

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

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The Judgment is available at

PRESS SUMMARY

HKSAR

v

<i>TAI YIU TING</i>	<i>D1</i>
<i>CHAN KIN MAN</i>	<i>D2</i>
<i>CHU YIU MING</i>	<i>D3</i>
<i>CHAN TANYA</i>	<i>D4</i>
<i>SHIU KA CHUN</i>	<i>D5</i>
<i>CHEUNG SAU YIN</i>	<i>D6</i>
<i>CHUNG YIU WA</i>	<i>D7</i>
<i>WONG HO MING, RAPHAEL</i>	<i>D8</i>
<i>LEE WING TAT</i>	<i>D9</i>

DCCC 480 of 2017

TRIAL JUDGE: HH Judge Johnny Chan

OFFENCES:

Charge 1: Conspiracy to commit public nuisance (against D1 to D3)

Charge 2: Incitement to commit public nuisance (against D1 to D7)

Charge 3: Incitement to incite public nuisance (against D1 to D7)

Charge 4: Incitement to commit public nuisance (against D8)

Charge 5: Incitement to incite public nuisance (against D8)

Charge 6: Incitement to commit public nuisance (against D9)

DATES OF HEARING: 19-22 & 26-30 November; 3-7 & 11-14 December 2018

DATE OF VERDICT: 9 April 2019

VERDICT:

Charge 1 – D1 -D3 guilty of conspiracy to commit public nuisance

Charge 2 – D1, D2, D4, D5, D6 and D7 guilty of incitement to commit public nuisance. D3 not guilty of the charge

Charge 3 – D4, D5, D6 and D7 guilty of incitement to incite public nuisance. D1, D2 and D3 not guilty of the charge

Charge 4 – D8 guilty of incitement to commit public nuisance

Charge 5 – D8 guilty of incitement to incite public nuisance

Charge 6 – D9 guilty of incitement to commit public nuisance

D1 is convicted of Charge 1 and Charge 2. He is acquitted of Charge 3.

D2 is convicted of Charge 1 and Charge 2. He is acquitted of Charge 3.

D3 is convicted of Charge 1. He is acquitted of Charge 2 and Charge 3.

D4 is convicted of Charge 2 and Charge 3.

D5 is convicted of Charge 2 and Charge 3.

D6 is convicted of Charge 2 and Charge 3.

D7 is convicted of Charge 2 and Charge 3.

D8 is convicted of Charge 4 and Charge 5.

D9 is convicted of Charge 6.

COUNSEL FOR THE HKSAR:

Mr David C Y Leung, SC, Director of Public Prosecutor, Mr Lui Tsz Ming Ira, Senior Assistant Director of Public Prosecutor, and Mr Lau Tak Wai Derek, Senior Public Prosecutor, for HKSAR / Director of Public Prosecutions

COUNSEL FOR THE DEFENDANTS:

Dr Gerard McCoy, SC, Mr Albert N B Wong, Mr Steven M W Kwan, instructed by Tang, Wong & Chow, for the 1st to 3rd defendants

Mr Ching Y Wong, SC, leading Ms Fiona H Y Nam and Ms Adgie N K Chan, instructed by CLY Lawyers, for the 4th defendant

Mr Robert Pang, SC leading Mr Timothy T Y Lam, instructed by Ho, Tse, Wai & Partners, for the 5th defendant

Mr Hectar H Pun, SC, leading Mr Anson Y Y Wong, instructed by Kenneth Lam, assigned by the Director of Legal Aid, for the 6th defendant

Mr Dykes Philip John, SC, leading Mr Tam Chun Kit, instructed by Kenneth Lam, assigned by the Director of Legal Aid, for the 7th defendant

Mr Lawrence Lok, SC, leading Mr Chan Wai Yin Joe, instructed by Ho, Tse, Wai & Partners, assigned by the Director of Legal Aid, for the 8th defendant

Mr Edwin Choy, SC, Ms Senia Ng and Ms Chow Hang Tung, instructed by Ho, Tse, Wai & Partners, for the 9th defendant

SUMMARY:

1. The Court heard arguments on the appropriateness and constitutionality of the charges.
2. The Court found that the use of the common law offence of public nuisance instead of appropriate statutory offences in the present case does not violate the convention that the Prosecution should behave with restraint. Whether the use of the common law offence of public nuisance would result in a heavier penalty in the event of a conviction depends on the culpability that the Prosecution is able to prove.
3. For the reasons given in the judgment, the Court found that the offence of conspiracy to cause a public nuisance does not have the undesirable effect of curtailing or suppressing civil disobedience at its formation stage or suppressing human rights as the defendants contended.
4. The Court found that if the agreement under complaint is one to occupy public roads by way of peaceful demonstration which would result in obstruction, if the Prosecution fails to prove the element of “not warranted by law”, the offence of conspiracy to cause a public nuisance cannot be made out. If the Prosecution is able to prove that if the agreement under complaint is carried out accordance with the intentions of the defendants, the demonstration in question would result in obstruction which is unreasonable according to the reasonableness test in *HKSAR v Yeung May Wan*, and hence not warranted by law, the parties to the agreement cannot complain if a charge of conspiracy to cause public nuisance is brought against them.

5. The Court found that on a charge of conspiracy to cause public nuisance, the court in determining whether the obstruction is unreasonable, is required to have the protection given to peaceful demonstration given by the Basic Law in the forefront of its consideration. The Court held that a charge of conspiracy to cause public nuisance would not generate a chilling effect in society and silence many legitimate speeches as the defendants contend.

6. The Court found that the constitutional challenge against Charge 1 failed for the reasons given in the judgment.

7. On Charge 1, the Prosecution alleged that D1 to D3, between about March 2013 and 2nd December 2014, in Hong Kong, conspired together and with other persons to cause a nuisance to the public through the unlawful obstruction of public places and roads in or in the neighbourhood of Central.

8. Charge 1 concerned a campaign known as “Occupy Central with Love and Peace” or “Let love and Peace Occupy Central” launched by D1 to D3 in or about March 2013 (the “OCLP”). Through the OCLP, D1 to D3 strived for their advocated form of universal suffrage in the election of the Chief Executive of the Hong Kong Special Administrative Region. D1 to D3 announced the commencement of the OCLP in a press conference on 27th March 2013.

9. The OCLP was a 4 stages campaign according to D1 to D3: signing of the covenant; the deliberation day; citizen authorization process, and finally, the act of civil disobedience.

10. The Prosecution alleged that the conspiracy under complaint was a conspiracy to obstruct unlawfully public places and roads in or in the neighbourhood of Central. The occupation of the public thoroughfares that D1 to D3 agreed to carry out would amount to a common injury to the public or a significant section of the public, hence what was agreed was a conspiracy to commit public nuisance.

11. The Prosecution alleged that the conspiracy was formed in March 2013 and ended on 2nd December 2014 when D1 to D3 announced their intention to surrender to the police on the following day.

12. The Court ruled admissible the survey results of the public surveys conducted by DW6 Professor Lee Lap Fung Francis. For the reasons given in the judgment, the Court attached no weight to the survey results.

13. D2 gave evidence that the OCLP initiated by D1 to D3 and what happened in late September 2014 and thereafter until 2nd December 2014 was a movement of civil disobedience. For the reasons given at paragraphs 262-270, for most part of the time during the conspiracy, D1 to D3 had been using a wrong yardstick to measure the proportionality of the disruption.

14. The Court noted that whilst the concept of civil disobedience is recognized in Hong Kong, civil disobedience is not a defence to a criminal charge.

15. The Court found that what had been agreed upon by D1 to D3 in March 2013 was an agreement to pursue a plan, i.e. the OCLP, which

might develop into a conspiracy to commit public nuisance. However, what had been agreed by D1 to D3 in March 2013 by D1 to D3 did not yet amount to a conspiracy to commit a public nuisance.

16. On 31st August 2014, the Standing Committee of the National People's Congress promulgated its decision on issues relating to the election of the Chief Executive of the HKSAR by universal suffrage in 2017 ("the Decision on 31st August).

17. Following the Decision on 31st August, protests were held against the decisions.

18. Following the Decision on 31st August, D1 to D3 decided to launch the civil disobedience part of the OCLP. They decided to launch the Occupy Central Movement on 1st October 2014 at Chater Road. A Notification of Intention to Hold a Public Meeting at Chater Road was served on the Police.

19. D1 to D3 agreed that after the notified meeting was over, they would start the civil disobedience part of the OCLP by the occupation of the pedestrian precincts of Chater Road. They also agreed that in the event a Letter of Prohibition was issued against the proposed meeting on 1st October 2014, the OCLP would go ahead at the planned location, the participants would sit and remain there after the public holidays and commence civil disobedience there.

20. The notified public meeting at Chater Road did not take place because of what took place in late September 2014.

21. On 22nd September 2014, the Hong Kong Federation of Students and Scholarism launched class boycotts against the Decision on 31st August.

22. Starting on 26th September 2014, public meetings were held at Tim Mei Avenue against the Decision on 31st August.

23. During a notified public meeting held at Tim Mei Avenue on 26th September 2014, certain students at the public meeting charged into the East Wing Forecourt of Central Government Offices (“CGO”) to “reclaim” the said forecourt. Some student leaders were arrested. Some protestors who had entered Civic Square occupied the flagstaff platform therein and refused to leave.

24. It was against the above background that D1 to D3 appeared at the venue at Tim Mei Avenue in the afternoon of 27th September 2014. D1 addressed the crowd in the presence of D2 at Tim Mei Avenue and said amongst other things:-

“..Let’s over-cram Admiralty first. Where shall (we) over-cram next? Central! We must be able to see the arrival of genuine universal suffrage in Hong Kong!”

25. At around 1:36 a.m. on 28th September 2014, D1 to D3 announced the launch of the Occupy Central movement. D1 said the Occupy Central movement would begin with occupying the CGO.

26. The Court found that as D1 to D3 implemented the OCLP, the agreement they reached in March 2013 became a conspiracy to commit

public nuisance in September 2014 when they decided to launch the Occupy Central Movement on 1st October 2014 at Chater Road.

27. The Court found that by announcing the launch of the Occupy Central movement on 28th September 2014, D1 to D3 only modified the original plan to launch the Occupy Central movement at Chater Road on 1st October 2014. The agreement remained a conspiracy to cause a public nuisance to the public through the unlawful obstruction of public places and roads in or in the neighbourhood of Central.

28. The Court found that the obstruction that would be caused to Chater Road according to the original plan and the obstruction caused to the roads as a result of the launch of the Occupy Central movement on 28th September 2014 unreasonable and hence unwarranted by the law.

29. The Court found that D1 to D3 remained parties to the conspiracy until 2nd December 2014 when they manifested their intention to surrender to the Police on the following day.

30. The Court found all the elements of the offence of conspiracy to cause public nuisance proved against D1 to D3 beyond reasonable doubt.

31. Charge 2 and Charge 3 concerned the words said by D1 to D7 at Tim Mei Avenue on 27th and 28th September 2014. The words said by D1 to D7 which were made the subject matters of complaint for Charge 2 and Charge 3 had been captured on videos and produced as evidence.

32. The Prosecution alleged that D1 to D7, by the words they used when they spoke on the main stage:-

- (i) D1 to D7 had unlawfully incited the persons at Tim Mei Avenue to cause a public nuisance to the public by unlawfully obstructing public places and roads at and in the neighbourhood of Tim Mei Avenue (Charge 2);
- (ii) D1 to D7 had unlawfully incited the persons present at Tim Mei Avenue to incite other persons to cause a public nuisance to the public by unlawfully obstructing public places and roads at and in the neighbourhood of Tim Mei Avenue (Charge 3).

33. The Court heard submissions on the issue of the constitutionality and proportionality of the offences of incitement to commit public nuisance and incitement to incite public nuisance.

34. For the reasons given at paragraphs 301-307 of the judgment, the Court found that there is nothing uncertain about the elements of the offences. Both offences satisfy the “prescribed by law” requirement. The Court also found that the respective mental requirements for both offences do not depend on the circumstances of any subsequent obstruction actually caused by the incitee(s) and therefore, the offences do not offend the principle against retroactivity. The Court also found that the two offences do not give rise to any chilling effect on the exercise of the fundamental rights to freedom of speech and freedom of peaceful assembly.

35. For the reasons given at paragraphs 310-317 of the judgment, the Court found that the offences of incitement to commit public nuisance and incitement to incite public nuisance satisfy the proportionality requirement for the restriction of the fundamental rights to freedom of

speech and freedom of peaceful assembly. The Court found that the reasonableness test laid down by the Court of Final Appeal in *Yeung May Wan* has subsumed into it the consideration of proportionality.

36. The Court found that, given the fact that Tim Mei Avenue had been cordoned off by the Police since the afternoon of 26th September 2014, the defendants who on 27th and 28th September 2014, incited the people at Tim Mei Avenue (i) to occupy, and hence obstruct the carriageway of Tim Mei Avenue; and/or (ii) to incite other persons to do the same should be given the benefit of doubt as to whether the relevant defendant(s) knew or believed that the incitement(s) under complaint would result in a public nuisance, i.e. unreasonable obstruction of the carriageways of Tim Mei Avenue that would result amount to a suffering of common injury by members of the public.

37. However, the Court found that there were incitements made by D1, D2 and D4 to D7 on 27th and 28th September 2014, either on an individual basis or on the basis of joint enterprise, to the persons present at Tim Mei Avenue to cause obstruction to the public places and roads in the neighbourhood of Tim Mei Avenue.

38. The Court found that there were incitements made by D4 to D7 on 27th and 28th September 2014, either on an individual basis or on the basis of joint enterprise, to the persons present at Tim Mei Avenue to incite other persons to cause obstruction to the public places and roads in the neighbourhood of Tim Mei Avenue.

39. For the reasons given in the judgment, the Court found that all the elements required to prove the offence of “Incitement to commit public

nuisance” (Charge 2) were proved against D1, D2, D4, D5, D6 and D7 beyond reasonable doubt. The Court found that the evidence was insufficient to prove Charge 2 against D3.

40. For the reasons given in the judgment, the Court found that all the elements required to prove the offence of “Incitement to incite public nuisance” (Charge 3) were proved against D4, D5, D6 and D7 beyond reasonable doubt. The Court found that the evidence was insufficient to prove Charge 3 against D1, D2 and D3.

41. Charge 4 “Incitement to commit public nuisance” and Charge 5 “Incitement to incite public nuisance” concerned what D8 said to the people present at Fenwick Pier Street on 28th September 2014.

42. The Prosecution alleged that by the words used, D8 incited the people present at Fenwick Pier Street to cause a public nuisance by urging those who were already on the carriageway of Fenwick Pier Street to stay on the road and urging other people standing on the nearby pavements to go and sit on the carriageway of Fenwick Pier Street (Charge 4).

43. The Prosecution alleged that by the words used, D8 incited the people present at Fenwick Pier Street to call up more people to come and obstruct the relevant section of Fenwick Pier Street (Charge 5).

44. What D8 said to the people present at Fenwick Pier Street was recorded on videos by the Police and produced as evidence.

45. The Prosecution called Mr Tong Wai Tung (PW5), Assistant Divisional Officer of Fire Services Department to show how the obstruction of Fenwick Pier Street on 28th September 2014 had blocked a fire engine at Kong Wan Fire Station from using Fenwick Pier Street to attend to a reported case of “Multiple Casualties Incident” at Admiralty Centre.

46. For the reasons given in the judgment, the Court found all the elements required to prove the offences of “Incitement to commit public nuisance” (Charge 4) and “Incitement to incite public nuisance” (Charge 5) were proved against D8 beyond reasonable doubt.

47. Charge 6 “Incitement to commit public nuisance” concerned what D9 said to the people present at Harcourt Road on 28th September 2014.

48. The Prosecution alleged that D9, by what he said to the people present on both sides of Harcourt Road, incited the people present to occupy all the carriageways of Harcourt Road and hold a public meeting on the carriageways.

49. What D9 said in the afternoon of 28th September 2014 was recorded on videos and produced as evidence.

50. For the reasons given in the judgment, the Court found all the elements required to prove the offences of “Incitement to commit public nuisance” (Charge 6) were proved against D9 beyond reasonable doubt.