



Summary of Judicial Decision

**Secretary for Justice v Wong Chi Fung (D1), Law Kwun Chung (D2)
and Chow Yong Kang Alex (D3) (“the Appellants”)
FACC 8-10/2017; [2018] HKCFA 4**

Decision : Appeals against sentence allowed
Date of Hearing : 16 January 2018
Date of Judgment/Decision : 6 February 2018

Background

1. On 26 September 2014, a notified assembly was held at an area at Tim Mei Avenue outside the Forecourt of the Tamar Central Government Offices East Wing, and was scheduled to end at 10 pm on that day. At around 10:24 pm, D1 at the stage appealed to the public to enter the Forecourt together with them. He passed the stage to D2 who continued to appeal to the public to enter the Forecourt.
2. D1 then rushed to the Forecourt, climbed over the fence and jumped into the Forecourt. About one minute later, D3 also climbed over the fence and down into the Forecourt and joined the other participants. At the same time, several hundred participants of the assembly either climbed over the fence or tried to force open the closed gates of the Forecourt, ignoring the security guards and the Police who tried to stop them. In the process, 10 security guards were injured as a result of the violence involved.
3. The defendants were convicted after trial of either taking part in (D1 and D3) or inciting others to take part in the unlawful assembly (D2). The magistrate sentenced D1 and D2 to 80 and 120 hours of community service order respectively, and D3 to three weeks' imprisonment suspended for one year.
4. The Secretary for Justice (SJ) applied for a review of the defendants' sentences at the Court of Appeal (CA). On 17 August 2017, the CA allowed SJ's application for review and imposed immediate imprisonment of 6 to 8 months on the three defendants (full text of the CA's judgment at http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=111053&QS=%2B&TP=JU). They all appealed to the Court of Final Appeal (CFA) against their sentences.

Issues in dispute

5. The CA's scope of power to review facts in SJ's application for review of sentences.
6. Consideration of defendant's motives in sentencing, in particular assertions of civil disobedience and exercise of constitutional rights.
7. The extent to which the CA ought to have made allowance in sentencing the defendants, that sentencing guidelines for future cases were being given.



8. Regarding D1, the extent to which the CA should have taken into account section 109A of the Criminal Procedure Ordinance, Cap. 221, which purpose was to make imprisonment of young persons between the ages of 16 and 21 a sentencing measure of last resort.

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

(full text of the CFA's judgement at http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=113536; press summary issued by the Judiciary at http://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2017/FACC000008_2017_files/FACC000008_2017ES.htm)

9. The CA could, in determining whether the sentencing court has committed any of the errors, look at any relevant evidence. If the court below has made an error as to the facts on which it proceeds to sentence, it is only right that the CA can correct the errors. (paragraph 59)
10. A submission in mitigation of the offence of unlawful assembly that the act was committed in the exercise of freedom of expression and freedom of assembly will be unlikely to carry any significant weight since, by definition, he was not doing so at the time of committing the offence. This is all the more so when violence was involved since there is no constitutional justification for violent unlawful behavior. Similar considerations apply to the submission in mitigation that the offence was committed by way of an act of civil disobedience. (paragraphs 69 & 70)
11. The CFA endorsed the CA's guidelines that unlawful assemblies involving violence (even a relatively low degree) may justifiably attract sentences of immediate imprisonment in the future. (paragraphs 121-125 & 135)
12. However, at the time of the magistrate's sentencing, the range of sentences for unlawful assembly includes the imposition of community service orders and there was no appellate court guidance that required an immediate custodial sentence. Hence, the sentences imposed by the magistrate could not be said to be outside the reasonable ambit of the magistrate's sentencing discretion. Thus, there was no proper basis for the CA to ascribe different weights to the relevant factors taken into account by the magistrate as the sentences were not manifestly inadequate. (paragraphs 104-106)
13. The CA as the review sentencing court has a duty under section 109A of the Criminal Procedure Ordinance to consider all non-imprisonment sentencing options for young persons between the ages of 16 and 21. (paragraph 131)

(press release of the Department of Justice in relation to the CFA's judgment is at https://www.doj.gov.hk/eng/public/pr/20180206_pr1.html)

**Prosecutions Division
Department of Justice**

June 2018