Department of Justice
The Government of the Hong Kong Special Administrative Region

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Summary of Judicial Decision

Secretary for Justice v SWS ("the Respondent")
CAAR 1/2020; [2020] HKCA 788

Decision	:	**Secretary for Justice's application for review of sentence allowed**
Dates of Hearing	:	**3 & 17 September 2020**
Dates of Judgment	:	**3 & 17 September 2020**
Date of Reasons	:	**22 September 2020**

Background

1. The Respondent aged 15 years and 1 month, whilst on bail for a charge of riot, threw 3 petrol bombs into the carriageway around midnight causing certain areas of it burnt to blackened. He was arrested soon after and among the items in his possession were 2 lighters, 4 towels, 1 towel which had been cut into three pieces, a pair of scissors, 5 gloves, 1 wooden chopstick and 2 funnels. The clothes he was wearing contained traces of highly flammable organic solvent. He later admitted to the probation officer he was testing petrol bombs at the material time.

2. The Respondent pleaded guilty to arson (sections 60(1) and (3), Crimes Ordinance, Cap. 200) and possessing items with intent to destroy or damage property (section 62(a), Crimes Ordinance, Cap. 200). He, then aged nearly 15 years and 6 months, was sentenced to concurrent terms of 18 months' probation order including 9 months' residential training at the Tuen Mun Children and Juvenile Home for both charges.

3. Secretary for Justice applied to review the sentences pursuant to section 81A of the Criminal Procedure Ordinance, Cap. 221.

4. Grounds of review:

   (1) a non-custodial sentence for arson was wrong in principle and/or manifestly inadequate;
   (2) a non-custodial sentence failed to reflect the gravity of arson and the culpability of the Respondent;
   (3) the imposition of a probation order for arson was wrong in principle and/or manifestly inadequate; and
   (4) overall sentences wrong in principle and/or manifestly inadequate.

Issue in dispute

5. Whether the non-custodial sentence of probation order was wrong in principle and/or manifestly inadequate for a young person convicted of arson committed by way of throwing petrol bombs.

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

(full text of the Court of Appeal 's judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130970&QS=%2B&TP=JU)

6. Juvenile Offenders Ordinance (Cap. 226) provides that no young person (aged 14 to under 16 years) shall be sentenced to imprisonment if he can be suitably dealt with in any other way. Alternatives to imprisonment would include non-custodial sentence such as probation order that focuses on rehabilitation but places little weight on deterrence or punishment, or custodial sentences such as detention in rehabilitation centre, training centre, or, for male offenders, detention centre which serve not only rehabilitation but also deterrence and punishment. The court in deciding which alternative to imprisonment to adopt should consider the relevant ordinances and legal principles together with the relevant circumstances of the case (paragraphs 45-46). It is noted that in imposing custodial sentence, it does not mean that the offender's rehabilitation had not been given weight to, for example, detention centre has a very great element of rehabilitation (paragraph 75).

7. Where possible, the court would try to give young offenders, especially young persons, a chance to rehabilitate. However, this does not mean that the court would only focus on the youth factor and ignore other sentencing factors. As a matter of public interest, for cases involving serious offence or offending circumstances, a heavy and deterrent sentence has to be imposed and the youth or personal circumstances of the offender would count very little, if at all. The reason is that the need for punishment and deterrence overrides the rehabilitative need of the offender (paragraph 48).

8. The Court of Appeal held that when the court sentenced young offenders for arson, appropriate weight should be given to factors such as protection of the public, commensurate punishment, societal disapproval and deterrence; and cannot just focus on rehabilitation and reform. In general, in view of the seriousness of an offence of arson, more weight should be put on the former factors rather than the latter ones. Unless the circumstances of the offence are particularly minor, or the case has exceptional circumstances or very strong mitigating factors; it is inappropriate to sentence young offenders to probation order for arson. It is because the primary purpose of probation order is to rehabilitate, it has not sufficiently catered for the need of public interest such as protection of the public, commensurate punishment, societal disapproval and deterrence and is not commensurable to the seriousness of an offence of arson (para. 55).

9. The respondent's conduct was a serious act of arson aggravated by the use of accelerant and the respondent committing the offences whilst on bail. Therefore, the only appropriate sentence is a custodial sentence (paragraphs 56-58). Although the probation order imposed by the magistrate included a

9-month residential training and such residential requirement restrained the respondent's freedom to a certain extent, it is nothing compared to being detained at detention centre. It is after all a non-custodial sentence and is incommensurate with the gravity of the case and the culpability of the respondent (paragraph 61).

10. It was wrong in principle for the magistrate to have failed to consider all relevant sentencing factors, focused only on rehabilitation but ignored deterrence and punishment and so on (paragraph 63). She had failed to balance these factors (paragraph 75). The magistrate had the duty to make it clear in her reasons for sentence the basis for the sentence imposed. The appellate court do not have any basis to assume that, the magistrate, being an experienced judicial officer, must have had appropriately dealt with all the relevant sentencing factors when she had not explicitly set out so (paragraph 63).

11. The magistrate had overrated the respondent as an "excellent" child when the respondent had areas to improve both in his academic performance and his conduct at school. The magistrate in considering the respondent's mitigation including his background and conduct must consider all relevant evidence and information. Otherwise, she would have placed inappropriate weight on these mitigating factors and erred (paragraph 65).

12. The Court of Appeal accepted that detention centre order is the most appropriate sentence as the disciplinary training and labour work would strengthen the respondent's law-abiding sense, improve his conduct and make him receptive to parental supervision upon release. This would assist his rehabilitation and long-term development. The post-release supervision for one year is also important to ensure that he is on the right track (paragraphs 66-69). The Court of Appeal allowed the Secretary for Justice's application and quashed the probation order and replaced it with concurrent terms of detention centre order (paragraphs 72, 75 and 76).

13. It is in the public interest that the court, bearing the duty to sentence the offender appearing before it in accordance with the relevant ordinances and legal principles, imposes a commensurate sentence. As long as the law permits and it is commensurate, the court has a discretion to impose a relatively lenient sentence and the appellate court would not disturb. However, if the court is overly lenient, it would on its face benefit the offender when in fact not. If the Secretary for Justice applies for a review of sentence, the offender would be anxious before the outcome is known; and if the review succeeds, the offender would face a heavier sentence and this might disturb the rehabilitation that he is undergoing. What the court should do is to impose a commensurate sentence (paragraph 73).

14. The magistrate in sentencing the respondent also gave him words of exhortation. However, those words should be said after the reasons for sentence is given, but not mixed together (paragraph 74).

Prosecutions Division
Department of Justice

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