

DCCC 927, 928 & 930/2020 (Consolidated)

[2021] HKDC 505

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO 927, 928 & 930 OF 2020**

HKSAR

v

TAM TAK CHI 譚得志

Before: His Honour Judge Stanley Chan

Date: 26 April 2021

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

Mr Dykes Philip, SC, leading Mr Brian Ho Chuen Tsui,
instructed by Michelle Tsoi Solicitors, for the defendant

Offences: [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
(發表煽惑文字)

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

[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 ON THE STAY APPLICATION

Background & development of the case

1. The defence raised 3 issues as the preliminary legal arguments before trial proper, and I have dealt with the first issue relating to the jurisdiction point. The ruling on the issue of jurisdiction was handed down on 9 April 2021. Consequent upon my ruling, Mr Dykes SC, counsel for the defendant, applied for an adjournment as the defence might consider to judicially review my first ruling in the High Court. I adjourned the hearing to 19 April 2021.

2. The defence has filed a 27-page ‘Reformulated skeleton submissions for the defendant on stay application’ on 31 March 2021. At para 4 of the skeleton submission, the defence listed out 2 grounds of the stay application: [a] the Charges are unconstitutional as they are not consistent with the Basic Law and the Hong Kong Bill of Rights; [b] the

issue of the preferment of the conspiracy charge and the transfer of part of the consolidated case [case number FLCC 1691/2020].

3. After considering their position carefully, Mr Dykes SC informed this court that they will not judicially review my first ruling, and would proceed to apply for a stay of 8 out of 14 charges in the consolidated charge sheet, namely 7 charges of uttering seditious words contrary to s 10(1)(b) of the Crimes Ordinance and one charge of conspiracy to utter seditious words [‘the Charges’]. Six other charges in the consolidated charge sheet [namely Charges 1, 3, 5, 6, 7 and 8] are not related to the stay application.

4. On 19 April 2021, when asked, Mr Dykes SC clarified that the defence would now drop the second ground, namely, the issue of the preferment of the conspiracy charge. The defence will confine to the point of unconstitutionality of the Charges only: para 4[a] of the defence’s submission.

The stay application

5. The defence submitted that the court has an inherent power to stay the Charges under the court’s jurisdiction to prevent an abuse of process. The jurisdiction includes staying or quashing charges which are unconstitutional or fair trial is not possible or where there has been manipulation of the court’s process. And the jurisdiction allows the court to give effect to the requirement in Basic Law 87(2) that courts give defendants a fair trial in criminal cases [para 6 of the defence’s reformulated submission].

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C 6. Mr Dykes SC stressed the importance of freedom of
D expression which is constitutionally guaranteed under Basic Law 27 and
E 39, enshrined in Art 16 of BOR and encapsulated in s 8 of the Bills of
Rights Ordinance Cap 383.

F 7. The defence argued, at para 14 of their submission, that:–

G [a] the definitions of seditious intention under s 9 fail to
H satisfy the ‘prescribed by law’ requirement under Basic
I Law 39; and

J [b] the offences constitute restrictions on freedom of
K expression but fail to satisfy the proportionality test
L because the seditious intentions under s 9 fail to pursue
M legitimate aim, that they are not rationally connected
N with the legitimate aim, and that they amount to a
O disproportionate restriction on the freedom of
expression.

P 8. The defence further submitted that the words ‘hatred’,
Q ‘disaffection’, ‘contempt’, ‘feelings of ill will’, and ‘enmity’ are subjective
R descriptions of one’s state of mind and these are abstract concepts
S incapable of legal definitions. The literal meaning of these words cannot
T provide any guidance to resolve uncertainty. It is also impossible to apply
U an objective standard to examine whether a speech or publication raises
V hatred, disaffection, contempt etc.

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B 9. Mr Dykes SC also referred to a number of old foreign cases,
C some dated back to 1886, to show that the ‘vagueness and uncertainty of
D the scope of seditious intention has been criticized in case law and reports
E of law reform commissions: para 24 of the submission. The defence argued
F that the intention element of the offence of sedition falls short of fulfilling
G the ‘prescribed by law’ requirement as it hinges on the possible and
potential subjective reactions of audience to whom the publication or
speech has made [para 30 of the submission].

H 10. It was submitted that any restriction on the right to freedom
I of expression must satisfy the four-stage proportionality analysis as
J promulgated in *Hysan Development Co Ltd and others v Town Planning*
K *Board* (2016) 19 HKCFAR 372. The defence argued that “the objective of
L the offence being to prevent people from showing disrespect or hostility
M towards the head of government and government institutions cannot be a
N legitimate aim nowadays.” [para 45 of the submission] The defence said
O “it is difficult to see how prohibiting speeches which are simply offensive
P and highly irritating to some of the audience but fall short of inviting
Q violence is rationally connected with the purpose of safeguarding public
R order.” [para 49 of the submission] The defence even suggested that “there
is a huge disconnect in between angry and disrespectful political speech
and violence. Criticism of governments made in the public domain allows
giving vent to the public grievances. It prevents citizens from resorting to
violent means if not allowed to blow off steam.” [para 51 of the submission]

S 11. In addition, the defence also argued that the offences are
T disproportionate restriction to the right of freedom of expression as
U incitement to violence is not an element of the offences. The defence
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B maintained that “the over-inclusiveness of such a broad definition amounts
C to a blanket prohibition of aggressive confrontational speech and criticize
D against the government or causing social disharmony. It imposes
E unnecessary restraint on political and other social debate and goes further
than to protect public order.’ [para 71 of the submission]

F 12. The defence comes to the conclusion that “where a statutory
G provision giving rise to a charge is unconstitutional and therefore of no
H effect, it is defective in substance and form. It is proper for the court to
I either stay or dismiss the charge.” [para 79 of the submission]

J *The Prosecution’s reply*

K 13. The Prosecution relied on their original submission [para 30
L to 40] dated 29 March 2021, and the supplemental submission filed on 19
M April in response to the defence’s oral submission in court.

N 14. The Prosecution submitted that “challenges to the
O constitutionality of an offence is plainly not a valid ground for granting a
P stay”: para 31 of the Prosecution submission. The courts have power to
Q take remedial interpretation of any statutory provision if the latter provision
contravened the Basic Law. To this end, it was submitted that the ground
of unconstitutionality is ‘utterly misplaced’: para 40 of the submission.

R 15. In the supplemental submission, the Prosecution further
S argued that the stay application relating to the Charges on the
T unconstitutional ground on the basis of fairness or abuse of process at
U common law is not justified. The issue of unconstitutionality, if any, can
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be dealt with preferably at the stage of closing submission at trial [para 5 of the supplemental submission].

16. It was submitted that the concept and understanding of ‘hatred’, ‘contempt’, ‘disaffection’ etc varies with time and locality and the trial judge can interpret these concepts with reference to the time, place and circumstances of the impugned conduct.

17. The Prosecution submitted that it is a balancing exercise between the fundamental rights and freedoms of individual and the interests of national security and/or public order [ordre public] within the constitutional framework. The restrictions of freedom of speech, even in circumstances where the speaker has no intention to incite violence, is necessary for and proportionate to the legitimate aims of the protection of national interest and public order [ordre public].

Consideration

18. The principles relating to stay application are well established and they are summarized by the editors in Archbold HK 2021 Chapter 4 para 49 to 50. In general, if a charge is properly brought before a court of competent jurisdiction, that court is obliged to try the case. However, the courts have a residual discretion to make orders, including an order staying proceedings brought before it, to protect itself from an abuse of the court’s process. But the circumstances in which a stay of proceedings will be justified are exceptional. That is a very high hurdle to pass.

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19. In gist, in exercise of its inherent power to prevent an abuse of its own process, the court has jurisdiction to stay criminal proceedings in two circumstances:-

[1] a fair trial for the accused is found to be impossible and continuing the prosecution would amount to an abuse of process. The burden is on the accused to show on a balance of probabilities that no fair trial can be held.

[2] in rare case where, even though a fair trial is available, the court is prepared to grant a permanent stay because there has been an abuse of power of a kind that renders the trial of the accused an affront to the court's sense of justice and propriety.

20. The second scenario is very rare as it is usually the case that the public interest lies in the guilt or innocence of the accused being fairly and openly determined at trial.

21. In the present case, the defence is not relying on the second limb, and only alleged that the 8 Charges are unconstitutional: para 4(a) of the defence submission.

22. To this end, it is not difficult to see outright that the defence fails to show that a fair trial is impossible. Whether the Charges are unconstitutional, as alleged by the defence, is and can be one of the many issues to be heard at trial. It should not be taken as a subject matter in the stay application. I am not convinced that the issue of unconstitutionality

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can render a trial unfair, let alone an abuse of process. Contentious issues are often raised at trial proper, and that is exactly the function of the court to decide all the relevant issues raised by parties concerned.

23. An abuse of process which leads to unfairness to the accused is the main thrust of a stay application. The defence confirmed that unconstitutionality of these 8 charges is the sole ground of their application.

24. At this stage, my main consideration is to make a ruling based on the established principles relating to application for a permanent stay. It is obvious that the issue of unconstitutionality should be a matter for the parties, if they deem necessary, to raise at trial, but not as a justification for a permanent stay of the 8 charges.

25. For the present purpose, I am not convinced that the laying of these charges by the Prosecution is an abuse of process. As I said, the issue of unconstitutionality, if any, should be argued in the court's process when the case is heard. There is nothing about the abuse of court's process at all. In addition, I am not persuaded that there is no fair trial possible if these charges are continued, bearing in mind there are a total of 14 charges in the consolidated charge sheet.

26. To conclude, I am of the view that the stay application relating to the 8 charges is misconceived. The issue of unconstitutionality of any charges can and should be canvassed and argued at trial. The defence fails to show on a balance of probabilities that no fair trial can be held. Accordingly, I refuse to exercise my residual discretion to stay the

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proceedings relating to the 8 charges. This application made by the defence must be rejected.

27. The trial will be proceeded as scheduled in May this year. As agreed by Mr Dykes SC, the trial will be conducted in Chinese and there will be no translation of documents, unless specifically requested with prior notice.

(Stanley Chan)
District Judge

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