

Case Summary (English Translation)

HKSAR v 阮嘉謙 (Yuen Ka Him) and Others

DCCC 985/2021 (dealt together with DCCC 801/2021);
[2022] HKDC 1147
(District Court)

(Full text of the reasons for sentence in Chinese at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=147831&currpage=T)

Before: HH Judge W. K. Kwok

Date: 8 October 2022

Sentencing – NSL 23 and ss. 159A and 159C of the Crimes Ordinance (Cap. 200) - conspiracy to incite the commission by other persons of the offence of subversion – CA’s sentencing principles on the offence of secession applicable to the offence of subversion – whether circumstances of the offence “serious” or “minor” – gravamen of the offence of subversion – focus on the behaviour of the offender, its substantive outcome, potential risk and possible effect – factors to be considered included the age and immaturity of an offender as well as other circumstances leading to his wrong and not fully informed decision – defendants having committed the offence because of these factors not ruled out – circumstances of the offence reduced to “minor” – offence still very serious – deterrent sentence necessary

NSL 33 – defendant concerned had already committed the substantive offence according to the unlawful agreement before opting out – commission of the offence not voluntarily discontinued when opting out – not constitute a ground for imposing a lighter penalty or reducing to a lower sentencing tier under NSL 33 – culpability limited to substantive offence committed before the opt-out

Background

(a) The case of DCCC 985/2021 (“Case 985”)

1. The seven defendants in Case 985 pleaded guilty to one count of conspiracy to incite the commission by other persons of the offence of subversion, contrary to NSL 22 and 23 and ss. 159A and 159C of the Crimes Ordinance (Cap. 200).

2. The charge alleged that the seven defendants, between 10 January 2021 and 6 May 2021, conspired together and with others to incite others to organize, plan, commit, or participate in the following acts by force or threat of force or other unlawful means with a view to subverting the State power, namely (a) overthrowing or undermining the basic system of the PRC established by the Constitution of the PRC; and (b) overthrowing the body of central power of the PRC or the body of power of the HKSAR.

3. On that day, the Court only dealt with the sentences on the first, third, fourth, sixth and seventh defendants (D1, D3, D4, D6 and D7) in Case 985. They were under 21 years of age at the time of sentencing.*

(b) The case of DCCC 801/2021 (“Case 801”)

4. Case 801 involved four defendants and four charges, namely burglary, possession of apparatus of radiocommunications without a licence, possession of offensive weapons or instruments fit for unlawful purposes, and possession of child pornography. D1 (Yuen Ka Him) and D2 (Choi Wing Kit) in Case 985 were D2 and D4 in Case 801 respectively. The former pleaded guilty to the offence of possession of apparatus of radiocommunications without a licence, contrary to ss. 8(1)(b) and 20 of the Telecommunications Ordinance (Cap. 106)

* Editor’s note: The sentencing of the second and fifth defendants in Case 985 was adjourned until after the Court of Appeal had dealt with the appeal against sentence in *HKSAR v Lui Sai Yu* [2022] HKDC 384. For the reasons for sentence on both defendants, see *HKSAR v Choi Wing Kit and another* [2023] HKDC 214.

5. While handling Case 985, the Court also dealt with the sentence on D1 Yuen Ka Him in Case 801.[†]

Major provision(s) under consideration

- NSL 23 and 33
- Crimes Ordinance (Cap. 200), ss. 159A and 159C

Summary of the reasons for sentence

6. The seven defendants in Case 985 were members of a local political group called “Returning Valiant”. Between 10 January 2021 and 6 May 2021, the seven defendants conspired together and with others in the name of the said organisation to continuously disseminate inciting messages through online social media platforms (namely two Instagram accounts and one Facebook page), speeches at street booths, distribution of leaflets, press conferences, and online live broadcasts, inciting the public to overthrow the PRC Government and the HKSARG by “armed uprising”. (paras. 4-5 and 7)

(a) Sentencing principle for the offence of subversion

7. Pursuant to NSL 23, concerning a person who incited the commissions by other persons of the offence of subversion under NSL 22, if the circumstances of the offence committed by such person were of a serious nature, the person should be sentenced to fixed-term imprisonment of not less than five years but not more than ten years; if the circumstances of the offence committed by such person were of a minor nature, the person should be sentenced to fixed-term imprisonment of not more than five years, short-term detention or restriction. When the circumstances of the case are considered to be of a “serious” nature, the only option of sentence was “imprisonment”, with a term of not less than five years. When the circumstances of the case were considered to be of a “minor” nature, the sentencing options are diverse, including

[†] Editor’s note: As regards the reasons for sentence on D2 Choi Wing Kit in Case 801, see *HKSAR v Choi Wing Kit and another* [2023] HKDC 214.

imprisonment, detention in a detention centre, detention in a training centre, community service, and detention in a reformatory school. There was no mandatory minimum term of imprisonment. (paras. 54-56)

8. All defendants were not directly convicted of violating NSL 22 and 23 but of one count of conspiracy to incite the commission by other persons of the offence of subversion, contrary to NSL 22 and 23 and ss. 159A and 159C of the Crimes Ordinance (Cap. 200). The Prosecution and Defence were in dispute as to whether the minimum penalty prescribed for a case in circumstances of a “serious nature” under NSL 23 was applicable to the present case. The Court considered that the CA would have a decision on the relevant issue when dealing with the appeal against sentence in *HKSAR v. Lui Sai Yu* [2022] HKDC 384. (para. 57)

9. The Court noted that if the circumstances of the present case were of a “minor nature”, the issue of minimum penalty would not arise and the CA’s decision in *Lui Sai Yu* would not provide guidance on the sentencing of the present case. Hence, the Court would first determine whether the circumstances of the present case were “serious” or “minor”. (para. 58)

(b) Whether the circumstances of the offence in Case 985 were of a “serious nature” or “minor nature” as a whole

10. The NSL did not expound what circumstances would be considered of a “serious nature” or of a “minor nature”. The only relevant case was *HKSAR v Ma Chun Man* [2022] HKCA 1151. Although the case concerned the offence of secession, its sentencing principles would also apply to the offence of subversion. (paras 59-60) The Court therefore held that: (paras. 61-62)

- (a) The gravamen of the offence of incitement to subversion was to: (i) stop people from inciting (including by way of persuading or encouraging) others to commit the offence of subversion, even if no one so incited carried out the offence; and (ii) allow intervention of the law at the earliest possible

time to stop a person who had been incited from carrying out the offence of subversion.

- (b) In considering whether the circumstances of a case of incitement to subversion were “serious” or “minor”, the Court needed to take account of the overall actual circumstances of the case.
- (c) Taking into account the gravamen of the charge of incitement to subversion, when the Court assessed 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.
- (d) In this regard, the factors which the Court needed to consider included but were not limited to the following:
 - (i) the context in which the offence was committed, including the date, time, location, occasion and society’s atmosphere at the material time and so on;
 - (ii) the *modus operandi*, including the ways, acts, wording, media or platform adopted;
 - (iii) the number of times and the duration of the incitement, and whether the acts were persistent;
 - (iv) the scale of the incitement;
 - (v) whether the matter happened suddenly or was premeditated; if it was the latter, the scale and precision of the premeditation;
 - (vi) whether violence or threat of violence was involved; if so, the urgency and seriousness of the relevant violence or threat;
 - (vii) whether other people were involved in committing the crime together;
 - (viii) the group the incitement targeted, the size of the group and the potential influence on them;
 - (ix) whether or not the incitement actually succeeded and resulted in someone committing the offence of

[subversion] or any other offence, or the risk and imminence that such offences would happen;

- (x) the actual or potential influence that the offender had on society or a certain sector or area.

11. In view of the following considerations, the Court held that the circumstances in the overall context of the offence in Case 985 were “of a serious nature”: (para. 74)

(a) Although the defendants were each charged with one count of conspiracy, the relevant unlawful agreement had been implemented as a matter of fact. (para. 63)

(i) Between 10 January 2021 and early May when each of the defendants was arrested, they continuously executed the unlawful agreement to incite others to commit the offence of subversion.

(ii) Every post published by them in the name of Returning Valiant, every speech made at the street booths, every leaflet they distributed, and the inciting messages disseminated in every press conference and online live broadcast, advocating “armed uprising” by the public to overthrow the PRC Government and the HKSARG, each constituted a separate substantive offence, namely inciting others to commit the offence of subversion.

(iii) Although each of defendants was charged with one count of conspiracy, the gravity of the circumstances of this case was not limited to the stage where they had only reached an unlawful agreement not yet acted upon. The defendants had actually acted according to this unlawful agreement, and the seriousness of the case was based on acts of incitements on multiple occasions assessed individually and as a whole.

(b) The “armed uprising” each of the defendants advocated was a continuous bloodshed revolution until success. They attempted to lead people into believing that they were in a place without democracy and freedom and a boundless bloodshed revolution

was the only way out. Although there was no direct evidence that others had been successfully incited by them, their speeches might incite some immature people, and might also convince those who originally advocated “peace, rationality and non-violence” to agree with their views. Insofar as a small group of people or even just a single person was incited by them, the stability of the Hong Kong society and the safety of the people could be seriously endangered. No city would possibly allow armed revolutions of any scale or even in a lone-wolf style, or let people spread this idea. The mere fact that they advocated for a boundless bloodshed revolution to overthrow the existing ruling regime rendered the circumstances of this case serious. (para. 64)

(c) The defendants had stated that it was not yet the time for revolution because the people were not yet enlightened, and they would work on enlightening the people. This indicated that their inciting behaviour would persist, which aggravated the seriousness of the facts of the case. (para. 65)

(d) The defendants encouraged like-minded people to equip themselves by learning and practising martial arts (such as regular physical training, boxing, judo, self-defence, etc.), and asked them to use the same in appropriate time. In essence, they suggested and encouraged like-minded people to take immediate action to prepare for armed revolution, and enhance their ability to use violence through learning and practising martial arts, so that the impending armed revolution could be bloodier. (para. 66)

(e) Such inciting behaviour could turn an otherwise peaceful person into someone who knew no bounds to the use of violence in a short space of time. Any incitement had a chance of success. Those incited might be people with no prior history of using violence or other means to endanger the personal safety of others. Incitement could succeed in a very short time. Those incited could be insidious before action and thus unpreventable. (para. 67)

- (f) The defendants had long-term plans for actions; they were not without implementation plans. For instance, they proposed to provide living support to the “comrades” who had been sentenced for the anti-extradition law amendment incident and faced livelihood difficulties after release, so that they could participate in resistance again. (para. 68)
- (g) The behaviour of the defendants was perpetrated under a social atmosphere of continuous unrest or at least a state of instability. At the material times, certain people or even a large portion of the population still rejected the constitutional order after the reunification and took action to resist. (para. 69)
- (h) The defendants chose locations with high pedestrian traffic to set up street booths for a wider outreach. Their speeches were also broadcast online through the media. Their culpability lay in making use of the busy locations to carry out the incitement with the intention of promoting their idea of armed revolution as widely as possible. Returning Valiant also published posts on the social media. The defendants’ incitements were not substantial in quantity and scale, but still of some volume and on a continuous basis. (para. 70)
- (i) Although the Defence emphasised that this case did not involve the sale or purchase of any weapons, the defendants’ plan was not an immediate armed revolution, and therefore there was no need to sell or purchase weapons at that stage. However, one of the posts showed that the person posting it intended to launch a “true armed revolution with live ammunition”. (para 71)
- (j) The defendants, knowing that the NSL had come into force, still established “Returning Valiant” to challenge the law and the PRC Government’s sovereignty over Hong Kong. This aggravated the seriousness of the circumstances of the case. The Court found it incredulous that the defendants had considered their acts at the time not at any risk of breaching the NSL. (para. 72)

(k) Although there was no evidence directly proving that anyone had committed subversive acts as a result of the defendants' incitement, this risk actually existed. Insofar as some people or even a single person carried out a boundless armed revolution as a result of the incitement, great harm would or might be caused to society. (para. 73)

(c) Whether the provision on voluntary discontinuation of the commission of the offence under NSL 33 was applicable to a defendant who had opted out of or not participated in the activities before the arrest

12. The Defence submitted that some defendants had opted out of or not participated in the activities of "Returning Valiant" before their arrest, which constituted a ground for sentence reduction or lowering of the penalty tier under NSL 33. The Court held that this ground could not be made out because the alleged opt-out defendant had already committed the substantive offence according to the unlawful agreement before he opted out. Hence, it was impossible for him to have voluntarily discontinued the commission of the offence when opting out; that is, he did not meet the requirements of NSL 33. The defendant might only suggest his culpability be limited to the substantive offence committed by him before opting out, whereas the offence subsequently committed by the others would have nothing to do with him. This was the usual common law position, not within the scope of NSL 33. (para. 76)

(d) Whether the circumstances of the offence of D1, D3, D4, D6 and D7 were serious

13. The CA stated in *Ma Chun Man* that unless otherwise provided for by the NSL, the local corpus of the law on sentencing were applicable. D1, D3, D4, D6 and D7 were all young (aged 16, 15, near 16, 16 and 18 respectively) at the time of the offence. According to common law sentencing principles, young people's immaturity and susceptibility to instigation were mitigating factors. (para. 77)

14. The Court considered that, the five defendants were misled by the then social milieu and certain people when the offence was committed, which resulted in their seriously wrong perception of Hong Kong and the country and their extreme idea of carrying out a bloodshed revolution. The respective defendants, as well as their relatives and friends, said that they regretted their wrongdoings and undertook not to reoffend. (para. 78)

15. Under such circumstances, the culpability of the respective defendants could be lowered by their immaturity, recklessness and being misled by others at the material time. In determining whether the circumstances of the case were “serious”, consideration had to be given to the age and immaturity of the offender as well as other circumstances leading to his wrong and not fully informed decision. The Court did not rule out the possibility that each defendant committed the present offence because of these factors. Hence, under the premise that the benefit of doubt should go to the defendants, the circumstances of the offence committed by each defendant were lowered to the “minor” tier. (para. 79)

(e) Sentencing of D1, D3, D4, D6 and D7

16. Given that the offence committed by the defendants remained very serious, and for the sake of the public interest, the Court had to impose a deterrent sentence. The imposition of a community service order would not serve the above purpose of sentencing. By striking a balance between deterrence and providing rehabilitation opportunities to the defendants, the Court sentenced D1, D3, D4, D6 and D7 to detention in a training centre. (para. 80)

17. In parallel, D1 Yuen Ka Him admitted possession of apparatus of radiocommunications without a licence in Case 801, on which he was also sentenced to detention in a training centre. The sentences on both charges were to run concurrently. (para. 81)