



Summary of Judicial Decision

Secretary for Justice v Leung Hiu Yeung and 12 others (“the Appellants”)

FACC 3-15/2018; [2018] HKCFA 43

Decision : Appeals against sentence allowed
Date of Hearing : 7 September 2018
Date of Judgment/Decision : 28 September 2018

Background

1. In the afternoon on 13 June 2014 while the Legislative Council (“LegCo”) Finance Committee meeting was held inside the LegCo Complex, about 300 to 400 protesters gathered outside the Complex. The glass doors of the entrances to the Complex were closed and layers of Mills barriers were set up. In the same evening when the Finance Committee proceedings continued, hundreds of protesters suddenly dashed towards the entrances to the Complex and (using the Mills barriers as well as long bamboo poles and metal bars) attempted to force their way into the Complex lobby by prising open or battering the doors. Each of the Appellants was either involved in prising or pulling open the glass doors.
2. The charging at the Complex lasted for more than half an hour. As a result, damage was caused to a number of facilities of the Complex, with the cost of repair amounting to over \$400,000. In the chaos, one of the LegCo security officers sustained fractured toes.
3. On 30 December 2015, all Appellants, save for one who pleaded guilty to the offences of unlawful assembly and attempted forcible entry, were convicted after trial of taking part in an unlawful assembly. On 19 February 2016, the Appellants were sentenced to community service orders for various durations.
4. Upon the Secretary for Justice’s (“SJ”) application for review of their sentences, on 15 August 2017, the Court of Appeal (“CA”) allowed the SJ’s application and quashed the sentences of community service order passed by the trial magistrate. In substitution thereof, the Appellants were sentenced to immediate imprisonment for 8 to 13 months (full text of the CA’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=111277&QS=%2B&TP=JU). The Appellants appealed to the Court of Final Appeal (“CFA”) against their sentences.

Issues in dispute

5. Whether the magistrate had made a relevant error so as to justify the CA exercising its jurisdiction under section 81A of the Criminal Procedure Ordinance (Cap. 221) (“CPO”) to review the sentences of community service orders.
6. Whether the CA, in substituting sentences of imprisonment, retrospectively applied the sentencing guidelines laid down in *SJ v Wong Chi Fung* CAAR



4/2016 (“*Wong Chi Fung (CA)*”).

7. Whether the CA failed to properly consider section 109A of CPO in respect of the 5th Appellant (who was at the time of the offence aged below 21 and at the time of conviction aged 21) and/or the 6th Appellant (who was at the date of sentence by the magistrate aged below 21 and at the date of review aged 21) before imposing custodial sentences.

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

(full text of the CFA’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=117648&QS=%2B&TP=JU; press summary issued by the Judiciary at https://legalref.judiciary.hk/doc/judq/html/vetted/other/en/2018/FACC000003_2018_files/FACC000003_2018ES.htm)

8. In imposing community service orders, the magistrate had erred in principle by omitting to take into account the fact that the Appellants (other than the one who pleaded guilty) were not remorseful. (paragraph 31)
9. The CFA was satisfied that given the scale of the unlawful assembly and the degree of violence involved, the community service orders imposed were manifestly inadequate sentences for the charge of unlawful assembly, even disregarding the guidance laid down by *Wong Chi Fung (CA)*. A custodial sentence of imprisonment was called for. The CA was entitled to substitute increased sentences of imprisonment at the review. (paragraphs 32 and 47)
10. Although the CA would have been entitled, on the existing authorities on unlawful assembly, to conclude that it was necessary to impose a term of imprisonment, none of the previous authorities considered had sentences which approached the 15 months’ imprisonment as imposed in this case. The CA could only have imposed sentences with a 15-month starting point by retrospectively applying the new sentencing guidelines that it laid down in *Wong Chi Fung (CA)*, and that was wrong in principle. (paragraphs 47 to 49)
11. Section 109A of CPO was to make imprisonment of young persons between the ages of 16 and 21 a sentencing measure of last resort. (paragraph 51) Having regard to the purpose of the section (which is clearly rehabilitative) and the wording of the section, the relevant date for the purposes of section 109A is the date on which a sentence of imprisonment is passed. (paragraphs 59, 60 & 64) However, if a young person has turned 21 years of age between the date of offending or conviction and the date of sentence, his youth will be a powerful factor in determining the appropriate sentence. In practical terms, such a young offender should only be sent to prison as a matter of last resort and the sentencing court will have to be alive to the possibility of obtaining reports for sentencing. (paragraphs 74 & 76)

**Prosecutions Division
Department of Justice**

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