香港終審法院

THE HONG KONG COURT OF FINAL APPEAL

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The Judgment is available at:

https://www.hkcfa.hk/en/work/cases/index.html

or

https://legalref.judiciary.hk/lrs/common/ju/judgment.jsp

PRESS SUMMARY

HKSAR	*Respondent*
v	
Tam Tak Chi (譚得志)	*Appellant*

FACC No 12 of 2024 on appeal from CACC 62 of 2022

[2025] HKCFA 4

APPELLANT: Tam Tak Chi

RESPONDENT: HKSAR

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

COURTS BELOW: District Court (HH Judge Stanley Chan); Court of Appeal (Poon CJHC, Pang and Anthea Pang JJA)

DECISION: Appeal unanimously dismissed

JUDGMENT: The Court delivering the Judgment

DATE OF HEARING: 10 January 2025

DATE OF JUDGMENT: 6 March 2025

REPRESENTATION:

Mr Philip Dykes SC, Mr Jeffrey Tam and Mr Ernie Tung, instructed by Ho Tse Wai & Partners, for the Appellant

Mr Anthony Chau, DDPP and Ms Crystal Chan, SPP, of the Department of Justice, for the Respondent

SUMMARY:

Background

1. This appeal concerns two questions. First, whether the offences of sedition contrary to the now repealed sections 9 and 10 of the Crimes Ordinance (Cap 200) ("**CO s 9**"and"**CO s 10**") were indictable offences triable only before judge and jury. Second, whether the prosecution was required to prove, as an element of the offence, that a defendant had an intention to incite violence or public disorder ("**Inciting Intention**").

2. Following the Appellant's participation in acts of civil unrest both before and after the promulgation of the National Security Law (Instrument A302) ("**NSL**"), the Appellant was charged with 14 offences comprising seven counts of "uttering seditious words", six public order offences (including some indictable offences), and one breach of a COVID-19 regulation. All charges were transferred together for trial at the District Court ("**DC**") pursuant to section 88(1) of the Magistrates Ordinance (Cap 227) ("**MO s 88(1)**").

3. The Appellant argued, both in this Court and below, that the DC had no jurisdiction to try the charges of sedition as they were common law indictable offences, and that the prosecution was required to prove the Inciting Intention as an element of the offence. The DC and Court of Appeal decided both points against the Appellant who then appealed to this Court.

Question 1: DC had jurisdiction to try the sedition charges

4. The Court held that the charges of "uttering seditious words" could be, and were, validly transferred to the DC, which had jurisdiction to try the charges both before and after the implementation of the NSL.

Pre-NSL

5. Before the NSL came into force, the offence of "uttering seditious words" contrary to CO s 10(1)(b) was a summary offence which could be transferred to the DC together with any indictable offences which the defendant was also charged with for trial in the DC under MO s 88(1)(b).

6. Pursuant to section 14A(1) of the Criminal Procedure Ordinance (Cap 221) ("**CPO s 14A(1)**"), where an ordinance created or resulted in an offence, that offence was only triable summarily unless it was declared to be treason or the words "upon indictment" or "on indictment" appeared. As neither of these applied to CO s 10(1)(b), which created the offence for which the Appellant was charged, "uttering seditious words" was a summary offence.

7. Additionally, under CPO s 14A(1)(d), a summary offence could be transferred to the DC in accordance with Part IV of the MO. Part IV included MO s 88(1)(b) which allowed offences triable only summarily to "piggyback" any indictable offence which the defendant also faced for trial together in the DC.

8. Therefore, in the present case, as the transfer orders were made pursuant to MO s 88(1), the charges of "uttering seditious words" could and were validly transferred to the DC by "piggybacking" on the indictable public order offences which the Appellant was also charged with.

Post-NSL

9. While Article 41(3) of the NSL ("**NSL41(3)**") made all offences endangering national security, including sedition, indictable, a magistrate could still transfer such a charge to the DC under MO s 88(1)(a) or deal with it summarily under section 92 of the MO ("**MO s 92**") in a suitably minor case.

10. A purely literal construction of NSL41(3) was undesirable and did not accord with the context and purpose of the NSL. Pre-NSL, the CO s 10(1)(b) offence was triable only summarily and was (and still is) a relatively minor offence carrying penalties within the sentencing jurisdiction of a magistrate. The charges could also be transferred "piggyback" to the DC for trial in the interests of procedural economy.

11. Furthermore, the flexibility as to the forum for trial of sedition from before the enactment of the NSL was maintained even post-NSL. Prior to the NSL, MO s 88(1) only restricted the transfer of "any indictable offence" included within Part III of the Second Schedule to the MO. While Parts I and II of the CO containing the sedition offences were included in the list, "uttering seditious words" was only a summary offence and thus not subject to the restriction on transfer.

12. Likewise, a magistrate could, pursuant to MO s 92, summarily try an indictable offence if it did not fall within the identically worded paragraph 5 of Part I of the same Schedule. Thus, the CO s 10(1)(b) offence was not subject to the prohibitions against transfer to the DC or trial in the Magistrates' Courts under MO ss 88(1) and 92.

13. This flexibility persisted post-NSL, as the four indictable offences created by the NSL could be tried at the appropriate level of court depending on the seriousness of the offences. This included the Magistrates' Courts and the DC pursuant to Article 45 of the NSL. Additionally, a magistrate could either transfer such charges to the DC pursuant to MO s 88(1)(a) or try those cases summarily pursuant to MO s 92 as none of those new offences were included in the relevant Schedules to the MO, notwithstanding the fact that they were declared by NSL41(3) to be indictable offences.

14. The legislative intent not to alter the flexibility as to the forum for trial was also reflected in the Safeguarding National Security Ordinance (Instrument A305) ("**SNSO**") which repealed Part II of the CO which contained the sedition offences along with the restrictions against transfer to the DC and trial in the Magistrates' Courts.

Question 2: Intention to Incite Others to Violence or Public Disorder not Required

15. The CO s 10(1)(b) offence was not a common law offence and did not require proof of the Inciting Intention as an element.

16. The legislative history of the offence showed a clear intention to displace the common law and its requirement of the Inciting Intention as an essential element of the offence. When the sedition offences were originally created by the Sedition Ordinance 1938, it did not require the Inciting Intention and introduced new features which had not existed at common law. Then, the Sedition (Amendment) Ordinance 1970, introduced both "incit[ing] persons to violence" and "counsel[ling] disobedience to law or to any lawful order" to the definition of "seditious intent". Finally, the Crimes (Amendment) (No 2) Ordinance 1996, which was passed but not brought into operation, stated in its Explanatory Memorandum that the addition of the words "with the intention of causing violence or creating public disorder or a public disturbance" to CO s 10(1) was intended to modify the statutory offence to reflect the position at common law.

17. Additionally, the various "seditious intentions" listed under CO s 9(1)(a) to (g) are all distinct alternatives being separated by the disjunctive "or". The Inciting Intention is only one of the many intentions which can constitute an offence under CO s 10.

18. Furthermore, following established case law, where the structure of sedition-related legislation was elaborate, like in the case of CO ss 9 and 10, this suggested that the legislation was intended to contain a full and complete statement of the law. There was nothing in the CO to support the view that the Inciting Intention was a necessary element of the offence of sedition and thus there was no reason to import or imply such an intention into the CO.

19. Finally, the preservation of the Inciting Intention as only one of many alternative and individually sufficient bases for establishing "seditious intention" under the SNSO also showed the continuing displacement of the common law in respect of the offence of sedition.

Disposition

20. Accordingly, the Court unanimously dismissed the appeal.