



JUDICIARY OF
ENGLAND AND WALES

Julian Assange v Swedish Prosecution Authority

High Court (Divisional Court)

2 November 2011

SUMMARY TO ASSIST THE MEDIA

The High Court (President of the Queen's Bench Division, Sir John Thomas, and Mr Justice Ouseley) has today dismissed an appeal by Julian Assange against his extradition to Sweden.

Introduction

The President of the Queen's Bench Division, Sir John Thomas, on behalf of the Court, sets out the background to the allegations against Mr Assange, the European Arrest Warrant (EAW), his arrest in England and subsequent hearing in paragraphs 1 - 7. ***The EAW sets out four offences:***

"1. ***Unlawful coercion*** - On 13-14 August 2010, in the home of the injured party [AA] in Stockholm, Assange, by using violence, forced the injured party to endure his restricting her freedom of movement. The violence consisted in a firm hold of the injured party's arms and a forceful spreading of her legs whilst lying on top of her and with his body weight preventing her from moving or shifting.

2. ***Sexual molestation*** - On 13-14 August 2010, in the home of the injured party [AA] in Stockholm, Assange deliberately molested the injured party by acting in a manner designed to violate her sexual integrity. Assange, who was aware that it was the expressed wish of the injured party and a prerequisite of sexual intercourse that a condom be used, consummated unprotected sexual intercourse with her without her knowledge.

3. ***Sexual molestation*** - On 18 August 2010 or on any of the days before or after that date, in the home of the injured party [AA] in Stockholm, Assange deliberately molested the injured party by acting in a manner designed to violate her sexual integrity i.e. lying next to her and pressing his naked, erect penis to her body.

4. ***Rape*** - On 17 August 2010, in the home of the injured party [SW] in Enköping, Assange deliberately consummated sexual intercourse with her by improperly exploiting that she, due to sleep, was in a helpless state.

It is an aggravating circumstance that Assange, who was aware that it was the expressed wish of the injured party and a prerequisite of sexual intercourse that a condom be used, still consummated unprotected sexual intercourse with her. The sexual act was designed to violate the injured party's sexual integrity." (para 3)

Grounds of Appeal (para 6)

Mr Assange appealed against his extradition on four grounds:

1. The EAW had not been issued by a “judicial authority”.
2. Offences 1-3 described in the EAW (set out at paragraph four **offences:** above) did not meet the dual criminality test (a principle of extradition that a person should only be extradited where the conduct is not only an offence under the law of the State requesting extradition, but also under the law of the State from which the person’s extradition is sought). None of the descriptions of the offences was a fair and accurate description of the conduct alleged. As regards offence 4, the conduct, if fairly and accurately described, would not have amounted to the offence of rape.
3. The condition in s.2(3) of the 2003 Act had not been satisfied as Mr Assange was not an “accused”.
4. The issue of the EAW and subsequent proceedings were not proportionate.

Mr Assange did not pursue other grounds which had featured in the hearing before the Senior District Judge

Court's general approach (paras 8 - 19)

The Court sets out the approach it took and looks at the construction of the Extradition Act 2003, the differences between the Act and the EU's legislation (the Framework Decision of June 2002) which the 2003 Act implemented in the UK, the purpose of the Framework Decision and the issue of mutual recognition.

Ground of appeal 1 - Was the EAW issued by a judicial authority? (paras 20 - 54)

Mr Assange contended that for the purposes of the 2003 Act, a judicial authority must be an independent person or body exercising judicial powers and functions. (para 25)

The Court considered what is meant by the term 'judicial authority' for the purposes of the 2003 Act and the Framework Decision. It also considered the term under the jurisprudence of the ECHR and the status of the designation of a judicial authority by another Member State.

The Court concluded that although the EAW was issued by a prosecutor, the prosecutor was a judicial authority under the 2003 Act and Framework Decision. The Court went on to say that Mr Assange had been represented at a hearing of the Svea Court of Appeal in Sweden, which had dismissed his appeal against the issuing an the arrest warrant.

The President of the Queen's Bench Division, on behalf of the Court, concluded:

"... [that] the action of the Prosecutor has been subject to independent scrutiny by judges in Sweden which as judges in another Member State we must respect.

"We therefore dismiss this first ground of challenge." (paras 53 - 54)

Ground of appeal 2 - Dual criminality: the fairness and accuracy of the description of the conduct alleged (para 55 - 127)

For certain serious offences listed in the Framework Decision called Framework Offences, dual criminality is not required. Where an offence is not a Framework Offence, dual criminality is required - the offence alleged must also be an offence in the country the accused is now in. Offences 1-3 are not Framework Offences; Offence 4, rape, is a Framework Offence. (para 55)

Mr Assange contended that whilst the conduct as described in Offences 1 and 3 would constitute an offence in England and Wales, a fair and accurate description of the prosecution case would not meet that test. He contended that Offence 2 did not meet the dual criminality test on the basis either of the description set out in the EAW or of a fair and accurate description of the offence. (para 58)

In respect of Offence 4, Mr Assange contended that whilst rape was a Framework Offence and therefore didn't require dual criminality, the conduct described in the EAW was not fairly and accurately described and that if it had it would not be rape. (para 59)

The Court considered the issue of dual criminality in relation to Offences 1 - 3 and ruled that dual criminality was satisfied in each. (paras 70 - 103)

The Court rejected Mr Assange's contention that under the law of England and Wales consent to sexual intercourse on condition a condom was used was remained consent to sexual intercourse even if a condom was not used or removed. (paras 86-91)

The Court considered the issue of Offence 4 and ruled that the conduct described in the EAW was fairly and accurately reported. The President of the Queen's Bench Division concluded:

"It is quite clear that the gravamen of the offence described is that Mr Assange had sexual intercourse with her without a condom and that she had only been prepared to consent to sexual intercourse with a condom. The description of the conduct makes clear that he consummated sexual intercourse when she was asleep and that she had insisted upon him wearing a condom. it is difficult to see how a person could reasonably have believed in consent if the complaint alleges a state of sleep or half sleep, and secondly it avers that consent would not have been given without a condom. There is nothing in the statement from which it could be inferred that he reasonably expected that she would have consented to sex without a condom." (para 124)

The court went on to say:

"It is clear that the allegation is that he had sexual intercourse with her when she was not in a position to consent and so he could not have had any reasonable belief that she did." (para 126)

The Court ruled that Mr Assange's objections raised in relation to Offence 4 fail. (paras 104 - 127)

Ground of appeal 3 - Was Mr Assange accused of an offence in Sweden? (paras 128 - 154)

It was common ground that extradition is not permitted for investigation or gathering evidence or questioning to see if the requested person should be prosecuted. Mr Assange's contention was that, although he was required for the purposes of being prosecuted, he had not been accused of an offence in Sweden as he had not been charged. The Court therefore had to consider whether Mr Assange was 'accused' for the purposes of the 2003 Act and Framework Decision.

The President of the Queen's Bench Division said:

"In the present case, as is accepted there is nothing on the face of the EAW which states in terms that Mr Assange is accused of the offences. ... The fact that the term "accused of the offence" is not used does not matter if it is clear from the EAW that he was wanted for prosecution and not merely for questioning." (para 148)

He went on to say:

"In our judgment Mr Assange is on the facts before this court "accused" of the four offences. There is a precise description in the EAW of what he is said to have done. The extraneous evidence shows that there has been a detailed investigation. The evidence of the complainants AA and SW is clear as to what he is said to have done as we have set out. On the basis of an intense focus on the facts he is plainly accused. That is ... decisive." (para 151)

He added:

"... even if the court was constrained to determine whether someone was an accused by solely considering the question of whether the prosecution had commenced, we would not find it difficult to hold that looking at what has taken place in Sweden that the prosecution had commenced. Although it is clear a decision has not been taken to charge him, that is because, under Swedish procedure, that decision is taken at a late stage with the trial following quickly thereafter. In England and Wales, a decision to charge is taken at a very early stage; there can be no doubt that if what Mr Assange had done had been done in England and Wales, he would have been charged and thus criminal proceedings would have been commenced. If the commencement of criminal proceedings were to be viewed in this way, it would be to look at Swedish procedure through the narrowest of eyes. On this basis, criminal proceedings have commenced against Mr Assange." (para 153)

The Court dismissed this ground of appeal.

Ground of appeal 4 - Proportionality (paras 155 - 160)

Mr Assange submitted that even if under the EAW he was technically a person accused of offences, it was disproportionate to seek his surrender under the EAW. That was because, as he had to be questioned before a decision was made on prosecution, he had offered to be questioned over a video link. It would therefore have been proportionate to question him in that way and to have reached a decision on whether to charge him before issuing the EAW. (para 155)

The Court dismissed this argument on the facts. The President of the Queen's Bench Division said:

"First, in this case, the challenge to the issue of the warrant for the arrest of Mr Assange failed before the Court of Appeal of Svea. In those circumstances, taking into account the respect this court should accord the decision of the Court of Appeal of Svea in relation to proceedings governed by Swedish procedural law, we do not consider the decision to issue the EAW could be said to be disproportionate.

"Second and in any event, this is self evidently not a case relating to a trivial offence, but to serious sexual offences. Assuming proportionality is a requirement, it is difficult to see what real scope there is for the argument in circumstances where a Swedish Court of Appeal has taken the view, as part of Swedish procedure, that an arrest is necessary." (paras 158 - 159)

He added:

"... The Prosecutor must be entitled to seek to apply the provisions of Swedish law to the procedure once it has been determined that Mr Assange is an accused and is required for the purposes of prosecution. ... Those procedural provisions must be respected by us given the mutual recognition and confidence required by the Framework Decision; to do otherwise would be to undermine the effectiveness of the principles on which the Framework Decision is based. In any event, we were far from persuaded that other procedures suggested on behalf of Mr Assange would have proved practicable or would not have been the subject of lengthy dispute." (para 160)

Conclusion (para 161)

The Court dismissed the appeal.

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This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.