

Case Summary (English Translation)

HKSAR v 彭滿圓 (Pang Moon Yuen Garry) and Another

WKCC 928/2022; [2022] HKMagC 9

(West Kowloon Magistrates' Courts)

(Full text of the Court's verdict in Chinese at

[https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=148257
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Before: Mr Cheng Lim Chi, Magistrate

Dates of hearing: 1, 5-9, 13-16 September and 21 October 2022

Date of verdict: 27 October 2022

Section 10(1)(a) of Crimes Ordinance (Cap.200) – offence of doing act or acts with a seditious intention – time limit for prosecution of offence – continuing offence – prosecution requirement to begin prosecution within 6 months after commission of offence

Section 10(1)(a) and (b) of Crimes Ordinance (Cap. 200) – elements of sedition offences – mens rea not include defendant having a seditious intention – taking account of nature and purpose of sedition offences in understanding words of “seditious intention” definition – intention to bring into hatred or contempt or to excite disaffection against administration of justice in Hong Kong – meaning of “hatred”, “contempt”, “disaffection” – whether remedying judges’/magistrate’s errors or inadequacies through the videos

Whether sedition charges were constitutional – “seditious intention” definition fulfilling “prescribed by law” requirement – restrictions imposed on freedom of speech by sedition offences not more than necessary for achieving legitimate aims, not more than reasonably necessary – sedition offences not unconstitutional – overseas cases not directly applicable to Hong Kong

Application for stay of proceedings – sedition offences under Crimes Ordinance not becoming invalid because of NSL – prosecution to choose under which legislation to institute prosecution – not unfair to defendant

Background

1. The Prosecution alleged that the first Defendant (“D1”), between 17 November 2020 and 16 February 2022, produced, uploaded and broadcast on a YouTube channel titled “The Pastor Go Crazy with You” eight videos, with contents making reference to the decisions, directions and conduct of judges and magistrates in deciding various cases, and maintained the said channel. He was charged with doing an act or acts with a seditious intention, namely with an intention to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; to raise discontent or disaffection amongst inhabitants of Hong Kong; and/or to counsel disobedience to law or to any lawful order, contrary to s. 10(1)(a) of the Crimes Ordinance (Cap. 200). (“Charge 1”)

2. In addition, D1 and the second Defendant (“D2”) were alleged to have spoken words with a seditious intention when sitting in on a case at a magistrates’ court, thereby uttering seditious words, namely with an intention to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; and/or to counsel disobedience to law or to any lawful order, contrary to s. 10(1)(b) of the Crimes Ordinance (Cap. 200). (“Charge 2”)

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

- BL 27
- BOR 16
- Crimes Ordinance (Cap. 200), ss. 9(1)(c), (d) and (g), 9(2), 10(1)(a) and (b), and 11

3. The Court mainly discussed:

- (a) whether the prosecution of Charge 1 had complied with the legal procedures (s. 11 of the Crimes Ordinance);
- (b) whether Charges 1 and 2 were constitutional (ss. 9(1) and 10(1) of the Crimes Ordinance);
- (c) whether the proceedings of the present case should be stayed;
- (d) the elements of the offences of sedition (ss. 9, 10(1)(a) and (b) of the Crimes Ordinance);
- (e) the verdict on Charge 1 (ss. 9(1)(c), (d) and (g) and 10(1)(a) of the Crimes Ordinance);
- (f) the verdict on Charge 2 (ss. 9(1)(c) and (g) and 10(1)(b) of the Crimes Ordinance).

Summary of the Court's rulings

(a) Whether the prosecution of Charge 1 had complied with the legal procedures (s. 11 of the Crimes Ordinance)

4. Pursuant to s. 11(1) of the Crimes Ordinance, no prosecution for an offence of sedition under s. 10 “shall be begun except within 6 months after the offence is committed”. The Defence alleged that some of the videos involved in Charge 1 had been uploaded to the YouTube channel six months before the prosecution was instituted. The Court considered that the prosecution of Charge 1 did not contravene the requirement under s. 11(1). Charge 1 was a continuing offence, which was prosecuted on the basis that D1 had maintained the YouTube channel until 16 February 2022. The institution of prosecution on 8 April 2022 was thus in compliance with the requirement of beginning prosecution “within 6 months after the offence is committed”. (paras 6-7)

5. D1’s continuous commission of the offence at all material times was the same as the situation of maintaining a bank account and continuously laundering money. Hence, the Court found that the question of duplicity (or double pleading) did not arise in respect of Charge 1. (para. 7)

6. Section 11(2) of the Crimes Ordinance provided that no prosecution for an offence of sedition under s. 10 shall be instituted without the written consent of the SJ. D1 argued that the “Consent to Prosecution” had contravened the requirement under s. 11(2) as it was not under the hand of the SJ. The Court held that since the document could be signed by a person authorized by the SJ, the prosecution of Charge 1 did not contravene the requirement under s. 11(2). (para. 8)

(b) Whether Charges 1 and 2 were constitutional (ss. 9(1) and 10(1) of the Crimes Ordinance)

7. The Defence submitted that the offences extended by the definition of “seditious intention” in ss. 9(1)(c) and (g) were ambiguous in wording and there was a lack of objective test, and that they failed to meet the “prescribed by law” requirement, with their restrictions imposed on the freedom of speech protected by the BL and the BOR being more than reasonably necessary.

8. The Court considered that there was neither ambiguity nor a lack of objective test concerning the definition of “seditious intention” in the Crimes Ordinance (including the words used in s. 9(1)(c) and (g)), and held that the offences of sedition had fulfilled the “prescribed by law” requirement: (paras 16-21)

(a) The principle of legal certainty did not require the law to be absolutely clear. When considering this issue, one could not only focus on certain words out of context, but must at the same time take into account the context and purpose of the provisions.

(b) By having regard to the nature and purpose of the offences of sedition and taking into account the ordinary meaning of the words used in the definition of “seditious intention” (including “hatred”, “contempt”, “disaffection”, “lawful order”, etc.), the meaning and scope of “seditious intention” could adequately be determined.

- (c) The offences of sedition would not lead to people falling foul of the law unwittingly. The offences of sedition were directed against the accused's acts and intention; therefore, how others reacted following the accused's utterance of words would be irrelevant to the accused's own acts and intention.
- (d) The Court agreed with what the DC had stated in *HKSAR v Tam Tak Chi* [2022] HKDC 208 that conceptual terms in the Ordinance such as "enmity", "feelings of ill-will", "disaffection", "contempt" and "hatred" could be explained and interpreted by the court as appropriate to the circumstances.

9. The Court also held that the offences of sedition did not restrict freedom of speech more than reasonably necessary: (paras 21-27)

- (a) The freedom of speech protected by the BL and the BOR was not absolute and could be subject to restrictions as prescribed by law that were necessary for the protection of legitimate aims.
- (b) Relying on the DC's decision in *Tam Tak Chi* and the Chief Magistrate's decision in *HKSAR v Koo Sze Yiu* [2022] HKMagC 4, the Court held that the legitimate aim of the offences of sedition was to safeguard national security and the restrictions imposed were in the interest of public order. The relevant provisions did not restrict freedom of speech more than reasonably necessary to achieve the legitimate aim, and were no more than reasonably necessary.
- (c) The feature of the offences of sedition was that they differed in terms of context in different jurisdictions. Cases and views from overseas had to be considered according to the constitution and legislation of the relevant jurisdiction, which could not be applied directly to Hong Kong.

10. Based on the above reasons, the Court held that the offences of sedition were not unconstitutional. (para 27)

(c) Whether the proceedings of the present case should be stayed

11. D1 applied for a stay of proceedings before the trial of the present case commenced. The Defence pointed out that the NSL was overriding and that the Crimes Ordinance was obsolete. It also contended that the offences of incitement in the NSL were inconsistent with the Ordinance.

12. The Court considered that it was the choice of the Prosecution as to under which law prosecution was to be instituted, and that the Court should not interfere. The prosecution was instituted by the Prosecution under the Crimes Ordinance but not the NSL, and it was neither an abuse of process nor unfair to D1. The offences of sedition under the Ordinance would not become invalid because of the NSL. (paras 30-31)

13. The Court held that the prosecution of the present case was not in any way unfair to D1, nor was it an abuse of process. There was also no sufficient ground to support D1's application for a stay of the proceedings of the present case. His application was refused accordingly. (para 32)

(d) The elements of the offences of sedition (ss. 9, 10(1)(a) and (b) of the Crimes Ordinance)

14. The Court agreed that, based on the relevant legal provisions, legislative intent, etc., it was necessary for the Prosecution to prove that: (para 39)

- (a) the Defendants did the act or acts/uttered the words (actus reus);
- (b) the act or acts/the words had a seditious intention (condition of actus reus);
- (c) at the time the Defendants did the act or acts/uttered the words, they:
 - (i) intended to do the act or acts/utter the words; and
 - (ii) knew that the act or acts/the words had a seditious intention (mens rea).

15. Based on the legislative history and the DC case of *HKSAR v Lai Man Ling* [2022] HKDC 981, the Defence submitted that it was necessary for the Prosecution to prove that the Defendants had a seditious intention. The Court agreed that the legislative history would facilitate the understanding of the legislative intent, but the Court should ascertain the intention of the legislature according to the wording of the relevant legislation. The Prosecution also pointed out that DC cases were not binding on the magistrates' courts. (paras 43 and 46)

16. Pursuant to s. 10(1)(a) and (b) of the Crimes Ordinance, the elements of the offence were “doing an act/acts with a seditious intention” and “uttering seditious words” respectively, whereas the definition of “seditious words” was that “words having a seditious intention”. The Court therefore held that “seditious intention” was merely used to define the acts and words that would amount to the commission of the offence, but not the mens rea. The mens rea of the offences of sedition did not include “having a seditious intention”. (paras 40 and 44)

17. The repealed s. 9(3) of the Crimes Ordinance originally provided that every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself. However, the meaning of the section only assumed that the person speaking such words and publishing such document intended the consequences which would naturally follow from what he had said and published, but did not define the mens rea of the offences of sedition as “seditious intention”. (paras 47-48)

18. The Court held that: (paras 49-51)

- (a) pursuant to the relevant provisions, the Crimes Ordinance had never provided that the mens rea of the offences of sedition was “seditious intention”. If the intention of the legislature was that the mens rea of the offences of sedition was “seditious intention”, it should have been made clear in the Ordinance.

(b) the mens rea of Charges 1 and 2 did not include having a seditious intention. However, if someone, at the time of doing the act/acts or uttering the words, had the intention of doing the act/acts or uttering the words, and also had knowledge that such act/acts or words had a seditious intention, the Court could hardly believe that he did not have the seditious intention.

(c) although the Ordinance did not define the words used in the definition of “seditious intention”, such as “hatred”, “contempt”, “disaffection”, etc., these words were all used in ordinary language. It was only necessary to take into account the nature and purpose of the offences of sedition; their meaning was very clear. For example, “hatred” included the meaning of abhorrence and detestation; “contempt” included the meaning of disparaging and despising; “disaffection” included the meaning of disloyalty, hatred and enmity.

19. In addition, the Prosecution agreed that it had to prove beyond reasonable doubt that the Defendants did not fall within the circumstances under s. 9(2) of the Ordinance. (para 53)

(e) The verdict on Charge 1 (ss. 9(1)(c), (d) and (g) and 10(1)(a) of the Crimes Ordinance)

20. D1 said that he was a pastor and an online media. He reminded others to abide by the law in the videos, and through the videos he merely remedied judges’ errors or inadequacies. The key issues were whether the contents of the eight videos had a seditious intention, and whether D1 was remedying judges’ errors or inadequacies through the videos, i.e. whether s. 9(2) of the Crimes Ordinance was applicable.

Videos 1 and 2

21. D1 mentioned in Video 1 that taking the laws as a tool to oppress and even exclude those who held different views, and using such means as a weapon, were merely acting as if in accordance with law, but in substance to ruin the rule of law. The Court considered that there were two interpretations of the meaning intended by D1, one was that D1 merely put forth the idea that laws could be used as a weapon to exclude those who held different views, which was not sufficient to constitute a seditious intention. Therefore, the Court could not be certain that there was a seditious intention concerning Video 1. (paras 58-61)

22. D1 mentioned in Video 2 that the threshold for granting bail was too high when the court handled an NSL case, and the Chief Magistrate even held a court hearing until late evening for dealing with a case involving 47 defendants, a scene bringing “shame before the world” and even worse than that of the third world countries. The Court considered that although D1 had criticized the court concerned, his criticism fell short of bringing into contempt or hatred against the administration of justice in Hong Kong. The Court thus could not be certain that there was a seditious intention concerning Video 2. (paras 62-65)

Videos 3 to 6

23. In Videos 3 to 6, D1 mentioned that a judge had refused some individuals from entering the courtroom without any legal basis, and repeatedly expressed that the court disregarded the law. The Court held that the contents of the relevant videos had a seditious intention; D1 also had a seditious intention when producing, uploading, and broadcasting the relevant videos: (paras 66-78)

- (a) Since the disturbances arising from the proposed legislative amendments [to the Fugitive Offenders Ordinance], there had been multiple cases of unlawful assembly and riot. When handling these cases, judges would need to issue directions as appropriate to the circumstances in order not to allow the courtroom to become a place to advocate political slogans and

anyone to cause improper disruption to the proceedings. Such approach was sensible and reasonable.

- (b) D1 had treated statements whose truthfulness was hard to verify as facts, and wantonly criticized the court for disregarding the law, without any knowledge of the actual situation in the courtroom.
- (c) Having taken into account D1's background (with a doctorate degree and having traveled to different places in the world), he certainly understood that the court was not a platform for political movements.
- (d) Even if he was of the view that the court should not deny those who wore yellow masks or outfits with umbrella pattern access to the courtroom, he certainly understood that he could lodge a complaint against a judge's misconduct in accordance with the established procedures, instead of unilaterally alleging on the internet that the judge had disregarded the law.
- (e) The contents of the videos merely focused on criticizing the judge for disregarding the law, with the intention to demean judges, bringing into contempt and hatred against the administration of justice in Hong Kong, rather than remedying the judge's inadequacies. D1's only purpose of producing, uploading, and broadcasting of the relevant videos was to demean the judges, bringing into contempt and hatred against the administration of justice in Hong Kong, instead of remedying the judge's conduct.

Video 6

24. In Video 6, D1 criticized a judge's attitude towards the defence counsel after deciding the case, and considered that there was a quality issue in that the judge's conduct was improper and had insulted the counsel. The Court held that there was a seditious intention concerning the relevant video: the only reasonable inference was that D1 had a seditious intention when producing, uploading and broadcasting the relevant video: (paras 79-85)

- (a) The judge's act to point out at an appropriate stage the error in points of law made by defence counsel could not be regarded as a making criticism.
- (b) D1's evaluation of the judge in the video carried a strongly subjective element and lacked an objective basis.
- (c) D1 and the defence counsel could lodge a complaint against the judge's misconduct in accordance with the established procedures, instead of alleging unilaterally on the internet that the judge had insulted the defence counsel and that there was a quality issue.
- (d) The video merely focused on criticizing the misconduct of the judge and reproaching the judge for insulting the defence counsel improperly, which certainly only served to demean the judge, bringing into contempt and hatred against the administration of justice in Hong Kong. The purpose of D1 in producing, uploading and broadcasting the video was merely to demean the judge, bringing into contempt and hatred against the administration of justice in Hong Kong, instead of remedying the judge's conduct.

Video 7

25. In Video 7, D1 criticized that a magistrate for intimidating those clapping in court, namely accusing the magistrate of handling the clapping issue improperly. The Court considered that the content of the video would bring into contempt against the administration of justice in Hong Kong, and counsel those in court to disobey the court's directions, and held that its content had a seditious intention; and that the only reasonable inference was that D1 had a seditious intention when producing, uploading and broadcasting the video: (paras 86-94)

- (a) It was legitimate and reasonable for the magistrate to disallow any clapping that would cause disruption to court operations.
- (b) D1 argued that he had attended court hearings on many occasions, but had never seen anyone being prosecuted for clapping. Having taken into account D1's background, the Court considered that he certainly understood that those sitting

in had to abide by the discipline in court and were not allowed to do any acts to disrupt court hearings. In the past, it was merely the court's discretion not to pursue against those who clapped in the courtroom.

- (c) It was not until someone clapped for the first time that the magistrate issued a warning to remind the attendees not to clap, and did not immediately pursue against the person causing disruption to court operations. However, the content of the video was only directed against the magistrate's "intimidation" of those sitting in, without mentioning at all that he had issued a warning, let alone the fact that someone still clapped after the warning.
- (d) The content of the video was biased, selectively portraying the events which took place in court on that day, so that those not in attendance were mistaken into believing that the magistrate was unsympathetic or had used means of intimidation to silence people, which vilified the magistrate's decision, and had nothing to do with remedying any judicial error.

Video 8

26. In Video 8, D1 generally criticized the administration of justice in Hong Kong (for example by mentioning "suppression" by law, "might without right", etc.). The Court considered that this was an arbitrary criticism against the court for suppressing the citizens by law without factual basis and grounds, and held that its content would bring into contempt, and even hatred, against the administration of justice in Hong Kong, and that the only reasonable inference was that D1 also had a seditious intention when producing, uploading and broadcasting the video. (paras 95-96)

Verdict on Charge 1

27. The Court found D1 guilty of Charge 1: (para 104)

- (a) The contents of Videos 3 to 8 concerned repeated criticisms against the courts, which was definitely not a momentary slip of tongue, but with an intention to demean judges or magistrates.
- (b) Each of the said videos had a seditious intention and was completely irrelevant to remedying the judges' or magistrate's errors or inadequacies.
- (c) Through the YouTube channel, D1 produced, uploaded and broadcast to the public videos with a seditious intention, and had an intention to do such acts, and was certainly aware that the contents of the relevant videos had a seditious intention.
- (d) Taking all the circumstances into account, the only reasonable inference was that D1, with a seditious intention, produced, uploaded and broadcast the relevant videos.

(f) The verdict on Charge 2 (ss. 9(1)(c) and (g) and 10(1)(b) of the Crimes Ordinance)

28. Charge 2 concerned the events which took place in Court 3 on 4 January 2022. During Chow Hang Tung's mitigation in WKCC 2595/2021, someone clapped all of a sudden, and thus the magistrate issued a warning to those in court about the liability of anyone who disrupted the order for the contempt of court. Chow then continued with her mitigation, but there was another round of clapping, and hence the magistrate directed the police to record the identity of those who clapped. D1 and D2 indicated that they did clap, and even verbally criticized the magistrate:

- (a) D1 said, "You have dropped your conscience, Your Worship", "Those who clapped stand up, no need to be afraid", "Dare to clap, dare to stand up, how many do they manage to arrest", "You have lost your conscience", etc.
- (b) D2 said, "There is dignity, [you] decide the case arbitrarily", "[You've] gone too far", "Is this a court[?!]", "There is no law now", etc.

29. The Court found D1 and D2 guilty of Charge 2: (para 145)

- (a) In the circumstances, the magistrate prohibited the Defendants from making a political statement and ordered the police to record the names of those who disregarded court's warning and disrupted court proceedings, which was reasonable and legitimate. The magistrate's directions were completely unrelated to the conscience as alleged by D1. (para 129)
- (b) D1 openly criticized the magistrate "your conscience has gone", "you have lost your conscience" and so on, apparently accusing the magistrate of lacking conscience when hearing the case and flagrantly denigrating the magistrate during the trial in the courtroom. (para 132)
- (c) D2 accused the magistrate of non-compliance with the law, deciding the case arbitrarily, out-of-line behaviour and delivering unfair judgment. (paras 141 and 144)
- (d) D1 and D2 publicly criticized the magistrate in front of everyone present, which could not be a momentary slip of tongue or ventilation of emotions. (para 141)
- (e) The contents of D1 and D2's speeches definitely brought into hatred and contempt against the administration of justice in Hong Kong, i.e. with a seditious intention. (paras 132 and 142)
- (f) At that time, there had already been two clapping incidents in the courtroom which interrupted the hearing, and the magistrate had even issued a warning. D1 and D2 in the circumstances certainly had the intention to make the utterances or say the words with a seditious intention, and they certainly knew that their utterances or words had a seditious intention. (paras 132 and 142)
- (g) D1 and D2 certainly had a seditious intention to make the utterances and said the words which had a seditious intention. (paras 132 and 143)
- (h) D1's clapping was not an act to oversee the [magistrate's] conduct. D1 and D2's utterances or words had nothing to do with conscience or remedying the [magistrate's] errors. (paras 131 and 144)

(g) Others

30. D1 questioned that this was merely a case of “criminal contempt of court”, but was investigated by the National Security Department of the Police, and was charged with the offences of sedition, which was unreasonable. The Court held that it was the decision of the Police and the Department of Justice as to which department was to investigate the case and which charge was to be laid finally, a matter which the Court should not intervene, and was also unrelated to the verdict of the case. (para 146)

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