

## Case Summary (English Translation)

### HKSAR v 王逸戰 (Wong Yat Chin) and Others

DCCC 984/2021; [2022] HKDC 1210

(District Court)

(Full text of the Court's reasons for sentence in Chinese at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=148155&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=148155&currpage=T))

Before: HH Judge W. K. Kwok

Date: 22 October 2022

*Sentencing – NSL 23 and ss. 159A and 159C of Crimes Ordinance (Cap. 200) – conspiracy to incite the commission by other persons of the offence of subversion – sentencing principle applying CA's judgment on NSL 21 – “Hong Kong Nation” – concept lacking historical or legal basis – culpability not reduced where no one was incited – conspiracy already carried out – present case falling within category of “minor nature” but towards the higher end of severity – starting point at 4 years and 9 months' imprisonment – aged under 21 years at the time of the offence*

#### **Background**

1. The four Defendants (D1, D2, D3 and D4) in the present case were members of “Student Politicism”. They pleaded guilty to one count of conspiracy to incite the commission by other persons of the offence of subversion, contrary to NSL 22 and 23 and ss. 159A and 159C of the Crimes Ordinance (Cap. 200).
2. The charge alleged that the four Defendants, between 25 October 2020 to 16 June 2021, conspired together and with other persons to incite other persons to organise, plan, commit or participate in any of the

following acts by force or threat of force or other unlawful means with a view to subverting the State power, namely (a) overthrowing or undermining the basic system of the PRC established by the Constitution of the PRC; (b) overthrowing the body of central power of the PRC or the body of power of the HKSAR.

### **Major provision(s) under consideration**

- NSL 23, 33 and 64
- Crimes Ordinance (Cap. 200), ss. 159A and 159C

### **Summary of the Court's reasons for sentence**

3. D1 was the convener of Student Politicism, D2 was the secretary-general, whilst D3 and D4 were the spokespersons. Between 25 October 2020 and 16 June 2021, Student Politicism carried out 7 street booth activities in a number of crowded public places. They set up street booths to promote their political stance by making public speeches, placing promotional cardboards, using loudspeakers and having volunteer workers distribute promotional leaflets. See paragraphs 4 to 35 of the reasons for sentence for the detailed facts of the case.

#### **(a) Sentencing principle for the offence of incitement to subversion under NSL 23**

4. Pursuant to NSL 23 and 64, anyone who committed the offence of incitement to subversion under NSL 23, where circumstances were of a “serious nature”, could only be sentenced to imprisonment for a term of not less than 5 years without other sentencing options. If the circumstances of the offence were of a “minor nature”, imprisonment or other forms of penalty (such as detention in a training centre or serving a community service order in open conditions) could be available options for sentencing, but if imprisonment was a suitable sentencing option, the maximum term would be 5 years or less without a minimum term prescribed. (paras 67 to 69)

5. As the four Defendants were convicted of one count of conspiracy

to incite the commission by other persons of the offence of subversion, the penalty applicable to the present case, in accordance with s. 159C(4) of the Crimes Ordinance, would not go beyond the maximum penalty stipulated by NSL 23. (para 70)

6. The NSL did not define the meaning of circumstances of a “serious” or “minor” nature. However, the CA’s judgment in *HKSAR v Ma Chun Man* [2022] HKCA 1151 was relevant to this issue. Although *Ma Chun Man* concerned the offence of “incitement to secession” under NSL 21, the sentencing principle laid down therein by the CA was also applicable to inciting the commission by other persons of the offence of subversion. (paras 72 to 73)

7. Citing *Ma Chun Man*, the Court held that inciting the commission by other persons of the offence of subversion was a pre-emptive offence, the gravamen of which was to: (a) stop people from inciting (including by way of persuading or encouraging) others to commit the offence of subversion, even if no one so incited carried out the crime; and (b) allow intervention of the law at the earliest possible stage to stop a person who had been incited from carrying out the offence of subversion. Its purpose was to sufficiently protect important public interests such as national security and territorial integrity as well as the foundation of the constitutional system and legal status of the HKSAR, to ensure that the offence of subversion could be nipped in the bud by timely and effective suppression and punishment. (para 75)

8. Taking into account the gravamen of the charge of incitement to subversion, when the Court assessed the seriousness of the circumstances of the case, the prime focus was on the offender’s acts, as well as the actual consequences, potential risks and possible influence entailed. In this regard, the factors which the Court needed to consider included but were not limited to the following: (para 76)

- (a) the context in which the offence was committed, including the date, time, location, occasion and society’s atmosphere at the material time and so on;
- (b) the modus operandi, including the ways, acts, wording, media

- or platform adopted;
- (c) the number of times and the duration of the incitement, and whether the acts were persistent;
  - (d) the scale of the incitement;
  - (e) whether the matter happened suddenly or was premeditated; if it was the latter, the scale and precision of the premeditation;
  - (f) whether violence or threat of violence was involved; if so, the urgency and seriousness of the relevant violence or threat;
  - (g) whether other people were involved in committing the crime together;
  - (h) the group the incitement targeted, the size of the group and the potential influence on them;
  - (i) whether or not the incitement actually succeeded and resulted in someone committing the offence of subversion or any other offence, or the risk and imminence that such offences would happen;
  - (j) the actual or potential influence that the offender had on society or a certain sector or area.

**(b) Whether circumstances of the present case were of a serious nature**

9. The Court agreed that merely from the point of publishing inciting speeches, the circumstances of the present case appeared to be less serious than that of *Ma Chun Man*: (para 81)

- (a) 19 public speeches were involved in *Ma Chun Man*, which were more than the total of seven street booths set up by the four Defendants in the present case.
- (b) Ma Chun Man was released on bail many times after arrested for the offence of incitement, but he still persisted in publishing the same inciting speeches on multiple occasions. The four Defendants in the present case were only summonsed for their alleged breach of the prohibition on group gathering instead of being arrested for publishing inciting speeches. Thus, unlike the case of *Ma Chun Man*, there was no aggravating factor of

any of the Defendants reoffending whilst on bail.

- (c) Ma Chun Man used social media such as Facebook and Telegram to publish inciting speeches, but no such allegation was made by the Prosecution in the present case.

10. Nevertheless, the Court still held that the present case involved a very serious offence: (para 82)

- (a) The speeches delivered by the relevant Defendants at the street booths were all advocating for “Hong Kong independence” and inciting the public to subvert the State power: (para 82)
  - (i) They put forth or advocated the concept of “Hong Kong Nation”, asserting that the ruling power should belong to the “Hong Kong people” or their so-called “Hong Kong Nation”.
  - (ii) The Court pointed out that Hong Kong had been a part of China since ancient times. Hong Kong people belonged to the Chinese nation. “Hong Kong Nation” was just a concept fabricated by those advocating for Hong Kong independence without any historical or legal basis. In so doing, the Defendants could mislead the general public (including children, youngsters and those who were immature or ignorant of the history) in the vicinity of the street booths into believing that Hong Kong did not belong to China.
  - (iii) By advocating “Liberate Hong Kong, Revolution of Our Times” under the concept of “Hong Kong Nation”, all Defendants indeed asserted to separate the HKSAR from the PRC and incited secession for seizure of political power.
  - (iv) As seen from his preaching at the street booths that Student Politicism stood with the “Hong Kong Nation” to continue the resistance until Hong Kong was liberated, it was impossible that D1 at the time had no knowledge of the meaning of Hong Kong independence and secession contained in the slogan. D2 assisted D1 in setting up and managing the street booth on each occasion. D3 and D4 had also led the public to chant the slogan.

- (v) The Court was convinced that all Defendants were aware of the meaning of this slogan when participating in the street booth activities, which also aptly represented their intention, namely to advocate “Hong Kong independence” and incite the public to overthrow the regime of the Central Authorities and the HKSARG for the establishment of the so-called “Hong Kong Nation” regime.
- (b) The four Defendants set up a total of 7 street booths, advocating the idea of “Hong Kong independence” and deliberately challenging the NSL on all occasions: (para 83)
- (i) After the implementation of the NSL, riots or large-scale unlawful assemblies basically vanished in the HKSAR. However, whilst advocating the idea of “Hong Kong independence” at the street booths, D1, by displaying photos taken by protesters during the riots, also sought to revive everyone’s “initial aspiration” and remind former protesters or rioters to take to the streets once again to rebel against the Central Authorities and the HKSARG.
- (ii) In view of the success of NSL in curbing social unrest, D1 hoped to encourage or persuade members of the public to come out again and fight against the Government, thereby accomplishing his wish to so-called “Liberate Hong Kong”.
- (iii) D3 had also made derogatory remarks on the NSL, exhorting the public not to be fazed by the law and bringing up the need for revolution.
- (c) The Defence claimed that there was a dedicated issue at the street booth on each occasion to arouse public concern over current affairs. The Court held that, the Defendants made use of these issues to allege that the Government was totalitarian and coax the public that they were fighting for a cause. Through these, the public was lobbied to accept their idea of “Hong Kong independence” and incited to take part in the fight or their so-called “revolution”: (para 84)

- (i) The Defendants raised the issue of remembering the “12 Hongkongers” with the intention to make people believe that those 12 Hong Kong persons intercepted by Mainland authorities were victims of government oppression rather than fugitives who fled Hong Kong to evade prosecution.
- (ii) The Defendants’ allegation that their chance of liberating Hong Kong was curtailed by outsiders’ “cultural erosion” was fear-mongering remarks. More outsiders speaking Putonghua was not tantamount to a cultural invasion. Cantonese-speaking people would not lose their ability to speak or continue to think in Cantonese after acquiring Putonghua.
- (iii) The Defendants opposed and boycotted the “LeaveHomeSafe” app on grounds that liberty would be deprived and privacy invaded by the Government. This remark undermined confidence and trust in the Government and disregarded the need for epidemic prevention.
- (iv) The Defendants did not discuss the relevant issues alone. They pleaded to the public in each street booth activity that they should fight against the ruling regime until the liberation of Hong Kong.
- (v) The easiest way to incite others to overthrow a regime was to make them distrust the regime and make those incitees feel that the government was totalitarian, so that they were made to believe that overthrowing the ruling regime was the only way out. These were indeed the acts done by the four Defendants.

(d) In order to overthrow the regime and achieve the goal of “Hong Kong independence”, the four Defendants began to incite others to use, or prepare to use, force: (paras 85-88)

- (i) Whilst speaking at the street booths, the Defendants incited the public to fight till the end against the ruling regime, which they described as totalitarian, until Hong

Kong was liberated. The content of their speeches increasingly advocated the use of violence. They started to advocate for revolution instead of mere street demonstrations.

- (ii) D1 said that when it came the time to resist, there would be no “distinction between peaceful and valiant protesters”, or even “all people would be valiants”. It was hoped that everyone would learn and practise martial arts and turn from defence into attack before Hong Kong could see a chance for liberation. He later even claimed that the next fight would not only be a social movement but possibly a war, indicating his tendency to advocate for the use of force or violence to achieve “Hong Kong independence”.
- (iii) D2 asked Hong Kong people to equip themselves physically, intellectually and mentally, as no one knew when the revolution would come.
- (iv) D3 said that they might resort to violence if the Government did not respond to their demands, stating that a revolution needed a sacrifice spirit.
- (v) D4 said that Hong Kong people had to rise and rebel bravely against tyranny and overthrow the totalitarian government so as to build the future of the “Hong Kong Nation”.
- (vi) When the four Defendants asked the public to get mentally prepared, be willing to sacrifice and forgo the moral shackles, the possibility that some might relate the same to the use of force without a bottom line could not be ruled out.

(e) In respect of the effect of incitement, the Court noticed that the street booths set up by the Defendants were rather popular. (para 89)

(f) The Court disagreed with the Defence’s submission that at the time when the street booths were set up, peace had been restored in the society and the risk of endangering the State and the



HKSARG was not high. At that time, there were still people chanting slogans such as “Five demands, Not one less” and “Liberate Hong Kong, Revolution of Our Times”. The Court held that the acts of the Defendants had posed a risk to the national security and the security of the HKSARG. (para 90)

(g) Albeit there was no direct evidence showing that someone was incited by the Defendants, the gravamen of this offence was preemptive. Hence, the culpability of the Defendants would not be reduced. (para 91)

(h) Although each Defendant was convicted of conspiracy, their conspiracy had already been carried out. Each street booth [activity] in which each Defendant participated constituted a substantive offence of inciting the commission by other persons of the offence of subversion. (para 92)

(i) In light of the commission of a substantive offence by the Defendants, the Court did not accept that D2 and D3 met the criteria for a lighter or reduced penalty based on “voluntary discontinuation of the commission of the offence” under NSL 33. However, as D3 had withdrawn from Student Politicism on 2 March 2021, the street booth held after that date would not be considered as part of her culpability. (para 92)

11. On the other hand, the Court accepted that the four Defendants in delivering their speeches did not provide a detailed roadmap or plan to pursue the aim of overthrowing the ruling regime and achieving “Hong Kong independence”. They did not incite others to use force without a bottom line; nor did they incite others to surrender the lives of their own or others in exchange for the success of the revolution; the possibility of using weapons was not mentioned. (para 93)

### **(c) Culpability and sentencing of the four Defendants**

12. The Court adopted *Ma Chun Man* as a benchmark case in assessing whether the present case was of “serious” or “minor” nature. Based on

the fact that the four Defendants in the present case had given fewer public speeches than *Ma Chun Man* and that they did not use social media for incitement as what Ma Chun Man did, the Court held that the present case fell into the category of “minor nature” but towards the higher end of severity due to the aforesaid serious circumstances. (para 94)

13. NSL 23 provided that a defendant who committed the offence of inciting the commission by other persons of the offence of subversion, where the circumstances of the case were of a minor nature, should be sentenced to “fixed-term imprisonment of not more than five years, short-term detention or restriction”. NSL 64 provided that in the application of the NSL in the HKSAR, the various penalties provided for in the NSL meant the corresponding penalties under the relevant local laws, or the corresponding penalties by construction with reference to the relevant local laws. After making such comparison or reference, “fixed-term imprisonment” provided for in the NSL referred to imprisonment under the local law; “short-term detention” referred to imprisonment, detention in a detention centre or detention in a training centre under the local law; and “restriction” referred to community service or detention in a reformatory school under the local law. Having considered the sentence in *Ma Chun Man*, the Court held that if a custodial sentence was considered appropriate in the present case, in so far as the overall culpability was concerned, an appropriate starting point would be 4 years and 9 months’ imprisonment without taking into consideration of other aggravating or mitigation factors. (para 95)

### ***Sentencing of D1***

14. Given D1’s role and level of involvement in the offence, a penalty other than imprisonment could not achieve a punitive and deterrent effect imprisonment was the only appropriate sentencing option. D1 was aged under 21 at the time of the offence, so the Court lowered the starting point by 3 months to 4 1/2 years’ imprisonment (i.e. 54 months). (para 96)

15. D1 claimed in the mitigation letter that he “felt sorry and regretted

what had been done”, but he had expressed no regrets in an earlier post [on social media]. The Court held that there was no need to make a ruling on this matter, as even if D1 had no remorse, according to *Ma Chun Man*, this did not constitute a factor that would add to the gravity of the case under NSL 23, nor did it constitute an aggravating factor under the common law. On the other hand, D1 was granted a one-third reduction to 36 months’ imprisonment for his guilty plea. Apart from the above, the Court could not see any reason for further reduction in sentence. (paras 97 to 98)

### ***Sentencing of D2***

16. D2 was aged under 21 at the time of the offence; he played an important role in the offence but mainly by providing assistance. The Court adopted 4 years and 3 months’ imprisonment (i.e. 51 months) as the starting point. The only valid mitigating factor was his guilty plea, which would result in a one-third reduction. Apart from that, there was no room for any further sentence reduction. D2 was sentenced to 34 months’ imprisonment accordingly. (paras 99 to 100)

### ***Sentencing of D3 and D4***

17. D3 and D4 were students with good grades, conduct and background. They were aged 18 or 19 only at the time of the offence, and currently under 21. Nevertheless in view of the gravity of the offence, the Court had to emphasise punishment and deterrence as sentencing rationales; rehabilitation in an open setting would not be proper. As such, detention in a training centre would be the most suitable sentencing option. D4 agreed to be admitted to a training centre and was sentenced to detention in a training centre accordingly. (paras 101 to 102)

18. D3, albeit suitable for detention in a training centre and eligible for a clear record under the Rehabilitation of Offenders Ordinance, still requested for a term of imprisonment. She aspired to continue her college education but a training centre would focus only on vocational training. The Court agreed that it would be more conducive to D3’s

rehabilitation if she was allowed to pursue her university education than forcing her to receive vocational training. Thus the Court exceptionally imposed an imprisonment term on D3. (paras 103 and 104)

19. In addition to the overall culpability, the Court also took account of D3's role. She only participated twice in the street booth [activities], but she did incite others by speeches to give false information in the course of epidemic prevention and mention possible use of violence. The Court held that 3 years and 9 months' imprisonment (i.e. 45 months) would be an appropriate starting point. Apart from one-third reduction on account of her guilty plea, there was no room for any further reduction. D3 was sentenced to 30 months' imprisonment accordingly. (paras 105 and 106)

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