

**FACC Nos. 8, 9 and 10 of 2017
[2018] HKCFA 4**

FACC No. 8 of 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

Applicant
(Respondent)

and

WONG CHI FUNG (黃之鋒) (D1)

Respondent
(Appellant)

FACC No. 9 of 2017

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 9 OF 2017 (CRIMINAL)
(ON APPEAL FROM CAAR NO. 4 OF 2016)**

BETWEEN

SECRETARY FOR JUSTICE

Applicant
(Respondent)

and

LAW KWUN CHUNG (羅冠聰) (D2)

Respondent
(Appellant)

FACC No. 10 of 2017

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 10 OF 2017 (CRIMINAL)
(ON APPEAL FROM CAAR NO. 4 OF 2016)**

BETWEEN

SECRETARY FOR JUSTICE

Applicant
(Respondent)

and

CHOW YONG KANG ALEX (周永康) (D3)

Respondent
(Appellant)

Before:

Chief Justice Ma, Mr Justice Ribeiro PJ,
Mr Justice Tang PJ, Mr Justice Fok PJ and
Lord Hoffmann NPJ

Date of Hearing: 16 January 2018

Date of Judgment: 6 February 2018

JUDGMENT

The Court:

A. *Introduction*

1. These appeals arise from the convictions in the Magistrates' Court of the three appellants for, in the case of the 1st and 3rd appellants, taking part in an unlawful assembly,¹ and, in the case of the 2nd appellant, for inciting others to take part in an unlawful assembly.² They were each sentenced to community service orders³ of various lengths. On the application of the Secretary for Justice for a review of the sentences,⁴ the Court of Appeal substituted substantially increased sentences of imprisonment ranging between 6 and 8 months. Leave to appeal to this Court was granted by the Appeal Committee.

2. In its judgment on the review application, the Court of Appeal took the opportunity to provide guidance to sentencing courts in the future regarding the sentences for unlawful assemblies, particularly emphasising the need to take

¹ Contrary to section 18 of the Public Order Ordinance (Cap.245).

² Contrary to section 18 of the Public Order Ordinance (Cap.245) and section 101I of the Criminal Procedure Ordinance (Cap.221).

³ Under the Community Service Orders Ordinance (Cap.378).

⁴ Pursuant to section 81A of the Criminal Procedure Ordinance (Cap.221).

a much stricter view where disorder and any degree of violence was involved. The Court of Appeal, consistent with its responsibilities for providing guidance in sentencing matters, was fully entitled to provide this guidance for the future and accordingly note should be taken of this new approach. Like the Court of Appeal, we specially draw attention to the importance of taking a much stricter view where disorder or violence is involved. Naturally, it will be incumbent on the sentencing court to take into account the extent of the participation or involvement of the convicted person but where disorder or violence is involved, these are serious aggravating features. Hong Kong is on the whole a peaceful society and these elements are to be deterred.

3. The appeals before us raise four particular questions (which we will presently identify) concerning sentencing principles and approach, the most relevant to the outcome for the three appellants being the question of whether the Court of Appeal, in providing guidance for the future in relation to unlawful assemblies, ought to have applied the new approach to these appellants. The other three questions relate to the approach regarding facts and factual findings that should be adopted in a review before the Court of Appeal, the taking into account of motives for the commission of offences such as the present (and in particular the aspect of what is known as civil disobedience) and lastly, the relevance of section 109A of the Criminal Procedure Ordinance (dealing with offenders who are minors).

4. The particular unlawful assembly out of which the convictions arose took place on 26 September 2014, shortly before the mass demonstrations known as “Occupy Central” took place mainly in and around the streets surrounding the Central Government Offices in Admiralty. The convictions and

sentences of the three appellants have given rise to widespread publicity and intense, sometimes heated, public discourse. In particular, since the actions leading to the appellants' convictions arose from the political debate on the content of proposed constitutional reforms of the process for the election of the Chief Executive, strong expressions of opinion have been voiced and feelings on both sides of the debate have run high.

5. It is important to state at the outset of this judgment that it is not the role or function of the courts of the Hong Kong Special Administrative Region ("HKSAR") to enter into this or any other political debate. Instead, the duty of the courts is, through an independent judiciary, to administer the law of the HKSAR, including the Basic Law, and to adjudicate on the legal issues raised in any case according to the law. In reaching a decision in any given case, a court exclusively applies the applicable legal principles to the relevant facts and thereby reaches a decision on the appropriate disposition of the case, explaining its reasons in its judgment. That is the sole task of this Court in these appeals.

B. The background facts

6. The following statement of facts is derived principally from the Reasons for Verdict ("RV") of the trial magistrate in the Magistrates' Court. They were not controversial.

B.1 The appellants

7. The 1st appellant, Joshua Wong Chi Fung, was born in 1996. He was aged 17 at the time of the offence of which he was convicted, 19 at the time of trial before the magistrate and 20 at the time of the sentence review in the Court of Appeal. He is a politically active young person and was the convenor of a pro-democracy secondary school student movement called Scholarism,

which opposed the Government's proposal to introduce "Moral and National Education" as a compulsory school subject. After Scholarism was dissolved, the 1st appellant and others founded a new political party called Demosistō in April 2016.

8. The 2nd appellant, Nathan Law Kwun Chung, was aged 21 at the time of the offence of which he was convicted and was 23 when convicted and sentenced by the magistrate. He was a standing committee member of the Hong Kong Federation of Students ("HKFS") and is a politically active young person. Since April 2016, he has been the chairperson of Demosistō.

9. The 3rd appellant, Alex Chow Yong Kang, was aged 24 at the time of the offence of which he was convicted and was 25 when convicted and sentenced by the magistrate. Also politically active, he was the secretary-general of the HKFS.

10. As the magistrate found, each of the appellants came from what she described as grass root or humble families and they each performed well in school. The 1st appellant was a student of the Open University, studying Politics and Public Administration. The 2nd appellant was Chairman of the Student Union of the Lingnan University of Hong Kong, where he was studying a degree course in Cultural Studies. The 3rd appellant was Chairman of the Hong Kong University Student Union and, at the time of the offence, was studying for a bachelor's degree in Comparative Literature. He has since been accepted for a master's degree programme at the London School of Economics and Political Science.

B.2 The Forecourt of the Central Government Offices

11. The Central Government Offices (“CGO”) at the Tamar site in Admiralty have been in operation since October 2011. In front of the East Wing of the CGO is a forecourt, also known as Civic Square (“the Forecourt”). The Forecourt was previously an area open to the public without any boundary surrounding it and members of the public were permitted, upon prior application, to hold organised assemblies there to demonstrate on political and social issues on Sundays and public holidays. In August 2012, as part of the opposition to the proposed “Moral and National Education” programme, Scholarism organised an assembly in the Forecourt during which police did not clear protesters away. Following the opposition to it, the Government abandoned its plan to introduce the “Moral and National Education” programme. The Forecourt has since then become a place of significance for those who took part in opposing those Government policies.

12. After the anti-national education protests, the Forecourt was closed from July 2014 to early September 2014 during which time a perimeter fence around the boundary of the Forecourt was constructed. This perimeter fence is three metres high and has three access gates, Gates 1 to 3. Construction was completed and the Forecourt re-opened on 10 September 2014 but with restricted access in accordance with arrangements set out in notices displayed on Gates 1 to 3. The notices stated that the gates would be closed from 11pm to 6am and that members of the public could not enter, except for those with permission from the CGO and the Legislative Council (“Legco”). In special circumstances, such as when there was a danger to security, the Forecourt would also be closed and only those with permission could enter. Members of the public would require permission from the Director of Administration if they

wished to assemble in the Forecourt. Such application could only be made in relation to specific times, between 10am and 6.30pm, on Sundays and public holidays. Mondays to Saturdays were excluded.

13. On the day of the offences, 26 September 2014, which was a Friday, the gates to the Forecourt were closed.

B.3 The assembly in Tim Mei Avenue on 26 September 2014

14. In September 2014, critics of the Government's proposed constitutional reforms of the process for election of the Chief Executive were expressing opposition to those proposals through various means. The HKFS wished to express their opposition to the proposals and had applied on two occasions to the Department of Administration to open the Forecourt for the purposes of public activities between 23 September and early October 2014 but both applications were refused.

15. On 26 September 2014, Scholarism and the HKFS held an assembly in an area off Tim Mei Avenue outside the Forecourt in relation to the proposed constitutional reforms. Prior to holding the assembly, a Notice of No Objection⁵ had been obtained from the police and it was valid until 10pm that day. For security reasons, the gates to the Forecourt were closed, security guards were on duty inside and outside the gates and Mills barriers had been erected outside. A stage had been set up in the area where the assembly was being held and the 1st appellant and others addressed those in attendance from the stage by means of a microphone and amplification system. Several hundred people were in attendance.

⁵ Pursuant to s.14(4) of the Public Order Ordinance (Cap.245).

16. Before the conclusion of the assembly, between about 6pm and 8pm on 26 September 2014, the HKFS held a meeting attended by the three appellants. A discussion took place regarding how those attending the assembly might enter the Forecourt and it was proposed that protesters should seek to enter the Forecourt through one of the gates when a member of staff or a reporter was entering. The possibility of criminal liability was discussed and copies of a document entitled “Points to Note When Under Arrest” which gave telephone numbers for legal assistance were distributed.

B.4 The commission of the offences

17. At about 10.20pm on the evening of 26 September 2014, when participants in the assembly were beginning to leave, the 1st appellant was on the stage addressing the crowd. He appealed to them to stay and called on them to go into the Forecourt, saying “Now, here we call on you, we hope you all enter the Civic Square together with us now.” At that point, he left the stage and ran towards the Forecourt. Many people were gathered at Gate 2 in front of the Forecourt. Security guards were trying to stop them from pushing the gate open. Others had already decided to enter by scaling the fence. About three minutes later, the 1st appellant climbed over the fence and jumped down into the Forecourt, ignoring police officers who shouted to him to stop. The 1st appellant landed on the ground in front of Police Sergeant 52877, Yam Ho Chung, and was immediately arrested.

18. One minute after that, the 3rd appellant also climbed over the fence and ignored the police who were shouting at him to stop. He evaded the police and entered the Forecourt and ran towards the area near Gate 2 where a throng was pushing to gain entry into the Forecourt. Some of the protesters were able

to stop the guards from closing the gate and, due to their superiority of numbers, the protesters succeeded in pushing the gate open and entering the Forecourt. Only after police reinforcements arrived and several dozen protesters had entered the Forecourt was the gate closed.

19. In the meantime, after the 1st appellant left the stage at Tim Mei Avenue, the 2nd appellant took over from him as master of ceremonies and appealed to the crowd to enter the Forecourt together. He provided a commentary on the events taking place at the Forecourt, including the intervention of the police and the clashes occurring at the scene. As recorded in the judgment of Poon JA in the Court of Appeal⁶ (at [36]), the 2nd appellant said the following things at that time:

- (1) “I call on everybody to go into the Civic Square together. Now a spearhead team has begun to charge into the Civic Square!”
- (2) “We have lifted up a door. If you people are coming up from LegCo, just turn right after coming up from LegCo and that’s the main entrance of the Civic Square.”
- (3) “Everybody, go into the Civic Square now. Let us recapture the public space which belongs to us.”
- (4) “Every time you close it down, we bust it!”
- (5) “... Tonight, we shall enter and station in the Civic Square...”
- (6) “Recapture the Civic Square!”
- (7) “We shall recapture the Square that belongs to us by using a method of non-active attack”
- (8) “Give us back the Civic Square!”
- (9) “Surround the Central Government Offices!”
- (10) “Pepper spray is now being used at the scene.”

⁶ See further below.

- (11) “The police have now deployed three lines of human chain hoping to stop us from entering the Civic Square.”
- (12) “Encircle the police in return.”
- (13) “The police are doing political oppression. Shame on them!”
- (14) “Everybody, please use Facebook to keep appealing for more reinforcement”, “Everybody, please use Facebook, all social media to call on others to come to Civic Square to support us; recapture the Square which belongs to the people.”
- (15) “Some friends have got injured at the scene. We are very sorry for that. This action of ours comes hastily. No information could be leaked out...”
- (16) “30 odd of our demonstrators are now encircled by the police. Inside this circle, they are brutally treated and there are massive clashes.”
- (17) “Some of our friends have been arrested ...”
- (18) “The convenor of Scholarism, Wong Chi-fung, has been arrested, and was accused of assaulting a police officer.”
- (19) “Someone is suffering from heart attack but the police do not allow the ambulance to come in”, “Now (a) nurse/s has/have reached the gate but the police refuse his/her/their entry. Let the people go, open the gate!”

20. The 2nd appellant asked students in school uniform, secondary school students and those underage to leave but asked them to go online to call more people to come. He told the participants to be peaceful and sensible and to exercise restraint, asking them to raise their arms in the air. He warned them to be prepared to be arrested and prosecuted. A telephone number was given to participants to which they could send their personal information if arrested.

21. Several hundred people tried to enter the Forecourt and, ultimately, several dozen successfully did so. Some of them pushed over the Mills barriers placed at the bottom of the flagpole at the centre of the Forecourt. Subsequently, those participants who were left, including the 3rd appellant, gathered under the flagpole, hand-in-hand, and chanted slogans. The period of time that elapsed from when the 1st appellant appealed to the crowd to enter the Forecourt until the

time the participants who managed to enter the Forecourt gathered under the flagpole was about 12 minutes.

22. As a result of the crowd's attempts to gain entry to the Forecourt, either by pushing through the gate or jumping off the fence, 10 of the security guards on duty, who tried to prevent them doing so, were injured. Most of the injuries were minor, such as tenderness, bruising and swelling. However, one security guard, Chan Kei Lun, had bruising and swelling of his left big toe and a mild fracture near the base of the phalanx of his toes.⁷ He gave evidence of being pushed from behind and injuring his left elbow and left big toe. Of the 10 injured security guards, 5 had to take sick leave for between 4 and 6 days and Mr Chan had to take sick leave for 39 days.

C. The proceedings against the appellants

C.1 The charges

23. As a result of the events described in Section B.4 above:

- (1) The 1st appellant faced two charges: Charge (1) – inciting others to take part in an unlawful assembly, contrary to section 18 of the Public Order Ordinance⁸ and section 101I of the Criminal Procedure Ordinance;⁹ and Charge (2) – taking part in an unlawful assembly, contrary to section 18 of the Public Order Ordinance.
- (2) The 2nd appellant was charged with inciting others to take part in an unlawful assembly (Charge (3)).
- (3) The 3rd appellant was charged with taking part in an unlawful assembly (Charge (4)).

⁷ The *basis phalangis digitorum pedis*.

⁸ (Cap.245).

⁹ (Cap.221).

24. The particulars of Charges (1) and (3) were materially the same and alleged that the 1st appellant, on 26 September 2014, and the 2nd appellant, between 26 and 27 September 2014, in Hong Kong:

“... unlawfully incited other persons to take part in an unlawful assembly by assembling together, conducting themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled would commit a breach of the peace, or would by such conduct provoke other persons to commit a breach of the peace.”

25. The particulars of Charges (2) and (4) were, similarly, in materially the same terms and alleged that the 1st appellant, on 26 September 2014, and the 3rd appellant, between 26 and 27 September 2014, in Hong Kong:

“... and other persons, took part in an unlawful assembly in that they, assembled together, conducted themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled would commit a breach of the peace, or would by such conduct provoke other persons to commit a breach of the peace.”

C.2 The trial before the magistrate

26. The appellants each pleaded not guilty to the respective charges against them and were tried before Ms June Cheung Tin Ngan, sitting in the Eastern Magistracy on 29 February, 1 to 4 March and 13 May 2016.¹⁰ On 21 July 2016, the magistrate delivered her RV and acquitted the 1st appellant on Charge (1) but convicted him on Charge (2) and convicted the 2nd appellant on Charge (3) and the 3rd appellant on Charge (4).

27. Since they are central to one of the issues raised in the appeals before this Court, it is necessary to summarise at some length the findings made by the magistrate in her RV concerning the commission of the various offences by the respective appellants and, in the case of the 1st appellant, his acquittal on the charge of incitement.

¹⁰ In ESCC 2791/2015.

28. As to the 1st appellant's acquittal on Charge (1), the magistrate was of the view that the 1st appellant's words, and his leaving the stage after addressing the crowd, amounted to encouraging, persuading and advising those assembled to go to the Forecourt together with him.¹¹ However, she believed that at the moment the 1st appellant made the call to the crowd to follow him, this was at an early stage of the action and that, when he was still on the stage, he might not have been able to see the situation at the gate or the Forecourt, and so he might have believed that the security guards would not actively stop people from entering the Forecourt.¹² She found there was no evidence that, during the meeting in the early evening and when making the call on the stage, the 1st appellant already knew that the security guards would actually block people from entering and that the participants would insist on doing so by pushing the gates or scaling the fence.¹³ Accordingly, she concluded that, regarding the 1st appellant's conduct when he was on the stage encouraging others to enter the Forecourt, the prosecution had not proved this charge beyond reasonable doubt.¹⁴

29. In relation to the 2nd appellant's conviction on the charge of incitement (Charge (3)), the magistrate found that the content of his speech on the stage involved calling on people to enter the Forecourt, announcing that the police had intervened and that there were conflicts and injuries at the scene, and recognising that the action involved potential legal liabilities and that some people had been arrested.¹⁵ She found that the act of making calls on the stage and the content of his speech obviously amounted to encouraging, persuading or

¹¹ RV at [35].

¹² RV at [40] & [97].

¹³ RV at [41].

¹⁴ RV at [42] & [97].

¹⁵ RV at [45].

advising participants of the assembly to enter the Forecourt together with the “spearhead team” and that he intended to encourage, persuade or advise the assembly participants to enter the Forecourt together.¹⁶ She considered the key point to be whether, when the 2nd appellant made the call on stage, the security guards or police had opened the gate or imposed any physical intervention on entry into the Forecourt.¹⁷ On this point, she found that, soon after the crowd entered the Forecourt, the 2nd appellant had already been informed that the police had intervened to stop the crowd from entering the Forecourt.¹⁸

30. On this basis, the magistrate held that “the only way for the participants of the assembly to force themselves into the Forecourt ... was by pushing the gate and scaling the fences” which “would obviously be disorderly conduct ... and intimidating conduct”.¹⁹ Hence, she found that when the 2nd appellant made his announcements on stage, he knew that those people entering the Forecourt were being opposed by the police so that if they heeded his calls to enter the Forecourt, “physical bumps” were certain and also possibly physical injuries. Their actions were likely to cause the police and security guards to fear that the persons assembled would commit a breach of the peace or reasonably to fear that the persons so assembled would provoke others to commit a breach of the peace.²⁰

31. In relation to the conviction of the 1st appellant on Charge (2), for taking part in an unlawful assembly, the magistrate found that, when he passed Gate 2 he saw a large crowd of people and the situation was “chaotic”. The people were stopped at the gate and could not enter and some had started to

¹⁶ RV at [48].

¹⁷ RV at [51].

¹⁸ RV at [55].

¹⁹ RV at [56].

²⁰ RV at [57] & [99].

scale the fence to jump into the Forecourt.²¹ She found that the 1st appellant knew he would be stopped by security guards or police from entering the Forecourt, yet chose to ignore them and instead scale the fence to gain entry and that this conduct was obviously disorderly and intimidating.²² The magistrate noted that the 1st appellant accepted that his act in jumping from a 3-metre tall fence was a risky act and found that his conduct in scaling the fence, and that of others pushing at the gate, “would definitely cause police officers and/or security guards, who were attempting to stop them, reasonably to fear injury by those who jumped off from the fences, causing a breach of the peace.”²³ She also found that police officers or security guards at the scene would reasonably fear that other people would be provoked, by the actions of the 1st appellant and others trying to push their way into the Forecourt, to try to push open the gate forcefully and to scale the fence to enter the Forecourt. This, she found, would cause injuries to the police officers or security guards leading to a breach of the peace.²⁴

32. In relation to the conviction of the 3rd appellant on Charge (4) for taking part in an unlawful assembly, the magistrate found that, about one minute after the 1st appellant climbed onto the fence, the 3rd appellant also scaled the same fence to enter the Forecourt.²⁵ She found that, like the 1st appellant in respect of Charge (2), the 3rd appellant and those who climbed the fence, as well as those who tried to push their way in through the gate, acted together with a common purpose, namely “to use violence and enter the Forecourt [in a] disorderly [way] despite the interventions of the security guards and/or the

²¹ RV at [63].

²² RV at [67] & [98].

²³ RV at [69]-[70] & [98].

²⁴ RV at [71] & [98].

²⁵ RV at [72].

police.”²⁶ The magistrate found that the 3rd appellant’s action in jumping off the fence was likely to injure the police officers next to the fence in the Forecourt and that the actions of the 3rd appellant and the others climbing the fence and pushing the gate would cause police officers reasonably to fear that they would be injured by the 3rd appellant, causing a breach of the peace.²⁷ Similarly, as with the 1st appellant, the police officers and security guards would reasonably fear a breach of the peace as a result of others being provoked by the 3rd appellant’s actions.²⁸

C.3 The sentences imposed by the magistrate

33. Having convicted the appellants, the magistrate adjourned for Community Service Order Suitability Reports to be obtained and, on 15 August 2016, she sentenced the 1st appellant to an 80-hour community service order and the 2nd appellant to a 120-hour community service order.²⁹ She considered that an 80-hour community service order would also be appropriate for the 3rd appellant but, since he was due to commence a full-time master’s degree programme in London in September 2016, she considered that, in substitution for a community service order, the 3rd appellant should be subject to a term of imprisonment of 3 weeks, suspended for 1 year.

34. In so sentencing the appellants, the magistrate:

- (1) Took account of the fact that the appellants were first time offenders who had displayed concern for societal problems, were passionate about politics and were willing to take action to realise their ideals (RS at [1]);

²⁶ RV at [73] & [100].

²⁷ RV at [77] & [100].

²⁸ RV at [78].

²⁹ ESCC 2791/2015, Reasons for Sentence, 15 August 2016 (“RS”).

- (2) Noted that the appellants' enthusiastic participation in student movements had received the understanding and support of their families (RS at [1]);
- (3) Held that the Court ought to consider the appellants' motives and purposes in committing the offences along with the seriousness of the offences (RS at [2]);
- (4) Accepted that the appellants were genuinely expressing their opinions and grievances out of their political convictions and concern for society and that their purpose and motives were not for their own profit or to injure others (RS at [3]);
- (5) Noted that the case took place before Occupy Central and the more intense political incidents that followed, that the appellants' actions were far more moderate than the incidents that followed, that the videos showed that the appellants consistently advocated that the action taken must be peaceful, rational and non-violent and that there was no evidence the appellants caused the injuries that were sustained or intended that others would be injured and expressed regrets about those injuries (RS at [6]);
- (6) Considered that the appellants' actions were reckless but not very violent or intended to injure security personnel or police officers, that they only wanted to enter the Forecourt, a place of symbolic meaning, to form a circle and chant slogans, and did not consider the appellants and other participants to be of a very violent type (RS at [7]);

- (7) Concluded, based on the facts found after trial, that the main impugned conduct of the 1st and 3rd appellants was their climbing over the fence to enter the Forecourt and that the 2nd appellant was more culpable than them because he had incited others to act in a disorderly manner, although he had continually reminded those present to remain orderly, be mindful of their personal safety and that taking part carried risks of legal liability (RS at [8]);
- (8) Noted that the 2nd appellant expressed regret that security personnel had been injured and that all three appellants cooperated during the process of arrest, investigation and trial, each of them expressing the probation officer that they were willing to bear the legal consequences and willing to be subject to community service orders (RS at [9]-[11]);
- (9) Considered all the circumstances of the case, including the probation officer's view that probation orders were not appropriate and his recommendation of community service orders, and concluded that the sentences she imposed (set out in the preceding paragraph) were appropriate (RS at [12]-[14]).

35. Following the magistrate's sentencing, the Secretary for Justice applied to the magistrate for a review of the sentences pursuant to section 104 of the Magistrates Ordinance.³⁰ On 21 September 2016, having considered the written and oral submissions of the prosecution and defence, the magistrate was not persuaded to vary the original sentences she had imposed and refused the application for review.³¹ The magistrate reiterated that, when imposing

³⁰ (Cap.227).

³¹ ESCC 2791/2015, Decision on the Application on Review of the Sentence, 21 September 2016.

the sentences, she had carefully taken into account (i) the circumstances of the offence and each of the appellants' criminal acts, (ii) the consequence of the appellants' criminal acts, (iii) the appellants' motives for committing the offences, and (iv) the background of and display of remorse by each of the appellants.³²

C.4 The application by the Secretary for Justice to the Court of Appeal for review

36. Contending that the sentences imposed were manifestly inadequate and/or wrong in principle, the Secretary for Justice applied to the Court of Appeal, pursuant to section 81A of the Criminal Procedure Ordinance, for a review of sentence. It was contended that the sentences imposed failed to reflect the seriousness, and in particular the public order nature, of the offence of unlawful assembly. It was also contended that the sentences imposed failed properly to reflect the culpabilities of the appellants and that the magistrate imposed sentences which were unduly lenient.

37. The Secretary for Justice's application was heard by the Court of Appeal³³ on 9 August 2017. By their judgment dated 17 August 2017, the Court of Appeal allowed the application, set aside the magistrate's sentences and imposed terms of imprisonment of: 6 months for the 1st appellant in respect of Charge (2), 8 months for the 2nd appellant in respect of Charge (3), and 7 months for the 3rd appellant in respect of Charge (4).³⁴

38. The main judgment was given by Poon JA, with whom both Yeung VP and Pang JA agreed. After examining the sentencing principles applicable to cases of unlawful assembly (which will be discussed further below),

³² *Ibid.* at [4].

³³ Yeung VP, Poon and Pang JJA.

³⁴ CAAR 4/2016, Judgment dated 17 August 2017 ("CA Judgment") at [170].

and recognising that the Court of Appeal may accede to an application to review and increase a sentence imposed by a lower court only where that sentence is wrong in principle or manifestly inadequate, Poon JA summarised the reasons why, in his view, the facts of this case were serious and that it constituted “a large-scale unlawful assembly, involving violence”,³⁵ namely (in summary):

- (1) The appellants’ decision to enter the Forecourt at the meeting before the incident showed their actions were not spontaneous or unpremeditated. This was reflected in the distribution to participants of the document “Points to Note When Under Arrest”.³⁶
- (2) During the meeting, it was within the appellants’ reasonable expectation that, in entering the Forecourt, there was a serious risk of the crowd clashing with the security guards and police officers, from which clashes violence would inevitably arise.³⁷
- (3) Once the action started, the appellants must have realised that the security guards and police were stopping protesters from forcing their way into the Forecourt and there were clashes, yet they persisted in their acts.³⁸
- (4) Several hundred people took part in the unlawful assembly and several dozen managed to force their way into the Forecourt over a period of about 12 minutes, which was not a short period of time.³⁹

³⁵ CA Judgment at [156].

³⁶ *Ibid.* at [157].

³⁷ *Ibid.* at [158].

³⁸ *Ibid.* at [159].

³⁹ *Ibid.* at [160].

- (5) 10 security guards were injured in the incident, most injuries being relatively minor but one being more serious, so that the degree of violence could not be described as slight.⁴⁰
- (6) The appellants and other participants did not have an absolute right to enter the Forecourt and knew that their act of forcing their way in was illegal.⁴¹
- (7) The appellants, as student leaders of the protesters, were planners of the incident and took leading roles in it; the 1st appellant called on, and the 2nd appellant incited, others to join in and these were highly irresponsible acts.⁴²
- (8) What the 2nd appellant did was highly dangerous, making use of sensational and even unfounded, inflammatory, language to incite the crowd.⁴³

39. Poon JA considered that the appellants' attitudes after their convictions showed that they had no genuine remorse for the offences they had committed.⁴⁴ He considered that the seriousness of the facts required the court to place more weight on the two sentencing factors of punishment and deterrence, and correspondingly less weight on their personal circumstances, motives and the sentencing factor of rehabilitation. Hence, he concluded that the appropriate sentences must be immediate custodial sentences.⁴⁵ In so concluding, despite the 1st appellant being 17 at the time of the offence and 20 at

⁴⁰ *Ibid.* at [161].

⁴¹ *Ibid.* at [162].

⁴² *Ibid.* at [163].

⁴³ *Ibid.* at [164].

⁴⁴ *Ibid.* at [165].

⁴⁵ *Ibid.* at [166].

the time of the appeal, Poon JA noted that his counsel, Mr Randy Shek,⁴⁶ agreed that it was unnecessary for the court to consider other sentencing options.

40. Poon JA held that the magistrate erred in principle in passing the sentences she did in that (in summary):

- (1) The magistrate did not consider the factor of deterrence in the sentences but gave disproportionate weight to the appellants' personal circumstances and motives.⁴⁷
- (2) In regarding the case as not involving serious violence, the magistrate overlooked that this was an unlawful assembly on a large scale and there was a risk of violent clashes.⁴⁸
- (3) The magistrate overlooked the fact that the appellants must have been reasonably able to envisage clashes between the participants and the security guards and police and that it was inevitable that at least some security guards would be injured.⁴⁹
- (4) In taking into account the appellants' desire to enter the Forecourt as a place of historical significance to protest, the magistrate overlooked the fact that, on the night in question, Scholarism and the HKFS had already held an assembly on the road outside the CGO and the Forecourt was closed and their forcing their way in was unlawful.⁵⁰
- (5) The magistrate gave too much weight to the appellants' alleged remorse in that, whilst they did not deny what they had done and

⁴⁶ Appearing as junior counsel to Mr Philip Dykes SC on behalf of the 1st appellant in this court.

⁴⁷ CA Judgment at [167(1)].

⁴⁸ *Ibid.* at [167(2)].

⁴⁹ *Ibid.* at [167(3)].

⁵⁰ *Ibid.* at [167(4)].

indicated they respected the court and were willing to bear the legal consequences, their remorse was superficial and should not be given too much weight.⁵¹

41. Poon JA therefore concluded that it was wrong in principle for the magistrate to have imposed community service orders or a suspended sentence and that these sentences were manifestly inadequate so that the Court of Appeal had to interfere.⁵² He determined that the appropriate starting points to be imprisonment of: 8 months for the 1st appellant on Charge (2); 10 months for the 2nd appellant on Charge (3); and 8 months for the 3rd appellant on Charge (4). To these starting points, he applied a discretionary discount of one month because the sentences came about by reason of an application for review by the Secretary for Justice and a further discretionary discount of one month for the 1st and 2nd appellants because they had each completed their community service orders. Accordingly, the sentences of imprisonment imposed were 6 months for the 1st appellant, 8 months for the 2nd appellant and 7 months for the 3rd appellant.⁵³

⁵¹ *Ibid.* at [167(5)].

⁵² *Ibid.* at [168].

⁵³ *Ibid.* at [169]-[170].

C.5 The grant of leave to appeal to the Court of Final Appeal

42. Following the review of sentence by the Court of Appeal, the appellants applied to this Court⁵⁴ for leave to appeal on the ground that substantial and grave injustice had been done and the 2nd and 3rd appellants also applied to the Court of Appeal for certification that points of law of great and general importance were involved in the CA Judgment. By its judgment dated 26 October 2017,⁵⁵ the Court of Appeal refused to so certify.

43. By further applications to this Court, the appellants sought leave to appeal on the additional ground that points of law of great and general importance were involved in the proposed appeal and by its Determination dated 7 November 2017, the Appeal Committee granted leave to appeal to the appellants on both the point of law ground and on the substantial and grave injustice ground.⁵⁶ The issues for which leave to appeal was granted were (in respect of all appellants):

- “(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?”

⁵⁴ By applications dated 11 September 2017 in the case of the 1st appellant and 14 September 2017 in the case of the 2nd and 3rd appellants.

⁵⁵ CAAR 4/2016, Judgment dated 26 October 2017 (Yeung VP, Poon and Pang JJA).

⁵⁶ FAMC 31-33/2017, Determination dated 7 November 2017 (Ma CJ, Ribeiro and Tang PJJ).

In respect of the 1st appellant alone, leave was further granted in respect of the following issue, namely:

“(4) To what extent should the Court of Appeal have taken into account s.109A of the Criminal Procedure Ordinance, Cap.221?”

44. Prior to the hearing before the Appeal Committee, on 24 October 2017, the 1st and 2nd appellants were granted bail pending the determination of their applications for leave to appeal⁵⁷ and, upon the grant of leave to appeal, bail was extended to them pending the determination of their appeals to this Court. When the Appeal Committee granted leave to appeal on 7 November 2017, the hearing of the appeal was fixed for 16 January 2018. At that leave hearing before the Appeal Committee on 7 November 2017, the 3rd appellant then also sought bail pending the determination of his appeal and this was granted.

D. Review of sentence under section 81A of the Criminal Procedure Ordinance

45. Section 81A of the Criminal Procedure Ordinance⁵⁸ provides:

“(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.”

And section 81B provides:

“(1) Upon the hearing of the application the Court of Appeal may, by order –

- (a) if it thinks that the sentence was not authorized by law, was wrong in principle or was manifestly excessive or manifestly inadequate, quash the sentence passed by the court and pass such other sentence (whether more or less severe) warranted in law in substitution therefor as it thinks ought to have been passed;

⁵⁷ FAMC 31/2017 (1st appellant) and 33/2017 (2nd appellant), 24 October 2017 hearing, before Ma CJ.

⁵⁸ (Cap.221).

(b) in any other case, refuse to alter the sentence.”

46. These provisions were introduced into Part IV of the principal ordinance⁵⁹ by the Criminal Procedure (Amendment) Ordinance in 1972 and, as the speech of the then Attorney General moving the bill shows, their purpose was to maintain uniformity of sentence and to avoid the injustice caused by substantial disparity in sentences imposed by different magistrates and judges dealing with similar offences.⁶⁰ A similar review of sentence jurisdiction exists in England and Wales under section 36 of the Criminal Justice Act 1988.

47. As the wording of section 81A shows, the grounds on which the Court of Appeal may interfere with a sentence passed by a lower court are restricted to the four grounds specified, namely that it is (i) not authorised by law, (ii) wrong in principle, (iii) manifestly excessive, or (iv) manifestly inadequate. If any of these grounds exists, the original sentence may be set aside, increased or reduced. Plainly, therefore, a review of sentence may be either advantageous or disadvantageous to the respondent to the application.

48. But the power to review a sentence on the application of the Secretary for Justice, in particular to seek an increase in sentence, does not confer on the Secretary for Justice an analogous right to that of a convicted person appealing against sentence.⁶¹ As Rigby CJ held in *Re Applications for Review of Sentences*:

“For my part, I am satisfied that there is a substantial distinction and I adhere to the view that ... a far more stringent test should be applied by the Full Court in considering an application by the Attorney General for leave to apply for review of sentence on the grounds of manifest inadequacy than the test required or imposed by the same court in an appeal by a convicted person against sentence.”⁶²

⁵⁹ Entitled “Appeals, Questions of Law Reserved and Referred and Review”.

⁶⁰ Hansard, 15 March 1972, p.475.

⁶¹ Criminal Procedure Ordinance, sections 83G, 83H and 83I.

⁶² [1972] HKLR 370 at p.376.

49. Procedurally, too, a review of sentence proceeds differently to an appeal by a convicted person whether against conviction or sentence.⁶³ An application for review of sentence requires the leave of the Court of Appeal and must be signed by the Secretary for Justice and accompanied by the documents specified in section 81A(2A). These are limited to the formal statement of the findings of fact (before a magistrate) or reasons for verdict (before a District Judge) and reasons for sentence or, in the case of a sentence imposed by a judge of the High Court, “the record of the whole of the proceedings before him other than the evidence given in any trial that took place in those proceedings”, together with the sentencing reports in relation to the convicted person. Section 81C provides that the review may not be heard whilst there is a pending appeal by the convicted person against his conviction or a pending application by him under sections 104 or 105 of the Magistrates Ordinance.⁶⁴

50. The ambit of the power of review of sentence is subject also, as a matter of legal context, to the constitutionally protected right against double jeopardy. In this regard, Article 11(6) of the Hong Kong Bill of Rights⁶⁵ provides that:

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

⁶³ Pursuant to sections 82 (in respect of conviction) or 83G or 83H (in respect of sentence) of the Criminal Procedure Ordinance.

⁶⁴ (Cap.227). This limitation on the hearing of a review of sentence explains the lengthy delay in the disposal of the sentence review in the present cases since it was only after the appellants had withdrawn their appeals against conviction that the Secretary for Justice’s application under section 81A could be heard by the Court of Appeal.

⁶⁵ By means of which the rights under Article 14(7) of the International Covenant on Civil and Political Rights are applied in Hong Kong and thereby given constitutional protection by Article 39(2) of the Basic Law.

It has not, however, been suggested in these appeals that the power of review in section 81A is unconstitutional or that, in an appropriate case, a convicted person who has not himself appealed or who may have completed a sentence later found to be wrong in principle or manifestly inadequate may not be subject to an increased sentence upon review by the Court of Appeal.

51. Nevertheless, whilst an increase of sentence is not incompatible with the concept of double jeopardy, as a matter of practice the Court of Appeal customarily makes allowance for the concept when increasing a sentence on review by applying a discount to the increased sentence: see *Secretary for Justice v Lo King Fat* [2016] 2 HKC 230 at [109]-[116]; *Attorney-General's Reference Nos.90 & 91 of 2003* [2004] EWCA Crim 1839 at [11]. In particular, where a sentence, such as a community service order, has been completed prior to an increase of sentence on review, the reviewing court typically applies a discount for that factor in arriving at the new sentence to be imposed: see *HKSAR v Chan Pak Hoe* (2012) 15 HKCFAR 244 at [52]; *Secretary for Justice v Buk Chui Ying* [2008] 5 HKLRD 185 at [26].

D.1 The extent of the Court of Appeal's power to review the facts on a review of sentence

52. The Court of Appeal, whether engaged in an appeal against sentence or a review of sentence, functions as a court of review and does not conduct a sentencing exercise of its own, so it ordinarily relies entirely, or almost entirely, on material before the sentencing court: see *R v A and B* [1999] 1 Cr. App. R. (S.) 52 per Bingham LCJ (as he then was) at p.56 (sub-para.(4)). It has been repeatedly recognised that an appellate court does not have the advantages of a trial court in having received the evidence at first hand and that this provides a strong rationale for limiting the basis on which it can interfere

with primary findings of fact made by the trial court: see, e.g. *Ting Kwok Keung v Tam Dick Yuen & Others* (2002) 5 HKCFAR 336 at [35].

53. Subject to those general considerations, there is no express limitation in section 81A on the matters which the Court of Appeal may examine in hearing an application for review of sentence. The limits of the review are defined by the statutory language which imposes threshold conditions for the exercise of the jurisdiction to substitute a different sentence, be it more or less severe. As noted above, those conditions are that the original sentence is (i) not authorised by law, (ii) wrong in principle, (iii) manifestly excessive, or (iv) manifestly inadequate. Unlike an appeal, which may proceed by way of rehearing, a review of sentence is limited to an examination of whether any of those four grounds of review are made out. If made out, only then is the Court of Appeal's discretion to vary the sentence or refuse the application engaged.

54. Although, procedurally, an application for review of sentence is accompanied by the documents listed in section 81A(2A), these are not the only documents that may be examined by the Court of Appeal in a review. The list of documents in section 81A(2A) is specified "for the purpose of subsection (2)(b), which simply provides that "[a]n application under subsection (1) shall ... (b) be accompanied by the documents, or copies of the documents, specified in subsection (2A)".

55. The specification of the documents to be filed by the Secretary for Justice on an application for review of sentence in section 81A(2A) was introduced into the Criminal Procedure Ordinance by amendment in 1979.⁶⁶ Prior to that amendment, the record of the proceedings in the case was required.

⁶⁶ By the Criminal Procedure (Amendment)(No.2) Ordinance 1979.

As the remarks of the Attorney General when moving the amending legislation show, the limitation on the documents to be filed was not to restrict the material which the Court of Appeal was entitled to review but rather to save time and costs since experience had shown that the Court of Appeal did not need the whole of the record.⁶⁷ However, section 81A(2A) does not suggest that in a review of sentence there is a bar to the Court of Appeal considering any evidence or exhibit duly proved, admitted or adduced in the sentencing court.

56. Section 81B deals with the review of sentence itself and provides in section 81B(3) that, for the purposes of the section, the Court of Appeal “may exercise any of the powers conferred by section 83V.” Section 83V contains, for the purposes of Part IV of the Criminal Procedure Ordinance, provisions relating to evidence and is in very wide terms as to the type of evidence that can be received by the Court of Appeal, even including new evidence. But section 83V(5) provides that, “In no case shall any sentence be increased by reason of or in consideration of any evidence which was not given at the trial.” Whilst that provision restricts the consideration of new evidence in a review of sentence by the Court of Appeal, it recognises by implication that the sentence may be increased by reference to evidence that was given at the trial.

57. That the Court of Appeal is permitted to have regard to all the evidence that was available to the sentencing court is also reinforced by reference to section 83T, relating to the preparation of a case for hearing by the Court of Appeal, which provides by subsection (1)(b) that the Registrar of the High Court shall “obtain and lay before the Court of Appeal in proper form all

⁶⁷ Hansard, 11 April 1979, p.712.

documents, exhibits and other things which appear necessary for the proper determination of the appeal or application.”

58. Textbook commentaries on the powers of the Court of Appeal in a review are also consistent with the proposition that the evidence available in the court below can be looked at: see *Taylor on Criminal Appeals* (2nd Ed.) at [13.47] and *Archbold Hong Kong* (2018 Ed.) at [7-445].

59. It is plainly appropriate that the Court of Appeal should be able, in determining whether the sentencing court has committed any of the errors which permit interference under section 81A (erred in principle etc.), to look at any relevant evidence available to the court below. If the court below has made an error as to the facts on which it proceeds to sentence, it is only right that the Court of Appeal can correct these: see e.g. *Attorney-General's Reference Nos. 90 & 91 of 2003* [2004] EWCA Crim 1839 at [10], where the English Court of Appeal substituted a higher sentence for an unduly lenient one which had been imposed on the mistaken assumption of the judge that the offender's plea was on the basis he believed the drugs of which he was charged with possession were amphetamine rather than ecstasy, which belief was not accepted by the prosecution. Moreover, the review mechanism can be for the benefit of the convicted person and not just to his disadvantage and, if an error of fact has been made by the sentencing court, it is right that the Court of Appeal should be able to take the correct fact into account in reviewing the sentence imposed.

60. The correct approach in principle is succinctly stated in the joint judgment of Dixon J, Evatt J and McTiernan J in the High Court of Australia in *House v The King* (1936) 55 CLR 499 at p.505:

“If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.”

61. However, the Secretary for Justice is not permitted to rely on a factual basis different to that accepted by the prosecution at trial or to re-open the way in which a case has been put by the prosecution at trial and thereby to require the Court of Appeal to enquire into facts which have not been pursued: see *Attorney General v Li Ah-sang* [1995] 2 HKCLR 239. There, a magistrate passed sentence for the offence of employing persons not lawfully employable on the basis that the employees were not illegal immigrants. The prosecution did not object to this nor allege that the employees were in fact illegal immigrants. Upon the review of sentence, on the basis that the employees were illegal immigrants, the Court of Appeal held that it was not open to the prosecution to rely on that basis which was a different factual basis to that accepted at trial. A similar approach is taken in England and Wales: see *Attorney-General's Reference No.95 of 1998 (R v Highfield)*, Times LR, 21 April 1999; *Attorney General's References Nos. 114-116 and 144-5 of 2002* [2003] EWCA Crim 3374 at [27]-[28].

62. It is also not open to the Court of Appeal in a review of sentence to ascribe a different weight to a factor properly taken into account by the sentencing judge in arriving at a sentence that is otherwise within the range of sentences appropriate for the offence. If the judge has failed to take a relevant matter into account or has taken into account an irrelevant factor, that is an error

of principle. However, the relative weight the sentencing judge ascribes to each relevant factor is a matter within the judge's discretion and, unless that exercise results in the imposition of a sentence that is manifestly inadequate, the relative weight attributed to each individual relevant factor is a matter for the judge. Save where it concludes that the sentence is manifestly inadequate, the Court of Appeal is not entitled to ascribe more or less weight to a relevant factor than did the sentencing court.

63. As Lane LCJ held in *Attorney-General's Reference (No.4 of 1989)* [1990] 1 WLR 41 at pp.46A-C:

“A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.”

Although a decision under section 36 of the Criminal Justice Act 1988, where the threshold for review is that the sentence was “unduly lenient”, the same considerations apply in the context of the inquiry under section 81A as to whether a sentence is “manifestly inadequate”. Unless the sentence imposed is manifestly inadequate or excessive, the Court of Appeal may not review the sentence on the basis that, had it been the sentencing court, it would have ascribed a different weight to a particular relevant factor. This limitation is simply a reflection of the statutory grounds for review of sentence laid down in section 81A.

D.2 Civil disobedience and exercise of constitutional rights as motive

64. An offender's motive for committing an offence is a relevant factor in a court's decision as to the appropriate sentence to be imposed and can be a relevant mitigating factor.⁶⁸ As Spigelman CJ said in *R v Swan* [2006] NSWCCA 47 at [61]:

“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.”

65. In the present cases, it is contended that it is relevant, as a mitigating factor, that the appellants committed the offences of which they have been convicted as acts of civil disobedience and in the exercise of their constitutional rights to freedom of expression and freedom of assembly under Article 27 of the Basic Law and Articles 16 and 17 of the Hong Kong Bill of Rights.

66. Article 27 of the Basic Law provides:

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

And Articles 16 and 17 of the Hong Kong Bill of Rights⁶⁹ provide:

“Article 16

Freedom of opinion and expression

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

⁶⁸ See, e.g., *R v Bright* [1916] 2 KB 441 per Darling J at p.444; *Neal v R* (1982) 42 ALR 609 per Brennan J (as he then was) at p.624; and *Sentencing in Hong Kong* (7th Ed.), Cross and Cheung, at p.383.

⁶⁹ By means of which the rights under Articles 19 and 21 of the International Covenant on Civil and Political Rights are applied in Hong Kong and thereby given constitutional protection by Article 39(2) of the Basic Law.

- (3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary—
- (a) for respect of the rights or reputations of others; or
 - (b) for the protection of national security or of public order (ordre public), or of public health or morals.

Article 17

Right of peaceful assembly

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

67. Although they are not absolute rights and lawful restrictions may be placed on their exercise in the interest of public order and for the protection of the rights and freedoms of others,⁷⁰ the importance of these rights has been repeatedly recognised in previous decisions of this Court.⁷¹ It follows therefore that the fact that an offence arises out of an occasion when constitutional rights to assemble and protest are being exercised is relevant to the background and context of the offending, particularly when those rights have been exercised peacefully and in accordance within the law up to the point when the offence was committed.

68. However, as Ribeiro PJ stated in *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [39]:

⁷⁰ *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [2], [33]-[34].

⁷¹ See, e.g. *Yeung May Wan & Others v HKSAR* (2005) 8 HKCFAR 137 at [1]; *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229 at [1]-[3]; and *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [31]-[32].

“Once a demonstrator becomes involved in violence or the threat of violence – somewhat archaically referred to as a ‘breach of the peace’ – that demonstrator crosses the line separating constitutionally protected peaceful demonstration from unlawful activity which is subject to legal sanctions and constraints. The same applies where the demonstrator crosses the line by unlawfully interfering with the rights and freedoms of others.”

69. For this simple reason, a submission in mitigation of the offence of unlawful assembly (and certainly in the case of incitement) that the act was committed in the exercise of the constitutional rights to freedom of expression and freedom of assembly will be unlikely to carry any significant weight. The fact of a conviction of the offence will necessarily mean that the offender has crossed the line separating the lawful exercise of his constitutional rights from unlawful activity subject to sanctions and constraints. In such a case, there is little merit in a plea for leniency on the basis that the offender was merely exercising constitutional rights since, by definition, he was not doing so at the time when the offence was committed. This is all the more so when the facts of the offending involve violence, in particular on the part of the offender himself, since there is no constitutional justification for violent unlawful behaviour. In such a case involving violence, a deterrent sentence may be called for and will not be objectionable on the ground that it creates a “chilling effect” on the exercise of a constitutional right, since there is no right to be violent. Quite simply the line of acceptability has been crossed.

70. Similar considerations apply to the contention that it is a mitigating factor that the offence was committed by way of an act of civil disobedience. As Lord Hoffmann noted in *R v Jones (Margaret)* [2007] 1 AC 136 at [89], “civil disobedience on conscientious grounds has a long and honourable history in this country.” Although that is a reference to the position in the United Kingdom, the concept of civil disobedience is one which is recognisable in any jurisdiction respecting individual rights, including Hong Kong.

71. Broadly, civil disobedience can consist of one of two types of behaviour. One type of behaviour consists of breaches of a particular law which is believed by the offender to be an unjust law. The other is law-breaking done in order to protest against perceived injustice or in order to effect some change in either the law or society. Either type of behaviour may be actuated by the offender's conscientious objections and genuine beliefs and a sentencing court may properly take these into account as the motive for the offending, although the weight to be attached to that motive will necessarily vary depending on many other circumstances, including the facts of the offending and its consequences and the need for deterrence and punishment.

72. Regardless of the type of behaviour concerned, however, there are certain hallmarks or conventions common to all forms of civil disobedience. In *A Theory of Justice* (revised Edition, 1999) at p.320, John Rawls⁷² defined civil disobedience “as a public, nonviolent, 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”.⁷³ To conform to civil disobedience as generally understood, therefore, the action carried out must be peaceful and non-violent.⁷⁴ An expectation of punishment is also inherent in the act of civil disobedience since it is by accepting the punishment that the protester seeks to draw attention to the alleged injustice against which he is demonstrating. As Lord Hoffmann observed, in *R v Jones (Margaret)* (*supra*) at [89]:

⁷² Formerly James Bryant Conant University Professor at Harvard University.

⁷³ See, too, the definition of “civil disobedience” in *Black's Law Dictionary* (10th Ed.) at p.299: “A deliberate but nonviolent act of lawbreaking to call attention to a particular law or set of laws believed by the actor to be of questionable legitimacy or morality.”

⁷⁴ See, e.g. *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 at [4] (peaceful protest against nuclear weapons); *Taranenko v Russia* (Application No.19554/05, First Section, 15 May 2014) at [91] (political protest against administration of President Putin by non-violent occupation of President's Administration building); *R v Krieger* [1998] AJ No.1119 (19 October 1998) at [35]-[37] and *R v Krieger* [2009] MJ No.430 (21 December 2009) (peaceful and non-violent acts of possessing and supplying marijuana in furtherance of belief the drug should be legalised for medical purposes).

“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.”

73. In the present cases, the acts of civil disobedience relied upon were not directed towards section 18 of the Public Order Ordinance (Cap.245) as an unjust law. Instead, they were committed in the course of protesting against the Government’s proposals for constitutional reform. There is no injustice in the application of the Public Order Ordinance to the appellants and in the imposition of lawful punishment on them for breach of its provisions. Thus, as Lord Hoffmann said in *Sepet v Home Secretary* [2003] 1 WLR 856 at [33]:

“... while the demonstrator or objector cannot be morally condemned, and may indeed be praised, for following the dictates of his conscience, it is not necessarily unjust for the state to punish him in the same way as any other person who breaks the law. It will of course be different if the law itself is unjust. The injustice of the law will carry over into its enforcement. But if the law is not otherwise unjust, as conscription is accepted in principle to be, then it does not follow that because his objection is conscientious, the state is not entitled to punish him. He has his reasons and the state, in the interests of its citizens generally, has different reasons. Both might be right.”

74. Where, therefore, in furtherance of an ostensibly peaceful demonstration, a protester commits an act infringing the criminal law which involves violence and is therefore not peaceful and non-violent, a plea for leniency at the stage of sentencing on the ground of civil disobedience will carry little (if any) weight since by definition that act is not one of civil disobedience.

75. Even where an act of protest may properly be characterised as one of civil disobedience, conforming to the hallmarks and conventions referred to above,⁷⁵ the court will not enter into an evaluation of the worthiness of the cause espoused. It was submitted, for example, on behalf of the 3rd appellant, that the fact that an offence was committed as an act of civil disobedience could be

⁷⁵ Para. [72] above.

a significant mitigating factor where “(a) the ideals behind a course of civil disobedience are consistent with the promotion of a pluralistic, open and tolerant society or political order, and (b) the means undertaken by the offenders impose only minor injuries or damages to property”.⁷⁶ It is not, however, the task of the courts to take sides on issues that are political or to prefer one set of social or other values over another.

76. As Lord Hoffmann said in *Sepet v Home Secretary (supra)* at [34]:

“... As judges we would respect their views but might feel it necessary to punish them all the same. Whether we did so or not would be largely a pragmatic question. We would take into account their moral views but would not accept an unqualified moral duty to give way to them. On the contrary we might feel that although we sympathised and even shared the same opinions, we had to give greater weight to the need to enforce the law. In deciding whether or not to impose punishment, the most important consideration would be whether it would do more harm than good. This means that the objector has no right not to be punished. It is a matter for the state (including the judges) to decide on utilitarian grounds whether to do so or not. As Ronald Dworkin said in *A Matter of Principle* (1985), at p 114: ‘Utilitarianism may be a poor general theory of justice, but it states an excellent necessary condition for a just punishment’.”

D.3 Approach when Court of Appeal gives guidance for future cases

77. As a reflection of the principle of legal certainty, it is settled law that the sentence for an offence should be in accordance with the practice prevailing at the time of the commission of the offence: see *HKSAR v Tsoi Shu & Ors* [2005] 1 HKC 51 at [39], citing *R v Chan Ka Wai*, CACC 530/1988, unrep., 9 May 1989 at [6]-[7].

78. The principle that an offender is to be sentenced on the existing or prevailing guideline or tariff of sentence existing at the time of the commission of the offence reflects the protection against retroactive criminal penalties

⁷⁶ Printed Case of the 3rd Appellant at [52].

conferred by Article 12(1) of the Hong Kong Bill of Rights⁷⁷ which relevantly provides:

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

79. A clear illustration of the approach of the Court of Appeal to this principle is the case of *Secretary for Justice v Ma Ping Wah* [2000] 2 HKLRD 312, which was an application for review of sentence in respect of a conviction for armed robbery. The Court of Appeal received further evidence as to the incidence of “head-bashing” robberies and the medical consequences of such attacks and determined that the existing guidelines for sentencing robbers armed with a knife or any other dangerous weapon (excluding firearms) which were displayed to the victim⁷⁸ should be changed to recognise head-bashing robberies “in a category of sufficient gravity to justify a particular band of guideline sentence which was not contemplated at the time when judgment was given in that case.”⁷⁹ The Court of Appeal, having given the new guideline as to sentencing in such cases, said:

“This new guideline as to sentence cannot, of course, apply to the present case as the deterrent effect it is intended to achieve can only apply to offences committed after this judgment has been delivered.”⁸⁰

80. Other examples of increased guidelines or tariffs of sentences are to be found in the context of trafficking in dangerous drugs,⁸¹ “vote-planting” as a form of electoral fraud⁸² and employing a person not lawfully employable.⁸³

⁷⁷ By means of which the rights under Article 15(1) of the International Covenant on Civil and Political Rights are applied in Hong Kong and thereby given constitutional protection by Article 39(2) of the Basic Law.

⁷⁸ Laid down in *Mo Kwong Sang v R* [1981] HKLR 610.

⁷⁹ *Secretary for Justice v Ma Ping Wah* [2000] 2 HKLRD 312 at p.320C-D.

⁸⁰ *Ibid.* at p.320F-G.

81. These categories of cases are, however, to be distinguished from sentencing cases concerning offences where there are no established guidelines or tariffs. The public order offences of which the appellants were guilty are such offences. There is neither an established set of guidelines nor any tariff of sentence for cases of unlawful assembly (the latter not being appropriate in any event since the nature of the offence does not lend itself to a tariff).

82. In the Secretary for Justice's application for a review of sentence in respect of the appellants' cases, it was submitted that there was an increase in the number of "cases involving offences committed in public order events" and hence the Court of Appeal was to be invited "to lay down guidelines in the sentences of offences related to such events."⁸⁴

83. In the event, although Poon JA said in the introductory paragraph of his judgment ([18]) that he was expounding on the principles on sentencing in unlawful assemblies that involve violence "to provide guidance to the sentencing courts in the future", the Court of Appeal did not lay down any fixed starting point of sentence for this category of offence as such. Instead, as noted in paragraph [2] above, the Court of Appeal emphasised the need, when sentencing in cases of unlawful assembly, to take a much stricter view where disorder and any degree of violence was involved. This was consistent with the Court of Appeal's responsibilities for providing guidance in sentencing matters and it was fully entitled to provide this guidance for the future.⁸⁵

⁸¹ *Attorney General v Ching Kwok-hung* [1991] 2 HKLR 125; *Secretary for Justice v Hii Siew Cheng* [2009] 1 HKLRD 1.

⁸² *Secretary for Justice v Lai Wai Cheong* [1998] 1 HKLRD 56.

⁸³ *Secretary for Justice v Ho Mei Wa & Anor.* [2004] 3 HKLRD 270.

⁸⁴ Secretary for Justice's Application to the Court of Appeal for Review of Sentence under section 81A at p.9.

⁸⁵ As was noted in *Seabrook v HKSAR* (1999) 2 HKCFAR 184 at p.194G-H, the Court of Appeal routinely deals with sentencing and in practice is always the final court dealing with sentence.

D.4 The relevance of youth in sentencing and section 109A of the Criminal Procedure Ordinance

84. The age of an offender, whether youth or advanced age, is always a relevant mitigating factor in sentencing.⁸⁶ In the case of a young offender, it is recognised that “the ordinarily better opportunity for reformation and rehabilitation, likely thereafter to diminish, must assume greater significance”.⁸⁷

85. Section 109A(1) of the Criminal Procedure Ordinance provides:

“No court shall sentence a person of or over 16 and under 21 years of age to imprisonment unless the court is of opinion that no other method of dealing with such person is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to the character of such person and his physical and mental condition.”

86. Section 109A was introduced by the Young Offenders (Miscellaneous Provisions) Ordinance in 1967 and is adapted from section 17(2) of the Criminal Justice Act 1948 in England and Wales. It is clear that the purpose of the provision is to ensure that, save in respect of certain excepted offences,⁸⁸ the imprisonment of young persons between the ages of 16 and 21 is a sentencing measure of last resort.

87. On its plain wording, the section places a duty on a sentencing court when considering the appropriate sentence to be imposed on an offender aged between 16 and 21, to obtain and consider information about the circumstances for the purpose of determining whether any method of dealing with the offender, other than a sentence of imprisonment, is appropriate. The “circumstances” refer to the circumstances of the offender, the offence and his suitability for particular types of punishment.

⁸⁶ *Sentencing in Hong Kong* (7th Ed.), Cross and Cheung, at pp.341-344.

⁸⁷ *R v Chiang Sun Keung* [1997] 1 HKLRD 24 at p.28C.

⁸⁸ See section 109A(1A) and Schedule 3 of the Criminal Procedure Ordinance.

88. In addition to obtaining and considering the information, the sentencing court is also required, by the section, to take into account information relevant to the young offender's character and his physical and mental condition. Each of these matters is plainly relevant to his suitability to other forms of punishment that may be imposed on a person aged between 16 and 21, be it probation, a community service order or committal to a detention centre or training centre.

89. Nevertheless, the requirement to obtain information is not absolute. As Salmon LJ (as he then was) observed in *Morris v Crown Office* [1970] 2 QB 114 at pp.129H-130A:

“In my view the second part of section 17 of the [Criminal Justice] Act of 1948 is in any event directory only. If a judge fails to obtain or pay attention to the necessary information before sentencing, his sentence would not thereby be invalid. It would only mean that the appellate court would obtain the necessary information and review the sentence in the light of it.”

90. Moreover, there may be certain cases where the court is able to be satisfied that no other sentence other than imprisonment is appropriate for the offender. *Yeung Ka Wah & Others v The Queen*, CACC 357/1970, unrep. (27 March 1971) is an example of such a case. There, the young offender was jointly charged with others of the offence of demanding money with menaces. In his judgment for the Court of Appeal, Huggins J (as he then was) said (at pp.4-5):

“In regard to two of the accused who were under 21 years of age and to whom s.109A of the Criminal Procedure Ordinance applied the learned judge expressly said that in view of the circumstances which he set out he was of opinion that the only appropriate method of dealing with those young accused was by way of imprisonment. We think a judge (but rarely, perhaps, a magistrate, for he deals with cases which prima facie are not so serious that a summary trial is inappropriate) is entitled, where the facts warrant it, to take the view that the serious nature of an offence so clearly overrides any considerations personal to the offender that he can properly exercise his discretion under s.109A without first obtaining a probation officer's report.”

It should be noted that this approach in the case of serious offences is now reflected in the exception of certain offences from the ambit of section 109A. Nevertheless, the general proposition that there may be some cases where the sentencing court can determine, without resort to obtaining information pursuant to section 109A, that the only appropriate sentence is one of imprisonment remains sound.

E. Applying the principles to the present case

91. In applying the principles set out above, the first question to ask is whether the magistrate could be shown to have imposed sentences on the appellants that were wrong in principle or manifestly inadequate as contended by the prosecution on the application for review.

92. Even if that is not shown to be the case, it still remains to consider the approach of the Court of Appeal on the review and the guidance laid down by it for future cases of unlawful assembly involving violence.

E.1 The range of sentences for unlawful assembly

93. On conviction on indictment for the offence of taking part in an unlawful assembly, a person is liable to imprisonment for 5 years and, on summary conviction, to a fine at level 2⁸⁹ and to imprisonment for 3 years.⁹⁰

94. An examination of past sentences imposed for unlawful assembly demonstrates that a wide range of types and severity of sentence that have been imposed for the offence. This was acknowledged by Poon JA in the opening paragraph of his judgment in the Court of Appeal⁹¹ and is not a matter of

⁸⁹ HK\$2,001 to HK\$5,000.

⁹⁰ Public Order Ordinance (Cap.245), section 18(3).

⁹¹ CA Judgment at [18].

surprise since the offence of unlawful assembly can be committed in a wide variety of different ways and with different consequences.

95. As illustrations of the range of sentences imposed for the offence of taking part in an unlawful assembly, see:

- (1) In *HKSAR v Wong Yuk Man* [2015] 1 HKLRD 132, fines of HK\$4,800 were substituted for suspended prison terms on appeal against sentence for two Legislative Councillors taking part in a protest who were convicted for an unlawful assembly consisting of a line of protesters moving slowly step by step in a line up to a police line and finally pressing their bodies against the police line to push it, but only for a short time.
- (2) In *HKSAR v Wong Yeung Tat* [2016] 4 HKLRD 445, an appeal against conviction was dismissed in respect of a conviction for unlawful assembly in respect of which a fine of HK\$5,000 was imposed. The unlawful assembly consisted of disorderly behaviour as part of a group of about 10 who rushed towards one of the entrances of the Legco complex and bumped into police and Legco security officers, resulting in five officers sustaining injuries.
- (3) In *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371, an appeal against conviction was dismissed in respect of a conviction for unlawful assembly by six defendants, who took part in a protest by a group of about 26 and who charged a police cordon set up to prevent the protesters entering private premises. Two of the defendants were each given community service orders for 60 hours and four of the defendants were each bound over to be of good behaviour (in the sum of HK\$2,000 for a period of 18 months).

- (4) In *HKSAR v Chung Kin Ping & Ors*, unrep., HCMA 296/2015 (12 May 2017),⁹² appeals against conviction by three defendants for unlawful assembly were dismissed in cases in which the magistrate had imposed community service orders of 80 hours. The unlawful assembly occurred when the defendants struggled with the police and tried to remove Mills barriers placed by the police to maintain order during a street march.
- (5) In *HKSAR v Yip Po Lam* [2014] 2 HKLRD 777, appeals against sentence by two defendants in respect of suspended sentences imposed for taking part in an unlawful assembly were dismissed. Sentences of four weeks' imprisonment suspended for 12 months were imposed for their taking part in an unlawful assembly involving more than 150 persons who had been taking part in an unauthorised street protest march and who, on the two defendants' direction, charged a police cordon designed to encircle the protesters.
- (6) In *HKSAR v Tai Chi Shing & Ors* [2016] 2 HKC 436, the defendants pleaded guilty to taking part in an unlawful assembly. The magistrate reviewed community service orders she had initially imposed and substituted custodial sentences based on a starting point of six months' imprisonment. An appeal against sentence was dismissed. The unlawful assembly had involved an intimidating protest at the Legco complex by about 100 persons and acts by the defendants described as riotous in nature, if not a riot by legal definition. The three defendants had variously admitted

⁹² Judgment only available in Chinese.

damaging a glass door of the complex, charging the glass wall of the complex with a Mills barrier and throwing stones and kicking the glass doors of the complex. The costs of repair of the damage were about HK\$600,000. The judge held that, in the circumstances, an immediate custodial sentence was appropriate, even for a first-time offender.

- (7) In *Chan Sam v The Queen* [1968] HKLR 401, an appeal against a sentence of 18 months' imprisonment for unlawful assembly was dismissed. The conviction arose in the aftermath of the 1967 riots from the defendant's actions as part of a crowd of about 200 protesters. The defendant had used a chair to attack one of the police officers who came to disperse the crowd.

96. In the Court of Appeal's judgment, reference was made to various decisions in England and Wales where sentences in excess of 16 months' imprisonment were imposed.⁹³ These cases should be read with caution, however, since they involved violence on a considerably greater scale than was present in this case. In *R v Caird & Others* (1970) 54 Cr App R 499, the offences involved conduct which was riotous in nature. Similarly, the offences in *R v Gilmour* [2011] EWCA Crim 2458 and *R v Blackshaw* [2012] 1 WLR 1126 arose out of a period of nationwide rioting and public disorder.

E.2 Did the Magistrate err in principle or impose manifestly inadequate sentences?

97. As indicated above, the Court of Appeal considered that the magistrate erred in principle in sentencing the appellants to community service orders and a suspended sentence and that these sentences were manifestly

⁹³ CA Judgment, Section H4.

inadequate. The five matters which the Court of Appeal considered constituted errors of principle are summarised in paragraph [40] above.

98. For the following reasons, we do not agree with the Court of Appeal's conclusion that the magistrate erred in principle in the five respects identified.

99. As to the first matter (CA Judgment at [167](1)), the magistrate was plainly aware of the factor of deterrence in any sentence since she adverted to a deterrent sentence in paragraph [6] of her RS, albeit she rightly did not think it was fair to punish the appellants for the incidents arising in the Occupy Central protests which were subsequent to the events forming the offences of which they were convicted. It would be surprising if any court in Hong Kong passing sentence on a convicted person did not consider the factor of deterrence "at all" as the Court of Appeal concluded and we do not think the magistrate fell into this error. She reiterated, in her Decision on the Application on Review of the Sentence at [4], that she had carefully taken into account "the circumstances of the offence and each of the Defendants' criminal acts" and cross-referenced this comment to the paragraphs in her RS where she referred to the possibility of a deterrent sentence. As to the Court of Appeal's criticism of the disproportionate weight given by the magistrate to factors such as the appellants' personal circumstances and motives, these were relevant matters for the magistrate to take into account and the weight to be accorded to them was a matter for her, subject only to the possibility that, if she imposed a sentence that was manifestly inadequate and out of line with the range of sentences imposed in practice because of the weight she gave those factors, that might provide an independent ground for reviewing the sentence.

100. As to the second matter (CA Judgment at [167](2)), the magistrate was aware of the large scale nature of the assembly since she variously referred to the fact that there were “hundreds of people” and “a large number of protesters and participants” involved: see RV at [50], [51] and [56]; RS at [7]. She was also well aware of the risk of violent clashes and clearly referred to this risk: see RV at [70]-[71] and [73]; RS at [7]. That it was the magistrate’s view, in her RS, that the level of violence was “not very violent” and the appellants and the other participants in the assembly were “not ... the very violent type”, was an assessment that was open to her on the primary findings of fact she made in her RV. Furthermore, there is no reason to think that the magistrate did not have those primary findings of fact in mind when, shortly thereafter, she sentenced the appellants and then reviewed those sentences on the application of the prosecution. In this context, it is pertinent to bear in mind Lord Hoffmann’s comments⁹⁴ which Bokhary PJ quoted in *Tam Dick Yuen* at [41], namely:

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

101. As to the third matter (CA Judgment at [167](3)), it is not, with respect, correct to say that the magistrate “completely overlooked” the appellants’ knowledge of the likelihood of clashes between the participants and the security guards and police and the inevitability that at least some security guards would be injured. On the contrary, the magistrate plainly did take this into account in convicting the appellants: see RV at [57], [69]-[71], [76]-[77].

⁹⁴ In *Biogen Inc v Medeva Plc* [1997] RPC 1 at p. 45, repeated in *Piglowska v Piglowski* [1999] 1 WLR 1360 at p. 1372D-F.

The magistrate adverted to the risk of injury but correctly noted that the injuries actually sustained were minor and there was no evidence the appellants themselves had caused those injuries: see RV at [81]; RS at [6]. Indeed, having seen the CCTV footage that formed part of the prosecution evidence at trial, we agree with her observation that the greater risk of injury was to the participants themselves who scaled the fence around the Forecourt.

102. As to the fourth matter (CA Judgment at [167](4)), there is no proper basis, in our view, for criticising the magistrate for overlooking the fact that the unlawful assembly followed a prior lawful assembly and that the protesters did not have an absolute right to enter the Forecourt and for taking the view that the intention of the protesters was only to enter the Forecourt to form a circle and chant slogans. The magistrate's recital of facts included the fact of the prior lawful assembly and her rejection of the appellants' defence of self-help shows that she was plainly aware of the fact that the appellants had no right to enter the Forecourt: see RV at [4], [9] and [86]-[96]. It is a fact that the intention of the protesters was to enter the Forecourt and that, after doing so, they did join hands under the mast in the centre of the Forecourt and chant slogans: see RV at [80]. The magistrate's conviction of the appellants was necessarily premised on her view that their behaviour in executing their intention to enter and protest in the Forecourt, and (in the case of the 2nd appellant) to incite others to do so, was unlawful.

103. As to the fifth matter (CA Judgment at [167](5)), the expression of remorse by the appellants was a relevant matter for the magistrate to take into account. The appellants gave oral evidence before her at trial and it was a matter for her to form a view as to the veracity and sincerity of their claims of remorse and as to the weight to be given to that factor. Unless the sentence she

imposed was manifestly inadequate, it was not for the Court of Appeal to question the weight the magistrate gave to that factor.

104. This leads to the question of whether the sentences were manifestly inadequate, as the Court of Appeal concluded. In the present case, in sentencing the appellants, the magistrate chose to emphasise certain positive factors in the appellants' favour, namely their youth, the fact these were first offences, their stable family backgrounds, their good academic prospects, their idealism and having acted for a cause perceived to be just without any motive of personal gain. She chose to down-play the more serious aspects of the offence, namely that the appellants were the leaders of (and in the 2nd appellant's case that he had incited) a large-scale unlawful assembly which involved confronting security guards and police giving rise to a high risk of some degree of violence and personal injury while pressing demands to be let into property from which they were lawfully excluded.

105. In doing so, the magistrate was carrying out a multifactorial assessment of the circumstances of the offending and of the offenders, in which assessment she was entitled to a degree of latitude in the weight to which she attributed to each individual relevant factor. As the discussion in Section E.1 above shows, the range of sentences for unlawful assembly includes the imposition of a community service order and, at the time the magistrate was sentencing the appellants, there was no appellate court guidance that required an immediate custodial sentence for a case of this nature. As Poon JA remarked,⁹⁵ a community service order was a sentence "frequently" passed in respect of unlawful assemblies. Other cases where custodial sentences had been imposed were far more serious and many of the mitigating circumstances in this case

⁹⁵ CA Judgment at [136].

were not present. The case of *HKSAR v Tai Chi Shing & Ors (supra)*, for example, in which a starting point of six months' imprisonment was adopted was significantly more serious and involved considerably more violence than the present case which can properly be described as being at the lower end of the scale of violence. In the case of the 1st appellant, in particular, a sentence of imprisonment could only be imposed if the court was satisfied no other method of dealing with him was appropriate: see Section D.4 above. We do not consider that the community service orders and suspended sentence respectively imposed by the magistrate on these appellants were outside the reasonable ambit of the magistrate's sentencing discretion. Since they were not manifestly inadequate, there was no proper basis for the Court of Appeal to ascribe different weights to the relevant factors taken into account by the magistrate.

106. In these circumstances, the applications for review of the particular sentences imposed on the appellants should have been refused.

E.3 Was the Court of Appeal's approach justified?

E.3a The Court of Appeal's findings of fact

107. The conclusion in Section E.2 above is sufficient to dispose of these appeals. However, the questions of law for which leave to appeal was granted raise wider issues as to whether the Court of Appeal's approach to the facts of the case was justified. In particular, it was contended by the appellants that the Court of Appeal did not have power, on a review of sentence, to reverse, modify, substitute or supplement the factual basis on which the original sentence was based.

108. In this regard, the appellants jointly contended that the Court of Appeal had, in finding that the present case was one of "a large-scale unlawful

assembly, involving violence”,⁹⁶ had taken account of factors which, it was submitted, constituted new findings of fact by the Court of Appeal. Those factors are the eight matters summarised in paragraph [38] above, together with the conclusion that the appellants’ attitudes showed they had no genuine remorse (CA Judgment at [165]).

109. Since it is not dispositive of the appeals, it is unnecessary to deal at length with these complaints. Nevertheless, the question of law underlying the appellants’ contentions is of general importance in the context of a review of sentence under section 81A and so it is necessary to deal briefly with them.

110. The extent of the Court of Appeal’s power to review the facts on a review of sentence is addressed in Section D.1 above. It is a proper exercise of the Court of Appeal’s jurisdiction under section 81A of the Criminal Procedure Ordinance to review the evidence before the sentencing court in order to ascertain whether one of the grounds on which the jurisdiction may be exercised is made out. Here, the Secretary for Justice was contending in the review that the magistrate had erred in principle and imposed a manifestly inadequate sentence. The Court of Appeal was entitled, and obliged, to consider the evidence before the magistrate to determine if those grounds of review were established.

111. We are satisfied that, save in two respects, the factors highlighted by the Court of Appeal were findings that were open to it to make on the evidence before the magistrate. Thus, on the evidence which the magistrate herself referred to in her RV, the Court of Appeal was entitled to find that:

- (1) The appellants’ plan to enter the Forecourt was not spontaneous and that it was premeditated (CA Judgment at [157]);

⁹⁶ CA Judgment at [156].

- (2) It was within the appellants' reasonable expectation that there was a serious risk of the crowd clashing with security guards and police officers and that this would inevitably lead to violence (CA Judgment at [158]);
- (3) There was a point when the appellants must have realised that security guards and police were stopping protesters from entering the Forecourt yet they persisted in trying to get in (CA Judgment at [159]);
- (4) The appellants and other protesters managed to gain entry to the Forecourt by the persistence of their unlawful acts in the face of and despite resistance from the security guards and police (CA Judgment at [160]);
- (5) There is a self-evident correlation between the number and extent of the injuries sustained and the degree of violence involved (CA Judgment at [161]);
- (6) It is a fact that the Forecourt was a place from which the appellants were excluded and that they knowingly determined to gain entry even if that constituted a breach of the law (CA Judgment at [162]);
and
- (7) In addition to the 2nd appellant who was convicted of incitement, it was open to the Court of Appeal to find that the 1st and 3rd appellants, by reason of their respective leadership roles in the student organisations to which they belonged and their activities that evening, encouraged the crowd of young people to take part in the unlawful assembly (CA Judgment at [163]).

112. The last-mentioned factor is not inconsistent with the 1st appellant's acquittal on Charge (1) for incitement. The basis of the acquittal, as explained above, was the narrow ground that the prosecution did not prove to the satisfaction of the magistrate that, when he was speaking to the crowd on the stage, he knew that the security guards and police would block the protesters entry to the Forecourt. It remains a fact, however, that, given his high-profile in the student protest movement, the 1st appellant's actions of leaving the stage, running towards the Forecourt and climbing the fence surrounding the Forecourt would have been seen by many of the crowd and would have encouraged them to join in the attempt to enter the Forecourt. There is no inconsistency between the 1st appellant's acquittal and the Court of Appeal's observation that he encouraged the crowd, in breach of the law, to enter a place from which they were excluded.

113. The eighth matter to which the Court of Appeal drew attention (CA Judgment at [164]) was, in our view, a matter which was open to it to find, save in one respect in which the court appears to have strayed beyond the evidence before the magistrate. It was open to the Court of Appeal to find that what the 2nd appellant did was "highly dangerous". It was also consistent with the evidence for the Court of Appeal to find that he used sensational slogans and these are set out at paragraph [19] above. However, there would not appear to have been an evidential basis for the finding that the words "Someone is suffering from heart attack but the police do not allow the ambulance to come in", "Now (a) nurse(s) has/have reached the gate but the police refuse entry" and "Let the people go, open the gate" were "unfounded". There does not appear to have been any evidence before the magistrate to indicate whether any of the 2nd appellant's statements were true or were false and certainly no finding by her

that those particular statements were untrue. In the absence of evidence against which to test the veracity of the 2nd appellant's statements, it was not open to the Court of Appeal to find that these statements were "unfounded". However, as indicated, the more substantive point found by the Court of Appeal, namely that the 2nd appellant's actions were highly dangerous was supported by the evidence as a whole and so this error by the Court of Appeal would not, on its own, have been material.

114. The Court of Appeal's finding that the appellants' attitudes "showed that they had no genuine remorse for the offences they had committed" (CA Judgment at [165]) would appear to contradict a clear finding of fact by the magistrate. She, it will be recalled, drew attention to what she considered to be remorse on the part of the appellants in her RS (at [9]-[11]) and in her Decision on the Application on Review of the Sentence (at [4(IV)]). Unless that finding of fact on the part of the magistrate was susceptible to being overturned on the usual grounds open to an appellate court (see Section D.1 above), the Court of Appeal should not, in our view, have made a finding which was contrary to that of the magistrate. In any event, for the reasons explained, it is not necessary to resolve this particular factual issue.

E.3b The Court of Appeal's guidance for future cases

115. The Court of Final Appeal is not a sentencing court and appeals to this Court on points of sentencing principle are among "the rarest of cases".⁹⁷ The function of sentencing is primarily that of the convicting court of trial, subject to review by the Court of Appeal, whether on an appeal by the convicted

⁹⁷ *Seabrook v HKSAR* (1999) 2 HKCFAR 184 at p.186J. For examples, see *Wong Chun Cheong v HKSAR* (2001) 4 HKCFAR 12 (concerning the approach to imposition of a training centre order) and *Lau Cheong & Anor v HKSAR* (2002) 5 HKCFAR 415 (concerning the constitutionality of the mandatory life sentence for murder).

person or on review on the application of the Secretary for Justice. The Court of Appeal is therefore the appropriate court to determine if there is a need for appellate guidance as to the levels of sentence for a particular offence and, if so, to set those levels of sentence.

116. The Court of Appeal correctly identified (CA Judgment at [108]) the factors relevant to any sentencing exercise, namely (1) protection of the public, (2) commensurate punishment, (3) societal disapproval, (4) deterrence, (5) compensation and (6) rehabilitation and reform. The weight to be given to these factors is generally a matter for the sentencing court, subject to the parameters of appropriate sentence fixed by statute and previous decisions of the courts.

117. When a particular offence is increasing in occurrence or frequency, or the consequences of an offence are more deleterious to the good of the community than previously understood, it is open to the Court of Appeal to give guidance to trial courts as to the appropriate level of sentences or as to which of the relevant sentencing factors should be given greater or lesser prominence in the weighing exercise carried out when determining the appropriate sentence for an offence.

118. In the present case, the Court of Appeal considered, in respect of sentencing principles generally, basic rights and the obligation to abide by the law (CA Judgment, Section H1), legal restrictions on the right of assembly (CA Judgment, Section H2), the gravamen of the offence of unlawful assembly (CA Judgment, Section H3), and disrupting public order with violence as an aggravating factor (CA Judgment, Section H4). Each of these matters were entirely appropriate factors for the Court of Appeal to stress in the context of sentencing for the offence of taking part in an unlawful assembly.

119. The Court of Appeal was justified in holding that, “In sentencing cases of disrupting public order, especially those which involve violence, the court must bear in mind the importance of preserving public order.”⁹⁸ Similarly, it was within its proper function as a court of review to hold that, “On the basic premise that public order must be maintained, and taking into account the gravamen of the offence of unlawful assembly, the court, in passing sentence, not only has to impose a penalty that is appropriate to the punishment of the offenders, but it also has to take into account the factor of deterrence.”⁹⁹

120. In short, it was appropriate for the Court of Appeal to say that, in the circumstances now prevailing in Hong Kong including increasing incidents of unrest and a rising number of large scale public protests, it is now necessary to emphasise deterrence and punishment in large scale unlawful assembly cases involving violence.¹⁰⁰ In this context, the sentiments expressed by Starke J in the Court of Criminal Appeal in Victoria in *R v Dixon-Jenkins* (1985) 14 A Crim R 372 at p.379 are apposite:

“There are large groups in present-day society of sincere, earnest but wrong-headed people who, because their convictions are so strong, or because they pretend their convictions are so strong, will stop at nothing in order to impose those views on the community, and this, in my opinion, just like hijacking, is calculated to become contagious, and if at the first step the courts do not show that such conduct, however well intended, will not be tolerated in this community, then it is unlikely that such behaviour will be stopped in its tracks. I therefore am of opinion that this is just the case where general deterrence has an overriding effect on the resulting sentence.”

121. We would therefore endorse the Court of Appeal’s list of factors relevant to a decision on the appropriate sentence for unlawful assembly involving violence (CA Judgment at [135]), namely:

⁹⁸ CA Judgment at [121].

⁹⁹ CA Judgment at [127].

¹⁰⁰ As Poon JA said at [18] of the CA Judgment, “In order to dispel any doubts that the public may have, and to provide guidance to the sentencing courts in the future, I find it necessary to expound on the principles on sentencing in unlawful assemblies that involve violence.”

- “(1) Whether the violent acts were spontaneous or premeditated; if it was the latter, how detailed and precise the plan was;
- (2) The number of people involved in the violent acts;
- (3) The degree of violence, including whether weapons were used and, if so, what kind and quantity of weapons;
- (4) The scale of violence, including the location, the number of places and the area in which violence took place;
- (5) The duration of violence, including whether the violent act was a prolonged one, and whether it still went on despite repeated warning by police or public officers;
- (6) The consequences of the violent act: for example, whether there was any loss or damage to properties and, if so, to what extent; whether anyone was injured and, if so, the number of injured persons and the degree of injury;
- (7) Even if there was no loss or damage to properties, nor any injury, what imminence and gravity of threat was caused by the violent acts;
- (8) The offender’s role and degree of participation; for instance, apart from taking part in the unlawful assembly, or using violence, whether he had arranged, led, summoned, incited or advocated others to take part in the unlawful assembly or use violence.”

122. Similarly, the Court of Appeal was justified in clarifying the principles on which it would be appropriate to impose a community service order (CA Judgment, Section H6) and the factors to be considered in determining if an offender is genuinely remorseful (CA Judgment at [147]).

123. The sentencing principles which the Court of Appeal laid down in cases of unlawful assembly involving violence (CA Judgment at [151]) were therefore entirely appropriate, namely:

- “(1) In accordance with general sentencing principles, the court will have regard to all the actual circumstances of the case and the seriousness of the facts pertaining to the commission of the offence. Appropriate weight will then be accorded to each applicable sentencing factor, and a sentence that is commensurate with the offence will then be imposed. The same principles apply to cases of unlawful assembly involving violence.

- (2) Although the definition of unlawful assembly in section 18 of the Public Order Ordinance is relatively simple, the range of factual situations covered is wide. The seriousness of the facts involved varies from case to case and may, depending on the actual circumstances, run from the extremely trivial to the extremely serious. Incidents involving violence are certainly much closer to the serious end of cases, but the facts of different cases still vary. So even for the more serious cases there will still be a spectrum of seriousness. Within the spectrum, the court will accord appropriate weight to the applicable sentencing factors based on the actual circumstances of the case and the seriousness of the facts pertaining to the commission of the offence.
- (3) On the basic premise that the public order must be maintained, and taking into account the gravamen of the offence of unlawful assembly, the court has to consider the factor of deterrence in sentencing. As to how much weight it should accord to this factor, the court has to have regard of the actual circumstances of the case.
- (4) If the case is of a relatively minor nature, such as when the unlawful assembly was unpremeditated, small in scale, involving very little violence, and not causing any bodily harm or damage to property, the court may give proportionally more weight¹⁰¹ to such factors as the personal circumstances of the offender, his motives or reasons for committing the offence and the sentencing factor of rehabilitation while proportionally less weight to the sentencing factor of deterrence.
- (5) If the case is a serious one, such as when the unlawful assembly involving violence is large-scale or it involves serious violence, the court would give the two sentencing factors, namely punishment and deterrence, great weight and give very little weight or, in an extreme case, no weight to factors such as the personal circumstances of the offender, his motives or reasons of committing the offence and the sentencing factor of rehabilitation.
- (6) After the appropriate weight has been accorded to all the applicable sentencing factors, the court would then impose a sentence on the offender that is commensurate with the case.”

124. Having set out these factors in its judgment, the Court of Appeal went on to indicate an appropriate starting point for the appellants’ cases, namely 8 months’ immediate imprisonment.¹⁰² This was not a tariff as such, since the offence of unlawful assembly does not lend itself to a tariff approach to

¹⁰¹ This is not to say or to be misinterpreted that the court agrees with the motives or reasons of the offender for committing the offence.

¹⁰² CA Judgment at [169].

sentencing, but it was a significant increase in the range of sentences compared with past cases (see Section E.1 above). Nevertheless, we are satisfied that it was right for the Court of Appeal to send the message that unlawful assemblies involving violence, even the relatively low degree of violence that occurred in this case, will not be condoned and may justifiably attract sentences of immediate imprisonment in the future, given the gravamen of the offence involving the instigation of a risk and fear of a breach of the peace by virtue of the number of protesters involved.

125. It should be noted, however, that the culpability of the offender may vary depending on his degree of participation in the unlawful assembly and the violence in question. In this regard, the “Guidelines on Freedom of Peaceful Assembly”¹⁰³ quoted by Tang PJ in his judgment in *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [141] are relevant. A distinction must be drawn between a participant in an unlawful assembly who remains peaceful and one who himself engages in or encourages violence. But cases in which the defendant is shown to have actually participated in violent acts, or to have incited others to commit the offence (as in the case of the 2nd appellant here), will justify increased sentences. Similarly, where the offender is shown to have encouraged, if not actually incited, the unlawful assembly, for example by virtue of his status or leadership of others joining the assembly, this may justify attributing to him culpability for the actual violence involved.

126. In accordance with the principles discussed in Section D.3 above, it would not, however, have been appropriate to apply the Court of Appeal’s guidance to the appellants here. The increase in sentences intimated by the Court of Appeal represented a sentence significantly more severe than the range

¹⁰³ 2nd Ed. published by the Organisation for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights, 25 October 2010.

established by the courts' existing sentencing practice and so, to avoid retrospectively imposing a more severe sentence based on a new sentencing guideline, the new level of sentence should not have been applied to them.

127. We would also add that we would respectfully disapprove the approach disclosed in paragraphs [6] and [7] of Yeung VP's judgment. There, the learned Vice-President appears to have justified the increased sentences imposed on the appellants because their actions were thought, but not shown as a matter of evidence, to be the result of the influence of other people encouraging them to break the law. That is not a proper basis for sentencing since it ignores the culpability of the individual appellants and instead seeks to attribute the culpability of other persons to them. However, that approach was not reflected in the main judgment of Poon JA in which the guidance for future cases was set out, so our conclusions above as to the appropriateness of that guidance is not affected by this point.

E.4 Did the Court of Appeal properly consider section 109A?

128. The question of whether the Court of Appeal's consideration of section 109A was correct would arise only if it had been entitled to review the sentence of the magistrate and assume the role of sentencing court. At the review stage, the question is not whether the Court of Appeal applied section 109A correctly but whether the magistrate was entitled to take it into account. In the opinion of this Court, she plainly was and did. However, in sentencing the 1st appellant to a term of imprisonment in substitution for the community service order imposed by the magistrate, Poon JA observed (in parentheses):

“The 1st respondent was only 17 at the time of the offence and now 20, his Counsel, Mr. Shek, nevertheless agreed that it was unnecessary for the court to consider other sentencing options.”¹⁰⁴

129. It would appear that the submission of Mr Shek, who appeared for the 1st appellant in the Court of Appeal on the review of sentence, was misunderstood. Mr Shek’s submission was made in the response to the stance of the Secretary for Justice on the review, which was that the Court of Appeal, if it were minded to grant the application for review, “should call for the relevant reports (for example, detention center, training center and/or rehabilitation center reports) to assist in determining the appropriate sentence for the first [appellant].”¹⁰⁵

130. Mr Shek agreed with the prosecution that section 109A established the principle that no court should sentence the 1st appellant to imprisonment unless of the opinion that no other method of dealing with him was appropriate. It was in that context that he submitted that the 1st appellant “takes the view that neither detention centre, training centre nor rehabilitation centre is a suitable sentencing option” and that “[t]he sentencing options which the prosecution asks the court to consider are fundamentally inappropriate for the 1st [appellant].”¹⁰⁶

131. It is clear, therefore, that the submissions of Mr Shek to the Court of Appeal were not that it was not appropriate to consider alternatives to a sentence of imprisonment but that the alternatives of a detention centre, training centre or rehabilitation centre were not suitable and that any reports on the 1st appellant were unlikely to disclose that these were suitable for him. Implicit in Mr Shek’s submission was that the Court of Appeal must be of the opinion that

¹⁰⁴ CA Judgment at [166].

¹⁰⁵ CAAR 4/2016, Applicant’s Submission dated 12 July 2017 at [40].

¹⁰⁶ CAAR 4/2016, The 1st Respondent’s Skeleton Submission on the Prosecution’s Application for Review of Sentence dated 26 July 2017 at [35]-[37].

a community service order was not appropriate before it could be satisfied that the only appropriate sentence was one of imprisonment. There was certainly no concession or waiver by Mr Shek that it was not necessary for the Court of Appeal to obtain information as required by section 109A. In any event, under section 109A, it would have been, if the Court of Appeal had been entitled to review the sentence of the magistrate, its duty as the sentencing court to consider all non-imprisonment sentencing options and not a matter for counsel.

132. As the discussion in Section D.4 above shows, there may be cases where the requirements of section 109A can properly be departed from since the circumstances will be such that it will be clear without the need to obtain further information that the only appropriate sentence is imprisonment. In the circumstances of the present offence of taking part in an unlawful assembly, this was certainly not one of those cases and the Court of Appeal erred in not following the requirements of section 109A.

133. In the circumstances, the Court of Appeal's approach in dispensing with the need to consider other sentencing options was erroneous and provides an independent reason, in the case of the 1st appellant, for quashing the substituted sentence of imprisonment imposed on him by the Court of Appeal.

F. Conclusion

134. For these reasons, we would allow the appeals of each of the three appellants, quash the sentences of imprisonment imposed by the Court of Appeal and reinstate those imposed by the magistrate.

135. As indicated in paragraph [2] above, the Court of Appeal was entitled to provide the guidance it did in relation to the appropriate sentences to be imposed in respect of large scale unlawful assemblies involving violence. Offenders in such future cases will therefore be subject to the new guidelines.

(Geoffrey Ma)
Chief Justice

(R A V Ribeiro)
Permanent Judge

(Robert Tang)
Permanent Judge

(Joseph Fok)
Permanent Judge

(Lord Hoffmann)
Non-Permanent Judge

Mr Philip Dykes SC and Mr Randy Shek, instructed by Bond Ng Solicitors, assigned by the Director of Legal Aid, for D1/the Appellant in FACC 8/2017 (the 1st Appellant)

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