Case Summary

HKSAR v Chan Tai Sum (陳泰森)

DCCC 354/2022; [2022] HKDC 815; [2022] 4 HKLRD 154
(District Court)
(Full text of the Court's ruling in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=146166&currpage=T)

Before: HH Judge W. K. Kwok
Date of Hearing: 27 June 2022
Date of Ruling: 1 August 2022

Jurisdiction – District Court – sedition charges contrary to s. 10(1)(a) of Crimes Ordinance (Cap. 200) – whether indictable or summary offence determined by s. 14A of Criminal Procedure Ordinance (Cap. 221) – sedition a summary offence and triable summarily only – permanent magistrate had jurisdiction to hear and determine sedition offence – contextual and purposive interpretation of "offence endangering national security" in NSL 41(3) – sedition not such offence – NSL not intended to usurp function of HKSAR to legislate on sedition under BL 23 – sedition remained a summary offence post-NSL – sedition charges properly transferred to District Court under s. 88(1)(b) of Magistrates Ordinance (Cap. 227)

Background

1. The defendant was charged with one count of inciting others to take part in an unlawful assembly, contrary to the common law and s. 18 of the Public Order Ordinance (Cap. 245) ("Charge 1") and three counts of doing an act or acts with seditious intention, contrary to s. 10(1)(a) of the Crimes Ordinance (Cap. 200) ("Charges 2 to 4"). The defendant was minded to plead guilty to all charges but submitted that the District Court

had no jurisdiction to hear and determine Charges 2 to 4.

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

- BL 23
- NSL 41(3)
- Crimes Ordinance (Cap. 200) ("CO"), s. 10(1)(a)
- Criminal Procedure Ordinance (Cap. 221) ("CPO"), s. 14A
- District Court Ordinance (Cap. 336) ("DCO"), ss. 74 and 75(1)
- Magistrates Ordinance (Cap. 227) ("MO"), ss. 2, 88(1), 91 and 92; Second Schedule, Part III

2. Under ss. 74 and 75(1) of the DCO, the District Court had jurisdiction to hear and determine charges that were transferred to it by a magistrate in accordance with Part IV (ss. 88 to 90) of the MO. The relevant provisions of s. 88(1) of the MO read:

> "…whenever any person is accused before a magistrate of any indictable offence not included in any of the categories specified in Part III of the Second Schedule, the magistrate, upon application made by or on behalf of the Secretary for Justice –
>
> (a) shall make an order transferring the charge or complaint in respect of the indictable offence to the District Court; and
> (b) may, if the person is also accused of any offence triable summarily only, make an order transferring the charge or complaint in respect of the summary offence to the District Court."

3. The defence agreed that Charge 1 had been properly transferred to the District Court as it was an indictable offence not specified in Part III of the Second Schedule of the MO, but contended that the magistrate had no jurisdiction to transfer Charges 2 to 4 because the sedition offence was and had always been an indictable offence within the meaning of s. 2 of the MO and hence these charges were not transferable together with Charge 1 under s. 88(1)(b); and since sedition was an offence against Part II (Other Offences against the State) of the CO which was included in the 5th category of the indictable offences specified in Part III of the Second Schedule, Charges 2 to 4 were not transferable to the District

Court under s. 88(1)(a) due to the express exclusion stated therein. He also argued that since the promulgation of the NSL, sedition had to be an indictable offence by virtue of NSL 41(3). (paras.9 and 14)

4. On the other hand, the prosecution submitted that sedition was an offence triable summarily only and the magistrate had jurisdiction and power to transfer Charges 2 to 4 to the District Court together with Charge 1 under s. 88(1)(b) of the MO. Whereas the defence argued that the meaning of "indictable offence" in s. 88(1) of the MO was to be found only in s. 2 of the MO*, the prosecution submitted that the starting point was s. 14A of the CPO which provided for the classification of offences and their respective modes of trial. (paras. 8(b), 12, 13 and 15)

5. The issue before the Court was whether the sedition offence under s. 10(1)(a) of the CO was a summary offence or an indictable offence.(para 11)

Summary of the Court's ruling

(a) Classification of sedition before promulgation of the NSL

6. The Court held that prior to the promulgation of the NSL, sedition was a summary offence that was triable summarily only: (paras. 15 et seq and 69)

(a) The definition of "indictable offence" in s. 2 of the MO was unhelpful, because as read together with ss. 72 and 79 of the MO, it provided a circular definition that gave no clue on what an indictable offence really meant. The meaning of indictable offence in s. 88(1)(a) of the MO had to be ascertained from a source outside the MO. (paras. 30-50)

(b) In light of the authorities from all levels of courts, it was beyond

* Section 2 of the MO provided that unless the context otherwise requires, "indictable offence" in the MO meant "any crime or offence for which a magistrate is authorized or empowered or required to commit the accused person to prison for trial before the court."

doubt that whether a particular offence was an indictable offence or a summary offence was to be determined in accordance with s. 14A of the CPO. (paras. 54-58)

(c) According to s. 14A of the CPO, sedition was a summary offence and was triable summarily only:
  (i) the offence of sedition created by s. 10(1)(a) of the CO was not declared to be treason;
  (ii) the words "upon indictment" or "on indictment" did not appear in s. 10(1)(a);
  (iii) the offence was not declared to be triable either summarily or upon indictment; and
  (iv) it was not declared to be punishable on summary conviction or on indictment. (para. 59)

7. The defence submitted that since the 5th category of the offences specified in Part III of the Second Schedule of the MO included the sedition offence, and s. 88(1)(a) of the MO excluded the offences specified in Part III of the Second Schedule from being transferred to the District Court, it must have presupposed that all the offences included in Part III of the Second Schedule, including the sedition offence, were indictable offences. He claimed that the Legislature would not do anything that was futile, pointless and otiose. (paras. 60 and 62)

8. The Court held that Part III of the Second Schedule of the MO had to be read together with s. 88(1)(a) of the Ordinance. If the offence to be transferred was not an indictable offence, it was not necessary to consider whether or not it was an offence specified in Part III of the Second Schedule. Hence, the first issue to decide was whether or not the offence to be transferred was an indictable offence, and if so, whether the offence was included in Part III of the Second Schedule. It would not be transferrable to the District Court if the answer was yes, and transferrable if the answer was no under s. 88(1)(a). It was conceptually wrong to refer first of all to Part III of the Second Schedule and deduce backward whether or not the offence to be transferred was an indictable offence. (para. 61)

9. The function of Part III of the Second Schedule of the MO was to limit the scope of indictable offences that might come before the District Court. As far as the 5th category of offences specified in Part III of the Second Schedule was concerned, the purpose was to exclude indictable offences against Part I or Part II of the CO to come before the District Court. However, it did not make it clear that one of the nine offences against these two Parts of the CO was in fact a summary offence. The 5th category of offences specified in Part III of the Second Schedule should be read to mean "any indictable offence against Part I or Part II of the Crimes Ordinance". (paras. 63-66)

10. The defence referred to ss. 91 and 92 of the MO and argued that sedition could not be a summary offence because no magistrate had jurisdiction to hear and determine a charge in respect of this offence. The Court held: (para. 67)

(a) Sections 91 and 92 of the MO limited the jurisdiction of a special magistrate and a permanent magistrate to try indictable offences summarily by excluding the offences specified in the Second Schedule or Part I of the Second Schedule (as the case might be), which had to be interpreted to mean indictable offences of the description specified in the Schedule, including "any indictable offence against Part I or Part II of the Crimes Ordinance".

(b) A permanent magistrate would have the jurisdiction to hear and determine the sedition offence as it was a summary offence, and his jurisdiction to do so was not derived from s. 93 of the MO. A special magistrate would have no jurisdiction because the sedition offence attracted a possible sentence beyond his sentencing power.

11. The defence argued that sedition had to be an indictable offence because all the other eight offences against Part I or Part II of the CO were indictable offences. The Court pointed out that the sedition offence was the only offence against the whole of Part I and Part II of the CO that had an offence-creating provision which did not contain any

words to indicate that it was an indictable offence under s. 14A of the CPO. The fact that sedition was treated differently in this way by the Legislature from the other eight offences clearly indicated that sedition was intended by the Legislature to be a summary offence. (para. 68)

(b) Classification of sedition after promulgation of the NSL

12. The defence argued that even if sedition was triable summarily only before the promulgation of the NSL, it had become an indictable offence after the promulgation of the NSL. Another District Court judge had decided in *HKSAR v Tam Tak Chi* [2021] HKDC 424 that sedition was an indictable offence because of NSL 41(3) but that decision was not binding on the Court in the present case. (paras. 70 and 72)

13. Noting BL 23 providing that the HKSAR "shall enact laws on its own" to prohibit any act of sedition, the Court held that the NSL could not have the intention of amending the offence-creating provision relating to sedition and changing it from a summary offence into an indictable offence. The NSL did not seek to usurp the function to legislate on the offence of sedition. If it had intended to do so, it would have said so explicitly. (para. 73)

14. The NSL had not sought to change the local laws relating to the sedition offence, but left the local laws as they were, and the NSL and the local laws would act hand in hand to protect national security. In other words, if sedition was a summary offence according to its offence-creating provision, and the Court in the present case had already so held, the sedition offence remained as a summary offence after the promulgation of the NSL. (paras. 74-76)

15. Although NSL 41(3) stipulated that "cases concerning offence endangering national security within the jurisdiction of the HKSAR shall be tried on indictment", the term "offence endangering national security" was subject to contextual and purposive interpretation: *HKSAR v Ng Hau Yi Sidney* [2021] HKCFA 42. Since the NSL did not seek to change the local laws relating to the sedition offence (including the provisions creating the offence of sedition), the sedition offence remained to be

triable summarily only and not on indictment, and the term "offence endangering national security" in NSL 41(3) did not include the sedition offence. Interpreting the inter-relationship between the NSL and the local laws relating to the sedition offence in this way would not result in any conflict between them. (paras. 77-79)

(c) Conclusion

16. The Court held that sedition had always been a summary offence and it remained so after the promulgation of the NSL. Since sedition was a summary offence, a magistrate would have no jurisdiction to transfer a charge in respect of this offence to the District Court under s. 88(1)(a) of the MO. However, if the accused faced not only a charge in respect of the sedition offence but also other charges which could be properly transferred to the District Court under s. 88(1)(a), a magistrate would then have the jurisdiction and power, in the exercise of his discretion, to order the charge for sedition to be transferred to the District Court together with the charges that could be properly transferred to the District Court under s. 88(1)(b). (paras. 80-81)

17. Since Charge 1 had been properly transferred by the magistrate to the District Court, the magistrate must also have jurisdiction and power to order the transfer of Charges 2 to 4 to the District Court under s. 88(1)(b) of the MO even though sedition was only a summary offence. For these reasons, the District Court had jurisdiction to hear and determine Charges 2 to 4. (paras. 82-83)

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