

Case Summary

HKSAR v Tong Ying Kit (唐英傑)

HCCC 280/2020; [2021] HKCFI 2239; [2021] 5 HKC 100
(Court of First Instance)

(Full text of the Court's reasons for sentence in English at
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=137543&QS=%2B&TP=RS)

Before: Hon Toh, Anthea Pang and Wilson Chan JJ

Date of Verdict: 27 July 2021

Date of Sentence: 30 July 2021

Sentencing – incitement to secession under NSL 21 – considerations – contravention of fundamental provisions of BL 1 and 12 – deterrent effect – seriousness of offence – pre-planned and deliberate – criminality of offence not depending on incitees acting upon incitement – starting point of 6.5 years imprisonment

Sentencing – terrorist activities under NSL 24 – sentences passed in other jurisdictions not helpful – no serious bodily injury caused – “other circumstances” limb in NSL 24(2) applicable – pre-planned and deliberate – injuries to three police officers – motorcycle as lethal weapon – secessionist nature of political agenda an aggravating factor – no double counting – starting point of 8 years imprisonment

Sentencing – separate and distinct offences – consecutive sentences applicable in principle – totality principle

Disqualification order – forward looking and preventive principle – longer than prison sentence

Background

1. In the afternoon of 1 July 2020, the Defendant drove his motorcycle with a flag at his back bearing the slogan “光復香港 LIBERATE HONG KONG 時代革命 REVOLUTION OF OUR TIMES” (“the Slogan”). He ignored all the instructions given by the police to stop his motorcycle, and instead, ran through the police checklines, eventually crashing into a group of police officers. As a result, three of them were injured.

2. The Defendant was convicted of incitement to secession under NSL 21 (“Count 1”) and terrorist activities under NSL 24 (“Count 2”) after trial.

Major provision(s)

- BL 1 and 12
- NSL 2, 21 and 24
- Road Traffic Ordinance (Cap. 374), s. 69(1)(h)

Summary of the Court’s reasons for sentence

Sentencing considerations – Count 1: incitement to secession

3. Any person who committed secession or carried out any act undermining national unification (or inciting others to do so) had to be suitably punished for contravening BL 1 and 12 which were the fundamental provisions in the Basic Law under NSL 2. The punishment had to have as its aim a general deterrent effect on the community as a whole and a specific deterrent effect on the individual in question. (para. 15)

4. NSL 21 set up a tiered system for sentencing offenders of incitement to secession: “If the circumstances of the offence committed by a person are 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; if the circumstances of the offence committed by a person are of a minor nature, the person shall be sentenced to fixed-term imprisonment of not

more than five years, short-term detention or restriction.” (paras. 16 -18)

5. Having taken into account the following matters, the Court decided that the circumstances of the offence of incitement to secession committed by the Defendant were of a “serious nature” under NSL 21. (para. 24)

(a) It was the Defendant who set the context for the display of the flag. The date, the time, the place and the manner were deliberately picked for attracting public attention. (para. 22)

(b) The way in which the Defendant displayed the flag (by carrying it on his back when he was travelling on a busy public highway on 1 July 2020 in plain view of the general public) was clear proof that he intended to attract public attention and intended the flag to be seen by as many people as possible. (paras. 19 and 20)

(c) The Defendant had deliberately failed to stop his motorcycle at multiple police checklines, showing obvious and open defiance to lawful instructions given by law enforcement officers. (paras. 19 and 22)

(d) 1 July 2020 was the very next day after the NSL had come into effect and was the anniversary date of the establishment of the HKSAR and the resumption of sovereignty over Hong Kong by the Government of the PRC. (paras. 19 and 23)

(e) There was nothing to support the claim that an incitement to the public at large would be less effective an incitement when compared with that by way of a one-to-one communication. The criminality of the offence of incitement did not depend on the incitee actually acting upon the incitement to commit the offence but on the incitor who sought to influence another to commit an offence. (paras. 20 and 21)

6. On the other hand, the offence committed by the Defendant, albeit of a serious nature, was not the worst case of its kind in that he committed the offence alone and that the Slogan was a general call for the separation

of the HKSAR from the PRC, without an elaborate plan being conveyed to the public at the same time. As such the Court adopted a starting point of 6.5 years of imprisonment for Count 1. (paras. 25 and 26)

Sentencing considerations – Count 2: terrorist activities

7. NSL 24 was in similar terms as the statutory provisions dealing with terrorist activities in other jurisdictions. However, as the structure and substance of the statutes were different and the cultural and socio-economic situations pertaining at the material time when a sentence was considered by the court were not identical, the Court did not find it helpful to refer to the sentences passed in other jurisdictions. (para. 27)

8. NSL 24 also adopted a tiered sentencing regime: “A person who commits the offence causing serious bodily injury, death or significant loss of public or private property shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; in other circumstances, a person who commits the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years.” (paras. 28-30)

9. As the injuries sustained by the police officers were not serious bodily injuries, the “other circumstances” limb of the sentencing regime was applicable in determining the starting point for this count. (para. 35)

10. Having taken into account the following matters, the Court considered a starting point of 8 years’ imprisonment to be appropriate for Count 2. (para. 39)

(a) The Defendant deliberately ran through the police checklines despite repeated warnings, and eventually crashed into the police officers at Checkline 4. (para. 31)

(b) What the Defendant did was calculated and deliberate acts which created a very dangerous situation for the road users and which indeed caused injuries to three police officers. (para. 32)

(c) The Defendant’s acts were pre-planned. He took a convoluted

route and deliberately challenged the police checklines, which had not only jeopardised public safety and security but had also caused grave harm to the society. (para. 33)

(d) The Defendant's motorcycle, with a 599 cc engine and 120 hp, was a lethal weapon when driven in the dangerous manner as the Defendant did in this case. (para. 34)

(e) The political agenda in Count 2 was of a secessionist nature which involved a contravention of BL 1 and 12 which were the fundamental provisions in the Basic Law under NSL 2. There was an added criminality in that such an agenda was seeking to undermine national unification. (paras. 36-37)

11. Taking the secessionist nature of the political agenda into account in sentencing the Defendant for Count 2 would not involve any double counting of this factor:

(a) For Count 1 (incitement to secession), the secessionist meaning of the Slogan formed the basis of the offence of incitement and was pivotal to the commission of the offence in Count 1. As such, it was not considered as an aggravating factor.

(b) For Count 2 (terrorist activities), the political agenda could be secessionist in nature, or otherwise. Where the political agenda was secessionist in nature, there was the added criminality as explained above. (para. 38)

Sentencing in this case

12. After determining that the appropriate starting point for Count 1 was 6.5 years' imprisonment and that for Count 2 was 8 years, the Court could not find any mitigating factors for reduction in sentence.

(a) Having pleaded not guilty to the offences, the Defendant could not then rely on his expressed remorse as a mitigating factor to ask for a reduction in sentence. (para. 40)

(b) Although the Defendant could be treated as previously of good character, this was not of any mitigating value in the face of the two counts of serious offences in this case. (para. 41)

(c) The Court was sympathetic to the Defendant's family members in respect of the predicament they might be in. However, these were matters which he should have thought about before embarking on his criminal acts and could not be any mitigating factors. (para. 42)

13. In the circumstances, the Defendant was sentenced to 6.5 years and 8 years respectively for Count 1 and Count 2. In principle, consecutive sentences should be passed as the two offences, though arising from the same set of facts, were separate and distinct offences with completely different elements and targeting different criminal conduct. However, considering the totality principle, the Court ordered 2.5 years of the sentence for Count 2 to run consecutively to that for Count 1, with the rest to run concurrently, resulting in a total term of 9 years' imprisonment. (para. 43)

14. Further, the Court imposed a disqualification order in respect of his driving licence for a period of ten years under s. 69(1)(h) of the Road Traffic Ordinance (Cap. 374) in line with the "forward looking and preventive principle". (paras. 44 to 46)

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