



**Summary of Judicial Decision**

**Secretary for Justice v Chung Ka Ho  
CAAR 4/2020; [2020] HKCA 990**

**Decision** : **Application for review of sentence allowed**  
**Date of Hearing** : **19 November 2020**  
**Date of Judgment** : **19 November 2020**  
**Date of Reasons** : **3 December 2020**

**Background**

1. The 24-year-old Respondent took part in an unlawful assembly participated by 400 to 500 protesters on the carriageway of Lyndhurst Terrace in Central on Halloween night. The protesters were in a confrontation with the police officers who formed a checkline at about 30 metres in front of them. Many of the protesters were dressed in dark colour, and had their faces covered by facemasks or scarfs. During the unlawful assembly, some protesters shouted abuses and made insulting hand gestures to the police; some protesters also projected laser beam at the police checkline. The emotions of the protesters were running high, and they refused to leave despite repeated police warnings. The unlawful assembly lasted about 25 minutes, during which the Respondent, who had his face covered with a scarf, had been standing at the forefront of the protesters. He once stepped out from the crowd and threw two gunny bags onto the road between the protesters and the police.
2. The Respondent pleaded guilty to a charge of unlawful assembly (contrary to section 18(1) and (3) of the Public Order Ordinance, Cap. 245). He was of hitherto clear record. Considering that the Respondent's offence was of a relatively minor nature, the magistrate held that community service order was an appropriate sentencing option and sentenced the Respondent to 120 hours of community service.
3. The Secretary for Justice applied to review the sentence pursuant to section 81A of the Criminal Procedure Ordinance, Cap. 221. The grounds of review were that:
  - (1) the magistrate underjudged the seriousness of the offence and accorded insufficient weight to the factors of punishment and deterrence in sentencing;
  - (2) the magistrate failed to properly consider the culpability of the Respondent; and
  - (3) the sentence of community service order was wrong in principle and



manifestly inadequate.

### **Issue in dispute**

4. Whether the sentence of community service order imposed on the Respondent for the offence of unlawful assembly 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=132229&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132229&QS=%2B&TP=JU))

5. When sentencing, it is important for the courts to take into consideration the gravamen of the offence of unlawful assembly as explained by the Court of Appeal in *Secretary for Justice v Wong Chi Fung* [2018] 2 HKLRD 699. The sentencing guidance in *Wong Chi Fung* applies not only to an unlawful assembly involving violence, but also to an unlawful assembly not involving actual violence. Notwithstanding the absence of actual violence, an unlawful assembly which is on the verge of escalation must be taken seriously by the courts, bearing in mind the “pre-emptive” purpose of the offence. Depending on the circumstances, an unlawful assembly not involving actual violence may still require a sentence with strong punitive and deterrent effects. The trial magistrate said he reminded himself of the principles in *Wong Chi Fung* but he merely paid lip service to them (Paragraphs 34, 47 to 56).
6. As discussed by the Court of Appeal in *Leung Kwok Hung v Secretary for Justice (No. 2)* [2020] 2 HKLRD 771, the courts need to pay heed to the potential risk of rapid deterioration of an unlawful assembly into serious violent confrontation, especially when many of the participants in the unlawful assembly were masked. This is because the participants may tend to lose control more easily due to the shielding and emboldenment effect stemming from mass facial coverings (Paragraphs 57 to 60).
7. Even where an unlawful assembly does not involve actual violence, the fact that the police officers are heavily outnumbered by the protesters may still entail a risk of violence in a highly charged confrontation (Paragraphs 61 and 62). The actions of the protesters being likely to provoke the reactions of other persons at the scene may also add to the risk of violence (Paragraphs 63 and 64). As was pointed out by the Court of Appeal in *Secretary for Justice v Law Man Chung* [2020] 4 HKLRD 954, when judging the seriousness of an offence, the court has to consider the date, the time, the location and occasion when the offence was



- committed, as well as the possibility of an uproar being caused in the crowd heightening the risk of violent confrontation (Paragraph 70).
8. With regard to the present case, the Court of Appeal observed that (i) the risk of rapid deterioration of the assembly into violent confrontation was high, since the assembly obviously stemmed from protests against the Fugitive Offenders Ordinance amendment bill that had led to a heated debate and the unprecedented public order issues, and it also occurred shortly after the enactment of the Prohibition on Face Covering Regulation which was also controversial at the time; and (ii) the unlawful assembly took place on a relatively narrow street crowded with a large number of people, such that if violent confrontation indeed occurred, it would lead to very serious consequences. These matters should have been taken into account when sentencing (Paragraph 69).
  9. The magistrate had misunderstood the Court of Appeal's holding in *Wong Chi Fung* in considering that an unlawful assembly without actual violence was not serious and describing the unlawful assembly in question as a "mild" and even "peaceful" one. He failed to fully appreciate the gravamen of the offence of unlawful assembly, the pre-emptive nature of the offence, and the risk of deterioration of the present case into violent confrontation. As a result, he gravely underjudged the seriousness of the present case and the culpability of the Respondent when he wrongly focused on the absence of an intention on the part of the Respondent to attack the police and the fact that the Respondent did not resist when being arrested. The magistrate's failure to properly consider these matters was an error of principle, and the sentence of community service order he imposed was manifestly inadequate. Given the seriousness of the case and the Respondent's culpability, notwithstanding the decent background of the Respondent, immediate imprisonment was the only sentencing option (Paragraphs 75 to 77).
  10. Having considered all the circumstances of the case, the Court of Appeal took a starting point of 6 months' imprisonment, which was reduced by one-third for the Respondent's guilty plea, and deducted by a further month given that this was a sentence review and that the Respondent had completed 8 hours of community service. The Respondent was thus sentenced to 3 months' imprisonment (Paragraph 78).

**Prosecutions Division**  
**Department of Justice**

**December 2020**