Neutral Citation Number: [2010] IEHC 468

THE HIGH COURT

[2010 No. 231 Ext]

Between:

The Minister for Justice, Equality and Law Reform

Applicant

And

Noel McPhillips

Respondent

Judgment of Mr Justice Michael Peart delivered on the 14th day of December 2010:

The surrender of the respondent is sought by a judicial authority in Belgium on foot of a European arrest warrant which issued there on the 8th February 2008 in respect of 16 offences which are set forth in the warrant. This warrant was endorsed for execution here on the 2nd June 2010, and he was arrested on foot of same on the 18th June 2010 and brought before the High Court on the following day, 19th June 2010. He has been remanded on bail from time to time pending the determination of the present application for surrender.

The opening paragraph at the top of this warrant states that surrender is requested "for the purposes of executing a custodial sentence". However, it is clear from the remainder of the warrant that this is not a case where the respondent has been convicted, let alone sentenced, and that in fact his surrender is sought so that he can be prosecuted in respect of these offences, though the respondent argues that in fact no decision has been made to prosecute him and that the purpose of seeking his surrender is so that he can be interrogated.

Tony McGillicuddy BL for the applicant submits that a commonsense approach should be taken by ignoring what is obviously an error in preparing the warrant, especially where it is clear from the remainder of the warrant that it is for the purposes of prosecution. However, no clarification or correction of this error has been sought or provided on this application. As it happens, no issue was raised by the respondent in relation to this error in the heading of the warrant in the Points of Objection or Supplemental Points of Objection which have been filed in this case, except that there is a general point raised, as I will come to, that the warrant is lacking in detail as regards the respondent, and does not fulfil the requirements of section 11 of the Act of 2003, and that accordingly the respondent should not be surrendered on foot of it.

No issue arises as to the identity of the respondent, but I am satisfied in any event from the Affidavit of Garda Paul Fee that the person who he arrested on the 18th June 2010 and brought before the Court on the following day is the person in respect of whom this warrant has been issued.

Points of Objection:
A number of objections are raised by the respondent and in respect of which Michael Forde SC has made submissions. These can be summarised in the following way:

1. The warrant does not adequately specify the domestic decision on foot of which the European arrest warrant has been issued.

2. The warrant does not disclose that a decision to prosecute the respondent has been made, and that it appears to indicate that his surrender is sought for the purpose of interrogation. In that regard, it is submitted that the presumption under section 21A of the Act of 2003 that a decision to prosecute has been made is rebutted by the contents of letters dated 26th May 2008 and 24th March 2010 from the issuing judicial authority.

3. The warrant generally fails to conform to the requirements of section 11 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") as to the contents of same, and specifically, in that it does not adequately disclose:

   (a) the degree of participation of the respondent in the offences

   (b) any adequate link between the respondent and the offences

   (c) the penalties which may be imposed upon conviction.

4. Two of the offences do not correspond – namely that of "concealment of a crane and tractor" and "forming a gang".

5. Delay

6. The issuing judicial authority (i.e. an examining magistrate) is not "an independent and impartial tribunal" within the meaning of Article 6 of the Convention, as the Framework Decision is subject to "fundamental legal principles" one of which is that the judiciary must be independent of the executive.

7. The discretionary nature of the Attorney General's Scheme renders it impossible for the respondent to engage the services of a Belgian lawyer in order to rebut the presumption that in this case a decision has been made to prosecute the respondent in relation to the offences and the presumption in section 4A of the Act of 2003

8. The Attorney General Scheme, not being a statutory scheme, cannot be regarded as fulfilling the provisions of Article 11.2 of the Framework Decision which provides that *"A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State*.".

Before addressing these points of objection I will set out the details of the offences as gleaned from the warrant and also some further information contained in the letters already referred to, as this will be relevant to some of the issues raised.

The offences:
The first two offences are described in the warrant as being:

1. Concealment of a crane truck and a tractor in Knokke-Heist on 02.04.2007 (in violation of section 505 of the Code of Criminal Law).

2. Forming of a gang, in Knokke-Heist and with connexion (sic) elsewhere in the Kingdom during a not further specified non prescribed period (in violation of sections 322, 323.2 and 324 of the Code of Criminal Law).

There then follow 14 separate offences described as "theft" of various trailers, tractors, a truck, a wheel loader and a "bottom discharge tank" on different dates and from different places in Belgium. In relation to all of these thefts there are brief details as to dates and place and the owners of the various items. The description of the offences in almost all instances refers to the items being "stolen".

No issue as to correspondence has been raised by the respondent in relation to these theft offences, and I am satisfied that there is sufficient for the purpose of correspondence to establish that they correspond to offences of theft under section 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001").

But an issue is raised in relation to the first two offences shown above, and Mr McGillicuddy submits that paragraph (e) of the warrant must be read when considering correspondence in respect of these offences, as it provides a background against which these offences must be viewed, and it is submitted that this makes it clear that all offences were committed by the coming together of the four named persons for the purpose of committing crimes and that, especially in relation to the offence of forming a gang this information is sufficient to bring that offence into correspondence with an offence here contrary to section 71 of the Criminal Justice Act, 2006, and it is submitted also that the fact that the offences were committed outside the jurisdiction of this State does not take them outside the candidate offences for correspondence. I shall deal with the correspondence in more detail in due course.

Paragraph (e) of the warrant:
I will set this out in full, as translated:

"The investigation has revealed until today that besides those vehicles, he stole other agricultural implement as well. In the apartment in Zeebrugge where he stayed for a few months, indications have been found, namely notes containing frame numbers of agricultural implement. Continued investigations revealed namely that all of those numbers were connected to thefts of such vehicles in the Netherlands as well as in Germany and Belgium.

The investigation and the interrogation of the witnesses have also made clear that MacPhilips Damien was not alone; he stayed in the apartment in Zeebrugge with Peachy Robert. They were both employed at transport company CJ International in Knokke-Heist for a whole period in 2005 and 2006.

Before moving to Zeebrugge, they stayed together in a camping in Groede in the Netherlands. In that area further thefts of such agricultural implement were committed.

After the arrest of McPhillips Damien, Peachy tried to reach him several times by phone, but in vain. A few days later, on 18.04.2007 he disappeared from the Belgian telephone network.

A European warrant for arrest was issued and Peachey was arrested in Germany and in the meantime put under warrant for arrest in Belgium.

Both suspects are still in pre-trial detention.

The telephone inquiry revealed that shortly after the several thefts the telephone of Peachey did not appear any longer on the telephone network in Belgium but in France. It was therefore assumed that the persons concerned had had the stolen vehicles disappear through France.

In order to have an oversight over the places in France where he was staying shortly after the several thefts a telephone inquiry was requested to the French authorities.

Based on the analysis of the telephone inquiry in Belgium and the pylon searches in France on the mobile phone number 0494/425937 of Robert Peachey, this mobile phone number appeared on several dates in the reach of the mobile phone pylons in Cherbourg (France) or in the near vicinity and in the reach of the mobile phone pylons on the way to the harbour.

It was also made clear that the suspects, after the thefts in Belgium and the Netherlands, had gone to the harbour of Cherbourg from where the stolen trailers and yard vehicles were probably shipped.

Through a letter of request it was made clear by the "Direction Zonale Ouest de la Police aux Frontieres" (Local Board of the border police) in Cherbourg that several goods were shipped through the Cherbourg harbour to Ireland via ferry companies Celtic Link and Irish Ferries. The shipping orders were given by company Victor Tracy International in Ireland. The shipments can be linked to the thefts as mentioned in this European Warrant for Arrest.

The principals for the shipments of the vehicles appear, according to the information received through the letter of request in Cherbourg, to be Mr McPhillips Haulage – Noel, Killyliffer, Roslea, Co. Fermanagh'; **McGingley Haulage – Gerry or McGinley Leon, Ramooney, Manorhamilton, Co. Leitrim**.

The investigation as to the final destination of the goods and the involvement of those persons is continued in Ireland.

Requests for legal assistance are being sent to the authorities in the Republic of Ireland and the authorities in Northern Ireland through the Home Office in London as Noel McPhillips runs a haulage company in Killyliffer and he is likely to be found there." *(my emphasis)*

It will be immediately obvious from this lengthy account of the offences that there is barely a mention of the respondent, and I have highlighted the only passage in which there is such a reference in the warrant.

Additional information provided:
As I have already mentioned, the issuing judicial authority has provided further information in two letters dated respectively 26th May 2008 and 24th March 2010.

The letter dated 26th May 2008 provides some further material in relation to the respondent's participation as follows:

"Concerning the participation of Noel McPhillips and Gerry McGinley to theft, receiving, the result of the investigation indicates that they gave the order, operating from the Republic of Ireland or from Northern Ireland. They are therefore considered to be gang members, probably even the organisers of thefts committed on the European mainland by others (a.o. McPhillips Damien and Peachy Robert). They are probably not involved in the thefts themselves.

……..

The organisation and planning of the thefts by McPhillips and McGinley was probably done in Ireland, the execution in Belgium amongst other places."

This suggests that it is alleged that the respondent Noel McPhillips was, from Ireland, part of the planning process for the thefts which were in fact carried out in Belgium by others (i.e. Damien McPhillips and Robert Peachy).

The letter dated 24th March 2010 provides some further information relating to the allegations against the respondent. In that regard it states:

"According to the information gathered via the request for legal assistance in Cherbourg, the shipments of the stolen vehicles appeared to have been ordered by McPhillips Haulage – Noel, Killyliffer, Roslea, Co. Fermanagh and McGingley Haulage Gerry or McGinley Leon, Ramooney, Manorhamilton, Co. Leitrim.

This means that the documents presented in Cherbourg to enable the shipment of the stolen vehicles to Ireland, came from both suspects, which constitutes the evidence that they form part of a criminal organisation together with the persons who have carried out the thefts."

The parties' submissions:

Correspondence:
A correspondence issue has been raised in relation only to the first two offences, namely "concealment of a crane truck" and "forming a gang". Correspondence in relation to the theft offences is, as I have said, conceded.

"Concealment of a crane truck":
This offence is stated in the warrant to be an offence contrary to Article 505 of the Belgian Code of Criminal Law. A copy of that article has been provided in both Flemish and French. From the French it can be simply translated as being an offence by "*those who have harboured, in whole or in part, items stolen, embezzled or obtained through a crime or offence*".

Clearly it is similar to offences here under section 17 or section 18 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 of handling stolen goods and being in possession of stolen goods respectively. Mr McGillicuddy submits either or both of these offences are the corresponding offences in respect of the offence alleged of concealing the crane truck. Mr Forde on the other hand submits that there are no facts disclosed in the warrant or the additional information which could establish the factual ingredients for such correspondence. The information provided by the issuing judicial authority makes it clear that the respondent was at all times operating from this State or in Northern Ireland, and was not in Belgium, and was not involved in the thefts themselves.

Section 17 of the Act of 2001 provides:

"17. – (1) A person is guilty of handling stolen property if (otherwise than in the course of the stealing) he or she, knowing that the property was stolen or being reckless as to whether it was stolen, dishonestly –

> *(a) receives or arranges to receive it, or*
>
> *(b) undertakes, or assists in its retention, removal, disposal or realisation by or for the benefit of another person, or arranges to do so."*

There is some factual material in the warrant and additional information which provides some basis for establishing that the respondent made arrangements for the shipping of the stolen goods to Ireland. The warrant states that the shipping orders were given by Victor Tracy International in Ireland, and that *"the principals for the shipments of the vehicles appear, according to the information received through the letter of request in Cherbourg to be McPhillips Haulage – Noel …".*

Extra-territoriality – correspondence and section 44 of the Act of 2003:
But Mr Forde submits that there is nothing in sections 17 and 18 to indicate that the respective offences would be committed where the handling or possession of stolen goods occurs in another jurisdiction, and that the extra-territoriality of the concealment offence would also prevent correspondence being established by virtue of section 44 of the Act of 2003, which provides:

"44.—A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

The question to consider therefore is whether, if certain goods were stolen in this State, but were handled or received in another State, the offence of receiving or handling stolen goods in that other state could be prosecuted in this State. If not, it is submitted that not only would there not be correspondence with an offence under sections 17 and/or 18 of the 2001 Act, but also that in the present case surrender in respect of the concealment offence is prohibited by the provisions of section 44 of the Act of 2003 above. Mr Forde submits that there is nothing in the provisions of section 17 or 18 of the Act of 2001 which indicates that such an offence is committed outside this State and that if such an offence were to be capable of being prosecuted where the offence is committed outside this State the legislation would have to specifically so provide.

It is relevant to consider the provisions of section 20 of the Act of 2001 when considering that question. Section 20 (1) of the Act of 2001 provides as follows:

> *"20. – (1) The provisions of this Part relating to property which has been stolen apply –*
>
> *(a) whether the stealing occurred before or after the commencement of this Act, and*
>
> *(b) to stealing outside the State if the stealing constituted an offence where and at the time when the property was stolen,*
>
> *and references to stolen property shall be construed accordingly." (*my emphasis*)*

Section 20 applies to offences under Part 3 of that Act, which includes offences under section 17 and section 18 of the Act. That indicates that a handling or receiving stolen property charge may be prosecuted in the State provided that the stealing of the property was an offence in the jurisdiction in which the stealing occurred and at the time it occurred. By reference to this section, the section 17 handling offence must be read as *"A person is guilty of handling stolen property stolen in this State, or outside the State provided the stealing constituted an offence where and at the time when the property was stolen"*. However, this cannot mean that if property is stolen in this State but handled/received in another State, the person so handling and receiving outside the State can be prosecuted in this State under section 17 of the 2001 Act.

It seems to me therefore that the concealment of the crane truck offence being prosecuted under the laws of Belgium does not correspond to an offence in this State and also that surrender in respect of this offence is prohibited under the provisions of section 44 of the Act of 2003.

"Forming a gang":
The warrant, as I have already referred to, indicates merely that arising from the facts disclosed the respondent and another person (Gerry McGinley) *"are therefore considered to be gang members, probably even the organisers of thefts committed on the European mainland by others …"*. There is no further information or facts to substantiate this involvement either in a gang as such or in relation to "forming" the gang. No detail is provided as to when the gang may have been formed or any place where that was done or dates when it is alleged it was formed by, inter alios, the respondent. It is not possible in such circumstances for this Court to be satisfied that this particular offence laid against the respondent by the issuing judicial authority corresponds to the candidate offence for correspondence, namely an offence contrary to section 71 of the Criminal Justice Act, 2006 which provides:

> *"71.—(1) Subject to subsections (2) and (3), a person who conspires, whether in the State or elsewhere, with one or more persons to do an act –*
>
> *(a) in the State that constitutes a serious offence, or*
>
> *(b) in a place outside the State that constitutes a serious offence under the law of that place and which would, if done in the State, constitute a serious offence,*
>
> *is guilty of an offence irrespective of whether such an act actually takes place or not."*

There is simply not enough factual information to satisfy the ingredients for that offence, even reading the warrant as a whole. While the warrant and the information suggests a coming together of four named persons and their involvement of offences, it falls short of any detail sufficient to establish the offence against this respondent. I have already made reference to the fact there is barely a mention of this respondent in the details contained in the warrant, and the additional information does not add sufficient other information in my view.

Prosecution or Interrogation:
Section 21A(2) of the Act of 2003 provides:

> *" 21A (2) -- Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."* (my emphasis)

It is submitted by the respondent that it is clear from the warrant and the additional information that the surrender of the respondent is being sought, not for prosecution as such, but rather so that he can be interrogated about these offences. While the presumption exists under section 21A (2) above, it is submitted that this presumption can be rebutted as therein provided, and that the contrary is proved in this case by the information actually provided by the issuing judicial authority, since it is clearly stated that "*it is necessary that they be arrested and thoroughly interrogated concerning these facts*".

The letters provided by the issuing judicial authority contain information relevant to the question of whether the respondent is being sought for prosecution or simply so that he can be interrogate.

The letter dated 26th May 2008 states in this regard:

> *"2. European arrest warrant for Noel McPhillips and Gerry McGinley*
>
> *(a) as mentioned in box b 1 [in the warrant] these European arrest warrants are issued following an arrest*

warrant by default dated 08.02.2008. Both persons need to be arrested in a judicial preliminary investigation in which they are suspected to have cooperated in certain misdemeanours, as described in the European arrest warrant.

(b) …… .

3. In view of the results of the investigation, it is necessary that they be arrested and thoroughly interrogated concerning these facts.

My office also requests their extradition in order to be able to confront them with the data in the large file and with other persons in custody (conspiracy)."

The letter dated 24th March 2010 states the following in relation to this issue:

"1. Both individuals are suspected of the accusations as set forth in the warrants, which means that the current examination has revealed that there are indications that they are involved in the thefts, concealments as mentioned and their organisation from Ireland. In my capacity of Examining Judge I am not in a position to state that there is evidence, as the judge ruling on the merits has to judge on this. It is my intention to interrogate over here the persons concerned about each and every indication in our possession of their involvement and to take them into custody in order to bring them before their judges.

2. The offences are mentioned in the warrant for arrest as they will be formulated before the judge with reference to the applicable sections of the Code of Criminal Law. I will send to you the extracts of the Code of Criminal Law for the purpose of clarification."

Under this head of objection, another objection is raised by the respondent, namely that the discretionary nature of the Attorney General Scheme means that the respondent is unable to engage the services of a Belgian lawyer to assist in the task of rebutting the presumption under the Act that a decision has been made to prosecute the respondent, since no assurance can be given to any such Belgian lawyer that his/her professional fees would be discharged in due course under the Scheme.

I do not believe that the presumption that a decision to prosecute the respondent has been made is rebutted in the sense required by section 21A, namely "*unless the contrary is proved*". Criminal procedures differ among Member States, and it has not been proven that the questioning of the respondent is not part of a prosecution process in the issuing state. That requires proof if the presumption is to be rebutted, and I am not satisfied that the respondent has demonstrated that the nature of the Attorney General Scheme has prevented him from engaging a Belgian lawyer to assist in discharging that onus. There is no evidence that efforts to obtain the services of a Belgian lawyer have been unsuccessful. There is no evidence that any attempt to engage such a lawyer has been made at all.

Contents of the warrant – section 11
While I am satisfied that the 14 theft offences correspond to offences here under section 4 of the Act of 2001, I am not satisfied that the warrant contains sufficient information in relation to the respondent's own involvement in the offences of theft. In fact there is information emanating from the issuing judicial authority which makes it clear that it is not thought that this respondent was involved in the thefts themselves. Again, I refer to the very brief reference to the respondent at all in the warrant. In my view the contents of the warrant fail to specify enough information about the respondent's involvement in these offences in order to satisfy the requirements of section 11 of the Act of 2003, and for that reason I do not believe that the respondent can be ordered to be surrendered on foot of this warrant in respect of those theft offences on foot of the present warrant. The additional information provided fails to add sufficient for that purpose either.

Other objections are raised by the respondent, such as that the domestic decision referred to in the warrant has not specified adequately, that the examining magistrate cannot be regarded as being a judicial authority for the purposes of issuing a European arrest warrant, delay, and the question of whether the Attorney General Scheme is a scheme for payment of lawyers' fees "under national law". In view of my conclusions already reached, I do not propose reaching any conclusion in relation to these remaining issues.

For the reasons I believe that it is not possible to make the order sought for surrender on foot of this warrant for the offences specified therein, and I refuse the application.