HCCC 280/2020
[2021] HKCFI 2239

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CRIMINAL CASE NO 280 OF 2020

BETWEEN

HKSAR

and

Tong Ying Kit (唐英傑) Defendant

Before: Hon Toh, Anthea Pang and Wilson Chan JJ in Court
Dates of Trial: 23-25, 30 June, 2, 5 - 9, 12 - 15 and 20 July 2021
Date of Verdict: 27 July 2021
Date of Sentence: 30 July 2021

R E A S O N S F O R S E N T E N C E

These proceedings and the facts

1. The Defendant stood trial before us after pleading not guilty to the offences of "incitement to secession" and "terrorist activities" under the NSL[1]. We convicted the Defendant of both

[1] Articles 21 and 24 of the NSL respectively.

offences on 27 July 2021 at the end of the trial and gave our Reasons for Verdict[2]. On 29 July 2021, we heard the mitigation advanced by Mr Grossman, SC, on behalf of the Defendant and we then adjourned sentence to 30 July 2021.

2. As we have set out in our Reasons for Verdict the evidence adduced at trial and our findings, we do not propose to repeat in detail the facts relating to the two offences. To put shortly, in the afternoon of 1 July 2020, the Defendant was found driving his motorcycle with a flag at his back bearing the Slogan "光復香港 LIBERATE HONG KONG 時代革命 REVOLUTION OF OUR TIMES". He ignored all the instructions given by the police to stop his motorcycle, and instead, ran through the police checklines, eventually crashing into a group of police officers. As a result, three of them were injured.

3. For PC 8260, there was no obvious fracture or dislocation at the injured sites. However, he had tenderness at the lower lumbar spine; both shoulders; index and middle fingers; both wrists; and abrasion at the left elbow; as well as haematoma on both forearms, and multiple bruising marks on knees. PC 8260 was discharged on 8 July 2020 with sick leave granted to 17 August 2020. He returned to work subsequently but when he testified at trial, he told the court that he had still not yet fully recovered in that he would feel painful when he moved his left wrist, and would find it relatively difficult even to perform simple tasks like twisting the cap of a water bottle. He also said he still had

[2] [2021] HKCFI 2200.

pain in his left shoulder and left waist and had to attend follow-up once every 3 months.

4. DPC 2674 was found to have right thumb dislocation with no definite fracture. He was treated with aluminium splint. Further, there was marked swelling at his left leg and bruise mark was noted at the shin region. Upon MRI examination, the left leg showed a 4.8 x 2.1 x 6.2 cm oval-shaped swelling, likely to be a haematoma. DPC 2674 also complained of left chest pain but radiographs of the chest and ribs showed no definite fracture. He was given sick leave up to 23 August 2020. At trial, DPC 2674 told us that, as at present, his right thumb could only bend for 45 degrees and he could not exert the same strength on his right thumb like before. However, he no longer required any follow-up.

5. PC 12197 had tenderness over his right chest wall and right thumb after the crash. No fracture was seen. He was treated and discharged on the same day with sick leave given to 5 July 2020.

The Defendant's background and mitigation

6. The Defendant was born in Hong Kong in 1996 and was educated up to Secondary 5 level. He was aged 23 at the time of the offences and is now aged 24. It was reported that the Defendant's health was good and he had worked as a restaurant waiter. He lived in a public housing unit with his father and younger sister. The Defendant was convicted of 4 traffic

offences between November 2017 and January 2020 in respect of all of which he was fined.

7. In mitigation, Mr Grossman submitted that this being the first NSL case and that the court's reasons for verdict are now widely circulated, others would know the consequences if they were to carry out similar acts like those of the Defendant and so the deterrent effect is achieved. Mr Grossman further submitted that the Defendant was instrumental in bringing out this warning to the public and in the circumstances, the court could consider imposing a more lenient sentence.

8. In respect of the Article 21 offence, Mr Grossman suggested that what is "serious" under the Article should be an actual effective one-on-one communication between the incitor and the incitee. Since what the Defendant did was simply raising a flag while driving around, it was said that the incitement was of a minor nature and nobody was actually affected other than by cheering and clapping hands. Therefore, Mr Grossman urged us to treat the circumstances of this offence as belonging to the category of "a minor nature" which would attract "fixed-term imprisonment of not more than five years, short-term detention or restriction" under Article 21 of the NSL.

9. For the Article 24 offence, Mr Grossman submitted that the Defendant was not mounting a deliberate attack on the police with the intention to cause serious bodily injuries or to kill. He also made the observation that the injuries of the police officers

were not serious as there was no bone fracture and none required any operations. In the circumstances, Mr Grossman said that this case should fall into the "other circumstances" limb of Article 24 which would only call for "fixed-term imprisonment of not less than three years but not more than ten years".

10. Although there are two offences, Mr Grossman said that, on the facts, they melded into one and wholly concurrent sentences were appropriate.

11. In respect of the Defendant's personal background, Mr Grossman emphasised that he was a decent young man. He committed the offences out of stupidity but he is now genuinely remorseful. Letters written by the Defendant himself, his family members, relatives and friends were handed up to the court. In the letters, the Defendant was invariably described as a simple-minded and kind-hearted person as well as a filial son who supported the family and his younger sister's studies abroad. In relation to the commission of the present offences, the Defendant's father said that he was easily influenced by politics and it was "bad publication that led to his wrong act" whilst the Defendant's aunt considered him to have been "affected by some people in the society and the media's false reporting". For the Defendant himself, he wrote to express his remorse, saying that he had now come to realise that political views are matters of perspectives and should not be more

important than human decency. He also expressed the hope that the society might put aside hatred.

12. In short, Mr Grossman urged us to pass as lenient a sentence as possible, taking into account the circumstances of this case.

Sentencing considerations - count 1: incitement to secession

13. Article 1 of the Basic Law of the Hong Kong Special Administrative Region ("HKSAR") provides that the HKSAR is an inalienable part of the People's Republic of China ("PRC"). Article 12 of the Basic Law further provides that the HKSAR shall be a local administrative region of the PRC, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.

14. Article 2 of the NSL in turn stipulates that the provisions in Articles 1 and 12 of the Basic Law on the legal status of the HKSAR are the fundamental provisions in the Basic Law. No institution, organisation or individual in the HKSAR shall contravene these provisions in exercising their rights and freedoms.

15. Accordingly, in our view, any person in the HKSAR who commits secession or carries out any act undermining national unification or inciting other persons to do so must be suitably punished for contravening such fundamental provisions in the Basic Law. Moreover, the punishment must have as its aim a

general deterrent effect on the community as a whole, as well as a specific deterrent effect on the individual in question.

16. Article 21 of the NSL sets up a tiered system for sentencing offenders of incitement to secession.

17. It provides:

> 「情節嚴重的，處五年以上十年以下有期徒刑；情節較輕的，處五年以下有期徒刑、拘役或者管制。」

18. Its English translation reads:

> "If the circumstances of the offence committed by a person are of a serious nature, the person shall be sentenced to fixed-term imprisonment of not less than five years but not more than ten years; if the circumstances of the offence committed by a person are of a minor nature, the person shall be sentenced to fixed-term imprisonment of not more than five years, short-term detention or restriction."

19. The circumstances in which the Defendant committed the offence of incitement to secession included the following: the Slogan was printed on a flag carried on his back when he was travelling on a busy public highway on 1 July 2020 plainly in the view of the general public; he had deliberately failed to stop his motorcycle at multiple police checklines, showing obvious and open defiance to lawful instructions given by law enforcement officers duly tasked to maintain law and order in Hong Kong; 1st July is the anniversary date of the establishment of the HKSAR and the resumption of sovereignty over Hong

Kong by the PRC Central People's Government; and 1 July 2020 was also the very next day after the NSL had come into effect[3].

20. It was our finding that the way in which the Defendant displayed the flag was clear proof that he intended to attract public attention and intended the flag to be seen by as many people as possible. Mr Grossman argued that the present circumstances were of a minor nature in that it was not an actual one-to-one communication. It would seem, in making that claim, that Mr Grossman was suggesting that an incitement to the public at large would be less effective an incitement when compared with that by way of a one-to-one communication. If that was the suggestion, then there was nothing to support this claim.

21. "An inciter … is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take many forms, such as a suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity."[4] Given the various forms an incitement may take, its effectiveness must depend on the particular circumstances of the case in question. In any event, the criminality of the offence of incitement does not depend on the incitee actually acting upon the incitement to

---

3 See, in particular, [140] of the Reasons for Verdict.

4 [28] of the Reasons for Verdict, referring to *R v Goldman (Terence)* [2001] EWCA Crim 1684.

commit the offence but on the incitor who seeks to influence another to commit an offence.

22. In the present case, the Defendant was not a lone protester quietly carrying a flag bearing the Slogan amongst a sea of protesters, he deliberately challenged a number of police checklines in order to attract as much attention to the secessionist message on the flag as possible and to leave a great impact and a strong impression on people. In our Reasons for Verdict, we also made the point that it was the Defendant who set the context for the display of the flag. The date, the time, the place and the manner were deliberately picked for attracting public attention.

23. The date of 1 July 2020 was of particular importance as it was the first day of implementation of the NSL, a law which was promulgated in light of the "increasingly notable national security risks in the HKSAR … [in] particular, since the onset of Hong Kong's 'legislative amendment turmoil' in 2019, anti-China forces seeking to disrupt Hong Kong have blatantly advocated such notions as 'Hong Kong independence', 'self-determination' and 'referendum', and engaged in activities to undermine national unity and split the country"[5].

24. Having taken into account all the above, we find that the circumstances of the offence of incitement to secession committed by the Defendant are of a "serious nature" under

[5] *HKSAR v Lai Chee Ying* [2021] HKCFA 3, [12].

Article 21 of the NSL, warranting a sentence of imprisonment of not less than five years but not more than 10 years.

25. On the other hand, we note that the offence committed by the Defendant, albeit of a serious nature, is not the worst case of its kind in that the Defendant committed the offence alone, and that the Slogan was a general call for the separation of the HKSAR from the PRC, without an elaborate plan being conveyed to the public at the same time.

26. In the circumstances, we consider that a starting point of 6½ years' imprisonment for count 1 should sufficiently reflect the Defendant's culpability in this offence.

Sentencing considerations - count 2: terrorist activities

27. Article 24 is in similar terms as the statutory provisions dealing with terrorist activities in other jurisdictions[6], some of which also carrying a maximum penalty of imprisonment for life. However, as each piece of statute will have its own structure and substance, and also because the cultural as well as socio-economic situation pertaining at the material time when a sentence is considered by the court would not be identical, we do not find it helpful to refer to the sentences passed in the other jurisdictions.

[6] Section 5 of the UK Terrorism Act 2006; Offence to engage terrorist act under the Australian Criminal Code (Section 101.1); and the Offences of Terrorism under the Canadian Criminal Code.

28. In respect of Article 24 of the NSL, it again adopts a tiered sentencing regime.

29. It provides:

> 「犯前款罪，致人重傷、死亡或者使公私財產遭受重大損失的，處無期徒刑或者十年以上有期徒刑；其他情形，處三年以上十年以下有期徒刑。」

30. Its English translation reads:

> " A person who commits the offence causing serious bodily injury, death or significant loss of public or private property shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; in other circumstances, a person who commits the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years."

31. In the course of mitigation, Mr Grossman suggested that the Defendant was merely driving recklessly on the day in question. This suggestion was not borne out by the evidence and was in fact contrary to our finding that the Defendant could have and should have stopped his motorcycle before he drove past each checkline and that despite repeated warnings, he deliberately ran through the checklines, eventually crashing into the police officers at Checkline 4[7].

32. We are further of the view that what the Defendant did was calculated and deliberate acts which created a very dangerous

[7] [127] of the Reasons for Verdict.

situation for the road users and which indeed caused injuries to three police officers.

33. Moreover, as pointed out in our Reasons for Verdict, the Defendant's acts were pre-planned. He took a convoluted route and he deliberately challenged the police checklines. What he did had not only jeopardised public safety and security but had also caused grave harm to the society[8].

34. We also note that the Defendant's motorcycle was one with a 599cc engine and 120 hp[9]. We had opportunities, at trial, to see for ourselves from the footages as to how the motorcycle was driven by the Defendant. We have no doubt that, like any other vehicle, the Defendant's motorcycle was a lethal weapon when driven in the dangerous manner as the Defendant did in this case. It was only fortunate that not more serious injuries were caused to the police officers and that the other road users were not hurt.

35. However, in our assessment, while the injuries sustained by the officers were not minor at all, they were not serious bodily injuries（重傷）. Therefore, the "other circumstances" limb of the sentencing regime is applicable, and we shall determine the starting point for this count based on that range.

---

8 [162] and [163].

9 Further Admitted Facts [24].

36. On our finding, the political agenda in count 2 was of a secessionist nature, which involves a contravention of the fundamental provisions in the Basic Law as observed above. We consider this to be a matter which we should take into account in sentencing the Defendant for the offence of terrorist activities.

37. Needless to say, whoever carries out terrorist activities with a view to intimidating the public in order to pursue political agenda, whatever that is, should be condemned and punished, but when the political agenda is secessionist in nature, it is our view that there is an added criminality in that such an agenda is seeking to undermine national unification.

38. We do not consider taking the secessionist nature of the political agenda into account would involve any double counting of this factor. For count 1, the secessionist meaning of the Slogan was the basis of the offence of incitement and was pivotal to the commission of the offence in count 1. As such, it is therefore not considered as an aggravating factor. For the offence in count 2, the political agenda could be secessionist in nature, or otherwise, but if it is the former, then there is the added criminality as explained above. In any event, we will keep in mind the totality principle in coming to an overall appropriate sentence for the two counts.

39. Having taken into account all the relevant matters, we consider a starting point of 8 years to be appropriate for count 2.

Sentencing in this case

40. As set out above, we have determined that the appropriate starting point for count 1 is 6½ years and that for count 2 is 8 years. We note the Defendant's expressed remorse. If he had pleaded guilty, that would have been the greatest manifestation of such remorse and appropriate reduction in sentence would have been available to him. The Defendant, however, pleaded not guilty to the offences, which of course is his right, but he cannot now rely on the expressed remorse as a mitigating factor to ask for a reduction in sentence.

41. We also note that apart from the few minor traffic convictions, the Defendant was previously of good character and we would treat him as such in sentencing. However, in the face of serious offences as the two counts in this case, his good character is not of any mitigating value.

42. The court is sympathetic to the Defendant's family members in respect of the predicament they may be in given that the Defendant was the main bread-winner and given the reportedly ill health of his mother and the advance age of his maternal grandmother. However, these are matters which the Defendant should have thought about before embarking on his criminal acts. They could not be any mitigating factors.

43. In the circumstances, we sentence the Defendant to 6½ years and 8 years respectively for counts 1 and 2. Although the two offences arose from the same set of facts, they are separate and

distinct offences with completely different elements and targeting different criminal conduct. In principle, consecutive sentences should be passed. However, considering the totality principle, we are minded to order partly consecutive and partly concurrent sentences in that 2½ years of the sentence for count 2 are to run consecutively to that of count 1, the rest to run concurrently, resulting in a total term of 9 years. We consider that this overall term should sufficiently reflect the Defendant's culpability in the two offences and the abhorrence of society, at the same time, achieving the deterrent effect required.

44. Given that the Defendant used his motorcycle in the course of the commission of the present offences, we also have to consider, apart from the aforesaid imprisonment term, whether a disqualification order[10] is appropriate. Plainly, in light of the fact that the Defendant was only holding a probationary driving licence at the time; the fact that he had 4 traffic convictions at the time of commission of the present offences; and the very dangerous manner in which the Defendant drove the motorcycle on the day in question, this is an obvious case in which a disqualification order should be imposed and Mr Grossman did not seek to argue otherwise.

---

[10] Section 69(1)(h) of the Road Traffic Ordinance, Cap 374, which reads: "(1) Without prejudice to any other provision relating to the penalty that may be, or is required to be, imposed for an offence, a court or magistrate before which a person is convicted of any of the following offences may order him to be disqualified for such period as the court or magistrate thinks fit – (h) any offence during the course of which, or in order to escape apprehension for which, he uses a motor vehicle.".

45. What remains to be considered is the duration of such an order. In *SJ v Hung Ling Kwok*[11], Cheung, JA, after referring to a line of authorities, pointed out that, based on the "forward looking and preventive" principle, the period of disqualification must run concurrently with the term of imprisonment and should have actual effect by being longer than the prison sentence. Further, the disqualification period should not anticipate the defendant's early release for good conduct[12].

46. In the present case, having considered the particular facts and in view of the overall term of 9 years imposed on the Defendant, we are of the view that the appropriate period of disqualification should be one of 10 years and we so order.

(Esther Toh)	(Anthea Pang)	(Wilson Chan)
Judge of the Court of First Instance	Judge of the Court of First Instance	Judge of the Court of First Instance

Mr Anthony Chau, DDPP (Ag) and Mr Ivan Cheung, SPP of the Department of Justice, for the HKSAR

Mr C S Grossman, S C leading Mr Lau Wai-chung Lawrence, assigned by Director of Legal Aid and Ms Chan Pik-kei (on a *pro bono* basis), instructed by Bond Ng Solicitors, for the Defendant

---

11 [2010] 4 HKLRD 365.

12 [14] to [18].