

Case Summary (English Translation)

HKSAR v 徐凱駿 (Chui Hoi Chun)

WKCC 3506/2022; [2022] HKMagC 13

(West Kowloon Magistrates' Courts)

(Full text of the Court's reasons for sentence in Chinese at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=149551&currpage=T)

Before: Mr. So Wai-tak, Chief Magistrate

Date of Conviction: 23 November 2022

Date of Sentence: 14 December 2022

Sentencing – pre-emptive nature in gravamen of offence of doing acts with a seditious intention– offence of desecrating national flag intended to fully protect national flag from desecration – should consider deterrent sentence – whether training centre order was appropriate sentence

Time limit for prosecution and retrospectivity of legislation – “doing” not “publishing” being an element of charge of doing acts with a seditious intention – not restricted to a particular type of acts or a limb of a particular act – Defendant’s whole criminal conduct in relation to such sedition offence clearly continuing – “publishing” being an element of offence of insulting national anthem and offence of desecrating national flag – “publishing” could have a continuing trait – Defendant’s criminal acts in all charges of continuing nature – prosecution not time-barred – no question concerning retrospectivity of legislation

Jurisdiction over extra-territorial offences – whether Defendant’s criminal acts or “substantial activities constituting the crime” occurred within Hong Kong – Hong Kong courts having jurisdiction to try present case

Background

1. The Defendant pleaded guilty to 4 charges:
 - (a) Amended Charge 1: “doing an act or acts with a seditious intention”, contrary to s.10(1)(a) of the Crimes Ordinance (Cap. 200);
 - (b) Charge 2: “intentionally publishing altered lyrics of the national anthem with intent to insult the national anthem”, contrary to s. 7(3)(a) of the National Anthem Ordinance;
 - (c) Charge 3: “intentionally publishing the insulting in any way of the national anthem with intent to insult the national anthem”, contrary to s.7(4) of the National Anthem Ordinance; and
 - (d) Charge 4: “intentionally publishing a desecration of the national flag with intent to desecrate the national flag”, contrary to s. 7(2) of the National Flag and National Emblem Ordinance.

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

- Crimes Ordinance (Cap. 200), ss. 10(1)(a) and 11(1)
 - National Anthem Ordinance, ss. 7(3)(a), 7(4) and 7(7)
 - National Flag and National Emblem Ordinance, ss. 7(2) and 7(5)
2. In addition to sentencing, the Court dealt with three legal issues raised by the Defence:
 - (a) Time limit for prosecution: whether the prosecution of the four charges was time-barred;
 - (b) Retrospectivity of legislation: whether Charges 2 and 4 took place prior to the commencement of the National Anthem Ordinance and the National Flag and National Emblem Ordinance;
 - (c) Jurisdiction over extra-territorial offences: whether the Hong Kong courts had jurisdiction to try the present case where the Defendant uploaded the subject contents abroad.

Summary of the reasons for sentence

A. The facts of the case

3. The Defendant, during the period between 28 May 2020 and 27 September 2022, published, made available and continued to make available his 29 posts and content items by using, possessing and maintaining accounts on three online platforms, namely LIHKG, Discord and YouTube. For details of the posts and content items, see Annex 2 to the reasons for sentence. (paras. 2 to 3)

4. In respect of Amended Charge 1, the contents which had a seditious intention included:

- (a) undermining the Central Authorities or the HKSARG with the use of deprecating and hostile words or other seditious content and appealing for others' agreement on such views;
- (b) advocating Hong Kong independence by way of slogans;
- (c) bringing into hatred against the Police Force and undermining the role of the Police Force in performing their duties to maintain law and order, by means of cursing and swearing;
- (d) inciting others to be hostile to persons from Mainland China;
- (e) claiming that he would persist with his acts even if arrested, and cursing persons from Mainland China and police officers to suffer from bodily harm or death. (para. 4)

5. In respect of Charges 2 to 4, the Defendant:

- (a) altered the lyrics of the national anthem with foul language and insulting contents;
- (b) displayed a desecration of the national flag by means of a video with visual and audio elements (namely replacing the original image of the national flag with words of Chinese foul language); and
- (c) sang to the tune of the national anthem with its original lyrics replaced by Chinese foul language. (para. 5)

B. Sentencing considerations

6. The higher courts had not laid down any sentencing guidelines for any of the charges in the present case. (para. 11)

(a) Charge 1: Doing an act or acts with a seditious intention

7. The maximum penalty on a first conviction for this offence was 2 years' imprisonment and a fine of HK\$5,000. In sentencing, the Court had to take into account the circumstances of the case, including the context in which the offence was committed, and the *modus operandi*, frequency, scale, subject of the incitement, risks and consequences etc. in relation to the offence, so as to determine the offender's specific culpability. (para. 12)

8. The Court had to give regard to the pre-emptive nature in the gravamen of this offence, which aimed to prevent the perpetrator from doing seditious acts to cause, excite, incite or infect others to form or identify with the perpetrator's beliefs, thereby realising his assertions by unlawful means. Therefore, the Court had to give primary consideration to deterrence in sentencing, so as to nip in the bud the spread and infiltration of such ideas advocated by the seditious acts, and the ensuing risks and consequences of breaching the peace. (para. 12)

(b) Charges 2 to 4: Insulting the national anthem or desecrating the national flag

9. The maximum penalty for insulting the national anthem and desecrating the national flag was 3 years' imprisonment and a fine of HK\$50,000. The Court cited a CA's decision which held that when considering the sentence for the offence under s.7 of the National Flag and National Emblem Ordinance, the court had to bear in mind the gravamen of the section was to provide full protection to the national flag against desecration, and to safeguard the legitimate interests of the national flag which was the symbol of the dignity, unity and territorial integrity of the State. Such legitimate interest, which touched upon the foundation of the constitutional system of the HKSAR, was of utmost

importance. The court had to ensure that the sentence would adequately represent the purpose of the law to protect such significant legitimate interest, and this included considering the imposition of a deterrent sentence. (para. 13)

(c) Sentencing options and other considerations

10. The Defendant was 18 years old at the time of sentencing, and 16 at the onset of the offence. The Defence strenuously argued that detention in a rehabilitation centre or detention centre would be a more appropriate sentencing option, whereas a training centre order would be unduly harsh, submitting that the detention period under a training centre order would be disproportionate to the gravity of the case. The Court, citing case law, held that a training centre order would be erroneous in principle only in cases which were of such a minor nature as not to warrant custodial sentences, and that the Training Centres Ordinance only provided for a maximum detention period whereas the time of the detainee's release would be determined according to his performance and conduct. (paras. 16 to 18)

11. Having taken into account the following factors, the Court held that a punitive and deterrent sentence had to be imposed to be commensurate with the gravity of the present case, and to warn against imitation by others in order to achieve the pre-emptive effect; only then would the general interests of society be served: (paras. 23 to 25)

- (a) The Defendant published, made available and continued to make available through three online platforms contents which had a seditious intention in the forms of texts, sounds, pictures or images etc., so that the message advocated by him could be swiftly and widely disseminated and circulated in the cyber world with sustainability and perpetuity, and ordinary Internet users could be at liberty to browse and access such contents.
- (b) The offence committed by the Defendant spanned a period of about 28 months, involving 29 content items in total.
- (c) Such contents were mainly about opposing the political regime, swearing at the State leaders, persons from Mainland China and

police officers in foul language, cursing them to suffer from bodily harm or death, and advocating Hong Kong independence.

- (d) The Defendant also altered the lyrics of the national anthem and an image of the national flag with extremely insulting words and content.
- (e) The contents disseminated by him mainly instigated public hatred and contempt against the Central Government, the HKSARG, Mainlanders and the Police Force. Such thinking, if not curbed early, would gradually cause social instability and fragmentation.
- (f) By insulting the national anthem and desecrating the national flag, both laden with symbolic meaning, he not only trampled on the dignity of the State and the nation but also undermined the sentiments of the people.

12. As shown in the training centre suitability report and the clinical psychologist's report sought on the defendant prior to sentencing, he had poor academic performance and conduct due to his Attention-Deficit/Hyperactivity Disorder. Although the Defendant expressed that he still disapproved violence, he also considered that he would not condemn the violent acts of protestors if they worked. Apparently, the Defendant still endorsed and accepted this distorted idea of changing the status quo in society by violent means. The Court held that a substantial period of training would be conducive to rectifying his values and his rehabilitation. (paras. 26 to 27)

13. Upon balancing social interests and factors such as the Defendant's personal background, the Court considered that a sentence of detention in a rehabilitation centre or detention centre would not be sufficient to reflect the gravity of this case. However, detention in a training centre, which emphasized vocational training and character development, would be an appropriate sentence. The Court sentenced the Defendant to detention in a training centre on the four charges to which he had pleaded guilty. (paras. 27-28)

C. Points of law at issue

14. Before taking the plea, the Defence raised issues with three points of law, namely (a) time limit for prosecution; (b) retrospectivity of legislation; and (c) jurisdiction over extra-territorial offences. The reasons for the rulings were set out in Annex I to the reasons for sentence.

(a) Issues concerning time limit for prosecution and retrospectivity of legislation

15. The Defence argued that the prosecution for all the four charges was time-barred. (paras. 4 and 7 to 9 of Annex I)

(a) Section 11(1) of the Crimes Ordinance provided that no prosecution for a sedition offence under s.10 should be begun except within 6 months after the offence was committed.

(b) As stipulated under s. 7(7) of the National Anthem Ordinance and s. 7(5) of the National Flag and National Emblem Ordinance, proceedings might only be commenced for an offence of insulting the national anthem or desecrating the national flag before whichever was the earlier of the following:
(i) the end of the period of 1 year after the date on which the offence was discovered by, or came to the notice of, the police;
(ii) the end of the period of 2 years after the date on which the offence was committed.

16. The Defence submitted that all the four charges centred on “publishing” and that the relevant provisions did not contain “continue to publish” or words to that effect. The Defendant made use of the Internet to commit the offences, which were completed at the moment when he uploaded the relevant contents. The fact that the uploaded contents continued to exist on the Internet was merely the outcome of the offences and would not perpetuate the criminal acts. (para. 10 of Annex I)

Whether Amended Charge 1 was time-barred

17. The Defendant argued that among the 29 content items in relation

to Amended Charge 1, the prosecution for Nos.1 to 26 was not instituted within 6 months and was therefore time-barred. The Court held that:

- (a) Amended Charge 1 was that the Defendant “does an act or acts with a seditious intention”, contrary to section 10(1)(a) of the Crimes Ordinance. The particulars of the charge were “publishing, making available and/or continuing to make available statements, photos, videos and pictures on LIHKG, Discord and YouTube”. Hence, the element of the charge was “doing” rather than “publishing”. “Publishing” was only part of the particulars to be proved by the Prosecution. (para. 12 of Annex I)
- (b) The Defence mixed up the two concepts of “elements” and “particulars”, resulting in its primary focus on “publishing” in its submissions. It was clearly a misunderstanding of the basis for prosecution. (para. 12 of Annex I)
- (c) As regards the issue on time limit for prosecution, the keyword in Amended Charge 1 was “doing” which was not confined to “publishing”. (para. 13 of Annex 1)
- (d) Section 10(1)(a) of the Crimes Ordinance provided that any person who “does any act with a seditious intention” should be guilty of an offence. Taken literally, the provision was not restrictive in any way. Whether the act in question was momentary or continuing would depend on the circumstances of each case. (para. 15 of Annex I)
- (e) Sedition in itself was a comprehensive term, which embraced all those practices, whether by word, deed or writing, which were calculated to disturb the tranquillity of the State, and led ignorant persons to endeavour to subvert the government and the laws. Given the wide range of circumstances caught by the gravamen of the offences of sedition, the provision should not be construed in a manner only restricted to a particular type of acts or a limb of a particular act. Such interpretation would undermine the

gravamen of the offences. (paras. 18-19 of Annex I)

18. The Defendant had created, established and possessed the online platforms, chatroom or channel in question before being abroad. He then continuously produced, composed and compiled the contents in question on these platforms, and subsequently published and continued to maintain and make available the same to netizens thereon for accessing and browsing. The contents continued to exist until he was arrested. Therefore, the Defendant had committed the whole criminal conduct continuously within and outside Hong Kong, which was clearly of a continuing nature. (para. 17 in Annex 1)

Whether Charges 2 to 4 were time-barred and the issue concerning retrospectivity of legislation

19. In respect of Charges 2 to 4, which were contrary to the relevant provisions of the National Anthem Ordinance and the National Flag and National Emblem Ordinance, the element concerned was “publishing”. The Defence argued that the Defendant had completed the publication, and hence the commission of the crime, upon uploading and transmitting the contents to the server. What members of the public could thereafter view online did not involve continuing publication by the Defendant. Therefore, the prosecution for Charges 2 to 4 was instituted beyond the 2-year statute bar, and Charges 2 and 4 even occurred before the commencement of the National Anthem Ordinance and the National Flag and National Emblem Ordinance. Except for content items Nos. 27 to 29 in relation to Amended Charge 1, which satisfied the statutory requirement, the remaining content items were invalid. (paras. 5 and 21 to 22 in Annex I)

20. The Court held that the Defence’s interpretation of “publishing” was unduly narrow and impractical. (paras. 23 to 24 and 28 to 29 in Annex I)

- (a) It was stipulated in both the National Anthem Ordinance and the National Flag and National Emblem Ordinance that “publish” included “to distribute, disseminate or make available to the

public”, in which “make available” covered the meaning of continuance. For example, if a publisher intended to cause the published contents to exist and continue to exist on a platform without taking any action to withdraw or seeking to withdraw such contents, he was continuing to make available the relevant contents.

- (b) The operation of the Internet consisted of different and inseparable acts and technical operations. Any web user issuing a command with a device to upload contents onto an online platform apparently had the intention to show it thereon for the public to browse at will. Therefore, to narrowly restrict the definition of “publishing” to the moment when the keyboard was pressed would be an unconvincing contention.
- (c) As seen from the UK case law, the time and act of publication would not be confined to the moment when the publisher pressed the keyboard. Instead, they covered the period commencing from the moment when the content was published until it was withdrawn, and also the entire act and period of time when the content was made accessible to members of the public.
- (d) The CFA had affirmed in a civil case that publishing could have a continuing trait. The Defence sought, yet unconvincingly, to refute this by breaking down and separating the overall conduct of publication.

21. The Court held that the criminal acts involved in the four charges were of a continuing nature and that the prosecution was not time-barred. Based on the above rulings, the issue raised by the Defence for Charges 2 and 4 concerning retrospectivity of legislation prior to its commencement was not applicable. (para. 30 in Annex I)

(b) Jurisdiction over extra-territorial offences

22. The Defence argued that the Defendant was abroad when uploading content items Nos. 1 to 8 in relation to Amended Charge 1 and content

items in relation to Charges 2 to 4, which were extra-territorial acts outside the jurisdiction of the Hong Kong courts. The Court held that the Defendant's criminal acts or "substantial activities constituting the crime" occurred within Hong Kong: (paras. 5, 31 and 39 in Annex 1)

- (a) Whenever images, pictures, sounds and the like were received by a web user on the monitor of a computer or device, they had to have gone through technical processes via computer codes such as uploading, downloading and conversion etc., which very often took place in more than one location. (para. 33 in Annex 1)
- (b) As noted in a UK case, contents albeit not being published in the UK could satisfy the jurisdiction requirement so long as it was capable of being viewed within the UK, and the jurisdiction consideration would depend upon questions of intention and causation in relation to where publication should take place. (para. 34 in Annex 1)
- (c) The situation was similar to that of a telephone scam. Even if a swindler was making a phone call from abroad to a victim within Hong Kong, the offence could be regarded as having taken place in Hong Kong so long as the victim picked up the call within Hong Kong. (para. 36 in Annex 1)
- (d) The Hong Kong courts would have jurisdiction over a case as long as the "substantial activities constituting the crime" in the case occurred within Hong Kong. (para. 37 in Annex 1)

23. Prior to the Defendant's departure from Hong Kong, he had opened, possessed and maintained accounts within Hong Kong for publishing and continuing to publish seditious contents. Although some of the contents were published outside Hong Kong, the contents published by him was mainly in traditional Chinese characters. Clearly, his intentions were to target at the Central Authorities and the HKSARG, and to advocate and disseminate seditious assertions within Hong Kong, with the netizens therein as the target audience. His intentions were to

incite hatred and disaffection within Hong Kong so as to achieve the agenda of Hong Kong independence. (para. 38 in Annex 1)

(c) Rulings on legal arguments

24. For the above reasons, the Court held that: (paras. 2 and 40 of Annex I)

(a) In respect of all the charges, the criminal acts alleged were of a continuing nature. The charges were not time-barred, and no issue of retrospective application of legislation arose.

(b) The Defendant's criminal acts or "substantial activities constituting the crime" occurred within Hong Kong. The Hong Kong courts had jurisdiction to try all the charges in the present case.

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