



Summary of Judicial Decision

**HKSAR v Leung Chung Hang Sixtus (“the Appellant”)
FACC 2/2021 ; [2021] HKCFA 24**

Decision : **Final appeal against conviction dismissed**
Date of Hearing : **22 June 2021**
Date of Reasons for Judgment : **16 July 2021**

Background

1. The Appellant had been elected to the Legislative Council (‘LegCo’) in September 2016 but he declined or neglected to take his oath on 12 October 2016. The Appellant wanted to re-take his oath at the LegCo meeting to be held on 2 November 2016 but he was not permitted to take part in that meeting. A notice to this effect was posted outside the LegCo chamber. Notwithstanding this, the Appellant attended the LegCo meeting but was ordered to leave. When he refused to do so, the meeting was adjourned to a conference room on the second floor. Afterwards, the Appellant, together with about 14 others, went to the second floor and attempted to enter the conference room, but they were blocked by a cordon of security officers. The Appellant and his accompanying group then rushed at the cordon in an attempt to force their way into the conference room. The Appellant held onto the frame of the door to the conference room and tried to haul himself over the security officers to get past them, while other members of the group supported him by pushing and shoving. The incident lasted about 20 minutes, during which a number of security officers were injured.
2. After a trial before a magistrate, the Appellant was convicted of the offence of taking part in an unlawful assembly, contrary to sections 18(1) and (3) of the Public Order Ordinance, Cap. 245 (‘POO’), and was sentenced to four weeks’ imprisonment for the offence. His appeal against both conviction and sentence was dismissed by the Court of First Instance. With leave granted by the Appeal Committee on the basis that a point of law of great



and general importance was involved in the lower Court's decision, the Appellant appealed against his conviction to the Court of Final Appeal.

Issue in dispute

3. The issue on the appeal was one concerning the mental requirement of the offence of taking part in an unlawful assembly. The certified question, for which leave to appeal was granted, was “which alternative set out in *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 should be applicable in relation to the ‘likely to cause any person reasonably to fear’ limb (the ‘Likely Limb’) of the offence created by section 18 of the POO”.
4. It was the Appellant's contention that either the first *Kulemesin* alternative (which requires proof of full *mens rea* embracing intention, knowledge and recklessness) or the second *Kulemesin* alternative (which removes the need for *mens rea* but allows a defence based on an honest and reasonable belief on the part of the accused as to the likely consequence of his act) applied to the Likely Limb, but in any event, the fifth *Kulemesin* alternative (which dispenses with any *mens rea* requirement) should not apply.

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

(Full text of the reasons for judgment of the Court of Appeal at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=137202&QS=%28FACC%7C2%2F2021%29&TP=JU)

5. In dismissing the appeal, the Court held that the Likely Limb of the offence of unlawful assembly under section 18(1) of the POO does not require proof of *mens rea* and should be categorized as falling under the fifth *Kulemesin* alternative, for the following reasons:
 - (1) section 18(1) of the POO provides that “when 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner”, they are an unlawful assembly if, in acting so, they either “intend ... to cause any person reasonably to fear



that [they] will commit a breach of the peace” (the ‘Intended Limb’); or their conduct is “likely to cause any person reasonably to fear that [they] will commit a breach of the peace” (the ‘Likely Limb’ mentioned above);

- (2) since intention is expressly required under the Intended Limb but deliberately omitted from the Likely Limb, the Legislature’s intention in creating the Likely Limb must have been to create an offence which can be committed without proof of an intention to cause, or reckless as to causing, the stipulated fear of a breach of the peace. As such, the presumption of *mens rea* has been displaced, and the first *Kulemesin* alternative does not apply to the Likely Limb (paragraph 24);
- (3) having regard to the nature and subject-matter of the offence and the statutory objectives of the POO, including the need to ensure protection of the public and the maintenance of public order, the second *Kulemesin* alternative does not apply to the Likely Limb either. This is because the Likely Limb, which is designed to deter conduct likely to cause any person reasonably to apprehend a breach of the peace, is not logically linked to whether the assembled persons do or do not foresee such reasonable apprehension as the consequence of their acts, but is focused on responding to the objectionable nature and quality of those acts. As a matter of construction, the Likely Limb focuses on the likely effect of the conduct objectively assessed, not on the effect contemplated by the assembled persons (paragraphs 40 and 47); and
- (4) since persons who, “in a group of at least three persons, have assembled together and conducted themselves in a disorderly, intimidating, insulting or provocative manner which, viewed objectively, will have been likely to cause any person reasonably to fear that the assembled persons will commit a breach of the peace”, are far removed from persons who have acted in a reasonable, diligent and socially unblameworthy manner, it is appropriate that section 18(1) be construed as prohibiting such conduct under the criminal law without



requiring an additional *mens rea* element to be established. The Likely Limb should therefore be construed as falling within the fifth *Kulemesin* category as to dispense with any *mens rea* requirement in respect of the likely consequence of causing reasonable apprehension of a breach of the peace (paragraphs 36 to 41, 46 and 47 of the Judgment).

6. The Court summarized its answer to the certified question as follows (paragraph 59):

- (1) the *actus reus* elements of the Likely Limb of section 18(1) of the POO are: (i) there must be “3 or more persons”; (ii) they must be “assembled together”; (iii) they must “conduct themselves in a disorderly, intimidating, insulting or provocative manner”; and (iv) their conduct, viewed objectively, must “cause any person reasonably to fear that [they] will commit a breach of the peace ... or provoke other persons to commit a breach of the peace”;
- (2) the prosecution will need to prove full *mens rea* on the part of the defendant in respect of each of elements (i) to (iii) above. No *mens rea* is required in respect of element (iv); and
- (3) the prosecution must also prove the defendant took part in the unlawful assembly within section 18(3) of the POO.

7. Given the findings by the trial magistrate that the Appellant must know the nature of the conduct of his group and the circumstances at the time of the offence were likely to cause any person reasonably to fear that they would commit a breach of the peace, which were upheld by the judge in the magistracy appeal, the Appellant’s guilt in respect of the offence is inevitable regardless of the answer to the certified question (paragraphs 52 to 57). The Appellant’s appeal against his conviction was accordingly dismissed.



Department of Justice

The Government of the Hong Kong Special Administrative Region

**Prosecutions Division
Department of Justice
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