

The Irish Times Law Report

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Extradition warrant must state alleged offence in terms recognisable as offence under Irish law

Attorney General (applicant/respondent) v Scott Dyer (respondent/appellant).

Extradition - Criminal fraud - Intent to defraud as a necessary element of the offence - Whether corresponding offence specified in foreign warrant - Whether evidence admissible to fill gap - Extradition Act, 1965 (No.17), section 47 - Extradition Act, 1965 (No.17), section 42 as amended by Extradition (European Union Conventions) Act, 2001, section 26.

The Supreme Court; judgment delivered on January 16th, 2004.

The District Court here has to be satisfied that an offence laid in a warrant sent here and endorsed for execution is so stated as to be recognisable as corresponding with an offence under our law. It must therefore contain such essential factual material as may be necessary to recognise whether or not the acts complained of are ones which, if committed in this country, would amount to a criminal offence.

The Supreme Court so held in allowing the appeal and dismissing the application of the Attorney General for an order that the appellant be delivered by way of extradition to Jersey.

Paddy McCarthy, SC, and Robert Barron, BL, for the applicant/respondent; Patrick Gageby, SC, and Remy Farrell, BL, for the respondent/appellant.

Mr Justice Fennelly commenced his judgment by setting out the background to the matter. The appellant was brought before the High Court, pursuant to the provisions of Part III of the Extradition Act, 1965, for an order that he be delivered by way of extradition to the police of the Island of Jersey on foot of a number of warrants issued in that jurisdiction. The President of the High Court, Finnegan P, in a judgment dated March 26th, 2003, made the orders sought. The orders were made on foot of 25 warrants for offences which have been described as criminal fraud, though that description does not appear on the face of the warrants.

The principle of double criminality is stated by section 47 (2) of the Extradition Act, 1965 as follows: "An order shall not be made under subsection (1) if it appears to the Court that the offence specified in the warrant does not correspond with any offence under the law of the State which is an indictable offence or is punishable on summary conviction by imprisonment for a maximum period of at least six months." The Act of 1965 contained no further definition of the notion of correspondence. However, section 26 of the Extradition (European Union Conventions) Act, 2001, inserted the following subsection into section 42 of the Act of 1965: "(2) For the purposes of this Part an offence under the law of a place to which this Part applies corresponds to an offence under the law of the State where

the act constituting the offence under the law of that place would, if done in the State, constitute an offence under the law of the State punishable - (a) on indictment, or (b) on summary conviction by imprisonment for a maximum term of not less than 6 months or by a more severe penalty...."

Mr Justice Fennelly stated that the only challenge to the extradition applications related to the issue of double criminality. The appellant argued that the offence specified in the warrant does not correspond with an offence in the law of the State. The Attorney-General offered two offences as candidates for the role of corresponding offence: firstly, an offence under section 32 of the Larceny Act, 1916, as amended by section 9 of the Larceny Act, 1990, and secondly, an offence under section 10 of the Criminal Justice Act, 1951. Mr Justice Fennelly pointed out that each of the provisions required the prescribed acts to be committed "with intent to defraud". In the absence of these words from each of the warrants, the Attorney-General relied on an affidavit sworn by Michael St John O'Connell, who described himself as "an Advocate of the Royal Court of the Island of Jersey".

Mr Justice Fennelly said that the principal point raised by the appellant is whether the warrants, coupled with the evidence of Mr St John O'Connell, constitute sufficient proof that the offences with which the appellant

is charged correspond with offences under Irish law. In essence, the appellant submitted that correspondence can be inferred only from the words used in the warrant, that the inquiry is conduct-based and does not refer to the legal or juristic character of the offences in the respective jurisdictions and that the evidence such as that of Mr St John O'Connell is not admissible to explain the nature of the offences charged. It was further submitted that, in any event, this evidence does not show that the appellant is charged with having the necessary intent to defraud.

Mr Justice Fennelly explained that the Act speaks not of double criminality, but of correspondence of offences. Whether the offence alleged by the requesting state corresponds with an offence against the law of this State might, in theory, be determined in either of two ways. Firstly, our courts might have to inquire into the degree of correspondence between the juristic elements of the offences as respectively defined in the law of the two jurisdictions. Secondly, it might suffice to show that the acts alleged by the requesting state would, if proved, amount to an offence of the required degree of gravity in the law of this State.

Mr Justice Fennelly then referred to the case of *State (Furlong) v Kelly* [1971] I.R.132 and noted the different approaches of O'Dalaigh C.J. and Walsh J. O'Dalaigh C.J. conceived the inquiry into correspondence in

terms of the legal elements of the offences created under the laws of the respective jurisdictions. However, Mr Justice Fennelly was of the opinion that the force of this approach had been diminished by the 2001 Act, which defines correspondence with reference to "the act constituting the offence" specified in the warrant. Walsh J, on the other hand, considered that the function of the District Justice was not to construe foreign law. Mr Justice Fennelly considered that the Furlong's case stands for the proposition that the correspondence inquiry depends on the facts alleged in the warrant. Mr Justice Fennelly said that the courts have followed the basic approach in Furlong's consistently ever since. Walsh J in *Wyatt v McLoughlin* [1974] I.R. 379 declared that the warrant must "contain such essential factual material as may be necessary to recognise whether or not the acts complained of are ones which, if committed in this country, would amount to a criminal offence".

The principle was restated by Henchy J in *Wilson v Sheehan* [1979] I.R. 423 at page 428 and Henchy J in *Hanlon v Fleming* [1981] I.R.489 where he repeated "it is a question of looking at the factual components of the offence specified in the warrant, regardless of the name given to it, and seeing if those factual components, in their entirety or in their near-entirety, would constitute an offence which, if committed in this State, could be said to be a corresponding offence of the required gravity."

Mr Justice Fennelly then turned to the matter before him and said that the absence of any allegation of "intent to defraud" would appear to render the warrants deficient for the purposes of extradition. The question which then arises is whether the evidence is admissible to explain the relevant provisions of Jersey law so as to fill the gap. Mr Justice Fennelly drew on the case law cited above and considered the possibility of resort to proof of foreign law. Mr Justice Fennelly noted that Walsh J in *Furlong's*

case contemplated the possibility that evidence of English law might have to be introduced even to explain such commonplace terms as "steal". However, Walsh J appears to have modified his position on this point in *Wyatt's* case where he said that the court was "not at all concerned with English law". The approach of Henchy J, in *Wilson v Sheehan*, was that, in the absence of expert evidence, the District Court would be debarred from considering the contents of the English Theft Act. Words would, *prima facie*, be given their ordinary meaning in what he called "layman's language". As a result, according to Mr Justice Fennelly, normally, words used in an extradition warrant will be given their ordinary meaning. This enables the courts to give effect, without resort to extrinsic evidence, to extradition requests where words, such as "steal", "rob" and "murder" are used. It is possible that such words have different meanings in the law of the requesting state, but, in the absence of anything suggesting that, the courts will examine correspondence by attributing to such words, when used in a warrant, the meaning that they would have in Irish law.

Counsel for the appellant argued that the evidence does not go far enough and does not permit the learned President to conclude that the allegation against the appellant included an intention to defraud. It was submitted that the reasoning of the learned President was circular in that he concluded that a necessary element of the offence which was omitted from the face of the warrant could be read into it simply by virtue of the fact that the element omitted is a necessary element of the crime. Mr Justice Fennelly recalled that the primary purpose of a warrant is for execution in the jurisdiction which issues it. The evidence of Mr St John O'Connell is that, unlike this jurisdiction, in the law of Jersey a charge of committing the offence of criminal fraud carries with it the necessary implication that the accused person is

alleged to have had the intent to defraud or to cause actual prejudice. Mr Justice Fennelly stated that if such an allegation had been made on the face of the warrant, it is indisputable that the warrant would have sufficed. The fact is, however, that none of the warrants use the expression, "criminal fraud". Nor does Mr O'Connell anywhere in his affidavit refer to the actual warrants at issue in this case. His evidence goes no further than to explain the offence of "criminal fraud". There is, therefore, a missing link. None of the documents, either singly or collectively, demonstrate that the appellant is charged with an offence of which intent to defraud is an element.

Mr Justice Fennelly added that it would have been very simple to supply the missing link. Either the warrants could have described the offences as being "criminal fraud" or Mr St John O'Connell could have referred to the warrants and explained that they relate to charges of criminal fraud. Indeed, it seemed to Mr Justice Fennelly that there could be a third alternative. The warrants could have alleged, "intent to defraud" or, according to the referred Jersey formulation, "intent to cause actual prejudice". This is sometimes described as "dressing up". A warrant might contain an allegation of fact whose proof, though not necessary according to the law of the requesting jurisdiction, would ensure its acceptance for the purposes of extradition. Drawing on

the judgment of Walsh J in *Wyatt's* case, Mr Justice Fennelly stated that there would be no objection to the inclusion of an allegation of fact, not necessary to prove in the requesting jurisdiction, so long as it corresponds to the facts actually to be proved. There is no reason to suspect that the courts of friendly jurisdictions with whom the State has entered into reciprocal extradition arrangements would act otherwise than in good faith. It would not, of course, be necessary to go so far in the present case, since it is clear that the inclusion of the words, "with intent to defraud" or to "cause actual prejudice" in the Jersey warrant would be merely to state something that must be proved according to that law.

In the absence of any allegation either express or to be implied of intent to defraud, Mr Justice Fennelly found that the warrants in the present case failed to satisfy the requirements of Part III of the Extradition Act, 1965, in respect of corresponding offences. Accordingly, Mr Justice Fennelly allowed the appeal and substituted an order dismissing the application of the Attorney General. Chief Justice Keane and Mr Justice McCracken concurred.

Solicitors: Chief State Solicitors for the applicant/respondent; Garrett Sheehan & Co., (Dublin) for the respondent/appellant

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Justin Phelan, managing director, centre, Brian Sweeney, right, sales and marketing director, and Stephen Keogh, technical director at Keyhouse with the company's digital dictaphone. Photograph: Moya Nolan

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