Case Summary

HKSAR v Tong Ying Kit (唐英傑)

HCCC 280/2020; [2021] HKCFI 1644; [2021] 3 HKLRD 87
(Court of First Instance)
(Full text of the Court's ruling in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136416&currpage=T)

Before: Hon Toh, Anthea Pang and Wilson Chan JJ
Date of Hearing: 7 June 2021
Date of Ruling: 7 June 2021

Jurisdiction – panel of three judges to hear alternative non-NSL charge in CFI under NSL 46 – underlying conduct arising out of same facts as NSL charges – no new substantive facts introduced – proceedings remained criminal proceedings "concerning offences endangering national security" for the purposes of NSL 46 – NSL 46 not requiring different tribunals of fact to deal separately with NSL offences and non-NSL offences pleaded in one indictment – no abuse of process to add alternative non-NSL charge given its close factual nexus with existing NSL charges – late introduction of amendment to indictment not unfair to Defendant

Background

1. The Defendant was charged with incitement to secession contrary to NSL 20 and 21 ("Count 1") and "terrorist activities" contrary to NSL 24 ("Count 2").

2. The Prosecution relied on s. 23(1) of the Criminal Procedure Ordinance (Cap. 221)[1] and applied for leave to amend the Indictment by

[1] Section 23(1) of the CPO read: "Where, before trial or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the

adding Count 3 for the offence of causing grievous bodily harm by dangerous driving, contrary to s. 36A of the Road Traffic Ordinance (Cap. 374), as an alternative to Count 2.

3. The Defendant objected on a number of grounds. The Prosecution emphasised that as Count 3 was to be added as an alternative count to Count 2, the Court could proceed to consider Count 3 only if it was not satisfied as to Count 2, and the purpose was to properly reflect the Defendant's criminality and his dangerous act of driving his motorcycle in the way as he did.

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

- NSL 41 and 46
- Criminal Procedure Ordinance (Cap. 221) ("CPO"), ss. 23(1), 51(1)(b) and 51(2)

4. In determining the application, the Court discussed:

(a) whether the Court, consisting of a panel of three judges, had jurisdiction to hear a case which did not fall under the NSL;
(b) whether adding a charge, albeit as an alternative, which fell outside the ambit of the NSL was an abuse of process; and
(c) whether introducing the amendment 10 months after the Defendant's arrest was unfair.

Summary of the Court's rulings

A. Whether the Court, consisting of a panel of three judges, had jurisdiction to hear a case which did not fall under the NSL

5. The proper context to be considered in the present case was that the underlying conduct alleged in Count 3 arose out of the same facts charged under the existing NSL offences in Counts 1 and 2 (i.e. all arising from the Defendant's acts and conduct as he drove his motorcycle on the

court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice".

day in question) and, in any event, was added as an alternative count to Count 2. It could not be said that the addition of Count 3 introduced to the case any new substantive facts which did not feature in the case against him under Counts 1 and 2, or that the proposed Count 3 was a novelty and a complete surprise. (paras. 5-6)

6. NSL 46 provided that in "criminal proceedings in the [CFI] concerning offences endangering national security", the SJ might issue a certificate directing that the case should be tried without a jury, and by a panel of three judges instead. It did not provide that such a certificate could only be issued in a case which "only concerned" offences endangering national security. In other words, even with the addition of Count 3, these proceedings remained to be criminal proceedings "concerning" such offences albeit that there was an alternative non-NSL offence on the indictment, and the reasons stated in NSL 46 and in the certificate for not having a jury trial would still apply. (para. 7)

7. The Court held the Defendant's complaint of lack of jurisdiction had no merit: (para. 9)

(a) NSL 46 should not be construed as requiring different tribunals of fact (i.e. a panel of three judges and a jury) to be formed in one single set of criminal proceedings to deal separately with NSL offences and non-NSL offences which could properly be pleaded in one indictment. (para. 7)

(b) It would not be in the interests of justice to require Counts 1 and 2 to be tried by the Court, and Count 3, laid as an alternative count to Count 2, by a jury separately, or for that count to be transferred to the District Court to be further dealt with. (para. 8)

(c) By the nature of an alternative count, the issue of guilt or otherwise on Count 3 would only arise if the Court decided to acquit the Defendant on Count 2. There was no basis in law to suggest that after the acquittal of the Defendant on Count 2 by the Court, a jury should then be empanelled or a District Court

judge should then be engaged to try the alternative Count 3, when a plea of *autrefois acquit* might be available to the Defendant. (para.8)

B. Whether adding a charge, albeit as an alternative, which fell outside the ambit of the NSL was an abuse of process

8. Bearing in mind the close factual nexus between Count 3 and the existing Counts 1 and 2, the Court held that there could be no question of an abuse of process. (para. 10)

(a) It would be absurd to suggest that simply because Count 3 was not an offence concerning national security, that *per se* mandated a separate trial for Count 3. (para. 11)

(b) Section 23(1) of the CPO had been construed in wide terms. (para. 12)

(c) This point could be reinforced by considering ss. 51(1)(b) and 51(2) of the CPO. The former provided that "*If a person is arraigned on an indictment ... he may plead not guilty to the offence specifically charged in the indictment but guilty to another offence of which he might be found guilty on that indictment*". (para. 13)

(d) If the Defence were right in their submissions, it would mean that even if this Defendant chose to plead not guilty to Count 2 but pleaded guilty to the offence of causing grievous bodily harm by dangerous driving, the Court could not enter that plea. (para. 14)

(e) It was absurd for the Defence to suggest that s. 51(1)(b) of the CPO was not applicable merely because the Court was a specially constituted court. The fallacy was apparent when one considered that a defendant facing an NSL offence and tried before a jury would be able to invoke s. 51(1)(b), whereas one facing the same NSL offence and tried before a panel of three judges would not be able to do so. This was contrary to the

terms of NSL 41. (para. 15)

C. Whether introducing the amendment 10 months after the Defendant's arrest was unfair

9. The Defendant's complaint of late introduction of the amendment related mainly to the late service of documents, additional evidence, translation of witness statements and unused materials. However, there had not been a substantial addition of evidence or materials going to the proposed Count 3 which had not already been provided to the Defendant. The Defendant's complaint was without merit. (paras. 17-18)

10. The Court concluded that the amendment sought was necessary to meet the circumstances of this case with no injustice caused, and allowed the Prosecution's application to amend the Indictment. (para. 19)

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