Case Summary

HKSAR v Lai Chee Ying (1st Defendant "D1")
Apple Daily Limited (2nd Defendant "D2")
Apple Daily Printing Limited (3rd Defendant "D3")
AD Internet Limited (4th Defendant "D4")

HCCC51/2022; [2023] HKCFI 3337
(Court of First Instance)
(Full text of the Court's ruling in English at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=157099&QS=%24%28HKCFI%2C3337%29&TP=JU)

HCCC51/2022; [2024] HKCFI 58
(Court of First Instance)
(Full text of the Court's ruling in English at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=157212&QS=%2B%7C%28HCCC%2C51%2F2022%29&TP=JU)

Before: Hon Toh, Hon D'Almada Remedios and Hon Alex Lee JJ
Dates of Hearings: 18 and 19 December 2023 (Time limit for prosecution);
2 January 2024 (Application for "clarification" of the Court's previous ruling)
Date of Ruling: 22 December 2023; 2 January 2024

Time limit for prosecution – conspiracy offence under Crimes Ordinance ("CO"), Cap. 200 – conspiracy is a continuing offence – when time starts to run in a continuing offence

Time limit for prosecution – meanings of "prosecution" and "begun" in s. 11 of the CO – whether "prosecution" must entail the appearance of the defendant in court to answer to the alleged offence

The point of time when criminal proceedings commenced – what constituted sufficient "information" and "laying of an information" for the purpose of relevant provision(s) of the Magistrates Ordinance ("MO")

Application for "clarification" of the Court's previous ruling – argument not raised on the last occasion – no second bite of the cherry of the same matter

Absence of merits of the application – no ambiguity in the Court's previous ruling – conspiracy is a continuing offence – no valid reason to artificially split the sedition charge into two parts – backdoor and audacious challenge to change Court's ruling

Background

1. The sole question is whether the charge against the defendants, being conspiracy to commit sedition, contrary to ss. 10 (1) (c), 159A and 159C of the CO ("the sedition charge"), which was alleged to have taken place between 1 April 2019 and 24 June 2021, was time-barred pursuant to s. 11(1) of the CO, which provided for the prosecution to be "begun" within 6 months after the offence is committed.

2. Prosecution's letter indicating the addition of the sedition charge, together with it annexures including the consents of the SJ was received by the Magistrate on 14 December 2021, while copies of the same documents were served on the legal representatives of all the defendants on that same day.

3. The defence challenged that the prosecution of the sedition charge was not begun on or before 1 October 2019 which was 6 months after the first date mentioned in the sedition charge.

4. Alternatively, the defence contended that the sedition charge was not begun on or before 24 December 2021 which was 6 months after the last date mentioned in the sedition charge, as the prosecution against D1 of the sedition charge only "begun" on 28 December 2021 when D1 was

brought to and appeared before the Magistrate in court to answer that charge, and only "begun" on 10 February 2022 for D2-D4 when they appeared before the Magistrate.

5. The defence therefore asserted that the sedition charge was time-barred and the court had no jurisdiction to deal with the sedition charge.

6. The Court ruled in favour of the prosecution that the sedition charge is not time barred. The Court held that the time limitation applicable under the sedition charge should only start to run on 24 June 2021, the last date of the charge of conspiracy to commit sedition, so that the prosecution of the defendants would be time-barred after 24 December 2021. The prosecution of the sedition charge was begun or instituted on 14 December 2021, which fell within the prescribed time limit of 6 months under s. 11 of the CO. The application of the defence therefore failed.

7. Subsequently, the 1st Defendant (D1) applied for "clarification" of the Court's ruling above, and asserted that the period of the conspiracy can be broken down into 2 periods: namely from 1 April 2019 to 13 June 2021 (which was beyond 6 months before the institution of the prosecution on 14 December 2021); and 14 June 2021 to 24 June 2021 (which was within 6 months before the institution of the prosecution on 14 December 2021).

8. Prosecution complained that such application was novel which raised completely new grounds, amounting to an abuse of process.

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

- Crimes Ordinance (Cap. 200), ss. 10(1)(c), 11(1) and 159
- Magistrates Ordinance (Cap. 227), s. 75

9. The Court discussed (in HKCFI 3337):

(a) the question of when the limitation of time starts to run in the

conspiracy, which involved multiple acts in violation of s. 10, CO; and

(b) the meaning of "prosecution" and when it was "begun" for the purpose of s. 11(1) of CO.

10. The Court discussed (in HKCFI 58):

(a) whether the application for "clarification" of the ruling was in fact an attempt to re-open a decided issue; and

(b) merits of the application.

Summary of the Court's rulings

(a) When time starts to run in a conspiracy (HKCFI 3337)

11. The defence contended that the conspiracy was "consummated" upon the commission of the first substantive offence pursuant to the conspiracy, and under s. 159D(1) of the CO, what triggers the running of time should be the first execution of the object of conspiracy (i.e. its "consummation"). (paras. 17-18 of the Court's ruling in HKCFI 3337) The defence therefore submitted that the sedition charge is time-barred after 1 October 2019.

12. The Court however noted that conspiracy is a continuing offence. (para. 33 of the Court's ruling in HKCFI 3337) The limitation of time would not commence to run until the cessation of the alleged conspiracy. In the present case, it was alleged that the defendants conspired to commit more than one act in violation of s. 10, CO, and the sedition charge would not have been "stale" after the commission of "the first offence". (para. 35 of the Court's ruling in HKCFI 3337)

13. The Court recognized that the subject matter of the sedition charge was the unlawful agreement pleaded by the prosecution, rather than any alleged overt acts carried out in pursuant to that agreement. (para. 33 of the Court's ruling in HKCFI 3337) The Court was therefore unable to accept the defence's contention that the alleged conspiracy is

"consummated" upon the commission of the first substantive offence in pursuance to the alleged conspiracy. (para. 35 of the Court's ruling in HKCFI 3337)

14. The Court held that the limitation of time should only start to run from the last, rather than the first date of what was covered by the conspiracy charge, so long as there is sufficient evidence to support the prosecution's case that there was one single conspiratorial agreement covering the whole of the charge period. (para. 41 of the Court's ruling in HKCFI 3337)

15. The Court therefore held that the time limitation applicable under the relevant provision of the CO should only start to run until the cessation of the alleged conspiracy (i.e. 24 June 2021), being the last date of the charge, and the prosecution would only be time-barred after 24 December 2021 (paras. 36 and 42 of the Court's ruling in HKCFI 3337).

(b) The meaning of "prosecution" and when it was "begun" for the purpose of s. 11(1) of CO (HKCFI 3337)

16. The Court was of the view that the issue as to when a "prosecution" was "begun" or "instituted" depends on the context in which those words are used and the purpose of the provisions. (paras. 43 and 45 of the Court's ruling in HKCFI 3337)

17. The Court noted that the constitutional framework in Hong Kong as set out in the Basic Law provides a clear division of function and duty between the prosecution and the courts, with the exercise of judicial powers belonging to the courts of the HKSAR, whilst the control of criminal prosecutions is the province of the Department of Justice. (para. 46 of the Court's ruling in HKCFI 3337)

18. The Court observed that, pursuant to the relevant provisions of the MO, the sedition charge was an indictable offence which shall be commenced by laying of an information before a Magistrate, which may occur before an accused appears or is brought to court. (para. 55 of the Court's ruling in HKCFI 3337) "Information" was defined by s. 2 of the

MO to include a charge, and such information alleging the commission of an indictable offence must be in writing, which shall contain or consist of a statement of the offence alleged to have been committed, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence. (para. 56 of the Court's ruling in HKCFI 3337)

19. The Court, after considering previous authorities, was of the view that in the present case, information was laid when the prosecution's letter indicating the addition of the sedition charge, together with it annexures, were received by the Magistrates' Court on 14 December 2021. The Court found the same to constitute sufficient "information" for the purpose of s. 75 of the MO. Therefore, no more is required of the prosecutor to launch the intended criminal proceedings, and what happened thereafter was not within the province of the prosecutor but of the Court (paras. 57 and 59 of the Court's ruling in HKCFI 3337).

20. The Court explained that the prosecution was the laying of the information, which was the act for the determination of whether or not the time limit had been met and proceedings had been instituted. (para. 60 of the Court's ruling in HKCFI 3337)

21. The Court also opined that should the defence's contention that the prosecution can only begin when a defendant appears in or is brought to court to answer the charge was right, this would lead to surprising results. The Court asked rhetorically a particular defendant who cannot appear in court due to his/her hospitalization, out of the jurisdiction or absconding and can only be brought to the Court after the time bar. If the contention of the defence was correct, then in such cases the defendant could no longer be tried as the prosecution would be time barred at the time of his/her appearance before the Court. The Court was not persuaded such undesirable outcome was the intention of the Legislature. (para. 62 of the Court's ruling in HKCFI 3337)

(c) Attempt to re-open a decided issue (HKCFI 58)

22. The Court noted that Counsel for D1 frankly admitted the argument

which he was seeking to advance had not been argued by him on the last occasion (i.e. in HKCFI 3337). The Court did not accept the label of the application as a "clarification", but found the same as a bold attempt to raise a new point which had not (but should have been) argued. The Court opined that counsel is expected to raise all his arguments in one go and not in a piecemeal fashion. (para. 4 of the Court's ruling in HKCFI 58)

23. After considering previous authorities and noting that D1 was all along represented by the same team of lawyers, the Court ruled that D1 was bound by the decision of his Counsel not to pursue the argument and should not be allowed to have a second bite of the cherry of the same matter.

24. Therefore, any application to re-open the time bar issue which had already been decided by the Court should not be entertained. (para. 5 of the Court's ruling in HKCFI 58)

(d) Merits of the application (HKCFI 58)

25. The Court found that, in any event, D1's application had no merit whatsoever, and did not accept that there was any ambiguity in the previous ruling of the Court requiring clarification. (para. 6 of the Court's ruling in HKCFI 58)

26. The Court reiterated that the alleged sedition charge was a continuing offence, and saw no valid reason to artificially split the same into two parts, as suggested by Counsel for D1.

27. The Court was of the view that the crux of the application being made by the defence was that the charge should be amended so that the date of the offence only commences from 14 June 2021 as opposed to 1 April 2019, and found such suggestion in complete contradiction to the Court's previous ruling, amounting to a backdoor and audacious challenge to change the Court's ruling. (paras. 7 and 9 of the Court's ruling in HKCFI 58)

28. The Court found the subject matter of the sedition charge as one

single unlawful agreement to which D1 was alleged to be one of the parties, whether or not the same in fact consisted of a single conspiracy (if any) and when such alleged conspiracy came to an end is a matter of evidence (para. 9 of the Court's ruling in HKCFI 58).

Conclusion

29. As the information of the sedition charge was received by and laid at the West Kowloon Magistracy on 14 December 2021, before 24 December 2021 after which the sedition charge would have been time barred, the sedition charge is therefore not time barred. The application of the defence therefore failed.

30. The subsequent application for "clarification" of the Court's ruling on 22 December 2023 was also dismissed. The Court was of the view that such application by D1 could not and should not be entertained. It was also clear from the Court's previous ruling that the sedition charge was not time-barred, and there was no reason to artificially split the charge into two parts (paras. 5 and 10-11 of the Court's ruling in HKCFI 58).

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