Case Summary

HKSAR v Tam Tak Chi (譚得志)

CACC 62/2022; [2024] HKCA 231
(Court of Appeal)
(Full text of the Court's judgment in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=158600&currpage=T)

Before: Hon Poon CJHC, Pang JA and Anthea Pang JA
Date of Judgment: 7 March 2024

Uttering seditious words under s. 10(1)(b) of Crimes Ordinance ("CO") – seditious intentions under s. 9(1)(a), (b), (d) and (g) of CO – whether an intention to incite violence is a necessary ingredient of sedition – legislative history of CO

Jurisdiction of the District Court to try sedition offences under s. 10 of CO – summary offences or indictable offences – statutory construction – legislative purpose and intent to create statutory offences of sedition in place of the common law offence – summary offence under s. 14A of Criminal Procedure Ordinance – may be transferred to the District Court for trial under s. 88(1)(b) of Magistrates Ordinance – NSL 41(3) does not change a s. 10 offence into an indictable offence

Constitutionality of sedition offence under s. 10 of CO – interference with right of freedom of expression – restriction prescribed by law and proportionate – Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR not legally binding in Hong Kong

Exercise of right to freedom of assembly as mitigation – act outside the permissible scope of the right

Background

1. The Applicant was a political activist and had actively participated in various social activities. On 3 March 2022, the Applicant was convicted of multiple charges arising from his criminal conduct while participating in public assemblies, public processions and campaigns for the "primary election", including hosting street booths in public places, on different occasions between 17 January and 19 July 2020. The charges may be divided into two groups broadly: (para. 1)

(a) The Public Order Charges for (i) incitement to knowingly take part in an unauthorized assembly; (ii) disorderly conduct in a public place; and (iii) holding or convening an unauthorized assembly, contrary to the common law and/or the Public Order Ordinance; and
(b) The Sedition Charges for uttering seditious words to the public, contrary to s. 10(1)(b) of the Crimes Ordinance ("CO"). The seditious words that he used included the slogan "光復香港·時代革命" translated as "Liberate Hong Kong·Revolution of Our Times" ("the Slogan"). The seditious intentions involved are those contained in s. 9(1)(a), (b), (d) and (g) of the CO, as the case may be.

2. The Applicant sought leave to appeal against the conviction of the Sedition Charges only and the sentences for both the Sedition Charges and the Public Order Charges. (para. 3)

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

- BL 27, 39
- NSL 4, 41(3)

- BOR 16
- Crimes Ordinance (Cap. 200), ss. 9, 10
- Criminal Procedure Ordinance (Cap. 221), s. 14A

3. The Applicant's main submissions run as follows: (para. 43)

(a) The District Court does not have jurisdiction over the Sedition Charges as sedition remains a common law offence and cannot be transferred to the District Court for trial.
(b) As a common law offence, sedition contains an intention to incite violence as a necessary ingredient. Since the prosecutor had never alleged that the Applicant intended to incite violence, his conviction of the Sedition Charges cannot stand.
(c) Alternatively, if an intention to incite violence is not a necessary ingredient of sedition, ss. 9 and 10 of the CO are unconstitutional because they lack legal certainty and disproportionately interfere with the fundamental right of freedom of expression.
(d) The Slogan is not seditious within the meaning of s. 9(1) of the CO.
(e) The Applicant did not have the required "seditious intention" under s. 9(1) of the CO in all the Sedition Charges.

Summary of the Court's rulings

(a) Whether the District Court has jurisdiction over the Sedition Charges

4. Whether sedition remains a common law offence or the statutory enactments have codified or displaced it is a matter of statutory construction. It is instructive to see how the law on sedition developed over the years cumulating in ss. 9 and 10 of the CO. (para. 63)

5. The 1938 Ordinance was enacted with the object of making better provision for the prevention and punishment of sedition. S. 3(1) defined what was and was not "seditious intention" in terms substantially similar to s. 9(1)(a)-(e) and 9(2) of the CO. The language used in s. 3(1) was largely adopted from the common law formulation of sedition. (para. 68) Significantly, s. 3 of the 1938 Ordinance did not include an intention to incite violence as a seditious intention. The absence of such an intention is crucial to the understanding of the legislative intent of the 1938 Ordinance, the predecessor of the CO. (para. 69)

6. The 1938 Ordinance was in 1970 amended to widen the definition of "seditious intention" contained in s. 3 by including an intention "to incite persons to violence" (para. (f)) and "to counsel disobedience to law or to any lawful order" (para. (g)). It was made clear in the Attorney General's statement when moving the second reading of the amendment bill that an intention to incite violence, though likely present in reality, was hitherto not considered as an element of the offence of sedition under the 1938 Ordinance. (para. 79)

7. In conclusion, the Court held that on a proper interpretation, the 1938 Ordinance had created new statutory offences of sedition and had thereby impliedly displaced the common law offence. As the immediate successor of the 1938 Ordinance, the CO has the same legislative purpose and intent. Sedition is now a statutory offence and not a common law offence. Save and except where s. 9(1)(f) applies, an intention to incite violence is not an element of the statutory offence of sedition under the CO. (para. 82)

8. As an offence created by statute, a s. 10 offence is a summary offence pursuant to s. 14A of the Criminal Procedure Ordinance and may be transferred to the District Court for trial under s. 88(1)(b) of the MO. (para. 83) NSL 41(3) does not have the effect of upsetting the current statutory regime for trial of a summary offence of endangering national

security. It does not seek to change a s. 10 offence into an indictable offence. (para. 89)

(b) Whether intention to incite violence a necessary ingredient of the statutory offence of sedition

9. The Applicant argued that taking into account the development of the international jurisprudence on sedition leading to *Vijay Maharaj (PC)* (a case in the Republic of Trinidad and Tobago), and the reminder in NSL 4 that human rights protections are a part of the NSL, an intention to incite violence should be implicitly incorporated into ss. 9 and 10 of the CO; otherwise they will fall foul of the dual requirements of legal certainty and proportionality. (para. 90)

10. The Court had reservations if *Vijay Maharaj (PC)* is applicable to the interpretation of ss. 9 and 10. (para. 96) The Judicial Committee's views on matters concerning the legal certainty and proportionality of the Trinidad Sedition Act are clearly *obiter dictum*. (para. 97) Further, the Judicial Committee's views are necessarily limited to the Trinidad Sedition Act. The legislative history of the 1938 Ordinance and the CO makes it clear beyond doubt that as a matter of interpretation, such an intention is not a necessary element of offence except s. 9(1)(f). (para. 98) Incorporating an intention to incite violence in ss. 9 and 10 of the CO would be wholly against its legislative intention. (para. 99)

(c) Constitutional challenges

(i) General approach

11. As the CFA observed, s. 10 offences are offences endangering national security. At the same time, it is common ground that in the present case, the Sedition Charges engage the right to freedom of expression under BL 27 and BOR 16(2). The right is not absolute and

may be restricted for one of the objectives listed in BOR 16(3) which has to be read together with BL 39(2). (paras. 104-106).

12. There is a wealth of case law developed by the CFA over the years on the combined effect of BL 39 and purported restrictions on the associated freedoms of expression, of public assembly and procession and demonstration. In *Fong Kwok Shan Christine*, Ribeiro PJ at [16] summarized the applicable principles thus:[1]

> "Accordingly, by the combined effect of BL 39 and BOR 16, if any purported restriction on the right of free expression is to be valid, it must have sufficient legal certainty to qualify as a restriction 'prescribed by law' and must be 'necessary for respect of the rights or reputations of others; or for the protection of national security or of public order (ordre public), or of public health or morals'. It is established that the requirement of necessity involves the application of a proportionality test and that the objectives listed in BOR 16 are exhaustive of purposes qualifying as legitimate aims to justify a purported restriction of the guaranteed right."

The proportionality test is the four-stage test as propounded by the CFA in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372. In determining if a restriction satisfies the dual requirements of legal certainty and proportionality, the Court undertakes a multi-functional assessment, which is by nature highly context-specific, and forms its conclusion on a holistic view of the case. (para. 107)

13. As the CFA observed in *HKSAR v Lai Chee Ying* (2021) HKCFA 3, although the court has no power to hold any provision of the NSL unconstitutional or invalid as incompatible with the Basic Law or the BOR, it does not mean that human rights, freedom and rule of law values

[1] *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425.

are inapplicable. The need to balance safeguarding national security and protection of human rights is in fact recognized in the NSL. (para. 109) In particular, NSL 4 requires that fundamental rights, if engaged in safeguarding national security, shall be protected in accordance with the law. (para. 110) Since the legislative intention of the NSL is to operate in tandem with local laws seeking convergence, compatibility and complementarity, NSL 4 plainly envisages that the constitutional principles developed at common law on how fundamental rights are protected continue to apply in safeguarding national security under local laws. (para. 111)

(ii) Prescribed by law

14. The "prescribed by law" requirement in BL 39 mandates the principle of legal certainty. (para. 113) To ascertain if s. 9 of the CO is legally uncertain, it is necessary for it to be construed in the light of its context and purpose. (para. 118)

15. At its core, sedition generally relates to dissemination of words. Several inter-related dimensions are at play:

(a) By their very nature, some aspects of the offence of sedition are not capable of a precise definition. A sufficient degree of adaptive flexibility is necessary for the offence to be effective and responsive to meet the risks or threats to national security that the society is facing at the time.
(b) Words are not spoken in vacuum and cannot be understood in abstract. They must be understood against the contemporaneous socio-cultural and political setting of society. To be effective, sedition offences must be sensitive to time, issue and context in which the words are spoken. They must be flexible enough to cope with the change in time and circumstances, such as societal evolution or political climate.

(c) Very often, words can set events into action. Seditious words may potentially lead to seditious acts or activities endangering national security, public order or safety. In punishing dissemination of seditious words, the offence aims at avoiding such potential detrimental consequences, which is imperative in safeguarding national security.

(d) With rapid technological advances and diversity and ease in communications, the offence must have the flexibility to keep pace. (para. 119)

16. Construed with the above considerations in mind, s. 9 satisfies the legal certainty requirement. (para. 120)

(a) First, to achieve the purpose of the offence and to enable it to timely and effectively respond in a timely manner to seditious acts or activities endangering national security, seditious intention has to be broadly framed to encompass a myriad of situations that may arise in different and changing circumstances at different times. (para. 121)

(b) Second, though broadly framed, the definitions for seditious intention in s. 9 have a sufficiently and clearly formulated core to enable a person, with advice if necessary, to regulate his or her conduct so as to avoid liability for the offence. (para. 122) The CA held that the words in the CO complained of, that is, "hatred", "contempt", "disaffection", "discontent", "feelings of ill-will and enmity", are ordinary language. When used in defining a seditious intention in s. 9(1):

(i) "hatred" connotes a strong sense of hostility or aversion towards the government or the administration of justice (s. 9(1)(a) and (c));

(ii) "contempt" refers to open, defiant disobedience or disrespect of the legitimacy or lawful authority of the government or administration of justice in Hong Kong (s.

9(1)(a) and (c));

(iii) "disaffection" refers to provoking, stimulating or implanting a feeling or view to oppose the legitimacy or authority of the government, the administration of justice or to antagonize the inhabitants (s. 9(1)(a), (c) and (d));

(iv) "discontent" refers to provoking, stimulating or implanting a feeling of resentment amongst the inhabitants (s. 9(1)(d));

(v) "feelings of ill-will and enmity" refers to provoking, stimulating or implanting animosity between different classes of the population of Hong Kong (s. 9(1)(e)).

Put in brief terms, they aim at prohibiting words which, objectively understood, have the intention of (1) seriously undermining the legitimacy or authority of the Central People's Government, the HKSAR Government and their institutions; the constitutional order or status of the HKSAR; and the administration of justice in Hong Kong; and (2) seriously harming the relationship between the Central People's Government or the HKSAR Government with Hong Kong inhabitants; and the relationship among Hong Kong inhabitants. (para. 123)

S. 9(1) has to be read together with s. 9(2). Properly read together with the fundamental right to free expression, they make it plain that criticising the government, the administration of justice including judgments of the court, or engaging in debates about or even raising objections to government policy or decision, however strong, vigorous, or critical they may be, do not constitute a seditious intention. Reading s. 9(1) together with s. 9(2) provides further clarity in differentiating between lawful and unlawful speeches. (para. 124) Moreover, the application of the definitions of seditious intention to various situations as they arise is a matter for the court to decide in light of experience. In this way, the relevant case law will offer to the public judicial guidance which they may consult to avoid

engaging in conduct which is likely to be held to be seditious. (para. 125)

(c) Third, the Applicant's complaint that it is impossible to apply an objective standard to see whether a speech engenders subjective feelings such as "hatred", is misconceived. For insofar as criminal liability is concerned, the dispositive question is whether the words uttered have the seditious intention as defined in s. 9(1). Whether the particular audience addressed were or were not so incited is irrelevant. (para. 127)

(d) Fourth, the Court did not accept the Applicant's argument that s. 9 is rendered legally uncertain because, other than s. 9(1)(f), it does not contain an intention to incite violence. The legality question entails a multi-factorial assessment. Presence or otherwise of an intention to incite violence is but a factor. It is not definitive. As highlighted recently by the English Supreme Court in *Pwr v DPP (SC(E))* [2022] 1 WLR 789, the Strasbourg jurisprudence does not contain any principle that a restriction on freedom of expression could only be justified (in terms of legality and proportionality) where the expression included an incitement to violence. The Applicant's reliance on the *Siracusa Principles* does not take his case any further. It was issued by the American Association for the International Commission of Jurists in 1984, representing the collective views of the authoring experts. However, their view is obviously dated and does not take account of the changing societal and political circumstances and advances of science and technologies since then. Modern experiences show that seditious acts or activities endangering national security now take many diversified forms. Some involve violence or threat of violence. Some involve non-violent means but can be equally damaging. There is no valid basis for criminalizing the former but not the latter. Further, as just seen, the *Strasbourg* jurisprudence does not support their view. Finally, the

Siracusa Principles are not legally binding in Hong Kong and for the reasons given, the Court is not persuaded to apply them in the present case. (paras. 128-129)

(iii) Proportionality

17. The Court applied the four-stage test set out in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372. (para. 132)

18. As regards the first question, it was accepted that the offence of sedition pursues the legitimate aim of safeguarding national security or public order. (para. 133)

19. The next question is whether the offence is rationally connected to that legitimate aim. Acts or activities endangering national security and public order nowadays can and do take many forms, some of which do not involve violence or threat of violence. In the Court's view, given its clear purposes and legal certainty as explained in the judgment, the offence of sedition is plainly rationally connected to its legitimate aim. (paras. 136-137)

20. The third question is whether the offence is no more than necessary to accomplish its legitimate aim. (para. 138) The mere absence of an intention to incite violence does not render the offence disproportionate. Focusing on this factor alone without reference to others in the multi-factorial assessment is too restrictive. More importantly, the delineation in s. 9 between what is seditious and what is not does not inhibit or have the effect of inhibiting open and frank dialogue and full and vigorous debate to promote societal development and the resolution of conflicts, tensions and problems. The core of the right to free expression exercised and realized in the public domain and for the purposes of public discourse as articulated in *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229 is not compromised. (para.

140)

21. Further, under s. 11(2) of the CO, no prosecution of a s. 10 offence shall be instituted without the written consent of the Secretary for Justice. Such procedural safeguard serves two purposes:

(a) First, it avoids the risks of law enforcement agents using subjective moral or value judgment as the basis for enforcement.
(b) Second, it ensures that the right to free expression said to be engaged in a given case is properly evaluated by the Secretary for Justice in terms of sufficiency of evidence or general public interest, as the case may be, before the prosecution of a s. 10 offence is allowed to be brought. (para. 141)

22. Taking an overall view, the Court found that the offence of sedition is no more than necessary to accomplish its legitimate aim. (para. 142)

23. The fourth and final question is, even a limiting measure passes the first three steps, whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroad made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in placing an unacceptably harsh burden on the individual. (para. 143)

24. Safeguarding national security and preserving public order is indispensable to the stability, prosperity and development of society. It ensures a safe and peaceful environment where the public can exercise their fundamental rights and pursue their goals. The societal benefits involved are evidently enormous. Nothing suggests that any individual, including the Applicant, a politician and activist highly critical of the government and a stern opponent of government policy, would be subject to an unacceptably harsh burden because of the restriction on seditious acts or speeches imposed by the offence. (para.

144)

25. In conclusion, the Court held that ss. 9 and 10 of the CO and accordingly the Sedition Charges satisfy the proportionality test. (para. 145)

(d) Whether the Slogan is seditious

26. The Applicant complained that the Judge adopted a wrong approach to the meaning of the Slogan. (para. 146)

27. The CA held that what s. 9(1) asks is whether the words uttered express a seditious intention as defined. It is a question of fact, entailing an objective assessment by the Court as a reasonable person to ascertain the meaning of the words in the context in which they were uttered. Generally speaking, the context includes the state of society; the state of public feeling or sentiment; the audience addressed; the occasion, the venue, and the means of the utterance. (para. 149)

28. The relevance of the audience's understanding of the meaning of the words depends on the specific context. For example, where the words are argots or coded language peculiar to the audience, their understanding of the meaning of the words will be relevant. The court as a reasonable person in that situation needs to have regard to their understanding in order to ascertain if the words carried any seditious intention. Barring such incidents, where for example the words are ordinary language uttered to the public at large, the court will exercise its own judgment as a reasonable person to ascertain their meaning. (para. 150)

29. Here, the context in which the Applicant uttered the Slogan involves two facets, resulting in a two-step approach:

(a) First, the socio-political context. The Slogan first emerged in 2016 and had since been used against the then prevailing socio-political situation in Hong Kong. Its origin, usage and development of meaning in such context is relevant in informing the meaning(s) attributed to it at the time of the Sedition Charges. At this step, if considered necessary and appropriate, the court may enlist experts to deal with those matters. The court makes all necessary findings as appropriate, including crucially the meaning(s) of the Slogan or what it is capable of bearing.

(b) Next, the actual factual circumstances in which the Applicant uttered it in each of the Sedition Charges. At this step, expert evidence plays no role. It is exclusively a matter for the court. After making all necessary findings on the factual circumstances in which the Applicant uttered the Slogan, and taking into account the meaning(s) of the Slogan or what it is capable of bearing as found at the first step, the court determined its meaning(s) and if it had a seditious intention as defined in s. 9(1). (para. 151)

30. The Judge had rejected the Applicant's expert evidence, there is no basis for this Court to disturb his decision. Assuming that the Slogan was capable of bearing the meanings as advocated by the Applicant, his expert accepted that they included those as identified by the prosecution's expert. The Judge was entitled to proceed on the common ground between the experts to find that when the Applicant uttered the Slogan, it had the seditious intention "to cause the consequence of separating the territory of residence from the State sovereignty; and in the context of Hong Kong's political context, these words were raised necessarily for the objective of separating the Hong Kong Special Administrative Region from the People's Republic of China". (para. 156)

(e) Specific intent or basic intent

31. The Judge did find that the Applicant had the seditious intention when he committed the Sedition Charges. In other words, he had in fact convicted the Applicant on the basis that a s. 10(1)(b) offence requires a specific intent. The debate between the parties on *mens rea* before the Court is therefore wholly academic. In the circumstances, it is inappropriate for the Court to deal with it or express any view on it, including the correctness or otherwise of HH Judge Kwok's view in *Lai Man Ling*. That has to await another occasion. (para. 160)

(f) Conclusion

32. None of the grounds of appeal against conviction has merits so the Court refused to grant leave to appeal against conviction and dismissed the appeal. (para. 168)

(g) Leave application for sentence

(i) Exercise of the right to freedom of assembly as mitigation

33. The submission that the exercise of the right of assembly should qualify as a mitigating factor ignores the fact that the Applicant was being punished for the very act of inciting others to participate in, or holding, an unauthorised assembly, which act is illegal and goes outside the permissible scope of the right.

34. The Court reiterated that both unlawful assembly and unauthorised assembly are pre-emptive offences which aim at preventing disruption to public order involving mass gathering. The Judge was therefore entitled to consider the sentencing factors identified in *Poon Yung Wai*[2] and to take into account the context when assessing the gravity of the

[2] *Secretary for Justice v Poon Yung Wai* [2022] 4 HKLRD 1002

offences committed by the Applicant: *HKSAR v Wong Chi Fung* [2022] 1 HKLRD 1305, at [28]. (para. 172)

35. Further, the Court agreed with the Respondent that targeting young students in one of the charges was an aggravating factor, which should be reflected in the sentence (para. 173).

(ii) Totality and good character

36. It was held that the Judge approached totality and mitigation in accordance with well-established principles. He made no error as contended. (para. 176)

(iii) Conclusion

37. None of the grounds for leave to appeal against sentence is meritorious. The Court refused to grant leave to appeal against sentence and dismissed the appeal (para. 177)

***Endnote – HKSAR v Tam Tak Chi,* FAMC 15/2024, [2024] HKCFA 25 (CFA Appeal Committee) (Full text of the Committee's determination in English at** https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=162033&currpage=T**)**

38. On 10 July 2024, the Applicant was granted a certificate by the CA to apply leave to appeal to the CFA in CACC 62/2022 on three questions.

39. On 14 August 2024, the Appeal Committee of the CFA granted leave to appeal to the Applicant on two of the questions, which in its view were of the requisite importance. As to the third question, the Appeal Committee considered the Applicant's arguments that the relevant provisions are constitutionally invalid for legal uncertainty, not meeting the "prescribed by law" test, and lack of proportionality, as not

reasonably arguable, and refused to grant leave on that issue.

40. The Appeal Committee pointed out that s. 9(1) lists what amounts to seditious intention and s. 9(2) specifies when certain categories of intention are not seditious, the latter covering what may be called constructive criticisms. The structure of s. 9 provides a framework for the court to conduct a nuanced assessment of the relevant intention. The offence is designed to avoid excessive rigidity and relies on the courts to apply the concepts purposively and with discrimination. Such flexibility meant that absolute certainty is unattainable but that did not make the offence legally uncertain. (paras. 9-10) In any event, the words used in s. 9(1), read in context, were not excessively vague, subjective or difficult to understand. A person would generally be able to judge, with legal advice if necessary, whether the intended consequences of their acts, viewed objectively, were likely to fall within one or more of the s. 9(1) categories, enabling them to avoid such unlawful conduct. The "prescribed by law" challenge was considered not reasonably arguable. (paras. 11-12)

41. On the proportionality analysis, the Appeal Committee does not think it reasonably arguable that the offences lack a rational connection with the legitimate aim of protecting national security realistically conceived. It rejected the contention that the relevant offences must target acts accompanied by a seditious intention which involves a "direct" threat to "the HKSAR government or CPG's political or territorial integrity", and observed that in the light of the widespread social unrest experienced in 2019, it would be rational to treat speech and publications disseminated with seditious intentions as provided by s. 9(1) of the CO as threats to national security in that they may incite serious public disorder. The Appeal Committee agrees that proportionate restrictions on freedom of expression require acceptance of criticism but lines must be drawn between constructive criticism and seditious incitement. As the offence leaves the questions of the nature

and width of acceptable criticism and whether a given intention falls within s. 9(1) or s. 9(2) in a particular case for judicial determination which is itself a safeguard which militates in favour of satisfying the "no more than reasonably necessary" criterion, it considers that the offence constitutes measures that is reasonably necessary. Besides, it considers that there is no sustainable suggestion that constraints on an individual uttering words deemed to be seditious under ss. 9 and 10 of CO outweighs the societal interest in protecting national security. As such, the Appeal Committee concluded that the offences under ss. 9 and 10 of the CO satisfy the proportionality test. (paras. 19-24)

42. To conclude, the Appeal Committee did not consider the third question reasonably arguable and refused leave in respect thereof. The appeal would be listed for hearing on 10 January 2025.

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