

THE HIGH COURT

1983 No. 367 Sp.

IN THE MATTER OF THE EXTRADITION ACT, 1965.

BETWEEN:



BERNARD FITZGERALD

PLAINTIFF

AND

DAVID LEAHY

DEFENDANT

Judgment delivered by O'Hanlon J., the 30th January, 1984.

On the 6th May, 1983, an Order for the extradition of the Plaintiff was made by District Justice Ballagh at the Dublin Metropolitan District Court, on foot of a Warrant for his arrest issued by Brentford Court in the Greater London area. The offence of which he was charged was recited in the following terms on the Warrant of Arrest:-

"Between December, 1982, and the 8th April, 1983, being a licensee of the Murco Service Station, Hayes Road, Southall, wilfully and with intent to defraud did dishonestly and with a view to gain for yourself, and with intent to cause loss to another, namely, Murco Petroleum Co. Ltd., falsified return sheets (invoices) of petrol sales. When a spot check was made of various pumps on which the meters are sealed it was found that there was a deficit in money which should have been banked daily by Fitzgerald to the amount of £25,647.00p. Contrary to Section 17 of the Theft Act, 1968".

The Plaintiff subsequently instituted the present proceedings in the High Court seeking an Order for his release pursuant to the provisions of Section

50 of the Extradition Act, 1965, and relying upon the ground specified in Sec. 50, sub-sec. (2) (c) of that Act, namely, 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 Order of the learned District Justice recited a finding made by him to the effect that the offence specified in the warrant corresponded with an offence under the law of the State which was an indictable offence, to wit, "Contrary to Section 1 of the Falsification of Accounts Act, 1875", and in the course of the present proceedings Counsel for the Defendant again relied on that offence as being the closest approximation in our law to the offence with which the Plaintiff stands charged under the law of England and Wales.

Sec. 1 of the Act of 1875 reads as follows:-

"1. If any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years".

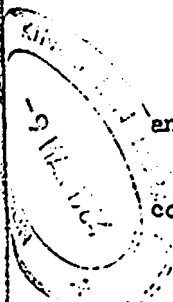
The Plaintiff contended that this could not be regarded as a "corresponding

offence" for the purpose of satisfying the requirements of the Extradition Act, 1965, having regard in particular to the fact that there were two essential ingredients of the offence under the Act of 1875 which did not form part of the offence in respect of which the Plaintiff has been charged under the provisions of Sec. 17 of the English Theft Act, 1968.

In the first place, a person cannot be convicted of the offence under the Falsification of Accounts Act, 1875, unless it can be established that he is a clerk, officer, or servant, or person acting in such capacity, for the person whose accounts have been falsified, and secondly, the accounts or other relevant documents must belong to or be in the possession of that employer, or have been received by the accused for or on behalf of that employer.

I accept that these two matters must be established in the course of any prosecution for an offence under Sec. 1 of the Act of 1875, if a conviction is to ensue.

In The State (Furlong) .v. Kelly, (1971) IR 132, the Supreme Court provided guide-lines for deciding in extradition cases whether it had been established that the offence with which the accused was charged corresponded with any offence under the law of our own State.



Chief Justice O Dalaigh, at p. 141 of the report, states the principles applicable in the following terms:

"The basic inquiry is to discover whether the several ingredients which constitute the offence specified in the warrant or one or more of such ingredients constitute an offence under the law of the State and if they do, whether that offence (the "corresponding offence") is an indictable offence As to the first limb of the inquiry, the position may be illustrated algebraically as follows. If the English offence consists of say, four essential elements then a corresponding offence exists only if it contains either precisely the same four essential elements or a lesser number thereof. If the only Irish offence that can be pointed to has an additional essential ingredient then there is no corresponding Irish offence to satisfy the requirements of s. 47, sub-sec. (2) of the Act of 1965, for the simple reason that ex hypothesi, conduct a+b+c+d falls short of being an offence under Irish law, or in plainer words, is not an offence. It is fundamental to extradition that no one shall be extradited for acts or omissions (the offence alleged in the warrant) which, if repeated within the State, would not offend against our law".

In the later case of Hanlon .v. Fleming, (1981) IR 489, the judgment of Henchy J., (with which the other members of the Court concurred), contains the following passage at p. 495 of the report:-

"The third point raises the question whether the specified offence has the required correspondence with an offence under the law of this State. The relevant decisions of this Court, such as The State (Furlong) .v. Kelly, Wvatt .v. McLoughlin, and Wilson .v. Sheehan, show that 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. The required gravity is not in issue here. What is in issue - and this is the nub of this appeal - is whether the factual elements of the specified offence, if laid in this State (either precisely or substantially as set out in the warrant) as the particulars of an indictment for an offence contrary to s. 33 sub-sec. 1 of the Larceny Act, 1916, would be a correct basis for a finding of guilty by a correctly charged jury".

Applying these principles to the present case it appears clear that the

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offence under our law which is put forward as corresponding substantially with the offence with which the accused is charged in England, contains two important ingredients, proof of which is necessary in order to sustain a conviction, and which do not form part of the English offence referred to in the warrant.

It has not been established that proof of the matters alleged in the warrant as constituting the offence committed by the accused in England would, if specified in an indictment in our courts, and duly established by evidence, be sufficient to support a conviction under Sec. 1 of the Falsification of Accounts Act, 1875. For this reason, I have come to the conclusion that the Plaintiff is entitled to the relief claimed by him in these proceedings and I make an Order for his release from custody in accordance with the provisions of Sec. 50 of the Extradition Act, 1965.

R. J. O'Hanlon

R.J. O'Hanlon.
30th January, 1984.

Note

Counsel for the Plaintiff:- Kevin O'Higgins, S.C. (with him Greg Murphy,

B.L. (instructed by James Orange, Solicitor)

Counsel for the Defendant:- Susan Denham, B.L. (instructed by the Chief
State Solicitor).

Cases and Materials cited:-

The State (Furlong) .v. Kelly, (1971) IR 132

Hanlon v. Fleming, (1981) IR 469

King .v. Pallin (1906) I KB 7

Stroud, Words and Phrases Judicially Defined - "Licencee".