Case Summary

HKSAR v Lui Sai Yu (呂世瑜)

CACC 61/2022; [2022] HKCA 1780; [2023] 1 HKLRD 751
(Court of Appeal)
(Full text of the Court's judgment in English at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=149076&currpage=T)

Before: Hon Poon CJHC, Pang JA and Anthea Pang JA
Dates of Hearing: 13 and 24 October 2022
Date of Judgment: 30 November 2022

Sentencing – offence of incitement to secession under NSL 21 – categorisation of offence as "serious" or "minor" – seriousness gauged by actual circumstances in each case – use of social media for incitement and other aggravating feature – determination of penalty within applicable tier after deciding whether offence committed by defendant was "serious" or "minor" – followed by adjustment of otherwise appropriate sentence if warranted

Construction of NSL 21 and 33(1) – contextual and purposive approach – local sentencing laws operating in tandem with NSL to further primary purpose of preventing, suppressing and imposing punishment for NSL offences – NSL taking priority in case of inconsistency – penalty regime of NSL 21 to give full effect to penological considerations – only mitigating circumstances not compromising primary purpose of NSL permissible – local sentencing laws on mitigation applicable only if NSL's primary purpose not compromised

Construction of NSL 21 – two-tier penalty regime – Lower Tier operating much the same way as local penalty regimes – penalty range

in Upper Tier reflecting gravity of serious NSL 21 offences – minimum of 5 years' imprisonment in Upper Tier a mandatory minimum – local sentencing guidelines did not inform construction of Upper Tier under NSL 21

Construction of NSL 33(1) – three disposal options in sliding degree of leniency – meaning of 從輕處罰 (imposing a lighter penalty) and 減輕處罰 (reducing a penalty) – penalty for serious NSL 21 offences could not be below 5 years' imprisonment if court "imposed lighter penalty" – penalty reduced from Upper Tier to Lower Tier if court "reduced penalty" – mitigating factors specified in NSL 33(1) exhaustive – other mitigating factors at common law applicable in "imposing a lighter penalty" but not in "reducing a penalty" – guilty plea not covered by NSL 33(1)(2) but a mitigating factor in "imposing a lighter sentence" within applicable tier – substantive Mainland sentencing law as aid to construction of NSL

Background

1. Between 30 June 2020 and 24 September 2020, the Applicant, together with other persons, incited other persons to organize, plan, commit or participate in acts with a view to committing secession or undermining national unification, namely, separating the HKSAR from the PRC or altering by unlawful means the legal status of the HKSAR via a Telegram channel of which the Applicant was one of the two administrators at all material times ("the Channel"). The Applicant pleaded guilty to a charge of incitement to secession contrary to NSL 20 and 21. The Judge below sentenced him to 5 years' imprisonment.

2. The Applicant attacked the Judge's categorisation of his offence as serious under NSL 21 and complained that the Judge had failed to give the customary one-third discount in full to reflect his guilty plea. He applied to the CA for leave to appeal against sentence on the following grounds:

(a) the Judge erred in categorising the circumstances of his offence as serious under NSL 21 ("Ground 1");

(b) alternatively, even if the offence was serious, the Judge erred in adopting a manifestly excessive starting point (“Ground 2”);

(c) the Judge erred in her interpretation of NSL 21 regarding the permissible final sentence by not taking into account NSL 33(1) whereby fulfilment of one of the prescribed circumstances might “reduce” even a minimum sentence, and by not taking into account relevant mitigating factors including the guilty plea (“Ground 3”); and

(d) the Judge failed to give sufficient reduction in sentence with reference to NSL 33(1)(2) and the relevant mitigating factors including the guilty plea (“Ground 4”).

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

- NSL 3(3), 8, 21, 33(1) and 42(1)

3. NSL 21 established a two-tier penalty regime for the offence of incitement to secession by reference to its severity: (a) if the circumstances of the offence were of a serious nature, the person should be sentenced to fixed-term imprisonment of not less than 5 years but not more than 10 years (“the Upper Tier”); and (b) if the circumstances of the offence were of a minor nature, the person should be sentenced to fixed-term imprisonment of not more than 5 years, short-term detention or restriction (“the Lower Tier”).

4. On the other hand, NSL 33(1) provided for three disposal options to adjust an otherwise appropriate penalty when any of the three conditions specified was established:

“有以下情形的，對有關犯罪行為人、犯罪嫌疑人、被告人可以從輕、減輕處罰；犯罪較輕的，可以免除處罰：

（一） 在犯罪過程中，自動放棄犯罪或者自動有效地防止犯罪結果發生的；

（二） 自動投案，如實供述自己的罪行的；

（三） 揭發他人犯罪行為，查證屬實，或者提供重要線索得以偵破

其他案件的。”[1]

5. The Court had to consider the following issues:

(a) whether the circumstances of the offence committed by the Applicant were serious within the meaning of NSL 21;
(b) the context of NSL 21 and 33(1);
(c) the proper construction of NSL 21: whether it was the legislative intention of the Upper Tier for serious NSL 21 offences to lay down a range of starting points between the maximum of 10 years and the minimum of 5 years, or whether it was to set 5 years as a mandatory minimum ("1st Core Issue"); and
(d) the proper construction of NSL 33(1): whether the legislative intention was that the three conditions specified in NSL 33(1) were exhaustive so that in their absence, the court could not adjust the penalty of a serious NSL 21 offence lower than the minimum of 5 years in the Upper Tier on account of other mitigating circumstances including a guilty plea ("2nd Core Issue").

Summary of the Court's rulings

(a) Whether the circumstances of the offence committed by the Applicant were serious within the meaning of NSL 21 (Grounds 1 and 2)

6. Applying the general approach to categorisation of an offence of incitement to secession under NSL 21 laid down in *HKSAR v Ma Chun Man* [2022] HKCA 1151 to the present case, the Court first considered the context of the offence. It noted that although the scale and severity of unlawful and violent assemblies between 30 June and 24 September

[1] The English translation of NSL 33(1) read:
"A lighter penalty may be imposed, or the penalty may be reduced or, in the case of a minor offence, exempted, if an offender, criminal suspect, or defendant:
(1) in the process of committing an offence, voluntarily discontinues the commission of the offence or voluntarily and effectively forestalls its consequences;
(2 voluntarily surrenders himself or herself and gives a truthful account of the offence; or
(3) reports on the offence committed by other person, which is verified to be true, or provides material information which assists in solving other criminal case."

2020 was less serious than before the NSL was applied to Hong Kong, Hong Kong was still facing considerable threats and risks to national security and public disorder. The threats and risks to national security by the Applicant's incitement were real and had to be given due weight in the overall assessment of the seriousness of his conduct. (paras. 27-29)

7. The seriousness of a particular offence had to be gauged by its actual circumstances, which by nature, must vary from case to case. With so many variables involved, there were limits to the extent to which comparisons with the detail of other cases could assist the sentencing court in determining the seriousness of the offence and the appropriate sentence before it. (para. 33)

8. It did not assist the assessment to ask if the context of the present offence was or was not the worst of its kind. The more relevant question was whether the context, together with the other features, in the overall assessment of the circumstances justified the categorisation of the offence as a serious one. (para. 33)

9. The Court reaffirmed that the use of social media for committing incitement was an aggravating feature. The aggravation laid in the extreme effectiveness of social media in providing platforms or means to individuals with the ease and ability to communicate or disseminate messages or content to a vast audience instantly without physical contact or geographical constraints, thereby amplifying the effects of the incitement and increased exponentially the threats and risks it posed to national security. Telegram was a widely used social media platform. The use of the Channel in the manner as it had been in the present case remained an aggravation which had to weigh heavily in the Court's assessment of the seriousness of the offence. (paras. 34, 35 and 37)

10. The following were other aggravating features identified by the Court: (para. 38)

(a) defiantly denouncing the authority of the NSL on the Telegram Channel;

(b) publishing secessionist posts and videos right after the application of the NSL to Hong Kong on 30 June 2020 and on 1 July 2020 which was the HKSAR Establishment Day, with clear risks of provoking secessionist and other unlawful acts;
(c) out of the 357 posts published on the Telegram Channel that were attributable to the Applicant as one of the joint administrators of the Channel, 8 were published by him directly;
(d) arousing public attention and discussion in the guise of polls by making use of secession materials with a view to advocating secession;
(e) acting in concert with others with a degree of division of labour between them as to how the Channel was administered;
(f) carrying posts on the Channel for sale of weaponry and gear, advocating violence and targeting the sovereignty over the HKSAR by China. Advocating the use of violence was a very serious aggravating factor;
(g) seeking to raise funds for the secessionist cause; and
(h) advertising for sale of weapons and gear on the Channel, aiming at people including protesters who were inclined to resorting to violence, thereby posing a greater risk to national security and public order.

11. The fact that the Applicant was not a social celebrity, hence with less influence on others, and that no persons had been shown to have been incited did not detract from the seriousness of his offence. (para. 40)

12. The Court held that the Judge was correct in categorising the circumstances of the present offence as serious within the meaning of NSL 21. It also agreed with the Judge's finding that the Applicant's culpability fell near the lower end of the category. The starting point adopted by the Judge was within the reasonable bounds that a sentencing court might impose for a serious offence sitting in that end. Grounds 1 and 2 therefore failed. (paras. 41-42)

(b) Context of NSL 21 and 33(1)

13. In construing NSL 21 and 33(1), the Court adopted the contextual

and purposive approach as the CFA had done in *HKSAR v Lai Chee Ying* [2021] HKCFA 3 and *HKSAR v Ng Hau Yi Sidney* [2021] HKCFA 42, noting that the basic principles underlying the NSL as contained and reflected in NSL 1 included the following five basic principles:

(a) First, "resolutely safeguarding national security";

(b) Secondly, "upholding and enhancing the 'One Country, Two Systems regime'";

(c) Thirdly, adhering to "administering Hong Kong in accordance with the law" and resolutely upholding "the constitutional order in the HKSAR as established by the Constitution and the Hong Kong Basic Law";

(d) Fourthly, resolutely opposing external interference; and

(e) Fifthly, "fully safeguarding the legitimate rights and interests of Hong Kong residents". (paras. 48-51)

14. Thus as an integral component of safeguarding national security, preventing, suppressing and imposing punishment for NSL offences was distinctly stated as a primary purpose of the NSL ("Primary Purpose"). It emphasised that the imperative in NSL 3(3), 8 and 42(1) on strict and full application of laws to further the Primary Purpose ("the Imperative") covered not only the NSL but also local laws.

15. After considering the context of the NSL as a whole, the Court arrived at the following instructive propositions:

(a) Local sentencing laws had to operate in tandem with the NSL to achieve the aim of safeguarding national security, giving priority to NSL provisions in case of inconsistency. (para. 56)

(b) Applying the Imperative to the penalty regimes in the NSL, priority should be given to the penological considerations of deterrence, retribution, denunciation and incapacitation, i.e. putting out the power of the offender to commit further offences ("the Penological Considerations"). It followed that the construction of NSL 21 had to give full effect to the Penological

Considerations. (para. 57)

(c) The court might take into account applicable mitigating circumstances to balance against the rigour of the Penological Considerations in arriving at a proportionate sentence. 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. This informed the construction of NSL 33(1). (para. 58)

(d) The Imperative also governed the application of local sentencing laws to the sentencing of NSL offences. To achieve convergence, compatibility and complementarity with NSL 21, local sentencing laws on mitigation could apply only if they did not prejudice the effect of the Penological Considerations. To achieve the same result with NSL 33(1), local sentencing laws on mitigation could only apply if they did not compromise the Primary Purpose. (para. 59)

(c) Construction of NSL 21: the two-tier penalty regime (1st Core Issue)

16. For minor offences, the Lower Tier stipulated three penalty options: fixed-term imprisonment, short-term detention, and restriction. For fixed-term imprisonment, the maximum was 5 years. Insofar as imprisonment was concerned, the Lower Tier set a range of starting points with 5 years as the maximum, leaving it to the court to determine what term was appropriate in the particular circumstances of the case. In so doing, the Lower Tier operated in very much the same way as most local statutory penalty regimes did. (para. 61)

17. For serious offences, the Upper Tier stipulated only one penalty option, i.e. fixed-term imprisonment. It also set a maximum of 10 years and a minimum of 5 years. By doing so, unwarranted divergence in the assessment of punishment by different courts was avoided. This reflected broadly the notion of fairness in the context of criminal justice that generally there should be a substantial degree of consistency in the punishment of offences with comparable severity. The choice of

imprisonment as the only penalty option and the range of penalties in the Upper Tier reflected the drafters' judgment with respect to the gravity of serious NSL 21 offences and how to give full effect to the Penological Considerations to further the Primary Purpose in sentencing serious NSL 21 offences. (para. 62)

18. Thus viewed purposively, the minimum of 5 years in the Upper Tier was mandatory. It followed that subject to the effect of NSL 33(1), whatever discount the court might give on account of mitigation, the ultimate sentence imposed could not go below the minimum of 5 years. The Judge's conclusion as to the construction of NSL 21 was correct. (paras. 63 and 96)

19. The Applicant argued that NSL 21 operated like the guideline judgments set by the CA in offences of trafficking in dangerous drugs. The Court held that local guideline judgments were premised on and operated within sentencing regimes which set the maximum penalty without a minimum. They did not inform the construction of the Upper Tier, which was a wholly different penalty regime. (paras. 80-81)

20. The Court's answer to the 1st Core Issue was that on a proper construction, the legislative intention of NSL 21 in prescribing the range of penalty for serious offences in the Upper Tier was to lay down a mandatory minimum of 5 years. (para. 90)

(d) Construction of NSL 33(1): whether the three specified conditions were exhaustive (2nd Core Issue)

21. The three disposals in NSL 33(1) were 從輕處罰 (imposing a lighter penalty), 減輕處罰 (reducing the penalty) and 免除處罰 (exempting the penalty). (para. 65)

22. Both parties agreed that 減輕處罰 meant reducing or lowering the penalty below the range of penalties stipulated by the law, that 從輕處罰 might be translated as "give a lighter punishment or penalty within the range stipulated by the law or regulations", and that the former was a more lenient option of adjusting the penalty than the latter. The three

disposal options accordingly followed their sliding degree of leniency in their order of appearance in NSL 33(1):

(a) 從輕處罰, imposing a lighter penalty, i.e. imposing a lighter penalty within the applicable tier as prescribed by the relevant NSL provisions;
(b) 減輕處罰, reducing the penalty, i.e. reducing the penalty from the applicable tier to a lower tier, which was more lenient; and
(c) 免除處罰, i.e. exempting the penalty, which was most lenient. (paras. 67-68)

23. It was the weight attached to the mitigating circumstances that determined if the court should 從輕處罰 (impose a lighter penalty) or 減輕處罰 (reduce a penalty). They essentially involved the same qualitative assessment in which the court evaluated and weighed all the available mitigating factors. (para. 69)

24. In sentencing an NSL 21 offence, if the court decided to 從輕處罰, it might impose a lighter penalty within either of the Upper Tier or Lower Tier. For serious offences, whatever discount the court might give, the ultimate sentence could not go below the mandatory minimum of 5 years in the Upper Tier. In contrast, if the court decided to 減輕處罰, it might reduce the penalty from the Upper Tier to the Lower Tier. (para. 69)

25. In providing for the disposal options of 從輕處罰 (imposing a lighter penalty) and 減輕處罰 (reducing a penalty), NSL 33(1) not only did not compromise the Primary Purpose but was in fact conducive to achieving it because each of the specified conditions was broadly consistent with such purpose. (para. 70)

26. Among all forms of mitigation, the specification of the three conditions, without more, was intentional. It reflected the drafters' judgment that they were the only relevant mitigating factors in the context of national security which might allow the court to not only 從輕處罰 (imposing a lighter penalty) but also 減輕處罰 (reducing a penalty), as the case may be, without prejudicing the Penological

Considerations or compromising the Primary Purpose. The legislative intention was plainly that, as specified conditions in the NSL, they were exhaustive in that sense. (para. 71)

27. It was also the legislative intention that local sentencing laws on mitigation were to operate in tandem with the NSL, provided that they did not prejudice the Penological Considerations or compromise the Primary Purpose. Other mitigating factors not specified in NSL 33(1) but recognised under common law, such as guilty pleas, could operate in full for the court to consider 從輕處罰, i.e. imposing a lighter sentence within the respective range of the Lower and Upper Tier. For whatever the discount those mitigating factors might afford, the ultimate sentence stayed within the range of either Tier, which still accorded with the drafters' judgment with respect to the gravity of and the Penological Considerations for NSL 21 offences. As such, they did not compromise the Primary Purpose. (para. 72)

28. Those other mitigating factors, however, could not apply to 減輕處罰, i.e. to reduce the sentence below the minimum of 5 years in the Upper Tier. If they were to apply to discount the sentence below 5 years, it would contradict the drafters' judgment with respect to the gravity of serious NSL 21 offences and prejudice the Penological Considerations for such offences, thereby compromising the Primary Purpose in that regard. As such, they were not compatible with either NSL 21 or 33(1). (para. 73)

29. The Respondent sought to rely on the substantive Mainland sentencing law, making reference to a book entitled "刑法條文理解適用與司法實務全書 — 根據刑法修正案 1~10 編定", 第一卷, 第四章, 第一節, "刑罰的具體運用"[2] on the grounds that Mainland sentencing law on the meanings of terms used in the NSL would help the construction exercise. The Court held that given the special status of the NSL as a national law applied to the HKSAR, regard might properly be had to the relevant Mainland law in aid of its construction. For one

[2] Unofficial translation of the title is "The Complete Book on the Understanding, Application and Judicial Practice of the Criminal Law Provisions, prepared according to Amendments 1~10 of the Criminal Law, Volume 1", Chapter IV: The Special Application of Penalties, Section 1: Sentencing.

of the working principles for drafting the NSL was accommodating the differences between Mainland China and the HKSAR, and striving to address the convergence, compatibility and complementarity between the NSL, and the relevant national laws and local laws of the HKSAR. Accordingly, the relevant Mainland law might in principle inform the construction of the NSL or a particular NSL provision. However, the need to refer to or consult the substantive Mainland sentencing law for the construction of NSL 21 or 33(1) did not arise in the present case. (paras. 87-89)

30. The Court's answer to the 2nd Core Issue was that NSL 33(1) was, on a proper construction, exhaustive in enabling the court to 減輕處罰, i.e. to reduce the sentence for a serious NSL 21 offence below the mandatory minimum of 5 years in the Upper Tier as appropriate. Other mitigating circumstances recognised under local laws, including guilty pleas, were not applicable for such purpose. The Applicant's timely guilty plea could not apply to adjust the ultimate sentence below the minimum of 5 years in the Upper Tier. (paras. 91 and 96)

(e) Grounds 3 and 4

31. In light of the answers on the two Core Issues, both Grounds 3 and 4 failed to the extent as discussed above. (para. 92)

32. In respect of Ground 3, the Applicant submitted that on a proper construction of NSL 21 and 33(1), the minimum term could and should be "reduced" such that a starting point could be adjusted downward for individual justice if one of the prescribed circumstances was satisfied. However, the Court held that the proper approach to sentencing under NSL 21 was for the court to firstly categorise the offence as either serious or minor, and then to determine the penalty within the applicable tier. The adjusting of an otherwise appropriate sentence, if warranted, would take place at the second step. The practical effect of the Applicant's submission was to ask the court to go back to the first step and re-categorise a serious case as a minor one. That was wrong in principle. (para. 93)

33. In respect of Ground 4, the Applicant submitted that the circumstances of his case came very close, if not identical, to the scenario specified in NSL 33(1)(2) although he did not voluntarily surrender himself. Thus he should be entitled to avail himself of NSL 33(1)(2). However, the Court held that the language of NSL 33(1)(2) was plain and unambiguous. Voluntary surrender took place before any appearance of the offender before the court. It would be too far-fetching to suggest that it covered the making of a plea by him at trial. (para. 94)

34. In conclusion, the Court upheld the sentence of 5 years' imprisonment imposed by the Judge and dismissed the Applicant's application for leave to appeal against sentence. (para. 97)

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