

Case Summary

HKSAR v Lui Sai Yu (呂世瑜)

FACC 7/2023; [2023] HKCFA 26

(Court of Final Appeal)

(Full text of the Court's judgment in English at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=154516)

Before: Cheung CJ, Ribeiro PJ, Fok PJ, Lam PJ and Chan NPJ

Date of Hearing: 9 August 2023

Date of Judgment: 22 August 2023

Approach to construing NSL provisions – common law approach – extrinsic materials in aid of construing NSL include NPC and NPCSC Explanations but exclude separate pieces of legislation in a different context and for different general purposes – principle of convergence, compatibility and complementarity between NSL, and relevant national laws and local laws – unrelated Mainland law excluded – NSL to function coherently with local laws subject to NSL 62

Sentencing – construction of sentencing provisions of NSL – principle of convergence etc applicable – local sentencing laws and principles apply in tandem with relevant NSL provisions – potentially relevant sentencing principles (including rehabilitation) not to be excluded from consideration – mitigating factors

Sentencing – NSL 20 and NSL 21 created two separate offences with different sentencing frameworks – incitement to secession to be sentenced under NSL 21 regime – sentencing process – discretion to determine starting point within appropriate penalty band taking into account both aggravating and mitigating factors – fixed-term imprisonment of not less than five years for serious NSL 21 offences mandatory unless NSL 33 applicable

Sentencing – NSL 33 – purpose, basic features and possible outcomes – operates separately from and after determination of penalty – conditions specified in NSL 33 exhaustive – downward adjustment of penalty if applicable

Background

1. The Appellant was charged with incitement to secession, contrary to NSL 20 and NSL 21, but the Court pointed out that since incitement was alleged, he was actually charged under NSL 21. This was important from the sentencing point of view as secession under NSL 20 and incitement to secession under NSL 21 were two separate (though closely related) offences and the sentencing regimes were significantly different. (paras. 2, 18 and 49)
2. The particulars of the charge stated that the Appellant had, together with others, incited other persons to organize, plan, commit or participate in acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification by separating the HKSAR from the PRC or altering by unlawful means the legal status of the HKSAR.
3. The Appellant pleaded guilty to incitement under NSL 21 before a District Judge, admitting that he and another person had been the administrators of a Telegram channel through which he had incited secession, calling for Hong Kong to become independent and posting messages which were of a nature designed to incite violence and counsel disobedience to the law by, for example, providing equipment and discussing tactics with protesters to use against the Police.*
4. The Judge held that the circumstances of offence were “of a serious nature” and a starting-point of five years and six months’ imprisonment should be adopted. She indicated that the sentence would be discounted by one-third to reflect the Appellant’s guilty plea made at the earliest opportunity, but then accepted the Prosecution’s submission that since

* Editor’s note: For background of the case, see the Case Summaries of *HKSAR v Lui Sai Yu* [2022] HKDC 384 and *HKSAR v Lui Sai Yu* [2022] HKCA 1780.

the sentence had to fall within the upper penalty band as prescribed by NSL 21, it could not be reduced below a minimum of five years' imprisonment. The Judge therefore confined the discount for the Appellant's guilty plea to a reduction of six months, imposing a sentence of five years' imprisonment.

5. The Appellant took his case to the CA, advancing four grounds of appeal. The first two grounds complained that the Judge had erred in classifying the offence as "serious" and that the starting-point had led to a manifestly excessive sentence. The CA dismissed those grounds. It held that the Judge's conclusion as to the seriousness of the offence was well justified by referring to its earlier decision in *HKSAR v Ma Chun Man* [2022] HKCA 1151 which had laid down the general approach to categorizing NSL 21 offences of incitement.

6. The third and fourth grounds concerned the true construction of NSL 21 and NSL 33 where the Appellant complained that the Judge was wrong not to have given the full one-third discount for his guilty plea. His arguments were that:

(a) the legislative intention regarding serious NSL 21 offences was "to lay down a range of starting points between the maximum of ten years and the minimum of five years" rather than to set five years' imprisonment as the hard and fast minimum sentence for offences falling within that band so that mitigating factors (such as a guilty plea) could be given full effect, resulting in a sentence falling below the five-year minimum; and

(b) the three conditions laid down in NSL 33 were not exhaustive and that other mitigating factors (such as a guilty plea) could also be taken into account to allow an offender to benefit from reductions in sentence provided for under NSL 33.

7. The CA rejected both arguments and upheld the Judge's sentence, but the Appeal Committee of the CFA granted leave to appeal on the following two questions of law certified by the CA as meriting

consideration by the CFA[†]:

- (a) “What is the proper construction of the sentencing provision in NSL 21 for offences of a serious nature ... , and in particular, whether the stipulation of ‘not less than five years’ fixed term imprisonment’ is mandatory?” (Question 1)
- (b) “What is the proper construction of NSL 33(1) in sentencing offences to which the provision applies and, in particular, whether the three conditions specified therein are exhaustive in that if none of them is established, the penalty for an NSL 21 offence which is of a serious nature cannot be reduced to less than five years’ fixed term imprisonment; or whether it is permissible to so reduce the sentence for such an offence on account of other mitigating factors?” (Question 2)

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

- NSL 20, 21 and 33(1)

8. The Court discussed the following matters in dismissing the appeal:

- (a) the approach to construing the sentencing provisions of the NSL;
- (b) the approach adopted by the Court of Appeal below;
- (c) construction of NSL 20 and NSL 21;
- (d) construction of NSL 33;
- (e) whether NSL 21 laid down a mandatory minimum final sentence of five years’ imprisonment;
- (f) whether the NSL 33 conditions were exhaustive;
- (g) the sentencing process: NSL 20 and NSL 21 offences.

Summary of the Court’s rulings

A. Approach to construing the sentencing provisions of the NSL

9. The Court (i.e. the CFA) recapitulated the proper approach to

[†] [2023] HKCA 611.

construing provisions of the NSL established in *HKSAR v Lai Chee Ying* [2021] HKCFA 3 by stating that the meaning and effect of a particular provision was to be determined in the light of the context and purpose of the NSL as a whole. In ascertaining that context and purpose, the Explanations given and Decisions made in proceedings of the NPC and the NPCSC in the course of promulgating the NSL for inclusion in Annex III of the Basic Law were extrinsic materials admissible as aids to construction of the NSL. (paras. 20-21)

10. The Explanation on the Draft NSL provided on 18 June 2020 to the NPCSC identified one of the NSL’s main “working principles” was to accommodate the differences between Mainland China and the HKSAR, and to strive to address the convergence, compatibility and complementarity between the NSL, and the relevant national laws and local laws of the HKSAR. The legislative intention was for the NSL to operate in tandem with the laws of the HKSAR, seeking “convergence, compatibility and complementarity” with local laws, and NSL 62 provided for possible inconsistencies, giving priority to NSL provisions in such cases. In other words, the NSL was intended to fit in and to function coherently with the HKSAR’s legal system, with local laws operating in normal fashion unless they were expressly or by necessary implication displaced by inconsistent provisions of the NSL. (paras. 22-25)

11. The convergence principle also applied to the interpretation of the NSL’s sentencing provisions. Within the framework laid down by the NSL, local sentencing laws and principles were intended to apply in tandem with the relevant NSL provisions. The provisions of NSL 64 made it clear that the NSL provisions were intended to operate on the principle of convergence, compatibility and complementarity with local sentencing laws and principles which were accordingly to be given full effect, subject to NSL 62 which gave NSL provisions priority in the event of inconsistency. Accordingly, the NSL provisions laid down a sentencing scheme and local laws operated within that framework. The courts were therefore able to draw upon a wealth of experience developed in this field, aiming to strike a balance between different sentencing principles. (paras. 27-30)

B. Approach adopted by the Court of Appeal below

12. The Court (i.e. the CFA) endorsed the approach of the CA in *Ma Chun Man* [2022] HKCA 1151 as consistent with the CFA's decision in *Lai Chee Ying* [2021] HKCFA 3 and the approach discussed above. However, it noted that the judgment of the CA below differed in some material aspects which could not be supported. In particular, the CA restricted the scope of the applicable sentencing principles and factors when dealing with NSL offences. (paras. 33 and 35)

(a) **Penological Considerations and rehabilitation principle:** The CA had omitted the principle of rehabilitation by defining the "Penological Considerations" as including "deterrence, retribution, denunciation and incapacitation". The CFA held that the weight, if any, to be given to particular sentencing principles and aggravating or mitigating factors would vary with each case and it might be that in a given instance, there was little room for rehabilitation in the sentencing decision. However, as a matter of principle, rehabilitation should not be omitted or excluded as a sentencing principle when giving effect to NSL 21, which expressly recognised that an offence might be "of a minor nature" and that the person concerned might be sentenced to a "fixed-term imprisonment of not more than five years, short-term detention or restriction". Given these sentencing options, in a particular case a court might well think it appropriate to give weight to the objective of rehabilitation by imposing a short, training-oriented sentence or a non-custodial sentence as the best means of protecting society. (paras. 36-37)

(b) **Principle of convergence etc and mitigating factors:** The CA defined the NSL's "Primary Purpose" as "safeguarding national security, preventing, suppressing and imposing punishment for the NSL offences", and "the Imperative" as the provisions of NSL 3(3), NSL 8 and NSL 42(1) "on strict and full application of laws to further the Primary Purpose". It went on to hold that in the context of the NSL, because of the Imperative, not all mitigating circumstances were applicable; only those which did

not compromise the Primary Purpose were permissible. However, the CFA found it hard to see how “the Imperative” should lead to the conclusion that not all mitigating circumstances were applicable. It was also difficult to see which mitigating factors should be regarded as those which did not compromise the Primary Purpose. As part of the sentencing exercise, the court had to determine the appropriate nature and level of sentence, taking into account both aggravating and mitigating factors as well as the individual’s circumstances. The entire process represented the implementation of the Primary Purpose. It was therefore not easy to see how any specific mitigating factor, balanced against other factors as part of the sentencing exercise, might be regarded as compromising the Primary Purpose. In fulfilling their duty of enforcing the NSL and local laws with a view to preventing, suppressing and punishing acts and activities endangering national security, the courts applied the existing corpus of local sentencing laws and principles in tandem with the NSL sentencing provisions. There was no basis for suggesting that in the process of convergence, selected elements of the local sentencing laws and principles should somehow be excluded from consideration. The court should adopt the approach of giving effect to the principle of convergence, compatibility and complementarity without excising any potentially relevant sentencing principles. (paras. 38-42)

- (c) **Relevant Mainland law as extrinsic aids:** The CA below held that relevant Mainland law might in principle inform the construction of the NSL or a particular NSL provision. As to which particular Mainland law was relevant for the construction exercise, how and to what extent it was relevant, and how to make reference to it had to depend on the actual circumstances of the case. However, the CFA did not agree that the proposition formulated by the CA represented a general principle. It reaffirmed that the Court’s approach to construction of the Basic Law, and by extension of the NSL, was the common law approach as established in *Director of*

Immigration v Chong Fung Yuen (2001) 4 HKCFAR 211. In *HKSAR v Lai Chee Ying* [2021] HKCFA 3, it was held that the statements made as part of the promulgation process were admissible extrinsic materials because NSL 1 referred to the key “5.28 Decision”[‡]. Such extrinsic materials did not encompass separate pieces of Mainland legislation which were enacted in a different context and for general purposes differing from and lacking any connection with the context and purposes for which the NSL was promulgated. (paras. 44-45)

- (d) **Convergence etc between (i) the NSL and (ii) relevant national laws and local laws of HKSAR:** The CA below quoted the Explanation on the Draft NSL of 18 June 2020 for the proposition that convergence between the NSL and other Mainland laws was intended, emphasising the reference to “the convergence, compatibility and complementarity between [the NSL], and *the relevant national laws* and local laws of the HKSAR” (emphasis original). However, the CFA stated that the Address by the Chairman of the NPCSC, Mr Li Zhanshu, on 30 June 2020 made it clear that the national law convergence referred to in the Explanation was “between the NSL and the national law on safeguarding national security, and not convergence with any unrelated Mainland law which employ[ed] concepts using similar language”. It remarked that the Address highlighted the separateness of the two legal systems while emphasising convergence specifically between the NSL and local laws. The Address did not suggest that the legal system in Hong Kong “converged” more generally with the Mainland system so as to require Hong Kong courts to search for and consider as possible aids to construction, similarly-worded Mainland laws. On the other hand, the court might refer to general or law dictionaries as possible aids to considering the meaning of unfamiliar terms deriving from a different legal jurisdiction. (paras. 46-48)

[‡] Editor’s note: The “5.28 Decision” is the “Decision of the NPC on Establishing and Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security in the HKSAR” adopted on 28 May 2020.

C. Construction of NSL 20 and NSL 21

13. Secession under NSL 20(1) and incitement to secession under NSL 21 were two separate offences involving different prohibited acts but were closely related and had to be read together. The offence under NSL 20(1) was committed by persons who organised, planned, committed or participated in secessionist acts, while NSL 21 applied to those who incited, assisted in, abetted or provided pecuniary or other financial assistance or property for the commission by other persons of the NSL 20 offence. (para. 49)

14. The sentencing provisions of NSL 20(2) distinguished between different roles that might be played by an offender in the performance of the prohibited acts, namely, as “principal offender”, “active participant” or “other participant”. NSL 20(2) laid down a framework of three bands or tiers of potential sentences of differing severity and assigned one such band to each such class of offender. (para. 50)

15. On the other hand, the sentencing provisions of NSL 21 simply provided for liability which was either inchoate (incitement) or secondary (assisting, abetting or financing) by reference to the commission of an NSL 20 offence by others. Unlike NSL 20(2), there was no further refinement by reference to the offender’s participatory role. NSL 21 provided a sentencing framework by specifying two (rather than three) bands of potential sentences. It required the court to assess the seriousness of the circumstances of the offence in deciding into which band the case fell. If the circumstances were of a “serious nature”, the person “shall be sentenced to fixed-term imprisonment of not less than five years but not more than ten years” and if the circumstances were “of a minor nature”, that person “shall be sentenced to fixed-term imprisonment of not more than five years, short-term detention or restriction”. The court was required to undertake an evaluative assessment of the seriousness of the circumstances of the offence to decide whether the sentence should fall within the upper or lower band. (paras. 51-53)

16. The fact that NSL 20 and NSL 21 provided for bands of possible penalties meant that the court had a discretion to determine at which level within the band the sentence should be imposed. In doing so, the court applied local sentencing laws and principles, involving consideration of starting-points, aggravating and mitigating factors, and so forth. (para. 53)

D. Construction of NSL 33

17. NSL 33 provided for three possible outcomes, namely a lightening, reduction or (for minor offences) exemption from penalties if one of the three specified conditions was applicable. These conditions involved the relevant person's (a) voluntary discontinuance of commission of the offence or forestalling its consequences, (b) voluntary surrender with a truthful account of the offence, or (c) a truthful report of another person's offence or giving material information which helped to solve other criminal case. (para. 54)

18. NSL 33(1) was not tied to any particular offence but operated in relation to all NSL offences. It catered not only for the convicted offender but also a defendant who was charged but not yet convicted, and a criminal suspect who had not yet been charged. In the case of a defendant or criminal suspect, the reference to "penalty" evidently had to be understood to mean a potential or projected penalty at the end of an eventual or notional sentencing exercise. NSL 33 was therefore intended to operate separately from and after determination of the penalty in the case in question. It presupposed an identifiable penalty which might then be lightened, reduced or exempted. (para. 55)

19. The purpose of NSL 33 was to encourage offenders and potential offenders not to go through with an offence and to assist the authorities in safeguarding national security and enforcing the law. It provided an incentive for such actions by permitting a downward adjustment of the penalty. (para. 56)

20. The CFA agreed with the analysis of the CA below that in the NSL33 context:

- (a) 從輕處罰 (translated as “a lighter penalty may be imposed”) had to be understood to mean that a lighter penalty might be imposed “within the applicable tier as prescribed by the relevant NSL provisions”;
- (b) 減輕處罰 (translated as “the penalty may be reduced”) had to be understood to mean that the penalty might be reduced “from the applicable tier to a lower tier”;
- (c) 免除處罰 (translated as “exempting the penalty”) represented the “most lenient” way of dealing with the person concerned.

The first two outcomes referred to in NSL 33 were plainly alternatives. (paras. 59-61)

E. Whether NSL 21 laid down a mandatory minimum final sentence of five years’ imprisonment

21. Since the Judge had decided that the Appellant’s NSL 21 offence was serious, the offence came within the upper band defined by a sentencing range with a maximum of ten years’ and a minimum of five years’ imprisonment. The Appellant contended that NSL 21 did not lay down a mandatory minimum final sentence of five years’ imprisonment, but merely delineated the range of starting points of custodial sentences in circumstances of a serious nature without limiting the normal discretion of the courts to reduce the same where circumstances warranted; and that having decided on a starting point within the prescribed band, the court was entitled to arrive at a sentence which fell below the five-year minimum after giving effect to an applicable mitigating factor, i.e. the timely plea of guilty in his case. (paras. 62-63)

22. The Court found the Appellant’s argument untenable. Read contextually, NSL 21 prescribed in mandatory language (i.e. “處” in the Chinese text which was translated as “shall be sentenced” in English) the nature and length of the sentence to be imposed. To suggest that the sentencing provisions of NSL 21 were concerned merely with establishing starting-points for the purposes of sentencing exercises was

to attribute a meaning which the language could not bear. NSL 21 set a framework of penalty bands tied to the relative seriousness of an individual offence, prescribing a sentence within the specified range. It could not consistently be suggested that the legislative intention was for an offence found to be “serious” for the purposes of that framework should then be dealt with by a sentence falling below the prescribed range. (paras. 64-65)

23. The Court further pointed out that NSL 33 had made express provision as to when cases initially classified as falling within a higher penalty band might be relocated to a lower band; this might occur where one of the three NSL 33 conditions was met and “減輕處罰” (reducing the penalty) applied. The absence of such mechanism within NSL 21 itself or in a separate provision assigning such a consequence to other classes of mitigating factors compelled the conclusion that, leaving NSL 33 aside, the lower limits of its prescribed bands were mandatory. (para. 66)

F. Whether the NSL 33 conditions were exhaustive

24. The Appellant argued that the three conditions in NSL 33 were not exhaustive and that the sentencing court could continue to rely on factors recognized under existing law as legal bases to impose a lighter penalty or to reduce a penalty if such factors were consistent with the purpose of the NSL. The Court rejected this argument. The purpose of specifying the three conditions was to provide offenders and potential offenders with an incentive to desist from committing offences, to assist the authorities in the suppression of activities endangering national security and to facilitate law enforcement. NSL 33, construed contextually and purposively, could not be understood as intending that such extenuating sentencing adjustments should be available in respect of mitigating factors unconnected with the clear rationale of that provision. (paras. 67-68)

G. The sentencing process: NSL 20 and NSL 21 offences

25. A sentencing judge would be mindful of any aspects of the

conviction – such as the role played by the offender in the commission of the offence – which might have a bearing on the sentence, especially as to which sentencing band or tier was applicable. If the conviction was under NSL 20, the appropriate penalty band was determined by whether the offender was found to have acted as “a principal offender or a person who commits an offence of a grave nature” or, if not, as an “active participant” or an “other participant”. If the conviction was under NSL 21, the applicable band depended on the court’s assessment of whether the “circumstances of the offence committed” were of a “serious” or “minor” nature. (paras. 69-70)

26. Deciding on “seriousness” involved an evaluative and discretionary judgment by the court. The CFA agreed with the CA in *HKSAR v Ma Chun Man* [2022] HKCA 1151 that in this context the prime focus was on the offender’s acts, as well as the actual consequences, potential risks and possible influence entailed. (para. 71)

27. Having determined, for instance, that an NSL 21 offence was of a serious nature warranting a sentence within the upper band, the court proceeded to apply familiar sentencing laws and principles. Exercising its discretion, the court determined a starting-point within the appropriate band and took account of aggravating and mitigating factors. At this stage, the court would be aware of whether any of the NSL 33 conditions might be engaged. If so, it should temporarily leave those mitigating factors – i.e. involving assistance to the authorities, etc – to one side to be dealt with only after a provisional sentence had been determined. That provisional sentence had to be located within the applicable penalty band. (para. 72)

28. If the court found that one of the NSL 33 conditions applied, it then considered to what extent a lightening (從輕處罰) or reduction (減輕處罰) of the sentence provisionally determined might be merited. Guidance might be sought from non-NSL examples of mitigation involving circumstances similar to those referred to in the three subparagraphs of NSL 33(1). Having weighed up the relevant circumstances, the court arrived at its final sentence. (para. 73)

H. Conclusion

29. The answer to Question 1 was that, subject to NSL 33 being applicable, the stipulation of “fixed-term imprisonment of not less than five years” in NSL 21 for offences of a serious nature was mandatory. As to Question 2, the three conditions specified in NSL 33(1) were exhaustive. The appeal was dismissed accordingly. (paras. 75-77)

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