



Summary of Judicial Decision

HKSAR v. Lo Kin Man (盧建民) (“1st Appellant”)

FACC 6/2021; [2021] HKCFA 37

Secretary for Justice v. Tong Wai Hung (湯偉雄) (“2nd Appellant”)

FACC 7/2021; [2021] HKCFA 37

Decision : **FACC 6/2021 – Appeal against conviction dismissed**
FACC 7/2021 – Questions answered by the Court

Date of Hearing : **5 October 2021**

Date of Judgment : **4 November 2021**

Background

1. The two captioned Court of Final Appeal (“CFA”) judgments concern a proper understanding of the structure and elements of the offences of unlawful assembly and riot, contrary to s.18 and s.19 of the Public Order Ordinance, Cap.245 (“**POO**”) and their relationship with certain common law doctrines.
2. In *Lo Kin Man* FACC 6/2021, the 1st Appellant and three others were jointly charged with riot which took place at Portland Street in Mong Kok between 8 and 9 February 2016. The 1st Appellant was convicted after trial by jury on a unanimous verdict and was sentenced to 7 years’ imprisonment. His appeals against conviction and sentence were dismissed by the Court of Appeal (“CA”). The Appeal Committee later granted leave to appeal against conviction in respect of 6 questions of law of great and general importance and under the substantial and grave injustice (“SGI”) limb.
3. In *Tong Wai Hung* FACC 7/2021, the 2nd Appellant and two others were acquitted of the offences of riot and unlawful assembly for incidents on 28 July 2019 after trial. The Secretary for Justice referred 2 questions of law to the CA for opinion pursuant to s.81D of the Criminal Procedure Ordinance, Cap.221, which were both answered in the affirmative. The CA later certified the same 2 questions as points of law of great and general importance for appeal to the CFA, for which leave to appeal was granted by the Appeal Committee.

Issue in dispute

4. In hearing the two appeals together, the CFA has considered a total of 9 questions (see Annex), which can be summarised into 4 issues:-
 - (1) The existence and nature of a requirement (if any) for proof of a “common



- purpose” shared by the defendant and other persons assembled (*Questions 1a-1d in FACC 6/2021*);
- (2) The applicability of the doctrine of joint enterprise to the two statutory offences and whether that doctrine enables liability to be established without the defendant being present at the scene (*Question 2a in FACC 6/2021, Questions 1 and 2 in FACC 7/2021*);
 - (3) Whether a defendant can be found guilty under POO ss.18 and 19 on the basis of “encouragement through [the defendant’s] presence”, without committing acts specifically prohibited by those sections (*Question 2d in FACC 6/2021*); and
 - (4) Whether a material irregularity arises in that the indictment does not mention any potential participants other than the co-defendants who were not convicted (*SGI in FACC 6/2021*).

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=139868&QS=%2B&TP=JU)

A. Elements of POO ss.18 and 19

Overview of the elements

5. The CFA elucidated the elements of unlawful assembly and riot as follows:-

- (1) POO s.18 (i) defines what constitutes an unlawful assembly and (ii) makes “taking part” in the unlawful assembly the conduct element of the offence. The constituent elements are (i) for three or more persons assembled together; (ii) to conduct themselves in the prohibited disorderly, intimidating, insulting or provocative manner; (iii) intended or likely to cause a reasonable apprehension that the persons so assembled will commit or provoke a breach of the peace. Any person who takes part in an unlawful assembly commits the offence (§§ 9-18, 109(a)).
- (2) POO s.19 builds on s.18, which makes the existence of an unlawful assembly one of the constituent elements of the offence of riot. A riot comes into being when any person taking part in an unlawful assembly commits a breach of the peace, turning the assembly into a riotous assembly. The offence is committed by any person who takes part in such riot (§§ 19-23, 109(b)).

The offence-creating provision of “taking part”

6. As for conduct element of “taking part”, the CFA held, *inter alia*, that:-

- (1) “Taking part” is a broad expression and is not confined to the conducts set



out in POO ss.18 and 19. A defendant is “taking part” in the relevant criminal assembly if (§§ 14, 109(d)):-

- (a) he performs the acts prohibited, i.e., for unlawful assembly under s.18, behaving in the prohibited disorderly, intimidating, insulting or provocative fashion, whereas for riot under s.19, committing a breach of the peace; or
 - (b) he acts in furtherance of such prohibited conduct which includes acts of facilitating, assisting or encouraging those taking part in an unlawful assembly or a riot.
 - (2) While mere presence does not make a person guilty, it does not take a great deal of activity on the defendant’s part to move the case from “mere presence” to “encouragement” category. For instance, a person present at scene may encourage, promote, or take part in riots, “by words, signs, or gestures, or by wearing the badge or ensign of the rioters”. Likewise, those present to “lend the courage of their presence to the rioters, or to assist, if necessary” can be found guilty of the offences (§§ 81-85, 109(e));
 - (3) If a defendant’s presence occurs in circumstances qualifying it as “encouragement” of the prohibited conduct by others, then he or she could be found guilty without specific conduct (§ 86);
 - (4) In determining whether a defendant was present and the location and duration of an unlawful assembly or a riot, a realistic, instead of overly rigid, approach should be taken, bearing in mind the highly fluid nature of unlawful assembly or riot and communications maintained by the participants (§§ 74-76, 109(e));
 - (5) A riot or an unlawful assembly does not cease so long as the participants refused to leave but remain at the scene, even if in the case of riot, the violence ebbs and flows (§ 77);
 - (6) The following evidence can support an inference of “taking part”: (i) time and place of arrest, (ii) items found on the defendant, such as a helmet, body armour, goggles, a respirator, a radio transceiver, plastic ties, laser pointers, weapons and materials to make weapons such as petrol bombs (§ 78); and
 - (7) Latecomers, who joined in an unlawful assembly or a riot after its formation, may also be guilty for the offences (§§ 12, 20).
7. As for the mental element, the CFA held that both offences are participatory in nature. The defendant must have a participatory intent, i.e., intend to take part in the unlawful assembly or riot, being aware of the related conduct of other participants and intending, while assembled together with them, to engage in or act in furtherance of the prohibited conduct or the commission of breach of the



peace. Proof of such participatory intent may generally be inferred from conduct (§§ 17, 22, 48, 109(c)).

8. “Breach of the peace” in the context of ss.18 and 19 includes, but is not confined to, situations which might give rise to provoked retaliation. It extends to actual or threatened violence to persons or property, without any need for the owner of such property to be present (§§ 88-93, 109(i)).

Extraneous common purpose not required to be proved

9. There is no requirement for the prosecution to prove any extraneous common purpose, i.e. an external objective motivating the participants in unlawful assembly or riot, as the 1st Appellant contended. The legislature clearly intended to exclude the uncertain common law requirement of common purpose from ss.18 and 19 (§§ 38-40). The notion of extraneous common purpose poses further conceptual and practical problems (§§ 48-50). The participatory intent described above already denotes the requirement of a defendant being aware of other participants’ related prohibited conduct (§ 50).
10. Further, the common law requirement to prove the defendants’ mutual intention to assist each other is no longer applicable (§ 50).

B. Applicability of joint enterprise, accessorial and inchoate liability, and the requirement of presence

11. Persons can be found guilty as a principal offender of unlawful assembly or riot if it is proved that he was present at the scene and “taking part” in the unlawful assembly or riot as explained above (§ 109(f)).
12. Invoking basic form of joint enterprise would add unwarranted burden on the prosecution of showing a prior agreement and cause possible confusion to jury in understanding two layers of “taking part”, namely first in the joint enterprise and then in the unlawful or riotous assembly. Therefore, in light of the statutory language of ss.18 and 19, basic form of joint enterprise is found to be unnecessary and not applicable to the offences of unlawful assembly and riot (§§ 66-67, 109(g)).
13. At the same time, the CFA emphasized that the applicability of accessorial and inchoate liability to two offences has not been affected. Defendants who promotes or acts in furtherance of an unlawful assembly or riot while not present at the scene would still be liable as accessories or as a conspirator or inciter of the main offences, and are punishable to the same extent as principal offenders. For instance, defendants of varying roles can be found guilty as follows (§§ 68-70, 109(f), 109(h), 111):-



Liability	Role/ Conduct
Principal or as Aider or abettor	(a) Persons who provide back-up support at the scene (e.g. collecting bricks, petrol bombs and other weapons; lookouts)
Inciter or counsellor	(b) Mastermind; (c) Persons who fund or provide materials; (d) Persons who encourage the assemblies on social media; (e) Persons who provide back-up support but are not present at the scene
Assisting offender	(f) Persons driving getaway car to help participants leave the scene

14. Further, extended form of joint enterprise may be applicable. In other words, a person with foresight may be guilty of a more serious crime committed in the course of an agreed plan of unlawful assembly or riot. For example, if a group of rioters, intending to destroy public property and to erect barriers stopping traffic, know that some amongst them would take along petrol bombs or lethal weapons which they might use, but proceed with their plan, and the weapons were then used to cause serious injury, those with foresight might be liable for the more serious offence (§§ 71-73, 109(h)).

C. Drafting of indictment

15. In drafting an indictment alleging unlawful assembly or riot against a defendant, it is good practice to allege, where the evidence permits, participation by other persons unknown by adding “with persons unknown” or “with persons not before the court” (§§ 95, 109(j)).



Annex

FACC 6/2021

Question 1a

In order to establish the offence of riot under section 19 of the Public Order Ordinance (Cap 245) ("POO"), whether proof of the unlawful assembly required that at least 3 persons be assembled together for a "common purpose" which was distinct from the intention of committing the statutorily prescribed acts, namely, conducting oneself in a disorderly, intimidating, insulting or provocative manner; and therefore whether the Trial Judge had erred in law in directing the jury that the element of "common purpose" is satisfied if they are satisfied that the Applicant assembling together with other defendants had the intention of conducting themselves in a disorderly, intimidating, insulting or provocative manner?

Question 1b

If the answer to Question 1a is in the affirmative, whether there is a legal requirement that the said prescribed acts and the breach of the peace must be committed with the specific intent to achieve the "common purpose" by such means?

Question 1c

For the common purpose to be a substantive element in the offence of riot, whether the Prosecution is required legally to prove that such alleged common purpose must be shared, mutually understood or communicated between the accused to a standard that there is a meeting of minds, or the Prosecution is simply required to prove that the same purpose was held individually by the accused without the need to prove further mutual understanding or communication?

Question 1d

Whether it is a distinct element of riot under section 19 of POO that the defendants must have the mutual intention to assist each other, by force if necessary, against any person who might oppose them in the execution of the common purpose?

Question 2a

Whether the doctrine of joint enterprise applies to the offences under sections 18 and 19 of the POO?

Question 2d

Whether a person could be found guilty of riot without specific conduct on his part falling under the prescribed conduct provided in sections 18 and 19, but merely by virtue of alleged encouragement through his presence?



SGI

On the substantial and grave injustice ground, whether a material irregularity arises in that the indictment does not mention any potential participants other than the co-defendants who were not convicted.

FACC 7/2021

Question 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.

Question 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.