



Summary of Judicial Decision

Secretary for Justice v Yu Ka Kui (“the Respondent”)

CAAR 5/2020; [2020] HKCA 1019

Decision	: Application for review of sentence allowed
Date of Hearing	: 23 November 2020
Date of Judgment	: 23 November 2020
Date of Reasons for Judgment	: 18 December 2020

Background

1. On 12 June 2019 since 8:30 a.m., no fewer than several thousands protestors had occupied Harcourt Road and blocked all vehicular lanes with metal railings and other objects. They occupied the carriageway for most of the day. The Police formed a checkline outside the Central Government Offices (“CGO”) to prevent the protestors from entering Tim Wa Avenue from Harcourt Road. Between 3:38 p.m. and 3:46 p.m., the protestors who assembled on Tim Wa Avenue threw objects such as helmets, umbrellas and bricks as they charged towards the police checkline, and police officers retreated to the CGO through the gate on Tim Wa Avenue. Meanwhile, the protestors attacked with escalated violence and the police checkline was forced to retreat from Tim Wa Avenue to the CGO. The Respondent and about 20 other protestors moved metal railings along Tim Wa Avenue and outside the CGO towards the police checkline. The Police had to resort to firing tear gas on Tim Wa Avenue to disperse the crowd. At 3:49 p.m. on the same day, the protestors set up barricades with metal railings to block the main gate of the CGO. As seen from the video clips, several hundreds of protestors including the Respondent assembled there at that time.
2. At the time of the offence, the Respondent, aged 33 and married with a one-year-old son, was the breadwinner of the family. With no criminal conviction record prior to the present offence, the Respondent pleaded guilty to one count of taking part in an unlawful assembly under section 18(3) of the Public Order Ordinance (Cap. 245 of the Laws of Hong Kong) and was sentenced to immediate imprisonment for two weeks.

Issue in dispute

3. The magistrate held the view that the Respondent’s participation was limited to the assembly on Tim Wa Avenue involving about 20 persons and should not be considered together with the assembly and road blockage on Harcourt Road.



Whether the sentence was wrong in principle and manifestly inadequate as the magistrate imposed the sentence on the basis that the Respondent's role did not involve taking the initiative to arrange, lead, summon, incite or advocate others to take part in the use of violence; the assembly he engaged in did not involve a large crowd; the premises or areas involved were limited in size; the duration was not long; the degree of violence involved in the moving of mill barriers was minimal; and no police officers on duty were injured and no property loss was caused as a result.

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

(Full text of the reasons for judgment of the Court of Appeal of the High Court (Chinese version only) at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132492&QS=%2B&TP=JU)

4. The Court of Appeal in *SJ v Chung Ka Ho* CAAR 4/2020 reiterated that the gravamen of the offence of taking part in an unlawful assembly lay in the fact that the number of participants was substantial and that the participants sought to achieve their common aim by weight of their sheer numbers. The public harm inflicted by the offence was often more profound and far-reaching than the prima facie acts of the offence. "The court shall act on the premise of maintaining public order", having regard to the pre-emptive and preventive purposes of the offence. The Court of Appeal in *Chung Ka Ho* once again extracted the legal principles in the *Wong Chi Fung* case to remind all parties concerned of the need to consider the gravamen seriously instead of just paying lip service to it. (paragraph 37)
5. There was a disparity in numbers between the Police and the protestors. The tumult was reaching boiling point and wild shouts were roaring incessantly around. With the protestors' emotions running high and nerves on edge, an intractable crisis was on the verge of breaking out. The acts of the Respondent were indeed inflaming an already explosive situation. (paragraph 43)
6. It was wrong in principle, and a wrongful and arbitrary segregation of the Respondent's acts from the whole context of the unlawful assembly, for the magistrate to consider the Respondent's acts only, to choose to turn a blind eye to the violent acts and breach of the peace committed by the protestors on Harcourt Road and Lung Wo Road without taking into account the large scale of the unlawful assembly and the overall behaviour of the crowd at the time, and to completely disregard the fact that the highly agitated participants could be further provoked anytime leading to casualties and damage to property. (paragraph 47)
7. In sentencing, the magistrate merely focused on the lack of evidence showing



any material loss of or damage to property and there being no injuries to any police officers on duty, without having regard to the gravamen of the offence and its preventive purpose. Even with no property damage and personal injury, the severity of the threats posed by all violent acts in their entirety should not be ignored. Two weeks' imprisonment as a deterrent sentence was simply nominal and did not have enough punitive and deterrent effects. Not only would a deterrent sentence deter the accused from reoffending, it would also send a proper warning to others. In the present case, the elements of punishment and deterrence ought to be given the greatest weight in sentencing. (paragraph 49)

8. The appropriate starting point for sentencing in this case was immediate imprisonment for 12 months, to be reduced by one-third for the Respondent's guilty plea. Given that this was a review of sentence and the Respondent had served his full sentence of two weeks, the Court exercised discretion and further reduced the sentence by one month, resulting in a sentence of seven months' imprisonment. (paragraph 50)

Prosecutions Division
Department of Justice
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