FACC No. 12 of 2024
[2025] HKCFA 4

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

FINAL APPEAL NO. 12 OF 2024 (CRIMINAL)
(ON APPEAL FROM CACC NO. 62 OF 2022)

BETWEEN

HKSAR **Respondent**

and

TAM TAK CHI (譚得志) **Appellant**

Before: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice Chan NPJ

Date of Hearing: 10 January 2025

Date of Judgment: 6 March 2025

J U D G M E N T

THE COURT:

1. This appeal principally concerns issues of a transitional nature since the relevant statutory provisions have since been repealed. However, leave to

appeal was granted because the appellant raised important issues regarding the validity of his conviction before the District Court which, he contends, acted without jurisdiction. It also raises issues concerning the essential elements of the then existing sedition offence.

A. The charges and the transfer

2. The appellant was charged with seven offences of uttering seditious words contrary to section 10(1)(b) of the Crimes Ordinance ("CO").[1] He was also charged under the Public Order Ordinance ("POO"),[2] for offences of disorderly conduct, knowingly taking part in an unauthorized assembly and holding or convening an unauthorized assembly.[3]

3. The CO s 10(1)(b) offences were alleged to have been committed on dates ranging from 17 January to 19 July 2020 and thus straddling the coming into force of the National Security Law ("NSL")[4] on 30 June 2020. Such a sedition offence was not covered by the NSL and it continued to exist as an offence under the CO which had been on our statute book in much the same form since 1938.[5] It remained in force until the pertinent provisions were repealed by the Safeguarding National Security Ordinance ("SNSO")[6] on 23 March 2024.

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1 Cap 200.

2 Cap 245.

3 Contrary to POO ss 17B(2), 17A(3)(a) and 17A(3)(b)(i) respectively. He also faced one charge of conspiracy to utter seditious words and one charge of violating the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, Cap 599G, but these offences do not require separate discussion.

4 The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("HKSAR") as applied by Promulgation of National Law 2020 (LN 136 of 2020).

5 Sedition Ordinance 1938 (Ord No 13 of 1938).

6 Instrument No A305.

4. The POO offences were all alleged to have been committed between 19 January and 24 May 2020 and thus before the NSL was promulgated.

5. By orders dated 4 November 2020, made on the application of the Secretary for Justice ("SJ"), the Magistrate[7] transferred all of the aforesaid charges for trial in the District Court. The appellant joins issue as to whether there was power to effect that transfer and whether his subsequent conviction in the District Court before HH Judge Stanley Chan[8] and dismissal of his appeal by the Court of Appeal[9] were entered without jurisdiction.

6. After trial, the appellant was sentenced to 18 months' imprisonment for each of the seven CO s 10(1)(b) offences, with 3 months ordered to run consecutively, giving a total of 21 months' imprisonment for the sedition offences, 12 months of which were ordered to run consecutively with the sentences totalling 28 months for the POO offences. The appellant was thus sentenced to a total of 40 months' imprisonment for both sets of offences.[10] His sentences have been served and the respondent has acknowledged that there is no question of any possible retrial.

B. The certified questions

7. Leave to appeal was granted by the Appeal Committee[11] in respect of the following questions which had been certified by the Court of Appeal,[12] namely:

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7 Chief Magistrate Victor So.

8 [2022] HKDC 208.

9 [2024] 2 HKLRD 565, Poon CJHC, Pang and Anthea Pang JJA.

10 Court of Appeal judgment (CA§§2, 37-42, 176-177).

11 [2024] HKCFA 25, Ribeiro, Fok and Lam PJJ.

12 [2024] HKCA 649.

> Are the offences identified in sections 9 and 10 [now repealed] of the Crimes Ordinance, Cap 200 ("Offences") indictable offences that must be tried in the Court of First Instance by a judge and jury under the requirements of the Second Schedule, Part III, Paragraph 5 [now repealed] of the Magistrates Ordinance, Cap 227? ("Question 1")
>
> Does proof of the Offences mean the prosecution has to prove an intention on the part of the defendant to incite third parties to violence or public disorder? ("Question 2")

8. Question 1 challenges the validity of the above-mentioned transfer to the District Court. The appellant seeks to argue that the CO s 10(1)(b) offence was an indictable offence that had to be tried in the Court of First Instance by a judge and jury,[13] and not in any other court, by virtue of certain provisions of the Magistrates Ordinance[14] ("MO") to which we shall come.

9. Question 2 raises an issue regarding the elements of the CO s 10(1)(b) offence, namely, whether proof was required of an intention to incite violence or public disorder.

C. Question 1 - Was the CO s 10(1)(b) offence transferable to the District Court for trial?

10. Because the offences charged straddled the promulgation of the NSL, it is necessary to consider the question of transferability as it stood in law both prior to and after the NSL came into operation on 30 June 2020. It will also be necessary to consider the position after enactment of the SNSO on 23 March 2024.

C.1 Prior to the NSL

11. Section 88(1) of the MO ("MO s 88(1)"), which remains in force and is to be found in MO Part IV, governs the relevant transfers. It requires a magistrate, on the SJ's application, to make an order transferring indictable offences for trial in the District Court, subject to certain exceptions. Where MO

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[13] Or, as the appellant accepts, a panel of three judges under NSL46.

[14] Cap 227.

s 88(1) applies, the magistrate has no discretion and has to make the transfer order. The section also empowers a magistrate to transfer a summary offence for trial in tandem with an indictable offence which is ordered to be transferred. MO s 88(1) states:

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

12. Thus, MO s 88(1) is concerned primarily with indictable offences. MO s 88(1)(a) deals with the transfer of an indictable offence. It obliges the magistrate to order such transfer on the SJ's application provided that the offence to be transferred does not fall within the exceptions set out in Part III of the Second Schedule of the MO ("MO Sch 2 Pt III"), to which we shall return.

13. While summary offences are not normally transferable, MO s 88(1)(b) allows the magistrate to order transfer of a summary offence "piggybacking" on the transfer of an indictable offence. Allowing the indictable and summary offences to be transferred for trial together plainly provides for procedural economy. It would be senseless to have a defendant tried for indictable offences in one court and separately for summary offences in another, especially where they may arise out of the same or related circumstances.

14. Was the CO s 10(1)(b) offence transferable under either MO s 88(1)(a) or MO s 88(1)(b)? One begins by considering the content of CO s 10(1)(b). It relevantly provides:

> Any person who ... utters any seditious words; ... shall be guilty of an offence and shall be liable for a first offence to a fine at level 2 and to imprisonment for 2 years, and for a subsequent offence to imprisonment for 3 years.

15. In considering whether MO s 88(1)(a) is engaged, the first question is whether CO s 10(1)(b), so constituted, creates an indictable offence. The answer is provided by section 14A(1) of the Criminal Procedure Ordinance[15] ("CPO") which stipulates that certain offences are only triable summarily:

> Where any provision in any Ordinance creates, or results in the creation of, an offence, the offence shall be triable summarily only, unless-
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> (a) the offence is declared to be treason;
> (b) the words "upon indictment" or "on indictment" appear; or
> (c) …
> (d) the offence is transferred to the District Court in accordance with Part IV of the [MO].

16. In accordance with CPO s 14A(1), the CO s 10(1)(b) offence was clearly not indictable and triable only summarily: it was an offence created by an Ordinance, not declared to be treason and did not contain the words "upon indictment" or "on indictment".

17. One may also note that CPO s 14A(1)(d) excludes from the application of CPO s 14A(1), summary offences which have been transferred under MO Pt IV. This evidently envisages summary offences transferred "piggyback" under MO s 88(1)(b) so that while classified as summary offences, they are not treated as "triable summarily only" but are susceptible to trial after transfer to the District Court.

18. Since the CO s 10(1)(b) offence was, by virtue of CPO s 14A(1), triable only summarily, it did not engage MO s 88(1)(a) and was not transferable under that provision. However, as CPO s 14A(1)(d) acknowledges, that did not

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[15] Cap 221.

prevent a valid "piggyback" transfer of the CO s 10(1)(b) offence for trial in the District Court pursuant to MO s 88(1)(b).

19. Does transferability under MO s 88(1)(b) apply in the present case? In our view, the answer is "Yes".

20. It will be recalled that the SJ applied for transfer not merely of the CO s 10(1)(b) offences but also of offences under POO ss 17A(3)(a) and 17A(3)(b)(i), resulting in the Magistrate's orders dated 4 November 2020 which were expressed to be made pursuant to MO s 88(1). Both those POO offences are made triable either on indictment or summarily, each providing that a person found guilty "shall be liable (i) on conviction on indictment, to imprisonment for 5 years; and (ii) on summary conviction, to a fine at level 2 and to imprisonment for 3 years."[16]

21. On the true construction of MO s 88(1), a person charged with an offence that is triable either on indictment or summarily qualifies as a "person ... accused before a magistrate of any indictable offence..." On the ordinary meaning of those words, the offence is "indictable", if it is capable of being tried on indictment. That applies to the aforesaid offences under the POO.

22. Accordingly, upon the SJ's application that the POO offences be transferred to the District Court, the Magistrate was obliged to make that transfer and additionally, he had power under MO s 88(1)(b) to order transfer of the CO s 10(1)(b) offence to the District Court for trial in tandem with the POO offences.

23. We therefore conclude that offences contrary to CO s 10(1)(b) that were alleged to have been committed before promulgation of the NSL, could

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[16] He was also charged under POO s 17B(2) which was, on its own, triable only summarily.

validly be transferred for trial in the District Court pursuant to MO s 88(1)(b), as occurred in the present case.

C.2 After promulgation of the NSL

24. Regarding offences alleged to have been committed after promulgation of the NSL, the effect of NSL41(3) on the foregoing analysis requires examination. NSL41(3) provides:

> "Cases concerning offences endangering national security within the jurisdiction of the [HKSAR] shall be tried on indictment".

25. As noted above, the NSL did not create any sedition offences. The CO offences, including under CO s 10(1)(b), continued in existence so that the appellant was prosecuted for offences contrary to that provision allegedly committed after the NSL came into operation.

26. As this Court held in *HKSAR v Lai Chee Ying*,[17] and as the Appeal Committee explained in *HKSAR v Ng Hau Yi Sidney*,[18] the sedition offences under CO Pts I and II qualify as "offences endangering national security". It follows that NSL41(3)'s stipulation that offences endangering national security shall be tried on indictment applied to those offences, including CO s 10(1)(b). Thus, NSL41(3) changed the CO s 10(1)(b) offence from an offence triable only summarily pre-NSL, to one which "shall be tried on indictment" post-NSL.

27. If one applies a literal construction to the relevant provisions, this change may be thought to have highly surprising and undesirable consequences in connection with the transferability of a CO s 10(1)(b) offence under MO s 88(1). There are, as we shall see, compelling reasons for rejecting such a

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[17] (2021) 24 HKCFAR 33 at §53(c)(ii) footnote 40 and §70(d)(ii).

[18] (2021) 24 HKCFAR 417 at §§12-13, 20, 24, 27 and 30-31.

construction, but the literal interpretation and its consequences should first be understood.

28. The literal construction runs as follows:

(a) Since the CO s 10(1)(b) offence, as an offence endangering national security, is deemed by NSL41(3) to be triable on indictment, it now engages MO s 88(1). The pre-NSL reason for non-engagement, namely, that the offence was not indictable, has fallen away.

(b) Accordingly, one must look to MO s 88(1) which regulates transferability by a magistrate who is dealing with a person accused of an indictable offence. Only MO s 88(1)(a) is potentially relevant here since, being indictable, the CO s 10(1)(b) offence cannot be transferred post-NSL as a piggybacking summary offence under MO s 88(1)(b).

(c) However, on the literal construction, transfer as an indictable offence under MO s 88(1)(a) is blocked because the CO s 10(1)(b) offence is caught by an exception specified by MO s 88(1). As we have seen, that section requires the magistrate to order transfer on the SJ's application "whenever a person stands accused of any indictable offence *not included in any of the categories specified in Part III of the Second Schedule*". The italicised words create the exception. The relevant category is set out in paragraph 5 of that Schedule ("MO Sch 2 Pt III para 5"), which lists: "Any offence against Part I or Part II of the Crimes Ordinance (Cap 200)."

(d) Since the CO s 10(1)(b) offence comes within CO Pt II, it follows (so the argument runs) that the exception specified by MO s 88(1) precludes transfer.

(e) Consequently, a person accused of an offence against CO s 10(1)(b) must be tried on indictment before the Court of First Instance since any transfer to the District Court is neither required nor permitted. Purported transfer in the present case was therefore invalid so that the District Court and later the Court of Appeal acted without jurisdiction.

29. The consequences of the aforesaid literal construction are surprising and undesirable for at least the following reasons:

(a) Pre-NSL, the CO s 10(1)(b) offence was (by virtue of CPO s 14A(1)) triable only summarily by the magistrate. This made sense since it was a relatively minor offence with a maximum sentence of imprisonment of only 2 years, increased to 3 years on a subsequent offence. Trial of such summary offences is the daily fare of magistrates whose jurisdiction does not extend beyond sentences of 3 years' imprisonment.[19]

(b) Moreover, pre-NSL, in the interests of procedural economy, the magistrate had power to transfer a summary offence piggyback for trial together with a transferred indictable offence.

(c) Post-NSL, the CO s 10(1)(b) offence remains a minor offence with the same, relatively modest, maximum sentence. As we have seen, the appellant received a sentence of 18 months' imprisonment for each of the seven CO s 10(1)(b) offences with three months ordered to run consecutively. But on the aforesaid literal construction, magistrates would be precluded from transferring them for trial to the District Court either under MO s 88(1)(a) or MO s 88(1)(b). The

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[19] MO s 57.

literal construction would also preclude magistrates from trying such offences which they might otherwise have been able to do under MO s 92 (discussed further below). The law would thus impose a straitjacket which requires trial to take place before a Court of First Instance judge and jury (or before a panel of three CFI judges if NSL46(1) is invoked) notwithstanding the possibly minor nature of the particular offence. This would involve an unnecessary drain on judicial resources and introduce unwelcome procedural complications associated with a trial on indictment. It would be contrary in spirit to the exhortation of NSL42 for judicial authorities to ensure that cases concerning offences endangering national security are handled in a fair, timely and effective manner.

30. It is wholly implausible that the statutory intent was to produce such undesirable consequences. Consideration of a contextual and purposive construction is demanded. It is clear that NSL41(3) changed the CO s 10(1)(b) offence from an offence triable only summarily to one triable on indictment, but it does not follow that that change was intended to prevent transfer of such offences by the magistrate for trial in the District Court under MO s 88(1), or prevented the magistrate, in a suitable case, from assuming jurisdiction to try the offence under MO s 92.

31. It is clear that pre-NSL, the CO s 10(1)(b) offence, being triable only summarily, did not engage MO s 88(1) which concerned itself only with indictable offences. It was therefore plainly not intended to be included as one of the offences falling within the MO Sch 2 Pt III para 5 exception referred to in MO s 88(1), even though that exception was broadly expressed, referring to "Any offence against Part I or Part II of the [CO]". The same point applies to the identical wording of the MO Sch 2 Pt I para 5 exception to MO s 92, concerned with indictable offences that may be dealt with by a magistrate (see below).

32. CO s 10(1)(b) came literally within those words, but from the outset with MO s 88(1) not being engaged, they were clearly not intended to apply to that offence. Rather, the purpose of the exception was to restrict transfers and trial in the District Court of offences of treason (CO Pt I) and of the various offences created by ss 6, 7, 15, 16 and 18 (CO Pt II) which expressly provided for trial upon indictment. Similarly, for MO s 92, the same words were not intended to apply to the CO s 10(1)(b) offence but rather to preclude a magistrate from trying those relatively more serious offences which expressly provide for trial on indictment. In other words, read in the context of MO s 88(1) and s 92, despite their apparent width, the words "Any offence against Part I or Part II of the [CO]" were intended to mean "any offence *then triable on indictment and falling within those Parts of the CO*," thus excluding the CO s 10(1)(b) offence.

33. There are compelling grounds for holding that NSL41(3) does not intend to alter the aforesaid pre-NSL position and that the CO s 10(1)(b) offence was not intended to be caught by the restriction on transfers. In other words, deeming the offence to be indictable is one thing, but placing it within the MO Sch 2 Pt III para 5 exception so as to prevent transfer is another.

34. NSL41(3) has to be read in the context of the four newly-minted offences of the NSL. These consist of the offences of Secession,[20] Subversion,[21] Terrorist Activities[22] and Collusion with a Foreign Country or with External Elements to Endanger National Security.[23] Additionally, the NSL provides for participatory and inchoate forms of those offences.

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[20] NSL20.

[21] NSL22.

[22] NSL24.

[23] NSL29.

35. It is noteworthy that each of the four new offences envisages criminal conduct varying widely in terms of seriousness, as reflected by the range of possible sentences. Thus, they all provide for life imprisonment as the maximum sentence intended for the gravest offences. For less serious cases, they lay down bands of fixed terms of imprisonment, such as of "not less than ten years"; or "not less than three years but not more than ten years", going progressively down to sentences of "fixed-term imprisonment of not more than three years, short-term detention or restriction".

36. The NSL accordingly makes provision for prosecution of such offences at an appropriate level of court to reflect the seriousness of any particular case. NSL45 states:

> "Unless otherwise provided by this Law, magistrates' courts, the District Court, the High Court and the Court of Final Appeal shall handle proceedings in relation to the prosecution for offences endangering national security in accordance with the laws of the [HKSAR]."

37. NSL44(3) stipulates that such prosecutions should be handled by designated judges, but again making it clear that this may occur at each level of court:

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

38. Since NSL41(3) specifies that these new offences – undoubtedly "offences endangering national security" – must be tried on indictment, they now engage MO s 88(1) but are not listed among the MO Sch 2 Pt III exceptions. Thus, where a person stands accused of one of the NSL offences, the magistrate is obliged, on the SJ's application, to transfer it for trial in the District Court, no doubt where the SJ has duly considered the seriousness of the particular case.

39. The flexibility available for prosecuting the NSL offences goes further. MO s 92, which has been referred to above, provides:

> "Whenever any person is accused before a permanent magistrate of any indictable offence except an offence specified in Part I of the Second Schedule, the magistrate, instead of committing the accused for trial before the court, may deal with the case and convict the accused summarily, and on conviction may sentence the accused to imprisonment for 2 years and to a fine of $100,000."

40. The exception under MO Sch 2 Pt I referred to in MO s 92 is enacted in the same terms as the exception in MO Sch 2 Pt III para 5 discussed above. The new NSL offences are not included in either set of restrictions. Thus, just as, under MO s 88(1)(a), a magistrate must transfer trial of one of the new NSL offences to the District Court on the SJ's application, under MO s 92, a magistrate may "deal with the case and convict the accused summarily" where the accused is charged with an NSL offence even though it is declared by NSL41(3) to be indictable.

41. What therefore emerges is that while NSL41(3) undoubtedly stipulates that the NSL offences must be tried on indictment, this is done while incorporating procedural provisions which ensure full flexibility regarding the level of court in which they may be tried.

42. The literal construction entails wholly incongruous consequences. It suggests that while the NSL offences, which are potentially far more serious than the CO s 10(1)(b) offence, enjoy the flexibility of being tried in an appropriate court, including a magistrates' court or District Court, properly reflecting the relative seriousness of a particular charge, by a wholly adventitious side-wind, a straitjacket was placed on how the CO s 10(1)(b) offence could be tried. There is no discernible reason to think that such was the legislative intention.

43. Viewed contextually and purposively, the intent of NSL41(3) is evidently to change CO s 10(1)(b) from a summary to an indictable offence, but not to alter the pre-NSL position regarding the inapplicability of the MO Sch 2 Pt III para 5 and the MO Sch 2 Pt I para 5 exceptions to that offence. This contextual and purposive construction is beneficial and consonant with the approach to other

offences endangering national security. Thus, after promulgation of the NSL, where a person stood accused of a CO s 10(1)(b) offence which had become an indictable offence, the magistrate could transfer it to the District Court under MO s 88(1)(a) and, in a suitably minor case, could deal with it summarily under MO s 92. It is obviously desirable that a minor offence, albeit coming within the description of an "offence endangering national security", should not be unjustifiably elevated "above its station" and treated as something more serious than it really is by requiring it to be tried in the Court of First Instance.

C.3 The position after enactment of the SNSO

44. The aforesaid legislative intention is reflected in the repeals effected by the SNSO, which leave the current position beyond doubt.

45. Parts I and II of the CO, including s 10(1)(b), were repealed by SNSO s 139 and were replaced by SNSO ss 23-26 which lay down a detailed scheme governing sedition offences. SNSO s 24 specifies that these new offences are indictable, while SNSO s 150 repealed the exceptions contained in MO Sch 2 Pt III, including para 5, which had previously restricted transfers of the now repealed offences under CO Pts I and II.

46. Consequently, the recent legislative changes reflect the intention that the indictable SNSO sedition offences should engage MO s 88 and should be transferable thereunder without restriction.

47. It is also noteworthy that SNSO s 150 repealed the restrictions in MO s 92 against magistrates dealing with offences listed in MO Sch 2 Pt I, which had included offences in CO Pts I and II.

48. The result is a sensible procedural scheme which allows full flexibility as to the choice of court venue for trying sedition offences,

commensurate with the seriousness of any particular case, eliminating any doubts that may have arisen as to the effect of NSL41(3).

C.4 Sedition as a common law offence

49. Mr Philip Dykes SC, appearing for the appellant, mounted a separate argument under Question 1, contending that the sedition offence with which the appellant was charged was indictable and subject to the non-transferability exception. He submitted that despite enactment of the Sedition Ordinance 1938 and subsequent legislation, the offence has remained operative as a common law offence always requiring proof of an intention to incite violence or public disorder and was indictable as such. That argument, which is central to the appellant's answer to Question 2, is dealt with further in the section of this judgment which follows. For the reasons there developed, that argument is rejected.

50. We conclude that the transfers ordered by the Magistrate in the present case were valid and that the answer to Question 1 is "No".

D. Question 2

51. The appellant proposes as a common thread in his answers to both Questions 1 and 2 that the common law offence of sedition had not been abolished.[24] For the purposes of Question 2, he contends that the common law requirement of proving an intention to incite third parties to violence or public disorder[25] has persisted as a necessary element of the CO s 10(1)(b) offence and that decisions holding otherwise should be overturned.[26] That argument faces insurmountable hurdles.

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[24] Appellant's Written Case ("AWC") at §12.

[25] See *Boucher v R* [1951] SCR 265 and *R v Chief Metropolitan Stipendiary Magistrate, Ex p Choudhury* [1991] 1 QB 429.

[26] AWC§77.

D.1 The legislative history

52. In our view, the legislative history of the offence makes untenable the appellant's argument that sedition has somehow continued in existence as a common law offence alongside later Ordinances. While it is clear that Stephen J's exposition[27] of the common law definition of sedition was highly influential and was drawn upon in formulating statutory definitions of "seditious intention",[28] the clear statutory intention in this jurisdiction has been that the legislation should displace the common law offence and in particular, that the common law requirement for proof of an intention to incite violence or public disorder was not adopted as an essential element of the statutory offence.

53. The Sedition Ordinance 1938 may be taken as the modern starting-point. Its section 3 defined what did and did not constitute "seditious intention" along lines similar to the provisions of CO s 9 (while referring to the colonial sovereign and government). The offences created included the offence of uttering any seditious words (s 4(1)(b)). Nowhere did the 1938 Ordinance state that an intention to incite violence or public disorder was a necessary element of the offence. It did, however, introduce features as part of a statutory scheme which had not existed at common law.[29] These included a restriction on prosecution except within six months after commission of the offence and except with the written consent of the Attorney General; the prevention of conviction on the uncorroborated testimony of one witness; and authority for magistrates to issue search warrants.

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27 A Digest of the Criminal Law : Crimes and Punishments (4th edition, 1887) at p 66.

28 See eg section 102 of the Draft Code in the Report of the Royal Commission on The Law Relating to Indictable Offences (C 2345, 1879); The Law Commission Report on the Codification of the Criminal Law: Treason, Sedition and Allied Offences (Working Paper No 72, 1977) at §71-73.

29 As indicated in the Table of Correspondence in the Sedition Bill 1938.

54. The Sedition (Amendment) Ordinance 1970 [30] came next. Significantly, it amended section 3(1) of the 1938 Ordinance, adding to the definition of "seditious intention" by introducing paragraphs "(f) to incite persons to violence" and "(g) to counsel disobedience to law or to any lawful order" as new categories of "seditious intention".

55. As the Court of Appeal below points out,[31] in moving the second reading of the 1970 Amendment Bill, the Attorney General explained[32] that "the bill amends section 3 of the principal Ordinance so as to make it sedition to incite persons to violence or to counsel disobedience to the law or to any lawful order." He noted that, while the statutory forms of sedition then existing would usually involve an incitement to violence, "such incitement does not, of itself at present constitute sedition", hence the need to "make it sedition". The Attorney was thus plainly proceeding on the basis that the 1938 Ordinance had departed from the common law and that it was necessary by amendment to "make" the said forms of intention categories of seditious intention.

56. Mr Dykes SC sought to argue that the enactment of paragraphs (f) and (g) had merely widened the offence to create two free-standing categories of "seditious intention" leaving untouched the common law requirement of proving an intention to incite violence or public disorder which persisted in relation to each of the other categories in paragraphs (a) to (e) of CO s 9(1) set out in Section D.2 below.

57. With respect, that cannot be accepted. If an intention to incite violence or public disorder was always part of the required seditious intention, enactment of paragraphs (f) and (g) would have rendered all the other categories

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30 Ord No 30 of 1970.

31 CA at §79.

32 Hansard, 11 February 1970, at pp 330-331.

superfluous. Proving an intention to incite violence or public disorder would suffice to establish "seditious intention", making it unnecessary and pointless to go on to prove the various forms of seditious intention listed in paragraphs (a) to (e), such as an intention to bring into hatred or contempt, or to excite disaffection against, certain persons, and so forth. Plainly, the enactment of paragraphs (f) and (g) was not intended to render paragraphs (a) to (e) redundant, but to fill a gap in the statutory offence, necessarily indicating that such intention to incite had not been part of the statutory offence created by the 1938 Ordinance, which had accordingly departed from the common law.

58. The 1938 Ordinance, as amended in 1970, was consolidated into the CO, with sections 3 and 4 of that Ordinance replicated by CO ss 9 and 10.

59. As pointed out by the respondent, the Crimes (Amendment) (No 2) Bill 1996 represents the next step in the legislative history and further undermines the appellant's argument regarding the alleged persistence of the common law. That Bill was introduced by the colonial government very shortly before transition to the HKSAR in 1997. It contained a provision seeking to add the words "with the intention of causing violence or creating public disorder or a public disturbance" to CO s 10. The Bill's Explanatory Memorandum stated that this was intended to "modify" the offences to reflect the position at English common law. The Bill was passed on 24 June 1997 and the Ordinance gazetted on 27 June 1997, but it has never been brought into operation. This unsuccessful attempt at amending the Ordinance is significant since it acknowledges that the position under the CO did not incorporate the common law rule and, secondly, because the HKSAR legislature has chosen not to bring it into operation.

D.2 The *provisions* of CO ss 9 and 10

60. The argument that the common law requirements persist is also inconsistent with what appears on the face of the statutory provisions defining

"seditious intention". The CO s 10(1)(b) offence of uttering seditious words for which the appellant was prosecuted was one of several offences constituted by CO ss 9 and 10 read together. CO s 10(5) stated that "*seditious words* means words having a seditious intention". CO s 9 defined such "seditious intention".

61. At the relevant time, CO s 9(1) read as follows:[33]

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

62. And CO s 9(2) stated when certain intentions are *not* "seditious":

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

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[33] Updated as prescribed by section 2A and Schedule 8 of the Interpretation and General Clauses Ordinance (Cap 1).

(c) to persuade [the] subjects or inhabitants of [the HKSAR] to attempt to procure by lawful means the alteration of any matter in [the HKSAR] as by law established; or

(d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of [the HKSAR].

63. On its face, CO s 9(1)(f) specifies an intention to incite persons to violence as only one of the alternative forms of seditious intention separated by the disjunctive "or" in paragraphs (a) to (e) of CO s 9(1), lending no support to the appellant's argument that such an intention is always an essential element of the sedition offences. Similarly, the words of CO s 9(1)(g) "to counsel disobedience to law or to any lawful order" are apt to cover the common law equivalent of "incitement to public disorder". Again, paragraph (g) constitutes only one of the various alternative forms of seditious intention each of which is capable of constituting the offence. As already noted, this is reinforced by the fact that these two categories of "seditious intention" were separately enacted as additional and alternative to those existing prior to 1970.

64. Thirdly, the appellant's argument on Question 2 is at odds with the applicable case-law.

65. In *Wallace-Johnson v The King*,[34] on an appeal from the West African Court of Appeal in a case involving publication and possession of "seditious writing" contrary to section 330 of the Criminal Code of the Gold Coast Colony, the Privy Council encountered a similar argument. It was contended "that the prosecution could not succeed unless the words complained of were themselves of such a nature as to be likely to incite to violence".[35] Like

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[34] [1940] AC 231.

[35] *Ibid* at 239.

the CO in Hong Kong, section 330 of the Code defined "seditious intention" setting out several alternative forms, but it was argued that the Code's intention was to reproduce the common law rule. This was rejected by Viscount Caldecote LC, who stated:

> "The elaborate structure of s 330 suggests that it was intended to contain, as far as possible, a full and complete statement of the law of sedition in the Colony. ... Nowhere in the section [defining 'seditious intention'] is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result, and their Lordships are unable to import words into s 330 which would be necessary to support the appellant's argument."[36]

66. When the appellants in *Fei Yi Ming and Lee Tsung Ying v R*,[37] sought to make the same point, arguing that incitement to violence was an essential element of the offence under the 1938 Ordinance, the prosecution was not called on in reply, the Full Court being of the view that it was "contrary to the [principle] laid down in *Wallace-Johnson v The King*".

67. The appellant now submits that the Court of Appeal below erroneously endorsed the Full Court's conclusion in *Fei Yi Ming and Lee Tsung Ying v R*, applying *Wallace-Johnson v The King*. He invites this Court to depart from the approach in *Fei Yi Ming*, relying on the recent Privy Council decision in *Attorney General of Trinidad and Tobago v Vijay Maharaj*[38] where the Board commented that *Wallace-Johnson* pre-dated decisions affirming the principle of legality so that it might now be possible to imply that an intention to incite violence was needed.

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36 *Ibid* at 240-241.

37 (1952) 36 HKLR 133 at 155-156.

38 [2023] UKPC 36.

68. *Vijay Maharaj* was principally concerned with issues of no present relevance. An appellant,[39] who feared prosecution under the Trinidadian Sedition Act 1920 for certain statements made on his talk show, brought proceedings challenging the constitutionality of that Act prior to any charges being brought against him. It was thus a case turning on a constitutional challenge and not on construction of the legislation.

69. The 1976 Constitution of the Republic of Trinidad and Tobago ("the Constitution") contained provisions guaranteeing rights of free expression in sections 4 and 5 which the appellant wished to rely on in attacking the Sedition Act provisions. However, section 6 of the Constitution prevented sections 4 and 5 from invalidating "an existing law" which prima facie included the Sedition Act. Trying to overcome that obstacle, it was argued that the provisions of the Sedition Act were too vague to constitute "a law" and thus were not "an existing law". That argument failed. The Privy Council held that section 6 posed a straightforward, factual question as to whether the relevant law had effect as part of the law of Trinidad and Tobago immediately before the commencement of the Constitution.

70. The appellant then sought to rely on section 1 of the Constitution which was unaffected by section 6 and which declared Trinidad and Tobago to be a sovereign democratic State, arguing that this required protection of political speech by imposing a requirement of inciting violence in sedition cases.[40] The Privy Council also rejected that argument, holding that such an interpretation of section 1 would, in by-passing section 6, undermine rather than promote, constitutional democracy.[41]

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[39] Who had died and whose claim was taken over by his son.

[40] *Ibid* at §58(3).

[41] *Ibid* at §82.

71. Those decisions form the *ratio* of the Privy Council's advice. The Board only mentioned construction and the principle of legality in passing, pointing out that *Wallace-Johnson* had been decided "many decades before the 'principle of legality'" had become recognised in decisions like *R v Secretary of State for the Home Department, Ex p Simms*[42] where Lord Hoffmann is cited as saying:

> "In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."[43]

72. However, as was acknowledged, the point did not arise as no prosecution had in fact been brought. Sir Rabinder Singh, writing for the Privy Council commented:

> "... that, were such a case to arise, there would be much to be said for the proposition that, applying the principle of legality, and quite apart from any constitutional considerations, the true interpretation of the Act is such that there is implied into it a requirement that there must be an intention to incite violence or disorder. Indeed, this appeared to be accepted on behalf of the respondent at the hearing before the Board."[44]

73. The Board was therefore referring to a possible approach "were such a case to arise". It was not engaged in construing the legislation and the proposition floated was apparently not disputed by the respondent. Moreover, the applicability of the principle of legality was not subjected to any discussion or detailed consideration.

74. The aforesaid *dictum* therefore gives scant support for the present appellant's case. Apart from being just a passing observation, the Board's comment relates to the Trinidadian Sedition Act 1920 which differs in significant respects from the CO. Notably, that Act does not contain any equivalent of CO

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42 [2000] 2 AC 115.

43 At p 131, cited in *Vijay Maharaj* at §45.

44 *Vijay Maharaj* at §47.

s 9(1)(f), introduced by the 1970 amendment to specify incitement of violence as one of several alternative forms of seditious intention, as mentioned above.

75. It is moreover not at all clear that the principle of legality would apply in relation to provisions like those in CO ss 9 and 10. To cite Lord Hoffmann more fully, his Lordship explained that the principle operates as one of construction in relation to general or ambiguous statutory language in the context of a constitution which makes Parliament sovereign:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the Courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."[45]

76. The principle of legality therefore operates to preserve fundamental rights from possibly unintended abrogation by general or ambiguous words "[in] the absence of express language or necessary implication to the contrary". In the present case, the offences in question were undoubtedly consciously intended by the legislature to constrain certain forms of speech or expression deemed to be seditious. We would be very slow to hold that the elaborate provisions of CO ss 9 and 10 were ambiguous "general words" of the sort envisaged by Lord Hoffmann.[46] It is notable that CO s 9 did not only define what constitutes "seditious intention", in CO s 9(2) it specified what *did not* constitute the same.

77. In any event, we do not accept that the CO s 10(1)(b) offence as it was constituted involved any infringement of guaranteed fundamental rights.

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[45] *Ex p Simms* at 131, cited in *A v Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362 at §68.

[46] *Ex p Simms* involved a blanket exclusion of all professional visits by journalists to prisoners.

Indeed, the appellant's constitutional challenge, proposed as a third Question for consideration on this appeal was held not to be reasonably arguable for the reasons set out in the Determination of the Appeal Committee.[47] In particular, the submissions that the offence was legally uncertain and thus not "prescribed by law"; and that the failure to make an intention to incite violence or public disorder an essential element rendered the offence a disproportionate restriction on free expression; were rejected. As pointed out in the Determination,[48] Article 16 of the Bill of Rights recognises that the scope of free expression may legitimately be restricted to protect national security and public order. There is no *a priori* reason for requiring the offence of sedition to specify an intention to incite violence or public disorder as a necessary element. In the CO, a balance with appropriate free expression was sought as reflected in CO s 9(2)'s preservation of the right to make constructive criticisms, carrying on an approach which had been adopted since 1938.

78. We might add that the appellant has rightly not sought to challenge his conviction on the facts. Given the persistence of his repeated offending which occurred in the volatile atmosphere of public disorder then experienced in Hong Kong as referred to by the Court of Appeal,[49] such a challenge would have been wholly without merit. Notably, he has not sought to raise a defence based on CO s 9(2).

79. For the reasons set out above, the statutory language and legislative history in the present case are inconsistent with implying as a necessary element, an intention to incite violence or public disorder. Equally, no such implication is

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47 [2024] HKCFA 25 at §§3-24.

48 *Ibid* at §21.

49 CA at §§39 and 41. As to the public disorder then experienced, see *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518 at §§87-97.

warranted by reference to the principle of legality. Accordingly, our answer to Question 2 is "No".

80. As a postscript, the provisions of the SNSO are instructive in the context of Question 2 for two reasons. First, they reiterate that an intention to incite violence or to incite unlawful acts represent only two alternative and individually sufficient bases for establishing seditious intention. Thus, SNSO s 23(1)(a) provides:

> "For the purposes of this Division ... a person does an act with a seditious intention if the person does the act with one or more of the intentions specified in subsection (2)."

81. Subsection (2) referred to, ie, SNSO s 23(2), lists "an intention to incite any other person to do a violent act in the HKSAR" (paragraph (e)), and "an intention to incite any other person to do an act that does not comply with the law of the HKSAR or that does not obey an order issued under the law of the HKSAR" (paragraph (f)) as two such alternatives. They are listed together with the other forms of intention specified in paragraphs (a) to (d) of that subsection, any one of which suffices to constitute the offence, as SNSO s 23(1)(a) stipulates. A continuity therefore exists in the statutory approach to "seditious intention" since enactment of the 1938 Ordinance, displacing the common law and making it untenable to argue that an intention to incite violence or public disorder is always required to constitute the element of seditious intention.

82. Secondly, the recently enacted SNSO has plainly settled the issue regarding the element of seditious intention required. It makes the appellant's argument that the Court should act on the *dictum* in *Vijay Maharaj* and should reintroduce a requirement for incitement to violence or public disorder unsustainable. In the light of the applicable legislation, the approach adopted in *Fei Yi Ming*, endorsing *Wallace-Johnson*, correctly reflects the position in this jurisdiction which has been in place since 1938. It is obviously not open to the

Court to introduce a conflicting rule and to ignore the plain effect of the governing legislative provisions.

E. Conclusion

83. We hold that the District Court and the Court of Appeal properly assumed jurisdiction in the present case and that the prosecution was not required to establish that the words uttered by the appellant were intended to incite violence or public disorder.

84. We accordingly dismiss this appeal.

(Andrew Cheung) Chief Justice	(R A V Ribeiro) Permanent Judge	(Joseph Fok) Permanent Judge

(M H Lam) Permanent Judge	(Patrick Chan) Non-Permanent Judge

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