

## Case Summary (English Translation)

### **HKSAR v Best Pencil (Hong Kong) Limited, CHUNG Pui-kuen (鍾沛權) and LAM Shiu-tung (林紹桐)**

DCCC 265/2022; [2024] HKDC 1430

(District Court)

(Full text of the English translation of Court's reasons for verdict at  
[https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=163283](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=163283))

Before: Honour Judge W K Kwok

Date of Reasons for Verdict: 29 August 2024

***Time limit for prosecuting an offence – section 159D of the Crimes Ordinance – continuous offence – time limit for prosecution does not start to run until after the period of the offence has ended***

***Sections 9 and 10 of the Crimes Ordinance – elements of the offence – incitement to violence not a necessary element of the statutory offence of sedition – mens rea – specific intent – with specific seditious intent or reckless about the consequences and knowingly taking the risk***

***Duties and roles of the press – Article 16(3) of the Hong Kong Bill of Rights – Article 19(3) of the ICCPR – observe and discharge “special duties and obligations”, including “safeguarding national security or public order (ordre public), or public health or morals”***

#### **Background**

1. The three defendants were jointly charged with one count of conspiracy to publish and/or reproduce seditious publications, contrary to ss. 10(1)(c), 159A and 159C of the Crimes Ordinance (Cap. 200) (“CO”). (para. 1)

2. The first defendant, Best Pencil (Hong Kong) Limited (D1), was the registered proprietor, printer and publisher of Stand News, an online media, under the Registration of Local Newspapers Ordinance (Cap. 268). The second defendant, Chung Pui-kuen (D2), was employed by D1 as the Chief Editor of Stand News from December 2014 onward. The third defendant, Lam Siu-tung (D3), similarly, was employed by D1 from December 2014 onward as a reporter of Stand News and was promoted to Deputy Editor on 1 December 2019. After the resignation of D2 on 1 November 2021, D3 was promoted to Acting Chief Editor and took up the duties of the Chief Editor. (para. 2)

3. The particulars of offence charged against the three defendants were that they: (para. 3)

“Between the 7<sup>th</sup> day of July, 2020 and the 29<sup>th</sup> day of December, 2021, both dates inclusive, conspired together and with other persons, to publish and/or reproduce seditious publications, namely publications having an intention: -

- (a) to bring into hatred or contempt or to excite disaffection against, the Central Authorities or the Government of the Hong Kong Special Administrative Region;
- (b) to excite inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established;
- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong;
- (d) to raise discontent or disaffection amongst inhabitants of Hong Kong;
- (e) to incite persons to violence; and/or
- (f) to counsel disobedience to law or to any lawful order.”

4. D1 did not appoint any of its directors, shareholders or legal representatives to attend any hearing. On the other hand, D2 and D3 pleaded not guilty to the charge and stood trial. (para. 5) In considering whether a trial should be conducted in the absence of D1, the court applied the legal principles set out by the Court of Appeal (“CA”) in *HKSAR v KWAN Wai-keung & Others* (CACC 259/2011). (paras. 11-16)

The judge exercised discretion to grant the prosecution's application and allowed the prosecution to adduce evidence in the absence of D1. (para. 17)

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

- Crimes Ordinance (Cap. 200), ss. 9, 10, 159A, 159C and 159D

### **Summary of the Court's rulings**

#### **A. Legal challenges brought by the defence**

##### ***(a) Time limit for prosecuting the offence***

5. The defence objected to D2 and D3 being prosecuted on 13 of the 17 articles which Stand News removed from its website more than six months by the date on which the prosecution charged the three defendants. It was argued that the time limit had expired, and the prosecution could not lay prosecution in respect of the publication of the articles, and was also barred by s. 159D(1) of the CO from prosecuting for the offence of conspiracy to publish seditious publications. (para. 17-22)

6. The Court applied *HKSAR v Lai Chee Ying* [2023] HKCFI 3337 in which it was held that the time limit for a conspiracy to commit multiple breaches of s. 10 did not start to run until the last day covered by the charge. (para. 26) As the allegation in this case also involved a conspiracy to commit multiple and successive breaches of s. 10 of the CO, the Court accepted the prosecution's argument that the time limit for prosecution did not start to run until the period of the offence had ended. The prosecution in this case was therefore not brought out of time. (para. 27)

7. As regards the restriction on prosecution under s. 159D(1) of the CO, as the content of the conspiratorial agreement alleged was the continuing publication of seditious articles in Stand News, s. 159D(1) did not restrict the institution of prosecution of the agreement. The Court

also agreed that the publications of the articles were only the overt acts of the conspiratorial agreement which could be used to prove the agreement in question. It was therefore held that the prosecution could adduce evidence in respect of all 17 articles from A1 to A17. (para. 30)

***(b) Application for permanent stay of proceedings***

8. The defence applied for a permanent stay of proceedings because apart from the 30 articles that the prosecutions had disclosed, the Police had also downloaded from the website of Stand News a few hundred articles which were not disclosed to the defence. (paras. 31-32)

9. It was held that there was insufficient evidence to show that the police officers had deliberately failed to disclose or delayed the disclosure of all the relevant materials. After the disclosure had been made by the prosecution, the defence was given sufficient time to examine the relevant articles, and the Court found that the delay in disclosure had not caused severe prejudice against the defence so that a fair trial would become impossible. (para. 45) On the whole, the defence had not proved that the prosecution's failure to disclose and/or delayed disclosure of the materials had resulted in the defence being denied a fair trial. The defence was neither able to establish that allowing the prosecution to continue would result in an abuse of the court proceedings by the prosecution, nor establish any other valid ground in support of a permanent stay of the proceedings. The defence application was dismissed. The prosecution was to proceed. (para. 48)

**B. Issues**

10. After stating the prosecution case (paras. 49-94) and the defence case (paras. 95-133) respectively, the judge gave legal directions to himself (paras. 134-142) before ruling on the following issues: (para. 143)

- (1) Whether the prosecution is required to prove that the publications in question constituted a real risk to national security;
- (2) The *mens rea* required for the offence of publishing seditious

publications;

(3) Whether operational proportionality is applicable in this case.

***(a) Proper application of s. 9(1) of the CO***

11. The defence accepted that the offence of publishing seditious publications is for the protection of national security, but argued that by considering the relevant words in ordinary daily usage while applying s. 9(1) of the CO, the restriction on freedom of speech would not be in compliance with the principle of legal certainty, because the literal meanings of those words such as “hatred”, “contempt”, “disaffection” and “discontent” in the provisions rendered the definitions of the seditious intentions vague and subjective, and the scope of application was also overbroad and arbitrary. The defence therefore argued that there must be certain requirements limiting the extent of those words. (para. 152(4))

12. The defence agreed with the judgment in *Lai Man Ling* that an intention of incitement to violence is not a necessary element of the offence of sedition. However, the defence argued that the prosecution still had to prove that the relevant publications and the publisher had the intentions to incite people to create a public disturbance or disorder against constituted authority. (para. 152(5))

13. The Court referred to the CA’s judgment in *HKSAR v Tam Tak Chi* [2024] HKCA 231 which ruled that the relevant words in s. 9(1) of the CO satisfied the principles of legal certainty, and could be regarded as prescribed by law, satisfying the requirement of proportionality, and did not contravene the Basic Law and the Hong Kong Bill of Rights. The Appeal Committee of the Court of Final Appeal (“CFA”) also affirmed the CA’s ruling, refusing to grant leave to appeal on whether or not the requirements of legal certainty and proportionality in relation to ss. 9 and 10 were satisfied. (para. 155)

***(b) S. 9(2) of the CO not applicable where the intention is to seriously undermine government authority etc.***

14. With reference to the CA's judgment in *Tam Tak Chi* and the Court's judgment in *Lai Man Ling*, the Court agreed that, in accordance with s. 9(2), pointing out errors in government measures, constitution, legislation or the administration of justice, or even persuading Hong Kong inhabitants to procure by lawful means the alteration of matters as by law established with a view to the remedying of such errors or defects would not constitute any seditious intention. On the other hand, the Court considered that s. 9(2) is clearly not applicable to speeches lacking an objective factual basis but having the intention of seriously undermining the authority of the Central Authorities or the SAR Government and so on. (paras. 161-164)

***(c) Whether an intention to incite public disturbance or disorder is an element of the offence***

15. As the CA ruled in *Tam Tak Chi* that the elements of the common law offence of sedition were not applicable to the statutory offence of sedition in Hong Kong, the defence submission must be rejected. (para. 167) The judge further stated that even without the CA's judgment, he would have rejected the defence submission with reference to the legislative records and background of the Sedition Ordinance 1938. (paras. 168-174)

***(d) Real risks to national security***

16. The defence was of the view that the offence of publishing seditious publications required that the *actus reus* constitutes a real risk to national security, because if there is no real risk to national security, the restriction on freedom of speech would become unreasonable and unnecessary, and would not be in accordance with the principle of systemic proportionality. (para. 152(6))

17. The CA in *Tam Tak Chi* pointed out that safeguarding national security must be balanced against the protection of fundamental rights such as freedom of speech and freedom of publication. To satisfy the principle of proportionality, the speech constituting the offence must be potentially detrimental to national security, public order and safety in the

relevant context. (para. 175)

18. In other words, when a speech is assessed as having seditious intentions, the relevant actual circumstances must have been taken into account, and the speech must have been deemed thereunder to be potentially detrimental to national security and has to be stopped. In addition, the intention concerned is the intention to seriously undermine the legitimacy or authority of the Central Authorities or the SAR Government, etc. The CA stated in para. 127 of *Tam Tak Chi* that it was irrelevant whether the audience were so incited by the seditious speech. Therefore, the Court held in the present case that as long as the relevant speech or publication is found to have the seditious intentions under s. 9(1), there is no need to separately consider whether the speeches constitute any real risks to national security. (para. 176)

***(e) Publisher must have a specific intent or must be reckless about the consequences***

19. In *Lai Man Ling*, the Court ruled that the offence of publishing seditious publications was an offence of specific intent. (para. 178) In the present case, the prosecution took the view that the requisite *mens rea* was the publisher's knowledge of the article's seditious intent, while the defence submitted that the ruling of *Lai Man Ling* was correct. (para. 179)

20. For the following three reasons relied upon by the same judge in *Lai Man Ling*, it was the Court's view that a publisher must have a specific intent before he can be convicted: (para. 181)

- (1) In general, when interpreting a statute, the common law presumes that the *mens rea* of an offender is necessary for conviction, and the prosecution failed to show that this presumption had been rebutted;
- (2) the old provisions assisting the prosecution to prove the *mens rea* of an offender were repealed in 1970, and they were repealed not for the reason of doing away with the burden of proof being imposed on the prosecution, but to require the prosecution to prove on their own the offender's intention

unaided by any statutory presumption; and  
(3) in *Fei Yi Ming*, when the trial judge directed the jury, he also asked them to consider the publisher's intention.

21. A sedition offence is an offence targeted against the consequences of the crime. Given such circumstances, in accordance with the principles laid down in *Kulemesin*, taking into account the fact that the offence of publishing seditious publications is intended to prevent speech from causing potential detrimental consequences to national security, the judge was of the view that his earlier decision in *Lai Man Ling*, whereby a publisher is guilty only if he has the specific seditious intent, is ineffective in safeguarding national security. This is because according to this view, even if a publisher is reckless as to the consequences of sedition, as long as there is no specific seditious intent, he cannot be found guilty, thus defeating the law's preventive nature. (para. 183)

22. On reconsideration, the judge considered that the appropriate balance is to require the prosecution to prove either that the publisher had the seditious intentions (specific seditious intent) of s. 9(1) at the time of publishing seditious publications, or that the publisher knew at the time of publishing that the seditious publications had the seditious intentions of s. 9(1) but was reckless as to the consequences and still published them (reckless as to the consequences of sedition). He also repeated the ruling in *Lai Man Ling* that a publisher does not need to have exactly the same seditious intentions mirroring those of the seditious publications, and that only at least one being the same will do. The judge ruled that the offence of sedition is an offence of specific intent, and that specific intent means that a publisher who publishes seditious publications with specific seditious intent, or is reckless about the consequences of sedition and knowingly takes the risk, will be held liable. This principle would not only safeguard national security effectively but also properly protect those fundamental rights such as freedom of speech and freedom of publication. (para. 183)

***(f) Operational proportionality***



23. Regarding operational proportionality, the defence was of the opinion that the court had to consider the overall circumstances, and whether or not the Defendants' freedom of speech and freedom of the press would be disproportionately restricted if the Defendants were convicted. (para. 152(7))

24. The Court held that when a speech, in the relevant context, is assessed to be causing potentially detrimental consequences to national security, and having the intention of seriously undermining the authority of the Central Authorities or the SAR Government, and thus has to be stopped, the resulting conviction would as a matter of course be in line with the operational proportionality principle, and therefore no further considerations will be required. The CFA in *HKSAR v Ng Ngoi Yee & ors* [2024] HKCFA 24 also affirmed that when a court applies provisions that are constitutionally valid when considering whether a defendant is guilty, there is no need to consider separately whether the conviction is in accordance with the principle of operational proportionality. (para. 184)

25. In *Tam Tak Chi*, the Appeal Committee of the CFA also affirmed the decision of the CA and did not grant leave to appeal on the ground of whether ss. 9 and 10 were consistent with the requirements of legal certainty and proportionality. (para. 185)

26. For the above reasons, the Court ruled that the defence failed on the constitutionality challenges, whereas the prosecution was required to prove that the defendants had the specific intent mentioned above in order to secure a conviction. (para. 186)

### **C. Duties and roles of the press**

27. When considering the publication of speeches, information and articles by the media and its workers, the only restriction is that they must observe and discharge certain "special duties and obligations", including "safeguarding national security or public order (*ordre public*), or public health or morals": Article 16(3) of the Hong Kong Bill of Rights, and Article 19(3) of the International Covenant on Civil and

Political Rights. There is no statutory requirement under the Laws of Hong Kong for the media to comply with any professional codes, nor is there a law restricting the media from becoming a political or advocacy platform, but any speech or publication that endangers national security or public order will be restricted. (para. 189)

28. When considering cases of the European Court of Human Rights illustrating the duties and responsibilities of the media, in particular those of editors, the judge found that paragraph 329 of the “Guide on Article 10 of the European Convention on Human Rights – Freedom of Human Rights (updated on 31 August 2022)” prepared by the European Council is obviously the most important. It states that the protection afforded by Article 10(2) of the European Convention on Human Rights to journalists in reporting matters of general interest should be subject to the condition that they must “act in good faith and on accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism”. (paras. 190-191)

#### **D. No unfairness in the trial**

29. The defence argued that the prosecution was not entitled to prove conspiracy by including in cross-examination other Stand News reports beyond the 17 articles. However, the Court had ruled that the master chronology of events concerning the background relating to the 17 articles and the related news reports are relevant to prove whether the defendants had the *mens rea* and may be used by the prosecution in cross-examination. (paras. 114 and 198) On the whole, there had been no unfairness in the trial. (para. 201)

#### **E. Articles with seditious intentions**

##### ***(i) Findings on the context of the relevant time period***

30. In the light of the CA’s judgment in *Tam Tak Chi*, the Court considered the actual circumstances, including the context of the relevant time period, as to whether the 17 articles had seditious intentions. (para. 202) In particular, the Court considered whether the

public was susceptible to incitement during that period, or whether a social setting had existed in which, in the words of Mr Justice Coleridge in *R v Aldred* (1909) 22 Cox C.C. 1, “a spark will explode a powder magazine”. (para. 204)

31. Whilst the time of the offence alleged in the charge was between 7 July 2020 and 29 December 2021, the context of the relevant time period was plainly interlinked with earlier events in Hong Kong. In considering the social context of the material time, an appropriate starting point would as a matter of course be the Anti-Extradition Law Amendment Bill Movement (Anti-ELAB Movement) which took place in 2019. (para. 206) The judge went on to consider events in the context of the period. (paras. 207-267)

***(ii) The 17 articles***

32. Based on the findings on the context of the relevant time period, the Court then considered the 17 articles (paras. 268-381). 11 out of the 17 articles, namely A1, A4, A5, A7, A10, A11, A12, A13, A14, A15, and A16, were ruled to have seditious intentions and found to be seditious publications. (para. 384)

33. Regarding readers’ comments on the social media platforms of Stand News in relation to the 17 articles, it was held that the writers of the comments were not qualified as expert witnesses, and their interpretations and/or reactions to the articles were not admissible as evidence of the facts. (paras. 382-383)

**F. *Mens rea* of the defendants**

34. The fact that the articles which were ruled to have seditious intentions and found to be seditious publications were published on the Stand News website and social media accounts is not in dispute, and D2 admits that he, as Chief Editor of Stand News, had approved the publication of all the articles except A16. At the time when A16 was published, D3 was the acting Chief Editor of Stand News, and the police had written to D3 (because of his capacity as Chief Editor), complaining

about A16's content, but A16 was published nonetheless. Therefore, the only reasonable and irresistible inference is that D3 approved the publication of A16 in Stand News. What follows is whether all or some of the three defendants knew that the articles were seditious and whether each defendant acted with *mens rea* (had the intent of sedition or was reckless as to the consequences of sedition). (para. 384)

35. In considering whether the three defendants had seditious intentions, the factors which the judge, as a juror, may take into account can include the source of funding of Stand News, the political background of the shareholders, editorials, published articles, publications, personnel appointments, and so on. (para. 397)

***(i) Trust Arrangements and Launch Statement***

36. Considering the establishment of Stand News, its Launch Statement, and the trust arrangement made by Tsoi Tung-ho ("Tsoi"), who left Hong Kong on 17 November 2019<sup>1</sup>, Yu, and D2 with their funders who did not wish to disclose their identities (who according to the Launch Statement approved of Stand News's journalistic philosophy), the Court was certain that D2 and Tsoi and others, for the benefit of the anonymous funders, operated an online media outlet in Hong Kong called Stand News to support and promote localism for Hong Kong's local self-rule. (para. 450)

37. Having addressed the source of funding for Stand News and its political proposition as stated in the Launch Statement, the Court then turned to some of the editorials published by Stand News. (para. 452)

***(ii) The line taken by Stand News***

38. From the background of the inception of Stand News, its Launch Statement, its three editorials and its paper publication, which was News Stand, the Court ruled that the political ideology of Stand News was localism, and that the line it took was to support and promote Hong Kong's self-rule, and that it had even become a tool for smearing and

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<sup>1</sup> See paragraph 4 of Reasons for Verdict.

vilifying the Central Authorities and the SAR Government during the Anti-ELAB Movement. This ruling did not mean that Stand News could not have published other non-seditious publications, such as non-political news, messages from the government or pro-establishment, or even interviews with government officials or pro-establishment figures. The defence that Stand News also published other publications did not affect the Court's ruling. (para. 485)

***(iii) Whether there was mens rea in publishing the articles***

39. D2 as the Chief Editor of Stand News, admitted having approved the publication of articles A1, A4, A5, A7, A10, A11, A12, A13, A14 and A15, which the Court ruled to be seditious. Having regard to the line that Stand News took, the judge found that D2 had knowledge and he approved of the articles' seditious intentions, and offered Stand News as the publishing platform to incite hatred towards the Central Authorities or the Hong Kong Government, to excite inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of matters established by law, and to incite hatred towards the administration of justice. In any event, D2 had at least been reckless about the consequences of sedition. The judge found that D2 had the *mens rea* for s. 10(1)(c) of the CO. (para. 486)

40. As regards article 16 (i.e. A16), the judge found that it was approved and published by D3. Having considered the line that Stand News took, D3's speech in support of the Anti-ELAB Movement when he appeared in the forum summit for online media in the capacity of Deputy Chief Editor, the act of embedding video clips that showed again slogans of the protests and the persistence in publishing A16 despite the complaint letter from the police about it being misleading and biased, the judge found that D3 had knowledge and he approved of the article's seditious intentions, and had offered Stand News as the publishing platform to incite hatred towards the Central Authorities or the Hong Kong Government and to incite hatred towards the administration of justice. In any event, D3 had at least been reckless about the consequences of sedition. The Court found that D3 had the *mens rea* for s. 10(1)(c) of the CO. (para. 487)

41. D1 employed D2 and D3 as the Chief Editor / Acting Chief Editor for the production and publication of the articles in question on behalf of D1. As such, the publication of these articles by D2 and D3 within the scope of the employment was tantamount to publication of the same by D1, and their intentions amounted to D1's intentions. Since D1 was the proprietor, printer and publisher of Stand News, he was also presumed to have published the articles under s. 15 of the Local Newspapers Ordinance, Cap. 268. (para. 488)

#### **G. Conspiratorial agreement existed between the defendants**

42. Tsoi, being the directing mind and will of D1, had the control of Stand News' operations and had a more senior position than D2. The only reasonable inference was that he must have had knowledge of the publication contents. In his testimony, D2 stated that the two of them shared similar stances on key core values or major issues of principles. D2 used to be an editor of House News that had been run by Tsoi previously and was invited by Tsoi to join as the Chief Editor upon the establishment of Stand News. D2 agreed that the Chief Editor was removable from office, but he remained in that post until the arrest of his wife; he then had to visit her every day, rendering it impossible for him to work. Therefore, Tsoi must also have approved of D2's decisions regarding publishing the publications. (para. 490)

43. From Tsoi's invitation of D2 to join Stand News as the Chief Editor, his knowledge of the contents of the publications by Stand News, and his approval of D2's decisions regarding publishing the publications, including publishing the above publications which have been ruled to be seditious, the only reasonable inference was that Tsoi, on behalf of D1, had an agreement with D2 regarding Stand News' publication, namely the conspiratorial agreement as stated in the charge of this case, on the continuous publication of seditious articles in Stand News. (para. 491)

44. D3's taking over of the post of Chief Editor after D2 had left the post must have received the consent and approval of Tsoi. Undoubtedly, with Tsoi's consent, there existed the same agreement with D3, as with D2, regarding publications by Stand News. In other words, when D3

took over the post, he joined in the above conspiratorial agreement between Tsoi and D2. D3's speech at the forum summit for online media and his approval and publication of A16 also support such an inference. (para. 492)

## **H. Conclusion**

45. The three defendants were found guilty of the charge of conspiracy to publish and/or reproduce seditious publications. (para. 493)

***Endnote – HKSAR v Best Pencil (Hong Kong) Limited, Chung Pui-ken and Lam Shiu-tung, DCCC 265/2022; [2024] HKDC 1609 (Full text of the English translation of Court's reasons for sentence at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=163596](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=163596))***

46. After considering the background of the three defendants and the family circumstances of D2 and D3 as set out in the judgment (paras. 3-9), and submissions for mitigation (paras. 10-27), the court delivered reasons for sentence.

47. Since this was the first time that the three defendants had been convicted, pursuant to s. 159C(4) of the CO, where the offence is punishable with imprisonment, the person convicted shall be liable to imprisonment for a term not exceeding the maximum term of 2 years. (para. 28) The culpability of each defendant was, of course, the weightiest consideration in sentencing. It directly affected the options available for sentencing, and the length of the term when imprisonment was the only appropriate sentence. (para. 29)

48. The judge pointed out: the offence of which the three defendants were convicted is that between the 7<sup>th</sup> day of July, 2020 and the 29<sup>th</sup> day of December, 2021, they conspired together and with other persons to publish and/or reproduce seditious publications, and not merely conspiring to publish and/or reproduce the 11 articles (A1, A4, A5, A7, A10 to A16) ruled by the Court to be seditious publications. These 11 articles were the overt acts of the conspiracy, and it was from these overt acts that the court inferred the existence of the conspiracy and that the

defendants together with others published seditious articles from time to time under such conspiracy. (para. 30)

49. In addition, the judge pointed out that it was not for performing journalistic duties of reporting that the three defendants were convicted. The judge ruled that sedition is an offence of specific intent, and that the prosecution must prove either that the publisher had the seditious intentions of s. 9(1) at the time of publishing the seditious publications (intentional), or that the publisher knew at the time of publishing that the seditious publications had the seditious intentions of s. 9(1) but was reckless as to the consequences and still published them (being reckless as to the consequence of sedition): see paragraph 183 of the Reasons for Verdict. (para. 31)

50. After analysing three editorials which had been published by Stand News and the paper publication “News Stand” published by Stand News, the judge ruled that the political ideology of Stand News was localism, and that the line it took as a media outlet was to support and promote local self-rule in Hong Kong, and that it had become a tool for smearing and vilifying the Central Authorities and the HKSAR Government during the Anti-ELAB Movement: see paragraph 485 of the Reasons for Verdict. Taking into account the line taken by Stand News, the judge further inferred that D2 and D3 knew and approved of the seditious intentions of the 11 articles at the time of publishing them and provided Stand News as the publishing platform, and therefore had the specific seditious intent, or at least were reckless as to the consequences of the sedition. (para. 33) The judge therefore did not accept the mitigation that D2 and D3 were convicted for performing the reporting duties of journalists. (para. 34)

51. The defence asserted that before this case, no guideline had been laid down by the court to restrict journalists, and D2 and D3 therefore did not know what they were not allowed to publish, and that they did not knowingly commit the offence, but just breached the law inadvertently. (para. 35)

52. The judge did not agree with the submission. Sedition has been a statutory offence since 1938, *Fei Yi Ming v The Crown* [1952] 36 HKLR



133 is a precedent recorded in the law report. According to the decision of the Full Court in that case, incitement of violence was not an element of the statutory offence of sedition in Hong Kong. Unless the judgment in the case is overturned, this remains a valid principle of law that gives guidance to media practitioners, including D2 and D3. (para. 36)

53. Moreover, s. 9(1) of the CO specifies which intentions constitute seditious intention. S. 9(2) further provides that even if a publisher publishes a statement or publication that may fall within the seditious intention under s. 9(1), as long as the publisher only intends to point out the errors in the measures of the Government, in the constitution, legislation or administration of justice, or to persuade the inhabitants of Hong Kong to make lawful alteration of any matter established by law, he will not be regarded as having a seditious intention. Therefore, one can see that the law has already provided the guideline on what media practitioners can or cannot publish, and what is crucial is clearly the publisher's intention. Besides, as the freedom of speech and freedom of the press are protected by the Basic Law, the Hong Kong Bill of Rights and the International Covenant on Civil and Political Rights, even though there is no precedent involving the media after the reunification, there are still a large number of overseas cases, including those of the European Court of Human Rights, to which journalists can make reference. The European Court of Human Rights has formulated guidelines on the duties and responsibilities of editors. Such guidelines are readily available on the Internet. (para. 37)

54. When the court has to determine whether a defendant has published a seditious publication, it will first consider whether the publication in question has any seditious intention. If the answer is no, the case ends and the defendant is not guilty; it is only when the answer is yes that the court will further consider whether the defendant himself has any seditious intention (specific seditious intent or recklessness). In the judge's view, in respect of journalists, the order of consideration can be reversed. If a person, including a journalist, intends to publish an article which criticises the Government and/or the regime, the judge may first consider what his intention is in publishing the article. If it is to smear and vilify the Central Authorities and the HKSAR Government

with the intention of seriously undermining the legitimacy, recognition or authority of the Central Authorities, HKSAR Government and their institutions, the constitutional order or status of the HKSAR, and the judicial system of the HKSAR; or intends to cause serious harm to the relationship between the Central Authorities or the HKSAR Government and Hong Kong inhabitants, or among Hong Kong inhabitants themselves, then he of course has to be liable for the offence. On the other hand, if his intention falls under s. 9(2), and instead of smearing, vilifying or spreading hatred or fear, his criticism or opinion is based on facts confirmed to be true by proper verification and authentication, and he maintains a faithful and impartial attitude in presenting, describing and recounting his comments or opinions in compliance with the code of ethics of journalism, in such a case, he will not be guilty of sedition even if his criticisms are strong and sharp. (para. 39)

55. It was also not accepted that Article 33 of the NSL applied to D2. D2 did not, in the course of committing an offence, voluntarily discontinue the commission of the offence. He removed some of the articles only to reduce the risk of having the law enforcement departments taking action against him and Stand News. (para. 49)

56. It is the view of the Court that during the period of the offence, the three defendants were not engaged in genuine journalistic work, but were participating in the so-called struggle at that time. It can be seen from the editorials of Stand News and News Stand that they sided with the protesters, resisting the Government. The crime committed by the three defendants was very serious. The conspiracy in question had lasted for about 1 year and 5 months, and even if one only focuses on the eleven articles which have been found seditious, they were published mostly at a time when over half of the people in the Hong Kong society had the least trust in the Central Authorities, the HKSAR Government, the Police Force and the Judiciary. Given that Stand News had about 1,600,000 followers, these seditious articles must have caused significant harm to both the Central Authorities and the HKSAR Government and also its inhabitants, although it is difficult to quantify such harm. (para. 50)

57. Due to the gravity of the offence, the Court found that imprisonment is the only appropriate sentencing option. (para. 51)

58. Having regard to the grounds for mitigation, the Court sentenced D2 to a term of 21 months' imprisonment (paras. 53-56) and D3 to a term which allowed him an immediate release having regard to his health condition. (paras. 57-61) Regarding the sentence of D1, the only viable sentencing option was a fine. The Court imposed a fine of HK\$5,000 on D1 which was the maximum penalty under the legislation. (para. 62)

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