Neutral Citation Number: [2010] IEHC 205

THE HIGH COURT

2009 57 Ext

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Patrick Murtagh

Respondent

Judgment of Mr Justice Michael Peart delivered on the 26th day of February 2010:

The surrender of the respondent is sought by a judicial authority in Northern Ireland on foot of the European arrest warrant which issued the on the 10th February 2009. That warrant was endorsed here for execution by on 4th March 2009, and the respondent was duly arrested on foot of same on 13 October 2009 and brought before the High Court on the 14th October 2009, from where he has been remanded from time to time pending the hearing of the present application for his surrender.

There is no issue raised as to the identity of the respondent, but I am satisfied in any event from the affidavit evidence of the arresting Garda Officer, Sgt. James Kirwan that the person who he arrested on the 13th October 2009 on foot of this warrant, is the person in respect of the same has been issued.

The surrender of the respondent is sought so that he can be prosecuted in Northern Ireland in respect of two offences of rape which are alleged to have occurred in 1979.

The complainant in relation to each of those offences first made her statement to the police in 2002 and the respondent was interviewed in 2003. He was later arraigned and sent forward for trial. But in due course on 19th September 2005, as he had not appeared before the Crown Court for his trial, a warrant was issued for his arrest. In due course, I will come back to the issue of delay which is raised as a ground of objection to the present application.

The two offences of rape referred to in this warrant have been marked as being offences within the categories of offence listed in Article 2.2 of the Framework Decision, and, as such, are offences in respect of which double criminality or correspondence is not required to be verified. Each offence satisfies the minimum gravity requirement.

I am satisfied that there is no reason to refuse to order his surrender pursuant to the provisions of sections 21 A, 22, 23 or 24 of the Act, and I am further satisfied, subject to reaching a conclusion in relation to the issue of delay, that his surrender is not prohibited by any provision of Part III of the Act or the Framework Decision.

Delay:
As I have already stated, the respondent refers to the fact that these offences are alleged to have been committed in 1979, at which stage the complainant was aged 15 years. The affidavit filed by the respondent has referred to the fact that the complainant first made a statement on 12th September 2002, and this fact is referred to also in the warrant itself. The respondent states that in March 2003 he was interviewed by the police and that on 3rd November 2004, he appeared at a magistrates' court and was committed to the Crown Court for trial on the two counts of rape. He goes on to say that on 14th December 2004 he was arraigned at Craigavon Crown Court, and then he states as follows:

> "Approximately 10 days before the trial was due to be heard, I was informed by my solicitor that the Counsel who were representing me had become tied up in a trial and would be unable to appear on my behalf on 19`h September 2005. My wife and I were extremely concerned by this. My solicitor advised me to discharge him and he appeared before His Honour Judge Markey QC on 13th September 2005 to inform him of the position. I say and am advised that the judge then listed my case for mention only on 19`h September 2005, rather than for trial. As it was for mention only, 1 did not think that I had to attend at court. "

The respondent refers to a letter dated 13th September 2005 from his solicitor in which his solicitor states the following:

> *We refer to the above matter and to writer's telephone conversation with your good self of yesterday.*
>
> *In light of the contents thereof writer appeared in front of His Honour Judge Markey QC and advised him of the position hearing. Writer explained to the judge that each of your instructed Counsel had had to withdraw from this case due to other legal commitments. Writer further explained that we had instructed further Junior and Senior*

Counsel and indeed was attempting to arrange for a consultation between them and your good self when you objected to such a course of action.

Writer would advise that the judge was not on sympathetic to your position and asked if

1. It was still your intention to attend court and

2. If so, would you have alternative solicitors instructed in the interim period.

Writer advised the judge that he was unsure of the intentions of your good self and accordingly, he requested that I make immediate communication with you to confirm that your case will be listed for mention only on Monday next and that it would be in your best interests to attend.

The judge intimated that in the event of you not being legally represented that the case could not proceed, but that he would advise you as to the next step you ought to take. I believe that he will be advising you along the same lines that I have. Obviously, it would be in your best interest to have an alternative firm of solicitors instructed, as you are no longer availing of our services, but this is a matter entirely for your good self. "

Having referred to this letter in his grounding affidavit, the respondent states that he heard nothing more about the charges against him until 13th October 2009 when he was informed that a European arrest warrant had issued against him. He states that he believes that at all times from 2003 onwards, the police authorities in Northern Ireland were aware that he resided at an address in this jurisdiction and that he has resided at that address, which is his home, with his wife for the past 10 years.

It has been submitted before this court that in circumstances where he received the letter to which I have referred, he was entitled to take the view that as the case was listed only for mention on 19th September 2005, rather than for trial, his attendance at court on that stage was not required. This submission is made in support of a contention that he has not been responsible in any way for the delay which occurred or for the fact that a bench warrant was issued for his arrest. He submits that a reasonable understanding or interpretation of the letter which he received from his alleged solicitor is that his attendance at court on that occasion was not required and that therefore he is innocent in relation to any subsequent delay which has occurred.

The prejudice which is submitted to have resulted from the complainant delay in this case from 1979 is, according to paragraph 8 of his grounding affidavit, that the husband of the complainant (who was not married at the time of the alleged offences) and to whom the complainant has stated she told of her allegations in about 1986/1987, died on 9 April 2004. The respondent is submitting that he cannot now receive a fair trial in circumstances where the complainant's husband is not available as a witness who could be called by him, or at least cross-examined if he were a prosecution witness. It is submitted that his death in 2004 has deprived the respondent of the opportunity of either using the evidence from that person, or at least that such evidence by way of cross-examination may produce a denial that the complainant (his wife) informed him of these allegations in 1986 or 1987.

That is the only prejudice asserted in the present case.

First of all it is submitted that the delay is a very lengthy delay and that it is unexplained delay and that no attempt has been made to explain it. Secondly, it is submitted that the respondent has not been in any way responsible for the delay which has occurred. Thirdly it is submitted that he has suffered prejudice as a result of that delay in the manner which I have described.

I am not satisfied that the prejudice alleged to exist can possibly be regarded as amounting to a real risk that, if surrendered, he will not receive a fair trial. Certainly it is not a basis for refusing to order his surrender. First of all it seems from the perspective of this jurisdiction that the evidence which may be given that such a statement was made by the complainant to her husband seven or so years after the alleged offence would be very arguably inadmissible in the first place, since it is not a complaint made at the earliest moment after the alleged offence, and that therefore its probative value, such as it is, would be easily outweighed by its prejudicial value, and could be excluded by the trial judge. Secondly, in the book of evidence which has been exhibited by the respondent it appears that a similar late complaint was made by the complainant to two other persons, albeit that these were five years and 10 years post-alleged offence.. and that these also would be at risk of being excluded for the same reason. It does not appear that there is any reasonably contemporaneous complaint to any person.

If there is any reality to the assertion by the respondent that he has suffered prejudice as a result of the death of the complainant's husband in April 2004, the respondent can deal with it before the trial judge or presumably by way of application to prohibit his trial. It is also the case that this death had occurred even before the date for his trial which was due to take place in September 2005. The question of prejudice had already arisen by that time, and the trial judge would have had to deal with that issue if the respondent raised it at trial. The respondent is in no worse a position now than he would have been in September 2005.

In view of this conclusion I express no view on the length of the delay itself, or the reasons for it, or the significance if any of the assertion that the respondent has not been responsible for any part of it. Neither do I express a view one way or the other as to whether this is a case which falls within any window of opportunity for arguing delay points which is submitted on behalf of the respondent to still exist following the judgment of Denham J. in *Minister for Justice, Equality and Law Reform v. Hall* , Supreme Court, 7th May 2009. Whatever capacity may still remain to argue delay in an exceptional case must surely still require that some prejudice amounting to a real risk of an unfair trial be firmly established by clear, cogent and compelling evidence. In the present case the alleged prejudice is not in that category. In fact it is weak and entirely speculative, and in any event there is no evidence that there is no remedy available to the respondent in the requesting state.

For these reasons I am satisfied that the order for surrender must be made, and I will so order.