



Summary of Judicial Decision

Secretary for Justice v Law Man Chung CAAR 4/2019; [2020] HKCA 262

Decision : **Application for review of sentence allowed**
Date of Hearing : **4 March 2020**
Date of Judgment : **24 April 2020**

Background

1. During an un-notified public gathering held at New Town Plaza on 22 September 2019, the Respondent, together with other protesters, desecrated the National Flag (which was detached from the flagpole outside Shatin Town Hall) by (i) throwing the National Flag up and letting it fall onto the ground; (ii) trampling on the National Flag in a mocking fashion at the atrium of the shopping plaza in the presence of a large crowd of people; (iii) after the National Flag was sprayed with blank ink and unknown liquid, parading the defaced National Flag at the shopping plaza; and (iv) after the National Flag was thrown down from Level 3 of the plaza onto the ground, dumping the National Flag into a rubbish trolley and pushing it together with the trolley into a pool. The Respondent was charged with the offence of desecrating the National Flag, contrary to section 7 of the National Flag and National Emblem Ordinance (the “NFNEO”).

Issue in dispute

2. Whether the sentence of 200 hours of community service imposed by the Magistrate on the Respondent upon his guilty plea was wrong in principle and/or manifestly inadequate.

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=127563&QS=%2B&TP=JU&ILAN=en)

3. When imposing sentence for the offence of desecrating the National Flag under section 7 of the NFNEO, the Court has to take into account the legislative objectives of the provision and the gravamen of the offence (Paragraph 29).
4. As held by the Court of Final Appeal in *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442, the purpose of section 7 of the NFNEO is to protect the National Flag against desecration generally in order to safeguard the



legitimate interests in protecting the National Flag, the unique symbol of dignity, unity and territorial integrity of the State. In sentencing an offence under section 7, the Court must ensure that the sentence adequately reflects the legislative intent of safeguarding these important legitimate interests, including considering imposing a deterrent sentence (Paragraphs 30 to 32).

5. In view of the legislative objectives and gravamen of the offence under section 7, when sentencing, the Court must carefully assess the degree of desecration of the National Flag caused, brought about or inflicted by the defendant. The more serious the desecration of the National Flag, the greater the degree of undermining the legitimate interests protected by section 7, and the sentence will be more severe (Paragraph 33).
6. Relevant factors to be considered by the Court in sentencing an offence of desecrating the National Flag include (Paragraph 34):
 - (1) The desecration caused, brought about or inflicted by the actual acts of the defendant to the National Flag, such as defilement, contempt, disdain and malice etc. Depending on the facts of the case, burning the National Flag is not necessarily more insulting than mutilating, scrawling on, defiling or trampling on the National Flag or other form of insults of the National Flag. If the National Flag is burned in a crowded place, or even with the use of accelerant, which poses a real danger to the person and property, it will inevitably increase the culpability of the defendant.
 - (2) The time, place and circumstances surrounding the defendant's act of desecration of the National Flag, and the reaction or consequences that the act may cause at the scene of the offence. If the defendant's acts have provoked other persons at the scene to commit other offences, or is likely to cause or has actually caused a conflict between persons holding different attitudes towards the National Flag, this will aggravate the seriousness of the offence.
 - (3) Whether the defendant's commission of the offence is premeditated or planned. If so, his culpability is higher.
 - (4) Whether the defendant committed the offence as part of a joint enterprise with others. If so, his culpability is higher.
 - (5) Irrespective of whether it was done as a result of instigation by others at the scene or of the defendant's own volition, persistent desecration of the National Flag using the same or different ways is an aggravating factor.



- (6) In principle, the following matters are also relevant to the gravity of the offence : whether the National Flag was obtained unlawfully; the defendant's knowledge of the source of the National Flag; whether the National Flag was prepared or altered or made by the defendant.
7. There is no need to lay down a sentencing tariff as there is a wide variety of ways in committing the offence of desecrating the National flag. The discussions and analysis of the legislative objectives and gravamen of the offence was a reiteration of the authoritative opinion of the CFA in *Ng Kung Siu* (paragraph 46).
8. The Respondent's acts of desecrating the National Flag in the present case were seriously bad and had gravely undermined the dignity of the State that the National Flag represents. He and other protesters flagrantly and repeatedly desecrated the National Flag in different modes and at different locations in the presence of a large crowd of people. His acts clearly expressed his contemptuous, defiling, mocking, disdainful and renouncing attitudes towards the National Flag, and also had the effect of inciting other people present at the scene. Furthermore, his putting the National Flag into the rubbish trolley as if it were rubbish was an exceedingly great insult to the dignity of the State the National Flag symbolizes (Paragraph 37).
9. The Magistrate had failed to fully comprehend the relevant facts and seriousness of the case. The Respondent's culpability was high. The sentence of 200 hours of community service imposed by him was manifestly inadequate, and a deterrent sentence of immediate imprisonment was the only sentencing option even taking into account the Respondent's background and clear record (Paragraphs 38 to 45).
10. Given the circumstances of the present case, the starting point for sentence should be no less than 4 months' imprisonment. However, given the Respondent's guilty plea and his partial completion of the community service, and in accordance with the usual practice of affording a sentence discount in an application for review of sentence, the Respondent's sentence was reduced to 20 days' imprisonment (Paragraph 47).

**Prosecutions Division
Department of Justice**

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