LC Paper No. CB(2)1468/10-11(01)

For information

Subcommittee on Mutual Legal Assistance in Criminal Matters (India) Order

Response to issues raised at the Sub-Committee meeting held on 24 March 2011

Purpose

At the Sub-committee meeting held on 24 March 2011, Members requested the Administration to provide supplementary information in respect of the Mutual Legal Assistance in Criminal Matters (India) Order ("the Order"). This note provides the information requested by Members.

Article XVIII (1) and (6)

2. Members of the Subcommittee requested the Administration to provide relevant cases in which the court had considered immovable property an "instrument of crime" vis-á-vis a "location of crime". According to Article XVIII (6) (b) of Schedule 1 to the Order, "instrument of crime" is defined as "any property which is, or is intended to be, used in connection with the commission of an offence."

3. While no relevant local court cases could be identified, a number of relevant commonwealth cases are extracted at the **Annex** (available in English only). The decisions emanated from these cases highlighted the principle that there must be demonstrated in a real sense some proximate connection between the commission of the particular offence and the immovable property in question. The degree of proximity is essentially a question of fact in each particular case. The mere fact that a particular offence was committed on a particular property would not necessary entail the consequence that the property was "connected with the commission of the offence" or that the property had become an "instrument of an offence". In other words, the property must have been employed in some way to make possible or facilitate the commission of the offence, either in its nature or through the manner of its utilisation.

Mutual Legal Assistance in Coroners' Inquests

4. The Administration will consider Members' comments on the proposal to provide legal framework for mutual legal assistance between Hong Kong and overseas jurisdictions in Coroners' Inquests, and will report to LegCo Panel on Administration of Justice and Legal Services on the findings.

April 2011
Security Bureau

Taylor v AG (1991) 52 A Crim R 166
(Australian case)

A forfeiture order was made against a residential property from which the selling of cannabis had been conducted regularly and over a long period of time. It was also used by the defendants as their family home. The Court held that the property was used as the place in and from which trading in drugs was carried out. It could, in effect, be seen as a drug shop and was thus "used in connection with the sale of the relevant drugs".

R v Rintel (1991) 3 WAR 527
(Australian case)

In relation to the house which was the subject of a forfeiture order, its use "as the place to store, prepare or supply the drugs" in question constituted a use of the premises in connection with the relevant drug offences. It was not merely the location of the offences. The Court pointed out that the ordinary meaning of the verb "to use" is "to employ for a purpose" and the ordinary meaning of "use" is "utilisation or employment for or with some aim or purpose".

DPP v Farley (Supreme Court, unreported, 17 September 1996)
(Australian case)

The premises, in which sexual offenses against young boys were committed, had been used as a place in which activities "to which boys are naturally drawn such as fixing bicycle chains, doing woodwork and tying knots" were undertaken with a view to gradually seducing them. The Court considered that the premises were effectively an instrument or lure used by the defendant in connection with and for the purpose of his offences.

DPP v Garner (Supreme Court, unreported, 26 April 1999)
(Australian case)

It was held that the defendant had used the houseboat which was subject to a forfeiture order, to provide the boys on whom serious sexual assaults were committed "with a pleasurable environment and exciting activities" and that the use of the boat was not "a mere incident of the crimes or as providing a locus for them but as an efficient tool of seduction of the boys".

DPP v King (2000) NSWSC 394
(Australian case)

The boat, where the minor had been indecently assaulted in an aggravated manner by the defendant during the course of sailing, was held to be " no more than the place where the alleged offence took place" since the necessary nexus between the commission of the alleged offence and the boat was lacking.

National Director of Public Prosecutions v RO Cook Properties and another [2004] SACLR 14
(South African case)

The kidnapped victims were held hostage and assaulted by the culprits in a suburban house which was leased out as a guest house. The Court found that the evidence showed mainly that the victims were taken and then detained and abused in the guest house. The nature, location, attributes or the appointment of the house itself played no distinctive role in the crimes, nor did any features of the house play a role in luring the victims there. The house provided only the venue for the crimes and therefore did not contribute an instrumentality of the offences.

The other property involved was operated as a hotel where drug dealers were frequented. The Court found no evidence that the persons arrested in

various police raids and searches were the same people and that rooms were rented out or equipped or adapted for the purposes of drug dealing. The hotel was held to be merely the place where the drug offences were committed.

Prophet v National Director of Public Prosecutions 2007 (2) BCLR140 (CC) (South African case)

A residential property which was subject to a forfeiture order had been adapted in almost every single room to facilitate the manufacture of drugs. Its use was planned and deliberate to the success of the illegal activities. The property was held to be instrumental in the commission of the offence and was not merely providing a location for the offence.