



Summary of Judicial Decision

Secretary for Justice v Yuen Chi Shing (“the Respondent”)

CAAR 6/2020 ; [2020] HKCA 1054

Decision : **Application for review of sentence allowed**
Date of Hearing : **25 November 2020**
Date of Judgment : **25 November 2020**
Date of Reasons for Judgment : **23 December 2020**

Background

1. In the small hours of 1st July 2019, protesters started to gather in the area of Tim Mei Avenue, Legislative Council Road, Lung Wo Road and Harcourt Road in Admiralty to protest against the Fugitive Offenders Ordinance Amendment Bill. At around 7 am on the same day, over 100 protesters, mostly dressed in black clothing with their faces covered and equipped with helmets, goggles and gloves, occupied the dual carriageway of Harcourt Road. The police set up a cordon at Performing Arts Avenue near the junction with Harcourt Road and Gloucester Road to prevent the protesters from marching towards Wanchai. Despite repeated warnings by the police, the protesters did not disperse but kept chanting slogans. They formed triangular barricades on the carriageway with the sharp ends of the barricades pointing at the police.
2. During the confrontation, the Respondent, who was dressed in black clothing and wearing a facemask and a pair of gloves, had been standing at the forefront of the protesters and had shouted verbal insults against the police officers. The confrontation with the police subsequently escalated, when the frontline protesters (including the Respondent) suddenly charged at the police by pushing or pulling the triangular barricades towards the police cordon, while other protesters at the back threw hard projectiles (such as water bottles, bricks and metal sticks) at the police officers and held up rows of umbrellas to shield themselves from the police. In response, the police officers swiftly conducted dispersal operation. The Respondent was then arrested by the police. The unlawful assembly lasted about 30 minutes.



3. The Respondent was a 35-year-old construction worker at the time of the offence. He had three previous convictions of theft. He pleaded guilty to one charge of unlawful assembly contrary to section 18(1) and (3) of the Public Order Ordinance (Cap. 245) and was sentenced to 6 weeks' imprisonment by the Magistrate. The Secretary for Justice applied to review the sentence pursuant to section 81A of the Criminal Procedure Ordinance (Cap. 221) on the grounds 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 6 weeks' imprisonment was wrong in principle and manifestly inadequate.

Issue in dispute

4. Whether the sentence of 6 weeks' imprisonment imposed by the Magistrate was manifestly inadequate and wrong in principle.

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

(Full text of the reasons for judgment of the Court of Appeal at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132564&QS=%2B&TP=JU)

5. Although the Respondent had already departed Hong Kong and was absent at the review hearing, given that he had been served with a notice of the review application, the Court of Appeal held that it could hear and determine the application in the Respondent's absence pursuant to section 81B(2A) of the Criminal Procedure Ordinance (Cap. 221) (Paragraph 8).



6. The Court of Appeal reiterated that the gravamen of the offence of unlawful assembly was the participants' acting in large numbers and using such large numbers to achieve their common purpose which gave rise to a serious threat to public order, and the purpose of the offence was to nip in the bud any harm to public peace. The sentencing courts must have regards to not just the consequences of the offence (such as injuries to persons or damage to properties), but also to factors including any premeditation of the offence, the number of participants, the location of the offence, the means of the offence, the areas affected, the duration of the offence, the level of actual violence or the imminence of threatened violence, and the role of the defendant, etc. Apart from the defendant's individual acts and his degree of participation, it is also relevant to consider whether he had arranged, led, called for, incited or advocated others to participate in the unlawful assembly or use violence. Even though the Magistrate in sentencing had cited at lengths these principles which were set out in *Wong Chi-fung*, he merely paid lip-service to them (Paragraphs 21, 22, 35(1) to (3)).

7. The Court of Appeal noted that the present case happened on the Hong Kong Special Administrative Region Establishment Day in 2019, when the waves of opposition to the Fugitive Offenders Ordinance Amendment Bill were in full swing and any unlawful assembly related to such opposition was extremely risky as the participants might be more prone to becoming agitated. The fact that the protesters were masked and hence emboldened; that they had ignored the police's warnings and refused to leave which gave rise to a risk of violence or escalation of violence; that the police were vastly outnumbered which entailed a risk of violence or escalation of violence in a highly charged confrontation; and the provocative nature of the protesters' conduct which may provoke the reactions of other persons at the scene, were all relevant factors which ought to be taken into account when sentencing (Paragraphs 35(4) to (8) and 36).



8. From the clothing of and the equipment taken by the frontline protesters and the forming of triangular barricades which they used to charge at the police, the protesters obviously acted with premeditation. The protesters must also have known that the huge crowd behind them would and did follow them in charging at the police. Such situation lasted for as long as 30 minutes, and some protesters even threw bricks and metal sticks at the police officers as they moved closer to the police. It was only fortunate that nobody was injured in the incident. These were all factors relevant to sentencing (Paragraph 37).

9. Although the Respondent's gear was not as full as the other frontline protesters, he chose to become part of them. Not only did the Respondent shout provocative insults, but he also charged at the police officers by moving the barricades together with other protesters. His culpability should not be underestimated, and his personal behavior had an instigative effect on the other protesters (Paragraph 38).

10. The Magistrate was wrong in adopting a starting point of only 9 weeks' imprisonment for the reasons that the case involved a mild level of violence without serious injury, that the police officers were not deterred to move forward, and that the Respondent had been sitting aside for most of the time. Not only had the Magistrate gravely underjudged the gravity of the offence and the Respondent's culpability, but he had also failed to take into account the gravamen and pre-emptive nature of the offence of unlawful assembly when sentencing. The sentence he imposed was manifestly inadequate and wrong in principle (Paragraph 39).

11. Having considered all the circumstances of the case, the Court of Appeal adopted a starting point of 15 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 finished serving his original sentence. The Court of Appeal thus sentenced the Respondent to 9 months' imprisonment, with warrant of



arrest issued for the Respondent to be apprehended and committed to prison (Paragraphs 40 and 41).

**Prosecutions Division
Department of Justice**

January 2021