

Case Summary

HKSAR v Tong Ying Kit (唐英傑)

HCCC 280/2020; [2021] HKCFI 2200; [2021] 5 HKC 100
(Court of First Instance)

(Full text of the Court's reasons for verdict in English at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=137456&currpage=T)

Before: Hon Toh, Anthea Pang and Wilson Chan JJ

Dates of Trial: 23-25, 30 June, 2, 5-9, 12-15 and 20 July 2021

Date of Verdict: 27 July 2021

Elements of offence – secession under NSL 20 – actus reus – use of force or threat to use force not a necessary element – mens rea – intention to commit secession

Elements of offence – incitement to commit secession under NSL 21 – incitement addressed to public at large – subject matter and all surrounding circumstances to be considered – natural and reasonable effect of article or words – means of carrying out incited acts immaterial – no principle of parity of mens rea on the part of incitee

Expert opinion – meaning of “Liberate Hong Kong, Revolution of Our Times” – natural and reasonable effect and contextual matters considered – capable of bearing secessionist meaning and inciting others to commit secession

Elements of offence – terrorist activities under NSL 24 – actus rea – “serious violence” does not mean serious injuries to persons – nature of act to be considered – “grave harm to the society” – not restricted to physical harm – disruption to law and order – law-abiding citizens fearing for own safety and worrying about public security of Hong

Kong – mens rea – intention to “intimidate the public in order to pursue political agenda”

Background

1. On 1 July 2020, the Defendant drove his motorcycle with a black flag bearing the slogan “光復香港 時代革命 LIBERATE HONG KONG REVOLUTION OF OUR TIMES” (“the Slogan”) at his back from Eastern Harbour Crossing to Wanchai. Despite repeated warnings, he ran through three police checklines and crashed into a group of police officers at the 4th one, injuring three of them.

2. The Defendant was charged with incitement to secession contrary to NSL 20 and 21 (“Count 1”), terrorist activities contrary to NSL 24 (“Count 2”), and as an alternative to Count 2, causing grievous bodily harm by dangerous driving (“Count 3”).

3. This was the first case involving offences under the NSL.

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

- NSL 5, 20, 21, 24, 41 and 45

4. The Court discussed:

- (a) the elements of the offences of secession (NSL 20) and incitement to commit secession (NSL 21);
- (b) the meaning of the Slogan;
- (c) whether the Slogan as at 1 July 2020 was capable of carrying the relevant secessionist meaning, namely, separating the HKSAR from the PRC;
- (d) whether displaying the flag with the Slogan on it in the particular circumstances of this case was capable of inciting others to commit secession;
- (e) the elements of the offence of terrorist activities (NSL 24);
- (f) whether the Defendant’s acts amounted to acts involving “serious violence against a person or persons” or “other

dangerous activities which seriously jeopardise public ... safety or security” causing or intended to cause “grave harm to the society” with a view to “intimidating the public in order to pursue a political agenda”.

Summary of the Court’s rulings

5. Although this case was presided over by a panel of three judges without a jury, legal principles such as burden of proof, standard of proof, presumption of innocence, right of silence and right to a fair trial, applied in this case as much as they applied in any criminal case tried in the CFI with a jury: NSL 5, 41 and 45. It could not be suggested that unfairness would result when a defendant was tried without a jury for, in the Magistrates’ Courts and District Court, all the cases were tried without a jury. (paras. 7 and 8)

Elements of the offences of secession (NSL 20) and incitement to commit secession (NSL 21)

6. The *actus reus* of the offence of secession under NSL 20 was simply the organisation, planning, commission or participation in any of the acts specified in NSL 20(1)(1) to (3). The use of force or a threat to use force was not a necessary element of the offence. Whether an act allegedly done by a defendant amounted to an act so specified was a matter of fact based on the evidence and the specific circumstances surrounding a particular case. (paras. 11 and 12)

7. As to the *mens rea* of the offence of secession, the culpable mind was one which did the prohibited act(s) with a view to committing secession or undermining national unification. (para. 13)

8. In respect of the *actus reus* and *mens rea* of the offence of incitement:

- (a) an incitement could be addressed to the public at large, whether in the form of a published article, an advertisement, or a speech;
- (b) when examining the subject matter said to constitute the incitement, all the surrounding circumstances had to be taken into

account, including the background leading up to the event complained of;

(c) in ascertaining whether the subject matter complained of constituted an incitement, the subject matter had to be looked at as a whole; and

(d) in deciding whether the words used were capable of the incitement alleged, the natural and reasonable effect of the article or the words had to be examined. (para. 33)

9. Thus, the Court had to ask: having regard to the natural and reasonable effect of displaying the flag with the Slogan on it in the particular circumstances of this case and when viewed as a whole, was such display of the Slogan capable of inciting others to commit secession under NSL 20? (para. 34) But before dealing with this issue, the Court had to first examine whether the Slogan as at 1 July 2020 was capable of carrying the relevant secessionist meaning, namely, separating the HKSAR from the PRC. (para. 134)

Expert opinions on the meaning of the Slogan

10. The prosecution expert witness used a historical approach to examine the meaning of the words “光復香港 時代革命”, the Chinese characters of the Slogan (“the Chinese Slogan”) at the material time. (para. 101) In his opinion:

(a) the words “光復香港” had the meaning of recovering the HKSAR which had fallen into enemy hands, and by extension of that, the words meant not admitting the HKSAR as part of the PRC, and viewing the PRC regime as an enemy; (paras. 103-104)

(b) the words “時代革命” had the meaning of causing a change of times by adopting means to cause a change to the regime or social system existing at the time (or a period of time) when the slogan is raised. By extension of that, the words meant rejecting the

governance of the PRC and the HKSAR, and attempting to replace the current regime or social system by way of changing the regime or social system. (para. 105)

11. Having considered the customary usage of the words or compound words from a historical perspective and the context in which they were used, the prosecution expert was of the opinion that at the material time on 1 July 2020, as a whole, the fundamental agenda and meaning of the Chinese Slogan was “to cause the consequence of separating the territory of residence from the State sovereignty; in the context of Hong Kong’s political language, these words were raised necessarily for the objective of separating the HKSAR from the PRC.” He added that the eight words meant: through changing the government or changing the regime, to take back Hong Kong in order to change this era. To take back Hong Kong meant to take back the governance of the HKSARG under the PRC regime. Further, according to the conventional usage of the words, it was to achieve this objective by violence. (paras. 115 and 116)

12. The prosecution expert referred to a police report which found that the use of the Slogan was associated with Hong Kong Independence and other political agenda hostile to the PRC and/or the HKSAR including words or statements to the effect of secession and/or subversion, and that the co-occurrence rate between the use of the Slogan and the waving/chanting of secessionist or subversive words increased sharply from 11% in 2019 to 70% in 2020. (paras. 118 and 121)

13. On the other hand, the two defence experts adopted an interdisciplinary approach to investigate into the subject, including social sciences and cultural studies. In their joint report, they gave the opinion that the assumptions and conclusion of the prosecution expert were flawed. They concluded that by September and October 2019, the Slogan had become a catch-all phrase signifying the vague desire to recover what was lost and the need for fundamental change in Hong Kong, but it was simultaneously open to virtually an infinite range of

possible readings of exactly what to recover and what fundamental changes were needed. However, one of the defence experts agreed in his examination-in-chief that it would not be possible to deny that such “big” change might involve Hong Kong Independence. He stated the defence experts’ conclusion that the Slogan was open and ambiguous and could be interpreted in many ways, so that, by definition, by 2020 there was no one single correct interpretation. In that sense, he could not say that the prosecution expert’s conclusion as to the meaning of the Slogan was incorrect or not. (paras. 124-126)

Meaning of the Slogan and incitement to commit secession

14. The Court accepted that the two parts of the Chinese Slogan (“光復香港” and “時代革命”) had a close semantic connection and could not be construed separately. They ought to be viewed as a phrase of words or slogan as a whole. (para. 135)

15. What the Court was concerned with in this case was not whether the Slogan meant one and only one thing but whether the Slogan, when taken as a whole after considering all the relevant circumstances, was capable of inciting others to commit secession. The focus should be on whether the words or message was capable of inciting others to commit the offence in question. In this respect, the prosecution and defence experts agreed that at the material time on 1 July 2020, as a whole, the Chinese Slogan was at the very least capable of having this meaning; “the objective of separating the HKSAR from the PRC.” (paras. 137-138)

16. It was important to take into account the context when construing the meaning of the Slogan.

- (a) The Slogan was printed on a flag carried at all material times on the back of a motorcyclist travelling on a busy public highway on 1 July 2020 plainly in the view of the general public.

- (b) On 1 July 2020, there were protests on Hong Kong Island protesting against the NSL.
- (c) The route chosen by the Defendant after crossing the Eastern Harbour Crossing involved some major thoroughfares.
- (d) While the flag was displayed, 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.
- (e) 1st July was the anniversary date of the establishment of the HKSAR and the resumption of sovereignty over Hong Kong by the PRC.
- (f) 1 July 2020 was the very next day after the NSL had come into effect, a law which specifically dealt with matters of national security, including secession. (para. 140)

17. Having regard to the natural and reasonable effect of displaying the flag with the Slogan on it in the particular circumstances of this case and taking into account the above contextual matters, the Court concluded that the Slogan as at 1 July 2020 was capable of carrying the meaning of separating the HKSAR from the PRC and such display of the Slogan was capable of inciting others to commit secession. (paras. 141 and 171(1))

18. The absence of any evidence as to how the said incited act of separating the HKSAR from the PRC was to be carried out was immaterial to the Prosecution's case of incitement. There was no requirement that the incitor must specify the means by which the offence was to be carried out. It was also not a legal requirement for the offence of incitement that there be parity of *mens rea* on the part of the incitee. Nor was the Prosecution required to prove that the incitee indeed carried out the offence incited. (para. 143)

Requisite mens rea of incitement: the Defendant's mens rea

19. The Court made the following findings in respect of the *mens rea* of the Defendant at the material time.

- (a) The way in which the Defendant mounted the flag at his back was a clear proof that he intended to attract public attention and intended the flag to be seen by as many people as possible. (para. 146)
- (b) It was the Defendant who set the context for the display of the flag. He deliberately chose 1 July 2020 to take action. The time and the place were particularly chosen by him to attract the attention of as many people as possible. (para. 146)
- (c) The Defendant was alive to possible breaches of the NSL at the material time. (para. 147)
- (d) The mentioning of a “safe spot” in his exchanges with another person earlier on that day and the fact that he had been kept informed about the various police checklines and road blocks were not only probative of his act being a pre-planned one but also that he was intending to offend the law. (para. 148)
- (e) The Defendant's repeated challenge to the police checklines, a symbol of law and order, was a clear illustration of his determination to attract as much public attention as possible and to leave a great impact and a strong impression on the people. (para. 149)

20. The Defendant was out there deliberately displaying the flag. He understood the Slogan to bear the meaning of Hong Kong Independence. By displaying the flag bearing the Slogan in the manner he did, the Defendant intended to convey the secessionist meaning of the Slogan to

others, and he intended to incite others to commit secession by separating the HKSAR from the PRC. (para. 150 and 171(2) and (3))

Elements of the offence of terrorist activities under NSL 24

21. The *actus reus* of the offence of terrorist activities was the organisation, planning, commission, participation in, or threatening to commit any of the activities specified under NSL 24(1)(1) to (5) and which caused grave harm to the society or which was intended by the defendant to cause such harm. “Causing or intended to cause grave harm to the society” was an element which the Prosecution was required to prove. “Harm” was not restricted to physical injury. (paras. 37 and 38)

22. The *mens rea* for the offence under NSL 24 was doing the prohibited act(s) with a view to coercing the CPG, the HKSARG or an international organisation or intimidating the public in order to pursue a political agenda. (para. 39)

NSL 24: “serious violence against a person or persons” or “other dangerous activities which seriously jeopardise public ... safety or security”

23. The Defendant did not stop at several police checkpoints despite being shouted at and directed to stop. In doing so, he created a dangerous situation where police officers had to jump out of his way and pedestrians and other road users lawfully using the roads were potentially put at risk and in harm’s way (para. 152)

24. A motorcycle was potentially a lethal weapon. If a person deliberately steered a motorcycle in a manner which rendered a collision with people inevitable, he was no doubt engaging in acts which involved serious violence against persons. (para. 158)

25. Serious violence against persons did not mean serious injuries caused to the persons. It was the nature of the act embarked upon which was required to be proved. Whether such act resulted in or caused

serious bodily injury was a matter relevant to sentence, not an element of the offence of terrorist activities. (para. 159)

26. In relation to the defence's submission that the Defendant had applied his brakes, the Court held that the Defendant's driving manner had to be examined in its entirety: collision was bound to occur whether he had applied brakes or not. Further, even assuming that the Defendant was driving at 20 kph, his speed at the material time was not safe given that there was a group of police officers in a short distance ahead of him. As there were pedestrians at the junction where the crash occurred, the manner of the Defendant's driving also put those pedestrians at risk of harm. (paras. 154 and 156)

27. As regards the defence's submission that a terrorist would not have acted in the way the Defendant did, for example, stopping at traffic lights and carrying first-aid items with him, the Court held that one should not take bits and pieces out of the entire picture of what the Defendant had done on that day. A person who was going to engage in terrorist activities did not follow a standard procedure. The situation might be so volatile that the person might just need to blend in with the ordinary members of the community or to act perfectly normally at times. (para. 155)

28. The Defendant's acts were acts involving serious violence against persons and/or were dangerous activities which seriously jeopardised public safety or security. It was beyond a doubt that the Defendant was indulging in very dangerous activities jeopardising public safety in driving in the way he did. Even if one were to just focus on the collision, there was clear proof that he had engaged in acts involving serious violence against persons. (paras. 157, 158 and 171(6))

NSL 24: Causing "grave harm to the society"

29. As could be seen from NSL 24, the Prosecution had to prove grave

harm being caused or intended to be caused to the society when the Defendant committed the prohibited acts. The ordinary meaning of the word “harm” was wide. The acts itemised in NSL 24(1)(1) to (5) were of such a broad range that it could not be suggested that “grave harm” meant only physical harm. Harm therefore was not restricted to physical harm. (para. 161)

30. A blatant and serious challenge mounted against the police force which was charged with the responsibility of maintaining public safety and security, and thus a symbol of law and order, would certainly instil a sense of fear amongst the law-abiding members of the public, in particular, apprehension of a breakdown of a safe and peaceful society into a lawless one. In that event, grave harm would certainly be caused to the society. (para. 162)

31. The Defendant’s acts in charging through the various checklines resulting in the collision clearly illustrated his intention to disrupt the maintenance of law and order, thereby rendering law-abiding citizens to fear for their own safety and to worry about the public security of Hong Kong. Such acts aiming at challenging the law and order in Hong Kong had caused grave harm to the society. (paras. 163, 166 and 171(5) and (7))

NSL 24: with a view to “intimidating the public in order to pursue a political agenda”

32. Given the manner in which the Defendant displayed the Slogan which was capable of bearing a secessionist meaning and he understood the Slogan to mean Hong Kong Independence, the Defendant’s intention was to arouse public attention on the agenda of separating the HKSAR from the PRC, which clearly was a political agenda. The Slogan still advocated a political agenda even if it was taken to mean a desire to recover what was lost and the need for a fundamental change in Hong Kong. (paras. 164 and 165)

33. Given the gross nature of what he had done and the inevitable adverse impact it would have on law-abiding members of the public, the Defendant did carry out the acts with a view to intimidating the public. Such intimidation was for the purpose of pursuing his political agenda, in that the intimidation was targeted against those in the community who did not support the political agenda, thereby seeking to contain or suppress counter voices. An intimidation to a section of the public was intimidation to the public all the same for a society was made up of individuals and different groups of such individuals. (paras. 167-168)

34. As the “intimidating” limb had been made out, it was unnecessary for the Court to deal with the “coercion” limb. (para. 169)

Conclusion

35. The Court held that each and every element of the offences in Count 1 and Count 2 had been proved and convicted the Defendant of both counts accordingly. As a result, it was unnecessary for the Court to deal with the alternative count in Count 3.

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