



Summary of Judicial Decision

Secretary for Justice v Kung Yat Kan, Clifford (“the Respondent”) CAAR 8/2020; [2020] HKCA 907

Decision	: Application for review of sentence allowed
Date of Hearing	: 23 October 2020
Date of Judgment	: 23 October 2020
Date of Reasons for Judgment	: 9 November 2020

Background

1. At around 8:25 am on 11 November 2019, a group of protesters were carrying out vandalism in the vicinity of an exit of Tseung Kwan O MTR station. Police officers including Sergeant 58151 (“the Sergeant”) and Constable 22776 (“the Constable”) arrived at the scene to sweep the area. When the Sergeant came close to the junction with Tong Tak Street while in pursuit of the protesters along Tong Chun Street, the Respondent suddenly used his left foot to kick the Sergeant in his left shin. The Sergeant was tripped but managed to regain his balance after staggering forward a few steps. The Sergeant was not injured as he was wearing a shin protector at the time. The Constable, who witnessed what happened as he had been following close behind the Sergeant, subdued and arrested the Respondent.
2. The Respondent was a clerk at the age of 18 years and 1 month at the time of the offence. He was 18 years and 9 months old at the time of sentencing. With a clear record prior to the present offence, the Respondent pleaded guilty to one count of assaulting a police officer in the due execution of his duty under section 36(b) of the Offences against the Person Ordinance (Cap. 212) and was sentenced to a 12 months’ probation order.

Issues in dispute

3. Whether the magistrate had given sufficient regard to the sentencing norm for the offence and whether she had wrongly underjudged the gravity of the offending.
4. Whether the magistrate’s consideration of the probation order as the appropriate sentence was wrong in principle and manifestly inadequate.



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

(Full text of the reasons for judgment of the Court of Appeal of the High Court at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=131704&QS=%2B&TP=JU)

5. It is rare that a person charged with assault on a police officer be sentenced to a probation order. (Para. 35)
6. A general strike on three fronts was staged on the day of the offence and the Respondent should have perceived the relatively chaotic situation outside. When police officers in full protective gear ran towards him in pursuit of protestors in his opposite direction, the Respondent must be aware that the police officers were in the course of law enforcement. Against the above background, the Respondent's purpose of kicking the Sergeant with his foot must have been to hinder the Sergeant's law enforcement action. The Respondent's assault on the police officer in such circumstances was very likely to have a contagion effect, thereby aggravating the violent conflict. The lower court should have noted and consistently applied this under comparable circumstances. (Paras 38-40)
7. The risks of drawing in other people in the assault on the police, protestors returning to the scene to snatch the offender (i.e. the Respondent) from the police officers and dissidents launching a counter-attack after witnessing what had happened must be higher under such an atmosphere than in other circumstances (including social conflicts of smaller scale). This is also what the trial magistrate should have noticed. (Para. 41)
8. As stated by the Court of Final Appeal in *Wong Chi Fung*, it was appropriate for the Court of Appeal to say that, in the circumstances now prevailing in Hong Kong including increasing incidents of unrest and a rising number of large scale public protests, it is now necessary to emphasise deterrence and punishment in large scale unlawful assembly cases involving violence. Such an observation certainly applies to incidents of assault on police officers in the same context and should have been followed by the lower court. (Para. 42)
9. The Respondent committed a serious offence whose gravity is more severe than that of general cases of assault on police officers. Even if his personal and family circumstances and the probation officer's recommendations had been taken into account, immediate imprisonment would be the only appropriate sentencing



option. By sentencing the Respondent to 12 months' probation order, the trial magistrate had given excessive weight to the above factors and departed from the sentencing norm for cases of assault on police officers. The sentence was wrong in principle and manifestly inadequate. In the light of all the circumstances of the case, the Court adopted a starting point of eight weeks' imprisonment, reducing it by one-third to 37.3 days for the Respondent's guilty plea. Given this was a review of sentence, the Court made a further reduction of one week, resulting in 30 days' imprisonment. (Para. 44)

Prosecutions Division
Department of Justice
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