



### Summary of Judicial Decision

**HKSAR v Ng Man Yuen Avery (“the Respondent”)**

**FAMC 15/2019; [2019] HKCFA 33**

**Decision** : **Application for leave to appeal to the Court of Final Appeal refused**

**Date of Hearing/Judgment:** **23 August 2019**

**Date of Reasons** : **27 August 2019**

### Background

1. On 4 September 2016, Mr Leung Chun-ying (“Leung”), who was the Chief Executive at the time, was on his way to vote at the Legislative Council election which was then being held. As Leung was about to enter a polling station, the Respondent hurled a sandwich (“the Sandwich”) at Leung. Leung ducked so that the Sandwich missed him. Walking approximately a metre behind Leung was Acting Chief Inspector of Police Lau (“Lau”), who was Leung’s personal security officer. With the back of his right hand, Lau warded off the Sandwich. This resulted in the Sandwich breaking into pieces, some of which landed on the right front part of Lau’s vest.
2. The Respondent was subsequently charged with common assault upon Lau. He was convicted as charged by a magistrate on 31 October 2017. The conviction was based on the principle of transferred malice, for which the Respondent’s intent to hit the person at whom he threw the Sandwich, namely Leung, operated as the necessary state of mind on the Respondent’s part for the purposes of a charge of common assault upon the person whom the Sandwich in fact struck, namely Lau. The Respondent was sentenced to 3 weeks’ imprisonment.
3. Upon the Respondent’s appeal (called “magistracy appeal” in legal terms) to the Court of First Instance (“CFI”) against both conviction and sentence, on 6 March 2019, a CFI judge allowed the Respondent’s appeal against conviction and set aside the sentence imposed by the magistrate (full text of the CFI’s judgment at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=120451&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=120451&QS=%2B&TP=JU)). The prosecution made an application to the Court of Final Appeal (“CFA”) for leave to appeal to the CFA from the CFI judge’s judgment.

### Issues in dispute

4. In a magistracy appeal by way of rehearing pursuant to section 113 of the Magistrates Ordinance (Cap. 227), is a CFI judge entitled to dispose of the



appeal based on an issue which was neither raised at trial nor at the appeal hearing and without hearing submissions by either party on such issue. (“Point of Law Limb”)

5. Whether in allowing the Respondent’s intermediate magistracy appeal against conviction, the CFI judge had materially misapprehended the evidence, in particular the testimony of the key witness (Lau) and the video clip capturing the incident, so that the decision in the CFI judge’s judgment amounts to a serious departure from accepted norms so that a substantial and grave injustice has been done. (“Substantial and Grave Injustice Limb”)

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

(full text of the Appeal Committee’s judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=123966&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=123966&QS=%2B&TP=JU))

6. On the evidence received by the magistrate, there was evidence on which he was entitled to find the facts of this case proved beyond reasonable doubt. It was also open to the magistrate to feel sure that the exculpatory parts of the Respondent’s evidence were properly to be rejected. On the magistrate’s view of the facts, he was entitled to convict the Respondent of a common assault upon Lau. (paragraph 4)
7. In the circumstances of this case, it was open to the prosecution to bring a charge of common assault by the Respondent upon Lau although the far more obvious course would seem to have been to bring a charge of common assault by the Respondent upon LEUNG. (paragraph 5)
8. Under the Point of Law Limb, the prosecution’s complaint is essentially that the CFI judge (i) quashed the conviction on grounds which had not been canvassed during the hearing of the appeal, (ii) did so without alerting the prosecution to what he had in mind, and (iii) thus left the prosecution with no opportunity to be heard on those grounds. The Appeal Committee opined that it is at least reasonably arguable that the prosecution was in effect deprived of an opportunity to be heard. But that alone would not warrant leave to appeal to the CFA. It is well-settled law that the rules of natural justice require that all parties be given an opportunity to be heard. The point itself is uncontroversial and it does not require a further pronouncement by the CFA. (paragraphs 8 & 9)
9. The prosecution’s complaints under the Substantial and Grave Injustice Limb are directed ultimately to appreciation of evidence and fact-finding. The Appeal Committee opined that it is not correct to suggest that the CFI judge’s judgment forms a precedent as to what does or does not amount in law to a common assault. (paragraph 10)



10. The Appeal Committee held that some of the points made under the Substantial and Grave Injustice Limb seem to have some substance. But that alone would not warrant leave to appeal to the CFA. The Appeal Committee reiterated that the “substantial and grave injustice” limb under section 32(2) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) “exists as a residual safeguard to cater for those rare and exceptional cases in which there is a real danger of something so seriously wrong that justice demands an enquiry by way of a final criminal appeal despite the absence of any real controversy on any point of law of great and general importance”. The Appeal Committee considered that in all the circumstances, justice does not demand a final appeal in the present case. (paragraph 11)
  
11. The Appeal Committee, however, underlined that every party including the prosecution has the right to be heard. (paragraph 11)

**Prosecutions Division**

**Department of Justice**

**August 2019**