HCCC 69/2022
[2024] HKCFI 1468

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

HIGH COURT CRIMINAL CASE NO. 69 OF 2022

BETWEEN

HKSAR

and

[D5]	NG Gordon Ching-hang (吳政亨)
[D8]	CHENG Tat-hung (鄭達鴻)
[D10]	YEUNG Suet-ying Clarisse (楊雪盈)
[D11]	PANG Cheuk-kei (彭卓棋)
[D14]	HO Kai-ming Kalvin (何啟明)
[D16]	LAU Wai-chung (劉偉聰)
[D17]	WONG Pik-wan (黃碧雲)
[D24]	SZE Tak-loy (施德來)
[D33]	HO Kwai-lam (何桂藍)
[D36]	CHAN Chi-chuen Raymond (陳志全)
[D37]	CHOW Ka-shing (鄒家成)
[D38]	LAM Cheuk-ting (林卓廷)
[D41]	LEUNG Kwok-hung (梁國雄)
[D43]	OR Yiu-lam Ricky (柯耀林)
[D46]	LEE Yue-shun (李予信)
[D47]	YU Wai-ming Winnie (余慧明)

Before: Hon Andrew Chan J, Hon Alex Lee J and Hon Johnny Chan J in Court

Dates of Hearing: 6 February 2023 to 27 February 2023, 1 March 2023 to 3 March 2023, 6 March 2023, 8 March 2023 to 10 March 2023, 14 March 2023 to 20 March 2023, 22 March 2023 to 26 April 2023, 4 May 2023 to 10 May 2023, 15 May 2023, 16 May 2023, 29 May 2023, 31 May 2023 to 2 June 2023, 8 June 2023 to 12 June 2023, 14 June 2023, 29 June 2023, 3 July 2023 to 13 July 2023, 18 July 2023 to 28 August 2023, 29 November 2023, 30 November 2023 & 4 December 2023

Date of Reasons for Verdict: 30 May 2024

Table of Contents

REASONS FOR VERDICT[1]

Background

1. The 5th, 8th, 10th, 11th, 14th, 16th, 17th, 24th, 33rd, 36th, 37th, 38th, 41st, 43rd, 46th and 47th defendants were charged together with 31 other defendants who had pleaded guilty with one count of Conspiracy to Commit Subversion, contrary to Article 22(3) of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("NSL 22(3)") and Sections 159A and 159C of the Crimes Ordinance, Cap 200.

2. The Particulars of Offence alleged that the 47 defendants, between 1 July 2020 and 7 January 2021 in Hong Kong, conspired together and with other persons, with a view to subverting the State power, to organise, plan, commit or participate in, by unlawful means namely:

(i) advocating, engaging or participating in a scheme with a view to abusing his or her powers and functions entrusted under Article 73 of the Basic Law of the Hong Kong Special Administrative Region ("HKSAR") of the People's Republic of China ("BL 73") after being elected to be a member ("Member") of the Legislative Council ("LegCo") for the purposes of:-

[1] This Reasons for Verdict was written by the above three, each contributed to different parts. Despite the difference in styles and formats, we unanimously agreed to the contents and the outcome of all the decisions.

(a) obtaining a controlling majority in the LegCo to indiscriminately refuse to pass any budgets or public expenditure to be introduced by HKSAR Government ("the Government") regardless of their contents or the merits of their contents;

(b) compelling the Chief Executive of HKSAR ("the Chief Executive") to dissolve the LegCo under Article 50 of the Basic Law ("BL 50") so as to paralyse the operations of the Governemnt;

(c) ultimately causing the Chief Executive to resign under Article 52 of the Basic Law ("BL 52") entailed by the dissolution of the LegCo and the refusal to pass the original budget by the new LegCo;

("the Scheme")

(ii) with a view to carrying out the Scheme, to stand or not to stand as candidates in the LegCo election (the "Election"), and / or inciting, procuring, inducing or causing others to stand or not to stand as candidates in the Election;

(iii) undertaking or agreeing, and / or inciting, procuring, inducing or causing others to undertake or agree to exercise or forbear to exercise his or her powers and functions under BL 73 after being elected as a LegCo Member when examining and approving budgets or public expenditure to be introduced by the Government in accordance with the Scheme;

(iv) undertaking or agreeing, and / or inciting, procuring, inducing or causing others to undertake or agree, to willfully or intentionally fail or neglect to discharge his or her duties of a LegCo Member after being elected in the Election, that is, to uphold the Basic Law, bear allegiance to HKSAR of the People's Republic of China and serve HKSAR conscientiously, dutifully, in full accordance with the Law, honestly and with integrity;

seriously interfering in, disrupting or undermining the performance of duties and functions in accordance with the law by the body of power of HKSAR. (the "Charge")

3. Essentially, the prosecution case was that between 1 July 2020 and 7 January 2021, the 16 defendants together with other persons came to an agreement to participate in the Scheme so as to seriously interfering in, disrupting or undermining the performance of duties and functions in accordance with the law by the body of power of the HKSAR by unlawful means with a view to subverting the State power. This was the term of the conspiracy.

4. It was alleged by the prosecution that the 16 defendants together with others agreed to pursue a course of conduct which was to indiscriminately veto any budgets or refuse to pass any budgets or public expenditure to be introduced by the Government regardless of the merits or the contents, in the event that they were elected to be LegCo Members and after obtaining a majority in the upcoming 2020 LegCo election with the intention of compelling the Chief Executive to respond to the "Five Demands Not One Less" demand (the Five Demands) and in the case that the Chief Executive refused to do so, she would have to dissolve the

LegCo under BL 50 and ultimately resign under BL 52. This was essentially the overt act as stipulated in sub-paragraph (i) of the Particulars of Offence.

5. The prosecution accepted that they had to prove beyond reasonable doubt the term of the conspiracy and the overt act stipulated in sub-paragraph (i) of the Particulars of Offence. The prosecution further alleged that the agreement was reached by the 16 defendants together with others before the promulgation of the NSL on 30 June 2020. They asserted that the said agreement became unlawful after the NSL came into effect but the 16 defendants continued to pursue that course.

6. The 2020 LegCo election was postponed due to the COVID pandemic. It was alleged by the prosecution that had the Scheme been carried out, that would paralyse the operation of the Government and inevitably create political instability in Hong Kong leading to constitutional crisis for HKSAR.

Legal Issues

7. A number of legal challenges were made by the defence as regards the elements of the offence under NSL 22. NSL 22 stated as follows:

> " Article 22 A person who organises, plans, commits or participates in any of the following acts by force or threat of force or other unlawful means with a view to subverting the State power shall be guilty of an offence:
>
> (1) overthrowing or undermining the basic system of the People's Republic of China established by the Constitution of the People's Republic of China;

(2) overthrowing the body of central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region;

(3) seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region; or

(4) attacking or damaging the premises and facilities used by the body of power of the Hong Kong Special Administrative Region to perform its duties and functions, rendering it incapable of performing its normal duties and functions.

A person who is a principal offender or a person who commits an offence of a grave nature shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; a person who actively participates in the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years; and other participants shall be sentenced to fixed-term imprisonment of not more than three years, short-term detention or restriction."

「 第二十二條 任何人組織、策劃、實施或者參與實施以下以武力、威脅使用武力或者其他非法手段旨在顛覆國家政權行為之一的，即屬犯罪：

(一) 推翻、破壞中華人民共和國憲法所確立的中華人民共和國根本制度；

(二) 推翻中華人民共和國中央政權機關或者香港特別行政區政權機關；

(三) 嚴重干擾、阻撓、破壞中華人民共和國中央政權機關或者香港特別行政區政權機關依法履行職能；

(四) 攻擊、破壞香港特別行政區政權機關履職場所及其設施，致使其無法正常履行職能。

犯前款罪，對首要分子或者罪行重大的，處無期徒刑或者十年以上有期徒刑；對積極參加的，處三年以上十年以下有期徒刑；對其他參加的，處三年以下有期徒刑、拘役或者管制。」

8. We were fully aware that the charge was one of conspiracy. However given this was the first case which the offence of subversion

was brought, we thought it appropriate to state first what the elements of the offence were and had to be proven by the prosecution.

9. In the context of the present case, the elements of the substantive offence under NSL 22(3) were:

(i) organised, planned, committed or participated in;

(ii) any act by the use of force or threat of use of force or other unlawful means;

(iii) which seriously interfered in, disrupted or undermined the performance of duties and functions in accordance with the law by the body of power of the HKSAR;

(iv) with a view to subverting the State power.

10. As regards the above, we were of the view that: element (i) was part of the *actus reus* of the offence; element (ii) related to the nature of the means adopted by the defendants; element (iii) related to the nature of the overt act and its consequence. This, together with element (i), constituted the *actus reus* of the offence. Furthermore, we were of the view that the *actus reus* had to be intentional so that any lesser forms of *mens rea* (for example recklessness and negligence) would not be sufficient; and element (iv) was an additional mental element which made the offence one of "specific intent".

11. In the present case, there was no allegation by the prosecution that the alleged conspiratorial agreement which was the subject matter of the charge entailed any acts by force or threat of force. Therefore, in simple terms that part of NSL 22 relied upon by the

prosecution was that any person who participated in any act which would be seriously interfering in, disrupting or undermining the performance of duties and functions in accordance with the law by the body of power of the HKSAR by "other unlawful means" with a view to subverting the State power should be guilty of the offence.

Ejusdem Generis

12. The first challenge posed by the defence centered on the scope of NSL 22(3) was the applicability of the *ejusdem generis* rule to the interpretation of "other unlawful means" (其他非法手段). Essentially, it was submitted by the defence that the expression "other unlawful means" should be confined to unlawful means with the use of force or the threat of force under that rule.

13. The *ejusdem generis* principle is summarised in *Bennion, Bailey and Norbury on Statutory Interpretation (8th edition)*. It is essentially a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matter of the same limited character. It is mentioned in the comments under section 23.8 that this common law *ejusdem generis* principle can be displaced by the mischief the legislation aimed at:-

> "Implied exclusion
>
> In some cases the context or other interpretative criteria will be sufficient to displace the *ejusdem gener*is principle
>
> > Example
> >
> > By the Local Government Act 1933, s76 (1), a member of a local authority was required to disclose their interest and refrain from voting where they had 'any pecuniary interest, direct or indirect, in any contract or proposed contract or *other*

> *matter'* (emphasis added) . Lord Parker CJ held that the mischief at which the enactment was directed required the italicised phrase to be given its unrestricted meaning. He said:
>
> 'whereas, of course, a consideration of the mischief aimed at does not enable the court to construe the words in a wider sense than they appear, it at least means that the court would not be acute to cut down words otherwise wide merely because this was a penal statue.'"

14. The case in which Lord Parker CJ made the statement cited above was *Rands v Oldroyd* [2]. Despite not having any specific contract or proposed contract with the local authority, a member who was a director of a company which could have made a contract tender was charged and convicted. Rejecting an argument that the words "or other matter" should be restricted to a specific transaction by reason of *ejusdem generis*, Lord Parker CJ further stated that:

> 'Bearing in mind the mischief aimed at by this Act, I do not think those words are to be read in other than a very general way, and I see no ground for introducing a limitation which, as I said, is one which cannot satisfactorily be defined."

15. The same proposition could be found in *HKSAR v Luk Kin Peter Joseph & Another* [3] where the Court of Appeal stated:

> "However, if, after having regard to context and purpose, it is decided that the legislature intended the words to bear an unrestricted meaning then the *ejusdem generis* principle simply has no application."

16. Therefore, the issue before this Court was whether the application of the *ejusdem generis* rule was displaced by the purposive interpretation of the relevant articles in the NSL, there being no dispute

---

2 [1959] 1 QB 204

3 CACC 283/2014, [2016] 1 HKLRD 378

that it was by the common law approach that the Court was to deal with the construction of the NSL: *Director of Immigration v Chong Fung Yuen*[4]; and *HKSAR v Lui Sai Yu*[5].

17. The general common law approach on statutory interpretation was summarised in the recent case of *HKSAR v Chan Chun Kit*[6]. In particular, it was held in *HKSAR v Lai Chee Ying*[7] that the NSL should be construed in light of its ordinary meaning, purpose and context. In so doing, regard could be made to the Explanations[8] and Decisions[9] made in proceedings of the National People's Congress ("NPC") and the National People's Congress Standing Committee ("NPCSC") regarding promulgation of the NSL as a law of the HKSAR, as extrinsic materials relevant to the consideration of the context and purpose of the NSL.

18. Applying the above to the present case, we noted first the primary purpose of the NSL was to safeguard national security. NSL 1 stated as follows:

> " Article 1 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

---

4 (2001) 4 HKCFAR 211

5 FACC 7/2023, (2023)26 HKCFAR 332, at [45]

6 (2022) 25 HKCFAR 191, citation omitted

7 [2021] HKCFA 3, (2021) 24 HKCFAR 33

8 The Explanation on "the Draft Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security", presented by Mr Weng Chen, Vice Chairman of the NPCSC, addressing the Third Section of the Thirteenth NPC on 22 May 2020.

9 The Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security on 28 May 2020.

> 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 national 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 Administrative Region"
>
> 「　　第一條　為堅定不移並全面準確貫徹"一國兩制"、"港人治港"、高度自治的方針，維護國家安全，防範、制止和懲治與香港特別行政區有關的分裂國家、顛覆國家政權、組織實施恐怖活動和勾結外國或者境外勢力危害國家安全等犯罪，保持香港特別行政區的繁榮和穩定，保障香港特別行政區居民的合法權益，根據中華人民共和國憲法、中華人民共和國香港特別行政區基本法和全國人民代表大會關於建立健全香港特別行政區維護國家安全的法律制度和執行機制的決定，制定本法。」

NSL 1 mentioned, in particular, the NSL was enacted in accordance with 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 adopted on the 28 May 2020.

19. NSL 3 and 6 placed the responsibility in safeguarding national security on residents as well as government organisations of the HKSAR:

" Article 3 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."

「 第三條 中央人民政府對香港特別行政區有關的國家安全事務負有根本責任。

香港特別行政區負有維護國家安全的憲制責任，應當履行維護國家安全的職責。

香港特別行政區行政機關、立法機關、司法機關應當依據本法和其他有關法律規定有效防範、制止和懲治危害國家安全的行為和活動。」

" Article 6 It is the common responsibility of all the people of China, including the people of Hong Kong, to safeguard the sovereignty, unification and territorial integrity of the People's Republic of China.

Any institution, organisation or individual in the Hong Kong Special Administrative Region shall abide by this Law and the laws of the Region in relation to the safeguarding of national security, and shall not engage in any act or activity which endangers national security.

A resident of the Region who stands for election or assumes public office shall confirm in writing or take an oath to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China in accordance with the law."

「 第六條 維護國家主權、統一和領土完整是包括香港同胞在內的全中國人民的共同義務。

在香港特別行政區的任何機構、組織和個人都應當遵守本法和香港特別行政區有關維護國家安全的其他法律，不得從事危害國家安全的行為和活動。

香港特別行政區居民在參選或者就任公職時應當依法簽署文件確認或者宣誓擁護中華人民共和國香港特別行政區基本法，效忠中華人民共和國香港特別行政區。」

20. One of the means adopted in safeguarding national security was the enactment of the offence of subversion. NSL 22, being the provision establishing the offence, was clearly aimed at preventing and suppressing subversion, the mischief behind.

21. The Explanation referred to in the case of *Lai Chee Ying* listed out various activities, such as advocating the notion of "Hong Kong independence", "self-determination" and "referendum" and paralysing governance by the government and operation of the legislature that took place in Hong Kong in 2019 which caused concerns to the Central People's Government and led to the enactment of the NSL. In the judgment of the case, the Court of Final Appeal stated:

> "11. The reference to the abovementioned Decision of the National People's Congress ("NPC") is to its Decision dated 28 May 2020 (which has been referred to as "the 5.28 Decision") forming part of the process of formulating and applying the NSL to the HKSAR. Given the special status of the NSL as a national law applied under Article 18 of the Basic Law (as will be discussed) and given the express reference in NSL 1 to that process, regard may properly be had to the Explanations and Decisions made in proceedings of the NPC and the NPC Standing Committee ("NPCSC") regarding promulgation of the NSL as a law of the HKSAR as extrinsic materials relevant to consideration of the context and purpose of the NSL.
>
> 12. The process started with the Explanation of a Draft Decision (which was subsequently to become the "5.28 Decision") presented to the NPC on 22 May 2020. The Explanation began by identifying the concerns of the Central Authorities in the light of recent events in Hong Kong:
>
> '***At present, the increasingly notable national security risks in the HKSAR have become a prominent problem. In particular, since the onset of Hong Kong's "legislative amendment turmoil" in 2019, anti-***

> ***China forces seeking to disrupt Hong Kong have blatantly advocated such notions as "Hong Kong independence", "self-determination" and "referendum", and engaged in activities to undermine national unity and split the country***. ***They have brazenly desecrated and defiled the national flag and emblem, incited Hong Kong people to oppose China and the Communist Party of China ("CPC"), besiege Central People's Government ("CPG") offices in Hong Kong,*** and discriminate and ostracize Mainland personnel in Hong Kong. ***These forces have also willfully disrupted social order in Hong Kong, violently resisted police enforcement of the law, damaged public facilities and property, and paralysed governance by the government and operation of the legislature. Moreover in recent years, certain foreign or external forces have flagrantly interfered in Hong Kong's affairs. They have made intervention and created disturbances in various ways, such as by legislative and administrative means and through non-governmental organisations.*** In collusion with those anti-China Hong Kong disrupters, these forces of the same ilk backed and cheered on the disrupters and provided a protective umbrella, and utilized Hong Kong to carry out activities endangering national security. ***These acts and activities have seriously challenged the bottom line of the "One Country, Two systems" principle, seriously undermined the rule of law, and seriously jeopardized national sovereignty, security and development interests.***'" (***emphasis added***)

22. As stated in the Explanation above, the NSL was enacted in full awareness that national security in Hong Kong could be undermined by non-violent acts such as advocating for Hong Kong independence and self-determination, desecrating national flag and emblem, inciting public hatred and paralysing governance by the government and operation of the legislature. In this regard, we noted that in the recent judgment in *HKSAR v Tam Tak Chi*[10], Poon CJHC who gave the judgment of the Court of Appeal, had the following to say:

---

[10] CACC 62/2022, [2024] HKCA 231, at [129].

> "Modern experiences show the seditious acts or activities endangering national security now take many diversified forms. Some involve violence or threat of violence. Some involve non-violent means but can be equally damaging. There is no valid basis for criminalising the former but not the latter."

23. One example of non-violent means given by the Court of Appeal was "malicious dissemination of misinformation"[11]. Whilst we were fully alive that the above-quoted was said in the context of "sedition" acts prohibited by the Crimes Ordinance Cap 200, it could be equally true for other activities which endangered national security. Bearing in mind that the NSL was enacted to "prevent, suppress and punish" conducts and activities which endangered national security, we could not see any reason why the NPC would have so narrowly restricted "other unlawful means" in NSL 22 to acts which would entail the use of "force or threat of force".

24. After stating the necessity and importance of establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security at national level, the Explanation went on to state the general requirements and basic principles (總體要求及基本原則):

> " In conformity with the above general requirements, the following basic principles must be observed and well grasped.
>
> The first is resolutely safeguarding national security. Safeguarding national security is the requisite for the State's enduring governance and lasting peace, and for Hong Kong's long-term prosperity and stability. It is the common responsibility of all the people of China including the people of Hong Kong, as well as the joint responsibility of the State and the HKSAR. ***Any activities which endanger national sovereignty and security, challenge the power of the Central***

[11] At footnote [99] of that judgment.

> ***Authorities and the authority of the Hong Kong Basic Law, and use Hong Kong to infiltrate and sabotage Mainland China touch on our bottom line and are never allowed***." (***emphasis added***) (unofficial translation)
>
> 贯彻上述总体要求，必须遵循和把握好以下基本原则。
>
> 「一是坚决维护国家安全。维护国家安全是保证国家长治久安、保持香港长期繁荣稳定的必然要求，是包括香港同胞在内的全中国人民的共同义务，是国家和香港特别行政区的共同责任。***任何危害国家主权安全、挑战中央权力和香港基本法权威、利用香港对内地进行渗透破坏的活动，都是对底线的触碰，都是绝不能允许的。***」(***emphasis added***) (Original text in simplified Chinese characters)

25. Secondly, the defence submission was inconsistent with the "5.28 Decision". The Decision stated:

> "6. The National People's Congress Standing Committee is entrusted to formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for the Hong Kong Special Administrative Region to safeguard national security, in order to effectively prevent, stop and punish acts and activities to split the country, subvert state power, organise and carry out terrorist activities and other behaviors that seriously endanger national security, as well as activities of foreign or external forces interfering in the affairs of the Hong Kong Special Administrative Region…" (unofficial translation)
>
> 「六、授权全国人民代表大会常务委员会就建立健全香港特别行政区维护国家安全的法律制度和执行机制制定相关法律，切实防范、制止和惩治***任何***分裂国家、颠覆国家政权、组织实施恐怖活动等严重危害国家安全的行为和活动以及外国和境外势力干预香港特别行政区事务的活动。...」***(emphasis added)*** (Original text in simplified Chinese characters)

The phrase used in Chinese was "任何分裂國家、顛覆國家政權、組織實施恐怖活動等嚴重危害國家安全的行為和活動". We noted the use of "任何" was not translated in the text of the unofficial translation.

26. In our judgment, the fact that the Explanation and Decision referred to "any" activities, not simply activities relating to the use of force or threat of force reinforced our view that a narrow interpretation of "other unlawful means" put forward by the defence would be contrary to the legislative purpose of the NSL.

27. It would not be difficult to anticipate that the operation of the legislature could be paralysed by a variety of ways and in different forms and methods other than the use of force or threat of force. The operation of the LegCo could come to a complete halt because of, for example, a cyber-attack on its infrastructure such as its information technology system, communication system or power supply system. Members and staff of the LegCo could also be subjected to attack by biological, chemical and radioactive agents.

28. Thirdly, the defence's interpretation was also inconsistent with the wording of NSL 22 in that a careful examination of the prohibited acts listed out in its sub-paragraphs (1)-(4) showed that not all of them would necessarily involve the use of "force or threat of force".

29. Sub-paragraph (1) prohibited any undermining of the basic system of the People's Republic of China as established by its constitution, whilst sub-paragraph (3) prohibited any serious interference in the performance of the legal duties and functions of the HKSAR. Neither of them would necessarily involve the use or the threat of use of force.

30. Sub-paragraph (4) prohibited the attacking or damaging of premises and facilities used by the HKSAR in performing its normal

duties and functions. Looking at NSL 22(3) from another perspective, if the defence were correct in suggesting that the "other unlawful means" should be confined to a narrower meaning, it followed logically that any attack on or damage caused to government facilities as envisaged in NSL 22(4) by non-violent means such as setting fire, flooding, dissemination of toxic gases or dispersal of biological pathogens would not be a breach and the perpetrators would go unpunished under the NSL even if the effects and consequences would be the same, if not more serious and widespread.

31. For the purpose of completeness, we had considered whether the use of toxic gases or biological pathogens in the attack of government facilities might fall within NSL 24, so that there would not be a lacuna. NSL 24 provided as follows:

> "A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence:
>
> (1) serious violence against a person or persons;
>
> (2) explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances;
>
> (3) sabotage of means of transport, transport facilities, electric power or gas facilities, or other combustible or explosible facilities;
>
> (4) serious interruption or sabotage of electronic control systems for providing and managing public services such as water, electric power, gas, transport, telecommunications and the internet; or
>
> (5) other dangerous activities which seriously jeopardise public health, safety or security."

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

(一) 針對人的嚴重暴力；

(二) 爆炸、縱火或者投放毒害性、放射性、傳染病病原體等物質；

(三) 破壞交通工具、交通設施、電力設備、燃氣設備或者其他易燃易爆設備；

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

(五) 以其他危險方法嚴重危害公眾健康或者安全。」

32. In our judgment, NSL 22 served a very different purpose than that of NSL 24 in that the latter aimed at prohibiting "terrorist activities" causing or intended to cause grave harm to the society "with a view to coercing the Government" in order to pursue political agenda, whereas NSL 22 aimed at protecting the People's Republic of China or the HKSAR in respect of: the basic system as established by the Constitution; the body of central power (sub-paragraph 1 and 2); the performance of legal duties and functions (sub-paragraph 3); and the performance of normal duties and functions (sub-paragraph 4).

33. Unless one were to stretch the meaning of "force or threat of force" in NSL 22 to the breaking point, the defence interpretation would produce a lacuna in the law and an absurdity which unduly limited the scope and hence reduced the effectiveness of the NSL as a means to

protect national security. That would not be conducive to the legislative purpose of the NSL: cf *Lai Chee Ying v Commissioner of the Police*[12].

34. Last but not least, we noted that whilst the phrase "whether or not by force or threat of force" (不論是否使用武力或者以武力相威脅) appeared in NSL 20 (Secession), sub-paragraph (2) of that article specifically referred to "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" (非法改變香港特別行政區或者中華人民共和國其他任何部分的法律地位) as a prohibited act. Therefore, it was clear that when the phrase "unlawful" or "unlawful means" was used, the NPC did not intend it to be restricted to acts involving the use of force or the threat of force. Therefore, we did not consider that NSL 20 could lend support to the defence submission.

35. In conclusion, we came to the view that the mischief rule required NSL 22(3) to be construed to cover acts not just by the use of force or the threat of force, but also other unlawful means. Limiting NSL 22 only to acts and activities by the use of force or the threat of force would be absurd and illogical and defeat the purpose of the NSL. It should be noted that the other means employed would still have to be an unlawful one, not just any means.

Unlawful means

36. The second issue raised by some of the defendants was that the term "other unlawful means" had to refer to a criminal offence. It

---

12 [2022] 5 HKLRD 205, at [35]

was submitted that any interpretation given for less than a full criminal offence would render the ambit of NSL 22 too broad and uncertain. It was further submitted that given the severe penalty attached, the notion of "other unlawful means" might, if including civil wrong, become too wide and uncertain.

37. Having heard from counsel, we were unable to accept the defence submission. In our judgment, the defence submission would go against the stated purpose of the NSL. As stated above, one of the national security risks stipulated in the Explanation was paralysing the operation of the legislature. It was described as a serious challenge to the bottom line of the "One Country, Two Systems" principle, the rule of law and national sovereignty, security and development interests". It would not be difficult to see that the operation of the legislature could be paralysed by a means which was not criminal offence in itself.

38. NSL 1 demanded a resolute, full and faithful implementation of the "One Country, Two Systems" policy and an improved legal system and enforcing mechanism in safeguarding national security. In accordance with NSL 3, the HKSAR held a duty under the Constitution of the People's Republic of China in safeguarding national security. NSL 6 also required residents of Hong Kong to obey the NSL and not to engage in conducts and activities endangering national security. It was therefore inconceivable that acts or activities by whatever forms and methods with a view to subverting the state power could be considered to be acceptable or tolerable. It was pertinent to note that the use of the unlawful means had to come with a view to subverting in order to constitute a full offence.

39. If it were the legislative intent that "unlawful means" in NSL 22 should be restricted to criminal acts, then the NPC could have easily made this intention clear by employing the term "criminal means" instead. The fact that NPC chose to use the more generic term than "criminal means" (犯罪手段) in NSL 22, in our view, is a clear indication against the defence submission. On the other hand, the defence interpretation would not only render NSL 22 unduly complex or even redundant in that it would require the prosecution to prove a crime within a crime, but would also seriously reduce the effectiveness of NSL 22 in relation to the purpose of prevention and suppression.

40. A reading of Chapter III (Offences and Penalties) as a whole did not support the defence submission:

(1) The term "非法" appeared a total of 5 times in the whole of NSL (all of which in Chapter III) and it was variously translated as "unlawful"[13], "unlawfully"[14] and "illegally"[15]. In this regard, we noted that the NSL was enacted in Chinese only and its English translation[16] gazetted in Hong Kong was said to be "for information". Therefore, we took into account the ordinary meaning of the original Chinese term "非法" and how it was used in the NSL. As we had already pointed out, the term "非法" in NSL 20(2) was not restricted to describe only criminal conducts. Similarly, in NSL 29(5) (Collusion with a Foreign Country or with External

---

13 NSL 20(2), 22 & 29(5)

14 NSL 29

15 NSL 26

16 Published in G.N. E 72 of 2020

Elements to Endanger National Security) where it referred to "provoking by unlawful means hatred … which is likely to cause serious consequences" (通過各種非法方式引發 … 憎恨並可能造成嚴重後果), there was no warrant for restricting the "unlawful means" to acts which were criminal offences in themselves. This was because the term "各種非法方式" meant "any kind of unlawful means". In the aforesaid articles, the term "unlawful" (非法) was wide enough to cover acts which were unconstitutional, in breach of the law or otherwise not following the proper procedure and therefore were unlawful in a general sense. In our judgment, this understanding of "非法" was equally applicable to the other articles of the NSL whenever it appeared without causing any difficulties. On the other hand, if the defence interpretation of NSL 22 were correct, then it would lead to an internal inconsistency in that the term "非法" would have to bear different meanings in other articles contained in the same chapter of the NSL. This, in our judgment, was both unnecessary and unjustified.

(2) Apart from "unlawful" (非法), there were other generic terms used to describe activities prohibited by the offence-creating articles in Chapter III of the NSL. For example, in NSL 24 (Terrorist Activities), sub-paragraph (5) referred to "other dangerous activities" (其他危險方法); NSL 26 referred to "other means to prepare for the commission of a terrorist activity" (其他形式準備實施恐怖活動).

41. One could therefore discern, so far as other offences (within the same chapter of the NSL) were concerned, they were not necessarily confined to criminal acts or acts involving the use of force. On a proper construction of all the offence-creating articles in Chapter III of the NSL, we came to the conclusion that the phrase "other unlawful means" referred not just to criminal acts but included means other than "by force or threat of force" in order to establish and improve the legal system and enforcing mechanisms for safeguarding national security and to prevent the offence of subversion.

42. As to the exact ambit of the unlawful means, namely whether any civil wrong would be sufficient, we did not think it necessary for us to express a definite view on this issue. Suffice for us to say that in the present case, we were only required to decide whether a breach of the Basic Law was capable of constituting an unlawful means.

Unlawfulness as an External Element

43. There was no dispute that for the purpose of a charge under NSL 22, the prosecution had to prove that the means in question was an unlawful one. However, the defence argued that the prosecution had to prove that the defendants knew at the material time that the means in question was unlawful. Hence, so the argument went, an honest albeit mistaken belief about the lawfulness of the means (advocated by Benny Tai, D1) should be afforded to the defence.

44. In our judgment, the prosecution were required to prove that the defendants intended to carry out the means which was the subject of the charge. Besides, there was also an additional mental element that the defendants so acted with "a view to subverting the State power". Thus,

NSL 22 was not an offence of strict liability but rather an offence with specific intent. Had the prosecution failed to prove the double intent, the offence would not be established.

45. That said, after careful consideration, we came to the conclusion that the prosecution was not required to prove that the defendants knew that the means was unlawful. It was clear to us that the use of the word "unlawful" in NSL 22 was an adjective to qualify the *actus reas* of the offence rather than the requisite *mens rea*. The situation was similar to, for example, the offence of unlawful sexual intercourse with a girl under the age of 13 where the prosecution were not required to prove that the defendant was aware the sexual intercourse being an unlawful one. Had it been otherwise, an accused would have a defence based on his or her ignorance of the law.

46. As aforesaid, it was our judgment that knowledge of the unlawfulness of the means in question was not an element of the offence under NSL 22. Furthermore, having regard to the purpose of the NSL, we considered that the gravamen of the offence of subversion lied on the fact that an accused intentionally committed an act which was prohibited by the article and that he or she did so with a view to subverting the State power. Therefore, it was irrelevant to the issue of guilt that the accused acted with a mistaken belief that his or her means was lawful; to hold otherwise would go against the purpose of the NSL.

Subverting the State Power

47. Another legal challenge raised by the defence was the use of the phrase "to subverting the State power" in the offence. It was essentially argued that as there was no definition for the words

"subverting" (顛覆) and "State power" (國家政權) in the NSL or anywhere, the offence lacked certainty.

48. In the absence of any specific definition in the NSL, the meaning of the two terms should therefore be constructed purposively. We turned first to the ordinary meaning of the term "State power" (國家政權). The Chinese dictionary 《辭海》defined "政權" as follows:

> 「政權，亦稱國家政權。通常指國家權力，有時也指體現這種權力的機關。」

49. Secondly, we turned to the wider legal context. In *HKSAR v Lai Chee Ying*, the Court of Final Appeal held that it was evident that the legislative intention was, subject to NSL 62, for the NSL to operate in tandem with the laws of the HKSAR, seeking "convergence, compatibility and complementarity" with local laws. In this regard, we noted that s 3 of the Interpretation and General Clauses Ordinance, Cap 1 provided a specific definition of "State" and "Power" as follows:

> " 'State' (國家) includes only :-
> (a) the President of the People's Republic of China;
> (b) the Central People's Government;
> (c) the Government of the Hong Kong Special Administrative Region."
>
> 「'國家' (state) 只包括:-
> (a) 中華人民共和國主席;
> (b) 中央人民政府;
> (c) 香港特別行政區政府…」
>
> " 'Power' (權、權力) includes any privilege, authority and discretion."
>
> 「'權、權力' (power) 包括任何特權、權限和酌情決定權。」

50. In addition, section 39 of the Interpretation and General Clauses Ordinance, Cap 1 dealt with the exercise of powers:

> "(1) Where any Ordinance confers any power or imposes any duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires."

51. BL 62 described the powers and functions of the Government of the HKSAR:

> "(1) To formulate and implement policies;
> (2) To conduct administrative affairs;
> (3) To conduct external affairs as authorised by the Central People's Government under this Law;
> (4) To draw up and introduce budgets and final accounts;
> (5) To draft and introduce bills, motions and subordinate legislation; and
> (6) To designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government."

52. Thus, applying the definition of "State" and "Power" to the NSL, we concluded that the term "State power" referred to the powers of the Government of the HKSAR and the duties and functions performed by various organs of the Government, such as government departments / bureaux. This was the "State power" which the NSL 22 sought to protect.

53. Thirdly, at the constitutional level, the NPC was and is the highest organ of state power of the People's Republic of China.[17] The BL was enacted by the NPC in pursuant to the Constitution.[18] The following articles of the BL are of note:

---

[17] Constitution of the People's Republic of China, Article 2.

[18] Ibid, Article 31

- by BL 2, the NPC authorises the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the BL;

- BL 12 reiterates that the HKSAR shall enjoy a high degree of autonomy and come directly under the Central People's Government;

- BL 43 states that the Chief Executive, who is the head of the HKSAR, shall be accountable to the Central People's Government and the HKSAR in accordance with the provisions of the BL;

- BL 73 defines the powers and functions of the LegCo which we would discuss in due course; and

- by BL 80, the courts of the HKSAR are given judicial power of the Region. In particular, by BL 158 the NPCSC authorise the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of the BL which are within the limits of the autonomy of the Region.

54. Based on all of the above, it was clear to us that as a matter of law, all the powers enjoyed by HKSAR ultimately came from the Constitution and the Central People's Government. The HKSAR Government exercised State power in Hong Kong on behalf of the latter in accordance with the provisions of the BL. Therefore, as regards the meanings of "State" and "power", we found that there was no inconsistency between the NSL and the Interpretation and General

Clauses Ordinance, Cap 1 which might render the latter not applicable to the former.

55. Thus, applying the definitions in the Interpretation and General Clauses Ordinance, Cap 1 of "State" and "power" to NSL 22, we concluded that the performance of duties and functions in accordance with the law by the body of power of the HKSAR referred to in NSL 22(3) was an aspect of the "State power" which the article sought to protect.

56. There was indeed no definition for the word "subvert" (顛覆) in the NSL. Given the NSL was a piece of national legislation made applicable to the HKSAR by the NPC, it came therefore with no surprise that it did not contain a definition section as normally found in our locally drafted legislation. In the absence of such definition, its ordinary and plain meaning should therefore be considered.

57. The Chinese dictionary《辭海》described "顛覆" as 「顛倒, 倒翻, 傾敗」.

58. The dictionary meaning for "subvert" as stated in the Shorter Oxford English Dictionary (Sixth Edition) was as follows:

> "disturb or overthrow (a system, coordination, principles etc) attempt to achieve, especially by covert action, the weakening or destruction of (a country, government, politice etc)"

59. An online search of the definition from Oxford Dictionary App revealed the following:

> "undermine the power and authority of (an established system or institution)."

60. Reference had already been made to the social context leading to the enactment of the NSL as stated in the Explanation. We noted, in particular, that much was said in the Explanation about hostile activities against the HKSAR and its bodies then existing which gave rise to "the increasingly notable national security risks in the HKSAR".

61. In our judgment, after taking into account the ordinary meaning of "subvert"; the social context leading to the enactment of the NSL; and our understanding of the term "State power", a serious interference in, disruption or undermining of the performance of duties and functions in accordance with the law by the body of power of the Hong Kong Special Administrative Region as referred to in NSL 22(3) could amount to an act "subverting the State power". We noted the interference, disruption and undermining had to be serious.

62. As to the specific intention required for the commission of offence, i.e., "with a view to subverting the State power", we did not think that there could be any doubt that if a person committed an act prohibited by either NSL 22(1) or (2) with intent to bring about the consequences stated in those sub-paragraphs, he or she would have done so "with a view to subverting the State power".

63. In our judgment, the same could also be said in respect of NSL 22(3). As aforesaid, the performance of duties and functions in accordance with the law by the body of central power of the People's Republic of China or the body of power of the HKSAR, as the case may be, was an aspect of the State power. Therefore if, a person who acted with the intention to bring about a "serious interfering in, disrupting, or

undermining of the performance of such duties and functions" he or she would have done so "with a view to subverting the State power".

64. Thus, NSL 22 could also be construed to be a self-defining provision in the sense that once any of the three prohibited acts, i.e. NSL 22(1), (2) and (3) which involved the undermining of an established political system had been committed with the intention to bring out the respective consequences as stated in the sub-paragraphs, that would amount to subversion. In our judgment, the parameters of the offences created by NSL 22(1), (2) and (3) are both clear and certain: c.f. *HKSAR v Mo Yuk Ping*[19].

65. In so far as NSL 22(4) was concerned, it aimed, on the face of its wording, at physical attack and damage to government premises and facilities, causing the Government incapable of performing its normal operation, a situation and its consequence. In our view, similar to the offence of "arson with intent"[20], which required not only the proof of an intention to do the act but also the intention to bring about certain consequences[21], the mental element of "with a view to subverting" might well have to be proved. However, we expressed no definitive view on this particular point which might have to wait for another occasion.

66. In the present case, we took the position that for the purpose of the conspiracy to commit an NSL 22(3) offence, the prosecution were also required to prove the specific intent of "with a view to subverting the State Power" in order to secure a conviction.

---

19 (2007) 10 HKCFAR 386, at §70-79.

20 Section 60(2) Crimes Ordinance, Cap.200

21 Ibid, s60(1)(a) and (b)

Unlawfulness and Abuse of Power

67. The next legal challenge focused on whether a breach of duty under BL 73 would constitute an unlawful means for the purpose of NSL 22.

68. As aforesaid, it was our judgment that the term "State power" would include the powers of the Government of HKSAR and the duties and functions performed by its various organs. Chapter IV of the BL prescribed the political structure of the HKSAR.

69. BL 43 and 60 stated that the head of the HKSAR and the head of the Government of the Hong Kong Special Administrative Region should be the Chief Executive of the Region. BL 59 stated that the Government of the HKSAR should be the executive authorities of the Region.

70. BL 48 described the powers and functions of the Chief Executive:

> "(1) To lead the government of the Region;
> (2) To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region;
> (3) To sign bills passed by the Legislative Council and to promulgate laws;
> To sign budgets passed by the Legislative Council and report the budgets and final accounts to the Central People's Government for the record;
> …
> (10) To approve the introduction of motions regarding revenues or expenditure to the Legislative Council;
> …"

71. As mentioned above in paragraph 51, BL 62 described the powers and functions of the Government of the HKSAR.

72. BL 73 described the powers and functions of the Legislative Council:

> "The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:
> (1) …
> (2) To examine and approve budgets introduced by the government;
> (3) To approve taxation and public expenditure;
> …"

73. In respect of the budgets and given the provisions in BL 48, BL 62 and BL 73, the Government prepared the budgets; the LegCo examined the budgets; and the Chief Executive signed and reported the budgets to the Central People's Government.

74. As such, it was clear that LegCo members collectively had a constitutional duty to examine and approve budgets when the occasion arose based on their merit. Had the budgets been approved, the Chief Executive would then be under a duty to make a report to the Central People's Government.

75. The defence submitted that in vetoing the budgets, the LegCo members were doing no more than exercising their constitutional duty, hence, the common law principles of Parliamentary Privileges and Non-Intervention ("The Parliamentary Privileges Principles") applied.

76. We were unable to accept the above submission. It was worth mentioning that section 38 of the Interpretation and General

Clauses Ordinance, Cap 1 mentioned the "Presumption of lawful exercise of power". Implicitly, there had to be in existence the concept of an "unlawful exercise of power".

77. In the case of *AG v Trotman*[22] which was relied heavily by the defence, Cummings-Edwards JA made clear that the Parliament must examine and scrutinise the contents of the Bill with care:

> "[64]…It is to be noted and expected too that Parliament will not easily or lightly use its power to non approval. …While Parliament can hold the executive to account, in keeping with its oversight function, it must act responsibly."

In our judgment, whilst the LegCo was not expected to and should not automatically and mechanically approve the budgets presented by the Government, a deliberate refusal by the majority of the LegCo members to examine the budgets regardless of their contents and merits would be a clear violation of BL 73 and NSL 3. If there was a plan by the majority of the LegCo members to veto the budgets indiscriminately, i.e., regardless of their contents and merits, with a view to force the Government to accede to their political agenda, that would amount to an abuse of their power.

78. BL 73 described the powers and functions of the LegCo clearly. NSL 3 imposed a duty on the executive authorities, legislature and judiciary in preventing, suppressing and imposing punishment for any acts or activities endangering national security. In our judgment, an act which would seriously interfere in, disrupt or undermine the

---

[22] [2016] 3 LRC 505

performance duties and functions of the Government was clearly an act which would endanger national security in Hong Kong.

79. We did not think that parliamentary privilege was applicable in the present case. The case of *HKSAR v Leung Kwok Hung*[23] did not in fact assist the defence. That case was whether the conduct of the accused (who was then a LegCo member) in question was covered by parliamentary privilege so that he could not be convicted of the charge of "Misconduct in Public Office". It was held that the charge was not covered by parliamentary privilege and did not contravene any of the protection provided by legislation[24].

80. More pertinently, in *Secretary for Justice v Leung Kwok Hung*[25], the Court of Final Appeal, applying *R v Chaytor*[26] and *R (Miller) v Prime Minister*[27], held that the freedom of speech and debate conferred by ss.3 and 4 of the Legislative Council (Power and Privileges) Ordinance, Cap 382 or BL 77 did not extend to provide LegCo members with immunity from prosecution for the offence of contempt under s.17(c) where, by conduct not forming part of any speech or debate, created a disturbance which interrupted or broke up the proper functioning of LegCo or its committees. As regards the common law privilege, Fok PJ, who gave the judgment of the Court of Final Appeal, referred to

---

23 DCCC 546/2016 (unreported) (dated 31 July 2017)

24 Ibid, at [55].

25 (2021) 24 HKCFAR 234

26 [2011] 1 AC 684

27 [2019] 3 WLR 589

Leung Kwok Hung v President of the Legislative Council (No.1)[28] where it was held:

> "… in the case of a written constitution, which confers law-making powers and functions on the legislature, the court will determine whether the legislature has a particular power, privilege or immunity"

Reference was also made to *R (Miller) v Prime Minister*[29], quoting *R v Chaytor*[30] which said:

> "it is for the court and not for Parliament to determine the scope of Parliamentary privilege, whether under article 9 of the Bill of Rights or matters within the 'exclusive cognisance of Parliament'"

As regards the statutory privileges contained in Legislative Council (Power and Privileges) Ordinance, Cap 382, Fok PJ had the following to say:

> "27. Construing the statutory privilege of free speech and debate in LegCo contextually and purposively, I would reject the appellant's argument that his impugned conduct fell within the protection of free speech and debate relied upon. The LCPPO is to be construed as coherent whole with sections 3 and 4 having to be read in context together with other provisions including section 17(c). As the Court of Appeal observed (at [42]):
>
> > 'Protection of the core legislative and deliberative business in terms of free speech and debate in the Council and proceedings in a committee is conferred by sections 3 and 4. Together with other privileges and immunities, they aim at enabling LegCo to carry out its functions independently and without outside interference. The provisions regulating admittance, etc and for offences, including section 17(c) aim at maintaining the

---

28 (2014) 17 HKCFAR 689, at [39]-[43]

29 [2019] 3 WLR 589 at [66]

30 [2011] 1 AC 684

> secure and dignified environment that LegCo needs to carry out its functions.'
>
> 28. The protection of freedom of speech and debate in LegCo is self-evidently an important right. It enables members of LegCo to advocate opinions freely and robustly and without inhibition due to the fear of legal proceedings for such speech and debate. It would be significant inroad into that freedom if a member of LegCo were subject to legal proceeding for things said by him in the course of sometimes heated political debate. Equally, as the passage quoted in the preceding paragraph demonstrates, the provisions regulating admission and creating offences are designed to achieve the statutory purpose of creating a secure and dignified environment conducive to the legislature carrying out its constitutional functions at its sittings without disruption or disturbance.
>
> 29. Accepting the appellant's broad argument in the present case that, merely because he was present at, and had been participating in, a committee meeting of LegCo, he had absolute immunity for his actions however and whenever occurring and even if they amounted to a disruption caught by section 17(c), would be to extend the privilege of free speech and debate beyond the purpose for which it is granted."

81. Applying the above to the present case, it was our judgment that neither the common law parliamentary privilege nor the statutory privileges of freedom of speech and debate had any application in the present case:

(1) the Scheme or agreement which was the subject matter of the Charge and which the defendants were alleged to have been parties was not a product of any speech or debate or any proceedings in LegCo. The prosecution case, if proved, was that the defendants had become parties to the Scheme or agreement before any of them were elected into the LegCo and at which time none of them enjoyed any privilege, be it under common law or from any statute; and

(2) in our judgment, an indiscriminate vetoing of the budgets or public expenditure introduced by the Government with a view to compel the Government to accede to certain political agenda would be a violation of BL 73 and BL 104, not to say if such acts were accompanied with a view to undermining the power and authority of the Government or the Chief Executive. As such, it would be clearly beyond the purpose of any privileges under consideration for them to cover LegCo members who had publicly professed the intention to commit such a violation of the constitutional duty.

82. The objective of vetoing the budgets was made known to the participants by D1 at the very early stage of Project 35+. In coordination meetings, participants of the Primary Election were all informed about that. In articles written by D1 and published on newspapers, the general public were informed of that too. As such, the Court did not need to probe or look into the motive or intention behind. It was revealed to us in the course of PW1's evidence. Further, due to the postponement of the 2020 LegCo election, participants of the Primary Election had never managed to become members of the LegCo.

83. In any event, parliamentary privileges were not absolute privileges. As mentioned in the Explanation above, apart from paralysing the operation of the legislature by Anti-China forces, certain foreign and external forces were also involved. According to the Explanation, intervention and disturbances by way of legislative and administrative means had been created by these forces.

84. NSL 3 imposed a duty on the executive authorities, legislature and judiciary in preventing, suppressing and imposing punishment for any act or activities endangering national security. In light of that, we failed to see why this Court, in trying a case like the present one which involved an allegation of subversion, could not look into the motive or intention behind. Further, NSL 62 stated clearly that the NSL prevailed over any local laws that were inconsistent with the NSL.

85. In addition, BL 104 stated as follows:

> "When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China."

86. Section 3AA of the Interpretation and General Clauses Ordinance Cap 1 provided as follows:

> "**References to upholding Basic Law and bearing allegiance to HKSAR**
>
> (1) For the purposes of an Ordinance, a person upholds the Basic Law and bears allegiance to the Hong Kong Special Administrative Region of the People's Republic of China if the person—
>
> (a) upholds the constitutional order of the Hong Kong Special Administrative Region established by the Constitution of the People's Republic of China and the Basic Law;
>
> (b) upholds the national sovereignty, unity, territorial integrity and national security of the People's Republic of China;
>
> (c) upholds—

(i) the fact that the Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China;

(ii) the People's Republic of China's exercise of sovereignty over the Hong Kong Special Administrative Region; and

(iii) the Central Authorities' exercise of governance over the Hong Kong Special Administrative Region under the Basic Law;

(d) upholds the implementation of "One Country, Two Systems" principle, and safeguards the political structure of the Hong Kong Special Administrative Region;

(e) upholds the objective to maintain the prosperity and stability of the Hong Kong Special Administrative Region within the framework of the Basic Law; and

(f) is loyal to, and safeguards the interests of, the Hong Kong Special Administrative Region.

(2) In subsection (1), a reference to uphold is a reference to intend to genuinely and truthfully observe, support, maintain and embrace, and genuinely and truthfully observe, support, maintain and embrace in words and deeds.

(3) ***For the purposes of an Ordinance, a person does not uphold the Basic Law and bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China when the person does, or intends to do, any of the following—***

(a) commits acts or carries out activities that endanger national security, including—

(i) commits an act required by Article 23 of the Basic Law to be prohibited;

(ii) commits an offence under the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (a translation of "《中華人民共和國香港特別行政區維護國家安全法》"); and

(iii) commits an offence relating to endangering national security under an enactment or under the common law;

(b) refuses to recognise the People's Republic of China's sovereignty over the Hong Kong Special Administrative Region and the exercise of the sovereignty, including objecting to the performance of duties and functions by the body of central power in accordance with—

(i) the Constitution of the People's Republic of China;

(ii) the Basic Law; or

(iii) the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (a translation of "《中華人民共和國香港特別行政區維護國家安全法》");

(c) refuses to recognise the constitutional status of the Hong Kong Special Administrative Region as a local administrative region of the People's Republic of China;

(d) advocates or supports "Hong Kong independence", including—

(i) pursues, promotes or implements "independence and state-building" of Hong Kong;

(ii) participates in an organisation the object of which is "Hong Kong independence";

(iii) pursues, promotes or implements an activity for "self-determination of sovereignty or jurisdiction", "referendum" or "devising constitution by all people", or participates in an organisation the object of which is "self-determination"; and

(iv) pursues or promotes the reign over Hong Kong to be transferred to a foreign country;

(e) solicits interference by foreign governments or organisations in the affairs of the Hong Kong Special Administrative Region;

(f) ***commits acts that undermine or have a tendency to undermine the order of the political structure led by the Chief Executive, contained in the Basic Law, including—***

(i) compels or overawes the Chief Executive by any unlawful means to change a policy, or a motion to be submitted to the Legislative Council for consideration;

(ii) ***indiscriminately objects to the Government's motion, and with this—***

(A) intends to threaten the Government;

(B) intends to render the Government incapable of performing its duties and functions as normal; or

(C) intends to force the Chief Executive to step down and to overthrow the Government; and

(iii) makes use of an election held by the Government to organise or implement, or to incite another person to organise or implement, a "de facto referendum" in any form to confront the Central People's Government and the Government;

> (g) commits acts that undermine or have a tendency to undermine the overall interests of the Hong Kong Special Administrative Region;
>
> (h) desecrates the national flag or national emblem, or regional flag or regional emblem, by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it;
>
> (i) insults or disrespects the national anthem or any other symbol and sign of national sovereignty.
>
> (4) For the purposes of an Ordinance, this section does not limit the meaning of a reference to upholding the Basic Law and bearing allegiance to the Hong Kong Special Administrative Region of the People's Republic of China." ***(Emphasis added)***

87. Although the amendment was made in 2021 and had no retrospective effect, its purpose however was to "explain" the meaning of the reference of "Upholding the Basic Law and bearing allegiance to the HKSAR in the Legislation". Its aim, as stated in the Official Records of Proceedings (17 March 2021 of the LegCo), was to render the legal requirement and condition on upholding the Basic Law and bearing allegiance to the HKSAR more "lucid". In other words, this provision was not enacted to add any new matters or concepts but simply to consolidate and explain more expressly past decisions and principles. We considered this section provided some support to our interpretation of what would amount to an abuse, and therefore unlawful use of the power of the LegCo.

88. As such, indiscriminate vetoing of the budgets or public expenditure introduced by the Government to compel the Government to respond to the Five Demands had all along been an act in violation of upholding the Basic Law as stipulated in BL 73 and BL 104, not to say if such acts were accompanied with a view to seriously undermining the power and authority of the Government or the Chief Executive.

Conspiracy and Its Elements

89. As aforesaid, the Charge which the defendants faced was a statutory conspiracy brought under ss159A and 159C of the Crimes Ordinance, Cap 200. Section 159A(1) and (2) provided as follows:

> "(1) Subject to the following provisions of this Part, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—
>
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement; or
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,
>
> he is guilty of conspiracy to commit the offence or offences in question.
>
> (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

90. As to the nature of conspiracy charge, in *HKSAR v Lai Kam Fat*[31], Ma CJ, giving the judgment of the Court of Final Appeal, said[32]:

> "34. Conspiracy is an inchoate offence, meaning that it is constituted by an agreement to pursue a future course of conduct with the necessary intent and does not require the actual carrying out of the agreed upon acts. It is a different offence from the commission of the underlying substantive offence and criminal liability for conspiracy depends on the

---

31 (2019) 22 HKCFAR 289

32 Ibid, at [34]

alleged conspirators' intentions. As Lord Nicholls of Birkenhead observed, in *R v Saik*:

> "… conspiracy imposes criminal liability on the basis of a person's intention. This is a different harm from the commission of the substantive offence. So it is right that the intention which is being criminalised in the offence of conspiracy should itself be blameworthy. This should be so, irrespective of the provisions of the substantive offence in that regard."

91. As to s159A(2), Ma CJ said that the essential purpose of that section was to ensure that lesser forms of *mens rea*, such as recklessness or negligence, or offences of strict liability, would not be sufficient for the offence of conspiracy, and in those cases the *mens rea* of conspiracy, namely intent or knowledge, had to be proved on a full subjective basis.

92. In the Reasons for Ruling of the No Case Submissions, which should be read together with the present Reasons for Verdict, we discussed at some length the elements of the conspiracy and the distinction between the terms of conspiracy and its overt acts:

(a) the elements of the conspiracy under consideration would be informed by the substantive offence. As to this, we had already set out the elements of substantive offence under NSL 22 above.

(b) for the purpose of establishing guilt for the conspiracy charged, the prosecution also had to prove that the defendant under consideration agreed with at least one of the named co-conspirators to commit a course of conduct which, if executed in accordance with their intentions, would necessarily involve the commission of the offence under

NSL 22 by one or more of them: *Harjani Haresh Murlidhar*[33]; and

(c) in the present case, the alleged course of conduct was, as aforesaid, to indiscriminately veto any budgets or refuse to pass any budgets or public expenditure to be introduced by the Government regardless of the merits or the contents, in the event that they were elected to be LegCo members after obtaining a majority in the upcoming 2020 LegCo election with the intention of compelling the Chief Executive to respond to the Five Demands and in the case that the Chief Executive refused to do so, she would have to dissolve the LegCo, which would eventually lead to her resignation by the operation of the relevant provisions in the BL.

93. As we said, for the purpose of NSL 22 the "unlawfulness" of the means employed by an accused pertained to the *actus reus* rather than the *mens rea* of the substantial offence. Moreover, because of the requirement of "with a view to subverting the State power", the substantive offence was not one of "strict liability". Furthermore, applying *HKSAR v Lai Kam Fat*, the only fact or circumstance which was necessary for an accused to know for the commission of the offence under NSL 22(3) was the knowledge that his or her act would have the consequence of "seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law" by the relevant body of power concerned. It was the existence of that fact or circumstance which was an ingredient of the offence and it was to the ingredient that s.159A(2) applied. It was our judgment, therefore, that in

[33] (2019) 22 HKCAR 446

order to prove guilt under the conspiracy charge, it was not necessary for the prosecution to prove that the accused knew that the means to be employed was "unlawful".

The Scheme

94. We would in due course address the issue as to whether there was any realistic possibility that the Five Demands, variously formulated at different stages, would be met by the Government.

95. Before we did that, in view of the requirement in s159A(1)(a), an issue arose as to whether the indiscriminate vetoing of the budgets, if carried out in accordance with the intention of the parties as alleged, would necessarily lead to a "seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of power of the HKSAR". As to this, we had no hesitation to find that the answer had to be in the affirmative. Our reasons were as follows.

96. BL 50 to 52 provided as follows:

> "Article 50
>
> If the Chief Executive of the Hong Kong Special Administrative Region refuses to sign a bill passed the second time by the Legislative Council, or the Legislative Council refuses to pass a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council.
>
> The Chief Executive must consult the Executive Council before dissolving the Legislative Council. The Chief Executive may dissolve the Legislative Council only once in each term of his or her office.

Article 51

If the Legislative Council of the Hong Kong Special Administrative Region refuses to pass the budget introduced by the government, the Chief Executive may apply to the Legislative Council for provisional appropriations. If appropriation of public funds cannot be approved because the Legislative Council has already been dissolved, the Chief Executive may, prior to the election of the new Legislative Council, approve provisional short-term appropriations according to the level of expenditure of the previous fiscal year.

Article 52

The Chief Executive of the Hong Kong Special Administrative Region must resign under any of the following circumstances:

(1) When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;

(2) When, after the Legislative Council is dissolved because he or she twice refuses to sign a bill passed by it, the new Legislative Council again passes by a two-thirds majority of all the members the original bill in dispute, but he or she still refuses to sign it; and

(3) When, after the Legislative Council is dissolved because it refuses to pass a budget or any other important bill, the new Legislative Council still refuses to pass the original bill in dispute."

97. First, in our judgment, it did not assist the defence that according to BL 51, the Chief Executive might, after the LegCo's first refusal to pass the budgets, apply to the LegCo for provisional appropriations. This was because if the agreement was to force the Government to comply with the Five Demands, and the refusal was done without looking at the contents and the merits of the budgets, and if the defendants indeed intended to carry out their part of the agreement as alleged, we simply did not see how it would be possible for them to approve the Chief Executive's application for provisional appropriations.

98. Secondly, in relation to the defence's submission that upon the first rejection of the Appropriation Bill by the LegCo, we doubted that the Government could, in accordance with the rules and practice of the LegCo, introduce another bill within the same session for the consideration of the LegCo, we did not think it would assist the defence. This was because according to the intention of the defendants as alleged by the prosecution, the second bill would similarly be rejected regardless of its merits and contents.

99. Thirdly, we were aware that the Chief Executive had the power, after the first dissolution of the LegCo, to approve provisional short-term appropriations according to the level of expenditure of the previous fiscal year. However that meant the Government would not be able to introduce any new policies or any increase in expenditure regarding existing policies on benefiting people's livelihood. The performance of its duties and functions would be seriously undermined or disrupted.

100. In short, the point of the agreement as alleged by the prosecution was to create a "constitutional crisis" in order to force the Government to accede to the Five Demands. We had no doubt that any of the "constitutional crises" outlined above, if occurred, would necessarily result in "seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of power of the HKSAR".

Impossibility

101. During the course of the evidence and closing submission, a point was made that the offence was "impossible" in the sense that some

of the defendants believed at the time that the Project 35+ could not succeed as the Government would disqualify the candidates from the pro-democracy camp or that insufficient seats could be secured for the functional constituencies, which might even not cast a vetoing vote on the budgets due to business interest, so that the latter would never be able to obtain a majority in the LegCo. In our view, the issue was about a "factual impossibility" rather than "legal impossibility".

102. As to this, it was necessary to point out that, provided that all the elements of the offence charged were present, the fact that the offence was objectively impossible to succeed would not afford the accused a defence; s159A(1)(b). Therefore, even if the facts were such that commission of the underlying offence of NSL 22(3) was impossible, the conspiracy could still be caught by s159C. That said, the intention to carry out the underlying offence was a critical element of the offence of conspiracy. In the present case, since one of the ingredients of the substantive offence was that the act was done with a specific intent, the prosecution had to prove not only that the conspirators had intended to do the prohibited act, but also that they had intended to do the prohibited act with the specific intent.

The Prosecution Evidence

103. In addition to a large number of undisputed evidence being adduced such as admitted facts, Facebook posts, video recordings, newspaper clippings, the prosecution called 14 live witnesses to testify.

104. Their evidence had been summarised in Annex A as attached to these Reasons for Verdict.

The Defence Evidence

105. On the defence side, apart from admitted facts, Facebook posts etc., 10 defendants decided to testify, 4 defence witnesses had been called. Their evidence had been summarised in Annex B attached to these Reasons for Verdict.

106. We also included the following decisions:

Annex C: Reasons for Ruling on Timing of Sentence.

Annex D: Reasons for Ruling on Admissibility of Evidence Sought to be Adduced under the Co-conspirator's Rule (the Rule).

Annex E: Reasons for Ruling on D5's No Case Submission

Annex F: Reasons for Ruling on D17, D33 and D38s' No Case Submission.

Factual Issues

107. Based on the above ruling on the law, in our view the major factual issues in the present case were as follows:

(1) whether there was at the material time an agreement in existence as alleged by the prosecution;

(2) if so, whether the defendants had knowledge of the Scheme;

(3) if so, whether the defendants were parties to that Scheme; and

(4) if so, whether the defendants had also the intention to subvert the State power and with that intention participated or continued to participate in the Scheme.

That said, the above issues might overlap, and might not be decided in the order as listed above, much depending on the individual cases of the defendants. Moreover, there were factual issues other than the above in relation to the individual case of the defendants. We would address those in due course.

Determination of Factual Issues

108. Let's look first at the factual findings and our determination on some of the factual issues in this case before we turn to individual defendant.

Inception of the Conspiracy

109. It was not disputed that it was D1 who first conceived the idea of gaining a majority in the LegCo. He published his idea on Apple Daily in December 2019 (Capturing a LegCo majority as an important step toward genuine universal suffrage) (立會奪半 走向真普選重要一步). His idea caught the attention of the pro-democracy camp.

110. After the landslide victory of the 2019 District Council election, the pro-democracy camp started to explore ways to obtain a majority in the then upcoming 2020 LegCo election. It could be seen from the December article that D1 mentioned about the use of two powers conferred on the LegCo. The first one was the fiscal power to respond to the genuine public need; D1 was however non-specific about the use of this power at that stage. The other power mentioned was the use of the investigative power probing into police brutality during the "Anti-Extradition Amendment Bill Movement".

111. A meeting was held with some of the influential figures of the pro-democracy camp in early January 2020. Given Au Nok-hin (PW1)'s experiences in liaison and coordination for pro-democracy camp in electioneering works, he was invited to join in the meeting. It was further decided that a coordination mechanism should be established within the pro-democracy camp in order not to waste votes and that more candidates could be elected into the LegCo with the hope of obtaining a majority of 35 seats. D1 insisted on holding a civil voting i.e. a Primary Election rather than conducting an opinion poll as part of the coordination mechanism. Hence Project 35+ was conceived.

112. It was not disputed that D1 in the meeting mentioned about the use of the fiscal power, in particular, vetoing the budgets once a majority was obtained. In other words, it seemed there was a change in the direction from its non-specific use to a more determined course. In that meeting, D1 also talked about achieving the Five Demands and creating a constitutional weapon with mass destruction.

113. After that meeting, D1 together with PW1 started to organise the project in January 2020. They approached various political parties, organisations and individuals. PW1 was invited to participate in the project as one of the two organisers. Essentially, there were two organisers, D1 being the brain behind the project and PW1 being the one in charge of liaison and coordination.

114. It was not disputed that they first approached the Civic Party in February 2020. The attitude of the Civic Party was non-decisive at the time. However, we noted the Civic Party held a press conference on 25 March 2020 expressing the party's support on the matter. Other

political organisations or individuals were contacted and spoken to. Opinions gathered were then analysed and sorted out. It was not disputed that decision was made to hold coordination meeting in all the geographical constituencies and the District Council (Second) constituency. The purpose was to resolve outstanding issues such as whether to hold civil voting with voters' participation, election forum, and replacement mechanism etc. D1 and PW1 further decided to engage Chiu Ka-yin Andrew (PW2) and Chung Kam-lun (PW3) (Convener and Deputy Convener of Power for Democracy) to assist in the arrangements and logistic for the Primary Election.

115. The Civic Party effectively changed its stance on 25 March 2020 completely. The chairman, party leader and senior members attended the press conference during which Yeung Ngok-kiu Alvin (D35) stated on behalf of the Civic Party clearly that if the Chief Executive failed to fulfill the Five Demands, the Civic Party would not be nice to her and that every bill, application for financial provisions, financial proposal for Finance Committee (tabled) afterwards would be vetoed by them. It was also stated that this was a solemn promise and further the Civic Party hoped to assist in accomplishing 35+ and veto the budgets together. D35 further stated that if the LegCo refused to pass the budgets, the Chief Executive might dissolve the LegCo and if the new LegCo still vetoed the original budget, the Chief Executive had to go.

116. Given the chronology of events and the utterances made by D35, we had no doubt that at least D35, if not the other members of the Civic Party who had participated in the subsequent Primary Election such as Tam Man-ho Jeremy Jansen (D20) and Kwok Ka-ki (D30) became a party to the agreement by 25 March 2020. As such, there was in

existence the agreement as early as March 2020 if not by 9 June 2020. This, in our judgment, disposed of the first major factual issue.

Engagement of Power for Democracy in Project 35+

117. In February, D1 had a meeting with PW2 and PW3. As a result, PW2 and the Chief Officer of Power for Democracy (Luke Lai) attended both preparation meeting and coordination meeting held for Kowloon East, the first geographical constituency to hold coordination meeting.

118. Luke Lai also attended coordination meetings held for other geographical constituencies. He made contemporaneous notes of items discussed for PW2's perusal. According to PW2, Luke Lai was a reliable and meticulous person.

Promotion of Project 35+ by D1

119. It was not disputed that D1 had published a number of articles on newspapers and Facebook in promoting Project 35+ and his idea of exercising the vetoing power as a mean to compel the Chief Executive to accede to the Five Demands.

120. On 10 March 2020, D1 published in the Apple Daily "The mechanisms and stages of the 35+ Project" (齊上齊落 目標 35+) which essentially stated, inter alia, that the pro-democracy camp would have sufficient votes to veto bills, budgets and applications for appropriation after obtaining 35+.

121. On 31 March 2020, D1 published another article "A LegCo majority is a constitutional weapon of mass destruction" (立會過半是大殺傷力憲制武器) which stated the use and purpose after obtaining a majority in the LegCo. For the first time on paper, D1 expressed the purpose of achieving a majority and vetoing the budgets was to acquire a "constitutional weapon of mass destruction" in destabilising the existing political system. D1 mentioned the political consequences such as the dissolution of the LegCo and the resignation of the Chief Executive after the budgets being vetoed.

122. On 14 April 2020, D1 went further and published another article "The definition and timing of mutual destruction" (攬炒的定義和時間) in which he detailed the concept of mutual destruction.

123. One week later on 21 April 2020, D1 published another article "The epochal significance of mutual destruction" (攬炒的時代意義) in which he mentioned the concept of mutual destruction as "grabbing half of the seats in the Legislative Council and then casting a veto on the "Budget". The purpose is to finally shut down the government, forcing the Communist Party of China to dissolve the Legislative Council, establish a provisional Legislative Council and then actually declare the end of "One Country, Two Systems".

124. Another week later on 28 April 2020, D1 published another article "Ten steps to real mutual destruction. This is the fate of Hong Kong" (真攬炒十步 這是香港宿命) in which D1 set out the actions and the time tables (between July 2020 and December 2021) to be taken on the 10 steps to mutual destruction.

125. It seemed clear to us that by March and April 2020, the ultimate aim and purpose of Project 35+ had been very clear and made known to the public by D1. To put it succinctly, D1's aim and purpose was to use the Scheme to undermine, destroy or overthrow the existing political system and structure of the HKSAR established under the Basic Law and the policy of "One Country, Two Systems". We wished to stress that the publication of all these articles simply provided a general background to the case. We did not rely on the truth of their contents, nor did we rely on the operation of the Co-conspirator's Rule as an exception to the rule against hearsay.

PW1's knowledge on Project 35+

126. PW1 stressed in giving evidence that his original objective in Project 35+ was confined to obtaining a majority in the LegCo and D1's objective however was over and above his objective. That might very well be the case for PW1 at the early stage of the project. Nevertheless, PW1 had all along been fully aware of D1's objective. Whilst giving evidence, PW1 gave us the impression that he was trying to distant himself, to a certain extent, from D1's objective and to limit the period of time that he was involved.

127. In our view, PW1 did play a significant and pivotal part in assisting D1 to achieve the goal when working on the project given the fact that PW1's involvement started at the January meeting. We of course noted that at a later stage, PW1 withdrew from the project after mid-July when the question of its legality was raised.

128. Although PW1 stressed that mutual destruction, to his understanding, started only from the stage where the vetoing power of the

budgets first being used and ended with the ultimate shutting down of the government, technically speaking that would be the case. However given the clearly stated ultimate aim and purpose of D1, PW1 would have known that Project 35+ was the starting point, the beginning to an end of a chain reaction. We therefore did not accept that.

129. Obtaining a majority in the LegCo was just a means and not an end. The rhetoric question one needed to ask was to what end that PW1 wanted. Not only PW1 had all along been aware of D1's objective, he also published on his Facebook dated 30 April 2020 an article titled "Deny the totalitarian line of Communist Party of China with 35+" (以「35+」否定中共極權路線). One therefore would have no difficulty in discerning that the aim and purpose behind PW1's Project 35+ was beyond obtaining a majority. If that was the destination of PW1's Project 35+ at the beginning, PW1 changed course soon after the departure.

130. In any event, PW1 further told us that after the 9 June press conference, he went along with D1's objective. As all the articles published by D1 had all along been in the public domain, we drew the irresistible inference that PW1, as one of the two organisers of the Project 35+ had been aware of all that. PW1 was also present in quite a few of the coordination meetings where D1 hosted the discussion. There was no dispute that in almost all of these coordination meetings, D1 reiterated the use of the vetoing power.

PW1's Participation in Coordination Meetings

131. It was not disputed that coordination meetings were held for all five geographical constituencies between March and May 2020. D1

attended all the coordination meetings whereas PW1 and PW2 attended some. One could therefore discern from D1's attendance in all these meetings that he was indeed the brain and the primary promotor of Project 35+. D1 was the one who had full knowledge on the progress and development in each coordination meeting of each geographic constituency. Most of the talking and discussion was done by D1. PW1 was enlisted primarily to assist D1 in liaison and coordination. There was also little evidence pointing to the fact that PW1 played an active role in the discussion, he only raised his query or disagreement with D1 after the meeting had ended.

Project 35+ Document

132. After a careful consideration of all the evidence, we were satisfied that D1 did either distribute or circulate the "Project 35+" document to all the participants either before or during the coordination meeting. The contents of the document were self-explanatory and easily understandable. They were very good tools to introduce the project in coordination meeting. If the document was not circulated before, we had no doubt that it had been referred to in the coordination meeting.

133. We noted by then D1 and PW1 had already approached a number of political parties, organisations and individuals in order to solicit their views. As such, the preparation of a document for the purpose of introducing the project to all the intended participants was logical. There was nothing unusual or secretive regarding any items on the document. We simply did not see any reason why D1 would withhold this piece of document from any participants. We noted from the document that D1's prime objective was notably absent. On the other

hand, D1 emphasised in the heading of the document that this was one coordination mechanism with voters' participation, a mechanism he insisted. Further, paragraph 1 of the document stated clearly that only those who agreed with the Five Demands could participate.

The Holding of Coordination Meetings

134. It could be seen from coordination meetings held for Kowloon East that the process of reaching consensus had been constantly evolving, from the very beginning of not holding Primary Election, in the case of Kowloon East, to the very end in attaching a "common programme / guiding principle" to the nomination form. In the case of Kowloon East, a secretariat, which was the only one in five geographical constituencies, was even established to promote the project.

135. It was beyond dispute that after the holding of the coordination meetings for the geographical constituency, consensus had been reached on four less contentious items, namely the holding of Primary Election, the holding of election forum, the targeted number of seats and the replacement mechanism. Notable absence was the use of the vetoing power. However the holding of coordination meeting was by no means the end of the coordination process. The number of lists to be put forward in some constituencies, such as Hong Kong Island, Kowloon West and New Territories East, was still much in the air which had to be decided later. In determining the number of lists, we were also aware that opinion poll would be conducted after the Primary Election.

136. In our view, the four consensuses reached at the coordination meeting were confined to practically logistical arrangements prior to the official LegCo election. These four consensuses had little to do with how

to achieve the "Five Demands Not One Less". They were "non-political" and were simply a part of a mechanism in maximising the number of pro-democracy camp LegCo members in the LegCo chamber. These four consensuses related to the means only. Surely the end was the more important matter that both the participants of the project and D1 cared about.

137. D1 was of course aware of the fact that so far as vetoing the budgets was concerned, not everyone went on board with his project in the coordination meetings. For example, we heard Paul Zimmerman from Hong Kong Island opposed that. The LSD also opposed that before and during the New Territories East second coordination meeting. Representative of the Democratic Party also raised his concerns. According to PW1, he also had private conversation with D1 after the second New Territories East coordination meeting. It would not be difficult to envisage that in a project like the present one with participants coming from across a wide spectrum of political beliefs and ideas, a unified agenda or consensus could be agreed on after one or two meetings. If achieved, that would tantamount to one step to heaven.

Coordination Agreement

138. We had no doubt that D1 continued his effort in pushing for his ideas, the single most important item to him. Given the ultimate aim and objective of D1, it was therefore not surprising to hear from PW1 that D1 mentioned that since the topic of vetoing the budgets had been raised in the coordination meeting, that issue therefore should be included in the coordination agreement. We noted that PW1 and PW2 also attended

some but not all coordination meetings. We knew PW1 actually did not attend any coordination meeting for New Territories West.

139. We had no doubt by the end of all the coordination meetings and before the expiry of the nomination period, except for a few who still had their reservation and did not take part in the Primary Election, the use of the vetoing power had become a consensus reached by the vast majority of the participants.

140. Despite the fact that some political parties such as the LSD and the Democratic Party which initially expressed reservation or opposition to the idea of vetoing the budgets, somehow they decided to change their positions. We had no doubt that D1 had continued to play his part in persuading the participants to go along with his ideas and objectives. We also noted that some attendees for example Paul Zimmerman did not participate in the Primary Election.

141. We noted in all the WhatsApp messages that we came across during the trial, no defendant had expressly objected to the idea of the use of the vetoing power. On this issue, we noted the evidence of PW1 regarding his view on D1 whom he thought did not act as a facilitator as he should be. Notwithstanding that, D1 was very cautious. As such, one therefore could see that the organisers had made clear in Part II of the nomination form which required candidates for the Primary Election to declare:

> "I hereby confirm that I agree and support the consensus of the coordination meeting led by Benny Tai Yiu-ting and Au Nok-hin including 'Democrats 35+ Civil Voting Project' and its goal."

142. When PW1 was being asked if the project was hijacked by D1, PW1 expressed his reservation on the use of "hijack". When PW1 was asked the "goal" of the project, he told us that if he were asked by the participants, he would tell them that it was the common programme / guiding principle, i.e. practically the contents of the coordination agreement. PW1 however told us that no participants had ever asked him that. Based on the entirety of the evidence, we had no doubt that all participants of the coordination meeting knew exactly what they were involved in the project.

143. The above declaration was repeated in paragraph 2 of the Election Deposit Receipt for participating in the Primary Election:

> "Candidates for the 'Democrats 35+ Civil Voting Plan' must support and agree with the consensus of the co-ordination meeting held by Tai Yiu-ting and Au Nok-hin, including the 'Democrats 35+ Civil Voting Plan' and its objective."

Paragraph 3 of the said receipt further stated that no refund would be made if the candidate violated the above consensus.

144. As stated above, we were satisfied that D1 had either circulated a copy of the document "Project 35+" or mentioned its contents to all the participants in the coordination meetings. We were also satisfied that after each geographical constituency coordination meeting, D1 had also prepared a summary of the meeting for the participants' perusal.

145. In the case of Kowloon East, the first geographical constituency where coordination meeting was held, PW1 stated that he had firstly seen a draft version after the first coordination meeting and a final version after the second coordination meeting of the document

"Project 35+ Majority in LegCo Co-ordination Mechanism of the Democracy Camp in Kowloon East" (35+立會過半計劃 民主派九東協調機制). A copy of the final version was recovered from PW2's telephone titled "Project 35+ Majority in LegCo Co-ordination Mechanism of the Democracy Camp in Kowloon East Agreement" (35+計劃 民主派九東協調機制協議). The difference lied in the use of the word "agreement" (協議). A WhatsApp group named "35+ Kowloon East LegCo Election Symposium" (35+九東立選座談會) was created in February 2020. From the WhatsApp record, one could see that Choy Chak-hung, Chairman of Kwun Tong District Council had forwarded a number of files i.e. "35+九東.docx", "35+九東 final.docx" and "35+九東 final(2).docx"[34] to all the members of the group. It was not disputed that these files contained the document "Project 35+ Majority in LegCo Co-ordination Mechanism of The Democracy Camp in Kowloon East (Draft) or (Agreement)".

146. According to the evidence of Sze Tak-loy (D24), a candidate for Kowloon East, he confirmed that he had received a copy of "35+ Kowloon East.docx" (35+ 九 東 .docx) and "35+Kowloon East final (2).docx" (35+九東 final (2).docx).

147. As PW1 was a former LegCo member for Hong Kong Island, he was given the responsibility of all the coordination work for Hong Kong Island. He confirmed that D1 had circulated a copy of the "Project 35+ Majority in LegCo Co-ordination Mechanism of the Democracy Camp in Hong Kong Island (Draft)" (35+立會過半計劃民主派港島協

[34] TB3/1A/15-16/80, TB3/1A/42-43/149, TB3/1A/45/158

調機制(初稿)) after the meeting. In addition, a copy of that document was also retrieved from the computer of Yeung Suet-ying Clarisse (D10) who was a candidate for Hong Kong Island.

148. Another document "Project 35+ Majority in LegCo Coordination Mechanism of the Pro-democracy Camp in Kowloon West Agreement" (35+立會過半計劃民主派九龍西協調機會協議) was seized from the computer of Wong Pik-wan (D17) who was a candidate for Kowloon West.

149. If one compared the contents of the "common programme / guiding principle" (共同綱領) i.e. an attachment to the New Territories West candidates' nomination form with the document "Project 35+ Majority in Legco Coordination Mechanism of the Democracy Camp in New Territories West Agreement" (35+立會過半計劃民主派新西協調機制協議), one would immediately notice the contents of both documents were substantially identical. It became clear to us that participants of the New Territories West coordination meeting also received a copy of the agreement.

150. PW3 told us clearly that after the first coordination meeting, D1 circulated certain document. According to PW3, he received a copy of the document with the file name "35+ New Territories East.docx" through the broadcast list from D1. PW3 remembered, after receiving that document, he had a discussion with D1 on the target number of seats in the document as it was different from the consensus reached in the meeting. PW3 talked to D1 who then sent out a corrected version.

151. According to PW3, he knew D1 had sent the document to everyone because he also obtained another copy through WhatsApp forwarded by Gary Fan (D39). So all in all PW3 had received the document three times.

152. On some occasions, D1 also made known to the participants of coordination meeting that the draft version would be used as the basis for discussion in the coming meeting, for example (i) after the first coordination meeting of Kowloon West on 26 March 2020 "35+ Kowloon West.docx" (35+九西.docx)[35]; (ii) after the first coordination meeting of New Territories East on 16 April 2020 "35+ New Territories East.docx" (35+新東.docx)[36]; (iii) after the first coordination meeting of New Territories West on 25 April 2020 "35+ New Territories West.docx" (35+新西.docx)[37].

153. For District Council (Second), D1 also distributed a copy of the "35+ District Council Two.docx" (35+區二.docx)[38] to all the participants on 1 May 2020.

154. Given the fact that D1 had asked for the telephone numbers of all the participants who attended coordination meeting, there was no reason why such agreements would not be distributed. We were satisfied that not only D1 had prepared a summary after each coordination meeting for each geographical constituency, he had also sent it to all the

---

35 TB3/85/1901-1902/359-360

36 TB3/85/1904-1905/372-374

37 TB3/85/1905-1906/377-378

38 TB3/85/1907/383

participants. As to whether individual participant had received them, we would deal with that under each individual below.

155. It was not disputed that PW1 did not attend all the coordination meetings. As such PW1 might not be in the best position to appraise of all the developments on the use of the vetoing power. For example, PW1 had no idea why in the case of New Territories East instead of "actively use", "use" was adopted in the final agreement. PW1 also did not attend any coordination meeting for New Territories West. In any event, as late as 9 June, PW1 became fully aware that the use of the vetoing power, whether actively or not, had become a consensus, in so far as the organisers were concerned. As stated above, when being asked if D1 had hijacked the project, PW1 replied by stating that in so far as the participants were concerned, it depended on the individual. In our view, that was a very diplomatic answer from a veteran politician who testified against those who once stood together with him in the project.

156. One day before the press conference on 9 June 2020, at PW1's request, he received all the final agreements of all five geographical constituencies from the organisers in one go at his request. We drew the irresistible inference that all these agreements which had already been prepared were made available for anyone's use and perusal instantly. Further, a copy of the agreement in relation to all five geographical constituencies and two functional constituencies could be found in PW2's mobile telephones.

157. In all these agreements, paragraphs 1 and 2 stated clearly the purpose and objective of the Primary Election. The participants of the

Primary Election declared that, if elected, they would either actively use or use the power conferred on the LegCo by the BL to veto the budgets.

158. The word adopted in the final version in the agreement for New Territories East and New Territories West was "use" whereas for the rest of other constituencies it was "actively use". However, as one could see in due course, the difference between "use" and "actively use", if any, in the agreements, became a matter of no moment as a result of the IWR declaration. We also noted from PW2's evidence that D1 stated in the first New Territories East coordination meeting that if there was going to be coordination, there should be a "common programme / guiding principle" (共同綱領). D1 further stated that after he had gathered the information, he should prepare a draft and send it out to everyone.

Press Conference on 9 June 2020

159. After all the coordination works done between March and May, it was decided by the organisers that a press conference should be held. No doubt the purpose of the press conference was to inform the public their results.

160. Prior to the press conference on 3 June 2020, D1 sent out a message to all the organisers on WhatsApp group, stating that after more than three months' effort, the pro-democracy camp had finally reached an agreement after the coordination from the five geographical constituencies and the District Council (Second) constituency and that a press conference would be held on 9 June 2020. PW1 replied "OK" and

PW2 stated he would make the arrangements[39]. As such, by the time the press conference was held, PW1 was fully aware that agreement had been reached on the purpose and objective of Project 35+,in particular, the use of the vetoing power.

161. D1 stated in the 9 June press conference that the organisers did not require any of the participants to sign the agreement. It was due to the fact that they did not want to create further risk for the participants from being disqualified. Had the four items been the only consensuses reached in the coordination meetings, we could not see any reasons how they could become risk for disqualification. D1 made the necessary announcement in the press conference on 9 June 2020. We noted that there was not a shred of objective evidence pointing to the fact that any of the participants had disagreed with D1's statements.

The Inked Without Regret Declaration (IWR declaration)

162. We found that as D1 declared no signed agreement was required, Chow Ka-shing (D37) together with Leung Fong-wai Fergus (D7) and Cheung Ho-sum Sam (D26) decided to create one "unofficially". We had no doubt that the decision made by the organisers, in particular D1, inevitably caused frustrations, if not upsets and angers, among some more "progressive" participants. As D37 stated in his evidence, he had little financial resources. He also had no major political party backing. To him, the determination to fight and the undertaking by those who lost in the Primary Election not to participate in the official LegCo election were the most important issues. We had no doubt that formed the origin of the birth of the IWR declaration.

---

[39] TB3/31/1067

163. On 10 June 2020, the above three initiated the IWR declaration. The contents of the declaration spoke plainly of its objectives. Paragraphs 1 and 2 of the IWR declaration stated that a "common programme / guiding principle" had been agreed which formed the basis for cooperation of the candidates and was the highest common factor across the spectrum of the resistance camp, D1 however did not require candidates to sign.

164. It was further stated that in order not to lose the trust of the voters, the initiators called upon all Primary Election candidates to sign. It was clear to us that paragraph 3(1) of the IWR declaration was an amalgamation of paragraphs 1 and 2 of the final agreement reached in each of the geographical constituency. It was also clear that paragraph 3(2) of the IWR declaration had the same effect of the last paragraph of the final agreement of each geographical constituency. From the wordings used and in their context, we had no doubt that it was created in response to D1's failure / reluctance to ask candidates to sign on the written final agreement. The purpose of the IWR declaration was to ensure, as paragraph 4 stated, that candidates in the resistance camp to have the fundamental will to fight on.

165. The above findings could find further support from the three initiators' utterances. The three initiators explained in one interview their reasons for initiating the IWR declaration. Essentially, they were disappointed by D1's failure / reluctance to ask the candidates to sign for the final agreement. Had there been no agreement reached regarding the use of the vetoing power in the coordination meeting and the requirement for signing, we doubted the three initiators would have such strong reaction.

166. We were also of the view that the failure / reluctance on the part of D1 also caused candidates of Kowloon East and New Territories West to attach in their nomination forms a copy of the "common programme / guiding principle" and the final agreement respectively.

167. A number of defendants from the five geographical and two functional constituencies, including some of the defendants in the present case, either endorsed or signed on the IWR declaration or posted the IWR declaration onto their Facebook. This lent further support to the fact that an agreement on the use of the vetoing power had been reached in all the constituencies.

168. The final agreement and the IWR declaration were supplementary to each other. The IWR declaration was an additional mechanism to strengthen the fundamental determination of the candidates in promoting D1's objective, albeit not having any official status.

Nomination Form and the Deposit Receipt

169. As stated above, paragraph 2 of Part II of the nomination form required candidates running in the Primary Election to confirm their agreement and support of the consensus of the coordination meetings led by D1 and PW1, including the "Democrats 35+ Civil Voting Project" and its goals. According to PW1, that referred to the Primary Election and the common programme / guiding principle of each geographical constituency. Had anyone asked him about the project and its goals, he would inform that person about the vetoing of the budgets. Nobody had however asked him. In our view all the participants knew perfectly well what the goals were.

170. Similar confirmation was required in paragraph 2 of the receipt of the deposit. It was mentioned that if the candidates opposed the consensus, the deposit would not be refunded. One could therefore see that the organisers placed great emphasis on the fact that unless one had agreed with the organisers' intention and ideas, one should not come along. By attending coordination meeting, listening to D1, receiving a copy of the coordination agreement, endorsing or signing on the IWR declaration and the nomination form and paying for the deposit, all participants were made aware of the use of the vetoing power and the purpose of it. All participants became parties to the Scheme.

Election Forums

171. All defendants on trial attended their respective election forums. Some of the defendants expressed and advocated their own objectives in the forums. We noted that in this kind of occasions, candidates might attack other candidates without any solid basis or foundation. We took no heed of any remarks made by one candidate against other candidates. We only took into account what any particular candidate said about himself or herself. Further we also considered whether any words uttered were simply election rhetoric.

Press Conference on 6 and 9 July 2020

172. On 6 July 2020, D1, PW1 and others held a press conference announcing the location of polling stations.[40] In the press conference, D1 mentioned one of the objectives was the use of the vetoing power to veto the budgets. D1 also talked about the dissolution of the LegCo.

---

[40] TB6/6B/386-387

173. On 9 July 2020, D1, PW1, PW2 and PW3, held another press conference announcing the details of the Primary Election. During the press conference, D1 reiterated the objectives of the Project 35+ once again: to obtain a majority of the LegCo and to exercise the power to veto the budgets.[41] As these two events took place after 1 July, the co-conspirator rule in our view had become applicable and what D1 said on those occasions were admissible evidence against the defendants.

Participation in the Primary Election

174. All the defendants except Ng Gordon Ching-hang (D5) on trial participated in the Primary Election on 11 and 12 July 2020.

Post Election Press Conference

175. In another press conference[42] held on 13 July 2020 after the Primary Election, D1 reiterated that the participants would abide by the agreement reached and that they had undertaken to make use of the power to veto the budgets.

176. On 14 July, D1 published a post on his Facebook and again stated that the participants had reached an agreement in the coordination meeting to veto the budgets.[43] In our view the co-conspirator rule was applicable to the declaration made by D1 on both occasions and what D1 said on these occasions were admissible evidence against the defendants.

---

41 TB6/7B/455-456

42 TB6/10B/814-816

43 TB1/158A/2061

Press Conference by the Resistance Camp on 15 July 2020

177. On the 15 July 2020, a press conference was held by the localist resistance camp including Ho Kwai-lam (D33), D37 and Yu Wai-ming Winnie (D47).

178. One of the defendants Shum Lester (D44) stated that they would veto the budgets indiscriminately in accordance with the agreement reached. D33, D37 and D47 who were present did not express any contrary view.

The Postponement of the LegCo Election

179. Due to the COVID pandemic, the 2020 LegCo election was postponed. Had the Project 35+ proceeded ahead and the pro-democracy camp succeeded in obtaining 35 seats in the LegCo election, the consequences intended by the defendants would be to compel the Chief Executive to accede to the Five Demands. One should not overlook the slogan was not just Five Demands. It was "Five Demands Not One Less", nothing less than five would suffice.

180. We accepted from PW1 that the Five Demands had its fluidity. The demands kept changing. Initially there was the demand for the Chief Executive to step down. It was later substituted for the demand of dual universal suffrage. Implicit in the demand for universal suffrage was the demand for the stepping down of the then Chief Executive. Notwithstanding the change of name, the stepping down of Chief Executive had all along been there.

181. We also accepted from PW1 that even the easiest demand for an independent commission for inquiry had been met with a refusal by the then Chief Executive back in August 2019. As such, the pursuit for "Five Demands Not One Less" was practically impossible. We also took notice that up to the present moment, except for the withdrawal of the Extradition Amendment Bill by the Government, none of the other demands had been met.

182. By vetoing the budgets once *per se*, D1's ultimate aim and purpose of the project would not be achieved and could hardly be described as a weapon of mass destruction. When the notion of "vetoing the budgets" was mentioned by D1, we had no doubt that he was referring to the overall vetoing powers collectively described in BL 50 to 52 and their consequential effect, namely the dissolution of the LegCo and the resignation of the Chief Executive.

183. We accepted from PW1's evidence that as early as the meal gathering in January 2020, when D1 mentioned the use of the vetoing power, he was talking about a constitutional weapon of mass destruction. According to PW1, D1 explained the term to mean vetoing the budgets twice in order to dissolve the LegCo and to compel the Chief Executive to go down.

184. D1 reiterated the use of the power conferred by the Basic Law in vetoing the budgets twice resulting in the dissolution of the LegCo and compelling the Chief Executive to step down in the worst scenario when he met senior members of the Civic Party. Had D1 not mentioned that, we doubted we would hear the stance adopted by the Civic Party in its press conference.

185. According to PW1, D1 mentioned the use of the vetoing power in coordination meeting for each geographical constituency. We had no doubt that D1 would not only mention the use of the vetoing power but also explain the consequential effect to all the participants. That was so because he needed the participants to exercise those powers if they were elected to be LegCo members.

186. PW1's evidence in this aspect was supported by PW2's evidence. PW2 stated in his evidence that D1 focused, in the coordination meeting, on the power conferred by the Basic Law to LegCo and also the details described in the Basic Law concerning the steps. D1's article "Ten steps to real mutual destruction. This is the fate of Hong Kong" was published in Apple Daily on 28 April 2020.

187. The use of the vetoing power was just a means. We had no doubt that D1 would explain to the participants of the coordination meeting the steps taken and the ends which he wished to pursue as reflected in the use of the words "to force the Chief Executive to respond to the 'Five Demands'" in paragraph 2 of the coordination agreement.

188. As such, the Chief Executive, after the budgets being vetoed twice, would have no option but to resign under BL 52. The ten steps as envisaged by D1, up to the stage regarding the stepping down of the Chief Executive, might not be as hollow as the defence suggested. Even the Chief Executive chose not to dissolve the LegCo, any application for provisional appropriations would be vetoed likewise by the majority-controlling LegCo members of the pro-democracy camp and in our view the result would be the same.

189. Although BL 51 allowed the Chief Executive to approve short term appropriations according to the level of expenditures of the previous fiscal year in the case that the LegCo had been dissolved, that meant the implementation of any new government policies would be seriously hampered and essentially put to a halt. The power and authority of both the Government and the Chief Executive would be greatly undermined. In our view and in the words of PW1, that would create a constitutional crisis for Hong Kong.

190. We therefore came to the view that the Scheme, if carried out in accordance with the intentions of the parties as alleged, would necessarily amount to or involve the commission by the successful candidates of a serious interfering in, disrupting or undermining the performance of duties and functions in accordance with the law by the Government of the HKSAR. We noted the Chief Executive was the head of the Government of the HKSAR.

191. We next turn to the individual defendants according to their geographical and functional constituency and lastly to the case of D5.

Hong Kong Island

D8 Cheng Tat-hung

192. Mr Pun, SC (and with him, Mr Wong and Ms Chan) submits that the Prosecution has failed to prove that:

(1) the Scheme existed;

(2) D8 was a party to the Scheme;

(3) D8 took part in the Scheme and had the intention to subvert the State power; and

(4) there was any "unlawful means" within the meaning of NSL 22.

Consideration of the evidence

193. D8 has a clear record. He gave evidence in Court. In assessing the evidence, we give ourselves the "good character direction" on both the propensity and credibility limbs in his favour.

Knowledge of the Scheme

194. We have no doubt that, based on D8's own testimony in Court, he was aware that there was an agreement to use the vetoing power of the LegCo to force the Government to accede to the Five Demands, failing which to cause the Chief Executive to step down after the LegCo was twice resolved. Firstly, there was D8's evidence of his participation in the preparatory meeting about one week before the press conference of the Civic Party. D8 was aware that during that meeting, D20 suggested that the Civic Party would take the lead to use the vetoing power as a gambling chip to fight for the five demands. Then, at the press conference (which D8 also attended), Alan Leong as the Chairman of the Civic Party said[44],

> "詒我知道呢而家詒喺民間呢就民主派裏面呢係詒發起咗去討論即係地區直選呢係點樣做一個初選，協調，詒或者係講緊詒近啲選舉嘅，係會有一個民調，或者退選等等呢啲咁嘅機制 … 但係我喺呢度就代表公民黨呢係好認真咁樣

[44] [TB6/3B/117/11]; CT [TB6/3C/151/11]

講，我哋最－－作為民主派其中－個較具規模嘅政黨呢，我哋係完全義無反顧地，我哋係會支持民間呢－個協調，以協助民主派嘅選民嚟到去最好地運作佢哋嘅選票，配票呀等等，嗄，嚟到呢係達致議會過半呢個目標嘅。… 公民黨一定會根據民間討論同意嘅共識機制嚟行事，唔會輸打贏要，必定係會服認哩個機制。”

["Well, er, I know that currently, er, the community has initiated a discussion regarding the (parties) within the democratic camp, that is, how the Primaries (and) coordination can be conducted for direct geographical elections, er, or it is being said that, er, in the coming election, there will be mechanisms such as an opinion survey or withdrawal from election, etc. … But, I am here to say very seriously on behalf of the Civic Party that we are the most - being one of the relatively large political parties in the democratic camp, we have no hesitation in our support of the community's coordination, so as to assist voters of the democratic camp in making the best use of their votes, allocating votes, etc., huh, thereby achieving the target of getting a majority in the Council. … I make a promise here seriously that the Civic Party will definitely act according to the consensus-mechanism agreed by the community after discussion. (We) will not take a "lose-hit, win-take" approach (and) will certainly submit to this mechanism."]

195. Immediately after the above quoted message of Alan Leong, D35, the Leader of Civic Party, followed up and said[45]:

“唔該阿傑哥。諗我係負責代表黨團係講講如果民主派喺九月係有機會獲得35+, 諗公民黨個態度係啲乜嘢。說到底係五大訴求，點樣可以透過把握住議會嘅多數去實現五大訴求呢？具體而言，如果林鄭月娥係唔會改變佢嘅時間表，十月初理應呢係選後第－個最重要嘅立法會嘅事務，喺宣誓之後就係處理行政長官施政報告，林鄭月娥理應唯施政報告嗰度正式面向香港人，面向住選舉嘅結果回應五大訴求，落實五大訴求，而如果佢做唔到嘅話，公民黨係會同佢唔客氣。簡單而言，以後政府嘅每一個法案，由施政報告，佢唔能夠回應五大訴求之後，由施政－－以後嘅每一

45 [TB6/3B/120/12]; CT [TB6/3C/152/12]

個法案，財政嘅撥款申請，財委會嘅撥款申請，我哋都會否決。呢個亦都係一個莊嚴嘅承諾。而直至去到三月嘅財務預算案，如果林鄭月娥仍然係唔願意有任何嘅退讓嘅話，我呢亦都會義無反顧咁樣對預算案投反對票，亦都希望能夠促成35+，一齊否決呢一個預算案。最終嘅結果係啲乜嘢呢？根據《基本法》五十同埋五十二條三，如果我哋立法會拒絕通過財政預算案，其實行政長官係可以解散立法會嘅，重選之後如果再次否決原嘅預算案嘅話，行政長官必須辭職。所以呢一件並非小事，亦都係非常非常嚴肅嘅一件事，所以我呢希望嘅就係，我哋而家有言在先，呢一個係我哋公民黨向大家作出嘅承諾 …”

[“Thank you, brother Kit. Er, I am responsible for speaking on behalf of the party-organisation that if the democratic camp does stand a chance to get 35+ in September, er, what attitude the Civic Party will take. After all, it is about the five demands. How to fulfil the five demands by taking the opportunity of being a majority in the Council? Specifically, if Carrie LAM does not change her timetable, the first and most important LegCo affair after the election will be in early October. The Chief Executive's Policy Address will be dealt with after oath-taking. Carrie LAM should, in the Policy Address, formally face Hong Kong people, face the election outcome, respond to the five demands and fulfil the five demands. If she fails to do so, the Civic Party will not be nice to her. Simply put, every Government bill (tabled) afterwards, starting from the Policy Address, after she has failed to respond to the five demands, starting from the Policy --, every bill, application for financial provisions (and) financial proposal for Finance Committee (tabled) afterwards will be vetoed by us. This is also a solemn promise. If, until the budget in March, Carrie LAM is still unwilling to make any concession, we will veto the budget as well without hesitation. (We) also hope to assist in accomplishing 35+ and veto this budget together. What will be the final result? According to Article 50 and Article 52 [3] of the Basic Law, if we, LegCo, refuses to pass the budget, in fact, the Chief Executive may dissolve LegCo and if the new LegCo still veto the original budget, the Chief Executive must resign. Therefore, this is not a minor matter, but a very, very serious matter. As such, we hope that, that is, we give our word here. This is a promise made by the Civic Party to everyone …”

Later, D35 also said in English[46]:

> I cannot speak on behalf of the Democrats, I can only speak on behalf of the Civic Party. Our aim is to achieve the five demands at all cost. And if the Democrats manage to get a majority at Legco after the election, as part of the democratic camp, Civic Party of course would try to convince and advocate that this government should listen to the people. And if they fail to do so, if they fail to fulfil the five demands, then they would have to face some very serious consequences, including of course, as I mentioned, all legislations, all bills, all financial items, including, including, assuming if the Chief Justice appointment cannot be dealt with before July, and if it has to be at the new Legco, then Civic Party would also veto that appointment. So I have to make it very clear."

D20 talked about the "roadmap" of the Civic Party[47]：

> "… 我哋而家係講出一個好明確嘅路線圖，話畀香港人聽，話畀北京知，話畀特區政府知，我哋嘅路線圖係乜嘢，今次九月立法會選舉，民主派要過三十五，過咗三十五之後，一個月之內就係呢一個林鄭佢嘅施政報告，施政報告如果冇落實到五大訴求，講得好清楚，否決晒所有法案，否決晒所有嘅撥款直至回應。再唔係去到之後嘅財務預算，喺三月，時間表畀埋你，我呢會否決財務預算，否決咗之後，根據《基本法》你可以解散立法會，再上過嚟，再否決嘅話，林鄭必須下台，你問我下一步會繼續點，就係繼續否決，佢搵邊一個特首上嚟，佢一日唔落實五大訴求，我哋一日反對落去。"
>
> ["… we are now giving out a very clear roadmap, telling Hong Kong people, telling Beijing (and) telling the Special Administrative Region Government what our roadmap is. In this LegCo election in September, the democratic camp has to get more than 35. Within a month after we get more than 35, Carrie LAM will deliver the Policy Address. If the Policy Address fails to fulfill the five demands, it has been made very

---

46 [TB6/3B/132/26]; CT [TB6/3C/157/26]

47 [TB6/3B/143-144/38]; CT [TB6/3C/162/38]

> clear that all the bills will be vetoed (and) all the financial proposals will be vetoed until a response is given. Or else, later, when the budget is (delivered), in March, the timetable has been given to you, we will veto the budget. After the veto, according to the Basic Law, you can dissolve LegCo. If (the budget) has been vetoed again after resubmission, Carrie LAM must step down. You ask me the next step (we) will continue to take, it is to keep giving a veto. Whoever will be (appointed) as the Chief Executive, so long as he/she fails to fulfil the five demands, our objection will continue.

Immediately after D20 had said the above, Alan Leong expressed his approval[48].

196. We accept PW1's evidence that he and D1 had a meeting with several members of the Civic Party (including Alan Leong) in February 2020. We noted also that the aforesaid views expressed by Alan Leong, D35 and D20 were aligned with what D1's had proposed in his articles published respectively on 3 March 2020 (titled: "反制警察政權就要立會奪半"[49] (To Counter the Police Power, half of the seats in the Legislative Council have to be won) and 10 March 2020 (titled: "齊上齊落 目標 35+"[50] (Going up and down together Target 35+). Therefore, we have no doubt that Alan Leong, D35 and D20 were referring to the Project 35+ proposed and being organised by D1. In fact, the defence has not suggested the contrary. Last but not least, we note that a screenshot of D1's Facebook post providing a link to D1's article titled "齊上齊落目標 35+"[51] was found in D8's office notebook computer[52]. In the said

---

48 [TB6/3B/144/39]; CT [TB6/3C/163/39]

49 [TB1/19A/201]; CT [TB1/19B/202]

50 [TB1/22A/230]; CT [TB1/22B/231]

51 [TB1/22/230]; (CT) [TB1/22/231-235]

52 [TB10/37/3747]; (CT) [TB10/37/3748-3750]

article, D1 advocated for the idea of obtaining sufficient seats in the LegCo to veto bills, budgets and appropriation applications by the Government.

197. We should say that we rely on the above passages and articles not for a hearsay purpose but as evidence of what would be in D8's knowledge. Based on the admitted evidence (about the press conference) and also D8's own testimony, we draw the inference, which we find to be irresistible, that by end of March D8 must be aware that within the Civic Party at least Alan Leong (the Chairman), D35 (the Leader) and D20 (a LegCo member) agreed that the Civic Party should join in D1's project and more importantly they also agreed that the Scheme be pursued. Whether their views also represented the official unified stance of the Civic Party is, in our judgment, beside the point that we are making here. We will come back to this shortly.

198. After March 2020, there is no dispute that D8 attended the coordination meetings of Hong Kong Island. Based on D8's own evidence, he was aware at least that the issue about using the vetoing power of LegCo had been raised. Moreover, we accept the evidence of PW1 that, among the attendees of the coordination meeting of Hong Kong Island, only Paul Zimmerman raised an objection to D1's proposal about the use or active use of the vetoing power. Then came the IWR declaration in early June 2020 and D8's own evidence as to the discussion within the Civic Party whether or not to endorse the IWR declaration. Needless to say that there was also a copy of the IWR declaration in D6's Facebook found in D8's office notebook

computer[53], which showed that the IWR declaration was endorsed by the Civic Party and potential candidates who were not members of the Civic Party. Putting aside for the moment what D8 said was his own stance on the IWR declaration, by early June 2020 he must have been aware that many of the potential candidates of the Primary Election had expressed their agreement to the use of the vetoing power to force the Government to accede to the Five Demands.

Views expressed at the Press Conference

199. It is D8's evidence that he had expressed his disagreement to the Scheme in the preparatory meeting before the press conference and also in the discussion prior to the Civic Party's endorsement of the IWR declaration on 11 June 2020. He said, however, that his dissenting view was not accepted. It is also D8's evidence that the views expressed by Alan Leong, D35 and D20 on 25 March 2020 was not the unified view of those who attended the press conference, as Kwok Ka Ki (D30) and Dennis Kwok expressed different views on that occasion. D8 said he agreed with the views of the latter two.

200. We note that although D30 and Dennis Kwok had not personally attended the preparatory meeting, both of them took part in the press conference and sat alongside with Alan Leong and D35. It defiles common sense that the Civic Party would hold a press conference if there was not a common message to convey.

---

53 [TB10/15A/3379]; CT [TB10/15B/3382]

201. Moreover, after D35 had finished what he said at Counter 26 quoted above, Dennis Kwok immediately supplemented by saying in English[54]:

> "Let me try to explain it this way, to answer your question. As individual legislative councillors or as an individual political party, our powers are limited. But the Legislative Council as a whole is a very powerful body, and it is constitutionally designed to be that way. So as a whole the Legislative Council can do a lot. But only if we can and we're willing to use that constitutional power to hold the government to account, to act as the check and balance that the legislative council ought to be from the very first day when it came into existence. So all we are advocating for is that the Legislative Council to actually use its power, whether it is a power to investigate the police, whether it is a power to veto a budget or an important legislation like article 23, we are using that power, but we can only use that power if we actually control the majority of the Legislative Council, and that is our aim, and that is our goal, and that is our only vision that we have in mind."
>
> (Emphasis supplied)

D35 then translated in Chinese what Dennis Kwok had just said. After that, D35 continued and said[55]:

> "二，我要再清楚咁強調，我哋公民黨係願意，如果特區政府唔處理五大訴求，喺未來嘅日子，新一屆嘅立法會係否決每一個法案，每一個財政撥款，包括如果而家終審法院首席法官嘅任命唔能夠喺今個會期處理，而實際上我哋而家公民黨好努力喺內會度做緊我哋應該做嘅嘢吖，如果新一屆會期先要處理首席法官嘅任命，公民黨亦都會有如其他嘅法案一樣一併否決。"
>
> ["Secondly, I have to stress clearly that, we, the Civic Party, is willing to, if the Special Administrative Region Government does not handle the five demands, in the days ahead, the new term of LegCo will veto each bill, each financial provision,

---

54 [TB6/3B/133/27]; CT [TB6/3C/157/27]

55 [TB6/3B/134-135/28]; CT [TB6/3C/158/28]

> including the current appointment of the Chief Justice of the Court of Final Appeal, if it cannot be dealt with in this (legislative) session. Actually, we, the Civic Party, are working very hard to do what we should do in the House Committees. If the appointment of the Chief Justice is to be dealt with in the new session, the Civic Party will also give a veto, just as (what we will do for) other bills."]

We have no doubt that D35 must have heard what Dennis Kwok said. Yet, D35 expressed no disagreement to it.

202. Not long after Dennis Kwok's speech, D35 called upon D30 to speak. The fact that D35 asked D30 to speak is, in our view, noteworthy. This is because one would expect D35 not to do so if he knew that D30 would say something inconsistent with his "solemn promise" made on behalf of the party. As it turned out, what D30 said was simply a refutation of Director Luo Huining's statement about the seizure of LegCo's power by the pro-democracy camp. D30 said further as follows[56]:

> "嗱，我想講一樣嘢，我哋喺今日香港唯一一樣嘢可以依靠呢就係一國兩制，… 我哋要將呢一個民意，市民授權，通常投票畀我哋嘅權力，要求政府回應市民，五大訴求呢個係市民過去咁多個月嚟講得好清楚，政府一路都唔回應，無論任何人選入去立法會都一定要將呢一樣嘢要求政府去回應 … 就算立法會過半係可以否決政府一啲不合理做法，都係當年《基本法》容許，…而最終如果政府拎出嚟嘅政策，包括佢嘅財政預算，所有嘅政策係得到市民嘅接納，坐喺度嘅立法會議員，哪怕佢哋三十五個四十個，點解唔係投票支持呀？如果倒番轉頭所有嘅政策或者撥款，好似而家咁樣啲撥款係胡亂去增加警察嘅開支，我哋作為民選嘅代表,將來三十五四十都好，佢一定要有責任係將呢一個民意反一一反映出嚟，直至政府係交出一個合理嘅財政預算，一個合理嘅政策吖嘛，呢個就係最重要嘅嘢，…，而將來我哋如果要貫徹《基本法》，就要一人一票係選行政長官同埋所有立法會議員，呢個先至係我哋最重要，亦都

[56] [TB6/3B/139-142/36]; CT [TB6/3C/160-162/36]

係點解喺五大訴求入面最重要第五個，就係要落實政制改革吖嘛，呢個係《基本法》入面寫咗出嚟，唔係我哋作出嚟，…”

["Well, I want to talk about one thing. Nowadays in Hong Kong, the only thing we can rely on is the One Country, Two Systems, … We must (relay) this public opinion, (and exercise) the power conferred by the public, the power entrusted to us normally (sic) through voting, to ask the Government to respond to the public. In these past few months, the public has made the five demands very clear (but) the Government has made no response all along. Whoever is elected to enter LegCo, (he) must ask the Government to respond to it. … Even vetoing some unreasonable government practices by a majority in LegCo is also allowed under the Basic Law … Ultimately if the policies put forward by the Government, including its budget, all the policies are acceptable to the public, why do the Legislative Councillors sitting (in the chamber), no matter they are 35 (or) 40 in number, not vote for (them)? On the contrary, if all the policies or financial proposals, like the existing proposals which arbitrarily increase the expenditure on the Police, we, as the elected representatives, no matter we are 35 (or) 40 in number in future, they (sic) are obliged to re - - reflect this public opinion until the Government puts forward a justified budget, a reasonable policy. That is of utmost importance. … And, in future if we are to fully implement the Basic Law, (we) have to select the Chief Executive and all the Legislative Councillors by way of one person, one vote. That is paramount to us. Also, (that) is why, of the five demands, the fifth one is the most important as it means implementing the constitutional reform. This is stated in the Basic Law, not fabricated by us. …”

(Emphasis supplied)

203. Based on the above, we do not accept D8's evidence that that there were any inconsistencies between the views expressed by Dennis Kwok and D30 on the one hand and those of Alan Leong, D35 and D20 on the other. Neither do we accept that D8 had such a belief. Furthermore, putting what D30 said in context, his criteria for determining the reasonableness of the budget was whether or not the Government would respond positively to the Five Demands. Thus, we consider that any difference between the speakers at the press conference

was one of emphasis rather than substance. For the same reason, we do not accept D46's evidence to the effect that D30's message was different from those of D20, D35 and Alan Leong.

Agreement to the Scheme

204. The issue remains as to whether D8 himself agreed to the carrying out of the Scheme. D8's evidence was that, if elected as a LegCo member, he would make use of the exemption mechanism of the Civic Party and seek to depart from the party's stance on the budgets and that he would examine the merits of the budgets rather than vote against them indiscriminately. The question for us is whether this part of D8's evidence is or may be true.

205. In this regard, we note that D8 worked his way up within the party from the basic rank. Whilst D8 served his first term as a District Councillor, he studied law. Although he had served as executive member of the party for many years, he resented the fact that his views were not accepted by the prominent figures of the party. D8 dreamed to be a Legislative Councillor. In the last LegCo election, Tanya Chan (a barrister) was the first on the Civic Party's list. D8 "played second fiddle" to her and was not elected. This time, the Primary Election presented an opportunity which he certainly would not like to miss. It strikes us that D8 demonstrated a desire to be on an equal footing with the prominent figures of the Civic Party, a number of them, we note, were lawyers.

206. As regards the preparatory meeting, despite the fact his dissenting views were not accepted, D8 must have foreseen what the latter two were going to say at the press conference. According to D8,

what D35 and D20 said at the press conference did not deviate from their views expressed at the preparatory meeting. D8 said and did nothing at the press conference to show that he did not agree with what was said by the party Chairman (Alan Leong) and the party leader (D35). Instead, he stood behind them holding a placard stating "35+議會過半 實現五大訴求"[57] (35+, Majority in Council, Realise the Five Demands).

207. Furthermore, a strong inference can be drawn that no matter what D8 might have expressed at the preparatory meeting, by 25 March 2020 he had already decided to follow what Alan Leong and D35 said was the party's stance. This is based on D8's attendance of the press conference and his standing behind the speakers and holding a placard. This strong inference against D8 is further strengthened by his subsequent conducts and statements.

208. Firstly, on 15 June 2020，D35 and D8 attended a phone-in programme of D100, titled: "林鄭月娥政府盲撐習近平國安法! 自己友怒問點解要交稅? 公帑養廢人! D100 風波裡的茶杯"[58]. A listener called and queried why D1 said on 9 June 2020 press conference of Project 35+ that candidates of the Primary Election would not be required to sign any statement stating the "common goals". D8 replied:

> "45. 我－－我簡單啲覆一覆喇，即係其實唔係話冇共同目標，共同目標就係撼動個政權去用 35 plus 。咁詼其實即係一開始都講過簽唔簽呢樣嘢嘅，只不過係即係戴教授係一個良好嘅願望，就驚國安法嚟到嘅時候..."

---

57 See: [TB6/3D/165].

58 [TB8/10B/423-4/45,47]; CT [TB8/10C/467/45,47]

[45. I -- I want to give a brief response. That is to say, actually it does not mean that there is no common goal. The common goal is to have the political regime shaken by using the 35 plus. So, er, actually, I mean, the issue of whether to sign this thing or not has been mentioned at the beginning. It is just, I mean, Professor TAI's good wish that when the National Security Law arrives …"

"47. ... 就會即係影響好多個人呀，咁所以佢係－－即係－－即係一個良好願望，話想大家有一個詼走棧位咁樣嘅啫。咁當然即係有啲人想繼續係有一啲共同嘅願望，咁所以就即係之前有個聯署喺度，咁譬如公民黨都簽咗嘅。咁呢個就等每一個政權－－政團自己去考慮喇，咁呢個都好難去規限得到嘅。"

["47 … I mean it will impact lots of people, so that is why he -- I mean -- I mean it is a good wish, and he wanted everyone to have, er, room for manoeuvre. Well of course there are some people who want to continue to have some common wishes. So, I mean, previously there was a joint signing (action), for example, the Civic Party has signed it. Well, for this, I will leave it to every political regime – political group for making their own consideration. Well, it is very difficult to set a requirement for this.]

We do not accept that D8 was just blindly reciting the party's line when he said the above. It is plain to us from the above statements of D8 that he acknowledged (at least as far as he was concerned) that: (1) the candidates had a "common goal" which was "to have the political regime shaken by using the 35+"; and (2) he agreed to the Party endorsing the IWR declaration.

209. As regards (2) above, we reject as illogical D8's evidence that the Civic Party's endorsement of the IWR declaration as a collective entity could offer more flexibility. Given what D35 and D20 had said in the Civic Party's press conference on 25 March 2020, we do not see how the party's endorsement of the IWR declaration as a collective entity

could provide any flexibility to its members who at the time were representing the Civic Party in the coming the Primary Election to deviate from the online declaration.

210. Secondly, on 19 June 2020 at the Civic Party's election rally, D8 said[59]:

> "126. I：嗱，我諗而家好清楚嘅情況就係，就住《國安法》蒞臨喇，我相信個政權都會用唔同方式去打壓而家參- - 可能參選人嘅參選資格。咁所以即使佢撈亂嗰啲即係- - 即係民政專員又好，即係參選嘅即係所謂嘅選舉主任又好- - 選舉主任又好，其實對於我哋嚟講係冇分別，因為我哋都無論嗰個人係邊個，揸刀嗰個人係邊個，呢把刀係一定會邁向所有嘅民主派候選人當中。咁所以喺呢個時空, 我哋只可以話畀大家知，我哋民主派必定要團結去力爭 35 plus，係可以喺嚟緊嘅立法會度呢係可以去否決財算- - 財政預算案呀，同埋係可以為香港人呢爭取落實五大訴求。"
>
> ["126. I: Well, I think what has been very clear now is that, when the National Security Law comes, I believe the regime will use different means to suppress the current candidates -- qualification of standing for election for possible candidates. Well, so even though they mix up those, whether District officers, or the so-called Returning Officers for elections –or Returning Officers, actually there is no difference for us, because no matter who they are, no matter who is holding the sword, the sword will definitely point at all candidates from the pro-democracy camp. Well, so, here and now, what we can tell you is that, we pro-democracy camp must be united to fight for 35 plus, so that (we) can veto the Budget - the Budget in the LegCo, and to fight to achieve Five Demands for Hongkongers."]

[59] [TB8/A7B/167-8/126]; CT [TB8/A7C/201-2/126]

We find that the only reasonable inference is that D8 meant what he said on that occasion which was not mere election rhetoric.

211. Thirdly, there were the documents he submitted for the Primary Election. At Part II, Clause 2 of his nomination form[60] dated 19 June 2020, there was the declaration saying:

> "2. 我確認支持和認同由戴耀廷及區諾軒主導之協調會議共識, 包括「民主派 35 十公民投票計劃」及其目標。
>
> I hereby confirm that I agree and support the consensus of the coordination meeting led by Benny TAI Yiu-ting and AU Nok-hin, including "Democrats 35+ Civil Voting Project" and its goals."

Similarly, in the Election Deposit Receipt given to D8, at Clause 2 it was written[61]:

> "2. 「民主派 35+ 公民投票計劃」候選人必須支持和認同由戴耀廷及區諾軒主導之協調會議共識，包括「民主派 35+ 公民投票計劃」及其目標"
>
> (2. Candidates for the 'Democrats 35+ Civil Voting Plan' must support and agree with the consensus of the coordination meeting led by TAI Yiu-ting and AU Nok-hin, including the 'Democrats 35+ Civil Voting Plan' and its objectives.)

In the election platform[62] which D8 submitted together with his nomination form, it was written:

> "公民黨將全力:
> - 爭取議會過半 35+,以關鍵否決權促使政府落實「五大訴求」
> - 反對「港版國案法」
> - 全力調查及追究警察濫權及濫暴罪行
>
> …

60 [TB7/B1A/329]; CT [TB7/B1A/341]

61 [TB7/B1A/669]; CT [TB7/B1A/348]

62 [TB7/B1A/335]; CT [TB7/B1B/346]

> • 彈劾及罷免林鄭月娥
> …
>
> The Civic Party pledges to:
>
> • Strive for majority in the LegCo with 35+ seats and use our veto power to press the HKSAR Government to commit on the Five Demands；
> • Oppose the National Security Law;
> • Invoke LegCo investigative powers to rectify police brutality;
> …
>
> • Impeach and remove Carrie Lam from office as Chief Executive";
> …"

We bear in mind, however, that D8's election platform was based on a template used by all candidates from the Civic Party. However, in our judgment, the fact that D8 had made these pledges made it difficult for him to later seek an exemption from the Civic Party.

212. Fourthly, on 23 June 2020 in D8's Facebook[63], he posted the following:

> "希望大家喺嚟緊 7 月 11、12 日嘅民主派初選出嚟投票，實現議會過半嘅第一步，令我地喺議會內外都有更多嘅力量，反抗呢個漠視民意嘅政府，我哋會透過否決唔同方案，包括否決財政預算案，逼令特首下台，從而去爭取五大訴求."
>
> ["(I) hope that all you guys will come out and vote in the pro-democracy camp Primary Election on 11 (and) 12 July to achieve the first step of (winning) more than half (of the seats) in the (Legislative) Council, so that we can have more strength both inside and outside the (Legislative) Council to oppose this government that ignores public opinion. We will force the Chief Executive to step down by vetoing different proposals, including vetoing the Budget, so as to fight for the five major demands."]

63 [TB8/A12A/502]; CT [TB8/A12B/506, 510]

Whether or not D8 had personally written the aforesaid post, we have no doubt and we find that he must have familiarised himself with what was said in his Facebook in his preparation for the Primary Election. In our judgment, it was inherently improbable that a member of D8's election campaign team could have published the post on his Facebook page without him being aware of its contents. The Facebook page of D8 was an important tool through which he could communicate with his supporters on matters related to his election campaign and he would certainly pay attention to how the public reacted to the posts on his Facebook page. It was inherently improbable that D8 was unaware of the content of the post in question.

213. On 27 June 2020 at Hong Kong Island election forum, D8 said[64]:

> "569. F : 詼，詼所以今次嘅選舉希望咁多位選民呢係出嚟投票，因為真正去到「35+ 」，我哋達成議會過半呢，其實喺我哋今次嘅選舉呢，民主派先可以用個選票去迫使行政長官呢係即係佢要落實五大訴求，我哋用否決財政預算案，我哋喺三月二十六號.....
>
> 571. F: ...呢講得好清楚，．．．
>
> 573. F: … 係會否決財政預算案，…
>
> 575. F: … 迫使行政長官。"
>
> [569. F: Er, er, that is why (we) hope that all voters would cast their votes in this election, because by achieving "35+", we will be able to obtain more than half in the legislature. In fact, in this election that we are running for, so that the pro-democracy camp will be able to compel the Chief Executive with votes, I mean, to implement the five demands.

[64] [TB8/B3B/2896-7/569-575]; CT [TB8/B3C/3014-5/569-575]

> By our vetoing the government's budget, on March 26...
>
> …
>
> 571. F: …have made it clear...
>
> …
>
> 573. F: (we) will veto the government's budget…
>
> …
>
> 575. F: … to compel the Chief Executive.]

214. Lastly, concerning the promotional video clip of the Civic Party prepared before the Primary Election, in the revised script[65] D35 was allocated the lines " … if she fails to do so, we, Members belonging to the Civic Party, will exercise our power under the Basic Law to veto government bill(s) and budget(s) in the future." With the knowledge of what D35 was going to say in the promotional video clip, D8 took part in the filming. We do not accept D8's evidence that he had no choice in the matter. He clearly had a choice. We find that he chose to follow the party's line so that he could have the support of the Civic Party to run in the Primary Election and the subsequent LegCo election. We do not accept that D8 would risk his political future by holding a stance on the budgets which would be contrary to the "solemn promise" made by D35 the Chairman.

215. In our judgment, what D8 said in his evidence as to his political stance cannot be reconciled with the public statements he had made. All along what D8 said in public was consistent with the stance of the Civic Party that they would veto the budget twice to force the Chief Executive to respond to the Five Demands. Moreover, what D8 had said

---

65 [TB8/A4B/70-1]; CT [TB8/A4C/77]

in public also made it impossible for him to honestly believe that he could apply for exemption if elected. Instead, what D8 had said in public showed that he had committed himself to the stance of the Civic Party on the issue of the vetoing of the budgets. For the reasons given above, we reject the exculpatory part of D8's evidence.

216. Having considered the totality of all the relevant evidence, we are left with no doubt that by the end of March 2020, D8 had already agreed to the Scheme. Furthermore, we find as a fact that, in order to obtain the continual support of his party in the Primary Election and the LegCo election, D8 agreed and intended to follow the even more radical line to take as stated by D35 and D20 at the press conference on 25 March 2020 so that, if elected, he would vote against the budgets indiscriminately regardless of their merits.

217. In our assessment, no weight can be attached to the "exculpatory letter" which PW1 wrote in detention to D8, as PW1 could not speak on behalf of D8 what was in D8's mind.

Intention to subvert

218. As regards D8's evidence that the Civic Party changed its stance on the "solemn promise" after the promulgation of the NSL, we note that in the revised election platforms of D8 and the other candidates of the Civic Party, the following statements were made as the first pledge to the public[66]:

---

66 [TB10/1A/148, 150 & 152]; CT [10/1B/484, 486, 488]

"**35 + 反制政府**
實現五大訴求
Strive for majority to
actualise Five Demands

進入議會後行使基本法賦予的否決權， 否決財政預算案，迫使政府落實五大訴求。"

[Exercise the power of veto entitled by the Basic Law after entering the Legislative Council to veto the Budget and force the government to meet the Five Demands.]

In this regard, the revised election platforms were the same as the pre-NSL one[67].

219. Although candidates of the Civic Party had sought to replace the grid forms which they had filed with Power for Democracy with a new slogan saying "以言入罪 無字政綱 SPEECH CRIMES ARE AGAINST FREEDOM", in our view, a reasonable man would interpret that slogan as a protest against the NSL. There was simply nothing to suggest that the Civic Party had changed its stance. We note that although the pledge to "veto all government bills" was not repeated, the pledge to "veto the Budget and force the government to meet the Five Demands" remained first and foremost in the party's new election platforms.

220. Taking everything into account, we find that the revision and replacement of the election platforms and promotional video scripts by the Civic Party was just a calculated move taken with a view to reduce the risk of its candidates being disqualified. However, as far as the budgets were concerned there had been no change of stance in the sense

---

[67] [D8-7]

that the party's leaders had all along determined to use the vetoing power to force the government to meet the Five Demands. Whether or not this stance was also shared by D8 and D46 requires separate consideration. We will discuss the position of D46 when we deal with the evidence concerning his case.

221. As regards D8, we do not consider it as credible that D8 might have told his election manager (an employee of the Civic Party) that he would not follow the party's stance in case he won the LegCo election. Having considered D8's words and conducts prior to and after the NSL, we come to the sure conclusion that D8 intended to follow the party's line on vetoing so as to fulfill his dream of becoming a legislative councilor and that had not changed after the promulgation of the NSL. We reject his evidence that he thought that the Project 35+ was impossible. As to D8's eventual departure from the party after his disqualification by the Returning Officer, we find that it was because of his frustration with the party and the dashing of his dream.

222. As aforesaid, by NSL 22(3), a subverting act includes one which seriously interferes in, disrupts, or undermines the performance of duties and functions in accordance with the law of the Government. Based on our findings above, we have no doubt that during the charge period D8 knew that one of the objectives of the Project 35+ was to exercise the power to veto the budgets indiscriminately in order to force the Chief Executive to accede to the Five Demands. Given D8's experience in politics and as a District Councilor, we have no doubt that he knew that the "Five Demands Not One Less" was a condition that the Government would not accept. Given his legal background, we also have no doubt that D8 was fully aware that the carrying out of the Scheme

would mean the twice dissolution of the LegCo and the eventual stepping down of the Chief Executive.

223. Furthermore, based on D8's continual participation in the Primary Election after the promulgation of the NSL, the only reasonable inference to be drawn is that he was acting with the requisite intention to subvert and that he was a party to the conspiracy charged.

Conclusion

224. We are sure and we find that:

(1) before the promulgation of the NSL, there was already an agreement at least between D1 and some members of the Civic Party that the Scheme be pursued;

(2) D8 was also a knowing party to the Scheme;

(3) after the promulgation of the NSL, D8 remained as a party to the Scheme; and

(4) all along, D8 had the intention to subvert the State power, with that intention he continued to participate in the Primary Election in furtherance of the Scheme and with the intention that it be carried out.

Therefore, we find D8 guilty of the charge.

D10 Yeung Suet-ying Clarisse

225. Mr Cheung (and with him, Mr Fong) raises the following:

(1) the prosecution is unable to prove that: (a) D10 was a party to the conspiracy charged; and (b) she had the intention to subvert the State power; and

(2) the Scheme did not constitute "subversion" for the purpose of NSL 22(3).

Consideration of the evidence

226. D10 has a clear record. She did not give evidence. In assessing the evidence, we give ourselves the "good character direction" on the propensity limb in her favour.

Knowledge of the Scheme

227. The evidence in this regard consists of the following. Firstly, we note that the first coordination meeting of Hong Kong Island was not attended by D10 but her representative. D10 personally attended the second and the third coordination meetings. On the other hand, the police found in D10's office notebook computer a draft of the Coordination Agreement of Hong Kong Island titled "35+立會過半計劃 民主派港島協調機制（初稿）" (Project 35+: Majority in LegCo Co-ordination Mechanism of the Pro-democracy Camp in Hong Kong Island [Draft])[68]. At para 2 of that document, it was stated:

> "參與此協調機制的個人或團體，認同若民主派能取得立法會一半以上的議席，會積極運用立法會的權力，包括否決財政預算案，迫使特首回應五大訴求，特赦抗爭者、令相關人士為警暴問責、及重啟政改以達雙普選。"

---

[68] File name: 35＋ 港島.docx: [TB10/61A/4052]; CT [TB10/61B/4053]

> ["Any individual or organisation that participates in this co-ordination mechanism agrees that if the Pro-democracy Camp is able to obtain the majority in LegCo, they will actively make use of the powers of LegCo, including the power to veto the budget, to force the Chief Executive to respond to the Five Demands and grant amnesty to protesters, to hold relevant persons accountable for police brutality, and to restart the political reforms to achieve dual universal suffrage."]

It is noted that the same paragraph was contained in the final version of the Co-ordination document for Hong Kong Island which D1 re-sent to PW2 on 8 June 2020. In the absence of any evidence to the contrary, the only reasonable inference is that D10 knew that the use or active use of vetoing power had been an important component of the "Project 35+".

228. Also found in D10's office notebook computer was an election pamphlet of Chan Shu-fai and Chu Hoi-dick Eddie (D25), titled: "北京攪炒全民響應　議會過半突破僵局" (Universal response (to) Beijing('s) mutual destruction, a majority of seats in the LegCo breaks through the deadlock"). In that pamphlet, it stated the objective of the "Project 35+" as follows[69]:

> "目標：
>
> - 民主派取得 35 席，即立法會否決權
> - 否決所有法案、議案、財委會撥款申請
> - 否決臨時撥款
> - 否決財政預算案，政府停擺
> - 特首解散立法會及重選
> - 再次 35+及再次否決財政預算案
> - 觸發北京介入，DQ35，推動國際制裁
> - 取消香港獨立關稅區地位"

[69] [TB10/63A/4060]; CT [TB10/63B/4063]

["Objective:

- The democratic camp to get 35 seats, i.e., veto power in the Legislative Council
- Veto all bills, motions, FC funding applications
- Veto ad hoc funding
- Veto the Budget(;) government suspension
- Dissolution of the Legislative Council by the Chief Executive and re-election
- Another 35+ and another veto of the Budget
- Trigger Beijing to intervene, DQ35, push for international sanction(s)
- Abolish Hong Kong's status as an independent customs territory"]

We have not lost sight of the fact that D10 and D25 were from different constituencies. However, we also note that both of them attended the press conference of the "Project 35+" as candidates on 9 July 2020.

229. Secondly, there is the evidence of D10's knowledge of the IWR declaration. Although the police was unable to find that online declaration in D10's Facebook, her name appeared in those of other candidates as an endorsee[70]. In the absence of any evidence to the otherwise, the only reasonable inference is that she was aware of the contents of the IWR declaration and the fact that it had been endorsed by other candidates. Moreover, we draw the further inference, which we also find to be the only reasonable one, that D10 must have been aware that the phraseology "will use" was employed in the IWR declaration in contrast to "will actively … use" employed in the draft Co-ordination Agreement.

230. Thirdly, there is evidence that D10 was aware that even after the promulgation of the NSL the use of the vetoing power remained an

[70] See eg [TB7/A2A/9]; CT [TB7/A2B/11.15]

important component of the "Project 35+". This is in view of the press conference of the "Project 35+" on 9 July 2020 which was attended by D10, LAU Chak Fung (D18) (of Kowloon West) and D25 (of New Territories West). On that occasion, D1 said,[71]

> "咁至於呢就 35+個目標係爭取能夠攞到立法會嘅控制權，從而呢係去行使《基本法》賦予畀立法會嘅憲制權力，嚟去要求特區政府問責，咁呢個呢係《基本法》所賦予畀立法會嘅權力嚟嘅，… 而且即係即使係真係會去否決咗啲個財政預算案呢，根據《基本法》呢，行政長官呢係擁有一個職能，就係去解散立法會，咁呢嗰即係話就算係真係行使嗰個權力係去否決咗財政預算案呢，其實行政長官仍然係可以繼續行使佢嘅職能嘅，…"
>
> ["Well, regarding the target of 35+ (Project), (it is) to acquire control in the Legislative Council so as to exercise the constitutional power given to the Legislative Council by the Basic Law to make the HKSAR government accountable. Well, this is the power given to the Legislative Council by the Basic Law. … Furthermore, that is, even if the Legislative Council veto the Budget, according to the Basic Law, the Chief Exc1cutive can exercise its function to dissolve the Legislative Council. …"]

We bear in mind that the above was said by D1 when he was explaining why he thought that the "Project 35+" and its objectives were not unlawful and did not violate the NSL. In this regard, as we have said, even assuming that D1 and other participants did harbour a mistaken belief as to the unlawfulness of their agreed Scheme, that would not afford them a defence to the present charge.

---

71 [TB6/7B/455-6]; CT (TB6/7C/520-1)

231. On the same occasion, D18 said,[72]

> "我哋呢一班候選人好希望係將街頭嘅口號係帶入議會，喺街頭——喺議會入面我哋係會——係會否決政府嘅不義嘅財政預算案，喺街頭出面我哋係會放低尊貴嘅議員形象，同一班手足一齊並肩作戰，齊上齊落，…"
>
> ["We, the group of candidates, very much hope that the slogans of the street (movement) can be brought into council. On the street - in the council, (we) will - will veto the government unjust Budget. Out on the street, we will put down our images as dignified councillors, work with comrades to fight together, and together we stand."]

Again, we are not saying that D18's words represented D10's position. The point is that D10 heard what D1 and D18 said.

232. Having regard to the accumulated weight of the above evidence, we are satisfied that D10 must have known at the material time that to obtain a majority in LegCo and after that to wield the vetoing power of the majority to force the Government to yield to the Five Demands was an integral part of Project 35+. Moreover, we have no doubt that D10 must have been aware that all along the Project 35+ aimed at the pro-democrats obtaining a majority in LegCo and forcing the Government to accede to the "Five Demands Not One Less". If the Government did not comply, the pro-democrats in the LegCo would cause the budgets to be vetoed, leading to the Chief Executive stepping down.

233. We are fully alive that "knowledge" does not mean "consent" or "agreement". That leads us to the following topic.

---

[72] [TB6/7B/482-3); CT (TB6/7C/533)

Party to the Scheme

234. On this issue, first and foremost, there is the evidence that D10 endorsed the IWR declaration which reads[73]:

> "1. 我認同『五大訴求，缺一不可』。我會運用基本法賦予立法會的權力，包括否決財政預算案，迫使特首回應五大訴求，撤銷所有抗爭者控罪，令相關人士為警暴問責，並重啟政改達致雙普選。
>
> 2. 我認同若支持度跌出各區預計可得議席範圍，須表明停止選舉工程。"
>
> ["1. I agree with "Five demands, not one less". I will use the powers conferred on the Legislative Council by the Basic Law, including vetoing the Budget, to force the Chief Executive to respond to the five demands, dropping all the charges against the resistance fighters, holding the relevant persons accountable for police brutality; and restarting political reform to achieve dual universal suffrage.
>
> 2. I agree that if the supporting rates fall outside the expected range of number of seats that can be secured in each respective constituency, (I) must clearly announce the end of the election campaign."]

D10's endorsement of the IWR declaration is strong evidence against her that there was then an existing agreement to carry out the Scheme and her intention to do so.

235. Secondly, in D10's election campaign leaflet titled "一線光" ("A Ray of Light")[74], under "參選宣言" (Declaration of Candidacy) she wrote,

---

73 For the text of the "IWR", see, eg, [TB7/A2A/9]; CT [TB7/A2B/11].

74 [TB10/53A/3969]; CT [TB10/53B/4037]

"五大訴求、議會過半是我們共同呼喚的將來, …。

["The five demands (being met) and a majority of seats in the Council are a future we wish for. …"]

The above was echoed in a document found in her possession dated 23 June 2020 where it was said[75],

"現任灣仔區議會主席楊雪盈，今日（6 月 23 日）正式宣布參與 2020 年立法會選舉民主派港島區初選。楊雪盈和香港人一起，共同達成民主派立法會過半的目標，令政府正面回應「五大訴求」。

【參選宣言】

…

國安法將至，香港人將面臨最黑暗日子，…

憑籍兩次勝選經驗，今日，我矢志踏前一步，為香港人囤積力量，為香港破局。我相信，五大訴求，是我們不變的堅持；議會過半，是香港人可以做到的事。

…"

["Incumbent Wan Chai District Council Chairwoman, YEUNG Suet-ying, today (June 23) officially announced her joining the pro-democracy primaries for the 2020 Legislative Council elections for the Hong Kong Island constituency. YEUNG Suet-ying together with Hong Kong people aiming to obtain more than half of the seats for the pro-democracy camp in the Legislative Council making the government to respond positively to the "five demands".

[Declaration of Candidacy]

…

With the national security law looming, Hong Kong people is going to face the darkest days of our times. …

With my experiences in winning two elections, today, I am determined to move another step forward to gather power for the people of Hong Kong people and for Hong Kong to break through. I believe, we will persevere in the five demands; more

---

75 [TB10/57A/4038]; CT [TB10/57B/4039-4041]

than half of the seats of Legislative Council is the thing Hong Kong people can achieve.

…"]

236. Thirdly, in D10's office notebook computer, the police found a document titled "QA (第三稿)" (QA (3rd Draft)[76]. There was the following question and answer:

"(六）你是否在一定會否決財政預算案？

答： 是。政府多年來提出的財政預算案，均是傾斜功能組別有票的階級，對一般市民不公平，看不到這個非民選的政府，在未來會提出真正符合香港人利益的財政預算案。"

[(6) Are you (one character incomprehensible) going to veto the budget definitely?

A: Yes. The budgets proposed by the government over the years have been tilted towards the voting class of the functional constituencies, which is unfair to the general public. I cannot see that this unelected government will propose a budget in the future that is truly for the benefit of Hongkongers.]

There was also another document titled "QA (第四稿)" (QA (4th Draft)[77]. It can be seen that the original Answer 6 was slightly amended but the substance remained the same:

"(六) 你是否在一定會否決財政預算案？

答： 是。政府多年來提出的財政預算案，都是由上而下，幫唔到真正有需要既人，政策傾斜功能組別，提出預算案既政府亦唔係直選，整個過程本身就唔公義。看不到非民選的政府，會提出符合香港人利益的財政預算案。"

["(6) Are you (one character incomprehensible) going to veto the budget definitely?

---

76 [TB10/54A/3992]; CT [TB10/54B/4000-4001]

77 [TB10/55A/4012]; CT [TB10/55B/4021-4022]

A: Yes. The budgets proposed by the government over the years have been based on the top down approach being unable to help those in genuine need. Policies are tilted towards functional constituencies, and the government that proposed the budgets is not a directly elected one, so the entire process itself is unjust. I cannot see that this unelected government will propose a budget in the future that is truly for the benefit of Hongkongers."]

There was also a new question and answer 18, which reads[78]:

"(十八) 如果需簽署確認支持「港版國安法」的確認書，你會否簽署？

答： 唔會。十七區區議會大會，幾乎所有民主派議員都反對「港版國安法」，如果政府推出一份咁既確認書，即係想 DQ 曬我地所有人。政權總會搵方法打壓我地，我地可以做既就係唔退縮。

我既立場很清楚，認為沒有普選之前，不適宜就國家安全或《基本法》第 23 條立法。"

["(18) If you are required to sign a letter of confirmation of support for the "Hong Kong National Security Law", will you sign it?

A: No, I will not. At the 17 District Council meeting, almost all members of the pro-democracy camp opposed the "Hong Kong National Security Law". If the government introduces such a letter of confirmation, it will mean that it wants to DQ all of us. The regime will always look for ways to suppress us. What we can do is to refrain from backing down.

My position is very clear. I do not think it is appropriate to legislate on national security or on Article 23 of the Basic Law before there is universal suffrage."]

It is apparent, therefore, that this 4th Draft was prepared either in anticipation of or after the promulgation of the NSL. It is also apparent that her position about the budgets had not changed.

---

78 [TB10/55A/4014]; CT [TB10/55B/4030]

237. Based on the evidence before us, we are satisfied and we find as a fact that: (1) the above documents found in D10's office notebook computer were prepared as her "lines to take" or debate notes for the purpose of the Primary Election; (2) she had knowledge of their contents; and (3) she agreed with them.

238. Fourthly, despite the evidence of PW1 and PW2 that D10 was independent with no political affiliation, it is our finding, based on the aforesaid documents found in her possession, that she considered herself belonging to the pro-democracy camp. Although D10 did not expressly bundle up vetoing of the budgets with the Five Demands, she said that her position was that she would "definitely veto" the budgets, as she considered that the Government was "unjust" so that no budgets it proposed would truly benefit the people of Hong Kong. This is also supported by what she said at the election forum of Hong Kong Island constituency held on 27 June 2020. From what she said, she clearly understood and aligned herself with the objective of the "Project 35+":[79]

> "275. C: 我希望大家係可以一齊做，而其實今次「35+」最——最癥結嗰樣嘢係啲咩嘢？我哋要有最強嘅名單，我哋要說服到更加多嘅香港人，佢哋嘅光譜未必同我哋完全一致，所以我哋希望呢一個名單上面呢，係能夠有唔同嘅光譜嘅人集合唯埋一齊。"
>
> ["275. C: I hope that all of us can do it together, and what actually is the c-crux of the "35+" this time? We need the strongest list. We have to persuade more Hongkongers. Their spectra are not necessarily identical with ours. Hence, we hope that this list can include people having different spectra."]

[79] [TB8/B3B/2833/275]; CT [TB8/B3C/2970/275]

239. Lastly, similar to the case of other candidates, there was the declaration at Part II, Clause 2 of her nomination form [80] dated 19 June 2020 and the Election Deposit Receipt[81].

240. Having considered the cumulative weight of all the relevant evidence, we are satisfied that the only reasonable inference to be drawn was that prior to the promulgation of the NSL and knowing that it was coming, she had already agreed that the Scheme be pursued and that remained her position after the NSL came into operation. The aforesaid findings, coupled with her continual participation in the "Project 35+" as a candidate, enable us to come to the sure conclusion that she was a party to the agreement to carry out the Scheme during the charge period.

Intention to Subvert

241. On this issue, firstly, there is the aforesaid evidence as to what she said on various occasions and in various documents of her determination to help bringing about a majority in LegCo by the pro-democrats and the eventual realisation of the Five Demands. Based on our finding of D10's knowledge of the objective of the Scheme and her experience as District Councilor, we draw the further inference, which we consider to be irresistible, that she intented to act together with other pro-democrats in LegCo and vote against the budgets indiscriminately regardless of their merits and she knew that if the budgets were vetoed, it would result in a serious interference in, disruption or undermining of the performance of the duties and functions of the Government.

---

80 [TB7/B7A/398]; CT [TB7/B7B/404]

81 [TB7/B7A/401]; CT [TB7/B7B/407]

242. Furthermore, based on our finding of D10's agreement to the objective of the Scheme and the fact of her continued participation in the Primary Election, an inference could readily be drawn that she had the intention to subvert the State power. This inference is further supported by what D10 wrote in her Facebook[82] on 13 July 2020 which was the day immediately after the Primary Election:

> "民主派初選結果初步公布了，我的得票很可能不足以讓我參與立法會選舉。首先，我一定會尊重選民的決定，遵守初選協定，跟從民主派協調的安排。我相信，這是基本的政治道德，也是民主派能在議會線上抗爭的基本條件。
>
> 除了萬分感謝之外，未能取得足夠選票，我也想跟我的支持者說句抱歉。但是，我也承諾，我會繼續在不同方面上，以我能做到的一切，為香港的民主化作支援。希望曾投票給楊雪盈的各位市民，千萬不要灰心！希望大家一定要在未來的正式選舉中，給各位初選勝出的代表，投下支持的一票！民主派能團結地在議會發揮最大的抗爭力量，難道不是我們共同的願望嗎？"
>
> ["The preliminary results of the democracy camp Primary Election have been announced. It is likely that (the number of) votes I get will not be enough for me to run in the Legislative Council election. First of all, I will definitely respect the voters' decision, abide by the Primary Election agreement (and) follow the arrangement coordinated by the democracy camp. I believe this is basic political ethics and (a) basic condition for the democracy camp to be able to make resistance on the parliamentary front.
>
> Apart from being enormously grateful, I would like to say sorry to my supporters for not being able to get enough votes. However, I also promise that I will continue to do whatever I can in various aspects to support the democratisation of Hong Kong. For (all those) citizens who voted for YEUNG Suet-ying, please do not be disheartened! (I) hope that in the future official election, you will all cast your supporting votes to the

[82] [TB8/A16A/545]; CT [TB8/A16B/546-547]

> representatives who won in the Primary Election! Isn't it our common wish that the democracy camp can exert the greatest resisting force in a united manner in the parliament?"]

243. We give full weight to the above post which D10 made voluntarily after the Primary Election when she realised that her chance of winning was fading away. We find that the above passage is not only consistent with her agreement to the Co-ordination Agreement of Hong Kong Island[83], but also evidence of her intention to carry out her part of that Agreement as well as the IWR declaration. We find also that she knew that the candidates she supported had also expressed their intention to carry out the Scheme and to vote against the budgets indiscriminately. In arriving as these findings, we have already taken into account what PW1 and PW2 said was D10's political views. Concerning PW2's evidence that D10 had told him to the effect that she did not feel obliged to follow D1's idea, we attached no weight to it as being at most a "mixed statement" (if not wholly exculpatory) which is not supported by D10's sworn evidence. In all the circumstances, we draw the irresistible inference that she had the intention to subvert the State power.

---

[83] [TB11/4A/21/11]; CT [TB11/4B/25/11]

"11. 表明參與此協調機制並報名參與官方選舉的個人或團體，若該名單在民調結果所顯示的支持度，排名不在該區的目標議席數目之內，承諾公開表明即時停止選舉工程，並呼籲本是支持他的選民，在選舉日當天不要投票支持該名單，及號召他們用各種方法支持民主派達到在立法會取得 35 個或以上議席的目標。"

["11. Individuals or groups that have expressly stated that they would join this coordination mechanism and registered as a candidate of the official election, if the ranking of their rate of support in the public opinion survey falls outside the target number of seats in their constituency, undertake that they will publicly announce immediate cessation of their election campaign. They will also appeal to the voters supporting them not to cast votes for them on the day of the official election. Further, they will ask them to use all available methods to ensure that the democracy camp can win 35 or more seats in the LegCo."]

Conclusion

244. Looking the matter in the round, in the absence of any explanation from D10, the accumulative weight of the evidence is such that we are left with no doubt that during the charged period:

(1) there was an existing agreement to pursue the Scheme with D1 as its central figure;

(2) D10 had full knowledge of the aforesaid agreement;

(3) D10 was a party to the agreement; and

(4) D10 had the intention to subvert the State power and the intention to carry out her part of the agreement.

245. In reaching the above conclusion, we have not forgotten that D10's subsequent conduct in end of July 2020, namely putting in a nomination on 31 July 2020 for the LegCo election, which apparently went against the said Coordinate Agreement and the IWR declaration. We note, however, that that only happened after PW1 and PW2 had announced their withdrawal from the "Project 35+". We would not speculate whether D10 was acting as a "soul child". Nevertheless, we find that D10's submission of the nomination does not cause us to have any doubt that she was a knowing and willing party to the Scheme during the charge period. Therefore, we find D10 guilty of the charge.

D11 Pang Cheuk-kei

246. Ms Lo raises the following on behalf of D11:

(1) "indiscriminate vetoing" of the budgets did not amount to an "unlawful means" for the purpose of NSL 22(3);

(2) there was no conspiracy as charged as there was no agreement to "indiscriminately veto" the budgets as alleged; and

(3) in any event, D11 was not a party to the conspiracy charged.

Consideration of the evidence

247. D11 has a clear record. He gave evidence in Court. In assessing the evidence, we give ourselves the "good character direction" on both the propensity and credibility limbs in his favour.

Knowledge of the Scheme

248. On this issue, there is the evidence of PW1, which we accept, that he and D1 met D11 and Lee Wing-choi in February/March 2019. Concerning this episode, PW1 said that at the time D11 did not care whether a majority could be obtained in LegCo or whether there would be a vetoing power. D11 just concerned whether electronic or paper vote would be used because the choice of the system would affect the chance of his winning.

249. Secondly, D11 accepts in his examination-in-chief that he had attended the first coordination meeting of Hong Kong Island held on 26 March 2020 and that the topic about the use the vetoing power was raised, even though he said that there was not much discussion on it. We note, however, that no agreement was reached among the participants on the use or active use of vetoing power in the first coordination meeting.

250. Thirdly, there was the discovery in D11's computer of a draft election pamphlet[84] with the headline: "共同協調人民奪權 齊上齊落對抗極權" (Coordinating People Together in seizing Power Fighting Against Totalitarianism in Unison) which D11 said was prepared by his assistant "小白". It was written on the front page of that draft:

> "在去年全民反惡法的浪潮下, 民主派於區議會選舉奪得 389 名議席。今年，立法會選舉將至, 民主派提出立會過半「35+」願景，提倡運用立法會權利，否決財政預算案，迫使當權者回應「五大訴求」。然而，具體執行會是如何？我們又在爭取立會過半的同時，會提出什麼倡議？"
>
> ["Last year, the pro-democracy camp won 389 seats in the District Council election amidst the wave of opposition to the evil law. This year, as the Legislative Council election is approaching, the pro-democracy camp has proposed a "35+" vision for a majority in the Legislative Council, advocating the use of the Legislative Council's power to veto the Budget and force those in power to respond to the "five demands". However, what will be the specific situation? What will we advocate while striving for a majority in the LegCo?"]

The answer to that rhetorical question was on the reverse side of the draft where there was the reference to D1's article in Apply Daily published on 28 April 2020 and also a time-line showing the "10 steps to Mutual Destruction".

251. Based on the above, we are sure that D11 was clearly aware that D1 proposed to use the Project 35+ as a means to achieve a majority in LegCo by the pro-democrats and, after that, to make use of the vetoing power of the LegCo to force the Government to accede to the Five Demands, failing which to cause the stepping down of the Chief Executive after the LegCo had been dissolved twice. Any suggestion by

---

[84] [TB10/97A/4255-6]; CT [TB10/97B/4257-4261]

D11 to the contrary is not accepted as it would be incredible and contrary to common sense.

Party to the Scheme

252. The evidence on this issue consists of the following. First, in the "Platform Highlights"[85] of D11 and his team which had been distributed to the public, the first platform was stated as follows:

> "**從一而終的抗爭派 / THE FIGHT AGAINST TOTALITARIANISM**
>
> 今年立會背水一戰，不論 35+與否，代議士必須運用否決權，否決所有不公義議案（包括財政預算案），不要曖昧投票立場，迫使當權回應「五大訴求」。運用議員身位及資源，支援街頭抗爭。我們亦不惜肢體抗爭，阻撓不公議會進行。"
>
> ["Resistance camp as always/ THE FIGHT AGAINST TOTALITARIANISM
>
> Fight the last battle in this year's Legislative Council election. Whether 35+ is secured or not, council members must exercise their right to veto all unjust bills (including the Budget), abandon the equivocal standpoint in voting, and force the authority to respond to the "Five Demands". Make use of our councilor identity and our resources to support protests on the street. We will also not shun physical resistance as we obstruct unjust Legislative Council affairs."]

It is noteworthy that D11 described both the budget and the LegCo as "unjust" and in the same breath talked about forcing the Government to respond to the Five Demands.

---

85 [TB10/75A/4181]; CT [TB10/75B/4185]

253. Furthermore, on the reverse side of that document[86] D11 expressed his strong determination to fight against the Government:

> "共產政權一向是以極權、一黨壟斷、暴力、恐懼來延續治權。…
>
> … 政權經已不再搽脂抹粉打壓人民，而是比「陽謀」更陽地明目張膽全民接管香港，推行惡法。面對香港如此危急存亡之時，香港人對反惡法、反極權這最後底線，是以血汗、個人前途甚至一眾手足的生命去抵抗…。
>
> 「抗爭意志融入細節 議會路線依然重要」
>
> 今年六一二，政權的虛怯連紀念六一二的街站也容不下。負責銅鑼灣紀念街站的我，只有緊守崗位才能對得著每一位曾經付出及犧牲的香港人。當天，即使港共以所謂的「非法集結」的罪名把我拘捕，為的就是要結束展覽，我也不會低頭，相比無數手足的付出，彭卓棋算什麼？要香港改變，必須付出代價；付出代價，必須全面搶攻抗爭平台。「街頭抗爭」、「議會抗爭」、「國際支援」，缺一不可。九月立會選舉是香港自由的終極之戰，退無可退，無險可守。「35+」是選舉主軸，以「議會抗爭攪炒」迫使政府回應「五大訴求」。這是沒有妥協的空間。
>
> 立法會議事堂的腐爛，不是 Day 1 的事。不論是純政治表態的議案還是具約束力的議案，我們也不應該放過任何一個機會去展示抗爭意志。我們經已厭倦了抱殘守缺的人物，沒有堅定的投票立場，憂心顧此失彼，終被時代唾棄。我們經已看得太多了…"
>
> [Communist authorities have always maintained their domination with totalitarianism, party monopoly, tyranny and terror. …
>
> … the authority has quite openly told us, that it will no longer oppress the people with periphrastic tactics, but rather will take over Hong Kong and implement the evil law more blatantly than [overt schemes]. In this critical time for Hong Kong, Hongkongers, whose bottom line was to oppose the evil law and totalitarianism, protested with sweat and toil as well as

[86] [TB10/75A/4182]; CT [TB10/75B/4189]

> their personal future and even the lives of fellow protesters. There were even a large number of fellow protesters being prosecuted for the charge of [riot]. We must bear in mind that in the eyes of the authority, there is no escape for all of us. Being young is the original sin. All we can do is to resist.
>
> "Integrate the will to resist into details The LegCo front is still critical"
>
> The overly cautious authority cannot even allow a demonstration in memory of the June 12 protest. Being in charge of commemorative activities on the street of Causeway Bay, I could only stick to my post in order to not fall short of the expectations of every Hong Konger who made their contribution and sacrifices. Even if the Hong Kong communist had arrested me in the name of [unlawful assembly] to end the demonstration, I would not have caved in to it. Compared to the efforts of countless fellow protesters, PANG Cheuk-kei is nothing. To change Hong Kong, we must pay a price; to pay the price, we much make a full-scale sound attack for our protest platform. [Street protests], [resistance in LegCo] and [international support] are all indispensable. The Legislative Council election in September is the final battle for the freedom of Hong Kong. There is no retreat and no defensive position. [35+] is the priority of the election, which enables us to force the government to respond to the [Five Demands] with [resistance in LegCo and mutual destruction]. There is no room for compromise.
>
> Corruption in the chamber of the Legislative Council has been a long-standing issue. We should not let go of any opportunity to demonstrate our will to resist, no matter in terms of bills that purely involve political gesture or binding bills. We are fed up with conservative people who only want to adhere to the status quo and do not have a firm standpoint when it comes to voting. Their hesitance will lead to nowhere and will cause them to be casted aside in this era. We have seen too much of these…"]
>
> (Emphasis supplied)

We note that D11 linked the Project 35+, "resistance in LegCo", "mutual destruction" and Five Demands together. Besides, what he said about the "corruption" in LegCo having been "longstanding" echoed with his earlier statements about the budgets and the LegCo proceedings being "unjust".

254. We have not ignored D11's evidence-in-chief that he was interested in exploring business opportunities in the Greater Bay Area and in assisting young entrepreneurs to make use of government funding to do the same. However, we do not accept the defence submission that in view of this asserted interest of D11, he was unlikely to have any intention to act together with others to veto the budgets or to undermine the government. We note that in D11's "Election Highlights", he had the following to say about economic reform:[87]

> "香港本位經濟 – START UP HONGKONG/ ECONOMIC REFORM
>
> 香港一直側重內地經濟，紅色資本滲透各大企業。我們要透過經濟手段，重振香港品牌，力推出口經濟，推動各種經濟邦交，強化國際連線。推倒既有經濟結構，促進社會流動。大力支援 START UP HONGKONG, 從根本與國際初創、中小企接軌，對抗紅色企業。"
>
> ["Hong Kong's economic reform/ START UP HONGKONG/ ECONOMIC REFORM
>
> Hong Kong had been putting its economic emphasis on the economy of Mainland. Red capital had infiltrated into enterprises of all sizes. We need to apply economic means to invigorate Hong Kong brands, step up export economy, promote all types of diplomatic relations in the economy sector, and strengthen international bonds. Overthrow the current economic structure and promote social exchanges. Give full support to START UP HONGKONG. Connect startups and small and medium enterprises with the international economy on a fundamental basis so as to counter red enterprises."]

Whilst D11 emphasised the development of local brands and local start-ups businesses, he suggested that the reform would require overthrowing the current economic structure. As such, D11's reform proposal was one

---

87 [TB10/75A/4181]; CT [TB10/75B/4186]

of "demolition first and reconstruction later". Viewing in this light, there was no necessary contradiction between D11's asserted business inspiration on the one hand and the anti-government political agenda contained in his election publication on the other.

255. Having considered the aforesaid pamphlet as a whole, we find that D11, educated as he was, would not have failed to realise that an ordinary and reasonable person would understand him to mean that he would vote against the budgets if he was elected into the LegCo in order to force the Government to respond to the "Five Demands Not one less". We find also that was exactly the message that D11 intended to convey.

256. What is more, there is the undisputed fact that he endorsed the IWR declaration in his Facebook[88] on 10 June 2020.

257. Then, similar to the case of other candidates, there was the declaration at Part II, Clause 2 of his nomination form[89] dated 19 June 2020 and the Election Deposit Receipt[90].

258. Last but not least, there was what he said at the election forum of Hong Kong Island held on 27 June 2020[91] when he knew that the NSL was looming large:

> "13.G: 大家好，我係港島區彭卓棋團隊，昂首拒默沉，吶喊聲響透，盼自由歸於這裏。我哋面臨國安法壓境，我哋抗拒沉默，面對極權嘅奴隸，我哋吶喊高呼，聲討賣港派、港共派、中間派，仲有袁

88 [TB7/A15A/210]; CT [TB7/A15B/213]
89 [TB7/B11A/434]; CT [TB7/B11B/450]
90 [TB7/B11A/446]; CT [TB7/B11B/462]
91 [TB8/B3B/2767/13]; CT [TB8/B3C/2925/13]

彌昌。我哋嘅敵人就係共產黨，我哋入到議會不息以肢體抗爭、癱瘓政府、否決財政預算案，亦會用議員身位支援街頭抗爭，請投我……（聽不清）彭卓棋港島區……”

["13. G: Hello, I am (a member of) the team of PANG Cheuk-kei of Hong Kong Island. Raise (your) head, refuse to keep silent, let the yell be heard, hope there will be freedom in this place. Facing the National Security Law being pressed on to the border, we refuse to keep silent. Facing the slaves of tyranny, we yell and shout to condemn the traitors of Hong Kong, the Communists in Hong Kong, the Centrists, and also YUEN Mi-chang. Our enemy is the Communist Party. Once we join the legislature, we will not hesitate (one homophone) to resist physically, paralyse the government, veto the government's budget, and will support street protests in our capacity as members (of the Council). Please vote for me… [indistinct] PANG Cheuk-kei, Hong Kong Island…"]

Later, he also said[92]：

“674.G: 捍自由來齊集這裏，全－－來全力抗對，共產黨要我跪，我哋係唔會跪，我哋會全力抗爭，對抗共產黨。”

["674G： For freedom, (we) gather here. All -- with all might (we) resist. The Communist Party wants me to kneel. We will not kneel. We will resist with all (our) might, resist the Communist Party."]

259. Taking everything into consideration, we give weight to D11’s persistent message to the public that if elected into the LegCo he would resist and fight against the Government by voting against the budgets. On the other hand, having observed D11 testifying in Court, we

92 [TB8/B3B/2916/674]; CT [TB8/B3C/3029/674]

find that he is an opportunistic and incredible witness who gave self-serving evidence. We attach no weight to that part of his evidence that what he said in his campaign was mere election rhetoric which he had no intention to carry out. Moreover, it is clear he portrayed the Government and the Communist Party of China as the "enemy" and said that the budget had to be vetoed as being "unjust". As such, we have no doubt whatsoever that D11 agreed with D1 and others that the Scheme be carried out and that was his firm position prior to the promulgation of the NSL.

Intention to Subvert

260. Based on what D11 said in his election materials and at the election forum, we draw the inference, which we find to be the only reasonable one, that he fully endorsed the objective of the Project 35+ which was aiming at vetoing the budgets indiscriminately in order to compel the Chief Executive to accede to the "Five Demands Not One Less". We find further that he had no intention to negotiate with the Government which he repeatedly described as a "tyranny". Rather, he intended to act together with other pro-democrats in LegCo and vote against the budgets indiscriminately regardless of their merits, knowing full well that the vetoing of the budgets would result in a serious interference in, disruption or undermining of the performances of duties and functions of the Government, and that, we find further, was also his intention to seriously undermine the legitimacy of the Government as well as the State power.

261. Having considered the evidence, we do not accept that D11 might have abandoned his original platform after the promulgation of the

NSL. To start with, D11 had never publicly announced that he had abandoned his original election platform.

262. Secondly, even though D11 and his team sought to retrieve their platform filed with Power for Democracy and were distributing "torn platforms", the message about "resisting" and "fighting" the Government could still be discerned without any difficulties in the "torn platforms". This is graphically illustrated by the photo published by D11 in his Instagram (D11-32) on 6 July 2020. The photograph depicts D11 and his two teammates holding a fist in one hand and holding the "torn platform" printed with the words "對抗極權") ("Resisting Tyranny") in the other. D11 admitted in his evidence that he and his teammates distributed that "torn platforms" to the public whilst they were holding street rallies using banners bearing the slogan "背水 重光" ("No Turning Back, Liberation).

263. In all the circumstances, we find that what D11 was not telling the truth when he said that he participated in the Primary Election without a platform. Quite to the contrary, we are left with no doubt the distribution of "torn pamphlets" was an act by which D11 was implicitly conveying to the public that he was determined to resist and to fight against the government. In fact, he was and remained as a party to the agreement with D1 and others to carry out the Scheme.

Conclusion

264. We are sure and we find that:

(1) before the promulgation of the NSL, there was in existence an agreement to pursue the Scheme with D1 as the central figure;

(2) D11 had full knowledge of the Scheme and was a party to the Scheme;

(3) after the promulgation of the NSL, D11 remained as a party to the Scheme as he was before; and

(4) he had the intention to subvert the State power, with that intention he participated in the Primary Election in furtherance of the Scheme and with the intention to carry it out.

Therefore, we find D11 guilty of the charge.

Kowloon West

D14 Ho Kai-ming Kalvin

265. D14 is a man of clear criminal record, as such he enjoyed the two benefits in regard to his credibility in giving evidence and propensity in committing crime.

266. D14's involvement with The Hong Kong Association for Democracy and People's Livelihood (ADPL) started in 2013. He had been the Vice-chairman of ADPL since 2016.

267. D14 ran in the Primary Election (Kowloon West) as a candidate on behalf of ADPL, whereas D24, the Chairman, ran in

Kowloon East on behalf of the party. D14 and D24 were the only candidates of ADPL in the Primary Election.

268. On 20 June 2020, D14 and D24 submitted their respective Primary Election nomination forms.

269. It is an admitted fact that D14 attended the election forum (Kowloon West) on 25 June 2020. The forum was broadcasted on 27 June 2020.

270. D14 won in the Primary Election (Kowloon West). On 22 July 2020, he submitted the nomination form for the 2020 LegCo Election.

271. It is the prosecution case that D14 had knowledge of the Scheme and also that it was the objective of the Project 35+ to win the majority in the LegCo so that the majority could indiscriminately veto the budgets in forcing the Government to respond to the Five Demands.

272. It is D14's case that to his understanding, the Project 35+ and the IWR declaration did not bind the candidates to veto the budgets. D14 believed that the power to veto the budgets was conferred by the BL. The participants of the Project 35+, if elected into the LegCo, could choose to employ any power among the various powers conferred by the BL.

273. It is not in dispute that D14 attended the first coordination meeting of Kowloon West held on 24 March 2020 and the second coordination meeting held on 29 April 2020 respectively.

274. We reject D14's evidence that he and D24 did not have communication and they did not have a uniform approach for the Primary Election.

275. In our judgment, the fact that Kowloon West and Kowloon East were two constituencies which had different characteristics should not result in absence of communication between the electioneering teams of D14 and D24. The use of the vetoing power was a topic that concerned both constituencies regardless of their different characteristics and it is unreasonable for D14 to suggest that the two electioneering teams did not have communication because of that reason.

276. In our judgment, the fact that the electioneering teams of D14 and D24 were different all the more called for communication and coordination between the two teams.

277. D14 and D24, being the Vice-chairman and Chairman of ADPL respectively, were the only two candidates of ADPL in the Primary Election. As D24 said in his evidence, ADPL was a small political party which was losing its popularity and being gradually marginalised at the material time.

278. In our judgment, it was important to D14 and D24 that their party should secure at least one seat in the coming LegCo election. In order for ADPL to participate in the coming LegCo election, at least one of the them must win in the Primary Election.

279. Given the importance of the Primary Election, it defies common sense that the election teams of D14 and D24 operated independently and adopted different electioneering strategies.

280. We reject D14's evidence that ADPL as a political party did not have a uniform stance on the issue of the vetoing of the budgets. It would be politically disastrous for ADPL if its Chairman (D24) and Vice-chairman (D14) did not have a uniform stance and spoke differently on the common issue of the vetoing of the budgets.

281. We are sure that D14 and D24 had discussions or coordination about their election strategies. They had to make sure that they would speak consistently in public on important issues touching on the Primary Election, of which the vetoing of the budgets was one. They had to make sure that they had a consistent line of defence against anticipated attack from competing candidates; words or statements made by one of the two might be used against the other and it would be disastrous if it was revealed to the public that the two candidates of ADPL did not have a uniform stance on important issues.

282. In our judgment, D14's evidence that the election teams of D14 and D24 operated independently and adopted different electioneering strategies does not sit well with his evidence that he informed the Caucus of ADPL of his support and endorsement of Clause 1 and Clause 2 of the IWR declaration and his interpretation of Clause 1 to the WhatsApp group of ADPL's Caucus members.

283. D14 did not just sign the IWR declaration, he published the content of the IWR declaration on his Facebook page with an image of

ADPL party logo, his name and the name of D24, the title "Inked Without Regret": "No Regrets for Signing Perseverance in Fighting" ("墨落無悔 堅定抗爭")， "Declaration of Position of the Resistance Bloc" ("抗爭派立場聲明書")， "Sze Tak Loy" ("施德來")， "ADPL" ("民協")， "Ho Kai Ming Kalvin" ("何啟明") [93] The said post is clear evidence that there was co-ordination between D14 and D24.

284. The prosecution is right to point out that the minutes of ADPL Caucus meeting on 28 March 2020 showed that it was the practice of ADPL Caucus to have discussions before they finalised the party's stance[94]. The evidence of D14 that ADPL did not have a uniform stance on whether they should veto the budgets does not sit well with what the minutes of the Caucus showed as to how the budget of the current year was discussed in the meeting of the Caucus on 29 February 2020[95].

285. The prosecution is also right to point out that even trivial matters were reported/discussed in the Caucus of ADPL on many occasions, e.g., the slogans to be adopted by ADPL for upcoming LegCo Election:

(i) "Suggested slogan "Majority in LegCo, Liberate Hong Kong" ("建議口號「立會過半、光復香港」")[96];

---

93 (P142-0404 [TB7/A6/62-63]; CT[TB7/A6/64-70])

94 (P1264-6 [TB10/104/4332-4333]; CT [TB10/104/4334-4338])

95 (item 2 of P1264-2 [TB10/100/4306]; (CT) P1264-2 [TB10/100/4310])

96 (P1264-2 [TB10/100/4314]; (CT) [TB10/100/4319]

(ii) "Resist authoritarianism, struggle for the future" ("抗威權、拼未來")[97];

(iii) "One of the election slogans suggested by election team is "Resist adversity universally, revolution for livelihood". The party thinks the meaning of "Resist adversity universally" is relatively inadequate. It suggests to continue to think of more slogans." ("選舉團隊其中一個建議選舉口號為「全民抗逆、民生革命」，黨團認為「全民抗逆」一句意思比較薄弱，建議可繼續思考更多口號")[98].

286. On the evidence before us, we reject D14's evidence that the Caucus of ADPL had never discussed the party's stance on vetoing the budgets; we also reject D14's evidence that the electioneering teams of D14 and D24 could decide their stances on vetoing the budgets without seeking the party's approval.

287. In our judgment, the exculpatory explanations of D14 are incredible and unreasonable. We find D14 an unreliable and dishonest witness.

Knowledge of the Scheme

288. We reject D14's evidence that he did not know that vetoing of the budgets was one of the objectives of the Project 35+. D14 agreed that D1 introduced the idea of "using the power to veto the Budget" in the first coordination meeting of Kowloon West on 24 March 2020. He also

---

97 (P1264-2 [TB10/100/4320]; (CT) [TB10/100/4322]

98 (P1264-2 [TB10/100/4326]; (CT) [TB10/100/4328]

agreed that during the first coordination meeting, D1 explained that any person who endorsed the Five Demands would be eligible to participate in the Primary Election. D14 agreed that the document "35+計劃 Project 35+" [99]was circulated during the first coordination meeting. We note that in Clause 1 of the document, it was stated that any individual that recognised "Five Demands Not One Less" and strived to achieve a controlling majority in the LegCo could join the coordination mechanism of the Primary Election.

289. The issue of vetoing the budgets was raised again in the second coordination meeting of Kowloon West by Cheung Kwan-yeung and responded by D1.

290. D14 attended both coordination meetings. During and after both coordination meetings, D14 did not raise any concern or objection when the above issue was raised. The issue was raised at a time when the budgets had not come into sight. It must be clear to D14 that D1 and Cheung Kwan-yeung were talking about vetoing the budgets indiscriminately, i.e., regardless of the merits of the contents.

291. We are sure that following the first coordination meeting, D14 received the document "35+立會過半計劃 民主派九西協調機制(初稿)" from D1. We accept the evidence of PW1 and PW2 that they each received a copy of the document. As D1 stated in his WhatsApp message in relation to the document[100], the document would serve as the foundation document for further discussion in the subsequent

---

[99] (P590-5 [TB2/1/1]; (CT) [TB2/1/2-5])

[100] (Counter 359 of P714-122 [TB3/85/1901]; (CT) [TB3/85/2098])

coordination meeting. In our judgment, it is only reasonable that the document, which served as summary of the matters discussed in the first coordination meeting, was sent to all the attendees of the first coordination meeting (including D14). We are sure that D14 received a copy of the document and he was aware of its contents at the time.

292. We accept the evidence of PW2 that he received a copy of the document "35+立會過半計劃 民主派九西協調機制協議" (with the file name "35+ Kowloon West final.docx") circulated by D1 on 30 April 2020 after the second coordination meeting of Kowloon West. D1 stated that "35+ Kowloon west final.docx" was the final coordination document.[101]

293. We note that a copy of "35+ Kowloon West final.docx" was retrieved from the computer of D17 upon her arrest. D17 was one of the candidates of the Primary Election in Kowloon West. D14 and PW1 knew each other and had each other's telephone numbers, the two had communications through messages on matters related to Primary Election. We are sure that D14 also received the document from D1 at the time. We see no reason why D1 would send the document to some candidates (e.g. D17) to the exclusion of D14. We are sure that D14 must be aware of Clause 2, which was about the use of the power to veto the Budget.

294. Given the fact that D14 had attended both the first and the second coordination meeting of Kowloon West, and given our finding that he must have received a copy of "35+ Kowloon West final.docx" at the time, we are sure that by 29 April 2020 (the time of the second

[101] (Counter 380-381 of P714-122 [TB3/85/1906-1907]; (CT) [TB3/85/2107]).

coordination meeting of Kowloon West), he was well aware that the objective of the Project 35+ was to achieve the majority in the LegCo in order to compel the Chief Executive to respond to the Five Demands by indiscriminately vetoing the budgets.

295. We reject D14's evidence that what he thought at the time was that the Project 35+ could result in a check and balance in the LegCo where the Five Demands could be achieved through negotiation with the Government. With D14's experience in the political field, we are sure that D14 knew the Five Demands was a demand that the Government would never accept, hence he knew that if the Project 35+ succeeded in achieving the majority in the LegCo, those who won their LegCo seats under the Project 35+ would veto the budgets indiscriminately.

296. In other words, D14 must have appreciated that the anticipated failure/refusal on the part of the Chief Executive or the Government to respond to the Five Demands was just an excuse that would be used for the vetoing of the budgets.

Party to the Scheme

297. In our judgment, not only D14 knew that the objective of the Project 35+ was to achieve the majority in the LegCo to compel the Chief Executive to respond to the Five Demands by indiscriminately vetoing the budgets, he endorsed it and advocated it in his electioneering campaign. We note that in his election pamphlet, he stated that the pro-democracy camp must achieve the LegCo majority and obtain the vetoing power, including the power to veto the budgets, in order to

achieve the Five Demands[102]. In our judgment, D14's endorsement of Clause 2 in Part 2 of his Primary Election nomination form stating "I hereby confirm that I agree and support the consensus of the coordination meeting led by Benny TAI Yiu-ting and AU Nok-hin, including 'Democrats 35+ Civil Voting Project' and its goals" should be read in the light of what D14 stated in his election pamphlet. We reject D14's evidence that the Five Demands was not one of the goals of the Project 35+ to his understanding.

298. In our judgment, the representations made by D14 in his electioneering campaign, taken together with the plain meaning of the IWR declaration that he endorsed, showed his intention of participating in the Scheme to achieve the impugned objective of vetoing the budgets indiscriminately.

299. D14, in his evidence, said he became aware of the IWR declaration on 10 June 2020. He had a discussion about the IWR declaration via WhatsApp with the Caucus of ADPL (of which D24 was a member). D14 informed the Caucus that he would support and endorse the IWR declaration. He endorsed the IWR declaration and published his signed IWR declaration on his Facebook page on 11 June 2020. He also created an image with the words "No Regrets for Signing Perseverance in Fighting" ("墨落無悔 堅定抗爭"), "Declaration of Position of the Resistance Bloc" ("抗爭派立場聲明書"), his name and the name of D24 and the name and logo of ADPL. In our judgment, D14 so titled and worded his Facebook post because he knew the IWR declaration was a pledge by the signatories that they would veto the budgets if elected as

[102] (P123 [TB10/99/4287-4288])

LegCo members. He endorsed the IWR declaration because he agreed with the contents. In our judgment, if the "Common Program" ("共同綱領") in "which was agreed upon at the Primary Election Coordination Meeting" ("在初選協調會議上已取得共識的共同綱領") stated in the preamble of the IWR declaration was the four points mentioned by PW1 in his evidence, it was unnecessarily to have the IWR declaration as a "Declaration of Position of the Resistance Bloc" ("抗爭派立場聲明書") at all.

300. We reject the evidence of D14 as to his interpretation of the IWR declaration. We find it absurd that D14 would read the first Clause of the IWR declaration in the way he claimed, i.e., all the participants of the Project *35+* had agreed to use the power conferred by the BL but the participants, in exercising their duty as LegCo members, could choose to employ any power among the various powers conferred by the BL. In our judgment, it would be otiose for the IWR declaration to state the obvious, i.e., that the LegCo members elected could choose to exercise the powers conferred by the BL. If each of the LegCo members successfully elected under the Project 35+ had a freehand to choose which power conferred by the BL to use, it would be difficult, if not impossible, for the majority to bargain with the Government collectively, i.e., they would not be in a position to force the Government to accede to the Five Demands.

301. In our judgment, D14's evidence that he would use whatever power conferred by the BL to force the Government to respond to the Five Demands, but not the power to veto the budgets, is contrary to the literary meaning and the context of the IWR declaration that he endorsed.

302. In our judgment, if D14's understanding of the consensuses "Common Program" ("共同綱領") in "which was agreed upon at the Primary Election Coordination Meeting" ("在初選協調會議上已取得共識的共同綱領") stated in the preamble of the IWR declaration were the four points mentioned by PW1 in his evidence, when D14 was asked by D16 why he was so "courageous" to be the first signatory of the IWR declaration in the election forum, he would not have answered and explained that as Hong Kong people wished to witness solidarity within the pro-democracy camp with a view of achieving 35+, it was important for all the candidates to sign the IWR declaration. [103]

303. Likewise, if D14 considered the "Common Program" ("共同綱領") in the preamble was the four matters mentioned in the evidence of PW1, when D14 was asked by the host of the election forum on the issue of mutual destruction, he would not have mentioned his endorsement of the IWR declaration in his answer and said the Communist Party of China was the prime culprit of the alleged mutual destruction. [104] It is difficult to see how the four matters mentioned by PW1 in his evidence could result in mutual destruction. In our judgment, by "Mutual Destruction", D14 was referring to the dire consequences following the vetoing of the budgets.

304. In our judgment, it is clear from the wordings of the IWR declaration that the purpose of the signing and publication of the same, as stated in the declaration, was to confirm the consensuses reached in the various coordination meetings and to subject the candidates of the

---

[103] (Counters 167 of P142-0037(T) [TB8/B1/2425-2426]; (CT) [TB8/B1/2525-2526])

[104] (Counters 335-336 of P142-0037(T) [TB8/B1/2462-2464]; (CT) [TB8/B1/2553-2554])

Primary Election to public scrutiny. It would make no sense to have the declaration signed and published if the consensuses reached in the coordination meetings were not binding on the candidates.

305. We find that D14 signed the IWR declaration knowing Clause 1 was a binding undertaking made by the signatories to veto the budgets indiscriminately. D14 signed it because he fully endorsed the idea of indiscriminate vetoing of the budgets.

306. It would be an abuse of the power conferred by the BL for LegCo members to veto the budgets indiscriminately to force the Chief Executive to accede to any political demand. We are sure that D14, as the Vice-chairman of ADPL and with his experience as a District Councilor and in the political field, knew the Five Demands was a condition that the Government would never accept.

307. On the evidence, we are sure that the D14 and D24, being the Vice-chairman and the Chairman of ADPL and the only 2 candidates endorsed by the party to represent the party in the Primary Election, must have reached a uniform stance in respect of the coordination meetings and the Coordination Agreements, i.e., "35+ Kowloon West final.docx" for D14 and "35+Kowloon East final (2).docx" for D24. D14's knowledge about the objective of the Project 35+ came not only from the coordination meetings of Kowloon West that he attended and "35+ Kowloon West final.docx" that he received from the organisers of the Project 35+, we are sure that D14 must have learnt about the objective of the Project 35+ from D24.

308. From the evidence, we find that the Caucus of ADPL had the practice of holding meetings to discuss and articulate the party's position on important issues, including the electioneering strategies and the party's position on the Budget. As shown by the minutes of the Caucus meetings, both D14 and D24 had reported their electioneering campaigns to the Caucus of ADPL, the matters reported included their intention to attend the coordination meetings of Kowloon West and Kowloon East (P1264-4)[105].

309. In our judgment, D14 and D24 must have reached a uniform stance on the issue of exercising the power to veto the Budget. They both agreed to undertake that they would veto the Budget indiscriminately if elected. They signed the IWR declaration to acknowledge the aforesaid undertaking.

310. As said, in the Primary Election nomination form submitted by D14 on 20 June 2020, D14 signed the declaration in Part II to confirm his agreement and support for the consensus of the coordination meeting led by D1 and PW1, including "Democrats 35+ Civil Voting Project" and its goals. D24 also submitted his Primary Election nomination form on the same day together with a signed Common Program/Guiding Principles as other candidates of Kowloon East did. From the evidence, we are sure that not only D14 was aware of the fact that D24 had signed and submitted a Common Program/Guiding Principles, he was also aware of the contents of the document, including the vetoing of the budgets. We are sure that the consensus of the coordination meeting led by D1 and PW1, including "Democrats 35+ Civil Voting Project" and its goals

---

105 [TB10/102/4320]; (CT) [TB10/102/4324])

referred to in the Primary Election nomination form referred to the matters contained in the coordination agreements but not the four matters referred to by PW1 in his evidence.

311. In the election forum (Kowloon West) on 25 June 2020, D14 said, amongst other things, that it was crucial for all the candidates to sign the IWR declaration in order to achieve 35+. He urged the voters not to vote for the candidates who refused to sign the IWR declaration. D14 said there was no room for negotiation when there was suppression from the totalitarian regime. He pledged he would use the resources of the LegCo to employ staff who could launch an endless fight against the "totalitarian regime" in order to overthrow the Communist Party of China. D14 also said the Communist Party of China was the prime culprit of any mutual destruction.

312. What D14 said in the election forum was consistent with what he stated in his election pamphlets, in which he stated that upon achieving the controlling majority in the LegCo, i.e., 35+, the pro-democracy camp would be able to veto the budgets to achieve the Five Demands[106].

313. When D24 attended the election forum of Kowloon East on 26 June 2020, he made similar statements as D14 did in his election forum on 25 June 2020, e.g. that the Chief Executive and the Communist Party of China would be the prime culprits for the mutual destruction and the vetoing of the budgets if ADPL succeeded in entering the LegCo.

---

[106] (P1237 [TB10/99/4287]; (CT) [TB10/99/4293-4299])

What D24 said was also similar to what the election pamphlet of D14 advocated.

314. When D14 and D24 spoke of vetoing of the budgets, no budget had not yet come into being. Obviously, D14 and D24 were not talking about vetoing of the budgets on merits. We are sure that they were talking about vetoing of the budgets regardless of its contents.

315. On the evidence, we are sure that D14 and D24, as the candidates representing ADPL in the Primary Election, adopted the common stance and undertook that if elected, they would veto the budgets indiscriminately to compel the Chief Executive to accede to the Five Demands.

316. In our judgment, D14 and D24, together with others, agreed to pursue the Scheme to indiscriminately veto or refuse to pass any budgets or public expenditure if a majority in the LegCo was achieved under the Project 35+. On the evidence, we were sure that by 20 June 2020 at the latest, D14 had become a party to the Scheme and he remained a party after the promulgation of the NSL. By submitting his nomination form and taking part in the Primary Election, D14 was a party to the Scheme.

Intention to Subvert

317. In our judgment, D14 would not agree to indiscriminately veto or refuse to pass any budgets or public expenditure for the simple sake of doing so, he agreed to pursue the Scheme with the intention to compel the Chief Executive to respond to the Five Demands. As we pointed out, it was a condition that only people who endorsed the "Five

Demands Not One Less" could take part in the coordination mechanism of the Primary Election.

318. In our judgment, D14 agreed to pursue the Scheme with the intended consequence that if the Chief Executive refused to respond to the Five Demands, she would have to dissolve the LegCo under Article 50 of the BL and/or to resign under Article 52 as a result of the dissolution of the LegCo and/or the persistent refusal to pass the original budget by the new LegCo.

319. In our judgment, D14's Facebook post "No Regrets for Signing Perseverance in Fighting Declaration of Position of the Resistance Bloc" ("墨落無悔 堅定抗爭 抗爭派立場聲明書") published after his endorsement of the IWR declaration showed that he had the genuine intention to veto the budgets indiscriminately.

320. In our judgment, what D14 said in the election forum, i.e., that the voters should not vote for those candidates who refused to endorse the IWR declaration; and that he further acknowledged his endorsement of the IWR declaration, showed that he was committed to Clause 1 of the IWR declaration that the signatories would veto the budgets indiscriminately if elected.

321. In our judgment, D14's undertaking to veto the budgets was consistent with the public statements made by the organisers of the Project 35+ after the promulgation of the NSL:

1. on 6 July 2020, D1 said, inter alia, in a press conference that one of the aims of the Project 35+ was to exercise the constitutional powers purportedly conferred on the LegCo

by the BL, including the power to veto the Budget, upon obtaining a majority in the LegCo. D1 also mentioned the dissolution of the LegCo as one of the consequences of the vetoing of the budgets;

2. in an article named "Will pro-democracy camp's 35+ Primary Election violate the NSL?" ("民主派 35+初選會否觸犯國安法?") published on Apple Daily on 7 July 2020, D1 stated that the plan of 35+ was to use the powers purportedly conferred on the LegCo by the BL to veto the budgets so as to put pressure on the Government or to make it accountable to the LegCo;

3. in a Facebook post of D1 on 9 July 2020, D1 responded to the statement made Mr Tsang Kwok-wai, the then Secretary for Constitutional and Mainland Affairs, made on the same that that the organisers or participants of the Primary Election might have contravened the NSL. D1 said the power to veto the budgets was conferred to the LegCo by the BL, hence, the vetoing of the budgets did not amount to unlawful means under the BL, D1 stated that all candidates of the Primary Election had agreed to use the power to veto the budgets;

4. in a press conference held by D1, PW1 and PW2 on 9 July 2020, D1 stated once again that the objective of the Project 35+ was to obtain a majority in the LegCo so as to exercise the power to veto the Budget.

322. On 13 July 2020, Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region made a statement condemning the participation in the Project 35+ as being illegal and having contravened the NSL.

323. On the same day, D1 disseminated messages in the WhatsApp groups of New Territories West, New Territories East, Hong Kong Island, District Council (Second), Health Services and Kowloon East that:

> "The information I published about the objective of 35+ is to make use of the power given to the LegCo by Basic Law, including veto the Budget and require accountability from SAR government. Not mentioning of veto every bill or paralysing the government."
>
> ["我公開的訊息說 35+的目的，是運用基本法賦予立法會的權力，包括否決財政預算案，令特區政府問責。不提否決每一個議案，也不說癱瘓政府。供大家參考。"]

324. In our judgment, clearly the purpose of D1's dissimilation of the messages in the respective constituencies was to provide a line to take to the participants of the Project 35+. He was not providing a true picture. The line to take provided by D1 was consistent with what he had said on 9 June 2020. In our judgment, D1 saw the need to dissimilate the above message in response to the statement made by Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region because it had all along been the objective of the Project 35+ to veto the budget with a view to paralysing the Government and this impugned objective was known to the participants of the Primary Election, including D14.

325. We are sure that D14 all along adopted the stance to veto the budgets indiscriminately to force the Chief Executive to respond to the Five Demands. We are sure that D14 had the intention to veto the budgets. It was the intended consequence of D14 that if the Chief Executive, as D14 expected, refused to respond to the Five Demands, the Chief Executive would have to dissolve the LegCo under Article 50 of the BL and or resign under Article 52 as a result of the dissolution of the LegCo and the refusal to pass the original budget by the new LegCo.

326. From the evidence, we are sure that at the material time, D14 had knowledge that the objective of the Project 35+ was to indiscriminately veto the budgets in compelling the Government to respond to the Five Demands upon obtaining the majority in the LegCo.

327. We are sure that D14 knew at the time the Five Demands was a condition that the Government would never accept, hence D14 knew that if the Project 35+ succeeded in achieving the majority in the LegCo, the LegCo members who won their seats under the Project 35+ would veto the budgets indiscriminately to compel the Government to respond to the Five Demands upon obtaining the majority in the LegCo.

328. On the issue whether D14 agreed with the organisers and other candidates to veto the budgets indiscriminately, we reject D14's evidence that he had no intention to veto the budgets. D14 had full knowledge that the objective of the Project 35+ was to veto the budgets indiscriminately to compel the Government to respond to the Five Demands. He had no reason to join the Primary Election if he did not share the impugned objective. In submitting his Primary Election nomination form, he endorsed Clause 2 of Part 2. After D14 became

aware of the IWR declaration, he signed to endorse the same. During the electioneering work, he made explicit statement in his election pamphlet that the pro-democracy camp should strive to obtain the majority in the LegCo and they should use the vetoing power to veto the budgets to achieve the Five Demands[107]. From the evidence, we are sure that D14 had reached an agreement with the organisers and other candidates (D24 included) to veto the budgets and they had the intention to use it as a means to achieve the intended consequences.

329. In the election pamphlets of D14, he stated that upon the pro-democracy camp attaining the majority in the LegCo, the majority LegCo members would be able to veto the budgets to achieve the Five Demands. In our judgment, D14 never believed that the attainment of Five Demands would be achieved. D14 knew that the pro-democracy camp LegCo members who won their seats under the Project 35+ would veto the budgets indiscriminately.

330. After the promulgation of the NSL on 30 June 2020, the IWR declaration still remained on D14's Facebook.

331. When D14 continued his election campaign on Facebook and Epoch Times on 11 July 2020, he did not make any attempt to retract from his endorsement of the IWR declaration, he still maintained his position that one of the major goals of the Primary Election was to demonstrate the solidarity amongst the pro-democracy camp in the fight against the totalitarian regime[108].

---

[107] (P1237 [TB10/99/4287-4288]; (CT) [TB10/99/4293-4294])

[108] (Counters 4 and 6 of P142-0101(T) [TB8/A18/563-565]; (CT) [TB8/A18/583-584])

332. On 4 July 2020, D24 attended a civil forum of Kowloon East. In the forum, D24 said once again, as he had said before the promulgation of the NSL, that he together with other candidates had undertaken to veto the budgets twice to compel the Chief Executive to step down and respond to the "Five Demands'. He said he aimed to achieve mutual destruction to a full extent[109]. What D24 said in the civil forum on 4 July 2020 showed no retraction from his statements in the election forum on 26 June 2020.

333. After D14 won in the Primary Election, he submitted his nomination form for the 2020 LegCo Election. He published a post on his Facebook page announcing his participation in the LegCo Election. He stated also that he would stand at the forefront of the "LegCo Battlefront" to fight against the totalitarian regime.

334. On the evidence before us, we are sure that D14, with full knowledge that the objective of the Project 35+ was to veto the budgets indiscriminately to compel the Government to respond to the Five Demands, participated in the Primary Election and agreed that he would veto the budgets indiscriminately if elected as a LegCo member.

335. The BL never conferred a power on the LegCo or its member to veto a budget indiscriminately. Under the BL, a LegCo member is required to examine and consider the budget. We are sure that D14 knew that indiscriminate vetoing of the budget to compel the Government to respond to the Five Demands was unlawful in that it constituted an abusive use of the power conferred on an elected LegCo

---

[109] (P142-0077(T) [TB8/A34/860-862]; (CT) [TB8/A34/952])

member and a breach of the requirement of upholding the BL and bearing allegiance to the HKSAR.

336. We are sure that D14 knew the Five Demands was a condition that the Government would never accept, hence he knew that if the Project 35+ succeeded in achieving the majority in the LegCo, those who won their seats under the Project 35+ would veto the budgets indiscriminately.

337. In other words, D14 must have appreciated that the anticipated failure/refusal on the part of the Chief Executive or the Government to respond to the Five Demands was just an excuse that would be used for the vetoing of the budgets.

338. For the reasons given in the earlier parts of our judgment, the Scheme if carried out, would amount to seriously interfering in, disrupting or undermining the performance of duties and functions with the law by the body of power of the HKSAR.

339. We are sure that D14 knew that indiscriminating vetoing of the budgets would result in a constitutional crisis and the ensuing paralysing effect on the operations of the Government. He just put the blame on the Chief Executive and the Communist Party of China as the prime culprits for the "Mutual Destruction". We are sure that D14 participated in the Primary Election with the requisite intention. We are sure that D14 was a party to the Scheme and he continued to be a party to the Scheme after the promulgation of the NSL.

Conclusion

340. We are sure and we find that:

(1) the Scheme was in existence before the promulgation of the NSL with D1 as the central figure;

(2) D14 had full knowledge of the Scheme and was a party to the Scheme;

(3) after the promulgation of the NSL, D14 remained as a party to the Scheme as he was before; and

(4) he had the intention to subvert the State power, with that intention he participated in the Primary Election in furtherance of the Scheme and with the intention to carry it out.

341. We find that all the elements of the offence proved against D14. We find D14 guilty of the charge.

D16 Lau Wai-chung

342. D16 is a man of clear criminal record, as such he enjoyed the two benefits in regard to his credibility in giving evidence and propensity in committing crime conferred on him by the law.

Knowledge of the Scheme

343. D16 impressed us as a man with some self-conceitedness shown. He showcased, on occasions, his knowledge in the course of his

evidence. For the draft debate notes[110] seized from D16's District Councillor Office upon his arrest, we considered the explanations given by D16, who chose to give evidence.

344. We note that it is a fact that D16 did not follow the contents of the draft debate notes in the election forum of Kowloon West. On the evidence before us, we are not sure that D16 agreed with the contents of the draft debate notes.

345. Although D16's name appeared as one of the signatories of the IWR declaration, we are not sure if he signed the IWR declaration or that he authorised someone to sign it on his behalf. It is a fact that D16 did not post the IWR declaration on his Facebook page and he did not make use of the IWR declaration in his electioneering work. In fact, the ideas of vetoing the budgets and the Five Demands did not feature in D16's election campaign. In our judgment, there is a reasonable doubt whether D16 subscribed to the idea of vetoing the budgets indiscriminately, which was the subject matter of Clause 1 of the IWR declaration.

346. The prosecution submitted that D16 gave no believable explanation as to why his name appeared on the IWR declaration. In our judgment, if D16 did not know who put his name on the IWR declaration without his consent, it would follow that he could not explain why his name appear on the IWR declaration.

---

[110] (P1330 [TB10/117A/4475-4479]; CT[TB10/117B/4480-4491])

347. We are sure that D16's name was affixed by one or more of his staff members who knew that D16 intended to participate in the Primary Election. If D16 was told by his staff members they had no clue as to who put his name on the IWR declaration, that was all D16 could say in his evidence.

348. We accept that D16 found himself in a "catch twenty two" situation when he learnt that his name appeared on the IWR declaration; if he asked to take his name down or if he was to publish a clarification on his social media, it would amount to a "political suicide", given the then political atmosphere.

349. It is a fact that D16 took the initiative to ask D14 in the election forum why D14 was the first to sign the IWR declaration. We accept D16's evidence that he asked the question because he wanted D14 to shine in the election forum. In any event, the true stance of D16 in relation to the IWR declaration was not exposed to the public as a result of the question he asked of D14.

350. Having watched the election forum of Kowloon West played in Court, we accept the evidence of D16 that he had a slip of tongue for the question he asked of D14. He meant to say "你哋" (you) instead of "我哋" (we).

351. We accept the evidence of D16 that he was not a user of Facebook, he had a Facebook page solely used for his District Council work, which was operated by his staff. We do not see it was unreasonable for D16 to use Facebook only for his District Council work. It is not in dispute that D16 employed staff members as well as volunteers

for his District Council work, we see nothing inherently improbable or unreasonable in D16's evidence in that regard.

352. We are prepared to accept D16 was not a user of WhatsApp. He said he used iMessage but not WhatsApp. In our judgment, it would be unreasonable if D16's evidence were that he did not use any mobile phone messaging app, but his evidence is that he used iMessage but not WhatsApp. In our judgment, whether D16 should use WhatsApp/iMessage or both was very much a personal preference. There is nothing in the prosecution's complaint that "there is no apparent reason for D16 to avoid using WhatsApp while opting for iMessage." D16 did not avoid using WhatsApp, he just chose to use iMessage but not WhatsApp. In fact, from the photographs produced, no computer or television set could be seen at the residence of D16.

353. We appreciate the fact that D16 was not a user of WhatsApp does not mean he was not aware of the messages in the WhatsApp Group of Kowloon West of which his core volunteer Victoria Wong was a member.

354. In our judgment, as long as Victoria Wong was able to provide D16 with information about the arrangement of the Primary Election in relation to Kowloon West which D16 believed was reliable, it was not a must for D16 to find out whether Victoria Wong obtained the information through WhatsApp/emails/telephone communication with the organisers. We do not think it was a must for Victoria Wong to tell D16 every time when she reported about the Primary Election that she obtained the information from the organisers via the WhatsApp Group of Kowloon West.

355. We note that the messages raised by Victoria Wong in the WhatsApp group did not directly touch on the Five Demands or the vetoing of the budgets. Victoria Wong asked questions about matters like the arrangement of the Primary Election[111]; she acknowledged that coordination regarding the Primary Election would be conducted in the group[112]; she also expressed her concern on the arrangement of polling stations on behalf of D16[113].

356. We accept D16 did not pay attention to most of the logistic updates in connection with the Primary Election after the first coordination meeting of Kowloon West that he attended. Further, we also accept that he did not read Apple Daily, Facebook posts or articles of D1, PW1 or other candidates of the Primary Election concerning the latest development of the coordination amongst the pro-democracy camp. D16 had no strong reason to pay attention to these matters before he decided to run in the Primary Election.

357. In our judgment, if Mr Lee, Ms Victoria Wong and the staff members were people that D16 thought he could trust, we see no reason why he should verify the information provided by his staff about the Primary Election with D1/other organisers/other candidates (e.g. D14).

358. From the evidence, we are sure the document "35+計劃 Project35+"[114] was circulated amongst the attendees in the first

---

111 (Counters 40 and 45 [TB3/11A/444 & 446]; CT[TB3/11B/497 & 501])

112 (Counters 14 [TB3/11A/437]; CT[TB3/11B/482-483])

113 (Counters 51 and 54 [TB3/11A/448-449]; CT[TB3/11B/505-506])

114 (P590-5 [TB2/A1/1];(CT) [TB2/A1/2-5]

coordination meeting of Kowloon West. We are sure that D16 must have received the document and read the contents of it.

359. D16 admitted also in his evidence that in the first coordination meeting of Kowloon West, D1 advocated, amongst other things, if the democrats could achieve the majority in the LegCo, they could exercise a series of constitutional powers, including the vetoing of the budgets. D1 also emphasised the importance of strategic voting for the 2020 LegCo Election.

360. While we are prepared to accept D16's evidence that he was not a user of WhatsApp, hence, he did not receive any documents or messages circulated by D1 or other organisers via WhatsApp directly, we are sure that the coordination agreements, i.e. "35+立會過半計劃 民主派九西協調機制(初稿)" with the file name "35+ Kowloon West .docx" and "35+立會過半計劃 民主派九西協調機制" with the file name "35+ Kowloon West final.docx" were sent by the organisers and received by Mr Lee or Victoria Wong. We are sure that D16 must have received the aforesaid documents from Mr Lee or Victoria Wong and he must have read the contents.

361. In our judgement, there is evidence that sheds light on D16's knowledge that it was the objective of the Project 35+ to veto the budgets indiscriminately.

362. It is not in dispute that on 20 November 2020. D16 submitted the Primary Election nomination form which contained a declaration to the effect that D16 confirmed his agreement and support of

the consensus of the coordination led by D1 and PW1, including the "Democrats 35+ Civil Voting Project" and its goals.

363. On the evidence, we do not accept D16's evidence he was not aware of any consensus or agreement reached by the candidates of Kowloon West about the bundling effect of the consensus or agreement.

364. We do not accept D16's interpretation of the contents of the IWR declaration. In our judgment, D16's interpretation that the IWR declaration just stated the obvious that one was not bound to exercise the vetoing power even if one was elected as a LegCo member went against the plain meaning of the first Clause of the IWR declaration that it had a binding and bundling effect on the successful candidates who won their seats under the Project 35+. It was plain from the wordings of the IWR declaration that the 2 clauses reflected the consensuses and agreements reached in the coordination meetings of various constituencies.

365. Taking into consideration that D16 had read the pamphlets and manifestos of other candidates like Cheung Kwan-yeung (D14) and D44 and the fact that he was aware of the contents of the IWR declaration, we are sure that D16 was aware that one of the objectives of the Scheme was to veto the budgets indiscriminately to compel the Chief Executive to respond to the Five Demands.

Party to the Scheme and Intention to Subvert

366. On the evidence before us, although D16's name appeared on the IWR declaration and he submitted his nomination form containing the declaration in Clause 2, D16 had never advocated in his

electioneering campaign to veto the budgets, not on his Facebook page or in the election forum he attended.

367. For the reasons given in the earlier part of our judgement, although the draft debate notes were found in the District Councillor office of D16, we are not sure if D16 subscribed to the contents of the notes.

Conclusion

368. The question that we have to ask ourselves is whether, having considered all the evidence, including any post-NSL acts and declarations and what is admissible under the Co-conspirator's Rules, we can be satisfied that the only reasonable inference to be drawn against D16 is that he agreed to the Scheme prior to and/or after the promulgation of the NSL. We are unable to arrive at such a conclusion. We are also not sure that D16 had the intention to subvert the State power at any stage.

369. For the reasons given, we find D16 not guilty.

D17 Wong Pik-wan

370. D17 elected not to give evidence and called no witness. D17 has a clear criminal record, as such she was less likely in committing crime.

371. It is an admitted fact that D17 ran in the Primary Election (Kowloon West) as a candidate on behalf of Democratic Party. D17 submitted her Primary Election nomination form on 20 June 2020.

372. D17 attended the election forum (Kowloon West) on 25 June 2020. The forum was broadcasted on 27 June 2020.

373. D17 ranked the 7th out of 9 candidates and lost in the Primary Election. She did not run in the 2020 General Election.

Knowledge of the Scheme

374. In considering whether D17 had knowledge about the impugned objective of the Scheme, we bear in mind the evidence of PW1, which we accept, that the representative of D17 attended the two coordination meetings of Kowloon West. In the first coordination meeting, D1 introduced the idea of "actively using the power to veto the budget". In the second coordination meeting, D1's article "Ten steps to real mutual destruction - the fate of Hong Kong" ("真攪炒十步 這是香港宿命")[115] was referred to by D1 and debated by Cheung Kwan-yeung and Sham Tsz-kit (D12). We also bear in mind the fact that D1 had widely publicised the objective of Project 35+ in his published articles, Facebook post, YouTube video interview, and the press conference held by the organisers of Project 35+ held on 26 March 2020.

375. In our judgment, the fact that the impugned objective of Project 35+ was introduced and discussed in the 2 coordination meetings of Kowloon West and widely publicised by D1 and the organisers of Project 35+ show that the impugned objective of Project 35+ was not something kept in secret by D1 and the organisers, instead they promoted the impugned objective quite openly.

---

[115] (P189[TB1/64/830]; (CT) [TB1/64/831-835])

376. In our judgment, the fact that D1 and the organisers Project 35+ had been promoting the impugned objective openly is not determinative of the issue whether D17 had knowledge about that the aforesaid objective of Project 35+.

377. From the evidence, we are sure that D1 had disseminated "35+立會過半計劃民主派九西協調機制(初稿)" with the file name "35+Kowloon West.docx" [116] to the attendees of the first coordination meeting of Kowloon West via the broadcast function of WhatsApp after the first coordination meeting on 26 March 2020. We note that the document was said to be a draft document prepared by D1 to be used as the basis for discussion in the second coordination meeting.

378. We are equally sure that D1 had disseminated "35+立會過半計劃 民主派九西協調機制" with the file name "35+ Kowloon West final docx"[117]. We note that D1 referred the document as the final coordination file.

379. A copy of "35+ Kowloon West final docx" was retrieved from D17's computer upon her arrest. From the evidence, we are sure that D17 must have received and read "35+ Kowloon West.docx" and "35+ Kowloon West final docx" at the time, not after the Primary Election. It would make no sense if these documents were sent to D17 after she had lost in the Primary Election.

---

[116] (a copy of it was retrieved from PW1's computer at P590-5 [TB2/4/12]]; CT[TB2/4/13-15])

[117] (P714-130 [TB3/88/2180]; (CT) [TB3/88/2181-2184 to the candidates after the 2nd CM on 30th April 2020

380. In Clause 2 of "35+ Kowloon West final docx", it was stated that every individual who joined the coordination mechanism of Project 35+ for Kowloon West had to agree that if the pro-democracy camp was able to win the majority in the LegCo, they would actively use the power of the LegCo conferred by the BL, including the power to veto the budgets, to force the Chief Executive to respond to the Five Demands.

381. In fact, a screen capture of the Democratic Party's Facebook post published on 22 March 2020 was retrieved from D17's computer upon arrest[118]. In the said Facebook post, it was stated that the Democratic Party would respect and comply with the coordination mechanism with the aim of achieving the majority in the LegCo. We are satisfied that by the time D17 submitted her Primary Election nomination form on 20 June 2020, she was aware that the Democratic Party would respect and comply with the coordination mechanism with the aim of achieving the majority in the LegCo.

382. As said, Wu Chi-wai (D23), the Chairman of Democratic Party ran for Kowloon East; Wan Siu-kin Andrew (D29), the Vice-Chairman of Democratic Party and a member of Democratic Party's Central Committee ran for New Territories West; and Lam Cheuk-ting (D38) ran for New Territories East. The evidence shows that the candidates of Democratic Party assisted in each other's election campaigns. It was necessary for them to discuss among themselves to make sure that their election campaigns were in line with the position taken by Democratic Party. From the evidence, we are sure that the issue of the use of the power to veto the budgets indiscriminately was one of

[118] (P1392-23 [TB10/143/4717]; (CT) [TB10/143/4718-4719])

the major issues arose in the coordination meetings attended by D23, D29 and D38 or their representatives. In our judgment, the same issue must have been discussed between D17 and the other candidates of Democratic Party

383. In our judgment, the fact that Democratic Party had candidates to run in Kowloon East (D23), New Territories West (D29) and New Territories East (D38) made it impossible for the organisers to hide the impugned objective of Project 35+ from D17.

384. D17 was a member of the WhatsApp group "Project 35+ Kowloon West Bulletin Board" ("35+ 計劃九龍西訊息發佈區") created by D1 on 24 June 2020[119].

385. From the evidence, we are sure that D17 knew it was one of the objectives of Project 35+ to indiscriminately veto the budgets to force the Government to respond to the Five Demands.

386. Given the undisputed fact that D17 was a serving LegCo Member and her tenure of service would only cease on 1 December 2020, with her experience in the LegCo affairs, she must have known that the power to veto the budgets was a power conferred by the BL.

387. Given D17's experience as a LegCo member, we are sure that she must have known that the Government would never agree to the Five Demands. She must have known that if the Project 35+ succeeded in achieving the majority in the LegCo, they would veto the budgets

[119] (P714-121 [TB3/11/433]; (CT) [TB3/11/478-479]

indiscriminately as the Government would never yield to their threat. With D17's experience in the LegCo, she must be aware that indiscriminate vetoing of the budgets would result in a constitutional crisis with the effect of paralysing the operations of the Government.

Party to the Scheme

388. In our judgment, D17 together with the organisers of the Project 35+ agreed to pursue Scheme which was to indiscriminately veto or refuse to pass any budgets or public expenditure if a majority in the LegCo was achieved under the Project 35+. By her conducts and utterances and by the time of her submitting the nomination form and taking part in the Primary Election, D17 was party to the Scheme.

389. In our judgment, D17 would not agree to indiscriminately veto or refuse to pass any budgets or public expenditure for the simple sake of doing so, she agreed to pursue the said course of conduct with the intention to compel the Chief Executive to respond to the Five Demands. It should be noted that it was made a condition of the 35+ Project that only people who endorsed the "Five Demands Not One Less" could take part in the coordination mechanism of the Primary Election.

390. In our judgment, D17 agreed to pursue the Scheme with the intended consequence that if the Chief Executive refused to respond to the Five Demands, she would have to dissolve the LegCo under Article 50 of the BL and/or to resign under Article 52 as a result of the dissolution of the LegCo and the persistent refusal to pass the budgets by the LegCo and the new LegCo.

391. We accept the evidence of PW1 that during the meal gathering in late January 2020, D1 explained to PW1 and the other attendees that with a pro-democracy majority in the LegCo, they could make use of the power to veto the budgets and the bills introduced by the Government to compel the Government to respond to the Five Demands. The vetoing of the budget twice by the LegCo would result in the dissolution and the resignation of the Chief Executive.

392. In our judgment, what D1 said in the meal gathering was entirely consistent with what he published on Apple Daily and Facebook:

1. D1's article "To counter the Police Regime, half of the seats in the Legislative Council have to be seized" ("反制警察政權就要立會奪半") published on 3 March 2020;

2. D1's article "Going up and down together Target 35+" ("齊上齊落 目標 35+") published on 10 March 2020;

3. D1's Facebook post published on 19 March 2020;

4. D1's article "Over half (of the seats) in the Legislative Council is a constitutional weapon of mass destruction" ("立會過半是大殺傷力憲制武器") published on 31 March 2020;

5. D1's article "New Landscape after Wuhan Pneumonia Rampage" ("武漢肺炎肆虐後的新格局") published on 7 April 2020;

6. D1's article "The meaning and timing of mutual destruction" ("攬炒的定義和時間") published on 14 April 2020;

7. D1's article "A Major fight by Mutual Destruction in Hong Kong" ("香港攪炒大對決") published on 20 April 2020;

8. D1's article "The contemporary meaning of Laam Chow" ("攪炒 的時代意義") published on 21 April 2020;

9. D1's article "Ten Steps to real mutual destruction -This is the fate of Hong Kong" ("真攪炒十步 這是香港宿命") published on 28 April 2020;

10. D1's article "Mutual Destruction, To Burn or Not to Burn?" ("攪炒， To burn or not to burn?") published on 19 May 2020;

11. In a radio programme of D100 broadcasted on 29 May 2020, D1 stated that it was the objective of the Project 35+ to veto the budgets. The Project 35+ would then use it as a means to dissolve the LegCo and the resignation of the Chief Executive or the shutdown of the Government.

12. As said, what D1 stated in the aforesaid published articles, Facebook posts and radio programme was entirely consistent with what he had told PW1 and the other attendees during the meal gathering in late January 2020. Many of the articles and Facebook posts were published during the period when the coordination meetings were held. All along D1 made no attempt to hide from the participants of the Project 35+ that he wanted to bring about the intended consequences of the vetoing of the budget twice, the dissolution of the LegCo, the resignation of the Chief Executive and the shutdown of the Government.

393. What D1 advocated in the aforesaid articles and posts was also echoed by PW1 in his Facebook post "To ensure a correct understanding of the facts – If I were qualified to respond to initiators of Standpoint Statement of the Resistance Camp" ("以正視聽-假如我有資格回應抗爭派立場聲明書發起人").

394. We are sure that the purpose of vetoing the budgets upon attaining a majority in the LegCo by the pro-democracy camp under the Project 35+ and the intended consequences were discussed during the coordination process of the project. We are sure that D17 had received and read the document "九西 final.docx".

395. We are sure that D17, as an experienced LegCo member, knew that the Chief Executive would never accede to the Five Demands. We are sure that the dissolution of the LegCo and the stepping down of the Chief Executive were the intended consequences of D17.

396. We are sure that D17 was aware of the stance of D23. What D17 said in the election forum of Kowloon West on 25 June 2020 echoed the stance advocated by D23. She said, inter alia, that the Democratic Party would be willing to sign a written agreement if required by D1[120]. She stated that the Chairman (D23) and all members of Democratic Party had time and again expressed that they would definitely all means, including vetoing the budgets, to fight for the Five Demands[121]. Having watched the election forum in Court, we are sure that the above statement

---

120 (Counters 140-141 of P142-0037(T) [TB8/B1/2418]; (CT) [TB8/B1/2519-2520])

121 (Counter 142-145 of P142-0037(T) [TB8/B1/2419]; (CT) [TB8/B1/2520-2521])

of D17 reflected her true stance and was not something said under pressure from others during the election forum.

397. It should be noted that after the promulgation of the NSL, D23 said, during a civil forum of Kowloon East on 4 July 2020, that all the participants of the Primary Election had promised they would definitely use the power of the LegCo to veto the Budget to force the Government to respond to the Five Demands[122]. What D23 said in the said civil forum is admissible evidence against D17 under the Co-conspirator's Rule. We attach full weight to the statement made by D23 on 4 July 2020.

398. We are sure that during the charge period, D17 adopted the same stance of D23 on the issue of exercising the power to veto the budgets indiscriminately to force the Chief Executive to respond to the Five Demands.

399. In our judgment, what D17 said in the election forum on 25 June 2020 on the issue of vetoing of the Budget was consistent with the public statements made by the organisers of the Project 35+ after the election forum of Kowloon West and the promulgation of the NSL.

400. We also take into account the fact that in the Primary Election nomination form submitted by D17 on 20 June 2020, she signed the declaration in Part II [123] to confirm her agreement and support for the consensus of the coordination meeting led by D1 and PW1, including "Democrats 35+ Civil Voting Project" and its goals.

401. In the election platform submitted by D17 together with her Primary Election nomination form, D17 pledged to win the majority seats of the LegCo, the implementation of the Five Demands, investigation of police brutality and comprehensive reform of the Police Force.

402. What D17 said in the election forum (Kowloon West) on 25 June 2020 showed that: (i) she adopted the stance of Democratic Party that it would veto the budgets indiscriminately on attaining a majority in the LegCo; (ii) she endorsed the impugned objective of the Scheme.

403. In the election forum on the issue of mutual destruction, D17 stated that Democratic Party's Chairman (D23) and its members had made it clear that they would use all the power and means within the constitutional framework (including the power the veto the budgets) to achieve the Five Demands[124]. D17 asked the public to support her in the Primary Election and vowed she would give her full support to the winning teams to strive for 35+ in the event she lost in the Primary Election[125]:

> "142. E(D18); Does the Democratic Party promise to carry out (')mutual destruction(') for sure? Carry out (')mutual destruction(') for sure?
>
> 143. D(D17): The chairperson of the Democratic Party and every (Legco) Member of ours,…
>
> 144. E(D18); Yes or no? Is it carrying out (')mutual destruction(') for sure?
>
> 145. D(D17): …. have already said clearly that we will fight for the five demands by using all the power and means within

---

122 (Counter 10 of P142-0077(T) [TB8/A34/822]; (CT) [TB8/A34/931-932])

123 (P665(D17) [TB7/B19/536-543]; (CT) [TB7/B19/544-553])

124 (Counters 142-145 of P142-0037(T)[TB8/B1/2419];(CT)[TB8/B12520-2521)

125 (Counters 374 of P142-0037(T)[TB8/B1/2477-2478]; (CT))[TB8/B1/2564-2565])

> the constitutional (framework). If veto to the Budget is useful to this, we will do it for sure. …"
>
> …..
>
> "374. D(D17): I hope everybody will support me Helena WONC in the primaries, to gain the support from the most spectra (sic) (and) the widest spectrum of the pro-democracy camp, to vote together in the primaries. If I cannot win, I will surely put all my effort to support the winning teams in this primaries, to fight for 35+ together and get back our Council."

404. Having viewed the election forum in Court, we do not think it can be fairly argued that D17 made the above statements under pressure from other contestants. In counters 143 to 145, D17 was just being interrupted by D18 in the middle of her answer, the message she conveyed was clear. We are sure what D17 said in the election forum represented her stance.

405. We are sure that D17 had the intention to pursue the Scheme.

406. After the promulgation of the NSL, D17 continued to promote the Primary Election on her Facebook in the same manner as she had done before the promulgation of the NSL, e.g. her Facebook post on 27th June 2020[126].

[126] (P142-0412 [TB8/A25/675-677]; (CT) [TB8/A25/678-693]) and the one dated 5th July 2020 (P142-0413 [TB8/A26/694]; (CT) [TB8/A26/695-697])

407. On 4th July 2020, D23 made a statement in a civic forum of Kowloon East that all the candidates participating in the Primary Election would definitely use their veto power in the LegCo, including the power to veto the budgets, to force the Central Authorities and the Government to respond to the Five Demands:

> "10. F(D23): ….More importantly, each of us promised that since we have participated in the Primary Election, we would definitely use our veto power in the LegCo, the veto power over the Budget, to force the SAR government and the Central Government to respond to the Five Demands. …" [127]

We are aware that D17 was not present when D23 made the above statement, but by the operation of the Co-conspirator's Rule, the above statement of D23 is admissible evidence against D17.

408. In a street rally on 8th July 2020 held by D23, D29, D38, D17 and other Democratic Party members, the Democratic Party's candidates solicited support for the Primary Election to achieve a majority in the LegCo. D17 was standing right next to D23 when the latter said during the rally that the Democratic Party joined others to strive for the majority in the LegCo with a view to exerting the greatest pressure on the Government.

409. A few days later, on 12th July 2020, D17 reiterated in her Facebook post the Democratic Party's and her commitment to act in accordance with the Scheme[128].

---

[127] (Counter 10 of P142-0077(T)[TB8/A34/822]; (CT))[TB8/A34/931-932])

[128] (P142-0415 [TB8/A27/698]; (CT) [TB8/A27/699-701])

410. After the result of the Primary Election for Kowloon West was known, D17 held a press conference on 14th July 2020. D17, accompanied by D23, D29, D38 and other Democratic Party's members, admitted her defeat in the Primary Election and announced that she would comply by the agreement. She further stated that she would not run for the 2020 General Election but she would support the winning teams of Democratic Party and other pro-democratic parties in achieving 35+ in the LegCo. D17 also called for unity among the pro-democracy majority in the LegCo so that the Five Demands could be implemented.

411. After the press conference, D17 posted on her Facebook page the statement she made in her press conference[129]. The press conference and the Facebook posts of D17 showed not only that D17 had all along been acting in concert with D23, D29 and D38 during the election campaign of the Primary Election, they also acted in unity after D17's defeat. On the evidence, we were sure that by 20 June 2020 at the latest, D17 had become a party to the Scheme and she remained a party after the promulgation of the NSL. By submitting her nomination form and taking part in the Primary Election, she was party to the Scheme.

Intention to Subvert

412. We are sure that D17, with her experience as a LegCo member and as a seasoned political figure, knew the Five Demands was a demand that the Government would never accept, hence D17 knew that if the Project 35+ succeeded in achieving the majority in the LegCo, those who won their seats under the Project 35+ would veto the budgets indiscriminately.

---

[129] (P142-0416 [TB8/A31/732-733]; (CT) [TB8/A31/734-742]) Co

413. In other words, D17 must have appreciated that the anticipated failure/refusal on the part of the Chief Executive or the Government to respond to the Five Demands was just an excuse that would be used for the vetoing of the Budget.

414. We are sure that D17 knew that indiscriminating vetoing of the budgets would result in a constitutional crisis and paralysing the operations of the Government. It was D17's intended consequence that if the Chief Executive refused to accede to the Five Demands, the Chief Executive would have to dissolve the LegCo under Article 50 of the BL and/or resign under Article 52 as a result of the dissolution of the LegCo and the persistent vetoing of the budgets by the new LegCo.

415. For the reasons given in the earlier parts of our judgment, the Scheme if carried out, would amount to seriously interfering in, disrupting or undermining the performance of duties and functions with the law by the body of power of the HKSAR.

416. We are sure that D17 participated in the Project 35+ with the requisite intention. We are sure that D17 was a party to the Scheme and she continued to be a party to it after the promulgation of the NSL.

Conclusion

417. We are sure and we find that:

(1) the Scheme was in existence before the promulgation of the NSL with D1 as the central figure;

(2) D17 had full knowledge of the Scheme and she was a party to the Scheme;

(3) after the promulgation of the NSL, D17 remained a party to the Scheme as she was before; and

(4) she had the intention to subvert the State power, with that intention she participated in the Primary Election in furtherance of the Scheme and with the intention to carry it out.

418. We find that all the elements of the offence proved against D17, we find her guilty of the offence.

Kowloon East

D24 Sze Tak-loy

419. D24 is a man of clear criminal record, as such he enjoyed the two benefits in regard to his credibility in giving evidence and propensity in committing crime conferred on him by the law.

420. It is not in dispute that D24 was the Chairman of ADPL at the time of the Primary Election. He joined ADPL as a member in 2008 and was elected as the Chairman in late 2016. He remained in that position until March 2021.

421. It is an admitted fact that D24 ran in the Primary Election (Kowloon East) as a candidate on behalf of ADPL.

422. On 20 June 2020, D24 submitted his Primary Election nomination form, attached with a document named "common program/guiding principle" endorsed by him.

423. D14 Ho Kai-ming Kalvin, the Vice-Chairman of ADPL, ran in the Primary Election (Kowloon West) as a candidate on behalf of ADPL. D14 and D24 were the only candidates of ADPL in the Primary Election.

424. It is not in dispute that D24 attended the three coordination meetings of Kowloon East held on 2 March, 16 March and 4 May 2020 respectively.

425. It is an admitted fact that D24 attended the election forum (Kowloon East) on 26 June 2020. The forum was broadcasted on 28 June 2020.

426. D24 ranked the 6th out of 6 candidates and lost the Primary Election of Kowloon East. He did not run in the 2020 General Election.

427. It is D24's case that to his understanding, the Project 35+ and the IWR declaration did not bind the candidates to veto the budgets. D24 believed that the power to veto the budgets was conferred by the BL and it was lawful to exercise the power. All along, D24 believed in the legality of the Primary Election and the use of the vetoing power.

428. On the disputed issue whether D24 agreed with the organisers and other candidates to veto the budgets indiscriminately to compel the Government to respond to the Five Demands, D24's case is that he had no intention to veto the budgets. He shared the principles and

aspirations of ADPL adhered to, namely: (i) to uphold the sovereignty of China and the principle of "One Country, Two Systems"; (ii) to improve democracy and enhance people's livelihood; and (iii) to serve the grassroots community. In order to serve the grassroots community and to enhance people's livelihood, D24 considered it was important to maintain a working relationship with the Government. If elected, he would negotiate and communicate with the Government. He saw vetoing of the budgets was only a bargaining chip and a strategy to compel the Chief Executive to respond to the Five Demands.

Knowledge of the Scheme

429. We accept the evidence of PW1 that the issue of vetoing the budgets and the use of the phrase "will active use the power conferred by the BL to veto the budgets" was discussed during the second or third coordination meeting of Kowloon East.

430. Following on the discussions in the coordination meetings, on 5 May 2020 (one day after the third coordination meeting of Kowloon East), Choy Chak-hung circulated a document with the file name "35+ Kowloon East final.docx" in the WhatsApp group "35+九東立選座談會" of which D24 was a participant. We are sure that D24 received the document via WhatsApp at the time. On 8 May 2020, Choy Chak-hung circulated a document with the file name "35+Kowloon East final (2).docx" to the same WhatsApp group after some corrections made. D24 admitted in his evidence that he had received and read "35+ Kowloon East final (2).docx". We are sure that D24 must be aware of Clause 2 of the document, which stated "actively using the power to veto the budget".

431. It is not in dispute that D24 signed the "Common Program/Guiding Principle". Clause 2 of the document concerned the use of the vetoing power and the phrase "will actively use" was adopted. To D24's knowledge, the "Common Program/Guiding Principle" was prepared by Yau Hon-pong, a member of Wong Tai Sin District Council who had assisted in the coordination of the Primary Election. Yau Hon-pong told D24 at the time he had asked the Kowloon East candidates to sign a public document, i.e., the "Common Program/Guiding Principle". It was D24's understanding that Yau Hon-pong prepared the document based on "35+ Kowloon East final (2).docx".

432. The document "35+ Kowloon East final(2).docx" was an accumulative summary of what had been discussed in the coordination meetings of Kowloon East. The "Common Program/Guiding Principle" was a public declaration signed and attached by Kowloon East candidates. In both documents, the formulation of "will actively use(ing) the power conferred by the BL to veto the budget" was adopted. We are sure that at the material time, D24 had knowledge that one of the objectives of the Project 35+ was to indiscriminately veto the budgets in compelling the Government to accede to the Five Demands upon obtaining the 35+ majority.

433. We reject D24's evidence of his interpretation of Clause 1 of the IWR declaration that it did not have any binding effect on the signatories. From the contents of the IWR declaration, it is clear to us that one of the purposes of the IWR declaration was to show the will of resistance of the signatories. It would make no sense at all that only Clause 2 of the declaration was binding on the signatories but not

Clause 1. We find D24's reading and interpretation of the declaration incredible.

434. Contrary to D24's claim that the IWR declaration had no binding effect at all, D24, in the same Facebook post, advocated that he saw the pro-democracy camp as a collective entity which had to act uniformly in order to counteract the Government.

435. The evidence of D24 that Clause 1 of the IWR declaration was not binding cannot be reconciled with what he said in his Facebook post[130] that:

> "I have signed the "No regret to put pen to paper, resist with perseverance" statement earlier on. I promise to utilise the powers of the Legislative Council, including the power to veto the budget to put up resistance (and) compel the Chief Executive to respond to the Five Demands. …"
>
> (「我早前已簽署《落墨無悔，堅定抗爭》聲明書，我承諾運用立法會權力，包括否決財政預算案的權力作抗爭，迫使特首回應五大訴求。…」)

436. From the wordings used by D24 in his Facebook post, obviously he saw Clause 1 of the IWR declaration was binding, hence he made the promise/undertaking by signing it.

437. D24 emphasised that the power to veto the budgets was a power conferred on the LegCo by the BL and the power could be used as a strategy to achieve the Five Demands and resolve social conflicts. We are sure that D24, being the Chairman of ADPL and with his experience

---

130 (P142-0419 [TB7/A22])

as a District Councilor and politics, knew the Five Demands was a condition that the Government would never accept.

438. D24, in his Facebook post on 15 June 2020, promised he would exercise the power to veto the budgets to compel the Chief Executive to respond to the Five Demands[131], what he stated in the said Facebook post went against his evidence: (i) that he had no intention to veto the budgets; (ii) ADPL had its own mechanism to examine the budgets, both ADPL and he would consider the content of the budgets and discuss the merits with other party members before making a decision.

Party to the Scheme

439. In our judgment, D24 and D14, together with the organisers of the Project 35+, agreed to pursue a course of conduct which was to indiscriminately veto or refuse to pass any budgets or public expenditure if a majority in the LegCo was achieved under the Project 35+.

440. As said, in the Primary Election nomination form submitted by D24 on 20 June 2020, D24 signed the declaration in Part II to confirm his agreement and support for the consensus of the coordination meeting led by D1 and PW1, including "Democrats 35+ Civil Voting Project" and its goals. He also attached the document "Common Program/Guiding Principles" signed by him. We are sure that the consensus of the coordination meeting led by D1 and PW1 was the same as in the "Common Program/Guiding Principles".

---

131 (P142-0419 [TB7/A22/312-315]; (CT) [TB7/A22/316-325])

441. In the election pamphlet attached to D24's Primary Election nomination form, D24 reiterated his endorsement of the IWR declaration[132].

442. In the election forum (Kowloon East) on 26 June 2020, D24 said, amongst other things, that he would veto the budget twice in order to resist the Government; that there was no room for negotiation with the Government; and he would fight for mutual destruction with the Government[133]. What D24 said in the election forum could not be reconciled with the principles and aspirations of ADPL that he claimed he shared and adhered to.

443. For the reasons we gave in the reasons for our findings of D14, we reject D24's evidence that the election team of D24 and D14 operated independently and adopted different electioneering strategies.

444. We reject D24's evidence that he had no intention to veto the budgets. The repeated representations about vetoing the budgets made by D24 could not be reconciled with his alleged understanding that vetoing the budgets was only a bargaining chip and that candidates (including D24) could choose whether or not to exercise the vetoing power.

445. D24 had said on many occasions that he would veto the budgets:

---

[132] (P665(D24)[TB7/B33/731])

[133] (Counters 60,69 and 309 of P142-0038(T) [TB8/B2/2592,2596,2672]; (CT) [TB8/B2/2695,2698,2754])

(i) in his Facebook post[134];

(ii) in his election leaflet[135];

(iii) in the election forum[136];

(iv) in the Civil Forum held on 4 July 2020[137].

446. We reject D24's evidence that the apparent stance he took was only his election strategy. In our judgment, the deeds and representations of D24 during his participation in the Primary Election, as the Chairman of ADPL, showed he had departed from the values held by ADPL in the past, i.e. (i) to uphold the sovereignty of China and the principle of "One Country, Two Systems"; (ii) to improve democracy and enhance people's livelihood; and (iii) to serve the grassroots community.

447. We reject D24's evidence that he was prepared to and he would negotiate with the Government. From his representations during the election campaign (before and after the promulgation of the NSL), it is clear to us that he wanted to convince his supporters and gain their votes by undertaking to veto the budget twice and he would stay true to the progressive stance he took and the new image of ADPL he portraited. Having made the undertaking to veto the budget twice, it would be politically suicidal for D24 and ADPL if D24 were to retract from that undertaking. On the evidence, we were sure that by 20 June 2020 at the latest, D24 had become a party to the Scheme and he remained a party

---

134 (P142-0419 [TB7/A22/312]; P142-0420 [TB8/36/998]

135 (P1639-1 [TB10/150/4775]

136 (counters 60,69 & 309, P142-0038 [TB8/B2/2592, 2596 & 2672])

137 (counter 59, P142-0077 (T) [TB8/34/861])

after the promulgation of the NSL. By submitting his nomination form and taking part in the Primary Election, D24 was a party to the Scheme.

Intention to Subvert

448. In our judgment, D24 would not agree to indiscriminately veto or refuse to pass any budgets or public expenditure for the simple sake of doing so, he agreed to pursue the said course of conduct with the intention to compel the Chief Executive to respond to the Five Demands. It should be noted that it was a condition that only people who endorse the "Five Demands Not One Less" could take part in the coordination mechanism of the Primary Election.

449. The NSL was promulgated on 30 June 2020. After the promulgation of the NSL, the IWR declaration remained on D24's Facebook.

450. On 4 July 2020, D24 said in a civil forum of Kowloon East that he together with other candidates had undertaken to veto the budget twice to compel the Chief Executive to step down and responded to the Five Demands. D24 also advocated to achieve "mutual destruction" to a full extent. He said he aimed to achieve mutual destruction to a full extent[138]. What D24 said in the civil forum on 4 July 2020 showed no retraction from his statements in the election forum on 26 June 2020.

[138] (P142-0077(T) [TB8/A34/860-862]; (CT) [TB8/A34/952])

451. In the election leaflets of D24, D24 promised to use his right to veto the budget to force the Government to address the Five Demands.[139]

452. D24 published posts in his Facebook on 12 and 13 July 2020[140], after his defeat in the Primary Election, announcing that he would abide by his undertaking in accordance with the coordination agreement. He asked the winning candidates of the Primary Election to achieve 35+. D24 did not run in the 2020 LegCo election.

453. The aforesaid statements and conduct of D24 after the promulgation of the NSL showed that he remained a party to the Scheme with the requisite intention.

454. We are sure that D24 all along adopted the stance to veto the budgets indiscriminately. We are sure that D24 had the intention to veto the budgets indiscriminately to compel the Chief Executive to accede to the Five Demands. It was the intended consequence of D24 that if the Chief Executive, as D24 expected, refused to respond to the Five Demands, the Chief Executive would have to dissolve the LegCo under Article 50 of the BL and or resign under Article 52 as a result of the dissolution of the LegCo and the persistent refusal to pass the original budget by the new LegCo.

455. For the reasons given in the earlier parts of our judgment, the Scheme if carried out, would amount to seriously interfering in,

---

139 (P1639-1[TB10/150/4775];(CT) [TB10/150/4776-4779])

140 (P142-0421[TB8/37/1008-1009];(CT) [TB8/37/1010-1012] and P142-0422[TB8/38/1013-1014];(CT) [TB8/37/1015-1020])

disrupting or undermining the performance of duties and functions with the law by the body of power of the HKSAR.

Conclusion

456. We are sure and we find that:

(1) the Scheme was in existence before the promulgation of the NSL with D1 as the central figure;

(2) D24 had full knowledge of the Scheme and was a party to the Scheme;

(3) after the promulgation of the NSL, D24 remained as a party to the Scheme as he was before, and;

(4) he had the intention to subvert the State power, with that intention he participated in the Primary Election in furtherance of the Scheme and with the intention to carry it out.

457. We find that all the elements of the offence proved against D24. We find him guilty of the charge.

New Territories East

D33 Ho Kwai-lam

458. D33 had a clear record. She elected to give evidence. As such she enjoyed the two benefits conferred on her by law i.e. credibility in giving evidence and propensity in committing crime.

Knowledge of the Scheme

459. It was not disputed that D33 had attended both coordination meetings for New Territories East. As stated above, we accepted that D1 either had distributed or circulated a copy of the "Project 35+" document before or during the first coordination meeting, D33 was fully aware of its contents.

460. As PW1 stated in his evidence that D1 would ask for the telephone number of all the participants who attended coordination meeting, there was no reason why D1 would not ask for D33's number in the first coordination meeting. Alternatively, as D33 stated that PW1 had her telephone number many years before, PW1 would clearly pass D33's telephone number to D1 as he was in charge of liaison.

461. In addition, we accepted on the 16 April 2020 that D1 did send out the first draft of the file "35+ New Territories East.docx" (35+新東.docx) to all the participants after the first coordination meeting and mentioned that that document would be used for discussion in the next meeting.

462. On 3 May 2020, D1 broadcasted a WhatsApp message to all the participants of the New Territories East coordination meeting reminding them of the date, the venue and the time for the second meeting. We knew D33 did attend the second meeting.

463. Two days after the second coordination meeting, D1 sent out a message with the file "35+ New Territories East final.docx" (35+新東

final.docx) attached on 7 May 2020.[141] As such, D33 was fully aware of the contents of the document regarding the use of the vetoing power. In the case of New Territories East, the choice of the word was "use".

464. Paragraph 2 of the document stated clearly that all participants would use the powers conferred by the Basic Law to veto the budgets. Paragraph 5 stated the targeted number of seats. Paragraph 6 stated the number of lists. Paragraph 9 stipulated the replacement system. Paragraph 11 mentioned the withdrawal system. This was a very comprehensive document encapsulating all the important aspects of the project. We had no doubt that D1 would send that out to all the participants. After reviewing all the evidence, we came to the conclusion that D33 did receive a copy of that.

465. PW3 also gave clear evidence about receiving and opening the "35+ New Territories East final.docx" on 8 June 2020. According to PW3, he did not receive any complaint from the participants about the contents of the document or the lack of document.

466. Not only D33 admitted that PW1 had her telephone number for many years, she also admitted that her name and number were included in the WhatsApp group "Project 35+ NT East Bulletin Board" (35+ 計劃新東訊息發佈區). Her phone number had clearly been added to the said WhatsApp group when D1 created the group on 24 June 2020. We came to view that her denial of not receiving these documents was just an attempt to distance herself from any knowledge regarding the use of the vetoing power.

---

[141] TB3/85/1907, 1909-1910/384, 391, 392

467. In the second coordination meeting, we accepted from PW1's evidence that there was a heated exchange between D1 and D37 regarding the adoption of "use" or "actively use" in vetoing the budgets. D33 told us in Court that either of them did not mean a great deal of difference to her. According to D33, some candidates in the past when running for election used the word "actively" instead of a more certain term because they wanted to avoid election expenses.

468. D33 testified in Court that she was expecting to sign for any agreement reached by the participants. Further, she was also expecting any agreement reached would be made known to the public. As she did not receive any document from the organisers, signed or unsigned by any participants, there was in her view no consensus reached on the use of the vetoing power.

469. We accepted that no signed consensus had ever been produced. According to D33, before the first coordination meeting, she felt necessary to raise a number of matters such as if there was an agreement, who were going to sign and the duties and obligations after signing etc. After the first coordination meeting, D33 also felt that if there was going to be a "common programme / guiding principle", that document had to be signed and disclosed to the public. D33 also expected that any consensus reached would be attached to the nomination form.

470. In our view, had the organisers failed to provide any written document i.e. coordination agreement for New Territories East, we would be very surprised if D33 did not follow that up with the organisers given her attitude on agreement. We also noted D33 on a number of occasions

raised her objection in Court when something said or done apparently was not in accordance with her understanding and / or instruction. We found D33's evidence in Court not credible and not reliable.

471. D33 did not complain because she was satisfied with the contents of the coordination agreement which she had received. D33 told us that she was a single issue candidate and wanted to bring the spirit of the "Anti Extradition Bill Movement" into the LegCo election. Paragraph 2 of the coordination agreement contained exactly that. In essence, we were of the conclusion that D33 was fully aware that there was at the material time an agreement in existence and that D33 was fully aware of the objective of the Scheme to obtain majority in the LegCo and the course of action to be taken if she were elected as a LegCo councilor.

Party to the Scheme

472. D33 published a number of posts on her Facebook:

(i) the IWR declaration on 10 June 2020;

(ii) the election manifesto "Declaration of Candidacy: Keep fighting with the last breath"[142] posted on 18 June 2020;

(iii) in one video published on 26 June 2020 in which she stressed the importance of obtaining a completely majority in the LegCo in order to give rise to a situation which would be unacceptable to Beijing[143];

---

142 TB8/A39/1021-1023

143 TB8/A40/1033-1036

(iv) in the election forum dated 28 June 2020, D33 stated that she would use the LegCo as a place for resistance and not a hall for discussion[144];

(v) D33 advocated for staging resistance and physical conflicts in the LegCo dated 9 July 2020[145].

(vi) D33 stated that the resistance camp should persuade moderate voters why they should use the LegCo election to trigger a constitutional crisis dated 14 July 2020.[146]

473. We placed full weight to what D33 said in June 2020, shortly before the submission of the nomination form to the 9 July 2020, two days before the Primary Election. Those posts were intended for the general public. As such, they should be read with the ordinary plain meaning of the letters and words. We noted D33 had given her interpretation in Court to which we rejected. Judging from these posts, a common theme, namely the use of the power in vetoing the budgets, opposing the Government and staging resistance emerged. When the LegCo chamber was no longer a place for policy discussion, the logical inference had to be that whatever government papers, policies or motions put before the LegCo would be futile. D33, with a clear understanding of the objective of Project 35+, in particular the use of the vetoing power and her full knowledge of the Scheme, submitted her nomination form.

474. D33 testified in Court that she participated in the Primary Election because she simply wanted to encourage people to vote and to

---

144 TB8/B4/3135

145 TB8/A43/1115-1116

146 TB8/A48/1213-1214

have a big turn out so that people from the outside world could not overlook or ignore. Surely D33 would like that to happen however we did not accept that to be the sole cause. Her election manifesto did not suggest that to be the case. In fact, we heard nothing of that view being mentioned in any of her election rallies, forums or interviews. In addition to that, we also heard nothing from D33 to the general public that achieving 35+ seats in the LegCo and compelling the Government to accede to the Five Demands was either unrealistic or impossible. Her testimony in Court was inconsistent with what she stated in her Facebook posts.

475. In our view what D33 wanted was, as she said in her evidence, the demand for universal suffrage for both the Chief Executive and the LegCo. What D33 really wanted was a completely new political system and structure, as she said repeatedly that the existing one had been dysfunctional and unable to serve the people of Hong Kong. In order to achieve that, she wanted a big turn out which could send her to the LegCo to resist and to break the deadlock and at the same time the outside world would take heed of that.

476. According to D33, another election leaflet was designed in late July 2020 for the postal service in relation to the official LegCo election. However, before the final version was completed, D33 had been disqualified. It was therefore only a draft. Again there was nothing in the leaflet talking about just a large turn out.

477. In the New Territories East Civic Forum held on 7 July 2020, D33 reiterated the fact that all elected members would have to explore every available means to fight in the LegCo and to exert pressure on the

Government[147]. By submitting her nomination form and taking part in the Primary Election, D33 was party to the Scheme.

Intention to Subvert

478. D33 ranked first in the Primary Election. On 14 July 2020, D33 stated again that the LegCo chamber was not a place for discussion but a resistance battlefront. She further stated that the most important mission was to make use of the LegCo election to create political tension or to trigger constitutional crisis[148]. We had no doubt that the political tension or constitutional crisis D33 referred to was the same crisis that D1 had been advocated for. These utterances ran totally against her evidence in Court that 35+ seats was impossible. Had she told the voters that her primary objective was for a big turn out, we doubted seriously that she would come up top in the Primary Election. In our view, a larger turn out without a majority and more would not create political tension or trigger any constitutional crisis directly. On the contrary, D1 was very optimistic about achieving a majority. He said so in a video broadcasted on 13 July 2020 in which he expressed his view that the pro-democracy camp could obtain 26 seats in the geographical constituency and that he was even hopeful for 45+ if the blue turned yellow.[149]

479. D33 attended the press conference held by the localist resistance camp on 15 July 2020. In her presence, D44 advocated the idea of exercising the vetoing power as a means to paralyse the LegCo.

---

147 TB8/A44/1131-1132

148 TB8/A48/1213

149 TB1/154B/2032-2033

D44 further stated that all those present would refuse to pass the budgets. Likewise D33 did not raise any objection or disagreement.

480. From the video footage, one could see before answering the second question as to whether the budgets would be vetoed, D44 turned round to D33's direction. In fact, D33 appeared together with D44 in quite a few election activities, and the two also shared election leaflets.

481. When Wong Pak-yu (D45) stated "In fact, our highest common factor is for sure talking about the resolute objection to the financial budget, if the 'Five Demands' are not satisfied. Well, this is our common, that is to say, opinion." D33 did not speak or complain to D45 about his incorrect remarks or misrepresentation after the press conference. According to D33, she did not think it necessary to tell anyone, be that D45 or D44, that their views did not represent her. Nor did she tell any reporters. In our view, she did not complain because they said exactly what D33 had in mind.

482. On 4 August 2020, D33 published an article on the Los Angeles Times. D33 stated that with an opposition majority, that would create a nightmare scenario for Beijing as it would be able to veto all government's proposal of budgets[150]. In fact, the stance adopted by D33 throughout the project was very consistent. We had no doubt by stating all these remarks, D33 wanted to undermine not only the duties and functions of the Government, but the legitimacy of it as well. All in all, despite D33's testimony in Court asserting that obtaining a majority of 35+ was an impossible task at that time and that she was running the

[150] TB8/A51/1246-1252

Primary Election with the intention of encouraging a big turn out, none of what she did and said throughout suggested that to be the case.

483. D33 in our view was one of those participants who held the most radical political view which was manifested by her utterances and conducts. She effectively wished to uproot the then existing political structure and system in Hong Kong and oppose the "One Country, Two Systems" principle. Perhaps she was one of those who would describe D1 as non-radical and non-progressive. We had no doubt that her intention in participating in the Scheme was to seriously interfering in, disrupting or undermining the performance of duties and functions of the Government with a view to subverting the State power; to put the Region to a complete halt with the hope that her notion of "breaking the deadlock" might happen. In light of all the matters stated above, we found D33 guilty of the offence.

D36 Chan Chi-chuen Raymond

484. D36 had a clear record. He elected to give evidence. As such he enjoyed the two benefits i.e. his credibility in giving evidence and propensity in committing crime conferred on him by law.

485. It was not disputed that D36 was a serving LegCo member at that time. He was also the Chairman of People Power. Together with Mr Tam Tak-chi (D22), Vice Chairman of People Power, they both ran for the Primary Election for New Territories East and Kowloon East respectively.

Knowledge of the Scheme

486. Although D36 did not attend any of the coordination meetings, he sent his other Vice Chairman Mr So Ho to attend as his representative. Mr So Ho attended both coordination meetings for New Territories East and made a report to D36 in one executive meeting for People Power where D36 was present on 13 May 2020. The minutes of the meeting prepared by Mr So Ho mentioned that in the New Territories East coordination meeting, there was discussion about the change of the word from "use" to "actively use" in vetoing the budgets[151]. D36 told us in Court that he was of the view that the two actually did not mean a huge difference to him.

487. In any event, D36 was fully aware of the use of the power in forcing the Government to respond to the Five Demands after obtaining a majority as early as mid-May 2020 despite his absence in the coordination meeting. D36 admitted in Court that D1 had his telephone number before. PW1 also had his telephone number. As such, we were satisfied that D36 had received a copy of the coordination agreement with the file name "35+ New Territories East.docx" and "35+ New Territories East final.docx". We also noted that D1 and D36 had each other's contact when the WhatsApp group "Project 35+ NT East Bulletin Board" was created on the 24 June 2020.

488. D36 admitted in Court that he had read D1's article "Ten steps to real mutual destruction. This is the fate of Hong Kong". As such, D36 was aware of the intention of D1 in initialising the project / the Scheme. D36 however denied that he had agreed on the use of the

[151] TB10/158/4995

vetoing power indiscriminately. Despite his denial, we were of the decision that D36 was fully aware that there was at the material time the Scheme in existence prior to his participation in the Primary Election.

489. According to D36, People Power had all along in the past refused to participate in any Primary Election organised by the pro-democracy camp. On this occasion, People Power agreed to do so primarily on one condition: namely there had to be a common political action agenda amongst the candidates of the pro-democracy camp. In People Power's Facebook dated 22 March 2020, People Power reiterated that if all parties worked to have a genuine Primary Election, they should lay down a common political action agenda and a common code of conduct in the LegCo for exercising check and balance against the Government[152]. The two items in our views were clearly two different concepts and distinguishable.

490. The common political action agenda in our view could not possibly be confined to just attending meetings, sitting through discussions, participating actively in various committees and casting votes. These were no more than exemplary conducts and behaviors in conducting LegCo businesses, more likely akin to what D36 referred to as the common code of conduct.

491. Further, the common political action agenda could not be the four items agreed in the coordination meeting. Those four items were related to the Primary Election: the holding of Primary Election, the holding of election forum, the targeted number of seats and the

[152] TB8/A90/373-376

replacement system. These four items did not say anything about what action one would take after going into the LegCo. The first three were non-controversial issues and the last one was marginally debatable. Nevertheless, the last item again was not relevant to any action or condition after entering the LegCo.

492. After reviewing all the evidence, we were satisified that the reason People Power and in particular D36 were willing to participate in the Primary Election was that in this incident, there was a common political action agenda acceptable to the People Power among the different parties of the pro-democracy camp. The common political action agenda in this case was the use of the power conferred by the BL in vetoing the budgets, a much more "political" action agenda in need, in view of the political atmosphere in the society at the time.

493. D36 admitted that after noticing the publication of the IWR declaration on D33's Facebook, People Power on the next day posted one onto its Facebook[153]. As to its contents, he agreed to paragraph 2 of the IWR declaration but the consensus mentioned there as he understood was about the four above-mentioned items only. We rejected D36's evidence on this issue.

494. Concerning vetoing the budgets stated in paragraph 3.1 of the IWR declaration, D36 stated that as it was one of the powers conferred by the BL on LegCo members, he could simply use it. There was however nothing in that paragraph bundling up all the successful candidates to a unified stance. We did not accept that to be the case. On

[153] TB8/A9/389-394

a plain reading of the IWR declaration, the letters and words were simple and straightforward. That was precisely the common political action agenda. That was the reason why D36 participated in the Primary Election.

495. As stated at paragraph 4 of the IWR declaration, the declaration was one mechanism in ensuring the candidates from the resistance camp to have a unified stance on their determination to fight, also an important common political agenda. In our judgment, D36 had full knowledge of the Scheme.

Party to the Scheme

496. In a street rally held on 26 June 2020, D36 appealed to all the pro-democracy candidates that after entering the LegCo, they should remember that it was simply a battlefront to fight and resist the Government with full strength. Essentially D36 wished the pro-democracy candidates to have once again the fundamental will.

497. In the street rally D36 expressed that the seats in the LegCo were just tools, their aims and purposes were to resist. On the other hand, nowhere in his street rally one could hear him emphasising to the voters that he would put the minority right at the forefront of his agenda.

498. In another video in July 2020, D36 further emphasised that every candidate in the Primary Election had put aside their individual or parties interest and would work together to resist till the end including what they said before regarding using the power conferred on the LegCo by the BL to vote against the budgets in compelling the Government to restart political reform and to respond to the Five Demands and achieve

dual universal suffrage[154]. We had no doubt that the message D36 intended to convey was to stage resistance. We placed full weight to what D36 uttered in the street rally and in his video in July shortly before the Primary Election.

499. D36 told us in Court that the intonation he used was rather strong. Essentially he was saying that he did not mean what he had said. We did not accept that. The intonation and the choice of words were consistent with his previous utterances and conducts and also what he stated in his election leaflet. D36 in a nutshell played down his involvement and his knowledge regarding the Scheme in Court. We rejected his evidence in Court.

Intention to Subvert

500. By submitting his nomination form and taking part in the Primary Election, D36 was party to the Scheme. D22 in the election forum for Kowloon East held on 26 June 2020 (broadcasted on 28 June 2020) mentioned again the use of the power in vetoing the budgets twice in paralysing the operation of the Government and forcing the stepping down of the Chief Executive.[155] Given the fact that D36 and D22 were respectively Chairman and Vice Chairman of People Power, it would therefore not be surprising to hear that. The two indeed had a uniform platform to run for the Primary Election. They also used the same election promotion materials.

---

[154] TB8/A53/1265

[155] TB8/B2/2588-2589/50

501. Further as participant for Kowloon East, D22 attached a copy of the "common programme / guiding principles" to his nomination form[156]. In our view, such move would not escape the notice and attention of D36. D36 might not have sighted the actual document, we were of the view that he needed not do so because he was fully aware of its contents.

502. On 10 July 2020, one day before the holding of the Primary Election, D36, in one promotional video together with D22[157], continued to mention the benefits of vetoing the budgets, dissolving the LegCo and the stepping down of the Chief Executive in obtaining a majority in the LegCo.[158.]

503. D36 took part in the Primary Election and won. On 22 July 2020, D36 submitted his nomination form for the upcoming 2020 LegCo Election with a leaflet titled "Never give in" (抗爭到底). When being questioned by the returning officer, D36's reply in our view was evasive and far from frank. The aim of his reply seemed to serve only one purpose, namely to avoid being disqualified. We had no doubt that D36 continued to participate in the Scheme with the intention to subvert the State power.

504. Against all the matters mentioned above and with a clear understanding of the objective of Project 35+, we had no doubt that D36 participated in the Scheme with one clear objective, that being the same as D1, namely to seriously undermine, destroy or overthrow the existing

---

156 TB7/B29/667

157 TB8/A55/1329-1331

158 TB8/A56/1343/11

political system and structure established under the Basic Law and the policy of "One Country, Two Systems" in addition to seriously interfering in, disrupting or undermining the performance of duties and functions of the Government. We had no doubt that he had the intention to subvert the Government of HKSAR. D36 was therefore guilty of the charge.

D37 Chow Ka-shing

505. D37 had a clear record. He elected to give evidence. As such he enjoyed the two benefits i.e. his credibility in giving evidence and propensity in committing crime conferred on him by law.

506. According to D37, he wanted to run in the Primary Election because it provided a good platform to promote his political idea. His other purpose was to assist Hong Kong to elect legislators with the strongest willpower to resist, given 35+ was an impossible task in his mind. As such, D37's intention was to fight for the Five Demands and to stage resistance. He then signed up for the coordination meeting.

Knowledge of the Scheme

507. It was not disputed that D37 attended all the coordination meetings for New Territories East. As to what happened in the second coordination meeting, we accepted what PW1 had told us. We did not accept it was D1 who first suggested the adoption of "will actively use" and then D37 suggested the use of "will use". After reviewing the evidence, we were satisfied that PW1 was telling the truth, in particular due to the argument between the LSD and D37, D1 as a result had to compromise. PW1 remembered clearly before the second coordination

meeting, Wong Ho-ming, Chairman of the LSD had asked him not to make any promise concerning the vetoing of the budgets. No doubt, D1 suggested the use of "actively use" to accommodate the difference. According to PW1, D37 even challenged D1 why the phrase "actively use" was used. D37 proposed the adoption of the "use" rather than "actively use". This more determined stance was ultimately adopted in the final version of the coordination agreement.

508. In any event, one could clearly see D37 hold a more radical belief or stance in his political ideology. We believed D37 would use every available means to force the Government to respond to the Five Demands. On this aspect, we rejected D37's contention that he would only "self-defence" himself and not use violence after entering the LegCo. The demand for the Five Demands, according to him, had the overwhelming support of the public, being lawful and reasonable. After all D37 told us in Court that his political vision was to establish Hong Kong as an ethnic group so that Hong Kong people could rule Hong Kong. He considered himself to be a localist and that he was safeguarding the local values, culture and language for Hong Kong. He also told us that the Basic Law and the existing "One Country, Two Systems" had not functioned as it should be.

509. According to D37, he had a brief meeting with D1 after the second coordination meeting where he apologised for his impoliteness in the meeting. D1 then asked for his telephone number. The reason D1 asked for his telephone number was obvious. If D1 did not have D37's telephone number before, we had no doubt that D1 had his telephone number by the end of the meeting. As such, there was no reason for D1 not to send D37 a copy of the coordination agreement. We had no doubt

that D37 had received a copy of the summary, i.e. "35+ New Territories East final.docx" "35+新東 final. docx" two days after the meeting. Further, we also noted that D1 had D37's telephone number by the time he created the WhatsApp group "35+ NT East Bulletin Board".

510. Paragraph 2 of the document stated clearly that all participants would use the powers conferred by the Basic Law to veto the budgets. As such, D37 was fully aware of the objective of vetoing the budgets. The contents of paragraph 2 also found themselves into the IWR declaration which D37, together with D26 Cheung Ho-sum Sam and D7 Leung Fong-wai Fergus had conceived and published. We were of the decision that D37 was fully aware that there was at the material time the existence of the Scheme.

511. D37, D7 and D26 ran for New Territories East, Hong Kong Island and New Territories West respectively. They came from three different geographical constituencies and attended different coordination meetings. Yet in the IWR declaration initiated by the three, paragraph 2 of the IWR declaration mentioned about a "common programme which was agreed upon at the Primary Election coordination meeting" (已取得共識的共同綱領) and "the largest common ground" (最大公因數) among the resistance camp. As all three spent a whole afternoon in discussing and drafting the IWR declaration, the logical inference had to be that consensuses as stated in paragraph 3.1 and 3.2 had been reached in coordination meetings led by D1 for all five geographical constituencies. We had no doubt that as a member of the localist resistance group and a political newcomer without much financial resources, the most important and significant consensuses in the eyes of

the three initiators and in particular D37 had to be spelled out clearly in paragraphs 3.1 and 3.2.

512. The holding of the Primary Election, election forum, the targeted number of seats and the replacement mechanism were in our view not only uncontroversial but also non-political. There was nothing to prohibit D1 in asking participants to affix their signatures if these were really the items on the "common programme / guiding principle". D37 told us in Court that the term "common programme / guiding principle" simply referred to the agenda and/or topics which had been discussed in the meeting. We rejected that. If the IWR declaration did not represent the consensus reached, we did not see the need why the three of them had to spend one whole afternoon in its preparation.

513. We heard disputes from Kowloon East about whether they should join the Primary Election. In other constituencies, that particular topic was not a contentious item at all. So when one talked about "common agenda",「共同綱領」, being an agenda and/or topics discussed, there was no common agenda amongst the five constituencies. We took the view that the reasons for not asking people to sign had to do with the fact that, as PW1 explained and more importantly what the three initiators stated in one interview, the fear for disqualification. In our judgment, D37 had full knowledge of the Scheme.

514. D37 stated in Court that as more people endorsed the IWR declaration, he even created a Google Word document for people to sign on and copy. Not only did D37 initiated the declaration, he also acted as its custodian and guardian. We had no doubt that he knew perfectly well the purpose behind. We also did not accept that as similar wordings

appeared in the final coordination agreement and the IWR declaration, they were merely coincidences as suggested by D37 in Court given the date of its creation, the similarity in terms of the wordings in both the coordination agreement and the IWR declaration, we had no doubt that the IWR declaration was clearly created to fill the gap left by D1, namely the reluctance of the organisers to leave any paper trace. All in all, we did not find the evidence given by D37 to be credible and reliable. D37 likewise tried to distant himself from the Scheme.

515. On 10 June 2020, D37 posted on his Facebook the IWR declaration. On 19 June 2020, D37 together with D7 and D26 sent one message to the organisers demanding a response from them for not asking the participants to sign the "common programme / guiding principle" or the final agreement. The objective of vetoing the budgets was expressly stated in that message[159]. D37 also confirmed in the message that a common programme / guiding principle had been reached in the coordination meeting.

Party to the Scheme

516. On 21 June 2020, D37 published on his Facebook his declaration[160] for participation in the Primary Election. His slogan was "Reject Colonisers, National Resistance against Tyranny" (拒絕殖民, 民族抗暴). In essence, he described Hong Kong as being colonized and governed by the tyrannical Mainland China. . To say the contents of this post were radical would be an understatement.

---

159 TB3/31/1132-1133

160 TB8/A60/1369-1373

517. On 25 June 2020, D37 published another article on his Facebook[161], stating that he would mutually destroy the legislative system designed by the colonisers (同殖民者設計嘅議會制度攪炒到底). Despite what D37 said about preserving Hong Kong values and culture, he was in substance not accepting the sovereignty of the Central People's Government over Hong Kong. On the other hand, D37 told us in Court that pressure should be exerted onto the Government to respond to the Five Demands. He would look at the budgets to see if the Government had responded by means of appropriations as the only prioritised standard to review the budgets. He also had never thought of paralysing the LegCo. His evidence in Court seemed to have gone to a very different direction from what he stated in his Facebooks. We had no hesitation in rejecting his evidence in Court.

518. By his conducts and utterances, we were sure by the time of him submitting the nomination form and taking part in the Primary Election, D37 was party to the Scheme. On 5 July 2020, D37 published another post on his Facebook stating that he would continue to run for the Primary Election. On the same day, D37 together with D7 and D26 explained their reasons for initiating the IWR declaration on YouTube. D37 told us that all along he was of the view that achieving a majority in the LegCo was an impossible task yet he decided to continue. Clearly D37 was all along as hopeful as D1 when D1 stated in the press conference held on 26 March 2020 that he was optimistic and confident about the project.[162]

---

161 TB8/A61/1385-1388

162 TB6/2B/37-42/47

Intention to Subvert

519. On 7 July 2020, D37 published another post on his Facebook together with a clip of his speech in one forum where he affirmed his determination in resorting to violence inside the LegCo and exhausting all means to paralyse the LegCo[163]. We again rejected D37's assertion in Court that the violence he mentioned was confined to self-defence only. Being a member of the localist resistance group, we had no doubt D37's purpose in going into the LegCo was to resist and fight by whatever means against the establishment, be it the Government or the pro establishment camp. We found D37's intention in taking part in the Primary Election was clear, namely his first step in bringing down the then existing Government and political structure.

520. D37 ranked 5th and won the Primary Election for the New Territories East. On 15 July 2020, D37 together with other successful candidates held a localist resistance camp press conference. In his presence, D44 stated expressly that those who were present at the press conference would refuse to pass the budgets. We heard no objection being raised by any participants present at the conference. Again we rejected what D37 said about he was in fact disagreeing with what D44 said. We had no doubt that D37's objective in participating in the Primary Election was the same as D1, namely to undermine, destroy or overthrow the existing political system and structure established under the Basic Law and the policy of "One Country, Two Systems" not to say in addition to seriously interfering in, disrupting or undermining the

[163] TB8/A64/1430-1432

performance of duties and functions of the Government. We had no doubt that D37 had every intention to subvert the Government of HKSAR.

521. With a clear objective of the Project 35+ and his intention to subvert, D37 submitted his nomination form for the 2020 LegCo election on 22 July 2020. We had no doubt that D37 was guilty of the offence.

D38 Lam Cheuk-ting

522. D38 did not testify in Court. Nor did he call any witness. D38 had a clear record up to 7 January 2021. As such he had less propensity in committing crime.

Knowledge of the Scheme

523. It was not disputed that D38 did not attend any of the coordination meetings for New Territories East. A representative, Mr Chong Wing-fai, attended on D38's behalf. In the second coordination meeting, when the heated exchange took place concerning the choice of words, Mr Chong Wing-fai stated that the Central Committee of the Democratic Party did not authorize him to deal with that issue. Given the fact that there was a heated debate and the non-commitment of the Democratic Party at the time, we had no doubt that issue would be brought to the attention of the Central Committee of the party and also to D38 in person.

524. Further as noted above, we were of the decision that after each coordination meeting, participants of the meeting received a copy of the documents "35+ New Territories East.docx" (35+新東.docx) and "35+ New Territories East final.docx" (35+新東 final.docx) through

WhatsApp. As to whom, whether it was Mr Chong Wing-fai or D38 that D1 sent the file, there was no evidence. However we were of the view that if the file was sent to Mr Chong Wing-fai, there was no reason for Mr Chong Wing-fai not to pass that to D38. What we knew was that by 24 June 2020, when D1 created the WhatsApp group, he had already had D38's telephone number. Further we also noted that PW1 was also once a member of the Democratic Party. We had no doubt that if PW1 had the telephone number of D38, being one of the organisers, PW1 would have passed the telephone number to D1. We were also of the decision that D38 had been made aware of the issue and the objective of Project 35+ sometimes in April or May 2020. In our judgment, D38 was fully aware that there was at the material time an agreement to obtain a majority in the LegCo and that he had full knowledge of the Scheme.

525. D38 did not publish any article on social media. Nor did he sign for the IWR declaration. What we knew was that he participated in the election forum for New Territories East on 26 June 2020. Found from D38's residence on the day of his arrest was a set of Primary Election Debate Notes (初選 Debate Notes)[164].

526. The Debate Notes mentioned the aim of the Primary Election was to achieve a majority of 35+. In addition, a number of matters / issues were mentioned in the notes.

---

[164] TB10/163/5215-5217

527. Amongst all the matters, it mentioned about asking Stand News Sister how to pursue police brutality in the LegCo. That of course was one of the Five Demands. It mentioned how to respond to Chow Ka-shing D37's accusation regarding the Democratic Party in splitting the votes. We noted Stand News Sister referred to Ho Kwai-lam (D33). So both D33 and D37's names had been found on these notes. These notes were referring clearly to New Territories East.

528. Then it followed by comments made by "Martin" regarding his disapproval of mutual destruction. We took judicial notice that "Martin" referred to Martin Lee, ex-Chairman of the Democratic Party. So D38 was aware of not only the concept of mutual destruction but also the fact that Martin Lee's disapproval of it was incorrect. From the passage, it seemed that both D38 and the then Chairman of Democratic Party Wu Chi-wai felt that the regime needed to pay a price.

529. The Debate Notes went on to mention whether one would veto the budgets. The passages stated that Wu Chi-wai had repeatedly said that the Democratic Party would actively use the power and that D38 had never voted for the budgets in the past four years.

530. The Debate Notes continued to mention about not signing the IWR declaration. The passage stated that that was due to the respect for and reasons put forward by D1. Had there been one declaration from D1, they would sign for that. Without any prior knowledge of the contents of the coordination agreement or being fully informed by Mr Chong, the Debate Notes would not contain all these details regarding the vetoing of the budgets. Given the fact that the Debate Notes were prepared at the time when the budgets had not come in sight, we drew the

irresistible inference that D38 intended to vote against the budgets irrespective of their merits and contents.

531. It was argued by the defence that there was no evidence pointing to the fact that D38 was the author of the notes or that he had approved of the contents. We disagreed.

532. First of all, the Debate Notes was found in D38's residence. Secondly at the beginning of the election forum, D38 followed the Debate Notes and stated that the enemy was the Chinese Communist Party[165]. When D38 was asked about the Democratic Party's stance on abstention regarding the appointment of judges, he followed the answer in the Debate Notes[166]. Further D38 did ask in the election forum "Stand News Sister" (D33) how to pursue police brutality in the LegCo[167]. D38 also followed the Debate Notes and asked at the end of the election forum people to treasure the chance to vote[168]. All of these above were mentioned in the Debate Notes.

533. In our view, the Debate Notes was prepared for D38's attendance at the election forum. Whether he was the author of the notes, it mattered little as we found the contents represented his belief, knowledge and stance. If D38 was not the author, he had adopted the contents with little reservation.

---

165 TB8/B4/3039

166 TB8/B4/3124-3125

167 TB8/B4/3200-3201

168 TB8/B4/3217

Party to the Scheme

534. In summary, D38 was fully aware of the objective of Project 35+. He was aware of and agreed to the Democratic Party's stance on vetoing the budgets. He was also fully aware of the contents of the IWR declaration. As stated in the Debate Notes, had that declaration come from D1, he would sign for it. As such he would have had no problem in vetoing the budgets. By his conducts and utterances and by the time of him submitting the nomination form and taking part in the Primary Election, D38 was a party to the Scheme.

535. D38 won in the Primary Election. With a clear knowledge of the objective of Project 35+, D38 submitted his nomination form for the 2020 LegCo Election on 27 July 2020. Attached to his nomination form was his Primary Election leaflet[169]. In the leaflet, D38 mentioned that in order to force the Government to respond to the Five Demands, the pro-democracy camp would hold a Primary Election.

Intention to Subvert

536. In one press conference held on 14 July 2020 after the Primary Election result was known where both D17 and D38 were present, D23 Wu Chi-wai, the Chairman of the Democratic Party stated clearly that the purpose of obtaining a majority was to force the Government to respond to the Five Demands. This further supported the fact that D38 continued to participate in the Scheme after the promulgation of the NSL.

---

[169] TB9/B63/5568-5569

537. When the Debate Notes mentioned about "mutual destruction", both D38 and the Chairman of the Democratic Party were of the view that the regime had to pay a price. Further, given D38's experience as a LegCo member, we were sure that he knew the serious adverse consequence by vetoing the budgets persistently by the majority on the performance of duties and functions of the Government. It was stated in the Debate Notes that D38 had never approved any budgets for the past four years, whatever reasons he put forwards in the past was not the focus of the present trial. We had no doubt that D38 would indiscriminately veto the next budget irrespective of its contents and merits for the reasons we stated above. In our view, D38 had the intention to seriously interfering in, disrupting or undermining the performance of duties and functions of the Government with a view to subverting the State power. In view of all the matters stated above, D38 was guilty of the offence.

D41 Leung Kwok-hung

538. D41 did not testify in Court. Nor did he call any witness. It was not disputed that D41 did not attend any coordination meeting for New Territories East. We accepted evidence from PW1 that Chan Po-ying, the Vice General Secretary of the LSD attended on his behalf. We noted the LSD's stance in that meeting.

Knowledge of the Scheme

539. Even before the second coordination meeting on the 5 May 2020, Wong Ho-ming, Chairman of the LSD telephoned PW1 and asked PW1 not to promise anyone about vetoing the budgets. In the meeting, the topic on vetoing the budgets and the choice of words were

raised by D37. Chan Po-ying disagreed with the stance of D37. At the end, D1 suggested the use of "actively use" so that it was one step forward, a somewhat compromise. As the topic was hotly debated, we had no doubt that the issue of vetoing the budgets had been brought to the attention of D41 and other senior officers of the LSD for their consideration.

540. Further, as stated above, we were of the decision that after each coordination meeting, participants of the coordination meetings received a copy of the document "35+ New Territories East.docx" (35+新東.docx) and "35+ New Territories East final.docx" (35+ 新東 final.docx) through the WhatsApp. Judging from the creation of the WhatsApp group on 24 June 2020, D1 and D41 by then had already had each other's contact.[170]

541. According to PW3, he received a copy of the "35+ New Territories East.docx" forwarded by D39 Fan Gary Kwok-wai (one of the participants of New Territories East) through the WhatsApp group of Neo Democrats. This further supported D1 had sent out the file to all participants.

542. The initial stance of the LSD changed. This could be seen from an article dated 24 May 2020 published by the LSD in June: "Striving for a Total Veto, Continuing to Resist Tyranny — Resolution of the League of Social Democrats in Response to the Current Changes in the Political Situation in Hong Kong" (爭奪全面否決權持續不斷抗暴

---

[170] TB3/12/558-559

政 — 社會民主連線回應當前香港政治形勢變化的決議文)[171]. In the article, LSD stated that in light of the advocacy for obtaining over half of the seats in the LegCo in order to obtain the "full vetoing power" to counteract the tyranny, the LSD had to size up the situation, review its past position, make new strategies, clarify future orientation and stand along with all HongKongers to fight against the Chinese Communist tyranny. In our judgment, D41 was fully aware that there was at the material time an agreement to obtain a majority in the LegCo, hence the vetoing power and that he had the full knowledge of the Scheme.

543. Photographs of D41 and D12 Sham Tsz-kit appeared in the article as both were running for the Primary Election on behalf of the LSD. The same article was reposted onto D41's Facebook. In the article, the LSD stressed whether it was "35+" or "35-", the pro-democracy camp should veto the budgets in order to get a response from the Government for the Five Demands. Judging from the response and all the matters stated above, we were sure that D41 had received a copy of the coordination agreement. We also had no doubt that D41 had been fully aware of the objective of the project.

Party to the Scheme

544. With a clear knowledge and objective of Project 35+, D41 participated in the Primary Election. He submitted his nomination form together with a copy of his election platform "Five Demands Not One Less. Stand Together Against the Evil Law" (五大訴求 缺一不可 抵抗

[171] TB8/A8/216-222

惡法 您我同行)[172]. D41 mentioned in the election platform that he decided to participate in the Primary Election to persevere with "Five Demands Not One Less" and to strive for universal suffrage. Further, D41 mentioned that the NPCSC imposed the evil NSL for political persecution etc. It was directed at the LegCo election this September for screening (out) candidates purportedly endangering national security, cracking down on the "35+" movement that would take more then half of the seats in the LegCo (and) preventing the people from having full veto power in the LegCo. D41 stated in the leaflet the importance of 35+ and the vetoing power. D41 also mentioned about the three fold resistance strategy adopted by the LSD for striving for the Five Demands and universal suffrage. By his conducts and utterances and him submitting the nomination form and taking part in the Primary Election, D41 was party to the Scheme.

545. In the election forum for New Territories East held on 26 June 2020, D41 stated clearly that he did not sign the IWR declaration because it simply repeated the objective of Project 35+ and that he had no problem in vetoing the budgets as he had been doing so in the past. He further stated that Project 35+ was a big strategy and the importance of obtaining a full vetoing power[173]. As a former LegCo member and a veteran politician, we were sure that he was fully aware of the dire consequence of persistent vetoing the budgets by the majority members of the LegCo. No doubt he would have known that it would cause serious adverse consequence on the operation of the Government.

---

[172] TB7/B57/1071

[173] TB8/B4/3055

Intention to Subvert

546. D41 might well have a lot of reasons or no reason in vetoing budgets in the past, that however was not the focus of this case. We were concerned with the situation in 2020. We had no doubt that by participating in the project, D41 intended to indiscriminately vetoing the budgets with the intentions to seriously interfering in, disrupting, undermining the performances of duties and functions of the Government; hence an intention to subvert the State power.

547. D41 continued to publish various posts on his Facebook before the Primary Election. He again emphasised the use of the full vetoing power after obtaining a majority in the LegCo[174].

548. D41 ran and lost in the Primary Election. The LSD published a declaration which was reposted by D41 onto his Facebook. In particular, D41 reiterated his continued support for Project 35+ and would be abiding by the result of the Primary Election and would not participate in the 2020 LegCo election[175]. Judging from all the evidence presented including articles and Facebooks published and utterances made by D41, we had no doubt that D41 had the necessary intention to seriously interfering in, disrupting or undermining the performance of the duties and functions of the Government and with a view to subverting the State power. In view of all the matters stated above, D41 was guilty of the offence.

---

174 TB8/A79/1689-1691

175 TB8/A83/1748

D43 Or Yiu-lam Ricky

549. D43 did not testify in Court. He called his election manager Mr Chan Chin Chun Cyrus (Chan C C) to testify. D43 had a clear record. As such he had less propensity in committing crime.

Knowledge of the Scheme

550. One WhatsApp message suggested that D1 was aware that D43 would attend the first coordination meeting of New Territories East. Further D43 had known PW1 for many years as they were once members of the Democratic Party. D43 also had the contact of PW1. Due to the fact that D43 attended the first coordination meeting, D1, if he did not have D34's telephone number before, would therefore have it during the meeting as PW1 described D1 would ask for the telephone number of the participants. Further, we had no doubt that had D1 not had D43's telephone number, PW1 as one of the organisers would also pass D43's telephone number to D1.

551. After the first coordination meeting of New Territories East, D1 sent out document with the file name "35+ New Territories East. docx" (35+新東.docx) on 16 April 2020 to all the participants. We did not see any reason why D1 would not send one to D43. We had no doubt that D43 had received a copy and would know from the document the use of the vetoing power. We arrived at such conclusion because we also took into consideration that D43 subscribed to the IWR declaration soon after the IWR declaration was posted online by D37. In our judgment, D43 was fully aware that there was at the material time an agreement to obtain a majority in the LegCo and that he also had the full knowledge of the Scheme.

552. After a careful consideration of Mr Chan C C's evidence, we did not find him to be an honest and reliable witness. We found his evidence to be unreliable and far from any truth.

553. Mr Chan C C told us that as D43 was very busy with his work, he did not have a habit of closely following political developments. We did not accept that to be the case. We noted from D43's election leaflet that D43 had been active in politics for many years. Further he set out a lot of issues in the election leaflet that he was interested in. We found that Mr Chan C C was trying to distant D43 from any political knowledge or development he had. We were also very skeptical about the assertion that D43 as a politician only read advertisements or tender notices published in newspapers for his building management work.

554. In our view, D43 paid close attention to what D1 had said. In one message dated 10 June 2020 where D43 discussed the IWR declaration with his election team, he mentioned the fact that D1 had no longer talked about vetoing the budgets lately. It was further submitted by the defence that, given D43's comment, D43 was therefore not a supporter of vetoing the budgets. We found no substance in this submission. In our view D43 was well aware of the latest political developments. The fact that D1 had no longer talked about that issue did not mean D1 had abandoned that idea. From the evidence, we knew that in June 2020 promulgation of NSL was imminent. In the article published by D1 in Facebook on 9 July 2020, shortly before the Primary Election where D1, in response to Mr Tsang Kwok-wai's remark, the then Secretary of Constitutional and Mainland Affairs, continued to mention his belief that vetoing the budgets could not be regarded as a violation of the NSL. D1 had not abandoned the Scheme. In fact, after

the withdrawal of PW1 and PW2 from the Scheme, D1 only told PW1 that he needed a break.

555. As a lot of money ($300,000 to $500,000) was involved in participating in the Primary Election, D43 would surely pay close attention to what the organisers said and did. Any changes made by the organisers, whether those changes were on political directions or logistic arrangements, might affect D43's election strategy, financial resources and his chance of success.

556. According to Mr Chan C C's evidence, as D43's election manager, he did not do any preparation work before the first coordination meeting. He did not know why D43's name appeared on D1's WhatsApp list. He did not attend any coordination meetings nor did he send any representative to or make any alternative arrangements for the second coordination meeting. We found the above evidence of Mr Chan C C to be inherently improbable. In our judgment, not only did he try to distance D43 from the project, he wanted to do the same for himself.

557. Mr Chan C C also told us that he did not receive any documents from the organisers. Given the fact that D1 had D43's contact telephone number during, if not earlier than the first coordination meeting, we simply could not think of any reasons why D1 failed to send any documents to D43. If Mr Chan C C were to be believed, D43's election team received practically no document for participating in such a huge project. That was in our view illogical and unbelievable.

558. Mr Chan C C further told us that the organisers should be held responsible for informing them any important matters that took place

in the meeting. In short, it was everyone's responsibility in informing him and D43 of any latest development. This was simply absurd. As stated above, Mr Chan C C tried to paint a picture of D43's limited knowledge regarding the Scheme.

559. Mr Chan C C also told us that on one occasion when D1 telephoned D43 about polling station, he noticed from the telephone screen the profile picture of D1 and the telephone number began with the prefix +852, hence D43 did not have D1's contact stored on his mobile telephone. Firstly, we did not believe Mr Chan C C would have paid attention to such minute details, given his failure on the electioneering work. We doubted he was such a meticulous person. Secondly it might well be the case that D43 did not have D1's contact, but that did not prove the fact that D1 did not have D43's telephone number. D1 should have D43's telephone number, otherwise D1 would not be able to send the message.

560. As to the IWR declaration, Mr Chan C C told us that except the "Five Demands Not One Less" which was a consensus reached in the coordination meeting, the rest was not. His understanding however was based on newspaper reports. As neither D43 nor Mr Chan C C attended the second coordination meeting, we failed to see how Mr Chan C C could state that in Court. Further when he was questioned on that, Mr Chan C C simply replied that he had nothing to add.

561. In our view, D43 subscribed to the IWR declaration because it reflected his understanding of the consensuses reached in the coordination meeting. The endorsement was made after careful

consideration and discussions. Paragraph 3.1 and 3.2 of the IWR declaration were clear on the undertakings.

562. Mr Chan C C told us that he had not read any of D1's articles. He also did not know what had been said by D1 and the organisers on the press conference held on the 9 June 2020. He also did not brief D43 on that. We found that to be incredible, too. As D43's election manager and person responsible for briefing D43 on political issues, if what Mr Chan C C said was true then he would have failed his tasks completely and miserably. As we stated above, not only did he try to distance D43 from the project, he wanted to distance himself from it too.

563. D43 published on his Facebook an article dated 17 May 2020 stating that there was no council chamber but resistance front only.[176] D43 mentioned that LegCo was no longer a place for discussing political affairs. That being the case, the irresistible inference had to be that he would not examine any budgets, government policies when the occasion arose. D43 also mentioned in that article that after getting 35+ seats in the LegCo, the pro-democracy camp would get the "governing power". D43 also stated that he would unite the resistance force and support the resistance camp to fight against enemies. He would surely participate in the coordination of resistance camp. In essence D43 regarded the then existing political system as a rotten system. It therefore came with no surprise that he agreed to affix his signature on the IWR declaration.

---

[176] TB8/ A89/1788

564. In D43's Facebook on 11 June 2020, D43 informed his voters of his stance on resisting steadfastly. [177] In another Facebook article on 20 June 2020, D43 stated that despite the fact that he might go to prison, he would never retreat.[178] We had no doubt that he participated in the Scheme with the intention to seriously interfering in, disrupting or undermining the performance of duties and functions of the Government.

Party to the Scheme

565. With a clear knowledge of Project 35+, D43 participated in the Primary Election. Attached to his nomination form was his election platform[179] in which D43 stated that Hong Kong people could no longer confront a totalitarian country just with a passive attitude but had to take the initiative to attack. By submitting his nomination form and taking part in the Primary Election, D43 was a party to the Scheme. It was submitted by the defence that as his political platform set out items that required financing from the budgets, hence D43 would not indiscriminately veto the budgets. We disagreed.

566. D43 set out first his views on the then existing Hong Kong political landscape in the election leaflet. He was of the view that the real Hong Kong was no longer in existence. He mentioned the suppression by the tyranny had intensified and that tyranny and high pressure colonial rule in disgrace would surely make HongKongers fight more fiercely. In our judgment, his view on "colonial rule" was similar to D37's. D43 listed out a number of political agenda in his election leaflet without

---

177 TB8/A90/1796-1797

178 TB8/A91/1805

179 TB7/B67/1198

giving any further details and / or elaborations on these agenda / items. In our view, it was difficult to say whether those items were his past work records or items that he wished to pursue after being elected. Even assuming it was the latter case, those items could also be pursued after the then existing political system and structure being replaced.

567. In another promotional leaflet, D43 stated that the LegCo was an important resistance battlefront and Hongkongers needed LegCo members who dared to resist[180]. One could clearly see the intention of D43 in running both for the Primary Election and the upcoming LegCo election.

568. It was submitted by the defence that by running together with another candidate Mr Lau Hoi-man who was not a supporter of mutual destruction, D43 did not have the intention to subvert.[181] We again disagreed. Nowhere in the election leaflet did D43 say he was not a supporter of mutual destruction. Further, Mr Lau Hoi-man stated in one interview with Stand News that he was of the view that judging from the development of the political situation in Hong Kong, mutual destruction was an inevitable outcome. Mr Lau Hoi-man further stated that although he was not in the mutual destruction camp, he was a democrat with the will to fight and take solid actions.

Intention to Subvert

569. We were sure that D43 as an experienced district councilor, knew the dire consequence of persistent vetoing of the budgets by the

---

[180] D43/7A

[181] D43/8

majority would have caused serious adverse consequences on the performance of duties and functions of the Government. Having reviewed all the evidence, we were of the conclusion that D43 had every intention to seriously interfering in, disrupting or undermining the performance of duties and functions of the Government and with a view to subverting the State power, despite the original objectives of the Community Alliance as stated in its Articles of Association.

570. D43 continued to promote Project 35+ despite his loss in the Primary Election. He urged voters to continue their support for the candidates who had won the Primary Election so that they could stage resistance in the LegCo battlefront. In our judgment as he urged others to continue to support the Scheme, he had every intention to subvert the Government despite his loss in the Primary Election. Against all the matters stated above, we found D43 guilty of the offence.

District Council (Second)

D46 Lee Yue-shun

571. Mr Kwan (and with him, Ms Chan) raised the following on behalf of D46:

(1) D46 was not a party to the agreement hatched by the organisers D1, PW1 and PW2;

(2) even if he was a party to that agreement, he withdrew from that agreement before the NSL came into effect; and

(3) in any event, there was no "unlawful means" for the purpose of NSL 22(3).

Consideration of the evidence

572. D46 has a clear record. In assessing the evidence, we give ourselves the "good character direction" on both the propensity and credibility limbs in his favour.

When did D46 become involved in the Primary Election?

573. Having heard and observed D46 giving evidence and having considered the documents he produced, we accept that he had not taken part in and did not know anything about the preparation meeting held prior to the Civic Party press conference on 25 March 2020. We accept that he had not been told beforehand the details of that conference except that it was to encouraged people to register as voters. We accept that up to late May 2020 D46 had no intention to run in the Primary Election and had not participated in any of the coordination meetings organised by D1 and PW1. We also accept that D46 only began to show an interest in running after the Civic Party had started the "conscription" in early June 2020. However, his application was not successful on that occasion. Lastly, we accept that D46 only became involved in the Primary Election after his release on police bail on 13 June 2020 and upon being called by Bill Lay.

574. As D46's version of the events leading to his candidacy for the Civic Party in District Council (Second) constituency is supported by his documents, in our assessment PW1's evidence that D1 had attended the coordination meeting of District Council (Second) held on 13 May 2020 is not reliable. As the evidence shows that the Co-

ordination Agreement for District Council (Second) was broadcasted by D1 on the same day[182] and D46 was not yet a candidate at that time, we are not satisfied that an inference could be drawn against D46 that he had received the said Coordination Agreement, not to say that there is no evidence that he was on that broadcast list.

575. For similar reasons, we also accept that D46 had nothing to do with the endorsement of the IWR declaration by the Civic Party on 11 June 2020 and he knew nothing about it at the time.

Was he aware of the Civic Party's stance on vetoing

576. Nevertheless, we are satisfied to the requisite standard that by the end of March 2020, D46 must have been aware of the Civic Party's stance and D35's solemn promise about the Five Demands and vetoing. This is based on the following:

(1) D46's attendance of March 25 press conference. As discussed in the case of D8, we do not accept D46's evidence that the Civic Party did not have a unified stance that it would strive for the Five Demands by vetoing all government bills and the budgets;

(2) D46 reposting on 25 March 2020 in his Facebook[183] the Civic Party's post titled: "［議會過半 反制政府］立法會過半的願景" ([Achieving majority in the LegCo to counteract the government] The Vision of achieving majority

[182] [TB3/85A/1911/399]; CT [TB3/85B/2114/399]

[183] [TB8/97A/1868]; CT [TB8/97B/1872]

in the LegCo). The post was a summary of what was said by the speakers at the press conference; and

(3) D46's admission of his presence at "the third Core Group Meeting of Psychological Warfare Office for Legislative Council Elections" on 30 March 2020. That said, we bear in mind D46's evidence of his limited participation at that meeting and that he had not received the minutes of that meeting. We find that this part of his evidence is consistent with our finding that he was yet to be considered as a candidate for the Civic Party at that stage. We believe that D46 was asked to be present at the meeting because of his expected assistance in voter registration.

Did D46 agree to the IWR declaration?

577. Our overall evaluation of D46's testimony is that we do not accept his evidence as to whether the prominent and leader figures of the Civic Party had a unified stance on "vetoing" and we find that he would be aware of that stance. Apart from the above, we find that his evidence generally has a ring of truth and is supported by the documents he adduced.

578. Bearing in mind that the burden of proof is on the prosecution, we accept that:

(i) D46 was not privy to the Civic Party's internal discussion on the IWR declaration; and

(ii) D46 did not become a candidate of the Civic Party in the Primary Election until sometime after his release on police bail on 13 June 2020.

The prosecution argued that because D46 said he was aware of the endorsement by the Civic Party of the IWR declaration, he as a representative of the Civic Party must have agreed to the IWR declaration. With respect, we do not find this argument convincing. To the contrary, we find that the prosecution has failed to prove that D46 was included or intended to be included as an endorsee of that online declaration. That leads us to the following issue.

Did D46 agree to carry out the Scheme?

579. Despite our aforesaid finding, did D46 nevertheless agree to abide by the "solemn promise" made by D35 and/or subscribe to the IWR declaration?

580. The prosecution case against D46 is based on the following:

(1) D46 submitting his nomination form[184] for the Primary Election on 19 June 2020;

(2) the "Declaration of Candidacy" in D46's Facebook announcing that he would represent the Civic Party in the Primary Election;

(3) the reliance of D46 on the party's financial and other support in the Primary Election, so that he was unlikely to deviate

[184] [TB7/B77A/1358]; CT [TB7/B77B/1372]

from the party's stance adopted by leaders and prominent figures of the party like D35 and D20;

(4) what the other Civic Party candidates said on in D46's presence (including the rally held on 19 June 2020) and in their Facebook posts;

(5) the fact that the election platforms of candidates of the Civic Party were all similar and they contained pledges like "Strive for majority in the LegCo with 35+ seats, and use our veto power to press the HKSAR Government to commit on the Five Demands"; and

(6) D46's possession of the debate notes[185], the draft "Line to Take" [186] and election manifesto [187] showing that D46 supported the Civic Party's stance; and

(7) after he had lost in the Primary Election, he announced that he would not run for the LegCo election[188].

581. On the other hand, account should also be taken of the following which is in D46's favour:

- As to (1) above, although D46 signed on his nomination form with the confirmation that he "agree and support the consensus of the coordination meeting led by Benny Tai Yiu-ting and Au Nok-hin, including "Democrats 35+ Civil Voting Project" and its goals", as we have said, we

[185] [TB10/166A/5258]; CT [TB10/166B/5279]
[186] [TB10/166A/5265]; CT [TB10/166B/5298]
[187] [TB10/171A/5617]; CT [TB10/171B/5621]
[188] [TB8/A104B/1957]; CT [TB8/A104C/1960]

accepted that he had not attended the only coordination meeting of District Council (Second) on 13 May 2020;

- As to (2) and (3), we bear in mind that D46 had on 25 March 2020 reposted the party's post titled "【議會過半 反制政府】立法會過半的願景" in his Facebook. But that was at a time when he was not a candidate of the Civic Party.

- As to (4), in our assessment there is not sufficient evidence to show that he knew beforehand what the other representatives of the Civic Party were going to say at the pep rally held on 19 June 2020. Unlike D8, D46 did not say anything on that occasion about the vetoing power of the majority.

- The prosecution places some importance on what D8 wrote in his Facebook on 23 June 2020 where D8 said that he and other members of the Civic Party would use various means, including vetoing the budgets and compelling the Chief Executive to resign in order to achieve the Five Demands[189]. In this connection, the prosecution refers to the fact that D46 was a follower of D8's Facebook page[190]. The inference that the prosecution would like us to drawn is that D46 agreed with what D8 said in his Facebook. However, we do not consider that the inference as a strong one, for a person can be a follower of another person's Facebook for a variety of

[189] [TB8/A12A/502]; CT [TB8/A12B/506]

[190] [TB8/A100A/1921]; CT [TB8/A100B/1923]

reasons. More pertinent is what D46 wrote in his own Facebook:

> "今日阿信同 Alan Leong Kah-Kit 梁家傑聯同鄭達鴻 - Tat Cheng 嚟到太古開街站， 仲請嚟康山東區區議員梁兆新 Patrick Leung 同康怡東區區議員魏志豪 Derek Ngai 一齊助陣，呼籲選民積極參加民主派初選， 把握每個表態的機會！
>
> 喺國安惡法壓境底下，香港人一定要不斷進化，抗爭到底！ 阿信同公民黨戰友亦都會上下一心，繼續同香港人並肩前行。喺嚟緊 7 月 11-12 日嘅民主派初選希望見到大家!"
>
> ["Today, "Ah Shun" held a street booth in Tai Koo together with Alan Leong Kah-Kit LEONG Kah-kit Alan and CHENG Tat-hung- Tat Cheng. LEUNG Siu-sun Patrick Patrick Leung, district councilor of Kornhill (Garden), Eastern District and NGAI Chi-ho Derek Derek Ngai, district councilor of Kornhill, Eastern District were also invited to show support. (We) call for the voters to actively participate in the democrats Primary Election, taking every chance to express (your) position!
>
> As the evil National Security Law is about to come into effect, Hongkongers must evolve continually, fight to the end! Ah Shun and all comrades of the Civic Party will continue to go ahead alongside Hongkongers with one mind. Hope to see you all in the coming democrats Primary Election on 11-12 July!"]

Notwithstanding that D8 and D46 attended the same event on that day, we note that D46 said not a word in his own Facebook about "vetoing" or Five Demands.

- As to (5), it is obvious that D46's political platform was based on a template used by all the candidates of the

Civic Party. We note also that D46 was a late comer to the Civic Party's campaign in the Primary Election. As such, we have reservation whether D46 would have much choice but to adopt the template used by the others;

- As regards the promotion video of the Civic Party shot on 20 June 2020, having observed D46 in the witness box we accept that he was late for the video shooting and when he arrived D35 had already completed his part of the recording. We also accept that D46 focused on his part of the script and did not pay attention to those parts relating to others;

- As regards (6), the evidence before us is that the briefing notes were prepared by someone else for him. We readily accept that D46's possession of the briefing notes, the Line To Take and the election manifesto (the old version of the election pamphlet which was based on the Civic Party's template) is evidence that he was aware of the party's stance on "vetoing" and that he, as Civic Party's representative, supported that stance. Yet, we accepted D46's evidence that after he had looked at the NSL, he immediately informed his team members to stop distributing the old version of the pamphlet and to design a new version[191] which did not mention the Five Demands.

- Concerning the election forum of District Council (Second) held on 4 July 2020, we note that D46 did not mention

[191] [D46-23]

anything about using the majority's vetoing power to force the Government to accede to the Five Demands.

- As regards (7), we do not consider that this is a matter of weight. Given D46's junior position in the Civic Party, he would have no choice but to quit the official LegCo election if he was unable to obtain party's support.

582. At this juncture, it is pertinent to note that whilst both D8 and D46 represented the Civic Party in the Primary Election, the respective weight of the evidence against them is significantly different:

- D8 had been an Executive Committee member of the Civic Party for some years. On the other hand, D46 was new to the party and at the lowest rung of the party ladder;

- whilst D8 was a "candidate hopeful" of the Civic Party for the LegCo election 2020 from the very beginning, D46 was only "conscripted" at a late stage. Although D8 said that D46 had been considered as his "No. 2", that arrangement had never been actualised;

- whilst D8 represented Civic Party in the coordination meetings organised by D1 and PW1, D46 did not. Therefore, that D46 had to rely on other people to tell what, if any, had been discussed or agreed at the coordination meeting;

- it is our finding that D8 agreed to follow the Civic Party stance on the IWR declaration and the "solemn promise". As regards to D46, it is our finding that he was not yet a candidate when the Civic Party endorsed the

IWR declaration. In view of the timing and the protracted history of how D46 eventually became a Civic Party candidate, we cannot be sure if D46 had agreed to the Civic Party endorsing the IWR declaration on his behalf; and

- D8 had on various occasions personally expressed his support for the use of the vetoing power to force the Government to accede to the Five Demands. D46 did not.

Conclusion

583. At the end of the day, having considered all the evidence relevant to D46, we cannot be sure that D46 was a party to the Scheme. Similarly, we cannot be sure that he had the intention to subvert the State power during the material period of time.

584. Therefore, we find D46 not guilty of the charge.

Health Services

D47 Yu Wai-ming Winnie

585. Mr Shek raises the following factual issues:

(1) D47 was not a party to the conspiracy;

(2) she did not intend to veto the Budget indiscriminately; and

(3) she did not have the intention to subvert the State power.

Consideration of the evidence

586. D47 has a clear record. In assessing the evidence, we give ourselves the "good character direction" on both the propensity and credibility limbs in her favour.

Knowledge of and Party to the Scheme

587. There is abundant evidence that D47 knew and agreed to the Scheme, including:

- D47's endorsement of the IWR declaration and her evidence that she agreed with the two points it contained; and
- what was written on the poster which she attached to her nomination form submitted to Power for Democracy.

588. There is also no doubt that her purpose of joining the "Project 35+" was to help bringing about a sea change in the political system. In order to that, it was her view that the present one had to be demolished, i.e., "破局" (literally "breaking the current situation"). This is evident by:

(1) what she said in "踏上這攬炒旅途" ("On the journey to mutual destruction") published on 31 March 2020[192]:

> "要破局，必須由制度上的變革開始，甚至把制度推倒重來也在所不惜。今年立法會選舉可能是破舊立新的好時機，同時觀乎極權的步步進逼，

[192] [TB8/A105A/1966]; CT (TB8/A105B/1976-1977)

亦可能是最後一次機會今次的選舉問乎整場反送中運動的推展，…”

["To break the situation, (one) must start with the system reform or even turn over the system and start all over again, sparing no effort. The LegCo election this year may be a good time to do something new and watch totalitarianism creep in. It may also be the last chance for this LegCo election to promote the Anti-Extradition Law Amendment Bill Movement…"];

(2) she reiterated similar ideas in her street interview on 10 August 2020[193]:

"…所以我哋真係要作出改變嘅話，你話攪炒其實只係一個手段，唔係我哋嘅目的。即係我哋唔係話想大家攪住一齊死，而係我哋係想破舊，破局而立新。 …示威者都會覺得係呢個政府教識我哋和平係冇用，先會演化到好似會變咗見到詼更多街頭嘅活動，但係街頭嘅運動我哋係要作出好大嘅犧牲。而行返入議會我哋係希望係可以減少呢啲犧牲，而係有一班代議士承受番呢個壓力。只係叫做踏出咗第一步嘅，都未話真係正正可以踏到去第一步嘅，因為其實你真係要透過選舉，真係選出到三十五位叫做民－－共同理念嘅民主派入到去議會，先係真係可以引致到之後嘅步驟囉。”

["…Therefore, if we are really making changes, say, the (idea) of "burning together" is actually a means (to an end) but not the goal. We want to break (free) from the past, break the (current) situation and create something new. … The protesters all felt that it was the government who made us (sic) realise that being peaceful doesn't work. And therefore, things have evolved into, like, seeing, turned into, er, more activities on the streets. But we have to make huge sacrifice for the movements on the streets. By going back into the council, we hope that prevent some of these sacrifices and have the group of representatives bear the pressure instead. It can be called the first step, but not like the real, proper first step. This is because, actually, you

193 [TB8/A118B/2350-1]; CT [TB8/A118C/2361-2362)

> have to rally, through the election, really elect the thirty five called demo - - democrats sharing the same belief into the council. By then, (we) can really make the following steps happen."]

Apart from the above, similar to the case of other candidates, there was also the declaration at Part II, Clause 2 of her nomination form[194] dated 19 June 2020 and the Election Deposit Receipt[195].

Intention to Subvert

589. Again, there can be no doubt that D47 had the intention to subvert the "State power" in the sense that she intended to bring about a serious interference and disruption of the Government's function in order to bring about a new political system. This, we find, was what she meant by "破局" (translated as break the situation). Apart from what she said in her interview by Epochtimes and her interview 10 August 2020 mentioned above, there is also the following:

- in an article titled" 攪炒的時代革新意義" ("New Implications of Mutual Destruction in the Age of Modern Reform")[196] dated 11 April 2020, she wrote:

> "九月的立法會選舉, 我們決志在議會全面不合作, 以爭取至少 35 席為手段, 然後由打從進入議會的第一天便全面否決所有政府提出的議案, 藉此觸法基本法第五十條, 令特首宣布解散立法會, 製造憲政危機。"
>
> "For the Legislative Council Election in September, we have decided to be comprehensively uncooperative. By means of gaining at least 35 seats,

194 [TB7/B83A/1431]; CT [TB7/B83B/1443]

195 [TB7/B83A/1440]; CT [TB7/B83B/1452]

196 [TB8/A106A/1981]; CT [TB8/A106B/2002-3]

> we will veto all motions from the government from day one of joining the Legislative Council, so as to trigger Article 50 of the Basic Law, making the Chief Executive dissolve the Legislative Council, thereby creating a constitutional crisis."

- in an interview by In-media published on 22 April 2020[197], D47 was reported to have said:

> "一定要用任何方法去推翻而家呢個政權、呢個政府，先可以做到一個改變。"
>
> ["(We) must overthrow this regime, this government by all kinds of means or there won't be any change."]

In cross-examination, D47 did not deny that she had said the above. She only said that report was "not detail enough".

Based on D47's aforesaid clear and public statements made on various occasions and in her election materials, we refuse to accept her evidence that she would be prepared to negotiate with the Government or to make compromise. To the contrary, we have no doubt that D47 had the intention to subvert the State power in the sense that she intended to act with others to exercise the vetoing power to cause a serious interference in, disruption or undermining of the Government's function, should the Government refused to accede her political demands.

590. D47's case is that she did not think what she intended to do was "unlawful". However, we do not accept that she honesty believed at the time that it was lawful for her and others to deliberately cause a "constitutional crisis" by an indiscriminately vetoing of the budgets. In

---

197 [TB8/A107A/2017]; CT [TB8/A107B/2036]

any event, even if she did so believe, as we have already discussed, this does not afford her a defence to the charge.

Conduct and intention after the NSL?

591. As to this issue, there were the following statements of hers which were made after 1 July 2020:

- In a report of D47's rally held on 8 July 2020[198], the reporter noted:

> "余慧明發言時表示，議會是「抗爭戰場」，要將抗爭意志帶入議會。《港區國安法》下，支持「攪炒」的候選人或會被 DQ。被問及應對方法，余慧明坦言國安法沒有任何標準可供參考，全憑政府定奪，但她不想「自我審查」、「被噤聲」，不會為了當選而選擇暫時隱藏「攪炒」、「抗爭」等信念， 希望「由心發聲」，不想違背一直以來的信念。"
>
> ["In the statement issued by YU Waiming, she stated that the legislature is a "battlefield of protests" and (she) will bring the will to resist into the legislature. Under the National Security Law for Hong Kong, candidates who support "mutual destruction" might be DQ (disqualified). When asked about ways to cope with this, YU admitted
>
> that there were no standards regarding the National Security Law, it was purely determined by the Government. Nevertheless, she did not want to "practise self-censorship" nor "to be silenced". She would not win the election at the expense of the values such as "mutual destruction", "resistance" and so forth. She hoped that she would "speak her mind" instead of violating her unfailing beliefs."]

198 [TB8/A113A/2268]; CT [TB8/A113B/2282]

Again, in cross-examination she did not deny having said the above." Her explanation was that it was her "negotiation strategy".

- on 8 July 2020, in her interview by "好。傳媒 Playful Media"[199], there were the following question (A) and answer (B):

"9A: 明白。咁呢其實你知道喇而家我哋政府嘅民意係好低喇，咁你有冇啲乜嘢意見或者係方法畀政府，令到佢哋可以挽救咁低迷嘅民意呢？

10B: 其實如果佢係有心做嘅我相信佢喺舊年六月九號嗰陣時其實已經做咗，如果佢係有心想解決呢個問題嘅，就應該一早係同香港人公開一啲對話喇。正正就係其實因為佢係一個－－已經變成一個極權嘅政府，佢完全停止晒同香港市民嘅任何對話，完全忽視晒香港人嘅訴求。所以即使你話換咗個特首都好喇，我都唔覺得係可以解決到而家呢個困局囉。"

["9A: Understood. Well, you know that the public is not thinking much of our government now. Well, can you think of any ideas or ways that can help the government with their low support (rate)?

10B: Actually, if the government really wanted to do something, I believe they would have done it on June 9th last year already. If it really wanted to solve this problem, it should have struck up some public conversation with the people of Hong Kong at a much earlier stage. It is exactly because it is - - has turned into a totalitarian government, it stopped having conversation with the citizens of Hong Kong and completely ignored the demands from the people of Hong Kong. Therefore, even if, say, (we

[199] [TB8/A114B/2306-7/9-10]; CT [TB8/A114C/2314-5/9-10]

> have) the Chief Executive changed, I don't think the current plight can be resolved."]

- On 13 July 2020, in her Facebook[200], she wrote:

> "抗爭派參與選舉，早就下定決心無論議會內外都要用盡一切手段令暴政付出沈重代價。無論日後情勢如何，能與香港人並肩係榮幸更係初心，極權面前。我地要團結一致，我地休戚與共。一息尚存，抗爭到底！"
>
> ["(When) the resistance camp runs for the election, (they) have long determined to use all possible means, both inside (and) outside the Council, to cause the tyrant regime to pay high prices for (what they have done). In the future, no matter how the future situation may hold, not only that it is my honor to walk with Hongkongers shoulder to shoulder always, but it is also (my) original intention. In the presence of totalitarianism, we should be united (in our efforts) to share weal and woe. We will protest relentlessly even with (our) last breath."]

592. Having considered the totality of the evidence, we are driven to the conclusion that D47's aforesaid were no mere "negotiation strategy". To the contrary, we find that D47 had no intention to negotiate with the Government which she considered was an "tyrant regime". We are sure that D47 would do what she said she intended to do, i.e., to act together with other pro-democrats in LegCo and vote against the budgets indiscriminately regardless of their merits in order to seriously undermine the power of the Government, it was also her intention to seriously undermine the legitimacy of the Government. We are left with no doubt that D47 did not change her mind after the promulgation of the NSL.

---

[200] [TB8/A117A/2339]; CT [TB8/A117B/2343-4]

Conclusion

593. Despite the fact that D47 had not taken part in any of the coordination meetings, on the basis of the evidence above, we come to the sure conclusion that:

(1) before the promulgation of the NSL, there was already an existing agreement (with D1 and PW2 as the central figures) that the Scheme be pursued;

(2) before the promulgation of the NSL, D47 was already a knowing party to the Scheme;

(3) after the promulgation of the NSL, she remained as a party to the Scheme; and

(4) D47 had the intention to subvert the State power, with that intention she participated in the Primary Election in pursuance of the Scheme and with the intention to carry it out.

Therefore, we find D47 guilty of the charge.

D5 Ng Gordon Ching-hang

594. Mr Shek (and with him, Ms Leung and Mr Li) raises the following in D5's defence:

(1) D5 did not agree to the Scheme and he was not a party to it;

(2) even if he was a party to the Scheme, the Scheme did not involve any "unlawful means" within the meaning of NSL 22(3); and

(3) in any event, he did not have any intention to subvert the State power at the material time.

Consideration of the evidence

595. Having heard counsel, we ruled on 15 June 2023, that the aforesaid emails and the interview are admissible as "mixed statements", the respective weight of its various parts would be assessed.

596. D5 has a clear record. Although D5 did not give evidence, there is the aforesaid interview which D5 gave to a reporter. Therefore, in assessing the evidence, we give ourselves the "good character direction" in D5's favour as regards both the propensity and credibility limbs.

Knowledge of the Scheme

597. Even D5 did not attend any of the coordination meetings, there is undisputed evidence showing that D5 was well aware that the Coordination Agreements of the five geographical constituencies contained references to the "use" or "active use" of the power conferred by the BL, including the power to veto the budgets, to force the Government to response to the Five Demands. See D5's Facebook post on 10 May 2020[201], where he wrote:

> "先前傳聞令一眾候選人爭持不下的「共同綱領」，也達到完滿結果。所有參與會議的五區候選人都同意簽署協議書「會（積極）運用」基本法賦予權力, 包括否決財政預算案。各區因應候選人的要求換了不同字眼，但其實無損大局，這是民主派團結路上的一大突破。"

[201] [TB5/24A/2835]; CT [TB5/24B/2837]

> ["The "common programme", which was rumored to be a contentious issue for all the candidates, has also reached a satisfactory result. All the candidates from the five districts, who participated in the meeting, agreed to sign an agreement to "[actively] use" the powers granted by the Basic Law, including vetoing the budget. Each district changed the wording in response to the candidates' requests, but this did not harm the overall situation. This was a breakthrough on the road of unity among the pro-democracy camp."]

Besides, there is also clear statements by D5 in his interview on 17 June 2020 showing that D5 was aware of the IWR declaration which he referred to as "攬炒書" ("Mutual Destruction Agreement") and that he knew that the Democratic Party had not signed it.[202] In our view, the only reasonable inference to be drawn is that D5 was aware of the contents of the IWR declaration. In the IWR declaration, it was stated that:

> "the Common Program, which was agreed upon at the Primary Election Coordination Meeting, forms the basis for cooperation between the candidates. The Program has taken into account differences in stances, and formed the largest common ground among the resistance camp spectrum."

There were also evidence of the WhatsApp messages between D5 and D1 and what D5's said in his own Facebook (all of which, we will come to in due course). Based on all the relevant evidence admissible against D5, we draw the inference, which we find to be irresistible, that he had knowledge of the Scheme and also that it was the objective of the Project 35+.

---

[202] Transcript D5-4A (CT D5-4B), Counters 6-8.

Whether D5 agreed to the Scheme

598. An issue arises, because of what D5 said in his email exchanges with "Anthony Yau" and later in the interview, as to whether he agreed to the Scheme at the material time. Having examined the evidence and considered submissions of counsel, we come to the decision that there is not any reasonable doubt that D5 agreed to the Scheme. Our reasons are as follows:

(1) Whilst D5 told "Anthony Yau" in the email exchanges that his priority was to achieve 35+, he did not object to the latter's idea of vetoing all government bills. Similarly, in the interview on 17 June 2020, what D5 said was that if he was put to choose between the IWR declaration and the Primary Election, he could only choose the Primary Election. However, that is not the same as he disagreeing with the Scheme. It was just that D5 considered that achieving 35+ in the LegCo was the basis for any viable strategies.[203] Moreover, given that "Anthony Yau" was apparently a stranger who was previous not known to D5, we find it unlikely that D5 would tell him everything. On the other hand, we consider that a greater weight should be attached to the extensive WhatsApp exchanges between D5 and D1 which we will come to shortly.

(2) It is also noteworthy that on 10 May 2020 when D5 learnt that a consensus was reached in the coordination meeting of the five geographical constituencies with the adoption of the

---

[203] Ibid.

formula of either "use" or "actively use" the powers granted by the Basic Law, including vetoing the budget, he considered it to be "good news".[204] Later, in the interview, concerning the IWR declaration he said, "Well, that agreement was, a few weeks ago, was, everyone was, rumour has it that, everyone was willing … willing to sign? Well, at the time I was also delighted, …".[205] The point is that D5 would not have been "delighted" if he did not agree with the IWR declaration.

(3) In D5's computer, the Police extracted an article of "Lee Bak Lou"[206] where it was written:

> "中華兵家巨著《孫子兵法》，英譯《The Art of War》，可見謀略本是一門藝術。
>
> 但很多有意參選人，似乎都只顧攪炒目標，而忘記了過程中所需的謀略藝術。<u>在中共這强大敵人面前，我們不單要做「攪炒行動者」，我們每人都要成爲「攪炒藝術家」</u>！
> 大家要記著，要議會攪炒，首要條件是人數過半，35+。沒有 35+，就算您幸運衝得進議會，能做的根本有限，徒勞無功。"
>
> ["The Art of War is a masterpiece of Chinese military strategists. It can be seen that strategy is an art in itself.
>
> However, many interested candidates seem to focus only on the goal of mutual destruction and forget the art of strategy required in the process. <u>In the face of the CPC, this powerful enemy, we should not only be a "Mutual Destruction Activist", but also become a "Mutual Destruction Artist" !</u>

---

204 D5's Facebook post dated 10 May 2020: [TB5/24A]; CT [TB5/24B]

205 Transcript D5-4A, Counter 8

206 [TB5/51A/4052]; CT [TB5/51B/4053-4056]

> Please bear in mind that the primary condition for mutual destruction with the Council is to have the majority of seats, 35+. Without 35+, even if you are lucky enough to enter the Council, what you can do is, after all, limited and futile."]
>
> (Emphasis supplied)

The same article was published in the Inmedia on 13 April 2020.[207]

The above shows that D5 was in agreement with those who embraced the idea of "mutual destruction". The difference between D5 and those he described as *"Mutual Destruction Activist"* was just one of priority and tactics.

(4) On 9 May 2020, in the Campaign's Facebook and Instagram D5 described the CCP as an unscrupulous antagonist and he appealed to the voters to resist and fight:

> "有人話，內會都搞成咁 35+有咩用？
> 中共都會使橫手
> 我會話，所以更加要35+ 逼中共出手
> 令支持民主勢力 出師有名"[208]
> ["Some people say, the House Committee ended up like this What is the use to get 35+? The Chinese Communist Party will use unscrupulous means
> I would say, that's why we need 35+ more, to force the Chinese communist Party to interfere, and to render the pro-democracy camp's to have a just cause]

---

[207] [TB5/19A/2709-1712]; CT [TB5/19B/2713-2732]

[208] [TB5/2A/403-405]; CT [TB5/2B/1336] and [TB12/1/107]; CT [TB12/1A/446]

"初選係為咗拎35+ 亦都係畀大家選出 有戰意嘅議員 幫手出力抗敵"[209]

["The Primary Election aims to secure 35+, and also to help select council members who are willing to fight vigorously against the opponent"]

(Emphasis supplied)

(5) 10 May 2020, in the Campaign's Facebook [210] and Instagram[211], D5 called for support of the candidates who embraced "mutual destruction":

"所有初選候選人已經同意共同綱領 同政府攪炒咁嘅初選 就係你值得嘅初選 唔係唔支持嘛？"

["All Primary Election candidates have agreed on the common guiding principles to seek mutual destruction with the government. This kind of Primary Election is what you deserve You will support it, right?"]

(Emphasis supplied)

(6) 10 May 2020, in the Campaign's Facebook [212] and Instagram [213], D5 stated that the purpose of the Primary Election was to "kick out the CCP"

"初選聯署抗剩票 踢走共黨需要你"

["Sign Primary Election Petition to
Counter Vote Splitting
Kicking out the CCP relies on you"]

---

209 [TB12/1/105]; CT [TB12/1A/444]

210 [TB5/2A/422]; CT [TB5/2B/1353],

211 [TB12/1/115]; CT [TB12/1A/454]

212 [TB5/2A/497]; CT [TB5/2B/1648]

213 [TB12/1/157]; CT [TB12/1A/535]

(7) On 17 June 2020, D5 said in the interview[214] that "resistance in the legislature", "street protests" and "international pressure" formed an "iron triangle". Thus, he considered the former was on a par with the latter two. Thus, he considered that the work of the pro-democrats in LegCo was to fight the Government and the CCP.

(8) On 3 July 2020, D5 put up a full front-page advertisement of the Campaign. Police discovered a transaction advice in D5's residence showing a transfer on 2 July 2020 of HK$135,000 to Apple Daily[215].

(9) On 9 July 2020, which was after the promulgation of the NSL, D5 reposted in the Campaign's Facebook[216] D1's article in reply to the query of Mr Tsang Kwok-wai, the Secretary for Constitutional and Mainland Affairs. In that article, D1 reiterated that,

> "Candidates who participate in the Primary Election concur with (the intention) to hold the SAR government accountable for the Legislative Council through obtaining majority seats in the Legislative Council and exercising the power conferred on the Legislative Council by the Basic Law, including vetoing the Budget."

The inference was that D5 agreed with what D1 said in that article.

---

214 Transcript D5-4A, Counter 14

215 [TB5/41/3000-3001]

216 [TB5/2A/734]; CT [TB/2B/2164]

599. Having considered all the relevant evidence as a whole, we find that what D5 said in the Campaign's Facebook and Instagram cannot be explained on the basis of mere election rhetoric. Furthermore, we find that the only reasonable inference to be drawn is that D5 in fact agreed that the pro-democrats, if elected into the LegCo, were to carry out the Scheme and to act against the Government and the Communist Party of China. As regards what D5 said in his emails with "Anthony Yau" and in his interview which purported to show that he was neutral on issues of vetoing government bills and the budget, they were exculpatory statements not having been subject to cross-examination. In view of the totality of all the evidence as discussed above, we consider that little weight could be attached to those exculpatory statements.

Party to the Scheme

600. As aforesaid, it would be sufficient for the prosecution to prove the charge against D5 if D5 agreed with D1 to carry out the Scheme with the requisite intention. If that could be proved, then it matters not that D5 was not known to the other defendants or alleged co-conspirators.

601. In evaluating the evidence, we bear in mind that the Campaign was D5's initiative, that D5 did not take part in the organisation of the "Project 35+" or any of the coordination meetings and that he was not a candidate. On the other hand, we take into account the following:

(1) From the WhatsApp exchanges of D5 and D1 between 19 January 2020 and 1 August 2020[217], an inference could be drawn that, apart from frequent communication through WhatsApp messages, the two of them also had a face to face meeting and telephone conversations, all of which were about the Primary Election[218].

(2) On 28 February 2020, D5 thanked D1 for what he did for Hong Kong and offered to help D1 at the best he could[219]. D5 also expressed the hope that the Primary Election would be successful[220].

(3) On 5 March 2020, D5 sent to D1 documents which he said he and his team had prepared with a view to promote the Primary Election[221]. D1 replied by saying that D5's thinking was close to his[222].

(4) On 6 April 2020, D5 shared with D1 the hyperlink of the Campaign's Facebook page[223]. D1 shared that hyperlink in his own Facebook page on the same day[224] and informed D5

---

217 [TB12/2]; CT [TB12/2A]

218 See eg,
[TB12/2/775-8/4-13]; CT [TB12/2A/821-3/4-13]
[TB12/2/785-6/39-42]; CT [TB12/2A/831-2/39-42]
[TB12/2/794/74]; CT [TB12/2A/845/74]
[TB12/2/798/85]; CT [TB12/2A/849/85]
[TB12/2/802/103]; CT [TB12/2A/853/103]

219 [TB12/2/780/21]; CT [TB12/2A/826/21] & [TB12/2/781/25]; CT [TB12/2A/827/25]

220 [TB12/2/780/22]; CT [TB12/2A/826/22] & [TB12/2/781/27]; CT [TB12/2A/827/27]

221 [TB12/2/778/14-15]; CT [TB12/2A/823/14-5] & [TB12/2/782/29-33];
CT [TB12/2A/829-30/29-33]

222 [TB12/2/784/35]; CT [TB12/2A/830/35]

223 [TB12/2/787/48]; CT [TB12/2A/834/48]

224 [TB1/47/605]; CT [TB1/47B/607]

about it[225]. D5 said he would keep D1 posted of the progress of the online petition[226]. In the Campaign's Facebook, D5 in return urged other people to visit D1's Facebook, to leave message to encourage D1 and to support the Primary Election[227].

(5) On 5 May 2020, despite the fact D5 was not an attendee of the coordination meetings in any of the constituencies, D1 informed D5 about what had been discussed in the coordination meetings about the number of notes that each voter could cast in the Primary Election[228].

(6) On 15 May 2020, D5 informed D1 that he would want to issue a public letter to all candidates stating that the Campaign would appeal to voters not vote for a candidate if he/she failed to abide by their mutual agreement. On 18 May 2020, D5 sent the drafts to D1 for comments. D1 agreed with the drafts in Chinese and in English[229]. At D5's request, on 20 May 2020 D1 broadcasted the Chinese version of the letter to the candidates of the Primary Election and D5 was informed about it[230].

(7) On 9 June 2020, D1 sent D5 the hyperlink of the GoGetFunding for the Primary Election and asked D5 to spread it[231]. D5 agreed. Two days later, D5 told D1 that he

---

225 [TB12/2/788/50]; CT [TB12/2A/836/50]

226 [TB12/2/789/53]; CT [TB12/2A/837/53]

227 [TB5/2A/104]; CT [TB5/2B/972]

228 [TB12/2/791/59-61]; CT [TB12/2A/841-2/59-61]

229 [TB12/2/796/79-96]; CT [TB12/2A/847-52/9-96] & [TB12/4/884]; CT [TB12/4A/885]

230 [TB12/2/800/95]; CT [Tb12/2A/851/95] and [TB3/85A/1913/403-4]; CT [TB3/85B/2116/403]

231 [TB12/2/801-2/100-102]; CT [TB12/2A/852-3/100-102]

had appealed to the public to support the crowdfunding for the Primary Election on all of their media platforms[232].

(8) In June 2020, D5 offered to look for volunteers to man polling stations and to procure iPads for use in the Primary Election[233] and he received from D1 information of the polling stations and observers[234].

(9) On 3 July 2020, which was after the promulgation of the NSL, D5 informed D1 that he had placed a front page advertisement[235].

(10) D5 recruited and sent volunteers to man the polling stations[236].

(11) On 12 July 2020, in the Campaign's Facebook D5 called on the candidates "to behave themselves and respect the rules of the Primary Election and the choice of voters"[237].

(12) On 15 July 2020, in the Campaign's Facebook[238], D5 declared that the Primary Election was successful,

> "But the battle to Say No to Primary Dodgers has just begun".

---

232 [TB12/2/803/105-107); CT [TB12/2A/856-7/105-107] and [TB5/2A/576]; CT [TB5/2B/1756, 1777]

233 [TB12/2/804/108-109]; CT [TB12/2A/857/108-109] & [TB12/2/808-812/123-131]; CT [TB12/2A/860-868/123-131]

234 [TB12/2/808/122]; CT [TB12/2A/860/122]

235 [TB12/2/817/148-149]; CT [TB12/2A/876-877/148-149]

236 [TB5/9B/2526]; CT [TB5/9C/2533] and [TB5/10B/2538]; CT [TB5/10C/2554]

237 [TB5/2A/797]; CT [TB5/2B/2276]

238 [TB5/2A/807]; CT [TB5/2B/2287]

Then, on 20 July 2020, in the Campaign's Facebook[239] D5 said,

> "The target seats as the upper limit. Only Kowloon East insists to declare that the Primary Election result is not counted. 5 teams will be sent to run again until the last poll on 2nd September.
>
> Most candidates from the pro-democracy camp are very united. Hopefully, candidates of Kowloon East will also consider the overall situation!
>
> For the overall situation, if candidates are reluctant to stay united, voters have to choose for them. Respect the Primary Election result, *ALL IN* the first three in the primary!
>
> We hope that everyone approves of this principle of "Within *N* are the principals. Outside *N* are the backups" and spread it out, so as to unite the pro-democracy camp sooner and deal with the opponent as one!
> Please spread the word!"

Here, the point is not whether what D5 said about Kowloon East constituency was true. The point is that D5 wanted the Primary Election to achieve its goal of obtaining a majority in LegCo by asking that those who lost in the primary should honor their promise not to run in the LegCo election.

(13) On 28 July 2020, in response to D1's dismissal by HKU, D5 wrote in the Campaign's Facebook[240] praising D1 and said that:

---

239 [TB5/2A/822]; CT [TB5/2B/2301, 2381]

240 [TB5/2A/835]; CT [TB5/2B/2403]

> "The plans proposed and implemented (by him) more often than not hit the right nail on the head of those in power and threaten the legitimacy of their governance. For this, he has become a thorn in the flesh for bigwigs."

D5 also said that,

> " "The Say No to Primary Dodgers" team fully supports Professor Benny Tai Yiu–ting and strongly condemns the utterly ugly political interference of the HKU council."

602. Based on all of the above and coupled with our previous finding that D5 had all along been aware of and agreed to the Scheme, we draw the inference, which we find to be the only reasonable one, he was not acting independently. We have no doubt that before 1 July 2020, D5 and D1 had already agreed that the Scheme be pursued.

603. Even though the Campaign might have started off as D5's own initiative, we are sure and we find that he formed an agreement with that D1 that the Scheme be carried out. Moreover, based on the evidence before us, despite the fact that (apart from D1) the other people involved in the "Project 35+" were not aware of D5's involvement, D5 knew that (apart from D1) there were those other people (namely the candidates) and that the activity which he undertook extended beyond his own dealings with D1 at the centre. D5 willingly and intentionally continued to facilitate the pro-democrats in obtaining a majority in LegCo by taking steps to ensure that only those who joined and won in the Primary Election would take part in the coming LegCo election. We have no doubt that D5 knew that the objective of the Scheme was to use the power to veto the budgets to compel the Chief Executive to accede to the "Five Demands Not one less". We are sure that D5 intended that the Scheme

be carried out and he was fully aware that the Scheme, if carried out, would ultimately lead to the twice dissolution of the LegCo and the consequential stepping down of the Chief Executive.

604. Thus analysed, we find as a fact that D5's agreement with D1 was the same as the one which D1 had with others, so that the former and the latter were a single common design: *R v Mehta (Subhash)*[241]. Furthermore, as the facts giving rise to the irresistible inference that D5 was a party to the agreement covered the period both before and after the promulgation of the NSL, we find also that he continued to be a party to that agreement after the promulgation of the NSL and the Primary Election.

Intention to Subvert

605. We have already listed out evidence, consisting of what D5 said in his article published in Inmedia on 9 April 2020 and in the Campaign's Facebook in May 2020 which shows that D5 agreed to the Scheme. In our assessment, the same evidence also shows that D5 embraced the idea of "mutual destruction", this is to say, to cause a serious interference in, disruption or undermining of the performance of the duties and functions of the Government, should it refuse to accede to the Five Demands. There was nothing to show that D5 had changed his mind in this regard after the promulgation of the NSL. Instead, the undisputed evidence is that he continued to provide active assistance to D1 after 1 July 2020. After the Primary Election, he declared that "the battle to Say No to Primary Dodgers has just begun". After all, the "Say

[241] [2012] EWCA Crim 2824

No to Primary Dodgers" campaign was about the then upcoming official LegCo election.

606. In all the circumstances, despite what D5 said in his emails with "Anthony Yau" and in his interview, we draw the inference which we find to be the only reasonable one that D5 continued to harbour the intention to subvert the Government after the NSL had come into operation.

607. As aforesaid, we reject the submission that "unlawful means" is an mental element. In our judgment, for the purpose of establishing guilt, it matters not that the defendants did not know that the means which was intended to be employed to achieve the agreement was unlawful.

Conclusion

608. To conclude, we are sure and we find that:

(1) before the NSL was promulgated, D5 had already agreed with D1 that the Scheme be pursued;

(2) after the NSL was promulgated, D5 remained as a knowing party to his agreement with D1 to carry out the Scheme as he was before;

(3) D5's agreement with D1 was the same agreement that D1 had with PW1, PW2 and other people and D5 knew that the activity which he agreed to undertake extended beyond his own dealings with D1;

(4) D5 continued to harbour the intention to subvert the State power; and

(5) with that intention, he continued to carry out his part of the Scheme after the promulgation of the NSL and had the intention to carry the Scheme out.

Therefore, we find D5 guilty of the charge.

Summary of the Outcome

609. Given all the reasons stated above, the following defendents are convicted of the charge, namely D5, D8, D10, D11, D14, D17, D24, D33, D36, D37, D38, D41, D43 and D47.

610. The following defendants are acquitted of the charge, namely D16 and D46.

(Andrew Chan) Judge of the Court of First Instance High Court	(Alex Lee) Judge of the Court of First Instance High Court	(Johnny Chan) Judge of the Court of First Instance High Court

Mr Jonathan Man, DDPP, Mr Anthony Chau, DDPP, Mr Andy Lo, ADPP (Ag), Ms Karen Ng, SPP and Ms Crystal Chan, SPP (Ag) of the Department of Justice, for the Prosecution/HKSAR

Mr Randy Shek, Ms Yvonne Leung and Mr Colman Li, instructed by O Tse & Co, for D5 (A18) Ng Gordon Ching-hang and D47 (A17) Yu Wai-ming Winnie

Mr Hectar Pun, SC, Mr Anson Y Y Wong and Ms Chan Hiu-in, Ferrida, instructed by Kenneth Lam, Solicitors, assigned by the Director of Legal Aid, for D8 (A1) Cheng Tat-hung and D41 (A13) Leung Kwok-hung

Mr Cheung Yiu-leung and Mr Fong Yan-hon, Enoch, instructed by Johnnie Yam, Jacky Lee & Co, assigned by the Director of Legal Aid, for D10 (A2) Yeung Suet-ying Clarisse

Ms Money Lo, instructed by Paul W Tse, for D11 (A3) Pang Cheuk-kei

Mr Yuen Wai-ming, Anthony, instructed by Chan & Chan, assigned by the Director of Legal Aid, for D14 (A4) Ho Kai-ming Kalvin

D16 (A5): Lau Wai-chung appeared in person

Mr Erik Shum and Ms Wong Yuen-pui, Christy instructed by Ho, Tse, Wai & Partners, for D17 (A6) Wong Pik-wan and D38 (A12) Lam Cheuk-ting

Mr Wong Ting-kwong, Peter and Ms Wong Lok-kei, Larissa instructed by Tang, Wong & Chow, assigned by the Director of Legal Aid, for D24 (A7) Sze Tak-loy

Mr Trevor Beel and Miss Lau Yik-kan, Priscilla instructed by Ip, Kwan & Co, assigned by the Director of Legal Aid, for D33 (A9) Ho Kwai-lam

Mr David W K Ma, Mr Richie Lai and & Ms Denise Or, instructed by O Tse & Co, for D36 (A10) Chan Chi-chuen Raymond

Mr Chan Sai-kit, Kevin and Ms Leung Lok-man, Teresa instructed by Chan & Chan, assigned by the Director of Legal Aid, for D37 (A11) Chow Ka-shing

Mr Richard H L Yip, Mr Elson Tong, and Mr Steve Cheung, instructed by JCC Cheung & Co. for D43 (A15) Or Yiu-lam Ricky

Mr Kwan Man-wai, Steven and Ms Charlotte O T Chan, instructed by C&Y Lawyers, assigned by the Director of Legal Aid, for D46 (A16) Lee Yue-shun

Annex C

Reasons for Ruling on Timing of Sentence

1. Of the 31 defendants ("PG Ds") who have indicated their guilty plea to the charge, 9 PG Ds (namely D6, D13, D15, D18, D27, D31, D34, D39 and D45) indicated they wish to be sentenced before the trial; 3 PG Ds (namely D2, D3 and D4) indicated that they wished to be sentenced after the conclusion of the trial; 18 PG Ds (namely D1, D7, D9, D12, D19, D20, D21, D22, D23, D25, D26, D28, D29, D30, D32, D35, D40 and D44) took a neutral stance (D1 and D21 indicated that in the event we decide that some of the PG Ds to be sentenced before the trial, they would like to be sentenced before the trial as well). D42 by a letter dated 2 February 2023 indicated that he would plead guilty to the charge. D42 did not state his stance on this matter.

2. The prosecution took the position that all PG Ds should be sentenced after the conclusion of the trial and the verdict.

3. We heard counsel submissions on the matter. We ruled on 11 January 2023 that all PG Ds should be sentenced after the conclusion of the trial and the verdict with reasons of our decision to be provided later, which we now do.

4. In the present case, we see no reason why this Court should depart from the general principle that when in a trial of more than one defendant, some pleaded not guilty and the others pleaded guilty, it was desirable that the sentence be postponed until the end of the trial unless there was a compelling reason to depart from the usual practice (*R v Chan Kwok Hung* [1996] 4 HKC 559 (CA)). The above rule applies whether

the defendants who pleaded guilty would give evidence at the trial of the others or not.

5. For those PG Ds who have offered to give evidence for the prosecution at trial, it is trite law that they should be sentenced only after they have testified and preferably at the conclusion of the trial together with the others (*R v Ma Sai Chuen & Another* [1984] HKC 443). In our judgment, it is undesirable some PG Ds are to be sentenced before the trial whilst some other PG Ds are to be sentenced after trial of those who pleaded not guilty.

6. The primary argument of the 9 PG Ds that they should be sentenced before trial is that there is a real risk that they would have served the whole or a substantial part of the sentence should their sentencing be adjourned to the end of the trial. Given the fact that they were refused bail since their first taken to Court on 1 March 2021, they would have been remanded for around 2 years and 3 months by early June 2023, if the trial can be finished within the scheduled time.

7. In the sentencing process, we shall follow the three-tier penalty regime provided by the NSL. The role of the defendant, the degree of participation and the nature of the offence etc., are the matters that we have to take into consideration in categorising the defendant in question according to the three-tier penalty regime before a decision is made about the sentence to be passed. In our judgment, the said consideration should be done after the conclusion of the trial and the delivery of verdict. By sentencing all defendants after the conclusion of the trial and the delivery of verdict, this Court can have a better understanding of the respective Summary of Facts admitted by the PG Ds

and their relative culpability. The risk of making a wrong assessment of the culpability and the role played by each defendant to be sentenced can be lessen.

8. With respect to counsel for D39, we do not see how the composition of legal representatives for the trial could be affected "by the potential interpretation to be issued by the NPCSC as to the scope and eligibility of legal representatives in national security cases" (para 6(c) of D39's submissions).

9. All matters taken into consideration, we see no compelling reason to depart from the general rule that all defendants should be sentenced after the conclusion of the trial and the delivery of the verdict. For the reasons given, we ruled that the sentencing of the PG Ds be adjourned after the conclusion of the trial and the delivery of the verdict.

Annex D

Reasons for Ruling on Admissibility of Evidence Sought under the Co-conspirator's Rule ("**the Rule**")

1. After the opening speech of the prosecution, upon enquiry by the Court, the prosecution confirmed on 13 February 2023 (Day 6 of the trial) that they sought to invoke the Rule in order to adduce evidence which, they say, were acts and declarations of one or more of the alleged co-conspirators in furtherance of the conspiracy charged. The prosecution wanted to invoke the Rule to assist them to prove:

(a) the extent and degree of participation of the defendants in the said conspiracy; and

(b) the nature and extent of the said conspiracy.

2. As objections were indicated by all of the defendants in this trial, we decided to hear the disputed evidence de bene esse. In order for us to rule on the prosecution's application, we asked the prosecution to:

(1) identify the date of formation of the alleged conspiracy and the respective dates on or by which the defendants allegedly became parties to that conspiracy;

(2) identify all the alleged co-conspirators not named in the charge whose acts and declarations were upon by the prosecution; and

(3) identify all items of evidence in question which the prosecution says are to be admissible pursuant the Rule.

3. We also gave directions for the filing of written submissions. In particular, noting that the conspiracy charge was brought under the NSL and that many of the acts and declarations in question were said to have been made prior to the promulgation of the NSL, parties were requested to assist the Court as to whether the Rule was applicable to pre-NSL acts and declarations.

4. As regards (1) above, it turned out that the prosecution was unable to identify either the date for the formation of the alleged conspiracy or the dates the defendants joined that conspiracy. Instead, the prosecution provided a series of alternative dates. We fully appreciated that for the purpose of establishing guilt, the prosecution was not required to pinpoint the exact moment at which the conspiracy began or at which each individual defendant joined in: HKSAR v Chen Keen. Yet, we had to say that the approach taken by the prosecution (namely providing a series of alternative dates) was not particularly helpful for the present purpose. This is because the time at which a co-conspirator joined the conspiracy bears upon how the Rule would operate against him.

5. As regards (2), the prosecution named Luke Lai ("**Lai**"), Choy Chak Hung ("**Choy**") and Dennis Kwok ("**Kwok**"), none of them having been mentioned at all in the particulars of the charge, as co-conspirators.

6. As regards (3), the list of items was first made available on 27 February 2023, but was subsequently amended on 3 March 2023 and on 13 April 2023. The final version becomes Annex I to the Prosecution's Submission dated 22 May 2023. Annex I consists of 9 schedules totaling 326 pages. We do not intend to go through the listed

items here one by one. It suffices for us to say that we have considered each and every one of it. Very briefly stated, the items can be divided into the following categories:

- various articles written and posted by D1 (from TB1) and those of PW1 (from TB2);
- WhatsApp messages retrieved from PW2' mobile phones (from TB3);
- articles from the Website and Facebook of the "Say No to Primary Dodgers" (from TB5);
- footages of various press conferences respectively held by the Civic Party, by "Project 35+" and others prior to the Primary Election and also audio recordings of CMs of NTW (from TB6);
- relating to election campaigns of various parties and election forums (from TB8);
- footage of the press conference of the Resistance Camp held on 15 July 2020 (from TB9); and
- a document seized from D46 (from TB10).

7. On 29 May 2023, we heard the submissions of the parties. By which time, save for a handful of formal witnesses who were police officers, the bulk of prosecution evidence had been adduced. Having carefully considered the submissions of the parties, both written and oral, on 2 June 2023 we made the following ruling:

> " Acts and declarations done or uttered by an alleged co-conspirator before the 1 July 2020 are inadmissible as an exception to hearsay made under the co-conspirator rule.

> However, we are of the decision that such acts and declarations are admissible for non-hearsay purpose.
>
> In respect of acts and declarations done or uttered on or after 1 July 2020, we are satisfied that the threshold requirements as stipulated in the case of *Vivien Fan* are met in respect of each and every defendant. Hence the co-conspirator rule is applicable.
>
> We are only dealing with the admissibility of those disputed evidence under consideration. As to its weight, we have not yet made any decision.
>
> Given the above determinations, we are also of the decision that the audio and video footage capturing the coordination meeting of New Territories West are not admissible under the co-conspirator rule but admissible for non-hearsay purpose. We consider that to be relevant to the charge under consideration. We also do not see any sufficient grounds in exercising our discretion to exclude."

We said that reasons would be given later. This, we now do.

Legal principles

8. There is little dispute between the prosecution and the defence as to the relevant legal principles which is summarised at paragraphs 38-12 & 13, *Phipson on Evidence*, 20th edition. In brief, where two persons are engaged in a common enterprise, the acts and declarations of the one in pursuance of that common purpose are admissible against the other. The Rule applies in both civil and criminal cases and in the latter whether there is a charge of conspiracy or not, provided that the crime charged was committed in pursuance of a conspiracy, i.e. an agreement of two or more persons to commit it. It is immaterial whether the existence of the common purpose or the participation of the person therein be proved first although either element is nugatory without the other.

9. The Rule has been affirmed in Hong Kong: *Oei Hengky Wiryo v HKSAR (No.2)*[1]; and *Vivien Fan & Ors v HKSAR*[2]. In particular, in criminal cases the Rule holds, although the acts and declarations proceeded from persons not charged, or were done in the absence of the party against whom they are offered, or without his knowledge; or even before he joined the combination; and the possession of one conspirator is that of all. Where a person joins a conspiracy after it has been formed, the acts and declarations of co-conspirators made before he/she joined the conspiracy are admissible against him/her. However, they are only admissible against the newly joined co-conspirator to prove the nature and extent of the conspiracy, but not his/her own extent and degree of participation therein: see *R v Pang Tat-sing*; *R v Au Shui Yuen Alick*; and *Phipson on Evidence*, *supra*[3].

10. Thus, the Rule in effect operates to allow what might otherwise be hearsay[4] (and therefore not admissible as proof of the truth of its contents) into evidence of the conspiracy. As Bokhary PJ, giving the judgment of the Court of Final Appeal in *Vivien Fan v HKSAR*[5], said:

> "81. … The co-conspirators rule is sometimes thought of as an exception to the rule against hearsay, but is more accurately understood as an approach under which what might otherwise be hearsay operates as evidence. Where the foundation for resorting to it has been laid, the co-conspirators rule operates as a rule whereby evidence of the acts and declarations of one or

---

1 (2007) 10 HKCFAR 98.

2 (2011) 14 HKCFAR 641.

3 At paragraphs 31-46 and 38-13.

4 The hearsay rule was succinctly explained by McHugh NPJ, giving the judgment of the Court of Final Appeal in Oei Henky Wiryo v HKSAR (No 2), supra, who held at [35]:

"…a reasonable working definition of the hearsay rule is that an oral or written assertion, express or implied, other than one made by a person in giving oral evidence in court proceedings is inadmissible as evidence of any fact or opinion so asserted."

5 Supra, at §81 of the judgment.

> more conspirators in furtherance of a conspiracy may be adduced to prove the extent and degree of participation of another or others in the conspiracy and the nature and extent of the conspiracy." (emphasis added)

11. A major justification for the Rule is said to be the doctrine of "agency". Thus, it was held in *Ahern v R*[6]:

> "That basis is provided in an appropriate case by the rule which states that when two or more persons are bound together in the pursuit of an unlawful object, anything said, done or written by one in furtherance of the common purpose is admissible in evidence against the others. The combination implies an authority in each to act or speak on behalf of the others: *Tripodi* at (7). Thus anything said or done by one conspirator in pursuit of the common object may be treated as having been said or done on behalf of another conspirator. The principle lying behind the rule is one of agency and the closest analogy is with partners in a partnership business. Indeed, conspirators have been described as partners in crime. The principle of agency has a particular application in cases of conspiracy where preconcert is the essence of the crime."

12. Another justification for the Rule is said to be the concept of "ratification" in relation to the admission of a co-conspirator's declarations against people who were not part of the common purpose at the time they were spoken: *R v Mahutoto (No. 2)*[7]:

> "After all, how could the late-comer have authorised the co-conspirator to speak on his or her behalf in furtherance of a common purpose to which the late-comer had not then subscribed? The answer lies in the concept of ratification. When a person decides to join a conspiracy after its inception, he or she is taken to have accepted the plan as it has developed and the steps that have already been taken towards arranging the intended unlawful acts. He or she is therefore taken as impliedly ratifying those steps already taken by the co-conspirators in furtherance of the common purpose."

---

6 (1988) 165 CLR 87.

7 [2001] 2 NZLR 115, at §122.

See also *R v Container Materials Ltd*[8]; and *R v Jones & Others*[9].

13. In order for the Rule to apply, the following conditions have to be met:

(1) there is "independent" (i.e. evidence other than that which is admissible under the Rule) and "reasonable evidence" to show the existence of the conspiracy under consideration and that the persons concerned were parties to it: see *R v Au Shui Yuen Alick, supra* and *Vivien Fan v HKSAR, supra*; and

(2) the act or declaration in question was made by a party "in furtherance of the conspiracy": see *Phipson on Evidence, supra*[10]; *Tripodi v R*[11]; and *R v Jones & Others*[12]*, supra*.

14. As pointed out by the prosecution in their Written Submission, statements "in furtherance of the common purpose of the conspiracy" can take many and various forms, example includes recruiting potential co-conspirators; bringing a co-conspirator up-to-date on the progress of the operation in order to arrive at an agreed course of action; seeking to control damage to an on-going conspiracy; and attempting to conceal the criminal objectives of the conspiracy: *Phipson on Evidence, supra*[13]. In our judgment, subject to what we have said on Ground (a), the acts and declarations under consideration could fall within one or more of the aforesaid categories.

---

8 (1940) 74 CCC 113, §128-9.

9 [1997] 2 Cr App R 119, §133-4.

10 At paragraphs 31-45 & 31-46.

11 (1961) 104 CLR 1.

12 Supra, at §130.

13 At paragraphs 31-45 & 31-46.

15. Last but not least, we are fully alive to the fact that the Court retains a residual discretion to exclude evidence which is admissible under the Rule. As Bokhary PJ had the following to say in *Vivien Fan v HKSAR*, supra:

> "84. None of that is to suggest that it is always only a question of whether evidence comes within the co-conspirators rule. Evidence may be excluded even where it does come within the rule. As emerges from *Secretary for Justice v. Lam Tat Ming* (2000) 3 HKCFAR 168 at pp 178J-179A and *Kissel's case* at para.200, the imperative of a fair trial subjects even probative evidence to a judicial discretion to exclude the same on the basis that it is more prejudicial than probative. A court's overriding duty to ensure a fair trial invests the court with a judicial discretion to exclude even admissible evidence if doing so is necessary in order to secure a fair trial. The discretion is a judicial one, and its proper exercise depends on a fair and coherent presentation of the basis on which the rule is being invoked."

The grounds of objection

16. All of the defendants argue that:

(a) the Rule has no application to pre-NSL acts and declarations (**"the No Retrospectivity Ground"**).

Besides, D5, D10, D11, D14, D16, D17, D24, D33, D37, D36, D38, D46 and D47 ("the Majority of the Defendants") in their Joint Submission and D43 submit that:

(b) there is no "reasonable evidence" as the foundation for the Rule to apply ("**the Lack of Foundation Ground**");

The Majority of the Defendants also rely on the following additional grounds:

(c) most of the impugned evidence is unable to show the participation of the individual defendants in the conspiracy ("**the Irrelevance Ground**"); and

(d) there is no admissible evidence to show that any one of Luke Lai, Choy Chak Hung or Dennis KWOK were co-conspirators (the "**Not a Co-conspirator Ground**").

<u>As regards (a): The No Retrospectivity Ground</u>

17. This ground only concerns pre-NSL acts and declarations and is a pure question of law.

18. Although the NSL came into effect at 11pm on 30 June 2020, for the purpose of this trial and just the sake of convenience we will treat it as having come into effect on 1 July 2020, which is also the first day of the charge period. The prosecution submits that:

(a) there is evidence that the Scheme (as defined in the Charge) was formed as early as in late January 2020 by D1 and PW1 to compel the HKSAR Government to respond to the Five Demands by indiscriminately veto the budgets or public expenditure to be introduced by the Government ("the Common Purpose");

(b) whilst the defendants and other co-conspirators may have joined the Scheme at various times before the NSL, the Common Purpose remained unchanged throughout and the Scheme continued after the NSL;

(c) the acts and declarations under consideration were made in furtherance of the Common Purpose;

(d) whilst some of the acts and declarations under consideration were made before the NSL, they are admissible pursuant to the Rule as all along the co-conspirators shared the Common Purpose; and

(e) further or alternatively, by reference to overseas jurisprudence, the acts and declarations done or made at a time when the conspiracy had not yet become criminal are admissible under the Rule.

("**The Prosecution's Primary Contention**")

19. As a fall-back position, the prosecution submitted alternatively that in any event the prosecution is entitled to rely on the relevant acts and declarations under consideration for non-hearsay purposes. ("**The Prosecution's Secondary Contention**")

20. On the other hand, the argument of the defence on this ground can be summarised as follows:

(1) The Rule only applies to acts and declarations which took place during the pendency of the conspiracy: *Gillies on the Law of Criminal Conspiracy*[14];

(2) The NSL has no retrospective effect (NSL 39) and it follows that there cannot be a charge of conspiracy to commit an offence under NSL 22 before 1 July 2020;

---

[14] 2nd Edition, at p.161.

(3) Besides, the prosecution frames the charge period as commencing on 1 July 2020 and that necessarily implies that the defendants joined the conspiracy on or after that day; and

(4) Therefore, there is no foundation for the prosecution to invoke the Rule to cover pre-NSL hearsay acts or declarations, there being:

(a) no unlawful/criminal agreement in existence when the acts and declarations took place;

(b) no question of proving the nature and extent of the criminal conspiracy under the Charge; and

(c) no question of proving the participation of other conspirators and the extent thereof under the criminal conspiracy under the Charge.

Consideration on Ground (a)

Does the NSL have retrospective effect?

21. To start with, NSL 4 provides that:

> "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."

NSL 5(1) says,

> "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."

NSL 39 also says:

> "This Law shall apply to acts committed after its entry into force for the purpose of conviction and imposition of punishment."

22. The Court of Final Appeal stresses in *HKSAR v Lai Chee Ying*[15] 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 and that NSL 62 provides for possible inconsistencies, giving priority to NSL provisions in such cases. From the articles quoted above, it is plain to us that the provisions in the NSL are not intended to have any retrospective effect. Furthermore, reading the NSL as a whole, we are unable to discern any contrary intention being expressed or implied in it.

23. As regards local laws, we note that BOR 12(1), which lays down the general principle against retrospectivity of offences, is identical to International Covenant on Civil and Political Rights 15(1) and as such it is entrenched by BL 39: *Ng Ka Ling & Others v Director of Immigration*[16]. We note also that BOR 12(1) is couched in terms similar

---

15 (2021) 24 HKCFAR 33.

16 (1999) 2 HKCFAR 4, §§39-40.

to Article 7 of the European Convention on Human Rights ("ECHR"). It has been held by the European Court of Human Rights that the rule against retrospectivity is an essential element of the rule of law. That rule is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable: *SW v United Kingdom*[17]. We bear in mind that judgments of the European Court of Human Rights are not binding on Hong Kong courts. However, we consider that the judgment of *SW v United Kingdom* is relevant and helpful in that BOR 12(1) should, like ECHR 7, be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment. The prosecution does not suggest the otherwise.

24. Based on the above, we conclude that the NSL taken as a whole is not intended to and does not have retrospective effect.

The existence of the Scheme

25. We have carefully considered the submissions advanced on behalf of the defendants that there is no evidence as to when PW1 or

[17] ECtHR, Appl No. 20166/92 (dated 22.11.1995), at para 35.

PW2 reached an agreement with D1 to embark upon a course of conduct to indiscriminately veto the budgets or public expenditure in order to compel the Government to respond to the "Five Demands".

26. However, based on the evidence of PW1-PW3, we accept that there is more than reasonable evidence that D1 and PW1 had formed an agreement to embark upon the Scheme in furtherance of the Common Purpose. In particular, PW1 gives evidence that before the press conference on 26 March 2020, D1 had already prepared the "common programme/guiding principle". On the day before the press conference on 9 June 2020, D1 had distributed documents via various WhatsApp groups and PW1 received the documents. Besides, there is also evidence of the press conference of the Civic Party on 25 March 2020 in which leaders of the party made references to the Primary Election and the use of the vetoing power as a bargain chip for the "Five Demands". There can be little doubt that those were references to the "Project 35+" of D1 and PW1.

27. As to when the Scheme first came into existence, we are of the view that there was reasonable evidence that the Scheme was already in existence by the time of the aforesaid press conference, if not earlier. Based on the evidence of PW1 and PW2, we also readily to accept that there is reasonable evidence, that the Scheme continued for some time after the Primary Election.

Lawfulness of the Scheme before the NSL

28. What we are unable to accept is the prosecution's contention that the Scheme would necessarily amount to or involve the commission

of any offence prior to 1 July 2020. Our reasons are as follows. First, despite the amount of time that the prosecution team had been given to prepare their case and the exceptional length and details of the Prosecution Written Opening (running 88 pages and consisting of 193 paragraphs in total), there is nothing to suggest that what the defendants allegedly agreed to do would involve the commission of any offence prior to the promulgation of the NSL.

29. Secondly, as regards the prosecution's reliance on the offence of "conspiracy to commit misconduct in public office" as a possible basis for invoking the Rule, we note that the defendants were arrested in January 2021 and had since appeared in court on numerous occasions prior to the commencement of this trial in February 2023. However, the allegation that the defendants might have committed the offence of "conspiracy to commit misconduct in public office" prior to 1 July 2020 was only raised for the first time in the Prosecution's Written Submission filed on 22 May 2023. By which time all the accomplice witnesses had finished their evidence. As pointed out by in the Joint Submission of the Majority of the Defendants, the defendants have been conducting their defences, cross-examining (or refraining from cross-examining) the witnesses, and admitting seemingly innocuous facts on the basis that there was no allegation of any offence before 1 July 2020. We cannot rule out the possibility that had the prosecution's stance on "conspiracy to commit misconduct in public office" been revealed much earlier, the defendants would have conducted their case differently.

30. In the circumstances, we are driven to the conclusion that the prosecution should not be allowed now to "move the goalposts" by relying on "conspiracy to commit misconduct in public office" as the

basis for invoking the Rule in order to cover pre-NSL acts and declarations. Otherwise, there would be an intolerable breach of the fundamental requirement of fairness as explained in *Vivien Fan's case*. Therefore, it is our ruling that the prosecution cannot rely on the NSL or "conspiracy to commit misconduct in public office" as a basis to invoke the Rule with a view to cover the pre-NSL acts and declarations of the alleged co-conspirators. Apart from "conspiracy to commit misconduct in public office", the prosecution is unable to provide any other bases for the invocation of the Rule.

Applicability of the Rule before the NSL

31. The issue then is whether acts and declarations done or made at a time when the Scheme was not criminal could still be admissible pursuant to the Rule. In this regard, the prosecution draws our attention to the article titled "*Hearsay and Conspiracy: A Re-examination of the Co-Conspirators' Exception to the Hearsay Rule*"[18]. In that article, where the history of the Rule was traced and its justifications critically examined, the learned author noted[19]:

> "The second condition of admissibility requires the declaration to have been made 'during the pendency of the conspiracy.' Pendency is the actual duration of the illegal agreement; those declarations made before the conspiracy was hatched and after its termination are inadmissible. Declarations during its term are admissible even though made prior to the cut-off date of the statute of limitations or at a time when the agreement was not criminal."

---

[18] (1954) 52 Mich. L.R. 1159 by H Levie.

[19] *Ibid*, at §1172.

The support for the above proposition is said to be the judgment the United States Court of Appeals for the Second Circuit in *United States v Dennis*[20].

The case of Dennis

32. However, a closer examination of the judgment of *Dennis* shows that the case does not in fact assist the prosecution. In *Dennis*, the appellant and others who were convicted of advocating the violent overthrow of the US government in violation of the Smith Act (1940) in that they conspired to organise the Communist Party of the United States as a group to teach and advocate the overthrow of the government of the United States by force and violence. Insofar as it is relevant to the present case, the following pieces of evidence was admitted by the trial judge in *Dennis*:

(1) declarations either of teachers of the "principles of Marxism-Leninism" to their pupils, or of members of the Party or of the National Committee to pupils or to some seeking admission to the Party, or at public meetings designed to secure members or to encourage the faithful; and

(2) the visits of some of the defendants to Moscow before 1940, i.e., before the enactment of the Smith Act.

[20] (2d Cir. 1950) 183 F (2d) 201.

33. The Circuit Court said at [35]:

> "… There can be no logical reason for limiting evidence to prove that the defendants were in a conspiracy between 1945 and 1948 to the period of the charge; if they were in the conspiracy earlier, declarations of any one of them or of any other person acting in concert with them are as competent as those made within the period laid. Whether they are relevant depends upon how far they form a rational support for believing that the conspiracy continued to 1945; but it is nonsense to say that events occurring before a crime, can have no relevance to the conclusion that the crime was committed; and declarations are no different from any other evidence. How far back of the commission of the crime one may go is a matter of degree, and within the general control of the judge over the relevancy of evidence. In the case at bar, there is not the least reason to hold that his discretion was abused. (Emphasis supplied)

34. Concerning the above passage, we have the following observations to make. Firstly, it is entirely unclear from the report as to when the declarations in (1) were made, in particular whether they were made before or after the enactment of the Smith Act. If they were made after the Smith Act had come into operation, then it would not help the prosecution in the present case. In this regard, since a contrast was made by the Circuit Court between the declarations in (1) and the Moscow visits in (2), it would appear that they were made after 1940.

35. Secondly, as regards the declarations in (1), the focus of the discussion was their relevancy to the charge rather than the truth or otherwise of what was being asserted in those declarations. Furthermore, the Circuit Court considered that the relevance of those declarations laid in what they could show about the speaker's state of mind. This is evident by the following passage at [31-33]:

> "All the defendants had at one time or another been members of the National Committee, which is the executive organ of the

> Party … All had been affiliated with the Party in other capacities for many years … Obviously, no reasonable person can doubt that they were aware of the teachings and advocacies which are spread throughout the authoritative texts, and that these were used to indoctrinate pupils. A colloquy which arose in a class between a teacher and a pupil, or the address of a speaker at a public meeting of the Party, were therefore declarations made in execution of the common enterprise, and they fell directly within the general rule and were plainly competent. …"

36. Thirdly, the trial judge in *Dennis* had directed the jury that they should use no declarations against any defendant, save those made by him himself, unless they were made within the period laid in the indictment. Therefore, what the Circuit Court said about any possible use of pre-charge acts and declarations against people other than the speaker himself is strictly speaking *obiter*.

37. More pertinent is what the Circuit Court said about the Moscow visit at [35]:

> "The same doctrine applies to evidence occurring before the acts charged had become a crime at all: e.g., in the case at bar the visits of some of the defendants to Moscow before 1940. Just as in the case of events occurring before the dates laid in the indictment, so events occurring before the conspiracy had become a crime, may have logical relevance to the conclusion that the conspiracy continued until after 1940. It is *toto coelo* a different question whether we are treating them as *media concludendi*, or as the factum itself. … we regard the admission of evidence of what any of the defendants did before the Smith Act was passed as competent and relevant."

38. However, whilst the above passage on its face supports the Prosecution's Primary Contention, it was the fact that the visits were made, rather than the truth of any (implied) assertions contained therein, that the Circuit Court was concerned about. Properly understood, the visits constituted a factual backdrop for the charge and

that usage did not involve any hearsay problems: cf *HKSAR v Arias Guardia*[21]. Thus, it is doubtful whether the Circuit Court was relying on the rule at all for their admission. In this regard, we note that based on more modern authorities, subject to the question of relevance, the evidence of the Moscow visits could now be admitted under the rule laid down in *Ahern v R, supra* and applied in *Oei Hengky Wiryo v HKSAR (No 2)* which permitted the admission of evidence of acts or declarations of one alleged conspirator made outside the presence of the others, provided that such evidence as not led to prove against the others the truth of any assertion or implied assertion made by the actor or the maker of the statement: *HKSAR v Arias Guardia*, supra.

39. Secondly, the Circuit Court focused on the relevancy of the Moscow visits as a condition for their admissibility. It went on to say that the relevance of those visits depended upon how far they formed a rational support for believing that the conspiracy continued to 1945. Since "relevance" is a matter of degree and a case-specific question. In our view, properly understood, the Circuit Court in *Dennis* was not laying down any general rule applicable to all factual scenarios. This is reinforced by *United States v Schneiderman*[22]. In that case, Mathes J, having considered *Dennis*, ruled explicitly that pre-legislation acts and declarations were not admissible against people other than their doers and makers as to their participation in the conspiracy:

> "Such evidence has been admitted as being relevant to the issue of what was the nature and character and aims and objectives of the Communist Party during the period covered by the indictment. …

---

21 [2022] 2 HKLD 527.

22 (1952) 106F Supp 892.

> Otherwise than as such evidence may aid the jury in determining the nature and character and aims and objectives of the Communist Party during the time covered by the indictment as above stated, evidence of alleged activities prior to June 28, 1940 is not to be considered by the jury as tending to establish the truth of any of the allegations of the indictment, except in this one particular: evidence as to alleged activities of any defendant in the Communist Party before June 28, 1940 may be considered by the jury, as to that defendant only, in determining whether or not such defendant was a member of the Communist Party and had knowledge of the nature and character and aims and objectives of the Communist Party and of what may have been advocated and taught by the Communist Party during the period covered by the indictment." (Emphasis supplied)

40. Based on all of the evidence, we are of the view that it forms no part of *ratio* in *Dennis* that acts and declarations done or made by an alleged conspirator at a time when the agreement was not criminal could be admissible against another pursuant to the Rule. In our judgment, the case of *Dennis* should be restricted to its own facts and does not provide a general support to the Prosecution's Primary Contention.

41. We note, in passing, also that whilst *Dennis* was referred to by the High Court of Australia in *Ahern*, it was only on the point that admissibility of evidence was a matter for the judge (rather than the jury) to decide. Despite the diligence of all parties, there is no case authorities, local or overseas, which are directly on point.

42. Nor do we think that the Prosecution's Primary Contention could sit comfortably with the doctrines of "agency" and "ratification". As mentioned above, we are of the view that the prosecution has failed to spell out how the Scheme could be said to be "unlawful" prior to the promulgation of the NSL. As such, we do not think that the defendants could be described as people who were "bound together in the pursuit of

an unlawful object" or "partners in crime". The situation might have been different if the prosecution had opened their case differently.

Decision on Ground (a)

43. Despite the diligence of counsel, no direct authorities can be found which support the Prosecution's Primary Contention. Neither can we. The present case is a novel situation. In effect, what the prosecution is now inviting us to do is to extend the scope of the Rule which is tantamount to creating a new exception to the rule against hearsay not reasonably foreseen at the time of the alleged offence. We are not inclined to extend the Rule in this direction. That should be the work of the Legislature: *Myers v DPP*[23].

Discretion

44. Even if we were wrong on this point, so that the Rule were technically applicable to pre-NSL acts and declarations, we would exercise our discretion (as stated in *Vivien Fan's case*) to exclude them for hearsay purpose on the ground of unfairness. Under our legal system, a person is free to do whatever he or she chooses to do provided that the act is not prohibited by law. Therefore, he or she is entitled to conduct his or her affairs according to and within the boundary of the current state of the law. This is the other side of the same coin of the *nulla poena sine lege* principle which underscores the importance of legal certainty and ensures individuals are protected from arbitrary exercise of power by the

---

[23] [1965] AC 1001, 1021.

state. It seems to us that the Prosecution's Primary Contention is tantamount to an inroad into this principle.

45. Secondly, having considered the pre-NSL items listed in Annex I, in our assessment the acts and declarations in question, as if admitted as evidence of the truth of their contents, would be more prejudicial than probative. On this basis alone, we would exercise our discretion to exclude them: see *SJ v Lam Tat Ming*[24]. In this regard, our attention has been drawn to the following example, found in *Kammann v US*[25] and cited in *Dennis*[26], the context of which was the US' declaration of war with Germany. The Circuit Court in Dennis agreed that such a discretion is available to the trial courts:

> "… the declarations of the accused before we were at war were extremely remote to prove his intent after we entered the war. There might indeed be a faint basis for supposing that one who sided with the Germans while we were neutral, would still side with them after we were enemies; but it was not surprising that the appellate court thought the inference too feeble to be within the trial court's discretion."

In that light, the case of *Dennis* is in fact against the prosecution on this point.

<u>As to (b): the Lack of Foundation Ground</u>

46. This ground is independent of Ground (a). In view of our decision on Ground (a), we do not propose to deal with this ground in details, as many of the items in Annex 1 would have already been

---

24 (2000) 3 HKCFAR 168.

25 7 Cir 259 F192.

26 *Supra*, at pp231-232.

excluded on that ground alone. However, since there are some items in Annex I which are post-NSL, it is still necessary for us to rule on this ground. Having considered the submissions from both sides, we do not find that this ground has merits. Our reasons are as follows.

47. The conspiracy charged is, as stated in the Prosecution's Amended Written Opening, the allegation that the defendants were parties to "the Scheme" to:

> "indiscriminately veto any Budgets or public expenditure to be introduced by the Government, compel the Chief Executive to dissolve the LegCo and/or cause the Chief Executive to resign. The purpose of the Conspiracy was to subvert the State power. The means employed involved the unlawful means other than force or threat of force."

48. As we understand it, the prosecution says that even though the Scheme was formed before 1 July 2020 and at a time when it was not yet unlawful, it continued to exist and became unlawful after the promulgation of the NSL.

49. On the other hand, the defence submits that: (1) the Scheme (if existed at all) is not "unlawful" even after the promulgation of the NSL; and (2) the charge would also fail if the defendants did not know at the time that what they had agreed to do was illegal.

50. No doubt, (1) and (2) above are issues of central importance in this trial. We will deal with the elements of the offence in due course. At this stage, it suffices for us to say that, subject to any further submissions which may be made at closing, we are unable to accept either of the two points raised above. In the following discussion, we will proceed on the basis that: (1) the Scheme was rendered unlawful after

(but not before) the promulgation of the NSL; and (2) the prosecution is not required to prove as an element of the offence that the defendants knew at the material time that the Scheme was unlawful in itself or that it would involve the use of "unlawful means", so that the absence of such knowledge would not afford them a defence.

Consideration of Ground (b)

51. We are of the view that there is reasonable evidence that the Scheme had come into being among the organisers in around June 2020, if not earlier and that the Scheme continued to exist after the promulgation of the NSL. We go on to consider whether there is independent and reasonable evidence as against the defendants that they individually were parties to the Scheme. We appreciate that at the time of this ruling, the defendants were yet to give evidence at the time of this decision.

52. As we see it, in order to make good the charge against a particular defendant, the prosecution is not required to prove that the Scheme was agreed by all candidates of the five geographical constituencies. In other words, the prosecution case against the defendants do not necessarily stand or fall together. Rather, what the prosecution has to do is to show that during the currency of the charge period: (1) there were at least two persons who were parties to the Scheme with the intention to carry it out; and (2) the defendant under consideration was a party to the agreement with the requisite *mens rea*: see s159A(1)(a), Crimes Ordinance. In due course, we will revisit the elements of the offence.

53. By s159A(2), a conspiracy charge can be made out even if the commission of the underlying substantive offence had been rendered impossible by the existence of some facts. It follows that it is sufficient, for the purpose of establishing guilt, to show that the defendant had known that the course of conduct to be pursued would necessarily amount to or involve the commission of an offence or offences and that he or she had intended to play some part in the agreed course of conduct in furtherance of the criminal purpose that it had been intended to achieve. Participation in the carrying out of the agreement by each conspirator was not required: *HKSAR v Cheung Sing Chi & Anor*[27].

54. Applying the above to the present case, we are of the view that it does not assist the defendants that there had been no cross-constituency meetings having been held. In our judgment, it would be sufficient if the defendants with the requisite intention agreed to play some part in the Scheme in furtherance of it. Subject to any further submissions which may be made at closing, we are of the view that it would not assist the defendants even if they believed mistakenly that what they had agreed to do was not illegal.

55. In order to invoke the Rule, the prosecution has to show that there is independent reasonable evidence on two matters, namely:

(a) during the charge period there was in existence the agreement as pleaded; and

(b) the defendants were parties to the agreement.

---

[27] [2004] 2 HKC 351.

56. The submission of the defence on this ground is relatively sparse. For example, in the Joint Submission, it is submitted that:

> "The lack of foundation evidence for the application of the Rule to individual Defendants will be addressed in their respective closing submissions."

The case against defendants who were candidates

57. We bear in the forefront of our mind that "reasonable evidence" showing that a defendant was a party to the agreement charged has to be "independent" of the evidence sought to be adduced pursuant to the Rule. That, in our view, does not prevent the Court from using the evidence listed in Annex I for a purpose which does not entail the rule against hearsay rule. For the avoidance of doubt, however, we should say that in considering this ground no reliance is placed on any of the newspaper articles or Facebook posts of D1 or PW1 as contained TB1 and TB2 respectively. Nor have we relied on any of the WhatsApp messages contained in TB3.

58. Instead, as regards those defendants who were candidates in the Primary Election, we take into account the following:

(1) the fact, which is not in dispute, that D1 made certain statements concerning the "Project 35+" at the press conferences on 26 March 2020, 9 June 2020 and 9 July 2020. Those statements in our view serve to define the nature and parameters of the project. In particular, we note that:

- in the March press conference, D1 already described the pro-democrats having a majority in LegCo as 「大殺傷力憲制武器」(variously translated as "lethal

constitutional weapon" or "constitutional weapon of mass destruction") which gave them to power to veto the budget;

- in the June press conference, D1 said that the consensus was to achieve 35+; and
- in the July press conference, D1 reiterated that the objective of the 35+ was to win the majority in LegCo so that the pro-democrats could exercise the power authorised by the BL to make the Government accountable, and that power included vetoing the Budget.

It needs to be stressed that here we are not concern with the truth of what D1 said but the fact that he had said certain things. Those statements of D1 also form the factual background of the subsequent Primary Election;

(2) the direct evidence of PW1-PW3 (the admissibility of which does not depend on the Rule) as to what was going on in the CMs. In particular, PW1 gave evidence that he noticed a "change of wind" in around May 2020 when the topic about vetoing power had assumed greater importance and become a subject of hot debate among the attendees of the CMs.

For the present purpose, we consider that based on the evidence before us, there is reasonable evidence of an agreement between the accomplice witnesses and D1 to continue with the Scheme, after the promulgation of the NSL. Their intention to act in furtherance of the Scheme could also be inferred from their failure to desist from their

respective involvement in the "Project 35+": cf *HKSAR v Cheung Sing Chi & Anor, supra.*

(3) the admitted fact that the defendants joined the Primary Election by submitting their respective nomination forms. We are not saying that the participation in the Primary Election *per se* amounts to an offence. Nor is this the prosecution case. However, what is of note is that at Clause 2, Part II of the nomination form, the candidate declared:

> "I hereby confirm that I agree and support the consensus of the coordination meeting led by Benny TAI Yiu-ting and AU Nok-hin, including "Democrats 35+ Civil Voting Project" and its goals."

In the Election Deposit Receipt issued to each of the candidates, it was provided that:

> "2. The candidates for [Democrats 35+ Civil Voting Project] must support and agree with the dominance and coordination of the consensus of the meeting by Tai Yiu-ting and Au Nok-hin, including the [Democrats 35+ Civil Voting Project] and its target."

In assessing the above, we have not lost sight of counsel submissions that the aforesaid clauses might be subject to different interpretations. However, we are at this stage only concern with what the clauses could show at *prima facie* level. In our view, a reasonable jury is entitled to find that the candidates were aware of and in agreement with what was being stated in those clauses against the backdrop of what D1 said at the aforesaid press conferences;

(4) besides, there is the endorsement by all the defendants (except D17 and D38) of the IWR which, included the following two points:

> "1. I agree with "Five demands, not one less". I will use the powers conferred on the Legislative Council by the Basic Law, including vetoing the Budget, to force the Chief Executive to respond to the five demands, dropping all the charges against the resistance fighters, holding the relevant persons accountable for police brutality; and restarting political reform to achieve dual universal suffrage.
>
> 2. I agree that if the supporting rates fall outside the expected range of number of seats that can be secured in each respective constituency, (I) must clearly announce the end of the election campaign."

We consider that there was in fact no conflict between what D1 said about the "Project 35+" and the terms of the IWR. Furthermore, despite the fact that different versions of "Co-ordination Agreement" were used in different constituencies, the IWR provides important reasonable evidence as to what all the endorsees had eventually agreed to do.

In this regard, we have not forgotten that although on its face D10 and D16 had endorsed the declaration, neither of them had posted the declaration in their respective Facebook. In our view, this is a matter which goes to weight, rather than admissibility;

(5) against the aforesaid factual background, there is the admitted fact that the defendants continued their participation in the election forums (except D47) and then in the Primary Election;

(6) as against D8 only, there was also the evidence about what was said at the press conference of the CP on 25 March 2020 by its leaders with the apparent support of D8 who stood behind the speakers;

(7) the seizures found in the possession some of the defendants (as evidence against the possessors only). Examples of those include:

- "35+港島.docx" discovered in D10's office notebook computer; and
- "35+九西 final.docx" discovered in D17's computer.

(8) the defendants' statements (as evidence against the makers only) expressed at the election forums (as contained in Trial Bundle 8) or contained in their respective election publications (as contained in Trial Bundle 9).

59. In assessment the aforesaid pieces of evidence, we do not lose sight of the criticisms levelled at them by the defence in their written submissions. However, we are of the view that the proper approach to those pieces of evidence is to consider their accumulative weight as a whole rather than in a piecemeal fashion. We also bear firmly in mind that at this stage we are only concern with the existence or otherwise of "reasonable evidence", rather than proof beyond reasonable doubt.

60. Having considered the relevant evidence available so far against each of the defendants individually, we are of the view that there is sufficient independent "reasonable evidence" against each of them showing that:

(1) prior to the commencement of the nomination period for the Primary Election, the Scheme had already been formed among the organisers (namely D1and PW1-PW3) of the "Project 35+";

(2) the defendants had become parties to the Scheme by the time when they submitted their respective nomination forms, if not earlier; and

(3) after the promulgation of the NSL, the Scheme continued to exist and the defendants remained parties to it until sometime after the Primary Election.

The case against D5

61. As regards D5, who was not a candidate in the Primary Election, we take into account:

(1) the undisputed fact that he was the initiator of the "Say No to Primary Dodgers" campaign;

(2) what he said in various Facebook posts and his interview;

(3) his WhatsApp exchanges with D1; and

(4) the front page advertisement he placed in Apply Daily on 3 July 2020 in support of the Primary Election.

We have also considered the points raised by his counsel Mr Shek in his written submission including the fact that D5 had not attended any of the CMs; that D5 had not taken part in the Primary Election; and that he was not known to the PWs or any of the candidates.

62. After taking everything into account, we are of the view that there is reasonable evidence that D5 was a party to the Scheme in that:

(1) D5 was aware of the aim of the 35+ Project was to obtain a majority in LegCo and to force the Government to yield to the "Five Demands" by making use of the vetoing power of the majority;

(2) the emails between D5 and D1 show that an agreement was formed between D1 and D5 in around May 2020 to use D5's campaign to facilitate the "Project 35+" by mobilising voters sympathetic of the pro-democracy camp to support only those candidates who had won in the Primary Election, thus exerting pressure on the candidates not to retract from their agreement that they would abide by the results of the Primary Election; and

(3) the fact that D5 placed on an advertisement in Apple Daily in early July prior to the Primary Election shows that he had the intention to carry out his agreement with D1 which persisted even after the promulgation of the NSL.

For the purpose of proving guilt, provided that D5 agreed with D1 to take part in the conspiracy charged, it matters not that he was not also known to other co-conspirators: *HKSAR v Chen Keen*, supra; *R v Meyrick and Ribuffi*[28]; *R v Griffiths*[29], applied in *R v Sheik Abdul Rahman Bux & Ors*[30].

63. Based on all of the above, this ground is rejected.

---

28 (1930) 21 Cr App R 94.

29 (1965) 49 Cr App R 279.

30 [1989] 1 HKLR 1.

As to (c): The Irrelevance Ground

64. This ground is said by the defence to be "distinct and separate" from the others. It is submitted on the defendants' behalf that at least for most of the items in Annex 1 relied on by the prosecution they do not implicate the defendants to have participated in any agreement to veto the budget.

Consideration of Ground (c)

65. Before deciding on this ground, a number of observations should be made to put this ground in its proper prospective:

(1) there can be no valid objections to using one's acts and declarations as evidence against himself or herself. As explained earlier, one's acts and declarations may be relevant in that they may cast light what his or her state of mind, rather than the truth of their contents. Such use of the evidence does not entail invoking the Rule;

(2) here, the defence objection is about one specific usage of the acts and declarations under consideration, namely whether they are capable of showing the "participation" of the defendants in the conspiracy charged ("the Objected Usage");

(3) however, the prosecution also intends to rely on the acts and declarations concerned to show "the nature and extent of the conspiracy". This, in our judgment, in itself could be a legitimate and permissible use of the evidence under consideration; and

(4) once the conditions for the operation of the Rule are met, then it matters not that those acts or declarations were done or made in the defendants' absence or without their knowledge.

Decision on Ground (c)

66. In order not to further lengthen this already lengthy ruling, we do not propose to discuss the post-NSL acts and declarations as contained in Annex I item by item. It suffices for us to say that, having considered each of them, we are of the view that those items are relevant in that they can cast light on the nature and extent of the Scheme and that the Scheme had continued after the promulgation of the NSL. Furthermore, subject to what we have already said on Grounds (a) and (b) above, we are satisfied that, leaving aside the question of unlawfulness for the moment, the post-NSL acts and declarations under consideration were done or made "in pursuant of" the Scheme in that they were conducive to the Common Purpose and the contrary is not reasonable arguable.

67. Based on the above, this ground is rejected.

As to (d): the "Not a Co-conspirator Ground"

68. The acts and declarations of Lai and Choy and relied upon by the prosecution were all pre-NSL, in view of our ruling on Ground (a) it would not be necessary for us to deal with the objections concerning them in detail. However, for the sake of completeness, it is appropriate for us to indicate briefly our views on this ground. In short, having

considered the submissions of the parties, we are not impressed by this ground, as we are of the view that there is at least reasonable evidence showing that the two of them were parties to the Scheme.

69. As regards Lai, the fact that he was an employee of PFD does not prevent him from being a co-conspirator. According to PW2, Luke Lai did not only prepare meeting notes of the CMs for PW2's information, but he was also responsible for preparing nomination forms for the Primary Election as well as in publishing election platforms of the candidates. However, we note that the acts and statement of Luke Lai relied upon by the prosecution were done or made prior to the NSL. Given our decision on Ground (a), those acts and declarations are in any event not admissible against the present defendants pursuant to the Rule.

70. As regards Choy, based on the evidence of PW1, he took a very active role in the CMs of KE, examples of which include the following:

- he was one of the administrators of the WhatsApp group named "35+ Kowloon East LegCo Election Symposium" (35+ 九東立選座談會) (TB3/1);
- he helped in arranging the venue for the 1st CM of KE on 2 March 2020 and was one of the organisers of that meeting. After the meeting, he sent out the draft document, "35+ Kowloon East.docx", to all the attendees, stating that the same was drafted by D1 for circulation;
- he sent out a WhatsApp message on 15 March 2020 setting out the details of the 2nd CM of KE;

- he helped liaising the 3rd CM of KE on 4 May 2020 and after the meeting he sent out a document named "35+ Kowloon East final.docx";
- he helped organising the 4th CM of KE on 18 May 2020; and
- he also attended the press conference of "Project 35+" on 9 June 2020 together with D1, PW1-PW3.

71. As such, we are puzzled by the fact that Choy was not at least named in the particulars of the offence as a co-conspirator, even though he had not been charged. We are also puzzled by the fact that the prosecution, having prepared the years for some two years, only see fit to name Choy as a co-conspirator when the matter was raised by the Court during the trial. That said, we are of the view that whether or not Choy was in fact a co-conspirator would not affect the outcome of the trial of the present defendants.

72. As regarding Kwok, the evidence that he was a party to the Scheme includes his attendance of the press conference of the CP on 25 March 2020 and what he said at that press conference and also his attendance (with D8, D20, D35 & D46) of the street rally of the CP in Shatin on 12 July 2020 campaigning for the Primary Election (TB8/5). In our judgment, the evidence of the said street rally is relevant and admissible pursuant to the Rule and, of course, the weight of which is a different matter.

The CMs of NTW

73. We now turn to the objection raised by Mr Beel (counsel for D33) to the audio and video recordings of the CM of NTW on 8 May 2020 (TB6/11-22) made by PW4 who is a civilian. Mr Beel accepts that the recordings are "prima facie admissible" but he argues that their admission would impede the defendants' right to a fair trial. Counsel urges us to exercise our discretion to exclude them from the evidence.

74. The principles governing the admissibility of covert recordings have been laid down in *HKSAR v Muhammad Riaz Khan*[31] and *HKSAR v Chan Kau Tai*[32], of which we would not repeat. In brief, the fact that evidence was obtained in breach of a defendant's right to privacy is no bar to its reception and it is a matter for the Court's discretion.

75. Having considered counsel's submission, subject to what we have already decided on Ground (a), we find that there are no valid to exercise our discretion to exclude the recordings. Our reasons are as follows:

(1) none of the present defendants (including D33) had attended the CM concerned and therefore their privacy right was not breached by the recording act of PW4;

(2) there is no suggestion by any of the defence counsel in cross-examination that PW4 had unduly tampered with any of the recordings produced in Court;

---

31 (2012) 15 HKCFAR 232.

32 [2006] 1 HKLRD 400.

(3) contrary to the submission of Mr Beel, we are of the view that the admission of the recordings would be conducive to, rather than impede, a fair trial in that they are direct and cogent evidence of what had been discussion at that CM; and

(4) there is no basis to suggest that the admissibility of the recordings in question would encourage the authorities to use agents to act on their behalves in order to side-step the procedural guards provided for in the Interception of Communications and Surveillance Ordinance, Cap 589.

76. However, in line with our ruling on Ground (a), it is our decision that the recordings in question, being pre-NSL acts and declarations of others, is not admissible under the Rule. On the other hand, they are plainly relevant to show the nature and scope of the Scheme and is admissible for non-hearsay purpose.

Conclusion on Prosecution's Primary Contention

77. Based on the above, it is our decision that acts and declarations done or uttered by an alleged co-conspirator prior to 1 July 2020[33] are inadmissible as an exception to hearsay made under the Rule but are admissible for non-hearsay purpose.

---

[33] Which include TB8, item 63, a video titled "【#71112 初選專訪(一)：鄒家成、梁晃維、張可森】". As pointed out by Mr Chan (counsel for D37) that video was created in June 2020 when D37 made the utterances as recorded. Whilst the video was released on 5 July 2020 (after post-production), there is no evidence of any more input from the interviewees including D37.

We also exclude from the operation of the Rule: TB5, item 52 (an undated article found in D5's computer); and TB10, item 166 (an undated document seized from D46's residence).

78. On the other hand, in respect of acts and declarations done or uttered on or after 1 July 2020, we are satisfied that the threshold requirements are met in respect of each and every defendant and therefore the Rule is applicable. The weight (if any) of those pieces of evidence, however, is a matter to be decided after consideration of all the evidence, including that of the defence.

Prosecution's Secondary Contention

79. The Prosecution's Secondary Contention is, in our view, not controversial. We note that even the Majority of the Defendants in the Joint Submission accept that:

> "75. The pre-legislation acts and declarations in *Dennis*, like the pre-NSL acts and declarations in this case, may be relevant to prove the doers and makers' state of mind and therefore admissible against the doers and makers, subject to the exclusionary rule."

80. In our judgment, the Prosecution's Secondary Contention, insofar as it does not entail any problems of hearsay or the invocation of the Rule, is well-supported by case authorities like *Ahern v R; Oei Hengky Wiryo v HKSAR (No 2)*; and *HKSAR v Arias Guardia*.

81. Furthermore, having carefully considered each of the items in Annex I, we are of the view that the acts and declarations of the defendants concerned are relevant and admissible in that they are capable of explaining the conduct of the doers and makers and/or cast light on their individual state of mind at the material period. In this regard, no distinction should be made between the pre-NSL acts and declarations and the post-NSL ones. Besides, we do not see any valid grounds for excluding any of the acts and declarations in Annex I which are to be

used for non-hearsay purpose. The weight to be attached to those, however, is a matter to be addressed and decided when it comes to our analysis of the evidence.

Annex E

Reasons for Ruling on D5's No Case Submission

The applicable test

1. The traditional test for deciding whether there is a case to answer is laid down in *R v Galbraith*[1]. In the recent case of *Re Secretary for Justice's Reference (Nos 1-3/2021)* [2], the Court of Appeal comprehensively explains and reiterates the relevant principles regarding a case depending on circumstantial evidence. We do not intend to repeat those. It suffices for us to say that on a proper application of the test in *R v Galbraith*, the question is whether it is properly open to the jury to reach the inference contended for by the prosecution. It is essential to focus on the question whether, taking the prosecution case at its highest, there was evidence upon which a reasonable jury, properly directed, could infer guilt. If so, the case could be left to the jury, notwithstanding there might be another inference consistent with innocence. The power to rule no case to answer after all the evidence has been heard is only to be very sparingly exercised. That said, in cases where the evidence is inconsistent with the defendant's guilt (i.e. evidence being incontrovertible and wholly irreconcilable with the prosecution case) such that the prosecution's case is doomed to fail, the judge could rule that there is no case to answer.

---

[1] [1981] 1 WLR 1039.

[2] [2022] 5 HKLRD 886.

D5's submission

2. Mr Shek for D5, relying on both limbs of *Galbraith*, submitted that there was either "no evidence" or that the evidence was too tenuous on the following matters in respect of D5:

(1) D5's role in the conspiracy as alleged in Annex II to the Prosecution's Re-Amended Opening ("Ground 1"); and

(2) that the conspiracy alleged involved "unlawful means" and that D5 had the necessary *mens rea* ("Ground 2").

3. As regards Ground (1), Mr Shek noted that the Prosecution allege in their opening that D5 played the following roles in the conspiracy charged:

(a) initiating and promoting the campaign titled "Say No to Primary Dodgers" ("**the Campaign**");

(b) advocating for the holding of the Primary Election;

(c) contributing to the design and arrangement of the Primary Election; and

(d) continuing in the promotion of the Campaign.

4. In relation to (a) and (d), Mr Shek had no quarrel that D5 initiated and promoted the Campaign. He submitted, however, that the evidence was against the prosecution case that D1 and D2 had intended to set up a "binding" Primary Election or that the Campaign was a respond to the advocacy of D1 and PW1 for that purpose. Mr Shek also stressed that the evidence showed that D5 was not an organiser of the Project 35+,

that he had not participated in any of the coordination and that he was unknown to any of the participants apart from D1.

5. In relation to (b), it was submitted that the fact that D5 had advocated for the holding of the Primary Election was neither here nor there, as that had already been decided by the organisers of Project 35+ as early as 26 March 2020. In relation to (c), it went against the evidence and there was nothing to show that D5 had the intention to push for indiscriminate vetoing of the Budget or public expenditure introduced by the Government.

6. As regards Ground (2), Mr Shek submitted that the prosecution had adduced no evidence on "unlawful means" and that there was no evidence to show that D5 had the intention to subvert the State Power.

Consideration

Terms vs mere overt acts

7. It was well-established that in case of a conspiracy charge, the fact that particulars of an offence were given did not mean that each of them was an essential ingredient of the offence. What the prosecution was required to prove were the terms, rather than the overt acts, of the agreement charged: *R v Hancock*[3]. The overt acts might simply be particulars provided to give reasonable information to the defendants on

[3] [1996] 2 Cr App R 554.

what the prosecution case was and how the prosecution intended to prove the existence of the conspiratorial agreement. However, sometimes it could be difficult to distinguish between the terms of the conspiracy and mere overt acts.

8. In explaining the distinction between the terms of the agreement on the one hand and mere overt acts on the other, the Court of Final Appeal in *HKSAR v Chen Keen*[4] cited with approval the following passages of Thomas LJ (as he then was) in *R v K*[5] (footnotes omitted):

> "… we agree with the editors of *Archbold* that much greater care needs to be taken in framing the indictment and especially in the definition of the agreement alleged. *There must be a clear distinction between the agreement alleged and the reasonable information given in respect of it.* ... In our view therefore, the indictment should identify the agreement alleged with the specificity necessary in the circumstances of each case; *if the agreement alleged is complex, then details of that may be needed and those details will as in Bennett form part of what must be proved.* If this course is followed, it should then be clear what the prosecution must prove and the matters on which the jury must be unanimous: see *Bennett*."

> "Further particulars should be given where it is necessary for the defendants to have further general information as to the nature of the charge and for the other purposes identified by Lawton L.J. in *Landy*. *Such further particulars form no part of the ingredients of the offence and on these the jury do not have to be unanimous*, as this court correctly decided in *Hancock*."
>
> (emphasis added)

---

[4] (2019) 22 HKCFAR 248, [64].

[5] [2005] 1 Cr App R 25.

9. In the final analysis, the crucial issue for the Court in this regard was whether the particulars given were "meant and understood to be simply overt acts proving or evidencing the existence of the conspiratorial agreements alleged under [the charge], or whether they were said to be … forming part of the respective conspiratorial agreements, agreed upon by the conspirators concerned" [6]. Our understanding of the effect of *Chen Keen's case* was that whether the particulars constituted the terms of the conspiracy under consideration was not solely a matter of construction of the charge, but would also depend on how the prosecution had opened and presented their case.

Elements of the offence

10. In deciding whether there was a *prima facie* case for the defendants to answer, this Court had first to determine what were the elements of the offence which the prosecution had to prove. We noted that cases like *R v Landy*; *R v Hancock*; *R v K*; and *HKSAR v Chen Keen*, the charges in question were the common law conspiracy to defraud. In the present case, we were concerned with a statutory conspiracy to commit a statutory offence. Therefore, the elements of the conspiracy under consideration would be informed by the statutory offence, which the defendants allegedly agreed to commit.

11. We would in due course discuss in greater details what we consider to be the elements of the substantive offence under NSL 22. For

---

[6] Supra, [70]. See also [83].

the present purpose, if suffices for us to say that the element of the substantive offence are as follows:

(1) organising, planning, committing or participating in;

(2) an act by force or threat of force or other unlawful means;

(3) which seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the Government of the HKSAR; and

(4) with a view to subverting the State power.

12. Therefore, in relation to D5, in order to establish guilt what the prosecution had to prove was that he agreed with at least one of the named co-conspirators to commit a course of conduct which, if executed in accordance with their intentions, would necessarily involve the commission of the offence under NSL 22: *Harjani Haresh Murlidhar*[7]. It followed that it would not be pertinent that:

- D5 was known only to D1 but not to any of the candidates;
- whether he had played the roles ascribed to him by the prosecution in their opening speech; or
- whether he had participated or agreed to participate in the Primary Election.

[7] (2019) 22 HKCAR 446.

13. For the present purpose, the crux of the matter was whether there was evidence to show, *prima facie,* that D5 was a party to the conspiracy charged: cf *Wong Chor Wo v HKSAR*[8]. In this regard, it was important to note that the prosecution had, on more than one occasion, made it abundantly clear that the particulars given in the charge were just overt acts rather than the terms of the agreement charged:

(1) on 13 February 2023, after the opening speech of the prosecution and before the first witness was called to give evidence, this Court posed the following questions to the prosecution:

> "Before you deal with the Admitted Facts let's deal with the issue of whether the charge, the particulars, whether the particulars, the terms of the conspiracy or whether the particulars are the word texts, etc, etc, because it seems, it seems to us that unlike the case of Chen Keen this is a statutory conspiracy charge so rather than a common law conspiracy so I don't know whether it makes any difference. …"

In reply, Mr Man for the prosecution replied,

> " My Lords, we would like to clarify with the following. As to the agreement itself, my Lords may I refer you to the opening, the existing written opening, paragraph 3A. …
>
> You can see that it reads "The essential terms of the conspiracy that defendants agreed to seriously intervene in, disrupt or undermine the performance or duties and functions in accordance with the law by the body of power of Hong Kong SAR, that is the defendants agreed indiscriminately vetoed any budgets or public expenditure to be introduced by the government to compel the Chief Executive to dissolve the LegCo and to cause the Chief Executive to resign".

[8] FAMC 42/2008 (unreported) (dated 9.9.2008).

> We would like to clarify, so far as the agreement is concerned, what the prosecution is saying, the defendants agreed course of conduct was to indiscriminately veto any budgets or public expenditure to be introduced by the government and the effect was to cause the Chief Executive to dissolve the LegCo and resign under the Basic Law. We believe this clarification would be sufficient for the defendants to know what the prosecution are alleging."

(2) Secondly, on 8 June 2023, when the dealing with the submissions of "No Case" by some of the defendants and upon being question by this Court about the case of *HKSAR v Chen Keen*, Mr Man once again confirmed his stance as follows:

> "MR MAN: My Lord, I have to submit that if we look at Chen Keen, that Decision of the Court of Final Appeal, we have to bear in mind that in that particular case, as what has been said in paragraph 83 of the Judgment, the prosecution had never informed the court what the overt acts are in that particular case and the court had not clarified with the prosecution as to what were the overt acts and so in the appeal proceedings the court had to decide whether the Judge when making the summing-up, directing the jury, as to whether they had to make a unanimous decision as to a particular area as stated in the indictment. They have...
>
> LEE J: So you are saying that because you have state your position very clearly as to what are the terms, what are the alleged terms of the conspiracy and what are merely overt acts as evidence of the conspiracy so there is no unfairness whatsoever?
>
> MR MAN: And there will be no misunderstanding whatsoever on the part of the defendants.
>
> …

> MR MAN: So it all depends on the particular facts and particular issue of a particular case. Here we are talking about an NS offence and when we look at the indictment the particulars is pretty long so it is quite unimaginative that the prosecution are saying that each and every words in the indictment have to be proved beyond reasonable doubt and they are all the core conspiracy amongst the conspirators. It's not our case and we had categorically told the court that even in the magistracy level and also here in this trial we had told the court clearly that the Roman (i), (ii), (iii), (iv) all overt acts except what we make it clear in our amended opening paragraph 3(a) that some particulars in Roman (i) is the core matter, is the element of the offence."

14. Paragraph 3(a) of the Re-Amended Opening of the Prosecution read as follows:

> "3a. The essential terms of the Conspiracy are that the defendants agreed to seriously interfere in, disrupt or undermine the performance of duties and functions in accordance with the law by the body of power of HKSAR. That is, the defendants' agreed course of conduct was to indiscriminately veto any Budgets or public expenditure to be introduced by the Government. The effect was to cause the Chief Executive to dissolve the LegCo and resign under the Basic Law. The purpose of the Conspiracy was to subvert the State power. The means employed involved the unlawful means other than force or threat of force."

15. In view of the above, we were satisfied that there was no room for any misunderstanding on what the terms of the conspiracy charged were. Given the clear reply by the prosecution to the Court, the defendants were made aware that the essence of the charge was the allegation that the defendants were parties to an agreement to participate in the Scheme so as to seriously interfering in, disrupting, or undermining

the performance of duties and functions of the Government of HKSAR by first obtaining a controlling majority in the LegCo and then unlawfully abusing their power as LegCo members by indiscriminately vetoing any budgets or public expenditure to be introduced by the government, with the effect that the Chief Executive would be forced to dissolve the LegCo twice and eventually to step down as provided for in the Basic Law. As to the other particulars given in the charge, they were just overt acts.

As regards Ground (1)

16. Applying the above to this case, based on the evidence before us concerning D5 and in particular his WhatsApp exchanges with D1 and what D5 said in his interview, we were satisfied that there was sufficient evidence to show, *prima facie*, that:

(i) D5 knew that the purpose of the Project 35+ was to make use of the vetoing power of the majority in LegCo in order to force the Government to accede to the "Five Demands", failing which to force the CE to dissolve the LegCo and to eventually step down by the operation of the BL;

(ii) D5 also knew that it was essential, in order for the Project 35+ to be successful, to ensure that only the winners in the Primary Election would run in the LegCo election;

(iii) in the circumstances, D5 agreed with D1 that he would assist in the Project 35+ by taking steps to see that only the candidates who won in the Primary Election would run in the LegCo election; and

(iv) despite the fact that the Campaign might have begun its life before D5 and D1 had reached the aforesaid agreement, it subsequently became the means by and through which D5 carried out his part of the agreement with D1 in that the Campaign was to: (1) put pressure on the pro-democrats who intended to run in the LegCo election to first take part in the Project 35+; and (2) deter losers in the Primary Election from running in the LegCo election.

Based on the above, we rejected Mr Shek's submission on Ground (1).

As regards Ground (2)

17. Subject to any further submissions which might be made in closing speeches, for the present purpose, we accept that the term "unlawful means" in NSL 22 is not restricted to criminal acts but is wide enough to cover a situation where a legislative councillor abuse his/her power in violation of his/her constitutional duty as prescribed in the BL. We also accept that if a legislative councillor agreed with his/her colleagues in the majority to indiscriminately veto the budget regardless of its merits with a view to coerce the Government to accede to their political demands which had nothing to do with the budget itself, failing which to bring down the CE, that would constitute an abuse of their power.

18. As regards the *mens rea* of the offence, we readily accepted that the crime of conspiracy required an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It

was the intention to carry out the crime that constituted the necessary *mens rea* for the offence: *Yip Chiu-cheung v Q (PC)*[9].

19. Concerning the specific intent of the substantive offence under NSL 22, subject to any further submissions which might be made in closing speeches, we were satisfied that an intention to subvert the "State Power" included an intention to seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the Government of the HKSAR.

20. In the case of D5, as aforesaid, we were satisfied that there was *prima facie* evidence showing that:

(i) he knew that the purpose of the Project 35+ was to make use of the vetoing power of the majority in LegCo in order to force the Government to accede to the "Five Demands", failing which to force the CE to dissolve the LegCo and to eventually step down by the operation of the BL; and

(ii) with that knowledge, he agreed with D1 to assist in the Project 35+.

Based on the above, coupled with the undisputed evidence that D5 had carried out the Campaign in aid of the Primary Election, we were satisfied that there was a reasonable inference properly open to the tribunal of fact that D5 had at the material time the requisite intention that

---

[9] [1995] 1 AC 111, 117-119.

the agreement (which was the subject matter of the charge) be carried out, including the specific intent to subvert the State Power.

21. Thus, we also rejected D5's submission on Ground (2).

Conclusion

22. Based on all of the above, we were satisfied that there was sufficient evidence against D5 so that he had a case to answer on the charge.

Annex F

Reasons for Ruling on D17, D33 and D38s' No Case Submission

1. A number of grounds were put forward by D17, D33 and D38 for their applications for no case to answer.

2. The first ground for D33 was that the prosecution failed to prove the essential element of "unlawful means".

3. For reasons stated in paragraph 12 to 46 of our Reasons for Verdict, we did not accept that.

4. The 2nd ground for D33 was that the prosecution failed to prove the essential element of "subverting the State power".

5. For reasons stated in paragraph 47 to 88 of our Reasons for Verdict, we did not accept that.

6. The 3rd ground put forward was that there was insufficient evidence to link D33 to the agreement to veto the budgets.

7. At the no case stage, we were only concerned with any prima facie evidence. In our view, there was sufficient prima facie evidence. Undisputed evidence pointed to the fact that by 9 June 2020 if not earlier, D1, PW1 and others had reached an conspiratorial agreement to use the power conferred by the BL to veto the budgets irrespective of the merits and contents of the budgets. There was prima facie evidence

that D33 had received a copy of the final coordination agreement. Further, D33 endorsed the IWR declaration, in particular, paragraph 3.1 and 3.2 of the declaration on 10 June 2020.

8. D33 submitted her nomination form by the end of June 2020and subsequently participated in the Primary Election in the beginning of July 2020. D33 won the Primary Election and participated in the localist resistance camp press conference on the 15 July 2020. The use of the vetoing power was mentioned. In addition, D33 published an article on the Los Angeles Time in August 2020.

9. In conclusion, D33's application for no case to answer was refused.

10. For D17 and D38, two grounds were put forward.

11. The first ground was that the prosecution failed to prove the element of "unlawful means".

12. For reasons stated in paragraph 12 to 46 of our Reasons for Verdict, we did not accept that.

13. The 2nd ground was that the prosecution failed to prove D17 and D38 agreed to veto the budgets indiscriminately and / or to subvert the HKSAR Government.

14. Again at the no case stage, we were only concerned with prima facie evidence. In our view, there was sufficient prima facie

evidence. Undisputed evidence pointed to the fact that both D17 and D38 sent their representative to attend coordination meeting. By 9 June 2020, if not earlier D1, PW1 and others had reached an conspiratorial agreement to use the power conferred by the BL to veto the budgets irrespective of the merits and contents of the budgets.

15. D17 and D38 submitted their nomination forms at the end of June 2020 and subsequently participated in the Primary Election in the beginning of July 2020.

16. In the election forum held at the end of June 2020, D38 followed the contents of Debate Notes which suggested the fact that he was aware of the contents of IWR declaration and that he would have no hesitation in signing it but for the fact that it was not initialised by the official organisers of the Primary Election.

17. The Debate Notes indicated D38's knowledge and belief on the Scheme.

18. As for D17, a copy of the final coordination agreement was found in D17's computer on the day of her arrest.

19. At the election forum, D17 undertook that she would be willing to sign for the IWR declaration if D1 required it to be signed. D17 further stated that if she lost in the Primary Election, she would support the winners in the Primary Election to achieve their common goal

of 35+. D17 lost in the Primary Election and undertook not to participate in the official LegCo election.

20. In light of the above, D17 and D38s' applications for no case to answer were refused.