Case Summary

HKSAR v NG Gordon Ching-hang (吳政亨),
CHENG Tat-hung (鄭達鴻), YEUNG Suet-ying Clarisse (楊雪盈),
PANG Cheuk-kei (彭卓棋), HO Kai-ming Kalvin (何啟明),
LAU Wai-chung (劉偉聰), WONG Pik-wan (黃碧雲),
SZE Tak-loy (施德來), HO Kwai-lam (何桂藍),
CHAN Chi-chuen Raymond (陳志全), CHOW Ka-shing (鄒家成),
LAM Cheuk-ting (林卓廷), LEUNG Kwok-hung (梁國雄),
OR Yiu-lam Ricky (柯耀林) , LEE Yue-shun (李予信),
YU Wai-ming Winnie (余慧明)

HCCC 69/2022; [2024] HKCFI 1468
(Court of First Instance)
(Full text of the Court's reasons for verdict in English at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=160373&currpage=T)

Before: Hon Andrew Chan J, Hon Alex Lee J and Hon Johnny Chan J
Date of Reasons for Verdict: 30 May 2024

Elements of offence under NSL 22 – application of ejusdem generis rule to the interpretation of "other unlawful means" – whether displaced by purposive interpretation – consideration of the context and purpose of the NSL with regard to relevant extrinsic materials – primary purpose of the NSL to safeguard national security – seditious acts or activities involving non-violent means can be equally damaging as those involving violence or threat of violence – limiting NSL 22 only to acts and activities by the use of force or the threat of force would defeat the purpose of the NSL

Whether the term "other unlawful means" in NSL 22 had to refer to a criminal offence – inconceivable if acts or activities by whatever forms and methods with a view to subverting the State power could be considered acceptable or tolerable – means other than "by force or threat of force" included – elements of the offence – double intent – intended to carry out the means and "with a view to subverting the State power" – mistaken belief irrelevant

Definition for "subverting" and "State power" – legal certainty – the two terms to be construed purposively – NSL operates in tandem with the laws of the HKSAR – definition of "State" and "Power" in s. 3 of the Interpretation and General Clauses Ordinance (Cap. 1) – ordinary meaning of "subvert" with reference to the social context leading to the enactment of the NSL – self-defining provision in NSL 22 – clear and certain parameters of the offences created by NSL 22(1)(1)-(1)(3)

Duty under BL 73 – to examine and approve budgets based on merits of their content – clear violation of BL 73 and NSL 3 if indiscriminately refuse budgets regardless of contents and merits with a view to forcing the Government to accede to political agenda – parliamentary privilege not applicable

Background

1. The 16 defendants were charged together with 31 other defendants who had pleaded guilty with one count of Conspiracy to Commit Subversion, contrary to NSL 22(1)(3) and ss. 159A and 159C of the Crimes Ordinance, Cap 200 ("CO"). (para. 1)

2. The Particulars of Offence alleged that the 47 defendants, between 1 July 2020 and 7 January 2021 in Hong Kong, conspired together and with other persons, with a view to subverting the State power, to organise, plan, commit or participate in, by unlawful means namely: (para. 2)

(a) advocating, engaging or participating in a scheme with a view to abusing his or her powers and functions entrusted under BL 73 after being elected to be a member of the LegCo for the purposes of:

(i) obtaining a controlling majority in the LegCo to indiscriminately refuse to pass any budgets or public expenditure to be introduced by HKSARG regardless of their contents or the merits of their contents;

(ii) compelling the CEof HKSAR to dissolve the LegCo under BL 50 so as to paralyse the operations of the Government;

(iii) ultimately causing the CE to resign under BL 52 entailed by the dissolution of the LegCo and the refusal to pass the original budget by the new LegCo

("the Scheme").

3. The essence of the charge was the allegation that the defendants were parties to an agreement to participate in the Scheme so as to seriously interfere in, disrupt, or undermine the performance of duties and functions of the HKSARG by first obtaining a controlling majority in the LegCo and then unlawfully abuse their power as LegCo members by indiscriminately vetoing any budgets or public expenditure to be introduced by the government, with the effect that the CE would be forced to dissolve the LegCo and eventually to step down as provided for in the BL. (Annex E to judgment, para. 15)

4. The 2020 LegCo election was postponed due to the COVID pandemic. (para. 6)

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

- NSL 22
- BL 73
- Crimes Ordinance (Cap. 200), ss. 159A and 159C

5. A number of legal challenges were made by the defence as regards the elements of the offence under NSL 22 as follows: (para. 7)

(a) whether the expression "other unlawful means" in NSL 22(1)(3) should be confined to unlawful means with the use of force or the threat of force under the *ejusdem generis* rule; (para. 12)
(b) whether the term "other unlawful means" had to refer to a criminal offence; (para. 36)
(c) whether the offence lacked certainty as there was no definition for the words "subverting" (顛覆) and "State power" (國家政權) in the NSL or anywhere; (para. 47) and
(d) whether a breach of duty under BL 73 would constitute an unlawful means for the purpose of NSL 22. (para. 67)

6. The Court went on to discuss the elements of the charge brought under ss. 159A and 159C of the CO (para. 89), and addressed the factual issues. (para. 107)

Summary of the Court's rulings

A. Legal challenges brought by the defence

(a) Applicability of the ejusdem generis rule

7. The defence submitted that the expression "other unlawful means" in NSL 22 should be confined to unlawful means with the use of force or the threat of force under the *ejusdem generis* rule. (para. 12) The issue was whether the application of the *ejusdem generis* rule was displaced by the purposive interpretation of the relevant articles in the NSL. (para. 16)

8. Applying *HKSAR v Lai Chee Ying* [2021] HKCFA 3 to this case, the Court noted the following:

(a) The primary purpose of the NSL was to safeguard national security under NSL 1 (para. 18), while NSL 3 and 6 placed the responsibility in safeguarding national security on residents as well as government organisations of the HKSAR. (para. 19) In safeguarding national security, NSL 22, being the provision establishing the offence of subversion, was clearly aimed at preventing and suppressing subversion, the mischief behind; (para. 20)

(b) As stated in the Explanation[1], the NSL was enacted in full awareness that national security in Hong Kong could be undermined by non-violent acts such as advocating for Hong Kong independence and self-determination, desecrating national flag and emblem, inciting public hatred and paralysing governance by the government and operation of the legislature.

(c) Bearing in mind that the NSL was enacted to "prevent, suppress and punish" conducts and activities which endangered national security, the Court could not see any reason why the NPC would have so narrowly restricted "other unlawful means" in NSL 22 to acts which would entail the use of "force or threat of force". (para. 23) The fact that the Explanation and the Decision[2] referred to "any" activities, not simply activities relating to the use of force or threat of force, reinforced the said view. (para. 26) Moreover, it would not be difficult to anticipate that the operation of the legislature could be paralysed by a variety of ways and in different forms and methods other than the use of force or threat of force, such as cyber-attack on the infrastructure of the LegCo and attack by biological, chemical and radioactive agents; (para. 27)

(d) The defence's interpretation was inconsistent with the wording of NSL 22(1) in that a careful examination of the prohibited acts listed out in its sub-paragraphs (1)-(4) showed that not all of

[1] Explanation on the Draft NPC Decision (22 May 2020), see footnote 4 of Part A of the annotations.

[2] NPC 5.28 Decision, see footnote 6 of Part A of the annotations.

them would necessarily involve the use of “force or threat of force”; (para. 28)

(e) If the defence were correct in suggesting that the “other unlawful means” in NSL 22(1) should be confined to a narrower meaning, it followed logically that any attack on or damage caused to government facilities as envisaged in NSL 22(1)(4) by non-violent means such as setting fire, flooding, dissemination of toxic gases or dispersal of biological pathogens would not be a breach and the perpetrators would go unpunished under the NSL even if the effects and consequences would be the same, if not more serious and widespread. (para. 30) The Court considered whether the use of toxic gases or biological pathogens in the attack of government facilities might fall within NSL 24, so that there would not be a lacuna. NSL 24 is aimed at prohibiting “terrorist activities” causing or intended to cause grave harm to the society “with a view to coercing the Government” in order to pursue political agenda, whereas NSL 22 is aimed at protecting the PRC or the HKSAR in respect of: the basic system as established by the Constitution; the body of central power (sub-paragraph 1 and 2); the performance of legal duties and functions (sub-paragraph 3); and the performance of normal duties and functions (sub-paragraph 4). (paras. 31-32) The defence interpretation would produce a lacuna in the law and an absurdity which unduly limited the scope and hence reduced the effectiveness of the NSL as a means to protect national security. That would not be conducive to the legislative purpose of the NSL; (para. 33) and

(f) The Court did not consider that NSL 20 could lend support to the defence submission as, whilst the phrase “whether or not by force or threat of force” appeared in NSL 20, NSL 20(1)(2) specifically referred to “altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People’s Republic of China” as a prohibited

act. Therefore, it was clear that when the phrase "unlawful" or "unlawful means" was used, the NPC did not intend it to be restricted to acts involving the use of force or the threat of force. (para. 34)

9. In conclusion, the Court came to the view that the mischief rule requires NSL 22(1)(3) to be construed to cover acts not just by the use of force or the threat of force, but also other unlawful means. Limiting NSL 22 only to acts and activities by the use of force or the threat of force would be absurd and illogical and defeat the purpose of the NSL. It should be noted that the other means employed would still have to be an unlawful one, not just any means. (para. 35)

(b) Whether the term "other unlawful means" had to refer to a criminal offence

10. Some of the defendants argued that the term "other unlawful means" in NSL 22 had to refer to a criminal offence, and that any interpretation given for less than a full criminal offence would render the ambit of NSL 22 too broad and uncertain. (para. 36)

11. The defence submission was rejected by the Court as it would go against the stated purpose of the NSL. The Court pointed out that one of the national security risks stipulated in the Explanation was paralysing the operation of the legislature. It would not be difficult to see that the operation of the legislature could be paralysed by a means which was not a criminal offence in itself. (para. 37) Having regard to NSL 1, NSL 3 and NSL 6, it was inconceivable that acts or activities by whatever forms and methods with a view to subverting the State power could be considered to be acceptable or tolerable. It was pertinent to note that the use of the unlawful means had to come with a view to subverting in order to constitute a full offence. (para. 38)

12. If it were the legislative intent that "unlawful means" in NSL 22 should be restricted to criminal acts, then the NPC could have easily made this intention clear by employing the term "criminal means" instead. The fact that NPC chose to use the more generic term than "criminal means" in NSL 22, in the Court's view, is a clear indication against the defence submission. (para. 39) On a proper construction of all the offence-creating articles in Chapter III of the NSL below, the Court came to the conclusion that the phrase "other unlawful means" referred not just to criminal acts but included means other than "by force or threat of force" in order to establish and improve the legal system and enforcing mechanisms for safeguarding national security and to prevent the offence of subversion: (para. 41)

(a) In NSL 20(1)(2) and NSL 29(1)(5), the term "unlawful" was wide enough to cover acts which were unconstitutional, in breach of the law or otherwise not following the proper procedure and therefore were unlawful in a general sense. In the Court's judgment, this understanding was equally applicable to the other articles of the NSL whenever it appeared without causing any difficulties. If the defence interpretation of NSL 22 were correct, it would lead to an internal inconsistency in that the term would have to bear different meanings in other articles contained in the same chapter of the NSL. This was both unnecessary and unjustified; (para. 40(1)) and
(b) Apart from "unlawful", there were other generic terms used to describe activities prohibited by the offence-creating articles in Chapter III of the NSL, such as NSL 24(1)(5) which referred to "other dangerous activities" and NSL 26(1) which referred to "other means to prepare for the commission of a terrorist activity". (para. 40(2))

13. As to whether the prosecution had to prove that the defendants knew at the material time that the means in question was unlawful (para. 43),

the Court held that knowledge of the unlawfulness of the means in question was not an element of the offence under NSL 22. (para. 46) For the offence of subversion, the prosecution is required to prove that the defendants intended to carry out the means which is the subject of the charge. Besides, there is also an additional mental element that the defendants so acted with "a view to subverting the State power". Had the prosecution failed to prove the double intent, the offence would not be established. (para. 44)

14. Furthermore, the Court considered that the gravamen of the offence of subversion lied in the fact that an accused intentionally committed an act which was prohibited by the article and that he or she did so with a view to subverting the State power. Therefore, it was irrelevant to the issue of guilt that the accused acted with a mistaken belief that his or her means was lawful; to hold otherwise would go against the purpose of the NSL. (para. 46)

(c) Definition for the words "subverting" and "State power"

15. The defence argued that as there was no definition for the words "subverting" and "State power" in the NSL or anywhere, the offence lacked certainty. (para. 47)

16. In the absence of any specific definition in the NSL, the meaning of the two terms should therefore be constructed purposively. (para. 48) In *HKSAR v Lai Chee Ying* [2021] HKCFA 3, the CFA held that it was evident that the legislative intention was, subject to NSL 62, for the NSL to operate in tandem with the laws of the HKSAR, seeking "convergence, compatibility and complementarity" with local laws.

(i)"State power"

17. The term "State power" in the present context referred to the powers

of the HKSARG and the duties and functions performed by various organs of the Government, such as government departments / bureaux. This was the "State power" which the NSL 22 sought to protect. (para. 52)

18. The performance of duties and functions in accordance with the law by the body of power of the HKSAR referred to in NSL 22(1)(3) was an aspect of the "State power" which the article sought to protect. (para. 55)

(ii) "Subvert"

19. There was no definition for the word "subvert" in the NSL. In the absence of such definition, its ordinary and plain meaning should be considered. (para. 56)

20. After taking into account the ordinary meaning of "subvert"; the social context leading to the enactment of the NSL; and the Court's understanding of the term "State power", a serious interference in, disruption or undermining of the performance of duties and functions in accordance with the law by the body of power of the HKSAR as referred to in NSL 22(1)(3) could amount to an act "subverting the State power". The Court noted the interference, disruption and undermining had to be serious. (para. 61)

21. As to the specific intention required for the commission of offence, i.e., "with a view to subverting the State power", there could not be any doubt that if a person committed an act prohibited by either NSL 22(1)(1) or 22(1)(2) with intent to bring about the consequences stated in those sub-paragraphs, he or she would have done so "with a view to subverting the State power". (para. 62) In the Court's judgment, the same could also be said in respect of NSL 22(1)(3). (para. 63) Thus, NSL 22 could also be construed to be a self-defining provision in the sense that once any of the three prohibited acts, i.e. NSL 22(1)(1), (1)(2)

and (1)(3) which involved the undermining of an established political system had been committed with the intention to bring out the respective consequences as stated in the sub-paragraphs, that would amount to subversion. In the Court's judgment, the parameters of the offences created by NSL 22(1)(1), (1)(2) and (1)(3) are both clear and certain. (para. 64)

22. For the purpose of the conspiracy to commit an NSL 22(1)(3) offence, the prosecution were also required to prove the specific intent of "with a view to subverting the State Power" in order to secure a conviction. (para. 66)

(d) Breach of duty under BL 73

23. BL 48, BL 62 and BL 73 respectively described the powers and functions of the CE, the HKSARG and the LegCo. (paras. 70-73) In respect of the budgets and given the provisions in BL 48, BL 62 and BL 73, the Government prepared the budgets; the LegCo examined the budgets; and the CE signed and reported the budgets to the CPG. (para. 73) As such, it was clear that LegCo members collectively had a constitutional duty to examine and approve budgets when the occasion arose based on their merit. (para. 74)

24. The defence submitted that in vetoing the budgets, the LegCo members were doing no more than exercising their constitutional duty, hence, the common law principles of Parliamentary Privileges and Non-Intervention applied. (para. 75)

25. The above submission was rejected by the Court. (para. 76) Members of the LegCo collectively have a constitutional duty to examine and approve budgets when the occasion arises based on their merits. Whilst the LegCo is not expected to and should not automatically and mechanically approve the budgets presented by the

Government, a deliberate refusal by the majority of the LegCo members to examine the budgets regardless of their contents and merits would be a clear violation of BL 73 and NSL 3. If there was a plan by the majority of the LegCo members to veto the budgets indiscriminately, i.e., regardless of their contents and merits, with a view to forcing the Government to accede to their political agenda, that would amount to an abuse of their power. Further, an act which would seriously interfere in, disrupt or undermine the performance of duties and functions of the Government was clearly an act which would endanger national security in Hong Kong in view of BL 73 and NSL 3. (paras. 74 and 77-78)

26. Neither the common law parliamentary privilege nor the statutory privileges of freedom of speech and debate had any application in the present case: (para. 81)

(a) the Scheme or agreement which was the subject matter of the charge and which the defendants were alleged to have been parties was not a product of any speech or debate or any proceedings in LegCo; (para. 81(1) and

(b) in the Court's judgment, an indiscriminate vetoing of the budgets or public expenditure introduced by the Government with a view to compelling the Government to accede to certain political agenda would be a violation of BL 73 and BL 104, not to say if such acts were accompanied with a view to undermining the power and authority of the Government or the CE. As such, it would be clearly beyond the purpose of any privileges under consideration for them to cover LegCo members who had publicly professed the intention to commit such a violation of the constitutional duty. (para. 81(2), see also para. 88)

B. Conspiracy and its elements

(a) Ss. 159A and 159C of the CO

27. The charge which the defendants faced was a statutory conspiracy brought under ss. 159A and 159C of the CO. (para. 89)

28. As to the nature of conspiracy charge, Ma CJ said in *HKSAR v Lai Kam Fat* (2019) 22 HKCFAR 289 that conspiracy is an inchoate offence, meaning that it is constituted by an agreement to pursue a future course of conduct with the necessary intent and does not require the actual carrying out of the agreed upon acts. (para. 90)

29. As to s. 159A(2)[3], Ma CJ said that the essential purpose of that section was to ensure that lesser forms of *mens rea*, such as recklessness or negligence, or offences of strict liability, would not be sufficient for the offence of conspiracy, and in those cases the *mens rea* of conspiracy, namely intent or knowledge, had to be proved on a full subjective basis. (para. 91)

30. As to the elements of the offence, the Court stated the following: (para. 92)

(a) the elements of the conspiracy under consideration would be informed by the elements of the substantive offence under NSL 22. As to this, the Court had already set out the elements of substantive offence under NSL 22 above; (para. 92(a)) and

(b) for the purpose of establishing guilt for the conspiracy charged, the prosecution also had to prove that the defendant under consideration agreed with at least one of the named co-conspirators to commit a course of conduct which, if executed

[3] S. 159A(2) of the CO provides:
"Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

in accordance with their intentions, would necessarily involve the commission of the offence under NSL 22 by one or more of them. (para. 92(b))

31. In this case, the alleged course of conduct was to indiscriminately veto any budgets or refuse to pass any budgets or public expenditure to be introduced by the Government regardless of the merits or the contents, in the event that they were elected to be LegCo members after obtaining a majority in the upcoming 2020 LegCo election with the intention of compelling the CE to respond to the Five Demands and in the case that the CE refused to do so and the budget was vetoed, she would have to dissolve the LegCo, which would eventually lead to her resignation by the operation of the relevant provisions in the BL. (para. 92(c))

32. As the Court said, for the purpose of NSL 22 the "unlawfulness" of the means employed by an accused pertained to the *actus reus* rather than the *mens rea* of the substantial offence. Moreover, because of the requirement of "with a view to subverting the State power", the substantive offence was not one of "strict liability". Furthermore, applying *HKSAR v Lai Kam Fat*, the only fact or circumstance which was necessary for an accused to know for the commission of the offence under NSL 22(1)(3) was the knowledge that his or her act would have the consequence of "seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law" by the relevant body of power concerned. It was the existence of that fact or circumstance which was an ingredient of the offence and it was to the ingredient that s. 159A(2) applied. The Court therefore held that in order to prove guilt under the conspiracy charge, it was not necessary for the prosecution to prove that the accused knew that the means to be employed was "unlawful". (para. 93)

(b) The Scheme

33. In view of the requirement in s. 159A(1)(a) of the CO[4], an issue arose as to whether the indiscriminate vetoing of the budgets, if carried out in accordance with the intention of the parties as alleged, would necessarily lead to a "seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of power of the HKSAR". As to this, the Court had no hesitation to find that the answer had to be in the affirmative. The reasons were as follows: (para. 95)

(a) if the agreement was to force the Government to comply with the Five Demands, and the refusal was done without looking at the contents and the merits of the budgets, and if the defendants indeed intended to carry out their part of the agreement as alleged, the Court simply did not see how it would be possible for them to approve the CE's application for provisional appropriations under BL 51; (para. 97)
(b) according to the intention of the defendants as alleged by the prosecution, the second bill, even if introduced, would similarly be rejected regardless of its merits and contents; (para. 98) and
(c) the Court was aware that the CE had the power, after the first dissolution of the LegCo, to approve provisional short-term appropriations according to the level of expenditure of the previous fiscal year. However that meant the Government would not be able to introduce any new policies or any increase in expenditure regarding existing policies on benefiting people's livelihood. The performance of its duties and functions would be seriously undermined or disrupted. (para. 99)

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[4] S. 159A(1) of the CO provides:
"Subject to the following provisions of this Part, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either
(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement; or
(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,
he is guilty of conspiracy to commit the offence or offences in question."

34. The Court hence had no doubt that any of the “constitutional crises” outlined above, if occurred, would necessarily result in “seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of power of the HKSAR”. (para. 100)

35. A point was made on the “factual impossibility” of the offence, i.e. the offence was “impossible” in the sense that some of the defendants believed at the time that the Project 35+ could not succeed as the Government would disqualify the candidates from the pro-democracy camp or that insufficient seats could be secured for the functional constituencies, which might even not cast a vetoing vote on the budgets due to business interest, so that the latter would never be able to obtain a majority in the LegCo. (para. 101)

36. As to this, the Court found it necessary to point out that, provided that all the elements of the offence charged were present, the fact that the offence was objectively impossible to succeed would not afford the accused a defence: s. 159A(1)(b) of the CO. Therefore, even if the facts were such that commission of the underlying offence of NSL 22(1)(3) was impossible, the conspiracy could still be caught by s. 159C of the CO. That said, the intention to carry out the underlying offence was a critical element of the offence of conspiracy. In this case, since one of the ingredients of the substantive offence was that the act was done with a specific intent, the prosecution had to prove not only that the conspirators had intended to do the prohibited act, but also that they had intended to do the prohibited act with the specific intent. (para. 102)

C. Factual issues

37. Based on the above ruling on the law, the major factual issues in the case were as follows: (para. 107)

(a) whether there was at the material time an agreement in existence as alleged by the prosecution;
(b) if so, whether the defendants had knowledge of the Scheme;
(c) if so, whether the defendants were parties to that Scheme; and
(d) if so, whether the defendants had also the intention to subvert the State power and with that intention participated or continued to participate in the Scheme.

38. The above issues might overlap, and might not be decided in the order as listed above, much depending on the individual cases of the defendants. Moreover, there were factual issues other than the above in relation to the individual case of the defendants. (para. 107)

39. The Court combed through the evidence from inception of the conspiracy, promotion of Project 35+ and participation in the Project, and came to the view that the Scheme, if carried out in accordance with the intentions of the parties as alleged, would necessarily amount to or involve the commission by the successful candidates of a serious interfering in, disrupting or undermining the performance of duties and functions in accordance with the law by HKSARG. (para. 190)

D. Conclusion

40. Having considered the evidence and submissions of the individual defendants, the Court found 14 defendants guilty of the charge, while Lau Wai-chung and Lee Yue-shun not guilty of the charge.

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