



Summary of Judgment

Tong Ying Kit (唐英傑) v HKSAR

HCAL 1601/2020; [2020] HKCFI 2133

Decision : **Application for habeas corpus dismissed**
Date of Hearing : **20 August 2020**
Date of Judgment : **21 August 2020**

Background

1. This is an application for a writ of habeas corpus to challenge the Applicant's current detention since 6 July 2020 pursuant to an order of Chief Magistrate So remanding him in custody pending the next hearing in the relevant criminal proceedings ("the Order").
2. In the afternoon of 1 July 2020, the Applicant was seen riding his motorcycle in the Wan Chai area at speed; he was carrying a backpack, from which a flag containing certain slogans was hoisted upwards and displayed to the public as he was driving. The police officers formed a number of checklines with a view to stopping the Applicant and, at the third checkline, he ignored their warning and rammed his motorcycle into the group of police officers, seriously injuring three of them. The Applicant was subsequently charged with offences contrary to Articles 20 & 21 and 24 under the National Security Law ("NSL"). On 6 July 2020, the Applicant's application for bail was refused by Chief Magistrate So for reasons including "Article 42 of the [National] Security Law".
3. The Applicant then applied for a writ of habeas corpus on 3 August 2020 on the primary basis that the current detention under the Order is unlawful. At the same time, he separately applied for bail under section 9J of the Criminal Procedure Ordinance (Cap. 221) ("CPO").

Grounds of Review

4. The 4 grounds raised by the Applicant said to have invalidated the authority to detain him are summarised as follows: (i) NSL 42 removes the Applicant's presumptive right to bail, based on the presumption of innocence, under CPO s.9D(1) ("Ground 1"); (ii) Chief Magistrate So did not exercise the Hong Kong Special Administrative Region's ("HKSAR") independent judicial power under the



Basic Law (“BL”) because he had been appointed by the Chief Executive (“CE”) to handle the Applicant’s case pursuant to NSL 44 (“Ground 2”); (iii) the creation of minimum terms of imprisonment in the NSL neutralises the HKSAR’s exercise of independent judicial power (“Ground 3”); and (iv) the NSL has not been rendered into an official or authentic text in English so that the Applicant’s right to choice of lawyers under BL 35 is frustrated.

Department of Justice’s Summary of the Court’s Rulings

(Full text of the judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130336&QS=%2B&TP=JU)

5. The Court first held that, as a matter of substance and reality, the Applicant’s challenge is against the Order, i.e. Chief Magistrate So’s refusal to grant him bail pending trial, which should be made in an application for bail review under CPO s.9J. It was accepted that a refusal of court bail cannot be challenged or circumvented by an application for a writ of habeas corpus; the remedy of bail is applicable and available in the present case. It was thus concluded that this habeas corpus application is an impermissible collateral challenge of criminal proceedings; and it would be dismissed on this ground alone. (paragraphs 13-14, 17 & 19)
6. The Court then reaffirmed that the central issue in an application for a writ of habeas corpus is whether there is lawful authority for a detention, while an application for bail proceeds on the basis that the detention is lawful, and then considers whether, in the exercise of the Court’s discretion in accordance with the legal principles under CPO s.9G, the accused person ought to be admitted to bail. Since the Applicant’s detention is pursuant to the Order made in the ordinary discharge of Chief Magistrate So’s judicial functions, his detention is with lawful authority. (paragraphs 20-22)
7. Notwithstanding the above ruling, the Court went on to deal with the Applicant’s challenges. In dismissing **Ground 1**, the Court first held that NSL 42 is not premised upon an assumption of guilt. It was reiterated that the construction of a statute is not a linguistic exercise, and should require a purposive and contextual approach. It was also considered wholly illogical to read paragraph 2 of NSL 42 (“NSL 42(2)”) as meaning that the accused person seeking bail is first required to admit his guilt; such construction would also be wholly inconsistent with the presumption of innocence recognised in NSL 5. Notwithstanding the word “繼續 (continue)” used in NSL 42(2), all that NSL 42(2) does is to direct the judge dealing with an application for bail to consider the question of whether the



accused person may, if bail is granted and while on bail, commit acts endangering national security. (paragraphs 27-30)

8. The Court then held that NSL 42(2) does not preclude bail being granted to a person accused of having committed an offence endangering national security. Its effect is to provide for a specific situation where bail shall not be granted. Where a person is charged with an offence endangering national security under the NSL, it is necessary to take into account NSL 42; the substantive question which a judge has to ask, when considering the question of bail of a person charged with an offence endangering national security, is whether there are grounds, or reasons, to believe that the accused person will continue to commit “acts endangering national security”. Importantly, the judge has to form a view on what the accused person may or may not do in the future, which is not something susceptible to exact proof as a matter of fact, but is a matter of judgment which the judge has to make upon an overall assessment of the relevant materials and circumstances before him. (paragraphs 35-37)
9. Additionally, it was held that, when carrying out the above-said assessment, NSL 42 ought to be construed and applied, so far as reasonably possible, in a manner which is consistent with the protection of fundamental rights, including the right to liberty of the person under BL 28 and Article 5 of the Hong Kong Bill of Rights for three reasons: (i) it is important to have regard to other provisions of the NSL and, in particular, NSL 4 and 5 which expressly recognise the presumption of innocence; (ii) the Court shall give a generous interpretation to the constitutional guarantee of rights, and a narrow interpretation to statutory provisions which impair liberty or restrict fundamental rights; and (iii) the Court is under a duty to protect the fundamental rights accorded by the BL and Hong Kong Bill of Rights. (paragraphs 38-42)
10. Finally, the Court emphasised that, although there is a presumption in favour of granting bail under CPO s.9D, an accused person does not have an absolute right to bail. It was then concluded that, if NSL 42(2) is given a proper construction and applied in the manner as suggested by the Court, it would unlikely be inconsistent with the various rights under the BL and Hong Kong Bill of Rights referred to by the Applicant, in particular, the presumption of innocence and presumption of bail. (paragraphs 46, 48)
11. Moving onto **Ground 2**, which was rejected, the Court emphasised that in relation to cases concerning offences under the NSL, CE does not assign or nominate any particular judge to hear any particular case. The question of which judge is assigned to hear any given case remains a matter for the Judiciary, not CE or the



Government. There is no proper or sufficient basis to contend that, in relation to cases concerning offences under the NSL, CE or the Government is in a position to interfere in matters that are directly and immediately relevant to the adjudicative function. While accepting that, when discharging judicial functions, the Judiciary must not only be independent, but must also be seen to be independent, it was stressed that a judge is bound by the Judicial Oath taken by him upon his appointment, which requires him to discharge his judicial duties in full accordance with the law and without fear or favour. (paragraphs 54-55, 57-58)

12. As for **Ground 3** which was rejected, it was held that it is not objectionable for the legislature to prescribe a fixed punishment (e.g. life imprisonment in the case of murder), or a range of sentences (including a maximum and minimum sentence), for any particular offence, leaving it to the judge to determine the appropriate sentence on the facts of any given case. It is also clear that NSL 20, 21 and 24 only prescribe ranges of sentences for persons found guilty of having committed offences under those articles, but do not prescribe the penalty to be imposed in any particular case. Additionally, it was not considered wrong in principle for Chief Magistrate So to take into account the prescribed ranges of sentences under NSL 20, 21 and 24 should the Applicant ultimately be convicted of those offences. (paragraphs 66-68)
13. Lastly, on **Ground 4** which was rejected, the Court was not aware of any law which requires a national law promulgated in the Chinese language to be accompanied by an authentic English text. It was also accepted that there are other national laws enacted by the National People Congress and applied in Hong Kong, notably the BL and the Nationality Law of the People's Republic of China, where the Chinese text represents the authoritative version, and it cannot be sensibly argued that such national laws are unconstitutional because they are not "accessible" law. Finally, the Court reiterated that there is no absolute right to choice of counsel under BL 35, and that the Applicant's right to choice of counsel has not been unlawfully impaired. (paragraphs 69, 72-74)
14. In light of the above, the application for a writ of habeas corpus is dismissed, and the Applicant's application for bail review will be separately dealt with. (paragraph 79)

Civil Division
Department of Justice
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