

HONG KONG / JUDGMENT

RE MATT JAMES PEARCE

COURT

Court of First Instance

DECIDED

23 February 2007

CASE / FILE NUMBER

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bjbj HCAL 20/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO. 20 OF 2007

Re : MATT JAMES PEARCE Applicant

Before : Hon Hartmann J in Court Date of Hearing : 23 February 2007 Date of Ruling : 23 February 2007

R U L I N G

AUTONUMOUT I have before me an application for the issue of a writ of habeas corpus. It is made pursuant to Order 54 of the Rules of the High Court. The application was filed on 16 February, that being the Friday before the commencement of the Lunar New Year holiday. I directed that it should be heard as soon as possible after the holiday and it therefore comes before me this morning. The applicant, Mr Pearce, prepared the application personally and has appeared personally before me this morning to advocate it. He does not have the benefit of legal representation. AUTONUMOUT The applicant submits that he has been unlawfully committed to prison and that his continued detention is therefore also unlawful. AUTONUMOUT To understand why, in my judgment, the applicant is not at present unlawfully detained, something briefly needs to be said of the background. AUTONUMOUT It must first be understood that, before being committed to prison, the applicant was tried in the Magistrates Court for a number of criminal offences. These included two offences of criminal intimidation and a series of offences of loitering causing concern. AUTONUMOUT No suggestion has been made that the Magistrates Court did not have jurisdiction to deal with the alleged offences nor that, upon conviction, it lacked jurisdiction to impose the sentences of imprisonment that were imposed. AUTONUMOUT

It is the applicant's case that his conduct found to be criminal was entirely lawful. He was conducting, he says, a series of peaceful demonstrations outside a school in Hong Kong, his complaints being aimed at a teacher or teachers at the school and/or at the school management itself. The applicant has described himself as a political activist and says that he was at all times aware of his constitutional right to demonstrate provided the demonstration remained peaceful. Not all demonstrations, he protests, may be acceptable but acceptability is not the principle which determines whether a demonstration is or is not lawful. AUTONUMOUT The applicant says that, although he raised the defence of lawful demonstration at his trial in the Magistrates Court and also on appeal in the Court of First Instance, both the magistrate and the judge, knowingly and blatantly, ignored the law; first, in convicting him of certain of the offences and, second, in dismissing the great substance of his appeal. AUTONUMOUT Although the applicant does not go so far as to suggest a lack of jurisdiction based on the exercise of bad faith on the part of either the magistrate or the judge who dealt with the appeal, he states unambiguously that, in his opinion, both the magistrate and the judge well knew the law and knowingly ignored it because, as they saw it, the purpose and nature of his entirely peaceful demonstration was not to their liking; that is, was not acceptable in their eyes. AUTONUMOUT In my judgment, it is plain that the applicant was lawfully arrested and charged. It is further plain that he was lawfully tried in the Magistrates Court, that court having jurisdiction. After trial, he was sentenced to terms of imprisonment. A person sentenced following a valid trial is deemed to be, to my understanding, in due execution, and the court will not entertain an application for a writ of habeas corpus in such circumstances. AUTONUMOUT The remedy open to a person who has been convicted in a lower court of a criminal offence or offences lies by way of an appeal to a higher court. In the present case, the applicant chose initially to appeal. His appeal came before Line DJ who, at the end of a full hearing, dismissed the greater substance of the appeal. AUTONUMOUT The applicant is aware of his right to apply to appeal to the Court of Final Appeal and, as I understand him, is making application to do so. In short, the applicant has not exhausted his rights of appeal. AUTONUMOUT As I have earlier indicated, no suggestion is made that the applicant has been sentenced to a sentence which is beyond the jurisdiction of the Magistrates Court nor that there is any present lack of jurisdiction; for example, that he is being held despite the expiration of his sentence. AUTONUMOUT Whatever the early history of the exercise of the writ of habeas corpus, today, I think, it is plain that a person, such as the applicant, who has been lawfully tried, convicted and sentenced by a court with appropriate jurisdiction, and where there is no ambiguity as to the certainty of the sentence, has one avenue of redress; that is, by way of appeal. The writ of habeas corpus has never been intended to be a broad collateral avenue of appeal. AUTONUMOUT As to the applicant's assertion that the magistrate and the judge who dealt with the appeal knowingly ignored his defence that he was conducting a lawful demonstration, a study of the judgments shows that this is not the case. The magistrate said the following Regarding the protests, the subject of the 3rd to the 14th charges, defendant first says that they were peaceful demonstrations, hence permitted under the Basic Law. But we need to look at the nature of these protests. They were not demonstrations, for example, by members of a labour union about workers rights. The defendant's protests were personal attacks against an individual person via her superiors, premeditated and calculated to destroy an individual's reputation, in the context of

a personal affair and about personal demands which had no basis in law. As the defendant said in court : It didn't look good for anyone with this personal dispute between me and the school, and This was a matter where I was fighting for justice for myself . The Basic Law does not grant unlimited freedom of expression and each case depends on its own facts : see Ng Kung Siu & Another [1999] HKCFAR 87. The defendant's personal motive and mens rea are crystal clear and he succeeded because PW2 (the subject of his demonstrations) resigned as a result of his acts. I am unable to see how the Basic Law could possibly allow the defendant's conduct to be regarded as reasonable or lawful. AUTONUMOUT On appeal, Line DJ said the following I take what the appellant has argued here to be really an attack on the constitutionality of both section 24 and 160(3) of the Crimes Ordinance. If a law does offend the Basic Law, then the courts will strike it down if the circumstances justify it. The circumstances require the court to look at considerations of necessity and proportionality. Both these provisions have now long withstood the passage of the Bill of Rights. Indeed, section 160 has been amended in the light of the passing of the bill. I have no doubt these criminal provisions exist for good reason; that they are lawful; that they are necessary to protect people from certain sorts of conduct and that they are proportionate to the mischiefs they seek to control. It would be a very sad day if a man could hound someone out of their job in Hong Kong merely by saying : I'm allowed to do that because I have the right to demonstrate . Accordingly, the constitutional challenge to the intimidation and the loitering, in my judgment, fails. AUTONUMOUT The applicant protests that both the magistrate and Line DJ were manifestly wrong in rejecting his submissions as to constitutional protection. I have explained to him that, when bringing an application of a writ of habeas corpus, absent special circumstances of the kind that I have referred to above (such as a lack of jurisdiction or certainty as to sentence) the issue is always the lawfulness of the present detention not whether, on a true understanding of the facts and/or law, the applicant may, despite a valid trial, have grounds for arguing that he should not have been found guilty. AUTONUMOUT In the circumstances, the application must be dismissed. AUTONUMOUT have explained to the applicant that he has a right to appeal my determination. He will receive a copy of my ruling as a matter of urgency. I have explained to him that the officers in the prison where he is presently held will assist him to file his appeal if he wishes to proceed to the Court of Appeal. He does, however, have to proceed within a limited period of time. (M.J. Hartmann) Judge of the Court of First Instance, High Court Applicant, in person PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$"@AB9D HHZbr Zk_UR %i?l ZorB r7Fv, 2wx^ #gP| %i?l r7Fv Zk_U #gP| & 6" ABC.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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