

Case Summary (English Translation)

HKSAR v 馬俊文 (Ma Chun Man)

DCCC 122/2021; [2021] HKDC 1325

(District Court)

(Full text of the Reasons for Verdict in Chinese at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=139624&currpage=T)

Before: HH Judge Stanley Chan

Date: 25 October 2021

Offence of incitement to secession under NSL 21 – defence – exercise of freedom of speech protected by BL – freedoms of speech, of assembly etc. not absolute – overriding principle of BL 1 – nobody actually incited to commit the offence, no method of commission set out, and no actual action taken not a defence – Defendant had mens rea but not merely chanting “idle-boast” slogans – no direct connection between incitement and number of inciters

Background

1. The Defendant was charged with one count of incitement to secession, contrary to NSL 20 and 21. He was alleged to have, during the period in question of slightly over three months, overtly advocated the idea of Hong Kong independence at various public places, including shopping malls and the places outside the Government Headquarters and police stations, so as to incite others to organize, plan, commit or participate in some acts, with a view to committing secession or undermining national unification, namely separating the HKSAR from the State, or altering by unlawful means the legal status of the HKSAR.

Major provision(s) and issue(s) under consideration

- BL 1 and 27
- NSL 4, 20 and 21

2. The Court mainly discussed:

- (a) whether the Defendant could raise the exercise of the freedom of speech protected under BL 27 as a defence;
- (b) whether the Defendant could raise any defence on the ground that he merely chanted “idle-boast” slogans, without any method of commission, any actual action taken, anyone responding, etc.;
- (c) whether a person chanting slogans alone without anyone responding could constitute incitement; and
- (d) the inciting effect caused by the Defendant’s acts.

Summary of the Court’s rulings

3. The Prosecution cited 20 instances to prove the Defendant’s *mens rea* and *actus reus*. His inciting acts included: (para.60)

- (a) repeatedly chanting slogans such as “Ethnic enhancement, Hong Kong independence”, “Hongkongers to build a state”, “Liberate Hong Kong, revolution of our times”, “Hong Kong independence, the only way out”, “With the last breath, protest till the end” and “Armed insurrection”;
- (b) displaying pieces of paper with printed words, “Ethnic enhancement, ONE NATION ONE HONG KONG, Hong Kong independence”;
- (c) explaining, by quoting the definition given by Leung Tin Kei during his candidacy in 2015, that “revolution of our times” was a revolution which could overthrow the Hong-Kong-communist regime and achieve Hong Kong independence; and that “liberate Hong Kong” was to regain the sovereignty from the PRC to establish a Republic of Hong Kong and to have the CE elected by universal suffrage and powers returned to the people;
- (d) saying that “Glory to Hong Kong” was the national anthem of the Republic of Hong Kong;
- (e) saying that the NSL was in fact mere ornament;

- (f) saying that he had set up the “610-thousand-not-afraid-of-being-arrested Channel” in Telegram to ask Hong Kong people to be brave to trample the legal bottom line to protest;
- (g) expressing that he demanded for Hong Kong independence;
- (h) appealing to the 610,000 people who had cast votes in the pro-democracy primary election that they, as members of the Hong Kong ethnic group, had to extend the influence on the national consciousness of more Hong Kong people; [saying that he] looked forward to the next revolution of our times, and had to influence more people to stop work, stop classes and stop the markets; [stating that] Hong Kong independence was the only way out that was feasible; and [advocating] overthrowing the government of the Hong-Kong-communist-regime and building a Republic of Hong Kong;
- (i) saying that sacrifices were needed for revolutions, the will of independence had to be advocated in primary schools, secondary schools and universities, to inculcate the idea of the next revolution of our times;
- (j) appealing to Hong Kong people to discuss Hong Kong independence in primary schools, secondary schools and universities, infiltrating it into campuses, and from there further into the society, making every individual in Hong Kong believe that Hong Kong independence was feasible;
- (k) appealing to gather and chant slogans together on the 8th, 15th, 21st, 22nd and 31st days of every month to advocate the will of independence, which was the only way to express true mourning; [and saying that] activities had to be launched on five days of every month, which was to become a local tradition;
- (l) publishing posts on the Facebook account of Ma Chun Man and in the Telegram account “610-thousand-not-afraid-of-being-arrested Channel”, asking people to participate in activities and advocating Hong Kong independence or the will of independence.

4. The Defence did not dispute that the CFI’s judgment in *HKSAR v Tong Ying Kit* [2021] HKCFI 2200 was of reference value to lower courts. The Defence also cited the observations and arguments in

relation to the offence of incitement in that case, i.e. there was no requirement that the inciter had to specify the means; nor was the Prosecution required to prove whether other persons committed the offence incited and whether the purpose of commission could be achieved. (paras. 43 and 45)

(a) Whether the exercise of the freedom of speech protected under BL could be a defence

5. The Defendant argued that he was only exercising the freedoms of speech and of expression protected by the BL, and had no *mens rea* to incite others to commit secession. The Court held that:

(a) NSL 4 stipulated that human rights should be respected and protected in safeguarding national security in the HKSAR. The rights and freedoms, including the freedoms of speech, of assembly and of procession, which the residents of the HKSAR enjoyed, should be protected in accordance with the law. However, freedoms and rights of individuals in a society underpinned by the rule of law were neither infinite nor absolute. Otherwise, their destructive and disruptive force would be self-evident. (paras. 46-47)

(b) The Defendant relied upon and emphasized the rights set out in the BL, but clearly neglected or turned a blind eye to the overriding principle of BL 1, i.e. “the [HKSAR] was an inalienable part of the [PRC]”. (para. 65)

(b) Whether the Defendant could raise any defence on the ground that he merely chanted “idle-boast” slogans, without any method of commission, any actual action taken, anyone responding, etc.

6. The Defence argued that the Defendant did not put forward any substantive plan, idea or method of commission, but merely chanted some empty slogans. The banners held in hand were for venting spleen. No actual action was taken to achieve his ideas, and no one acted in response. He did not believe that what he had said and done incited

others, and hence there was no contravention of the NSL. The Court held that:

- (a) The offence of incitement did not require that someone was actually incited to commit the relevant offence. The Defence alleged that the Defendant could not incite others because the media interviewing him were merely some unknown online pages. Nevertheless, the Defendant's failure to attract mainstream media interviews with his behaviour and popularity did not mean that he did not want to do so. The Defendant enjoyed showcasing himself, whether or not by being interviewed or by shouting alone in the shopping malls. Whether or not [the inciter] succeeded in inciting the others was not an essential element of the offence of incitement. (paras. 50, 80 and 81)
- (b) It was immaterial whether the Defendant took any actual action to commit secession, nor was this an element of the offence, because the charge faced by the Defendant was "incitement to secession" under NSL 21, not "secession" under NSL 20. (paras. 50 and 66)
- (c) The Defendant's hope of having other members of the public chanting with him indicated his intention and hope that the public would respond to his slogans and echo his political statements. The chanting could be considered as attention seeking, and it could not be said that there was no incitement. It could not be said that there were no inciting acts because nobody responded. (paras. 52 and 58)
- (d) Although the Defendant did not set out the methods or measures of commission, he did mention the targets of infiltration, i.e., starting the advocacy from primary schools, secondary schools and universities, then extending to the society and further working its way into every individual in Hong Kong; inculcating the idea of revolution into the next generation; establishing the so-called Hong Kong ethnic group

and the Republic of Hong Kong; and “regaining the sovereignty of Hong Kong from the PRC”. (para 78)

7. The Defendant contended that those slogans with connotation of force were merely idle-boast slogans, not in the least constructive. The Court considered that, whether or not the Defendant’s chanting or pronouncement contained connotation of force, his repeated pronouncements of such slogans were no “idle boast” as claimed by the Defence. The Defendant had committed the offence on as many as 20 occasions. His tone of speech, attitude, intonation and content at those times were relatively consistent and related. The Court not only found no idle-boast of the Defendant, but also found him to be genuine and candid in speaking his mind and position, hoping that others would participate or follow. (paras. 53 and 67)

8. The Defence argued that the NSL concerned the actual acts of secession, rather than prohibiting acts which were frivolous or merely attention seeking. However, the Court did not consider what the Defendant had said frivolous:

- (a) Firstly, the Defendant was charged with the offence of incitement to secession instead of organizing or planning to commit secession under NSL 20. Therefore, the Defence had misplaced their focus.
- (b) Secondly, the Defendant often gave long-winded speeches and repeatedly pronounced, as if he were a legal scholar or a person in authority, that the NSL was mere ornament and more apparent than real. He had not only attacked the NSL, but had also advocated his own political arguments and praised the political stance of certain people. (paras. 54-55)

9. The Defendant on numerous occasions repeated his political statements like a “human-flesh recorder” quoting the slogans and definitions of a political figure. He was the account holder of the Facebook account in question and the “610-thousand-not-afraid-of-being-arrested Channel” in Telegram, and had pieces of paper or placards

which were printed, rather than handwritten, with words including “Hongkongers to build an independent state” and “Ethnic enhancement, ONE NATION ONE HONG KONG, Hong Kong independence”. All these had left no doubt for the court to find the *mens rea* in the defendant, and to find [the slogans] no mere self-gratification or “idle boast” as claimed by the Defence. Considering that the NSL was fake and mere ornament, the Defendant deliberately flouted the law. His motive and *mens rea* were more than obvious. (paras. 68 and 72-74)

(c) Whether a person chanting slogans alone without anyone responding could constitute incitement

10. The Defence argued that the Defendant committed the acts mostly alone. The Court held that there was no direct connection between incitement and the number of inciters and pointed out that it was a misunderstanding of the spirit and purpose of the law to suggest that a lone wolf would not breach the law by speaking out on online social platforms alone to incite others to commit secession (paras. 56-57)

11. The Defence contended that the Defendant very often chanted the slogans with the idea of Hong Kong independence alone, but only very few people responded and the crowd was often silent. This indicated his lack of appeal. The Court considered that no response from anyone did not mean absence of inciting acts. Shouting alone could be considered as attention seeking, so one could not say there was no incitement. At the scene, he was also surrounded and interviewed by those who appeared to be reporters. (paras. 57-58)

12. The Court noted that the Defendant repeatedly advocated Hong Kong independence and used his Facebook and Telegram accounts to call for people’s participation in activities to pronounce the idea of Hong Kong independence. The Defendant was not alone. He was sometimes with another person, quoting speeches of other political figures. At the places where he appeared, sometimes there were also responses from members of the public. The element of incitement was plainly evident. (para. 75)

(d) The inciting effect caused by the Defendant's acts

13. The Defence argued that the Defendant's behaviour on the whole would not produce any inciting effect, and its impact on national security and public order would be limited. The Court considered that the Defendant had no say in this matter, otherwise everything would fall into chaos. One had to assess incitement by looking at the overall environment, the social context at the time, and individual behaviour, but not solely based on the reaction at the scene. Incitement could take place by osmosis, and indeed the Defendant did often say that Hong Kong people should gather five days every month so that they would believe in the possibility of Hong Kong independence. (paras.76-77)

Conclusion

14. The Court considered that the Defendant had believed in his own words and sincerely hoped that Hong Kong people would climb a mountain together, to advocate the will of independence and to inculcate the idea of the revolution of next generation, thereby establishing the Republic of Hong Kong and regaining the sovereignty from the PRC. Such a clear political stance left no room for doubt that the Defendant had both the *mens rea* and *actus reus* of incitement to secession. In those 20 instances within a period of slightly over three months in 2020, the Defendant continuously and unreservedly incited and advocated the matters expressly prohibited under NSL 20(1)(1) and (1)(2), namely, separating the HKSAR from the PRC and altering by unlawful means the legal status of the HKSAR. The Court finally convicted the Defendant of committing the offence of incitement to secession, contrary to NSL 20 and 21. (paras. 82-84)

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