



Summary of Judicial Decision

Secretary for Justice v CWC (“the Respondent”)

CAAR 12/2020; [2021] HKCA 166

Decision	: SJ’s application for review of sentence allowed
Date of Hearing	: 14 January 2021 and 4 February 2021
Date of Judgment	: 14 January 2021 and 4 February 2021
Date of Reasons for Judgment	: 10 February 2021

Background

1. In the afternoon of 18 November 2019, the Respondent and a female were each found hurling petrol bombs at the Chai Wan Police Married Quarters. The petrol bomb thrown by the Respondent flew across the wall surrounding the quarters and the driveway between the wall and the multi-storeyed quarters. It ended up hitting the window of one of the flats of the quarters causing burnt mark on the window and the exterior wall. At that time, the flat was occupied by the tenant and one family member. Other flats on the same floor also had people inside. Although the petrol bomb thrown by the female flew across the wall surrounding the quarters, it only hit the driveway. The ensuing fireball narrowly missed landing on a vehicle exiting from the carpark. The petrol bomb charred the wall of the driveway and shards were scattered in the vicinity.
2. The Respondent pleaded guilty to a charge of arson being reckless as to whether life would be endangered, contrary to sections 60(2) and (3) and 63(1) of the Crimes Ordinance (Cap.200). The trial magistrate imposed a 3-year probation order. The Respondent was aged below 16 when he pleaded guilty and was over 16 at the time of sentence.
3. The Secretary for Justice applied to review the sentence pursuant to section 81A of the Criminal Procedure Ordinance (Cap.221) on the following grounds:
 - (1) a non-custodial sentence was wrong in principle and manifestly inadequate;
 - (2) the sentence was insufficient to reflect the gravity of the case and the culpability of the Respondent; and
 - (3) the imposition of a probation order was wrong in principle and manifestly inadequate.



Issue in dispute

4. Whether the non-custodial sentence of a probation order was wrong in principle and manifestly inadequate for a young person convicted of arson being reckless as to whether life would be endangered committed by way of hurling a petrol bomb.

Department of Justice's Summary of the Court's rulings

(Full text of the reasons for judgment of the Court of Appeal (Chinese version only) at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133536&QS=%28caar%7C12%2F2020%29&TP=JU)

5. As the facts of arson cases can take various different forms, the Court of Appeal did not find it appropriate to lay down tariffs. However, based on previous cases, the Court of Appeal has established the sentencing principles for arson and the factors to be considered: see *Secretary for Justice v SWS* [2020] HKCA 788. The Court of Appeal has provided sufficient and comprehensive sentencing guidance for arson. The trial magistrate had to follow these binding guidance (Paragraph 9). Hong Kong is a densely populated city, the consequences and risks of arson are different from those in the United Kingdom. Hence it is inappropriate to make reference to the sentencing guidelines set out by the UK Sentencing Council. Those sentencing guidelines do not provide additional assistance to sentencing arson offences (Paragraphs 9 and 61).
6. As the trial magistrate considered that the facts of the case were serious and all sentencing options were open, it would be a better approach for him to order all relevant reports; otherwise, he would not be able to fully consider all sentencing options. As the trial magistrate did not wish to remand the Respondent in custody, he did not seek relevant reports (including Young Offender Assessment Panel Report and other reports for sentences in custodial form) and thus lacked sufficient basis or relevant information to consider appropriate sentencing options other than a probation order. He was also perceived as having pre-determined that a non-custodial sentence was the most appropriate sentencing option. This was undesirable (Paragraphs 8 and 10-12).
7. Arson cases must be treated seriously and should generally be dealt with by way of immediate imprisonment. This creates tension for sentencing juvenile offenders as the dominant consideration in dealing with juvenile offenders should normally be rehabilitation. The key is to strike a balance. If the case is really grave, custodial sentences are inevitable. As detention facilities other than prisons embrace certain rehabilitative ingredients, they are the best route for rehabilitating certain juvenile offenders. This approach equally applies to all young offenders under the age of 21 (Paragraph 63).



8. The trial magistrate underestimated both the overall gravity of the present case and the Respondent's culpability. Details are as follows:
 - (1) The trial magistrate overlooked that various circumstances of the case indicated that the Respondent, together with the female and another male, all dressed alike, were acting in a joint enterprise and premeditated to the extent that even the escape route was well planned (Paragraph 66).
 - (2) The trial magistrate did not particularly point out the significance of the premises under attack being the police quarters. The present case was undoubtedly related to the social confrontation that was at its peak at that time. The Respondent was randomly and indiscriminately assaulting police officers and their families. The offence was a serious attack and damage to public order and safety. No court should underestimate its seriousness. The trial magistrate made the observations that the volume of the petrol bomb was small, that not much accelerant could be used, that the relevant aggravating feature was limited, and that as the petrol bomb was blocked by the closed window, it did not get into the flat and the injury caused was not serious. It is obvious that the trial magistrate had misplaced his focus. Furthermore, petrol bomb is unstable by nature and could easily land on unintended locations. Upon impact, glass shards would splatter everywhere. Further, a petrol bomb has certain shooting range and that it can be used to launch attack from a distance, make it an extremely dangerous weapon. Hence it should be seriously treated by the court (Paragraph 67).
 - (3) The trial magistrate stated that the commission of the offence was largely attributed to the Respondent's diagnosis of Asperger's Syndrome and Oppositional Defiant Disorder. This statement was not entirely correct. The original statement from the psychological report was that, "were likely associated with", and the so-called association meant the symptoms could affect one's judgment and empathy and that he could easily be influenced by his peers and he could not appreciate the victims' predicament. In any event, the Respondent knew what he did was illegal, he even showed remorse towards the property damage although he was indifferent to the occupants of the quarters. Accordingly, he had a risk of re-offending. For a defendant who knew full well what he was doing, he could but chose to forgo control his conditions, such conditions could not be a reason or excuse for his participating in the commission of this serious offence and would not attract any discount in sentencing (Paragraph 68).
9. Although the probation order imposed by the trial magistrate was for the maximum period allowed by law, it was still wrong in principle and manifestly inadequate. While the Respondent's rehabilitation should not be ignored



because of his young age, the sentence for him should be tilted in favour of punishment and deterrence to reflect the gravity of the present case (Paragraph 69). Accordingly, the Court of Appeal ordered for suitability reports for community services as well as Rehabilitation Centre, Detention Centre and Training Centre for the Respondent (Paragraph 19).

10. Other than Detention centre, the Respondent was assessed in the reports to be suitable to perform community services or to be detained at Rehabilitation Centre or Training Centre (Paragraph 70). However, the Respondent said in the reports he threw the petrol bomb upon the instruction of other people. His defence counsel clarified that the Respondent did not rely on the suggestion that he was under duress. The Court of Appeal did not accept the defence counsel's clarification and considered the Respondent's attitude capricious and indecisive, and his remorse and self-reflection were extremely superficial and limited (Paragraphs 71-72). The Court of Appeal did not consider a community services order, being non-custodial form, was an appropriate sentence and neither is detention in a Rehabilitation Centre which emphasizes helping young offenders to re-integrate into the society. By contrast, a Training Centre order is a better guarantee for success for the Respondent's self-reflection, rehabilitation and prevention of re-offending as it is longer in duration, more structured and provides psychological and other forms of counselling and different courses. In view of the gravity of the present case and the culpability of the Respondent, Training Centre is the most suitable and commensurate sentence among all three recommended options. Generally speaking, a successful application for review of sentence will normally attract certain discretionary discounts. However, since the mode of sentence imposed was wrong and has to be corrected, there is no room for discount. Further, a Training Centre possesses considerable rehabilitative elements. When the Respondent would be released depends on how he behaved in the centre. The actual detention period could be short or long. No injustice would therefore be caused to the Respondent (Paragraph 73). Accordingly, the Court of Appeal quashed the probation order and sentenced the Respondent to a Training Centre (Paragraph 74).
11. As regards the role prosecutors should play at the sentencing stage of a trial, the principles established in *Attorney General v Jim Chong-shing* [1990] 1 HKLR 131 remain applicable. Prosecutors should not by advocacy attempt to influence the court in sentencing. If the court requires assistance from the prosecution, the prosecutor can act according to the directions of the court as long as it does not prejudice the common law principles and other applicable principles, including those decided in *Jim Chong-shing*. (Paragraphs 14-16, 62).



Department of Justice

The Government of the Hong Kong Special Administrative Region

Prosecutions Division

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