

Case Summary

HKSAR v Tam Tak Chi (譚得志)

DCCC 927, 928 & 930/2020; [2021] HKDC 505

(District Court)

(Full text of the Court’s ruling on the stay application in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=135249&currpage=T)

Before: HH Judge Stanley Chan

Date: 26 April 2021

Uttering seditious words contrary to s. 10(1)(b) of Crimes Ordinance (Cap 200) – application for stay of proceedings – court’s jurisdiction to stay criminal proceedings – constitutionality of charges to be heard at trial – laying of charges not an abuse of court process – fair trial not impossible

Background

1. The defendant was charged with 14 counts of various offences, including seven charges of uttering seditious words contrary to s. 10(1)(b) of the Crimes Ordinance (Cap. 200) and one charge of conspiracy to utter seditious words (collectively “the Charges”). He applied to stay the proceedings relating to the Charges on the ground that the Charges were unconstitutional for being inconsistent with the Basic Law and the BOR.

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

- BL 27 and 39
- BOR 16
- Crimes Ordinance (Cap. 200) (“CO”), ss. 9 and 10(1)

2. In determining the application for stay of proceedings, the Court considered: (a) whether the issue of unconstitutionality could render a trial unfair and justify a stay of proceedings; (b) whether the laying of the Charges by the Prosecution was an abuse of process; and (c) whether a fair trial was possible if the Charges were continued.

Summary of the Court's ruling

3. The defence argued that the Charges were unconstitutional in that the offences constituted restrictions on freedom of expression guaranteed by BL 27 and 39(1) and BOR 16 but: (a) the definition of seditious intention under s. 9 of the CO failed to satisfy the "prescribed by law" requirement under BL 39(2); and (b) the offences failed to satisfy the proportionality test because the seditious intentions under s. 9 failed to pursue a legitimate aim, they were not rationally connected with the legitimate aim, and they amounted to a disproportionate restriction on freedom of expression. The defence submitted that the words "hatred", "disaffection", "contempt", "feelings of ill-will" and "enmity" were subjective descriptions of one's state of mind and these were abstract concepts incapable of legal definitions. It also argued that the restrictions were disproportionate as incitement to violence was not an element of the offences. (paras. 6-11)

4. The Court held that in exercise of its inherent power to prevent an abuse of its own process, it had jurisdiction to stay criminal proceedings in the following circumstances:

(a) where a fair trial for the accused was found to be impossible and continuing the prosecution would amount to an abuse of process. The burden was on the accused to show on a balance of probabilities that no fair trial could be held;

(b) in rare case where, even though a fair trial was available, the court was prepared to grant a permanent stay because there had been an abuse of power of a kind that rendered the trial of the accused an affront to the court's sense of justice and propriety. (paras. 18

and 19).

5. Whether the Charges were unconstitutional could be one of the many issues to be heard at trial and should not be taken as a subject matter in the stay application. The Court was not convinced that the issue of unconstitutionality could render a trial unfair, let alone an abuse of process. The issue of unconstitutionality should be a matter for the parties to raise at trial, but not as a justification for a permanent stay of the Charges. (para. 22-24)

6. Neither was the Court convinced that the laying of the Charges by the Prosecution was an abuse of process. The Court was not persuaded that there was no fair trial possible if the Charges were continued. (para. 25)

7. In conclusion, the Court held that the issue of unconstitutionality of any charges could and should be canvassed and argued at trial. The defence failed to show on a balance of probabilities that no fair trial could be held. Accordingly, the Court refused to exercise its residual discretion to stay the proceedings relating to the Charges. The trial would proceed as scheduled. (paras. 26-27)

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