Case Summary

HKSAR v Ma Chun Man (馬俊文)

HCCP 711/2020; [2020] HKCFI 3132; [2021] 1 HKC 316
(Court of First Instance)
(Full text of the Court's ruling in English at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132658&QS=%28hccp%7C711%2F2020%29&TP=JU)

Before: Hon Alex Lee J
Date of Hearing: 15 December 2020
Date of Reasons for Ruling: 29 December 2020

Bail review – meaning of "whether or not by force or threat of force" in NSL 20 – violence not an element of secession – consistent with freedom of expression – Johannesburg Principles not binding

Risk of reoffending – undertaking by applicant – multiplicity and frequency of incidents – likely sentence

Background

1. The Applicant was charged with one count of incitement to secession contrary to NSL 20 and 21. The charge was based on a series of 19 incidents where he was alleged to have, inter alia, persistently chanted slogans and displayed placards advocating for the independence of Hong Kong. The Applicant applied to the Court for bail under s. 9J of the Criminal Procedure Ordinance (Cap. 221) after the Chief Magistrate had refused his bail.

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

- BL 1, 12 and 27
- NSL 2, 20 and 21

2. The Court discussed:

(a) whether NSL 20 and 21, interpreted consistently with the Basic Law, criminalized "peaceful advocacy of secessionist ideas" ("Issue (a)");
(b) whether the restriction imposed by NSL 20 on the rights and freedoms concerned could meet the requirements of legal certainty and necessity in terms of national security ("Issue (b)");
(c) whether the concern about the "risk of re-offending" could be addressed by the Applicant giving an undertaking not to repeat the alleged conducts ("Issue (c)"); and
(d) whether the Applicant's sentence would be short as submitted by the Applicant's counsel ("Issue (d)").

Summary of the Court's rulings

3. The Court rejected the Applicant's application after considering the issues mentioned above.

Issue (a)

4. The NSL ought to be construed and applied, so far as reasonably possible, in a manner which was consistent with the protection of fundamental rights entrenched by the BL and BOR. (para. 15)

5. The Applicant's submission that the "not by force" component in the phrase "whether or not by force or threat of force" in NSL 20 referred to "non-violent acts that are both unlawful and unacceptable, such as certain terrorist act(s)" and "other serious unlawful acts" was rejected. The Court compared NSL 20 (secession) with NSL 22 (subversion) and found that there was a highly arguable case that the acts prohibited by NSL 20 did not require violence as an element. (paras. 20 and 21)

6. Further, the Court considered the proposed criteria of "unlawful and

unacceptable" under the Applicant's proposed construction so imprecise that it was capable of leading to great conceptual uncertainty and practicable difficulties. The principle of legal certainty required reasonably clear boundaries to be set so that people knew how to conduct their activities accordingly. (para. 22)

7. The Court did not agree with the Applicant's suggestion that the "not by force" component would include "other serious unlawful acts" such as hacking or attacking of computers operated by authorities or institutions concerning national security. These situations were dealt with by NSL 24 which would be rendered largely redundant according to the Applicant's construction. The Applicant's attempt to put a strained meaning on the phrase "whether or not by force or threat of force" by reading words into the article which were not there failed. (paras. 22 and 23)

Issue (b)

8. Citing BL 1 and 12 as well as NSL 2, and given the background leading to the enactment of the NSL, the Court held that NSL 20 was, at the very least, not indefensible notwithstanding the freedom of speech and freedom of expression as provided in BL 27 and BOR 16 which were not absolute and could be subject to restrictions. BOR 16 also provided that the exercise of the right to freedom of expression carried with it special duties and responsibilities. (para. 25)

9. The "Johannesburg Principles on National Security, Freedom of Expression and Access to Information" did not belong to any international covenants and were not binding on the HKSAR. There were provisions in the Principles which were at variance with the common law principles applicable in Hong Kong. If the Applicant meant what he was alleged to have said, then the chanting of slogans like "全民勇武" (All People be Valiant) and "武裝起義" (Armed Revolt) was apparently not a "peaceful exercise of the right to freedom of expression" or a "mere publicity". (paras. 26 and 27)

Issue (c)

10. In an appropriate case, an undertaking not to repeat the alleged conducts could serve as a means to satisfy the NSL 42(2) requirement which stipulates that "no bail shall be granted … unless the judge has sufficient grounds for believing that … the defendant will not continue to commit acts endangering national security." However, the Court did not accept the Applicant's undertaking offered after having considered his behaviour displayed, including his repeated commission of similar offences whilst under police bail and his speeches appearing to become more radical over time. (paras. 32 and 33)

Issue (d)

11. Noting that the District Court would likely be the venue of the trial, the Applicant's case was unlikely to fall within the "not less than 5 years" category under NSL 21. The Court acknowledged that sentence in case of conviction would depend on the evidence and mitigation but did not accept the Applicant's submission that the sentence would be as short as 3 months. (paras. 34 and 35)

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