

Case Summary (English Translation)

HKSAR v 古思堯 (Koo Sze Yiu)

WKCC 481/2022; [2022] HKMagC 4
(West Kowloon Magistrates' Courts)

(Full text of the Court's statement of findings in Chinese at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=146392&currpage=T)

Before: Mr. Peter Law, Principal Magistrate

Dates of trial: 6,7,8 June 2022 and 11 July 2022

Date of verdict: 12 July 2022

Section 10(1)(a) of Crimes Ordinance (Cap.200) – attempting to do or making preparation to do an act or acts with a seditious intention – sedition offences not requiring element of violence – words alleged to have a seditious intention to be construed from surrounding circumstances and atmosphere at that time – bringing into hatred, contempt or exciting disaffection against Central Authorities – exciting inhabitants of Hong Kong to attempt to procure alteration otherwise than by lawful means of any matter as by law established – bringing into hatred, contempt or exciting disaffection against administration of justice in Hong Kong – raising discontent or disaffection amongst inhabitants of Hong Kong – act or acts having reached stage of attempt

Whether sedition offence under s. 10(1)(a) contravened BOR 16 and BL 39 – relevant freedom not absolute – restrictions of sedition offence as prescribed by law, with legitimate aim and necessary – proportionality test being reasonable necessity – proportionate to legitimate aim – satisfying requirements of “systemic proportionality” and “operational proportionality” – Johannesburg Principles not binding on Hong Kong courts – charge not unconstitutional

Background

1. The Defendant was charged with one count of “attempting to do or making any preparation to do an act or acts with a seditious intention”, contrary to s. 10(1)(a) of the Crimes Ordinance (Cap. 200). The particulars of offence stated that on 4 February 2022 in Hong Kong, the Defendant attempted to do or made any preparation to do an act or acts with a seditious intention, i.e.:

- (a) to bring into hatred or contempt or to excite disaffection against the Central Authorities and/or the HKSARG;
- (b) to excite inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established;
- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong;
- (d) to raise discontent or disaffection amongst inhabitants of Hong Kong; and/or
- (e) to counsel disobedience to law or to any lawful order.

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

- BL 39
- BOR 16
- Crimes Ordinance (Cap. 200), ss. 9(1)(f), 9(2) and 10(1)(a)

2. The Court mainly discussed:

- (a) whether it was necessary to prove in the sedition offences that sedition was effectuated by violence, i.e. whether violence was an element of the charge;
- (b) whether the provisions of the sedition offence concerned (ie s. 10(1)(a) of the Crimes Ordinance) themselves were in breach of the BOR and the BL; and
- (c) whether the relevant words were sufficient to constitute a seditious intention.

Summary of the Court’s rulings

3. On 4 February 2022, i.e. the opening day of the Winter Olympics, the police found upon search at the Defendant's residence a self-made coffin, on which there were hand-written words "Down with the Communist Party", "End one-party dictatorship", "Democracy and human rights take priority over the Winter Olympics" and "Hong Kong National Security Law, even eating shit gets rich". Also, next to the coffin was a cloth strip resembling a "spirit-recalling flag", with "The stench of the butcher regime remains forever" written on it. The Defendant admitted that he intended to bring with him the coffin and the strip of cloth to protest at the Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region ("LOCPG") on that day.

(a) Whether it was necessary to prove that sedition was effectuated by violence

4. In light of the following reasons, the Court was satisfied that there was entirely no basis to construe violence or advocacy of violence by others as a requisite for the offences of sedition, and held that violence was not a necessary element of the offences of sedition: (para. 19)

(a) Both the Privy Council in *Wallace Johnson v The King* [1940] AC 231 and the Hong Kong court in *Fei Yi Ming v The Crown* (1952) 36 HKLR 133 had decided that incitement to violence was not a necessary element to be proved by the prosecution. In 1970, the Legislative Council of Hong Kong also added a separate sub-clause, namely "to incite persons to violence" (see the existing s. 9(1)(f) of the Crimes Ordinance). Therefore, in respect of a sedition charge, except for the circumstances under s. 9(1)(f), violence was never a necessary element for sedition. (paras. 14-17)

(b) Although the sedition offences were created in the last century, their fundamental legislative purposes had always been protecting national security and maintaining public order, etc., which remained unchanged to this day. In the last century, it was usually the case that only by violence could sedition be

eventuated. However, in light of the current technology, violence was not necessarily required for eventuating it. Therefore, when the courts construed the statutory provisions, while the fundamental legislative intent could not be altered, the flexible application of the legislation should keep abreast of the times to give effect to its legislative spirit. (para. 18)

(b) Whether s. 10(1)(a) of the Crimes Ordinance itself was in breach of the BOR and the BL

5. BL 39 provided that the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong should remain in force and should be implemented through the laws of the HKSAR. The rights and freedoms enjoyed by Hong Kong residents should not be restricted unless as prescribed by law. Such restrictions should not contravene the provisions of BL 39(1). Based on Art. 19 of the International Covenant on Civil and Political Rights, BOR 16 protected the right to freedom of expression. (paras. 20-21)

6. As noted by the Court, the CFA in *Leung Kwok Hung and HKSAR* [2005] 8 HKCFAR 229 held that the relevant freedom protected by the BL and the BOR was not absolute, but might be subject to restrictions provided that two conditions were satisfied: (1) the restriction was prescribed by law; and (2) the restriction had a requisite legitimate purpose, namely it was necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. The Court held that the restriction in the present case was prescribed by law, had a legitimate purpose, namely in the interests of national security, public safety and public order (*ordre public*) in a democratic society, and was also necessary. (paras. 21-23)

7. The Court also noted the four-step process laid down by the CFA in *Hysan Development Co. Ltd. v Town Planning Board* [2016] 19 HKCFAR 372 for assessing whether the relevant restriction was proportionate to the legitimate aim. The four steps were: (para. 24)

- (1) the relevant restriction had to pursue one or more legitimate aims;
- (2) the restriction had to be rationally connected to the legitimate aim(s);
- (3) the relevant restriction had to be no more than necessary to advance the legitimate aim(s); and
- (4) where an encroaching measure had passed the three-step test above, the Court needed to further incorporate a fourth step into the analysis to look into whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, examining in particular whether pursuit of the societal interest would result in an unacceptably harsh burden on the individual.

8. The Court noted that the proportionality test was a test of reasonable, not strict, necessity, and was satisfied that the restriction in this case was able to pass the above four-step test. (paras. 25-29)

- (a) Steps (1) and (2) were not in dispute and the test could be passed.
- (b) Safeguarding national security and social order, preventing administration of justice from being undermined, preventing enmity or opposition among members of the public, public obedience to the law and so on were the most fundamental and essential societal interests. On balance, the Court was satisfied that Step (3) of the test could be passed as well.
- (c) If problems arose in national security, social order, administration of justice, public sentiment and so on, social divisions would result and dire consequences would ensue. Section 9(2) of the Crimes Ordinance also provided that certain circumstances were not considered seditious and that positive criticism would attract no liability. Even though violence was not a necessary element of the sedition offences, a balance could still be struck between protecting national security and social order on the one hand, and protecting individual rights and freedoms on the other. Therefore,

the Court was satisfied that Step (4) of the test could also be passed.

9. The Court then cited *Leung Kwok Hung v Secretary for Justice* [2020] HKCA 192 and noted that the CA had decided that the proportionality analysis had to be applied on two levels. The first level was “systemic proportionality”, i.e. the proportionality of the legislation or rules themselves; and the second level was “operational proportionality”, i.e. whether the actual implementation of the legislation or rules in the case was proportionate. (paras. 30-32)

- (a) For the reasons mentioned above, the Court held that the relevant legislative provisions could pass the “systemic proportionality” test.
- (b) Upon balancing all the circumstances, the Court considered that the arrest and prosecution of the Defendant could pass the “operational proportionality” test:
 - (1) The Defendant had prior experience and knowledge that the act in the present case was unlawful, but he still defied the law;
 - (2) The Defendant was charged with a sedition offence, which was a lesser offence compared with the prescribed offences under the NSL in his initial contemplation;
 - (3) He chose to commit the offence at the opening of the Winter Olympics when there were already voices in various places seriously against the State and some people even advocated a boycott;
 - (4) With the grave mass violations of the law in Hong Kong a few years back, albeit such events already subsided, many people had yet to recover in full emotionally. Resurgence would readily set in upon stimulation.

10. As for the “Johannesburg Principles on National Security, Freedom of Expression and Access to Information” mentioned by the Defence, the CFI had held in *HKSAR and Ma Chun Man* [2020] HKCFI 3132 that

they were not binding on Hong Kong courts. (para. 36)

11. The Court held that even absent the requirement to prove an element of violence, the sedition offence under s. 10(1)(a) of the Crimes Ordinance was not unconstitutional. (para. 34)

(c) Whether the relevant words were sufficient to constitute a seditious intention

12. In considering a sedition charge, the Court not only had to look at the words themselves that were alleged to have a seditious intention, but also could not lose sight of the surrounding circumstances and atmosphere at that time when construing those words. (para. 37)

13. Taking the facts of the case as a whole, the purpose of the Defendant's writing "Democracy and human rights take priority over the Winter Olympics", "Down with the Communist Party", "End one-party dictatorship" and "The stench of the butcher regime remains forever" on the coffin and cloth strip, as well as his ultimate purpose were to alter or even overturn the arrangements established by the PRC Constitution. As indicated by those words "down with" and "end", he was obviously more than just making criticism and expressing discontent. (para. 38)

14. The PRC Constitution clearly provided that the Communist Party of China had its specific status and role constitutionally. Altering or even overturning in whatever way any matter established constitutionally would undoubtedly affect national security, which was an offence under the NSL and would also run counter to the original intent of the BL under the "One Country, Two Systems" framework. (para. 39)

15. From a macro perspective, those words would trigger, alter and even overturn matters established by the Constitution. Under "One Country, Two Systems", this amounted to procuring the alteration, by unlawful means, of the system in Hong Kong as by law established, and would also trigger the contravention of the NSL. (para. 40)

16. The Court was satisfied that the messages involved had a seditious intention, and would bring into hatred or contempt or excite disaffection against the Central Authorities. (para. 41)

17. As to whether there was an intention to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong, the words concerned were “Hong Kong National Security Law, even eating shit gets rich”. The Court considered that the Defendant was delivering the message that the NSL was a draconian law with an overwhelmingly dominating power. The Court held that the administration of justice was not merely confined to the trial of cases in court, but was very broad in scope covering matters such as law enforcement, prosecutions, and trials, etc.. The message conveyed by the Defendant would undermine people’s confidence in the administration of justice, and would bring into or trigger hatred and contempt. Hence, the Court was satisfied the words in question were seditious. (paras. 42-43)

18. In considering whether the words had an intention to raise discontent or disaffection amongst inhabitants of Hong Kong, the Court noted that with the spate of large-scale mass violations of the law over the past few years, there had been a sentiment of discontent among the public. Although the events had subsided, many people had yet to recover deep down. The delivery of such messages under these circumstances would reignite the sentiment of discontent. Therefore, the Court was satisfied that such messages entailed triggering a sentiment of discontent. (paras. 44-45)

19. The defendant made the arrangements below in his choice of timing and actions to match his protest, which showed that he hoped more people would know his messages and join him: (paras. 46-48)

- (a) He chose to stage the protest in the run-up to the Winter Olympics, when there was widespread criticism overseas and even advocacy of a boycott. His commission of such acts at that time would hype him up and create a mutually echoing effect.
- (b) The spate of grave mass violations of the law in Hong Kong over

the past years were directed against the Central Authorities and the HKSARG. Albeit such events had subsided, many people had yet to recover deep down. The Defendant's acts triggered the risk of resurgence.

- (c) He protested by lifting a coffin for the purpose of an added insulting effect and making the news more explosive.
- (d) He sent an interview notice to the media through his friend for the purpose of getting more people to know his message.
- (e) The route of protest selected by him could draw the attention of passers-by and be readily seen by passengers travelling by vehicle.
- (f) He picked LOCPG as the protest venue because it was the State's highest organ in Hong Kong.

20. The words mentioned by the Defendant such as "down with" "end", etc. connoted overturning, whereas such words as "butcher" and "eating shit" were derogatory and insulting; all of which were in no way good-natured expressions within the scope of s.9(2) of the Crimes Ordinance, but rather intended to provoke troubles. Hence, the Court held that the Defendant could not be exempt from his liability by relying on s. 9(2). (paras. 50-51)

(d) Conclusion

21. Having considered all the circumstances, the Court made the following rulings and convicted the Defendant as charged. (paras. 52-54)

- (a) The words written by the Defendant had a seditious intention;
- (b) The Defendant's acts had reached the stage of attempt;
- (c) The Defendant's acts were beyond the circumstances under s. 9(2) of the Crimes Ordinance, and thus the Defence could not rely on that provision for exemption;
- (d) The offence in the present case fell within the category of national security;
- (e) For a charge of sedition, the intention of inciting others to sedition by violence was not a necessary element of the charge;
- (f) The charge in the present case was not unconstitutional;
- (g) The Defendant's acts amounted to an attempt to do acts with

more than one seditious intention.

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