



### Summary of Judicial Decision

## **Secretary for Justice (“Applicant”) v. Tong Wai Hung and Others (“Respondents”) CASJ 1/2020, [2021] HKCA 404**

<b>Decision</b>	<b>: Reference of questions of law to the Court of Appeal answered in the affirmative</b>
<b>Date of Hearing</b>	<b>: 25 January 2021</b>
<b>Date of Judgment</b>	<b>: 25 March 2021</b>

### Background

1. On 28 July 2019, a public meeting was held at Chater Garden pursuant to a letter of no objection issued by the police. At around 3 pm, a large number of people left the meeting and marched westwards towards the Liaison Office of the Central People’s Government, in breach of the conditions specified in the said letter of no objection. At around 5:20 pm, an eastward cordon line was formed by the police outside Western Police Station on Des Voeux Road West to prevent any unauthorized assembly. At the same time, a large crowd of protestors assembled on Des Voeux Road West between Western Street and Centre Street before the police cordon line. The prosecution case is that between around 5:20 pm and 7 pm, the disorderly conduct of the said crowd of protestors degenerated into acts of breach of peace.
2. At around 7 pm, the police commenced sweeping and dispersal action eastwards along the carriageway of Des Voeux Road West, during which the assembled protestors began to hurl objects towards the police. Having spotted some protestors who had fled from Des Voeux Road West into Ki Ling Lane (an adjacent alley perpendicular to Des Voeux Road West), officers of the Special Tactical Contingent chased after the protestors into Ki Ling Lane and eventually turned into Sai Yuen Lane (another alley perpendicular to Des Voeux Road West). The 1<sup>st</sup> to 3<sup>rd</sup> Respondent were located at the end of a cul-de-sac outside No.18 Sai Yuen Lane where a metal fence was erected, and were arrested at the scene.



3. Following a trial before His Honour Judge A. Kwok (“the learned trial Judge”), the 1<sup>st</sup> to 3<sup>rd</sup> Respondents were acquitted of the offences of riot and unlawful assembly (as an alternative charge), contrary to sections 19 and 18 of the Public Order Ordinance, Cap.245 (“POO”) respectively. In acquitting the Respondents, the learned trial Judge held, *inter alia*, that sections 18 and 19 of the POO had excluded the common law doctrine of joint enterprise (which would have covered offenders not being present at the scene) from the offences of riot and unlawful assembly.

### **Questions of law involved**

4. Pursuant to section 81D of the Criminal Procedure Ordinance, Cap.221 (“CPO”), the Secretary for Justice (“the Applicant”) referred the following questions of law for the Court of Appeal’s determination:
  - (1) For the offences of unlawful assembly and riot respectively under sections 18 and 19 of the POO whether the common law doctrine of joint enterprise as elucidated in *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640 is applicable; and
  - (2) If Question (1) is answered in the affirmative, for the offences of unlawful assembly and riot, whether the principle that a defendant’s presence at the scene is not always necessary for criminal liability under the common law doctrine of joint enterprise as enunciated in *Sze Kwan Lung & Others v HKSAR* (2004) 7 HKCFAR 475 is applicable.
5. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents have given consent to the use of their names in the proceedings.

### **Department of Justice’s Summary of the Court’s rulings**

(full text of the Court of Appeal’s judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=134508&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=134508&QS=%2B&TP=JU))

6. The Court answered both questions in the affirmative. To begin with, the Court held that, as a common law notion, the doctrine of joint enterprise applies to all offences, common law or statutory, unless it is expressly or impliedly excluded by statute (para.3). Whether the doctrine applies to sections 18 and 19 of the POO is a matter of statutory construction (para.37).



7. The Court observed that for the common law offences of unlawful assembly and riot, an accessory or a party to a joint enterprise is liable as the principal. Having reviewed the legislative history of sections 18 and 19 of the POO, the Court held that the legislature must have intended to retain the common law rule for the statutory offences of unlawful assembly and riot because it furthers the statutory objective of maintaining public order (para.54). In particular, the Court agreed with the Applicant's submissions as follows:-

"56. ... unlawful assemblies and riots nowadays are highly fluid in nature. They involve a myriad of participants playing various roles and sometimes with a rather sophisticated division of labour among them. Some physically participate in the unlawful assembly or riot at the scene. Some aid or abet the participants at the scene. Some may not even be present but are clearly participants under the doctrine of joint enterprise. Take the following examples:

- (1) A mastermind of the unlawful assembly or riot who remotely oversees the situation and gives commands or directions to the participants on the ground.
- (2) A person who funds or provides materials for the unlawful assembly or riot.
- (3) A person who encourages or promotes the unlawful assembly or riot by making telephone calls or spreading messages on social media.
- (4) A person who provides back-up support to the participants in the vicinity of the scene, such as collecting gear, bricks, petrol bombs, other weapons, and other materials to be used by the participants.
- (5) A lookout stationed in the vicinity who alerts the participants to the advance or deployment of the police.
- (6) A person who drives a getaway car to allow the participants to leave the scene.

The list is not exhaustive.

57. Whatever role the above participants might have played, they have all acted in concert with the principal offenders thereby sharing both their physical acts and culpability. If the doctrine of joint enterprise were excluded from sections 18 and 19, they would not be held liable as such, leaving a significant lacuna in the law of unlawful assembly and riot. The public interest in the maintenance of public order would be seriously undermined, if not irreparably damaged. This could not have been the legislative intent when enacting sections 18 and 19."



8. The availability of alternative criminal bases, such as traditional accessory rules or inchoate offences, does not deny the separate utility of the doctrine of joint enterprise (para.58). Nor does the rule against doubtful penalization apply for the Court sees no ambiguity in the legislative intent of sections 18 and 19 of the POO (para.60).
9. The requirement of “common purpose”, or commonly referred to as the “corporate nature”, of unlawful assembly and riot as elucidated in *SJ v. Leung Kwok Wah* [2012] 5 HKLRD 556 and *HKSAR v. Leung Tin Kei* [2020] 4 HKLRD 462 (CA) concerns the principal offenders, and does not displace the ordinary common law principles relating to accessories or parties to a joint enterprise (para.66). The Court also disagreed that the application of extended joint enterprise would blur the distinction between unlawful assembly and riot (paras.73 - 74).
10. Insofar as overcharging is concerned, the Court observed that when a peaceful demonstration degenerates into an unlawful assembly or a riot, a peaceful participant or onlooker should leave the scene as soon as reasonably practicable. While his mere continued presence because of some good reasons or the actual circumstances at the scene does not render him liable, he should be held liable if he becomes involved in the violence or the threat of violence. The same applies to those who are not present at the scene. Accordingly, the Court concluded that the application of the traditional accessory rules or the doctrine of joint enterprise does not give rise to over-charging (paras.77 - 81).
11. Concerning the prevalent use of social media, the Court reiterates that freedom of expression is not absolute. It does not provide immunity to those who have participated in an unlawful assembly or a riot by encouraging or promoting it, in the disguise of exercising their freedom. If there is sufficient evidence to establish their liability under the accessory rules or the doctrine of joint enterprise, they have crossed the permissible line and are no longer innocent people (paras.82 - 83).

**Prosecutions Division  
Department of Justice**

**April 2021**