Case Summary (English Translation)

HKSAR v Ma Chun Man (馬俊文)

CACC 272/2021; [2022] HKCA 1151; [2022] 5 HKLRD 221
(Court of Appeal)
(Full text of the Court's judgment in Chinese at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=146236&currpage=T)

Before: Hon Poon CJHC, Pang and A Pang JJA
Date of Hearing: 7 June 2022
Date of Judgment: 3 August 2022

Sentencing – offences under NSL – applicable laws – legislative intention of NSL – NSL to converge and complement with HKSAR local laws – NSL prevailing over inconsistent HKSAR local laws – purposes of NSL penal provisions – HKSAR sentencing laws applicable, unless otherwise provided by NSL

Sentencing – incitement to commit secession under NSL 21 – whether circumstances of charge being of "serious nature" or "minor nature" – gravamen as fundamental sentencing consideration – nature of incitement similar to common law offence of incitement – gravamen to stop inciting others from committing offence of secession and allow intervention of law at earliest possible stage – usual considerations for assessing seriousness of circumstances of case – overall actual circumstances of case – offender's acts, actual consequences, potential risks and possible influence entailed – present case of "serious nature" - mere absence of force or threat of force not making circumstances less serious – whether offender was remorseful irrelevant to whether case was of "serious nature" – culpability in present case being relatively low within category of "serious nature"

Background

1. The Applicant was charged with the offence of incitement to secession, contrary to NSL 20 and 21. The Applicant was convicted by the DC. The trial judge concluded that the present case was of a serious nature, and adopted a starting point of 6 years. Since the time of the trial was considerably saved by the way the defence was conducted, the judge exercised his discretion and reduced the sentence by 3 months and finally sentenced the Applicant to imprisonment for 5 years and 9 months.

2. The Applicant applied to the CA for leave to appeal [against sentence], on the sole basis that having considered the charge, the seriousness of the facts and the Applicant's overall culpability in the present case, the trial judge erred in finding the present case to be within the category of "serious nature", resulting in the sentence being wrong in principle and/or manifestly excessive, as the trial judge:

(a) erred in regarding whether the Applicant was remorseful as a factor in considering whether his case was of a "serious nature";
(b) overemphasised the inciting effect caused by the Applicant's acts;
(c) failed to sufficiently consider that the Applicant had used no force, and had not defied or charged at any law enforcement officer when committing the offence; and
(d) failed to sufficiently consider that the Applicant's acts did not involve any detailed plan of secession and that the inciting effect was limited.

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

- BL Preamble para. 2, BL 1 and 12
- NSL 2, 20, 21 and 33

3. In the present case, the Court discussed:

(a) the laws applicable to sentencing offences under the NSL;
(b) how to classify cases as of a "serious nature" or "minor nature" under NSL 21;

(c) whether the circumstances of the offence of "incitement to secession" committed by the Applicant were "of a serious nature" or "of a minor nature";
(d) if they were of a serious nature, whether the sentence of imprisonment of 5 years and 9 months imposed by the trial judge on the Applicant was manifestly excessive.

Summary of the Court's ruling

(a) Laws applicable to sentencing offences under the NSL

4. In the sentencing of an offence under the NSL within the jurisdiction of the Hong Kong court, the prime question was the applicable law. This issue might be addressed from two perspectives. (para. 57)

(i) The legislative intention of the NSL

5. The CFA elucidated the legislative intention of the NSL in *HKSAR v Lai Chee Ying* [2021] HKCFA 3, providing a guiding principle as to how the NSL and the local laws in Hong Kong were to be applied to certain issues involving the NSL. Such guiding principle was applicable to matters including criminal procedures and bail, as well as the sentencing of offences under the NSL. (para. 61)

(ii) Purposes of relevant penal provisions

6. The penal provisions under the NSL had reflected the above principle regarding applicable laws.

(a) Parts 1 to 4 in Chapter III of the NSL had respectively laid down the four types of offences, and provided for the corresponding punishments. These provisions had provided for punishments in several levels, ranging from more to less serious, with reference to sentencing factors such as the actual criminal acts, the role of the offender, the actual consequence resulting from the offence concerned, and the seriousness of the circumstances under which the offence was committed. With the exception of

the provisions on minimum terms, these penal measures were generally consistent with the sentencing principles and considerations of the Hong Kong courts.

(b) It was laid down in Part 5, Chapter III of the NSL other penal provisions, among which NSL 33 set out various circumstances under which a lighter penalty might be imposed, or in which the penalty might be reduced or even exempted. These circumstances were also the sentencing factors which were generally taken into account by the Hong Kong courts.

(c) NSL 64 provided that when the NSL was applied in the HKSAR, the various penalties provided for in the NSL meant the corresponding penalties in the relevant local laws or the corresponding penalties by construction with reference to the relevant local laws. The penalties under the NSL could thereby converge with the corresponding penalties under local laws. (paras. 61-64)

7. When the Hong Kong courts imposed sentences in NSL cases, the relevant provisions had to be complied with and within the framework established by these penal provisions; unless otherwise provided for by the NSL, the corpus of the law on sentencing which had all along been used in the HKSAR were applicable. In case of any inconsistency, the corresponding NSL provisions should be applied pursuant to NSL 62. (para. 66)

(b) How to classify cases as of a "serious nature" or "minor nature" under NSL 21

8. Cases were categorised into being of a "serious nature" or of a "minor nature" with respect to the penalties laid down under NSL 21, but the NSL did not contain any provision on how cases were to be classified into these two categories. Since it was the legislative intent of the NSL to converge and be complementary with local laws, and the NSL did not provide otherwise, when the Hong Kong courts dealt with this issue, the local legal principles on sentencing were applicable. (para. 67)

(i) Gravamen of the offence of incitement to secession

9. It was an established sentencing principle that the court generally took the gravamen of the offence as the most fundamental consideration. (para. 68)

10. Upholding national unity and territorial integrity was an important theme underlying the resumption of the sovereignty of Hong Kong by the PRC: see the second paragraph of the Preamble of the BL. For this reason, the BL 1 stated that, the HKSAR was an inalienable part of the PRC. BL 12 explained that the HKSAR should be a local administrative region of the PRC, which should enjoy a high degree of autonomy and come directly under the CPG. These two articles had laid the foundation of the constitutional system and the legal status of the HKSAR under the policy of "One Country, Two Systems", which were fundamental provisions in the BL: see NSL 2. Regardless of whether it was the offence of secession or incitement to secession, both provisions were of utmost importance in upholding national unity and territorial integrity, as well as the foundation of the constitutional system and the legal status of the HKSAR as an inalienable part of the PRC under the "One Country, Two Systems" policy. (paras. 69-71)

11. The offence of incitement to secession under NSL 21 was a pre-emptive offence. "Incitement" (煽動) literally meant instigation and prompt with encouragement. Under the local law, the nature of "incitement" (煽動) was similar to that of the common law offence of "incitement" (煽惑). Since its nature was similar to that of the (common law) offence of "incitement", the gravamen of the offence of incitement to secession under NSL 21 might be expressed as follows:

(a) stop people from inciting (including by way of persuading or encouraging) others to commit the offence of secession, even if no one so incited carried out the crime; and
(b) allow intervention of the law at the earliest possible stage to stop a person who had been incited from carrying out the offence of secession.

Its purpose was to sufficiently protect important public interests such as national security and territorial integrity as well as the foundation of the constitutional system and legal status of the HKSAR, to ensure that the offence of secession could be nipped in the bud by timely and effective suppression and punishment. (paras. 72-73)

(ii) Usual considerations for assessing the seriousness of the circumstances of the case

12. Whether the circumstances of a case of "incitement to secession" were "serious" or "minor" depended on the overall actual circumstances of the case. Due to their similar nature, the court might draw on the general principles established in the precedents of the (common law) offence of "incitement" to ascertain whether the circumstances of the case were "serious" or "minor". (para. 74)

13. Taking into account the gravamen of the charge of "incitement to secession" and applying the relevant cases and principles, 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. In this regard, the factors which the court needed to consider included, but were not limited to the following:

(a) 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;
(b) the *modus operandi*, including the ways, acts, wording, media or platform adopted;
(c) the number of times and the duration of the incitement, and whether the acts were persistent;
(d) the scale of the incitement;
(e) whether the matter happened suddenly or was premeditated; if it was the latter, the scale and precision of the premeditation;
(f) whether violence or threat of violence was involved; if so, the urgency and seriousness of the relevant violence or threat;

(g) whether other people were involved in committing the crime together;
(h) the group the incitement targeted, the size of the group and the potential influence on them;
(i) whether or not the incitement actually succeeded and resulted in someone committing the offence of secession or any other offence, or the risk and imminence that such offences would happen;
(j) the actual or potential influence that the offender had on society or a certain sector or area. (para. 75)

14. All in all, the court was required to carefully consider the circumstances of the case as a whole, identify the existence of individual factors, accord appropriate weight and assess the case as a whole in order to determine whether the circumstances of the case were "serious" or "minor", and then apply general sentencing principles to determine the offender's specific culpability and decide on an appropriate sentence. (para. 76)

(c) Whether the present case was of a "serious nature" or "minor nature"

15. The Court found that the present case fell within the category of "serious nature" under NSL 21. (para. 77)

16. First, since the implementation of the NSL on 30 June 2020, the overall atmosphere in Hong Kong had gradually been alleviated during the period of the offence, but there were still unlawful assemblies involving violence in Kowloon and on Hong Kong Island. The community was still subject to attacks of violence. It was notable that Hong Kong was still facing a high risk of national security and the rule of law being endangered. Under such circumstances, the Applicant still persisted in perpetuating the offence, which no doubt seriously aggravated the risk of national security and the rule of law being undermined. (para. 78)

17. Second, the Applicant had on many occasions overtly derided the NSL as "fake", "child's play" and "mere ornament", and even described

it as "not worthy of mention". He stressed many times to the public that advocating "Hong Kong independence" was not unlawful, taking the police bail given to him repeatedly as an example. The Applicant's acts not only created a serious challenge to the authority of the NSL and the foundation of the constitutional system and the rule of law in Hong Kong, but also were specious and confused the public, inducing others to wrongly believe that acts of "Hong Kong independence" were, as he said, not unlawful, which increased the risk of others committing secession. As seen from the letter for mitigation written by the Applicant himself, the Applicant was determined to commit the offence. His counsel's contention that he did so because of being ignorant and being misconceived that he was exercising his freedom of speech had no merit at all and was not consistent with the facts. (paras. 79 and 82)

18. Third, the Applicant's *modus operandi* was aimed at enhancing the effect of his incitement on others to commit secession, and had increased the risk that others would commit the offence of secession as a result of his incitement: (para. 83)

(a) He picked specific dates and locations to commit the offence for the obvious purpose of attracting more public participation or attention and attempting to enhance the effect of incitement by playing on others' emotions.

(b) He chose to perpetrate the offence at various large shopping malls on Hong Kong Island, Kowloon and the New Territories for the obvious reasons that shopping malls had a large flow of people, making it easier to attract people's attention or participation, and thus enhancing the effect of incitement.

(c) He was interviewed by the media on many public occasions and gave remarks which incited secession. He certainly knew that after being reported by the media, with some footage of interviews being even uploaded onto the internet, his inciting remarks would naturally reach more people.

(d) He did not only initiate activities by making use of the internet, but also advocated his message of "Hong Kong

independence" by using the internet. With the broad reach of the internet, abusive use of social media to incite others to commit crime made the offenders more culpable.

(e) He persistently committed the offence at different public places and also propagated the idea of "Hong Kong independence" on the internet. There were many persistent incitements over a long period.

19. Counsel for the Applicant contended that the objective effect of the Applicant's inciting acts was limited, but the Court did not accept these views: (paras. 84-85)

(a) The Applicant did commit the offence on sensitive dates and locations which posed a relatively higher risk.

(b) The dissemination of inciting remarks by the Applicant during public occasions was only one of the ways by which he had committed the offence. The court must also consider his other inciting acts and the circumstances of the case as a whole to assess the effect and risk resulting from his criminal acts.

(c) The relevant cases were a strong rebuttal to the view that the influence of the Applicant's use of the internet to commit the offence was extremely limited.

(d) The Defence submitted that the Applicant was not famous personally; he was alone when the offence was being committed; what he said and did failed to draw the attention of mainstream media; there was no evidence that he was associated with any organisation; and no one answered his appeal to join the activities in question. However, all these submissions had ignored the pre-emptive nature in the gravamen of the offence of incitement. Reference could be drawn from foreign case law that a defendant incited others to riot in a particular place, and even though the riot did not spread to that place, and irrespective of the words used by the defendant or the reaction

of the public, his culpability remained considerably serious. The same reasoning was applicable to the present case. On the other hand, if the Applicant was a famous person or his remarks inciting others to commit secession had attracted many people's attention, or many people had joined the related activities in response to his appeal, his culpability would have been more serious.

20. Fourth, at the time of the offence, Hong Kong was still facing the risk of violent confrontations. The Applicant picked the specific days of each month, which were dates of relatively high risk, to call for the public to join the activities initiated by him at the relevant locations for mourning and so on, and then he perpetrated the offence on the spot, which undoubtedly increased the risks of his activities turning into violent outbreaks against public order. (para. 86)

21. Fifth, the Applicant perpetrated the crime with premeditation. On many occasions, he had in advance appealed on the said Facebook account and the said Telegram channel to the public to participate in his activities before perpetrating crime at the specified time and place. There were several occasions when he even brought along some pre-made propaganda material and displayed them at the scene. (para. 87)

22. Sixth, the object of the Applicant's incitement included the public, and he in particular targeted the 610,000 residents who had voted in the "pro-democracy primary election". He even called upon primary schools, secondary schools and universities to advocate the idea of "Hong Kong independence" to their students. The Court considered that targeting young students as the recipient group of his incitement was extremely irresponsible, and aggravated his culpability. In fact, the Applicant had repeatedly called upon the "discussion" on Hong Kong independence on campuses for the purpose of advocating the "will of independence", "so that more people believe Hong Kong independence is the only way out", "sowing the seeds of 'independence' and 'revolution' on campus", so as to "pave the way for the next 'revolution of our times'". It was apparent that he intended to target students as the recipient group, inciting them to commit secession. (paras. 88-89)

23. Seventh, the Applicant incited others to convey secessionist messages through multiple means; for example, he told people to advocate "Hong Kong independence" by way of "procession" etc on those specific days of each month, and even wanted to turn such activities into a local tradition. He also enticed people to start from campuses and from there infiltrate into society. He also told people to take strike actions, boycott classes and shut down markets so as to pave the way for the arrival of "revolution of our times". Although the content of the Applicant's incitement did not involve detailed or meticulous planning, it was not totally haphazard. There were certain steps and levels, and the potential risk of someone being incited to perpetrate crimes in the way mentioned by him could not be ruled out. (paras. 90-92)

24. Eighth, the Applicant had been arrested for incitement repeatedly, but once he was released on bail, he was immediately interviewed by reporters and repeated inciting others to commit secession. This was a total disregard for the law, which also made him more culpable. (para. 93)

25. Whether the absence of force or threat of force by an offender would make the circumstances of the offence less serious would depend on the actual situation of the case. Although the Applicant did not use force or threat of force in the present case, he had repeatedly used slogans such as "army building" and "armed insurrection" overtly. Having considered the circumstances as a whole, the mere absence of force or threat of force did not make the circumstances of the offence less serious. (para. 95)

26. Counsel for the Applicant submitted that the trial judge had erred in relying on the factor that "the Defendant was not remorseful" as one of the reasons to classify the present case as of a "serious nature", because whether the Applicant was remorseful or not was only one of the mitigating factors for the court to consider in sentencing, and had nothing to do with whether the circumstances of the offence he had committed were serious. The Court agreed with this view, but in the light of the above eight factors, the present case was of a "serious nature" under NSL

21. Even though the trial judge had made such an error, it did not detract from the conclusion that the present case was of a "serious nature". (paras. 96-97)

27. In view of the above reasons, the Court upheld the trial judge's finding that the present case was of a "serious nature" under NSL 21. (para. 98)

(d) Whether the sentence imposed by the trial judge was manifestly excessive

28. Although the present case fell within the category of "serious nature" under NSL 21, having considered all the circumstances, the Court was of the view that the Applicant's culpability was relatively low within the said category. Accordingly, the term of sentence should be close to the minimum sentence, i.e. 5 years. Therefore, the starting point of 6 years adopted by the trial judge was manifestly excessive; the appropriate starting point was 5 years and 3 months. The trial judge reduced the sentence by 3 months on account of how the defence was conducted which was not a legal requirement but entirely a matter of the judge's discretion, a decision to which the Court deferred. Hence the sentence was 5 years' imprisonment. (para. 99)

29. As a result, the Court granted the Applicant's application for leave to appeal against sentence and treated the application as the appeal proper. The appeal was allowed and the Applicant was sentenced to 5 years' imprisonment. (para. 100)

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