

E R A Conference

20th/21st April 2012

EUROPEAN CRIMINAL LAW

IRISH CASE STUDY

In 1999 David, an amiable 24 year old Scotsman, went on holidays to Greece. On the island of Mykonos he met Ingrid, a Swedish national in a bar. Ingrid was very worldly wise which she explained to him was as a result of all the stories she had heard from her father, a prison officer in Stockholm. They spent several hours together in the bar and he bought her a substantial amount of drink. She told him that she was 17 and was using a fake ID to pass herself off as 19 so that she could be served in the bar. Only persons over 18 can be served alcohol in Greece. However, the age of consent for sexual intercourse is 16. At the end of the evening she left with David in his car and they had sex.

The following night Ingrid was in the same bar when she met Illeas, a Greek national from Athens. She left the bar with him and went to the nearby beach where they had sex. Their activity came to the attention of the police as having sex in a public place is unlawful although routinely overlooked. However, the policeman immediately saw that the ID was fake and eventually established that she was 14. She was taken into care and Illeas was arrested. He readily admitted to knowing that she was under age and in due course was prosecuted and sentenced to six months imprisonment.

In discussion with the care workers she described the incident that had taken place the previous night with David. David was identified, located and arrested. He was questioned for three days without a lawyer. The questioning took place in the Greek language with only rudimentary translation. Throughout his questioning he maintained the position that he honestly believed that she was 17. A honest but mistaken belief as to the age of the complainant is a defence in Greek law. The police were not impressed with his version and he was charged and brought to trial. He was refused bail and spent 18 months in custody. He was tried on a single charge of having sex with a minor but was acquitted. He returned to Scotland and settled down. He resumed a university course that he had previously abandoned and graduated in 2003. By this time he had met Mary, an Irish national and by profession a teacher of Irish who was studying Celtic Studies in Edinburgh. They had a child together and discussed marriage. It was only at this point that he disclosed to her that he had spent time in prison in Greece on remand. She said that she would marry him nonetheless but insisted that he receive counselling both in terms of his drinking and in terms of his sex drive. He undertook the counselling in 2003 and 2004 and disclosed to his counsellor that he had never believed Ingrid's claim to be 17, had always understood her to be under age, and in fact was excited by it. Under Scots law the counsellor was obliged to make a mandatory report of these admissions to both the Social Services and the police. The counsellor told David that he had done so. David and Mary

realised immediately that Social Services were likely to take an intensive interest in them and that they might even lose custody of their child. They moved to live in Ireland which had been their intention in any event as David was finding it hard to get employment and they would ultimately rely on Mary's teaching of Irish.

The Scottish police passed the information about the admission on to the Greek authorities. In Greek law, a fresh trial can be ordered where new evidence emerges. The admission to the counsellor satisfied the test and the relevant Greek court directed a warrant to be issued. On foot of the Greek warrant a European Arrest Warrant was transmitted to Ireland and David was brought before the High Court in 2007.

The warrant transmitted from Athens to Dublin was not signed and the High Court directed his release.

By now David had become very interested in Irish politics and became a subject of interest to An Garda Siochana. In 2010 his home was searched under Section 29 of the Offences Against The State Act and he himself was arrested under Section 30. Nothing was found to connect to any political offence and after 48 hours questioning he was released. The search however did yield personal diaries in which he had recorded continuing fantasies about Ingrid wondering what she was at now, imagining them still together and recording in very graphic detail the events of 1999.

The Gardai notified the Swedish authorities that a person who appeared to have committed an offence involving a Swedish citizen was resident in Ireland. They also indicated that they had found evidence in the form of the diaries. The Swedish authorities indicated that they had been aware of David's whereabouts for some time and specifically had been aware of the Greek warrant from years earlier. They were provided with access to the diaries and decided on the basis of the probable availability of the originals under mutual legal assistance that they would mount a trial in Sweden. Swedish law provides for extra territorial jurisdiction for sex with a minor. Separately they claim extra territorial jurisdiction for any form of assault on a Swedish citizen wherever perpetrated.

In 2012 a Swedish Arrest Warrant was received in Ireland and David was arrested on foot of it. The warrant states in its title that it is for the purpose of prosecution. However, it is clear from the body of the warrant that a procedural step in Swedish law requires that he be confronted in Sweden with the accusation against him and given an opportunity to deny it before the prosecutor can legitimately make a final decision as to whether he should be placed on trial or not.

The descriptions of the offences claims them all to be Article 2.2. offences. However, it is clear from the description of the offences that a number of them are not in fact listed offences. They included offences such as using a vehicle in the furtherance of a crime, supplying alcohol to a minor and creating pornographic material relating to children (the diaries). David wishes to contest his surrender.

He assets:-

A. The Swedish warrant is defective insofar as it recites the Greek domestic warrant but not a Swedish domestic warrant.

- B. That he is entitled to the benefit of the ne bis in idem rule.
- C. That the warrant is defective in that it is claiming offences to be Article 2.2 offences when they are not.
- D. That the warrant is not for trial because of the intervening Swedish procedure.
- E. Part of the evidence that would be admitted at trial would be what he said in Greek custody in 1999 when he did not have the benefit of a lawyer. Even though those interviews were exculpatory he would have preferred had he had proper legal advice to have remained silent throughout.
- F. The admission to his counsellor should not be admitted in evidence as it is a violation of his right of privacy and his family rights.
- G. That his diary should not be admitted in evidence or used to ground an application because they have been obtained in breach of the constitution as Section 29 warrants are invalid in this situation.
- H. No guarantee has been given by the Swedish authorities that if convicted he would be given credit for the time spent on remand in Greece.
- I. If surrendered he would be held in prison conditions that breach human rights norms. While Swedish prison conditions are generally good, sex offenders are held incommunicado and in isolation. This is claimed to be for their own protection and there is expert evidence to the effect that it is dehumanising on prisoners to be held in isolation over lengthy periods.
- J. He fears that if in prison he would be victimised by colleagues of Ingrid's father who believe that he and other men like him have destroyed her life.
- K. That he has been placed at an unfair advantage because Swedish law does not provide a defence of honest mistaken belief and has sex with a minor as a strict liability offence.
- L. That since 1999 his life and that of Mary and his children have changed and that his family rights and those of Mary will be violated by his surrender.

ISSUES

1. The formal content of the warrant and any defects that can be successfully relied on.
2. The venue for fair trial arguments.
3. The effect of delay and the venue for raising that argument.

WHEN TO RAISE ARGUMENTS IN RELATION TO THE CONSTITUTION

The effect of a statutory defence not being available in the requesting State although it is available in the requested State and on these facts in the place where the event occurred.

The adequacy of legal aid where he cannot have the assistance of lawyers, paid by the State, in Greece, Sweden and Scotland whose applicable laws are relevant.

Can double jeopardy ever apply.

Sentenced Prisoners Transfer Treaty issues.

Corresponding Offences – minimum gravity even for Article 2.2 offences.

Extra territoriality.