



### **Summary of Judicial Decision**

#### **HKSAR v NG Man-yuen Avery (A1), CHAU Ka-faat (A2) and CHENG Pui-lun (A3) HCMA 492/2019; [2020] HKCFI 2425**

**Decision** : **Magistracy Appeal**  
**Appeals against conviction refused**

**Date of Hearing** : **12 August 2020**

**Date of Reasons for Judgment** : **17 September 2020**

#### **Background**

1. On 6 November 2016, a large scale unnotified public procession took place from Central to the Liaison Office of the Central People’s Government (“LOCPG”) in Western District which was followed by an unnotified assembly outside the LOCPG in response to a hitherto unannounced meeting at the LOCPG in anticipation of the Standing Committee of the National People’s Congress exercising its power to interpret the Basic Law regarding the legal requirements and preconditions to uphold the Basic Law and to bear allegiance to the HKSAR for standing for election in respect of or taking up the public office as a result of two Legislative Councillors elect failing to do so upon their swearing-in.
2. Both the procession and assembly involved thousands of demonstrators which necessitated the Police to deploy a large amount of manpower and resources to facilitate their peaceful procession by, amongst other things, diverting the traffic en route and setting up Designated Public Activities Area (DPAA) on the pavement of Connaught Road West outside the LOCPG for the unnotified assembly to stage their demonstration.
3. Having entered the DPAA, A1, on two occasions, climbed onto the Mills barrier and incited the demonstrators in front of him to climb over the Mills barrier in order to occupy the vehicular lanes of Connaught Road West, on which there was continuous traffic. Some demonstrators responded to A1’s appeal and climbed onto the Mills barrier.
4. When the Police were taking away A1 from the Mills barrier, A2 and two other demonstrators obstructed the Police by grabbing A1 with a view to pulling A1 away from the Police despite repeated warnings to stop.



5. After A1 had been taken away by the Police, another person incited other demonstrators in the DPAA to storm the LOCPG. In response, A3 moved towards the Mills barrier and charged the Police cordon by pushing the Mills barrier.
6. A1 was charged with and convicted of two charges of Inciting others to take part in an unlawful assembly (Charges 1 and 4), A2 one charge of Obstructing a police officer in the due execution of his duty (Charge 6) and A3 one charge of Taking part in an unlawful assembly (Charge 10).
7. A1 to A3 appealed against their convictions. On 17 September 2020, a CFI judge dismissed A1 to A3's appeals against conviction.

### **Issues in dispute**

8. A common ground of appeal of A1 to A3 was that the Police had failed to properly discharge their duty in facilitating the "spontaneous" demonstration to reach the LOCPG in time before the meeting at the LOCPG ended; and to be staged within sight and sound of the personnel of the LOCPG.
9. Individually, A1 argued that (a) climbing over Mills barrier did not by itself constitute a breach of the peace; (b) by asking the demonstrators to climb over the Mills barrier calmly and in an orderly fashion he did not intend that a breach of the peace would be resulted; and (c) there was no evidence that any person at the scene would have reasonably feared that the demonstrators would commit a breach of the peace.
10. A2 argued that he tried to pull A1 away from the Police when they were pulling A1 off the Mills barrier only because he had mistakenly believed that A1 was in danger without any intention to obstruct the Police.
11. A3 argued that he had not pushed or charged the Mills barrier himself but was only being pushed towards the Mills barrier by others behind him during the chaos.

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

(full text of the CFI's judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=130857&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130857&QS=%2B&TP=JU))



Spontaneous demonstration:

12. The Court summarized the following legal principles concerning “spontaneous demonstration” (§35):

- (1) The fact that the Police have not been notified about a demonstration pursuant to the Public Order Ordinance, Cap 245 does not necessarily constitute a reason for dispersal by the Police although it is not impossible. (See *Kudrevious v Lithuania* (2016) 62 EHRR 3 §152);
- (2) Under special circumstances, demonstrators can exercise their constitutional right under the Basic Law to hold a spontaneous demonstration even if it is unnotified. (“Special circumstances” include in response to a political event: *Kudrevious v Lithuania* §152, see also *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229);
- (3) Whether a demonstration is spontaneous or not, demonstrators should not cause excessive disruptions to the ordinary life of the public, or commit any illegal acts. The authorities should show a certain degree of tolerance, the magnitude of which is fact-specific. (See *Kudrevious v Lithuania* §§153-155);
- (4) For spontaneous demonstration, the authorities are required to adopt reasonable and appropriate measures to ensure that the demonstration can take place peacefully. What is “reasonable and appropriate” depends on the objective circumstances, including whether or not there was prior notification as the Police may not have sufficient time to prepare for the necessary deployment. (See *Oya Ataman v Turkey* Application no. 74552/01§36, and *Chan Hau Man, Christina v Commissioner of Police* [2009] 6 HKC 44 §§14-16 & 86);
- (5) On the other hand, the Police have a duty to prevent a demonstration from turning into a disorderly event and to protect the rights and freedom of the other citizens including their right to be free from violence and injury. Yet, any law enforcement action of the Police must be proportionate. (See *Leung Kwok Hung v Secretary for Justice & Chief Executive in Council* [2020] 2 HKLRD 771 §§181-182, 229.)

13. In the context of the present case, the Court agreed with the trial Magistrate that the Police had no duty to ensure that the demonstrators could reach the LOCPG *at a particular time and to meet the people they intended to protest against*, namely the attendants of a meeting at the LOCPG before the meeting ended. (§38)

14. The Court further held that it is questionable whether there existed any “special



circumstances” that might have justified the alleged spontaneous procession to the LOCPG since the evidence shows that, a large number of demonstrators did not follow the original notified route of procession from Wan Chai to Central but detoured to the LOCPG in Western at the very early stage of the event, which suggests that the demonstrators should have had sufficient time to give notice to the Police about their intended procession to the LOCPG. (§39)

15. Even if there existed any “special circumstances” that might have justified the spontaneous demonstration, the Court held that the positive duty on the part of the Police “to adopt reasonable and appropriate measures to ensure that the demonstration can take place peacefully” is not absolute, but subject to many factors including the environment en route, the traffic condition, the number of demonstrators involved, and the Police’s deployable resources. (§40)
16. In the present case, both the notified and unnotified parts of the procession occupied a large part of the Hong Kong Island between Wan Chai and Western and the number of demonstrators was large. Also, the entire course of the demonstration took long hours from the afternoon to late evening. The unnotified part between Central and the LOCPG in Western had clearly posed difficult challenges to Police’s deployable resources especially in light of the limited space and hectic traffic en route. Outside the LOCPG, the large flowerbeds and vehicular passages also posed difficulty for the Police to manage the 3,000 odd demonstrators within the limited space and the hectic traffic on Connaught Road West. The Court agreed with the trial Magistrate’s finding that the Police had adopted reasonable and appropriate measures to ensure that the demonstration could take place peacefully and the right of the demonstrators had not been disproportionately restricted. (§41)
17. The Court also rejected the suggestion that the Police should allow the demonstrators on the pavement of Connaught Road West to occupy the vehicular lane closest to the pavement, because to achieve the same the Police would have to occupy the 2<sup>nd</sup> vehicular lane closest to the pavement leaving only the merging 3<sup>rd</sup> and 4<sup>th</sup> lanes for the hectic traffic which was not feasible. (§42)
18. On the other hand, notwithstanding that the area designated by the police for the demonstration, namely the DPAA, was not located right outside the LOCPG but to a side of which, the Court held that the DPAA was close enough to the LOCPG for the protest by the demonstrators to be heard by those inside the LOCPG. (§§43-44)



19. In respect of A1's appeal, the Court held that whether a particular act of "climbing over a Mills barrier" constitutes disorderly conduct must be viewed in the light of all the circumstances surrounding the act and so does inciting another to do so. (§56) The Court agreed with the trial Magistrate's finding that in the context of the present case, for the demonstrators to successfully climb over the Mills barrier as incited by A1, a certain degree of violence must be used by the demonstrators against Police's resistance which must be disorderly, and A1 must know about it. A1's choice of words in his incitement to the effect that the demonstrators in climbing over the Mills barrier should do so calmly, orderly and need not touch the Mills barrier, was clearly a subterfuge. (§§57-58, 68 & 73) In light of the scale of the demonstration involved, A1's incitement to climb over the Mills barriers for the purpose of occupying the vehicular lanes of Connaught Road West had exceeded the boundary of tolerance which might be afforded to a peaceful occupation of public roads in a peaceful demonstration as in ***HKSAR v Chow Nok Hang*** (2013) 16 HKCFAR 837. (§59)
20. In respect of A2's appeal, the Court agreed with the trial Magistrate's finding that as captured on the relevant video evidence, A2 had clearly used his hands to grasp A1's left leg with a view to pulling A1 away from the Police despite repeated warnings to stop. There was hence sufficient factual basis for the trial Magistrate to find that A2 had willfully obstructed the Police in taking away A1, and there was no basis for A2 to argue that he was acting under any mistaken but honest belief that he was only helping to prevent A1 from falling onto the ground. (§82)
21. In respect of A3's appeal, the Court agreed with the trial Magistrate's finding that as captured on the relevant video evidence, A3 had clearly dashed towards the Mills barriers without being pushed from behind, charged the Mills barrier back and forth repeatedly, and then used his right shoulder to raise the barrier to push it against the Police cordon on the opposite side. This was clearly disorderly conduct and the trial Magistrate was correct in concluding that A3 and demonstrators had conducted themselves in a disorderly manner intending or likely to cause any person reasonably to fear that the persons so assembled would commit a breach of the peace or would by such conduct provoke other persons to commit a breach of the peace. (§91)
22. The Court also held that A3 had misinterpreted Lam J's (as he then was) judgment



in *HKSAR v Leung Kwok Wah* [2012] 5 HKLRD 556 at §37 to say that a person’s fear for his *own safety or security* does not constitute the objective limb of the 3<sup>rd</sup> ingredient of the offence of unlawful assembly by relying on a sentence in §37 that “It should be noted that the fear is not about fear as to the person’s own safety or security.” The Court held that in §37, Lam J was saying that in the context of the objective limb, what is required to be proved is that a person would “fear that one way or another a breach of the peace will result” (the sentence that immediately follows that relied on by A3 in §37) and Lam J was *not* saying that a person’s fear for his *own safety or security* would *not* constitute *a breach of the peace*. (§§90-91)

**Prosecutions Division**  
**Department of Justice**

**September 2020**



# Department of Justice

The Government of the Hong Kong Special Administrative Region

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