



**Summary of Judicial Decision**  
**Secretary for Justice (“SJ”) v Szeto Ho-san (“the Respondent”)**  
**CAAR 15/2020; [2021] HKCA 156**

**Decision** : **Application for review of sentence allowed**  
**Date of Hearing** : **28 January 2021**  
**Date of Judgment** : **28 January 2021**  
**Date of Reasons for Judgment** : **10 February 2021**

**Background**

1. In the evening of 5 November 2019, the police intercepted the Respondent and three other males outside Sha Tin Town Hall. Upon search, two cement-filled metal rods, which could be used separately or connected into a long metal rod, were found from the Respondent’s rucksack. The Respondent was arrested for possession of offensive weapons. Under caution, he claimed he got from a friend the two metal rods which he intended to use for “self-defence” when confronted by people with different political views. In the subsequent record of interview, he claimed that he was on his way to a dance practice in the open area outside Sha Tin Town Hall. He carried the metal rods for self-defence because he saw from a news clip earlier that attacks had happened due to different political views. He only remembered that he made acquaintance with the person who handed him the metal rods at an amusement game centre but he could not remember the date on which the rods were handed to him nor that person’s name and phone number.
2. The Respondent pleaded guilty to one charge of possession of offensive weapons in a public place, in breach of sections 33(1) and (2) of the Public Order Ordinance (“POO”) (Cap. 245), and was sentenced to 10 days’ immediate imprisonment. He was 20 years and 2 months old at the material time and 21 years old at the time of the guilty plea and sentencing. He had no previous criminal conviction.
3. The SJ applied for a sentence review pursuant to section 81A of the Criminal Procedure Ordinance (Cap. 221) on the following grounds:
  - (1) the Magistrate failed to fully consider the sentencing norm for the offence and underestimated the gravity of the crime in the case;
  - (2) the Magistrate overemphasised the fact that the Respondent did not



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- use the metal rods and was not arrested at a scene of confrontation;
  - (3) the Magistrate underrated the culpability of the Respondent and the gravity of the case;
  - (4) the Magistrate overemphasised the Respondent's personal background and was misguided by the ways other court cases were handled. The sentence imposed could not fully reflect the Respondent's culpability; and
  - (5) the sentence imposed would not have been reasonably deemed as within the appropriate scope of sentence if a judge had considered all the relevant factors.

### **Issues in dispute**

4. Whether the sentence of 10 days' imprisonment imposed by the Magistrate was wrong in principle and/or manifestly inadequate.

### **Department of Justice's Summary of the Court's decision**

(Full text of the Court of Appeal ("CA")'s judgment (Chinese version only) at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=133530&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133530&QS=%2B&TP=JU))

5. There was no alternative to custodial sentence for the offence of possession of offensive weapons in a public place under section 33 of the POO. In accordance with *HKSAR v Chan Ming Lok* [2009] 6 HKC 7, the provision of section 33 was to serve as a preventive measure through the imposition of severe penalties (paragraph 14).
6. Article 63 of the Basic Law provides that the Department of Justice (DoJ) shall control criminal prosecutions, free from any interference. If the Magistrate believed that the case should be resolved in other ways, a more appropriate approach would be to communicate, before plea taking, with the prosecution and the defence in a controlled manner and convey the court's concerns, then make a deliberation. If the Magistrate questioned the prosecution's prosecutorial decision during the Respondent's mitigation after his guilty plea, it would inevitably give an impression that the sentence was affected by the Magistrate's dissatisfaction with the prosecution's choice of charge (paragraph 16).
7. The brief facts of the case setting out the Respondent's replies under caution did not mean that the prosecution accepted that the content of



- the replies was true. In fact, the Respondent's account of how the metal rods were obtained and his claim of self-defence were neither made nor reiterated under oath. They were also not tested by cross-examination. Furthermore, even the claim of self-defence was ruled out, according to the Respondent's statement under caution, it could still be inferred that he had an intention of attacking others (paragraph 17).
8. Moreover, although the prosecution did not dispute the defence's claim in mitigation that the Respondent had no knowledge that the metal rods were cement-filled, the CA disagreed that the sentence review was subject to such claim by the Respondent. Even if the Respondent's claim of "self-defence" was true, his possession of the metal rods for "self-defence" under the context and circumstances as stated by the Respondent did not constitute a mitigating factor (paragraphs 18 and 19).
  9. The CA could infer from the brief facts of the case whether the Respondent knew that the metal rods were filled with cement. The Respondent did not explain clearly when, where and from whom the metal rods were handed to him. He intended to extricate himself from his involvement or eliminate his culpability by denying his knowledge of the modification of the two metal rods. The CA had examined the two metal rods. It was obvious that the inner tubes were filled with cement, hence weighty. When the rods were connected, it was simply inevitable that one would notice the cement inside (paragraphs 20 and 21).
  10. The CA held that modified offensive weapons were even more lethal and dangerous. Any improper use could cause serious casualties. Moreover, the two metal rods could be used separately or as one piece when connected. There were indeed sufficient grounds for the DoJ to prosecute the case under section 33 of the POO. The Magistrate misunderstood or even underrated the gravity of the case when he questioned the prosecutorial decision (paragraph 22).
  11. The CA agreed that a sentence could have taken into account both compassion and justice, but the main premise was that the penalty must effectively reflect the Respondent's culpability, with weight accorded to both punishment and deterrence and strike a balance between aggravating and mitigating factors of the case. The CA observed objectively that the starting point adopted by the Magistrate was affected by his dissatisfaction with the prosecution's choice of charge that he had



- erred in principle. Even if this was not the case, the CA still held that the Magistrate had not given due consideration and weight to the aggravating factors of the case (paragraph 24).
12. The present case took place when there were frequent serious confrontations in society. Wilful assaults and criminal damages were not uncommon too. The Respondent was wearing a black face mask, bringing along black gloves, and carrying a black rucksack with the two metal rods inside. He claimed that he would take out the rods for self-defence when confronted by people with different political views. If the Respondent had indeed been on his way to a dance practice with his friend(s) at Sha Tin Town Hall, which was not a scene of confrontation at the time, why would it not be the case that he could just leave the scene immediately in the event of a confrontation? Why, on the contrary, was he carrying weapons for attacking other people if need be? It shows that the Respondent did expect to find himself in a confrontation, and he came prepared by bringing along the two metal rods (paragraph 25).
  13. The objective of prohibiting the possession of offensive weapons in public places is to promote a safe social environment and also to reduce effectively the likelihoods of resorting to unlawful force in confrontations. As such, sentencing for charges under section 33 of the POO must be sufficiently deterrent. In the particular social condition and climate at the time of the offence, the elements of punishment and deterrence should be given the greatest weight in sentencing, so as to serve as a warning to others. However, the Magistrate, when imposing a lenient sentence, had erroneously taken into consideration the factors that in light of the complicity of the social condition, even adults would be driven by emotions and prone to wrongdoings and breaking the law, and that no actual harm was caused to others. (paragraphs 26 and 27).
  14. The Magistrate, by imposing lenient sentence on the Respondent on such erroneous mitigating circumstances, would have sent a wrong message to society that, even in the absence of appropriate and strong mitigating factors, young people committing serious offences will still receive lenient sentences (paragraphs 28).
  15. Despite having considered the entire social condition at the time, the Magistrate over emphasized issues which were not mitigating factors and wrongly downplayed the gravity of the case. As a result, he sentenced



the Respondent to 10 days' imprisonment, which was wrong in principle and manifestly inadequate. The CA took the view that the appropriate starting point for the present case was eight months' immediate imprisonment. A one-third discount was given for the Respondent's guilty plea. A discretionary reduction in sentence was further given on the reasons that the Respondent had already served 10 days of imprisonment; there was delay on the Applicant's part in filing the sentence review; and that the Respondent have to face the anxiety of being sent back to jail. Accordingly, the Respondent was sentenced to three months' imprisonment (paragraph 29).

16. The CA reiterated that the imposition of an inappropriate sentence is only superficially beneficial to a defendant. If the SJ applies for a sentence review, the defendant has to suffer the anxiety in waiting for the CA's decision and to face a heavier sentence in the event of a successful review. Apart from bringing disappointment or even a setback to the defendant, it may also disrupt the rehabilitation that he is going through. For the above reasons, the court should impose a commensurate sentence on a defendant (paragraph 30).

**Prosecutions Division**  
**Department of Justice**  
**November 2021**