Case Summary

Tong Ying Kit (唐英傑) v HKSAR

HCAL 1601/2020; [2020] HKCFI 2133; [2020] 4 HKLRD 382
(Court of First Instance)
(Full text of the Court's judgment in English at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130336&QS=%2B%7C%28HCAL%2C1601%2F2020%29&TP=JU)

Before: Hon Chow and Alex Lee JJ
Date of Hearing: 20 August 2020
Date of Judgment: 21 August 2020

Proper procedure to challenge refusal of bail – bail review under Criminal Procedure Ordinance (Cap. 221) s. 9J and habeas corpus application compared

Meaning of "continue" in NSL 42(2) – common law approach adopted in construing and applying NSL 42(2) – narrow restriction against bail under NSL 42(2) – assessing bail applications under NSL 42 consistently with protection of fundamental rights – practical application of NSL 42 and Criminal Procedure Ordinance (Cap. 221) s. 9G compared

Judicial independence – designation of judges by CE under NSL 44 to hear national security cases – exercise of independent judicial power by designated judges – whether prescription of sentencing ranges under NSL 20, 21, 24 objectionable

Absence of authentic English text of NSL – whether NSL accessible – right to choice of counsel under BL 35 not unreasonably restricted

Background

1. The Applicant was charged with offences contrary to NSL 20, 21 and 24. His application for bail was refused by the Chief Magistrate who made an order remanding him in custody pending the next hearing ("the Order"). He sought to challenge his continued detention by applying for a writ of *habeas corpus*.

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

- BL 28, 35 and 89(1)
- NSL 20, 21, 24, 42 and 44
- Criminal Procedure Ordinance (Cap. 221) ("CPO"), ss. 9G and 9J

2. In dismissing the Applicant's *habeas corpus* application, the Court discussed:

(a) the proper avenue to challenge the Order;
(b) whether there was lawful authority for the Applicant's detention;
(c) whether the Applicant's presumptive right to bail had been taken away by NSL 42;
(d) whether the Chief Magistrate who had been designated by the CE to handle cases concerning offences endangering national security was independent;
(e) whether the mandatory terms of imprisonment prescribed in NSL 20, 21 and 24 neutralised the exercise of independent judicial powers of the HKSAR; and
(f) whether the lack of an official or authentic text in English rendered the NSL inaccessible and frustrated the Applicant's right to choice of lawyers under BL 35.

Summary of the Court's rulings

(a) The proper avenue to challenge the Order

3. The proper procedure to challenge the Order ought to be an

application for review of refusal of bail to the High Court under s. 9J of the CPO. Where the legislature had provided a simple and quick procedure to challenge an order of a magistrate refusing to grant bail, the person under detention ought generally to make use of the statutory procedure instead of applying for a writ of *habeas corpus*. In the present case, the remedy of bail was applicable and available. The challenge to the constitutionality of various "mandatory" provisions of the NSL, including NSL 20, 21, 24 and 42, could be raised before a High Court judge hearing the bail application. The present *habeas corpus* application was a collateral challenge of criminal proceedings which should not be permitted. (paras. 3(1), 13, 15, 17 and 19)

(b) Whether there was lawful authority for the Applicant's detention

4. The sole consideration of the court in the *habeas corpus* application was whether the Chief Magistrate had lawful authority to make the Order, not whether his decision was correct, the latter being a matter to be determined in a bail review, which proceeded on the basis that the detention was lawful. Since the Applicant's detention was pursuant to an order of the Chief Magistrate made in the ordinary discharge of his judicial functions, it could not be said to be without lawful authority. (paras. 3(2)-(3), 21 and 22)

(c) Whether the Applicant's presumptive right to bail had been taken away by NSL 42

5. The Applicant argued that in order to be granted bail under NSL 42, an applicant for bail had to acknowledge that he had already committed acts endangering national security or the judge or magistrate had to form a view that the applicant had committed such acts and that he would not continue to commit them. The Court rejected this argument as an unreasonable reading of NSL 42. It held that the construction of a statute was not a linguistic exercise. A purposive and contextual approach was required. NSL 42 was part of Chapter IV of the NSL which envisaged a trial to determine the question of guilt of an accused person. The word "continue" in NSL 42(2) merely meant "for a continuing period, i.e. for the future if bail is granted". NSL 42(2)

merely directed the judge dealing with a bail application to consider whether the accused might commit acts endangering national security while on bail, if granted. It would be wholly illogical to read NSL 42(2) as meaning that the person seeking bail was first required to admit his guilt. Such a construction of NSL 42(2) would be wholly inconsistent with the presumption of innocence expressly recognised in NSL 5. (paras. 27-30)

6. The restriction against bail being granted under NSL 42(2) was a narrow one. It was not helpful to approach the NSL 42(2) question (i.e. whether there are grounds, or reasons, to believe that the accused person would continue to commit "acts endangering national security") by reference to considerations such as the burden, or standard, of proof. It was a matter of judgment which the Judge had to make upon an overall assessment of the relevant materials and circumstances. (para. 37)

7. NSL 42 should be construed and applied, so far as reasonably possible, in a manner consistent with the protection of fundamental rights, including the right to liberty of the person under BL 28 and BOR 5. (para. 38)

8. When determining whether there were sufficient grounds for believing that a person accused of having committed an offence contrary to NSL would not continue to commit acts endangering national security, a judge should resolve any reasonable doubt in favour of the accused. While there might be a difference of emphasis between s. 9G(1) of the CPO and NSL 42, the practical application of NSL 42 was unlikely to result in any different outcome of a bail application in the vast majority of cases. (paras. 3(4), 43 and 45)

9. NSL 42(2) did not impose any absolute prohibition against bail, nor should it be read as imposing a presumption against bail. With proper construction and application, NSL 42(2) was not inconsistent with the various rights under the BL and the BOR, in particular, the presumption of innocence and the presumption of bail. (para. 48)

10. As far as Hong Kong courts were concerned, the common law approach should continue to be adopted in the construction of the NSL. If the Basic Law, which was right at the interface of "one country, two systems", was to be construed using the common law approach, there was no valid basis to adopt any other approach in the construction of the NSL. (para. 49)

11. NSL 42(2), in substance, targeted the risk of the accused committing offences endangering national security while on bail. Withholding bail in such a situation would not give rise to arbitrary detention. (para. 50)

(d) Whether the Chief Magistrate was independent

12. NSL 44 only enabled the CE to designate a number of judges at different levels of courts in Hong Kong to handle cases concerning offence endangering national security. The question of which designated judge was assigned to hear any given case remained a matter for the Judiciary, not the CE or the Government. There was no proper or sufficient basis to contend that, in relation to such cases, the CE or the Government was in a position to interfere in matters that were directly and immediately relevant to the adjudicative function. (paras. 3(5), 54 and 55)

13. There was nothing to suggest that the Chief Magistrate was not free from influence or pressure when considering the Applicant's bail application. Judges were duty-bound by the Judicial Oath to discharge their functions strictly in accordance with the law, and to be completely free of any interference from, or influence by, the Government. A reasonable, fair-minded and well-informed observer would not think that judges designated by the CE were, or might be, no longer be independent of the Government. NSL 44 had nothing to do with a designated judge's security of tenure which was protected by BL 89(1). The argument that the Chief Magistrate was not "independent" merely because he was one of the judges designated by the CE under NSL 44 was rejected. (paras. 3(5), 56, 58, 59 and 64)

(e) Whether the mandatory terms of imprisonment prescribed in NSL 20, 21 and 24 neutralised the exercise of independent judicial powers

14. As a matter of principle, it was not objectionable for the legislature to prescribe a fixed punishment (e.g. life imprisonment) 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. NSL 20, 21 and 24 only prescribed ranges of sentences for offences under those Articles, but not the penalty to be imposed in any particular case. They did not impermissibly interfere with the exercise of judicial powers in sentencing. It was not wrong in principle for the Chief Magistrate, when deciding whether to grant bail to the Applicant, to take into account the prescribed ranges of sentences should he ultimately be convicted of those offences. (paras. 3(6) and 66-68)

(f) Whether the NSL was inaccessible

15. There was no law requiring a national law promulgated in the Chinese language to be accompanied by an authentic English text. There were other national laws enacted by the NPC and applied in Hong Kong, notably the Basic Law and the Nationality Law of the PRC, where the Chinese text represented the authoritative version. The NSL was fully accessible to the Applicant and could not be said to unreasonably restrict his right to choice of counsel under BL 35, notwithstanding the absence of an authentic English text. (paras. 3(7), 69 and 72-74)

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