

[English Translation – 英譯本]

CACC 272/2021

[2022] HKCA 1151

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

CRIMINAL APPEAL NO 272 OF 2021  
(ON APPEAL FROM DCCC 122/2021)

BETWEEN

HKSAR

Respondent

and

MA CHUN MAN

Applicant

(馬俊文)

Before: Hon Poon CJHC, Pang and A Pang JJA in Court

Date of Hearing: 7 June 2022

Date of Judgment: 3 August 2022

**JUDGMENT**

Hon Poon CJHC (giving the Judgment of the Court):

1. Article 21 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“NSL”) provides that a person who incites others to commit secession shall be guilty of an offence:

“If the circumstances of the offence committed by a person are of a serious nature, the person shall be sentenced to fixed-term imprisonment of not less than five years but not more than ten years; if the circumstances of the offence committed by a person are of a minor nature, the person shall be sentenced to fixed-term imprisonment of not more than five years, short-term detention or restriction.”

In this application for leave to appeal against sentence, this Court has to deal with the following issues:

- (1) whether the circumstances of the offence of “incitement to secession” committed by the applicant, Ma Chun Man, were “of a serious nature” or “of a minor nature” under Article 21; and
- (2) even if they were of a serious nature, whether the sentence of imprisonment of five years and nine months imposed by the trial judge<sup>1</sup> on the applicant was manifestly excessive.

A. *Trial*

A1. *Prosecution Case*

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<sup>1</sup> District Judge Stanley Chan.

2. The prosecution alleged that the applicant committed “incitement to secession”, contrary to Articles 20 and 21 of NSL, and the particulars of offence are as follows:

“[The applicant], between 15 August 2020 and 22 November 2020 (both dates inclusive), 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.”

3. The evidence adduced by the prosecution included:

- (1) the facts admitted by both parties pursuant to section 65C of the Criminal Procedure Ordinance<sup>2</sup>; <sup>3</sup>
- (2) a total of 18 video clips downloaded by the police from the internet,<sup>4</sup> a total of two video clips recorded by the police,<sup>5</sup> and the transcripts of the video clips;<sup>6</sup>
- (3) (a) placard, with a defiled bauhinia emblem and the printed words, “香港人要獨立建國！香港人要取回主導權！抵抗赤化，唯有獨立 香港人，建軍！建國！” (Hongkongers to build an independent state! Hongkongers to regain the

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<sup>2</sup> Cap 221 of the Laws of Hong Kong.

<sup>3</sup> Prosecution exhibits P30 and P30(a).

<sup>4</sup> They were prosecution exhibits P1 to P10 and P12 to P19 respectively. The prosecution played video clips P7 to P19 in court.

<sup>5</sup> Prosecution exhibits P11 and P12.

<sup>6</sup> Prosecution exhibits P1a to P19a.

dominating power! To resist communisation, independence is the only way. Hongkongers, build an army! Build a state!) seized by the police from the applicant on 27 October 2020,<sup>7</sup> a total of seven pieces of paper with the printed words, “民族自強 ONE Nation ONE Hong Kong 香港獨立” (Ethnic enhancement, ONE Nation ONE Hong Kong, Hong Kong independence) seized from the applicant on the 28<sup>th</sup> day of the same month and 3 November, and a total of 16 photos taken by the police of these pieces of paper;<sup>8</sup>

(4) a total of 41 pages of screenshots of posts captured by the police from a Facebook account named “馬俊文” (Ma Chun Man) (“the said Facebook account”) from 19 October to 23 November 2020;<sup>9</sup>

(5) a total of 65 pages of screenshots of posts captured by the police between 14 October and 23 November 2020 from a Telegram channel “61 萬 唔 驚 拉 Channel” (610-thousand-not-afraid-of-being-arrested Channel), which was set up by the applicant on 10 August 2020 (“the said Telegram channel”);<sup>10</sup>

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<sup>7</sup> Prosecution exhibit P21.

<sup>8</sup> The seven pieces of paper were prosecution exhibits P22 to P28; the 16 photos were prosecution exhibits P29(1) to (16).

<sup>9</sup> Prosecution exhibits P31(1) to (41).

<sup>10</sup> Prosecution exhibits P32(1) to (65).

(6) the exhibits found by the police from the applicant's home upon search on 23 September 2020, including five black short-sleeved tops, with the words printed on the front: “寧鳴而死 不默而生 GIVE ME LIBERTY OR GIVE ME DEATH” (Speak up and die rather than live in silence. GIVE ME LIBERTY OR GIVE ME DEATH)<sup>11</sup> and a notebook bearing the words “美國隊長的抗爭日記” (Captain America's Diary of Protest) on its cover.<sup>12</sup>

In addition, the prosecution called two police officers who separately testified on matters such as the incident which occurred on 15 August 2020, the search of the applicant's home on 23 September 2020 and the discovery of the said Facebook account and the said Telegram channel on the internet platforms Facebook and Telegram.

4. The prosecution alleged that during the material times, the applicant committed the offence at various locations in Hong Kong and published some posts on the internet to advocate “Hong Kong independence”; for details, see the video recorded evidence and the screenshots of the posts on the said Facebook account and the said Telegram channel, which were produced in court.

5. The circumstances under which the applicant committed the offence on various public occasions are summarised below.

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<sup>11</sup> Prosecution exhibit P34.

<sup>12</sup> Prosecution exhibit P36.

(1) *Outside Pacific Place, Admiralty on 15 August 2020*

6. At around 5 to 5:50 pm on that day, the applicant and two other persons mourned for Leung Ling Kit outside Pacific Place, where about eight to ten reporters were present. The applicant repeatedly chanted slogans such as “民族自強 香港獨立” (Ethnic enhancement, Hong Kong independence), “香港人建國” (Hongkongers to build a state), “光復香港 時代革命” (Liberate Hong Kong, revolution of our times) and “香港獨立 唯一出路” (Hong Kong independence, the only way out).<sup>13</sup>

(2) *In YOHO MALL I, Yuen Long on 21 September 2020*

7. On 20 and 21 September, the applicant published a number of posts on the said Facebook account, appealing to the public to attend “平反721-元朗yoho和你行” (Vindicating 721—Walking with you at yoho Yuen Long) in YOHO MALL I, Yuen Long at 6:30 pm on the 21<sup>st</sup> day.

8. At around 6:30 to 7 pm on 21 September, the applicant and another person appeared at YOHO MALL I, Yuen Long. During that period of time, the applicant repeatedly led the people at the scene to chant slogans such as “Ethnic enhancement, Hong Kong independence”, “Hongkongers to build a state”, and some people in the crowd responded.<sup>14</sup>

(3) *In PopCorn shopping mall, Tseung Kwan O on 22 September 2020*

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<sup>13</sup> See prosecution exhibit P1.

<sup>14</sup> See prosecution exhibit P2.

9. On 15 September, the applicant published a number of posts on the said Facebook account, appealing to the public to attend “梓彥悼念和你唱” (Mourning for Tsz Yin, singing with you) in PopCorn shopping mall, Tseung Kwan O at 6:30 pm on 22 September. On 22 September, the applicant again published a number of posts on the said Facebook account, appealing to the public to attend the said activity and “彥霖追悼會” (Memorial service for Yin Lam) at the same location at 7 pm on the same day.

10. At around 6:30 to 7:15 pm on that day, the applicant appeared at PopCorn Shopping Mall, Tseung Kwan O. During that period of time, he loudly led those present to repeatedly chant slogans including “Liberate Hong Kong, revolution of our times”, “Hong Kong independence, the only way out”, “Ethnic enhancement”, “Hongkongers to build a state”, “香港人反抗” (Hongkongers to resist), “沒有暴徒 只有暴政” (No rioters, only tyranny), “一息尚存 抗爭到底” (With the last breath, protest till the end), “解散警隊 刻不容緩” (Disband the police force, brook no delay), and some people in the crowd of on-lookers nearby responded.<sup>15</sup>

11. Subsequently, the applicant was arrested by the police for the offence of “incitement to secession” in PopCorn shopping mall, Tseung Kwan O and he remained silent under caution.

(4) *Outside Hollywood Plaza, Mongkok on 24 September 2020*

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<sup>15</sup> See prosecution exhibit P3.

12. On 24 September, the applicant was released on bail by the police. At around 10 to 10:15 pm on the same day, the applicant was interviewed by a reporter outside Hollywood Plaza, Mongkok. He said that the said Telegram channel was originally set up in the hope that Hong Kong people could be free from the fear of being arrested and be brave to trample the legal bottom line to protest.<sup>16</sup>

(5) *In Langham Place shopping mall, Mongkok on 3 October 2020*

13. On 2 October, the applicant published a number of posts on the said Facebook account, appealing to the public to attend “永續活動—全港十八區星期六和你唱” (Perpetual activities—singing with you at eighteen districts throughout Hong Kong on Saturday) at large shopping malls in eighteen districts throughout Hong Kong (including Langham Place shopping mall, Mongkok) on the following day, for the purpose of advocating the will of independence, and suggesting chanting slogans such as “Liberate Hong Kong, revolution of our times”, “Ethnic enhancement, Hong Kong independence”.

14. At around 6:30 to 6:50 pm on 3 October, the applicant appeared at Langham Place shopping mall, Mongkok. During that period of time, he repeatedly chanted slogans including “Ethnic enhancement, Hong Kong independence”, “Liberate Hong Kong, revolution of our times”, “Hongkongers to build a state”, “Hong Kong independence, the only way out” and so on, and some people in the crowd responded.<sup>17</sup>

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<sup>16</sup> See prosecution exhibit P4.

<sup>17</sup> See prosecution exhibit P5.

(6) *In PopCorn shopping mall, Tseung Kwan O on 8 October 2020*

15. On 7 October, the applicant published a number of posts on the said Facebook account, appealing to the public to attend “Mourning for Tsz Yin, singing with you” in PopCorn Shopping Mall, Tseung Kwan O on the following day for the purpose of advocating the will of independence.

16. At around 6:38 to 6:48 pm on 8 October, the applicant appeared at PopCorn Shopping Mall, Tseung Kwan O, and chanted to the public repeatedly slogans such as “Hong Kong independence, ethnic enhancement”, “Hongkongers to build a state”.<sup>18</sup>

(7) *Inside Pacific Place, Admiralty on 15 October 2020*

17. On 11 October, the applicant published a number of posts on the said Facebook account and the said Telegram channel, appealing to the public to attend “梁凌杰悼念和你唱” (Mourning for Leung Ling Kit, singing with you) in Pacific Place, Admiralty on 15 October for the purpose of advocating the will of independence.

18. At around 6:37 to 6:44 pm on 15 October, the applicant appeared at Pacific Place, Admiralty. During that period of time, the applicant, when being interviewed by about fifteen reporters, said:

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<sup>18</sup> See prosecution exhibit P6.

(1) He demanded for Hong Kong independence. He wanted to prove to all Hong Kong people that expressing one's demand was exercising the freedom of speech, which would not break the law.

(2) The NSL was "child's play" and "mere ornament", which was in fact "not worthy of mention" under the Basic Law.

(3) Everyone who heard his appeal could participate in every assembly, street station and procession, so as to spread the message of Hong Kong independence among primary schools, secondary schools and universities, so that more people would talk about it.

(4) The purposes for which he initiated this activity was to avoid being "silenced by the regime" (政權滅聲), to express the demand for Hong Kong independence, and to influence more people before the arrival of the next "revolution of our times".

(5) His chanting of the slogan of "independence" would not lead to secession.

Afterwards, the applicant repeatedly chanted slogans such as "Liberate Hong Kong, revolution of our times", "Hong Kong independence, the only way out", "Hong Kong independence, ethnic enhancement", "With the last breath, resist till the end", "No rioters, only tyranny", "Disband the police

force”, and some people in the shopping mall responded and on-lookers were also attracted.<sup>19</sup>

19. Subsequently, the applicant was arrested by the police in Pacific Place, Admiralty for the offence of “seditious intention”. He remained silent under caution.

(8) *Outside Langham Place shopping mall, Mongkok on 17 October 2020*

20. On 17 October, the applicant was released on bail by the police. Close to 11 pm on the same day, he was interviewed by a number of reporters outside Langham Place shopping mall, Mongkok. The applicant repeatedly said that the NSL was in fact “mere ornament” and Hong Kong people had the freedom of speech to express the demand for Hong Kong independence. He also said that all the 610,000 people who had cast votes in the “pro-democracy primary election” had to advocate the will of independence with more effort, to gather more people to chant slogans together on the 8<sup>th</sup>, 15<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and 31<sup>st</sup> days of every month, and to discuss “Hong Kong independence” in primary schools, secondary schools and universities, so that more people would believe that Hong Kong independence was the only way out which was feasible; and to influence more people to stop work, stop classes and stop the markets when the next “revolution of our times” came.<sup>20</sup>

(9) *In YOHO MALL I, Yuen Long on 21 October 2020*

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<sup>19</sup> See prosecution exhibit P7.

<sup>20</sup> See prosecution exhibit P8.

21. On 19 October, the applicant published a number of posts on the said Facebook account and the said Telegram channel, appealing to the public to attend “Vindicating 721—Walking with you at yoho Yuen Long” for the purpose of advocating the will of independence.

22. At around 7 pm on 21 October, the applicant appeared at YOHO MALL I, Yuen Long, and was interviewed by about 15 to 20 reporters. He repeated what he had said in previous interviews and quoted what a political figure had said to explain that the “revolution of our times” was a revolution which could overthrow the Hong-Kong-communist regime and achieve Hong Kong independence; and “liberate Hong Kong” was to regain the sovereignty from the People’s Republic of China to establish a Republic of Hong Kong, and to have the Chief Executive elected by universal suffrage and powers returned to the people.

The applicant again appealed to the 610,000 people who had cast votes in the “pro-democracy primary election” that they, as members of the “Hong Kong ethnic group”, had to extend the influence on the national consciousness of more Hong Kong people. He said that a “revolution of our times” had to be started, which was something to look forward to, and work, classes and the markets were to stop. He again emphasised that Hong Kong independence was the only way out that was feasible, advocated overthrowing the government of the “Hong-Kong-communist regime” and building a Republic of Hong Kong. He also said that the “revolution of our times” had already started and preparation had to be made for combat. Immediately after the interview, the applicant loudly led surrounding citizens to chant slogans such as “Liberate Hong Kong, revolution of our times”, “Hong Kong independence, the only way out”,

“Ethnic enhancement, Hong Kong independence”, and other people in the shopping mall responded. A male standing next to the applicant joined in to lead the citizens to chant slogans such as “Liberate Hong Kong, revolution of our times”, “黑警死全家” (Black cops’ whole family die).<sup>21</sup>

23. Subsequently, the applicant was arrested by the police for the offence of “seditious intention” in YOHO MALL I, Yuen Long, and he remained silent under caution.

*(10) At Hollywood Plaza, Mongkok on 23 October 2020*

24. On 23 October, the applicant was released on bail by the police. Sometime after 8 pm on the same day, when being interviewed by about three reporters outside Hollywood Plaza, Mongkok, he again appealed to the public to gather and chant slogans together on the 8<sup>th</sup>, 15<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and 31<sup>st</sup> days of every month to advocate the will of independence, which was the only way to express true mourning and not hypocritical mourning. The applicant also said, “Why have I not been charged after doing so many things; it is because I have not committed any crime.”<sup>22</sup>

*(11) At IFC Mall, Central and outside the Central Government Offices on 27 October 2020*

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<sup>21</sup> See prosecution exhibit P9.

<sup>22</sup> See prosecution exhibit P10.

25. On 26 October, the applicant wrote on the said Telegram channel, appealing to the public to attend “lunch 哥和你買 iPhone” (Brother Lunch buying iPhone with you) at IFC Mall, Central on the following day, for the purpose of advocating the will of independence.

26. Around 1:45 pm on 27 October, in IFC Mall, Central, the applicant displayed (a) placard with a defiled bauhinia emblem and the printed words, “香港人要獨立建國！香港人要取回主導權！抵抗赤化，唯有獨立 香港人，建軍！建國！” (Hongkongers to independently build a state! Hongkongers to regain the dominating power! To resist communisation, independence is the only way. Hongkongers, build an army! Build a state!” There were about eight or nine reporters gathering news materials at the scene. In the evening on the same day, the applicant wrote on the said Facebook account, stating: “無論係『睇蘋果』定還是『舉標語』，我們嘅目的都是為了香港獨立，因為大家都是香港人，大家都是香港民族嘅一份子。這就是所謂嘅兄弟爬山，各自努力。” (No matter whether it is ‘reading Apple Daily’ or ‘holding banners’, Hong Kong independence is our purpose because we are all Hongkongers. We are all members of the Hong Kong ethnic group. This is so-called brothers climbing a mountain together and each making his own efforts.)<sup>23</sup>

27. At 3:30 to 4 pm on the same day, the applicant and another man appeared outside the Central Government Offices. When being interviewed by about two reporters, the applicant said that he had not been

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<sup>23</sup> See prosecution exhibit P11A.

charged by the police because he had not broken any law at all. He considered that discussing and advocating Hong Kong independence was not an act of incitement. He wanted to prove and let all Hong Kong people believe that “it is not against the law for us to do these things”. He wanted more people to discuss the topic of Hong Kong independence in primary schools, secondary schools and universities so as to extend the influence and to inculcate the idea of the next “revolution of our times”. He emphasised that the “610,000 Hongkongers”, as members of the “Hong Kong ethnic group”, needed to arouse the national consciousness of more Hong Kong people, making more people believe in Hong Kong independence, ethnic enhancement and the feasibility of Hong Kong independence.<sup>24</sup>

(12) *Outside St. John’s Building, Central on 28 October 2020*

28. On 28 October, the applicant wrote on the said Telegram channel, appealing to the public to attend the “被捕現場和你查詢” (Enquiring together with you at the scene of arrest) outside St. John’s Building at 3:30 pm and “和你聲援鍾翰林&交請願信” (Supporting Chung Hon Lam with you & submitting a petition) outside Central Police Station at 5:15 pm on the same day, for the purpose of advocating the will of independence.

29. Around 3:30 to 4:10 pm on the same day, the applicant and another man appeared outside St. John’s Building, Central. The applicant displayed a piece of paper with the printed words, “Ethnic enhancement,

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<sup>24</sup> See prosecution exhibit P11.

ONE Nation ONE Hong Kong, Hong Kong independence” and was interviewed by about three reporters. He said, “Sacrifices are needed for revolutions. The will of independence has to be advocated in primary schools, secondary schools and universities, to inculcate the idea of the next revolution of our times.”<sup>25</sup>

*(13) Outside Central Police Station on 28 October 2020*

30. Around 6 pm on that day, outside Central Police Station, the applicant displayed to about twelve reporters a piece of paper with the printed words, “Ethnic enhancement, ONE Nation ONE Hong Kong, Hong Kong independence” and repeatedly chanted, “宣揚香港獨立無罪，討論香港獨立無罪” (Advocating Hong Kong independence is no crime. Discussing Hong Kong independence is no crime) and “捍衛新聞自由，香港獨立唯一出路” (Safeguarding freedom of the press, Hong Kong independence, the only way out), and said that this approach was used to advocate Hong Kong independence.<sup>26</sup>

31. Subsequently, the applicant was arrested by the police for the offence of “seditious intention” outside Central Police Station and he remained silent under caution.

*(14) Outside Central Police Station on 30 October 2020*

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<sup>25</sup> See prosecution exhibit P12.

<sup>26</sup> See prosecution exhibit P13.

32. On 30 October, the applicant was released on bail by the police. At around 6 pm on the same day, the applicant was interviewed by about two reporters outside Central Police Station, and emphasised that he was “working on Hong Kong independence” and said,<sup>27</sup>

“Have to actively discuss the topic of Hong Kong independence to widely circulate the message of independence among schools; have to make more people believe that Hong Kong independence is the only way out which is feasible; have to take a leading role to arouse the national consciousness of Hongkongers.”

(15) *In Chater Garden, Central on 3 November 2020*

33. At 1:30 to 2:45 pm on 3 November, the applicant appeared at Chater Garden, Central to support a demonstration organised by other people. During that period of time, the applicant was holding paper with the printed words, “Ethnic enhancement, ONE Nation ONE Hong Kong, Hong Kong independence” and was also interviewed by about three reporters. He said that he wanted to prove that he had not contravened the NSL because the police did not charge him, and said that the NSL was in fact fake and he considered that advocating Hong Kong independence by itself was not an act of incitement. He wanted to prove this point to Hong Kong people again and again. He appealed to Hong Kong people to discuss “Hong Kong independence” in primary schools, secondary schools and universities, infiltrating it into campuses, and from there further into society, making every individual in Hong Kong believe that “Hong Kong independence” was feasible, and to get together on the 8<sup>th</sup>,

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<sup>27</sup> See prosecution exhibit P14.

15<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and 31<sup>st</sup> days of every month to hold up the flags of “Hong Kong independence”.<sup>28</sup>

34. Subsequently, outside Statue Square, Des Voeux Road Central, Central, the applicant was arrested by the police for the offence of “seditious intention”. When he was being taken onto the police vehicle, he was still chanting nonstop, “Advocating Hong Kong independence is no crime. Discussing Hong Kong independence is no crime.” The applicant remained silent under caution.

*(16) Outside Central Police Station on 5 November 2020*

35. On 5 November, the applicant was released on bail by the police. Sometime after 1 pm on the same day, he was interviewed by a reporter outside Central Police Station. The applicant repeated what he had said previously that the “revolution of our times” was a revolution that could overthrow the “Hong-Kong-communist regime” and achieve the revolution for Hong Kong’s independence; “liberate Hong Kong” meant Hong Kong regaining sovereignty from the People’s Republic of China and building a Republic of Hong Kong. “願榮光歸香港” (Glory to Hong Kong) was the anthem of the Republic of Hong Kong; the eight characters “光復香港 時代革命” (Liberate Hong Kong, revolution of our times) were very important, embedding the meaning of the independence of Hong Kong. He further said that activities had to be launched on the five days of every month, which was to become a tradition among people, and that the topic of “Hong Kong independence” had to be [circulated] among

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<sup>28</sup> See prosecution exhibit P15.

school campuses, and from there, further infiltrate into the community in every district.<sup>29</sup>

(17) *In New Town Plaza, Shatin on 14 November 2020*

36. On 14 November, the applicant published a number of posts on the said Telegram channel, appealing to the public to attend the “Perpetual activity—Singing with you at eighteen districts throughout Hong Kong on Saturday” in large shopping malls in 18 districts throughout Hong Kong (including New Town Plaza, Shatin) on the same day, for the purpose of “advocating Hong Kong independence, sowing the seeds of revolution among primary schools, secondary schools and universities to inculcate the idea of the next ‘revolution of our times’”.

37. In the evening, from 6:30 to sometime after 7 on the same day, the applicant appeared at New Town Plaza, Shatin and repeatedly chanted slogans such as “liberate Hong Kong, revolution of our times”, “Hong Kong independence, the only way out”, “ethnic enhancement, Hong Kong independence”, “Hongkongers to build a state”, “唱榮光” (Sing Glory), arousing responses from citizens at the scene. Subsequently, the applicant was interviewed by about seven reporters. He repeated his previous remarks, including that discussing the independence of Hong Kong would not break the law, and also said that both the “議會戰線” (battlefront of the Council) and “國際戰線” (international battlefront) had disappeared, leaving behind only “街頭戰線” (street battlefront), which

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<sup>29</sup> See prosecution exhibit P16.

needed more people to join and more seeds to be sown. The applicant stated explicitly that even if he was arrested, he would continue doing so.<sup>30</sup>

(18) *In YOHO MALL I, Yuen Long on 21 November 2020*

38. On 20 November, the applicant wrote on the said Telegram channel, appealing to the public to attend “Vindicating 721—Walking with you at yoho Yuen Long” at YOHO MALL I, Yuen Long on the following day.

39. Around 6:20 to 7:10 pm on 21 November, the applicant appeared at YOHO MALL I, Yuen Long and was interviewed by about eleven reporters. The applicant again repeated what he had said previously, saying that personal fame and gain, status and life had to be sacrificed so as to advocate the will of independence together and to influence more people. He also said that at present Hong Kong people were afraid of being arrested because they were hypocritical and selfish, and that “liberate Hong Kong” had to be done and the Hong Kong ethnic group had to be acknowledged.<sup>31</sup>

(19) *In PopCorn shopping mall, Tseung Kwan O on 22 November 2020*

40. On 21 November, the applicant wrote on the said Telegram channel, appealing to the public to attend “Mourning for Tsz Yin, singing with you” at PopCorn shopping mall, Tseung Kwan O on the following day.

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<sup>30</sup> See prosecution exhibit P17.

<sup>31</sup> See prosecution exhibit P18.

41. At some time after 6 pm on 22 November, the applicant appeared at PopCorn shopping mall, Tseung Kwan O, and was interviewed by about six reporters. He appealed to the public to gather on those five days of every month to advocate the will of independence. Subsequently, the applicant repeatedly chanted slogans such as “Hongkongers to build a state”, “Hong Kong independence”, “全民勇武 武裝起義” (All people be valiant, armed insurrection), “獨立建國 唯一出路” (Building an independent state, the only way out).<sup>32</sup>

42. Subsequently, the applicant was arrested by the police for the offence of “seditious intention” on the open-air podium outside the atrium on the first floor, PopCorn shopping mall, Tseung Kwan O, and he remained silent under caution.

A2. *Defence Case*

43. The applicant basically did not deny the prosecution case; he did not dispute the documentary and video recorded evidence, or cross-examine the two prosecution witnesses. He elected not to give evidence or to call any witness.

44. The defence put forward for the applicant through closing submissions was that he was only exercising his freedom of speech, and had no *mens rea* or *actus reus*; he did not put forward any substantive plan, idea or method of commission, nor did anyone respond to his message.

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<sup>32</sup> See prosecution exhibit P19.

A3. *Conviction*

45. The trial judge was satisfied that during the period in question, the applicant had overtly advocated the idea of Hong Kong independence at various public places, including shopping malls and the places outside the Government Headquarters and police stations, so as to incite others to commit secession. His inciting acts included the following.<sup>33</sup>

(1) [He] repeatedly shouted out and led other citizens to chant slogans such as “Hong Kong independence, the only way out”, “Hongkongers to build a nation”, “Liberate Hong Kong, revolution of our times”, “All people be valiant, armed insurrection” and “Ethnic enhancement, Hong Kong independence”, and showed paper printed with “Ethnic enhancement, ONE Nation ONE Hong Kong, Hong Kong independence” to the public many times.

(2) When being interviewed by journalists, [he] advocated the idea of “Hong Kong independence”, clearly indicated that Hong Kong independence was what he demanded; considered that the NSL was “mere ornament”; and appealed to the public to discuss the independence of Hong Kong, in particular among primary schools, secondary schools and universities, and to gather to chant slogans together to advocate the will of independence on the five “specific days” of each month so as

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<sup>33</sup> Reasons for verdict, see [2021] HKDC 1325.

to inculcate the idea of the next “revolution of our times”. He also explained that in the slogan “Liberate Hong Kong, revolution of our times”, “liberate Hong Kong” meant regaining the sovereignty of Hong Kong from the People’s Republic of China, and “revolution of our times” was a revolution which could realise the independence of Hong Kong, and he even appealed to the public to prepare for combat.

(3) Publishing posts to advocate the independence of Hong Kong on the said Facebook account and the said Telegram channel.<sup>34</sup>

46. The trial judge rejected the defence put forward for the applicant that he was exercising his freedom of speech at the material times and so on.

47. Therefore, the applicant was convicted as charged.

*A4. Sentence*

48. At the time of sentence, the applicant was aged 31, single and living with his parents and younger brother, but they did not have a close relationship. He had a clear record save and except two records for

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<sup>34</sup> Although the applicant did not admit, the trial judge found that the only reasonable inference to be drawn was that he was in fact the holder of the said Facebook account and the said Telegram channel.

contravening the Prevention and Control of Disease (Prohibition on Gathering) Regulation<sup>35</sup>.

49. The applicant had completed Form 5 education with poor academic results; his work performance was poor. He also described himself as “good at nothing, and having no self-motivation, no dream or plan for life”. According to the psychologist’s report, the applicant had led a lonely and boring life which was full of frustration and desperation. There was also a strong sense of inferiority due to having low achievement throughout his life and a restricted social life. He had good self-understanding but seriously lacked coping ability, so he resorted to imagining himself to be a competent and brave character in electronic games and Japanese anime, so as to escape from the chronic dissatisfaction he felt in real life. He admitted that calling upon people to go out to the street to protest and chant slogans could in some way satisfy his need for in-group connectedness and social recognition, giving him a more purposeful lifestyle and developing a more fulfilling personal identity.

50. The applicant had not joined any political organisation. He wrote in his letter for mitigation that he “began to take part in procession only in April 2020 out of curiosity upon watching news reports.” It was submitted for the applicant that it was only after being motivated by the speech of some political figures that he got the feeling of finding his “dream” and “being charged with important tasks” for Hong Kong. The applicant explicitly indicated that he himself must put advocating the idea of “Hong Kong independence” into action to set an example, and he wrote,

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<sup>35</sup> Cap 599G of the Laws of Hong Kong.

“All people be valiant and armed insurrection is not an empty slogan but our vision”; although he committed offences, he “feels no shame and remorse”; and “from now on... will do my very best and make every effort in my life to work for the dream which I believe in”.

51. It was also submitted for the applicant that his acts in question involved neither violence nor actual threats endangering others’ safety, and the court had to take into account that the inciting effect caused by what the applicant had said and done was limited. The defence also submitted that the present case was less serious than *HKSAR v Tong Ying Kit* [2021] HKCFI 2239 because the applicant had not committed the offence on any special date, and he had not used any violence or overtly charged at any law enforcement officer. Therefore, it was asserted that the present case was not one that fell within the category of “serious nature” under Article 21 of the NSL.

52. Finally, the court was invited to consider that the defence had agreed with most of the prosecution case without substantive dispute on the evidence, which saved the court’s time.

53. The trial judge concluded that the present case was of a serious nature on the following grounds:<sup>36</sup>

- “(1) The defendant feels no remorse at all. He also states explicitly in his letter for mitigation that ‘he feels no shame and no remorse for what he has done’. There is also no mention in the clinical psychologist’s report that the defendant has the slightest regret and self-reflection.

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<sup>36</sup> Reasons for Sentence, see [2021] HKDC 1406; the text below is an extract from para 14;

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- (2) Within a short period, the defendant again and again incited others to commit secession and to regain the sovereignty of Hong Kong from the People's Republic of China, and he even thought about the so-called national anthem of Hong Kong. He also talked about taking relevant steps to advocate the idea of secession gradually, which was to start at primary schools, secondary schools and universities, and from there promote to and infiltrate into various levels of the Hong Kong community so as to instigate the next revolution. The defendant has been incited by others to participate in political activities, and now he in turn exacerbates the matter as an inciter.
- (3) The defendant blatantly shouted slogans at public places, held up printed banners from time to time, and sometimes also wore a top bearing political slogans. He also participated in activities with other people occasionally. He did promotion work in advance for some activities on his Facebook [account] or Telegram channel, and he would also appear at the specified place at the appropriate time.
- (4) To a certain extent, such inciting acts of the defendant were done only to satisfy his need for self-gratification and 'sense of existence', to attract others' attention and strive for publicity and exposure. However, what he said and did would very likely cause those incited but not well informed to further incite others or perform even more radical actions. The defence has said that the defendant found his dream only because of being motivated by what some political figures had said. It was exactly in such a context that it would be hard to eliminate the possibility that the defendant's acts would cause those incited to turn into another Ma Chun Man, i.e. the defendant. I do not agree with the defence that the defendant 'acted alone and there were rarely any passers-by who stopped to listen to his rather repetitive and unattractive words' (see para 5 of the defence's submissions). I strongly believe, from the defendant's facial expression, what he said and did, his tone of speaking and the content of what was said as shown in the footage, that was not what the defendant thought. I agree with the defence in that the defendant 'was not necessarily able to understand the complicated causes and effects behind the social events'... but he still persisted in inciting others.
- (5) Apart from promoting and propagating the idea of Hong Kong independence, the defendant also did a lot to undermine the NSL, thinking that the NSL was fake, mere ornament and powerless. He also misled others by

telling them the fallacy that he could still get bail despite having been arrested several times, so as to ‘support’ his claim of not having broken any law. With such fallacy, some people might really think that there was no problem and hence proceed to break the law themselves. Similar to what happened recently, some people told others to cast blank votes in elections, and some really did so, thereby breaking the law.

(6) Article 20 of the NSL expressly provides that one may be guilty of the offence of secession ‘whether or not by force’. Whether or not the defendant used force, contravened lawful instructions given by law enforcement officers or charged at law enforcement officers, and whether the political stance proposed by the defendant succeeded or gained support of others were all not crucial. What is important is that the defendant did have the *mens rea* and *actus reus* to incite others to commit secession. The defendant did not act impulsively but was well prepared, and he deliberately pronounced his proposition loudly. He even claimed to be ‘the second-generation Captain America’ – his pride could not be clearer.”

54. As such, the trial judge adopted a starting point of 6 years. Since the time of the trial was considerably saved by the way the defence was conducted, the judge exercised his discretion and reduced the sentence by 3 months and finally sentenced the applicant to imprisonment for 5 years and 9 months.

*B. Grounds of appeal*

55. The applicant applied to the Court of Appeal for leave to appeal on the sole basis that having considered the charge, the seriousness of the facts and the applicant’s overall culpability in the present case, the trial judge erred in finding the present case to be within the category of “serious nature”, resulting in the sentence being wrong in principle and/or manifestly excessive, as the trial judge:

- (1) erred in regarding whether the applicant was remorseful as a factor in considering whether his case was of a “serious nature”;
- (2) overemphasised the inciting effect caused by the applicant’s acts;
- (3) failed to sufficiently consider that the applicant had used no force, and had not defied or charged at any law enforcement officer when committing the offence; and
- (4) failed to sufficiently consider that the applicant’s acts did not involve any detailed plan of secession and that the inciting effect was limited.

56. At the hearing, Mr Edwin Choy, SC submitted for the applicant that even if the present case fell within the category of “serious nature”, the sentence of imprisonment for five years and nine months was still manifestly excessive in light of points (2) to (4) of the grounds of appeal above.

*C. Laws applicable to sentencing offences under the NSL*

57. The NSL is a piece of national law applied in the Hong Kong Special Administrative Region. Article 40 provides that the Hong Kong Special Administrative Region shall have jurisdiction over cases concerning offences under the NSL, except under the circumstances

specified in Article 55. In the sentencing of an offence under the NSL within the jurisdiction of the Hong Kong court, the prime question is the applicable law. This issue may be addressed from two perspectives: first, the legislative intent of the NSL, and second, the purpose of the relevant penal provision.

*C1. The legislative intention of the NSL*

58. Section B in *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33 has set out in detail the background and purpose of the enactment of the NSL and its implementation in Hong Kong, which involve the Explanations on Draft Decision presented to the National People’s Congress (“NPC”) on 22 May 2020, the NPC’s Decision on 28 May 2020, the Draft of NSL, and the Explanations on the Draft presented to the NPC Standing Committee (“NPCSC”) on 18 June 2020. The Court of Final Appeal has summarised the relevant legislative materials of the NPC and the NPCSC as follows:<sup>37</sup>

- (1) Despite the passage of 23 years since the establishment of the Hong Kong Special Administrative Region, the SAR Government had yet to discharge its constitutional duty under Article 23 of the Basic Law to enact legislation to safeguard national security. The national security risks in the Hong Kong Special Administrative Region had become increasingly notable; in particular, the “legislative amendment turmoil” happened in 2019 in Hong Kong, and the

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<sup>37</sup> Paras 10 to 18 in the judgment.

acts and activities involved significantly challenged the bottom line of the principle of One Country, Two Systems, and gravely undermined the rule of law, and seriously jeopardised national sovereignty, security and development interests. The Central Government therefore decided that steps were to be taken at the national level to establish and improve the legal system and enforcement mechanisms for the Hong Kong Special Administrative Region to safeguard national security, and to change the long-term defenceless condition in the area of national security.

(2) There are five basic principles underlying the decision of the Central Government:

- (a) resolutely safeguarding national security;
- (b) upholding and enhancing the One Country, Two Systems regime;
- (c) adhering to administering Hong Kong in accordance with the law and resolutely upholding the constitutional order as established by the Constitution and the Basic Law;
- (d) resolutely opposing external interference; and
- (e) fully safeguarding the legitimate rights and interests of Hong Kong residents.

(3) The drafting work of the NSL has reflected several working principles, including focusing on improving the relevant

systems in the SAR Government, addressing institutional deficiencies and shortcomings, assigning responsibilities and coordinating institutional arrangements in relation to safeguarding national security, accommodating the differences between the two places, and striving to address the convergence, compatibility and complementarity between the NSL, and the relevant national laws and local laws of the Hong Kong Special Administrative Region.

59. Subsequently, the Court of Final Appeal mentioned<sup>38</sup> that on 6 July 2020, the NPCSC Chairman said in his speech addressed to the NPCSC upon the approval of the NSL that in upholding the policy of “One Country, Two Systems”, the Law had full regard to the differences between the two systems as well as the actual situation in Hong Kong, and it converged with the national law on safeguarding national security and was compatible with the existing legal system in Hong Kong.

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<sup>38</sup> Para 21 of the judgment.

60. After considering the legislative background and the provisions under Articles 1<sup>39</sup>, 3<sup>40</sup>, 4<sup>41</sup> and 5<sup>42</sup> of the NSL, the Court of Final Appeal stressed the following:

“29. While it is evident that the legislative intention is for the NSL to operate in tandem with the laws of the HKSAR, seeking ‘convergence, compatibility and complementarity’ with local laws, NSL 62 provides for possible inconsistencies, giving priority to NSL provisions in such cases:

<sup>39</sup> Article 1 provides: “This Law is enacted, in accordance with the Constitution of the People’s Republic of China, the Basic law of the Hong Kong Special Administrative region of the People’s Republic of China, and the Decision of the National People’s Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security in the Hong Kong Special Administrative Region, for the purpose of ensuring the resolute, full and faithful implementation of the policy of One Country, Two Systems under which the people of Hong Kong administer Hong Kong with a high degree of autonomy; safeguarding nation security; preventing, suppressing and imposing punishment for the offences of secession, subversion, organisation and perpetration of terrorist activities, and collusion with a foreign country or with external elements to endanger national security in relation to the Hong Kong Special Administrative Region; maintaining prosperity and stability of the Hong Kong Special Administrative Region; and protecting the lawful rights and interests of the residents of the Hong Kong Special Administration Region.”

<sup>40</sup> Article 3 provides: “The Central People’s Government has an overarching responsibility for national security affairs relating to the Hong Kong Special Administrative Region.

It is the duty of the Hong Kong Special Administrative Region under the Constitution to safeguard national security and the Region shall perform the duty accordingly.

The executive authorities, legislature and judiciary of the Region shall effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with this Law and other relevant laws.”

<sup>41</sup> Article 4 provides: “Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law.”

<sup>42</sup> Article 5 provides: “The principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security. A person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law. No one shall be convicted and punished for an act which does not constitute an offence under the law.

A person is presumed innocent until convicted by a judicial body. The right to defend himself or herself and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings.”

‘This Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law.’”

61. The Court of Final Appeal elucidated the legislative intention of the NSL, saying that it provided a guiding principle as to how the NSL and the local laws in Hong Kong were to be applied to certain issues involving the NSL. Such guiding principle is applicable to matters including criminal procedures<sup>43</sup> and bail<sup>44</sup>, as well as the sentencing of offences under the NSL. As analysed below, the penal provisions under the NSL have also reflected this principle regarding applicable laws.

*C2. Purposes of relevant penal provisions*

62. Parts 1 to 4 in Chapter III of the NSL have respectively laid down the four types of offences, namely secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security,<sup>45</sup> and provided for the corresponding punishments. In short, these provisions have provided for punishments in several levels, ranging from more to less serious, with reference to sentencing factors such as the actual criminal acts, the role of the offender, the actual consequence resulting from the offence concerned, and the seriousness of the circumstances under which the offence was committed. With the exception of the provisions on minimum terms, these penal measures are generally consistent with the sentencing principles and considerations of the Hong Kong courts.

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<sup>43</sup> Articles 41 and 45 of the NSL are to be read together.

<sup>44</sup> Article 42 of the NSL; see the judgment of the Court of Final Appeal in *Lai Chee Ying*, at para 42.

<sup>45</sup> See Articles 20 and 21; 22 and 23; 24 to 28 and 29 and 30 respectively.

63. It is laid down in Part 5, Chapter III of the NSL other penal provisions, among which Article 33 sets out various circumstances under which a lighter penalty may be imposed, or in which the penalty may be reduced or even exempted:

“A lighter penalty may be imposed, or the penalty may be reduced or, in the case of a minor offence, exempted, if an offender, criminal suspect, or defendant:

(1) in the process of committing an offence, voluntarily discontinues the commission of the offence or voluntarily and effectively forestalls its consequences;

(2) voluntarily surrenders himself or herself and gives a truthful account of the offence;

(3) reports on the offence committed by other person, which is verified to be true, or provides material information which assists in solving other criminal case.

(4) Sub-paragraph (2) of the preceding paragraph shall apply to a criminal suspect or defendant who is subjected to mandatory measures and provides a truthful account of other offences committed by him or her under this Law which are unknown to the law enforcement or judicial authorities.”

These circumstances are also the sentencing factors which are generally taken into account by the Hong Kong courts.

64. In addition, Article 64 of the NSL provides that when the NSL is applied in the Hong Kong Special Administrative Region, the various penalties provided for in the NSL means the corresponding penalties in the relevant local laws or the corresponding penalties by construction with reference to the relevant local laws:

“In the application of this Law in the Hong Kong Special Administrative Region, the terms ‘fixed-term imprisonment’,

‘life imprisonment’, ‘confiscation of property’ and ‘criminal fine’ in this Law respectively mean ‘imprisonment’, ‘imprisonment for life’, ‘confiscation of proceeds of crime’ and ‘fine’; ‘short-term detention’ shall be construed, with reference to the relevant laws of the Region, as ‘imprisonment’, ‘detention in a detention centre’ or ‘detention in a training centre’; ‘restriction’ shall be construed, with reference to the relevant laws of the Region, as ‘community service’ or ‘detention in a reformatory school’; and ‘revoke licence or business permit’ means ‘revoke registration or exemption from registration, or revoke licence’ as provided for in the relevant laws of the Region.”

The penalties under the NSL can thereby converge with the corresponding penalties under local laws.

65. The above provisions on penalties reflect the legislative intent of the NSL. Although the purpose of these provisions is not stated explicitly, it can be clearly seen. Within the framework formulated by the penal provisions under the NSL, the Hong Kong courts may apply local laws in sentencing offences under the NSL except under the circumstances stated in Article 62 of the NSL.

### *C3. Conclusion*

66. Based on the above discussion as a whole, it is the conclusion of this Court that when the Hong Kong courts impose sentences in NSL cases, the relevant provisions must be complied with and within the framework formulated by these penal provisions, unless otherwise provided for by the NSL, the corpus of the law on sentencing which have all along been used in the Hong Kong Special Administrative Region are applicable. In case of any inconsistency, the corresponding NSL provisions shall be applied pursuant to Article 62 of the NSL.

D. *How to classify cases as of a “serious nature” or “minor nature”*

67. Cases are categorised into being of a “serious nature” or of a “minor nature” with respect to the penalties laid down under Article 21 of the NSL, but the NSL does not contain any provision on how cases are to be classified into these two categories. Since it is the legislative intent of the NSL to converge and be complementary with the local laws, and the NSL does not provide otherwise, pursuant to the principle in paragraph 66 above, when the Hong Kong courts deal with this issue, the local legal principles on sentencing are applicable.

D1. *Gravamen of the offence of “secession”*

68. It is an established sentencing principle that the court generally takes the gravamen of the offence as the most fundamental consideration.

69. Upholding national unity and territorial integrity is an important theme underlying the resumption of the sovereignty of Hong Kong by the People’s Republic of China: see the second paragraph of the Preamble of the Basic Law; *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 266, at para 319; and *HKSAR v Ng Kung Siu and Another* (1999) 2 HKCFAR 469, at p 483F-G. For this reason, the Basic Law states right at the outset, in Article 1, that the Hong Kong Special Administrative Region is an inalienable part of the People’s Republic of China. Article 12 explains that the Hong Kong Special Administrative Region shall be a local administrative region

of the People’s Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People’s Government. These two Articles have laid the foundation of the constitutional system and the legal status of the HKSAR under the initiative of “One Country, Two Systems”. As Article 2 of the NSL emphasises, these two Articles are fundamental provisions in the Basic Law.

70. The NSL aims at safeguarding national security, preventing, suppressing and imposing punishment for acts endangering national security: see Articles 1, 3(3), 8<sup>46</sup> and 42(1);<sup>47</sup> and *Lai Chee Ying*, at para 62.

71. Article 20 of the NSL provides as follows:

“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

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<sup>46</sup> Article 8 provides: “In order to safeguard national security effectively, the law enforcement and judicial authorities of the Hong Kong Special Administrative Region shall fully enforce this Law and the laws in force in the Region concerning the prevention of, suppression of, and imposition of punishment for acts and activities endangering national security.”

<sup>47</sup> Article 42(1) provides: “When applying the laws in force in the Hong Kong Special Administrative Region concerning matters such as the detention and time limit for trial, the law enforcement and judicial authorities of the Region shall ensure that cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offence.”

(3) surrendering the Hong Kong Special Administrative Region or any other part of the People’s Republic of China to a foreign country.

...”

Article 21 of the NSL states as follows:

“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. ...”

Regardless of whether it is the offence of “secession” or “subversion”, both provisions are of utmost importance in upholding national unity and territorial integrity, as well as the foundation of the constitutional system and the legal status of the Hong Kong Special Administrative Region as an inalienable part of the People’s Republic of China under the “One Country, Two Systems” initiative.

72. The offence of “incitement to secession” under Article 21 of the NSL is a pre-emptive offence. “Incitement” (煽動) literally means instigation and prompt with encouragement, see 《現代漢語詞典》 (the name of a Chinese dictionary), 7<sup>th</sup> ed., p 1138; and 《現代漢語規範詞典》 (the name of a Chinese dictionary), 3<sup>rd</sup> ed., p 1144.<sup>48</sup> Under the local law, the nature of “incitement” (煽動) is similar to that of the common law offence of “incitement” (煽惑).<sup>49</sup> In *Secretary for Justice v*

<sup>48</sup> In the unofficial English translation of the NSL, “煽動” is translated as “incite”.

<sup>49</sup> “煽惑” is “Incitement” in English, see s 101I(2)(c), Criminal Procedures Ordinance, Cap 221, Laws of Hong Kong.

*Poon Yung Wai* [2021] HKCA 510, this Court briefly described the gravamen of the (common law) offence of “incitement” as follows:

“33. Inciting others to commit an offence is a common law offence and one of the inchoate offences. Put simply, a person is guilty of incitement if he persuades or encourages another to commit an act which would constitute a crime if done by the other: *R v Curr* [1968] 2 QB 944. The offence of incitement was created to prevent the commission of crimes and therefore it is sufficient to constitute incitement even if the crime is not carried out or attempted: *R v Higgins* (1801) 2 East 5.

34. The gravamen of the offence of incitement is to:

- (1) stop people from persuading or encouraging others to commit crime, even if no one so persuaded or encouraged carried out the crime; and
- (2) allow intervention of the law at the earliest possible time to stop a person who has been incited from carrying out the relevant crime.”

73. Since its nature is similar to that of the (common law) offence of “incitement”, the gravamen of the offence of “incitement to secession” under Article 21 of the NSL may be expressed as follows:

- (1) stop people from inciting (including by way of persuading or encouraging) others to commit the offence of secession, even if no one so incited carried out the crime; and
- (2) allow intervention of the law at the earliest possible stage to stop a person who has been incited from carrying out the offence of secession.

Its purpose is to sufficiently safeguard national security and territorial integrity, and important public interests such as the foundation of the constitutional system of the Hong Kong Special Administrative Region and its legal status, to ensure that the offence of secession could be nipped in the bud by timely and effective suppression and punishment.

*D2. Usual considerations*

74. Whether the circumstances of a case of “incitement to secession” are “serious” or “minor” depends on the overall actual circumstances of the case. Due to their similar nature, the court may draw on the general principles established in the precedents of the (common law) offence of “incitement”, for example, *Poon Yung Wai*, at para 45; *Divin and McGinlay v HM Advocate* [2013] JC 259, at para 20; and *Secretary for Justice v Law Man Chung* [2020] 4 HKLRD 941, at para 34, to ascertain whether the circumstances of the case are “serious” or “minor”.

75. Taking into account the gravamen of the charge of “incitement to secession” and applying the above cases and the relevant principles, when the court assesses the seriousness of the circumstances of the case, the prime focus is on the offender’s acts, as well as the actual consequences, potential risks and possible influence entailed. In this regard, the factors which the court needs to consider include but are not limited to the following:

- (1) the context in which the offence was committed, including the date, time, location, occasion and society’s atmosphere at the material time and so on;

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- (2) the *modus operandi*, including the ways, acts, wording, media or platform adopted;
- (3) the number of times and the duration of the incitement, and whether the acts were persistent;
- (4) the scale of the incitement;
- (5) whether the matter happened suddenly or was premeditated; if it was the latter, the scale and precision of the premeditation;
- (6) whether violence or threat of violence was involved; if so, the urgency and seriousness of the relevant violence or threat;
- (7) whether other people were involved in committing the crime together;
- (8) the group the incitement targeted, the size of the group and the potential influence on them;
- (9) whether or not the incitement actually succeeded and resulted in someone committing the offence of secession or any other offence, or the risk and imminence that such offences would happen;
- (10) the actual or potential influence that the offender had on society or a certain sector or area.

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76. All in all, the court is required to carefully consider the circumstances of the case as a whole, identify the existence of individual factors, accord appropriate weight and assess the case as a whole in order to determine whether the circumstances of the case are “serious” or “minor”. After that, the court has to apply general sentencing principles to determine the offender’s specific culpability and decide on an appropriate sentence.

*E. Whether the present case was of a “serious nature”*

77. After careful consideration, this Court finds that the present case falls within the category of “serious nature” under Article 21 of the NSL.

78. First, since the implementation of the NSL on 30 June 2020, although the violent and illegal acts which followed the “legislative amendment turmoil” had been effectively suppressed and the overall atmosphere in Hong Kong had gradually been alleviated by the time of the offence, it was not as Mr Choy had suggested that the applicant’s acts had not seriously aggravated the risks of endangering national security and undermining public peace. As a matter of fact, during the period of the offence, in September and October 2020, there were still unlawful assemblies involving violence in Kowloon and on Hong Kong Island. Although they were smaller in scale and less serious than those that happened before, the community was still subject to attacks of violence. It was notable that Hong Kong was still facing a high risk of endangerment to national security and the rule of law. Under such circumstances, the

applicant still persisted in perpetuating the offence, which no doubt seriously aggravated the risk of undermining national security and the rule of law.

79. Second, the applicant had on many occasions overtly derided the NSL as “fake”, “child’s play” and “mere ornament”, and even described it as “not worthy of mention”. He stressed many times to the public that advocating “Hong Kong independence” was not unlawful, and he took the police bail given to him repeatedly as an example. The applicant’s acts not only created a serious challenge to the authority of the NSL, the foundation of the constitutional system and the rule of law in Hong Kong, but also were specious and confused the public, inducing others to wrongly believe that the behaviour related to “Hong Kong independence” was, as he said, not unlawful, which increased the risk of others committing secession.

80. Mr Choy submitted that since the applicant then had no knowledge about the NSL, he wrongly believed that merely shouting out slogans with no actual action did not overstep the boundary of the NSL, which was the only reason why he said that the NSL was “fake”. Mr Choy submitted that the applicant wrongly thought he was exercising the freedom of speech conferred to him by law, and he had no intention to challenge or shake the foundation of the legal system of Hong Kong.

81. Since the applicant did not give evidence at the trial, there was no evidence to support Mr Choy’s submissions. In fact, the above submission was rejected by the trial judge:

“50. In my view, by such explanation the defendant was just trying to justify himself and disregarding the facts.... The defendant repeatedly said that he was exercising his freedom of speech pursuant to the Basic Law. He on his own construed the law ‘in his own way’. His claim of having not breached any law does not mean that he has not breached the law or has understood the law correctly. The defendant said that he had been arrested and allowed bail afterwards repeatedly, and by this he could ‘prove to others’ that he had not breached the law and was only exercising his civil right. He was bragging about himself. Actually, I do not understand why the defendant had to breach the law in order to prove something.”

Since this is one of the findings of facts on which the trial judge found the applicant guilty, Mr Choy, in trying to play down his culpability, submitted that the applicant had committed the offence just because of being ignorant or having the misconception that it was an exercise of freedom of speech. This submission cannot stand.

82. In any event, Mr Choy’s submissions and what the defendant himself said contradict each other. In the letter for mitigation written by the applicant himself, he never said that he had committed the offence because of being ignorant of the law or having the misconception that he was exercising his freedom of speech. On the contrary, he emphasised that “all people be valiant and armed insurrection is not an empty slogan but our vision”; and he even said he “feels no shame and remorse for what he has done”; and “has to do his very best and make every effort in his life to persist in working for his belief”. In other words, the applicant was determined to commit the offence. To say that he did so because of being ignorant and being misconceived that he was exercising his freedom of speech has no merit at all and is not consistent with the facts.

83. Third, the applicant's *modus operandi* was aimed at enhancing the effect of his incitement on others to secession:

- (1) The community was astonished by the violent attack which happened in Yuen Long on 21 July 2019. During the period of the "legislative amendment turmoil", three Hong Kong persons unfortunately died; they were Leung Ling Kit Marco, Chow Tsz Lok Alex and Chan Yin Lam. Chow and Chan were students. Their deaths aroused great concern. The 15<sup>th</sup> day of each month and Pacific Place at Admiralty were related to Leung's death; the 8<sup>th</sup> day and Tseung Kwan O were related to Chow's death; and the 22<sup>nd</sup> day and Tseung Kwan O were related to Chan's death. During the period in question, the 8<sup>th</sup>, 15<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> days of each calendar month were relatively sensitive dates. The applicant appealed to the public to join the "Vindicate 721—Walk with you at yoho Yuen Long" which would take place at YOHO MALL I in Yuen Long on 21 September, 21 October and 21 November. On 15 August, the applicant mourned for Leung at Pacific Place and also initiated an activity to mourn for Leung at Pacific Place on 15 October and appealed to the public to join. Also, the applicant initiated an activity and appealed to the public to join to mourn for Chow and Chan at PopCorn in Tseung Kwan O on 22 September, 8 October and 22 November. He perpetrated the offence right on the spot on those dates. The applicant picked those specific dates and locations to commit the offence for the obvious purpose of attracting more public participation or attention and

attempting to enhance the effect of incitement by playing on others' emotions.

(2) The applicant chose to perpetrate the offence at various large shopping malls on Hong Kong Island, Kowloon and the New Territories for the obvious reasons that shopping malls had a large flow of people, making it easier to attract people's participation or on-lookers, and thus enhancing the effect of incitement.

(3) The applicant was interviewed by the media on many public occasions and gave remarks which incited secession. He certainly knew that after being reported by the media, with some footage of interviews being even uploaded onto the internet,<sup>50</sup> his inciting remarks would naturally reach more people.

(4) The applicant did not only initiate activities by making use of the internet, but also advocated his message of "Hong Kong independence" by using the internet. In fact, he explicitly stated that the said Telegram channel was set up to encourage more Hong Kong people to protest, to "trample the bottom line of the law". With the broad reach of the internet, abusive use of social media to incite others to commit crime makes the offenders more culpable: *Secretary for Justice v Yu Ka Kui* [2020] HKCA 1019, at para 28, see *HKSAR v Chan*

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<sup>50</sup> See the evidence of the relevant video clips.

*Yau Hei* (2014) 17 HKCFAR 110, at para 89; and *R v Blackshaw* [2012] 1 WLR 1126, at para 73.

- (5) Within the period from August to November 2020, the applicant persistently committed the offence at different public places and also propagated the idea of “Hong Kong independence” on the internet. There were many persistent incitements over a long period.

The applicant’s *modus operandi* had undoubtedly increased the risk that others would commit the offence of “secession” as a result of his incitement.

84. Mr Choy asserted that the objective effect of the applicant’s inciting acts was limited because of the following reasons:

- (1) The applicant did not commit the offence on any iconic date.
- (2) As pointed out by the trial judge, the applicant “acted alone and there were rarely any passers-by who stopped to listen to his rather repetitive” speech. It could also be seen from the prosecution’s video footage produced to the court that the applicant had no follower. No matter how loud he shouted out slogans, the public nearby rarely responded, and people at the scene were neither agitated to an uproar nor committed other offences as a result. The trial judge’s observations regarding the applicant’s facial expression, what he said and did, his tone of speech, content of what was said and so on,

at most only showed the applicant to be unrepentant then, but had nothing to do with the consequence which resulted from his inciting acts. The number of on-lookers who gathered around at the scene was limited. When the applicant was giving his speech, he did not cover his head or face, or take the opportunity of any sudden uproar of the crowd to begin to perpetrate the offence, or give emotional support to those inclined to commit crimes at the scene, and no vigorous physical contact or ripple effect resulted. The trial judge said that the applicant just “insisted on acting in his own way” and agreed that there was no evidence in the case showing that anybody had been directly or indirectly incited by him to do anything illegal.

(3) Although the applicant’s illegal acts lasted for a relatively long time span, obviously he was not famous personally, and he was always alone when the offence was being committed. What he said and did failed to draw the attention of mainstream media, and there was no evidence that he was associated with any organisation.

(4) Although the applicant had used the said Facebook account and the said Telegram channel to perpetrate the offence, no one showed any interest, and no one answered his appeal to join the activities in question. Therefore, the influence was extremely limited.

85. This Court does not accept these views due to the following reasons:

(1) As stated above, the applicant did commit the offence on sensitive dates and locations which posed a relatively higher risk.

(2) Most of Mr Choy's submissions were confined to the dissemination of inciting remarks by the applicant during public occasions, but this was only one of the ways by which he had committed the offence. The court must also consider his other inciting acts and the circumstances of the case as a whole to assess the effect and risk resulting from his criminal acts.

(3) The relevant cases are a strong rebuttal to Mr Choy's submissions regarding the applicant's use of the internet to commit the offence: see para 83(4) above.

(4) Mr Choy has ignored the pre-emptive nature in the gravamen of the offence of incitement. As the High Court of Justiciary of Scotland pointed out in *Divin* at para 20, the defendant and others incited other people to riot in Scotland, and even though the riot did not spread to Scotland, and irrespective of the words used by the defendant and others or the reaction of the public, their culpability remained considerably serious. The same reasoning is applicable to the present case: see *Poon Yung Wai*, at para 45(1); therefore, Mr Choy's submissions on

points (3) and (4) above do not really assist the applicant. Conversely, if the applicant was a famous person or his remarks inciting others to commit secession had attracted many people's concerns, or many people had joined the related activities in response to his appeal, his culpability would have been more serious.

86. Fourth, at the time of the offence, Hong Kong was still facing the risk of violent confrontations. The applicant picked the 8<sup>th</sup>, 15<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> days of each month, which were dates of relatively high risk, to call for the public to join the activities initiated by him at the relevant locations for mourning and so on, and then he perpetrated the offence on the spot, which undoubtedly increased the risks of his activities turning into violent outbreaks against public order.

87. Fifth, the applicant perpetrated the crime with premeditation. On many occasions, he had in advance appealed on the said Facebook account and the said Telegram channel to the public to participate in his activities before perpetrating crime at the specified time and place. There were several occasions when he even brought along some pre-made propaganda material and displayed them at the scene.

88. Sixth, the object of the applicant's incitement included the public, and he in particular targeted the 610,000 residents who had voted in the "pro-democracy primary election". He even called upon primary schools, secondary schools and universities to advocate the idea of "Hong Kong independence" to their students. He targeted young students as the recipient group of his incitement, which was extremely irresponsible and

aggravated his culpability: See *Secretary for Justice v Wong Chi Fung and others* [2018] 2 HKLRD 657, at paras 11 and 163.

89. Mr Choy submitted that the applicant only appealed to schools to canvass and discuss the topic of “Hong Kong independence” without targeting young people or inciting them to break the law. However, the fact is that the applicant had repeatedly called upon the “discussion” on Hong Kong independence on campuses for the purpose of advocating the “will of independence”, “so that more people believe Hong Kong independence is the only way out”, “sowing the seeds of ‘independence’ and ‘revolution’ on campus”, so as to “inculcate the idea of the next ‘revolution of our times’”. It is apparent that the applicant intended to target students as the recipient group, inciting them to commit secession.

90. Seventh, the applicant incited others to convey the message of secession through multiple means; for example, he told people to advocate “Hong Kong independence” by way of “procession” etc on those specific days of each month, and even wanted to turn such activities into a local tradition. He also enticed people to start from campuses and from there infiltrate into society. He also told people to stop work, stop classes and stop the markets so as to inculcate the idea of the arrival of “revolution of our times”.

91. Mr Choy contended that the slogans and acts in question did not involve any detailed plan of secession. The applicant’s so-called appeal to start from primary schools, secondary schools and universities, and the so-called stoppage of work, classes and the markets were merely slogans. There was no timetable or step for implementation, no proposed

route for achieving the objective, no proposition on the coordination or allocation of resources, and even no mention of who were to organise, plan or execute the content of the slogans. Therefore, it could not be said to be a “detailed plan”.

92. In the view of this Court, although the content of the applicant’s incitement did not involve detailed or meticulous planning, it was not totally haphazard. There were certain steps and levels, and the potential risk of someone being incited to perpetrate crimes in the way mentioned by him cannot be ruled out.

93. Eighth, the applicant had been arrested for incitement repeatedly, but once he was released on bail, he was immediately interviewed by the press and repeated the incitement to secession to others. It may be described as a total disregard for the law, which also makes him more culpable: see *HKSAR v Wong Yun Fat* [2017] 4 HKLRD 59, at paras 45 to 48. Mr Choy submitted that the applicant had again and again perpetrated crimes while on bail only because of his ignorance of the NSL. However, as stated in paras 81 and 82 above, this proposition cannot stand.

94. Mr Choy agreed that according to Article 20 of the NSL, whether or not the applicant had incited others to use force, or incited others to resist the lawful directions given by law enforcement officers or to charge at them was not relevant to the applicant’s conviction. However, he suggested that in considering the seriousness of the circumstances in the present case, the court must consider the above factors before it could come to an appropriate sentence. He further pointed out that the applicant was unlike the defendant in *Tong Ying Kit* who had advocated the idea of “Hong

Kong independence” at the scene of a protest where emotions ran high; moreover, the applicant had never, as what the defendant in that case had done, used force to pronounce his demands. The applicant had been intercepted for investigation and arrested by the police several times; he was very cooperative and did not say anything hostile nor challenge the authority of the police.

95. This Court is of the view that whether the absence of force or threat of force by an offender would make the circumstances less serious would depend on the actual situation of the case. Although the applicant did not use force or threat of force in the present case, he had repeatedly used slogans such as “army building” and “armed insurrection” overtly. Having considered the circumstances as a whole, the mere absence of force or threat of force did not make the circumstances less serious.

96. Finally, Mr Choy contended that the trial judge had erred in relying on the factor that “the defendant was not remorseful” as one of the reasons to classify the present case as of a “serious nature”, because whether or not the applicant was remorseful was only one of the mitigating factors for the court to consider in sentencing, and had nothing to do with whether the circumstances of the offence he had committed were serious.

97. This Court agrees with Mr Choy’s submission on this, and for the relevant legal principle, see: *HKSAR v Ho Yung Yin*, CACC 417/2012, unreported, 12 August 2013, at para 24:

“Unless the criminal record shows the defendant to be a persistent offender, and here it does not, then his prior conviction does not aggravate the offence; it simply means that the defendant cannot get any mitigating benefit from being a person of good character. Likewise, the above principle also

applies to remorse and restitution. A failure to show remorse or make restitution merely means an absence of mitigating features....” (The quoted Chinese text is not official.)<sup>51</sup>

However, in the light of the above eight factors, the present case is of a “serious nature” under Article 21 of the NSL. Therefore, even though the trial judge has made such an error, it does not detract from the conclusion that the present case is of a “serious nature”.

98. In view of the above reasons, this Court upholds the trial judge’s finding that the present case is of a “serious nature” under Article 21 of the NSL.

*F. Whether the sentence was manifestly excessive*

99. Although the present case falls within the category of “serious nature” under Article 21 of the NSL, having considered all the circumstances, this Court is of the view that the applicant’s culpability is relatively low within the said category. Accordingly, the term of sentence should be close to the minimum sentence, i.e. 5 years. Therefore, the starting point of 6 years adopted by the trial judge was manifestly excessive; the appropriate starting point is 5 years and 3 months. The trial judge reduced the sentence by three months on account of how the defence was conducted which is not a legal requirement but entirely a matter of the

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<sup>51</sup> The original text in English is quoted in this footnote: “Unless the criminal record shows the defendant to be a persistent offender, and here it does not, then his prior conviction does not aggravate the offence; it simply means that the defendant cannot get any mitigating benefit from being a person of good character. Likewise, with remorse and restitution. A failure to show remorse or make restitution do not aggravate the offence, they merely mean that they are absent as mitigating features...”

judge's discretion, a decision to which this Court defers. Hence the sentence is 5 years' imprisonment.

*G. Conclusion*

100. In view of the above reasons, this Court granted the applicant's application for leave to appeal against sentence and treated the application as the appeal proper. The appeal is allowed and the applicant is sentenced to 5 years' imprisonment.

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

Mr Edwin W.B. Choy, SC and Mr Chris Chung Luen Ng, instructed by Kenneth Lam & Solicitors, assigned by the Legal Aid Department, for the Applicant

Mr Chau Tin Hang, Anthony, Deputy Director of Public Prosecutions (Special Duties) (Acting) and Ms Chan Wing Sum, Crystal, Senior Public Prosecutor (Acting), of the Department of Justice, for the Respondent

Translated by the Judgment Translation Unit of the Judiciary and vetted by Ms Jenny Chung, Solicitor.