Case Summary

HKSAR v Lai Man Ling (黎雯齡) and Others

DCCC 854/2021; [2022] HKDC 355; [2022] 4 HKC 410
(District Court)
(Full text of the Court's ruling in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=143644&currpage=T)

Before: HH Judge W. K. Kwok
Date of Ruling: 24 January 2022
Date of Reasons for Ruling: 21 April 2022

"Designated judges" under NSL 44(3) – conspiracy to commit sedition regarding seditious publication under s. 10(1)(c) of Crimes Ordinance (Cap. 200) – nature of offence endangering national security – conspiracy to publish seditious publication an offence endangering national security – mandatory to be handled by "designated judges" under NSL 44(3) – primary duty of prosecution to ensure presiding judge has jurisdiction – not a "judge-shopping exercise"

Background

1. The five defendants were charged with one count of conspiracy to print, publish, distribute, display and/or reproduce seditious publications, contrary to ss. 10(1)(c), 159A and 159C of the Crimes Ordinance (Cap. 200). By a letter to the Registrar of the District Court, the prosecution requested this case be handled by a designated judge in the District Court pursuant to NSL 44(3) on the ground that this case was for proceedings in relation to the prosecution of an offence endangering national security. The first three defendants objected to the prosecution's application.

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

- BL 23
- NSL 7 and 44(3)
- Crimes Ordinance (Cap. 200) ("CO"), ss. 9 and 10
- Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO"), s. 2A(3) and Sch. 8

2. The issue before the Court was whether the present case was for the prosecution of "an offence endangering national security" that triggered the engagement of NSL 44(3).

Summary of the Court's ruling

3. "Designated judges" were the judges in each level of courts designated by the CE to handle cases concerning offences endangering national security pursuant to NSL 44(1). NSL 44(3) provided that the proceedings in relation to the prosecution for offences endangering national security in each level of courts "shall be" handled by designated judges in the respective courts. By using the word "shall", NSL 44(3) made it mandatory that all proceedings relating to the prosecution for "offences endangering national security" in each level of courts had to be and could only be handled by the designated judges in that level of courts. (paras. 15-16)

4. Whether or not the offence of conspiracy to print, publish, etc, seditious publications was an "offence endangering national security" depended on the elements that constituted the offence. (para. 33)

5. Section 10(5) of the CO provided that "seditious publication" meant a publication having a seditious intention. According to the definition of "seditious intention" in s. 9(1) of the CO, seditious intention might appear in one or more of the seven forms listed in paragraphs (a) to (g) of s. 9(1). Each of these forms of intention, if carried out, would have serious adverse impacts on the political, social and economic stability and development of the HKSAR which was an inalienable part of the PRC, and the potential victims of the offence were the Central

Authorities of the PRC as well as the Government and the inhabitants of the HKSAR, or any of them. The defendants were alleged to have the seditious intention falling within s. 9(1)(a), (c), (d), (f) and (g) of the CO. It was beyond argument that they were charged with an offence endangering national security. (para. 34)

6. A seditious offence had been consistently considered by the authorities as an offence endangering national security. (para. 35)

(a) BL 23 provided that "the [HKSAR] shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government …".

(b) In *HKSAR v Lai Chee Ying* [2021] HKCFA 3, the CFA said it was difficult to envisage the accused committing acts endangering national security which would not amount to offences under the NSL or under HKSAR law such as the offences of treason, incitement to disaffection, or sedition in Parts I and II of the CO.

(c) Part II of the CO was entitled "Other Offences Against the Crown", which after 1 July 1997 had to be construed to mean other offences against the CPG of the PRC: IGCO, s. 2A(3) and Sch. 8.

(d) In *HKSAR v Ng Hau Yi Sidney* [2021] HKCFA 42, the CFA stated that the combined effect of BL 23 and NSL 7 made it clear that a prohibited act of sedition – including an offence contrary to s. 10(1)(c) of the CO – qualified as an offence endangering national security.

7. Counsel for the second defendant submitted that the CFA in *Ng Hau Yi Sidney* [2021] HKCFA 42 had left room for the defendant to raise a contextual or purposive argument to show that the offence charged in the present case was not an offence endangering national security because the CFA had stated in that case whether an offence was an offence endangering national security was "subject to any contextual or purposive arguments to the contrary which may arise in any particular case". The Court rejected that submission.

(a) What the CFA had said was simply that when the NSL referred to "offences endangering national security" without distinguishing between those offences created by the NSL itself, and other offences of that nature, it lent itself to the construction that it was referring to all such offences without distinction; and the sentence "subject to any contextual or purposive arguments to the contrary which may arise in any particular case" meant only that there might be occasions when it was necessary to interpret a particular Article under the NSL, in light of its context and purpose, to mean that its application was restricted only to the offences created by the NSL, or restricted only to the other offences endangering national security under the existing laws of the HKSAR, but it was not to be applied to all of them, even though that particular Article just referred to "offences endangering national security". That sentence could not be taken to mean that a particular kind of offence (for instance, sedition) might be regarded as an offence endangering national security in some cases, but not in other cases, depending on the particular facts and circumstances of each individual case. (para. 37)

(b) It would be absurd and illogical if it was mandatory for a bail application made by a person charged with a seditious offence to be dealt with by a designated judge according to the CFA ruling in *Ng Hau Yi Sidney*, but the trial proper was not so dealt with because that offence was not regarded as an offence endangering national security at trial, even though the trial proper could be regarded as the most important part of any criminal proceedings. (para. 38)

8. What the Court needed to consider was the nature of the offence charged, i.e. whether or not it was an offence endangering national security. The function of the Court at that point of time was simply to ensure that the alleged facts, taken at its highest, might support the offence charged which was by its nature an offence endangering national security. In the present case, the facts alleged by the prosecution plainly supported the charge. (paras. 39-40)

9. The Court was satisfied that the defendants were all charged with an offence endangering national security. Hence, NSL 44(3) was engaged and all proceedings relating to the prosecution of the present charge should be handled by designated judges in the District Court. (para. 41)

10. The Court remarked that the criticism levelled by the defence against the prosecution that the request to the Registrar of the District Court was a "judge-shopping exercise" was wholly unjustified. (paras. 43-44)

(a) The prosecution made that request because of their interpretation of NSL 44(3) which made it mandatory for all cases concerning offences endangering national security to be handled by designated judges.

(b) The prosecution had never asked for the case to be heard by any particular judge. It only asked for the case to be heard by the group of judges who had the requisite legal authority to handle the case.

(c) That request was made by the prosecution solely for the purpose of ensuring that the ensuing legal proceedings would be conducted in accordance with the requirements of the law.

(d) Whether or not the presiding judge had the jurisdiction to hear the case was an important matter that had to be resolved the sooner the better. If such an issue had arisen, the prosecutor in charge of the criminal prosecution had the primary duty to raise the issue with the Court to ensure that the ensuing legal proceedings would not be rendered null and void.