HCAL 17/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 17 OF 2011

IN THE MATTER of Eastern Magistracy Case number ESMP1387 of 2010

and

In the matter of an Application for a writ of Habeas Corpus ad Subjudiciendum under s. 22A of the High Court Ordinance, Cap. 4

and

In the matter of the Fugitive Offenders Ordinance, Cap. 503

BETWEEN:

HO Man Kong	Applicant
and	
Superintendent of Lai Chi Kok Reception Centre	1st Respondent
The Commonwealth of Australia	2nd Respondent

Before: Hon Wright J

Date of hearing: 21 July 2011

Date of handing down judgment: 28 July 2011

JUDGMENT

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1. The applicant is an Australian national as well as a permanent resident of Hong Kong. He was arrested in Hong Kong on 5 September 2010 by virtue of a provisional warrant of arrest issued under the provisions of s.7(1)(b) of the Fugitive Offenders Ordinance, Cap. 503, (the Ordinance). In October 2010 a request was made by the Government of Australia for the surrender of the applicant: on 10 November 2010 the Chief Executive issued an authority to proceed which recited that:

> A request for surrender having been received from Australia for the surrender of [the applicant] who is wanted in the said place for prosecution in respect of offences against the law relating to dangerous drugs including narcotics and psychotropic substances.
>
> I hereby order that the said person be dealt with under Part II of the Fugitive Offenders Ordinance (Cap. 503).

2. This application, made pursuant to the provisions of s.12 of the Ordinance, in terns of s.22A of the High Court ordinance, Cap. 4, arises from proceedings before Mr. Jason Wan in Eastern Magistracy in compliance with that authority to proceed. After a hearing lasting three days, he ordered that the applicant be committed to custody pursuant to the provisions of s. 10(6)(b) of the Ordinance:

(a) in respect of offences against the law relating to dangerous drugs including narcotics and psychotropic substances, the particulars of which, had they occurred in Hong Kong, would constitute the following offences contrary to Hong Kong law:

(i) conspiracy to traffic in dangerous drugs;

(ii) trafficking in dangerous drugs; and

(iii) attempt to traffic in dangerous drug;

(b) to await the Chief Executive's decision as to his surrender, in respect of those offences, to Australia by which the request was surrender in respect of the applicant was made; and

(c) if the Chief Executive decides that he shall be surrendered to Australia, to await such surrender.

3. The applicant is currently in the immediate custody of the first respondent.

4. The Australian Government seeks the surrender of the applicant in connection with transactions involving crystal methamphetamine. It is the Australian Government's case that the applicant participated in the supply, in Sydney, Australia, of some 3 kg of crystal methamphetamine in December 2009 and the importation into and distribution within Australia of some 51 kg of crystal methamphetamine in January 2010. The applicant was in Hong Kong at the time of the commission of each of these offences. It is alleged that he had discussions by way of telephone with an identified co-offender, which discussions codes were used. Those discussions, or some of them, were monitored by the Australian authorities which also carried out physical surveillance on persons in Australia alleged to be involved in the offences.

5. The monitoring of the discussions was by way of interception and recording of the telephone calls. It is not suggested that the monitoring and recording of those telephone calls (the telephone recordings) was unlawful in Australia: to the contrary, there was clear and extensive evidence contained in the material before the magistrate, especially that of Detective Senior Constable Todd Francis Mathers, that the telephone recordings were carried out in accordance with the Australian Telecommunications (Interception and Access) Act 1979. Evidence obtained in this fashion in Australia is admissible in the course of a criminal trial there.

THE ISSUES

6. At the committal hearing before the magistrate four specific issues were raised on behalf of the applicant: the evidence relating to identification of the recorded voices was inadequate and unreliable so the magistrate could not find that it was the applicant who had participated in the recorded conversations; the prosecution claim that code words were used in the course of the intercepted conversations was speculative and unsupportable as those parts of the conversations were equally consistent with innocent conversation; there was a jurisdictional defect in respect of one of the warrants of arrest issued against the applicant in Australia; there was insufficient evidence admissible under Hong Kong law for the magistrate to be satisfied that a *prima facie* case had been demonstrated to exist against the applicant, in that none of the telephone recordings would be admissible in Hong Kong by virtue of s.61(1) of the Interception of Communications and Surveillance Ordinance, Cap 589 (ICSO).

7. In this application the applicant relies upon the jurisdictional defect which he submits is evident in respect of one of the Australian warrants of arrest and on the submission that s.61(1) ICSO prohibits the introduction of the telephone recordings as evidence before the magistrate.

8. There is no dispute that the offences for which the surrender of the applicant is sought are "relevant offences" as defined in s.2(2) of the Ordinance. The respondents do not challenge the applicant's assertion that, absent the telephone recordings, there would be insufficient evidence against him to justify finding a *prima facie* case to exist.

THE AUSTRALIAN WARRANT OF ARREST

9. Two warrants of arrest were issued in Australia. The first was issued on 27 August 2010 by the Local Court in Sydney. It is described as an “Arrest Warrant" and makes reference to the Criminal Procedure Act 1986. It lists three offences and provides a short description of each offence and the date and place of each offence in schedule form. Attached to it are three separate documents each of which which is styled "Court Attendance Notice" and sets out, in list form, the details of the defendant, the prosecutor and the offence. Although the first arrest warrant refers to three alleged offences, the first is no longer pursued. The second and third offences set out in that warrant appear as follows:

Seq No.	Short description of offence	Date of offence	Place of offence
2	Traffic in commercial quantity of controlled drug	1.1.2010	Glendenning
3	Knowingly take part in supply of prohibited drug	15.12.2009	Hurstville

10. A second arrest warrant was issued on 1 September 2010 by the same court which: it and the Court Attendance Notice, follows the same format as the first. It contains a reference only to one offence, which is referred to as "Attempt traffic in commercial quantity of control drug". As a matter of convenience I shall refer to the two offences in the first warrant as, respectively, the first and second offences and that in the second warrant as the third offence. This is the order in which the magistrate dealt with the offences in his committal order as appears at § 2 above.

11. Objection is taken only to the first warrant and only insofar as it relates to the first offence. It is the applicant's contention that that warrant refers to the discrete offence of what, in Hong Kong, would be trafficking in a dangerous drug whereas the magistrate has ordered his committal in respect of an entirely different offence, *viz*, conspiracy to traffic in a dangerous drug. It is correct that on the face of the warrant the offence is one of trafficking in a dangerous drug. It is correct, also, that the offences of trafficking and conspiracy to traffic in a dangerous drug are two separate and distinct offences in Hong Kong law. From the evidence before the magistrate it is clear that the position is the same in Australia.

12. The magistrate had regard to the contents of the Court Attendance Notice that relates to the first offence. Under the heading in the Court Attendance Notice "Details of offence/s" reference is made to the Criminal Code Act 1995, s.302.2(1) and there then appears the phrase "Traffic in commercial quantity of controlled drug". Particulars are then given in this form:

> HO Man Kong, contrary to subsection 11.5(1) of the Criminal Code (Cth), conspired with GU Xiong and others to commit an offence contrary to subsection 302.2(1) of the Criminal Code (Cth), namely trafficking a substance, the substance being a controlled drug, namely 50095.4 g of crystallised methamphetamine, and the quantity trafficked being a commercial quantity.

13. The affidavit of the prosecutor as to matters of law establishes that s.11.5(1) of the Criminal Code creates the crime of conspiracy whilst s.302.2(1) creates the crime of trafficking in a commercial quantity of a controlled drug.

14. It is not proper, the applicant asserts, to have regard to the content of the Court Attendance Notice as there is no evidence as to its status nor has it been properly authenticated. There is no merit in this submission. The arrest warrant and the three Court Attendance Notices attached to it, one relating to each charge, are clearly one composite document. The arrest warrants and the attached Court Attendance Notices are annexures to the affidavit of Detective Senior Constable Mathers. They are bound together in the bundle of documents, the bundle itself being authenticated. That is sufficient authentication: see *Tiongco v The Government of the Republic of the Philippines and Anor* [1998] 2 HKLRD282 at 312E:

> All the affidavits had been signed by a judge or magistrate or officer of the Philippines and there is a global certificate of authentication to which the affidavits were attached. A similar argument was deployed in *Oskar v Government of Australia* [1998] 1 AC 366 in relation to a similar section of the Fugitive Offenders Act, and in that case there was one official seal affixed to a tape binding together and it is documents. Lord Ackner said at p.377C:
>
> I agree with the Divisional Court that the section does not require each statement to carry on its face a certificate from the magistrate. Such a requirement would be highly artificial. The section is complied with if there is a separate certificate, which sufficiently identifies all the statements which it certifies, as in the instant case, where they are all tied together.

15. There can be no doubt that the offence alleged against the applicant was one of conspiracy to traffic in whatever manner the offence may have been loosely described in the summary on the face of the arrest warrant: no one, be it the applicant or anyone else, sensibly could be under any misapprehension to the contrary upon seeing the documents.

16. That fact would have been reinforced by reference to the request for extradition, which was before the magistrate, signed by the Minister for Home Affairs in Australia which details the first offence as:

> Conspiracy to traffic in a commercial quantity of a controlled drug, namely crystallised methamphetamine, contrary to subsection 302.2(1) of the Criminal Code with subsection 11.5(1) of the Criminal Code.

17. In any event, it is not necessary to go this far to resolve this issue. I have done so simply as a matter of courtesy to the argument advanced by Counsel on behalf of the applicant.

18. The issue seems to me to be resolved simply by reference to the Ordinance. By virtue of s.10(6)(b)(ii) of the Ordinance (see §26 below for the full text) a magistrate is required to be satisfied that the "supporting documents" in relation to the offence have been produced and are duly authenticated. What is required in terms of supporting documents is defined by s.2(1) of the Ordinance:

> Supporting documents means-
>
> (a) in relation to an offence in respect of which a person is wanted for prosecution-
>
> (i) a warrant of arrest (or a copy thereof) issued in the prescribed place which has made the request for surrender concerned; and
>
> (ii) other documents which provide evidence of-
>
> (A) the offence;
>
> (B) the penalty which may be imposed in respect of the offence; and
>
> (C) the conduct constituting the offence;
>
> [emphasis supplied]

19. It is self-evident from that definition that there is no requirement as to the particular format or contents of the warrant of arrest: the sole requirement is that it is a warrant for the arrest of the person whose surrender is sought which has been issued by the requesting country. That seems to me to be entirely understandable: the form and content of a warrant of arrest - as such a document is called in Hong Kong, or arrest warrant as it appears to be called in Australia - will vary from jurisdiction to jurisdiction. It would unnecessarily complicate the extradition process if the Hong Kong Ordinance were to attempt to prescribe to other jurisdictions detailed requirements as to the format or content of such a document. It also would presuppose knowledge of Hong Kong law on the part of those in the requesting state if it were to be drafted to reflect the Hong Kong offences: conversely, it would presuppose a Hong Kong magistrate to have knowledge of the laws of the requesting state if it were to be drafted in accordance with that jurisdiction's laws.

20. What the magistrate needs to be satisfied about is that there is produced before him a properly authenticated document which is shown to be a warrant issued by the requesting country for the arrest of the person whose surrender its sought. The details of the offence, the penalty and the conduct which he has to consider in arriving at his decision are contained in other documents, not the warrant of arrest.

21. In *R v Governor of Pentonville Prison, ex parte Budlong and Anor* [1980] 1 All ER 701 when considering the same issue, Griffiths J. said, at 706C:

> The only other document of a formal nature that is required to be before the magistrate is the foreign warrant authorising the arrest of the criminal.... There is nothing in the treaty that requires any other formal document to be before the magistrate and no authority has been cited to show that extradition has ever been refused on this ground. I am quite satisfied that in extradition proceedings there is no requirement for any formal documents to be before the magistrate other than the order of the Secretary of State and the warrant of arrest, neither of which, for the reasons I have given, are required to set out all the particulars of the English offence. It is to be evidence that the magistrate is directed to look to see whether there are sufficient facts established to constitute an offence contrary to English law and not to any formal document. I am glad to find that this is so, for it would be deplorable if the technicalities of English procedure were introduced to thwart an otherwise proper request for extradition. [Emphasis supplied]

22. This decision followed an earlier decision in *R v Jacobi and Hiller* (1881) 46 LT 595 at p. 597, where the court held that:

> ...the warrant need show nothing more than the fact that it has been issued by some competent authority and is in fact an official document for the arrest of the prisoner.

and itself was followed by P Chan, J., in *In the matter of Paul Kan* HCMP1273/1992 (unreported, 3 July 1992).

23. In my judgment, the warrants of arrest which were before the magistrate in respect of all three offences were in due form.

THE EFFECT OF S.61(1) ICSO

24. It is the submission of the applicant that the provisions of s.61(1) ICSO have the effect of rendering inadmissible in criminal proceedings in Hong Kong all material obtained during any interception of telephone conversations and, thus, excluding it from the consideration of the magistrate in extradition proceedings.

25. The argument was developed further along what were referred to as "constitutional" lines with the submission that if it were to be held that the evidence obtained by the interception of telephone conversations in a jurisdiction other than Hong Kong were allowed to be tendered in evidence in Hong Kong then, consequent upon the provisions of Article 30 of the Basic Law, s.61(1) would be unconstitutional and the court should then "read in" to that section such words as are necessary to ensure all such evidence is always excluded.

26. The task of a magistrate in extradition proceedings appears from s.10(6)(b) of the Ordinance, relevant passages of which are in the following terms:

> (6) Where-
>
> (a) … ; or
>
> (b) an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied-
>
> (i) that the offence to which the authority relates is a relevant offence;
>
> (ii) that the supporting documents in relation to the offence-
>
> (A) have been produced; and
>
> (B) are duly authenticated;
>
> (iii) where the person is wanted for prosecution in respect of the offence, that the evidence in relation to the offence would be sufficient to warrant the person's committal for trial according to the law of Hong Kong if the offence had been committed within the jurisdiction of that court or any other court; and
>
> (iv) …

> the court shall (unless the person's committal is prohibited by any other provision of this Ordinance) by order commit him to custody-
>
> > (i) to await the Chief Executive's decision as to his surrender to the prescribed place by which the request for surrender concerned was made; and
> >
> > (ii) if the Chief Executive decides that he shall be surrendered to that place, to await such surrender.
>
> [Emphasis supplied]

27. The requirement that the evidence before a magistrate be sufficient to permit the person's committal for trial is to be judged in accordance with the laws of Hong Kong is found repeated in Article 9(3) of Schedule 1 to the Fugitive Offenders (Australia) Order which provides:

> If the request relates to an accused person it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the requesting party. In the case of requests to Hong Kong, the request shall also be accompanied by such evidence as, according to the law of Hong Kong, would justify committal for trial if the offence had been committed within the jurisdiction of Hong Kong.
>
> [Emphasis supplied]

28. The English legislation which predated the Ordinance, which came into effect in April 1997, but had been extended to Hong Kong contained similar provisions, s.10 of the Extradition Act 1870 providing:

> In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.
>
> [Emphasis supplied]

whilst s.7(5) of the Fugitive Offenders Act 1967 similarly provided:

> Where an authority to proceed has been issued in respect of the person arrested and the Court of committal is satisfied, after hearing any evidence tendered in support of the request for the return of that person or on behalf of that person, that the offence to which the authority relates is a relevant offence and is further satisfied:
>
> (a) where that person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the court;
>
> ...
>
> the Court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his return thereunder; but if the Court is not so satisfied or if the committal of that person is so prohibited, the Court shall discharge him from custody.
>
> [Emphasis supplied]

29. It is well-settled that a magistrate is to consider the evidence which accompanies the request for surrender detailing the conduct of the alleged offender in order to establish whether it is such that a jury, properly directed, could convict upon it - the *prima facie* case test. (See, for example, *R v Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277 at 298E-300F; *Thongchai Sanguandikul v Government of the United States of America And Anor.* [1993] 2 HKLR 475 at 477-45 and 479-40; *Re CHONG Bing Keung* [2000] 1 HKC 256 CA at 260D-E; *Lay Eng Tao v Superintendent of Tai Lam Centre for Women and United States of America* CACV3897A/2001; *See Cherk Ching v Superintendant of Lai Chi Kok reception Centre and Anor.* [2005] 4 HKLRD 105 §§5-6.)

30. It is also well settled that it is the rules of evidence of the requested state - in this matter, Hong Kong - which are to be applied to the material before the magistrate in order for him to determine whether a *prima facie* case has been established. (See, for example, *R v Governor of Pentonville Prison, ex parte Kirby* [1979] 1 WLR 541 at 543H; *R v Governor of Pentonville Prison, ex parte Chinoy* [1992] 1 All E R 317; *Attorney General v LUI Kin Hong Jerry* CACV125/1996).

31. Courts both here and in other jurisdictions consistently have emphasised, irrespective of the particular legislative regime in effect at any given time, the unique nature of extradition proceedings and the necessity to maintain the simplicity of their procedure. The procedure departs many of the checks and balances which one finds in other areas of the law, particularly with developments in human rights law: three of the more striking departures are that there is no right of cross-examination; discovery is not available; there is no right to lead evidence which contradicts evidence tending to show the commission of the offence in respect of which extradition is sought.

32. There are, of course, good reasons for these departures: the proceedings before the magistrate are a consequence of international agreements based upon comity and reciprocity; it is taken that the requesting party acts in good faith; the magistrate's function is to determine whether there is a *prima facie* case for a fugitive to answer; the proceedings before the magistrate do not determine guilt or innocence of the fugitive, which is reserved for decision in the event that he is extradited; it is not the magistrate but the Chief Executive, who decides whether a person should be surrendered; there is the protection of habeas corpus proceedings; and the necessity for a committing magistrate to be required to decide matters of foreign law is avoided.

33. In *Cartwright and Anor v Superintendent of Her Majesty's Prison and Another* [2004] 1 WLR 902 Lord Steyn, when delivering the majority judgment, said in connection with the modern approach to interpretation of extradition legislation:

> In extradition law the court must adopt a balanced approach. Throughout extradition law there are two principal threads. First, in exercising powers of extradition courts of law must... be vigilant to protect individuals from the overreaching of their rights by the government. Justice to the individual is always of supreme importance. Secondly, the board considers that it is imperative of legal policy that extradition law must, wherever possible, be made to work effectively. There was some controversy about this point. It is, therefore, necessary to explain the position.
>
> Crime and criminals have always traversed national boundaries. But in the modern world advances in technology and means of communication have enormously increased this phenomenon, notably in the fields of financial crimes, drugs offences and terrorism. It is, therefore, of great importance that extradition law should function properly.... Moreover, in *Re Ismael* [1999] 1 AC 320 the House of Lords in a unanimous judgment commented on the need to bring suspected criminals, who have fled abroad, to justice through the extradition process. In that case I observed, at 327:

> There is a transnational interest in the achievement of this aim. Extradition treaties and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the text permitted in order to facilitate extradition...

34. Whilst there are marked procedural difference between extradition proceedings and a criminal trial, for the purpose of determining whether a *prima facie* case exists that justifies the committal of the applicant the magistrate was only entitled to rely upon evidence that would be admissible under Hong Kong rules of evidence.

> It is common ground that, as a matter of law, the fact that proceedings are extradition proceedings does not permit the admission of evidence which in domestic proceedings would be inadmissible

per Stock J in *Wong Shu Kwan, Johnny v Government of Canada and Anor* HCAL135/2000.

35. I do not understand the applicant to suggest that prior to ICSO coming into effect evidence however obtained, including by way of interception of communications, would not have been admissible in a criminal trial in Hong Kong provided that it was relevant and subject only to the court's overriding jurisdiction to exclude evidence that was more prejudicial than probative. The consequence of that is that, subject only to the question of relevance, such evidence would also be admissible for the purpose of extradition proceedings.

36. This is illustrated by *Thanat Phaktiphat v Chief Superintendent of Lai Chi Kok Reception Centre and Anor* CACV5/1995 in which a magistrate had committed the applicant to custody following upon an application by the United States of America: a substantial portion of the evidence against that applicant came from 31 telephone calls which had been carried out by law enforcement authorities under the authority and order of a United States District Judge. Godfrey JA said:

4 ...It was not argued before Mayo, J. that this material had been unlawfully obtained in the USA. Clearly, it would be admissible in any criminal proceedings against the appellant in the USA.

5. The magistrate, accepting (correctly) that the evidence was relevant evidence, declined the appellant's invitation to exclude it...

...

7. For my part, I agree with Mayo, J. that the magistrate was right

....

11. In my judgment, the Hong Kong magistrate, hearing an application for extradition by a requesting state and faced with evidence that was lawfully obtained in and under the law of that state, cannot possibly be entitled to exclude it from his consideration on the ground (the only ground urged on behalf of the appellant here) that the court would have had a discretion to exclude it from consideration in committal proceedings in Hong Kong on the ground that it had been obtained unlawfully, even if that ground were made out.

12. The reasons for this are many; it is sufficient to referred to two.

13. In the first place, we are concerned, not with committal proceedings in Hong Kong but with extradition proceedings in Hong Kong; to which, as just demonstrated, entirely different considerations apply from those which apply in committal proceedings. I would hold that, in extradition proceedings, questions relevant to the fairness or otherwise of receiving evidence are questions for the court of trial, not for the magistrate hearing the extradition proceedings.

> 14. In the second place, even if we had been concerned with committal proceedings, the position in Hong Kong (as at common law: see e.g. **R v Khan (Sultan)** [1994] 4 All E R 426) is that the magistrate has no discretion to exclude relevant and therefore admissible evidence from his consideration, even if it be alleged that it was unlawfully obtained.

37. Rather, the applicant relies solely upon what he contends to be the effect of the introduction of s.61(1) ICSO. That section reads:

> (1) Any telecommunications interception product shall not be admissible in evidence in any proceedings before any court other than to prove that a relevant offence has been committed.

38. The parties accept that the exemption from the prohibition in respect of "a relevant offence" is of no applicability in these proceedings.

39. The applicant's contention is that the evidence obtained in Australia constitutes "telecommunications interception product". As a consequence of that, it is submitted, the introduction of the material in evidence is prohibited by s.61(1).

40. The submission continues that excluded material is "telecommunications interception product" which is material obtained consequent upon an authorisation granted under ICSO and that unless all materials obtained by way of any interception of communications is rendered inadmissible by "reading in" to s.61(1) the necessary prohibition, an absurdity would arise in that materials obtained under an authority in Hong Kong would be inadmissible by virtue of s.61(1), those obtained without authority or obtained in other jurisdictions would remain admissible subject only to the requirement of relevance.

41. The applicant's submission is based upon the fundamental proposition that the telephone recordings constitute "telecommunications interception product". Section 61(1) is quite specific in its terms: it prohibits the introduction in evidence of that category of material. That material is defined in clear terms in s.61(8) thus:

> "telecommunications interception product" means any interception product to the extent that it is-
>
> (a) any contents of a communication that have been obtained pursuant to a relevant prescribed authorization; or
>
> (b) a copy of such contents.

whilst

> "relevant prescribed authorization" means a prescribed authorization for a telecommunications interception;

42. It follows, therefore, that unless the material has been obtained "pursuant to the relevant prescribed authorisation" it cannot be "telecommunications interception product". Of course, this is precisely the point that the applicant makes in regard to material obtained in Hong Kong other than under a prescribed authorisation but whatever the position may be in that regard - and I express no view on that issue - it has no relevance in the present proceedings, which concern the admissibility of evidence obtained under lawful authority in another jurisdiction following the prescribed procedure of that jurisdiction. Accordingly, it seems to me to be both unnecessary and inappropriate to consider whether it is necessary to read in the provision in the blanket terms suggested by the applicant.

43. The question then arises whether the product obtained under a prescribed authorisation in another jurisdiction could qualify as "telecommunications interception product". That is a question that must be answered in the negative. Section 2(1) of ICSO provides:

> "prescribed authorization" means a judge's authorization, an executive authorization or an emergency authorization;
>
> "judge's authorization" means a judge's authorization issued or renewed under Division 2 of Part 3…
>
> "emergency authorization" means an emergency authorization issued under Division 4 of Part 3…

> "executive authorization" means an executive authorization issued or renewed under Division 3 of Part 3..

44. Division 1of Part 3 of ICSO makes it abundantly clear that a judge referred to in the phrase "judge's authorisation" is a judge of the Court of First Instance appointed by the Chief Executive. Plainly, these are references to the positions held by persons in Hong Kong although, for the sake of completeness, it is to be noted that s.3 of the Interpretation and General Clauses Ordinance, Cap 1, defines, unsurprisingly, both "Chief Executive" and "Court of First Instance" as being references to that office and institution in the Hong Kong Special Administrative Region.

45. In this context the applicant submitted further that because s.10(6)(b)(iii) of the Ordinance requires the magistrate to consider whether "...the evidence in relation to the offence would be sufficient to warrant the person's committal for trial according to the law of Hong Kong <u>if the offence had been committed within the jurisdiction</u> of that court..." (emphasis supplied) the telephone recordings must "... be treated for the purposes of these committal proceedings as if they had been authorised in Hong Kong."

46. In support of this contention the applicant sought to rely upon a passage in the judgment of the Court of Appeal in *Somchai Liangsiriprasert v The Government of the United States of America and Anor* [1990] 1 HKLR 85 at 95F where Fuad, V.-P., giving the judgment of the court, said:

> Substituting Hong Kong for England it seems to us that the magistrate had to be satisfied that there was before him *prima facie* evidence that the conduct of the applicant amounted to the commission of an offence or offences according to the laws Hong Kong. It is to be noted that the effect of s.10 is that the magistrate, for this purpose, applies the fiction that the crime for which the fugitive offender is accused had been committed in Hong Kong.

in association with a single phrase "... all the circumstances of the case..." in a passage by Lord Keith of Kinkel in *Tarling v Government of Singapore* (1980) 70 Cr App R 77 at 136, contending that this means that the Australian interceptions had also to be regarded as having occurred in Hong Kong.

47. The passage in *Tarling* read in full:

> In considering the jurisdiction aspect it is necessary to suppose that England is substituted for Singapore as regards all the circumstances of the case connected with the latter country, and to examine the question whether upon that hypothesis and upon the evidence adduced the English courts would have jurisdiction to try the offences charged.

48. It does not seem to me to be open to interpret the decisions relied upon by the applicant in this manner: it is clear that reference in each instance was being made to the conduct of the offender, not the method of investigation or securing evidence for the purposes of prosecuting that conduct. There is not, in my view, any justification for suggesting that s.10(6)(b)(iii) of the Ordinance requires anything other than the acts or omissions of the offender to be considered in order to ascertain whether that conduct constituted an offence in this jurisdiction.

49. The provisions of s. 61(1) are clear and unambiguous. The meaning of it appears clearly from the text. There is no necessity to go outside the ordinance itself in order to ascertain its meaning.

CONCLUSION

50. I am satisfied that the telephone recordings do not fall within the definition of "telecommunications interception product" and therefore are not caught by the provisions of s.61(1) ICSO. In my judgment, they remain admissible, subject only to relevance. Their relevance is self-evident. It would not be open to the magistrate to disregard the telephone recordings on the basis that they were more prejudicial than probative, should he come to that view, as that would be a matter for the trial court: see *Thanat Phaktiphat* above.

51. In the circumstances the application is dismissed. There will be an order *nisi*, returnable within 14 days, that the applicant pay the respondents' costs, as taxed or agreed.

(A R WRIGHT)
Judge of the Court of First Instance

Mr Wayne Walsh, Deputy Law Officer, and Ms Linda Lam, Deputy Principal Government Counsel, Department of Justice, for the Respondents

Mr Alexander King, SC, and Mr Andrew Lynn, instructed by Messrs. Haldanes, for the applicant.

Please refer to CACV161/2011 for the relevant appeal(s) to the Court of Appeal.