

DCCC 927, 928 & 930/2020
(Consolidated)

[2021] HKDC 424

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NOS 927, 928 & 930 OF 2020**

HKSAR

v

TAM TAK CHI 譚得志

Before: His Honour Judge Stanley Chan

Date: 9 April 2021

Present: Mr Anthony Chau, Senior Assistant Director of Public
Prosecutions and Miss Crystal Chan, Public Prosecutor, for
HKSAR

Mr Philip Dykes, SC, leading Mr Jeffrey C K Tam & Mr Brian
Ho Chuen Tsui, instructed by Michelle Tsoi Solicitors, for the
defendant

Offence: [1] Incitement to knowingly take part in an unauthorized
assembly (煽惑他人明知而參與未經批准集結)

[2], [4], [9], [10], [12], [13] & [14] Uttering seditious words (發
表煽動文字)

[3], [5] & [7] Disorderly conduct in a public place (公眾地方內
擾亂秩序行為)

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[6] Holding or convening an unauthorized assembly (舉行或召集一個未經批准集結)

[8] Refusing or wilfully neglecting to obey an order given by an authorized officer (拒絕遵從或故意忽略遵從授權人員作出的命令)

[11] Conspiracy to utter seditious words (串謀發表煽動文字)

RULING

Background

1. Originally the defendant applied for a stay application in relation to a total of 8 charges, namely 7 charges of uttering seditious words contrary to s 10(1)(b) of the Crimes Ordinance [CO] and one charge of conspiracy to utter seditious words. The stay application was scheduled to be heard on 31 March 2012.

2. There are 6 other charges in the consolidated charge sheet [namely, Charges 1, 3, 5, 6, 7 and 8] but these charges do not relate to the stay application. The consolidated charge sheet contains a total of 14 charges.

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B 3. In a letter of 10 February 2021, defence solicitors raised
C 2 matters relating to the issue of further and better particulars of offence
D and that of election between the conspiracy charge and the substantive
E charges.

F 4. For the sake of convenience and in consideration of legal costs,
G both parties agreed that these 3 issues, namely, the stay application, the
H issue of further and better particulars of charges and the election of charges,
I can be heard on the same day, 31 March.

J 5. The defence filed their skeleton submission dated 22 March
K 2021. The defence, at para 4 of the original submission, stated the grounds
L of the stay application as follows:-

M (1) the charges do not comply with the Indictment Rules
N Cap 221C regarding the obligation to supply particulars
O of the offences;

P (2) the charges are unconstitutional as they are inconsistent
Q with the Basic Law and the Hong Kong Bills of Rights.

R (3) the preferment of the conspiracy charge and the transfer
S of the case FLCC 1691/2020 amount to an abuse of
T process or was done without jurisdiction.
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6. Further supplemental submissions by the defence were filed on 26 March and 30 March respectively. The theme of these supplemental submissions relates mainly to the issue of jurisdiction, an item which was placed under the heading ‘A point about jurisdiction’: para 5 to 13 of the defence’s original submission.

7. The prosecution filed their submission together with various authorities and legal documents on 29 March.

8. On 31 March, before submissions were made, I directed that it would be prudent for the defence to specify what exactly are the grounds for the stay application, and what are the grounds for the other issues. The written submissions made by the defence have to be amended so that all parties concerned can be sure what grounds are for what purpose. That is particularly of importance when the court is asked to deal with the stay application of certain charges.

9. The principles for a stay are well established and can be found in *Archbold HK 2021* Chapter 4 para 49 to 51.

10. Consequent upon my direction, the defence submitted 3 separate “Reformulated Skeleton Submissions” relating to the abovesaid 3 issues.

11. Mr Dykes SC, counsel for the defendant, now submitted that it would be proper for him to argue the issue of jurisdiction first.

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The issue of jurisdiction

The position of the defence

12. It was submitted that the District Court may not have jurisdiction to try and hear the seven charges of sedition charges and the sedition conspiracy charge.

13. All along until the operation of the National Security Law (NSL), sedition offence is a summary offence. Mr Dykes SC submitted that following the CFA judgment in *HKSAR v Lai Chee Ying* [2021] HKCFA 3 [judgment handed down on 9 February 2021], the sedition offences under s 10(1)(b) of the Crimes Ordinance [CO] are offences endangering national security and the National Security Law applies. In this regard, the defence said that Art 41(3) of the National Security Law should apply which states that cases concerning endangering national security shall be tried on indictment. That covers sedition offence under s 10(1) of the Crimes Ordinance.

14. On the premise that sedition offences are indictable offences, the defence argued that magistrates are not competent to try sedition offences because of the restrictions under Part I of the Second Schedule to the Magistrates Ordinance.

15. On the other hand, since sedition offences are indictable offences, the defence submitted that Part III of the Second Schedule to the Magistrates Ordinance will be invoked. The said Part III limits the power of transferring certain offences to the District Court. That explains why the

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defence amended para 9 of the reformulated submission by saying that “a permanent Magistrate cannot transfer a s 10 [offence] to the District Court.” It was submitted that those indictable seditious offences can only be tried in the Court of First Instance [see para 11 of the defence reformulated submission on jurisdiction].

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The position of the prosecution

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16. The prosecution maintained their position as stated from para 58 to 71 of their original submission, even though it was prepared before the defence’s submission was further reformulated.

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17. The prosecution insisted that the District Court has the jurisdiction to try all the seditious offences. It was submitted that the seditious offence is a summary offence because the offence provision does not have words ‘upon indictment or on indictment’. The enactment of NSL does not change the nature of seditious offence being a summary offence: para 65 of the prosecution’s submission. In addition, the prosecution argued that the seditious offences, being summary offences, were transferred together with other indictable offences to the District Court, pursuant to section 88(1)(b) of the Magistrates Ordinance. Hence the District Court has the jurisdiction to try all the charges.

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18. It was further submitted that ‘tried on indictment’ under Art 41(3) of the NSL does not mean that the trial can only be conducted in the Court of First Instance as suggested by the defence: para 67 of the submission.

19. The defence attacked the position of the prosecution by saying that “the Prosecution’s case about jurisdiction does not get to grips with the defendant’s argument that it is not possible to say that sedition offences are offences endangering national security with the meaning of the NSL and that they are triable in the District Court as such.” [see para 12 of the reformulated defence submission]. In short, the defence said the Prosecution did not address the issue raised by the defence.

Consideration

20. The Law of the People’s Republic of China on safeguarding national security in the Hong Kong Special Administrative Region, in short the National Security Law or NSL, is a new law applicable to HKSAR from 11 pm on 30 June 2020: see preamble 2 in the Implementation rules for Art 43 of the NSL.

21. The importance of the issue of jurisdiction, in my view, has been underestimated by both parties.

22. I am of the view that this jurisdictional issue can have a far reaching effect, directly or indirectly, on the effect of the Second Schedule to the Magistrates Ordinance. To this end, this issue is more important than the stay application per se.

23. It is necessary for me to mention a number of Articles under the NSL in the first place so that my ruling can be understood in context.

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24. Art 65 of the NSL stipulates that the power of interpretation of the Law shall be vested in the Standing Committee of the National People’s Congress [NPCSC]. Unlike the usual local legislation in Hong Kong, there is no definitions section in the NSL except a brief mention of some legal terms under Art 64.

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25. Art 41 says the NSL and the laws of the HKSAR shall apply to procedural matters, including those related to criminal investigation, prosecution, trial and execution of penalty, in respect of cases concerning offence endangering national security over which the HKSAR exercises jurisdiction.

26. Art 41(3) further states that cases concerning offence endangering national security within the jurisdiction of the HKSAR shall be tried on indictment.

27. Art 45 stipulates that unless otherwise provided by the NSL, the courts in HK shall handle proceedings in relation to the prosecution for offences endangering national security in accordance with the laws of the HKSAR.

28. Art 62 makes it clear that the NSL shall prevail where provisions of the local laws of the HKSAR are inconsistent with the NSL. [Note: When asked, Mr Dykes SC accepted the position, that is to say, in case of inconsistency, the NSL prevails.]

29. In my view, for the present purpose, it is not the function of this Court, nor can this Court in such a position, to provide an authoritative interpretation of the various Articles under the NSL. What I am trying to do is to make a ruling upon the issues raised by the defence for all practical purposes in this particular consolidated case.

30. The first issue raised by the defence is the jurisdiction of this court to hear those 8 charges [namely Charges 2, 4, 9, 10, 11, 12, 13 and 14].

31. There should be no dispute that all Articles under the NSL should be read in the whole context with the General Principles under Chapter I in mind. Obviously it is of vital importance that a purposive approach should be adopted. In Hong Kong, we have the Interpretation and General Clauses Ordinance Cap 1. Under section 19 of Cap 1, it is said, "All Ordinance shall be deemed to be remedial and shall receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit." Naturally, I consider that this principle of interpretation is applicable in this case.

32. As I have mentioned, the power of interpretation of the NSL is vested in NPCSC. The NSL has a much higher legal status than the local laws as it is a piece of national law and Art 62 provides its overriding legal effects over the local laws. For instance, the criteria for granting bail has changed drastically vis-à-vis the principles and considerations under Part 1A of the Criminal Procedure Ordinance Cap 221.

33. It was submitted by the defence that under the Schedule to the Magistrates Ordinance Cap 227, a magistrate is not competent to try sedition offences under s 10 of the Crimes Ordinance Cap 200.

34. On the other hand, the defence also argued that under s 88(1) of the Magistrates Ordinance, a magistrate can only transfer an indictable offence to the District Court, except those specified in Part III of the Second Schedule. Incidentally, sedition offences, as offences under Part II of the Crimes Ordinance, are included in Part III of the Second schedule. Therefore, it was submitted that a magistrate cannot transfer these s 10 sedition offences to the District Court. As these sedition offences cannot be lawfully transferred to the District Court, it follows that the District Court has no jurisdiction to try the sedition offences.

35. Hence, the defence submitted that, at para 11 of the defence skeleton submission on the issue of jurisdiction, “In short, the implication of Article 41(3) of the NSL, is that the sedition offence is an indictable offence only within the meaning of section 2 of MO. The upshot is that only the Court of First Instance can try the sedition offences that are indictable offences only with the meaning of section 2 MO [the Magistrates Ordinance].”

36. In short, the defence submitted that section 10 offences are either to be tried on indictment only in the Court of First Instance because of Art 41(3) of NSL, or alternatively, if the NSL does not apply, the sedition offences must be tried summarily by a magistrate under Part II of Magistrates Ordinance, or by a District Judge upon a lawful transfer of the case to the District Court [para 13 of the defence submission].

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C 37. It is my view that broadly speaking, the NSL is promulgated
D to tackle those issues laid down under Chapter 1 of the NSL. This national
E law does not act as a piece of legislation to reconcile all the local legislations
F in Hong Kong. Hence Art 62 provides the NSL with a special status to
G prevail over the local laws if inconsistency between the NSL and local laws
H appears.

I 38. On the other hand, Art 41(3) states that cases concerning
J offence endangering national security with the jurisdiction of the HKSAR
K shall be tried on indictment. Art 45 states that courts in Hong Kong shall
L handle proceedings in relation to the prosecution for offences endangering
M national security in accordance with the laws of the HKSAR.

N 39. The defence does not argue that sedition offences under s 10
O are not offences endangering national security. The defence accepts that.

P 40. In my view, if sedition offences are offences endangering
Q national security, it would be absurd that the NPCSC would 'exclude' these
R s 10 offences from being tried in the District Court. In accordance with the
S NSL, it is clear that offences endangering national security do not limit to
T those 4 specific offences under Chapter III, namely Secession, Subversion,
U Terrorist Activities and Collusion with a foreign country or with external
V elements to endanger national security. That explains why Art 45 says
unless otherwise provided by the NSL, all courts in HK, including the
District Court, shall handle proceedings in relation to the prosecution for
offences endangering national security in accordance with the laws of the
HKSAR.

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41. I am of the view that the position of the defence on this jurisdiction issue is inherently contradictory. If a magistrate cannot transfer seditious offences, being indictable offences, to the District Court for trial, then the transfer order to the District Court will not be valid. That means the transfer of the case from the Magistracy to the District Court would be void ab initio. If that is the case, a District Judge would not have the power to hear a case invalidly transferred. Then it leads to the next question: why should a District Judge have the power to decide whether he or she has the jurisdiction over a case invalidly transferred?

42. The defence did not challenge the prosecution when the latter sought to transfer the case to the District Court for trial. If the transfer was not valid, the defence should take action well before the magistrate signed the transfer order in November 2020.

43. For the present purpose, when the defence asks me to decide the issue of jurisdiction, it can be implied that the defence accepts that I do have the jurisdiction to hear the case relating to the charge sheet that contains seditious offences. Otherwise, the defence should have considered other arena to argue this jurisdiction point.

44. It is clear that Part III of the Second schedule to the Magistrates Ordinance refer to those indictable offences, generally termed as excepted offences, and Part III does not cover s 10 seditious offence. It is because before the enactment of the NSL, seditious offence is a summary offence. That means the prosecution is entitled to transfer the summary offence to

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B the District Court for trial if the conditions under s 88(1)(b) of the
C Magistrates Ordinance are met.

D 45. I take the view that the argument put forward by the defence,
E if accepted, would create a weird situation whereby on the one hand, the
F sedition offence was ‘transformed’ to an indictable offence, and yet the
G defence ‘changed’ the status of Part III of the Second Schedule by including
H sedition offence as one of the excepted offences because of the NSL.
I Inevitably, it would change the original intention and/or purpose of the
Hong Kong Legislature when Part III of the Second Schedule to the
Magistrates Ordinance was promulgated.

J 46. It is clear that the NSL stipulates that all cases concerning
K offence endangering national security are cases to be “tried on indictment”:
L Art 41(3). That means offences endangering national security, which
M include s 10 sedition offences, are indictable offences as words ‘on
N indictment’ appear in the Article. It follows that despite the fact that the
O words ‘on indictment’ do not appear in the original s 10 sedition offence
P provision, they can be taken as indictable offence under the NSL [to a
certain extent, this would also have an impact on s 14A of the Criminal
Procedure Ordinance Cap 221].

Q 47. The prosecution maintains that because the words ‘on
R indictment’ do not appear in the s 10 offence provision hence the sedition
S offence remains as a summary offence. In my view, the prosecution fails
T to appreciate the fact that the latest amendment to the sedition offence under
U s 10 dated back to 1970 while the NSL becomes operative only at 11 pm on
V 30 June 2020.

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C 48. The intention of NPCSC is clear. Art 62 of the NSL provides
D that the NSL shall prevail over the local laws in HK when inconsistency
E appears.

F 49. I am of the view that when it is accepted that sedition offence
G is an indictable offence under the NSL, it is clear that the excepted offences
H relating to Part I and II of the Crimes Ordinance, which are taken as
I offences endangering national security, as stated in Part III of the Second
J Schedule to the Magistrates Ordinance cannot stand.

K 50. As the NSL prevails over the local law, Part III of the Second
L Schedule will have to be 'adapted' to cater for offences endangering
M national security because of the enactment of the NSL. That means the
N sedition offence can still be transferred to the District Court for trial because
O sedition offence is no longer an excepted offence in the Second Schedule
P to the Magistrates Ordinance.

Q 51. In my view, this approach is consistent with the spirit of and
R the general principles under Chapter I of the NSL and also s 19 of the
S Interpretation and General Clauses Ordinance Cap 1 of the Hong Kong
T legislation.

U 52. By analogy, this approach can also have an impact on Part I of
V the Second Schedule to the Magistrates Ordinance relating to those offences
that can be labelled as offences of national security. That relates to the
power that a permanent magistrate can deal with certain indictable offences
summarily, except those offences listed under Part I: s 92 of the Magistrates

Ordinance. Of course, this ancillary issue relating to s 92 is not relevant to the present application.

Conclusion

53. I take a different perspective and approach in analyzing the issue of jurisdiction.

54. The sedition offence, being an offence endangering national security, is an indictable offence. It is the intention of the NSL that indictable offences endangering national security can be heard in or handled by the Magistrates' courts, the District Court, the High Court and the Court of Final Appeal: see Art 45. I rule that the excepted offences relating to Part I and Part II of the Crimes Ordinance as stated in Part II of the Second Schedule to the Magistrates Ordinance would not be valid, as it is inconsistent with the general principles and the relevant Articles of the NSL: Art 62. In these circumstances, it would be lawful for the magistrate to transfer the indictable offence under s 88(1)(a) of the Magistrates Ordinance.

55. It is my ruling that the transfer of these sedition offences to the District Court was valid and the transfer was effected in accordance with the NSL. In my view, my ruling can also dispose of the defence argument, at least partly, relating to the sedition conspiracy charge [see para 14 to 18 of the defence submission].

56. To conclude, I reject the defence submission on the jurisdiction issue. I rule that those charges, the subject matter of this

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application, are validly transferred to the District Court and I have the jurisdiction and powers to try these charges.

57. We will then proceed to the remaining issues so raised by the defence.

(Stanley Chan)
District Judge

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