HKSAR v Fong Kwok Shan Christine

FACC No. 2 of 2017 (4 October 2017)[1]
CFA

Background

The Appellant was admitted to the public gallery above a conference room in the LegCo complex where two meetings of LegCo's Public Works Subcommittee were held to discuss the extension of the South-East New Territories landfill. At the first meeting, she protested by removing her jacket to reveal characters written on her T-shirt. She also handed to her assistant a paper poster which he displayed by holding it against the glass panel which walled off the public gallery. This caused a commotion and the premature adjournment of the meeting. At the second meeting, the Appellant and others chanted slogans in the public gallery against the extension of the landfill. The Appellant ignored warnings that she and the other protestors would be ejected, then she linked arms with others to resist ejectment. As a result, the meeting had to be adjourned and reconvened in a different conference room with the public excluded from attendance.

The Appellant was convicted of contravening s. 12(1)[2] of the Administrative Instructions for Regulating Admittance and Conduct of Persons, Cap. 382A ("AI") and was also convicted of contravening AI s. 11.[3] The appeal was dismissed by the CFI. Leave to appeal to the CFA was granted on the following questions of law of great and general importance, namely:

"(1) Whether the enactment of section 11 of the AI pursuant to section 20(b) of the Legislative Council (Powers and Privileges) Ordinance (Cap.382) ("LCPPO") is inconsistent with the principle of freedom of speech guaranteed by BL 27 and Article 16 of the BoR, which rendered section 11 unconstitutional?

(2) The same question ... in respect of section 12(1) of the AI."

Issues

The CFA considered that the certified questions gave rise to the following issues for determination in the appeal:

(i) Whether the right to freedom of expression was engaged (*the "rights not applicable" argument*);

(ii) Whether the court should refrain from interfering with the internal regulation of the

[1] Reported at (2017) 20 HKCFAR 425.

[2] S. 12(1) of the AI provides that "No person shall, in a press or public gallery, display any sign, message or banner".

[3] S. 11 of the AI provides that "Persons entering or within the precincts of the Chamber shall behave in an orderly manner and comply with any direction given by any officer of the Council for the purpose of keeping order."

admittance and conduct of persons within LegCo (*the "non-intervention" argument*);

(iii) Whether AI s. 11 was invalid as it was legally uncertain and did not constitute a restriction "prescribed by law" (*the "prescribed by law" argument*); and

(iv) Whether AI s. 12(1) was unjustifiably wide in banning all forms of display of sign, message or banner regardless of its purpose, nature, manner and its impact on the public order in LegCo (*the "blanket prohibition" argument*).

The constitutional provisions

BL 27 provides:

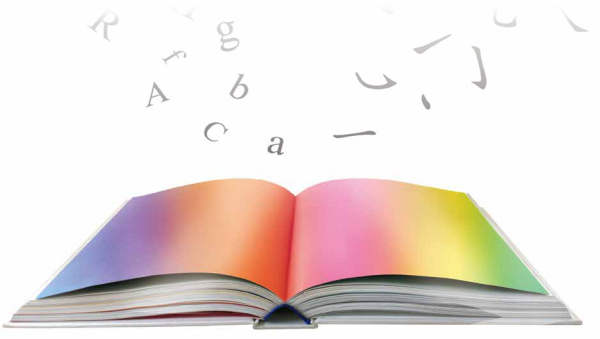
> "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike."

BL 39 relevantly provides:

> "(1) The provisions of the ICCPR ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.
>
> (2) The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

Article 16 of the BoR provides:

> "(1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.



(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary —

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (*ordre public*), or of public health or morals."

By the combined effect of BL 39 and Article 16 of the BoR, the CFA held that any restriction on the right to free expression must have sufficient legal certainty to be a restriction "prescribed by law" and must be "necessary for respect of the rights or reputations of others, or for the protection of national security or of public order (*ordre public*), or of public health or morals".

First Issue: The "rights not applicable" argument

Counsel for the Respondent submitted that members of the public, including the Appellant, "do not have a right to exercise their freedom of expression in the public gallery" of LegCo so that "the constitutional challenges fail *in limine*." By analogy with decisions relating to demonstrations sought to be mounted on private property, the Respondent argued that there is "no freedom of forum" and that the right to freedom of expression does not apply if sought to be exercised on government premises to which the general public has not been given free access. The guaranteed right simply does not arise on such properties so that there is no room for examining the aim, rationality or proportionality of the restriction.

The CFA gave two main reasons for rejecting "the rights not applicable argument". First, whether in its "hard line" version of excluding the right to freedom of expression on all government-owned properties or in its intermediate form of excluding the right only on some of them, it impermissibly sought to subjugate fundamental constitutional rights to property interests, leaving the applicability or otherwise of that right to the unfettered choice of a government agency regarding the grant of access. Secondly, the argument failed to recognise that the proposed location of a demonstration or other form of expression was an intrinsic dimension of the right so that exclusion from that location was properly analysed as a restriction of the right which required to be justified on orthodox proportionality principles.[4]

The CFA considered that the correct starting-point or the orthodox approach is to focus on the guaranteed right, adopting the assumption that it is universally applicable, subject to any constitutionally valid restriction. Thus, where the right to freedom of expression is invoked, one would ask whether factually, that right is engaged. If so, the question becomes whether any restriction pursues a legitimate aim falling within one of the permitted categories listed in Article 16 of the BoR; and if so, whether it is rationally connected with accomplishing that aim; whether the restriction is no more than reasonably necessary for accomplishing that purpose; and whether a reasonable balance has been struck between the societal benefits of the encroaching measure on the one hand and the inroads made into the guaranteed right on the other.[5]

The CFA considered that there are many locations in which, as a matter of common sense, demonstrations and similar exercise of free

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[4] *Tabernacle v The Secretary of State for Defence* [2009] EWCA Civ 23 and *Mayor of London v Hall* [2010] All ER (D) 171 (Jul) ; [2011] 1 WLR 504 followed. *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 not followed.

[5] *Hysan Development Co Ltd v Town Planning Board* [2016] 6 HKC 58 ; (2016) 19 HKCFAR 372 applied.

expression should be excluded. Such locations include internal government offices, air traffic control towers, prison cells and Judges Chambers.[6] However, the proper basis of the exclusion in the above cases is that the right to freedom of expression may validly be restricted and not that the Court should accept a presumptive rule excluding engagement of the right *in limine*.

The CFA further considered the exercise of free expression on private property. The Court's tentative view is that where the guaranteed right is engaged, the orthodox approach of ascertaining whether any restriction of access is proportionate remains applicable but with the qualification that elements of particular significance regarding private property must be given special weight in the proportionality analysis. Such considerations flow from the existence of constitutional protections relating to private property under BL 105 and the right to privacy under Article 14 of the BoR and the protection conferred to the "homes and other premises of Hong Kong residents" under BL 29.

The CFA considered the CFI's decision in *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371. Cheung J, as he then was, noted that under the Basic Law, restrictions necessary for the protection of the rights of others are permitted and that where one is concerned with a private residential development, it protects home and privacy rights. His Lordship considered alternative possible locations for the demonstration in question and noted that ample opportunities exist to exercise the relevant rights in public places. Cheung J concluded that:

> "... the right of peaceful assembly and the right to freedom of expression stop, so far as physical or geographical limits are concerned, at the boundary of private residential property belonging to others, in the absence of any permission to enter."[7]

The CFA considered while the above passage might be read as espousing a private property-based presumptive exclusion of the right to freedom of expression, the better view seems to be that the judgment as a whole proceeds on the orthodox basis that the denial of access, involving as it did

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6 *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139.

7 *Au Kwok Kuen*, above, at [53].

a private residential development, was legitimate and valid, applying proportionality principles.

The CFA acknowledged that the position may be a little less obvious when it comes to privately owned commercial properties such as shopping malls and similar premises, to which the public have free access. The CFA, after reviewing the decision of the European Court of Human Rights in *Appleby v United Kingdom* (2003) 37 EHRR 38, opined that there is only an imperfect analogy between the approaches to freedom of expression as exercised in public versus private properties. In each case, the limitation of the right embodied by denial of access to the site is assessed on proportionality principles. But, where private property is concerned, special elements involving protections of private property and privacy in the home enter the equation, weighing heavily in favour of validating restricted access.

Second Issue: The "non-intervention" argument

The Respondent argued that the Court should not interfere with LegCo's decision to regulate conduct as set out in AI ss. 11 and 12 because they constitute internal management of LegCo's affairs. The CFA considered that regulation of the admittance and conduct of strangers who wish to enter the precincts of LegCo fall outside the category of managing LegCo's internal processes so that the non-intervention principle does not apply.[8]

Even if such regulation does fall within the internal management category, the non-intervention principle would have to give way since the court is duty-bound to examine the validity of AI ss. 11 and 12 in so far as they impose restrictions on the exercise of a constitutional right.

Third Issue: The "prescribed by law" argument

The Appellant argued that AI s. 11 failed the "prescribed by law" requirement for not being sufficiently certain. BL 39 and Article 16 of the BoR require any purported limitation of the right of free expression to have sufficient legal certainty to qualify as a valid restriction "prescribed by law".[9]

The CFA rejected the submission that penalizing a person for failing to "behave in an orderly manner" leaves him, because of the vagueness of those words, "unclear precisely what he must avoid

[8] *Leung Kwok Hung v President of the Legislative Council (No 1)* [2015] 1 HKC 195 ; (2014) 17 HKCFAR 689 applied.

[9] In *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 at [61], citing *Shum Kwok Sher v HKSAR* [2002] 3 HKC 117 ; (2002) 5 HKCFAR 381 this principle was summarized as follows:

> "A criminal offence must be so clearly defined in law that it is accessible and formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, whether his course of conduct is lawful or unlawful. It is, however, accepted that absolute certainty is unattainable and would entail excessive rigidity. Hence it is recognised that a prescription by law inevitably may involve some degree of vagueness in the prescription which may require clarification by the courts."

doing" and so constitutes an invalid restriction on the guaranteed right.

The CFA considered that when AI s. 11 is properly construed in the light of its context and purpose, it is impossible to say that it lacks legal certainty. The CFA emphasized that s. 11 does not simply penalize a failure to "behave in an orderly manner" without more. It penalizes only persons, who enter or are within the precincts of LegCo, and fail to "behave in an orderly manner". The section also requires compliance with any direction given by a LegCo officer "for the purpose of keeping order". The CFA held that the section is self-evidently concerned with keeping order in those precincts.

Moreover, the CFA pointed out that the clear purpose of AI s. 11 is to set a standard of orderly behaviour on the part of visitors congruent with LegCo's institutional and social importance. In its context, s. 11[10] showed that it is part of a statutory framework aiming at creating a secure and dignified environment in the LegCo complex conducive to the legislature carrying out its constitutional functions at its sittings without disruption or disturbance, while permitting members of the public to observe the proceedings within the Chamber as an open legislative process. In the light of the context and purpose illuminated by the relevant provisions of the LCPPO including the Long Title, ss. 2, 3, 5(b), 6(1), 8(1) and (3), 17(c) and 20(b), the CFA found that anyone reading AI s. 11, with appropriate advice if necessary, would know that creating a disturbance by demonstrating in the public gallery while a LegCo subcommittee is sitting would constitute a contravention.[11]

Fourth Issue: The "blanket prohibition" argument

The Appellant argued that, by rendering all forms of display of any "sign, message or banner" a criminal offence regardless of its purpose, nature, manner and its impact (if any) on the public order in the LegCo, AI s. 12 is unjustifiably wide. The CFA disagreed and held that AI s. 12 does not simply make "all forms of display of any 'sign, message or banner' a criminal offence". On the contrary, AI s. 12 only makes display of "sign, message or banner" in a press or public gallery a criminal offence. The prohibitions are aimed at displays which would entail the risk of disorder in public galleries and which may disturb LegCo sittings and the rights of others observing the proceedings.

[10] The section's context is provided by its primary Ordinance, the LCPPO, and the other sections of the AI.

[11] *Steel v United Kingdom* (1999) 28 EHRR 603, *Lau Wai Wo v HKSAR* (2003) 6 HKCFAR 624 ; [2004] 1 HKLRD 372 ; [2003] HKCU 1412 and *Brooker v Police* [2007] 3 NZLR 91 distinguished.

The CFA also considered AI s. 12(3) which provides:

> "An officer of the Council may refuse admission to a press or public gallery to any person displaying any sign, message or banner, or to any person displaying any sign or message on any item of clothing, or to any person who, in the opinion of an officer of the Council, may so display any sign, message or banner, may so display any sign or message on any item of clothing or *may otherwise behave in a disorderly manner*."

The CFA held that the italicized words strongly indicate that the prohibition of signs, messages or banners, including signs or messages on items of clothing in a public or press gallery, is aimed at conduct which amounts to behaving in a disorderly manner, thus contextually limiting the scope of subsections (1) and (2). A person in a public gallery wearing a T-shirt which happens to bear an innocuous message unconnected with the legislature's proceedings, not brandished intrusively, is not intended to be caught. The CFA concluded that properly construed, AI s. 12 does not lay down the alleged "blanket prohibition" and the Appellant's argument advanced on that basis fails.

AI s. 12 — a valid restriction on the right to freedom of expression?

The CFA is of the view that restrictions on the right to freedom of expression to safeguard the proper functioning of the legislature come within formulations of the protection of *ordre public*, one of the purposes listed in Article 16 of the BoR. *Ordre public* is a broad and flexible concept which can be imprecise and elusive as explained in the judgment of *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 and reiterated in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229. The concept has been described as "a basis for restricting some specified rights and freedoms in the interests of the adequate functioning of the public institutions necessary to the collectivity..."[12].

The CFA held that the restrictions under AI s. 12 are rationally connected with accomplishing the aim to restrict intrusive or disruptive conduct in the Chamber. The restriction does no more than reasonably necessary for accomplishing this aim. The CFA considered that AI s. 12 has a limited scope, applying only to persons who are in a press or public gallery. It targets intrusive behaviour to protect good order during a LegCo meeting. Moreover, the Appellant was not prohibited from exercising her freedom of expression in other venues.

Lastly, the CFA found that a reasonable balance has been struck between the benefit to society of enabling LegCo properly to carry out its constitutional functions on the one hand and the limited restriction on the guaranteed right of freedom of expression on the other. The CFA concluded that AI s. 12 is a proportionate and valid restriction on the right to freedom of expression.

Conclusion

The CFA did not agree that the appeal shall fail *in limine* and the Court rejected the Appellant's arguments challenging the legal certainty of AI s. 11 and the proportionality of AI s. 12. The Court unanimously dismissed the appeal.

[12] *HKSAR v Ng Kung Siu* [2000] 1 HKC 117; (1999) 2 HKCFAR 442 and *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 ; [2005] 3 HKLRD 164 ; [2005] HKCU 887 considered.

HKSAR v Leung Hiu Yeung

FACC No. 5 of 2017 (1 February 2018)[1]

CFA

Background

On 13 June 2014, when the Finance Committee of the LegCo was in session scrutinizing a funding application relating to advanced works at the North East New Territories New Development areas, protestors rushed to the entrances of the LegCo building with a view to gaining entry into the building through the locked doors. As the protestors started removing the barriers set up in front of the doors, Mr. Jasper Tsang Yok-sing ("Mr. Tsang"), the then LegCo President and concurrently the Chairman of the Legislative Council Commission ("LCC") considered that issues of security and order of the LegCo building had exceeded the capacity of LegCo's security personnel. With the agreement of other members of the LCC, he decided to seek assistance from the police who entered the lobby to stand by at his request.

The protestors then attempted to force their way into the LegCo building. When the police tried to form a cordon to disperse the protestors from the front entrance, the Appellant vigorously shoved the police officers forming the line.

The Appellant was convicted of, *inter alia*, obstructing an officer of the Council while in the execution of his duty contrary to s. 19(b)[2] of the Legislative Council (Powers and Privileges) Ordinance, Cap. 382 ("LC(PP)O"). The officer in question being an Inspector of Police ("Inspector Kwok").

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1 Reported at (2018) 21 HKCFAR 20.

2 S. 19(b) of the LC(PP)O provides that "Any person who ... assaults, interferes with, molests, resists or obstructs any officer of the Council while in the execution of his duty ... commits an offence and is liable to a fine of $10,000 and to imprisonment for 12 months."

S. 2(1) of the LC(PP)O defines "officer of the Council" as meaning:

> "…the Clerk or any other officer or person acting within the precincts of the Chamber under the orders of the President and includes any police officer on duty within the precincts of the Chamber."

The Appellant was granted leave to appeal to the CFA against his conviction under s. 19(b) of the LC(PP)O, the following questions of law being certified, namely:

> ***Question 1***: Do police officers entering the "precincts of the Chamber" as defined in s. 2 of the LC(PP)O to deal with issues arising under s. 8(3)[3] of the LC(PP)O, require an authority given under s. 8(2)[4] or (3) of the LC(PP)O?
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> ***Question 2***: When a police officer enters the precincts of the Chamber[5] as defined in s. 2 of the LC(PP)O but without an authority under s. 8(2) or (3) of the LC(PP)O, is that police officer "on duty within the precincts of the Chamber" and so an "officer of the Council" within the meaning of s. 2 of the LC(PP)O?

The Appellant's Case

The Appellant challenged his conviction on two main grounds:

(i) Inspector Kwok was not an "officer of the Council" within the meaning of s. 19(b); and

(ii) even if Inspector Kwok was such an officer, he was not acting in the execution of his duty when obstructed by the Appellant.

1st Ground: Not an officer of the Council

The Appellant contended that as BL 78 which immunizes members of the LegCo from arrest when attending or on their way to a meeting of the LegCo, it must entail a power to refuse entry by persons, including police officers who sought entry into LegCo's precincts to arrest a member, and the power to eject if the police officers were already inside. The Appellant asserted that a prior invitation was an essential requirement for lawful entry into the LegCo's precincts by police officers because unrestricted entry would be incompatible with the principle of separation of powers. Further, it was contended that the powers of the police at common law and under the Police Force Ordinance, Cap. 232 ("PFO") provided no basis for police officers to enter and carry out policing duties in the precincts of the LegCo without prior invitation. Though Mr. Tsang did request police's assistance, the Appellant argued that Mr. Tsang did so only as Chairman of the LCC but not as the President of the LegCo. Mr. Tsang's invitation was therefore ineffective to justify entry of the police.

The CFA held that the Appellant could not rely on BL 78 to argue that the presence of police officers in LegCo's precincts was inconsistent with the constitutional safeguard of immunity from arrest created under the article. BL 78 provides: "Members of the Legislative Council of the Hong Kong Special Administrative Region shall not be subjected to

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[3] S. 8(3) of the LC(PP)O stipulates that "The President may from time to time, for the purpose of maintaining the security of the precincts of the Chamber, ensuring the proper behaviour and decorum of persons therein and for other administrative purposes, issue such administrative instructions as he may deem necessary or expedient for regulating the admittance of persons (*other than members or officers of the Council*) to, and the conduct of such persons within, the Chamber and the precincts of the Chamber." (Italics supplied)

[4] S. 8(2) of the LC(PP)O stipulates that "The right of persons other than members or officers of the Council to enter or remain within the precincts of the Chamber shall be subject to the Rules of Procedure or any resolution of the Council limiting or prohibiting the enjoyment of such right".

[5] The "precincts of the Chamber" are relevantly defined to include, "the entire building in which the Chamber is situated and any forecourt, yard, garden, enclosure or open space adjoining or appertaining to such building and used or provided for the purposes of the Council".

arrest when attending or on their way to a meeting of the Council." The CFA held that the object of similar provisions found in the LC(PP)O[6] was to ensure freedom of speech and debate essential to the legislative process.

In line with the position at common law[7] in connection with parliamentary privilege,[8] the immunities created by BL 78 and the relevant provisions of the LC(PP)O do not restrict the criminal liability even of members of the legislature in respect of ordinary criminal offences whose enforcement has no adverse impact on the core business of LegCo. Nor does the enforcement of the ordinary criminal law within the precincts of LegCo involve any infringement of the separation of powers principle. The CFA held that BL 78 had no relevance to persons who were not members, charged with offences such as those of which the Appellant was convicted.

The LC(PP)O provisions

The CFA went through the LC(PP)O and the Administrative Instructions for Regulating Admittance and Conduct of Persons, Cap. 382A ("AI") which laid down a statutory scheme for regulating admittance of persons, other than members and officers of the LegCo, into the LegCo's precincts. The relevant provisions of the LC(PP)O and the AI affirmed the right of officers of the Council to enter and remain within LegCo's precincts.

The CFA observed that the LC(PP)O exempts all officers of the Council from rules regulating admittance without any qualification regarding police officers. The CFA opined that if it had been intended that police officers should require a prior invitation by or on behalf of the President before they could enter the LegCo's precincts, one would

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6 Safeguarding freedom of speech and debate in the Council (s. 3); immunizing LegCo members against civil or criminal proceedings for things said in, or reported in writing to, the Council (s. 4); protecting members from arrest for any criminal offence whilst attending a sitting of the Council or a committee (s. 5); and so forth.

7 *R v Chaytor* [2011] 1 AC 684.

8 Derived from Article 9 of the Bill of Rights 1689 and the customary recognition of matters within the exclusive cognizance of Parliament.

have expected the exemption to be suitably qualified.

Similarly, the CFA found that under s. 8(3) of the LC(PP)O, the admittance of officers of the Council to the precincts of the Chamber is not subject to regulation by the administrative instructions. There is no qualification making the admittance of police officers conditional upon a prior invitation. S. 20 of the LC(PP)O[9] also makes it clear that the offence of contravening any Rules of Procedure under s. 8(2) or any administrative instruction under s. 8(3) does not apply to officers of the Council in general.

The CFA noted that there was no suggestion in the LC(PP)O that a prior invitation by the LegCo President was needed in the case of police officers on duty within those precincts. S. 2(1) of the LC(PP)O defines "officer of the Council" as including "any police officer *on duty* within the precincts of the Chamber". Nothing was said in the LC(PP)O about such officer having first to be invited to enter the premises. It provides that as long as the officer is "on duty" within the precincts, he or she qualifies as an "officer of the Council".

Moreover, where the President's permission is necessary for one to enter particular parts of the LegCo building, it will be expressly specified in the rules. For instance, s. 4(1) of the AI provides: "No person other than a Member or an officer of the Council shall enter the antechamber marked as such on the plan or any committee room without the permission of the President." Ss. 4(2), 5, 6 and 7 are to similar effect.

The CFA observed that if police assistance was required, it is likely that a request would be made by a responsible person in the LegCo. Nothing in the LC(PP)O requires that a request has to be made by the President acting as such. In any event, entry without such an invitation did not make the presence of a police officer on duty within the precincts of LegCo unlawful and did not deprive such an officer of his status as an "officer of the Council" for the purposes of s. 19(b).

Finally, the CFA pointed out that even if police officers like Inspector Kwok needed an invitation to enter issued by the President of LegCo, in the present case, Inspector Kwok did in fact receive an invitation from Mr. Tsang. The fact that Mr. Tsang considered himself to be acting as Chairman of the LCC when making the request did not matter since objectively and as a matter of law,[10] he was also President of LegCo when he sought police's intervention.

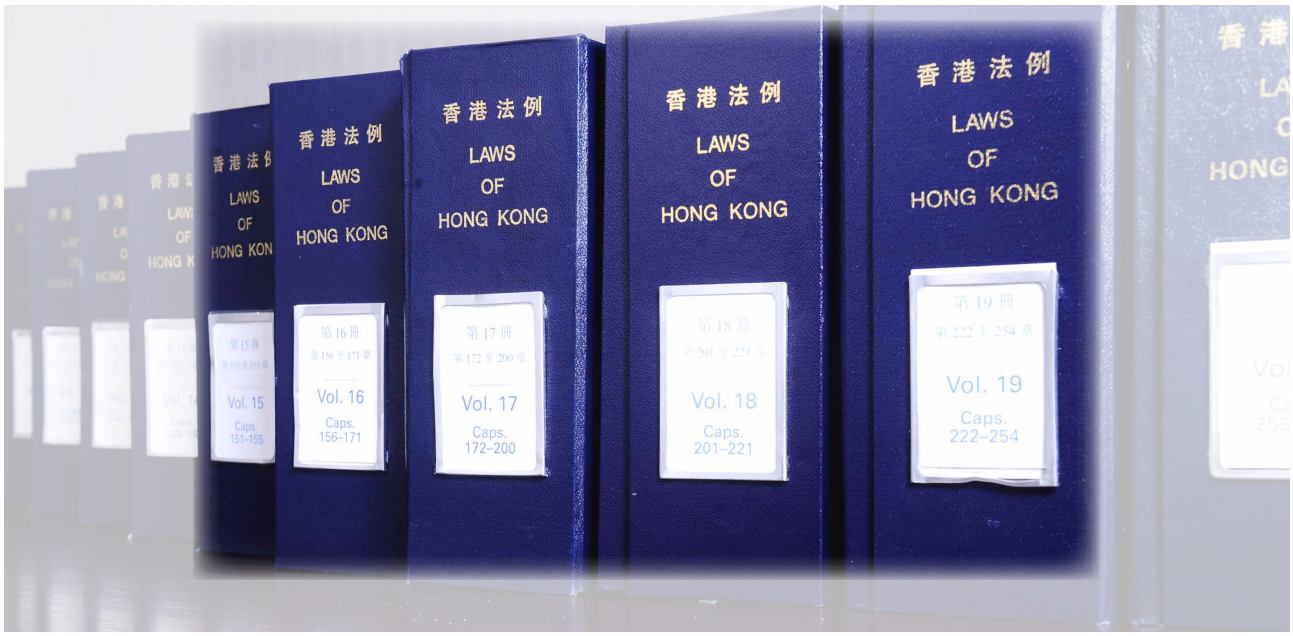
2nd Ground: Inspector Kwok was not acting in the execution of his duty

The Appellant argued that there was a public right of access to the LegCo which could only be suspended or abrogated by a written authority.[11] For instance, the President could have issued an administrative instruction under s. 8(3) of the LC(PP)O closing LegCo on the evening of 13 June 2014. However, no such written authority had been

[9] S. 20 makes it an offence to enter or attempt to enter the precincts of the Chamber in contravention of rules referred to in s. 8(2) or in contravention of instructions regulating admittance under s. 8(3).

[10] Pursuant to s. 4(1)(a) of the Legislative Council Commission Ordinance, Cap. 443 , Mr. Tsang was *ex officio* Chairman of the LCC because he was President of LegCo. S. 4(1)(a) provides that: "The Commission shall consist of the following members ... the President of the Council, who shall be Chairman of the Commission".

[11] Such as a LegCo Rule of Procedure, a Council Resolution or an administrative instruction issued by the President.



issued. In the absence of any written authority to restrict access to the LegCo, Inspector Kwok and the other officers were not acting in the execution of their duty when obstructed by the Appellant.

The CFA held that the Appellant's argument was without merit. A lawful restriction on access to LegCo was in place. The CFA ruled that s. 8(3) of the LC(PP)O authorizes the President from time to time, for the purpose of maintaining the security of the precincts of the Chamber, to issue such administrative instructions as he may deem necessary or expedient for regulating the admittance of persons (other than members or officers of the Council) to those precincts. Two administrative instructions issued by the President were in force on 13 June 2014 and were relevant in the circumstances then.

The CFA emphasized that the protestors were evidently intent on entering the LegCo building to disrupt the Finance Committee meeting in progress. LegCo's security officers were acting lawfully pursuant to s. 12(3)[12] of the AI in refusing them admission to the building on the footing that they were behaving, and likely to behave, in a disorderly manner. Inspector Kwok and other officers were acting lawfully in the execution of their duty, both under the PFO and as officers of the Council under s. 19(b) of the LC(PP)O in helping to enforce those directions, given for the purpose of keeping order pursuant to s. 11[13] of the AI.

Conclusion

For the above reasons, the appeal was unanimously dismissed by the CFA.

The CFA concluded that the answer to *Question 1* is "No" subject to the observation that entry may be to carry out the police officers' ordinary duties and not necessarily confined to dealing with issues arising under s. 8(3) of the LC(PP)O. The answer to *Question 2* is "Yes", assuming that the officer enters the precincts of the Chamber in order to carry out his ordinary policing duties.

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[12] S. 12(3) of the AI authorizes an officer of the Council:"... to refuse admission to a press or public gallery to any person ... who, in the opinion of an officer of the Council, ... may ... behave in a disorderly manner."

[13] S. 11 of the AI provides: "Persons entering or within the precincts of the Chamber shall behave in an orderly manner and comply with any direction given by any officer of the Council for the purpose of keeping order."

Secretary for Justice v Wong Chi Fung, Law Kwun Chung and Chow Yong Kang Alex

FACC Nos. 8-10 of 2017 (6 February 2018)[1]
CFA

Background

These appeals arose from convictions in the Magistrates' Court of the three Appellants for, in the case of the 1st and 3rd Appellants, taking part in an unlawful assembly, and, in the case of the 2nd Appellant, for inciting others to take part in an unlawful assembly. The unlawful assembly out of which the convictions arose occurred on 26 September 2014, shortly before the mass demonstrations known as "Occupy Central" took place mainly in the streets surrounding the Central Government Offices ("CGO") in Admiralty.

Decisions below

The 1st and 3rd Appellants were found guilty after trial by the magistrate of taking part in an unlawful assembly contrary to s. 18 of the Public Order Ordinance, Cap. 245 ("POO"). The 2nd Appellant was found guilty of inciting others to take part in an unlawful assembly. On 15 August 2016, the 1st and 2nd Appellants were sentenced to 80-hour and 120-hour community service respectively. The 3rd Appellant was sentenced to 3 weeks' imprisonment, suspended for one year.

The Secretary for Justice ("SJ") applied to the magistrate for a review of the sentences pursuant to s. 104 of the Magistrates Ordinance, Cap. 227. This application was refused by the magistrate on 21 September 2016.

The application by the SJ to the CA for review

On 13 October 2016, the SJ applied to the CA for a review of the sentences under s. 81A of the Criminal Procedure Ordinance, Cap. 221 ("CPO"). The CA allowed the application and held that the magistrate erred in principle in passing the sentences she did in that (in summary):

(i) The magistrate did not consider the factor of deterrence in the sentences but gave

[1] Reported at (2018) 21 HKCFAR 35.

disproportionate weight to the Appellants' personal circumstances and motives.

(ii) In regarding the case as not involving serious violence, the magistrate overlooked that this was an unlawful assembly on a large scale and there was a risk of violent clashes.

(iii) The magistrate overlooked the fact that the Appellants must have been reasonably able to envisage clashes between the participants and the security guards and police and that it was inevitable that at least some security guards would be injured.

(iv) In taking into account the Appellants' desire to enter the East Wing Forecourt of the CGO ("Forecourt") as a place of historical significance to protest, the magistrate overlooked the fact that, on the night in question, two students bodies, i.e. Scholarism and the Hong Kong Federation of Students, had already held an assembly on the road outside the CGO and that the Forecourt was closed but they insisted on forcing their way in unlawfully.

(v) The magistrate gave too much weight to the Appellants' alleged remorse. The Appellants' remorse was superficial and should not be given too much weight.

The CA set aside the magistrate's sentences and imposed on the 1st, 2nd and 3rd Appellants imprisonment sentences of 6 months, 8 months and 7 months respectively. The Appellants applied to the CFA for leave to appeal on the ground that substantial and grave injustice had been done and the 2nd and 3rd Appellants also applied to the CA for certification that points of law of great and general importance were involved in the CA judgment. The latter application was rejected by the CA.

The grant of leave to appeal to the CFA

The Appellants subsequently sought leave to appeal to the CFA on the additional ground that points of law of great and general importance were involved in the proposed appeal. The CFA granted the Appellants' application for leave to appeal on four separate issues.

First Issue: the CA's power to review facts on a review of sentence

The first issue concerns the extent to which, on an application for review of sentence under s. 81A of the CPO, the CA may reverse, modify, substitute or supplement the factual basis on which the original sentence was based.

As a matter of principle, the CFA emphasized that in an application for review of sentence, the SJ does not have an analogous right to that of a convicted person appealing against sentence,[2] and a review of sentence differs procedurally from an appeal by a convicted person whether against conviction or sentence. The review is restricted to the following four grounds i.e. that the sentence was (i) not authorized by law, (ii) wrong in principle, (iii) manifestly excessive, or (iv) manifestly inadequate. The power of review of sentence is subject to the constitutionally protected right against double jeopardy. Article 11(6) of the BoR provides that:

> *"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong."*

In determining whether the sentencing court has committed any of the above errors, the CFA said that it is appropriate for the CA to look at any relevant evidence available to the sentencing court

[2] As Rigby CJ held in *Re Applications for Review of Sentences* [1972] HKLR 370 at p. 376:
"For my part, I am satisfied that there is a substantial distinction and I adhere to the view that … a far more stringent test should be applied by the Full Court in considering an application by the Attorney General for leave to apply for review of sentence on the grounds of manifest inadequacy than the test required or imposed by the same court in an appeal by a convicted person against sentence."

below. If the sentencing court below has made an error as to the facts on which it proceeds to sentence, the CA can correct it in the review.

The CFA surveyed the relevant authorities in Hong Kong and the UK and held that if the judge has failed to take a relevant matter into account or has taken into account an irrelevant factor, that is an error of principle. However, save where it concludes that the sentence is manifestly inadequate, the CFA held that the CA is not entitled to ascribe more or less weight to a relevant factor than the sentencing court did.

Second Issue: civil disobedience and the exercise of constitutional rights as motive

Regarding the extent to which the magistrate should have taken into account the motives of the Appellants in committing the offences, the Appellants submitted that the offences were committed as acts of civil disobedience and in the exercise of the constitutional right to freedom of expression and freedom of assembly under BL 27 which states that "*Hong Kong residents shall have freedom of speech, …of assembly, of procession and of demonstration …*" and Articles 16 and 17 of the BoR.

The CFA held that there is little merit in a plea for leniency on the ground that the offender was merely exercising his constitutional rights[3] as the fact of a conviction of the offence will necessarily mean that the offender has crossed the line separating the lawful exercise of constitutional rights from unlawful activity.

The CFA observed that the concept of civil disobedience is recognisable in Hong Kong, and can broadly consist of (i) breaches of a particular law which is believed to be unjust by the offender, or (ii) law-breaking done in order to protest against perceived injustice or in order to effect legal

[3] Ribeiro PJ stated in *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [39]:
"Once a demonstrator becomes involved in violence or the threat of violence – somewhat archaically referred to as a 'breach of the peace' – that demonstrator crosses the line separating constitutionally protected peaceful demonstration from unlawful activity which is subject to legal sanctions and constraints. The same applies where the demonstrator crosses the line by unlawfully interfering with the rights and freedoms of others."

or social change. The offender's conscientious objections and genuine beliefs actuating either type of behaviour may be taken into consideration as the motive for the offending. The hallmark common to all forms of civil disobedience is that the action carried out must be peaceful and non-violent. The weight attached to the motive will necessary vary depending on the circumstances, and the court will not evaluate the worthiness of any causes espoused. An expectation of punishment is also inherent in the act of civil disobedience. It is by accepting the punishment that the protester seeks to draw attention to the alleged injustice against which he is demonstrating.

The CFA explained that in the present appeals, the acts of civil disobedience relied upon were not directed towards s. 18 of the POO as an unjust law, but were committed in the course of protesting against the Government's proposals for constitutional reform. A plea for leniency at the stage of sentencing on the ground of civil disobedience would carry little weight since the act which involves violence is by definition not one of civil disobedience.

Third Issue: the CA's guidance for future cases

The third issue relates to whether the sentencing guideline laid down by the CA for future cases can apply to the Appellants' case.

The CFA recognized the principle that an offender is to be sentenced on the existing guideline or tariff of sentence existing at the time of the commission of the offence. This reflects the protection against retroactive criminal penalties conferred by Article 12(1) of the BoR which provides:

> *"... Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."*

The CFA noted that there are no established guidelines or tariffs of sentence for the public order offence of unlawful assembly.

The CA had not laid down any fixed starting point of sentence for the offence of unlawful assembly. The CA emphasized the need for deterrence and punishment. The CFA considered that it was appropriate and consistent with the CA's responsibility to provide guidance in sentencing matters for the future and for the CA to take a stricter view in sentencing in large scale unlawful assembly cases involving violence given the circumstances prevailing in Hong Kong including increasing incidents of unrest and a rising number of large scale public protests.

The CFA endorsed the sentencing principles that the CA laid down and the list of sentencing factors it considered to be relevant and agreed that the CA was right to send the message that unlawful assemblies involving violence, even the relatively low degree of violence that occurred in the present appeals, will not be condoned.

The CFA, however, found it inappropriate to apply the CA's guidance to the Appellants in these appeals in order to avoid retrospectively imposing significantly more severe sentences on them based on the new sentencing guideline. This approach reflects the principle of legal certainty and the

protection against retroactive criminal penalties conferred by Article 12(1) of the BoR.

Fourth Issue: s. 109A of the CPO and the relevance of youth in sentencing

The final issue in this appeal related solely to the 1st Appellant. The question was the extent to which the CA should have taken into account s. 109A of the CPO.

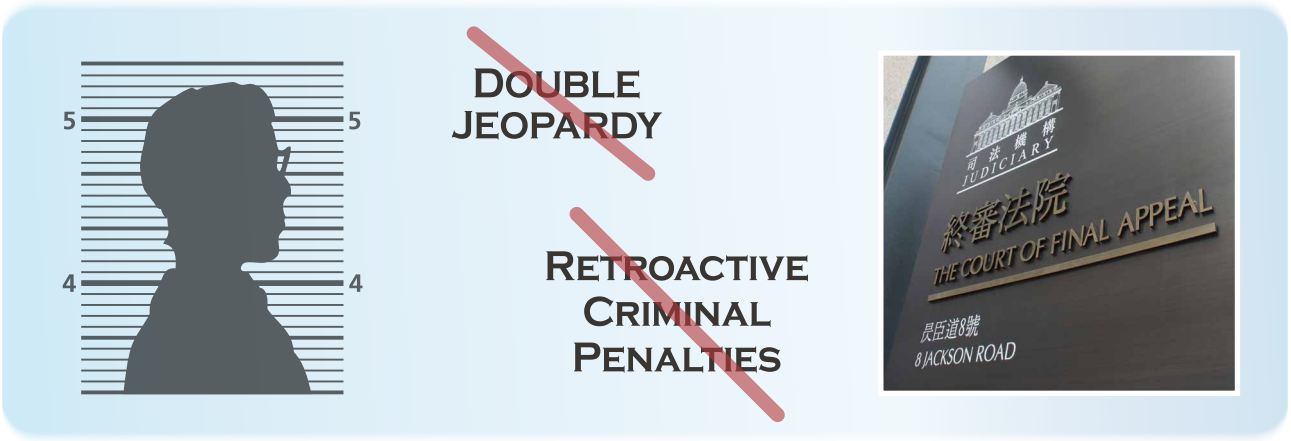
S. 109A[4] of the CPO requires a sentencing court when considering the appropriate sentence to be imposed on an offender aged between 16 and 21, to obtain and consider information about the circumstances of the young offender, the offence, as well as information relevant to the young offender's character and physical and mental condition in assessing his suitability for particular types of punishment. Whilst the requirement to obtain information is not absolute, the court shall not impose a sentence of imprisonment unless it is of the opinion that no other sentencing option is appropriate.

The CFA found that the CA misunderstood the submission of the 1st Appellant's counsel to mean that the CA could dispense with the assessment under s. 109A of the CPO. In any event, if the CA had been entitled to review the sentence of the magistrate, it would have been the CA's duty, as the sentencing court under s. 109A of the CPO, to consider all non-imprisonment sentencing options. Accordingly, the CA erred in not complying with s. 109A.

Applying these principles in the present case

Did the Magistrate err in principle or impose manifestly inadequate sentences?

On the various matters identified and summarized earlier, the CA was of the view that the magistrate erred in principle. The CFA disagreed with the CA that the magistrate erred in principle by failing to take into account relevant matters. To the contrary, the CFA held that the magistrate was plainly aware of the factor of deterrence, the large scale nature of the assembly, the risk of violent clashes, the Appellants' knowledge of the likelihood of clashes between the participants and the security guards and the police and the inevitability that at least some security guards would be injured; as well



[4] S. 109A(1) of the CPO provides:
"No court shall sentence a person of or over 16 and under 21 years of age to imprisonment unless the court is of opinion that no other method of dealing with such person is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to the character of such person and his physical and mental condition."

as the fact that there was a prior lawful assembly and that the protesters did not have an absolute right to enter the Forecourt. Furthermore, the CFA considered that the weight to be accorded to the Appellants' personal circumstances and motives, as well as their expression of remorse, was strictly a matter within the magistrate's discretion unless the sentences that the magistrate imposed were manifestly inadequate or out of line with the range of sentences imposed in practice.[5]

The CFA found that the magistrate's sentences were not manifestly inadequate. At the time of the sentences, there was no appellate court guidance requiring an immediate custodial sentence for a case of similar nature, and the range of sentences for unlawful assembly included the imposition of a community service order. In the CFA's view, since the sentences were not manifestly inadequate, there was no proper basis for the CA to ascribe different weights to the relevant factors taken into account by the magistrate.

The CA's findings of fact

Regarding the Appellants' contention that the CA had taken into account factors which constituted new findings of fact, the CFA held that all of the factors highlighted by the CA save two were open to it to make on the evidence before the magistrate. The CFA opined that in the absence of evidence against which to test the veracity of the 2nd Appellant's statements, it was not open to the CA to find that the statements were "unfounded". Moreover, the CA's finding that the Appellants' attitudes "showed that they had no genuine remorse for the offences they had committed"[6] would appear to contradict a clear finding of fact by the magistrate who drew attention to what she considered to be remorse on the part of the Appellants in her Reasons for Sentence[7] and in her Decision on the Application on Review of the Sentence.[8] Unless that finding of facts on the part of the magistrate was susceptible to being overturned on the usual grounds open to an appellate court, the CFA took the view that the CA should not have made a finding which was contrary to that of the magistrate.

Conclusion

The CFA unanimously allowed all three appeals, quashed the sentences of imprisonment imposed by the CA and reinstated those imposed by the magistrate. The CFA reiterated that offenders taking part in large scale unlawful assemblies involving violence in future will be subject to the new guideline laid down by the CA.

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5 As Lord Hoffmann's commented in *Biogen Inc v Medeva Plc* [1997] RPC 1 which Bokhary PJ quoted in *Ting Kwok Keung v Tam Dick Yuen & Others* (2002) 5 HKCFAR 336 at [41] namely:

"The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

6 CA Judgment at [165].

7 at [9]-[11].

8 at [4(IV)].

HKSAR v Choi Wai Lun

FACC No. 11 of 2017 (9 May 2018)[1]

CFA

Background

A 13-year old girl, who represented herself as 17 years old, offered sexual services on an adult website. The Appellant went to a guest house with the girl. They showered together and the Appellant ran his hands over her body. The girl performed oral sex on the Appellant. The Appellant was prosecuted for indecent assault contrary to s. 122(1) and (2) of the Crimes Ordinance, Cap. 200 ("CO"). The Appellant claimed that he did not have any suspicion about the girl's age in light of her mature appearance, build and speaking tone. The girl also gave evidence that she would dress more maturely when meeting clients. It was not disputed that the girl consented to all the above acts.

S. 122(1) and (2) of the CO provide as follows:

(1) Subject to subsection (3), a person who indecently assaults another shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

(2) A person under the age of 16 cannot in law give any consent which would prevent an act being an assault for the purposes of this section.

Decisions below

The Appellant was acquitted after trial before the Magistrate who held that the offence was not one of absolute liability. Where there was actual consent, an honest belief on the Appellant's part that the girl was aged 16 or more would result in an acquittal. The Magistrate's ruling was reversed by the CFI. Relying on the CFA's decision in *HKSAR v So Wai Lun*[2] (involving unlawful sexual intercourse with a girl under 16), the CFI held that, as a matter of necessary implication, the legislative intent was that indecent assault on a person aged under 16 should be an offence of absolute liability.

Leave to appeal

The Appeal Committee granted leave to appeal to the CFA, certifying the following questions of law as being of great and general importance, namely:

(i) *Whether an offence contrary to s. 122(1) and (2) of the CO, taken together is an offence of absolute liability when the alleged victim is a person under 16 years of age.*

[1] Reported at (2018) 21 HKCFAR 167.

[2] Reported at (2006) 9 HKCFAR 530.

(ii) *Whether an accused charged under s. 122(1) with indecently assaulting a person who was under 16 years of age could legally put forward a defence that the person in fact consented and the accused genuinely believed that he/she was 16 years of age or over.*

(iii) *Whether in a prosecution under s. 122(1) where the alleged victim is a person under 16 years of age, the prosecution is required to prove absence of genuine belief on the part of the accused that the person was 16 years of age or over.*

Determining the *mens rea* of a statutory offence

The CFA referred to the CA's decision in *HKSAR v So Wai Lun*.[3] In that case, Ma CJHC (as he then was) noted that the modern starting-point is that *mens rea* is presumed to be an essential ingredient where the statute is silent on the mental element unless that presumption is displaced expressly or by necessary implication. This has been held to reflect the principle of legality.[4]

In cases where the presumption of *mens rea* is held to be dislodged, the English approach (previously followed in Hong Kong) presents a stark choice between construing the statute as requiring full *mens rea* and construing it as imposing absolute liability. In Hong Kong, following the CFA's decision in *Hin Lin Yee v HKSAR*,[5] five possible bases of liability are recognized, ranging from full *mens rea* to absolute liability with three intermediate possibilities.

To accommodate more serious criminal offences such as the one in *Kulemesin v HKSAR*[6] and to cater for *mens rea* as to the consequences of the prohibited act, the CFA reformulated the five possible alternatives in *Hin Lin Yee* as follows:

(i) The *mens rea* presumption persists and the prosecution must prove knowledge, intention or recklessness as to every element of the offence ("the first alternative");

(ii) The prosecution need not set out to prove *mens rea*, but if there is evidence capable of raising a reasonable doubt that the defendant may have acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, liability would not attach, he must be acquitted unless the prosecution proves beyond reasonable doubt the absence of such exculpatory belief or that there were no reasonable grounds for such belief ("the second alternative");

(iii) The presumption has been displaced so that the prosecution need not prove *mens rea* but that the accused has a good defence if he can prove on the balance of probabilities that he acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, he would not be guilty of the offence ("the third alternative");

(iv) The presumption has been displaced and that the accused is confined to relying on the statutory defences expressly provided for, the existence of such defences being inconsistent with the second and third alternatives mentioned above ("the fourth alternative"); and

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3 Reported at [2005] 1 HKLRD 443.

4 *B(A minor) v DPP* [2000] 2 AC 428 per Lord Steyn at 470, citing Lord Hoffmann in *R v Secretary for the Home Department, Ex parte Simms* [2000] 2 AC 115 at 131.

5 Reported at (2010) 13 HKCFAR 142.

6 Reported at (2013) 16 HKCFAR 195.

(v) The presumption is displaced and the offence is one of absolute liability so that the prosecution succeeds if the prohibited act or omission is proved against the accused, regardless of his state of mind regarding the relevant elements of the offence in question ("the fifth alternative").

The CFA referred to the five reformulated alternatives as "the *Kulemesin* alternatives". It held that all the above alternatives should be considered as possible conclusions when construing statutory criminal offences, both serious and regulatory, which were silent or ambiguous as to the state of mind relevantly required.[7]

The presumption of *mens rea*

The CFA considered that in indecent assault cases, leaving aside those involving persons under the age of 16, two main *actus reus* elements must be proved. First, the prosecution must prove "intentional touching of another person without the consent of that person and without lawful excuse". Hence, where there is genuine consent, there is no assault. Secondly, the prosecution must prove that the assault was "accompanied by circumstances of indecency towards the person alleged to have been assaulted". The presumption of *mens rea* required the prosecution to prove *mens rea* corresponding to those two *actus reus* elements. This means that the prosecution must prove that the accused intended to lay hands on the victim without her consent. If there is evidence giving rise to a reasonable doubt as to whether the accused believed her to be consenting, the prosecution must negative that belief. However, s. 122(2) of the CO deems persons under the age of 16 incapable of giving consent, thus making an indecent act towards such a person an assault even though the evidence clearly establishes consent in fact. The effect of s. 122(2) is to eliminate consent as an ingredient from both the *actus reus* and *mens rea* of indecent assault. The presumption of *mens rea* therefore does not concern any element of consent in cases involving persons under the age of 16.

7 *Ibid* at [90].

Nevertheless, the accused's mental state regarding the victim's age is an entirely different matter. While the victim's age is not relevant in cases involving persons aged 16 or over, the fact that the victim is under 16 would be an essential ingredient of the offence as modified by s. 122(2). In the latter scenario, indecent assault becomes an offence which the accused would commit by doing an indecent act towards the victim, being a person under 16, with or without that person's consent. The CFA therefore concluded that the age of the victim forms part of the *actus reus* of the "modified offence" and the presumption of *mens rea* is engaged.

Displacing the presumption

The question of whether the presumption of *mens rea* is displaced is a matter of statutory construction, requiring examination of the statutory language, the nature and subject-matter of the offence, the legislative purpose and any other matters indicative of the statutory intent.

Having considered the Hong Kong courts' long-standing policy regarding age-related sexual offences, the CFA held that the presumption of *mens rea* is displaced in respect of indecent assaults on persons under the age of 16 in this jurisdiction. The Court opined that the manifest statutory intention behind s. 122(2) was to confer special protection on a class of vulnerable persons against sexual exploitation. In fact, it has always been the courts' approach to implement such protection. If the presumption of *mens rea* is not displaced in relation to the girl's age, the statutory purpose would be compromised accordingly and the prosecution was required to disprove, beyond reasonable doubt, any claim made by the defendant that he honestly believed that the victim was aged 16 or over.

Basis for displacement

(i) Absolute liability?

The CFA considered that absolute liability is primarily imposed for what are essentially regulatory offences rather than serious offences, and only where some useful purpose may be served by imposing absolute liability. It held that the CFI erred in ruling that s. 122(2) of the CO imposed absolute liability where the victim was in fact under the age of 16. With reference to *Hin Lin Yee* and *Kulemesin*, the CFA affirmed that prior to concluding that an offence was one of absolute liability, the Court must consider whether the statutory purpose could be sufficiently met by construing it as laying down a less draconian, intermediate form of liability.

The CFA rejected the application of *So Wai Lun* in the present case and distinguished it for two reasons. Firstly, unlike the offence of unlawful sexual intercourse under s. 124 of the CO,[8] there was no equivalent of an express "reasonable belief" defence in the legislative history of indecent assault, much less a later abandonment of such a defence. Secondly, the CA's judgment in *So Wai Lun* was delivered before the recognition of intermediate bases of liability. Thus, the CA's decision reflected the stark choice between full *mens rea* and absolute liability. If the case had been decided today, the Court would have to consider whether the statutory purpose of the offence could be sufficiently met by construing s. 124 as laying down an intermediate mental requirement in place of full *mens rea*. It is possible that an entirely different conclusion would have been reached especially considering that the offence under s. 123 of the CO (unlawful sexual intercourse with a girl under 13), which is punishable by life imprisonment, ought then also to be construed as one of absolute liability.

[8] *So Wai Lun* concerned s. 124 of the CO.

Further, the CFA disagreed with the High Court's approach of treating the doubling of the maximum sentence for indecent assault in 1991 as an indication that absolute liability was intended by the legislature. The CFA added that in general, the more serious an offence is in terms of penalty and social obloquy, the more likely that the presumption of *mens rea* is sustained. Hence, the doubling of the maximum militates against, rather than supports a construction favouring absolute liability.

(ii) The fourth *Kulemesin* alternative?

In contrast to the CFI's finding, the CFA pointed out that the availability of a reasonable belief defence in s. 122(3) and (4) of the CO does not mean that a defendant falling outside those subsections is not intended to have any defence. The fourth *Kulemesin* alternative is only adopted if the availability of the expressly enacted defences is inconsistent with the second and third alternatives also being available. No such inconsistency arises here. Subsections (3) and (4) only provide defences in narrow and rare circumstances involving an honest and reasonable belief that one is married to the alleged victim, and the absence of any reason to suspect that the alleged victim is a mentally incapacitated person. The existence of such specialized defences is therefore not inconsistent with having a defence based on the belief that the victim was aged 16 or over. Likewise, there is nothing wrong with construing s. 122(2) as accommodating the second or third *Kulemesin* alternatives generally in cases falling outside subsections (3) and (4).

(iii) The second or third *Kulemesin* alternative?

The CFA opined that both the second and third alternatives admit a defence of an honest and reasonable belief on the part of the accused. The difference between them is that under the second alternative, the defendant bears only an evidential burden whereas the third alternative requires him to discharge a persuasive burden as to his belief. The CFA held that the statutory purpose of s. 122(2) of the CO, namely to safeguard vulnerable girls and boys under the age of 16 against sexual exploitation, is most closely reflected by the third *Kulemesin* alternative by imposing a persuasive burden on the accused.

The Court explained that the third alternative was more preferable than the second alternative because the latter did not go far enough to protect vulnerable victims. Under the second alternative, although guilt could be established by the prosecution negativing either an accused's alleged honest belief in relation to the victim's age

or the reasonableness of his alleged belief, the accused would still be acquitted if the court or jury thinks that it may well be the case that he did not honestly and reasonably believe that the victim was of sufficient age, but that a reasonable doubt remains as to whether he did harbour such a belief.

In contrast, the third alternative better reflects the statutory purpose as an accused, who alleges that he honestly and reasonably believed that the victim was old enough to consent, ought to be required to persuade the court or jury that he did in fact so believe, a matter which he is best placed to explain. It is a suitably demanding standard designed to encourage men to steer clear of indecent conduct with young girls who may fall within the protected class, placing them otherwise at peril of being unable to discharge the persuasive burden.

Rationality and proportionality

A reverse onus derogates from the constitutional right to be presumed innocent. Such derogation must pass the rationality and proportionality tests in order to be justified: the reverse onus has a rational connection with the pursuit of a legitimate aim and that it is no more than necessary for the achievement of that aim. Further, the adoption of a reverse onus must strike a reasonable balance between the societal benefits promoted and the inroads made into the constitutionally protected presumption of innocence and that it does not place an unacceptably harsh burden on the individual.

The CFA held that by construing s. 122(2) of the CO as imposing a persuasive burden on the accused to prove that he honestly and reasonably believed that the girl in question was aged 16 or more passes the above tests. The reverse onus has a rational connection with the pursuit of the legitimate aim of giving heightened protection to vulnerable under-aged girls and boys, and is no more than necessary to achieve such a level of protection. The inroads made into the constitutionally protected presumption of innocence, being the price of promoting necessary protection of a vulnerable class, strikes a reasonable balance in the context of a fair trial for the accused.

Applying the above principles, the CFA concluded that the CFI was wrong to hold that s. 122(2) imposes absolute liability where the victim is in fact under the age of 16. On its proper construction, the presumption has been displaced so that the prosecution does not need to prove *mens rea* as to the girl's age, but the accused has a good defence if he can prove on the balance of probabilities that he honestly and reasonably believed that the girl was 16 or over. The CFA unanimously allowed the appeal and restored the Appellant's acquittal.