CACC 62/2022, [2024] HKCA 231
On appeal from [2022] HKDC 208 and [2022] HKDC 343

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CRIMINAL APPEAL NO 62 OF 2022

(ON APPEAL FROM DCCC NOS 927, 928 AND 930 OF 2020 (CONSOLIDATED))

BETWEEN

HKSAR — Respondent

and

TAM TAK CHI (譚得志) — Applicant

Before: Hon Poon CJHC, Pang JA and Anthea Pang JA in Court
Date of Hearing: 4 July 2023
Dates of Further Written Submissions: 31 October, 13 & 17 November 2023
Date of Judgment: 7 March 2024

JUDGMENT

The Court: [1]

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[1] The proceedings below were conducted in Chinese, save and except the hearing on 31 March 2021, which resulted in the ruling dated 9 April 2021 [2021] HKDC 424 ("Ruling"). Both the Reasons for Verdict dated 2 March 2022, [2022] HKDC 208 ("RV"), and the Reasons for Sentence dated 20 April 2022, [2022] HKDC 343 ("RS"), were hence written in Chinese. As the appeal was, by consent, conducted in English, this judgment is written in English. The references to the evidence and the RV and RS are taken from the agreed English translations.

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A. Introduction

1. The applicant, also known as "Fast Beat", was a political activist, a Christian preacher, a presenter of the online radio station D100 and a member of People Power, a political party, since 2013. In the course of his political career, which started in 2010, he had actively

participated in various social activities, including the anti-extradition law movement in 2019. As was his aspiration, he attempted to run for the Legislative Council election in 2020 and took part but failed in the so-called "primary election" held by the pan-democratic camp. In the criminal proceedings below,[2] HH Judge Stanley Chan ("the Judge") on 2 March 2022 convicted him of multiple charges arising from his criminal conduct while participating in public assemblies, public processions and campaigns for the "primary election", including hosting street booths in public places, on different occasions between 17 January and 19 July 2020.[3] The charges may be divided into two groups broadly:

(1) The Public Order Charges, contrary to the Public Order Ordinance ("POO"[4]). They are Charge 1 for incitement to knowingly take part in an unauthorized assembly, contrary to common law and section 17A(3)(a) of the POO and punishable under section 101I of the Criminal Procedure Ordinance ("CPO"[5]); Charge 3 for disorderly conduct in a public place, contrary to section 17B(2) of the POO; and Charge 6 for holding or convening an unauthorized assembly, contrary to section 17A(3)(b)(i) of the POO.

(2) The Sedition Charges for uttering seditious words to the public, contrary to section 10(1)(b) of the Crimes Ordinance

[2] DCCCs 927, 928 & 930/2020 (consolidated).

[3] The Judge also convicted the applicant of Charge 8 for refusing or wilfully neglecting to obey an order given by an authorized officer, contrary to section 10(3)(a) and 10(4) of Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, Cap 599G and fined him HK$5,000; but acquitted him of Charges 5 and 7 for disorderly conduct in a public place and Charge 11 for conspiracy to utter seditious words. The present applications do not concern those charges.

[4] Cap 245.

[5] Cap 221.

("CO"[6]). They are Charges 2, 4, 9, 10, 12 to 14. The seditious words that he used included the slogan "光復香港·時代革命" translated as "Liberate Hong Kong·Revolution of Our Times" ("the Slogan"). The seditious intentions involved are those contained in section 9(1)(a), (b), (d) and (g) of the CO, as the case may be.

2. On 20 April 2022, after hearing mitigation, the Judge sentenced the applicant to a total of 40 months' imprisonment as follows:

(1) in respect of the Public Order Charges: (a) two years' imprisonment for Charge 1; (b) 1 month's imprisonment for Charge 3 to be served consecutively; and (c) 18 months' imprisonment for Charge 6, 3 months of which to be served consecutively; and

(2) in respect of the Sedition Charges, 21 months' imprisonment, 12 months of which to be served consecutively.

3. The applicant now seeks leave to appeal against the conviction of the Sedition Charges only and the sentences for both the Sedition Charges and the Public Order Charges.

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[6] Cap 200.

B. Proceedings below

B1. Ruling on jurisdiction

4. The applicant took a preliminary point by arguing that the District Court had no jurisdiction to try the Sedition Charges but it was rejected by the Judge.[7]

B2. Evidence

5. Through 3 sets of admitted facts adduced pursuant to section 65C of the CPO, the prosecution produced various documentary exhibits and video clips which the police downloaded from the Internet, including the applicant's Facebook page, showing the circumstances in which he committed the offences.[8] The prosecution also called 7 witnesses including PW1 to PW5 on the factual aspects of various charges, PW6, Professor Lau Chi-pang, a Professor of History in Lingnan University, and PW7, a police officer who conducted internet search in respect of the Slogan between June 2019 and July 2020.

6. After the Judge found that there was a case to answer, the applicant chose not to give evidence but called Professor Janny HC Leung, an expert in linguistics and the Head of School of English at the University of Hong Kong, to deal with the Slogan.

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[7] For that matter, Charge 11 as well. See Part C1 below for the Judge's reasoning.

[8] Except otherwise stated, all the documentary and video evidence is in Chinese, and the references in English below are based on the agreed translations.

B3. Rulings on legal issues

7. In addressing the three legal issues raised by the defence in the closing submission, the Judge first ruled that the Sedition Charges are constitutional.[9]

8. Next, the Judge dealt with the Slogan. The experts' qualification was not disputed. Their evidence on the Slogan may be briefly stated thus:

(1) After tracing the origin, historical and recent development of the Slogan since its first appearance in 2016 and during the turmoil in 2019, Professor Lau pointed out that the linguistic context of the Slogan was consistent throughout. Its fundamental agenda and meaning is to "cause the consequence of separating the territory of residence from the State sovereignty; and in the political context of Hong Kong, these words were raised necessarily for the objective of separating the Hong Kong Special Administrative Region from the People's Republic of China".[10]

(2) Professor Leung raised a number of criticisms of Professor Lau's evidence.[11] One such criticism was that political speech tends to be hyperbolic and metaphorical but Professor Lau's report "provides an overly restrictive

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[9] RV, [52] – [58].
[10] See his first expert report, Exhibit P45, [57].
[11] Her expert report, Exhibit D1, p.11.

interpretation of the Slogan that fails to explain the contemporary usage of the Slogan and its keywords".[12] After conducting her own researches and surveys on the contemporaneous usage of "Liberate" and "Revolution" in various contexts, [13] and noting, for example, some people had used the Slogan in election campaigns in 2016, she considered that it was reasonable to infer that "Liberate Hong Kong" meant "the need to rectify a problem" and "to return to the original, a more desirable state of affairs for Hong Kong", while "revolution" meant "letting young people lead social changes".[14] The Slogan as a whole referred to "a need to rectify a problem and to return to the original, a more desirable state of affairs for Hong Kong".

9. In accepting Professor Lau's evidence but rejecting Professor Leung's,[15] the Judge found that the fundamental agenda and meaning of the Slogan is "to cause the consequence of separating the territory of residence from the State sovereignty; and in the context of Hong Kong's political context, these words were raised necessarily for the objective of separating the Hong Kong Special Administrative Region from the People's Republic of China".[16]

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[12] Exhibit D1, p.39.
[13] Exhibit D1, pp.17, 24, 32.
[14] Exhibit D1, p.28.
[15] RV, [60] – [67].
[16] RV, [68].

10. Thirdly, in rejecting the defence's submission that the applicant's words against The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("NSL") and the Communist Party had no seditious intention but were simply political commentary and lawful criticisms, the Judge ruled that the applicant could be found guilty if he committed any one or more of the seven seditious intentions under section 9 of the CO.[17]

B4. Conviction

11. Turning to the facts, since the applicant does not appeal against the conviction of the Public Order Charges, an outline of the circumstances in which they were committed is sufficient.

12. The applicant's *modus operandi* in committing the Sedition Charges was essentially this. He addressed members of the public attending the activities by loudspeakers shouting and leading the public to shout seditious words. The seditious words broadly fall into three categories:

(1) the Slogan;

(2) abuses and insulting remarks against the police such as "*black cops*", "*graduates of Yi Jin*", "*making indiscriminate arrests*"; curses against the police and their families and relatives and calls for "*disbanding the police*"; abuses against "*the blue ribbon*", "*the retarded*", "*the useless*

[17] RV, [69] – [73].

oldies" and "*the Mainland bumpkins*" for "*bringing harm and death to Hong Kong*"; and

(3) attacks against the NSL and the Communist Party such as "*Oppose the [NSL]*", "*the [NSL] makes Hong Kong dead*", "*the [NSL] is the imposition of death penalty*", "*the [NSL] is the law of the Communist Party, when the Communist Party is safe, Hong Kong is not safe*", "*Overthrow the Communist Party*", "*a political regime of tyranny and lies*".

We will set out in some details the circumstances in which he committed the offences to give the matrix for his alleged seditious conduct.

B4.1 Charge 1

13. On 2 January 2020, the police received a notification of the intention for holding a public meeting at Chater Garden in Central and a public procession from Central to Causeway Bay on 19 January (Sunday). On 16 January, the police issued a letter of no objection with respect to the public meeting but objected to the public procession. The decision was upheld by the Appeal Board on Public Meetings and Processions on the following day.

14. On 17 January 2020, between about 6 pm and 9 pm, a public meeting referred to as "Tai Po Secondary School Students' Meeting – No Fear of White Terror" was held at the amphitheatre in Tai Po Waterfront Park. A banner printed with *"No Fear of White Terror"* and two vertical banners printed with the Slogan and *"Rise and Fall Together"*

respectively were mounted on the small podium.[18] The applicant was one of the speakers and spoke to the participants for about 18 minutes using a microphone and loudspeaker. He repeatedly asked the audience, including students, to attend the public meeting to be held at Chater Garden and the public procession from Chater Garden to Causeway Bay on 19 January, demonstrating *"no fear of white terror"*.

15. After reviewing the evidence, the Judge found that the applicant's statements and intention were to call on others to take part in the unauthorized procession on 19 January 2020 and convicted him on Charge 1.[19]

B4.2 Charge 2

16. At the above meeting, the applicant also said, *"Liberate Hong Kong"*; *"some people said Hong Kong independence"* and *"all right"*;[20] and *"disband the police force"*. He further cursed the police and their family members, shouting and leading the participants to shout abusive language against them. The Judge convicted the applicant of Charge 2 because: (1) the police are part of the administration of justice under section 9(1)(c) of the CO to be protected from the applicant's attacks in his call to disband the police and his curse against them and their families; (2) he further used the Slogan to procure the alteration by

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[18] As recorded in Exhibit P6 (open-sourced video footages downloaded by the police from YouTube): Voice of Hope – Current Affairs Hotspot ([Hong Kong 01 • 17] [Live] Tai Po Secondary School Students' Meeting); and Exhibit P7 (downloaded from YouTube): People Power ([Tai Po Secondary School Students' Meeting] 2020117 Tai Po Secondary School Students' Meeting, Raymond Chan Chi-chuen protested in the Legislature, and Fast Beat attended to deliver the speech); and transcript, Exhibit P6a.

[19] RV, [75]-[80].

unlawful means of the system in Hong Kong as established by law under section 9(1)(b) of the CO; and his seditious intention was therefore obvious.[21]

B4.3 Charge 3

17. On 19 January 2020, the applicant attended the public meeting in Central and then walked to the direction of Causeway Bay.[22] At about 5 pm, the applicant hosted a street booth at a public place outside Sogo Department Store on Great George Street, Causeway Bay.[23] According to PW2, Chief Superintendent Chan Kin-kwok, around 300 people surrounded him. Using a microphone and loudspeaker, he spoke to the public for about 26 minutes and led about 70 to 80 onlookers to shout abusive words and foul language at the police officers who were on guard nearby. He referred to the police as (1) *"damned cops"* who could do nothing if *"we know the proceedings and protect our rights"*; (2) *"black cops"*; and (3) *"childish"* and *"graduates of Yi Jin"* who made indiscriminate arrests to *"meet required quota at random"*, and were *"neither the guardians of the law nor the law enforcers but those who undermine the rule of law"*. He repeatedly cursed the police and their family members and relatives, and asked those who lived near Wong Tai Sin Police Quarters *"to buy loudspeakers to cause nuisance to the police officers, and curse them, their parents and the husbands' and wives'*

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[20] Exhibit P6a, counter 198; the applicant was responding to others.

[21] RV, [82].

[22] As recorded in Exhibit P9 and P10 (open-sourced video footages downloaded by the police from Facebook): Takchi Tam (Fast Beat) (Takchi Tam (Fast Beat) was once on live broadcast; and transcript, Exhibits P9a and P10a.

[23] As recorded in Exhibit P11 (open-sourced video footages downloaded by the police from Facebook): Takchi Tam (Fast Beat) (Takchi Tam (Fast Beat) was once on live broadcast; and transcript, Exhibit P11a.

families". The applicant further chanted slogans to which the crowd echoed. For example, when he said, *"black cops"*, the crowd said, *"whole family will die"*; when he said, *"five demands"*, they responded, *"not one less"*; and when he said, *"Liberate Hong Kong"*, they said, *"Revolution of Our Times"*. He did not stop despite repeated warnings by the police.

18. Finding that the applicant's words constituted disorderly conduct in public places and that the abusive and insulting words extensively used with the intent to provoke a breach of peace or whereby a breach of peace was likely to be caused, the Judge convicted the applicant of Charge 3.[24]

B4.4 Charge 4

19. On 15 March 2020, around 3 pm, the applicant hosted a street booth outside Upper Ngau Tau Kok Estate Plaza.[25] A banner of *"Rubbish Government · All people have demands"* was displayed there. About 20 to 30 elderly people lined up to get free masks. The applicant spoke to the crowd by a microphone and loudspeaker. He also arranged a "Question & Answer" session and used placards as a template for eliciting answers or responses from the crowd which were derogatory and improper accusations against the police, such as police *"beating elderly women"*; *"beating young people"*; *"making indiscriminate arrests"*,

[24] RV, [83]-[95].

[25] See Exhibit P15 (open-sourced video footages downloaded by the police from Facebook): Takchi Tam (Fast Beat) ([Ngau Tau Kok Street Booth] 2020315 Democracy Challenge for Senior at Lower Ngau Tau Kok Estate); and transcript, Exhibit P15a.

"assaulting and arresting with lost conscience"; and traffic police officers *"would fire at students or drive into people"*. He described the police's *"good deeds"* as *"firing at children"*, *"grabbing elderly women to San Uk Ling"*, *"beating pregnant women"*, *"using taxpayers' money to buy equipment for beating people to death"*.

20. The Judge convicted the applicant of Charge 4 because his activities and behaviour at the street booth, whether by way of speech or a purported Question & Answer session, were seditious in that he brought the police into hatred.[26]

B4.5 Charges 6 and 9[27]

21. On 23 May 2020 (Saturday), the applicant posted a video footage on his Facebook page entitled *"What is the National Security Law? Notes on Walking on the Street on Sunday"*.[28] Among other things, he asked viewers to pay attention to the time at 1 pm on Sunday. He further said that some people would walk on East Point Road and then walk to Chater Garden in Central and arrive there at 8 pm; that people assembled there separately would remember the telephone numbers of two lawyers by heart; that if the assembled people were alleged to be in violation of prohibition on group gathering under Cap 599G, they should reply that they were taking part in a health talk, which was exempted; that there was no law in Hong Kong that prohibits a person from walking on

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[26] RV, [98] – [100].

[27] The applicant also committed the offence under Charge 8 on that occasion. As it does not feature in the present applications, we will not deal with it separately.

[28] Exhibit P18; transcript, P18a.

the street; that he was not inciting any person to take part in any unauthorized meeting or assembly; that he had not arranged to meet with the viewers on Sunday and he did not have any common purpose with them to meet there; that those people with religious beliefs would feel *"the calling"* to go there. He ended by saying *"see you then"*. No group or individual had applied to the police for holding a public meeting or procession at the junction of East Point Road and Great George Street in Causeway Bay on 24 May 2020, which was notifiable under the POO, and the police had not issued a letter of no objection either.

22. On 24 May 2020 (Sunday), at about 11:30 am, the applicant hosted a street booth on East Point Road, Causeway Bay. Displayed there were (1) a banner with the words *"The country is safe but Hong Kong is in danger · Anti-pandemic health talk"*;[29] (2) a placard attached to an aluminium ladder with the words *"The Communist Party is safe · Hong Kong is not safe"* and *"The National Security Law is actually the Party's security law, which protects the Party's security, but treads on human rights, kills freedom · suffocates democracy, shows contempt for the rule of law, and brutalizes Hong Kong"*;[30] (3) two posters with words *"Indiscriminate issuance of penalty tickets on prohibited gathering in the name of fighting pandemic"* and *"Raise defence if you do not want to be framed for committing an offence in respect of a prohibited gathering or be framed to pay a fine of $2000"*;[31] and (4) two posters with words

[29] Exhibit P23.
[30] Exhibit P24.
[31] Exhibit P25.

including *"Black cops made mass indiscriminate arrests, Hongkongers need self-protection"*.[32]

23. At the booth were also a stack of placards printed with the Slogan and a person wearing the usual protest gear on one side, and the 2020 calendar (of which 21 July, 31 August and 1 October are shown in bold) on the other;[33] another stack of placards with words including those on the placard and the two posters referred to at [21] above and *"In dark times and the century of suffering, Hong Kong people must treat conscience well, always stay candid and bright at heart, and make 'civil disobedience', 'civil discussion of politics', 'civil non-cooperation', 'civil resistance in rivalry with the 'political correctness' and 'national security' from the official dictatorship!"*;[34] and a reusable bag containing a stack of leaflets printed with *"Hong Kong Communist"* and cable ties.[35]

24. The applicant stood on a ladder with a banner as the backdrop and spoke to the onlookers with a microphone and loudspeaker.[36] He repeatedly said it was a health talk for distributing face masks, etc, and not a street booth, which was exempted from the prohibition on group gathering under Cap 599G and did not need approval; and that the police could not arrest him. He even claimed that *"we have nurses and medical staff explaining all health knowledge"*.

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[32] Exhibit P26.
[33] Exhibit P27.
[34] Exhibit P28.
[35] Exhibit P29.
[36] Exhibit P19 (downloaded from Facebook – Takchi Tam (Fast Beat) ([Health Talk in Causeway Bay] 20200524 Health Talk on East Point Road, Fast Beat was arrested, and the materials of the talk were "robbed", Slow Beat questioned the police at the scene but no response was received); transcript P19a.

He uttered the words and remarks referred to at [12]. He chanted *"Stand with Hong Kong. Fight for freedom. Hong Kong is dead"*; and said that he was arrested unlawfully. He asked people to shout the slogan of *"Five Demands"*. He shouted the slogan *"Liberate Hong Kong"* and said he was for *"Liberate Hong Kong, Revolution of Our Times"*.

25. According to PW4, Inspector Luk Ka-wing, when the applicant spoke to the crowd, there were about 20 helpers nearby, with many onlookers (once as many as 100) around. Members of the media including some who appeared to be from foreign press were also there. The onlookers responded to the applicant when he chanted the slogans of *"Five Demands"* and *"Liberate Hong Kong"*. PW4 did not see any medical staff at the scene while the applicant kept uttering political manifestos and delivering political messages. PW4 gave the applicant warnings, asking him to stop but he did not and said through the loudspeaker that he was holding a health talk which was excepted under Cap 599G. He chanted in English, *"Stand with Hong Kong. Fight for freedom. Hong Kong is dead ... they arrested me unlawfully"* in front of people who appeared to be from foreign media.

26. The Judge found as an objective fact that an unauthorized assembly was held by the applicant in the disguise of a health talk. After looking at the whole circumstances including the set-up of the booth, the banners, posters and leaflets there, the Judge found without

hesitation that he convened and held an unauthorised assembly and convicted him of Charge 6.[37]

27. As to Charge 9, the Judge found that the contents of the banners, placards and other materials were attacks on the Hong Kong Government, the NSL, and the Central Authorities. The applicant intended to bring the Central Authorities or the Hong Kong Government into hatred or contempt, and to excite the public to attempt to procure the alteration, otherwise than by lawful means, of matters established by law in Hong Kong, and to counsel disobedience to law and other lawful orders. The 62 leaflets containing contents such as *"Hong Kong should be fully self-determined, establish its own provisional government, and ask foreign countries for military assistance to restore order from chaos"* and *"Overturn Hong Kong Communist Administration"* were seditious.[38]

B4.6 Charge 10

28. On 4 July 2020, at around 10 pm, the applicant hosted a street booth and held a procession at Sai Yeung Choi Street and Argyle Street in Mongkok. The meeting and procession were unauthorized. According to PW5, Police Constable 19826, the applicant, together with 30 men and women, distributed flyers related to his "primary election" to passers-by, and using a microphone, delivered speech against the Government continuously, including chanting the slogans *"Liberate Hong Kong"* and *"Five Demands"* while the people around echoed with

[37] RV, [112]-[113].
[38] Exhibit P29a.

"Revolution of Our Times" and *"Not one less"*. They cursed the police officers whenever they saw police vehicles passing by. Following the applicant's lead, some people held cardboards and election flags bearing the applicant's image and shouted political slogans along the way. Later, the applicant said he was a candidate for Kowloon East and asked people to vote for him and Chan Chi-chuen in the "primary election" on 11 and 12 July. The applicant shouted the Slogan repeatedly and his followers echoed. Some passers-by joined the procession along the way but they left at different locations. Sometime past 11 pm, the group returned to Sai Yeung Choi Street near Soy Street and sang the song *"Glory to Hong Kong"* to mark the end. The group dispersed at around 11:14 pm and the applicant stayed behind for media interviews.

29. More specifically,[39] the applicant repeatedly chanted the Slogan. He said that the Slogan made *"Hong Kong people stand with the yellow ribbon camp"*. He verbally abused the police and *"the blue ribbon"*, *"useless oldies"*, *"retarded"* and their families. He repeatedly said, *"Let's start the 'Liberation of Hong Kong, Revolution of Our Times' with the Legislature"* and when he asked people to vote for him and Chan Chi-chuen in the "primary election", *"Overthrow the Communist Party"*, *"a political regime of tyranny and lies, leading to the enactment of national security laws all over the world"*, *"oppose the National Security Law"*, *"we must shout 'the Slogan' forbidden by the Government, don't be intimidated by the Government"*, and *"We indeed have resistance, keep it up to build a country, take revenge and fight back"*.

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[39] Exhibit P31 (downloaded from the applicant's Facebook: "Takchi Tam (Fast Beat) (Fast Beat – # A night in Mong Kok election advertisement: 2020.07.04); transcript, Exhibit P31a.

30. The Judge found that, in canvassing public support for the purported "primary election", what the applicant said to the crowd had gone to the extreme, using verbal abuses to bring into hatred people of different political views, the police and their families, the NSL, the Chinese Communist Party, and the Hong Kong Government. He had a seditious intention and none of the defences under section 9(2) of the CO was applicable.[40] He therefore convicted the applicant of Charge 10.

B4.7 Charge 12

31. On 8 July 2020, the applicant hosted a street booth outside Exit A of Wong Tai Sin MTR Station. He used a microphone and loudspeaker to speak to the public, canvassing votes in the coming purported "primary election".[41] He likened the NSL to the COVID-19 pandemic which made Hong Kong dead. Among others, he said *"We have to shout 'the Slogan', we have to shout even what the Government doesn't allow us to shout, we must not be deterred by the Government"*; *" we want to overthrow the Communist Party and oppose the National Security Law"*; *"you like us to scold the Mainlanders, the useless oldies, the retarded, the blue ribbon and the police ... fight against the pro-establishment camp and the Communist Party, don't want the [NSL]"*.

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[40] RV, [120].

[41] Exhibit P34, (downloaded from the applicant's Facebook: "Takchi Tam (Fast Beat) (Wong Tai Sin Street Booth in the evening today, Exit A of Kwun Tong tomorrow, election advertisement: 2020.07.08); transcript, Exhibit P34a.

32. The Judge convicted the applicant of Charge 12 because in attempting to gain support from voters, the applicant intended to bring into hatred or contempt the Communist Party and the Hong Kong Government; he also frequently shouted the Slogan and challenged the NSL; and his seditious intention was obvious.[42]

B4.8 Charge 13

33. On 9 July 2020, the applicant hosted a street booth outside Exit A1 of Kwun Tong MTR Station and a procession outside there and at Yue Man Square. He used a microphone and loudspeaker to speak to the public, again canvassing votes in the purported "primary election". He encouraged the crowd to shout the Slogan and attacked the Communist Party and the police, "the blue ribbon", etc. He called for disbanding the police and accused the police of shooting people to death on 31 August and 1 October. He said, among other things, *"Vote for the one who continues to say 'the Slogan', 'Overthrow the Communist Party', and 'Oppose the National Security Law'"*; *"the blue ribbon, the Mainlanders and the police, all of them need to be punished and scolded"*; *"the Communist Party has to be annihilated"*; *"we will taunt and kick [the police], and scold them"*; *"We are most happy to see the five types of people, namely the blue ribbon, the retarded, the useless oldies, the Mainlanders and the police, we would scold away when (they) come to our street booth"*; *"don't be intimidated by the Government"*; *"there is only one way for the Hong Kong people to move on, that is, the way of resistance, the way of fighting back"*; *"We are very afraid of the*

[42] RV, [123] –[124].

enactment of the National Security Law by the Government, we won't be afraid to liberate Hong Kong"; and *"tell the Communist Party that we fear not"*.

34. In convicting the applicant of Charge 13, the Judge found that he wantonly uttered seditious words, bringing into extreme contempt and hatred the political structure of the HKSAR, the then Legislative Council ("the LegCo") members and the Chief Executive; that he was irrationally critical of the police, called on others not to comply with the recently promulgated NSL and counselled disobedience to law; that it was a serious departure from the freedom of speech with the simple purpose of pleasing his fellow comrades with seditious words, and procuring political fanatics to support him in winning the purported "primary election", and then getting a seat in the LegCo to fight and disrupt its operation.[43]

B4.9 Charge 14

35. On 19 July 2020, the applicant hosted a street booth outside Kai Tin Shopping Centre. He used a microphone and loudspeaker to speak to the public, to canvass votes.[44] He said, *"nothing can restrict the freedom of speech, the eight-character phrase of 'the Slogan' is penalised for speech crime"*. He chanted *"Liberate Hong Kong"*; *"disband the police force"* and accused the police of, among other things,

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[43] RV, [126] – [127].

[44] Exhibit P41 (downloaded from the applicant's Facebook" "Takchi Tam (Fast Beat) (Lam Tin neighbourhood enthusiastically gave nomination, the Black Cops continued to surround us, warning us not to chant 'the Slogan', but the Lam Tin neighbourhood were as brave as me without fear! Election advertisement: 2020.07.19)"; transcript P41a.

"beating people to death on 31 August" and *"shooting people dead on 1 October"*.

36. The Judge found that the applicant's seditious intention was obvious as he had repeatedly shouted the Slogan and abused the police in order to gain support. He was inciting discontent against the Hong Kong Government, disobedience to the NSL, and promoting hostility towards law enforcement.[45] He was therefore convicted of Charge 14.

B5. Sentences

37. The applicant was born in Hong Kong. At the time of sentence, he was 50 years old. He graduated from the University of Hong Kong in 1994 and was awarded a Master of Arts in Christian Studies in 2008 and a Master of Arts in Theology in 2010.[46] He worked in a radio station after graduating from HKU. He was fined $3,000 in August 2020 for one count of common assault.[47]

38. It was stressed in mitigation that while participating in the anti-extradition law movement in 2019, the applicant had remained respectful of the freedom of speech that Hong Kong is entitled to as a free and open society, and actively expressed his opinions and demands on the status quo of society through speeches, which was not for his own interests.[48] Further, the applicant in his background report claimed that

[45] RV, [129] – [130].
[46] RS, [4].
[47] RS, [11].
[48] RS, [5].

he did not know uttering seditious words would result in grave legal consequences, and that he would not have done so if he had known this.[49] He also said that he never had any intention of harming any person. However, the Judge did not find any substance in his mitigation.[50] It was because (1) it was inconceivable that he was unaware of the gravity of the offences in light of his speech and behaviour giving rise to the offences;[51] and (2) he was acting in his own interest because he wished to win the purported "primary election" with a view to gaining a seat in the Legislative Council and to strengthening his own political power.[52] Further, the Judge noted that the applicant committed the offences while on bail.[53]

39. As an overall consideration, the Judge took into account the socio-political situation forming the background of the offences, namely, the spate of violence that broke out in late 2019, which affected the political environment, the authority of the Hong Kong Government and the public peace; and the promulgation and implementation of the NSL on 30 June 2020 which became a turning point towards stability.[54] He bore in mind the maximum sentence for each of the Public Order Charges and the Sedition Charges, noted that there was no applicable sentencing guidelines; stressed that there was no mitigation in substance; and imposed the starting point as the ultimate sentence. He dealt with the specific charges as follows.

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[49] RS, [10].
[50] RS, [18].
[51] RS, [12].
[52] RS, [17].
[53] RS, [14].
[54] RS, [8].

40. In respect of the Public Order Charges:

(1) For Charge 1, the Judge regarded as aggravating factors that the applicant, while enjoying a certain state of celebrity, took advantage of a meeting for secondary school students and improperly called on impressionable young students to take part in an unauthorised procession for political purposes. Referring to *Secretary for Justice v Poon Yung-wai* [2021] HKCA 510, the Judge imposed 2 years' imprisonment.[55]

(2) For Charge 3, noting that the offence was committed in the midst of the spate of violence affecting Hong Kong, the Judge imposed one month's imprisonment.[56]

(3) For Charge 6, while the applicant had called for the unauthorised assembly online on the previous day, disguising it as a health talk, and rallied the crowd on the day for his political gains by being abusive of the police and by denigrating the NSL, the assembly was not a very large one. The Judge imposed 1½ years of imprisonment.[57]

41. For the Sedition Charges, the Judge took into account the spate of violence affecting Hong Kong since 2019; the applicant's political purpose and calculations; his repeated use of the Slogan; his

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[55] RS, [18](1).
[56] RS, [18](3).
[57] RS, [18](4).

abuse of the police and call for disbandment.[58] The Judge divided the Sedition Charges into two groups. The first group consisted of offences committed before the NSL became effective, namely, Charges 2, 4 and 9. The second group consisted of offences committed after the National Security Law came into force, namely Charges 10, 12, 13 and 14:[59]

(1) For the first group of charges, the Judge imposed 15 months' imprisonment for each of the charges, and ordered the sentences to run concurrently.

(2) For the second group, taking into account the aggravating factors, such as they were committed after the NSL came into force and while the applicant was on bail, the Judge held that deterrent sentences were required, and imposed 18 months' imprisonment for each of these charges and ordered the sentences to run concurrently.

(3) As between the two groups, the Judge ordered 3 months of the sentences of the first group to run consecutively to the sentences of the second group. The total sentence for the Sedition Charges was therefore 21 months' imprisonment.

42. The Judge went on to consider the totality principle in order to avoid an unduly crushing or unfair punishment on the applicant. Noting that Charges 1 and 2 occurred on the same day, as did Charges 6, 8 and 9, and that the Sedition Charges are of the same nature; and bearing

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[58] RS, [18](2).
[59] RS, [18](2)

in mind, on the other hand, that sentencing should reflect his culpability and should have sufficient deterrent effect in the public interest,[60] the Judge imposed the sentence as set out at [2] above.[61]

C. Leave application for conviction

43. In the Perfected Grounds of Appeal, the applicant raised seven grounds against conviction.[62] In advancing those grounds, Mr Dykes SC for the applicant has, by way of oral submissions and further written submissions on the Judicial Committee of the Privy Council's judgment in *Attorney General of Trinidad and Tobago v Vijay Maharaj* [2023] UKPC 36, which was given on 12 October 2023 after the hearing before us, refined some crucial parts of his arguments. As having been fully developed now, his main submissions run as follows:

(1) The District Court does not have jurisdiction over the Sedition Charges.[63] It is because despite the statutory enactments over the years, sedition remains a common law offence. As such, it is an indictable offence and is subject to the restrictions in the Second Schedule of the Magistrates Ordinance ("MO").[64] A magistrate accordingly cannot

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[60] RS, [19].
[61] RS, [20].
[62] The applicant has since the filing of the Perfected Grounds of Appeal ("PGA") abandoned ground 8, which alleges apparent bias against the Judge. Ground 9 wraps up the preceding grounds of appeal by complaining that the convictions against the applicant of the Sedition Charges are unsafe and unsatisfactory. As it does not add anything in terms of substance, it falls or stands together with other grounds. We therefore will not deal with it separately.
[63] Ground 1 of the PGA.
[64] Cap 227.

transfer it to the District Court for trial. It can only be tried in the Court of First Instance.

(2) As a common law offence, sedition contains an intention to incite violence as a necessary ingredient. Even if, as contended by the respondent, it is a statutory offence, such an intention is still a necessary ingredient of sections 9 and 10 of the CO as a matter of interpretation. However, since the prosecution had never alleged that the applicant intended to incite violence, his conviction of the Sedition Charges cannot stand.

(3) Alternatively, if an intention to incite violence is not a necessary ingredient of sedition, sections 9 and 10 of the CO are unconstitutional because they lack legal certainty and disproportionately interfere with the fundamental right of freedom of expression.[65]

(4) The Slogan is not seditious within the meaning of section 9(1) of the CO.[66]

(5) The applicant did not have the required "seditious intention" under section 9(1) of the CO in all the Sedition Charges.[67]

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[65] Grounds 2, 3, 4a and 4b of the PGA.
[66] Grounds 5a and 5b of the PGA.
[67] Ground 6 of the PGA.

(6) Specifically, in relation to Charge 4, the applicant's hosting of a "Question and Answer" street booth did not constitute the required *actus reus* of uttering "seditious words".[68]

44. As can be readily seen, the first three points raise general issues of law concerning the prosecution of sedition under sections 9 and 10 of the CO on a systemic level. They have much wider implications beyond the present case. In contrast, the last three points are mostly fact-sensitive, limited to the present case. At the hearing before us, Mr Dykes argued the systemic grounds and Mr Jeffrey Tam, the other grounds.[69]

45. With the above preface, we begin our discussion with the jurisdictional challenge.

C1. Whether the District Court has jurisdiction over the Sedition Charges

C1.1 Legislative context

46. We first set out the relevant provisions to give the legislative context to the discussion.

47. Section 9(1) of the CO provides that:

"(1) A seditious intention is an intention –

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[68] Ground 7 of the PGA.

[69] They appeared together with Mr Ernie Tung.

> (a) to bring into hatred or contempt or to excite disaffection against [the Central People's Government],[70] or against [the Government of the Hong Kong Special Administrative Region ("HKSAR")]; or
>
> (b) to excite [the inhabitants of the HKSAR] to attempt to procure the alteration, otherwise than by lawful means, of any other matter in [the HKSAR] as by law established; or
>
> (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in [the HKSAR]; or
>
> (d) to raise discontent or disaffection amongst [the inhabitants of the HKSAR];
>
> (e) to promote feelings of ill-will and enmity between different classes of [the population of the HKSAR]; or
>
> (f) to incite persons to violence; or
>
> (g) to counsel disobedience to law or to any lawful order."

Section 9(2) then stipulates four sets of circumstances in which an act, speech or publication is not seditious:

> "(2) An act, speech or publication is not seditious by reason only that it intends—
>
> (a) to show that [the Central People's Government, or the Government of the HKSAR] has been misled or mistaken in any of [their measures]; or
>
> (b) to point out errors or defects in the government or constitution of [the HKSAR] as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

[70] The references in square brackets represent the constructions to be given to the original words and expressions contained in section 9, which is a statutory provision in force immediately before 1 July 1997, under section 2A(3) and Schedule 8 of the Interpretation and General Clauses Ordinance, Cap 1.

> (c) to persuade [the inhabitants of the HKSAR] to attempt to procure by lawful means the alteration of any matter in [the HKSAR] as by law established; or
>
> (d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of [the population of the HKSAR]."

48. Section 10 goes on to provide:

> "(1) Any person who –
>
> (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or
>
> (b) utters any seditious words; or
>
> (c) prints, publishes, sells, offers for sale, distributes, displays or reproduces any seditious publication; or
>
> (d) imports any seditious publication, unless he has no reason to believe that it is seditious,
>
> shall be guilty of an offence and shall be liable for a first offence to a fine at level 2 and to imprisonment for 2 years and for a subsequent offence to imprisonment for 3 years …"

And "seditious word" means words having a seditious intention: section 10(5). For present purposes, offences provided for under section 10 are referred as "section 10 offences" and an offence under section 10(1)(b), with which we are concerned in the present proceedings, "a section 10(1)(b) offence".

49. Section 14A of the CPO stipulates:

> "**Trial of offences**
>
> (1) Where any provision in any Ordinance creates, or results in the creation of, an offence, the offence shall be triable summarily only, unless –
>
> (a) the offence is declared to be treason;
> (b) the words 'upon indictment' or 'on indictment' appear; or
> (c) …
> (d) the offence is transferred to the District Court in accordance with Part IV of the [MO].
>
> (2) Where any provision in any Ordinance creates, or results in the creation of, an offence and –
>
> (a) the offence is declared to be treason; or
> (b) subject to subsection (4), the words 'upon indictment' or 'on indictment' appear,
>
> the offence shall be triable only upon indictment.
>
> (3) …
>
> (4) Where any provision in any Ordinance creates, or results in the creation of, an offence and the offence is declared to be triable either summarily or upon indictment or to be punishable on summary conviction or on indictment, the offence shall be triable either on indictment or summarily.
>
> (5) Nothing in this section shall affect–
>
> (a) the powers conferred upon a magistrate by [the MO] or by any other law to try an indictable offence summarily; or
>
> (b) the powers conferred upon the District Court by any law to try indictable offences."

50. In short, pursuant to section 14A of the CPO, offences created by statute are classified as triable: (1) only summarily; (2) only on

indictment; and (3) either way. The classification of an offence and the mode of trial determines where the trial should take place or, in other words, which court has the jurisdiction to try the offence. An offence is indictable where it is declared to be treason; or the words "upon indictment" or "on indictment" appear. An indictable offence may be tried in the Court of First Instance or the District Court or, where the provisions in Part V of the MO apply, the Magistrates' Courts.

51. For common law offences, that is, offences not created by statute, they are indictable offences which are, subject to any statutory modification, triable only on indictment: see *Blackstone's Criminal Practice 2024*, Part D6.4 at p 1649.

52. Section 88(1) of the MO, which is contained in Part IV, provides:

> "**Transfer of certain indictable offences**
>
> (1) Notwithstanding anything contained in any other provision of this Ordinance but subject to subsection (3), [71] whenever any person is accused before a magistrate of any indictable offence not included in any of the categories specified in Part III of the Second Schedule, the magistrate, upon application made by or on behalf of the Secretary for Justice –
>
> (a) shall make any order transferring the charge or complaint in respect of the indictable offence to the District Court; and
>
> (b) may, if the person is also accused of any offence triable summarily only, make an order

[71] That is not relevant for present purposes.

> transferring the charge or complaint in respect of the summary offence to the District Court."

Included in Part III of the Second Schedule of the MO is any offence against Part II of the CO. Sections 9 and 10 are to be found in Part II of the CO.

53. Correspondingly, section 74 of the District Court Ordinance ("DCO"[72]) confers on the District Court criminal jurisdiction to hear and determine all such charges as the Secretary for Justice may lawfully prefer under section 75, which reads:

> "**75. Procedure upon transfer of charge or complaint**
>
> (1) Where a charge or complaint has been transferred to the Court by a magistrate in accordance with the provisions of Part IV of [the MO], the Court shall have jurisdiction and powers over all proceedings in relation to the offence therein alleged similar to the jurisdiction and powers of the Court of First Instance would have had if the accused person had been committed to that court for trial on indictment, save that nothing in this section shall be deemed to give jurisdiction to hear and determine such charge or complaint.
>
> (1A) …
>
> (2) Where a charge of complaint or proceedings on indictment has or have been transferred under subsection (1) … the Secretary for Justice shall … deliver to the Registrar a charge sheet setting forth the charge or charges preferred against the accused person, and any such charge may allege the commission of any indictable offence not included in any of the categories

[72] Cap 336.

> specified in Part III of the Second Schedule to [the MO] and any offence triable summarily only, whether or not the offence was included in the order transferring the charge or complaint or proceedings on indictment, as the case may be, …"

54. In summary, the District Court has jurisdiction to try (1) an indictable offence transferred to it by a magistrate under Part IV of the MO and (b) a summary offence included in the charge sheet under section 75(2) of the DCO.

55. Finally, NSL 41(3) provides that cases concerning offences endangering national security within the jurisdiction of the HKSAR shall be tried on indictment. In *HKSAR v Ng Hau Yi Sidney* (2021) 24 HKCFAR 417, the Court of Final Appeal observed:

> "30. As noted above in [*HKSAR v Lai Chee Ying* [2021] 24 HKCFAR 33], the Court identified the 'offences of treason, incitement to disaffection or sedition under Parts I and II of [the CO]' as instances of offences endangering national security under laws in force in the HKSAR.
>
> 31. That the NSL should be construed to include the section 10(1)(c) offence as an offence endangering national security appears inescapable. … The combined effect of BL 23 and NSL 7 is therefore to make it clear that a prohibited act of sedition – including an offence contrary to section 10(1)(c) of [the CO] – qualifies as an offence endangering national security."

The same observation plainly applies to all section 10 offences.

C1.2 The Judge's ruling

56. Before the Judge, Mr Dykes submitted that sedition was a summary offence until the NSL came into operation. As held in *Lai Chee Ying*, an offence endangering national security includes section 10 offences to which the NSL applies. Pursuant to NSL 41(3), offences endangering national security, including section 10 offences, should be tried on indictment. As a section 10(1)(b) offence is included in Part III of the Second Schedule, a magistrate may not transfer it to the District Court pursuant to section 88(1) of the MO. Accordingly, a section 10(1)(b) offence can only be tried in the Court of First Instance.[73] The District Court thus does not have jurisdiction over the Sedition Charges.[74]

57. The prosecution argued that section 10 offences are summary offences since the words "upon indictment" or "on indictment" do not appear in section 10 of the CO: section 14A(1) of the CPO. That has not been changed by the NSL. As such, a magistrate may transfer a section 10(1)(b) offence to the District Court together with another indictable offence not included in Part III of the Second Schedule of the MO under section 88(1)(b) of the MO.[75] Further, "tried on indictment" in NSL 41(3) does not mean that the trial can only be conducted in the Court of First Instance, as contended by the applicant. The District Court thus has jurisdiction to try the Sedition Charges.

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[73] Ruling, [12]-[15].
[74] And for that matter, Charge 11 as well.
[75] Ruling, [16]-[18].

58. The Judge held that pursuant to NSL 41(3), section 10 offences, which were summary offences, are now to be taken as indictable offences under the NSL although the words "upon indictment" or "on indictment" do not appear in section 10 of the CO. The excepted offences relating to Part I and Part II of the CO as stated in Part III of the Second Schedule to the MO cannot stand as such categorization would be contrary to the NSL. (Though he did not expressly said so, the Judge effectively ruled that such categorization had been impliedly repealed by the NSL by virtue of NSL 62.) The intention of the NSL is that indictable offences endangering national security, including section 10 offences, can be heard or handled by the Magistrates' Courts, the District Court, the High Court and the Court of Final Appeal: NSL 45. As such, it would be lawful for a magistrate to transfer a section 10(1)(b) offence to the District Court under section 88(1)(a) of the MO. In the result, the Judge rejected the applicant's submissions and ruled that the District Court had jurisdiction over the Sedition Charges.[76]

59. The Judge's ruling differs from a later judgment of the District Court in *HKSAR v Chan Tai Sum* [2022] 4 HKLRD 154.[77] There, in rejecting the same jurisdictional challenge, HH Judge WK Kwok held that the District Court has jurisdiction over an offence under section 10(1)(a) of the CO because, among other reasons, sedition is a summary offence created by statute which can be validly transferred by a magistrate to the District Court for trial under the MO; and applying a

[76] Ruling, [44]-[56].

[77] Handed down on 1 August 2022.

purposive interpretation, the term "offence endangering national security" in NSL 41(3) does not include sedition.

C1.3 Stance on appeal

60. The parties' positions before us remained dramatically opposed.

61. Mr Dykes maintained that section 10 offences are offences endangering national security and as such are indictable offences as defined by section 2 of the MO. Accordingly, for the same reasons which he contended before the Judge, the magistrate cannot transfer a section 10(1)(b) offence to the District Court and it can only be tried in the Court of First Instance. However, he advanced a new and different reason why section 10 offences are indictable offences. He now argued that sedition is a common law offence, which is indictable, and it remains so despite the statutory enactments over the years resulting in sections 9 and 10 of the CO because they just reproduce the common law offence without abolishing it.[78] He submitted that statutes are enacted against the background of the common law. The common law will not be altered unless through express words or a necessary implication: *Bennion, Bailey and Norbury on Statutory Interpretation*, Eighth Edition, sections 25.1, 25.3 and 25.6.[79] However, the Sedition Ordinance enacted in 1938

[78] Mr Dykes in his oral submissions distilled eleven reasons from his written submissions why sedition remains a common law offence. Those eleven reasons are further boiled down to the main points discussed below.

[79] As examples of express abolition of common law offences, Mr Dykes cited section 34(1) of the Theft Ordinance Cap 210, abolishing a range of common law offences concerning dishonesty while preserving just those relating to the public revenue and cheating.; and section 159E(1) and (2) of the CO, abolishing the common law offence of company except fraud.

("the 1938 Ordinance") was simply to make better provision for the offence of sedition. The 1938 Ordinance and its successor, the CO, only affected the common law offences of sedition but did not expressly abolish them. Further, an implied abolition of the common law offence is extremely unlikely. For the common law is unlikely to have been abolished if the effect of the statute is to take away an established right.[80] It will not be removed except under the clear authority of written law: *Bennion*, section 27.8. Moreover, according to its preamble, the 1938 Ordinance sought to make better provision for the prevention and punishment of sedition. An ordinance that affects common law offences as regards matters of procedure or penalty does not abolish it: see *R v Richard Carlile* (1819) 3 B & Ald 161. Nothing in the legislative history of the statutes shows that the common law sedition offences had been codified. Finally, felonies and misdemeanors had not been abolished by the Administration of Justice (Felonies and Misdemeanours) Ordinance in 1991. Only the distinction between them had been abolished: section 2. It was open to the LegCo to abolish the common law sedition offence, a misdemeanor, and create new statutory offences or declare that the sedition offences were statutory misdemeanors or statutory misdemeanors triable summarily. But it did not happen.

62. Mr Chau, DDPP for the respondent,[81] maintained that section 10 offences are summary offences created by statute. The common law offence of sedition had been codified in Hong Kong by the statutory enactments and had thereby been displaced by statute. As such,

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[80] Mr Dykes cited trial by jury under the common law as an example.
[81] Together with Ms Crystal Chan, SPP, and Ms Elisa Cheng, SPP(Ag).

a section 10(1)(b) offence may be transferred to the District Court under section 88(1)(b) of the MO. That position has not been altered by the NSL. In this regard, he did not support the Judge's view.

C1.4 Statutory or common law offence – a matter of construction

63. Whether sedition remains a common law offence or the statutory enactments have codified or displaced it is a matter of statutory construction: see *Bennion*, sections 25.6 to 25.11 for the general principles. In this regard, it is instructive to see how the law on sedition developed over the years cumulating in sections 9 and 10 of the CO.

64. Historically, sedition in Hong Kong originated from English common law. For the discussion at hand, it is not necessary to delve into the whole common law of sedition but only so much as is relevant to the major difference between the parties, namely, whether incitement to violence is a necessary ingredient for a section 10 offence. Under the common law, it is well-established that incitement to violence is a necessary ingredient of the offence of sedition. In *Boucher v The King* [1951] 2 DLR 369, Kellock J after reviewing the authorities, said at p 301:

> "In my opinion, to render the intention seditious, there must be an intention to incite to violence or resistance or defiance for the purposes of disturbing constituted authority. I do not think there is any basis in the authorities for defining the crime on any lower plane."

In *R v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury* [1990] 1 QB 429, the English Court of Appeal pointed out that the common law offences of sedition and seditious libel were accurately stated by the Supreme Court of Canada in *Boucher*. Specifically, Watkins LJ at p 453C-E said:

> "So far as material the court held that the seditious intention upon which a prosecution for seditious libel must be founded is an intention to incite to violence or to create public disturbance or disorder against His Majesty or the institutions of government. Proof of an intention to promote feelings of ill will and hostility between different classes of subjects does not alone establish a seditious intention. Not only must there be proof of an incitement to violence in this connection, but it must be violence or resistance or defiance for the purpose of disturbing constituted authority.
>
> We agree, with respect, with that too. …"

65. That incitement to violence was a necessary ingredient for sedition was clearly the common law position in Hong Kong before any statutory intervention.

66. In 1907, the Chinese Publications (Prevention) Ordinance was enacted. It was the first statute with the object of preventing publications in Hong Kong of matters calculated to disturb the peace in Mainland China. As it only concerned seditious publications in Hong Kong on a territory outside jurisdiction, it did not appear to affect the common law offence of sedition locally: see *Boucher*, at p.297, per Kellock J, quoting Phillimore J in *R v Antonelli* 70 JP 4: "seditious libels are such as tend to disturb the government of this country".

67. In 1914, the Seditious Publications Ordinance came into force to provide against the circulation in Hong Kong of seditious publications. It defined "seditious matters" and provided for offences for possession, issue, sale or exposure, etc of newspaper, book or other document containing seditious matter.[82] It would appear that it was the first comprehensive criminal legislation on seditious publications.

68. In 1938, the 1938 Ordinance was enacted with the object of making better provision for the prevention and punishment of sedition, repealing and substituting the 1914 Ordinance. Section 2 defined "seditious publication" and "seditious words" as a publication and words having a seditious intention respectively. Section 3(1) defined what was and was not "seditious intention" in terms substantially similar to section 9(1)(a)-(e) and 9(2) of the CO. The language used in section 3(1) was largely adopted from the common law formulation of sedition.[83] Section 4 provided for offences in substantially the same terms as section 10 of the CO. It also set out the punishment.

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[82] See sections 2 to 4.

[83] The then common law formulation of sedition was summarized in *Archbold's Pleading, Evidence & Practice in Criminal Cases*, 1927, at p.1111:

> "Sedition, whether by words spoken or written, or by conduct, is a misdemeanor indictable at common law, punishable by fine and imprisonment. It embraces all those practices, whether by word, deed, or writing, which fall short of high treason, but directly tend or have for their object to excite discontent or dissatisfaction: to excite ill-will between different classes of the King's subjects; to create public disturbance, or to lead to civil war; to bring into hatred or contempt the sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder; or to incite people to unlawful associations, or assemblies, insurrections, breaches of the peace, or forcible obstruction of the execution of the law, or to use any form of physical force in any public matter connected with the state. … And the definition does not prevent candid, full, and free discussion of any public matter, which is the right of every citizen, unless the discussion takes place under circumstances calculated or intended to *incite tumult*; or the statements made are an appeal to the passions of the hearers and *an incitement to violence or outrage*." (Emphasis supplied)

69. Significantly, section 3 of the 1938 Ordinance did not include an intention to incite violence as a seditious intention. As will be elaborated, the absence of such an intention is crucial to the understanding of the legislative intent of the 1938 Ordinance, the predecessor of the CO.

70. The 1938 Ordinance was considered by the Full Court in *Fei Yi Ming & Another v the Crown* [1952] 36 HKLR 133. There, the appellants, the proprietor-publisher and editor respectively of a newspaper, appealed against their conviction by a special jury of a seditious publication on 5 March 1952 under the 1938 Ordinance. One of the grounds of appeal was that the trial judge erred in directing the jury that incitement to violence was not a necessary element to be proved by the prosecution. The Full Court at p.156 noted that it did not call upon the respondent as that submission was contrary to the principle laid down in *Wallace-Johnson v The King* (1940) AC 231 (Privy Council). Since the Full Court adopted *Wallace-Johnson* wholesale, it is necessary to look at that case more closely.

71. There, the appellant was found guilty of unlawfully publishing in a newspaper a seditious writing of and concerning the government of the Gold Coast, then a British Colony, contrary to the relevant provisions in section 330 of the Criminal Code, which were couched in terms substantially similar to the corresponding provisions of the 1938 Ordinance, in the absence of evidence of any outbreak of violence or of any manifestation of hostility to the government as a result of the article. On appeal to the Privy Council, he argued that the

prosecution could not succeed unless the words complained of were themselves of such a nature as to be likely to incite violence and unless there was positive extrinsic evidence of seditious intention, citing in support a number of English and Scottish cases on the common law offence of sedition. In rejecting his argument, Viscount Caldecote LC at pp 239-241 said:

> "Their Lordships throw no doubt upon the authority of these decisions, and if this was a case arising in this country, they would feel it their duty to examine the decisions in order to test the submissions on behalf of the appellant. The present case, however, arose in the Gold Coast Colony, and the law applicable is contained in the Criminal Code of the Colony. It was contended that the intention of the Code was to reproduce the law of sedition as expounded in the cases to which their Lordships' attention was called. Undoubtedly the language of the section under which the appellant was charged lends some colour to this suggestion. There is a close correspondence at some points between the terms of the section in the Code and the statement of the English law on sedition … The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony, and not in English or Scottish cases, that the law of sedition for the Colony is to be found. The Code was no doubt designed to suit the circumstances of the people of the Colony. The elaborate structure of s.330 suggests that it was intended to contain, as far as possible, a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland.
>
> …
>
> Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result, and their Lordships are

> unable to import words into s.330 which would be necessary to support the appellant's argument.
>
> The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist, must also fail, and for the same reason. If the words are seditious by reason of their expression of a seditious intention as defined in the section, the seditious intention appears without any extrinsic evidence. The Legislature of the Colony might have defined 'seditious words' by reference to an intention proved by evidence of other words or overt acts. It is sufficient to say that they have not done so."

72. Pausing here, two propositions may be derived from *Fei Yi Ming* in adopting *Wallace-Johnson* for its interpretation of the 1938 Ordinance:

(1) The law of sedition in Hong Kong was to be found in the 1938 Ordinance and not the common law. In other words, the 1938 Ordinance had displaced the common law offence of sedition.

(2) An intention to incite violence was not an element of the statutory offence of sedition under the 1938 Ordinance.

73. We digress to dispose of Mr Dykes's argument that *Fei Yi Ming* supports his proposition that sedition remains a common law offence. He relied heavily on the procedure which the then Attorney General adopted in prosecuting the appellants and contended that by upholding the Attorney General's adoption of such procedure, the Full

Court had actually treated the sedition offence under the 1938 Ordinance as a common law offence. This requires some elaboration.

74. The first point to note is that the District Court had yet to be established when *Fei Yi Ming* was decided.[84] To properly understand Mr Dykes's argument, it is necessary to set out the statutory context at the time, as follows:

(1) Section 34 of the Interpretation Ordinance provided that a provision in an enactment which constituted or resulted in the constitution of an offence shall, unless such offence was declared to be treason, felony, or misdemeanor or the words "upon indictment" appeared, be deemed to include a provision that such offence shall be punishable upon summary conviction. Section 35 of the same Ordinance dealt with penalty where no punishment was proscribed for misdemeanor by fixing a term of three years' imprisonment and a fine of $5,000. Section 4 of the 1938 Ordinance did not describe the offences thereunder to be treason, felony or misdemeanor or contained the words "upon indictment". It further set out the punishment to be two years' imprisonment and a fine not exceeding $1,000 on a first conviction and three years' imprisonment on a subsequent conviction.

(2) Section 42 of the Criminal Procedure Ordinance provided that every person tried before the court shall be tried on

[84] The District Court was established in 1953 by the DCO.

indictment before a judge and jury. Section 44(1) of the same Ordinance specifically provided that nothing in the Ordinance "shall affect the right of the Attorney General to file any information in the court against any person for misdemeanor". In England, the Attorney General in the old days had the right to bypass the Grand Jury and examining magistrates and use an *ex officio* information to present a charge of various offences including sedition directly to a petty jury: *Blackstone's Commentaries on the Laws of England*, Book IV, Chapter 23 at pp.303-305; and *Archbold*, supra, at pp.129-132. The rationale for using *ex officio* information for sedition appeared to be the need for speedy prosecution: see *Blackstone*, at p.304. It differed from the committal procedure where the case had to be first brought up in the Magistrates' Courts and then committed to the court for trial. In *Bailey v R* [1955] 39 HKLR 75, the court, in another context, confirmed that the common law rights of the Attorney General of England as to information were also vested in the Attorney General of Hong Kong by virtue of section 44 of the Criminal Procedure Ordinance.

(3) Under section 73(1) of the then Magistrates Ordinance, where an indictment was filed by the Attorney General against any person, the procedure before trial as contained therein would follow. And by section 2 of the same ordinance, indictment included an information in the court.

(4) Sections 88 and 89 of the Magistrates Ordinance empowered a magistrate to deal with indictable offences summarily except offences specified in the first part of the Schedule. Paragraph 5 of the Schedule excepted "any offence against the King's title, prerogative, person or government".

75. In *Fei Yi Ming*, the Attorney General invoked section 44(1) of the Supreme Court Ordinance and filed an information against the appellants for the sedition offence under section 4(1)(c) of the 1938 Ordinance. The Registrar then issued a certificate of the filing of the information under section 73(1) of the Magistrates Ordinance. The trial of the appellants before a judge and jury in the Supreme Court eventually ensued. On appeal, the appellants argued that such procedure was misconceived, which was rejected by the Full Court. After considering the legislative history and on a proper construction of the provisions, the Court at p.149 observed that the normal mode of proceeding to trial after committal in Hong Kong was, until 1899, upon information signed by the Attorney General. The effect of the Criminal Procedure Ordinance was to abolish the old "Hong Kong" type of information and substitute trial on indictment. The Court further at pp.150 and 151 held that the only class of information in the court which would come up for trial after 1899 would be those preserved by section 44(1) of the Criminal Procedure Ordinance; and that the prosecution currently followed the provisions of section 73 of the Magistrates Ordinance to which section 44(2) was subject.

76. Mr Dykes argued that sedition was a misdemeanour indictable under the common law. The *ex officio* information procedure lied at common law for misdemeanor only: See *Archbold*, supra, at p.130. The Attorney General in *Fei Yi Ming* proceeded by way of an *ex officio* information because the section 4 offence under the Sedition Ordinance was a common law misdemeanor, which had to be tried by a judge and jury because of the restrictions in sections 88 and 89 and the Schedule of the Magistrates Ordinance. By upholding the Attorney General's adoption of the *ex officio* information procedure, the Full Court had treated the sedition offences under the 1938 Offence as common law misdemeanors. The Full Court clearly considered that section 34 of the Interpretation Ordinance did not apply as the 1938 Ordinance did not constitute a new statutory misdemeanor of sedition. Mr Dykes then added that the penalty clause in section 4(1) of the 1938 Ordinance modified the effect of section 35 of the Interpretation Ordinance. As such, the penalty clause did not constitute a new statutory misdemeanor. In conclusion, counsel submitted that *Fei Yi Ming* is authority in support of his case that the common law sedition offences still exist.

77. Taking his submissions further, Mr Dykes argued that there was no intrinsic connection between the sedition offence and the *ex officio* information procedure, which might be adopted for other offences: see *Archbold*, ibid. When the right to bring criminal *ex officio* information for misdemeanors was abolished by section 51(5) of the CPO[85] in 1971, it did not change the character of the sedition offence,

[85] Section 51(5) reads: "Any power to bring proceedings for an offence by criminal information is abolished."

which remained a common law misdemeanor covered by the restriction in paragraph 5 of the Schedule (now the Second Schedule) of the Magistrates Ordinance.

78. The first difficulty in Mr Dykes's argument is that the Full Court in *Fei Yi Ming* approached the procedural objection purely on statutory interpretation of section 44 of the Criminal Procedure Ordinance and section 73 of the Magistrates Ordinance and no more. It did not deal with sections 34 and 35 of the Interpretation Ordinance or sections 88 and 89 and the Schedule of the Magistrates Ordinance at all. The Court did not arrive at its conclusion on the basis that sedition was a common law misdemeanor. This leads to the second difficulty which is fatal to Mr Dykes's argument. In adopting *Wallace-Johnson* and rejecting the ground of appeal that incitement to violence was an essential ingredient of the offence, the Full Court had effectively held that sedition offences under the 1938 Ordinance were statutory and not common law offences. Mr Dykes's reliance on the procedure adopted in *Fei Yi Ming* is wholly misplaced.

79. Continuing with the legislative history, the 1938 Ordinance was in 1970 amended to widen the definition of "seditious intention" contained in section 3 by including an intention "to incite persons to violence" (paragraph (f)) and "to counsel disobedience to law or to any

lawful order" (paragraph (g)).[86] In moving the second reading of the amendment bill in the LegCo, the Attorney General said:[87]

> "The present definition of seditious intention, in section 3 of the Ordinance, is based on the common law and makes it sedition to excite disaffection, to promote feelings of hostility between different classes of population, to rouse discontent or disaffection, to excite people to alter matters established by law by unlawful means or to excite disaffection against the administration of justice. In all these forms of sedition it is likely that there will usually be an incitement to violence or to disobedience to the law, but such incitement does not, of itself, at present constitute sedition.
>
> Experience of the sort of seditions publication which has appeared in Hong Kong argues that it should be, and so clause 2 of the bill amends section 3 of the principal Ordinance so as to make it sedition to incite persons to violence or to counsel disobedience to the law or to any lawful order."

The Attorney General's statement made it clear that an intention to incite violence, though likely present in reality, was hitherto not considered as an element of the offence of sedition under the 1938 Ordinance. It was consistent with the view of the Full Court expressed in *Fei Yi Ming* 20 years ago. By the 1970 amendment, it had now become a separate and distinct form of seditious intention.

80. The 1938 Ordinance remained in force until 1971 when it was consolidated into the CO with sections 3 and 4 replicated by sections 9 and 10 of the CO respectively. So much for the legislative history.

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[86] Another amendment was to make "display seditious publication" an offence under section 4.
[87] Hansard, 11 February 1970, at pp.330-331.

81. It is a well-established principle of statutory interpretation that the legislature is presumed to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner: see *Bennion*, section 11.3 at pp.395-396 for the general principles. The legislature is also presumed to have legislated against the background of the relevant principles of common law: see *Bennion* section 25.1 at p.786 for the general principles. Examining the above legislative history with those principles in mind gives substance to the proposition that the legislative purpose and intent of the 1938 Ordinance was to create statutory offences of sedition in place of the common law offence. It is because:

(1) The LegCo must have enacted the 1938 Ordinance in the knowledge of, and having regard to, the common law on sedition. It was hardly surprising for the LegCo to borrow the language used in the common law for the statutory terms. Significantly, the common law required an intention to incite violence as a necessary ingredient. So not including such an intention expressly in section 3 was a conscious legislative decision.

(2) Further, the LegCo could not have intended to incorporate such an intention implicitly. For one thing, it begs the question why, given its importance, the LegCo did not expressly provide for it in the first place. Moreover, the legislative materials for the 1970 amendment exercise made

it plain that the LegCo acted on the basis that such an intention had not been implicitly incorporated in section 3.

(3) Absent the intention to incite violence as a necessary ingredient, the sedition offences provided for under the 1938 Ordinance was fundamentally different from the common law offence. The two could not be the same. In other words, the LegCo could not have intended to simply reproduce the common law offence of sedition by the 1938 Ordinance. The LegCo must have intended to create new statutory offences of sedition by the 1938 Ordinance.

(4) As to the effect of the 1938 Ordinance on the common law offence of sedition, there is nothing in principle to prevent statutory and common law rules co-existing in the same area. It is ultimately a matter of interpretation: *Bennion*, section 25.9, at p.806. However, if the LegCo had intended that the common law offence of sedition continued to operate alongside the statutory regime, the 1970 amendment exercise would not have been necessary. For the prosecution could have simply resorted to the common law if and when necessary.

(5) Further, looking as a whole, the 1938 Ordinance formed a comprehensive statutory scheme for the criminal law on sedition. It defined what constituted a seditious intention and what did not; provided for various substantive offences

of sedition; and set out the punishment. As such, it is a strong indication that the common law offence of sedition should not continue to apply: *Bennion*, section 25.11, at p 808. The LegCo must have intended it to be a full and complete code on sedition in Hong Kong. It was not an ordinance that only affected the common law offence of sedition on penalty or procedure as contended by counsel. It was a substantive piece of enactment.

82. In conclusion, we hold that on a proper interpretation, the 1938 Ordinance had created new statutory offences of sedition and had thereby impliedly displaced the common law offence. Although the Full Court's reasoning in *Fei Yi Ming* is not as full as ours, it was correctly decided. As the immediate successor of the 1938 Ordinance, the CO has the same legislative purpose and intent. Sedition is now a statutory offence and not a common law offence. Save and except where section 9(1)(f) applies, an intention to incite violence is not an element of the statutory offence of sedition under the CO. We reject all of Mr Dykes's contrary submissions that sedition remains a common law offence. We will in Part C2 consider his submissions whether it should nevertheless be implied in sections 9 and 10 of the CO an intention to incite violence by way of an up-dated interpretation.

C1.5 A summary offence transferrable to the District Court

83. As an offence created by statute, a section 10 offence is not an offence of treason and does not contain the words "upon indictment"

or "on indictment". Pursuant to section 14A of the CPO, it is a summary offence. And the restriction on excepted indictable offences under section 88(1) of the MO does not apply. A section 10 offence may therefore be transferred to the District Court for trial under section 88(1)(b) of the MO.

84. In the present case, the Sedition Charges were ordered to be transferred to the District Court together with other indictable offences pursuant to section 88(1)(b) of the MO as follows:

(1) Charge 2, with Charge 1 in FLCC 1711/2020;

(2) Charge 9, with Charge 6 in ESCC 954/2020;

(3) Charges, 4, 10, 12 to 14 with Charge 11 (conspiracy being an indictable offence) in FLCC 1691/2020.

Accordingly, the District Court had jurisdiction to try them.

C1.6 Effect of NSL 41(3)

85. Finally, we consider the effect of NSL 41(3). It provides:

> "Cases concerning offence endangering national security within the jurisdiction of the Hong Kong Special Administrative Region shall be tried on indictment."

86. Mr Dykes submitted that if sedition offences are "offences endangering national security" under NSL 45, jury trial is consistent with the requirement that such offences are tried on indictment because as

common law offences, they are indictable. If sedition offences are summary only, they cannot be tried on indictment and, presumably are not "offences endangering national security".

87. To recap, acting on the Court of Final Appeal's observation in *Ng Hau Yi Sydney* that offences endangering national security include a section 10 offence and reading NSL 41(3) in the way as he did, the Judge held that a section 10 offence was now to be taken as an indictable offence. Contrast *Chan Tai Sum* where HH Judge Kwok held that on a purposive construction, NSL 41(3) did not include sedition.

88. With respect, neither Mr Dykes's view nor the Judges' views is correct.

89. As held in *Lai Chee Ying*, the primary legislative intention of the NSL is for it to operate in tandem with the laws of the HKSAR in safeguarding national security, seeking convergence, compatibility and complementarity with local laws. Further, the NSL plainly intends that all levels of the HKSAR courts will continue to exercise jurisdiction in accordance with the NSL and existing laws in handling offences endangering national security: see NSL 44(1), NSL 44(3)[88] and NSL

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[88] NSL 44(1) and (3) provides:

「香港特別行政區行政長官應當從裁判官、區域法院法官、高等法院原訟法庭法官、上訴法庭法官以及終審法院法官中指定若干名法官，也可從暫委或者特委法官中指定若干名法官，負責處理危害國家安全犯罪案件。行政長官在指定法官前可徵詢香港特別行政區維護國家安全委員會和終審法院首席法官的意見。上述指定法官任期一年。

…

在裁判法院、區域法院、高等法院和終審法院就危害國家安全犯罪案件提起的刑事檢控程序應當分別由各該法院的指定法官處理。」

45.[89] And local laws on procedural matters including those related to trial shall continue to apply: NSL 41(1).[90] Construing NSL 41(3) with the above considerations in mind, its legislative intent is clear. NSL 41(3) does not have the effect of upsetting the current statutory regime for trial of summary offence of endangering national security. The designation of the sedition offences under the CO, the classification of statutory offences under section 14A of the CPO, the procedural mechanism in the MO for transfer of offences to different levels of court, and the corresponding provisions in the DCO conferring criminal jurisdiction on the District Court to try cases transferred, continue to operate in tandem with NSL 41(3). Contrary to Mr Dykes's submission, a section 10 offence is an offence endangering national security within the meaning of the NSL, and remains a summary offence and the District

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Its English translation reads:

"The Chief Executive shall designate a number of judges from the magistrates, the judges of the District Court, the judges of the Court of First Instance and the Court of Appeal of the High Court, and the judges of the Court of Final Appeal, and may also designate a number of judges from deputy judges or recorders, to handle cases concerning offence endangering national security. Before making such designation, the Chief Executive may consult the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal. The term of office of the aforementioned designated judges shall be one year.

…

The proceedings in relation to the prosecution for offences endangering national security in the magistrates' courts, the District Court, the High Court and the Court of Final Appeal shall be handled by the designated judges in the respective courts."

[89] NSL 45 provides:

「除本法另有規定外，裁判法院、區域法院、高等法院和終審法院應當按照香港特別行政區的其他法律處理就危害國家安全犯罪案件提起的刑事檢控程序。」

Its English translation reads:

"Unless otherwise provided by this Law, magistrates' courts, the District Court, the High Court and the Court of Final Appeal shall handle proceedings in relation to the prosecution for offences endangering national security in accordance with the laws of the Hong Kong Special Administrative Region."

[90] NSL 41(1) provides:

「香港特別行政區管轄危害國家安全犯罪案件的立案偵查、檢控、審判和刑罰的執行等訴訟程序事宜，適用本法和香港特別行政區本地法律。」

Court may try it upon a transfer under section 88(1)(b) of the MO. NSL 41(3) does not seek to change a section 10 offence into an indictable offence as suggested by the Judge. Judge Kwok's reading of NSL 41(3) has not given sufficient regard to the primary legislative intention of the NSL as expounded by the Court of Final Appeal in *Lai Chee Ying*. Further it is *prima facie* contrary to the Court of Final Appeal's observation in *Ng Hau Yi Sydney* that offences endangering national security include section 10 offences and might have created unnecessary internal inconsistency for the meaning or application of the term "offences endangering national security" in the NSL.

C2. Whether intention to incite violence a necessary ingredient of the statutory offence of sedition

90. We now come to Mr Dykes's contention that an intention to incite violence is a necessary ingredient of the statutory offence of sedition under the CO. In his further written submissions filed after the hearing, Mr Dykes argued that taking into account the development of the international jurisprudence on sedition leading to *Vijay Maharaj (PC)*, and the reminder in NSL 4 that human rights protections are a part of the NSL, such an intention should be implicitly incorporated into sections 9 and 10; otherwise they will fall foul of the dual requirements of legal certainty and proportionality. He submitted that we should depart from *Fei Yi Ming* in this regard and followed *Vijay Maharaj (PC)*.

91. In *Vijay Maharaj (PC)*, SM was a well-known and controversial figure in public life in Trinidad and Tobago.[91] He hosted a talk show, broadcasted by the 2nd appellant, in which he offered commentary with callers expressing opinions on various issues affecting society. He often used his talk show to criticize the Government and to express strong and sometimes provocative statements on matters of public interest. On 9 April 2019, he made certain statements on the talk show which attracted a warning of the Telecommunications Authority issued to the 2nd appellant on 17 April 2019, describing his statements as "divisive and inciteful". Police investigations and judicial review proceedings ensued. SM feared that he would be charged, prosecuted and convicted of a criminal offence under the Trinidad Sedition Act 1920. No prosecution had however been brought against him or the second appellant under the Trinidad Sedition Act or otherwise. On 31 May 2019, he and the 2nd appellant commenced proceedings challenging the constitutionality of sections 3, 4 and 13 of the Trinidad Sedition Act.[92]

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[91] Formerly a British colony which gained independence in 1962.

[92] Section 3 of the Trinidad Sedition Act provides:

"(1) A seditious intention is an intention –

(a) to bring into hatred or contempt, or to excite disaffection against the Government or the Constitution as by law established or the House of Representatives or the Senate or the administration of justice;

(b) to excite any person to attempt, otherwise than by lawful means, to procure the alteration of any matter in the State by law established;

(c) to raise discontent or disaffection amongst inhabitants of Trinidad and Tobago;

(d) to engender or promote –

(i) feelings of ill-will or hostility between one or more sections of the community on the one hand and any other section or sections of the community on the other hand; or

(ii) feelings of ill-will towards, hostility to or contempt for any class of inhabitants of Trinidad and Tobago distinguished by race, colour, religion, profession, calling or employment; or

(e) to advocate or promote, with intent to destroy in whole or in part any identifiable group, the commission of any of the following acts, namely:

(i) killing members of the group; or

(ii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

Subsequently, SM died. His son was allowed to substitute for and on behalf of his estate.

92. Relevantly, section 6 of the Constitution of the Republic of Trinidad and Tobago provides that nothing in sections 4 and 5 (on protection of fundamental rights) shall invalidate any "existing laws". The effect of section 6 makes an existing law constitutional, that is, consistent with the Trinidad Constitution even though it would conflict with sections 4 and 5 if they applied to it: *Johnson v Attorney General of Trinidad and Tobago* [2009] UKPC 53, per Lord Rodger at [13]. As identified by the Judicial Committee at [29], one of the two broad issues was whether the relevant provisions of the Trinidad Sedition Act are existing laws within the meaning of section 6 of the Trinidad Constitution and are therefore protected from judicial review on the ground that they are incompatible with sections 4 and 5 of the Trinidad Constitution.

93. The appellants argued that section 6 entailed an examination of the quality of the Trinidad Sedition Act to determine if it qualified as

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(2) But an act, speech, statement or publication is not seditious by reason only that it intends to show that the Government has been misled or mistaken in its measures, or to point out errors or defects in the Government or Constitution as by law established, with a view to their reformation, or to excite persons to attempt by lawful means the alteration of any matter in the State by law established, or to point out, with a view to their removal by lawful means, matters which are producing, or have a tendency to produce –
(a) feelings of ill-will, hostility or contempt between different sections of the community; or
(b) feelings of ill-will, hostility or contempt between different classes of the inhabitants of Trinidad and Tobago distinguished by race, colour, religion, profession, calling or employment.

(3) In determining whether the intention with which any act was done, any words were spoken or communicated, or any document was published, was or was not sedition, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

Section 4 provides for various offences of sedition some of which are similar to section 10 of the CO.

"law" for the constitutional protection. From that premise, they reasoned that the relevant provisions of the Trinidad Sedition Act were too vague and void for uncertainty; and that they were overbroad, amounting to a disproportionate interference with the freedom of speech. The Trinidad Sedition Act therefore did not qualify as an existing law for the purpose of section 6. The first instance judge held in their favour. But the Trinidad Court of Appeal disagreed, holding that sections 3 and 4 of the Trinidad Sedition Act were existing laws under section 6 of the Trinidad Constitution; and also that those sections satisfied the dual requirements of legal certainty and proportionality.[93]

94. The Judicial Committee rejected the appellants' argument that section 6 of the Trinidad Constitution necessitated an examination of the underlying quality of the law in question and held that the Trinidad Sedition Act was clearly an existing law immune from his constitutional attacks by section 6. In the course of addressing the appellants' arguments on lack of certainty and proportionality of sections 3 and 4 of the Trinidad Sedition Act, the Judicial Committee briefly traced the development of the law of sedition in various common law jurisdictions and after that exercise, said:

> "43. As has been noted above, the Sedition Act in Trinidad and Tobago also has those similarities. Nevertheless, Mr Knox submits that it is not restricted by the requirement of an intention to incite violence or disorder. The mainstay for this submission is the decision of the Board in *Wallace-Johnson v R* [1940] AC 231 (a case concerning the interpretation of similar legislation in force in what was then the Gold Coast). At pp 239-240, Viscount Caldecote LC, in giving the opinion of the

[93] See its judgment in Civ. App. No. P023 of 2020 delivered on 26 March 2021.

Board, said that the words of the legislation were clear and unambiguous and there was no warrant for imposing a gloss of an intention to incite violence upon them. He said that the similarity in wording to Stephen's *Digest of the Criminal Law* was immaterial because conditions in the colony of the Gold Coast were different from those in England. This was at a time when the Gold Coast was not a democratic, selfgoverning state: it gained independence as Ghana in 1957.

44. The Board now has the advantage of being able to consider the decision of the Supreme Court of Canada in *Boucher*, which came some 11 years after *Wallace-Johnson.* In *Boucher*, at p 282, Kerwin J distinguished *Wallace-Johnson* in brief terms:

> 'The decision of the Judicial Committee in *Wallace-Johnson v The King*, is not of assistance as there it was held merely that the provisions of the Gold Coast Criminal Code were clear and unambiguous and intended to contain as far as possible a full and complete statement of the law of sedition in the Colony and that, therefore, the English common law as expounded in the *Burns* Case was inapplicable.'

45. It is also important to note that the decision of the Privy Council in *Wallace-Johnson* was decided many decades before the "principle of legality" became recognised in a series of decisions by the House of Lords in the 1990s, eg *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115. In one famous formulation of that principle, at p 131, Lord Hoffmann said:

> 'In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'

46. It is to be noted that, in the present case, no prosecution was in fact brought and so the Board does not have the advantage of seeing any rulings by a trial judge or directions to a jury. The Board notes, however, what was said by the Court of Appeal as to the approach that should be taken by a trial judge if there were a prosecution, including the need to bear in mind contemporary mores and the importance of freedom of

> expression. The Board considers that weight should be given to the views of the Court of Appeal, which is closer to local conditions than it can be. It is therefore far from obvious to the Board that, if the compatibility of the Sedition Act had to be assessed by reference to the facts of a particular case, it would be given the wide interpretation which the appellants contend it must have.
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> 47. To the contrary, the Board is of the opinion that, were such a case to arise, there would be much to be said for the proposition that, applying the principle of legality, and quite apart from any constitutional considerations, the true interpretation of the Act is such that there is implied into it a requirement that there must be an intention to incite violence or disorder. Indeed this appeared to be accepted on behalf of the respondent at the hearing before the Board."

95. Mr Dykes submitted that *Vijay Maharaj (PC)* is the most up-to-date and authoritative decision on the offence of sedition as it has developed in the common law world. After referring to the evolution of the offence and its articulation in near identical legislations in various Commonwealth jurisdictions, the Judicial Committee had no difficulty in not applying *Wallace-Johnson* and held that an intention to incite violence is implicitly an element of the sedition offence in the Trinidad Sedition Act based on the principle of legality. Given the similarities between sections 3 and 4 of the Trinidad Sedition Act and sections 9 and 10 of the CO and the absence of any saving clause like section 6 of the Trinidad Constitution, this Court should follow *Vijay Maharaj (PC)* and giving the CO an updated interpretation based on the doctrine of legality, hold that an intention to incite violence is an element of the statutory offence of sedition. Further, this Court should not follow *Fei Yi Ming* in this regard as it is plainly wrong, applying the principle of *stare decisis* as

explained in *Solicitor (24/7) v Law Society of Hong Kong* (2008) 11 HKCFAR 117.

96. We have reservations if *Vijay Maharaj (PC)* is applicable to the interpretation of sections 9 and 10.

97. As alluded to at [94] above, the issue that required the Judicial Committee's determination was whether the Trinidad Sedition Act was an existing law for the purpose of section 6 of the Trinidad Constitution as a matter of construction. In rejecting the appellants' argument that an examination of the underlying quality of the Act was required, the Judicial Committee effectively ruled that matters concerning its legal certainty and proportionality, which affected its underlying quality, were irrelevant to the construction exercise. It means that the Judicial Committee's views on those matters are clearly *obiter dictum*.

98. Further, the Judicial Committee's views are necessarily limited to the Trinidad Sedition Act. Whether an intention to incite violence should be incorporated as an element of offence in a given criminal code must depend on its actual provisions to be interpreted by reference to the specific legal and social landscape in which it exists. If there are major differences between that code and the Trinidad Sedition Act, different interpretations may well follow. Here, as pointed out, the legislative history of the 1938 Ordinance and the CO makes it clear beyond doubt that as a matter of interpretation, such an intention is not a necessary element of offence except section 9(1)(f).

99. The reference by the Judicial Committee to the modern concept of legality paved the way for Mr Dykes's next argument on interpretation. As noted, he invited this Court to depart from *Fei Yi Ming* and to give sections 9 and 10 an updated interpretation by reference to the concepts of legality and proportionality. Underlying counsel's argument is the doctrine that a statute is always speaking. We accept that generally speaking, the concepts of legality and proportionality fall within the board legal context when interpreting a statute nowadays. However, the doctrine that a statute is always speaking is applicable *only* if it would be consistent with the legislative intention: see *Bennion*, at p.142. Incorporating an intention to incite violence in sections 9 and 10 of the CO would be wholly against its legislative intention. That is not permissible. We have also explained why in our view *Fei Yi Ming* was correctly decided. There is accordingly no basis for this Court to depart from it. Of course, whether the absence of such an intention would render sections 9 and 10 unconstitutional is quite another matter, and we will address that shortly.

100. For completeness, Mr Dykes relied on the changes to sedition offence proposed by the Hong Kong Government in 2003. In that exercise, the Government presented to the LegCo a new sedition offence triable by a magistrate, a District Court Judge or a judge and jury in the Court of First Instance with the possibility of a defendant electing jury trial: see the National Security (Legislative Provisions) Bill 2003, sections 18D and 18E. The Bill made it clear that the amendments to the relevant existing laws, including the CO and MO, were needed to create new offences for the abolition of common law offences and the

right to elect jury trial. He argued that those proposals could be explained by the Government recognizing that sedition was a common law offence and that it wished to continue with jury trials after a statutory reformulation of the offences against Part I or Part III of the Second Schedule of the MO. We are unable to accept his arguments.

101. Nothing in the 2003 materials, when properly understood, lends any support to the contention that the Government had treated sedition as a common law offence. In any event, whether sedition remains a common law offence is a matter of statutory interpretation of the 1938 Ordinance and the CO. The 2003 materials, which came years later and do not shed light on the context or purpose of the 1938 Ordinance or the CO, cannot be regarded as post-enactment materials in aid of the interpretation exercise. So whatever the Government's position there and then might be is quite irrelevant.

102. This concludes our considerations of the interpretation of sections 9 and 10 of the CO. We next turn to the constitutional challenges.

C3. Constitutional challenges

C3.1 General Approach

103. As the Court of Final Appeal observed, section 10 offences are offences endangering national security. Such offences are of immense importance in safeguarding national security, one of the primary aims of the "one country, two systems" enshrined in the Basic Law.

104. At the same time, it is common ground that in the present case, the Sedition Charges engage the right to freedom of expression. Such a right is one of the fundamental rights guaranteed under article 27 of the Basic Law and article 16(2) of the Hong Kong Bill of Rights ("BOR").[94] (There is no difference in substance between the right to freedom of expression guaranteed under BL 27 and that provided for in BOR 16: *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425, at [15].) The right lies squarely at the heart of Hong Kong's system and way of life. Its cardinal importance is well recognized: *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837, at [31]. As Li CJ explained in *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229 at [2]:

> "These freedoms are of cardinal importance for the stability and progress of society for a number of inter-related reasons. The resolution of conflicts, tensions and problems through open dialogue and debate is of the essence of a democratic society. These freedoms enable such dialogue and debate to take place and ensure their vigour. A democratic society is one where the market place of ideas must thrive. These freedoms enable citizens to voice criticisms, air grievances and seek redress. This is relevant not only to institutions exercising powers of government but also to organizations outside the public sector which in modern times have tremendous influence over the lives of citizens. Minority views may be disagreeable, unpopular, distasteful or even offensive to others. But tolerance is a hallmark of a pluralistic society. Through the exercise of these freedoms minority views can be properly ventilated."

105. However, the right to freedom of expression is not absolute. It has never been. It may be restricted for one of the objectives listed in BOR 16(3):

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[94] Giving effect to article 19 of the International Covenant on Civil and Political Rights ("ICCPR").

> "The exercise of the right provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary –
>
> (a) for respect of the rights and reputations of others; or
>
> (b) for the protection of national security or public order (ordre public), or of public health or morals."

106. BOR 16 has to be read together with BL 39(2):

> "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of [BL 39(1)]."

As observed by Ribeiro PJ in *Chow Nok Hang*, at [29], BL 39(1) accords constitutional status to the ICCPR as enacted in the Hong Kong Bill of Rights Ordinance. BL 39 therefore underscores the right to freedom of expression provided for under BOR 16 subject to the restrictions mentioned above. Further, as a fundamental right, the right to freedom of expression must be given a generous interpretation so as to give individuals their full measure and that restrictions on it must be narrowly interpreted.

107. There is a wealth of case law developed by the Court of Final Appeal over the years on the combined effect of BL 39 and purported restrictions on the associated freedoms of expression, of public

assembly and procession and demonstration. In *Fong Kwok Shan Christine*, Ribeiro PJ at [16] summarized the applicable principles thus:[95]

> "Accordingly, by the combined effect of BL 39 and BOR 16, if any purported restriction on the right of free expression is to be valid, it must have sufficient legal certainty to qualify as a restriction 'prescribed by law' and must be 'necessary for respect of the rights or reputations of others; or for the protection of national security or of public order (ordre public),[96] or of public health or morals'. It is established that the requirement of necessity involves the application of a proportionality test and that the objectives listed in BOR 16 are exhaustive of purposes qualifying as legitimate aims to justify a purported restriction of the guaranteed right."

The proportionality test is the four-stage test as propounded by the Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372. In determining if a restriction satisfies the dual requirements of legal certainty and proportionality, the court undertakes a multi-functional assessment, which is by nature highly context-specific, and forms its conclusion on a holistic view of the case.

108. Moreover, it is worth mentioning that in the same case, the Court of Final Appeal rejected the attempts at a *priori* exclusion or disapplication of guaranteed rights on state-owned properties, without examining whether the exclusion of the right is justified. As Ribeiro PJ stressed at [39]:

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[95] Omitting the footnotes which gave citation of the relevant cases decided by the Court of Final Appeal. The same for the next quotation of his Lordship's judgment at [39].

[96] The concept of *public ordre* includes public order in the law and order sense, that is, the maintenance of public order and the prevention of public disorder: *Leung Kwok Hung*, at [69]; *Chow Nok Hang*, at [38].

> "In my view, the correct starting point and the proper focus throughout is on the guaranteed right, adopting the assumption that it is universally applicable, subject to any constitutionally valid restriction. Thus, where the right to freedom of expression is invoked, one asks whether factually, that right is engaged. If so, the question becomes whether any restriction which purports to limit its exercise is valid, that is, whether it pursues a legitimate aim which falls within one of the permitted categories listed in BOR 16; and if so, whether it is rationally connected with accomplishing that aim; whether the restriction is no more than reasonably necessary for accomplishing that purpose; and whether a reasonable balance has been struck between the societal benefits of the encroaching measure on the one hand and the inroads made into the guaranteed right on the other."

That orthodox approach reiterated by his Lordship applies equally to a restriction based on national security, one of the objectives specified in the constitutional provisions. Such a restriction does not amount to a *priori* exclusion or disapplication of the guaranteed rights.

109. This aligns with the legislative intention of the NSL on how to balance safeguarding national security and protection of human rights for cases arising after its implementation. As the Court of Final Appeal observed in *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, although the court has no power to hold any provision of the NSL unconstitutional or invalid as incompatible with the Basic Law or the BOR, it does not mean that human rights, freedom and rule of law values are inapplicable. The need to balance safeguarding national security and protection of human rights is in fact recognized in the NSL.

110. NSL 2 provides that no one in the HKSAR shall contravene BL 1 or BL 12 in exercising his rights and freedoms. As explained in

Lai Chee Ying v Secretary for Justice [2023] 3 HKLRD 275, at [28], BL 1 and BL 12 underscore the general constitutional duty of the Region to safeguard national security. By referring to them, NSL 2 mandates that no one can endanger national security in exercising their fundamental rights. In a similar vein, NSL 6(2) imposes a positive duty to abide by the NSL and local laws in relation to safeguarding national security and not to engage in any act or activity which endangers national security. At the same time, NSL 4 requires protection of human rights in these terms:

> "Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the [Basic Law] and the provisions of [the ICCPR] … as applied to Hong Kong, *shall be protected in accordance with the law*." (Emphasis supplied)

The italicized words require that fundamental rights, if engaged in safeguarding national security, shall be protected in accordance with the law.

111. Since the legislative intention of the NSL is to operate in tandem with local laws seeking convergence, compatibility and complementarity, NSL 4 plainly envisages that the constitutional principles developed at common law on how fundamental rights are protected continue to apply in safeguarding national security under local laws. It enables a fair balance to be struck and in turn allows a clear line to be drawn between the lawful exercise and full enjoyment of

fundamental rights on the one hand and conduct which endangers national security on the other. If an individual crosses the line in purportedly exercising his fundamental rights, he will not only lose the constitutional protection, but will also commit a breach of NSL 2 and NSL 6(2) and expose himself to legal sanctions for engaging in act or activity endangering national security.

112. With these general principles in mind, we turn to consider if sections 9 and 10 of the CO satisfy the "prescribed by law" requirement.

C3.2 Prescribed by law

113. The "prescribed by law" requirement in BL 39 mandates the principle of legal certainty.[97] The principles are well settled: see *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381; *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386; *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16. In *Winnie Lo*, Ribeiro PJ at [74] referred to the authoritative summary of principles enunciated by Sir Anthony Mason NPJ in *Mo Yuk Ping*:

> "[61] ... A criminal offence must be so clearly defined in law that it is accessible and formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, whether his course of conduct is lawful or unlawful. It is, however, accepted that absolute certainty is unattainable and would entail excessive rigidity. Hence it is recognised that a prescription by law inevitably may involve some degree of vagueness in the prescription which may require clarification by the courts.
>
> [62] The concept of legal certainty recognizes that in a common law system, the common law, declared as it is by the judges,

[97] Which is likewise incorporated in the expression "according to law" in BOR 11(1).

involves an incremental element of judicial lawmaking, whether by way of moulding the law to meet new circumstances and conditions or to correct errors of principle or doctrinal error. In any event, with the common law, as with the interpretation of statute law, it is inevitable that questions continue to arise which require clarification by judicial decision. That is one reason why absolute certainty is unattainable and why some degree of vagueness is inherent in the formulation of laws, especially laws expressed in general terms.

[63] It is also to be expected that, in the case of a general offence expressed in broad and abstract terms, that the degree of vagueness will be perhaps greater than that to be expected in the case of a specific offence directed to a particular situation or particular situations."

His Lordship then went on to say:

"75. The central requirement is therefore that the offence must have a sufficiently clearly formulated core to enable a person, with advice if necessary, to regulate his or her conduct so as to avoid liability for that offence. At the same time, the principles recognize the need for both flexibility and development.

76. A crime may be of such a nature that its definition has to be broad and flexible enough to embrace many different ways of committing that offence. Such was the case, for instance, with the offences of conspiracy to defraud, considered in *Mo Yuk Ping* and misconduct in public office, examined in *Shum Kwok Sher*. Offences so defined are not legally uncertain.

77. And, as noted in the summary above, in a common law system, the courts develop the law over time, clarifying it and modifying it to meet new circumstances and conditions. As Sir Anthony Mason NPJ made clear, such a process of development is not constitutionally objectionable provided that it does not result in judicially extending the boundaries of criminal liability:

> Mr Griffiths SC made the valid point that, in conformity with *DPP v Withers* [1975] AC 842 and *R v Knuller (Publishing, Printing and Promotions) Ltd*[1973] AC 435, it was not for this Court to create a new offence as an answer to a perceived problem of imprecise definition or

> accessibility. That said, it is well established that, by employing accepted and traditional judicial techniques, a court is entitled, indeed bound, to clarify the existing law where clarification is needed so long as, in doing so, the court does not extend the boundaries of criminal liability. To do so would create retrospective criminal liability and offend the provision of art.12(1) of the Bill. The offence of misconduct in public office, as I have explained it, is consistent with the existing authorities. The explanation amounts at most to a clarification which, even if it does not narrow the offence, does not expand it."

114. More recently, the European Court of Human Rights in *Sanchez v France*, Application No. 45581/15, 15 May 2023, reiterated the principles in similar terms, underscoring accessibility and foreseeability on the one hand and elaborating on flexibility and development on the other:[98]

> "124. The Court reiterates that the expression 'prescribed by law' in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects.
>
> 125. As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a 'law' within the meaning of Article 10 §2 unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. … Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice. The level of precision required of

[98] Omitting the citation of authorities.

> domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed.
>
> 126. A margin of doubt in relation to borderline facts does not therefore by itself make a legal provision unforeseeable in its application. Nor does the mere fact that a provision is capable or more than one construction mean that it fails to meet the requirement of 'foreseeability' for the purposes of the Convention. The role of adjudication vested in courts serves precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice.
>
> 127. At the same time, the Court is aware that there must come a day when a given legal norm is applied for the first time. The novel character of a legal question that has not hitherto been raised, particularly with regard to previous decisions, is not in itself incompatible with the requirements of accessibility and foreseeability of the law, provided the solution adopted is consistent with one of the possible and reasonably foreseeable interpretations."

115. Mr Dykes premised his arguments on the importance of the freedom of speech in a pluralistic society such as Hong Kong. He cited various overseas materials, including *Boucher*, per Kellock at pp.292-305, per Locke J at p.328; the 2007 Report of New Zealand Law Reform Commission on sedition at §160; *R v Lohnes* [1992] 1 SCR 167, at p.180; *Media Council of Tanzania and Others v Tanzania*, Reference No. 2 of 2017, 28 March 2019; and *Vijay Maharaj (PC)*, which, according to counsel, criticized the offence of sedition in their jurisdiction as being vague, overboard, in breach of the freedom of expression and having a chilling effect on speech and writing, particularly if it is material critical of the government. He specifically relied on *Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on*

Civil and Political Rights (ICCPR), deprecating "vague" limitations imposed in the name of national security.

116. Based on those materials, Mr Dykes took three main points. First, absent an intention to incite violence as an element of offence, sections 9 and 10 of the CO lack legal certainty. Such an intention would have supplied the needed certainty. Second, section 9(1) describes "seditious intention". It includes words such as "hatred", "contempt", "disaffection", "discontent", "feelings of ill-will and enmity". Applying an objective standard to see whether speech engenders these subjective feelings is impossible. The speaker may not be able to predict the effect of words. One person's political persuasion may lead to an outraged response ("discontent" or "hatred") but have no effect on another person. Third, the ambiguity inherent in the various heads of "seditious intention" in section 9(1) cannot be cured by section 9(2). It is because without clear parameters for section 9(1), the "lawful intentions" defences provide no assistance in limiting the scope of the offence; and section 9(2) does not provide a complete defence since the use of the word "only" means that even if speech falls within one of the exception, it may still be caught if there is more than one intention.

117. We pause to make two preliminary observations:

(1) As Mr Chau pointed out, although the Sedition Charges involve section 9(1)(a), (b), (d) and (g), according to his submissions on the wording used for seditious intention, Mr Dykes's criticisms are directed towards section 9(1)(a) and

(d). He made no similar objections to section 9(1)(b) and (g). He also attacked section 9(1)(e) but it concerns none of the Sedition Charges. In the circumstances, while we will base our discussion on general principles, our findings are primarily related to section 9(1)(a) and (d).

(2) Mr Dykes's submissions centred on the meaning of seditious intention in section 9. He did not separately deal with section 10. It is not his case that the offences created by section 10 on their own lack legal certainty. Thus for present purposes, it is sufficient for us to just focus on section 9.

118. To ascertain if section 9 of the CO is legally uncertain, it is necessary for it to be construed in the light of its context and purpose: *Fong Kwok Shan Christine*, at [78] and [79].

119. At its core, sedition generally relates to dissemination of words. Several inter-related dimensions are at play:

(1) By their very nature, some aspects of the offence of sedition are not capable of a precise definition. That said, to avoid unjustifiable interference with the freedom of expression, the offence must set clear parameters for what is seditious and what is not. Clarity of course does not mean rigidity. As will be elaborated below, a sufficient degree of adaptive flexibility is necessary for the offence to be effective and

responsive to meet the risks or threats to national security that the society is facing at the time.

(2) Words are not spoken in vacuum and cannot be understood in abstract. They must be understood against the contemporaneous socio-cultural and political setting of society. Thus, words which were innocent in the past may have become offensive now with the change in the state of society, public attitude or feelings generally or towards a particular subject matter. Words which a society finds acceptable may be repugnant to another with a different cultural heritage or political setting. Accordingly, to be effective, sedition offences must be sensitive to time, issue and context in which the words are spoken. They must be flexible enough to cope with the change in time and circumstances, such as societal evolution or political climate.

(3) Very often, words can set events into action. Seditious words may potentially lead to seditious acts or activities endangering national security, public order or safety. In punishing dissemination of seditious words, the offence aims at avoiding such potential detrimental consequences, which is imperative in safeguarding national security.

(4) With rapid technological advances and diversity and ease in communications, the offence must have the flexibility to keep pace.

120. Construed with the above considerations in mind, section 9 satisfies the legal certainty requirement.

121. First, to achieve the purpose of the offence and to enable it to timely and effectively respond to seditious acts or activities endangering national security, seditious intention has to be broadly framed to encompass a myriad of situations that may arise in different and changing circumstances at different times.

122. Second, though broadly framed, the definitions for seditious intention in section 9 have a sufficiently and clearly formulated core to enable a person, with advice if necessary, to regulate his or her conduct so as to avoid liability of the offence.

123. The words complained of, that is, "hatred", "contempt", "disaffection", "discontent", "feelings of ill-will and enmity", are ordinary language. When used in defining a seditious intention in section 9(1):

(1) "hatred" connotes a strong sense of hostility or aversion towards the government or the administration of justice (section 9(1)(a) and (c));

(2) "contempt" refers to open, defiant disobedience or disrespect of the legitimacy or lawful authority of the government or administration of justice in Hong Kong (section 9(1)(a) and (c));

(3) "disaffection" refers to provoking, stimulating or implanting a feeling or view to oppose the legitimacy or authority of the government, the administration of justice or to antagonize the inhabitants (section 9(1)(a), (c) and (d));

(4) "discontent" refers to provoking, stimulating or implanting a feeling of resentment amongst the inhabitants (section 9(1)(d));

(5) "feelings of ill-will and enmity" refers to provoking, stimulating or implanting animosity between different classes of the population of Hong Kong (section 9(1)(e)).

Put in brief terms, they aim at prohibiting words which, objectively understood, have the intention of (1) seriously undermining the legitimacy or authority of the Central People's Government, the HKSAR Government and their institutions; the constitutional order or status of the HKSAR; and the administration of justice in Hong Kong; and (2) seriously harming the relationship between the Central People's Government or the HKSAR Government with Hong Kong inhabitants; and the relationship among Hong Kong inhabitants.

124. Section 9(1) has to be read together with section 9(2). It sets out four circumstances in which there is no seditious intention. Properly read together with the fundamental right to free expression, they make it plain that criticising the government, the administration of justice including judgments of the court; or engaging in debates about or even

raising objections to government policy or decision, however strong, vigorous, or critical they may be, do not constitute a seditious intention. It provides further clarity in differentiating between lawful and unlawful speeches.

125. Moreover, as is the tradition and practice in our common law system, the application of the definitions of seditious intention to various situations as they arise is a matter for the court to decide in light of experience. In this way, the relevant case law will offer to the public judicial guidance which they may consult to avoid engaging in conduct which is likely to be held to be seditious.

126. Understanding section 9 in such a way does not result in judicially extending the boundaries of its criminal liability.

127. Third, Mr Dykes's complaint that it is impossible to apply an objective standard to see whether a speech engenders subjective feelings such as "hatred", is misconceived. For insofar as criminal liability is concerned, the dispositive question is whether the words uttered have the seditious intention as defined in section 9(1). Whether the particular audience addressed were or were not so incited is irrelevant.

128. Fourth, we do not accept Mr Dykes's argument that section 9 is rendered legally uncertain because, other than section 9(1)(f), it does not contain an intention to incite violence. As demonstrated, the legality question entails a multi-factorial assessment. Presence or otherwise of an intention to incite violence is but a factor. It is not definitive.

Further, his submission does not sit well with the Strasbourg jurisprudence on the point. As highlighted recently by the English Supreme Court in *Pwr v DPP (SC(E))* [2022] 1 WLR 789, the Strasbourg jurisprudence does not contain any principle that a restriction on freedom of expression could only be justified (in terms of legality and proportionality) where the expression included an incitement to violence.

129. Mr Dykes's reliance on the *Siracusa Principles* does not take his case any further. It was issued by the American Association for the International Commission of Jurists in 1984, representing the collective views of the authoring experts. However, their view is obviously dated and does not take account of the changing societal and political circumstances and advances of science and technologies since then. Modern experiences show that seditious acts or activities endangering national security now take many diversified forms. Some involve violence or threat of violence. Some involve non-violent means but can be equally damaging.[99] There is no valid basis for criminalizing the former but not the latter. Further, as just seen, the Strasbourg jurisprudence does not support their view. Finally, the *Siracusa Principles* are not legally binding in Hong Kong and for the reasons given, we are not persuaded to apply them in the present case.

130. As to the other overseas materials that Mr Dykes relied on, the development on sedition in those jurisdictions must have been made to suit their own societal, legal and political setting, which is evidently

[99] Such as malicious dissemination of misinformation.

quite different from ours. We do not consider Mr Dykes could derive much assistance from them.

131. In conclusion, we hold that section 9 of the CO and consequently section 10 as well satisfy the "prescribed by law" requirement. We reject all Mr Dykes's submissions to the contrary.

C3.3 Proportionality

132. We now come to proportionality, applying the four-stage test set out in *Hysan Development Co Ltd*.

133. The first question is whether the offence of sedition pursues a legitimate aim. Mr Dykes accepted, and rightly so, that it pursues the legitimate aim of national security or public order.

134. The next question is whether the offence is rationally connected to that legitimate aim.

135. Mr Dykes again focused on section 9(1). He first harked back to his criticisms that the definitions of seditious intention in section 9(1) are too vague. Further, relying on the *Siracusa Principles*, at §29, Mr Dykes submitted that a legitimate aim is one which protects the existence of the nation or its territorial integrity or political independence against force or threat of force. However, save for section 9(1)(f), none of the heads of "seditious intention" threatens national security so that the HKSAR's or PRC's political authority or territorial integrity is

endangered. As to public order, without an intention to incite violence as an element of the offence, it is inconceivable how mere offensive or disagreeable speech can be rationally connected with the purpose of safeguarding public order. We disagree.

136. We have already demonstrated why on a proper interpretation, the seditious intentions as defined in section 9(1) are legally certain. Further, as pointed out, the view in the *Siracusa Principles* that presence or threat of force is essential to safeguarding national security is plainly outdated. The same is also true for safeguarding public order. Acts or activities endangering national security and public order nowadays can and do take many forms, some of which do not involve violence or threat of violence.

137. In our view, given its clear purposes and legal certainty as explained in the previous section, the offence of sedition is plainly rationally connected to its legitimate aim.

138. The third question is whether the offence is no more than necessary to accomplish its legitimate aim.

139. Mr Dykes argued that section 9 imposes a disproportionate restriction on the right to freedom of expression because the prosecution does not need to prove an incitement to violence. He prayed in aid some overseas materials from Canada, US and India and the consultation document on proposals to implement BL 23 published by the Government in 2002 to support that the statutory offence of sedition

should include an element of force or violence to justify the restriction. Again, we disagree.

140. The mere absence of an intention to incite violence does not render the offence disproportionate: see *Pwr v DPP (SC(E))*, supra. Focusing on this factor alone without reference to others in the multi-factorial assessment is too restrictive. More importantly, as seen,[100] the delineation in section 9 between what is seditious and what is not does not inhibit or have the effect of inhibiting open and frank dialogue and full and vigorous debate to promote societal development and the resolution of conflicts, tensions and problems. The core of the right to free expression exercised and realized in the public domain and for the purposes of public discourse as articulated in *Leung Kwok Hung* at [2],[101] is not compromised.

141. Further, under section 11(2) of the CO, no prosecution of a section 10 offence shall be instituted without the written consent of the Secretary for Justice. Such procedural safeguard serves two purposes. First, it avoids the risks of law enforcement agents using subjective moral or value judgment as the basis for enforcement. Second, in line with longstanding international practice under the common law, part 5 of the Prosecution Code stipulates that a decision to prosecute has to satisfy two conditions. The first is that the admissible evidence available is sufficient to justly instituting or continuing proceedings. The second is that the general public interest must require that the prosecution be

[100] See [122] to [124] above.
[101] See [104] above.

conducted. Further, according to the Prosecution Code, at §6.1, consent to prosecute is a safeguard to ensure that an appropriate level of scrutiny is exercised in cases where it is required. As such, it ensures that the right to free expression said to be engaged in a given case is properly evaluated by the Secretary for Justice in terms of sufficiency of evidence or general public interest, as the case may be, before the prosecution of a section 10 offence is allowed to be brought.

142. Taking an overall view, we find that the offence of sedition is no more than necessary to accomplish its legitimate aim. In the circumstances, we need not deal with Mr Chau's argument that the offence is a proportionate interference with the right to free expression because the level of penalty is not unduly harsh.

143. The fourth and final question is, even a limiting measure passes the first three steps, whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroad made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in placing an unacceptably harsh burden on the individual. It must however be stressed that in the great majority of cases, its application would not invalidate a restriction which has satisfied the requirements of the first three stages of the inquiry: *Hysan Development Co Ltd*, per Ribeiro PJ at [73].

144. Mr Dykes submitted that nothing suggests that criminal sanctions on speech would further societal benefits or strike a fair balance

between societal benefits and the inroads made into the individual's rights. With respect, his submissions fail to give any weight to the paramount importance of national security and public order which the offence of sedition seeks to protect. Safeguarding national security and preserving public order is indispensable to the stability, prosperity and development of society. It ensures a safe and peaceful environment where the public can exercise their fundamental rights and pursue their goals. The societal benefits involved are evidently enormous. Contrary to Mr Dykes's assertion, nothing suggests that any individual, including the applicant, a politician and activist highly critical of the government and a stern opponent of government policy, would be subject to an unacceptably harsh burden because of the restriction on seditious acts or speeches imposed by the offence. We agree with Mr Chau that this case falls within the majority of cases envisaged by Ribeiro PJ in which the fair balance had been struck.

145. In conclusion, we hold that sections 9 and 10 of the CO and accordingly the Sedition Charges satisfy the proportionality test. In the circumstances, the Judge is correct in his conclusion and we need not separately deal with Mr Dykes's complaints that the Judge's reasons are inadequate, which, even if established, would not matter.

C4. Whether the Slogan is seditious

146. In his written submissions, Mr Dykes complained that the Judge adopted a wrong approach to the meaning of the Slogan. He took three main points:

(1) The Judge erred in thinking that expert evidence was admissible. The Slogan is ordinary language used in a political context, and its meaning is accessible to the audience. To achieve sedition, words used by the applicant must be comprehensible to the audience. He would be a hopeless politician if he spoke to the public in a way that could only be understood through expert evidence. The public could not be expected to understand the Slogan without being equipped with the experts' knowledge as a result of historical and etymological research. The proper approach to consider the meaning of the Slogan is to ask how a reasonable man would understand it. If the Judge needed expert evidence to discover the meaning of the Slogan, it proves that it had several meanings. It raises doubt whether the target audience understood the true meaning of the Slogan.

(2) The Judge placed undue weight on *HKSAR v Tong Ying Kit* [2021] HKCFI 2200 and erred in taking it as an authority to say that the Slogan embodies a seditious intention.

(3) In any event, the Judge erred in finding that the evidence of Professor Lau should be preferred over that of Professor Leung.

147. In his oral submissions, Mr Jeffrey Tam emphasized that the applicant's primary position is that it was not necessary to engage expert

evidence on how the audience whom the applicant addressed would understand the Slogan. He did not otherwise dwell on the points raised in the written submissions.

148. The first written point seems to have suggested, as a general proposition, that the understanding of the audience to whom the alleged seditious words were uttered is essential in determining if they had a seditious intention as defined in section 9(1) of the CO. This would appear to be too simplistic an approach.

149. What section 9(1) asks is whether the words uttered express a seditious intention as defined. It is a question of fact, entailing an objective assessment by the court as a reasonable person to ascertain the meaning of the words in the context in which they were uttered. Generally speaking, the context includes the state of society; the state of public feeling or sentiment; the audience addressed; the occasion, the venue, and the means of the utterance: see *R v Burns & Ors* (1886) 16 Cox 355; *R v Aldred* (1909) 22 Cox 1; *Boucher*, at p.281.

150. The relevance of the audience's understanding of the meaning of the words depends on the specific context. For example, where the words are argots or coded language peculiar to the audience, their understanding of the meaning of the words will be relevant. The court as a reasonable person in that situation needs to have regard to their understanding in order to ascertain if the words carried any seditious intention. Barring such incidents, where for example the words are

ordinary language uttered to the public at large, the court will exercise its own judgment as a reasonable person to ascertain their meaning.

151. Here, the context in which the applicant uttered the Slogan involves two facets, resulting in a two-step approach:

(1) First, the socio-political context. The Slogan first emerged in 2016 and had since been used against the then prevailing socio-political situation in Hong Kong. Its origin, usage and development of meaning in such context is relevant in informing the meaning(s) attributed to it at the time of the Sedition Charges. At this step, if considered necessary and appropriate, the court may enlist experts to deal with those matters. The court makes all necessary findings as appropriate, including crucially the meaning(s) of the Slogan or what it is capable of bearing.

(2) Next, the actual factual circumstances in which the applicant uttered it in each of the Sedition Charges. At this step, expert evidence plays no role. It is exclusively a matter for the court. After making all necessary findings on the factual circumstances in which the applicant uttered the Slogan, and taking into account the meaning(s) of the Slogan or what it is capable of bearing as found at the first step, the court determine its meaning(s) and if it had a seditious intention as defined in section 9(1).

152. Although the Judge did not expressly say so, that would appear to be the approach that he had implicitly adopted in dealing with the Slogan. It was clearly for the socio-political context that he admitted the experts' evidence. Accordingly, there is no substance in the applicant's primary complaint that the Judge should not have done so. Indeed, that complaint is striking when before the Judge, the applicant took no such issue and called Professor Leung.

153. This complaint also seems to have conflated the role and scope of the experts' evidence, which addressed the meaning of the Slogan and what it was capable of bearing from a socio-political context, and the Judge's fact-finding function in determining the meaning of the Slogan and if it had a seditious intention when the applicant uttered it in the circumstances as he did.

154. There is no merit in the second written point that the Judge erred in regarding *Tong Ying Kit* as the authority that the Slogan was seditious either. At the outset of the trial, the Judge reiterated the parties' consensus that that case involved a finding of fact (not law), which was not binding on him on the admission of, and the findings to be made on the experts' evidence.[102] Nothing in the Reasons for Verdict suggests that he simply adopted *Tong Ying Kit* in ruling that the Slogan bore the meaning as the prosecution contended.

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[102] 26/7/2021, Transcript pp.21R-S and 22J-L.

155. As to the third written point, in facing the conflicting opinions, the Judge was entitled to accept Professor Lau's and reject Professor Leung's and he had explained why. There is no basis for this Court to disturb his decision.

156. Finally, Mr Tam submitted that the essential issue was simply whether the Slogan was capable of bearing meanings different from that advanced by the prosecution. The answer must be yes according to the experts' evidence. The Judge therefore erred in accepting what Professor Lau said as the only meaning of the Slogan. However, the Judge had already rejected Professor Leung's evidence and as said, there is no basis for this Court to disturb his decision. It is not open to Mr Tam to submit that the Judge ought to have regard to other meanings that Professor Leung said the Slogan was capable of bearing. In any event, even if Professor Leung's evidence were not rejected, it would not have taken the applicant's case any further. Assuming that the Slogan was capable of bearing the meanings as advocated by Professor Leung, she importantly accepted that they included those as identified by Professor Leung. That formed the common ground between the experts. The Judge was entitled to proceed on that common ground to find that when the applicant uttered the Slogan, it had the seditious intention as set out at [9] above.

C5. Specific intent or basic intent

157. Mr Dykes in the written submissions made three complaints.

158. First, he contended that a section 10(1)(b) offence is one of specific intent. The prosecution must therefore prove that the applicant had a seditious intention when committing the Sedition Charges. He placed reliance on section 9(2) of the CO and *HKSAR v Lai Man Ling* [2022] 4 HKLRD 657, in which HH Judge Kwok at [73] – [78] ruled that a section 10(1)(c) offence is one of specific intent.

159. In response, Mr Chau submitted that on a proper construction of sections 9 and 10, the *mens rea* required for a section 10(1)(b) offence is one of basic intent. The prosecution only needs to prove that the defendant intended to utter the seditious words and he knew that the utterance was having a seditious intention prescribed under section 9(1). Negligence or recklessness is not sufficient. In response to the Court's question, Mr Tam said he accepted Mr Chau's submissions and did not develop the point on specific intent any further. He seemed to have conceded the point.

160. Because of Mr Tam's somewhat ambivalent position, we did not have the benefit of full oral submissions on the point. Further, the Judge did find that the applicant had the seditious intention when he committed the Sedition Charges. In other words, he had in fact convicted the applicant on the basis that a section 10(1)(b) offence requires a specific intent. The debate between the parties on *mens rea* before us is therefore wholly academic. In the circumstances, it is inappropriate for this Court to deal with it or express any view on it, including the correctness or otherwise of HH Judge Kwok's view in *Lai Man Ling*. That has to await another occasion.

161. Second, Mr Dykes submitted that the Judge failed to identify the relevant seditious words; and how each of them corresponds with which limb of section 9(1). Mr Tam did not develop this point in his oral submissions. We again disagree.

162. The particulars of each of the Sedition Charges have expressly identified the particular sub-paragraphs of section 9(1) relied on as follows:

(1) Charges 2 and 4: sub-paragraphs (a), (b) and (d);

(2) Charges 9, 10, 12 to 14: sub-paragraphs (a), (b) (d) and (g).

163. In convicting the applicant of each of the Sedition Charges, the Judge described the seditious intention(s) that he found proven by the prosecution with reference to, though without specifying, the relevant sub-paragraph(s), thus:

(1) Charges 2 and 4: sub-paragraphs (a) and (b);

(2) Charge 9, 10, 13 and 14: sub-paragraphs (a), (b) and (g);

(3) Charge 12: sub-paragraphs (a), (b), (d) and (g);

His findings on seditious intention clearly correspond to the particulars of the Sedition Charges.[103]

164. For completeness, Mr Dykes complained that the Judge found that the police forms a part of the "administration of justice" under section 9(1)(c) but convicted him on the basis of section 9(1)(b).[104] However, what the Judge said about the police was only part of his reasoning. He expressly convicted the applicant on the basis of section 9(1)(b) because the applicant chanted the Slogan.

165. Third, Mr Dykes prayed in aid section 9(2) of the CO. He submitted the applicant's background and involvement in politics and social activities was part of the context for deciding if the seditious intention had been made out. But the Judge failed to take it into account; and consequently to find that none of the statutory exceptions under section 9(2) could apply. Specifically, the conviction of the Sedition Charges is inconsistent with the Judge's findings of motive and is a result of not paying attention to section 9(2)(c). None of these submissions is meritorious because:

(1) The Judge was fully aware of the applicant's political background and the statutory defences under section 9(2).

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[103] The comparison is largely taken from the table prepared by Mr Chau at [84] of the respondent's submissions, which we respectfully adopt.

[104] RV, [82].

In fact, he expressly referred to the latter when he convicted the applicant of Charge 10.[105]

(2) The applicant could not possibly avail himself of section 9(2) on the facts as found by the Judge.

(3) The complaint that the conviction is inconsistent with the Judge's findings of motive conflates motive with seditious intention. The Judge found him guilty of sedition not because of his motives but based on his words and conduct.

C6. Charge 4

166. Mr Dykes in the written submissions complained that the Judge went wrong in finding that the applicant's hosting of a Question & Answer Street booth constituted the *actus reus* of the uttering seditious words in Charge 4. Similarly, Mr Tam did not make any further oral submissions.

167. As Mr Chau submitted, this point ignores the realities of the evidence before the Judge which is summarized at [19] above. Evidently, the Judge did not convict the applicant merely because he hosted a street booth. He did so because of what the applicant said and did when hosting the booth.

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[105] RV, [120].

C7. Conclusion

168. For the above reasons, none of the grounds of appeal against conviction has merits. We accordingly refuse to grant leave to appeal against conviction and dismiss the appeal.

D. Leave application for sentence

169. The applicant complains that the overall sentence of 40 months is manifestly excessive or wrong in principle by raising three grounds:

(1) the Judge erred in failing to consider the exercise of the right of freedom of assembly by the applicant when sentencing him on Charges 1 and 6;[106]

(2) the Judge erred in giving insufficient weight or consideration to the totality principle; and

(3) the Judge erred in rejecting all the mitigating factors, in particular, the applicant's good character and exceptional commitment to public service.

We will deal with them separately.

[106] Grounds 10 to 12 respectively, as refined by way of submissions.

D1. Exercise of the right to freedom of assembly as mitigation

170. Mr Tam argued that the Judge erred in considering the social turmoil of 2019 when sentencing the applicant for the unauthorised assembly charges. Further, as the applicant did not promote the use of violence and there was no evidence about any reprehensible conduct, the Judge erred in relying on *Secretary for Justice v Poon Yung Wai* [2022] 4 HKLRD 1002. While accepting that the applicant had made derogatory comments against the police, Mr Tam emphasized that the applicant simply urged his audience to participate in a procession following an authorised public meeting.

171. The submission that the exercise of the right of assembly should qualify as a mitigating factor in the present case ignores the fact that the applicant was being punished for the very act of inciting others to participate in, or holding, an unauthorised assembly, which act is illegal and goes outside the permissible scope of the right: *Leung Kwok Hung*, *supra*; and *HKSAR v Lai Chee Ying & Others* [2023] 4 HKLRD 484.

172. In respect of the Judge's consideration of the 2019 social turmoil and his reliance on *Poon Yung Wai* when sentencing the applicant, we should reiterate that both unlawful assembly and unauthorised assembly are pre-emptive offences which aim at preventing disruption to public order involving mass gathering. The Judge was therefore entitled to consider the sentencing factors identified in *Poon Yung Wai* and to take into account the context when assessing the gravity of the offences

committed by the applicant: *HKSAR v Wong Chi Fung* [2022] 1 HKLRD 1305, at [28].

173. Further, we also agree with Mr Chau that targeting young students in Charge 1 was an aggravating factor, which should be reflected in the sentence: see *Secretary for Justice v Wong Chi Fung* [2018] 2 HKLRD 699, at [11] and [163].

D2. Totality and good character

174. As to the application of the totality principle, Mr Tam simply suggested that since all the offences took place between January and July 2020 and they had the same background and context, the offences should be regarded as a series of events when applying the totality principle.

175. In relation to the Judge's rejecting the mitigation put forth, in particular, the applicant's positive good character and his exceptional commitment to public service, Mr Tam made no submissions in substance but suggested that the Judge also erred in commenting that the applicant committed the offences for the "*sole purpose of getting a seat in the LegCo to 'enjoy' the income, authority and social status*" as there was no basis for the Judge to make that finding.

176. In our view, the Judge approached totality and mitigation in accordance with well-established principles. He made no error as contended. As to the impugned comment italicised above, it was just an in-passing remark made by the Judge when addressing the point advanced

in mitigation that the applicant did not commit the offences "for his own interest".[107] There is no substance in the complaint either.

D3. Conclusion

177. For the reasons given above, none of the grounds for leave to appeal against sentence is meritorious. The 2-year and the 18-month terms imposed by the Judge for Charges 1 and 6 respectively are neither manifestly excessive nor wrong in principle. In consequence, we refuse to grant leave to appeal against sentence and dismiss the appeal.

(Jeremy Poon) Chief Judge of the High Court	(Derek Pang) Justice of Appeal	(Anthea Pang) Justice of Appeal

Mr Philip Dykes SC, Mr Jeffrey Tam and Mr Ernie Tung, instructed by Ho Tse Wai & Partners, for the applicant

Mr Anthony Chau, DDPP, Ms Crystal Chan, SPP, and Ms Elisa Cheng, SPP (Ag), of the Department of Justice, for the respondent

[107] Reasons for Sentence, at [17].