CACV 161/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 161 OF 2011

(ON APPEAL FROM HCAL NO. 17 OF 2011)

BETWEEN

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

Before: Hon Stock VP, Fok JA and Lam JA in Court

Date of Hearing: 31 July 2012

Date of Judgment: 31 July 2012

Date of Handing Down Reasons for Judgment: 21 September 2012

REASONS FOR JUDGMENT

Hon Stock VP:

Introduction

1. On 17 March 2011, a magistrate in Hong Kong made an order pursuant to section 10(6)(b) of the Fugitive Offenders Ordinance, Cap 503 (the Ordinance) by which he committed the appellant to custody in respect of a number of drug trafficking offences to await the decision of the Chief Executive as to the appellant's surrender to Australia, a request for which surrender had been made by the Government of the Commonwealth of Australia.

2. An application was thereafter made on the appellant's behalf for the issue of a writ of habeas corpus *ad subjiciendum* but by a judgment dated 28 July 2011, Wright J dismissed that application.

3. The appellant launched an appeal against that judgment and on 31 July 2012, we dismissed the appeal. These are our reasons for doing so.

The alleged criminality

4. The alleged criminal conduct in respect of which the appellant's surrender is requested may be summarised quite briefly. It falls into two episodes, each concerned with a separate unlawful consignment from Hong Kong to Australia of a substantial quantity of dangerous drugs.

5. The first episode was in December 2009 when about 3 kg of crystal methylamphetamine was supplied in a basement car park in Sydney to a man who was then arrested. Although the appellant was in Hong Kong at the time of this offence, intercepts conducted in Australia of mobile telephones used in Australia disclosed communications between a supplier or suppliers in Australia and the appellant and revealed the appellant as a person directing the trafficking operation. The case in Hong Kong has proceeded on the unchallenged basis that the intercepts were carried out in accordance with Australian law. Some of the conversations upon which reliance is placed took place whilst the appellant was in Hong Kong; others during a short visit by him to Australia.

6. The second episode took place in January 2010 and the evidence was of a shipment from Hong Kong of car parts to a warehouse in Australia. Those parts were disassembled and packages removed from them. The packages contained approximately 51 kg of methamphetamine to a value of about AUD 20 million. The packages were subsequently loaded into a taxi. The taxi was stopped by Australian law enforcement authorities and an offender arrested. At all material times for the purpose of this episode, the appellant was in Hong Kong and the evidence is that he was in regular contact with a number of co-defendants via mobile telephone in the course of which contact he discussed plans to traffic the drugs. The evidence against the appellant in relation to this episode is again constituted entirely by intercept evidence; and, again, the intercepts were made in Australia in accordance with Australian law.

Procedural steps

7. Warrants for the arrest of the appellant in connection with these activities were issued by a Local Court in New South Wales on 27 August and 1 September 2010; to the terms of which warrants we will return since those terms form the basis of the second ground of appeal.

8. By a Request dated 5 October 2010, the Minister for Home Affairs of the Commonwealth of Australia requested the Government of the Hong Kong Special Administrative Region that the appellant to be returned to Australia to be dealt with according to law, stating that the appellant was accused in Australia of the offences of conspiracy to traffic in a commercial quantity of crystallised methylamphetamine; of knowingly taking part in the supply of a large commercial quantity of crystal methamphetamine; and of attempting to traffic in a commercial quantity of crystallised methamphetamine[1].

9. On 10 November 2010 the Chief Executive, exercising the power conferred on him by section 6(2) of the Ordinance issued an authority to proceed, by which he ordered that the appellant be dealt with under Part II of the Ordinance. The authority recited the fact that the appellant was "wanted in [Australia] in respect of offences against the law relating to dangerous drugs including narcotics and psychotropic substances."[2]

10. Proceedings for committal were heard in the Eastern Magistrates Court over a period of several days in February and March 2011 and on 17 March 2011, the committal order was made. The terms of the order[3] were the subject of the second ground of appeal.

Admissibility of the intercept evidence

11. The first ground of appeal concerned the admissibility of evidence.

12. Section 10 (6) (b) of the Ordinance permits the court of committal to make a committal order upon satisfaction of conditions prescribed by that subsection. One such condition is :

> "where the person is wanted for prosecution[4] in respect of the offence[5], 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."[6]

13. It follows that the application of Hong Kong rules of evidence – and therefore of admissibility – are engaged: see, by analogy, *R v Governor of Pentonville, Ex p. Kirby*[7]. This was common ground between the parties to these proceedings and it was also common ground that the intercept evidence in this case is the only evidence against the appellant in respect of the offences to which the authority to proceed relates. It further follows that if that intercept evidence would be inadmissible as against a defendant in a Hong Kong criminal trial, the condition precedent prescribed by subsection (6)(b)(iii) for the appellant's committal could not be satisfied.

14. The gravamen of the inadmissibility argument before Wright J was to the effect that a proper reading and application of section 61(1) of the Interception of Communications and Surveillance Ordinance, Cap 589 ("ICSO")[8] rendered the telephone recordings inadmissible in Hong Kong proceedings. That position was no longer maintained before us. Instead, the argument concentrated on the provisions of art. 30 of the Basic Law, which states that:

> "The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences."

15. The argument was that art. 30 prohibits the admission of evidence obtained by an invasion of privacy of a communication of a Hong Kong resident. Art. 30, it was said, "proclaims admissibility standards". Whilst the intercepts themselves were effected in Australia, the conversations intercepted were of the appellant speaking whilst he was in Hong Kong and art. 30 protects communications by Hong Kong residents in Hong Kong. The exceptions to which art. 30 refer, namely, the inspection of communications to meet the needs of public security or investigation into criminal offences are not, it was argued, applicable in this case because the investigations were carried out and completed by the Australian authorities. Whilst it was correctly accepted that s 61 of ICSO could not properly be used to interpret art. 30, it was suggested that s 61 was not entirely irrelevant; it was a partial fulfilment of art. 30 in that it prohibited the use in evidence of intercept products, as defined by the Ordinance, for trials in Hong Kong; whereas art. 30 contemplated their evidential exclusion even where the intercept took place abroad, provided that the intercept was of a communication with a Hong Kong resident who was in Hong Kong at the time of the communication.

16. The argument is, with respect, without logical foundation. Art. 30 simply does not say what counsel suggested, nor does the Article impliedly so dictate. It avowedly *permits* interceptions for the purpose of investigations into criminal activity so long as the interception accords with legal procedures and it is silent as to the use that made be made of intercepts effected pursuant to such legal procedures. Therefore, for the appellant's argument to succeed, one would have to conclude that it is by necessary implication that the Article prohibits evidential use of the fruits of lawful intercepts and it is, in our judgment, not possible to construct such a necessary implication. If it is permitted to make the intercept, as is clearly envisaged, why are the fruits of the intercept forbidden? A reason might present itself if the production in evidence of those lawfully obtained fruits impinge upon another right, namely, the right to a fair trial – a consideration to which we next turn – but, that apart, the use of the lawful intercept, an intercept expressly permitted by art 30, no more constitutes an impermissible invasion of privacy than the intercept itself. Nor is it logical to suppose that those who drafted the Basic Law envisaged the admission into evidence of lawful local intercepts but its exclusion when the intercept took place abroad in accordance with the laws of a jurisdiction which embraces such safeguards as are commensurate with accepted international norms and with the right to a fair trial.

17. Even were one to suppose that the evidence from an intercept had been secured unlawfully, that fact of itself would not at common law render the evidence inadmissible. If the evidence be relevant to the issue or issues in the case, it is – unless applicable statute otherwise stipulates – admissible subject to the discretion of the court to exclude evidence the prejudicial value of which outweighs its probative value or if exclusion is otherwise necessary for a fair trial[9]. There is no reason to conclude that art. 30 contemplates some new approach to unlawfully obtained evidence, let alone to that which is lawfully secured. Such prohibition on the admission of intercept evidence as is part of the law of Hong Kong is to be found only in section 61(1) of ISCO and an examination of the rationale for that provision and of the section's absence of impact upon receipt in Hong Kong proceedings of evidence of intercepts effected elsewhere will itself illustrate – if further illustration be necessary – the fallacy of the appellant's argument.

18. ISCO was enacted in 2006, well after promulgation of the Basic Law. The Ordinance was enacted to regulate the conduct of interception of communications in a way which met the requirement of art. 30 that such interceptions as were rendered permissible by that Article were effected in accordance with "legal procedures" as thereby envisaged. Previous procedures had been ruled unconstitutional as not meeting this requirement. [10] It is pertinent to note that the Court of Final Appeal in *Koo Sze Yiu and another v Chief Executive of Hong Kong*[11] recognised that whilst the interception of communications impacted upon the privacy of the communications, covert surveillance was nevertheless:

> " … an important tool in the detection and prevention of crime and threats to public security i.e. the safety that the public is entitled to enjoy in a free and well-ordered society. The position reached upon a proper balance of the rival considerations is that covert surveillance is not to be prohibited but is to be controlled. Such control must sufficiently protect … fundamental rights and freedoms, particularly freedom and privacy of communication. The "legal procedures" requirement contained in art. 30 of the Basic Law exists to ensure such protection."

19. Section 61 of ICSO, Cap 589 provides as follows:

> "(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.

(2) Any telecommunications interception product, and any particulars as to a telecommunications interception carried out pursuant to a relevant prescribed authorization, shall not be made available to any party to any proceedings before any court (other than any such proceedings instituted for a relevant offence).

(3) In any proceedings before any court (other than any such proceedings instituted for a relevant offence), any evidence or question which tends to suggest any of the following matters shall not be adduced or asked—

> (a) that an application has been made for the issue or renewal of a relevant prescribed authorization, or the issue of a relevant device retrieval warrant, under this Ordinance;
>
> (b) that a relevant prescribed authorization has been issued or renewed, or a relevant device retrieval warrant has been issued, under this Ordinance;
>
> (c) that any requirement has been imposed on any person to provide assistance for the execution of a relevant prescribed authorization or a relevant device retrieval warrant;
>
> (d) that any information has been obtained pursuant to a relevant prescribed authorization.

(4) Notwithstanding subsection (2) or any other provision of this Ordinance, where, for the purposes of any criminal proceedings (whether being criminal proceedings instituted for an offence or any related proceedings), any information obtained pursuant to a relevant prescribed authorization and continuing to be available to the department concerned might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence—

> (a) the department shall disclose the information to the prosecution; and
>
> (b) the prosecution shall then disclose the information to the judge in an ex parte hearing that is held in private.

(5) The judge may, further to the disclosure to him of the information under subsection (4)(b), make such orders as he thinks fit for the purpose of securing the fairness of the proceedings.

(6) Where any order is made under subsection (5) in any criminal proceedings, the prosecution shall disclose to the judge for any related proceedings the terms of the order and the information concerned in an ex parte hearing that is held in private.

(7) Notwithstanding subsection (5), no order made under that subsection authorizes or requires anything to be done in contravention of subsections (1), (2) and (3).

(8) In this section—

> ….
>
> "relevant offence" (有關罪行) means any offence constituted by the disclosure of any telecommunications interception product or of any information relating to the obtaining of any telecommunications interception product (whether or not there are other constituent elements of the offence);

....

"telecommunications interception product" (電訊截取成果) 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."

20. A prescribed authorisation to which subsection (8) refers is a judge's authorization issued pursuant to the provisions of ICSO for an interception. [12]

21. It was correctly conceded by Mr McCoy SC on behalf of the appellant that on a proper reading of section 61(1) in conjunction with the relevant definitions in section 2, section 61 does not render the contents of foreign intercepts inadmissible in Hong Kong proceedings.

22. The point in addressing section 61 in this judgment is not only to endorse that concession but to state that, in our judgment, the exclusionary provision of subsection (1) was not designed to give effect to anything supposedly required by art. 30 of the Basic Law; rather, it was to ensure that the confidentiality which the legislature has deemed desirable in the public interest to maintain in relation to methods and extent of lawful interceptions in this jurisdiction does not adversely impact upon the ability of defendants to secure a fair trial. Section 61 itself is replete with provisions designed to maintain confidentiality. How then might that objective impinge on a fair trial?

23. The answer is to be found in the judgment of Lord Hobhouse in *R v P*. [13] The case concerned the admissibility in criminal proceedings in England of recordings of intercepts, where the intercepts and the recordings of calls made or received in England were lawfully effected in another country. The contention that there was a rule of policy of English law that intercept evidence should not be used in criminal trials, regardless of where and by whom the interception had been carried out, was rejected. The prevailing English domestic provision, section 9 of the Interception of Communications Act 1985, which preserved the secrecy of surveillance operations covered by the Act did not expressly render inadmissible records of conversations intercepted in accordance with the provisions of the Act but the decision of the House of Lords in *R v Preston**[14]*** was to the effect that "the drafting of the Act necessarily had the result that the prosecution could not rely upon the intercept evidence, .. ."[15] The rationale for the exclusion of such evidence was explained by Lord Hobhouse thus: whereas it is necessary in a developed society to have a scheme for the surveillance of those liable to attack or prey upon the society or its members, what is the consequence for the use of information thus gleaned if it be desired to maintain the secrecy of surveillance methods? :

> "If the interception results, as no doubt will not infrequently be the case, in the obtaining of evidence which will assist in the conviction of criminals, are the authorities going to use that evidence in court to assist in the prosecution of the criminals concerned? Other things being equal all relevant probative evidence is admissible. But where surveillance evidence is concerned the use of the evidence comes at a price. If the fairness of the trial is to be preserved the defendant must be permitted to probe the evidence and question the witnesses who come to court to provide the proof. This means that disclosure has to be made and the secrecy of the means and extent of the surveillance has to be sacrificed. This is a real problem for those involved in the prevention and detection of crime as the cases involving informers and concealed cameras have shown. The solution traditionally adopted by the authorities has been to elect for the maintenance of secrecy and to prefer this to the use of covertly obtained material in court. This was the choice made in the 1985 Act."[16]

24. That is also the choice made by section 61 of ICSO in relation to domestic intercepts. But where secrecy is not the choice, "the necessity is that all relevant probative evidence be available to assist in the apprehension and conviction of criminals and to ensure that their trial is fair."[17] That is why the argument in *R v P* failed; a decision that approved a similar result in *R v Aujla*[18]. Absent a statutory prohibition upon the admission of testimony obtained by the lawfully executed intercept, the evidence is admissible and in the present case there was disclosed no basis in law that would render recordings of the Australian intercepts *inadmissible* in proceedings in Hong Kong[19].

25. Since the evidence was admissible, that is the end of the argument. Questions of discretion which might arise on the particular facts of a foreign intercepts case tried in Hong Kong do not concern us, nor is it suggested that they should; for such questions go to discretionary exclusion and not to admissibility and "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": per Godfrey JA in *Thanat Phaktiphat v Chief Superintendent of Lai Chi Kok reception centre and another*[20].

The warrants

26. The second assertion upon appeal was that the magistrate lacked jurisdiction to commit the appellant in relation to the alleged offence of conspiracy to traffic in a commercial quantity of a controlled drug and that Wright J erred in holding otherwise.

27. The magistrate ordered the appellant to be committed to custody:

> "... 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 drugs."

28. The arrest warrant issued in Australia dated 27 August 2010 and placed before the magistrate at the committal proceedings contained a box headed "Short description of offence" as well as the date and place of each offence described. In relation to the December 2009 conduct, the short description was: "Knowingly take part in supply of prohibited drug." The short description for the January 2010 offence ran as follows: "Traffic in commercial quantity of controlled drug." The arrest warrant dated 1 September 2010 described the offence as: "Attempt traffic in commercial quantity of controlled drug"; and this also related to the January 2010 conduct.

29. It was said for the purpose of this ground of appeal that the reference in the committal order to "trafficking in dangerous drugs" and to "attempt to traffic in dangerous drugs" were referable, respectively, to the "knowingly take part" offence referred to in the first warrant and to the attempted offence referred to in the second warrant. But, it was argued, neither warrant was for the appellant's arrest for the offence of conspiracy and that the Ordinance precluded a committal order in respect of an offence for which a warrant had not been issued in the requesting jurisdiction.

30. For the purpose of the present case, the relevant conditions precedent for the making of a valid committal order were those in section 10(6)(b):

> "(6) Where –
>
> (a) …
>
> (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;
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> (ii) that the supporting documents in relation to the offence –
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> (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…

(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."

31. Tracing those requirements in the order in which they appear in subsection (6):

(1) An authority to proceed in respect of the arrested appellant was issued. Its validity was not challenged.

(2) Did the authority to proceed relate to a relevant offence? A relevant offence is defined by section 2(2) of the Ordinance as an offence punishable under the law of the prescribed place[21] for more than 12 months and:

"(c) The acts or omissions constituting the *conduct* in respect of which the person's surrender to that place is wanted amount to conduct which, if the conduct had occurred in Hong Kong, would constitute an offence –

(i) coming within any of the descriptions specified in Schedule 1; and

(ii) punishable in Hong Kong with imprisonment for more than 12 months, or any greater punishment." (Emphasis added)

(3) The authority to proceed recited "a request for surrender of [the appellant] who is wanted in [Australia] for prosecution in respect of offences against the law relating to dangerous drugs including narcotics and psychotropic substances". The alleged acts of the appellant constituting the conduct in respect of which the appellant's surrender was sought – conduct described in detail in affidavits produced to the magistrate – clearly came within one of the descriptions of a Schedule 1 offence, namely, an offence against the law relating to dangerous drugs , including narcotics [and] psychotropic substances (para 8 of the Schedule). So, the authority to proceed related to a relevant offence.

(4) Supporting documents were produced. No suggestion was made that they were not duly authenticated. "Supporting documents" are defined by section 2(1) as:

(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;

(C) the conduct constituting the offence;

Paragraph (b) of the definition is not presently relevant.

(5) "warrant" is defined by section 2(1) thus:

" warrant"(手令), in relation to a prescribed place, includes any judicial document authorizing the arrest of a person wanted for prosecution in respect of an offence.

(6) There is authority to which the judge in the court below referred to the effect that the foreign warrant of arrest "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.": *R v Jacobi and Hillier*[22]. That much might suffice for present purposes to dispose of the appellant's point but it is, we think, unlikely, in context, that the Ordinance contemplates that the production of a warrant of arrest for conduct wholly unconnected with the request for surrender or the authority to proceed will suffice. That was Mr Walsh's submission but it is one which we do not find attractive.

(7) Mr McCoy's submission, on the other hand, was that there must be a disciplined correlation between the description of offences specified in the arrest warrant issued in the jurisdiction of the prescribed place and the offences described in the committal order. We did not agree with Mr McCoy's submission.

(8) There can be no question but that the warrant of arrest in this case related to an offence in respect of which the appellant is wanted for prosecution in Australia and that the conduct in respect of which the warrant was issued is the same conduct underlying the authority to proceed. It is difficult to see why anything additional was required. The point was made in *Cosby v Chief Executive HKSAR*[23]that:

"An analysis of the Fugitive Offenders Ordinance reveals certain key features … . They are:

(1) that the statutory regime directs the Chief Executive in the exercise of his duties under this Ordinance to the *conduct* of the fugitive in respect of which a surrender is sought by the requesting jurisdiction;

(2) that the same statutory regime directs the magistrate to the *conduct* of the fugitive revealed by the evidence placed before the magistrate at a committal hearing; and

(3) that neither the Chief Executive nor the magistrate is required to, nor should they, engage upon a study of the constituent elements of the foreign offence with which a wanted person has been charged, nor is either required to match the foreign offence with a local offence.

> There is an important difference for the purpose of the Ordinance between the law of the requesting jurisdiction ("the law of the prescribed place"), and a relevant offence against that law. … the courts and the Chief Executive are concerned with the law of the requesting jurisdiction to the extent only that it is necessary to see whether the offence described by that law carries a term of 12 months' imprisonment or more, and (sometimes) to see whether the law of the requesting place embraces that which is known in extradition law as the specialty requirement."
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> The point was further made in that judgment that :
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> "The Fugitive Offenders Ordinance … has to cater for co-operation with territories which embrace disparate legal concepts, and crimes framed quite differently from ours. Hong Kong's extradition legislation, as well as its extradition agreements, therefore strive to minimise the circumstances in which either the executive or the courts are required to examine the law of the requesting jurisdiction, and to maximise the emphasis upon conduct which in Hong Kong would constitute a scheduled crime."[24]

(9) It follows that there is no need for a match between the description of offence in the foreign warrant and the description of the offence in the committal order.

(10) Section 4 of the Ordinance is instructive in relation to the present point. It categorises those who may be arrested and surrendered in accordance with the provisions of the Ordinance. It says :

"A person in Hong Kong who is wanted in a prescribed place for prosecution … *in respect of a relevant offence* against the law of that place may be arrested and surrendered to that place in accordance with the provisions of this Ordinance."

(11) It seems to us therefore that a natural reading of that provision with that part of the definition of "supporting documents" which refers to the warrant of arrest means that, at most, all that need be shown is that a warrant of arrest has been issued in the prescribed place in respect of conduct which, had it occurred in Hong Kong, constitutes an offence in Schedule 1 of the Ordinance subject to any exception or qualifications relating to that Schedule as may be contained in the order which directs the Ordinance to apply a specific extradition arrangement, and that that is the offence to which the authority to proceed relates.

(12) It must in any event be noted that the committal order was an order committing the appellant to custody in respect of offences against the law relating to dangerous drugs including narcotic and psychotropic substances. The *particulars* provided in the committal order were particulars of the Hong Kong offences disclosed by the conduct had that conduct occurred in Hong Kong; and it is the particulars of one of the *Hong Kong* offences (conspiracy to traffic) thus described upon which objection is in truth concentrated.

(13) Whilst the point to which we now, and finally, turn was not necessary to our decision in relation to the second ground of appeal, it was in any event not accurate to assert that none of the warrants constituted a warrant in respect of the offence of conspiracy. The warrant dated 27 August 2010 stated, under the heading "Reason for arrest": "Court Attendance Notices have been filed in the Registry for the above offences". The Court Attendance Notices to which the warrant thus referred are separate documents which, according to the judgment below[25], were attached to the warrant and one of them describes the offence between 1 January 2010 and 21 January 2010 as an offence of "Traffic in commercial quantity of controlled drug" and the particulars under the heading of "Actual Offence" allege a conspiracy by the appellant with others to traffic in a controlled drug, namely 50 kg of crystallised methamphetamine. It is difficult in these circumstances validly to assert a flaw in correlation – even were such correlation necessary – between the offence alleged by the warrant and the offence referred to in the committal order.

(14) The other supporting documents referred to in section 2 were all produced and no point is taken in their respect.

(15) Other than the admissibility point, it was not suggested that the conditions in section 10 (6) (b) (iii) were not met.

Hon Fok JA:

32. I agree.

Hon Lam JA:

33. I also agree.

Hon Stock VP:

34. We make an order nisi that the applicant do pay the 1st and 2nd respondents' costs of this appeal, to be taxed if not agreed.

(Frank Stock)	(Joseph Fok)	(M H Lam)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Gerard McCoy, SC and Mr Andrew Lynn, instructed by Haldanes, for the Applicant/Appellant

Mr Wayne Walsh, Deputy Law Officer (Mutual Legal Assistance) and Ms Linda Lam, DPGC of Department of Justice for the Respondents

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[1] As we shall later see the second accusation relates to the 3 kg trafficking episode in December 2009; and the first and third accusations are alternatives which relate to the much larger importation in January 2010.

[2] By Section 4 of the Ordinance, a person in Hong Kong wanted in a "prescribed place" in respect of a "relevant offence" may be surrendered in accordance with the provisions of the Ordinance. A prescribed place is a place outside Hong Kong to which a person may be surrendered pursuant to an international arrangement to which the procedures of the Ordinance have been applied by the Chief Executive. Australia is such a place; and a relevant offence includes an offence "against the law relating to dangerous drugs including narcotics and psychotropic substances." (see Schedule 1, para 8; and Article 2 (x) of the Fugitive Offenders (Australia) Order, which is the prescribed arrangement in the present case, provides for surrender in relation to "offences against laws relating to drugs, including narcotics and psychotropic substances."

[3] See paragraph 27 below.

[4] As opposed to where the person has already been convicted in the requesting jurisdiction and is wanted there either for sentence or for execution of a sentence already imposed.

[5] The offence to which reference is here made is the offence to which the authority to proceed relates: see section 10(6)(b)(i).

[6] Section 10(6)(b)(iii)

[7] [1979] 1 WLR 541 at 543 H.

[8] The terms of s 61(1) are at paragraph 19 below.

[9] The principle and its application are succinctly summarised in *Criminal Evidence in Hong Kong*, Bruce and McCoy I – [901].

[10] See *Leung Kwok Hung and another v HKSAR* [2006] HKCU 230; and *Koo Sze Yiu and another v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441.

[11] (2006) 9 HKCFAR 441 at 449.

[12] See definition in section 2 of ICSO.

[13] [2002] 1 AC 146.

[14] [1994] 2 AC 130.

[15] per Lord Hobhouse in *R v P* at 163H.

[16] ibid. at 163 A-C.

[17] ibid at 165 H to 166 A.

[18] [1998] 2 Cr App R 16.

[19] See also *R v Governor of Belmarsh Prison and another ex parte Martin* [1995] 2 All ER 548 as to the application of this approach to extradition proceedings.

[20] CACV 5/1995, 12 May 1995, unreported.

[21] A "prescribed place" is a place outside Hong Kong to or from which a person may be surrendered pursuant to prescribed arrangements: see section 2(1) of the Ordinance.

[22] (1881) 46 LT 595 at 597; followed in *In the matter of Paul Kan* HCMP 1273 of 1992, 3 July 1992, unreported.

[23] [2000] 3 HKC 662 at 672-673.

[24] At 676 D.

[25] Paragraph 9.

Please refer to FACV13/2013 for the relevant appeal(s) to the Court of Final Appeal.