

HCCC 51/2022  
[2024] HKCFI 58

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
CRIMINAL CASE NO 51 OF 2022**

BETWEEN

HKSAR

Respondent

and

LAI CHEE YING 1<sup>st</sup> Defendant (D1)

APPLE DAILY LIMITED 2<sup>nd</sup> Defendant (D2)

APPLE DAILY PRINTING LIMITED 3<sup>rd</sup> Defendant (D3)

AD INTERNET LIMITED 4<sup>th</sup> Defendant (D4)

Before: Hon Toh, Hon D'Almada Remedios and Hon Alex Lee JJ in Court

Date of Hearing: 2 January 2024

Date of Ruling: 2 January 2024

**R U L I N G**

Introduction

This is the application of D1 for “clarification” of our ruling handed down on 22 December 2023 (“**the Ruling**”) concerning the time limitation issue of Count 1 of the Indictment.

The Question asked

2. The question which Mr Pang, SC, counsel for D1, now poses is as follows (footnotes omitted):

“2. In the Ruling, this Court ruled that:

2.1. the limitation of time started to run on 24 June 2021 (§42);

2.2. the prosecution on count 1 was begun or instituted on 14 December 2021 (§§59 and 61); and

2.3. therefore count 1 is not time-barred.

3. However, this Court further held that:

“... by the operation of ss 11(1) and 159D(1) of the CO, the Sedition Charge<sup>2</sup> is still subject to a time limitation of 6 months.” (§41)

“... [the purpose of s 11(1) of the CO] is to prevent the prosecution of “stale” of-fences and to prompt the prosecution to act in a timely fashion.” (§48)

**C. The two periods of continuation of conspiracy**

4. As it now stands, the conspiracy under count 1 is alleged to have continued from 1 April 2019 to 24 June 2021. By reference to ss 11(1) and 159D(1) of the CO, that period of 815 days can be broken down into 2 periods:

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- 4.1. 1 April 2019 to 13 June 2021 (which was beyond 6 months before the institution of the prosecution on 14 December 2021); and
- 4.2. 14 June 2021 to 24 June 2021 (which was within 6 months before the institution of the prosecution on 14 December 2021).
5. As time limitation goes to the jurisdiction of the Court to try the accused on the charge, it is necessary for this Court to determine whether its jurisdiction extends beyond the 6-month period from the commencement of the prosecution on 14 December 2021.
6. This issue was understandably not canvassed during the arguments on 18 and 19 December 2023 as the “conspiracy argument” advanced on behalf of Mr Lai with reference to s 159D(1) of the CO (which is not accepted by this Court) precluded this issue.
7. This issue is raised on the basis of the conclusions reached by this Court as out-lined in §§2 and 3 above.”

3. Mr Chau, for the Prosecution, objects to the present application to raise completely new grounds and complains that it amounts to an abuse of process.

### Consideration

#### *Attempt to re-open a decided issue*

4. As frankly admitted by Mr Pang, the argument which he now seeks to advance had not been argued by him on the last occasion. Although Mr Pang labels the present application as a seeking of “clarification”, it is, with respect, a bold attempt to raise a new point in the disguise of seeking a clarification which has not (but should have been) argued. In this regard, we are not impressed by Mr Pang’s explanation that

the issue which he now wishes to raise was somehow precluded by his previous stance on the “conspiracy argument”, as it is not uncommon for counsel to advance his arguments on alternative bases. Counsel is expected to raise all his arguments in one go and not in a piecemeal fashion.

5. D1 has already had the opportunity and has fully argued his case that Count 1 was time-barred. In those submissions argued, his counsel made an informed choice and decided not to pursue the argument which his counsel now wants to advance on his behalf. As such, D1 is bound by that previous decision of his counsel and any application to re-open the time bar issue which has already been decided by this court shall not be entertained: cf *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208. If the accused in *Chiang Lily’s case* was not allowed to have a second bite of the cherry of the same matter by changing his legal team, we are unable to see how D1 could do so when he is all along represented by the same team of experienced and competent lawyers. For this reason alone, D1’s present application cannot and should not be entertained.

*Absence of merits of the application*

6. In any event, we are satisfied that D1’s present application has no merit whatsoever. We do not accept that there is any ambiguity in the Ruling which needs to be “clarified”.

7. Mr Pang’s new argument, with respect, goes against the Ruling that the Sedition Charge is alleging a continuing offence. The crux of the application being made by the defence on this different and fresh point is 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. This is in complete contradiction to our ruling and is with respect a backdoor and audacious challenge to change our ruling. As we have already pointed out in the Ruling, the subject matter of Count 1 is the unlawful agreement pleaded by the prosecution, rather than any alleged overt acts carried out in pursuant to that agreement. (at para 33<sup>1</sup>) Based on the case authorities we referred to, Count 1 is a continuing offence and that the time limitation applicable under s159D(1) of the Crimes Ordinance (“CO”) did not start to run until after the cessation of the alleged conspiracy. (at paras 36 & 40)

8. The case authorities relied upon by Mr Pang for his new argument do not in fact assist D1, as the provisions for time limitation applicable in those cases were such that time started to run when the matter complained of arose and the cases were decided on that basis:

(1) In *R v Slade ex p Saunders* [1895] 2 QB 247, where the accused was convicted of an offence of acting contrary to a closing order, the applicable provision for time limitation was s11 of the Summary Jurisdiction Act 1848 which required “such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose”.

(2) In *R v Chertsey Justices ex p Franks* [1961] 2 QB 152, where the accused was convicted of failure to comply with an enforcement notice to discontinue use of his land as a caravan

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<sup>1</sup> Paragraph no. of the Ruling. Same as below.

site, s104 of the Magistrates' courts Act 1952 provided that the six-month time limitation was "from the time when the offence was committed, or the matter of complaint arose"; and

- (3) In *Silochan v Cedeno* (2023) 102 WLR 540, where the appellants were convicted of failure to comply with an enforcement notice to demolish extensions of their property, s33(2) of the Summary Courts Act said, "the complaint "shall be made within six months from the time when the matter of the complaint arose, and not after."

Whereas in the present case, by reading s.11 and s.159D of the CO together, the time for bringing a prosecution under s.10 of the CO is limited to "within 6 months *after* the offence is committed. Therefore, we do not see any inconsistencies between the aforesaid authorities and the judgment of the Court of Appeal in *HKSAR v Kong Wai Chun*, CACC 252/2009 (unreported, dated 20 May 2011). In any event, as we have said in the Ruling, we agree with and consider ourselves bound by *HKSAR v Kong Wai Chun*.

9. Furthermore, as we have said in the Ruling (at para 41):

"we can see no unfairness or injustice to the accused if the time only starts to run from the last, rather than the first date of 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)

The subject matter of the Sedition Charge is one single unlawful agreement to which D1 is alleged to be one of the parties. As noted in the above passage, whether or not the Sedition Charge in fact consisted of a single conspiracy (if any) and when such alleged conspiracy came to an end is a matter of evidence. Subject to any evidence to the contrary which may emerge during the trial, we can see no valid reason to artificially split the Sedition Charge into two parts, as counsel is now seeking to do.

10. Lastly, it is clear from our ruling that the Sedition Charge is not time-barred and we see no reason to amend it as suggested by D1. (at Para 64)

Conclusion

11. Based on the above, the present application of D1 must be dismissed.

(Esther Toh)  
 Judge of the  
 Court of First Instance  
 High Court

(S. D' Almada Remedios)  
 Judge of the  
 Court of First Instance  
 High Court

(Alex Lee)  
 Judge of the  
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Mr Anthony Chau, DDPP, Mr Ivan Cheung, ADPP (Ag), Ms Karen Ng, SPP, and Ms Crystal Chan, SPP of the Department of Justice, for the Respondent

Mr Robert Pang, SC leading Mr Marc Corlett, Mr Steven Kwan, Mr Albert N.B. Wong, Mr Colman Li, and Mr Ernie Tung, instructed by Robertsons, for the 1<sup>st</sup> Defendant

Mr Jon Wong, Ms Natalie Yeung and Ms Joanna Wong, instructed by Sit Fung Kwong & Shum, for the 2<sup>nd</sup> to 4<sup>th</sup> Defendants

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