

HONG KONG / JUDGMENT

MR MATT JAMES PEARCE v. THE CORONERS

COURT

Court of Appeal

DECIDED

31 August 2007

CASE / FILE NUMBER

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bjbj cacv 188/2007 in the high court of the hong kong special administrative region court of appeal civil appeal no. 188 of 2007 (on appeal from HCAL NO. 52 of 2007) BETWEEN MR MATT JAMES PEARCE Applicant THE CORONERS (MR JOSIAH LAM AND MR MICHAEL CHAN) Respondent Before: Hon Le Pichon and Yuen JJA in Court Date of Hearing: 28 August 2007 Date of Handing Down Judgment: 31 August 2007 J U D G M E N T Hon Le Pichon JA: This is an appeal from the decision of Reyes J dated 14 June 2007 refusing the applicant s application for leave to apply for judicial review of the coroner s decision of 4 October 2006 not to hold an inquest into the death of Chief Superintendent Stephen Fung King-man (Fung). At the conclusion of the appeal hearing, judgment was reserved which we now give.

Background

Mr Fung died on 8 September 2006. He is reported to have plunged to his death from a building in a public housing estate in Kwai Chung. At the time of his death, Mr Fung was apparently on sick leave, having some six months earlier made a previous attempt to kill himself. There are newspaper reports to the effect that in February 2006 the Independent Commission Against Corruption (ICAC) had approached Mr Fung for help in an investigation but he was not a suspect and no charges were ever brought against him. The applicant is a political activist. He was dissatisfied with the coroner s decision and applied for leave to judicially review that decision. The relief sought as stated in his Form 86A was for an order of certiorari to set aside the coroner s decision, an order of mandamus to compel the coroners to hold an inquest and a declaration that the applicant is a properly interested person for the purpose of the inquest. The judge summarised the applicant s grounds for making the application for leave for judicial review in paragraphs 4 and 5 of his judgment:

4. He believes that the circumstances of Mr Fung s death are a matter of considerable public importance . He states that [w]ilst it is probable that Mr Fung did die from suicide, I believe there needs to be closer examination by an inquest to make 100% certain that it was suicide .

5. In particular Mr Pearce asserts that:- [T]here are unanswered questions about this case and there are suspicious circumstances surrounding his death. Mr Fung was an extremely senior policeman and the people of Hong Kong have a right to know what was going on. It is clear that Mr Fung was under considerable pressure from other people in Hong Kong. I believe the ICAC have a responsibility to the public to say in open court exactly what they knew.... The judge proceeded on the assumption (without accepting its correctness) in the applicant's favour that he had the necessary locus to make the application. However, he held that the application was nonetheless pure speculation, there being nothing in it to suggest that the coroner came to a wrong or irrational decision that no reasonable coroner could have made. This appeal Although the applicant was asked more than once to explain by reference to the decision handed down in what respects the judge had erred in the exercise of his discretion in refusing to grant leave, the applicant made no attempt to do so. Rather, he stated and relied on 5

facts

which I set out below.

- (1) Mr Fung had been questioned by the ICAC in February 2006.
- (2) The ICAC had raided Mr Fung's office at that time.
- (3) The Commissioner of Police had declined the applicant's request made by letter (which letter was not before this court) to exercise his power to ask the coroners for a public inquest, stating that the Hong Kong Police Force respects the decision of the Coroner.
- (4) Mr Fung had been the former head of the Organised Crime and Triad Bureau.
- (5) The applicant had been threatened by a group of criminals in the lobby outside the court shortly before the hearing of his application by the judge on 12 June 2007. In relation to the third matter, the applicant's complaint appeared to be that the police failed to give a full picture to the coroner in the report into the incident which had been submitted to the coroner. But as that report is not in evidence nor is there evidence of what was before the coroner when he made his decision, there would not appear to be any basis for the allegation. As to the fifth matter, the applicant said that on the morning of the hearing, after coming out of the lift and on his way into court, he found himself suddenly surrounded by a group of about five men who told him not to take his application any further. They then left via the staircase. The applicant said he felt intimidated and shocked by the incident. He did not mention this incident to the judge at the hearing below although he said he did inform the head of security of the court building subsequently. In my view, none of the five matters has any relevance so far as this appeal is concerned. Coroners Ordinance, Cap. 504 (the Ordinance) As the Ordinance is pertinent to the resolution of this appeal, it would be appropriate to highlight some of its provisions here. Where a person dies suddenly, by accident or violence, or under suspicious circumstances, a coroner may, if he considers that an inquest is necessary, hold an inquest into the death. See section 14(1) of the Ordinance.

The Ordinance does not set out any criteria by reference to which the coroner's powers are to be exercised. The purpose of an inquest is to enquire into the cause of and the circumstances connected with the death. Proceedings and evidence at the inquest are thus directed to ascertaining, inter alia, the identity of the person; and how, when and where a person came by his death. See section 27. If a person who is dissatisfied with the coroner's decision is a properly interested person (as defined in section 2 of the Ordinance), he may make an application to the Court of First Instance under section 20 of the Ordinance. If that court is satisfied that a coroner has failed to hold an inquest which ought to be held, it may order an inquest to be held. The onus would thus be on the person making the application to demonstrate, first, that he is a properly interested person and, second, that an inquest ought to be held. For such an application to be made, no prior leave of the court is required. The applicant appeared to appreciate that he would be out of court unless he could show that he is a properly interested person for the purposes of the Ordinance. That is evident from the relief sought in his Form 86A. But what is less clear is why no application was made under section

20. Pausing here, it is to be noted that the applicant claims to be the holder of two degrees and claims to have experience of the law and courts. The applicant has exhibited a letter dated 17 January 2007 from the Judiciary Administrator to the following effect: Regarding your enquiry about making an application to the High Court to overrule the coroner's decision, you may consider applying for a judicial review. That letter was written in response to a letter dated 3 January 2007 (which is not in the hearing bundle) from the applicant apparently addressed to the Registrar of the High Court but it is unclear how a letter addressed to the Registrar came to be dealt with by the Judiciary Administrator. It may be that the application for leave to judicially review the coroner's decision was made following the receipt of the 17 January letter. However, it is to be observed that it is not the function of either the Registrar or the Judiciary Administrator to render legal advice. Administrative staff, not being legally trained, are plainly not qualified to do so. The letter of 17 January 2007 therefore appears to have been misguided in so far as it might appear to be rendering advice. Be that as it may, I do not consider that the applicant has been prejudiced in any way as will become apparent from paragraph REF _Ref176168592 \r \h below. The term properly interested person is defined in section 2 of the Ordinance as meaning in relation to the death of a person, a person who belongs to a class or description of persons specified in Schedule 2 in respect of the deceased. Schedule 2 is in these terms:
 1. Any person who is a parent, spouse, sibling or child of the deceased.
 2. Any person who is the registered medical practitioner of the deceased.
 3. Any person who is a personal representative, within the meaning of section 2 of the Wills Ordinance (Cap. 30), of the deceased.
 4. Any person who is a beneficiary under a policy of insurance on the life of the deceased.

5. Any person who is an insurer who has issued a policy of insurance on the life of the deceased.
6. Any person who is appointed by a trade union, within the meaning of section 2 of the Trade Unions Ordinance (Cap. 332), to which the deceased at the time of his death belonged if the death may have been caused by an injury received in the course of his employment or by an occupational disease, within the meaning of section 3 of the Employees Compensation Ordinance (Cap. 282), or pneumoconiosis, within the meaning of section 2(1) of the Pneumoconiosis (Compensation) Ordinance (Cap. 360), or any other disease (whether described as an occupational disease or otherwise) which may have been contracted in the course of his employment.
7. Any representative of any department of the Government which is concerned with the death of the deceased and who is authorized by the head of that department to be such representative for the purposes of this Ordinance.
8. Any person whose act or omission or that of his agent, servant or employee may, in the opinion of a coroner, have caused the death of the deceased.
9. Any other person who, in the opinion of a coroner, should be regarded as a properly interested person by reason of any particular interest in the circumstances surrounding the death of the deceased. The applicant claimed to be within paragraph 9 of Schedule
2. He said that he was a very interested person and that any good person in Hong Kong, any social justice campaigner would be very interested in having a public inquest . As noted above, the judge did not consider this point because he assumed (without accepting) that the applicant was a properly interested person for the purposes of the Ordinance. The real question is whether, for the purposes of the Ordinance, the applicant is such a person. Unless a person could bring himself within one of those classes, he would have no locus to make any application under section
20. When one looks at the different classes of persons set out in Schedule 2, it is quite clear that the legislature was confining those classes to persons who had a special relationship with the deceased person. In R V. HM Coroner for the Southern District of Greater London, ex p. Driscoll [1994] C.O.D. 91, the Divisional Court (Kennedy LJ and Pill J) had occasion to consider the meaning of the phrase properly interested persons under similar English legislation and concluded that, on the facts of that case, close blood relations who were in contact with the deceased immediately before he died would come within that class. The court observed (at page
- 93) that: [i]n interpreting the expression properly interested person , the word interested should not be given a narrow or technical meaning and it was not confined to a proprietary right or a financial interest in the estate of the deceased. The word properly imported not only the notion that the interest must be reasonable and substantial but also that the coroner may need to be satisfied that the concern of the proposed intervener was genuinely directed to

the scope of an inquest as defined in rule 36 [of the Coroners Rules 1984]. There could be circumstances in which a coroner could conclude that even a close relative was not a properly interested person. In my view, as a matter of statutory construction, it is quite clear that an ordinary member of the public would not come within paragraph

9. The applicant interest in the present case is no different from that of an ordinary member of the public. The fact that he is a political activist does not change the nature of his interest. Nor would the fact that he professes to be very interested make any difference. For my part, I have no hesitation in holding that the applicant is not within paragraph 9 of Schedule
2. It would follow that if he had made an application under section 20, apart from anything else, he would have failed for want of locus. It is trite law that judicial review proceedings are a remedy of last resort and that these should not be commenced until all legal remedies have been exhausted. As no application had been made under section 20 of the Ordinance, the applicant had not exhausted all legal remedies before applying for leave to commence judicial review proceedings. His application was thus premature and accordingly, the judge's decision in refusing leave must be upheld for different reasons. Had the applicant made an application under section 20, that application would have met with the same fate for the reasons stated above. Nor could any application thereafter for leave to issue judicial review proceedings have been successful because of the lack of locus, leaving aside the question of merits which, in my view, would itself present an insurmountable obstacle on the facts of the present case. So even if the applicant were to consider that he had been wrongfooted by the letter of 17 January 2006, he has not suffered any prejudice as a result. Accordingly, I would dismiss this appeal. Hon Yuen JA: I agree. (Doreen Le Pichon) Justice of Appeal (Maria Yuen) Jus 1udk G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 HC_~ HC_~ Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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