Case Summary (English Translation)

HKSAR v 崔駿民 (Chui Chun Man)

WKCC 4617/2021; [2023] HKMagC 3
(West Kowloon Magistrates' Courts)
(Full text of the Court's reasons for verdict in Chinese at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=150866&currpage=T)

Before: Ms. Heung Shuk-han Veronica, Acting Principal Magistrate
Date of trial: 17-21 and 31 October 2022; 7 November 2022; 5 and 7 December 2022; and 5 January 2023
Date of verdict: 27 February 2023

Admissibility of evidence – "voir dire" – Defendant provided mobile passcodes to police officers voluntarily, without oppression or inducement – Defendant's right to silence and privilege against self-incrimination not infringed – electronic information deriving from mobile phones and computer could be admitted as real evidence – court could still exercise discretion to admit evidence even if the search infringed Defendant's rights - balancing between individuals' rights and societal interests in determining whether to admit evidence

Section 10(1)(a) of Crimes Ordinance (Cap.200) – doing an act or acts with a seditious intention – elements of sedition offence concerned – making the public statements – relevant statements had a seditious intention – Defendant intended to make relevant statements – Defendant knew that his act or acts had the alleged seditious intention – prosecution not required to prove that Defendant had a seditious intention when making relevant statements – whether the words had a seditious intention – taking into account context as a whole but not merely dictionary meanings – meanings of "hatred", "contempt" and "disaffection" – public statements directed at the Police Force

Background

1. The Defendant was charged with doing an act or acts with a seditious intention between 25 September 2021 and 28 September 2021 in Hong Kong, namely making public statements on Facebook, with an intention to bring into hatred or contempt or to excite disaffection against the HKSARG, to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong, or to raise discontent or disaffection amongst inhabitants of Hong Kong, contrary to s. 10(1)(a) of the Crimes Ordinance (Cap. 200).

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

- Crimes Ordinance (Cap. 200), ss. 9 and 10(1)(a)
- Evidence Ordinance (Cap. 8), s. 22A

2. The issues discussed by the Court included:

(a) Whether the relevant evidence was admissible ("*voir dire*")

(i) Whether the police obtained, in the absence of the Defendant's voluntariness, the passcodes of his mobile phones P11 and P13 to search the electronic contents in both of them, thereby infringing his right to silence and privilege against self-incrimination;

(ii) As regards the electronic information deriving from the mobile phones and the computer, whether the Prosecution failed to satisfy the requirements under s. 22A of the Evidence Ordinance;

(iii) Whether the Court could exercise discretion to admit the relevant evidence;

(b) Elements of the sedition offence concerned as follows:

(i) Whether the Defendant's public statements had the alleged seditious intention; whether the Defendant knew that the statements made by him had such seditious intention; and whether he also had such intention;

(ii) Whether the comments made by the Defendant fell within s. 9(2)(b) and (d) of the Crimes Ordinance, rendering them not seditious.

Summary of the Court's rulings

3. The Defendant made statements/comments/posts on the public page of his social media Facebook account and the public page of the Hong Kong Police Force's Facebook ("HKPF Facebook"), with respect to the incident involving a woman police inspector (hereinafter referred to as "Inspector Lam") who went missing after falling into the sea whilst on duty. The Prosecution relied on the electronic information and photos contained in the Defendant's mobile phones as well as the computer screen captures prepared by the police as the main evidence to prove that the Defendant had done the act or acts with a seditious intention. The Court dealt with the admissibility of the relevant evidence by way of a "*voir dire*".

(a) Whether the relevant evidence was admissible ("*voir dire*")

(i) Whether the police obtained, in absence of the Defendant's voluntariness, the passcodes of his mobile phones P11 and P13 to search the electronic contents in both of them, thereby infringing his right to silence and privilege against self-incrimination

4. The Prosecution bore the burden to prove that the passcode of P11 was provided voluntarily by the Defendant, rather than being obtained from the Defendant through intimidation or inducement resorted to by a person in authority, or by oppression. The Court held that the police officers in presence did not intimidate or offer inducement to the Defendant by words or conduct; nor did they do any acts which were

conducive to and capable of weakening the Defendant's will, for obtaining the passcodes of the mobile phone. (paras. 72-75)

5. The Defence argued that the police did not caution the Defendant before asking him for the passcodes, which was in breach of Rule II of the Rules and Directions for the Questioning of Suspects and the Taking of Statements ("Rules for Questioning of Suspects"). The Court held that the Defendant was facing a disciplinary investigation rather than a criminal investigation. He was a person under disciplinary investigation but not a suspect of a criminal offence. Rule II of the Rules for Questioning of Suspects was not applicable in the then circumstances. That the police officers in presence did not caution the Defendant did not constitute a breach of Rule II. (para. 78)

6. The Defence argued that the Defendant had to answer questions from the superior officers pursuant to s. 30 of the Police Force Ordinance, and thus he told them of the passcodes. The Court held that the Defendant was not ordered to provide the passcodes on that day. In the course of providing the passcodes, the Defendant had not expressed his involuntariness. Nor was there any evidence to prove that the Defendant was forced to answer or respond to the questions or requests by the police officers. (para. 83)

7. The Court held that the Prosecution had proved beyond all reasonable doubt the Defendant did voluntarily provide the passcode of P11 to the police officer, without subject to oppression or inducement. At all material times, no police officer had intimidated, induced or exerted undue pressure on the Defendant. There was neither any injustice nor grounds in the case which justified the exercise of residual discretion by the Court to exclude the passcode of P11 provided by the Defendant to the police officer. The Court also held that the Defendant had never provided the passcode of mobile phone P13 to the police. That passcode was deduced by the police. On such basis, the police's acts of unlocking P11 with the passcode of P11, searching the phone's electronic contents with photos taken, searching P13 with the passcode deduced by the police, and retrieving the electronic contents of the two mobile phones, did not infringe the Defendant's right to silence and

privilege against self-incrimination. Furthermore, since the police officer responsible for conducting the electronic forensic examination on P11 and P13 conducted such examination without using the passcodes, such examination did not concern these two rights of the Defendant. (paras. 84-88 and 139-142)

(ii) As regards the electronic information deriving from the mobile phones and the computer, whether the Prosecution failed to satisfy the requirements under s. 22A of the Evidence Ordinance

8. The Prosecution was of the view that the purpose of admitting the relevant evidence was not for proving the facts stated and contained in the document produced by the computer, and thus s. 22A of the Evidence Ordinance was not applicable[1]. Besides, the Prosecution considered that the disputed evidence was real evidence, which was admissible. The Defence argued that the Prosecution had relied on the authenticity of the statements for charging the Defendant with the sedition offence, and that as the relevant evidence was used as hearsay evidence, it had to comply with s. 22A of the Evidence Ordinance. (paras. 144-151)

9. The Court held that the evidence under dispute in the *voir dire* was not used as hearsay evidence. Agreeing with the Prosecution's submission, the Court held that the evidence in question was real evidence, which *per se* could be admitted as evidence. In admitting such evidence on the basis of real evidence, s. 22A of the Evidence Ordinance did not apply. (paras. 152-157)

10. The Court then held that since the evidence concerned was relevant to the trial and that all the disputed evidence was prima facie authentic, the evidence was admissible. Admission of such evidence would not be unfair to the Defendant or give rise to bias; nor would it result in a

[1] On this issue, s. 22A of the Evidence Ordinance provided as follows: "(1) Subject to this section and section 22B, a statement contained in a document produced by a computer shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if… . … (11) Nothing in this section affects the admissibility of a document produced by a computer where the document is tendered otherwise than for the purpose of proving a fact stated in it."

situation where the prejudicial effect outweighed the probative value of the evidence. (paras. 158-170)

(iii) Whether the Court could exercise its discretion to admit the relevant evidence

11. Despite its rulings that the Defendant voluntarily provided the passcode of P11 to the police and unlocked P13; that the police inspected P13 pursuant to a valid search warrant; that all the police officers involved did not contravene Rule II of the Rules for Questioning of Suspects when making contact with the Defendant; and that the Defendant's right to silence and privilege against self-incrimination were neither infringed nor undermined, the Court nonetheless also considered whether the relevant evidence would remain admissible if one or all of the rulings were erroneous.(para. 171)

12. The Court noted that the CFA held in *Chan Kau Tai v HKSAR* (2006) 1 HKLRD 400 that the court had the discretion to admit or exclude evidence to ensure a fair trial, and emphasized in *HKSAR v Muhammad Riaz Khan* (2012) 15 HKCFAR 232 that while there was no absolute bar to the reception of evidence obtained in breach of a defendant's constitutional rights, the courts had to take into account the circumstances of each case to strike a balance between the interests of individuals and those of society on the basis of rationality and proportionality in determining whether discretion could be exercised to receive such evidence. (paras. 172-173)

13. Based on the following analysis, the Court would also exercise discretion to allow the admission of the relevant evidence. (paras. 174-176)

(a) The electronic contents of the electronic devices concerned (in particular, the photos of P11 taken by the police) were the material evidence in this case, which helped decide whether the Defendant had committed the act or acts allegedly committed by him and their nature. If admitted as evidence, both parties would have the opportunity to cross-examine witnesses and/or make submissions

regarding such evidence, so as to convince the Court as to whether the nature of the Defendant's act or acts would amount to the alleged criminal conduct. This would be conducive to a fair trial.

(b) After balancing between the Defendant's constitutional rights and the interests of the general public, the Court held that those electronic contents were of sufficient probative value in this case and would support the allegations of this serious charge. It would be in the public interest to admit such evidence.

(c) Even if the police inspected P11 and P13 without the Defendant's consent or obtaining a search warrant, the relevant acts were not deliberate or in bad faith. Further, insofar as P13 was concerned, the police had applied for a warrant prior to the inspection. Later on, they had also applied for a search warrant from the court before conducting forensic examinations on P11 and P13.

(d) The police did not act without good faith; instead they respected the Defendant's privacy. The police officer concerned merely took photos of the information in the Facebook application in P11, which was related to the investigation. Subsequently, the forensic officer also merely printed out the evidence related to the case. This showed that the police did respect the Defendant's privacy.

(e) Notwithstanding the approval of admission of the relevant evidence, no bad precedent would be set: this would unlikely be considered as an encouragement to law-enforcement officers to arbitrarily infringe the constitutional rights of members of the public.

14. For the above reasons, the Court allowed the admission of all the disputed exhibits. (para. 177)

(b) Elements of the sedition offence concerned

15. In the Court's view, the offence that the Defendant faced comprised

the following three elements: (paras. 243 and 245)

(a) Regarding actus reus
    (1) the Defendant did the act or acts as alleged in the charge, namely making the public statements in question on Facebook;
    (2) the subject public statements made by the Defendant on Facebook had the alleged seditious intention;

(b) Regarding mens rea
    (3) when making the subject public statements on Facebook, the Defendant had the intention to make such statements by conduct, with the knowledge that his act or acts had the alleged seditious intention.

16. The Defence argued that the Prosecution also had to prove that the Defendant had a seditious intention when making the public statements in question (Element (4)). The Court held that the Prosecution was only required to prove elements (1) to (3). In any event, there was not only sufficient evidence in the present case to prove elements (1) to (3), but also sufficient evidence to prove element (4) alleged by the Defence. (paras. 244-245)

17. Concerning element (1), there was already sufficient evidence in the case to prove that the Defendant had made the subject public statements and comments on Facebook. (para. 246)

18. Concerning elements (2) and (3), the alleged seditious intention was:

(a) to bring into hatred or contempt or to excite disaffection against the HKSARG;
(b) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or
(c) to raise discontent or disaffection amongst inhabitants of Hong Kong.

19. Both parties agreed that the relevant considerations to be taken into account by the Court in its analysis of whether the words in question had a seditious intention included: (a) the nature of the audience; (b) the public sentiment at that time; and (c) the time, place and form of expressing the words in question. Insofar as element (2) was concerned, the Prosecution pointed out that the state of society at the material time was also relevant. (paras 248-250)

20. The Court was of the view that in considering whether certain words had the alleged meanings, it was necessary to take into account the context as a whole, but not merely the dictionary meanings. The Crimes Ordinance did not define the terms used in the definition of "seditious intention", such as "hatred", "contempt", "disaffection", etc. These terms were in fact ordinary language and the Court only had to take account of the nature and purpose of the sedition offences. (paras. 251-252)

21. The Court cited the English case *R v Sullivan and Pigott* (1868) 11 Cox CC 44, which stated that sedition was a crime against society, nearly allied to that of treason. Sedition was a comprehensive term, and it embraced all the practices, whether by word, deed or in writing, which were calculated to disturb the tranquillity of the State and led ignorant persons to endeavour to subvert the Government and the laws. The objects of sedition were generally to induce discontent and insurrection and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition was to incite the people to insurrection and rebellion. Sedition had been described as disloyalty in action, and the law considered as sedition all those practices which had for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt against the Government, the laws or constitution, and generally all endeavours to promote public disorder. (para. 252)

22. On this basis, the meanings of the relevant terms were very clear. For example, "hatred" included the meaning of abhorrence and detestation; "contempt" included the meaning of disparaging and

despising; and "disaffection" included the meaning of disloyalty, hatred and enmity. (para. 252)

(i) Whether the Defendant's public statements had the alleged seditious intention; whether the Defendant knew that the statements made by him had such a seditious intention, and whether he also had such an intention

23. The Defence argued that the act or acts of the Defendant were not seditious and that he was merely ventilating his own emotions and opinions, and he did not have a seditious intention *per se*. His acts merely constituted a gloat over the incident. The Court dissented: (paras. 253-262)

(a) At the time when Inspector Lam's fate remained uncertain after falling overboard and gone missing whilst on duty, the Defendant left a curse in his comment, indicating his hope that Inspector Lam was killed while on duty, and became a floating corpse or even a decomposed body. He also expressed the malicious remarks that Inspector Lam deserved to die, showing his hatred and contempt towards the police officer who fulfilled her duty with dedication at the time of the incident. The Defendant expressed his delight over the possible death of Inspector Lam.

(b) The Defendant did not target solely at Inspector Lam, but all the police officers in the Police Force. He also expressed his wish for all police officers to die as early as possible and described police officers as "dogs". He clearly harboured hatred, contempt and disaffection against police officers.

(c) The Hong Kong Police Force operated under the leadership and command of police officers. The words by the Defendant were obviously directed at the entire Police Force, and filled with hatred and discontent against the Police Force.

(d) Leaving comments on such public platform as HKPF Facebook page was a deliberate choice by the Defendant. He himself also

left comments on his personal Facebook page concerning the incident of Inspector Lam's disappearance after her fall overboard. Obviously, he knew that he was using two different platforms. It was the Defendant's deliberate choice as to which comments to make on which Facebook page.

(e) The Defendant chose on purpose to publicly make these malicious remarks against the Police Force on the HKPF Facebook page, in particular, next to the Police insignia, which was a symbol of dignity of the Police Force. He made alluring and inducing remarks on this page, despite knowing that it was accessible to the public. He repeatedly said that Inspector Lam's death was delightful, in order to magnify the hatred, contempt and disaffection against the Police Force as well as to convey such message.

24. The Court held that: (paras. 263-265)

(a) The Defendant's deliberate choice to express his contempt, hatred and disaffection against police officers on such public platform as HKPF Facebook page was certainly not for the purpose of expressing personal views. Rather, he did it so as to advocate the message that contempt, hatred and disaffection ought to be held against police officers and the Police Force, and induce and provoke discontent against the police, with the intent of bringing into hatred or contempt or to excite disaffection against the Hong Kong Police Force through these messages, and making people believe and accept that the Police Force was full of "dog officers". These messages clearly had such a seditious intention. The Defendant also certainly knew that the statements published by him had such a seditious intention.

(b) The Police Force formed part of the Government and the administration of justice, while policemen were also members of the public, belonging to a particular occupation group. Noting that the Defendant deliberately sent these messages in such manner, the Court was certain that the Defendant intended to bring

into hatred or contempt or to excite disaffection against the Hong Kong Government and/or the administration of justice in Hong Kong, and/or to raise discontent or disaffection amongst inhabitants of Hong Kong through these messages. These messages clearly had such intentions. The Defendant certainly also knew that the messages published by him had such intentions. He certainly had such intentions as well.

(c) The Defendant's description of police officers as "dog officers" in the subject comments would inevitably provoke emotions of the people who supported the law enforcement of the police. Even though the series of violent social events arising from the anti-extradition amendment bill movement had largely subsided at the material time, the matters deriving from such social events were not over yet. Hostility amongst members of the public could be triggered at any time. It was clear that the publication of the comments in question there and then by the Defendant would easily raise, instigate or provoke discontent or disaffection amongst members of the Hong Kong public. Obviously, the Defendant also had such intention.

(ii) Whether the subject comments made by the Defendant satisfied s. 9(2)(b) and (d) of the Crimes Ordinance, rendering them not seditious

25. The Defence argued that the comments made by the Defendant satisfied s. 9(2)(b) and (d) of the Crimes Ordinance, rendering them not seditious. However, the Court held that the Defendant's comments had never pointed out the errors or defects of the Government or the administration of justice; nor feelings of ill-will and enmity between different classes of the population. Neither could it be observed that there was any intent to rectify such errors or defects or to remove such feelings of ill-will and enmity. (paras. 266-267)

Conclusion

26. The Court held that the Prosecution had proved all the elements of the charge against the Defendant beyond all reasonable doubt, and therefore convicted the Defendant as charged. (para. 268)

588153-v1C