分科二 訟辯
Sub-division II Advocacy

2015 年，分科二有逾半時間由副刑事檢控專員黃惠沖資深大律師掌管，直至 2015 年 9 月，在他獲委任為法律政策專員後由許紹鼎資深大律師接掌。本分科的律師大都是經驗豐富的訟辯律師，負責在敏感和重要的刑事案件的審訊和上訴聆訊擔任主控官，並協助死因裁判官召開死因研訊。除了法庭訟辯工作外，他們還負責根據名為 FAST 的快速法律指引制度，定期為執法機關提供法律指引。

For the most part of 2015, Sub-division II was headed by Mr Wesley Wong, SC, Deputy Director of Public Prosecutions until September 2015, when Mr Wong was appointed the Solicitor General and succeeded by Mr Martin Hui, SC. Counsel in this Sub-division are mainly experienced advocates who prosecute sensitive and important criminal cases including trials and appeals as well as assist coroners in holding death inquests. In addition to their court duties, counsel also regularly provide legal advice to law enforcement agencies under the speedy advisory system known as "FAST".

本分科另一項重要工作是為新入職的檢控官提供合適的實務培訓；專為新入職人員開設的刑事訟辯課程，能讓他們掌握必須的知識和技巧，以應付本分科富挑戰的檢控工作。新同事首先要出席一系列不同的刑法與實務專題講座，隨後會在刑事審訊裏擔任訟辯律師，參與包括為期兩星期的模擬法庭審訊，繼而派駐裁判法院實習七星期，在庭上檢控案件。之後，他們會在本分科工作一段短時間，獨力負責檢控相對簡單的案件及／或在一些複雜的案件擔任副手，以累積訟辯經驗，預備他們日後成為獨當一面的正式檢控官。

以下是一些由分科二的律師處理的一些重大或矚目案件。

在香港特別行政區 訴 李欽培及另外 11 人（區院刑事案件 2015 年第 25 號）一案中，一名發展商及 11 名新界原居民被控在據稱由 22 名原居民根據小型屋宇政策申請建屋牌照期間，串謀詐騙地政總署。根據小型屋宇政策，只限在合資格地方擁有土地的新界原居民，才有資格申請免費建屋牌照。雖然該批原居民名義上是申請人，表面上也是有關土地的註冊擁有人，但他們從未擁有有關土地的任何權益，只是在發展商遞交建屋牌照申請之前的短時間內，以據稱的代價轉讓該等土地給他們，而他們從未繳付或意圖繳付有關代價。這些原居民容許發展商以他們的名義申請建屋牌照，換取經濟報酬，而且蓄意向地政總署隱瞞他們與發展商的秘密交易。各被告經審訊後被裁定罪名成立。發展商被判處監禁 3 年，各原居民則被判處監禁 2 年 6 個月至 2 年 10 個月不等。各被告就定罪及刑罰提出上訴，有關的上訴聆訊日期未定。

Another significant aspect of this Sub-division is that it affords useful, practical training opportunities to newly appointed public prosecutors. The Criminal Advocacy Course is designed for new joiners to equip them with the necessary knowledge and skills required for undertaking challenging prosecution work of this Division. After attending a series of lectures on various topics about criminal law and practice, these new comers will have an opportunity to get a first-hand taste of being an advocate through firstly, a 2-week mock trial and subsequently, a 7-week attachment at the Magistrates' Courts to conduct prosecution. They would then spend a short stint in the Sub-division to accumulate advocacy experience through prosecuting relatively simple cases on their own and/or being assigned as junior counsel in complicated matters, with a view to gearing them up to be full-fledged prosecutors in their own right.

The following are some of the major or high profile cases conducted by counsel in Sub-division II.

In *HKSAR v Li Yam-pui David and 11 Others* DCCC 25/2015, a developer and eleven indigenous villagers were charged with the offences of conspiracy to defraud against the Lands Department during the applications for building licences purportedly made by 22 indigenous villagers under the Small House Policy. Under the Small House Policy, only indigenous villagers who own land in qualifying areas are eligible to apply for a free building licence. Whilst the villagers were the applicants in name and apparent registered owners of the land concerned, they never owned any interest in the land concerned; rather, the land was assigned to them by the developer shortly before submitting the application for a purported consideration which they never paid or intended to pay. The villagers received a financial reward for allowing the developer to use their names in the building licence applications. In addition, the villagers purposely concealed from the Lands Department their secret dealings with the developer. All the defendants were convicted after trial. Whilst the developer was sentenced to 3 years' imprisonment, the villagers were sentenced to imprisonment for a period ranging from 2 years and

在香港特別行政區 訴 鄺浩雲（東區裁判法院刑事案件 2015 年第 167 號）一案中，一名在職警員在警察總部的女廁內藉詞向因店鋪盜竊而被捕的持雙程證中國內地女子搜身，從而性侵犯該女子。他被控一項猥褻侵犯罪和一項公職人員行為不當罪，經審訊後被裁定兩項控罪罪名成立。法院就前一項控罪判處被告監禁 14 個月，而後一項控罪則判處監禁 8 個月，並命令後者的兩個月刑期在前一項控罪的刑期屆滿後才執行，即監禁合共 16 個月。他就定罪及刑罰提出上訴，在 2016 年 9 月 2 日遭駁回。

在香港特別行政區 訴 陳偉業 [2016] 2 HKLRD 718 一案中，被告被裁定明知而參與或繼續參與未經批准的集結，又或明知而成為或繼續成為此等集結的成員，違反《公安條例》（第 245 章）第 17A(3)(a) 條。他提出上訴，但遭高等法院原訟法庭駁回。被告在禮賓府東閘叫羣眾進行號稱“民主自由行”的活動，人羣隨後往下走至皇后大道中與雪廠街的交界處，阻塞交通。被告稍後抵達交界處，企圖控制或領導該處的集結，之後他與羣眾遊行至花園道，再返回中環。法庭認為，在該交界處的集結及其後的遊行，構成為共同目的而組織的遊行（即人羣集結並一起沿着同一路線前往相同目的地），而且遊行有共同目的（即透過“民主自由行”進行“示威”，向政府表達意見和不滿）。法庭裁定，即使該集結原先屬自發，但被告在場企圖控制或領導，集結的性質起了根本的變化，與經事先召集或組織而舉行的集會和遊行再無分別。再者，即使“民主自由行”是未經事先籌備和無指定路線的遊行，根據《公安條例》第 13 條，有關人士仍有必要給予當局“合理通知”。被告就定罪提出上訴，在 2015 年 5 月 26 日上訴遭駁回。

在香港特別行政區 訴 蘇永健（第一被告）及吳定邦（第二被告）（東區裁判法院刑事案件 2015 年第 302 號）一案，數名警員在 2014 年年底“佔領中環行動”期間在金鐘港鐵站遇襲。當天早上三名剛休班警員走進海富中心，一批示威者辱罵他們，更與其中一名警員對峙，不久，包括第二被告在內的示威者便襲擊該名警員。當另外兩名警員上前協助，第二被告及其他施襲者同樣襲擊二人，甚至在其中一名警員跌倒在地後，仍對他繼續拳打腳踢。警方增援人員到場後，有警員認出第一被告是其中一名施襲者。一名督察嘗試與第一被告對質，但被對方單手擊中臉部。

第二被告經審訊後被裁定兩項襲擊在正當執行職務的警務人員罪和一項普通襲擊罪罪名成立，判處監禁合共 10 個月。第一被告被控襲擊在正當執行職務的警務人員，但被判無罪。

在香港特別行政區 訴 鄧德鵬（九龍城裁判法院刑事案件 2014 年第 4179 號）一案中，被告經

6 months to 2 years and 10 months. All the defendants appeal against conviction and sentence and the hearing date is yet to be fixed.

In *HKSAR v Kong Ho-wan* ESCC 167/2015, a serving police constable was charged with a count of indecent assault and a count of misconduct in public office for sexually abusing a female two-way permit holder from Mainland China, who had been arrested for shop theft, in a female toilet of the Police Headquarters on the pretext of conducting a body search on her. The defendant was convicted after trial of both charges. He was sentenced to 14 months imprisonment on the former charge and 8 months' imprisonment on the latter charge. Two months of the term on the latter charge was ordered to run consecutively to the term on the former charge. The total sentence was 16 months' imprisonment. His appeals against conviction and sentence were dismissed on 2 September 2016.

In *HKASR v Chan Wai-yip Albert* [2016] 2 HKLRD 718, the Court of First Instance dismissed the appeal from the defendant who was convicted of knowingly taking or continuing to take part in or forming or continuing to form part of an unauthorised assembly, contrary to section 17A(3)(a) of the Public Order Ordinance (Cap. 245). At the east gate of Government House, the defendant told a crowd to carry out the so-called "Marching Freely for Democracy". The crowd then went downhill to the junction of Queen's Road Central and Ice House Street and blocked the traffic. The defendant later arrived at the junction and attempted to assume control or leadership of the assembly there. The crowd including the defendant subsequently proceeded to Garden Road, and further went back to Central. The Court found the assembly at the junction and the procession arose subsequently constituted a procession organized for a common purpose: people assembling and going together along the same route to the same destination and that the procession also had a common purpose: to "protest" by "Marching Freely for Democracy" so as to express their views and discontent with the government. It was held that even if the assembly was originally a spontaneous assembly, its nature underwent a fundamental change by the defendant's attempt to assume control or leadership of it at the scene, and it was no longer different from a meeting and procession which was held following convening or organization; and that even if "Marching Freely for Democracy" was a procession having no prior preparation and no designated route, "reasonable notification" under section 13 of the Public Order Ordinance was still essential. His appeal against conviction was dismissed on 26 May 2015.

In *HKSAR v So Wing-kin (D1) and Ng Ting-pong (D2)* ESCC 302/2015, a group of police officers was assaulted at the Admiralty MTR Station amidst the Occupy Central Movement in late 2014. When 3 officers, having got off duty in the morning, entered the Admiralty Centre, they were verbally abused and one officer was confronted by a number of protestors. These protestors, including D2, soon started to assault that officer. When the other two officers came for assistance, they were also assaulted by the assailants, including D2. The assailants continued to punch and kick one of the officers even after he had fallen down on the floor. After Police reinforcement had arrived at the scene, D1 was recognized by an officer to be one of the assailants. When an Inspector tried to confront D1, he turned around and used his hand to hit the Inspector's face once.

審訊後被裁定一項在公眾地方作出擾亂秩序的行為罪罪名成立。警方根據原訟法庭頒發的禁制令，協助移走在旺角的示威者。數以百計示威者拒絕離開，並在行人路上逗留，部分人情緒激動。被告煽動他人無視警方警告，而且更衝擊警方用以防止示威者重返道路的封鎖線。裁判官判處被告罰款港幣 3,000 元。

香港特別行政區 訴 許智峯（東區裁判法院刑事案件 2014 年第 4099 號）一案被告是區議員，他被控兩項普通襲擊罪，經審訊後裁定罪名不成立。被告在民政事務總署辦事處靜坐抗議，他要求進入辦事處範圍但被拒絕，他突然跳上接待處櫃台，企圖強行闖入辦事處範圍。數名護衛員上前按着被告雙腳，制止他內進，但被告以腳踢及伸腿作反抗，擊中護衛員的腹部和手指。裁判官裁定，雖然被告為侵入者，而護衛員是使用合理武力阻止被告企圖非法進入，但不能排除被告與護衛員之間的身體接觸有可能屬意外。因此，被告獲判無罪。

控方申請覆核原審的無罪裁決，裁判官維持原判，但接納控方陳詞所指，被告在案發時的行為確實涉及威脅使用暴力或至少確實令人對使用暴力有合理疑慮。因此，裁判官命令被告以港幣 1,000 元簽保，守行為 12 個月。

在香港特別行政區 訴 徐焯榮（荃灣裁判法院刑事案件 2015 年第 1053 號）一案中，被告在駕駛汽車時體內酒精濃度超出訂明限度，經審訊後被裁定罪名成立。裁判官判刑時頒令如下：(i)120 小時社會服務令；(ii) 罰款港幣 12,000 元；(iii) 取消駕駛資格 12 個月；以及 (iv) 修習駕駛改進課程。案發時被告的有關呼氣分析儀器讀數為每 100 毫升呼氣含 23 微克酒精（每 100 毫升 23 微克），較每 100 毫升 22 微克的相關訂明限度超出 1 微克。辯方質疑呼氣分析儀器讀數的準確度。控方的專家首次就有關呼氣分析儀器的可靠性和準確度提供專家證供，獲裁判官接納，並（可能是香港司法管轄區首次）採納加拿大最高法院在 *R v Moreau* [1979] 1 SCR 261 案中闡明的原則所指，“不能以認可的呼氣分析儀器有一般性的難以準確測量情況或存在固有誤差的可能性，而推翻以《道路交通條例》（第 374 章）第 39C(3)(a) 條訂下的證明書所確立有關被告體內酒精濃度的表面證據”。

在香港特別行政區 訴 黃曉鵬（東區裁判法院刑事案件 2014 年第 3200 號）一案中，2013 年 11 月 22 日被告在應考海事處舉行的“遊樂船隻二級操作人合格證明書”考試作弊，他被控一項串謀詐騙罪。當被告答畢首條試題，一名監考員揭發他利用複合無線電傳送設備，向同黨傳送試題影像，並收聽對方的答案。被告與同黨合謀，企圖誘使海事處在發出相關證明書

After trial, D2 was convicted of two charges of assaulting a police officer in the due execution of his duty and a charge of common assault. He was sentenced to a total term of 10 months' imprisonment. D1 was acquitted of the charge of assaulting a police officer in the execution of his duty.

In *HKSAR v Tang Tak-pang* KCCC 4179/2014, the defendant was convicted after trial of one charge of behaving in a disorderly manner in a public place. Pursuant to an injunction ordered by the Court of First Instance, Police offered assistance in removing the protestors in Mongkok. Hundreds of protestors refused to leave and remained at the pavements. Some acted emotionally. The defendant incited others to ignore the Police warning and to charge the Police cordon line, which was set up to prevent the protestors to return to the roads. The magistrate imposed a fine of HK$3,000 upon the defendant.

In *HKSAR v Hui Chi-fung* ESCC 4099/2014, the defendant, a District Councillor, was acquitted after trial of two charges of common assault. The defendant staged a sit-in protest at the office of the Home Affairs Department. When his request for access to the office area was refused, the defendant suddenly jumped onto the reception counter table and attempted to force his way into the office area. A few security guards came up to stop the defendant from entering by pressing his legs. The defendant resisted by kicking and stretching his legs, hitting the guards' stomach and fingers. Although the magistrate found that the defendant was a trespasser and the guards had used reasonable force to resist the attempted unlawful entry, he could not rule out the possibility of accidental bodily contact between the defendant and the guards. Hence, the defendent was aquitted.

On an application for review by the Prosecution of the verdict of acquittal, the magistrate affirmed his decision. He however accepted the Prosecution's submission that the defendant's conduct at the material time did involve threat of violence or at least did give rise to reasonable apprehension of such violence. Accordingly, the defendant was ordered to be bound over for 12 months by entering into a recognizance of HK$1,000.

In *HKSAR v Chu Cheuk-wing* TWCC 1053/2015, the defendant was convicted after trial of one charge of driving a motor vehicle with alcohol concentration exceeding the prescribed limit. In sentencing, the magistrate made the following orders: (i) a Community Service Order for 120 hours; (ii) a fine of HK$12,000; (iii) a disqualification order for 12 months; and (iv) attending driving improvement course. The breathalyzer reading was 23 micrograms of alcohol in 100 milliliters of breath (23ug/100ml) i.e. one microgram exceeding the relevant prescribed limit of 22ug/100ml. Defence challenged the accuracy of the breathalyzer reading. The magistrate accepted the testimony of the prosecution's expert, who gave expert evidence on the reliability and accuracy of the breathalyzer in question for the first time in Hong Kong. The magistrate also, probably for the first time in this jurisdiction, adopted the principles enunciated by the Supreme Court of Canada in *R v Moreau* [1979] 1 SCR 261 that possible uncertainties in general terms or inherent fallibility of approved instrument are not capable of rebutting the prima facie evidence of the defendant's alcohol concentration established by the

方面作出有違其公職的作為。控辯雙方均提出專家證據。辯方的專家證人接受控方盤問時認同，接收人不必在靜止狀態也可接收傳送器發出的訊息，而試場裏基本沒有障礙物可以完全阻擋有關訊號。在審訊中法庭處理了若干問題，包括辯方指稱控方未能證明實際上是被告作出“控罪詳情指稱的公開作為”，並以“犯罪行為不可能發生為抗辯理由”提出不可能作出該等指稱的公開作為。被告經審訊後被裁定罪名成立，判處罰款港幣 4,000 元。他就定罪提出的上訴在 2016 年 10 月 26 日被駁回。

在香港特別行政區 訴 周昀霆（東區裁判法院刑事案件 2015 年第 2796 號）一案中，被告是職業治療師，被控普通襲擊罪。2014 年 9 月 27 日凌晨 1 時 25 分左右，逾 100 名示威者在立法會綜合大樓 1 號公眾入口外聚集。部分示威者以身體壓向警方的人鏈封鎖線，被告則手握瓶子，把瓶內的水潑向在封鎖線前排執勤的兩名軍裝警員。審訊的主要爭議點是認人証據和缺乏犯罪意圖。被告自願作證，經審訊後被裁定罪名成立，判處有條件釋放，須以港幣 1,000 元簽保在 12 個月內行為良好。法院又下令被告支付訟費港幣 1,000 元。

evidentiary certificate pursuant to section 39C(3)(a) of the Road Traffic Ordinance (Cap. 374).

In *HKSAR v Huang Xiaopeng* ESCC 3200/2014, the defendant was charged with one count of conspiracy to defraud for cheating in an examination for “Pleasure Vessels Operator Grade 2 Certificate of Competency Examination” held by the Marine Department on 22 November 2013. He managed to answer the first question of the examination when he was caught by one of the examiners for using composite radio transmission equipment to send visual images of the examination questions to a co-conspirator; and receive audio answers to those questions from the co-conspirator. The agreement between the defendant and the co-conspirator was to induce the Marine Department to act contrary to their public duty in respect of the granting of the relevant certificate. Expert evidence was called by both parties. Under cross-examination by the Prosecution, defence expert witness agreed that it was not necessarily the case that a person had to remain stationary to receive the signals from the transmitter, and that there was nothing in the examination venue which could completely block the signals. Some of the issues raised at trial included the contention that the Prosecution failed to prove that “the overt acts as pleaded in the particulars of the charge” were in fact carried out by the defendant, and those alleged overt acts were also impossible to be carried out under the “defence of impossibility”. The defendant was convicted after trial and sentenced by way of a fine of HK$4,000. His appeal against conviction was dismissed on 26 October 2016.

In *HKSAR v Chau Kwan-ting* ESCC 2796/2015, the defendant, who was an occupational therapist, was charged with the offence of common assault. At about 1:25 a.m. on 27 September 2014, more than 100 protestors gathered outside Public Entrance No.1 of the Legislative Council Complex. Some protestors were pressing their bodies against the police human chain cordon line. The defendant splashed water from a bottle that he was holding onto two uniformed police officers manning the front row of the cordon line. The main issues at trial were identification and the lack of mens rea to commit the offence. The defendant elected to give evidence. He was found guilty after trial and sentenced by the Court to a conditional discharge upon his entering into a recognizance in a sum of HK$1,000 for 12 months to be of good behaviour. The defendant was also ordered to pay costs of HK$1,000.