HCCC 280/2020
[2021] HKCFI 2200

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CRIMINAL CASE NO 280 OF 2020

BETWEEN

HKSAR

and

Tong Ying Kit (唐英傑) Defendant

Before: Hon Toh, Anthea Pang and Wilson Chan JJ in Court

Dates of Trial: 23-25, 30 June, 2, 5 - 9, 12 - 15 and 20 July 2021

Date of Verdict: 27 July 2021

REASONS FOR VERDICT

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A. *Introduction*

1. The Defendant in this case faces two offences (the 1st and the 2nd count) under the National Security Law ("NSL")[1] and another offence of "causing grievous bodily harm by dangerous driving" ("the 3rd count"), which is laid as an alternative to the 2nd count, as follows:

First Count

STATEMENT OF OFFENCE

Incitement to secession

PARTICULARS OF OFFENCE

TONG Ying-kit, on the 1st day of July, 2020, in the area from Eastern Harbour Crossing to the junction of Jaffe Road and O'Brien Road, Wanchai, in Hong Kong, incited other persons to organise, plan, commit or participate in acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification, namely separating the Hong Kong Special Administrative Region from the People's Republic of China or altering by unlawful means the legal status of the Hong Kong Special Administrative Region.

Second Count

STATEMENT OF OFFENCE

Terrorist activities

PARTICULARS OF OFFENCE

TONG Ying-kit, on the 1st day of July, 2020, in the area from Eastern Harbour Crossing to the junction of Jaffe Road and O'Brien Road, Wanchai, in Hong Kong, with a view to coercing the Central People's Government or the Government

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1 The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, applied to the HKSAR on 30 June 2020.

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of the Hong Kong Special Administrative Region, or intimidating the public in order to pursue political agenda, committed terrorist activities causing or intended to cause grave harm to the society, namely serious violence against persons, or other dangerous activities which seriously jeopardise public safety or security, causing serious bodily injury to Police Constable 8260, Police Constable 2674 and Police Constable 12197.

Third Count

(alternative to the Second Count)

STATEMENT OF OFFENCE

Causing grievous bodily harm by dangerous driving

PARTICULARS OF OFFENCE

TONG Ying-kit, on the 1st day of July, 2020, at Jaffe Road near the junction with O'Brien Road, Wanchai, in Hong Kong, caused grievous bodily harm to Police Constable 8260, Police Constable 2674 and Police Constable 12197 by driving a motor vehicle, namely a motorcycle bearing registration mark TV 7283, on a road dangerously.

2. In respect of the formulation and application of the NSL to the HKSAR, we could do no better than by referring to the summary set out in section B of the Court of Final Appeal's judgment in *HKSAR v Lai Chee Ying*[2]. In the circumstances, we are not going to repeat it here. Suffice for us to say that this is the first case in which offences under the NSL are tried in the HKSAR court.

[2] [2021] HKCFA 3.

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3. Given that this is the first case involving offences under the NSL and that therefore there is no precedent, the court had to deal with a number of issues prior to the commencement of this trial. The Defence, for instance, have challenged the procedure adopted for this case, that is, trial by a panel of three judges instead of by a jury.[3] Parties also could not agree as to the elements involved in each of the offences.

4. Insofar as the challenge to the certificate issued under Article 46 of the NSL by the Secretary for Justice, directing that the case be tried without a jury, is concerned, the Defendant proceeded by way of judicial review and it was not a matter which we dealt with.

5. In respect of the elements of the offences, after hearing parties' arguments and upon consideration of the legal principles involved, we gave our ruling orally on 29 April 2021.

6. Further, we also dealt with an application by the Prosecution to adduce expert evidence and an application to add the 3rd count as the alternative to the 2nd count which applications were opposed by the Defendant. The brief reasons for our decisions were respectively given in writing on 9 April 2021 and 7 June 2021.[4]

7. It is important to reiterate that although this is a case presided over by a panel of three judges, the legal principles such as the burden of proof, the standard of proof, the presumption of innocence, the right of silence and the right to a fair trial, apply in this case as much as

[3] Pursuant to a certificate issued by the Secretary for Justice under Article 46 of the NSL.

[4] [2021] HKCFI 946 and [2021] HKCFI 1644.

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they apply in any criminal case tried in the Court of First Instance with a jury.[5]

8. In fact, it has never been, nor could it be, suggested, that unfairness would result when a defendant is tried without a jury for, in our Magistrates' Courts and District Court, all the cases are tried without a jury. Further, in the aforesaid judicial review application made by the Defendant concerning the certificate, he frankly, and rightly so in our view, accepted that there could be a fair trial whether the case is tried with or without a jury.[6]

B. The offences charged

B.1 Count 1: incitement to secession and the elements of the offence

9. Article 20 of the NSL provides:

> 「任何人組織、策劃、實施或者參與實施以下旨在分裂國家、破壞國家統一行為之一的，不論是否使用武力或者以武力相威脅，即屬犯罪：
>
> (一) 將香港特別行政區或者中華人民共和國其他任何部分從中華人民共和國分離出去；
>
> (二) 非法改變香港特別行政區或者中華人民共和國其他任何部分的法律地位；
>
> (三) 將香港特別行政區或者中華人民共和國其他任何部分轉歸外國統治。」

[5] Articles 5, 41 and 45 of the NSL.

[6] *Tong Ying Kit v Secretary for Justice* [2021] HKCFI 1397, [7(3)] and [26(a)].

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10. Its English translation reads:

> "A person who organises, plans, commits or participates in any of the following acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification shall be guilty of an offence:
>
> (1) separating the Hong Kong Special Administrative Region or any other part of the People's Republic of China from the People's Republic of China;
>
> (2) altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People's Republic of China; or
>
> (3) surrendering the Hong Kong Special Administrative Region or any other part of the People's Republic of China to a foreign country."

11. In our ruling delivered orally on 29 April 2021, we pointed out Article 20 clearly provides that the use of force or a threat to use force is not a necessary element of the offence. We do not consider any further explanation is required on this point given the unambiguous words used.

12. In the premises, the *actus reus* of the offence under Article 20 is simply the organisation, planning, commission or participation in any of the acts specified under Article 20(1) to (3). Whether what is allegedly done by a defendant amounts to acts so specified is, of course, a matter of facts based on the evidence and the specific circumstances surrounding a particular case.

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13. Turning to the *mens rea* of the offence under Article 20, we are of the view that, based on the clear wording used in the Article, the culpable mind is one which does the prohibited act(s) with a view to committing secession or undermining national unification.

14. Article 21 provides:

> 「任何人煽動、協助、教唆、以金錢或者其他財物資助他人實施本法第二十條規定的犯罪的，即屬犯罪…」

15. Its English translation reads:

> "A person who incites, assists in, abets or provides pecuniary or other financial assistance or property for the commission by other persons of the offence under Article 20 of this Law shall be guilty of an offence…"

16. In respect of the *mens rea* and *actus reus* of the offence of incitement, we would like to refer to the helpful summary given in the Court of Appeal's judgment in *HKSAR v Jariabka Juraj*[7] in which Lunn, VP cited what Tuckey LJ said in *DPP v Armstrong*[8], and reiterated:

> "63. Of the offence of incitement, Tuckey LJ said:
>
> 'The *actus reus* of the offence is the indictment (*sic)* by the defendant of another to do something which is a criminal offence. He must do so with the intention that if the other person does as he asks he will commit a criminal offence. That is the *mens rea*. On this analysis the intention of the person incited is entirely irrelevant.'

[7] [2017] 2 HKLRD 266.
[8] [2000] Crim LR 379.

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64. He noted that the editors of Archbold asserted 'to solicit another to commit a crime is indictable at common law, even though the solicitation or incitement is of no effect.'

65. Tuckey LJ went on to say:

'The nature of the offence of incitement is accurately defined in the draft Criminal Code produced by the Law Commission in their paper No 177 at clause 47 which says:

> A person is guilty of incitement to commit an offence or offences if
>
> (a) he incites another to do or cause to be done an act or acts which, if done, will involve the commission of the offence or offences by the other; and
>
> (b) he intends or believes that the other, if he acts as incited, shall or will do so with the fault required for the offence or offences.'

66. Then, Tuckey LJ said:

'On this analysis of the law there is no principle of parity of *mens rea* of the kind contended for by the respondent and accepted by the magistrate. Were that to be the law, then all the cases about agent provocateur would have been wrongly decided because in each such case (where often the agent provocateur is a policemen *(sic)*) if it were a defence to the defendant to say: "Well, the officer never intended to commit the offence which I asked him to commit", there would be no offence of

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> incitement and many people would be in prison for committing such offences who should not be.'"

17. Further, we note that in *R v Most*[9], a Crown Case reserved for the opinion of the Court of Criminal Appeal, the court held that the publication and circulation of a newspaper article could be an encouragement, or endeavor to persuade to murder (the words used in the relevant statute) although it was not addressed to any person in particular, and that it was correct for the jury to be directed that if they thought by the publication of the article, the defendant did intend to, and did encourage or endeavor to persuade any person to murder any other person, as well as if they found that such encouragement and endeavoring to persuade was the natural and reasonable effect of the article, then they could convict the defendant as charged.

18. In that case, the defendant faced 2 counts of seditious libel and 10 counts of incitement to murder. The subject matter of all the counts was the same, that is, an article written in German in a newspaper published weekly in London, and enjoying an average circulation of 1,200 copies. The article contained, inter alia, the following,

> "What one might in any case complain of that is only the rarity of so-called tyrannicide. If only a single crowned wretch were disposed of every month, in a short time it should afford no one gratification henceforward still to play the monarch. … Meanwhile, be this as it may, the throw was good; and we hope that it was not the last. May the bold deed, which, we repeat it, has our full sympathy, inspire revolutionists far and wide with fresh courage."

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[9] (1881) 7 QBD 244.

The only encouragement and endeavor to persuade proved at the trial was the publication of the libel.

19. The defence argued that there was no evidence of any personal communication between the defendant and the persons he was alleged to have encouraged to murder the sovereigns and rulers of Europe and that the statute contemplated some personal communication between the parties, something more than the mere publication of a seditious or scandalous libel. The Attorney General, however, submitted it was clear that an orator addressing a crowd addressed the individuals of which that crowd was composed.

20. Lord Coleridge, CJ, when giving the judgment and affirming that the jury was properly directed, commented that the evidence proved that the publication was written, printed, and sold by the defendant and intended by him to be read by the subscribers/purchasers as well as that the publication was naturally and reasonably intended to incite and encourage, or to endeavour to persuade, persons who should read that article to murder the crowned and uncrowned heads of states[10].

21. It was further observed that "An endeavour to persuade or an encouragement is none the less an endeavour to persuade or an encouragement, because the person who so encourages or endeavours to persuade does not in the particular act of encouragement or persuasion personally address the number of people, the one or more persons, whom

[10] Ibid, p 251.

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the address which contains the encouragement or the endeavour to persuade reaches."[11]

22. In *Invicta Plastics Ltd v Clare*[12], the manufacturer company of a device capable of giving advance warning to its users of a band of transmissions from radio amateurs, police radar speed traps and commercial/military airport radar, placed an advertisement in a car magazine about the device. Later, upon the request of a prosecutor posed as a person interested in the device, the company provided a leaflet to the prosecutor which gave further information about the device. As a result, the company was respectively charged with the offence of inciting the readers of the magazine and the prosecutor to use unlicensed apparatus for wireless telegraphy.

23. The defence argued that the offence was not made out because the advertisement merely encouraged readers to find out more about the device, so it did not amount to incitement in fact or in law. In respect of the leaflet, it was submitted that all the information contained therein was true. Such, coupled with the warning that its use for certain purposes would be unlawful, did not constitute any incitement to use the device in an unlawful manner.

24. At trial, it was considered that both the advertisement and the leaflet deliberately aimed at inciting prospective purchasers to buy the device in order specifically to receive the police radar speed trap signals, the deliberate reception of which was illegal. The reasoning was that

[11] Ibid, p 252.
[12] [1976] RTR 251.

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the style of the advertisement and the fact that the advertisement was inserted in a purely motoring magazine were such that "it would be stretching credulity and the naivety of readers of the advertisement and leaflet to an entirely unacceptable extent to imagine that the intent could have been otherwise."[13]

25. As a result, the English Court of Appeal held that the company was rightly convicted and that it was necessary to look at the advertisement and the leaflet as a whole. The court said that, in doing so, it was plain that from the words used, readers were being persuaded and incited to use the device.

26. Further, the 13-year-old complainant in *R v M*[14] was approached and was handed a note by the respondent who was charged with "causing or inciting a child to engage in sexual activity" which read,

> "Between me and you your beautiful and have a nice bum lol. Come round for some fun if you want at 12. Please keep it quiet tho. If you don't that's fine. Come round the back if you do. X."

27. The trial judge considered that the question he had to ask himself was: "As a matter of law, do the contents of the note and the circumstances in which it was handed over amount to incitement?" and he was minded to direct a not guilty verdict.

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[13] Ibid, p 256B-C.

[14] [2014] EWCA Crim 2823.

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28. The Crown then brought an appeal and in the course of submissions, referred to the explanation given in *R v Goldman (Terence)*[15], which was in these terms:

> "21. The ordinary meaning of 'incitement' as adopted in the authorities is that it encompasses encouragement, persuasion or inducement. The following definition was graphically given by Holmes JA in *Mkosiyana* (1966) 4SA 655 at 658. 'An inciter… is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take many forms, such as a suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity."

29. The case of *Invicta Plastics Ltd v Clare*[16] was also relied on and the Crown argued that the note was not simply an invitation to the complainant to go to the respondent's house. It was capable of being interpreted as an encouragement to visit his home to engage in sexual activity, referring to her "nice bum", to her being "beautiful" and, perhaps more significantly, "coming round for some fun".[17]

30. The English Court of Appeal agreed with the Crown and said, "Individually and collectively, we have no doubt that the words used are capable of amounting to an incitement to engage in sexual activity. It is certainly a proposal or request. It seeks to influence the mind of the

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[15] [2001] EWCA Crim 1684, per Clarke LJ.

[16] Ibid.

[17] Ibid, [12].

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girl whom he propositioned by reference to the flattering description of her body and the prospect of having fun."[18]

31. *Young v Cassells*[19] concerned a speech delivered by the defendant at a meeting of strikers and others and in which he had said, "If a police constable uses his baton to you give him one back; and if one won't do, make it a double-header." The words were said to constitute incitement to others to resist constables in the execution of their duty. On appeal, the New Zealand Supreme Court observed that "To appreciate the meaning and intention of the words used the surrounding circumstances must be looked at."[20]

32. In respect of the defence argument that the words used were not an incitement to resist the police but only that if a striker was unlawfully assaulted, one could hit back or retaliate, the court commented:

> "All that I have to determine under this head is, Were the words capable of the meaning put on them by the Magistrate? It has not to be overlooked that in putting down a riot batons may be used – force may be used … The circumstances have to be considered. There had been riots, and police were, it was said, to be called in to suppress such breaches of the peace, and the words were that if they used their batons they were to be assaulted. How can it be said that that was not an inciting to resist the police in the execution of their duty? The appeal

[18] Ibid, [13].
[19] (1914) 33 NZLR 852.
[20] Ibid, p 852-853.

> was made to men to interfere with the police in the execution of their duty, and they were incited to do so…"[21]

33. What could be distilled from the above authorities are these:

(1) an incitement could be addressed to the public at large, whether in the form of a published article, an advertisement, or a speech;

(2) when examining the subject matter said to constitute the incitement, all the surrounding circumstances have to be taken into account, including the background leading up to the event complained of;

(3) in ascertaining whether the subject matter complained of constitutes an incitement, the subject matter has to be looked at as a whole; and

(4) in deciding whether the words used are capable of the incitement alleged, the natural and reasonable effect of the article or the words has to be examined.

34. In other words, insofar as count 1 is concerned (and putting aside the question of *mens rea* for the time being), we have to ask ourselves this: having regard to the natural and reasonable effect of displaying the flag with the slogan on it in the particular circumstances of

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[21] Ibid, p 855.

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this case and when viewed as a whole, is such display of the slogan capable of inciting others to commit secession under Article 20 of the NSL?

B.2 Count 2: terrorist activities and the elements of the offence

35. Article 24 provides:

「為脅迫中央人民政府、香港特別行政區政府或者國際組織或者威嚇公眾以圖實現政治主張，組織、策劃、實施、參與實施或者威脅實施以下造成或者意圖造成嚴重社會危害的恐怖活動之一的，即屬犯罪：

(一) 針對人的嚴重暴力；

(二) 爆炸、縱火或者投放毒害性、放射性、傳染病病原體等物質；

(三) 破壞交通工具、交通設施、電力設備、燃氣設備或者其他易燃易爆設備；

(四) 嚴重干擾、破壞水、電、燃氣、交通、通訊、網絡等公共服務和管理的電子控制系統；

(五) 以其他危險方法嚴重危害公眾健康或者安全。」

36. Its English translation reads:

"A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence:

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> (1) serious violence against a person or persons;
>
> (2) explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances;
>
> (3) sabotage of means of transport, transport facilities, electric power or gas facilities, or other combustible or explosible facilities;
>
> (4) serious interruption or sabotage of electronic control systems for providing and managing public services such as water, electric power, gas, transport, telecommunications and the internet; or
>
> (5) other dangerous activities which seriously jeopardise public health, safety or security."

37. For an offence under Article 24, as explained in our ruling given orally on 29 April 2021, we are of the view that "causing or intended to cause grave harm to the society" is an element which the Prosecution is required to prove. In other words, the *actus reus* of the offence is the organization, planning, commission, participation in, or threatening to commit any of the activities specified under Article 24(1) to 24(5) and which causes grave harm to the society or which is intended by the defendant to cause such harm.

38. "Harm", according to the Shorter Oxford English Dictionary, when used as a noun, means "hurt, injury, damage, mischief". In other words, the ordinary meaning of "harm" is not restricted to physical injury.

39. In respect of the *mens rea* for the offence under Article 24, it is doing the prohibited act(s) with a view to coercing the Central People's Government ("CPG"), the Government of the Hong Kong Special Administrative Region ("HKSARG"), or an international organisation or intimidating the public in order to pursue political agenda.

C. Issues at trial

C.1 Count 1: Incitement to secession

(1) Meaning of the slogan and incitement to commit secession

40. One of the main issues in this case is the meaning of the slogan "光復香港 時代革命 LIBERATE HONG KONG REVOLUTION OF OUR TIMES" ("the Slogan") printed on the flag and which was hoisted at the back of the Defendant when he was driving the motorcycle.

41. The Defence, while accepting that in the past, one of the possible meanings of the Slogan might be "Hong Kong Independence", contended that, at the material time, the Slogan meant different things and there was no one single meaning understood by everyone.

42. The Defence further submitted that, on the evidence adduced, the offence was not made out because the Defendant was simply driving a motorcycle in a particular way on that day. He did not do anything to incite others to commit an offence, not to mention the offence of secession.

(2) The Defendant's understanding of the meaning of the Slogan and his intention

43. The Defence contended that, in any event, there was no evidence to prove that the Defendant had the requisite *mens rea* when he displayed the flag on that day.

C.2 Count 2: terrorist activities

(1) Did the Defendant's acts amount to acts involving serious violence against persons or other dangerous activities?

44. It was the Defence case that the collision occurred simply because of the conduct of the police. They argued that if the police had not tried to stop the Defendant while he was driving the motorcycle and/or had not thrown the shield at the Defendant, he would not have lost control of his motorcycle.

45. It was therefore urged upon us that the Defendant did not intend to run into the police officers and that the Defendant, by doing what he did on that day, did not commit any acts involving serious violence against persons or involving other dangerous activities which seriously jeopardised public safety or security as pleaded in the particulars of the count.

(2) Grave harm to the society

46. Even if we were to find that the Defendant deliberately ran into the police officers, the Defence's position was that such an act was an isolated incident with limited impact and was not an act causing grave

harm to the society, nor could the Prosecution prove that such an act was intended by the Defendant to cause grave harm to the society.

(3) Did the Defendant carry out those acts with a view to coerce the CPG/HKSARG or to intimidate the public in order to pursue political agenda?

47. Again, the meaning of the Slogan is pertinent.

48. If, after examining all the relevant circumstances, we were to find that the Slogan was capable of meaning "Hong Kong Independence" at the material time, then the next issue we have to address is whether the conduct of the Defendant on that day was carried out with a view to coerce the CPG/HKSARG or to intimidate the public in order to pursue political agenda within the meaning of Article 24 of the NSL.

49. The Defence submitted that it was not and that there was no evidence about any coercion or intimidation or the pursuit of a political agenda.

C.3 Count 3: causing grievous bodily harm by dangerous driving

50. The main issue relating to count 3, the alternative count, is whether the Defendant's driving at the material time constituted dangerous driving and whether it was his driving which caused grievous bodily harm to the officers concerned.

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D. No Case Submissions

51. At the close of the Prosecution case, Mr Grossman, SC, made a no case submission in respect of all three counts but we ruled that there was a case to answer in respect of each of those counts.

52. The Defendant elected not to give evidence but called two expert witnesses, Professor Eliza W Y Lee and Professor Francis L F Lee to give their opinions on the meaning of the Slogan, and a factual witness DW3 (Ms Kong Yuen-kwan), seeking to establish that the Defendant had a lunch appointment that day.

E. Legal Directions

53. We have given ourselves all the necessary directions when assessing the evidence before us, including the burden and standard of proof; a defendant's right of silence; his right not to give evidence; circumstantial and inferential evidence; separate treatments for the different counts; and expert evidence.

54. At the end of the Defence's closing submissions, we were told that the Defendant has been convicted of three traffic offences between November 2017 and September 2019 in respect of all of which he was fined. In the circumstances, we were invited to treat the Defendant as a person of good character. Having considered the matter and the applicable principles, we advised the parties that we would give ourselves the propensity limb of the good character direction when approaching counts 1 and 2. However, given that count 3 is a traffic offence under the Road Traffic Ordinance, Cap 374, which is of the same

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nature as that of the Defendant's previous convictions, we declined to so direct ourselves when dealing with count 3. Both parties raised no objection to this approach and this is what we have done.

F. Evidence at trial

F.1 The Defendant's background

55. It is not disputed that the Defendant was born in Hong Kong in 1996 and educated in Hong Kong.[22]

56. He lived in Hong Kong and was out of Hong Kong between June 2019 and July 2020 only for about 2 weeks in September 2019 and for about a week in February 2020.[23] He is a permanent resident of Hong Kong.

57. The Defendant was the registered owner of motorcycle TV 7283 since 2 August 2019 and he held a probationary driving licence at the material time.

F.2 Events on 1 July 2020

58. On 30 June 2020, the HKSARG announced that the NSL would take effect in Hong Kong and this was reported extensively in the news.[24]

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[22] See para 1 of the Admitted Facts, P1, and the school reports, P210.

[23] See para 3 of P1.

[24] See para 7 of P1.

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59. On 1 July 2020, there were protests in the Hong Kong island area and the Defendant drove his motorcycle from Eastern Harbour Crossing to the junction of Jaffe Road and O'Brien Road and at his back was a black flag with the Slogan printed in white in 4 lines from top to bottom.[25]

60. The route the Defendant took was captured by CCTV cameras along the way.[26]

F.2.1 Checkline 1 at the junction of Hennessy Road and Luard Road

61. According to PW1 (Woman Superintendent W Y Tam), at about 1525 hours, checklines were formed on the eastbound and westbound carriageways of Hennessy Road[27] which is a 3-lane carriageway. In forming the checklines, one lane on each carriageway was reserved for emergency vehicles.

62. At 1537 hours, PW1 saw the Defendant's motorcycle driving at quite a high speed. The Defendant was told to stop by the police in the checkline and PW2 (Senior Inspector H W Wong) used a loudhailer to order the Defendant to stop but to no avail. At one stage, the closest distance between the Defendant and the police was just about 1 metre. When the Defendant's motorcycle passed, people around the corner were shouting "hey hey".

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[25] See P2.

[26] See paras 13 – 28 of P1.

[27] See P206.

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63. PW2's estimate of the speed of the Defendant's motorcycle was about 50 kph and he believed that the Defendant had increased the speed just before and after the junction at Checkline 1.

F.2.2 Checkline 2 on Hennessy Road

64. PW3 (SGT 58806) was at the junction of Hennessy Road and Fleming Road cordon. At 1535 hours, he and his team members were heading towards Luard Road. He saw the Defendant's motorcycle driving towards him in the middle lane travelling at about 40 kph and it was about 50 metres away from him. PW3 directed the Defendant to stop by raising his right hand and police baton, and by shouting loudly but the Defendant did not stop. Instead, when the Defendant was about 20 to 25 metres away from them, he increased the speed to about 60 kph. The Defendant then passed him just about 2 to 3 feet away.[28]

65. After the Defendant had passed him, people on the footbridge and on the ground cheered and clapped. There were about 50 to 60 of them. PW3 said he was concerned for the safety of the colleagues behind him and the pedestrians in the area when the Defendant passed.

66. He agreed that his estimates as to the speed of the motorcycle were based on his 20 years' experience as a motorcyclist but they were not necessarily accurate. He also agreed that, at the last moment, the Defendant did swerve to avoid hitting people.

[28] See P38 CCTV footage.

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F.2.3 Checkline 3 at the junction of Luard Road and Jaffe Road

67. PW4 (DPC 13900) was at the checkline junction Luard Road near Jaffe Road. They were there to prevent protesters rushing in to block the road from Luard Road. Exhibit P206C is where he was at the checkline. He saw the Defendant's motorcycle turning from Lockhart Road into Luard Road towards where their checkline was. They tried to stop him. However, the Defendant ignored their order to stop, increasing the speed and turning right into Jaffe Road.

68. When PW4 first saw the Defendant, the Defendant was about 25 to 30 metres away, turning into Luard Road. The Defendant then accelerated from a speed of 10 to 15 kph[29] to one of 30 kph when they went up to indicate him to stop. At that time, the Defendant was just 3 to 5 metres away from him.

69. PW5 (PC 14767) said he heard the sound of cheering and clapping, so he and his team members went up and used hand gesture to indicate to the Defendant to stop. They also shouted loudly. However, the Defendant did not stop and continued to drive. Therefore, he shot two pepper rounds, but the rounds failed to land on the motorcycle. He was about 6 metres away from the motorcycle when he shot the rounds, and he could see that the motorcycle was about 1 to 2 metres away from some of his team members at that time.

70. The process was recorded on P41 and PW5 identified his first pepper shot as at 15:39:32. Under cross-examination, he said he

[29] See P41 CCTV footage.

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fired his first shot when the Defendant was abreast of him. He was then shown Exhibit D2 and based on the footage, he identified his first shot as at 15:43:21 and his second shot as at 15:43:23. In re-examination, he clarified that from Exhibit D2, there were some 4 to 5 flashes and that some of the flashes were light reflection only and had nothing to do with the pepper shots. He only fired twice. The first shot was fired before the Defendant turned into Jaffe Road. The second shot was fired when the Defendant was abreast of him.

F.2.4 Checkline 4 at the junction of Jaffe Road and O'Brien Road

71. PW6 (Senior Inspector T Y Ho) was at the checkline at O'Brien Road junction Jaffe Road.[30] At 1535 hours, he saw the Defendant on Jaffe Road, driving towards O'Brien Road. The Defendant was behind a brown car ("Brown Car"). The Defendant then overtook the Brown Car on the left and his team members shouted to the Defendant to stop. However, instead of stopping, the Defendant accelerated as he heard a loud sound of the engine. Shortly afterwards, the Defendant's motorcycle ran into his colleagues, causing injuries to three of them (PC 8260, PC 12197 and DPC 2674).

72. PW6 estimated the speed of the Defendant as approximately 20 kph when first seen on Jaffe Road but when he overtook the Brown Car, it was going at about 40 kph. PW6 saw the motorcycle and the Defendant fall on the ground and the Defendant then crawled slowly forward. At that stage, the Defendant was arrested.

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[30] See P206-D.

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73. Since people on the overhead bridge were throwing hard objects at the police, PW6 shouted loudly and asked them to leave immediately. When the people refused and continued to throw hard objects despite several more warnings, pepper shots were fired at the footbridge. PW6 identified himself in P19 and said that when he saw the motorcycle, the distance was about 50 metres.

74. PW7 (DPC 9682) was at the front of the group of police officers who went to stop the Defendant. His right hand was holding a police shield at the time and he raised his shield to indicate the Defendant to stop. The Defendant did not stop and continued to drive towards him and his team. PW7 said he wanted to grab hold of the Defendant to get him to stop, but he could not do so because after passing through the gap, the Defendant then turned the front of the motorcycle to the right and accelerated.

75. PW7 said the motorcycle came very close to him, about 30 to 40 cm. He feared that the motorcycle would hit him, so he had to take action to avoid it. Somehow his shield came loose. When he turned around, he saw that the motorcycle had run into his colleagues.

76. He said that when he first saw the motorcycle on Jaffe Road, it was travelling at about 40 kph, but when it was approaching the Brown Car, it slowed down to about 20 kph. After the motorcycle had overtaken the Brown Car, it then accelerated to about 40 to 50 kph.

77. In cross-examination, PW7 agreed that he did not carry the shield properly because he thought that there was no conflict at that time.

He therefore just held onto the edge of the plastic shield. When the motorcycle brushed past him in a very high speed, the shield came off. He said that because the motorcycle was very close to him, so he feared that he might be hit by the motorcycle and he therefore raised the shield. (By way of demonstration, PW7 raised his right arm to eye level and swept down to the left.)

78. PW7 disagreed that he threw his shield at the Defendant which hit the Defendant's helmet. He also disagreed that the collision was an accident because had the Defendant stopped when he told him to, the collision would not have happened.

79. PW8 (PC 12197) saw the Defendant's motorcycle overtaking the Brown Car, it then accelerated when it was about 1 to 2 metres away from him, finally crashing into him and his colleagues. The speed of the motorcycle was about 10 to 20 kph when it was in the gap, but after it overtook the Brown Car and accelerated towards them, PW8 was unable to assess its speed as it was too short a distance.

80. PW8 identified himself on P19 as the officer on the far right. After he was hit, he fell against the left front fender of a car parked at the roadside and he felt pain at his left rib and back.

81. PW9 (PC 8260) identified himself in P19 as the officer on the left, behind the first officer in black. He said that the motorcycle was about 10 metres away from him and it had slowed down (going at about 20 to 30 kph) when it passed the Brown Car through the gap.

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Therefore, they went to stop it, but suddenly, he heard the sound of a thrust and the motorcycle crashed into him.

82. After the crash, he lost his balance and fell onto the ground. He then picked himself up and went to help subdue the Defendant. He observed that the Defendant was trying to flee because the Defendant was moving his arms and legs. Later, he asked the Defendant if he was injured. However, the Defendant did not reply. PW9 told us that the Defendant was moved from the position where he fell because people were throwing items at them and causing a commotion. He estimated that there were about 20 to 30 onlookers on the footbridge.

83. Under cross-examination, PW9 agreed that in P42, after the Defendant fell onto the ground, the Defendant was surrounded by the police, as can be seen on the tape.

84. PW9 has not yet recovered fully as his left wrist hurts when he moves it, and therefore, even the task of twisting a water bottle is more difficult for him. He still has pain on his left shoulder and his left waist, also numbness on the waist. It has been a year after the crash but he still needs to attend follow-up once every 3 months to be X-rayed.

85. PW10 (DPC 2674) was one of those officers who were hit by the Defendant's motorcycle. His right thumb still cannot exert to the same strength as before, and the range of bending was not like before, only up to 45 degrees. He still has to attend rehabilitation for his thumb.

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86. Although he was discharged that very same evening, PW10 still had pain on his left side and on his leg. He therefore went for further treatment and was discharged on 3 July 2020.[31]

87. Before the Defendant's motorcycle crashing into his colleagues, PW11 (PC 10426) heard the sound of the motorcycle's engine intensifying which to him meant acceleration. PW11 told us that when he saw the motorcycle overtake the Brown Car, he immediately shouted to the Defendant to stop and he had repeated it several times.

88. At that time, he was holding onto the edge of a plastic shield. However, when the motorcycle was driving past him, the force was so great that he was unable to hold the shield and it flew away.

89. PW11 identified on P5 the time when the shield was transferred from his left hand (his dominant hand) to his right hand, which was at 0012 to 0015. He disagreed that he had thrown his shield at the Defendant.

F.2.5 Driver of the Brown Car

90. PW12 (Mr Lau) was the driver of the private car which stopped at Jaffe Road. He said he did so because he saw policemen ahead of him. He also saw the Defendant's motorcycle overtake his car at a high speed and it then crashed into the police ahead.

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[31] See P45.

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F.3 Other evidence

91. PW13 is Professor Lau Chi-pang. He was called as an expert in history to give his opinion on the Slogan. As the Defence had also called two experts on this topic, we consider that it would be convenient to set out all the expert evidence relating to the Slogan in section F.4 below.

92. The statement of PW14 (Senior Inspector W M Cheung) was admitted as P228 and the certified English translation P228A under section 65B of the Criminal Procedure Ordinance, Cap 221.

93. His evidence was that his team had viewed a total of 2,177 videos out of which he himself had viewed 825. He was able to separate the videos into 8 categories.[32]

94. PW15 (Dr Tsang Cheuk-nam) is a forensic scientist and his statement was marked as MFI-1. He said he was tasked on 21 July 2020 to determine the speed of the Defendant's motorcycle.

95. He had viewed the footages and was able to say that the speed of the motorcycle was about 20 kph when it was stopped by the police. He was unable to tell from the footages whether the Defendant accelerated or decelerated. His calculation was based on the time on the camera and the length of the motorcycle.

[32] The table of videos is P102.

96. PW15 said that the brake light of the motorcycle could be seen at Frame C5279.[33] He further said that, according to the code issued by the Transport Department, the thinking time of a driver before applying the brake would be about 0.9 second.

97. PW16 (DPC 12510) was the officer who video-recorded (P17) the body search of the Defendant by PC 11315.

98. PW17 (PC 11315) was assigned to body search the Defendant. He said he found a gas mask and first aid items, including first aid pad and saline solution on the Defendant.

99. When P17 was shown to him, PW17 said he did not remember why he was handling the Defendant's wallet and he could not remember what the Defendant was referring to as being the "光復香港時代革命" item.

F.4 Meaning of the words "光復香港 時代革命" "LIBERATE HONG KONG REVOLUTION OF OUR TIMES"

F.4.1 Prosecution Evidence

F.4.1.1 Expert opinion of Professor Lau Chi-pang ("Professor Lau")

100. The Prosecution adduced evidence from Professor Lau, the Associate Vice President (Academic Affairs and External Relations) and a Professor of the Department of History of Lingnan University.

[33] See p8 of MFI-1.

101. Professor Lau provided his expert opinion as to the meaning of the words "光復香港 時代革命", the Chinese characters of the Slogan ("the Chinese Slogan") at the material time, in particular, the origin and development, both historical and recent.

102. In coming to his expert opinion, Professor Lau had first of all considered the meaning of the compound words ("詞") "光復", "時代" and "革命" from a historical perspective.

103. Professor Lau concluded that the words "光復香港" has the meaning of recovering the HKSAR which has fallen into enemy hands, and by extension of that the words mean not admitting the HKSAR as part of the People's Republic of China (the "PRC"), and viewing the PRC regime as an enemy.

104. In his oral evidence, Professor Lau elaborated that the use of the compound word "光復" in modern Chinese means to restore or take back the regime or national territory that had fallen into the hands of enemy or foreign ethnic group. When "光復" is used, it is spoken from the perspective of a legitimate regime. To raise "光復香港" is to place the person in a legitimate position, and then to decide that the government facing this person is not legitimate, not legal. Therefore, that government must be an enemy or a government controlled by a foreign ethnic group. To put Hong Kong within this phrase means that the situation at the time is that the regime in Hong Kong is controlled by an enemy. According to the person uttering that phrase, the PRC is

illegally possessing the city of Hong Kong. The person who says it reckons that the HKSAR does not belong to the PRC.

105. As to the words "時代革命", Professor Lau concluded that it has the meaning of causing a change of times by adopting means to cause a change to the regime or social system existing at the time (or a period of time) when the slogan is raised. By extension of that, the words mean rejecting the governance of the PRC and the HKSAR, and attempting to replace the current regime or social system by way of changing the regime or social system.

106. In considering the meaning of compound words from a historical perspective, Professor Lau testified that an important background assumption has to be made: that the Chinese language is a language that has "customary usage", namely through usage over a long period of time and in a large area of China. The meaning of Chinese characters would not be changed merely because different people are using it. An ordinary person in Hong Kong, when he/she is faced with a Chinese word or compound word, the usual or customary meaning of such a word or compound word would appear. Therefore, there can be communication and the same message can be distributed.

107. Moreover, in his oral evidence as well as in his report, Professor Lau emphasised that in order to have a proper understanding as to the meaning of the Chinese Slogan, it is important to approach the question at two levels: (i) the proper or customary usage of the words or compound words from a historical perspective; and (ii) the context in which they were used. By "context", Professor Lau was referring to

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"when" the word was used; the "circumstances" when it was used; "to whom" it was used; and when the user was using it, whether there were any "objectives" that could be seen objectively.

108. As to context, Edward Leung Tin-kei (梁天琦) ("Leung"), leader of the "localist" group Hong Kong Indigenous, was the one who improvised the Slogan in question and put the compound words together to create the 8-word Chinese Slogan. After considering the words used by Leung in 2016 at his campaign rally for the New Territories East By-election on 20 February 2016 (video footages and also a leaflet found by Professor Lau in his research[34]), Professor Lau opined that the meaning of the words in question on 1 July 2020 was not significantly different from the meaning intended to be conveyed by Leung.

109. Professor Lau pointed out that at the campaign rally for the New Territories East By-election, Leung publicly expressed the following political agenda:

> "He [Wong Toi-yeung] spoke to me [Leung Tin-kei] about the need for resistance with bravery and violence, to bring down this Hong Kong Communist regime, to bring a change to all the Hong Kong people, and ultimately to build a country of (our) own. This is what he told me. Upon hearing that, I said 'Correct!'"

110. According to Professor Lau, by recounting his dialogue with Wong Toi-yeung, Leung clearly expressed the thought of "building a country of (our) own"; this utterance actually summarized Leung's

[34] Exhibit P202, P202-A.

political agenda to overthrow the current regime. Leung's agreement with Wong's words provided an important message: that is how Leung saw the Slogan and how he saw his political ideal. In addition, the use of the 8 characters by Leung followed the customary usage of these words or compound words in history.

111. Professor Lau also considered the use of the Slogan on 21 July 2019 outside the Liaison Office of the Central People's Government in the HKSAR ("LOCPG") where there was damage caused to the National Emblem and the facilities of LOCPG. Professor Lau pointed out that the predecessor to the LOCPG was the Hong Kong branch of Xinhua News Agency (新華社), which was an official body of the CPG stationed in Hong Kong. Since its establishment in May 1947, Xinhua News Agency performed the role of an important bridge for exchange and cooperation between Hong Kong and the Mainland, and it was a representation and symbol of the PRC and the CPG in Hong Kong. By damaging the National Emblem and the facilities of the LOCPG and with the usage of the words on 21 July 2019, the words were suggestive of rejecting the governance of the PRC Government. In the circumstances, Professor Lau opined that the context in which the words were used had been consistent before and after, and had never had any obvious change.

112. Professor Lau further opined that the report compiled by the police (to be dealt with at paragraphs 117 to 121 below) is relevant material for considering the meaning of the Chinese Slogan at the material time. According to the report, the Slogan was very much related to words associated with secession and subversion; and the Slogan

was first seen in the protest on 21 July 2019 outside the LOCPG after Leung's debut usage.

113. From the foregoing, Professor Lau concluded that the context of the Chinese Slogan on 1 July 2020 was not significantly different from the context in which it was presented at Leung's campaign rally for the New Territories East By-election held on 20 February 2016.

114. Furthermore, Professor Lau made the important point that the two parts of the words in question (ie "光復香港" and "時代革命") have a close semantic connection and cannot be construed separately. They must be viewed as a phrase of words or slogan as a whole.

115. Having considered the customary usage of the words or compound words from a historical perspective and the context in which they were used, Professor Lau was of the opinion that at the material time on 1 July 2020, as a whole, the fundamental agenda and meaning of the Chinese Slogan was "to cause the consequence of separating the territory of residence from the State sovereignty; in the context of Hong Kong's political language, these words were raised necessarily for the objective of separating the HKSAR from the PRC."

116. Under cross-examination, Professor Lau elaborated that the eight words meant: through changing the government or changing the regime, to take back Hong Kong in order to change this era. To take back Hong Kong meant to take back the governance of the HKSARG under the PRC regime. Further, according to the conventional usage of the words, it is to achieve this objective by violence.

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F.4.1.2 Video footages found relating to the usage of the Slogan

117. Senior Inspector W M Cheung ("SIP Cheung")[35] and his team conducted investigation and research into usage of the words since June 2019. During the period between 9 June 2019 and 1 July 2020, a total of 218 out of 389 days were found to involve the use of the Slogan in activities relating to protests and other unlawful acts upon a review into 2,177 videos. Between 9 June 2019 and 31 December 2019, 64% of the days in the said period (206 days) were found to involve the use of the Slogan. Between 1 January 2020 and 1 July 2020, 48% of the days in the said period (183 days) were found to involve the use of the Slogan (notwithstanding the onset of the COVID-19 pandemic).

118. These video footages further showed that the use of the Slogan was associated with Hong Kong Independence and other political agenda hostile to the PRC and/or the HKSAR including words or statements to the effect of secession and/or subversion.

119. In SIP Cheung's statement, "secession (分裂國家)" was to denote "the situation with the occurrence of chanting or waving of flag(s) or banner(s) bearing the phrases "香港獨立 唯一出路 (Hong Kong independence, the only way out)", "民族自強 香港獨立 (National self-strengthening, Hong Kong independence)", "香港人建國 (Hong Kong people to establish our state)" and "Hong Kong Independence"".

120. "Subversion (顛覆國家)" was defined by SIP Cheung to denote "the situation with the occurrence of chanting or waving of flag(s)

[35] PW14.

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or banner(s) bearing the phrases "驅逐共黨 光復香港 (Expel the Communist Party, liberate Hong Kong)", "驅逐共黨 還我香港 (Expel the Communist Party, return Hong Kong to us)", "天滅中共 全黨死清光 (The Heaven will destroy the Chinese Communist Party, with the whole party extinct)" and "止警暴，制黑亂，滅港共，倒林鄭 (Stop Police violence, curb black chaos, destroy the Hong Kong Communist Party, down with Carrie LAM)"".

121. Significantly, the co-occurrence rate between the use of the Slogan and the waving/chanting of secessionist/subversive words as defined above increased sharply from 11% in 2019 to 70% in 2020.

F.4.2 Defence Expert Evidence

122. The Defence adduced evidence from Professor Eliza W Y Lee, a Professor of Political Science and Public Administration at the Department of Politics and Public Administration, the University of Hong Kong and Professor Francis L F Lee, Director and Professor at the School of Journalism and Communication, the Chinese University of Hong Kong (together, the "Defence Experts").

123. The Defence Experts adopted an interdisciplinary approach to investigate into the subject, including social sciences and cultural studies, which is different from the historical approach that Professor Lau had used to compile his expert reports. The Defence Experts jointly prepared a report dated 3 June 2021 (the "Defence Expert Report")[36]

[36] See D5.

124. At paragraph 18 of the Defence Expert Report, the Defence Experts gave the opinion that the assumptions of Professor Lau and the arguments and conclusion of Professor Lau founded on those assumptions are flawed, for the following reasons:

(1) 光復 ("liberate") and 革命 ("revolution") both have meanings in use other than those identified in Professor Lau's report prior to and, particularly and most pertinently in the recent development of Hong Kong's socio-cultural context in 2019 and 2020.

(2) At least part of the Chinese Slogan has an established and verifiable intertextual history that preceded its adoption by Leung for his electoral campaign in early 2016. In other words, Leung may not accurately be characterised as the "Creator of the Slogan" or the sole "Creator" as stated by Professor Lau.

(3) Leung devised the Slogan for the purpose of electoral campaigning. While the Slogan was juxtaposed with his campaign speeches, individual specific items or objects in Leung's campaign speeches cannot be automatically equated to the meaning of the Slogan.

(4) Studies by the Defence Experts established that the recent history of the Slogan, its context and use are demonstrably different from that of Leung in early 2016. While the Slogan was used by Leung for his electoral campaign in early 2016, it was not in general usage in the few years afterwards. The empirical evidence established that the Slogan only re-emerged

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and became widely used in the Anti-Extradition Law Amendment Bill ("Anti-ELAB") movement in July 2019 following public outrage over the Yuen Long attack on 21 July 2019. The Slogan was thus recontextualized in 2019 by protestors in the Anti-ELAB movement such that it took on a range of different meanings.

125. The Defence Experts concluded that by September and October 2019, the Slogan had become a catch-all phrase signifying the vague desire to recover what was lost and the need for fundamental change in Hong Kong, but it was simultaneously open to virtually an infinite range of possible readings of exactly what to recover and what fundamental changes were needed.

126. However, in his examination-in-chief, Professor Francis L F Lee agreed it would not be possible to deny that such "big" change may involve Hong Kong Independence. Towards the end of his cross-examination, Professor Francis L F Lee stated the Defence Experts' conclusion that the Slogan was open and ambiguous and could be interpreted in many ways, so that, by definition, by 2020 there was no one single correct interpretation. In that sense, he could not say that Professor Lau's conclusion as to the meaning of the Slogan was incorrect, nor could he say that it was correct.

G. *Assessment of Evidence*

G.1 *The Defendant's driving*

127. We accept the evidence that at each of Checklines 1 to 4, police officers had given lawful instructions to the Defendant to stop his motorcycle, whether by way of shouting loudly, using a loudhailer or by hand gestures, which instructions were all ignored by the Defendant. We find that the Defendant could have and should have stopped his motorcycle before he drove past each checkline. Despite repeated warnings (even with the firing of pepper balls at Checkline 3), the Defendant deliberately ran through the Police checklines and eventually collided with the police officers at Checkline 4.

128. We accept the evidence that the Defendant did accelerate his motorcycle either shortly before or shortly after arriving at each of Checklines 1 to 4. In particular, regarding Checkline 4 at the junction of Jaffe Road and O'Brien Road, we accept that after the Defendant had overtaken the Brown Car through the gap, his motorcycle accelerated as evidenced by the loud engine sound heard in the video.

129. We accept that at Checkline 1, the closest distance between the Defendant's motorcycle and the police officers was about 1 metre, that at Checkline 2 was about 1 metre, and that at Checkline 3 was about 1 to 2 metres. The Defendant's act of intentionally running through multiple checklines at such close proximity to the police officers was, in our view, inherently dangerous regardless of the speed at which he was travelling.

130. Regarding the collision at Checkline 4, we accept the evidence of Dr Tsang Cheuk-nam ("Dr Tsang")[37]. Dr Tsang testified that Frame C5279 showed the moment when the brake light of the motorcycle was lit, indicating a position well past the first 2 police officers and when the motorcycle was about to plough into the remaining group of police officers. Working backwards with the typical reaction time of drivers of 0.9 second, Dr Tsang further testified that Frame C5252[38] showed the probable moment when the driver of the motorcycle perceived the danger of hitting the police officers and decided to apply braking, indicating a position where the motorcycle was at the left front of the Brown Car. The effect of Dr Tsang's evidence is that when the Defendant chose to overtake the Brown Car through the gap at the speed he did (instead of complying with police instructions to stop his motorcycle behind the Brown Car), the collision with the police officers was inevitable, bearing in mind that by the time he reacted in applying the brakes to slow down, the motorcycle had already arrived at the group of police officers.

131. As to the issue of whether the shield was deliberately thrown at the Defendant by PW7 DPC 9682 (according to the Defence, the act of deliberately throwing is shown in the video, whereas according to PW7, he had hoped to block the motorcycle with the shield but lost grip of it accidentally), in view of our finding above that the collision was bound to happen even without the intervention of objects being thrown at the Defendant, we do not find it necessary to make a determination on this.

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[37] PW15.

[38] See p7 of MFI-1.

132. We agree with the Prosecution's submission that as demonstrated by his driving route, having passed through Checkline 1 and Checkline 2, the Defendant could have left the scene along Hennessy Road and travelled to Causeway Bay. Instead, the defendant made a turn from Hennessy Road to Fleming Road and then another turn to Lockhart Road; thereafter he further drove past Checkline 3 turning into Jaffe Road. The Defendant's intention to target police checklines on the material day is beyond dispute.

133. Based on the Defendant's driving route that afternoon, we reject the Defence's suggestion that he was avoiding the Police. Instead, the Defendant must have been (i) directing his actions against police officers at police checklines challenging the law and order; and (ii) at the same time parading around the area whilst flying the flag with the Slogan on his back.

G.2 Meaning of the Slogan and incitement to commit secession

134. As concluded in paragraph 34 above, the issue before the court is: having regard to the natural and reasonable effect of displaying the flag with the Slogan on it in the particular circumstances of this case and when viewed as a whole, is such display of the Slogan capable of inciting others to commit secession. However, before we could deal with this issue, we have to first examine whether the Slogan as at 1 July 2020 was capable of carrying the relevant secessionist meaning, namely, separating the HKSAR from the PRC.

135. We accept Professor Lau's opinion that the two parts of the Chinese Slogan (ie "光復香港" and "時代革命") have a close semantic connection and cannot be construed separately. They must be viewed as a phrase of words or slogan as a whole.

136. In answering the question posed above, we do not find the analysis of the Defence Experts particularly helpful because as explained by Professor Francis L F Lee in his examination-in-chief, the emphasis of the analysis was to test a "key hypothesis", namely whether the Slogan had one meaning only and that was how everybody understood it. The analysis was not directed at the question as to whether the Slogan was capable of having the meaning ascribed to it by Professor Lau.

137. We should reiterate that what we are concerned with in this case is not whether the Slogan meant one and only one thing as contended by Mr Grossman but whether the Slogan, when taken as a whole after considering all the relevant circumstances, was capable of inciting others to commit secession. The authorities which we have examined did not speak in terms of "one meaning only". Instead, the focus was on whether the words/message/article/advertisement was capable of inciting others to commit the offence in question.

138. There is in fact no dispute amongst the 3 experts that at the material time on 1 July 2020, as a whole, the Chinese Slogan was at the very least capable of having the meaning ascribed to it by Professor Lau, namely, "the objective of separating the HKSAR from the PRC." In the circumstances, it is not necessary for the court to resolve the differences

between the approach of Professor Lau on the one hand and the approach of the Defence Experts on the other.

139. In coming to this view, we take into account that the Defence Experts have never disputed that the Slogan is capable of bearing a secessionist meaning:

(1) At paragraph 61 of the Defence Expert Report, the Defence Experts accept it is undeniable that in his campaign speeches on 20 February 2016, Leung spoke in favour of Hong Kong's political independence.

(2) Under cross-examination, Professor Eliza W Y Lee agreed that the Slogan put forward by Leung would, to some people, carry the meaning stated at paragraph 36 of Professor Lau's report,[39] namely *inter alia*, "the subject words were clearly put forward for the objective of advocating one or more political agendas [of Leung]; such political agendas in turn have the advocacy of Hong Kong independence and secession as their main content."

(3) At paragraph 114 of the Defence Expert Report, the Defence Experts expressly accept that "Hong Kong Independence" is one of the ideas that may be associated with the Slogan.

(4) In her examination-in-chief, Professor Eliza W Y Lee fairly accepted that regarding the compound word "光

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[39] See P200A.

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復", it can mean recovering a regime that is lost, although it does not necessarily have that meaning.

(5) Under cross-examination, Professor Eliza W Y Lee again fairly accepted that regarding the compound word "革命", it can mean overthrowing the government, although it does not necessarily mean so.

140. In the present case, Professor Lau and the Defence Experts have, rightly in our view, emphasised the importance of "context" when construing the meaning of the Slogan. In this regard, it is important to take into account the following:

(1) the Slogan was printed on a flag carried at all material times on the back of a motorcyclist travelling on a busy public highway on 1 July 2020 plainly in the view of the general public;

(2) on 1 July 2020, there were protests on Hong Kong Island. According to PW1, Woman Superintendent Tam, the protests on Hong Kong Island were against the NSL, and the protests were illegal because an organiser had applied for the holding of a public event but was unsuccessful;

(3) the route chosen by the Defendant after crossing the Eastern Harbour Crossing involved some major thoroughfares on Hong Kong Island, including the Eastern Corridor, the Central-Wanchai Bypass, Connaught Road Central, Queensway, and Hennessy Road;

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(4) the Defendant did not travel along Hennessy Road in a single direction. Rather, having travelled in an easterly direction along Hennessy Road towards Causeway Bay, the Defendant turned into Lockhart Road and travelled in a westerly direction before turning into Jaffe Road to resume travelling in an easterly direction;

(5) while the flag was displayed, the Defendant had deliberately failed to stop his motorcycle at multiple police checklines, showing obvious and open defiance to lawful instructions given by law enforcement officers duly tasked to maintain law and order in Hong Kong;

(6) the significance of the date is obvious: 1st July is the anniversary date of the establishment of the HKSAR and the resumption of sovereignty over Hong Kong by the PRC; and

(7) 1 July 2020 was of course also the very next day after the NSL had come into effect, a law which specifically deals with matters of national security including, in particular, secession.

141. Having regard to the natural and reasonable effect of displaying the flag in the particular circumstances of this case and taking into account the above contextual matters, we have no difficulty in coming to the sure conclusion that the Slogan as at 1 July 2020 was

capable of carrying the meaning of separating the HKSAR from the PRC and was capable of inciting others to commit secession.

142. Mr Grossman argued that the Slogan was so vague that it was not capable of carrying any secessionist meaning. With respect, this submission is contrary to the Defence Experts' evidence that one of the possible meanings of the Slogan was Hong Kong Independence which is clearly secessionist in nature.

143. The Defence further complained that the Prosecution, in this charge of incitement, had not adduced any evidence as to how the said incited act of separating the HKSAR from the PRC was to be carried out. In our view, the absence of such is immaterial to the Prosecution's case of incitement. Taking the offence of murder as an example, a person is guilty of incitement to murder as long as the *actus reus* of incitement and the *mens rea* to incite murder are proved. There is no requirement that the incitor must specify the means, for instance, by stabbing, by poisoning, or by strangulation, through which the murder is to be carried out before he could be so convicted. Needless to say, it is also not a legal requirement for the offence of incitement that there be parity of *mens rea* on the part of the incitee. Nor is the Prosecution required to prove that the incitee indeed carries out the offence incited.

144. The particulars in count 1 allege "separating the HKSAR from the PRC" or "altering by unlawful means the legal status of the HKSAR". Since we have found that the "separating" limb has been made out, we do not consider it necessary to deal with this alternative basis of "altering the legal status of the HKSAR".

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G.3 The requisite mens rea of incitement

145. We now turn to examine the *mens rea* of the Defendant at the material time.

146. First of all, the way in which the Defendant mounted the flag at his back is clear proof that he intended to attract public attention and intended the flag to be seen by as many people as possible. It should also be noted that it was the Defendant who set the context as described above for the display of the flag. The date, the time, the place and the manner were not just randomly picked. On the evidence adduced, we find ourselves able to draw the only reasonable inference that the Defendant deliberately chose 1 July 2020 to take action. Based on his WhatsApp exchanges with Dinosaur BB, we also find that the time and the place were particularly chosen by the Defendant in order to attract the attention of as many people as possible.[40]

147. Secondly, the sending from the Defendant's mobile phone of a screenshot showing the purple flag (which relates to warnings about NSL offences)[41] demonstrates that the Defendant was alive to possible breaches of the NSL at the material time.

148. Thirdly, the mentioning of a "safe spot" in his exchanges with Dinosaur BB as early as 1334 hours on that day and the fact that he was kept informed about the various police checklines and road blocks are not only probative of his act being a pre-planned one but also that he was intending to offend the law. If the Defendant only had an innocent

[40] See P75-8A, P75-8B.

[41] See 75-8 (Trial Bundle (TB), Vol 5, Tab 6, p124).

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understanding of the meaning of the Slogan and if he did not understand it to convey the meaning of Hong Kong Independence, he would not be mentioning the location of a "safe spot". Whether it was in fact a "safe spot" or not, it showed the Defendant's state of mind at the time. Equally, Dinosaur BB would not need, in the dialogue with the Defendant, to repeatedly tell the Defendant to take care if the Defendant was merely trying to display a flag conveying innocent meaning.

149. We also find the Defendant's repeated challenge to the police checklines, a symbol of law and order, a clear illustration of his determination to attract as much public attention as possible and to leave a great impact and a strong impression on the people.

150. Considering all the above, we are sure that, as evidenced by the convoluted route he chose, the Defendant was out there deliberately displaying the flag. We are also sure that the Defendant fully understood the Slogan to bear the meaning of Hong Kong Independence and by displaying, in the manner he did, the flag bearing the Slogan, the Defendant intended to convey the secessionist meaning of the Slogan as understood by him to others and he intended to incite others to commit acts separating the HKSAR from the PRC.

151. The Defendant was not simply meeting his friends for lunch as testified by DW3 and we reject her evidence on this. Mr Grossman also suggested that the Defendant was a first-aider trying to help out on the day, but there was no evidence before us as to this. In any event, the suggestion did not sit well with DW3's evidence that the Defendant was planning to join them for lunch in Causeway Bay that day.

G.4 Did the Defendant's acts amount to acts involving serious violence against persons or other dangerous activities?

152. It is clear from the evidence, and not challenged by the Defence, that the Defendant did not stop at several police checkpoints, despite being shouted at and directed to stop. In doing so, he created a dangerous situation where police officers had to jump out of his way and pedestrians and other road users lawfully using the roads were potentially put at risk and in harm's way. A particularly stark picture of this was when the Defendant turned into Jaffe Road at a close distance from police officers on the ground and pepper shots were fired at him. Still, in flagrant disregard of the orders to stop, he turned the corner at speed totally without consideration of the safety of other road users.

153. After turning into Jaffe Road, the Defendant came to the police checkline at the junction of Jaffe Road and O'Brien Road where the Brown Car had already stopped. Yet, the Defendant blatantly continued on by overtaking the Brown Car on the left at a speed of about 20 kph[42] and despite police running towards him, he not only did not stop but attempted to pass the police at a very close distance[43] We note it was suggested that PW7 "threw the shield into the face of the Defendant which distracted him." However, there was no evidence as to the alleged hitting of the Defendant or distraction.

154. We further note Mr Grossman's submission that the Defendant had applied his brakes but we would like to make two points.

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[42] PW15 Dr Tsang's evidence.

[43] See PW7's evidence where he said the motorcycle brushed past him and causing him to lose control of his shield.

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Firstly, the Defendant's driving manner has to be examined in its entirety. The Defendant should have stopped behind the Brown Car, yet he overtook it and collision was bound to occur whether he applied brakes or not. Secondly, even assuming that the Defendant was driving at 20 kph, his speed at the material time was not safe given that there was a group of police officers in a short distance ahead of him; that the Brown Car in front of his motorcycle had already stopped; and that, when overtaking from the left, he was then manoeuvring his motorcycle through a narrow gap between vehicles.

155. Mr Grossman also emphasised that a terrorist would not have acted in the way the Defendant did, for example, stopping at traffic lights and carrying first-aid items with him. We find this submission to be taking bits and pieces out of the entire picture of what the Defendant did on that day. Moreover, the submission seems to have been based on a false premise: there is a protocol to follow when a person is going to engage in terrorist activities. With respect, we do not think there is such a standard procedure. Nor is there any typical conduct which a person aiming to engage in terrorist activities will certainly display. The situation may be so volatile that the person may just need to blend in with the ordinary members of the community or to act perfectly normally at times. We therefore see no force in this argument put forth by Mr Grossman.

156. We could see from the screenshots of the video footage[44] that there were pedestrians at the junction where the crash occurred, so the manner of the Defendant's driving was also putting those pedestrians

[44] See P5, TB Vol 2, Tab 13, photos 1-6.

at risk of harm. In the circumstances, when the Defence argued that the Defendant's acts did not involve dangerous activities which seriously jeopardised public safety or security, that was an untenable argument on the facts as noted above.

157. We can only find from what occurred that day that it was certainly beyond a doubt that the Defendant was indulging in very dangerous activities jeopardising public safety in driving in the way he did.

158. Further, if one were to just focus on the collision, that is clear proof that the Defendant engaged in acts involving serious violence against persons. It needs no repeating that a motorcycle is potentially a lethal weapon. If a person deliberately steers a motorcycle in a manner which renders a collision with people inevitable, he is no doubt engaging in acts which involve serious violence against persons.

159. We accept the Prosecution's submission that serious violence against persons does not mean serious injuries caused to the persons. It is the nature of the act embarked upon which is required to be proved. Whether such act results in or causes serious bodily injury is a matter relevant to sentence, not an element of the offence under Article 24 of the NSL.

160. Thus, even if we were only to consider the collision, we are sure that the Defendant's act indeed involved serious violence against persons as set out under Article 24.

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G.5 Grave harm to the society?

161. As can be seen from Article 24 of the NSL, and based on our ruling on 29 April 2021, the Prosecution has to prove grave harm being caused or intended to be caused to the society when the Defendant committed the prohibited acts. In this connection, it should be noted that the ordinary meaning of the word "harm" as set out above is wide. Further, the acts itemised in Article 24(1) to (5) are of such a broad range that it could not be suggested that "grave harm" means only physical harm. For instance, under Article 24(4), interruption or sabotage of electronic control systems for providing and managing the internet, serious or otherwise, may not cause physical injury to persons. Harm therefore is not restricted to physical harm.

162. In our view, a blatant and serious challenge mounted against the police force which is charged with the responsibility of maintaining public safety and security, and thus a symbol of law and order, will certainly instill a sense of fear amongst the law-abiding members of the public, in particular, apprehension of a breakdown of a safe and peaceful society into a lawless one. In that event, grave harm would certainly be caused to the society.

163. Turning back to the present case, we have no doubt that the Defendant mounted a deliberate and serious challenge against the police force when he ignored all the police warnings to stop and charged through the checklines, each of which was composed of more than 10 officers, ultimately colliding into the group of officers at Checkline 4, causing injuries to 3 of them. Such acts, per se, were acts targeting the police officers at the scene but given that the police force is a symbol of

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law and order, the Defendant's act in charging through the various checklines resulting in the said collision clearly illustrates his intention to disrupt the maintenance of law and order, thereby rendering law-abiding citizens to fear for their own safety and to worry about the public security of Hong Kong. If any example is required, we note ordinary citizens like PW12 and his passenger were shocked by what happened. Mr Grossman suggested that such was only the normal reaction when one witnessed a traffic accident. We do not agree. What they witnessed was not just an ordinary traffic accident; it was a person overtaking a stationary car, continuing on despite police warnings, and finally crashing into the police officers in the execution of their duty.

G.6 Did the Defendant carry out the acts with a view to intimidating the public in order to pursue a political agenda?

164. As noted above, the Defence Experts had never disputed that the Slogan was capable of bearing a secessionist meaning, though they maintained that the Slogan was ambiguous and that there was no single correct meaning. Following our assessment of the evidence concerning the way and manner in which the Defendant displayed the Slogan and given his understanding, we are sure that the Defendant's intention was to arouse public attention on the agenda of separating the HKSAR from the PRC, which clearly is a political agenda.

165. Even if we were wrong in finding that the Defendant understood the Slogan to mean Hong Kong Independence and adopted that meaning when displaying the flag, given the Defence Experts' opinion as elucidated in their report and oral evidence that the Slogan could mean a desire to recover what was lost and the need for a

fundamental change in Hong Kong, we are of the view that the Slogan still advocated a political agenda.

166. As set out above, we are sure that the Defendant's acts at the material time were acts involving serious violence against persons and/or dangerous activities which seriously jeopardised public safety or security. We are also sure that such acts were aimed at challenging the law and order in Hong Kong and had indeed caused grave harm to the society.

167. We have no doubt that the Defendant did carry out the acts with a view to intimidating the public given the gross nature of what he did and the inevitable adverse impact it would have on law-abiding members of the public. He drove through some of the major thoroughfares of Hong Kong and his acts were done in open public view. It is untenable that the Defendant did not have the public reaction on his mind.

168. We are also sure that such intimidation was for the purpose of pursuing his political agenda, in that the intimidation was targeted against those in the community who did not support the said political agenda, thereby seeking to contain or suppress counter voices. An intimidation to a section of the public was intimidation to the public all the same for a society is made up of individuals and different groups of such individuals.

G.7 Coercing the CPG or the HKSARG

169. On the Prosecution's submission that the Defendant did what he did with a view to coercing the CPG or the HKSARG, since we have

found that the "intimidating" limb is proved, we do not consider it necessary to deal with the "coercion" limb. Suffice for us to say that we do have some reservation as to whether this element is made out in the present case. Lest there be any misunderstanding, our observation on this is, of course, confined to the present case and we are not expressing any opinion as to under what particular circumstances the "coercion" limb could or could not be proved for much would depend on the actual factual matrix.

170. We further note from the Prosecution's submissions that their understanding of Article 24 is that the "coercion" limb is not linked to the element of "in order to pursue political agenda" which, according to them, is only relevant to the "intimidating" limb. Given the structure of and the language used in Article 24, we have reservation as to this interpretation of the Prosecution. However, as we have not heard any argument on this and as we do not find it necessary to deal with the "coercion" limb in this case, we should not be taken to have expressed any opinion on this matter one way or another.

H. Summary of findings

171. In summary, we are sure of the following:

(1) having regard to the natural and reasonable effect of displaying the flag with the words "光復香港 LIBERATE HONG KONG 時代革命 REVOLUTION OF OUR TIMES" on it and in the particular circumstances of this case, such display of

the words was capable of inciting others to commit secession;

(2) at the material time, the Defendant himself understood the Slogan to carry a secessionist meaning, that is, separating the HKSAR from the PRC;

(3) when the Defendant displayed the Slogan in the manner he did, he intended to communicate the secessionist meaning of the Slogan to others and he intended to incite others to commit secession by separating the HKSAR from the PRC;

(4) the Slogan is a political agenda advocated by the Defendant at the time;

(5) the Defendant's failure to stop at all the police checklines, eventually crashing into the police, was a deliberate challenge mounted against the police, a symbol of Hong Kong's law and order;

(6) the Defendant's acts were acts involving serious violence against persons and/or were dangerous activities which seriously jeopardised public safety or security;

(7) the Defendant's acts had caused grave harm to the society; and

(8) the Defendant carried out those acts with a view to intimidating the public in order to pursue political agenda.

I. Conclusion

172. Given our findings above, we are sure that each and every element of the offences in count 1 and count 2 have been proved. Accordingly, we convict the Defendant of both counts.

173. In the result, there is no need for us to deal with the alternative count in count 3.

(Esther Toh) Judge of the Court of First Instance	(Anthea Pang) Judge of the Court of First Instance	(Wilson Chan) Judge of the Court of First Instance

Mr Anthony Chau, DDPP (Ag) and Mr Ivan Cheung, SSP of the Department of Justice, for the HKSAR

Mr C S Grossman, S C leading Mr Lau Wai-chung Lawrence, assigned by Director of Legal Aid and Ms Chan Pik-kei (Private) instructed by Bond Ng Solicitors, for the Defendant