FACC 8/2017

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 8 OF 2017

BETWEEN

SECRETARY FOR JUSTICE Respondent

And

WONG, CHI-FUNG (黃之鋒) Appellant

CASE FOR WONG, CHI-FUNG

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Notes:

1. All emphases are added except when otherwise stated.
2. [A/1/2/§3] refers to Record Part A, Tab 1, Page 2, Paragraph 3
3. "**A1**" refers to Mr. Wong Chi-fung.

A. The Issues

1. By the Appeal Committee's order, leave to appeal was granted to the 3 Appellants on these issues: [A/21/389-392]

   All Appellants:

   (1) To what extent can the CA on an application for review of sentence under s.81A of the *Criminal Procedure Ordinance*, Cap.221 (the "CPO") reverse, modify, substitute or supplement the factual basis on which the original sentence was based?

   (2) To what extent should a sentencing court take into account the motives of a defendant in committing the crime of which he or she has been convicted, particularly in cases where it is asserted that the crime was committed as an act of civil disobedience or in the exercise of a constitutional right?

   (3) Insofar as the CA was seeking to do so at all, in arriving at the appropriate sentences for the applicants, to what extent ought the CA have made allowance for the assertion made by them that guidelines to sentencing courts for the future were being given?

A1 only

(4) To what extent should the CA have taken into account s.109A of the CPO?

B. Factual Background and Procedural History

2. The background to the case is in paragraphs 10 to 25 of A1's Form B. [A/15/329-332/§§10-25]

3. A1 was convicted along with the other Appellants of taking part in an unlawful assembly contrary to s.18 of the *Public Order Ordinance*, Cap.245, but acquitted of the offence of inciting others to take part in an unlawful assembly. He was sentenced to a Community Service Order ("CSO") of 80 hours.

4. The magistrate found that the prosecution could not prove the incitement charge because there was no evidence proving that A1 knew that security guards would block entry to the Forecourt. A1 may have believed that entry would not be seriously opposed. His actions, and the actions of those responding to his call to go into the Forecourt, may not have been disorderly or threatening.

5. On the other hand, A1 was found guilty of taking part in an unlawful assembly because his scaling, and jumping down from, the perimeter fence to enter the Forecourt was disorderly and would cause a reasonable fear that there would be a breach of the peace.

6. When sentencing A1, the magistrate found that he had good family support; he was receiving full-time tertiary education and had a genuine concern for social issues. The incident was more moderate than some of the incidents in the subsequent Occupy Central movement. A deterrent sentence was not appropriate. She accepted that A1 had consistently advocated peaceful, rational, and non-violent action. There was no evidence to suggest that A1 had caused, or intended to cause, injuries to others. [A/5/112-116/§§1-11]

7. The SJ sought a review of the sentence under s.104 of the *Magistrates Ordinance*, Cap.227 ("MO"). [A/6/118]

8. The magistrate considered the application. She repeated that she had considered the seriousness of the offence. She had considered again the circumstances of the offence and A1's acts, the consequences of those acts, his motives, and his background and expression of remorse. She would not change the sentence. [A/8/122-125]

9. The SJ then obtained leave from the CA to review the sentence. [A/9/126-135]

10. The CA granted the SJ's subsequent application for review and replaced the already completed CSO with a 6-month prison term. [A/11/200-291]

11. In arriving at this decision, the CA took the view that the Appellants had reached a consensus beforehand that they would encourage others to break the law by forcing a way into the Forecourt. They must have been aware that clashes between the crowd and security guards "*were inevitable, and that casualties as well as damage to property were highly likely*". [A/11/202-203/§§7-13] [A/11/278-284/§§157-165]

12. The CA rejected A1's claim of the zero-violence principle of "*peace, rationality and non-violence*" was "*nothing but empty talk*" and "simply untenable under the circumstances of the time". It adopted the prosecution's submission that A1's claim of non-violence was simply "*paying lip service*". It was within the Appellant's expectation that violence would arise from the serious risk of the crowd clashing with the security guards and police officers.

C. The CA's Power on Review under s.81A of the CPO

13. S.81A(1) CPO is in Part IV. It says:

"*(1) The Secretary for Justice may, with the leave of the Court of Appeal, apply to the Court of Appeal for the review of any sentence (other than a sentence which is fixed by law) passed by any court, other than the Court of Appeal, on the grounds that the sentence is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate*."

14. The powers of the CA to reverse, modify, substitute or supplement the factual basis of a sentence under s.81A CPO ('the modification jurisdiction') are very limited. The court's jurisdiction is a review jurisdiction, not an appellate one.

15. CA may modify a finding by receiving new evidence under s.83V(1) CPO ("*For the purpose of this Part, the Court Appeal may, if it thinks it necessary or expedient in the interests of justice [receive*

evidence]"). The new evidence might show that a judge or magistrate made erroneous findings of fact. However, no sentence can be increased as a result of new evidence on a review: see s.83V(5).

16. This limitation reflects the fact that powers of the CA under s.81A are constrained by common law principles protecting persons accused of a crime from double jeopardy ("DJ"). This protection is now reinforced by Article 11(6) *Hong Kong Bill of Rights Ordinance* ("HKBOR") and Article 39(2) of the *Basic Law* ("BL"). See §§40-41 below.

17. Both Article 11(6) HKBOR and the common law DJ principle operate in three ways. The protection prevents:

    (a) A second prosecution for the same offence after conviction.
    (b) A second prosecution for the same offence after acquittal.
    (c) Multiple punishments for the same offence.

18. S.81A CPO, when taken together with s.83V(5), gives effect to the DJ principle at (c) above by forbidding an upward revision of sentence if new evidence is introduced.

19. The CA may use the modification jurisdiction in only one case coming under s.81A CPO. That is when the SJ brings a case to the CA, not seeking enhancement of sentence, but a reduction on the grounds that it is 'manifestly excessive'. The use of s.81A CPO for this purpose was envisaged: see *Hong Kong Hansard*, 15th March 1972, Second Reading of *Criminal Procedure (Amendment) Bill*, pp. 474-477.

20. In all other cases the SJ must accept the findings of the magistrate or judge and, in jury cases, it must consider the record of the proceedings, and not the evidence: see s.81A(2A)(a)-(c) CPO which has the effect of excluding evidence given in the proceedings below from being submitted to the CA on an application for review: see *Criminal Procedure (Amendment) (No.2) Bill 1979* amending s.81A to define the materials to be sent to the CA on an application.

21. This conforms to the approach of UK courts when exercising review powers under the *Criminal Justice Act* 1988 there must be an agreed factual basis: see *Taylor on Criminal Appeals* (2012) at §§13.47-13-48.

22. Without seeing the evidence from the court below it is virtually impossible for the CA to say that a judge or magistrate evaluated it incorrectly and that it is in a position to change the factual basis of a sentence.

23. These are the plain statutory indications that the modification jurisdiction is very limited and, when used, benefits a respondent in the rare case of review by the SJ of a manifestly excessive sentence.

24. Contrast with the materials supplied by a magistrate when there is an appeal by a defendant against sentence: see s.116(1) MO requiring ‘depositions’ as well as findings and grounds for decision: see also *Archbold Hong Kong 2017*, §§7-42 to 7-46 for sentence appeal procedure and powers of appeal court.

25. The CA went beyond the limitations in s.81A(2A) CPO and considered evidence adduced at the magistrate's trial, in particular the Admitted Facts, the video evidence (Exhibits P2(1) and P31) which the SJ asked to use at the review hearing, and the medical reports of injured security guards.

[A/11/209/ note 5]

[A/11/214-217, 239/ notes 18-40, 75]

[A/11/217/ note 43]

DJ Principle at Common Law

History

26. The common law DJ principle is an overarching protective legal construct of great antiquity. It applied when s.81A was first enacted in 1972. Then the CA noted that the new jurisdiction was 'foreign to the traditions of our law summed up in the maxim '*nemo debet bis vexari pro eadem causa*': see *Re Applications for a Review of Sentence by the AG* [1972] HKLR 370 per Leonard J at 415-417.

27. The effect of s.81A CPO on the DJ principle and whether the court was according the principle the recognition it deserved was a matter of concern to Stock V-P (as he then was) forty years later in *HKSAR v Chun To Raymond* [2013] 2 HKC 390, §§173-174 and *SJ v Leung Yuet Hung* [2014] HKLRD 304 at §§62-63.

28. The origins of the DJ principle are not certain. They may be biblical: see *Pearce v R* (1998) 194 CLR 610, 630-631 (Kirby J). They may originate in Roman Law: see *Digest of Justinian*, Book 48, Title 2, Note 7, *On the duties of Proconsul:* "*The Governor should not permit the same person to be again accused of crime of which he has been*

acquitted": See Jay A. Sigler, *A History of Double Jeopardy* (1965) 7 Am. J. Legal Hist 283 at 283-4)

29. Whatever the origin, an outline DJ principle was contained in the Norman French terms '*autrefois convict*' and '*autrefois convict*' which began to operate in the twelfth century: see *Cooke v Purcell* (1984) 14 NSWLR 51 (CA) at 54-55.

30. By the sixteenth century the DJ principle was established so as to appear in law reports: see *Sparry's Case* (1589) 5 Co Rep. 61a, 77 ER 148-*nemo debet bis vexari pro una et eadem causa*; *Vaux's Case* (1591) 4 Co Rep 44a, 76 ER 992.-*autrefois* plea limited to verdict on merits.

31. By the eighteenth century, the DJ principle had been clarified and exceptions ironed out as personal rights of prosecution by felony appeals withered and criminal procedures were simplified: see Sigler at 288-295. Blackstone referred to the DJ principle as the '*universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence*': see W. Blackstone (1789), *Commentaries on the Law of England*, Vol.4, page 329.

32. This principle was taken up in the United States in 1791 and converted into a right by way of the Fifth Amendment to the US Constitution*:* '*nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*': see *US v Wilson*, 420 U.S. 332 (1975) at 340-343 on the sources of the Fifth Amendment.

33. The DJ principle was extended to offences other than felonies with the proliferation of statutory offences in the nineteenth century. This was the principle imported into Hong Kong. It endures today through BL8.

34. To the extent that the common law offers more protection than Article 11(6) HKBOR, it is to be preferred: see s.2(5) HKBOR. However, statute cannot cut down the protection in Article 11(6) as it proceeds from Article 14(7) of the ICCPR and the BL: see BL39(2).

35. The only significant exception to the common law principle that emerged in the nineteenth century is the statutory right of appeal and the liability to a retrial: see s.83E CPO for retrial power. Under the common law the DJ principle would bar a retrial or review.

36. The modern DJ principle is now taken to be subject to finality of conviction and acquittal as rights of appeal in criminal cases are near universal. A sentence review power is also consistent with the DJ principle so long as it conforms to it.

37. Finally, an acquittal or conviction has to be valid in the sense that it was the verdict of a court that had jurisdiction and was not tainted: see §1.10 *Law Reform Commission of Hong Kong Report on Double Jeopardy* (2012) for instances when a verdict would not support an *autrefois* plea.

<u>Rationale of DJ Principle</u>

38. There are two reasons why the DJ principle exists.:

a) To limit State power

i) The State enjoys superior resources in mounting prosecutions. The DJ principle imposes constraints on the State's power to maintain successive prosecutions: see *Law Commission, Double Jeopardy and Prosecution Appeals*, UK Law Com No. 267 (2001) at 4.17.

"*There is also, we now accept, a related wider social value achieved by delineating the proper ambit of the power of the state. The finality involved in the rule against double jeopardy (known by almost everyone, even if not by name) represents an enduring and resounding acknowledgement by the state that it respects the principle of limited government and the liberty of the subject. The rule against double jeopardy is, on this view, a symbol of the rule of law and can have a pervasive educative effect.*"

See also *Law Reform Commission of Hong Kong Report on Double Jeopardy* (2012) at §2.2:

"*In Green v US, Black J explained the reasons why a person should not be prosecuted more than once for the same offence:*

> *'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment,*

expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty.'" (citing 355 U. S. 184 at 188)

See similar observations by Rand J in Canadian Supreme Court in *Cullen v R* [1949] SCR 658 at 668. See also a recent statement of the content of the DJ principle as it operates here is at [28] in *Yeung Chun Pong v SJ* (CA) [2008] 2 HKC 46 at 60-61:

"*The purpose of the rule* [DJ principle] *is to prevent oppression of an accused, oppression constituted by occasioning the accused '... embarrassment, expense and ordeal and compelling him to live in a constant state of anxiety and insecurity' and it is undoubtedly within the court's power to prevent such oppression. The rule has a further rationale, which is to guard against an abuse of prosecutorial power whereby the chance of a conviction of someone who may be innocent may be enhanced by repeated prosecutions.*"

b) To achieve Finality

i) There is a public interest in achieving finality. Finality prevents conflicting judicial decisions and promotes confidence in the judicial system.

"*The interests at stake … touch upon matters fundamental to the structure and operation of the legal system and to the nature of judicial power. First, there is the public interest in concluding*

litigation through judicial determinations which are final, binding and conclusive. Secondly, there is the need for orders and other solemn acts of the courts (unless set aside or quashed) to be treated as incontrovertibly correct. This reduces the scope for conflicting judicial decisions, which would tend to bring the administration of justice into disrepute. ... Finally, there is the principle that a cause of action is changed by judgment recovered in a court of record into a matter of record, which is of a higher nature."

See *R v Carroll* (2002) 213 CLR 635 at 661 at §86 per Gaudron and Gummow JJ

The Ultimate Objective

39. The end that the DJ principle serves is not so much in preventing successive trials concerning the same or similar charges, which are, in themselves only vexatious, but it is to prevent multiple punishments that could follow on from the retrials: see *Ex parte Lange* 85 U.S. 163 (1873) at 173.

"*For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly, it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution*"

Article 11(6) HKBOR

40. Article 11(6) HKBOR reads:

"*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.*"

41. The UNHRC General Comment on the Equality and Fair Trial Provisions in Article 14 (CCPR/C/GC/32) includes these paragraphs on Article 14(5):

"*54) Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of* ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted* in absentia *who requests it, but applies to the second conviction.*

55) ....

56) The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial.

Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal."

The Application of the DJ Principle in A1's case

42. The principle applies in two ways. First, A1 was acquitted of the offence of incitement but the CA referred to A1 'encouraging' or 'calling on' or 'inciting' others to join in an unlawful assembly. Second, A1 had completed the CSO when his sentence was reviewed and so was 'punished again' by the CA. [A/11/203-204/§§9, 11] [A/11/282-283/§163] [A/11/285-286/§167(4)]

The Effect of the Acquittal of the Incitement Offence

43. The magistrate acquitted A1 because his words of encouragement to the demonstrators did not, in her view, amount to incitement to join an unlawful assembly. The acquittal was not appealed under s.105 MO (Case Stated). It was a 'final' acquittal. [A/3/73-76/§§37-42]

44. When the SJ applied for review the CA was supplied with the "statement of the facts found" by the magistrate: see s. 81A(2A)(a). [A/3/51-105]

45. The statement included the facts found in relation to the incitement offence and the reasons for the acquittal. Both the conviction for the unlawful assembly offence and the acquittal formed part of the record of the magistrate and could be required to be drawn up as 'official' orders under s.28 MO.

46. The CA's description of A1 'calling on' or 'encouraging' others to join an unlawful assembly amounted to saying he incited others to commit an offence. The offence of "incitement" covers acts of persuading, exhorting, encouraging or commanding others to commit a crime. The many synonyms for 'incitement' led to the UK Parliament to rename the offence of incitement as "encouragement": see s.45 *Serious Crimes Act 2007* implementing the recommendation of Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, UK Law Com No 300 (2006) at §§5.32-5.

47. The CA could not make a finding find that A1 "encouraged" others to commit the offence of unlawful assembly under the DJ principle, even if s.81A permitted modification of facts found by the magistrate. See *Qamar Sharaz v HKSAR* (2007) 10 HKCFAR 632 (acquittal impeached in costs appeal by defendant); *Serious Organized Crime Agency v. Trevor Hymans* [2011] EWHC 3332 (QB) at [18]. See also *Garrett v R* (1977) 139 CLR 437 per Barwick J at p.445 emphasizing that it is impermissible to go behind a formal judgement recording an acquittal in other proceedings.

" *As to the first of the above submissions, in my opinion the former acquittal could not be called in question by evidence led by the Crown in the subsequent trial. This conclusion does not depend on the purpose which the Crown sought to achieve by the admission of the evidence. It depends entirely on the tendency of the evidence itself.*

The relevant principle is that the acquittal may not be questioned or called in question by any evidence which, if accepted, would overturn

or tend to overturn the verdict. That the applicant was not guilty of the former charge because acquitted of it is a matter which passed into judgment: it is res judicata. *It is upon that principle and not upon any issue estoppel that the applicant succeeds.*"

48. A1 was prejudiced by these findings because they turned him into an instigator of the unlawful assembly when he had been found by the magistrate to be only a participant.

The Completed Sentence

49. The magistrate imposed the CSO under s.4(1) *Community Service Orders Ordinance*, Cap. 378 ("CSOO"). A1's obligations under the CSO were, basically, to comply with the requirements in the CSO by following the directions of a probation officer: see s.6(1) CSOO. The probation officer did not suspend giving directions after SJ had started the review and A1 completed the CSO before the hearing of the review.

50. A1 did not have an expectation that the CSO would be the final punishment because of s.81A CPO. A review of a sentence which is still being served does not directly engage the DJ principle: see *US v. DiFrancesco*, 449 U.S. 117 (1980) at 132-138. However, if a sentence is changed on an appeal or review, the defendant has the right to be credited with time already spent undergoing punishment: see *North Carolina v Pearce*, 395 U.S. 711 (1969) at 718-719.

51. When A1 had completed the CSO he had the right not to be 'punished again' for the unlawful assembly offence.

52. S.81A CPO has a marginal reference to the "*NZ Crimes Act* 1961, s.383". That NZ provision contained a sentence appeal power for the prosecution. The DJ principle at common law (see now s.26(2) *NZ Bill of Rights Act* 1990 for the statutory DJ principle) was respected in NZ in 1961 by provisions that addressed the possibility that, before a sentence appeal could take place, a defendant might have completed a sentence.

53. Section 399 of the NZ 1961 Act [now s.345 *Criminal Procedure Act* 2011] provided for the suspension of non-custodial sentences upon the filing of an appeal. S.383(3) of the NZ Act [now s.249 *Criminal Procedure Act* 2011] provided that a prosecutor's appeal would lapse once the custodial term was completed.

54. LegCo chose not to adopt these measures that would prevent multiple punishment.

55. Canada has entrenched the DJ principle in its *Charter of Rights and Freedoms* at s.11(h). Its legislation guards against the possibility of multiple punishment by making provision for suspending the operation of non-custodial sentences pending appeal by a defendant or prosecutor: see s.683(5) *Criminal Code*.

56. Where, however, for whatever reason, a person has served a sentence and there is then a successful review by the prosecution, courts have been very cautious in imposing a term of imprisonment on a defendant

who has served a non-custodial sentence. In *R v Donaldson* (1997) 14 CRNZ 537, Thomas J explained the rationale behind such caution, at 549-550:

"*...Again, care must be taken to ensure that the Court does not override the sentencing Judge's discretion to take a merciful approach or to adopt a course calculated to achieve rehabilitation, even in cases which would normally call for a deterrent sentence, particularly if the sentencing Judge has presided over the trial and therefore had the opportunity to see and hear the witnesses and make an assessment of the offender's culpability. ...Even if the Court determines that the sentence is manifestly inadequate or based upon a wrong principle, it will still be reluctant to interfere if this would cause injustice to the offender. In particular, the Court will be more disinclined to interfere where a community-based sentence has been imposed and conditions which were ordered have been complied with than where an inadequate custodial sentence is in issue. ...*"

57. That a defendant has completed a CSO has been a reason for an Australian court to refuse to impose a term of imprisonment even though the original sentence was manifestly inadequate: see §20 in *Pryce v Sawtell* [1988] 32 A Crim R 111 at 116.

58. In *Secretary for Justice v Chan Sai Kin (陳世堅)* (Chinese judgment) (unrep., CAAR 1/2011, 20 October 2011), the defendant was sentenced to 240-hours' CSO. On review, the CA refused to substitute a term of imprisonment into the original sentence, one of the reasons

being that the defendant had completed CSO and it was 'unfair': see §§44-46.

59. There are other reasons for the CA not to interfere with a sentence even though it believed it to be manifestly inadequate: see *Secretary for Justice v Leung Yat Ming & Another* (unrep., CAAR 9/1998, 25 June 1999) where the CA noted exceptional circumstances, including a 1-year interval between the original sentence and the review. Although the CA agreed with the SJ's submissions on the original sentence, it refused to substitute immediate imprisonment into the suspended sentences.

60. See also *Secretary for Justice v Lin Min Ying & Another* [2002] 2 HKLRD 823 where the approach in *Leung Yat Ming* was followed. The CA noted 3 factors favouring non-intervention with the suspended sentences: 1) around 2.5 years of investigation before trial, 2) eight months after sentence was passed, and 3) completion of CSO (at §§25-27).

61. The reluctance to intervene reflects the fact that sentencing again after a sentence that has been already served is not only very unfair but that it also is a violation of the DJ principle. Similarly, when there is an upward adjustment of sentence, defendants have a right to be credited with the punishment already served. Doing this is not something that is discretionary: see CA Judgment at §170 crediting A1 with 1 month's imprisonment for the completed CSO as a matter of 'discretion'. [A/11/287/§170]

D. Civil Disobedience and Exercise of Constitutional Right as Sentencing Considerations

62. The magistrate accepted that A1 had a genuine motive of furthering political ideals and that he was not motivated by personal interests or wanted to harm others. [A/5/112/ §§1, 3]

63. The CA, however, considered that where the offence is a "*serious one, such as when an unlawful assembly involved violence on a large-scale or it involved serious violence*", the court would give "*very little weight or, in an extreme case, no weight*" to the motive of the offender in committing civil disobedience. The CA then proceeded to find that the Applicant's offence was indeed a "*serious*" one and discounted the Applicant's motives in sentencing. [A/11/275/ §151(5)]

64. The CA also castigated A1 for a lack of "remorse" and, on that basis, decided that a CSO would be inappropriate. [A/11/204/ §13] [A/11/284/ §165] [A/11/286 -287/ §§167(5), 168]

General principles on consideration of motive in sentencing

65. Motive is always relevant to sentencing. In *Swan v R* [2006] NSWCCA 47, Spigelman CJ held:

> *"The Crown submitted that the Applicant's motive did not diminish the 'seriousness of the offences'. This submission, unless limited to a narrow concept of the objective gravity of the offences, should be rejected.* ***Motive is always a relevant factor****. It affects the* ***moral culpability*** *of the offender, the weight to be given to* ***personal***

deterrence *and may affect the weight to be given to* ***general deterrence****."* (at §61)

66. The CA stressed that its focus in cases like A1's would be to "punish" and "deter". Motive is relevant to both.

Exercise of constitutional rights

67. Where a defendant broke the law while exercising the right to freedom of assembly, and where his intentions were peaceful when he joined the assembly, this should be taken into account when sentencing.

68. In *Gulcu v Turkey* (App No.17526/10, Second Section, 19 January 2016), the ECtHR held that severe punishment of a teenage protester, who had thrown stones at the police, constituted an unjustifiable interference with freedom of assembly (Art 11 ECHR):

"97. …The Court notes that nothing in the case file suggests that this demonstration was not intended to be peaceful or that the organisers had violent intentions. The Court further observes that the applicant claimed that when he first joined the demonstrators, he started walking and chanting slogans with them. Thus, he had the intention of showing support for Mr Öcalan, but not of behaving violently when he started demonstrating, and these submissions were not contested by the Government. Besides, there is nothing in the domestic courts' decisions showing that the applicant had ***violent intentions when he joined the demonstration****. What is more, the charges against the applicant did not concern infliction of any bodily harm on anyone.*

The Court therefore accepts that during the events of 14 July 2008 the applicant enjoyed the protection of Article 11 of the Convention…"

69. The nature and severity of the penalties imposed must be taken into account when assessing the overall proportionality of the interference with freedom of assembly: see *Gulcu* at §111.

70. In *Taranenko v Russia* (App no. 19554/05, First Section, 15 May 2014), the facts of which are somewhat similar to A1s' case, the ECtHR held that the conviction and sentence (3 years' imprisonment suspended for 3 years) of a protester who was in a group that forced their way into the President's Administration constituted an unjustifiable interference with their freedom of expression (Art 10 ECHR) interpreted in light of Art 11 ECHR.

71. The Court observed that the protesters' conduct, "*although involving a certain degree of disturbance and causing some damage, did not amount to violence*" (at §93): "*They were not armed and did not resort to any violence or force, except for pushing aside the guard who attempted to stop them. The disturbance that followed was not part of their initial plan but a reaction to the guards' attempts to stop them from entering the building*" (at §91). Moreover, the protesters had not "*personally participated in*" causing damage to the President Administration's property (at §92).

72. In respect of deterrent sentencing, the sentence must not be that it would deter, or create a *"chilling effect"* on, the exercise of freedom of assembly: see *Taranenko* at §95.

73. Hence, while Art 17 HKBOR refers to the right of *peaceful* assembly, as the CA emphasized at §116 of its judgment, the right does not cease to protect the participants of the assembly at the sentencing stage, so long as they did not have "*violent intentions*": see *Gulcu* at §97. [A/11/256/§116]

74. The fact that the assembly created "*a certain degree of disturbance and causing some damage*" is not sufficient to remove such protection: see *Taranenko* at §93. To the extent that the CA suggested otherwise at §120 of its judgment that they would "*lose the protection… once they overstep bounds laid by law*", it is inconsistent with these cases and makes the protected right precarious. [A/11/259/§120]

75. Freedom of expression is not a 'fugitive and closeted virtue', rarely seen in public places and then always chaperoned. It does not exist merely to "*enable people of different views to hold sensible and reasonable discussions over controversial issues*". As the US Supreme Court held in *Thomas v Collins*, 323 U.S. 516 (1945) at 537, in the context of the First Amendment to the US Constitution: [A/11/258/§119]

> *"Of this, we may assume the men who wrote the Bill of Rights were aware. But the protection they sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts… Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed, and to preserving the right to urge it that the protections are given."*

76. If the CA was looking for "remorse" from A1 because he was exercising his right to demonstrate, it would not find it because it was A1's right. A1 expressed remorse though for the minor injuries to security staff because the assembly became unlawful. [A/5/114/§6]

Civil disobedience

77. Civil disobedience is a particular form of exercise of the constitutional rights to freedom of expression and assembly.

78. A definition of civil disobedience is that it is *"a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."*: see John Rawls, *A Theory of Justice (Revised Edition)*, p.320

79. A1 participated in a peaceful political protest outside Government headquarters. He trespassed at "Civic Square", a place of political significance before it was closed off in July 2014.

80. The trespass turned into unlawful assembly when the police and security guards reacted to the trespass. As accepted by the magistrate, the disorderly conduct that followed was not part of their initial plan as in *Taranenko* at §91. [A/3/75-76/§§40-42] [A/5/114/§6]

81. The protest was a classic act of civil disobedience. It was "conscientious". It was "public" and "political" in that it was directed at the government to express dissatisfaction with the lack of progress in democratic reform. It was "non-violent" in origin.

82. Courts have recognised civil disobedience as a means of changing law or policy. It is a mark of the *"civilized society"* that the CA hoped for at §119 of its judgment. As a form of freedom of expression, an act of civil disobedience must receive a degree of protection. [A/11/258-259/§119]

83. In *R v Jones (Margaret)* [2007] 1 AC 136, Lord Hoffmann said,

> *"My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account."* (at §89)

84. A1 pleaded not guilty but did not deny committing the acts in question. Unlike the CA's comments, he was shown to be right in contesting prosecution because he was acquitted of the incitement matter. [A/11/204/§13]

85. The cases relied on by the SJ and used by the CA such as *R v Caird* (1970) 54 Cr App R 499, *R v Gilmour* [2011] EWCA Crim 2458 and *R v Blackshaw* [2001] EWCA Crim 2312, dealt with *"wanton and vicious violence of gross degree"* (*Caird* at 506; *Blackshaw* at 1130F), which was very different from this case. Behaviour such as looting and acts of criminal damage, even if they originate in acts of civil disobedience, cannot be excused or extenuated because of that.

86. The CA did not refer, however, to other, less serious cases of public disorder, more like this one, where courts considered the motives of the defendants and factored them into their sentences.

87. In *R v Foley* (1968) 52 Cr App R 123 at 125, Lord Parker CJ said,

"*Where people are acting from genuine and passionate motives, as these men were, then the Court would strain every nerve to see that they were not sentenced to imprisonment when they were acting according to their conscience and doing what they think is right according to their conscience.*"

88. Similarly, in *R v Jones (Annwen) & Ors* [2006] EWCA Crim 2942, the English CA considered that the fact that the offences were "*committed in the course of… a political protest*" is "*highly relevant to the appropriate punishment*" (at §16). The court referred to the observations of Lord Hoffmann as quoted above.

89. In *R v Al Dahi* [2013] EWCA Crim 1267, Cranston J (who sat in *Gilmour*) held that the context of "*political demonstration*" should be

distinguished from the context of "*mindless violence*" in *Gilmour* (at §12).

90. In *R v Smith* [2016] EWCA Crim 2080, Hickinbottom J (who also sat in *Gilmour*) again distinguished the context of that case from *Gilmour*. Taking into account all the circumstances, including that the defendant "*was defending values that she holds dear*," the court suspended the original sentence of imprisonment.

E. Allowance for Sentencing Guidelines

91. A1's position is:

    a) The CA judgment amounts to a sentencing guideline;

    b) It is a settled principle that an offender is "*to be sentenced upon the existing or prevailing guideline or tariff of sentence which existed at the time of the commission of the offence*" (the "non-retroactive guidelines principle");

    c) This principle is supported by longstanding case law, and is reinforced by Art 12(1) HKBOR.

Did the CA lay down new sentencing guidelines?

92. A guideline case may be no more than an indication that, for a particular type of crime, past sentences are no longer an appropriate guide and immediate custodial sentences would be necessary in future

unless "very special circumstances" existed: see *Secretary for Justice v Lai Wai Cheong* [1998] 1 HKLRD 56 at 60F-G.

93. Poon JA said that this case was to "*provide guidance to the sentencing courts in the future*". [A/11/205-206/§18]

94. In addition to discussing the offence and the principle that unlawful assemblies involving violence require deterrence and punishment, the CA prescribed a sentencing option for achieving this objective, *i.e.* immediate imprisonment. [A/11/205/§16] [A/11/277/§153]

95. The sentence passed on A1 was very harsh in the context of offences connected with past protests.

96. Before this judgment and that in *SJ v. Leung Hiu Yeung* (CAAR 3/2016, 15 August 2017), the range of sentences for taking part in an unlawful assembly in the context of political protests typically included CSOs, suspended sentences, and occasionally, short-term imprisonment: see *HKSAR v Yip Po Lam & Ors* [2014] 2 HKLRD 755.

97. Even in the most serious recent case involving "*riotous*" behaviour, *HKSAR v Tai Chi Shing* [2016] 2 HKC 436, where some defendants used a Mills barrier to damage a glass door at the LegCo Complex and another threw stones and kicked the door, the starting point was 6 months of imprisonment for adult defendants and a CSO for the 19-year-old defendant.

98. This case is much less serious than *Tai Chi Shing*, but the CA adopted an even higher starting point of 8 months for A1.

Non-retroactive guideline principle is settled law

99. The non-retroactive guideline principle has been considered "*settled law*" at least since 1989: see: *R v Chan Ka Wai* (CACC 530/1988, 9 May 1989) at §§6-7, cited in *HKSAR v Tsoi Shu* [2005] 1 HKC 51 at 60.

100. A "*new approach to sentencing*" should not operate to the disadvantage of the defendant: see *Attorney General v Ching Kwok-Hung* [1991] 2 HKLR 125 at 130I-J; *Secretary for Justice v Hii Siew Cheng* [2009] 1 HKLRD 1 at 31.

101. Where defendants were "*chosen at random*" so as to enable a review application to be made to correct disparity in sentences, the CA considered it "*unfair*" to subject those defendants to an increase in sentence: see *Secretary for Justice v Ho Mei Wa & Another* [2004] 3 HKLRD 270 at 280G-H.

102. Where a guideline case is used to correct past lenient sentencing practices and to introduce immediate custodial sentences, the new guideline should also not apply to the offender in that case: see *Lai Wai Cheong* at 61A-C.

103. The non-retroactive principle is settled. It should not be disturbed.

Art 12(1) HKBOR / Art 15(1) ICCPR

104. The CA in *Tsoi Shu* cited Art 12(1) HKBORO as one of the bases for the non-retroactive guideline principle.

105. Art 12(1) HKBOR, which mirrors Art 15(1) ICCPR, provides that,

> "*... Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. ...*"

106. That Art 15 ICCPR is non-derogable underlines the importance of the right (Art 4(2) ICCPR).

107. While commenting on the use of "civil detentions", the Human Rights Committee stated, "*If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence... under the label of a civil detention.*": see *General Comment No. 35*, UN Doc CCPR/C/GC/35, 16 December 2014, §21.

108. During the drafting of the ICCPR, an amendment moved by the UK to allow a heavier penalty applicable at the date of sentence to be imposed was rejected: see *Report of the Third Committee*, UN Doc A/4625, 8 December 1960, §20(b).

Rejecting the "maximum penalty approach"

109. Despite the rejection of the UK's amendment to the ICCPR, English courts nevertheless sentence according to guidelines at the date of sentence instead of those at the date of offence. In *R v Bao* [2008] 2

Cr App R (S) 10, this practice was held not to breach the non-retroactivity protection in Art 7(1) ECHR (at §17).

110. Art 7(1) ECHR has been narrowly interpreted to provide that the court "*cannot sentence beyond the maximum which applied at the time of the offence*" (the "Maximum Penalty Approach"): see *R v. Doherty (Shaun)* [2017] 1 WLR 181 at 198H and 201C-D, citing, inter alia, *Coame v Belgium*, Reports and Judgments 2000-VII.

111. Relying mainly on UK authorities, a majority of the NZ Supreme Court also adopted the same approach to s.25(g) of the NZ Bill of Rights Act 1990: see *Morgan v Superintendent, Rimutaka Prison* (2005) 7 HRNZ 893 at §§77-79.

112. However, Art 12(1) HKBOR is intended to provide a greater protection to convicted persons than Art 7(1) ECHR does, as demonstrated by the absence of the *lex mitior* principle in the latter: see *Doherty* at 194G.

113. S.25(g) of the *New Zealand Bill of Rights Act* is worded differently from Art 12(1) HKBOR and is separated from the protection from retroactive criminal penalties under s.26 of that Act.

114. Elias CJ, dissenting in *Morgan*, held that the Maximum Penalty Approach does not accord with the "*natural meaning*" of "*penalty*". Moreover, domestic human rights provisions giving effect to the ICCPR must be interpreted and applied to ensure that those rights are "*practical and effective*". It is "*completely unrealistic*" to regard the

penalty applicable at the time of offence as the maximum penalty prescribed by statute at that time*:* see *Morgan* at §25.

115. In *Flynn v Her Majesty's Advocate (Scotland)* [2004] SC (PC) 1, while considering whether retroactive changes to the parole regime for mandatory life prisoners breached Art 7(1) ECHR, Baroness Hale also held that it would be "*unrealistic*" to regard the penalty applicable to murder as a sentence that the offender be imprisoned for his life, since there would be a possibility of parole (at §99).

116. However, Baroness Hale cautioned that her conclusion "*does not cast doubt upon*" the practice of sentencing a defendant according to the guidelines at the date of sentence (at §100). In *Morgan*, Tipping J commented that there is "*no valid basis*" for Baroness Hale's distinction between changes to sentencing guidelines and changes to the parole regime in this regard (at §95).

117. For determining the penalty "applicable" at the date of offence for the purposes of Art 12(1), the focus should be on a "realistic" assessment rather than the maximum in the statute. Sentencing guidelines should be taken into account.

118. The assumption behind the Maximum Penalty Approach that a defendant could always have been sentenced up to the maximum prescribed by the statute is unrealistic. It would "*put the legal profession as well as offenders in an impossible position*" in terms of the value of legal advice: see *Attorney-General's Reference No. 33 of 1996 (Daniel Latham)* [1997] 2 Cr App R (S) 10 at 18.

119. The importance of non-retroactivity is recognised in the common law in the form of the presumption against retrospective laws: see *Bennion on Statutory Interpretation*, 6th Ed., Sections 97-98, pp. 291-298.

120. The US Supreme Court has held that advisory sentencing guidelines promulgated after a defendant committed an offence, which provided for a higher sentencing range, could not be applied to that defendant: see *Peugh v. United States*, 569 US ___ (2013).

121. Article I, Section 9, Clause 3 of the US Constitution provides that no "*ex post facto* Law" shall be passed (the "*Ex Post Facto* Clause").

122. The meaning of "*ex post facto* law" in English common law, at the time of the drafting of the US Constitution, included that "*[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.*" (at p.7 of *Peugh*, citing *Calder v Bull*, 3 Dall. 386 (1798))

123. Sotomayor J wrote at p.13 of *Peugh* that the *Ex Post Facto* Clause:

> "*… ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action… Even where these concerns are not directly implicated, however, the Clause also safeguards "a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.*"

124. Applying these basic principles to the context of sentencing guidelines, Sotomayor J continued at pp.14-15,

"*[T]he purpose and effect of the change in [the Guidelines calculation] was to increase the rates and length of incarceration for [fraud]." ... Such a retrospective increase in the measure of punishment raises clear* ex post facto *concerns. We have previously recognized, for instance, that a defendant charged with an increased punishment for his crime is likely to feel enhanced pressure to plead guilty. ... This pressure does not disappear simply because the Guidelines range is advisory; the defendant will be aware that the range is intended to, and usually does, exert controlling influence on the sentence that the court will impose*."

"*It is true that… a defendant does not have an "expectation subject to due process protection" that he will be sentenced within the Guidelines range. But, contrary to the dissent's view, see post, at 11–13, the* Ex Post Facto *Clause does not merely protect reliance interests. It also reflects principles of "fundamental justice."*""

125. These observations are apposite to Art 12(1) HKBOR and the non-retroactive guideline principle.

126. There are thus principled reasons, to give effect to the non-retroactive guideline principle. None of the overseas authorities going the other way provide good reason to disturb the settled principle of non-retroactivity applying in Hong Kong.

F. Section 109A CPO

127. The Applicant was born in 1996. He was 17 at the time of the offence in 2014, 19 when convicted by the magistrate in 2016 and 20 when his case came to the CA in 2017. He is, and has always been, within s.109A CPO for this case.

128. The provisions of s.109A are:

> "*(1) 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.*
>
> *(1A) This section shall not apply to a person who has been convicted of any offence which is declared to be an excepted offence by Schedule 3.*
>
> *(2) In this section* ***court*** *includes the District Court and a magistrate.*"

129. There were no circumstances which would have allowed the CA to dispense with the requirements of s.109A. The offence was not an 'excepted' offence in Schedule 3. The circumstances of the offence

and the personal circumstances of the A1 were not such as to make a prison sentence inevitable, regardless of his circumstances. The Applicant did not, and could not, waive the requirements of the section.

130. The failure to comply with s.109A means that it is for this court to follow it if it thinks that there may be no other method of dealing with A1 except imprisonment.

Purpose of s.109A

131. S.109A has the effect of requiring a court to consider all the usual factors in sentencing (opportunities for training and rehabilitation, personal circumstances, family and educational backgrounds, employment opportunities) as they bear on a young offender then come to a decision about the need for imprisonment: see discussion in *Hong Kong Hansard*, 1st November 1967, First Reading of the *Young Offenders (Miscellaneous Provisions) Bill* 1967, pp.447-450.

132. S.109A is an adaptation of s.17 *Criminal Justice Act* 1948. The purpose of s.17 was to ensure that the imprisonment of children and young persons (14 years to 21 years) was a sentencing measure of last resort. The modifications made on adaptation of this section of the 1948 Act in the CPO did not detract from this objective save in relation to excepted offences which were added in 1971.

133. The effect of s.109A is that when a judge or magistrate has decided that a sentence of imprisonment may be imposed on person between

16 and 21 the information required under sub-section (1) *must* be obtained and considered before imposing a sentence of imprisonment.

134. The judge or magistrate is relieved of this obligation if the offence is an excepted offence contained in the Third Schedule. (The excepted offences include offences such as manslaughter, rape, serious assaults, wounding and firearms offences.)

135. The court will also be relieved of the obligation if the offender's circumstances as known to the court on conviction clearly indicate that no other method than of dealing with him or her will be appropriate. These will be cases of incorrigible recidivism where all the alternatives to imprisonment have been tried and failed. These cases will be rare.

136. S.109A is a means of giving effect with internationally accepted principles of dealing with children and young persons in the criminal justice system. Rule 17(1) of the *U.N. Standard Minimum Rules for the Administration of Juvenile Justice* ("the Beijing Rules") states:

"*17(1) The disposition of the competent authority shall be guided by the following principles:*

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

(d) The well-being of the juvenile shall be the guiding factor in the consideration."

137. The CA recognized that these principles should guide decision-making when sentencing young offenders: see *HKSAR v Bu Hua Lai and ors.* [2007] HKCLRT 688 at [26]-[27].

138. That case also explains another situation where s.109A might not be followed by judges and magistrates. The policy of the CSD mentioned in [27] of *Bu Hua Lai* of refusing to admit non-residents to detention and training centres makes the s.109A exercise pointless and so makes it easier for judges and magistrates to say that imprisonment is the only option. Whether the CSD policy is lawful is another matter.

<u>Failing to Comply with s.109A</u>

139. If the person sentenced to imprisonment without the requirements of s.109A having been followed appeals that sentence, or where the sentence is subject to review under s.81A, the appeal court will conform with the requirements of s.109A. See *The Queen v Vanezza*

R Ramirez (unrep., HCMA 1490/1989, 25 January 1990) per Bokhary J (as he then was); *Morris v Crown Office* [1970] 2 QB 114 per Salmon L.J at 129. The prison sentence may, nonetheless, be a lawful one despite non-compliance.

The Present Case

140. Where, like A1, a young offender whose offence is outside Schedule 3, is resident in the HKSAR and has strong community and stable family ties, it must be a very rare case that a judge or magistrate can say imprisonment is 'necessary' without having followed the requirements of s.109A.

141. This is because, even when there is a case for a deterrent sentence being imposed, the interests of the young offender as someone who should not go to prison, except as a last resort, still come into play and should usually prevail against other considerations.

142. It cannot be said that *this* offence of unlawful assembly inevitably required that a sentence of imprisonment needed to be imposed on *this* offender so that s. 109A need not have been followed.

143. The CA overlooked the details of the case of *HKSAR v Tai Chi Sing* [2016] 2 HKC 436 concerning an unlawful assembly at the Legislative Council Complex in November 2014 where nearly $600,000 of damage was caused.

144. The judge hearing sentence appeals by two defendants described the events as "riotous" in nature, if not a "riot" by legal definition' at §43.

A 19-year-old convicted of unlawful assembly and criminal damage who did not appeal was sentenced to a CSO after a s.109A referral: see §8. The judge remarked that all the sentences passed by the magistrate on the defendants were consistent with 'the administration of justice' at §45.

145. The SJ did not seek a s.81A review of that sentence. The facts of that case are comparable to the Applicant's case and it shows that s.109A inquiries can lead to a sentence other than imprisonment.

Waiver

146. The requirements in s.109A cannot be waived by a defendant. They are not there for his or her benefit but exist for a wider public interest in seeing that young persons are not sent to prison unnecessarily: see *Bennion on Statutory Interpretation*, 6th Ed., Section 12, pp.33-36.

147. At the review hearing, the SJ took the position that the CA needed to obtain reports for alternatives such as Detention Centre, Training Centre and/or Rehabilitation Centre to assist the Court in arriving at the appropriate sentence: see §40 SJ's Written Submissions.

148. A1's counsel, on the other hand, thought that obtaining these reports to consider other custodial options was not going to be useful. This was because D1 had displayed outstanding leadership qualities, was mature and was receiving a university education. As such, A1 was not a person that needed to go to a Detention Centre to instil a sense of discipline; he did not need to undergo vocational training in a

Training Centre; nor did he need to receive counselling in a Rehabilitation Centre: see §§35-37 of D1's written submissions.

149. D1's counsel was not suggesting that the CA could dispense with s.109A. Rather, he was suggesting that reports were likely to say that A1 would not benefit from these other custodial options.

150. The CA should not have treated counsel's remarks about the utility of seeking information under s.109A as a waiver or a release, if that is what it did. [A/11/245, 284/§§93, 166]

151. Nor should A1's counsel been taken to concede that, because other custodial options were not likely to be thought appropriate, then the only way of dealing with the Applicant was immediate imprisonment. Even the SJ considered that more information about the Applicant was required before imposing a sentence of imprisonment because s.109A applied. [A/11/241/ §83]

Current Application of s.109A

152. S.109A still applies to the Applicant. The words '*No court shall sentence…*' presuppose a conviction of a person between 16 and 21 that triggers the inquiry procedure. It is the date of conviction that is the relevant date, not the date when sentence is passed.

153. If it were otherwise there would be anomalies and injustices. If two defendants, both aged 20, had their cases put back for s.109A inquiries and when their cases came back to court one defendant was

then 21. If he was then dealt with more harshly than his marginally younger co-defendant there would be injustice.

154. Or, as in this case, a s.81A review, something not of A1's making, takes a case beyond a defendant's 21st birthday: see *R v Danga* [1992] Q.B. 476 at 479-481 on the application of similar age-sensitive sentencing restrictions.

155. The application of s.109A by reference to the date of conviction is influenced by the provisions of s.15 of the Juvenile Offenders Ordinance, Cap. 226 which require a court to consider sentencing options for children (under 14) and young persons (over 14 but under 16) upon the establishment of guilt, not the date of disposal of the case.

156. Upon guilt being established, a magistrate may deal with the offender in one or more of the ways identified at subsection (1)(a)-(m) so the choice of disposal options is tied to the date of conviction.

157. The approach is consistent with Art 12(1) HKBOR: see §§104-108 above.

158. The CFA is now in the position of the court in *The Queen v Vanezza R Ramirez* where a complaint of non-compliance with s.109A arising on an appeal was considered. However, using s.109A now would be problematic because A1 has already served the equivalent of a 3-months' sentence.

159. This court should note the non-compliance with s.109A in the CA and the fact that the issue arises now on a s.81A review, not an appeal initiated by A1. In these circumstances, the court should quash the sentence of imprisonment.

Dated 29th day of November 2017

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To: The Registrar of the Court of Final Appeal
The Respondent, Secretary for Justice

FACC 8 / 2017

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 8 OF 2017 (CRIMINAL)

(ON APPEAL FROM CAAR NO. 4 OF 2016)

BETWEEN

SECRETARY FOR JUSTICE **Respondent**

and

WONG, CHI FUNG **Appellant**

CASE FOR THE APPELLANT

Filed on the 29th day of September 2017.

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