

Case Summary

HKSAR v Wong Denis Tak Keung (黃德強) and Another

DCCC 798/2022; [2023] HKDC 168

(District Court)

(Full text of the Court’s reasons for sentence in English at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=150822&currpage=T)

Before: HH Judge E Lin

Date: 24 February 2023

Sentencing – incitement to subversion under NSL 23 – principles laid down by Court of Appeal concerning incitement to secession under NSL 21 applicable – whether circumstances of the offence committed by defendant of serious nature (Upper Tier) or minor nature (Lower Tier) – mandatory minimum of 5 years’ imprisonment for offence in Upper Tier – substantive offence not completed possibly a mitigating factor but not a pivotal element in deciding whether offence committed in circumstances of a serious or minor nature – offender’s acts, actual consequences, potential risks and possible influence entailed considered – circumstances of commission of the offence by D1 fell within lighter side of Upper Tier

Sentencing – possession of arms without a licence under Firearms and Ammunition Ordinance (Cap. 238) – crossbows – very dangerous weapons – purpose of acquisition and possession of arms – complicity in keeping arms for own use or others’ use

Background

1. The first Defendant (“D1”) was the registered holder of two Facebook accounts (“the Facebook Accounts”) through which he displayed 25 posts to the general public between 27 March 2020 and 10

February 2022, (a) inviting other persons to join his martial arts class, learn to use weapons and join his troop, and (b) inciting them to overthrow the Communist Party of China and the HKSARG by violent revolution, establish a shadow government and an independent Hong Kong State, encourage general public to resist the authorities, and take revenge action, including violence and war, against the Hong Kong Police Force and the Communist Party of China.* The second Defendant (“D2”) was one of the six participants of the martial arts class led by D1. On his plea and admission of facts, D1 was convicted of incitement to subversion, contrary to NSL 22 and 23 (“Charge 1”).

2. In addition, D1 and D2 were convicted on guilty plea of possession of arms without a licence, contrary to s. 13(1) and (2) of the Firearms and Ammunition Ordinance (Cap. 238) (“Charge 3” and “Charge 5” respectively). The subject matter was crossbows. According to s. 2 of the Firearms and Ammunition (Declaration of Arms) Regulations (Cap. 238, sub. leg. D) and Part 1 of the Schedule, a crossbow with a draw weight of more than 6 kilograms fell within the definition of “arms” for the purpose of the Ordinance. The Defendants had no licence to possess the crossbows.

Major provision(s)

- NSL 21, 22 and 23
- Firearms and Ammunition Ordinance (Cap. 238), ss. 2 and 13

Summary of the Court’s reasons for sentence

Incitement to subversion (Charge 1)

3. Although the interpretation of the offence and penalty under NSL 23 had yet to be considered by the appellate courts, it would be safe to assume that the principle laid down by the CA in *HKSAR v Ma Chun*

* The Particulars of Offence read: “[D1], between 1 July 2020 and 20 March 2022 ... incited other persons to organise, plan, commit or participate in the following act or acts by force or threat of force or other unlawful means with a view to subverting the State power, namely:- (1) overthrowing or undermining the basic system of the [PRC] established by the Constitution of the [PRC]; and/or (2) overthrowing the body of central power of the [PRC] or the body of power of the [HKSAR].”

Man [2022] HKCA 1151 concerning the offence of incitement to secession under NSL 21 would be applicable to the offence of incitement to subversion under NSL 23, given that: (a) the substantive offences of secession and subversion were both in the same Chapter of the NSL; and (b) both NSL 21 and 23 adopted exactly the same wording in establishing the two-tier sentencing regime. (paras. 21-22)

4. The only issue to be determined was whether the circumstances of the offence committed by D1 were of a serious nature (the Upper Tier) or a minor nature (the Lower Tier) for the purpose of NSL 23. In the latter case (the Lower Tier), the Court would have to order some form of detention or restriction up to 5 years. In the former case (the Upper Tier), the Court had to order a fixed-term imprisonment of at least 5 years, but no more than 10 years. Following *HKSAR v Lui Sai Yu* [2022] HKCA 1780 concerning the proper construction of the penalty provisions in NSL 21, the Court held that the wording of NSL 23 imposed a mandatory minimum of 5 years' imprisonment for a serious offence in the Upper Tier even after taking into consideration all mitigating factors and whatever discount to which the defendant would have entitled. (para. 23)

5. As such, the Court had to determine:

- (a) whether the present case fell into the "serious" or "minor" category;
- (b) on which part of the spectrum in that category the present case lay; and
- (c) the appropriate sentence that corresponded to the gravity of the offence. (para. 24)

6. Counsel for D1 contended that the fact that the substantive offence of subversion under NSL 22 had not been committed would be a powerful mitigating factor to consider whether the inchoate offence of incitement to subversion under NSL 23 had been committed in circumstances of a serious nature. The Court held that this was not a proper reading of the NSL. That the substantive offence had not been completed might well be a mitigating factor but it was not a pivotal

element in deciding whether the inchoate offence of incitement under NSL 23 had been committed in circumstances of a serious or minor nature. (paras. 25-27)

7. The Court applied *Ma Chun Man* in which the CA held that in assessing the seriousness of the circumstances of the case, the prime focus was on the offender's acts as well as the actual consequences, potential risks and possible influence entailed. The Court considered that the following factors were most relevant in determining whether the circumstances of the offence committed by D1 were serious. (paras. 28-29)

(a) Context in which the offence was committed

- (i) The subversive posts were first made on 27 March 2020 and continued to be published after the NSL came into force on 1 July 2020 until D1 was arrested on 20 March 2022.
- (ii) Read as a whole, the posts were designed to promote and rekindle the feeling of discontent and disgust against the Hong Kong Police Force, the HKSAR and the Chinese Government.
- (iii) The posts advocated the learning and use of military combat skills and weapons to upset the status quo and to overthrow the HKSAR and the Chinese Government with violence.

(b) Modus operandi

- (i) The use of social media (namely, Facebook) for committing incitement was an aggravating factor.
- (ii) By opening 2 different Facebook accounts, D1 had shown that it was not an impulsive, uncalculated idle act of venting his personal grievance against the status quo, but a deliberate move on his part.
- (iii) Apart from calling for a violent revolution in the Facebook Accounts, there were solid plans of overthrowing the government, setting up an independent state, collusion with other dissidents, and seeking assistance from foreign countries.

- (iv) The fact that D1 had made the posts, and had gone about renting a place, setting up a studio for martial arts lessons, and stockpiling weapons and arms to implement his plan for a violent revolution to overthrow the HKSAR and the Chinese Government indicated his actual intention of implementation.
- (v) Decorating the studio where the classes were held as a shrine glorifying the supposed martyrs and riotous behaviour during 2019 was a deliberate act on D1's part to incite those attending his classes resentment towards the government and the place.

(c) Number of times and duration

The posts were on display for a total period of 21 months. There were a total of 39 posts of a subversive nature, advocating the idea of a violent revolution to overthrow the HKSAR and the Chinese Government.

(d) Scale

- (i) D1 had a total of 5,943 "friends" to his Facebook Accounts. Once the messages were posted in the social media, there was no way to contain their proliferation, ascertain the exact scale of D1's incitement, or gauge the extent of damage they would cause.
- (ii) There were three classes each week and at least 20 individuals enrolled in his classes.

(e) Premeditation

- (i) D1 had gone to a lot of soul searching to come up with the proposal, plan and manner of execution.
- (ii) He repeatedly used contemporary rumours based on alleged police brutality and government conspiracy and presented them as manifestations of the evils of the HKSAR and the Chinese Government.

(iii) His purpose was to nurture the sense of discontent, distrust and disgust of the HKSAR and the Chinese Government.

(iv) This was a consistent pattern in such behaviour and could not be an impulsive act.

(f) Violence

The basic premise of D1's proposal was to use violent means to alter the status quo. To that end, he advocated the acquisition of knowledge on the use of martial arts, combat technique and weapons such as machetes and crossbows.

(g) Accomplice

D1's inflammatory and subversive posts attracted approving responses from other netizens. As those enrolling in his classes all registered under their Facebook names, they had come into contact with D1 through the same social media.

(h) Target and size of incitement and the potential influence

By posting on the Facebook Accounts and making them global, D1 aimed at inciting anyone who had an interest in the matter.

(i) Actual result of the incitement

Apart from the fact that D1 actually started to implement his plan by giving classes as a preliminary step to start a violent revolution, there was no evidence of any other person motivated by D1 to make any move to topple the HKSAR and overthrow the Chinese Government with violence.

(j) Actual and potential influence of the incitement

Although there was no evidence that D1's incitement had any actual impact on the society of Hong Kong, the society was still shell-shocked by the social events that took place in the latter half

of 2019 and a section of the population was still quite irrational and gullible.

8. The Court found that D1's subversive posts and the actual steps taken to implement them would have effect on certain segment of the society. This would potentially harm the society as a whole. It held that the circumstances of the commission of the offence fell within the lighter side of the spectrum of the Upper Tier. As such, it adopted 5 years and 6 months of imprisonment as the starting point for Charge 1. (paras. 30-31)

Possession of arms without a licence (Charges 3 and 5)

9. The arms in question were crossbows which were considered very dangerous for their ease of use and availability, especially in the context of a densely populated city like Hong Kong. The maximum sentence of the offence was a level 6 fine and imprisonment for 14 years. (paras. 32-34)

Charge 3 (D1)

10. The subject matter of Charge 3 was two crossbows inside a camouflage bag on the floor of the store room next to D1's bedroom together with 61 arrows. Their draw weights were four to five times the legal limit. The Court had the following observations. (paras. 35-37)

(a) D1's plea of ignorance on the legality of possession of the arms was not a defence.

(b) The arms and weapons were acquired not for their aesthetic value, but for the purpose of implementing what he advocated, i.e. overthrowing the HKSAR and the Chinese Government with violence.

(c) D1 had been extolling the importance of training in martial arts, military combat for the violent revolution; to that end he advocated

and had offered such training to convert the general public and those who were of like mind.

(d) D1 had suggested the importance of weapons in his vision of a revolution and been making notes to study and compare the use and functions of various brands of crossbows and other weapons.

(e) The arrows, essential for the use of crossbows as weapons, were placed conveniently together with the crossbows in a camouflage bag, which could be easily transported, assembled and put to use.

(f) The bag could be easily accessed by D1 himself or any visitor.

11. Having taken the above observations into account, the Court held that D1 had possession of the crossbows for his own use and/or the use of others for the purpose of a military uprising against the HKSAR and the Chinese Government, and adopted 30 months' imprisonment as the starting point for Charge 3. (paras. 38-39)

Charge 5 (D2)

12. The subject matter of Charge 5 was five crossbows seized at D2's residence. Their draw weights were three to five times the legal limit. D2 was not charged with any NSL offences. (paras. 17(1), 42 and 44)

13. D2 submitted that she joined D1's classes for having some exercise and helped to store the offending articles as a favour for D1. The Court had the following observations. (paras. 45-50)

(a) D2's plea of ignorance was inherently impossible as the class she joined was advertised in D1's Facebook Accounts as for martial arts training with the explicit purpose to overthrow the HKSAR

and the Chinese Government, and the students in D1's attendance records were identified by their Facebook names.

(b) Most of the crossbows were kept in purpose-built camouflage bags. They could be easily accessed and taken anywhere, and be assembled and put to use quickly.

(c) The machetes and axes had no use in a residential tenement or normal outdoor activities in Hong Kong, and the items on the list were not for the discipline of Tai Chi or for exercise purpose.

(d) The classroom was decorated like a shrine to honour the riotous movement in 2019 and the supposed "martyrs".

14. The above factors led the Court to conclude that D2 was well aware of D1's intention and had been complicit in keeping the crossbows for her own use or for the use of others. (para. 51)

15. The Court found that although crossbows were less lethal than firearms in terms of their range, speed and power to cause damage, they were nonetheless very dangerous weapons and required little training for using them to cause injury to life and damage to property. (para. 52)

16. Having taken into account the number of crossbows, their draw weight, and the circumstances in which they had been found to be in D2's possession, the Court found that it was necessary to impose a deterrent sentence. It therefore adopted 24 months' imprisonment as the starting point for Charge 5. (para. 53)

Sentence for D1 (Charges 1 and 3)

17. The Court had adopted as a starting point 5 years and 6 months' imprisonment for Charge 1 (incitement to subversion) and 30 months' imprisonment for Charge 3 (possession of arms without a licence). For Charge 3, the 30 months' imprisonment was reduced to 20 months to take account of D1's guilty plea. (para. 54)

18. To avoid punishing D1 twice for the same set of facts and to take into account the totality principle, the Court ordered that the sentence of Charge 3 to run concurrently with that of Charge 1. (para. 55)

19. As to the mitigating factors, the Court considered that the letters from D1's family, social worker, friends and pupils did not contain any valid reasons for clemency. D1 was an adult and must have known what he had been promoting and attempting to implement posed a danger to the stability of the society. (paras. 58 and 60)

20. By reason of the penalty provisions in the NSL, D1 could not avail himself of the customary 30 per cent discount for pleading guilty[†]. Nonetheless, having taken into account his plea and absence of previous transgressions, the Court reduced his sentence from 5 years and 6 months to 5 years' imprisonment. (para. 61)

Sentence for D2 (Charge 5)

21. The Court accepted the veracity of the pleas for clemency from D2's employers, colleague and her other siblings. On the other hand, four of the crossbows seized in D2's residence were very dangerous weapons as it was confirmed that the arrow discharged from a distance of 7 metres could pierce through corrugated cardboards and the rubber boards behind. Having considered the evidence as a whole, the Court considered 24 months a proper starting point for Charge 5 but reduced it to 16 months' imprisonment to reflect her guilty plea. (paras. 62-65)

#582301v3C

[†]Editor's note: The "customary 30 per cent discount for pleading guilty" mentioned here probably refers to the customary one-third discount for pleading guilty.