

Case Summary (English Translation)

HKSAR v 譚得志 (Tam Tak Chi)

DCCC 927, 928 and 930/2020; [2022] HKDC 208
(District Court)

(Full text of the Court’s reasons for verdict in Chinese at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=142703&currpage=T)

Before: HH Judge Stanley Chan

Date: 2 March 2022

Constitutionality of the offence of uttering seditious words – whether restrictions of rights protected under the BL and BOR proportionate – definition of seditious intention not too wide – proportionate and reasonable balance – sedition offences constitutional and prescribed by law

Meaning of “Liberate Hong Kong, Revolution of Our Times” – its basic ideas and objectives considered

Seditious intention – challenging HKSARG’s exercise of public powers – words against the Communist Party – words against the NSL

Background

1. The Defendant faced 14 charges, including incitement to knowingly take part in an unauthorised assembly, uttering seditious words, disorderly conduct in a public place, holding or convening an unauthorised assembly, etc. committed on different occasions between 17 January and 19 July 2020.

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

- BL, Chapter II, Art. 12
- Crimes Ordinance (Cap. 200), ss. 9 and 10
- Interpretation and General Clauses Ordinance (Cap. 1), Sch. 8, s. 1(b)
- Prevention and Control of Disease (Prohibition on Gathering) Regulation (Cap. 599G), s. 10
- Public Order Ordinance (Cap. 245), ss. 17A and 17B(2)

2. Prior to analysing the relevant facts of the case and making its decision accordingly, the Court addressed the three legal issues raised by the Defence:

- (a) the constitutionality of the offence of uttering seditious words;
- (b) the implication and nature of “Liberate Hong Kong, Revolution of Our Times”;
- (c) the words against the NSL or the Communist Party.

Summary of the Court’s rulings

A. Legal issues

(a) The constitutionality of the offence of uttering seditious words

3. The Defence argued that the definition of “seditious intention” for seditious offences under the Crimes Ordinance was too broad, and that the restrictions on the rights of speech, assembly and procession protected by the Basic Law and human rights law were not “prescribed by law”, making it difficult for the public to understand and comply with.

4. The Court held that all the freedoms of the citizens could not be infinitely magnified as to override the rights of others and even those of the State and society, and national security. The question was whether the restrictions were proportionate and reasonable. (para. 53)

5. Sections 9 and 10 of the Crimes Ordinance had long been in existence prior to Hong Kong returning to China. Often, statutory offences could not be rigidly stipulated because with the changing

circumstances, times or social climate, the provisions had to keep pace with the times (unless the provisions were frequently amended). This also enabled conceptual terms such as “enmity”, “feelings of ill-will”, “disaffection”, “contempt” and “hatred” to be explained and interpreted by the court as appropriate to the circumstances. (para. 54)

6. The Defence argued that the Government had not brought prosecutions against any person under the relevant provisions since the 1970s because the Government was aware that the relevant offences were not compatible with contemporary human rights law. The Court considered this argument too assertive and misleading. There might be many reasons not to bring prosecution by invoking the relevant provisions, which might include changes in the social and political ecology after 1967, and whether the social atmosphere had been para-political. (para. 55)

7. The Defence said that the sedition offences under the Crimes Ordinance amounted to a disproportionate restriction, but the Court pointed out that s. 9(2) had set forth the exceptions to seditious intention. Like statutory defence, its purpose was to strike a proportionate and reasonable balance, a balance which had its regard to the regional and local social conditions. In this regard, the judgments of overseas court cases were not of material assistance. (para. 56)

8. Sedition offences were offences endangering national security under the existing laws of the HKSAR, and the restrictions imposed by them were naturally for the purpose of safeguarding national security. This also served the collective societal benefit to achieve peace and order of society. The definition of seditious intention was not overly broad as it was necessary to maintain the timeliness and sufficient flexibility in its coverage, analogous to the offence of “misconduct in public office” at common law which did not find it appropriate to adopt a single and exhaustive definition. Hence, the Court held that the sedition offences were constitutional, in line with the letter and spirit of the BL and the BOR, and were prescribed by law. (paras. 57-58)

(b) Meaning and implication of “Liberate Hong Kong, Revolution of

Our Times”

9. This was the second time that the Court was asked to interpret the meaning and implication of this slogan in a criminal trial. The first time was in *HKSAR v Tong Ying Kit* [2021] HKCFI 2200 before the CFI. The CFI’s ruling on this slogan provided important guidance and reference for the lower courts. (paras. 59-60)

10. In the present case, the Prosecution still adopted Prof. Lau Chi-pang’s expert opinion. His conclusion was that the slogan was necessarily for the objective of separating the HKSAR from the PRC. The Defence, on the other hand, called another expert witness, Prof. Leung, who attempted to provide an explanation from the linguistic perspective. Her conclusion was that “the slogan as a whole referred to a need to rectify a problem and to return to the original state, a more desirable state of affairs for Hong Kong ... Different protesters could interpret the slogan in ways that suited their own ideology”, but without stating that the Government’s interpretation was wrong or deviated from reality. (paras. 60, 61 and 64)

11. Upon considering the overall context and the contents and positions of the expert reports from both sides, the Court accepted the Prosecution expert’s submission that the slogan “Liberate Hong Kong, Revolution of Our Times” had “the fundamental idea and meaning to bring about the separation of the territory of residence from the State sovereignty; in the context of Hong Kong’s political parlance, these words were put forth necessarily for the objective of separating the HKSAR from the PRC”. This submission was also accepted by the Defence expert as one of the interpretations of the slogan, albeit not the only one. (para. 68)

(c) The words against the NSL or the Communist Party

12. The Defence submitted that the Defendant merely pointed out the drawbacks of the NSL and should not be regarded as having seditious intention. The Defence submitted that taking into account the context as a whole, the Defendant’s words against the NSL and the Communist Party had no seditious intention, but were simply political commentary

and lawful criticisms. From the political manifestos and verbal abuses uttered by the Defendant in different places on 1 July 2020, the Court did not consider that the Defendant really had any in-depth knowledge of the NSL provisions. He was merely saying the cliché that his freedom of speech was violated, so he had to shout “Liberate Hong Kong, Revolution of Our Times”, “Five Demands” and so on, without touching on the content and coverage of the NSL at all. This was the tactic used by some politicians to incite others. (paras. 69-71)

13. The Defendant said that he enjoyed his freedom of thought and freedom of speech and sincerely “spoke” his “mind”. From the context of the Defendant’s statements, his speeches went beyond mere criticisms or commentary. He incited others to ignore the NSL, challenge the authority of the police, bring into contempt and attack with violence the pro-establishment legislators, and even named a few LegCo members as targets of attack. (para. 72)

14. Citing s. 1(b) of Sch. 8 to the Interpretation and General Clauses Ordinance, the Defence submitted that the wording “Her Majesty” in s. 9 of the Crimes Ordinance should be construed as a “reference to the [CPG] or other competent authorities of the [PRC]”. As such, the Defendant’s imprecation and attack against the Communist Party was not tantamount to attacking the CPG, and that any words against the Communist Party should not be regarded as “seditious words” under s. 9. (para. 71)

15. The Court held that the focus of this case was that the Defendant’s seditious words were against the HKSARG which exercised public powers. Chapter II of the BL stipulated “the relationship between the Central Authorities and the HKSAR”, and BL 12 provided that HKSAR should come directly under the CPG. The HKSARG was formed by the CPG in accordance with the Constitution of the PRC and the BL. The Defendant’s attack of the “Communist Party” was only a part of his seditious words. The constitutional status of the Communist Party of China under the Constitution of the PRC was well known and established. Even with the words against the Communist Party omitted, the Defendant still had the seditious intention to attack the HKSARG.

This attack was also an attack on the Central Authorities since the HKSARG was authorised by the Central Authorities. For the purpose of this case, it was not necessary for the Court to make any ruling on this constitutional issue. The Defendant could be found guilty through committing any one or more of the seven items prescribed as a seditious intention under s. 9. (para. 73)

B. Charges faced by Defendant

(a) 1st Charge: Incitement to knowingly take part in an unauthorised assembly (convicted)

16. On 17 January 2020, the Defendant in the park called on the public to take part in an unauthorised public procession to be held on Hong Kong Island two days later. The Defence contended that the Court should not infer that the Defendant was inciting others to take part in an unauthorised procession simply because the procession under objection ended in Causeway Bay. The Court held that judging from the context of the video footage, it was clear that the Defendant's statements and intention were to call on others to take part in that unauthorised procession. It was immaterial as to where the destination was or whether there was any follow-up action. (paras. 78-80)

(b) 2nd Charge: Uttering seditious words (convicted)

17. On 17 January 2020, the Defendant standing on a podium mounted with banners stating "No fear of white terror" and buntings stating "Liberate Hong Kong, Revolution of Our Times" and "[We] rise and fall together," delivered a speech and led the participants in chanting "Disband Hong Kong Police, delay no more", "Liberate Hong Kong, Revolution of Our Times", and abusive expressions against the police. (para. 76)

18. The Court took the view that the Police was a law enforcement agency and an important part of the HKSARG. Section 9(1)(c) mentioned "香港司法" in the Chinese text, whereas the English text said "administration of justice". The Police was naturally part and parcel of

the “administration of justice” (“執行司法公正”). The Defendant incited others to disband the Police, and cursed at the police officers and even their family members. (para. 82)

19. By using and chanting the slogan “Liberate Hong Kong, Revolution of Our Times”, the Defendant was indeed procuring the alteration, otherwise than by lawful means, of the structure in Hong Kong as by law established. His seditious intention at that time could not be more obvious. (para. 82)

(c) 3rd Charge: Disorderly conduct in a public place¹ (convicted)

20. On 19 January 2020, the Defendant led a group of onlookers to shout abusive words and foul language at the police officers on guard in the vicinity. The Defence said that the assembly was very peaceful at that time, and the Defendant repeatedly controlled the public’s emotions, called on the public not to heckle, and urged the public to leave many times. The Court held that the Defendant was obviously speaking to mean the contrary. Any mentally mature person would know what the Defendant truly meant. His words and deeds were clearly intended to provoke a breach of peace, or whereby a breach of peace was likely to be caused. (paras. 92-94)

(d) 4th Charge: Uttering seditious words (convicted)

21. On 15 March 2020, the Defendant hosted a street booth where people lined up to collect free surgical masks. The Defendant engaged them in the form of a Q&A , using placards to prompt preempted answers that the police would “beat up the elderly women, beat up the young people, make indiscriminate arrests, police would assault and arrest without conscience, and that traffic police officers would shoot students or ram into people”. He further said that the police had fired at the children, thrown the elderly women to San Uk Ling, beaten up pregnant women, used taxpayers’ money for purchasing of equipment to beat people to death. The Court found that irrespective of the form, whether it was

¹ Public Order Ordinance (Cap. 245), section 17B(2).

just a speech or by way of a game-like method, the Defendant’s seditious behaviour could not be more obvious – inciting others to bring into hatred against the law-enforcing police officers and to accuse and slander the police in a baseless and sweeping generalisation manner. (paras. 96, 98 and 99)

(e) 5th Charge: disorderly conduct in a public place (acquitted)

22. The Defendant’s intention was to “bully” the person, and attempted to derogate her for her Mainland accent. This was an issue of the Defendant’s character and ethics, which did not amount to disorderly conduct in the society and a breach of peace. (para. 102)

(f) 6th Charge: holding or convening an unauthorized assembly² (convicted)

23. On 23 May 2020, the Defendant obliquely called on others to go to East Point Road to take a walk “separately” on the following day. He also mentioned an exemption from the prohibition on group gathering on the ground of holding a health talk. The Court held that the Defendant was only trying to justify himself under the guise of a “health talk”. On that day, the Defendant only mentioned the four-character phrase 健康講座 (“health talk”) a number of times with no details provided. The banners, posters and leaflets at the street booth bore no relevance to the real health issues under the pandemic. The Court held that the Defendant had convened and held an unauthorised assembly. (paras. 112-113)

(g) 7th Charge: Disorderly conduct in a public place (acquitted)

24. The Defendant’s conduct of maliciously attacking the police with foul language did not amount to disorderly conduct. Nor did the people assembled behave in a disorderly manner or provoke a breach of the peace. (para. 114)

(h) 8th Charge: Refusing and wilfully neglecting to obey an order

² Public Order Ordinance (Cap. 245), section 17A.

given by an authorized officer (convicted)

25. The Defendant violated the prohibition on group gathering, yet he argued with the police and refused to disperse the prohibited group gathering. The police had to escort him away from the scene, but he continued to make political statements on the way to the police vehicle. The Court held that the Defendant had refused to obey the police's orders, contrary to section 10 of the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation. (para. 116)

(i) 9th Charge: Uttering seditious words (convicted)

26. In May 2020, the Defendant printed more than 600 calendar cards with "Liberate Hong Kong • Revolution of Our Times" printed on one side, and a figure in protest gear printed on the other. Leaflets were printed with seditious words such as "Hong Kong Communist Tyranny", "Black cops made mass arbitrary arrests, Hongkongers need self-protection", "The National Security Law is actually the Party's security law, which protects the Party's security, but treads on human rights, extinguishes freedom, suffocates democracy, shows contempt for the rule of law, and brutalizes Hong Kong" and "civil resistance". Seditious words were also found in 62 leaflets (Exhibit P29a), including "Hong Kong should be fully self-determined, establish its own provisional government, and ask foreign countries for military assistance to restore order from chaos" and "Overturn Hong Kong Communist Administration". The Court held that the Defendant had intended to bring into hatred or contempt against the Central Authorities or the HKSAR, to excite inhabitants to attempt to alter, otherwise than by lawful means, of matter in Hong Kong as by law established, or to counsel disobedience to law and other acts. (paras. 117-118)

(j) 10th Charge: Uttering seditious words (convicted)

27. On 4 July 2020, the Defendant incited others to bring into hatred against those who held different political views [the so-called "Blue Ribbon"], cursed at the Blue Ribbon, ridiculed the Blue Ribbon as "crown-balding" guys, brought into hatred against the police, and even

verbally abused their families, brought into contempt against the NSL, the Communist Party and the HKSARG, counselled confrontation with the police and disobedience to law, and even provided phone numbers for legal support. The Defendant obviously held a seditious intention to excite others to bring into utmost contempt and confrontation against the police, the Government, and the NSL that came into effect four days before. None of the s. 9(2) defences of the Crimes Ordinance was available to the defence of the Defendant's case. (paras. 119-120)

(k) 11th Charge: Conspiracy to utter seditious words (acquitted)

28. The Prosecution was not able to state the identity of the other conspirator. Although this was not a requirement in law, as seen from the video footage and the relevant transcript, this might have been a byproduct of human interactions and acting in concert during the procession. (para. 121)

(l) 12th Charge: Uttering seditious words (convicted)

29. On 8 July 2020, the Defendant hosted a street booth outside the exit of the MTR station and spoke through a microphone and a loudspeaker. The relevant video footage was posted on his Facebook webpage. To appeal to the voters, the Defendant incited people to bring into hatred or contempt against the Communist Party and the HKSARG, sought to crush the pro-establishment camp, named several LegCo members in particular, and repeatedly shouted the slogan "Liberate Hong Kong • Revolution of Our Times" to challenge the NSL. The seditious intention could not be more obvious. (paras. 122-123)

(m) 13th Charge: Uttering seditious words (convicted)

30. On 9 July 2020, the Defendant delivered a speech with a microphone and a loudspeaker, and the relevant video footage was posted on his Facebook webpage. The Defendant uttered seditious words for the so-called primary election, bringing into extreme contempt and hatred against the political structure of the HKSAR, the then LegCo members and the CE of the HKSAR. His attack against the police became

irrational. He called on others not to comply with the recently promulgated NSL, inducing discontent and disaffection amongst Hong Kong people as well as their disobedience to law. (paras. 125-127)

(n) 14th Charge: Uttering seditious words (convicted)

31. On 19 July 2020, the Defendant shouted “Liberate Hong Kong, Revolution of Our Times” in a shopping mall and imputed the police. His purpose was, by means of incitement, to provoke others to put up resistance and intensify such resistant sentiments so as to get votes for him, with a view to first getting himself qualified for the so-called primary election, and then obtaining a seat in the LegCo. The Defendant’s seditious words were to raise discontent against the HKSAR, and promote sentiments of disobedience to the NSL, and enmity to the orders given by law enforcement officers. (para. 129)

32. The Court finally held that apart from Charges 5, 7 and 11, the Defendant was convicted of the remaining 11 charges.

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