Summary of Judicial Decision

Secretary for Justice ("SJ") v SHY ("the Respondent")
CAAR 7/2020; [2020] HKCA 829

Decision	:	**SJ's application for review of sentence allowed**
Dates of Hearing	:	**23 September and 14 October 2020**
Date of Judgment	:	**14 October 2020**
Date of Reasons	:	**28 October 2020**

Background

1. At midnight hours, the Police saw the Respondent together with four others crouching on the ground and acting suspiciously outside a secondary school. They fled when they saw the Police but the Respondent was intercepted eventually. The paper bag she was carrying contained a glass bottle with traces of ethyl alcohol, a bottle of antiseptic solution, a can of flammable light petroleum distillate (109 ml), a towel and a piece of tin foil containing some washing powder. The Respondent admitted under caution she had intended to make a petrol bomb with those materials by following the information obtained from the internet, but it was just "for fun", and she would like to be given a chance.

2. The Respondent pleaded guilty to the charge of possession of instrument fit and intended for unlawful purposes (section 17 of the Summary Offences Ordinance, Cap. 228). She was 15 years and 4 months of age at the material time and just turned 16 at the time of sentence. Having heard preliminary mitigation, the trial magistrate indicated that all sentencing options were open but only ordered for a probation officer's report without specifying the reasons. Given the fact that the petrol bomb had yet to be made, that the Respondent, a good young student, had pleaded guilty to the offence and that a juvenile court would generally incline towards rehabilitation rather than punishment, the magistrate accepted the probation officer's recommendation and imposed upon the Respondent a probation order of 12 months.

3. The SJ applied for a review of sentence pursuant to section 81A of the Criminal Procedure Ordinance, Cap. 221.

4. The grounds of review are as follows:
   (1) a non-custodial sentence was inadequate to reflect the gravity of the case

and the culpability of the Respondent; and

(2) the imposition of a probation order was wrong in principle and/or manifestly inadequate.

Issue in dispute

5. Sentencing considerations where young offenders possessed instruments fit for unlawful purposes with intent to use the instruments for making petrol bombs.

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

(Full text of the Court of Appeal's judgment (Chinese only) at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS= 131488&QS=%2B&TP=JU)

6. Based on well-established legal principles, the Hon Mr Justice Poon, Chief Judge of the High Court, had reiterated and elucidated in *SJ v. SWS* [2020] HKCA 788 (paras 45-49) the sentencing principles applicable to young persons in the age range of 14 to 16 who are convicted of serious offences (para. 2). In sentencing, the court has to consider the relevant sentencing factors, give them appropriate weight, and then impose a commensurable sentence. At the time of evaluating all sentencing factors, where practicable, the court will seek to provide young offenders with an opportunity to rehabilitate. Nevertheless, as a matter of public interest consideration, if it is necessary to impose deterrent sentences where the offence or the circumstances of the offence was serious, the youth or personal circumstances of the offenders would count little, if at all, in mitigation (para. 38). The same principles apply to offenders aged under 21. Lower courts must follow the said sentencing principles (paras 2-3).

7. The Respondent possessed instruments and materials fit for making a petrol bomb and had the intent to do so in order to test its power. It was beyond doubt a serious offence. The original sentence of probation for 12 months was clearly in breach of the said sentencing principles and had completely overlooked the point that the sentence must sufficiently reflect the important sentencing principles of punishment and deterrence. It was an error in principle which had led to the sentence being manifestly inadequate. The court must therefore intervene (para. 4).

8. As the trial magistrate had indicated that all sentencing options were open which include both custodial and non-custodian sentences, she should have ordered for all relevant reports in one go so that she could have adequate and full regard to all available sentencing options before making a decision. However, she had

only asked for a probation officer's report and did not specify the reasons therefor. As a matter of perception, this would give the impression that she had long considered the most appropriate sentencing option was probation order. Unless there are exceptional circumstances, having heard preliminary mitigation, if the court considers there is a need to call for reports to consider different sentencing options in view of the defendant's criminality, the appropriate way is to seek all relevant reports in one go so that the court could have all relevant circumstances and information related to sentencing in hand and properly sentence the defendant (paras 7-8 and 50).

9. As the Respondent was not charged with arson, and the particulars of offence only suggested her being in possession of those articles involved with intent to use for unlawful purposes on her own but not with others, nor had she had the joint intention with others to use the articles for unlawful purposes, it is inappropriate to consider the sentence with reference to the offence of arson or joint enterprise (para 42).

10. In considering whether the charges and the facts of the case and the Respondent's criminality fall within the serious category, relevant factors include: (1) the maximum sentence of the offence is 2 years' imprisonment; (2) the circumstances in which the offence took place as set out in the brief facts which the Respondent had admitted; (3) the Respondent was in possession of flammable light petroleum distillate in public place with intent to make a petrol bomb; (4) she intended to test the power of the petrol bomb; (5) societal disapproval of the aforesaid criminal intent, despite the fact that the making of the petrol bomb was not yet completed; and (6) no matter whether the articles in question could make a petrol bomb or not, the Respondent was obviously acting with premeditation (paras 42-46).

11. The fact that the Respondent was not present at a protest or unlawful assembly at the time of the incident does not take the case out of the serious category. Rather, it is undoubtedly an aggravating factor had she been in possession of the articles in question with intent to make a petrol bomb in a crowded place (para. 47).

12. Even if the trial magistrate accepted the Respondent's claim that she did it just "for fun", it does not mean that the gravity of the case or the Respondent's criminality could be reduced. The court's main consideration is still the Respondent's intent. Given it is a serious act for the Respondent to have intended to use the instruments in her possession to make a petrol bomb, even

if she held such an intent really just "for fun", the sentence should all the more clearly reflect the serious consequences that the commission of such an offence could bring about, and to let the Respondent realise that no one should act on a whim without regard to the safety of public's life and property. The court should at the same time also impose a deterrent sentence to let others intending to commit the same offence know that the consequence for such commission would be grave and would not be tolerated by the court (para. 48).

13. The trial magistrate should have found that the present case falls within the serious category. As the act committed in the present case involves public safety, the trial magistrate should have imposed a deterrent sentence so as to achieve the purposes of public protection, societal disapproval of such an offence and conduct, and punishing the offender (para. 49).

14. The trial magistrate focused on the Respondent's rehabilitation and imposed a probation order, this failed to sufficiently reflect the elements of punishment and deterrence. The sentence was incommensurate with the present case, wrong in principle and manifestly inadequate (paras 52 & 56).

15. Had it not been a review application and that the Respondent had undergone probation for a period of time, the court would agree with the Applicant's submission that a non-custodial sentence would not have sufficiently reflected the charge, the facts of the case and the Respondent's criminality even on a guilty plea. However, in the light of the present circumstances, the imposition of a community service order on the Respondent can achieve the purposes of rehabilitation and serve as adequate punishment to deter the Respondent and others who intend to commit the same offence (para. 56). On one hand, community service order carries a punitive element; on the other hand, it takes into account the consideration for rehabilitation of offenders (para. 55).

16. The court allowed the SJ's application, quashed the probation order and replaced it with a community service order of 120 hours with conditions including curfew (paras 57-58).

Prosecutions Division
Department of Justice
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