Summary of Judicial Decision

Secretary for Justice v CMT and YYH
CAAR 3/2020; [2020] HKCA 939

Decision	:	**Application for review of sentence allowed**
Dates of Hearing	:	**30 October and 13 November 2020**
Dates of Judgment	:	**30 October and 13 November 2020**
Date of Reasons	:	**13 November 2020**

Background

1. The 1st Respondent ("R1") and the 2nd Respondent ("R2"), respectively aged 14 years and 10 months and 14 years and 1 month, took part in an unlawful assembly participated by over 100 protesters on a weekday afternoon on a major thoroughfare in the urban area in Kowloon. The protesters targeted at the police officers who formed a checkline to prevent them from advancing towards the direction of The Hong Kong Polytechnic University. Bricks and no less than 39 petrol bombs were hurled by the protesters to charge at the police checkline. Both R1 and R2 were seen at the front of the body of protesters; R1 had used an umbrella to shield other protesters who were moving barricades to charge at the police checkline; R2 had given hand signals to those behind him, gesturing to them to halt or back off. Both R1 and R2 had taken part in the unlawful assembly for more than an hour until they were arrested by the police.

2. R1 and R2 each pleaded guilty to a charge of unlawful assembly (contrary to section 18(1) and (3) of the Public Order Ordinance, Cap. 245) in the juvenile court. They were respectively aged 15 years and 5 months and 14 years and 8 months at the time of sentence, and were of hitherto clear records. Reckoning that their roles in the unlawful assembly were "relatively passive", the magistrate dismissed the charge against them without recording a conviction ("Dismissal Orders"), and committed them under section 34(1)(b) and (d) of the Protection of Children and Juveniles Ordinance, Cap. 213 ("PCJO") to the care of their parents and placed them under the supervision of a social welfare officer for 12 months with special conditions ("CP Orders").

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

   (1) the magistrate accorded insufficient weight to the factors of punishment and deterrence in sentencing and the sentences were

without any punitive element;

(2) the magistrate underjudged the culpability of R1 and R2; and

(3) the overall sentences imposed were wrong in principle and manifestly inadequate.

Issue in dispute

4. Whether the Dismissal Orders and CP Orders were wrong in principle and/or manifestly inadequate for R1 and R2 who were convicted of taking part in a large-scale unlawful assembly involving violence.

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

(full text of Court of Appeal's judgment at *https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=131850&QS=%2B&TP=JU*)

5. The recording of a conviction is in itself an element of punishment. It may encourage the offender not to engage in further criminal activity and may also act as a deterrence to others. Dismissing a charge means that although the court is satisfied of the young offender's guilt, no conviction will be recorded against him. It does not have any punitive element or deterrence effect, thus tilting the balance emphatically towards the offender's rehabilitation. The court generally speaking will be persuaded to dismiss the charge only if the offence is trivial; or the circumstances in which the offence was committed moderate or diminish the offender's culpability significantly, such as where it involved no more than a fractional error of judgment or a sudden and wholly unexpected loss of control, or a single incident or act entirely out of the offender's otherwise good character and behaviour; or there is very strong mitigation arising from the personal circumstances of the offender; and the offender is truly remorseful (Paragraph 20).

6. A care or protection order seeks to protect a child or a juvenile in need of care or protection. Its objective is solely rehabilitation (Paragraph 23). Before a juvenile court decides to make a care or protection order, it must be satisfied that the offender is in need of care or protection under one or more of the four statutory criteria as set out in section 34(2) of PCJO, i.e. (a) he has been or is being assaulted, ill-treated, neglected or sexually abused; (b) his health, development or welfare has been or is being neglected or avoidably impaired; (c) his health, development or welfare appears likely to be neglected or avoidably impaired; or (d) he is beyond control, to the extent that harm may be caused to him or to others

(Paragraphs 22 and 27).

7. The present case was a very bad case bordering on rioting (Paragraph 29). The magistrate's finding that R1 and R2 played a relatively passive role was flatly contradicted by the evidence, which showed that R1 and R2 had actively participated at the front section of the unlawful assembly and their acts had emboldened, encouraged and reinforced the violent behaviours of the other protesters (Paragraph 31). The magistrate had proceeded on the wrong factual finding on the culpability of R1 and R2, which was an error of principle justifying the Court of Appeal to interfere on a sentence review (Paragraph 47).

8. Because R1 and R2 had committed a serious offence, appropriate weight must be given to the sentencing factors of punishment, deterrence and condemnation despite their youth. As the case involved a large-scale unlawful assembly involving considerable violence, the sentencing guidelines propounded by the Court of Appeal in *Secretary for Justice v Wong Chi Fung* [2018] 2 HKLRD 699 (approved by the Court of Final Appeal in (2018) 21 HKCFAR 35) applied with full force (Paragraph 40).

9. After balancing the gravity of the offence and the culpability of R1 and R2 against their personal circumstances, the Dismissal Orders and CP Orders, which focused exclusively on rehabilitation and carried no weight of punishment or deterrence, were found to be manifestly inadequate and wrong in principle. The public interest in recording the convictions was not outweighed by the Respondents' concern of their effect, bearing in mind that their convictions might be spent under the Rehabilitation of Offenders Ordinance, Cap. 297. The Dismissal Orders and CP Orders were thus set aside. Convictions were recorded for both R1 and R2 (Paragraphs 52 to 54).

10. The appropriate sentence must have a sufficient punitive element and deterrence, while at the same time take care of the Respondents' rehabilitation (Paragraph 52). However, bearing in mind that it was an application for review and as mandated by section 11(2) of the Juvenile Offenders Ordinance, Cap. 226, if there were other suitable ways to deal with the Respondents, who were under 16, immediate custodial sentence should not be imposed. In order to ascertain if there were suitable alternatives other than immediate custodial sentence, Probation Officer's Reports and Community Service Order ("CSO") Suitability Reports on both R1 and R2 were obtained (Paragraph 61).

11. Having regard to the personal circumstances of R1 and R2 (in particular, their extreme youth and, in respect of R1, her mental conditions which

might significantly deteriorate if a harsh sentence was imposed on her), immediate custodial sentence was not appropriate (Paragraphs 48 to 50, 65 and 68). After considering the relevant reports:

(1) for R1, the Court agreed with the Probation Officer's assessment that community service work on the site may exacerbate her mental issues. Because of the very special circumstances of R1, CSO was not suitable for her, and the remaining option was probation. R1 was thus sentenced to a 12-month Probation Order with special conditions (Paragraph 65); and

(2) for R2, a probation order was too lenient and failed to sufficiently reflect his culpability, which was considered to be higher than that of R1. On the other hand, a CSO may serve the purpose of both punishment and rehabilitation and fill the gap between a custodial sentence and a probation order. Unlike R1, there was no suggestion that R2 was unsuitable to perform community service. R2 was therefore sentenced to 80 hours of CSO with special conditions (Paragraphs 68 to 71). The court's power under section 5(1)(a) of the Community Service Orders Ordinance, Cap. 378, to impose tailor-made conditions that fit the particular needs and circumstances of the offender was confirmed (e.g. condition that the offender should attend medical/psychiatric treatment as and when directed) (Paragraphs 58 and 59).

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November 2020