

Case Summary

HKSAR v Cho Suet Sum Chloe (曹雪芯) and Another

DCCC 767/2021; [2022] HKDC 119; [2022] 3 HKC 1
(District Court)

(Full text of the Court's ruling on Newton hearing and
reasons for sentence in English at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=142184&currpage=T)

Before: HH Judge W.K. Kwok

Date: 31 January 2022

Newton hearing – whether leaflet had intention to incite people to violence – intention and knowledge of publisher – all circumstances surrounding publication relevant – contents of leaflet – achieving independence and building army in Hong Kong with permission of CPG impossible – leaflet had intention to incite persons to violence

Sentencing – conspiracy to commit sedition under ss. 10(1)(c), 159A and 159C of Crimes Ordinance (Cap. 200) – considerations – offence committed close to offence of incitement to secession under NSL 21 – imprisonment to achieve deterrent effect on both community and defendants – individual roles played by defendants in commission of offence – incitement to violence an aggravating factor – young age a mitigating factor – overseas cases not helpful

Background

1. The Defendants (D1 and D2) pleaded guilty to one charge of conspiracy to print, publish, distribute, display or reproduce seditious publications, contrary to ss. 10(1)(c), 159A and 159C of the Crimes Ordinance (Cap. 200). The admitted facts were that at D1's request, D2

agreed to design a double-sided leaflet advocating for Hong Kong independence (“the Leaflet”). D1 printed, displayed, published and distributed hardcopies of the Leaflet at various places in Wanchai. Although D1 also accepted that the publications had the seditious intention (a) to bring into hatred or contempt or to excite disaffection against the HKSARG (s. 9(1)(a)), (b) to excite inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established (s. 9(1)(b)), and (c) to counsel disobedience to law or to any lawful order (s. 9(1)(g)), she did not admit that the publications had an intention to incite persons to violence (s. 9(1)(f)). On the other hand, D2 did not dispute that the Leaflet had an intention to incite persons to violence.

2. The front page of the Leaflet bore the title “香港聯邦共和國” (Federal Republic of Hong Kong) and a logo designed by D2 which was a rectangle in black with a 5-petal bauhinia resembling the bauhinia in the regional flag of the HKSAR but with differences (“the Logo”). Underneath the title and logo were Chinese texts setting out the capital, the constitution, the political system, the legal system, etc. of “the Federal Republic of Hong Kong”. On the back page were four sentences in Chinese texts: (a) “香港人要獨立建國！” (“1st Sentence”); (b) “香港人要取回主導權！” (“2nd Sentence”); (c) “抵抗赤化，唯有獨立” (“3rd Sentence”); and (d) “香港人，建軍！建國！” (“4th Sentence”).

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

- BL 1, 12 and 14
- NSL 1 and 21
- Crimes Ordinance (Cap. 200) (“CO”), ss. 10(1), 159A and 159C

3. A Newton hearing was conducted to determine whether the publications in question, i.e. the Leaflet, had also an intention to incite persons to use violence. The fact that D2 did not dispute that the Leaflet

had such an intention was irrelevant. This issue had to be determined as if D2 had raised the challenge as well. (paras. 35-36)

A. Summary of the Court's ruling on the Newton hearing

4. In order to determine whether the Leaflet had also an intention to incite persons to violence, the Court had to examine not only the Leaflet itself but also the intention of the publisher because if it could not be proved beyond reasonable doubt that D1 had the intention to incite persons to violence, she would have no *mens rea* to commit the offence charged under the limb prescribed in s. 9(1)(f) of the CO. In fact, the Court had to consider all the circumstances of the case surrounding the publication of the Leaflet in determining that issue. (para. 46)

Contents of the Leaflet

5. Counsel for D1 submitted that peaceful means such as persuasion and economic pressure were available to bring about the changes advocated in the Leaflet. The Court pointed out that nowhere in the Leaflet urged or suggested Hong Kong people to employ peaceful means to achieve its stated purposes. On the contrary, the 4th Sentence (“Hong Kong people, Build an army! Establish a state!”) asked Hong Kong people specifically to build an army. (paras. 48-49)

6. When the four Sentences were read together, the first three stated what the Leaflet incited Hong Kong people to do: (a) to establish an independent sovereign state which meant to separate the HKSAR from the PRC; (b) to regain the dominating power to make decisions which meant to take away the power of the PRC and/or the HKSARG to make decisions for Hong Kong; and (c) to resist communization which meant to resist the PRC, concluding at the end of the 3rd Sentence that independence was the only way out. The 4th Sentence was clearly an incitement to the people to take action as stated to effect the independence of Hong Kong. (para. 50)

Intention of the Defendants

7. Counsel for D1 submitted that the changes stated in the Leaflet could be achieved by discussion with the CPG and obtaining permission from it. The Court held that this was impossible as the constitutional order and law in Hong Kong were clear, citing BL 1, BL 12 and NSL 1. D1 and D2, being the publishers of the Leaflet, knew very well that such permission would never be forthcoming, and that was why they stated that “independence was the only way out” in the 3rd Sentence and called upon Hong Kong people to build an army and to establish a state to achieve independence in the 4th Sentence. The fact that they were of the view that it was futile to discuss with the CPG to achieve the independence of Hong Kong, and resorted to building or procuring the building of an army for that purpose gave rise to the only reasonable and irresistible inference that they had never thought of using peaceful means to procure the changes. (para. 51)

8. It was fanciful to argue that it was theoretically possible for the CPG to give permission to build an army in Hong Kong as under BL 14, the CPG was solely responsible for the defence of HKSAR and the army stationed here was the PRC army. D1 and D2 knew full well that the purpose of building an army in HKSAR was to resist the CPG and the HKSARG. The only reasonable and irresistible inference to be drawn was that they had never intended to seek permission to build an army in Hong Kong. It was clear that D1’s intention was to build an army to achieve independence of Hong Kong. (paras. 52 and 57)

Other circumstances of the case

9. In the 4th Sentence, D1 and D2 called upon Hong Kong people to first build an army and then establish a state. An army, in its ordinary meaning, was an organized military force equipped with weapons to kill and to wound if necessary so as to achieve whatever purposes their commanders directed them to achieve. D1 and D2 must be well aware that the CPG and the HKSARG would not allow the independence of Hong Kong to occur, and they therefore incited Hong Kong people to build an army to attain their goal of independence through the use of violence. (para. 53)

10. The bauphinia in the Logo referred to the HKSAR. The Logo conveyed the message that bloodshed would occur over different parts of Hong Kong, and the Logo was a true reflection of the minds of the publishers, i.e. D1 and D2, that they envisaged bloodshed to occur but it was unavoidable for the sake of achieving independence. (para. 54)

11. The Leaflet was designed and distributed after the enactment of the NSL. It was an act in defiance of the NSL. Building an army to achieve independence of Hong Kong was a measure directed at the NSL, and calling Hong Kong people to build an army to achieve independence was an incitement to people to take the law into their own hands, which would involve unlawful actual violence. (para. 55)

12. Given the large number of people taking part in the earlier social disorders and/or riots who felt disgruntled with the NSL, and those who were sympathetic with them, the Leaflet could have the effect of inciting these people to use unlawful actual violence again by joining or procuring the building of the army as advocated in the Leaflet. (para. 56)

13. The Court concluded that the Prosecution had proved beyond reasonable doubt that the Leaflet had also an intention to incite persons to violence. Accordingly, D1 was convicted on the basis that all four items of the particulars of the charge had been proved against her. D2 was convicted upon his guilty plea and admission of facts.(paras. 58-59)

B. Summary of the Court's reasons for sentence

Sentencing considerations

14. The Defendants were involved in a conspiracy to incite people to procure the independence of Hong Kong, i.e. to separate the HKSAR from the PRC. By inciting people to build an army to establish an independent state, they were inciting people to violence so as to accomplish their purposes through the use of force. The offence committed by them was very close to the offence of incitement to secession under NSL 21. (para. 71)

15. Following *HKSAR v Tong Ying Kit* [2021] HKCFI 2239, the sentence had to achieve the purposes of punishment and deterrence, in the sense of both a general deterrent effect on the community as a whole, and a specific deterrent effect on the individual in question. To achieve the requisite sentencing purposes, the only appropriate sentencing option applicable to D1 was imprisonment. The overseas cases cited by counsel for D1 were not helpful because the offence of sedition had to be case specific and local conditions played a significant factor. As for local cases, while the Appellant in *Fei Yi Ming v R* (1952) 36 HKLR 133 had been sentenced to a fine of \$4,000 in default of 9 months' imprisonment for seditious publication, there were cases in which substantial terms of imprisonment had been imposed for sedition when riots broke out in 1967. The sentencing range for sedition could be very wide. (paras. 72-77)

Sentencing for D1

16. The maximum sentence that could be imposed for the first conviction of sedition was two years' imprisonment. Having taken account of the following matters, the Court considered a starting point of 18 months' imprisonment to be appropriate for D1: (para. 78)

- (a) the offence committed by the Defendants was very close to the offence of incitement to secession under NSL 21;
- (b) D1 was the prime mover of the offence;
- (c) by recruiting D2 who was only a 16-year-old Form 4 student into the conspiracy, D1 had taken advantage of the naivety of a young man;
- (d) D1 was involved in the printing, production and distribution of hardcopies of the Leaflet;
- (e) D1 intended to produce the effect as particularised in all four items of the particulars of the charge;
- (f) her intention to incite persons to violence to achieve independence of Hong Kong made the offence particularly serious;
- (g) but the scale of distribution was small, and the conspiracy was executed in an amateurish manner.

17. In light of the nature and gravity of the offence, there was no effective mitigating factor for reduction in sentence other than D1's guilty plea. However, as D1 denied that the Leaflet had an intention to incite persons to violence, a Newton hearing was held and a finding was made against her. Incitement to violence to secure independence of Hong Kong was a factor that made her offence serious. Hence, the appropriate discount should be 25% of the starting point instead of the usual one-third discount. For these reasons, D1 was sentenced to 13½ months' imprisonment. (paras. 79-81)

Sentencing for D2

18. D2 committed the offence at the age of 16 and was currently only 17. Although he had committed a very serious offence, he played a lesser role in the offence than D1. His immaturity made him vulnerable to the suggestion of others to commit the offence. (para. 82)

19. The sentence to be imposed on D2 should be commensurate with the seriousness of the offence and the circumstances of the case to serve the purposes of protection of the public, punishment, open condemnation and deterrence. On the other hand, the young age of an offender was always a mitigating factor and it was in the public interest if a young man could be rehabilitated and reformed so that he would stay away from crimes. (para. 83)

20. The Court found that probation or community service order would not serve the above purposes of sentencing, but detaining D2 in a Rehabilitation Centre for a period so that he would receive appropriate training and counselling and subject to aftercare supervision would be beneficial to his rehabilitation and reformation. D2 was therefore sentenced to Rehabilitation Centre. (paras. 84-85)