorities in Jersey are entitled to prosecute offences, and this Court would refuse to extradite the respondent only in exceptional circumstances on the basis of unexplained delay, and where actual prejudice is demonstrated. There are no exceptional circumstances such as were found by me to exist in *Minister for Justice, Equality and Law Reform v. SR*, unreported, 15th November 2005, and *Minister for Justice, Equality and Law Reform v. Stapleton*, unreported, High Court, 21st February 2006.

I order the release of the respondent for the reason that I am not satisfied that the provisions of s. 23 of the Act have been strictly complied with, and the extradition of the respondent has not therefore been "duly requested" for the purposes of s. 29(1)(a) of the Act.