

Case Summary for:  
**XIE JING FENG v. SUPERINTENDENT OF LAI CHI KOK RECEPTION CENTRE AND ANOTHER<sup>1</sup>**

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<b>Court:</b>	Court of First Instance (Hong Kong)
<b>Judges:</b>	Hon Au J
<b>Applicant (and Counsel):</b>	Xie Jing Feng (Mr Phillip Ross (instructed by Ivan Tang & Co))
<b>Respondent (and Counsel):</b>	Superintendent of Lai Chi Kok Reception Centre and Government of the Republic of India (Mr Wayne Walsh SC, DLO and Mr Felix CY Hoe, SGC of the Department of Justice)
<b>Date heard:</b>	1 March 2016
<b>Date promulgated:</b>	13 February 2017
<b>Full text:</b>	<a href="https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2017/195.html">https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2017/195.html</a>
<p><b>ABSTRACT:</b> The Applicant was arrested in Hong Kong pursuant to a request made by the Indian Government in relation to drugs-related offences. In 2015, he made the first <i>habeas corpus</i> application based on the grounds of unlawful arrest, lack of <i>prima facie</i> case and absence of relevant offence under Indian law. The Court rejected all three grounds.</p>	
<b>Key words:</b>	<i>habeas corpus, Fugitive Offenders Ordinance, unlawful arrest</i>

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The Justice Centre is grateful for the assistance rendered by Morrison & Foerster on this case summary.

<sup>1</sup> [2017] HKCFI 195; Also cited as: HCAL 223/2015

## SUMMARY:

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### Facts and Procedural History:

On 21 November 2008, officers of the Narcotics Control Bureau (the “**NCB**”) of India found 1.56 kg white crystalline Methamphetamine powder substance in a vehicle that the Applicant was on in Vadodara, Gujarat, India. The Applicant then led the officers to a company called Sakha Organics Ltd (“**SOL**”) in Vadodara, at the premises of which 110.32 kg of liquid Methamphetamine was found. During an interview with the NCB, the Applicant admitted that he conspired with others to manufacture Methamphetamine at SOL, and the 1.56 kg Methamphetamine found in the vehicle was from SOL and to be delivered by the Applicant to others (the “**Applicant’s Confession**”). Thereafter, the Applicant was placed under judicial custody.

On 28 April 2011, the Applicant was collected from the jail to a local hospital for medical treatment. On their way back to the jail, the Applicant was un-cuffed to wash his face. The Applicant suddenly crossed the road and rode off on a motorcycle. The officers failed to catch the Applicant.

In March 2015, the Applicant was arrested in Hong Kong pursuant to the request made by the Indian Government. In May 2015, the Indian Government made a request for surrender together with supporting documents. On 22 May 2015, the Acting Chief Executive of Hong Kong (the “**CE**”) issued the authority to proceed. On 22 October 2015, the committal hearing was held. On 23 October 2015, the magistrate of the Court of Committal in the Eastern Magistracy made an order of committal (the “**Committal Order**”) committing the Applicant into custody pending the CE’s decision as to his surrender. The Applicant then filed a *habeas corpus* application seeking to challenge the lawfulness of detention under the Committal Order.

### Issues:

Whether the Applicant was under unlawful detention under the Committal Order based on any of the following grounds:

- (1) the Applicant was under unlawful arrest when the authority to proceed was issued as the provisional arrest had been terminated at that time;
- (2) there was no *prima facie* case of the drugs-related offences alleged to be committed by the Applicant; or
- (3) there was no offence of escaping lawful custody under the Indian penal code.

### Judgment:

The Court dismissed the Applicant’s *habeas corpus* application.

## Reasons for Judgment:

### Ground 1: the provisional arrest had been terminated

According to Article 10(3) of the Agreement for the Surrender of Fugitive Offenders between the Government of Hong Kong and the Republic of India (the “**Agreement**”), the provisional arrest of a person shall be terminated upon the expiration of 60 days from the date of his arrest if the request for surrender has not been received. (*para 23*)

The Applicant was arrested on 21 March 2015. The Applicant contended that no evidence showed that the request for surrender was received before 20 May 2015. The Court was satisfied that, based on the evidence available, the Indian Government made the request for surrender on 17 May 2015, which fell within the sixty days of the Applicant’s arrest, and thus the first ground failed. (*paras 25 to 30*)

### Ground 2: no *prima facie* case of the drugs-related offences

The Applicant contended that the Applicant’s Confession was not admissible under Indian law (as it was not made before a magistrate as required under the Indian Evidence Act 1872) and, without the Applicant’s Confession, the other part of the evidence did not constitute a *prima facie* case of the drugs-related offence. (*paras 31 to 33*)

The Court found that under the Fugitive Offenders Ordinance (Cap 503) (the “**FOO**”), the Court needs only be satisfied that the evidence supported a *prima facie* case in accordance with Hong Kong law “*as if the case has been committed in Hong Kong*”. The law of the requesting party (i.e., Indian law) was irrelevant and therefore the second ground failed. (*paras 35 to 37*)

### Ground 3: no offence of escaping lawful custody under the Indian penal code

The Court first held that it was not necessary to deal with Ground 3 as the Committal Order was lawful and valid based on Grounds 1 and 2. (*para 43*)

Nevertheless, the Court considered Ground 3. The Applicant contended that as a condition precedent for making a valid committal order, the Court of Committal must be satisfied that an offence stated in the authority to proceed is a “relevant offence” under the FOO, and the Government of India could not show that there was an offence of escaping from lawful custody. The Court found that under the FOO, the Court of Committal needs only be satisfied that the offence stated is punishable with an imprisonment for more than 12 months, and not that the fugitive’s conduct does constitute the foreign offence under the law of that place. (*paras 42 to 49*)

The Court further commented that “*that is clearly to, among others, exclude the need for the Court of Committal in Hong Kong to be engaged and entangled in any debate on foreign law as to what are the constituent elements of that foreign offence and whether the fugitive conduct prima facie fits that offence*”. (*para 49*)

In any event, the Court was satisfied that the Indian penal codes did include offences relating to escape from custody. (*para 54*)

## **Other Considerations:**

The Applicant also made the following allegations in his affirmation to support the application: (i) the supporting documents were not properly authenticated; (ii) there was insufficient evidence to support the Committal Order; (iii) surrender should be refused based on humanitarian grounds and because the accusation was not made in good faith or in the interest of justice; (iv) surrender was subject to the restriction under Article 6 of the Agreement; and (v) he would be subjected to cruel, inhuman or degrading treatment and punishment if surrendered. (*para 64*)

The Applicant's counsel accepted these were grounds that should be considered by the CE in deciding whether to consent to the request for surrender, but not to support the *habeas corpus* application; the Court nevertheless dealt with each ground briefly in the judgment (*paras 21 and 66 to 79*)

The Applicant applied for a writ of *habeas corpus* the second time on 27 March 2019 (HCAL 855/2019). The application was dismissed by Chow J on 8 April 2019: [2019] HKCFI 910. The appeal on the decision was dismissed by the Court of Appeal on 1 April 2021.

## **Legal Provisions considered:**

1. The FOO: sections 2(2), 3 to 6, 10, 13 and 23  
<https://www.elegislation.gov.hk/hk/cap503>
2. The Agreement: Arts. 6, 8(3), 10(3) and 12(2)  
<https://www.elegislation.gov.hk/hk/cap503P!en>
3. The Indian Penal Code: sections 216 and 224  
<https://legislative.gov.in/sites/default/files/A1860-45.pdf>

## **Key Cases cited:**

1. *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre* [2012] 5 HKLRD 329 (confirmation that section 10(6)(b)(iii) of the FOO involves the application of Hong Kong evidence rules; the committal court in Hong Kong is not concerned with matching the alleged offences in the requesting state with the offences that could *prima facie* be regarded as having been committed in Hong Kong based on the same underlying conduct)  
<https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkca/2012/394.html>