Neutral Citation No. [2015] NICA 32

Ref: **MOR9653**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **28/05/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

EIMANTAS PROBERKAS

Appellant;

-v-

KLAIPEDA CIRCUIT COURT, LITHUANIA

Respondent.

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Before: Morgan LCJ, Girvan LJ and Stephens J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against a decision by the Recorder of Belfast on 13 February 2015 ordering the extradition of the appellant to Lithuania to serve a custodial sentence for an offence of burglary. The issue in the case is whether the Recorder was required to discharge the appellant by virtue of section 20 of the Extradition Act 2003 ("the 2003 Act"). Mr Jebb appeared on behalf of the appellant and Mr Ritchie for the respondent. We are grateful to both counsel for their helpful oral and written submissions.

Background

[2] The appellant committed the offence of burglary on 30 September 2009 in the course of which a substantial amount of jewellery was stolen. On 30 November 2010 he was sentenced to 3 years imprisonment suspended for three years with ancillary orders restricting his liberty, requiring him to work or study and imposing an

obligation to provide compensation. There is no dispute about the fact that he was present for the sentence. During the period of suspension he committed administrative offences as a result of which he was warned on 13 October 2011 that the suspension of the sentence might be revoked. As a result of reoffending 70 hours correctional service was imposed upon him on 30 May 2013 and the suspension of his sentence was revoked on 11 September 2013 by reason of his failure to fulfil the obligations imposed upon him by the court. There is no evidence that he was present when the suspension was revoked. A total of 2 years 11 months and 28 days remains to be served.

[3] On 30 October 2013 the appellant left Lithuania for Dublin. On 6 March 2014 the European Arrest Warrant was issued and he was arrested by PSNI on 11 January 2015. The only issue in the case concerns section 20 which provides as follows:

> "**20 Case where person has been convicted**
>
> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
>
> (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
>
> (7) If the judge decides that question in the negative he must order the person's discharge.

> (8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—
>
> (a) The right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;
>
> (b) The right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

[4] The parties agreed that the appellant was convicted on 30 November 2010. The appellant submitted that the subsequent ruling on 11 September 2013 in which the suspension of the sentence was revoked was a further conviction. It is agreed that there is no evidence that the appellant was present when this ruling was made. There is also no evidence that the appellant was advised of the date of this hearing and no evidence that he deliberately absented himself. The critical issue is, therefore, whether the ruling in September 2013 was a conviction.

Consideration

[5] Similar circumstances have been considered in a number of cases. In Baksys v Lithuania [2007] EWHC 2838 (Admin) the appellant had been convicted of criminal damage and given a seven month sentence deferred on the basis that he pay compensation and not leave his place of residence without the consent of the supervising institution. In breach of that restriction he left Lithuania to go to the United Kingdom approximately one month later. Although he was present when the suspended sentence was imposed, he was not present on 10 May 2004 when the deferral was cancelled and he was ordered to serve the custodial sentence imposed.

[6] It was submitted that the hearing on 10 May 2004 constituted a conviction in the form of a decision that he had not complied with the obligations imposed on him by the earlier sentence. The Divisional Court rejected the argument. It found that there was no evidence that the consideration of the obligations and the order that the sentence should be served constituted a fresh hearing with a fresh sentence. It was entirely consistent with the conclusion that the original sentence was imposed by reason of the failure to comply with the obligations on deferral.

[7] This broad reasoning was then followed in Brodka v Poland [2011] EWHC 1262 (Admin). That was a case in which a sentence of imprisonment of 18 months suspended for four years for offences of violence was imposed by the court on 29 April 2003. The appellant left Poland to come to the United Kingdom on 13 January 2006. The sentence was then activated on 24 April 2007. It was contended that since he was not present at the latter hearing he could avail of section 20 of the 2003 Act. The court rejected that submission finding that the conviction occurred in 2003 and the proceedings in 2007 concerned solely the sentence.

[8] These authorities were reviewed by Lloyd Jones LJ in Beretki v Romania [2012] EWHC 336 (Admin). That was a case in which the appellant had been sentenced to a suspended sentence of three years' imprisonment. The sentence was activated on 15 September 2008 and it was submitted that this hearing resulted in a fresh conviction for the purposes of section 20. Lloyd Jones LJ relied on the observation of Collins J in Atkinson v the Supreme Court of Cyprus [2009] EWHC 1579 that a trial is the legal process whereby guilt or innocence is to be decided. That establishes a distinction between the determination of guilt and the imposition of a sentence for the offence which is found to have been committed. The court concluded that the activation of a suspended sentence did not amount to a fresh conviction.

[9] Mr Jebb sought to distinguish this line of authority relying upon the provisions of article 75 (4) of the Lithuanian Code of Criminal Procedure ("the Code") which states:

> "Where, during the period of suspension of sentence, the convicted person fails, without valid reasons, to comply with the penal sanction and/or mandatory injunctions imposed by the court or violates public order, abuses alcohol or commits other offences for which administrative penalties or disciplinary sanctions have been imposed upon him at least twice, the court shall, on the recommendation of the institution supervising the conduct of the convicted person, warn the convicted person that suspension of the sentence may be revoked. Where the convicted person further fails to comply with the penal sanction and/or mandatory injunction imposed by the court or commits offences, the court shall, on the recommendation of the institution supervising the conduct of the convicted person, rule on the revocation of suspension of the sentence and execution of the sentence."

[10] We do not consider that these provisions assist the appellant. The entitlement to rule on the revocation of the suspended sentence is triggered *inter alia* by the failure of the accused to comply with the penal sanction. There is no suggestion that such a failure constitutes a criminal offence. The warrant in this case indicates that the suspension of the sentence was revoked as a result of the failure by the appellant to fulfil the obligations imposed on him by the court. If Mr Jebb was correct that this was a conviction he accepted that there would be no power to extradite since the breach was not an extraditable offence.

[11] Sections 64 and 65 of the 2003 Act are examples of the policy of the legislation to make a distinction between conviction and sentence. The revocation of the suspension of a sentence is the enforcement of the original sentence and is not part of the process of conviction. We consider, therefore, that section 20 of the 2003 Act has no application in this case.

Conclusion

[12] For the reasons given we dismiss the appeal.