FACC 9/2017

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

CRIMINAL APPEAL NO. 9 OF 2017

(On appeal from CAAR 4/2016)

Between

Law Kwun Chung — Appellant

and

Secretary for Justice — Respondent

THE APPELLANT'S CASE

Dated the 18th day of November 2017

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THE APPELLANT'S CASE

The 1st Appellant/"A1" refers to the Appellant in FACC 8/2017,
the 2nd Appellant/"A2" refers to the Appellant in FACC 9/2017,
the 3rd Appellant/"A3" refers to the Appellant in FACC 10/2017 and
the Appellants /"As" collectively refers to all the appellants.
[A:] refers to page number in Record of Proceedings - Part A

A INTRODUCTION

1. On 26 September 2014, A2 being a standing committee member of the Hong Kong Federation of Students took part in a public assembly outside the Forecourt of the Central Government Offices ("the Forecourt"). The police had issued a notice of no-objection valid until 10pm. At about 10:24pm, A1 called on members of the public to go into the Forecourt and then proceeded to scale the fence into the Forecourt. A2 called upon members of the public to enter into the Forecourt. A3 also scaled the fence into the Forecourt. A few tens of people managed to enter the Forecourt. The actions of the participants lasted for only a short period of time. Some participants pushed over Mills barriers erected around the flag pole in the Forecourt. Then the participants joined hands under the flag pole and chanted slogans protesting in an orderly and peaceful manner.

2. A1 and A3 were charged and tried for unlawful assembly. A1 and A2 were also charged with inciting others to take part in an unlawful assembly. After a trial lasting 6 days in the course of which 12 prosecution witnesses were called and all As testified, the trial magistrate convicted A1 and A3 of unlawful assembly and A2 for inciting others to take part in an unlawful assembly. A2 was convicted on the basis that "*if the participants of the assembly followed his call, and insisted on entering the Forecourt in those circumstances, their actions would*

Reasons for Verdict para.57 **[A:85]**

cause physical bumps for sure, and might even cause physical injuries".

3. After considering probation and community service order reports, A2 was sentenced to 120 hours community service. A2 has satisfactorily completed his community service.

4. The prosecution applied for a review of the sentence pursuant to s.104 of the Magistrate's Ordinance on the ground that :- Prosecution's Submissions for Review of Sentence para.1

(1) Taking part and inciting unlawful assembly were serious offences and the court would normally impose deterrent sentences of immediate imprisonment.

(2) It was wrong for the trial magistrate to draw a distinction from the usual criminal cases on the basis of the motives of As.

(3) Although the actions of the As were not very violent, this was not a mitigating factor.

(4) The sentences did not reflect their culpability

i. A1 and A3 acted with others; and

ii. All As acted with premeditation and planning which caused injuries to the security guards.

(5) Community Service was therefore manifestly inadequate.

(6) All As did not have genuine remorse.

The trial magistrate after considering the submissions and authorities declined to review her sentence, holding that all the matters raised by the prosecution had been considered in her reasons for sentence.

Decision on Review of Sentence para.1 and 5 **[A:122 & 124]**

5. The prosecution applied to the Court of Appeal for review of sentence. On review, the Court of Appeal:-

CA August Judgment para.156-170 **[A:278-288]**

(1) Listed 8 matters which in their view rendered the present case serious :-

(a) As' actions were premeditated (**"The Premeditation Factor"**);

(b) It was within As' reasonable expectation that there was a serious risk of the crowd clashing with the security guards and violence would inevitably arise ("**The Reasonable Expectation Factor"**);

(c) As persisted with their acts despite the fact that once the action started, they must have realized with certainty that the protesters were being stopped and the parties were having clashes ("**The Realization of Resistance Factor"**);

(d) Several hundreds of people took part in the

unlawful assembly who persisted in their act despite the actions of the police and security guards ("The Persistence Entry Factor");

(e) 10 security guards were injured ("**The Injury Factor**");

(f) As had no right to enter the Forecourt but insisted on entering showing disregard for the law ("**The Disregard of Law Factor**");

(g) As encouraged and A2 incited young people and students to break the law ("**The Incitement of Young People Factor**"); and

(h) A2 incited protesters using sensational slogans and unfounded words ("**The Unfounded Allegations Factor**").

(2) Found that the trial magistrate had failed to take into account those 8 factors.

(3) Found that As had no genuine remorse.

(4) Found that the trial magistrate had erred in principle by :

(a) Failing to consider the factor of deterrence but attached disproportionate weight to other circumstances in As' favour;

(b) Failing to consider that the case was an unlawful assembly of a large scale and there was a risk of violent clashes and thus

wrongly concluded that the case did not involve serious violence;

(c) Failing to consider that As must reasonably be able to envisage that there would be clashes between the participants, security guards and the police, and that it was inevitable that at least some security guards would be injured;

(d) Failing to consider the As insisted on forcing their way into the Forecourt unlawfully and encouraged or incited others to do so; and

(e) Giving too much weight to the As "alleged" remorse.

(5) Considered that the only correct sentence was an immediate custodial sentence.

(6) Sentenced A2 to 8 months' imprisonment.

6. The facts and background appear in the judgment of the Court of Appeal of 17 August 2017 ("CA August Judgment"). A2 will not repeat the same here.

CA August Judgment para.19-57 **[A:206-228]**; A2's Form B para.1-13 **[A:364-375]**

B LEAVE TO APPEAL

7. Leave to appeal has been granted on four issues, where only the first three are related to A2, namely:

Determination of Appeal Committee para.2 **[A:391]**

(1) To what extent can the Court of Appeal on an application for review of sentence under s.81A of the Criminal Procedure Ordinance, Cap 221 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 Court of Appeal was seeking to do so at all, in arriving at the appropriate sentences for the applicants, to what extent ought the Court of Appeal have made allowance for the assertion made by them that guidelines to sentencing courts for the future were being given?

C ISSUE 1 :

CAN THE COURT OF APPEAL ALTER THE FACTUAL BASIS OF SENTENCING

Context

8. The Court of Appeal took upon itself the role of the trial judge to make findings of facts and, based on its own fact finding, held that the trial magistrate erred in principle or imposed a manifestly inadequate sentence, and sentenced A2 afresh. These new findings have been identified in the Appellants' Joint Comparison Table (for which As will make separate application for filing of the same).

9. A2 submits that the Court of Appeal had no power to make and apply such findings of facts which were not found by or even contrary to the findings of the trial magistrate to the disadvantage of A2:-

(1) As a matter of statutory construction, the powers of the Court of Appeal on a **review** of sentence are limited. *cf* the powers on a sentencing **appeal**. The nature of a review of sentence does not permit the Court of Appeal to embark on a fact finding exercise.

(2) There are sound reasons for this restriction. An appellate court is not properly equipped to embark on a fact-finding exercise. *cf* a trial court. The present case is an example of what can and did go

wrong when the Court of Appeal took upon itself the fact-finding role which should be the province of the trial court, in that the facts found by the Court of Appeal :-

(a) were made on wrong factual / evidential basis: the Premeditation Factor, the Persistence Entry Factor, the Injury Factor, the Incitement of Young People Factor and the Absence of Remorse Factor;

(b) were made in the complete absence of factual / evidential basis: the Unfound Allegations Factor ; and

(c) They were not pursued by the prosecution below: the Reasonable Expectation Factor, the Incitement of Young People Factor and the Unfound Allegations Factor.

(3) The danger of any "absurdity" arising on account of a sentence being imposed on a wholly erroneous basis is more apparent than real. The prosecution can apply to review the decision of a magistrate under s. 104 of the Magistrate's Ordinance. For District Court and Court of First Instance, the perfection rule applies (*HKSAR v. Tin's Label Factory Limited* (2008) 11 HKCFAR 637), and any error giving rise to an absurdity may be remedied.

10. The Court of Appeal considered that it had the power to make findings of fact:-

CA's Judgment of 26 October 2017 para.6-8 and 30-49 **[A:300-302 & 311-323]**

(1) The general principle is that in dealing with an application for review of sentence, the Court of Appeal will proceed on the basis of the facts proved or admitted; it would not constitute itself as a court of first instance inquiring into facts which had not been pursued or proved in the court below. Accordingly, the Court of Appeal will generally proceed on the basis of the facts as found by the court below.

(2) Subject to the rule that the Court of Appeal must proceed on the factual basis which the prosecution did not seek to correct below, where the ground for review is that the sentencing court acted on an erroneous factual basis, the Court of Appeal is entitled to examine the evidence adduced below to consider if, based on the facts **proved, admitted or not in dispute**, the sentencing court did make the error. If so, the Court of Appeal is entitled to correct the factual error and to consider if, based on the factual basis as corrected, the sentence imposed is wrong in principle or manifestly inadequate. If so, the Court of Appeal is entitled to interfere.

(3) Where it is shown that, based on the facts **proved, admitted or not in dispute**, the sentencing court has failed to take into account certain matters which are relevant to sentence, the sentencing court has proceeded on an incomplete factual basis, rendering the sentence imposed wrong as a matter of law and principle. In such circumstances, the Court of Appeal is not bound by the findings made by the sentencing court for the purpose of sentence because those findings are incomplete for such purpose. The Court of Appeal is entitled to consider all the relevant matters including those wrongly ignored by the sentencing court to determine if in the overall circumstances of the case, the sentence imposed is wrong in principle or manifestly inadequate. If so, the Court of Appeal is entitled to interfere.

Background: Legislative History

11. Under the Criminal Procedure Ordinance (No.9 of 1899), there was no general right to appeal to the Full Court. The Full Court only had the power to entertain question of law reserved by the trial judge.

12. The general right to appeal against conviction and sentence by a defendant to the Full Court was created under the Criminal Procedure (Amendment) Ordinance

(No.5 of 1933).

13. The power of review upon AG's reference was introduced by the Criminal Procedure Amendment Bill 1972. At the second reading of the bill on 15 March 1972, then AG raised four matters:-

(1) The new law did not give AG any right to interfere with a sentence but the assessment would remain a matter for the Court;

(2) The power would be unlikely to be used frequently but it should be available so that unduly harsh sentence could be corrected if the defendant did not appeal;

(3) The power would assist the courts in maintaining uniformity of sentence; and

(4) There was no equivalent mechanism in the UK but the power of review of similar nature existed in at least twenty Commonwealth countries including Australia, Canada, Singapore, Malaysia and Fiji.

(Hansard of 15 March 1972)

The Nature of Power of the Court of Appeal in Sentencing "Appeal"

14. Notwithstanding that the word "review" is adopted in ss.81A, 81B and 81C of Criminal Procedure Ordinance (Cap. 221) ("CPO") as opposed to "appeal" as in s.82 or s.118 of the Magistrates Ordinance (Cap.227), it is convenient to start with the nature of power of the Court of Appeal in sentencing appeal.

15. The court of appeal hears criminal appeal as an appeal *stricto sensu*, which requires that an error be demonstrated before the appellate court can act. The appeal court, acting as a court of error, is not concerned with whether it agrees with the trial judge's findings, even less with whether it would have made those same findings. It cannot substitute what it would have found for what the trial judge found unless and only unless it has been demonstrated to it that the trial judge erred. (*HKSAR v. Ng Man Yee* [2014] 4 HKC 241, §38; *HKSAR v. Ip Chin Kei* [2012] 4 HKLRD 383, §§ 20-24).

16. In an appeal against sentence the Court of Appeal Criminal Division is a court of review: Its function is to review sentences imposed by courts at first instance, not to conduct a sentencing exercise of its own from the beginning.
(*R v. A and B* [1999] 1 Cr App R (S) 52 at 56)

17. In *Markarian v. The Queen* (2005) 215 ALR 213, which was cited at §38 of Ng Man Yee, Kirby J. elaborated on the nature of the power of a court of error, at §§100-101,

> "… *An explicit finding of error by appellate judges is not a mere technicality. It is the precondition to the authority which the appellant court enjoys under the law to disturb the conclusions of the trial judge. What is involved in this rule is not simply professional respect for the trial judge, still less for a formula of words. It is a salutary reminder to the appellate court of the advantages that the trial judge enjoys; the impossibility of expressing all of the considerations leading to an outcome in judicial reasons; and the special difficulty of doing so where the outcome involves (as sentencing does) discretionary and quasi-discretionary considerations of judgment. To pause at the end of the analysis of criticisms of the reasons of a trial judge, and to express clearly the appellant court's satisfaction that error has been established, is a useful reminder to the appellate court that its function is different from that of the trial judge. It is so even if, once error is shown, the appellate court enjoys its own separate power to substitute the orders that ought to have been made at trial*." (emphasis added)

18. *Markarian* was decided in the context of an "appeal" against sentence. Hong Kong speaks of "review" as opposed to "appeal". The choice of the word "review" as opposed to "appeal" is deliberate and one of substance. It intends a more stringent test and principle substantially different from that governing an appeal against sentence (*Re Applications for Review of Sentence*s [1972] HKLR 370, Full Court, at 375-376, 398-401, 414, 416-417). The reasons for refusal to adopt the "appeal" mechanism as applied in the foreign jurisdictions (*eg.* in respect of New South Wales, the then s.5D of the Criminal Appeal Act 1912 as amended by s.33 of the NSW Crimes Amendment Act 1924 and the current s.5D of the Criminal Appeal Act 1912; and in respect of New Zealand the then s.383 of the Criminal Appeal Act 1961 as amended by s.9 of the Crimes Amendment Act 1966 and the current s.246 of the Criminal Procedure Act 2011) is, therefore, also plain.

19. The power of review is also circumscribed, in that it is exercisable only if the sentence is

(1) Not authorized by law;

(2) Wrong in principle;

(3) Manifestly excessive; or

(4) Manifestly inadequate.

It is not exercisable in any other case, *eg* if the Court of Appeal simply considers that it would have imposed a heavier (or lighter) sentence (s. 81A(1) of CPO).

20. The difference is highlighted by the distinction between the procedure in respect of "appeal" and "review" under CPO:-

(1) In the context of an "appeal", under s.83T of CPO, the Registrar is required to obtain and lay before the Court of Appeal "all documents, exhibits and other things which appear necessary for the proper determination of the appeal or application".

(2) However, no exhibit or evidence is required for SJ Review. Under s.81A(2A)(a)-(d), in respect of a sentence imposed by a Magistrate or District Judge, only the statement of the facts / reasons for verdict and reasons for the sentence, together with any report obtained for the purpose of the sentence, are required. In respect of a sentence passed by a High Court Judge, only the whole of the proceedings before him **other than the evidence** given in any trial that took place in those proceedings, together with any report, are required. This indicates that the legislation does not contemplate an investigation and resolution of evidence at the Court of Appeal.

(3) It is acknowledged that CPO does not prohibit consideration of evidence. For example, the Court of Appeal has jurisdiction to receive new evidence under s.83V. However, s.83V(5) specifies that no

sentence can be **increased** by reason of or in consideration of any evidence which was not given at the trial.

21. It is therefore plain that in view of the nature of the power of the Court of Appeal as a court of error, the adoption of the "review" mechanism as opposed to "appeal", the different procedure adopted in the review proceedings and the nature of the grounds of review set out in s.81A, the assessment concerns with examination for error. The Court of Appeal is not entitled to find facts on its own, not to mention findings facts on its own for the purpose of comparing its conclusion with that of the first instance judge in order to determine whether an error exists.

22. The various decision relied on by the parties are in line with the principles summarized above:-

(1) In *AG's reference No.95 of 1998 (R v Highfield*) TLR, April 21 1999, the English the Court of Appeal refused to entertain AG's reference in a sentence review based on factual basis not advanced below. Whilst the decision was referred to in *AG's reference Nos.114-116 & 144-5 of 2002* [2003] EWCA Crim 3374 (at §§27-28) as supporting the proposition that AG could not seek to re-open the way in which the case which had been put by the crown below, the report of *Highfield* clearly states that the Court of Appeal

acted upon the general principle that whether a sentence referred to the Court of Appeal by AG was unduly lenient was a question which had to be decided not in light of what was alleged but by what was proved or found to have been established. *AG's reference Nos.114-116 & 144-5 of 2002* and *R v Li Ah-sang* [1995] 2 HKCLR 239 clearly established that the prosecution will not be allowed to pursue what was not pursued below. But they are consistent with the general principle: What the prosecution alleges in the Court of Appeal are not facts proved or found to have been established below. The review must therefore be dismissed as the Court of Appeal is not to play the role of the first instance judge.

(2) *AG's reference 90 & 91 of 2003* [2004] EWCA Crim 1839 (at §10) relied on by SJ at the leave hearing was also firmly grounded on the same principle. The defendant's express abandonment of the alleged belief that the drugs were amphetamine and the admission of facts left no room for the sentencing judge to proceed as he did. The Court of Appeal did not embark on its own fact-finding exercise but merely acted on the fact admitted below.

(3) SJ relied on *AG's reference Nos.4 & 7 of 2002* [2002] 2 Cr App R (S) 77 at §33 at the leave hearing. The case is not inconsistent with the above analysis since the Court of Appeal did not purport to undertake any fact finding exercise but it merely sought to take into account a fact which was obviously agreed and undisputable in sentencing.

(4) The exercise undertaken by the Court of Appeal in *SJ v. Au Chi Hang* [2006] 2 HKLRD 310 is consistent with the principles stated above since the Court of Appeal is entitled to examine the materials not for the purpose of making its own finding of facts but for the purpose of ascertaining whether the sentencing judge erred in principle as alleged.

The Court of Appeal Should Not Constitute Itself a Second Fact-Finding Court

23. *Switlishoff et al* [1950] 1 WWR 913 (§§10-11) emphasizes that the task of an appellate court is primarily one of an appellate nature. The functions of trial and appellate courts are fundamentally distinct. The appellate court cannot attempt to act as if it were the assize judge sitting in the living atmosphere of the trial. It is not the duty of an appellate judge to say whether he thinks he would or would not have reached the same conclusion

had he been the assize judge, which at best must needs be pure speculation. The question for the appellate court is whether the trial judge had gone judicially wrong by any rational test that appellate courts, acting as appellate courts of review have come to recognize and apply over the years.

24. This principle is well acknowledged and expressed in decisions concerning appeals from findings of facts. The Court of Appeal will not consider the fact finding of a first instance judge wrong unless it is proved to the high standard of "plainly wrong" (*Ting Kwok Keung v. Tam Dick Yuen & Others* (2002) 5 HKCFAR 336; *HKSAR v. Egan* (2010) 13 HKCFAR 314 §§194-195). *Piglowska v. Piglowski* [1999] 1 WLR 1360 (quoted at §41 of *Ting Kwok Keung*) stresses that appellate caution is not just a matter of professional courtesy. 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.

25. This is simply recognition of the advantages that trial judges have. In the present case, the trial magistrate heard the evidence over the course of a 6-day trial. She was presented with the entirety of the video evidence which lasted for about 6000 minutes and the entirety of the transcripts in respect of the video evidence, as opposed to the Court of Appeal which was invited to view a few

excerpts selected by the prosecution.

26. The dangers of an appellate court taking on the role of a fact-finder (for which it is not suited) is illustrated in the present case by the following :-

(1) The trial magistrate, who heard each of the As giving evidence and had full consideration of the whole of the evidence in context, considered that A2 was remorseful; The Court of Appeal who did not have the advantage of seeing and hearing A2, found that he had no genuine remorse.

Reasons for Sentence para.9-11 **[A:115-116]**

CA August Judgment para. 165 **[A:284]**

(2) The trial magistrate made no finding that A2 had known at the meeting (between 6pm – 8pm) that a decision had been made to enter the Forecourt. The evidence recited by the trial magistrate was that he had left the meeting before any concrete decision had been made to re-enter the Forecourt. However, the Court of Appeal found as a fact (and without the benefit of the testimony of A2) that it was within A2's knowledge that action would be taken to enter the Forecourt after the assembly.

Reasons for Verdict para. 16 III **[A:59-60]**

CA August Judgment para. 157 **[A:278]**

(3) The trial magistrate made no finding that there was at the meeting any reasonable expectation of a risk of violent clashes. Instead she found (at some point of A2's encouragement on the stage), that there would obviously be disorderly conduct and

Reasons for Verdict para. 16 IV **[A:60-61]**; Reasons for Verdict para. 56 and 57 **[A:85]**;

intimidating conduct, that the protesters' actions would cause physical bumps and might even probably cause physical injuries. However, the Court of Appeal, who did not hear any evidence about how the meeting was conducted, found that it was within As' reasonable expectation that there was a serious risk of clashes, and that violence would inevitably arise from those clashes. This finding would have been dependent on what A2 knew and appreciated at the time of the meeting and indeed subsequently.

CA August Judgment para. 158 **[A:278-279]**

(4) The trial magistrate made no finding regarding any unfounded inflammatory allegations. However, the Court of Appeal made the finding that A2 made unfounded allegations which were extremely inflammatory. No evidence had been elicited from either side about the truthfulness or otherwise of such statements. A2 was not even cross-examined on this. At no stage did the prosecution allege that the statement was an unfounded allegation.

CA August Judgment para. 164 **[A:283-284]**

These findings of facts by the Court of Appeal were to the disadvantage of A2. They were unsupported by the trial magistrate's own findings or indeed by the evidence.

Absurdity

27. Upon the application to the Court of Appeal for a certificate, and at the leave hearing, the Respondent sought to argue that if the Court of Appeal does not have power to correct the factual basis in reviewing a sentence, then an absurdity would arise in that even when it is demonstrated that the original sentence was imposed on a wholly erroneous basis, and the mistake in sentencing could never be rectified on review.

Respondent's Written Submissions for the Leave Hearing para.15

28. This "absurdity" is more apparent than real. If there is any **wholly erroneous** basis for sentence, this would have been apparent when the sentence is pronounced. At the magistrates court level, the prosecution would be able to utilize the powers of review under s. 104 of the Magistrates Ordinance (as it did in this case).

29. At the District Court and Court of First Instance Level, the perfection rule provides an avenue for the prosecution to bring to the Court's attention so that it may correct any errors which may have occurred in sentencing. The point at which a sentence is recorded is at the end of each day's sitting of the court when the Registrar delivers to the Commissioner of Correctional Services or his deputy a certificate of all sentences passed by the court on that day. (s.86(1) of the CPO, *HKSAR v. Chu Kin Yuen* [2008] 1 HKLRD 405 at 20)

30. Thus, where a mistake has been made, *eg* as to the nature of a dangerous drug, this can and should be corrected at the sentencing hearing (or in the case of a case in the magistrate's court, within the time limited for review).

The Present Case

31. The Court of Appeal applied a wrong test and was wrong in finding that the trial magistrate erred:-

(1) The Court of Appeal was wrong in making new fact findings, namely, the Premeditation Factor, the Reasonable Expectation Factor, the Persistent Entry Factor, the Injury Factor, the Incitement of Young People Factor, the Unfound Allegations Factor and the Absence of Remorse Factor and applied such fact findings to reach the conclusion as it did and then proceed to fault the trial magistrate for not reaching or refusing to reach the same conclusion.

A2's Form B, para.10 and 21-34 **[A:371-373 & 378-385]**

(2) Taking the Court of Appeal's decision as a whole, the Court of Appeal made its own findings and in substance found the trial magistrate wrong for having reached a different conclusion.

CA August Judgment para.167 **[A:285-286]**

(3) Even if the Court of Appeal is entitled to find new facts, the new facts were not found in accordance with law (*cf.* As' Joint Comparison Table):-

A2's Form B, para.10 and 21-34 **[A:371-373 & 378-385]**

(i) Facts found on wrong factual / evidential basis: the Premeditation Factor, the Persistence Entry Factor, The Injury Factor, the Incitement of Young People Factor and the Absence of Remorse Factor.

(ii) Facts found in the complete absence of factual / evidential basis: the Unfound Allegations Factor.

(iii) Facts which the prosecution had not pursued below: the Reasonable Expectation Factor, the Incitement of Young People Factor and the Unfound Allegations Factor.

D. ISSUE 2

MOTIVE OF CIVIL DISOBEDIENCE AND EXERCISE OF CONSTITUTIONAL RIGHTS IN SENTENCING

Motive as a Relevant Factor

32. Motive has always been regarded as a relevant factor in sentencing. See, *eg. R v. Bright* [1916] 2 KB 441, *Neal v. R* (1982) 42 ALR 609. Motive reflects moral culpability, which is particularly relevant to the element of punishment in any sentence. Hence we would view the acts of Robin Hood more favourably than those of the Sheriff of Nottingham.

Civil Disobedience as a Mitigating Factor

33. As observed in *R v. Jones (Margaret)* [2007] 1 AC 136 (§89), civil disobedience represents a long and honourable history, referring to the conduct of the people who break the law to affirm their belief in the injustice of a law or government action. Apart from the suffragettes mentioned in *Jones*, those who take part in civil disobedience include Rosa Parks, Vaclav Havel, Lech Walesa, and even Vladimir Lenin, whose views and actions have been subsequently vindicated.

34. The concept of civil disobedience in the vast majority of such cases has at its heart that the offender acts for what he/she perceives as the common good. Although this may not be the prevailing view at the time, it is in recognition that the offender acts with virtuous instead of selfish or otherwise destructive motives that distinguishes acts of civil disobedience from ordinary criminal acts.

35. In *SJ v. Leung Hiu Yeung and Others* (unrep., CAAR 3/2016) (11 September 2017) (§§109-116), the Court of Appeal appears to accept that when an offender was motivated by civil disobedience, the sentencing court may impose a more lenient sentence, though the court may give little or no weight to this motive depending on the seriousness of the case.

36. It is submitted that motive will always be relevant. However, it is acknowledged that there are cases which are so serious that the motives of the perpetrator, however noble, pale into insignificance in view of the seriousness of the offence. It is submitted, however, that such cases must be few and far between.

37. In addition to Hong Kong (*Leung Hiu Yeung*) and England (*Jones*), civil disobedience has also been accepted as a distinctive factor in sentencing in Canada. The province of British Columbia even goes a step further to regard it as a distinctive factor as part of the prosecution policy (cf. Crown Counsel Policy Manual "Civil Disobedience and Contempt of Related Court Orders")

38. The Canadian cases of Krieger is a good illustration:

(1) *R v Krieger* [1998] AJ No.1119 (19 October 1998): The defendant was sentenced for possession of marijuana for the purpose of trafficking. The defendant described his commission of offence as civil disobedience as he believed that the drugs should be legalized for medical purpose and he hoped to attract support in the public for the change in the law. The court accepted that he was motivated by his belief that the drugs possessed healing power and that the commission of the offence was aimed at drawing public attention to a

current issue and regarded the case as an exceptional one. The court therefore departed from the "well settled principle" of imprisonment even for first offender and sentenced him to a $500 and contribution of $50 to the Victim Fund (§§31-40).

(2) *R v Krieger* [2009] MJ No.430 (21 December 2009): The same defendant was sentenced for exactly the same offence, where by this time he had been convicted of the same offence for several times and he admitted of selling marijuana for several years as business. He even set up a foundation to supply medical marijuana. Still, his motive was not financial gain but compassion for those suffering from diseases. The court took into account the civil disobedience nature of the case and the fact that in various cases constitutional challenges to the law for failing to sufficiently address medical use of the drugs effectively vindicated the civil disobedience. The court regarded the case as not one crying out for denunciation, specific deterrence or rehabilitation. General deterrence was not appropriate because the case would not deter those motivated by financial gain. (§§1, 7-14, 23-25)

Exercise of Constitutional Rights

39. Freedom of expression and right of peaceful assembly are constitutional rights (Article 27 Basic Law, Articles 19 and 21 of the International Convention on Civil and Political Rights ("ICCPR") and Articles 16 and 17 Hong Kong Bill of Rights.

40. The nature and severity of the penalty are factors to be taken into account in the assessment of the proportionality of the state's interference of the rights. This is so even if conviction survives the proportionality test (*Skalka v. Poland* (2004) 38 EHRR 1, §§38-42; *Chauvy v. France* (2005) 41 EHRR 29, §78)). The European Court of Human Rights has further pointed out that attention must be paid to the potential chilling effect on the exercise of the right created by the interference (*Morice v. Franc*e (2016) 62 EHHR 1, §§127, 175-176). The court has to take into account all circumstances as a whole including the effect of the penalty personal to the defendant (*Morice v. France* §176).

41. The concept of proportionality is well established in Hong Kong. In sentencing an offender whose offence involved the exercise of a constitutional right, the court must consider the question whether the nature and severity of the sentence will render the sentence disproportionate.

42. In the context of the right to freedom of expression and freedom to peaceful assembly, the right to freedom of peaceful assembly is secured to everyone who organizes or participates in a peaceful demonstration. The notion of "peaceful assembly" does not cover a demonstration where the organizers and participants have violent intentions which result in public disorder (*G v. Germany Application* no.13079/1987). However, the protection is wide enough to protect the assembly which has a real risk of resulting in disorder by developments outside the control of those organizing it. The same protection applies in such case and any restriction placed on the assembly must, too, be proportionate (*Christians against Racism and Fascism v. UK* 21 DR 138, §4).

43. Unlawful assembly concerns with disorderly conduct intended or likely to cause the fear of breach of peace (s.18(1) Public Order Ordinance (Cap.245)). It is said to be a preventive measure.

CA August Judgment para.126 **[A:262]**

44. Whilst it may be arguable that whether the first limb "intending to cause a fear" amounts to "violent intentions", the offence can be committed under the second limb of conducting oneself in a manner "likely to cause a fear" without an intention and actual application of violence. Therefore, commission of the unlawful assembly does not *per se* imply that the people who participated in the assembly were not "peaceful".

Similarly, as the organizer is concerned, although the assembly organized may be one in which there is an inherent risk of causing fear, the constitutional protection remains so long as the organizer did not intend violence. In respect of a charge of inciting unlawful assembly, as the organizer is concerned, the focus of the enquiry is therefore not simply whether the assembly so organized eventually developed into one involving violence, but did the organizer intend violence. If the organizer did not intend violence, a proportionality test must be applied.

45. It is therefore submitted when the offender is motivated by civil disobedience and/or exercising his/her constitutional rights, the sentencing court's approach should be:-

(1) The motive of civil disobedience and/or the exercise of constitutional right must be considered as a relevant factor.

(2) The factor of civil disobedience is a mitigating factor. It must be sufficiently addressed in order to determine the appropriate approach of the sentence.

(3) Even if the usual case of the kind requires an immediate custodial sentence, civil disobedience can constitute an exceptional circumstance to

justify departure from the usual sentence.

(4) Ultimately, if the exercise of constitutional rights is involved, the proportionality test must be applied to examine whether the nature and severity of the sentence would lead to chilling effect in the exercise of the right or otherwise disproportionate.

46. In the present case, the conduct incited, *i.e.* the entry into the forecourt, was an exercise of the freedom of expression and the entry was the expression itself (*Tabernacle v. Secretary of State for Defence* [2009] EWCA Civ 23, §37). The trial magistrate found that there was no evidence that A2 intended or participated in the causing of the injuries. A2 was convicted of inciting an unlawful assembly on the basis of recklessness, i.e. he appreciated the risk of the likelihood of the fear but nevertheless took it (*Sin Kam Wah & Another v. HKSAR* (2005) 8 HKCFAR 192 §§42-44). There is no finding that A2 intended violence. The facts found by the magistrate point the other way. It is submitted that A2's conduct was within boundary of the constitutional protections. Proportionality test must be applied in balancing the exercise of the constitutional rights and the need of protection of public order.

Reasons for Verdict para.16 I, II and 90 **[A:59 & 98-99]**

Reasons for Sentence para.6-7 **[A:113-115]**

47. Applying these principles, in the present case:-

(1) The approach adopted by the trial magistrate in taking into account, *inter alia*, (i) the fact that As were expressing their opinion and complaints to advance their political ideals and their concerns about the current society; (ii) their purpose and intention are not for their own benefit or to harm others; (iii) As' attitude towards the offence; and (iv) the conduct is not very violent, and the adoption of a tolerant and understanding attitude, is in line with the principle stated above. The trial magistrate did not err in any respect.

Reasons for Sentence para.2-7 **[A:112-115]**

(2) The Court of Appeal failed to properly take into account the motive of "civil disobedience". Furthermore, it excluded community service order for absence of genuine remorse, and it failed to consider whether civil disobedience amounted to exceptional circumstances.

(3) The Court of Appeal failed to properly address the motive of the exercise of the right of freedom of expression and the fact that A2 did not have violent intention.

(4) The Court of Appeal also failed to address the chilling effect of the sentence that it will result in

deterring the public from organizing or participating in assembly intended to be peaceful simply because of the existence of a risk: the Court of Appeal in effect expressed the view that every large scale assembly, even though intended to be peaceful, would inherently involve a risk of getting out of control.

CA August Judgment para.126 **[A:262]**

E. ISSUE 3:

EXTENT OF ALLOWANCE FOR NEW GUIDELINE CASES

Context

48. In the introductory paragraph to the judgment of Poon JA (to which the other two members of the Court agreed), it was recognized that sentences passed by the lower courts in this kind of case varied, and that it was necessary to provide guidance to sentencing courts in the future. Although not expressed as "guidelines", nonetheless the "guidance" operated in the same way as guidelines, imposing substantially harsher sentences than prevailing sentencing practice. The fact that Court of Appeal was effectively laying down a guideline of immediate custodial sentences can be discerned from the remarks of Yeung VP, where he said that "if the sentences imposed by **this** court do not suffice to deter similar offences, the court may need to resort to sentences **of even greater deterrent effect** to uphold the dignity of the rule of law"

CA August Judgment, para.18 **[A:205-206]**

CA August Judgment, para.16 **[A:205]**

(emphasis added).

49. The sentence imposed on A2 clearly departs from the sentencing practice as at the time of the offence. With the only exception of the case of *Chan Sam v. The Queen* [1968] HKLR 401 (which occurred in the aftermath of the leftist riots in 1967), immediate custodial sentences with starting points of 10 months was way beyond the sentences previously imposed by the Courts as referred to by the prosecution at the Court of Appeal:

- *HKSAR v. Tai Chi Shing & Ors* [2016] 2 HKC 436 (Starting point of 6 months, reduced by 1/3 for PG and further reduced by 1/2 month for partial completion of CSO)
- *HKSAR v. Wong Yuk Man* [2015] 1 HKLRD 132 (Fine)
- *HKSAR v. Yip Po Lam* [2014] 2 HKLRD 777 (4 weeks imprisonment suspended for 12 months)
- *Chan Sam v. The Queen* [1968] HKLR 401 (18 months imprisonment)
- *HKSAR v. Chung Kin Ping and Ors* (unrep., HCMA 296/2015) (12 May 2017) (Chinese Judgment) (Appeal against conviction only) (80 hours CSO)
- *HKSAR v. Wong Yeung Tat* [2016] 4 HKLRD 445 (Appeal against conviction only) (Fine)
- *HKSAR v. Au Kwok Kuen* [2010] 3 HKLRD 371(Appeal against conviction only) (60 hours

CSO for D1 and D4; Fine and bind-over for 18 months for D2, D3 and D5-6)

General Principle

50. It is a settled principle of sentencing 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 unless the guideline or tariff has become lower by the day of the sentence (*HKSAR v. Tsoi Shu & Ors* [2005] 1 HKC 51, §39).

51. In *Tsoi Shu*, the Court of Appeal referred to Article 12 of Hong Kong Bill of Rights and *R v. Chan Ka Wai* (unrep., CACC 530/1988) (9 May 1989). *Chan Ka Wai* considered it "settled law" that that the sentence for an offence should be in accordance with the practice prevailing at the time of the commission of the offence.

52. In *HKSAR v. Ma Ping Wah* [2002] 2 HKLRD 312 (320F-G), the Court of Appeal provided new guidelines on "head-bashing" robbery and stated that the new guidelines cannot, "of course", apply to the case before it.

53. The same approach has been adopted in New Zealand on the ground that to formulate revised guidelines for sentencing and then to apply them in the defendant's case might give an appearance of unfairness to the defendant

(*R v. Mako* [2000] 17 CRNZ 272, §21; *R v. Taueki* [2005] 3 NZLR 372, §62).

54. It is therefore submitted that the final sentence imposed by the Court of Appeal departed from the settled norm.

F. CONCLUSION

55. The trial magistrate imposed community service orders on A2. She did so after properly considering all the facts, and after considering the motives of As. It is submitted that she was entitled to do so, and indeed was correct in doing so.

54. It is interesting to note that the Sentencing Council of England and Wales recommends a starting point of a low level community order for Affrays which are a brief offence involving low level violence where no substantial fear was created (*cf.* Sentencing Council of England and Wales, Magistrates' Court Sentencing Guidelines). Whilst sentencing norms in different jurisdictions have limited value in the assessment of the proper sentence for a crime committed in Hong Kong, the guidelines provide helpful comparison from a jurisdiction which has had serious problems with riots and other similar offences.

55. The Court of Appeal overstepped the limits imposed on applications for review, ventured on its own to find and rely on facts (either not found or contrary to facts found by the trial magistrate) justifying a heavier sentence, wrongly declined to give weight to the motives of As who were acting out of civil disobedience and exercising constitutional rights of freedom of expression and assembly, and imposed a custodial sentence against A2 with a starting point of 10 months imprisonment, far above the prevailing sentencing practice. For the reasons given, the Court of Appeal was wrong and the decision of the Court of Appeal should be quashed.

Dated the 18th day of November 2017

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