[English Translation – 英譯本]

CAAR No. 4 of 2016

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

APPLICATION FOR REVIEW NO. 4 OF 2016

(ON APPEAL FROM ESCC NO. 2791 OF 2015)

BETWEEN

SECRETARY FOR JUSTICE	Applicant
and	
WONG CHI FUNG (黃之鋒) (D1)	1st Respondent
LAW KWUN CHUNG (羅冠聰) (D2)	2nd Respondent
CHOW YONG KANG ALEX (周永康) (D3)	3rd Respondent

Before: Hon Yeung VP, Poon and Pang JJA in Court

Date of Hearing: 9 August 2017

Date of Judgment: 17 August 2017

JUDGMENT

Hon Yeung VP:

1. I have considered the judgment drawn up by Poon JA and the multitude of cases cited by him. I concur with his judgment as well as his reasons for judgment.

2. I should reiterate that pursuant to the Basic Law and the Hong Kong Bill of Rights Ordinance, Hong Kong residents enjoy the freedoms of assembly, speech, procession, demonstration and expression of opinions. The basic freedoms conferred on Hong Kong residents are comprehensive and in no way lesser than the freedoms enjoyed by people of other advanced and free societies.

3. However, the aforementioned freedoms are not absolute or unrestricted; they are subject to the supervision of the law. Hong Kong residents are obliged to observe the laws that are in force in Hong Kong, and the exercise of the rights conferred by law is by no means a reason or excuse for doing illegal acts. Any act of protest or demonstration for which the police have not issued a Notice of No Objection, or in which violence or the threat of violence is used to express one's opinions, crosses the boundary of the peaceful exercise of the rights and enters the territory of unlawful activities; it becomes an unlawful act which interferes with the rights and freedoms of others.

4. The lawful exercise of rights conferred by law, and the protection of the enjoyment of rights and freedoms by others according to law, co-exist with each other without conflict, and should be a symbol of a civilised society which upholds the rule of law.

5. Acts done in the name of the free exercise of rights, but which are in substance acts which undermine public order and breach the peace, will throw society into chaos, impact seriously and adversely on its progress and development, and prevent others from exercising and enjoying the rights and freedoms to which they are entitled. If such acts cannot be effectively stopped, then all discussion about freedom and the rule of law will become empty talk.

6. In recent years, an unhealthy wind has been blowing in Hong Kong. Some people, on the pretext of pursuing their ideals or freely exercising their rights conferred by law, have acted wantonly in an unlawful manner. Certain people, including individuals of learning, advocate "achieving justice by violating the law" and, under this slogan, they encourage others to break the law. These people openly flout the law. Not only do they refuse to admit their lawbreaking activities are wrong, but they even go as far as regarding such activities as a source of honour and pride. It is unfortunate that such arrogant and conceited ways of thinking have influenced some young people and have caused them to engage as they please in activities that are damaging the public order and disruptive of the peace at assemblies, processions or demonstrations.

7. This case is an excellent example of the influence of the trend that is mentioned. All three respondents are backbone members of young people organisations. In the name of their organisations, having obtained a Notice of No Objection from the police, they organised an assembly at the section off Tim Mei Road outside the Forecourt of the Central Government Offices (Forecourt) on the night of 26 September 2014, and successfully attracted the participation of hundreds of citizens, especially young people and students. With full knowledge that the assembly had to end at 10 pm, they conferred and reached a consensus in advance that they would force their way into the Forecourt at the conclusion of the assembly, claiming that they were going to "recapture the Civic Square".

8. Before 26 September 2014, the Hong Kong Federation of Students (HKFS) had made two applications to the Administration Wing, requesting the opening-up of the Civic Square for public activities from 23 September to early October 2014. However, these applications were rejected. Therefore, at the time the three respondents reached the above consensus, they had full knowledge that the Civic Square would be closed and guarded by security guards.

9. The three respondents should also have been aware that many, especially young people, would participate in the assembly on 26 September 2014. Obviously, it was their wish to rely on the participation of these people to achieve their purpose of "recapturing the Civic Square" by sheer force in numbers.

10. The three respondents must have been aware that when crowds of people forced their way into the Civic Square, clashes between them and the security guards guarding the Civic Square would be inevitable, and that casualties as well as damage to property were highly likely.

11. The three respondents had at the pre-action meeting discussed the criminal liability of the participants, and subsequently distributed copies of "Points to Note When Under Arrest" to them. This made clear their awareness that their planned action was unlawful, but they still participated in and/or incited others, especially young students, to take part in the unlawful action. It was extremely irresponsible of the three respondents to call upon or incite young students to violate the law, the consequences of which may become lifelong regrets of these young students.

12. The claim by the three respondents that they were going to "recapture the Civic Square" by way of the zero-violence principle of "peace, rationality and non-violence" was nothing but empty talk, something to which they paid lip service and a slogan by which they deluded themselves and others.

13. In the face of clear and undeniable evidence from the prosecution, the three respondents had refused to plead guilty. In fact, to date, they still refuse to admit that they had done anything wrong. They argue that they had acted out of their concerns for social issues, as well as their passion for politics and ideals. The assertion that they are remorseful is strained and totally unconvincing. There is no conflict between their concerns for social issues and passion for politics and ideals on the one hand, and the need for them to abide by the law on the other.

14. I concur with the judgment of Poon JA. The offences committed by the three respondents are serious for which deterrence is justified.

15. I am of the view that given the nature of these offences, the mode in which they were committed and the attitude of the three respondents, sentencing them by way of a community service order or suspended sentence is in contravention of sentencing principles; it is acutely inadequate and cannot possibly reflect the gravity of the offences.

16. In my judgment, the only appropriate sentence is a short term of immediate imprisonment. I have to emphasize that if the sentences imposed by this court do not suffice to deter similar offences, the court may need to resort to sentences of even greater deterrent effect to uphold the dignity of the rule of law.

17. It gives me absolutely no pleasure in coming to a sentence that would send young people with aspirations and ideals to prison. However, this court is duty-bound to send a clear message to the public that when taking part in assemblies, processions, demonstrations or like activities, in the free exercise of their rights, participants must abide by the law and must not cause any damage to public order and public peace. All acts of violence, especially acts of violence which involve the charging at or assaulting law-enforcement officers and personnel responsible for maintaining order, will be met by a substantial sentence; otherwise there will be no social accord or social progress, and citizens' rights and freedoms as safeguarded by law may altogether vanish.

Hon Poon JA:

18. In recent years, some assemblies, processions or demonstrations, held peacefully at the beginning, were later transformed into unlawful activities because some of the participants resorted to violence. The offenders involved were usually charged with unlawful assembly or like offences in subsequent proceedings. This application for review is one of these cases. When sentences passed by the lower courts in this kind of cases vary, ranging from immediate imprisonment to community service order, such disparity will cause the public to query the bases on which the courts imposed the sentences, and jeopardize the proper administration of criminal justice. 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.

A. Introduction

19. The respondents in this application for review were charged with the following offences in relation to unlawful assembly:

(1) the 1st respondent: inciting others to take part in an unlawful assembly, contrary to section 18 of the Public Order Ordinance[1] and section 101I of the Criminal Procedure Ordinance[2] (Charge (1)) and taking part in an unlawful assembly, contrary to section 18 of the Public Order Ordinance (Charge (2));

(2) The 2nd respondent: inciting others to take part in an unlawful assembly (Charge (3)); and

(3) The 3rd respondent: taking part in an unlawful assembly (Charge (4))

20. The particulars of Charges (1) and (3) are similar, respectively alleging that the 1st respondent, on the 26 day of September 2014, and the 2nd respondent, between the 26 day and the 27 day of 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."

21. The particulars of Charges (2) and (4) are also couched in similar terms, respectively alleging that the 1st respondent, on the 26 day of September 2017 [sic], and the 3rd respondent, between the 26 day and the 27 day of September 2017 [sic], 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."

22. The respondents pleaded not guilty to all charges and stood trial before Ms June Cheung (trial magistrate) at the Eastern Magistrates' Courts on 29 February, 1 to 4 March and 13 May 2016. On 21 July 2016, the trial magistrate handed down her Reasons for Verdict, finding the 1st respondent not guilty of Charge (1) but guilty of Charge (2); the 2nd respondent guilty of Charge (3); and the 3rd respondent guilty of Charge (4).

23. On 15 August 2016, the trial magistrate sentenced the 1st respondent to a community service order of 80 hours on Charge (2), the 2nd respondent to a community service order of 120 hours on Charge (3), and the 3rd respondent to 3 weeks' imprisonment suspended for 1 year on Charge (4). Thereafter, pursuant to section 104 of the Magistrates Ordinance[3], the prosecution made an application to the trial magistrate for a review of the sentences. On 21 September 2016, the trial magistrate handed down her Reasons for Decision, confirming the original sentences imposed on the respondents.

24. Dissatisfied with the above sentences, the Secretary for Justice, on 13 October 2016, applied to the Court of Appeal for a review of the sentences pursuant to section 81A of the Criminal Procedure Ordinance[4].

25. The respondents were aggrieved by the convictions. Messrs Ho, Tse, Wai & Partners, on behalf on the 2nd and 3rd respondents, on 15 August 2016, and the 1st respondent, acting in person, on 29 August 2016, filed their Notices of Appeal and appealed against their convictions respectively. Pursuant to section 81C(1)(a) of the Criminal Procedure Ordinance, this application for review could not be heard at that time due to the respondents' appeals against their convictions.

26. On 20 April 2017, A Wong J ordered that upon the respondents' abandonment, their appeals were dismissed. On 16 May, the Court directed that this application for review would be heard on 9 August. At the conclusion of the hearing, we reserved our decision.

B. Prosecution case

27. At the trial, the prosecution called a total of 12 witnesses. They also relied on the video footages recorded by the police at the scene, footages produced by the CCTV at the scene and the news clips from various television stations to support their case. The defence did not dispute the background of the incident, or the video-recorded acts of the respondents. The footages were produced by way of admitted facts of the prosecution and the defence[5]. The defence did not have serious disputes over the evidence of the various prosecution witnesses[6].

B1. Forecourt

28. The incident took place on 26 September 2014 at the forecourt of the Tamar Central Government Offices' (CGO) East Wing (Forecourt), which was dubbed "Civic Square". It was first opened in 2011. Before July 2014, no gates were installed at the Forecourt to restrict public access, so basically it was open to the public. In July 2014, construction works were carried out to erect fences on the boundary of the Forecourt, and the work was completed in September of the same year. When the Forecourt was reopened, the opening hours and related arrangements were as follows:

(1) The Forecourt was opened daily from 6 a.m. to 11 p.m. for public access. Once the gates were closed, only holders of the CGO passes or the Legislative Council passes would be allowed entry. Ordinary members of the public could not enter.

(2) Ordinary members of the public were required to make written application to the Director of Administration, and only after they had obtained permission could they use the Forecourt for public assembly/ procession on Sundays or public holidays from 10 a.m. to 6:30 p.m..

29. Yuen Fook Cheung, the Senior Executive Officer responsible for the management and security of the CGO and the Chief Executive's Office gave evidence that the Forecourt was part of the CGO and as such, a private property. It was in general not open to the public and the Department of Administration had set out some restrictions on its usage. Chiu Yin Wa, the Principal Executive Officer responsible for the security and facilities of the CGO building, gave evidence that since the erection of fences at the Forecourt, the place was closed between 11 p.m. and 6 a.m., with security guards guarding the gates. He asserted that "public open space" did not include the Forecourt which was not a public area but was government property. Only when the Department of Administration gave permission and when there was no violation of the Public Order Ordinance[7] could members of the public hold an assembly or demonstration in the Forecourt.

B2. Overview of the incident

30. The first respondent was the convenor of Scholarism[8] while the 2nd and 3rd respondents were a standing committee member and the secretary general of Hong Kong Federation of Students' (HKFS) respectively[9]. The HKFS had on two occasions made applications to the Department of Administration for opening the Forecourt for public activities from 23 September 2014 to early October 2014, but the applications were refused.

31. On 26 September 2014, the organisations to which each of the respondents belonged held an assembly at the area off Tim Mei Avenue outside the Forecourt. Notice of No Objection had been obtained from the police before the assembly was held and the said Notice was valid until 10 p.m. of the same day. On that day, both gates of the fence at the Forecourt were closed for security reasons. At the material time, security guards were on duty both inside and outside the gates[10] and Mills barriers were erected outside the gates for safeguarding.

32. To put it simply, the prosecution case was that when the assembly came to an end that night, several hundred participants of the assembly[11] either climbed over the fence or tried to force open the closed gates. They ignored the security guards and the police who were trying to stop them and forced their way or intended to force their way into the Forecourt which was not open at that time. In the incident, the respondents took part in and/or incited others to take part in the unlawful assembly.

B3. Details of the incident

33. After 10:20 p.m. on the material night, when the citizens who took part in the assembly were beginning to leave, the 1st respondent who was on the stage at the assembly venue, through the broadcasting system, appealed to the participants of the assembly to stay and called upon them to go into the Forecourt[12]:

> " Now, here we call on you, we hope you all enter the Civic Square together with us now."

After saying that, the first respondent ran off to the Forecourt and left the stage to the 2nd respondent. At that time, many people tried to push open Gate 2 at the fence of the Forecourt. When the security guards tried to stop them from entering through the gate, some other people had already climbed over the fence at the Forecourt and got into the Forecourt. About 3 minutes later, the 1st respondent climbed over the fence, and jumped off the fence, ignoring the police officers who shouted to stop him (Charge (2))[13]. Sergeant 52877, Yam Ho Chung, gave evidence that the 1st respondent landed on the ground in front of him. They were very close to each other, with less than one metre in between[14]. Immediately, the 1st respondent was stopped by the police.

34. One minute later, the 3rd respondent also climbed over the fence. He ignored the police officers who were shouting to stop him. After evading the police, he entered the Forecourt and then ran towards the area near Gate 2[15] (Charge (4)).

35. According to the evidence of the security guard So Yik Chung, at the time somebody placed his/her hand(s) between the two sides of the gate to stop the security guard(s) from closing the gate, while the participants of the assembly outside the door pushed at the gate together, which led to confrontation with the security guard(s). Since the security guards were smaller in number, the participants of the assembly eventually succeeded in pushing open the gate and entered the Forecourt. It was only after the police reinforcements arrived that the gate was closed[16].

36. As aforesaid, the 2nd respondent took over from the 1st respondent, stayed on the stage and appealed to the participants of the assembly to enter the Civic Square together. He announced that a "spearhead team" had entered the Civic Square, repeatedly called upon the participants to go into the Forecourt[17] (Charge (3)), and kept on updating about what was going on in the Forecourt, including police intervention and the clashes that occurred at the scene which caused injuries. The 2nd respondent uttered the following at the 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!"[18]

(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."[19]

(3) "Everybody, go into the Civic Square now. Let us recapture the public space which belongs to us."[20]

(4) "Every time you close it down, we bust it!"[21]

(5) "… Tonight, we shall enter and station in the Civic Square…"[22]

(6) "Recapture the Civic Square!"[23]

(7) "We shall recapture the Square that belongs to us by using a method of non-active attack"[24]

(8) "Give us back the Civic Square!"[25]

(9) "Surround the Central Government Offices!"[26]

(10) "Pepper spray is now being used at the scene."[27]

(11) "The police have now deployed three lines of human chain hoping to stop us from entering the Civic Square."[28]

(12) "Encircle the police in return."[29]

(13) "The police are doing political oppression. Shame on them!"[30]

(14) "Everybody, please use Facebook to keep appealing for more reinforcement"[31], "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."[32]

(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…"[33]

(16) "30 odd of our demonstrators are now encircled by the police. Inside this circle, they are brutally treated and there are massive clashes."[34]

(17) "Some of our friends have been arrested ..."[35]

(18) "The convenor of Scholarism, Wong Chi-fung, has been arrested, and was accused of assaulting a police officer."[36]

(19) "Someone is suffering from heart attack but the police do not allow the ambulance to come in"[37], "Now (a) nurse/s has/have reached the gate but the police refuse his/her/their entry. Let the people go, open the gate!"[38]

The 2nd respondent further asked the students in school uniform, secondary school students and those who were underage to leave, but he told them that they could go online to call upon more people to come[39]. He also told the participants that they had to be peaceful, sensible and exercise restraint and asked them to raise their arms high up in the air, and he reminded them that the action was civil disobedience and those involved in it should be psychologically prepared for being arrested and prosecuted. He said those who took part in the action had the risk of being arrested and prosecuted. A phone number was given to them so that they could send their personal information to that number if they were arrested[40].

37. At the material time at the scene, several hundred people[41] intended to enter the Forecourt. Eventually, several dozens of assembly participants successfully entered the Forecourt and some of them pushed over the Mills barriers placed at the bottom of the flag post at the Forecourt. Subsequently, the participants, including the 3rd respondent, gathered under the flag post, hand in hand and chanted slogans.[42] It took about 12 minutes from the time when the 1st respondent appealed to the public to enter the Forecourt to the time when those participants who entered the Forecourt gathered under the flag post.

38. In the incident, a total of 10 security guards of the CGO were injured when they were trying to stop the participants from entering the Forecourt. Most of them suffered minor injuries, such as tenderness[43], bruising and swelling. Amongst them security guard Chan Kei Lun suffered more serious injuries. His left big toe had bruising and swelling, and mild fracture near the basis phalangis digitorum pedis. He told the doctor that somebody had pushed him from behind causing injuries to his left elbow and left big toe[44]. Among the 10 injured security guards, 5 had to take sick leave for 4 to 6 days, and security guard Chan had to take sick leave for a total of 39 days.

C. Defence case

39. The respondents did not dispute the prosecution's case of their respective conduct at the time of the incident. What they disputed was whether their conduct constituted any offence, i.e. whether their conduct possessed the elements of the offence with which they were charged, such as "intended or likely to cause any person reasonably to fear that the persons so assembled would commit a breach of the peace". The defence of self-help was also raised. The respondents all elected to testify in support of their case.

C1. Meeting prior to the incident

40. At about 8pm on the night of the incident, HKFS held a meeting on their action of entering the Forecourt. According to the 1st respondent, at that time, someone suggested that when government staff members or reporters went into the Forecourt via the gate, they could seize the opportunity and make their way into the Forecourt together[45]. The 2nd respondent claimed that he returned onto the stage as the master of ceremony in the middle of the meeting and at that time no decision had been made. He only learnt from the 1st respondent subsequently that HKFS and Scholarism would take action after the assembly concluded[46]. The 3rd respondent said that he had forgotten the details of the action, including who had taken part. However, he believed that 10 odd people would go into the Forecourt in an orderly manner, and the security guards would allow them to go in and assemble[47]. The issue of criminal liability of the participants was also discussed during the meeting, and copies of "Points to Note When Under Arrest" with telephone numbers for legal assistance were distributed on that night[48].

C2. Prior assessment of the risk of clashes

41. As to whether this action would lead to any clashes, the 1st respondent testified that he had mentioned the principle of non-violence in the meeting, namely, not to take the initiative in inflicting bodily injuries but would insist on moving forward. He agreed that if the participants were prevented from moving forward, physical bumping and pushing between the two sides might occur. He, however, did not think it would result in a risk that people of either side might be injured[49]. The 2nd respondent claimed that if the security guards tried to stop them with their bodies, the participants would act on their consensus that no violence would be used at all and would remain standing in their original position, therefore their action would not cause any injuries to the security guards. However, no consensus was reached on the question of retreat in the meeting[50]. The 1st and 2nd respondents further testified that based on their experience of organizing activities in the Forecourt in the past, security guards would only issue verbal advice. Therefore, they did not anticipate that any violence, scuffles or physical clashes would occur that night[51]. The 3rd respondent said that although, during the meeting, there was no specific discussion on how to handle the situation if they were prevented from entering the Forecourt, the principle of "peace, rationality and non-violence" had been established, he therefore believed that the risk of having physical clashes with security guards or police officers was very low[52].

C3. The course of the incident

42. In his testimony, the 1st respondent said when he was making his appeal on the stage, he could only hear commotion and argument at the gate but could not see what happened there. He was of the opinion that the participants had all along been acting in a peaceful and sensible manner and did not think anyone would use violence[53].

43. The 1st respondent went on and stated that he had no prior intention to climb over the fence. However, when he ran to and reached the gate, he saw some people already climbing up the fence. Many people gathered outside the gate and the security guards refused to let them in. Since the gate was not very wide, he thought he would have to wait for quite a long time if he was to enter via the gate, so he decided to go into the Forecourt by climbing over the fence[54]. The 1st respondent, under cross-examination, accepted that there was a risk of injuring police officers and/or reporters when he jumped off from the 3-metre fence[55].

44. The 2nd respondent said in his testimony that upon hearing the appeal made by the 1st respondent and the response from the participants, he knew that the action had begun, so he continued to disseminate information on the stage and called on the participants to go into the Forecourt. However, he had no idea by what method HKFS would arrange for the participants to enter the Forecourt[56]. The 2nd respondent did not recall whether he learnt of the fact that the participants were prevented from passing through the gate, but he was informed by those present at the scene of matters including the arrival of police officers. He believed that the police officers might stop the participants or even disperse them. The 2nd respondent stated that he saw that the participants on Tim Mei Avenue were behaving in a peaceful and sensible manner, hence he believed that they would stick to the principle of "peace, rationality and non-violence" and would not resort to violence[57].

45. The 3rd respondent stated that he was responsible for communication with the reporters after the meeting, and that he had also briefly mentioned the action to several students. At the time of the incident, it was only after he had heard the appeal made by the 1st respondent that he went into the Forecourt. When passing through Gate 2, he saw crowds of people, reporters and flash light and also heard some noises. He then became aware that people were prevented from going into the Forecourt and were in a stalemate with the security guards. Before climbing the fence, he already saw, through the gaps of the fence, those assembly participants who had entered the Forecourt and police officers[58].

C4. The meaning of the Forecourt to the respondents

46. The 2nd respondent considered that the Civic Square was a public place pregnant with historical meaning – where the citizens had successfully pressured the government into withdrawing the introduction of national education. He believed that the closure of that space was an indication that the government suppressed people's political right to express their opinions in that place. Therefore, the action taken by the respondents and the participants to enter the Forecourt was nothing but an expression of their political demands and an exercise of their rights to freedom of expression and freedom of assembly[59].

D. Verdict of the trial magistrate

D1. Issues

47. Following an analysis of the elements of the offences, the trial magistrate identified the issues pertaining to the two types of offences in this case[60]:

(1) Inciting others to take part in an unlawful assembly (Charges (1) and (3))

(i) Whether the 1st and 2nd respondents' speaking on stage constituted the conduct of incitement, and whether they intended to incite people present at the scene to act according to what they said;

(ii) Whether, if those present at the scene acted according to what the defendants [sic] said, their conduct would be disorderly or intimidating;

(iii) Whether the conduct of those who acted according to what the defendants [sic] said would 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; and

(iv) Whether the defence of self-help was open to those who acted according to what the defendants [sic] said.

(2) Taking part in an unlawful assembly (Charges (2) and (4))

(i) Whether the conduct, i.e. climbing over the fence, of the 1st and 3rd respondents respectively, and the conduct of other people who, at the material time, entered the Forecourt together by climbing over the fence and pushing the gate, was disorderly and intimidating;

(ii) Whether their conduct was 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; and

(iii) Whether the defence of self-help was open to them.

D2. Charges (1) and (3)

48. As to the Charges of inciting others to take part in an unlawful assembly, the trial magistrate stated that what happened in the present case could not be said to be similar to what happened in assemblies held previously at the Forecourt, because, in the past, fences had not been erected in the Forecourt, and there were no security guards stationed at the gate to restrict the entry of visitors[61].

49. However, in respect of Charge (1), the trial magistrate could not be sure that at the point in time when the 1st respondent made his appeal on stage, assuming those present in the assembly would indeed go into the Forecourt in response to his appeal, the security guards would definitely stop them from entering the Forecourt in any way other than by issuing verbal advice. It followed that, at the point in time when the 1st respondent made his appeal, the act of entering the Forecourt was not necessarily disorderly or intimidating. On this basis, the trial magistrate found that the prosecution was not able to prove Charge (1) to the standard of beyond any reasonable doubt[62].

50. As to Charge (3), the trial magistrate made an analysis of what the 2nd respondent said. She considered that even though the 2nd respondent was unable to see clearly the Forecourt and the gate, and what he said did not indicate he was aware that the security guards were stopping the people from entering, he had been informed that the police had stepped in and announcements had been made about it. The trial magistrate pointed out that if, upon being stopped by the police, the several hundred participants who were present still acted in response to the appeal of the 2nd respondent to go into the Forecourt, the process would definitely not be a peaceful one, for in order to forcibly enter the Forecourt, they could only conduct themselves in a disorderly and intimidating manner, like pushing the gate and climbing over the fence. The 2nd respondent was also aware that some participants were injured and some people were arrested after the police stepped in. The trial magistrate found that when the 2nd respondent was making the appeal, he clearly knew that under such circumstances, if the participants insisted on going in together in response to his appeal, some people would be injured, and the police officers and security guards would be caused to reasonably fear that the persons so assembled would commit a breach of the peace or provoke other persons to commit a breach of the peace[63].

51. Regarding the subsequent appeals made by the 2nd respondent which had no direct relations with the entry to the Forecourt, the trial magistrate held that those were merely words to express his political stance. Hence, no adverse inference against him was drawn from those words[64].

D3. Charges (2) and (4)

52. So far as the offences of taking part in an unlawful assembly were concerned, the trial magistrate took into account the fact that the 1st respondent and other people who climbed over the fence and pushed open the gate were obviously acting in concert and in a group, sharing a common objective of forcing their way into the Forecourt in defiance of the security guards/police officers who were trying to stop them. Therefore the trial magistrate found that the 1st respondent and the others conducted themselves in a disorderly and intimidating manner and that their jumping off from the top of the three-metre high fence would necessarily cause the people intending to stop them to reasonably fear that they would sustain bodily injuries themselves and that a breach of the peace would be committed[65].

53. The 3rd respondent later climbed up the fence and he was in the same position as the 1st respondent. As pointed out by the trial magistrate, the 3rd respondent testified that there was no discussion during the meeting about the effect of the erection of fences on the chances of entering the Forecourt, and that he thought the police might allow the assembly to continue as what happened in 2012 when they engaged in anti-national education activities. He reckoned that the chance of encountering actual obstruction was very low. Nevertheless, when the 3rd respondent climbed up the fence, he was already aware that the assembly participants encountered obstruction and could not enter the Forecourt through the gate in an orderly manner. The trial magistrate said that the security guards/police officers had to stop many people who pushed the gate or climbed over the fence, including the 3rd respondent, who jumped off from the fence. The trial magistrate found that the acts of those people would cause the security guards/police officers to reasonably fear that there would be or likely to be scuffles, resulting in bodily injuries. They would also fear that the acts of the 3rd respondent and others would encourage more people to follow suit, resulting in a breach of the peace[66].

D4. Other matters

54. As to the pushing over of Mills barriers by some people after the assembly participants entered the Forecourt, the trial magistrate stated that there was no evidence from the prosecution to prove that the respondents participated in, knew about or foresaw the pushing over of the Mills barriers by the crowd. Therefore, no adverse inference was drawn against the respondents in this regard[67].

55. Concerning the fact that some security guards were injured during the incident, the trial magistrate said there was no evidence from the prosecution as to who inflicted the injuries on them, nor was there any evidence as to whether the respondents had taken part in those attacks or had knowledge about the attacks[68].

D5. Defence of self-help

56. Citing the case of *HKSAR v Leung Kwok Wah and five others* [2012] 5 HKLRD 556, the trial magistrate stated that even in public places or premises of a public nature, demonstrators did not have an absolute right to demonstrate, nor did they have an absolute right in choosing the place of demonstration and the manner in which they conducted the demonstration. At the material time, the Forecourt was government premises not open to the public, so the participants including the respondents did not have the right to enter this type of premises for demonstration, nor was there any ground to hold that the security guards and the police officers' efforts of restraining them constituted unlawful interference. Therefore, self-help was not a defence open to the respondents[69].

D6. Conviction

57. Finally, the trial magistrate found the 1st respondent guilty of Charge (2), the 2nd respondent guilty of Charge (3) and the 3rd respondent guilty of Charge (4).

E. Sentence

E1. Community Service Order Suitability Reports

58. Before sentencing, the trial magistrate called for Community Service Order Suitability Reports for the respondents.

E1.1 1st respondent's Report

59. The 1st Respondent was aged 17[70] at the time of the offence. He was a student of the Open University, studying in an undergraduate programme in Politics and Public Administration. He occasionally took up freelance jobs, including that of a magazine columnist and guest radio broadcaster. He had become active and involved in different social movements and political events since 2012. Regarding this case, according to the 1st respondent, what they did was the result of a collective and strategic decision reached among different protestors with a view to raising public concern. He had no regret for his action and considered that he was convicted because of his fight for social justice. He emphasized that what they did was intended to be peaceful, rational and non-violent. Although he was sad to learn that some security guards were injured, he considered that the government was the one who should be held responsible. He pleaded not guilty because in his opinion, the offences with which he was charged were themselves a violation of human rights.

60. The probation officer concluded that, although having no regrets, the 1st respondent had expressed his respect towards the rule of law and readiness to bear the legal consequence associated with the present offence. Taking into consideration his young age, independence and mature mentality, clear criminal record and strong parental support, the probation officer recommended, instead of a probation order, a community service order of 81 to 160 hours.

E1.2 2nd respondent's Report

61. The 2nd respondent was aged 21[71] and the Chairman of the Student Union of Lingnan University of Hong Kong. At the time of the offence, he was studying a degree course in Cultural Studies and taking up freelance jobs such as writing for some newspapers and appearing as a guest speaker in radio programmes. He grew up in a single-parent family and was brought up by his mother. He became interested in public affairs during his secondary school years, and then became active in social movements. Since April 2016, he has been the chairperson of Demosisto.

62. According to the 2nd respondent, due to his dissatisfaction with the method of electing the Chief Executive, he joined the activities organized by the HKFS, such as student strikes and sit-in protests. He admitted that on the day in question when some demonstrators climbed over the fence, he appealed to other demonstrators to enter the Forecourt, but he said he had advised younger demonstrators who were in school uniform not to take part in it and had reminded the participants to keep calm and be rational in their actions. He considered he and the demonstrators had the right to enter the Forecourt. He believed that if more volunteers had been placed at the scene, the clashes between the demonstrators and the security guards could have been reduced. He felt sorry that some security guards were injured. He said he had never anticipated that. He conceded that as a political leader, he should adopt legitimate ways to express his political views in future.

63. The probation officer stated that the 2nd respondent showed regret for the fact that some security guards were injured in the incident and promised to adopt peaceful, rational and non-violent means to voice his views in the future. He was willing to bear the legal consequence. In view of the 2nd respondent's clear criminal record and cooperative attitude, a community service order of 100 to 140 hours instead of a probation order was recommended.

E1.3 3rd respondent's Report

64. At the time of the offence, the 3rd respondent was aged 24[72], the Chairman of the HKU Student Union and was studying for a Bachelor's degree in Comparative Literature. He was very involved in the activities and affairs of the Student Union. He believed that the charge itself restricted his civil rights. Despite his disapproval of this law, he was prepared to accept the legal responsibility. He considered that since he was aiming for the common good, he had no regret for the action he took that led to the present offence. In his view, since the government had not been responsive to the concerns of the citizens over various social issues, they had to resort to more proactive means to attain their goals.

65. The probation officer considered that the 3rd respondent had strong family support and that he was hard-working, responsible and self-disciplined. He stood a good chance to rehabilitate on his own feet without the intervention of probation supervision. As for community service order, although the 3rd respondent was willing to do unpaid work in order to shoulder his legal responsibility, his plan to study in a 1-year master degree programme in the UK rendered it impractical for him to abide by the requirements of a community service order. Therefore, community service order was not recommended in the case of the 3rd respondent.

E2. Reasons for sentence

66. The trial magistrate pointed out that the respondents were leaders of the student democratic movements in Hong Kong. They came from grassroot or middle-class families, had good academic performance, no previous criminal convictions and were passionate in social issues. They turned their political passion into action and what they did was backed by the understanding and support from their families.

67. The trial magistrate was of the view that the present case was different from ordinary criminal cases. Besides considering the gravity of this case, the purpose of the respondents for committing the offences should also be taken into account. She accepted that what the respondents did was a genuine expression of their demands based on their political ideals and their concern for the condition of the society, and that they were not acting for their own interests or for the purpose of injuring others. She commented that young people were relatively pure and innocent and did not have regard to actual benefits, but that they might be more impulsive. When sentencing them, therefore, the court ought to adopt a more lenient and understanding attitude, trying to understand the motives behind their violations of the law.

68. The trial magistrate continued and pointed out that this case happened before other more radical political incidents such as the Occupy Central Movement, it was therefore unfair to the respondents if the court took into account subsequent developments in the political arena and imposed a deterrent sentence on them, and that moreover, their actions in the present case were much more moderate than what happened in subsequent political incidents. She said that judging from their actions in the present case, those who would most likely get injured would have been the 1st and the 3rd respondents and other participants who climbed over the fences. She also pointed out that there was no evidence showing that the respondents took part in injuring the security guards or intended to injure others. She stressed that the respondents regretted that some people were injured in the incident.

69. The trial magistrate took the view that the respondents' actions were not very violent, and that all they wanted to do was to gain entry to the Civic Square, a place they genuinely believed to be full of historical and symbolic meaning, to form a circle there and to chant slogans.

70. The trial magistrate found that based on the findings of fact she made earlier, i.e. the guilty conduct of the 1st and the 3rd respondents was to climb over the fence and enter the Forecourt which was closed off, while that of the 2nd respondent was to incite others in the assembly to behave in a disorderly manner, his culpability was more serious than the other two respondents, but that the 2nd respondent did remind the participants to behave in an orderly manner, be mindful of safety and the legal risks involved, and had also advised that students and those who were not clear about their potential liabilities should not participate.

71. Regarding the issue of remorse, the trial magistrate stated that the 2nd respondent told the probation officer that upon reflection, he admitted he ought to have expressed his political views by lawful conduct and means, and that he felt sorry that some security guards were injured. The trial magistrate emphasized that although the respondents were convicted after trial, they had been cooperative in the course of their arrests, the investigation and the trial, and they were respectful towards the court. They did not deny that they had taken part in the incident or deny doing what they had done. Their defences were merely about whether their conduct *per se* constituted an offence. They also made clear to the probation officer that they were willing to bear the legal consequences and were willing to accept the penalty by way of community service order.

72. Having considered the above factors, the trial magistrate found that the appropriate sentences were 80 hours of community service order for the 1st and the 3rd respondents, and 120 hours of community service order for the 2nd respondent. However, since the 3rd respondent had been accepted for admission to a master degree course by the London School of Economics and Political Science and his study would begin in September 2016, it would be hard for him to comply with a community service order. She therefore sentenced him to three weeks' imprisonment, suspended for one year.

E3. Prosecution's application for review of sentence refused

73. The trial magistrate refused the prosecution's application for review of sentence. She reiterated that she had carefully considered the following sentencing factors[73]:

(1) circumstances surrounding the commission of the offences and the criminal acts of the respondents;

(2) outcome of the respondents' criminal acts;

(3) the respondents' motives for committing the offences;

(4) backgrounds of and remorse shown by the respondents.

The trial magistrate came to the conclusion that the prosecution failed to convince her that she should vary the sentences, and the original sentences were confirmed.

F. Secretary for Justice's stance

F1. Grounds of application for review of sentence

74. Mr David Leung, SC, Deputy Director of Public Prosecutions and Miss Annie Li, Public Prosecutor, for the Secretary for Justice, applied for review of sentence on the following grounds:

(1) The sentences imposed failed to reflect the seriousness of the offences:

(i) Because the offences derive their gravity from being part of an assembly which, by weight of its sheer numbers, is set on achieving a common purpose; and

(ii) The gravamen of the offences is to penalise offenders for the objective impact on public order caused by their conduct, hence prevent people from engaging in such conduct; violence therefore is not a necessary element.

(2) The sentences imposed failed to properly reflect the culpability of the respondents:

(i) Even though the relevant conduct was not very violent, the fact that it resulted in an actual breach of the peace and that some security officers were injured should not be overlooked; and

(ii) The respondents committed the offences with premeditation and preplanning.

(3) When dealing with such offences, the court in general would pass a deterrent sentence. The trial magistrate erred in principle in that she placed particular emphasis on the respondents' motives and considered that the present case was different from ordinary criminal cases.

(4) The trial magistrate erred in principle in making community service orders and passing a suspended sentence for the respondents respectively because:

(i) The respondents displayed no genuine remorse, thus failed to fulfil the prerequisite for making a community service order; and

(ii) Having regard to the circumstances of the case and the aggravating factors, the passing of a suspended sentence was wrong in principle.

F2. Summary of submissions

75. Mr Leung SC stressed in his submission that the offence of taking part in an unlawful assembly derives its gravity from being part of an assembly which, by weight of its sheer numbers, sets on achieving a common purpose. To prove the offence, its corporate nature must be established. The culpability in relation to this offence is higher than that of "behaving in a disorderly manner in a public place"[74] which involves only one person. Therefore, the trial magistrate committed an error of principle in sentencing. She should not have focused on an individual respondent's own impugned conduct, e.g. the 1st and 3rd respondents' climbing the fence. Mr Leung SC submitted that while the individual conduct of each respondent may not be very violent, they, by weight of numbers, were pursuing an unlawful purpose. If the violent acts of other participants of the assembly, including those who forced open the gate, had been considered together, the respondents' culpability would have been far higher than that relating to their own conduct.

76. Mr Leung SC continued and submitted that the gravamen of the offence of unlawful assembly is not the respondents' subjective culpability but more importantly, it is to penalise them for the objective adverse impact to public order caused by their conduct and to prevent people from engaging in such conduct. The court must take into account the atmosphere in the society at the time, including the fact that some people were vociferously advocating the Occupy Central movement at the time. Mr Leung SC stressed that violent conduct is not a necessary element of the offence. However, if violence has been used against others in the incident, that is an aggravating factor; it will also amount to other offences.

77. Mr Leung SC pressed the point that the evidence of the respondents showed that they had discussed before the incident in a meeting how to gain entry to the Forecourt. It showed that the action was planned and they knew it was possible that their action would be resisted and the participants were aware of the risk of being arrested, but they still took part in/incited others to take part in the action.

78. Citing *HKSAR v Tai Chi Shing & Ors* [2016] 2 HKC 436 and *HKSAR v Leung Kwok Hung* [2014] 5 HKLRD 652, Mr Leung SC submitted that if the conduct of the defendant has caused an actual breach of the peace, it is an important aggravating factor. In the present case, although the respondents are first offenders and their conduct was not very violent, the unlawful assembly in question involved actual violence causing injuries to others. Immediate imprisonment should be imposed.

79. Mr Leung SC argued that the following factors in the present case support sentencing the respondents to immediate imprisonment:

(1) The unlawful assembly was pre-meditated and planned;

(2) The incident did involve a degree of violence, causing injuries to many security guards;

(3) A great number of people took part in the unlawful assembly;

(4) The unlawful assembly lasted for a period of time that was not short: The two sides struggled inside and outside the gate for about 10 minutes. Then, the participants of the assembly succeeded in forcing open the gate and entered the Forecourt. The gate could be closed again only after police reinforcement had arrived.[75]

80. Mr Leung SC took the view that as far as the offences are concerned, the motives and purposes of the respondents do not constitute exceptional circumstances. However, the trial magistrate regarded the present case as different from ordinary criminal cases and therefore adopted a wrong basis for sentencing. Mr Leung SC pointed out that in previous decided cases[76], the courts emphasized that the courts would not condone using the exercise of the right to freedom of speech or assembly as a pretext for behaving in a way that disregarded the law and social order. He also submitted that in *R v Caird* (1970) 54 Cr App R 499, the court held that in sentencing cases of unlawful assembly or riot, proper weight should be given to the factor of public interest. Mr Leung SC attached to his written submission a list of decided cases that were related to sentencing in unlawful assembly offences. He pointed out that the courts had used imprisonment as a form of punishment in cases where the defendant broke the law in the course of expressing his opinions.

81. Mr Leung SC submitted that the respondents did not have genuine remorse and were not suitable for community service orders. From the probation officer's reports, it can be seen that both the 1st and the 3rd respondents claimed they did not regret for what they had done because what they did was for social justice. As for the 2nd respondent, although he said he felt sorry and regret for the fact that some security guards were injured due to imperfections in the organisation of the demonstration, and claimed that when he was on the stage he had asked the people in the assembly to use peaceful, rational and non-violent means to break through and enter the Forecourt, as the trial magistrate pointed out, the 2nd respondent knew full well that police officers were actually preventing the assembly participants from doing what they wanted. If they still insisted to act according to what he said, i.e. to enter the Forecourt together, it would certainly lead to physical bumping and pushing between people of the two sides and might even result in bodily injuries. Therefore, the applicant considered that the 2nd respondent's statement about "peace, rationality and non-violence" was something he affirmed with his lips but denied in his heart and that he did not have genuine remorse.

82. Mr Leung SC submitted that in view of the aggravating factors in the present case as well as the attitude of the 3rd respondent, it was also wrong in principle to impose a suspended sentence on him.

83. As regards the 1st respondent, he was only 17 years of age at the time he committed the offence. By virtue of section 109A of the Criminal Procedure Ordinance, no court shall sentence him to imprisonment unless the court is of the opinion that no other method of dealing with him is appropriate. Mr Leung SC suggested that relevant reports, such as detention centre, training centre and/or rehabilitation centre reports should be called for to assist the court in deciding on an appropriate sentence.

84. Lastly, Mr Leung SC submitted that the 1st respondent had served the number of hours of community service required by the order, and the 2nd respondent had also served his 120 hours of community service; therefore, if the court allowed this review and sentenced the respondents to immediate imprisonment, the length of the prison term should be adjusted downwards in accordance with that fact.

G. Respondents' stance

G1. Submission of the 1st respondent

85. Mr Randy Shek, counsel for the 1st respondent, submitted that when the court considers whether to impose a deterrent sentence, the court needs to consider not just the seriousness of the offence but also the seriousness of the conduct involved in the case. An appropriate sentence should be arrived at after taking into account factors such as the number of participants, the respondent's conduct, the collective conduct of the assembly participants, the extent of bodily injuries and property damage, the duration of the assembly, the effect on social order, as well as the nature of the assembly itself. Mr Shek emphasized that the seriousness of the offences is already reflected by the maximum sentence and the fact that prosecution can be instituted by way of indictment. Considerable flexibility in prosecution and sentencing has been given to the prosecution and the court.

86. Mr Shek sought to distinguish the present case from those cases cited by the applicant in which imprisonment sentences were imposed. He argued that the degree of violence involved in the present case is different from that in *Tai Chi Shing*. The security guards in the present case were only slightly injured and those injuries were not caused deliberately by the 1st respondent. Mr Shek also submitted that the 1st respondent is different from the defendant in *HKSAR v Yip Po Lam* [2014] 2 HKLRD 755. Although the 1st respondent disapproves of the charge, he nonetheless is willing to bear the legal responsibility and he respects the court's sentence. The 1st respondent climbed over the fence but took care not to injure others, and did not have any bodily contacts with police officers. He is different from the appellant in *Chan Sum v The Queen* [1968] HKLR 401, who attacked a police officer with a chair.

87. Mr Shek contended that there is no evidence in the present case that the respondents committed the offences because of the Occupy Central movement, nor is there any evidence that their committing the offences was to provoke people to join in the movement. Thus, no consideration should be given in the sentencing exercise to political incidents that happened subsequently. He submitted that the trial magistrate had comprehensively considered the backgrounds of the respondents, their motives, their conduct when committing the offences and its effects, the comparison between the present case and subsequent political incidents, the absence of evidence which showed that the respondents took part in injuring or intended to injure the security guards, and the regrets shown by the respondents. Mr Shek argued that the trial magistrate did not overlook the seriousness derived from the corporate nature of the present case.

88. Mr Shek stressed that it can be seen from the 1st respondent's Community Service Order Suitability Report that the 1st respondent was a 17-year-old young man of good character who was eager to fight for justice. Therefore, the decision not to impose a deterrent sentence on him was a principled one supported by good reason. Regarding the aggravating factors advocated by the applicant, Mr Shek submitted that on the basis of the trial magistrate's findings of fact in respect of Charge(1), there was no evidence that when the 1st respondent was speaking on stage, he already knew that the security guards would actually take action to stop them. The applicant therefore cannot accuse the 1st respondent of engaging in unlawful assembly with premeditation and preplanning.

89. Mr Shek averred that unlawful assembly is different from riot in that violence is not necessarily involved in the former. If the conduct of a defendant who commits unlawful assembly involves violence, that is an aggravating factor, but if it is other people who use violence, then it ought not to be an aggravating factor. He considered that even if there is premeditation and there are many participants, and they conduct themselves in a disorderly, intimidating, insulting or provocative manner, the resulting breach of the peace will still be lesser than that caused by actual violence. When considering sentence, the court should therefore take into account the nature and seriousness of the offence.

90. Regarding the consideration given by the trial magistrate to motive, he submitted that, from the context of her reasons for sentence, it can be seen that it is simply a factor which any criminal court will consider when it comes to sentencing. The trial magistrate committed no error of principle by taking into account the ideals and motives of the respondents. What she did did not deviate from the general principles of sentencing. He considered that the prosecution, by putting the impact to public order above everything else, have disregarded the general sentencing approach which is well established.

91. Mr Shek submitted that the respondents had been cooperative during the arrest, investigation and the trial process and they respected the verdicts of the court. They admitted what they had done and bore the legal consequences. They did not act like those who showed no remorse by their refusal to admit having done anything against the law. He submitted that if the stance of the prosecution is that the 1st respondent cannot be considered as being remorseful until he indicates that he regrets for participating in social movements, then it is forcing him to abandon his ideals publicly, which amounts to insulting him publicly.

92. Mr Shek asserted that if community service order is not a suitable option, the court may still consider a suspended sentence, which is not an approach without support in previous cases[77]. Mr Shek emphasized that the 1st respondent committed the offence out of his concerns for social issues, his passion to politics and that what he did was to put his ideals into action, not injuring other people for personal gains. Mr Shek submitted emphatically that the 1st respondent adhered to his ideals and at the same time expressed his regrets for causing injuries to the security guards, and that he was willing to bear the legal consequences. Therefore, despite the fact that he did not publicly express his remorse, the various factors mentioned above are sufficient to be exceptional circumstances on the basis of which the court can consider a suspended sentence.

93. Lastly, he agreed that according to section 109A of the Criminal Procedure Ordinance, unless the court is of the opinion that no other method of dealing with the 1st respondent is appropriate, no court shall sentence him to imprisonment. Nevertheless, he took the view that neither detention centre, training centre nor rehabilitation centre is a suitable option, because the 1st respondent is mature and has a talent for leadership. He has made achievements in the democratic movement and has not given up his studies. Therefore, he is not a youth at risk who needs to learn discipline through a detention centre, nor does he need to complete his studies, acquire some skills or cultivate his good character in a training centre, or receive counselling in a rehabilitation centre. He submitted that the court is not obliged to follow section 109A.

G2. Submission of the 2nd respondent

94. Mr Michael Chai and Ms Priscilla Chow, representing the 2nd respondent, submitted that the corporate nature itself is already one of the key elements in unlawful assembly-related offences; therefore it is not an aggravating factor and that even though the offence is more serious than "behaving in a disorderly manner in a public place", it does not mean that the court should come to the conclusion that a deterrent sentence is necessary to reflect the gravity of the offence.

95. Mr Chai submitted that there is a wide range of sentencing options available for the offence. Sentencing should be based on the gravity of the particular case and the culpability of the defendant. The decided cases clearly show that different punishments with different degrees of severity, ranging from immediate imprisonment to suspended sentence, community service order or just a fine, should be considered according to the circumstances of individual cases. Mr Chai emphasized that the trial magistrate had considered the overall circumstances, including the conduct of other participants and that the prosecution did not produce any evidence which could show any relation between this case and Occupy Central. He submitted that the trial magistrate regarded the not-very-violent conduct engaged in by the respondents as a relevant factor in sentencing, but she did not say that it was a mitigating factor.

96. Regarding the issue of premeditation raised by the prosecution, Mr Chai submitted that it is inconsistent with the finding made by the trial magistrate, namely, the focus in this case was whether the assembly participants could enter the Forecourt smoothly, which in turn was dependent on whether or not the security guards/police officers would actually take action to stop them. Therefore, the action discussed in the meeting held at 8 p.m. on the night in question did not amount to unlawful assembly and for this reason, the trial magistrate found that the appeal made by the 1st respondent did not amount to inciting others to take part in an unlawful assembly. Mr Chai emphasized that the turning point in this case was the moment when the 2nd respondent, knowing that the police officers had taken actual action to stop them, called on the assembly participants to enter the Forecourt together. Therefore, based on this finding, the unlawful assembly came into existence abruptly at the moment the assembly participants encountered actual obstruction. It was not premeditated. Mr Chai submitted that the 2nd respondent did not take part in the 8 p.m. meeting, therefore he did not premeditate the commission of the offence.

97. Mr Chai referred to *HKSAR v Wong Yuk Man* [2015] 1 HKLRD 76 and submitted that the court would not blindly hold the defendant criminally responsible for all the unreasonable acts committed by other assembly participants. He also submitted that *Leung Kwok Hung* and the present case could not be regarded as comparable as there were the factors of "intentional trouble-making" and "intentionally disruptive behaviour" in the former case. As can be seen from various cases on unlawful assembly, even though the facts involved pushing and pulling Mills barriers, storming into the hall of a building, pressing against and pushing the police cordon, knocking down somebody and even causing injuries to others, depending on the circumstances of individual cases, immediate imprisonment may not be necessary. Mr Chai submitted that the applicant has no basis to complain that the trial magistrate erred in principle when exercising her discretion or that the sentences were manifestly inadequate.

98. Mr Chai submitted that, generally, in sentencing the court must take into account factors like the defendant's motive and purpose of committing the offence, and that the trial magistrate's comment that the motive and the purpose involved in the present case were utterly different from those in other ordinary cases was correct. He pointed out that the defendants in *Tai Chi Shing* and *Leung Kwok Hung* either created disturbance deliberately or held a demonstration in name but in fact the purpose was to damage things. They were different from the respondents. Mr Chai emphasized that regardless of whether there were any exceptional circumstances, it is not unusual for the court, in the exercise of its discretion, not to impose a sentence of imprisonment after considering the defendant's motive and purpose of committing the offence.

99. Mr Chai did not agree with the applicant's allegation that the trial magistrate "commended and glorified" unlawful acts. As for the applicant's submission that, on the authority of cases including *Caird,* proper weight should be given to the public interest, Mr Chai submitted that it was emphasized in those cases that when considering public interest, the interests and the personal circumstances of the defendant should not be overlooked, that a balance should be struck, and that a more lenient approach could be more beneficial to the public.

100. Regarding the applicant's allegation that the 2nd respondent "affirmed with his lips but denied in his heart", Mr Chai submitted that the trial magistrate found that the 2nd respondent was reckless but did not purposely or intentionally cause injury to others. Whether there was anything which he "affirmed with his lips but denied in his heart" at the time he committed the offence has nothing to do with whether he was remorseful at the time of sentencing. The applicant further submitted that the 2nd respondent's promise that he would express his opinions in a peaceful, rational and non-violent way in future is only another expression of his attitude of "affirmed with his lips but denied in his heart". Mr Chai replied that even though one is found to have acted in a manner inconsistent with the principle of "peace, rationality and non-violence", it does not mean that he will not reflect on his conduct and correct his mistakes. Moreover, it was recorded in the Community Service Order Suitability Report that the 2nd respondent intended to go into the Legislative Council to express his opinions in a lawful manner.

G3. Submission of the 3rd respondent

101. Mr Edwin Choy and Mr Joe Chan, representing the 3rd respondent, submitted that the prosecution had failed to prove that the facts of the present case were "very violent"; neither did the trial magistrate regard the not "very violent" conduct of the respondents as a mitigating factor. They took the view that even if the applicant is correct as regards the gravity of the offence of unlawful assembly, the applicant has still failed to show that the sentences in the present case were manifestly inadequate.

102. In reply to the two aggravating factors referred to by the applicant, Mr Choy submitted that the trial magistrate had accepted what the 3rd respondent said, i.e. according to his previous experience, the police would allow the assembly to proceed without actually stopping it; and even if was stopped, the participants would abide by the principle of non-violence. In the event, the assembly was stopped, and the assembly participants were in a deadlock with the security guards, and the 3rd respondent finally chose to climb over the fence. None of these were within the 3rd respondent's expectation. Mr Choy did not agree that the 3rd respondent committed the offence with premeditation.

103. Regarding the applicant's submission that a deterrent sentence should be imposed because some security guards were injured, Mr Choy replied that the authorities do not support this submission. The court should impose sentences of different degrees of severity according to the circumstances of each case. Mr Choy asserted that in the sentencing process the trial magistrate had carefully considered the injuries of the security guards. As to the cases of *Tai Chi Shing* and *Leung Kwok Hung*, Mr Choy submitted that the factors of intensive violence and intentionally stirring up trouble featured in those two cases, and it is not right therefore to equate them with the present case.

104. Mr Choy also submitted that the trial magistrate did not limit her consideration to just the backgrounds and personal interests of the respondents and that the sentences did not indicate that the magistrate had disregarded the public interest. The magistrate considered that if a young person, who committed mistakes in the course of expressing his opinions, is sentenced to immediate imprisonment, that would have a disastrous effect on him. He said such approach was fair and reasonable.

105. Regarding the issue of remorse, Mr Choy referred to the passages about the various ways in which remorse may be demonstrated in *Cross and Cheung on Sentencing in Hong Kong*, p.397. He submitted that even though the 3rd respondent regarded what he did was for the benefit of society and did not regret for it, he sincerely apologized to the injured security guards, had been cooperative during the investigation and the trial, and showed respect to the court all along; such behaviour was indicative of remorse.

106. In summary, Mr Choy submitted that the sentence of three weeks' imprisonment suspended for one year imposed on the 3rd respondent was not manifestly inadequate and that the trial magistrate did not err in principle.

H. Sentencing principles

107. I shall, first of all, set out the sentencing principles applicable to this and other similar cases of unlawful assembly involving violence, and then discuss whether or not the sentences imposed on the respondents by the trial magistrate were appropriate.

108. Generally speaking, the court will take into account the following factors in sentencing:

(1) Protecting the public – protect the public from the adverse effects of the offence in question;

(2) Meting out penalties – the sentence imposed ought to be commensurate with the offence committed, i.e. one that reflects the seriousness of the offence and the culpability of the offender;

(3) Open condemnation – the sentence ought to reflect the social disapproval of the offence and the criminal conduct of the offender;

(4) Deterrence – prevent the offender from re-offending and prevent other people from committing the offence;

(5) Compensation – the sentence may require the offender to give compensation to the victim of the offence as a form of remedy or recompense;

(6) Rehabilitation and reform – one of the objectives of sentencing is the rehabilitation and reform of the offender; it is hoped that after serving the sentence, the offender will be law-abiding.

When faced with different offences or different facts, the court will consider whether a particular sentencing factor is applicable and if so, how much weight it should be given. In deciding how much weight to be attached to a particular sentencing factor, the court will, generally speaking, consider the nature and seriousness of the offence, the seriousness of the facts surrounding the commission of the offence, the consequences of the offence, the offender's motive for committing the offence, and the personal circumstances of the offender, etc. Even if it is for the same offence, if the facts and circumstances of the case are different, the weight given to the same sentencing factor by the court may be different. It is necessary for the court to assess fully and comprehensively all the circumstances of the case, and the seriousness of the facts surrounding the commission of the offence, before giving proper weight to the applicable sentencing factors. A sentence that is commensurate with the case is then to be imposed on the offender.

109. The same basic sentencing principles apply to unlawful assembly. But this is only the starting point. In order to better understand the sentencing principles pertaining to this and other similar cases of unlawful assembly involving violence, a more thorough discussion is necessary. I shall begin with the most basic relevant legal concepts.

H1. Basic rights and the obligation to abide by the law

110. In a civilized society where the rule of law reigns, its citizens are entitled to the fundamental rights as protected by the law, but they must at the same time obey the law. They must exercise their rights in a lawful manner, and must not disregard the obligation to obey the law in the name of exercising their rights. This principle of reciprocity balances the rights of citizens according to the law and their obligation to abide by the law. Although the underlying rationale of this principle is self-evident, it is something worth reiterating. On the one hand, if the individual's rights are over-emphasized at the expense of observing the law, people will easily become self-serving, with little regard for other people's rights and the overall interests of the society, so that the society is prone to fall into disarray. On the other hand, if observing the law is over-emphasized at the expense of the rights of citizens, the social environment will easily become harsh, which is not conducive to the progress and development of either the individuals or the society as a whole. Due consideration must be given to both the entitlement to rights and the observance of the law; a fair balance between them has to be struck.

111. In Hong Kong, the reciprocity principle of the entitlement to rights on the one hand, and the necessity of compliance with the law and exercising the rights in accordance with the law on the other, is embodied in the articles on the fundamental rights and duties of residents in Chapter III of the Basic Law. Articles 25 to 39 of Chapter III set out the various rights enjoyed by all Hong Kong residents, whereas Article 42 stipulates that all Hong Kong residents shall have the obligation to abide by the laws in force in Hong Kong. Therefore, it is expressly prescribed in the Basic Law that when exercising their rights guaranteed by law, all Hong Kong residents shall abide by the law. Hong Kong residents must adhere to the law in exercising their rights.

112. In construing the articles on fundamental rights in Chapter III of the Basic Law, the applicable legal principle is that those articles shall be given a generous interpretation whereas the restrictions on rights shall be interpreted narrowly, so as to give full effect and protection to the fundamental rights. However, such a principle of construction shall not be misunderstood as indicating that the rights of the residents are unrestricted. When exercising their rights, the residents are still subject to the restrictions imposed by law – they shall still abide by the law in exercising their fundamental rights and must exercise their rights in a lawful manner.

H2. Restriction on the right of assembly imposed by law

113. The present application for review is about how to exercise the freedom of assembly lawfully[78]. The freedom of peaceful assembly is guaranteed by Article 27 of the Basic Law and Article 17 of the Hong Kong Bill of Rights Ordinance[79]. And the aforesaid principle of reciprocity under which residents shall abide by the law when enjoying their rights is also applicable. Because this reciprocity principle is the most fundamental legal basis for determining the criminality of and meting out sentences for offences similar to that of the present review, it is necessary to explain how this principle is applied to this kind of cases.

114. The importance of the freedom of assembly is undisputable. It is closely associated with the freedom of speech. Both are key elements indispensable to the building of a civilized society. They are essential to social stability and progress. As stressed by the Court of Final Appeal in *HKSAR v Leung Kwok Hung* (2005) 8 HKCFAR 229 at [2], the ability to resolve conflicts, tensions and problems through open dialogue and debate is of the utmost importance in a democratic society. The freedom of assembly and freedom of speech enable such dialogue and debate to take place with vigour. These freedoms also enable citizens to hold discussion on different issues, especially controversial ones; they enable citizens to voice their criticisms, air grievances and seek redress on views and positions they disapprove.

115. However, the freedom of assembly has never been absolute. All who take part in an assembly must never ignore their obligation to obey the law, act as they please, and then excuse their so doing in the name of exercising their rights to expression and assembly. They shall and can only hold an assembly within the perimeter set by the law in exercising their rights to expression and assembly.

116. It has always been the case that the law only recognizes and protects the right to peaceful assembly. This has long been provided for in provisions safeguarding the freedom of assembly themselves. Article 17 of the Hong Kong Bill of Rights Ordinance stipulates that:

> "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."

Thus, what Article 17 recognizes is the right to peaceful assembly only, and on this right it has set out certain restrictions, including those for preserving public safety and public order, and for protecting the rights of others. As noted above, although the court would apply a narrow interpretation to those restrictions in order to give full effect and protection to the right to peaceful assembly, citizens must still exercise that right in a lawful manner.

117. In *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837, after surveying the relevant foreign and local authorities, Ribeiro PJ summed up the boundaries imposed by law on the exercise of the right to assembly, including those boundaries that are found in statutory provisions guaranteeing that right, as follows:

> "38. [The law] allows a line to be drawn between peaceful demonstrations (where, as noted above, full rein is given to freedom of expression) and conduct which disrupts or threatens to disrupt public order, as well as conduct which infringes the rights and freedoms of others…
>
> 39. Once a demonstrator becomes involved in violence or the threat of violence – somewhat archaically referred to as a 'breach of peace' – that demonstrator crosses the line separating constitutionally protected peaceful assembly and demonstration from unlawful activity which is subject to legal sanctions and constraints. The same applies where that participant crosses the line by unlawfully interfering with the rights and freedoms of others.
>
> 40. The law therefore imposes bounds on the constitutionally protected activity of peaceful assembly…"

The restriction of "not to disrupt or threaten to disrupt public order or breach of peace" is intended to protect public order; whereas the restriction of "not to unlawfully interfere with the rights and freedoms of others" is intended to give respect and protect the lawful rights and freedoms of others. Both are the hallmarks of a civilized society where the rule of law reigns.

118. Society is prone to descend into anarchy if public order is not preserved; once such a situation arises, the harm done to both the society and its citizens cannot be understated. For the society as a whole, preserving public order is indispensable to societal safety and public peace. Lawlessness in anarchic situations undermines social stability and hampers continuous development of a society. For the general public, preserving public order helps create a safe and stable social environment to enable individuals to exercise their rights (including human rights of which the freedom of assembly and expression is one), express their views and pursue their goals. In fact, the above-mentioned rights themselves will be lost in situation of anarchy if public order is not preserved. That is exactly the rationale underlying Article 17 of the Hong Kong Bill of Rights in only safeguarding peaceful assembly: the legal protection of the right of assembly is effective only in a society where public order is preserved. Because preserving public order is so important to the society and the general public, the law must always remain vigilant to ensure that the public order in Hong Kong is not under threat. That does not mean that the law is only concerned about public order, or that it will ignore the rights and freedoms enjoyed by citizens in accordance with law, lest the society is likely to descend into a suppressed state, which would impede Hong Kong's development and progress and deprive its citizens of their various freedoms and rights. The law must give consideration to both, and to strike a balance between the right of assembly and the need to preserve public order. That balance is embodied in the basic premise that assemblies must be held peacefully without disrupting or threatening to disrupt public order, or without involving any violence or threat to use violence.

119. In a civilized society, it is common for different people or sectors to have different opinions and different aspirations for a wide range of interests and rights. Therefore, its citizens should foster mutual respect and mutual understanding, and make mutual allowances among themselves so that different people or sectors are able to exercise their rights and express their views peacefully and lawfully all at the same time. This principle of mutual respect, understanding and allowances is a hallmark of any sophisticated, progressive, civilized and diverse society. The law must ensure the continued and effective operation of that principle in Hong Kong so that different people and sectors can get along peacefully and lawfully with one another, regardless of their divergent opinions and views. It would also enable people of different views to hold sensible and reasonable discussions over controversial issues in an atmosphere of mutual respect.

120. The participants of an assembly will lose the protection of the law on exercising their right to assembly once they overstep the bounds laid down by law, and they shall have to bear the consequences and be sanctioned by the law. The offenders cannot say that the law deprives them of or suppress their freedom of assembly and expression by sanctioning them. The reason is that the law has never allowed them to exercise these freedoms through unlawful means or ways.

121. It is an offence for the participants of an assembly to disrupt or threaten to disrupt public order, or use or threaten to use violence, even if what they started off doing was to hold a peaceful and lawful assembly. As the case may be, the offences they might have committed include a range of public order offences such as unauthorized assembly[80], disorder in public places[81], unlawful assembly[82] and riot[83], etc. There can also be other additional offences, such as criminal damage, common assault, or obstructing police or public officers, etc. In sentencing cases of disrupting public order, especially those which involve violence, the court must bear in mind the importance of preserving public order. These sentences shall reflect the determination of the law in preserving public order and serve as a clear message to the society and the public that the court will in no way allow the public order to be disturbed or disrupted unlawfully.

H3 Gravamen of the offence of unlawful assembly

122. The offence concerned in the present review is unlawful assembly, which is a statutory offence prescribed by section 18 of the Public Order Ordinance:

> "18. Unlawful Assembly
>
> (1) When 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace, they are an unlawful assembly.
>
> (2) It is immaterial that the original assembly was lawful if being assembled, they conduct themselves in such a manner as aforesaid.
>
> (3) Any person who takes part in an assembly which is an unlawful assembly by virtue of subsection (1) shall be guilty of the offence of unlawful assembly and shall be liable -
>
> (a) on conviction on indictment, to imprisonment for 5 years; and
>
> (b) on summary conviction, to a fine at level 2 and to imprisonment for 3 years."

123. In sentencing, the court will consider the gravamen of the offence with which an offender is charged. The gravamen of the offence of unlawful assembly is the participants' acting in large numbers and using those large numbers to achieve their common purpose: see *Caird*, per Sachs LJ at pp. 504-505. The offence of unlawful assembly in *Caird* is a common law offence, but the gravamen of that offence is the same as the offence in section 18 of the Public Order Ordinance: see *Leung Kwok Wah*, per Lam JA (as he then was) at [18]-[22].

124. In the more recent case of *R v Gilmour* [2011] EWCA Crim 2458, Hughes LJ observed:

> "It is an unavoidable feature of mass disorder that each individual act, whatever might be its character taken on its own, inflames and encourages others to behave similarly, and that the harm done to the public stems from the combined effect of what is done en masse."

In *R v Blackshaw* [2001] EWCA Crim 2312, Lord Judge, the Lord Chief Justice, took a similar view. In describing the state of mind of the offenders in a violent unlawful assembly, he said at [9]:

> "The reality is that the offenders were deriving support and comfort and encouragement from being together with other offenders around them. Perhaps too, the sheer numbers involved may have led some of the offenders to believe that they were untouchable and would escape detection."

125. Although the charges in *Gilmour* and *Blackshaw* were not unlawful assembly, but were other offences of disrupting the public order, the fact that the offenders were trying to achieve their common goal by sheer numbers, is a characteristic common to all offences of massive public disorder. Thus the above observations by Hughes LJ and Judge LCJ are equally applicable to the section 18 offence.

126. Furthermore, we know from experience that, when a large number of demonstrators are gathered, emotions are likely to run high, or the crowd may even become agitated, so that these situations have the inherent risk of breaking out into violence. Occasionally, unruly elements may also be present, who would seize the opportunity to achieve the very objective of fomenting violence. Such risks cannot be overlooked: see *The Queen v To Kwan-hang* [1995] 1 HKCLR 251, per Macdougall VP at p.257. It follows that the provision on unlawful assembly under section 18 is a necessary preventive measure, designed to nip in the bud the serious consequences which may arise from a breach of the peace or possible breach of the peace: see *Leung Kwok Wah* per Lam JA at [40].

127. 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. That is to say, a sentence must not only seek to prevent the offenders from reoffending, but also to give a warning to deter others from violating the law by breaking and disrupting public order in like manner. The weight that the court should accord to this factor of deterrence depends on the factual circumstances of the case. If the case is sufficiently serious, it is necessary for the court to impose a deterrent sentence.

H4. Disrupting public order with violence

128. Under the rule of law, the law will not and cannot tolerate any act of violence or threat of violence. Those engaged in protests must not deploy violence against anyone: *R v Asim Alhaddad & Others* [2010] EWCA Crim 1760, per Thomas LJ at [14]. Those who take part in an assembly carry the clear responsibility not to put the public at risk by engaging in disorderly or violent acts: *Gilmour,* Hughes LJ at [16].

129. It is an aggravating factor if the offenders of an unlawful assembly inflicted violence, or threatened to use violence. In such a case, the sentence must provide adequate punishment and deterrence: cf. *Alhaddad*, per Hughes LJ at [15] and [16]. For the purpose of the administration of justice, it is for the sentencing courts to ensure that the public is protected, so it is necessary to provide for both punishment and deterrence when passing sentence: cf. *Blackshaw*, Lord Judge at [4]. In other words, when sentencing for the offence of unlawful assembly involving violence, the court will place great weight on the factors of punishment and deterrence.

130. For an unlawful assembly involving violence, the sentencing court will take into account an offender's individual circumstances. However, for the purpose of punishment and deterrence, an offender's personal welfare will not be a paramount consideration when compared with the public interest: *Caird*, per Sachs LJ at p.508. In other words, when the court considers what is an appropriate sentence in the overall circumstances is, little weight will be given to an offender's personal circumstances and rehabilitation. In extreme circumstances, no weight will be given at all.

131. When an offender used violence or, worse, engaged himself in wanton and vicious violence, even if he claimed he committed the offence out of deeply held moral or political convictions, that would not constitute a mitigating factor in favour of a lenient sentence. The major factor for the court to consider is the degree of violence, and the extent to which public peace was affected: *Caird*, per Sachs LJ at p.506. The rationale behind this is that, in a civilized society where the rule of law prevails, there must exist some lawful ways or means by which people can promote their idea or advocate their cause; hence the pursuit of their idea or cause must not be used as an excuse for resorting to unlawful violence. Likewise, it is not open to offenders to use the excuse of "being compelled by circumstances" to resort to violence. This so-called compulsion does not amount to a mitigating factor in favour of a lenient sentence. If these two excuses were to be accepted as mitigating factors or reasons for a lenient sentence, self-righteous individuals would feel free to do whatever they want, since they would need to bear insignificant or, in their eyes, even negligible legal consequences. In that case, public order is prone to collapse.

132. What the offenders think of people holding different views is no excuse for using violence on those people. As Sachs LJ emphasized:

> "Any suggestion that a section of the community strongly holding one set of views is justified in banding together to disrupt the lawful activities of a section that does not hold the same views so strongly or which holds different views cannot be tolerated and must unhesitatingly be rejected by the courts."

133. As the gravamen of unlawful assembly is that the offenders pursued their common purpose by weight of their sheer numbers acting together, generally speaking, a convicted person cannot advance as a mitigating factor the plea that the other offenders are more culpable than he is. As Sachs LJ explained in *Caird*, at p.509:

> "The next point to be mentioned is what might be called the 'Why pick on me?' argument. It has been suggested that there is something wrong in giving an appropriate sentence to one convicted of an offence because there are considerable numbers who were at the same time committing the same offence, some of who indeed, if identified and arrested and established as having taken a more serious part, could have received heavier sentences. This is a plea which is almost invariably put forward where the offence is one of those classed as disturbances of the public peace – such as riots, unlawful assemblies and affrays. It indicates a failure to appreciate that on these confused and tumultuous occasions each individual who takes an active part by deed or encouragement is guilty of a really grave offence by being one of the number engaged in a crime against the peace……
>
> If this plea were acceded to, it would reinforce that feeling which may undoubtedly exist that if an offender is but one of a number he is unlikely to be picked on, and even if he is so picked upon, can escape proper punishment because others were not arrested at the same time. Those who choose to take part in such unlawful occasions must do so at their peril.
>
> …Any participation whatever, irrespective of its precise form, in an unlawful assembly derives its gravity from becoming one of those who, by weight of numbers, pursued a common and unlawful purpose. The law has always leant heavily against those who, to attain such a purpose, use the threat that lies in the power of numbers."

134. I would reiterate that for cases of unlawful assembly involving violence, the main consideration in sentencing is for the offenders to be punished, and for others to be deterred from violating the law by breaking and disrupting public order in like manner. As to the offender's personal circumstances, regardless of how honourable he perceives his motive or reason for committing the crime to be, or whether he thinks the other offenders are more culpable than he is, they will, generally speaking, not be regarded as a strong mitigating factor in favour of imposing a lenient sentence.

H5. Facts pertinent to unlawful assembly involving violence

135. In deciding the appropriate sentence, it is necessary for the court to consider the facts surrounding the commission of the offence. In my judgment, the facts relevant to the offence of unlawful assembly involving violence are as follows:

(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.

Depending on the actual circumstances of each case, other additional facts pertaining to the offence may need to be taken into account.

H6. Community Service Order

136. Since community service order is a sentence that the lower courts would frequently pass on the offence of unlawful assembly, it is necessary to reiterate the relevant principles and explain how they are to be applied to cases of unlawful assembly involving violence.

137. Section 4 of the Community Service Orders Ordinance [84] provides:

> "4. Power to make community service orders
>
> (1) Where a person of or over 14 years of age is convicted of an offence punishable with imprisonment, the court which sentences him for that offence may make an order requiring him to perform, during the life of the order, unpaid work in accordance with this Ordinance for such number of hours, not exceeding 240, as may be specified in the order.
>
> (2) A community service order may be made against an offender—
>
> (a) in addition to any other sentence that the court imposes; or
>
> (b) instead of any other sentence that the court may impose, unless such other sentence is mandatory.
>
> (3) A court shall not make a community service order against an offender unless—
>
> (a) the offender consents to the making of such an order; and
>
> (b) the court is satisfied—
>
> (i) after considering a report by a probation officer about the offender and his circumstances and, if the court thinks it necessary, hearing a probation officer, that the offender is a suitable person to perform work under such an order; and
>
> (ii) that provision can be made for the offender to perform work under such an order.
>
> (4) More than one community service order may be made by one or more courts in respect of the same offender so as to be in force at the same time provided that the total number of hours that remain to be spent by the offender in performing work under the orders does not at any time exceed 240.
>
> (5) Before making a community service order the court shall explain to the offender in ordinary language—
>
> (a) the purpose and effect of the order (and in particular the conditions and requirements that may be specified in it under section 5(1) and the requirements of section 6(1));
>
> (b) the consequences which may follow under section 8 if he fails to comply with any of those conditions and requirements or under section 9 if he commits an offence during the period of the community service order; and
>
> (c) that the court has under section 10 the power to review the order on application either of the offender or of the supervising probation officer."

138. A community service order provides for both retribution and rehabilitation. Because of the element of retribution, the order is not necessarily a lenient option. As Chan CJHC (as he then was) elaborated in *Secretary for Justice v Li Cheuk Ming* [1999] 1 HKLRD 63, at page 65 E to G:

> "[A CSO] comprises the element of retribution as well as the function of rehabilitation. Such type of sentence is punitive to the extent that it imposes restrictions on the offended and curtails his free time. Besides, it is rehabilitative in that when performing the service, the accused can 'have the opportunity for character building, restoring their personal dignity, and improving their standing in the community' and will be able 'to establish constructive interests, develop worthwhile patterns of behavior."

139. A community service order also provides for remedy. An offender contributes to the society through unpaid work so that the public affected by the damage caused by the offender's crime to the society would benefit.

140. There are legal opinions that a person should meet the following criteria before being sentenced to a community service order:

(1) be a first offender, or a person with a 'light' criminal record;

(2) come from a stable home background;

(3) have a good work record – orders are not designed to encourage the lazy or to show the idle the errors of their ways;

(4) be in employment, or have a real prospect of employment;

(5) have shown genuine remorse;

(6) present no more than a slight risk of re-offending.

See *R v Brown* (1981) 3 Cr App R (S) 294, at p. 295.

141. These six criteria or factors provide a useful and working guideline, and are frequently found in the majority of cases where community service orders were deemed appropriate. However, when the court is considering the suitability of a community service order, not all six factors have to be present; nor should the relevant consideration be restricted to these six factors only: *HKSAR v Wan Ka-kit* [2006] 3 HKLRD 9, per Stuart-Moore VP at [27]. Stuart-Moore VP continued to say:

> " 28. The Court, in other words, was not restricting the factors to be taken into account for the purposes of making a community service order to the six which they had mentioned. Nor was it insisting that all six factors should necessarily be present, although we would think that in the vast majority of cases where such an order was appropriate most, if not all, of these factors would be present."

A relevant factor which is not mentioned in *Brown*,but is often present is the young age of an offender.

142. A community service order is often regarded as an alternative sentencing option to custodial sentence. Nonetheless, for a serious offence which clearly calls for a deterrent sentence, even if the offender is suitable for a community service order, it is generally not appropriate to impose one: *HKSAR v Wong Yiu Kuen* [2002] 1 HKLRD 712, per Mayo VP at pp. 714-I to 716-D; and pp. 717-H to 718-A. For instance, for some years, our courts have emphasized that bribery and corruption are offences that cannot be tolerated and would warrant deterrent sentences, and that the community service order is not an appropriate option: *HKSAR v Pao Chin Hong Andy* [2014] 1 HKLRD 600, per Cheung JA at [35]. In *HKSAR v Chiu Chun Wai & another* [2008] 1 HKC 306, Stuart-Moore VP at [19] said that for thefts on a large scale, community service order should never have been considered as a viable alternative to a custodial sentence. Also, in *Secretary for Justice v Buk Chui Ying* [2008] 5 HKLRD 185, a case involving serious theft, Stuart-Moore VP at [25] held that there was no need to look beyond the gravity of the offence to see that community service order was never a sentencing option.

143. A case close to the offence of unlawful assembly involving serious violence is the case of *Alhaddad*. In that case, the English Court of Appeal held that in a case involving serious and violent disorder on a large scale, a community service order is not an appropriate sentence, and that even if an offender pleaded guilty, a custodial sentence is required: per Thomas LJ at [45].

144. Even where the offence is serious, if there are very exceptional circumstances, the community service order may still be a sentencing option. In *Li Cheuk Ming*, Chan CJHC said at p. 66-I:

> "We opine that exceptional circumstances are mainly judged on the basis of degree and common understanding. Generally speaking, exceptional circumstances can be categorized into personal exceptional circumstances, exceptional circumstances relating to the nature of the offence, and exceptional circumstances relating to consequences. The definition of exceptional circumstances varies from case to case. The circumstances are usually very extreme or it could attract an immediate outpouring of public sympathy."

145. However, in serious cases, the offender's personal circumstances do not normally constitute exceptional circumstances: *Pau Chin Hung Andy,* per Cheung JA at [36(1)]. In other words, the offender's personal circumstances must be extremely exceptional before the court may consider if a community service order is to be preferred to a custodial sentence.

146. The court has always considered genuine remorse as a precondition for receiving a community service order: *Wong Yiu Kuen*; in *Buk Chui Ying* per Stuart-Moore Ag CJHC at [22]-[25]; in *Pau Chin Hung Andy* per Cheung JA at [36(5)]. If no genuine remorse is demonstrated, the court would normally refuse to make a community service order.

147. Genuine remorse means that the offender acknowledges that he has committed an offence and shows remorse for what he has done and caused. Thus a genuinely remorseful person will normally plead guilty and explicitly accept his legal responsibility. It follows that, in deciding whether the offender is genuinely remorseful, one of the major factors that the court would look for is whether he has entered a timely plea. If an offender pleads not guilty, and expresses his remorse only after he is tried and convicted, the court would carefully examine such claim. Generally speaking:

(1) Although the court will not reject his indication of remorse simply because he has contested his trial, neither will the court easily accept that he is genuinely remorseful for what he has done.

(2) If the offender considers that it is his right under the presumption of innocence to ask the prosecution to prove its case, or he elects to plead not guilty because he disputes that the conduct he has admitted constitutes an offence, he is of course entitled to do so. If he is convicted after trial, the court will not enhance his sentence because of his conduct of defence. However, it does not mean that the court must necessarily accept that although he has conducted his defence in such a manner, he is genuinely remorseful.

(3) If the offender considers that his prosecution is, in itself, not justified (as is the case of the 1st and 3rd respondents who consider that charging them with unlawful assembly was against their human rights) and maintains that particular view even upon conviction, that would be a clear indication that he is still refusing to accept what he has done is unlawful. In that case, the court will not accept his claim of genuine remorse, for such a claim contradicts his stance that the prosecution was unjustified.

(4) If the offender insists that he is innocent after being convicted, or expresses firmly that he has not done anything wrong, it is a further indication that he has no genuine remorse; even he says he is willing to accept legal responsibility and punishment, it cannot change the fact that he has no genuine remorse for the offence he has committed.

148. Showing respect to the court does not necessarily demonstrate genuine remorse because all parties before the court, be it the prosecution or the defence, have to respect the court and comply with the court's procedure. They do that as a matter of course and may have nothing to do with remorse. The offender cannot be considered as genuinely remorseful by merely saying that he respects the court if he shows no genuine remorse in other aspects.

149. Pursuant to section 4(3)(a) of the Community Service Orders Ordinance, another precondition for making the community service order is that the offender has to consent to the making of such an order. No matter how suitable the case is, the court shall not make a community service order if the offender does not consent to it.

150. As to whether it is appropriate to impose a community service order in a case of unlawful assembly involving violence, the sentencing court has to bear in mind the above sentencing principles. The court also needs to take into account the legal and sentencing principles mentioned above from H1 to H4. And naturally, it also has to carefully assess the actual circumstances of the case as a whole.

H6. Conclusion

151. Drawing the above discussions together, the sentencing principles which the courts should adopt in cases of unlawful assembly involving violence can be summarized as follows:

(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 weight[85]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.

152. Generally speaking, although the facts of minor cases are not that serious, the court is still required to ensure that the public order is effectively maintained. So there remains a need for sentences to be suitably deterrent. If all the six factors set out in *Brown* are present, or the facts of the case are suitable, a community service order can be an appropriate sentencing option. It is because the punitive factor in a community service order can be regarded as having a sufficient deterrent effect while its rehabilitative factor can help offenders, especially young offenders, turn over a new leaf.

153. For serious cases, the main purpose of the sentence is to punish and deter. So the overall consideration of the court should be inclined towards imposing an immediate custodial sentence. Unless there are very exceptional circumstances, and these circumstances should by definition be rare, sentences other than an immediate custodial sentence, including suspended sentences and community service orders, are not appropriate.

I. Sentences in this case

154. I now turn to discuss whether the sentences imposed on the respondents by the trial magistrate are appropriate.

155. The established legal principle is that the Court of Appeal would not easily grant the application for review of sentences made by the Secretary for Justice and increase the sentences imposed by the lower courts. The reasons include (1) the sentencing court, which has the advantage of hearing the case at trial hence a full understanding of the seriousness of the case, shall be able to impose appropriate sentences on the offenders in most cases; and (2) there being a presumption in *favourem libertatis* in law, the Court of Appeal would not be easily persuaded that a sentence passed by a lower court is manifestly inadequate. See *Attorney General v Lau Chiu-tak & Another* [1984] HKLR 23, and *Secretary for Justice v Wong Chi Wai* [2012] 3 HKC 361 for the relevant legal principles. Therefore, the Court of Appeal would only interfere with and increase a sentence if the Secretary for Justice is able to persuade the Court that the sentence imposed by the lower court is wrong in principle or is manifestly inadequate.

156. Based on all the relevant evidence, I am of the view that the facts of the present case were serious. It was a large-scale unlawful assembly, involving violence.

157. First, the respondents held a meeting before the incident and decided to make an unlawful entry into the Forecourt. Although the 2nd respondent left before the meeting finished, it was already within his knowledge that action would be taken to enter the Forecourt after the assembly. Although the respondents' plan of entering the Forecourt did not seem to be very elaborate, their act was not spontaneous or unpremeditated. From their pre-action distribution of the "Points to Note When Under Arrest" in advance, it is obvious that they knew the action was unlawful and the participants were running the risk of being arrested.

158. Second, even during the meeting, it was within the respondents' reasonable expectation that, in entering the Forecourt, there was a serious risk of the crowd clashing with the security guards and police officers, and from these clashes violence would inevitably arise.

(1) According to the respondents' evidence, they said they would firmly adhere to the principle of "peace, rationality and non-violence", and their pre-action assessment of the risk of clashing with security guards was low. However, the so-called "peace, rationality and non-violence" principle was, under the circumstances at that time, simply untenable. According to the 1st respondent, under the non-violent principle, one was meant to insist on moving forward – albeit that one would not take the initiative to cause bodily harm to others. Moreover, he admitted that there might be bodily bumping and jostling between the opposite sides if the movement of the protesters was obstructed. It implies that he knew their action might not be peaceful or non-violent. The 1st respondent said he did not consider that there was any risk of people getting injured even if there was bumping and jostling. His assertion is contrary to common sense.[86] According to the 2nd respondent, if the security guards tried to block their way with their bodies, the participants would, pursuant to the understanding of not using violence, stand still, thus not causing any injury to the security guards. However, no consensus was reached in the meeting regarding retreat, and the intention of the participants was not to stand still but to enter the Forecourt. Even if they were to remain stationary, they would still be in a standoff with security guards or police, and the risk of clashes remained. Furthermore, because no consensus was reached on the question of retreat, some of the participants might insist on gaining entry into the Forecourt. If they did, they would naturally be stopped by the security guards and police officers, so there would be clashes. According to the 3rd respondent, although there was no clear discussion on what should be done when the participants encountered resistance in the course of entering the Forecourt, the principle of "peace, rationality and non-violence" had been established. He therefore considered the risk of having bodily bumping and jostling with security guards and police officers to be very low. This statement of him is, as stated below, self-deluding.

(2) The 1st and 2nd respondents testified that judging from past experience in organizing activities in the Forecourt, all the security guards would do was give verbal advice, so it was not expected that any violence, pushing and jostling, or bodily clash would take place. However, the actual circumstances on the material night and the circumstances surrounding their previous activities were completely different; they are not comparable. It was self-deluding for them to have thought so.

(3) Counsel for the respondents argued that the trial magistrate had made findings of fact that the respondents did not plan to use violence before entering the Forecourt. But all counsel relied on was the fact that, when dealing with charge (1), the trial magistrate had stated that she could not be sure whether the 1st respondent had the necessary *mens rea*[87]. If one reads the verdict given by the trial magistrate carefully in its full context, one can readily see that she had not made the findings of fact as submitted by counsel.

(4) Judging from the actual circumstances at that time, namely, fences had just been erected at the Forecourt; the two previous applications made by HKFS for entering the Forecourt had been refused; all the gates of the fences had been closed for security reasons; a number of security guards were maintaining order in front of and behind the fences while the police were in the vicinity, any attempt to gain forcible entry into the Forecourt would certainly be met with resistance. Hence, prior to the incident, the respondents must reasonably be able to envisage that clashes with security guards and the police would be inevitable. Their so-called principle of "peace, rationality and non-violence" was only their wishful thinking and pure subjective wish; it was self-deluding and can even be described as "paying lip service".

159. Third, no matter what the subjective wish of the respondents was before the incident, once the action started, they must have realized with certainty that the security guards and police were stopping the protesters from forcing their way into the Forecourt, and the parties were having clashes, but they nevertheless persisted with their unlawful act.

160. Fourth, several hundred people took part in the unlawful assembly, and several dozens succeeded in forcing their way into the Forecourt. Some of them then forcibly removed the Mills barrier surrounding the flag staff and gathered with other participants under the flag staff. The whole incident lasted for about 12 minutes, which is not a short period of time. In the course of the incident, although the security guards and police had given them advice and attempted to stop them, and the police had even displayed their red banner twice to warn people that force would be used if they did not stop charging, they still persisted with their unlawful act.

161. Fifth, 10 security guards were injured in the incident. Although most of them suffered relatively minor injuries, except for one whose injuries were more serious, the degree of violence cannot be described as slight.

162. Sixth, the respondents and the participants in the unlawful assembly did not have an absolute right to enter the Forecourt for meeting or demonstration. Yet they insisted that the Forecourt was a public place to which they should have access. Although they knew in advance that forcing their way in was an illegal act, they were nevertheless committed to their own course in complete disregard of the consequences of breaking the law. It shows that they were not only self-righteous, but they had no regard for the law.

163. Seventh, the respondents, who were student leaders of the democratic movement at the time, had a certain influence over the student organisations of their own as well as on other students. They were the planners of this large-scale unlawful event and took leading roles in it. The 1st respondent was calling on and the 2nd respondent incited others to join. The video clips of that night shows that many of those who forced or attempted to force their way into the Forecourt in response to the respondents were young people, many of whom were probably students. The respondents encouraged and the 2nd respondent even incited these young people and students to break the law and put them under the risk of getting injured in physical clashes with security guards and police. These highly irresponsible acts added to their culpability.

164. Eighth, in respect of the 2nd respondent's culpability, what he did was highly dangerous. At the time he was clearly aware that the security guards and police were trying to stop the several hundreds of protesters from forcing their way into the Forecourt, and that clashes had already broken out, and yet he still incited them to do so. The 2nd respondent made use of sensational slogans such as 'Every time you block it, we bust it.', and even words that were unfounded but extremely inflammatory such as 'Someone is suffering from heart attack but the police do not allow the ambulance to come in", or "Now (a) nurse(s) has/have reached the gate but the police refuse entry", "Let the people go, open the gate", etc. to incite the others. Although the 2nd respondent had suggested youngsters wearing school uniform not to take part, the fact remained that many young people and students at the scene had indeed acted upon his incitement to force or tried to force their way into the Forecourt. Although he told the students to leave, he also told them to call on others on Facebook or through the public media to come to the scene to render assistance. The 2nd respondent reminded the participants to stay calm and rational, yet he incited them with a lot of sensational words – this of course further fuelled the already high emotions of the participants. On the whole, what the 2nd respondent did at the time of the offence was serious, which added to his culpability.

165. After their convictions, the 1st and 3rd respondents still questioned the legitimacy of the offence of unlawful assembly; they asserted that the prosecution against them was in violation of their human rights. The 2nd respondent maintained that he and the other protesters had the right to enter the Forecourt that night. The respondents' attitudes showed that they had no genuine remorse for the offences they had committed.

166. Given the seriousness of the facts in their case, it is necessary for 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. The sentences imposed must be sufficiently deterrent to prevent them from re-offending and to warn others not to follow their steps. Therefore, the appropriate sentences must definitely be an immediate custodial one. [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.] This is not to say that the court would not consider the personal circumstances and motives of the respondents, but as said above, only a lesser weight could be given to those matters. Moreover, those matters do not amount to such exceptional circumstances as would spare the respondents from an immediate custodial sentence.

167. In my judgment, the trial magistrate erred in principle when passing sentence in that:

(1) The trial magistrate did not at all consider the factor of deterrence in the sentences as required but go all one-way in according disproportionate weight to such factors as the respondents' personal circumstances and motives, etc.

(2) The trial magistrate considered the case as not involving serious violence. What she overlooked is that this was an unlawful assembly of a large scale, and there was a risk of violent clashes.

(3) The trial magistrate took the view that although the security guards were injured, there was no evidence to show that the respondents were involved in causing, or intended to cause injury to others. However, as has been pointed out above, the objective and actual circumstances of the case were that, prior to the incident, the respondents must reasonably be able to envisage that there would be clashes between the participants, security guards and the police, and that it was inevitable that at least some security guards would be injured. The trial magistrate had completely overlooked this point.

(4) It was the view of the trial magistrate that all the respondents wanted was to get into the Civic Square, a place which they genuinely believed to be of historical significance, to form a circle and chant slogans. However, the trial magistrate had overlooked the fact that, on the night in question, Scholarism and HKFS, had already had their assembly on the road off CGO. The Forecourt was closed. They did not have the absolute right to enter the Forecourt for another assembly but they insisted on forcing their way in unlawfully and also encouraged or incited others to do so. They were not only self-righteous but they had no respect for law and order.

(5) The trial magistrate erred in giving too much weight to the respondents' alleged remorse. The fact is, apart from being apologetic to the injuries suffered by the security guards, the respondents were adamant that their forcible entry into the Forecourt was right. They asserted that they were merely exercising their rights to expression and assembly. The 1st respondent stated clearly in his Community Service Order Suitability Report that he had no regret at all for what he had done. He reckoned that the charge violated his human rights and that he was convicted for upholding social justice. The 3rd respondent said something similar in his Community Service Order Suitability Report. Even though the respondents did not deny what they had done and indicated that they respected the court and that they were willing to bear the legal consequences, their so-called remorse is superficial and should not be given too much weight.

168. All in all, it was wrong in principle for the trial magistrate to have sentenced the respondents to community service orders or suspended sentence. These sentences were manifestly inadequate and the Court of Appeal has to interfere.

169. Taking account the maximum penalty on conviction in the magistracy for unlawful assembly under section 18 of the Public Order Ordinance being 3 years, and having carefully assessed all the facts of the case including such factors as the respondents' personal circumstances and motives for committing the offences, etc., and having considered all the sentencing factors including that of deterrence to those who think they can disregard the law in the name of exercising their rights and who wilfully use violence or other seriously unlawful means to take part in or incite others to take part in an unlawful assembly, I consider the appropriate starting points to be:

(1) 8 months for the 1st respondent in respect of Charge (2);

(2) 10 months for the 2nd respondent in respect of Charge (3);

(3) 8 months for the 3rd respondent in respect of Charge (4).

170. As this is an application for review made by the Secretary for Justice, following usual practice, the starting points may be reduced by a discretionary discount of 1 month. Furthermore, since the 1st respondent and 2nd respondent have both completed their community service orders, their sentences can be further reduced by another discretionary discount of 1 month. The total terms of imprisonment are thus:

(1) 6 months for the 1st respondent in respect of Charge (2);

(2) 8 months for the 2nd respondent in respect of Charge (3);

(3) 7 months for the 3rd respondent in respect of Charge (4).

171. Lastly, I would reiterate that it cannot be said that the respondents were convicted and sentenced for exercising their rights to the freedom of assembly, demonstration and expression. [As a matter of fact, they had just had a lawful assembly on Tamar Road outside the Forecourt before the incident took place.] The reason why they were convicted and sentenced is that they had overstepped the boundaries laid down by the law by themselves entering, or inciting others including young people and students to enter, the Forecourt, a place where they and the other protesters had no right to enter at the time, by seriously unlawful means, thereby committing the offences of taking part in or inciting others to take part in an unlawful assembly. Neither can it be said that the penalty imposed on them by the Court of Appeal has suppressed the lawful exercise of their rights to the freedom of demonstration, assembly or expression. So long as they act within the boundaries of the law, their freedom of demonstration, assembly and expression will be fully and adequately protected. But once they overstep the boundaries by breaking the law, the sanction imposed on them by the law does not suppress or deprive them of their rights to demonstration, assembly and expression as the law has never allowed them to exercise such rights through unlawful means in the first place.[88]

Hon Pang JA:

172. I agree with the judgments of Yeung VP and Poon JA. The more one feels about an issue, the more one wishes to press one's point and the more one desires that there should be progress in the matter. This is all very understandable. However, if in the course of advocating one's demand, one is given to the position that some long and well established law is but an unreasonable restriction on the right to freedom of expression, plus indulging one in the self-satisfaction of having broken that law as one pleases, that is not a situation which would on any ground enable the courts to pass unduly lenient sentences. An offender who is inflicted with such an attitude not only breaks the law in conduct, but in his mind too he harbours contempt and regards himself as being above the law. With respect to controversial matters of public debate where emotions are easily stirred, the grave consequences of such an attitude gaining ground are self-evident. If it provokes opposite groups or camps to emulate and compete in promoting their causes through unlawful means, the result can only be a further deterioration in public order. As has been pointed out by Yeung VP and Poon JA, it is in the end the right to freely express oneself and the right to assemble that would suffer, for the environment in which citizens can safely and effectively exercise those rights would be lost. One of the major errors of the trial magistrate is that having failed to identify the true nature of the respondents' conduct, she had accorded undue importance to some of the lesser features in this case.

173. Finally, I would again emphasize that the word "non-violent" must be given its commonsense meaning. If by reason of his duty, a person is bound to stop another person from entering a certain site or area, then the physical clashes between them can only be described as unavoidable if, being conscious of the situation, the other person nevertheless insists on charging or jostling forward at speed or with his body weight. Moreover, if the persons involved in such charging or jostling outnumber the persons who are defending, then the threat of physical injuries to the latter must be regarded as real and not to be underestimated. The proposition that there is no violence for so long as there is no hitting out is not a tenable proposition.

Hon Yeung VP:

174. We unanimously allow the Secretary for Justice's application for review of sentences. The sentences passed by the trial magistrate on the respondents are quashed. In substitution thereof, we sentence the respondents as follows:

(1) the 1st respondent to 6 months' imprisonment in respect of Charge (2);

(2) the 2nd respondent to 8 months' imprisonment in respect of Charge (3);

(3) the 3rd respondent to 7 months' imprisonment in respect of Charge (4).

(Wally Yeung)	(Jeremy Poon)	(Derek Pang)
Vice President	Justice of Appeal	Justice of Appeal

Mr David LEUNG, SC, DDPP and Miss Annie LI, PP of the Department of Justice for the applicant

Mr Randy Shek instructed by M/s Vidler & Co. for the 1st respondent

Mr Michael Chai and Ms Priscilla Chow instructed by M/s Ho, Tse, Wai & Partners for the 2nd respondent

Mr Edwin Choy and Mr Joe Chan instructed by M/s Ho, Tse, Wai & Partners for the 3rd respondent

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[1] Cap. 245, Laws of Hong Kong

[2] Cap. 221, Laws of Hong Kong

[3] Cap. 227, Laws of Hong Kong

[4] Leave was granted by Hon Cheung CJHC to the Secretary for Justice on 12 October 2016 to make this application to me [sic].

[5] Paragraphs 9 to 20 of Admitted Facts of the Prosecution and the Defence, and paragraphs 2 to 4 of Further Admitted Facts of the Prosecution and the Defence.

[6] With the exception of the evidence of PW11 security guard Fung Chung-kwan. Fung testified that on the material night, a man claiming to be an assistant of a LegCo member brought along 10 odd persons and requested to enter the Forecourt. When he opened the gate to see what was going on, that man stormed towards the gate and pushed and bumped against him once. He held that man by his clothing to stop him entering, and received two blows on the chest from the man. Then, the 10 odd persons pushed the gate together. After a struggle of 3 to 5 minutes, the 10 odd persons charged into the Forecourt. Fung sustained multiple injuries on his body. The trial magistrate was of the view that Fung's evidence was not totally credible and not reliable, thereby rejecting his evidence: see pages 52 to 53 of the review hearing bundle, paragraphs 82 to 85 of the Reasons for Verdict.

[7] Review hearing bundle page 57; Reasons for Verdict paragraphs 93-94.

[8] Scholarism is a secondary school students' association.

[9] HKFS is a tertiary students' association.

[10] The trial judge pointed out in her Reasons for Verdict (footnote no.73) that inside the gate there were about 4 security guards while outside the gate there were two security guards.

[11] Review hearing bundle page 43, Reasons for Verdict paragraph 50.

[12] This is charge (1), but since the first respondent was found not guilty of it, the facts in relation to this charge shall not be described in detail.

[13] Review hearing bundle pages 23-24, Reasons for Verdict paragraph 9.

[14] Review hearing bundle page 47, Reasons for Verdict paragraph 64.

[15] Review hearing bundle pages 24-25, Reasons for Verdict paragraph 13.

[16] Review hearing bundle page 53, Reasons for Verdict paragraph 84.

[17] Review hearing bundle page 24, Reasons for Verdict paragraphs 11-12.

[18] Prosecution exhibit P12, TVB news clip (time: 00:00:12 to 00:00:19).

[19] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 9.

[20] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 4.

[21] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 20.

[22] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 65.

[23] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraphs 13, 18, 43, 45 and 79.

[24] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 79.

[25] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraphs 23-32.

[26] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraphs 64-66.

[27] Prosecution exhibit P2(1) video clip, showing the time between 22:32:53 and 22:33:00 on 26 September 2014; prosecution exhibit P2A(1) paragraph 40.

[28] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 49.

[29] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraphs 13, 61, 69 and 70.

[30] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraphs 95-103.

[31] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 75.

[32] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 104.

[33] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 53.

[34] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 70.

[35] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 79.

[36] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 93.

[37] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 81.

[38] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraphs 75 and 77.

[39] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraph 104.

[40] Prosecution exhibit P2(1) video clip; prosecution exhibit P2A(1) paragraphs 33, 40, 77- 81; review hearing bundle pages 40-42, paragraph 45.

[41] Review hearing bundle page 43; Reasons for Verdict paragraph 50.

[42] Review hearing bundle pages 51-52; Reasons for Verdict paragraph 80. As can be seen from the relevant video clips, there were several dozens of people surrounding the flag post at the time.

[43] See Exhibit P19-P28 (Chinese translation, P19A- P28A)

[44] Review hearing bundle page 52; Reasons for Verdict paragraph 81.

[45] Review hearing bundle page 25, Reasons for Verdict paragraph 15 I.

[46] Review hearing bundle page 27, Reasons for Verdict paragraph 16 III.

[47] Review hearing bundle page 29, Reasons for Verdict paragraph 17 III and review hearing bundle page 30, Reasons for Verdict paragraph 17 VI.

[48] Review hearing bundle page 25, Reasons for Verdict paragraph 15 III and review hearing bundle page 30, Reasons for Verdict paragraph 17 VI.

[49] Review hearing bundle page 25, Reasons for Verdict paragraphs 15 I-II.

[50] Review hearing bundle pages 27-28, Reasons for Verdict paragraph 16 IV.

[51] Review hearing bundle page 26, Reasons for Verdict paragraph 15 VII; Review hearing bundle page 27; Reasons for Verdict paragraph 16 IV.

[52] Review hearing bundle page 30, Reasons for Verdict paragraph 17V.

[53] Review hearing bundle page 26, Reasons for Verdict paragraph 15 IV.

[54] Review hearing bundle pages 47-48, Reasons for Verdict paragraphs 62 and 66.

[55] Review hearing bundle page 48, Reasons for Verdict paragraph 69.

[56] Review hearing bundle page 28, Reasons for Verdict paragraph 16 V.

[57] Review hearing bundle pages 28-29, Reasons for Verdict paragraphs 16 VII-X.

[58] Review hearing bundle page 29, Reasons for Verdict paragraphs 17 I, II and IV.

[59] Review hearing bundle page 27, Reasons for Verdict paragraph 16 II.

[60] Review hearing bundle pages 35-36, Reasons for Verdict paragraph 31.

[61] Review hearing bundle pages 38-39, Reasons for Verdict paragraph 39.

[62] Review hearing bundle page 39, Reasons for Verdict paragraphs 40-42.

[63] Review hearing bundle pages 44-45, Reasons for Verdict paragraphs 52-57.

[64] Review hearing bundle pages 45-46, Reasons for Verdict paragraphs 58-59.

[65] Review hearing bundle pages 47-49, Reasons for Verdict paragraphs 65-71.

[66] Review hearing bundle pages 49-51, Reasons for Verdict paragraphs 73-78.

[67] Review hearing bundle pages 50-51, Reasons for Verdict paragraph 80.

[68] Review hearing bundle page 52, Reasons for Verdict paragraph 81.

[69] Review hearing bundle pages 54-58, Reasons for Verdict paragraphs 86-96.

[70] The 1st respondent is now aged 20.

[71] The 2nd respondent is now aged 24.

[72] The 3rd respondent is now aged 27.

[73] Review hearing bundle pages 77-78, Reasons for Decision relating to the application for review paragraph 4.

[74] Section 17B(2) of the Pubic Order Ordinance.

[75] Prosecution exhibit P31, CCTV CAM 587 time shown on video 22:24:01-22:27:02 of 26 September 2014 and CAM 584 time shown on video 22:24:53-22:33:42 of 26 September 2014.

[76] *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 paragraph 1; *Leung Kwok Hung* paragraph 26; *Caird* page 508, pages 510-511; and *HKSAR v Lau Cheuk Ngai, Lau Hing Pui & Wong Wai Ho* CACC 38/2017 (30 June 2017).

[77] See *YIP PO LAM*.

[78] This includes the freedom of procession and of demonstration. Procession is a moving assembly while demonstration is usually staged in the form of assembly or procession. As such, assembly generally covers procession and demonstration. For the sake of brevity, only assembly is discussed in this judgement. However, the discussion by this Court on assembly is also applicable to procession and demonstration.

[79] In paragraph 20 of the judgement in *HKSAR v Leung Kwok Hung* (2005) 8 HKCFAR 229, the Court of Final Appeal noted that there is no substantive difference between the right of assembly guaranteed by both Article 27 of the Basic Law and Article 17 of the Hong Kong Bill of Rights Ordinance.

[80] S 17A, Public Order Ordinance.

[81] S 17B, Public Order Ordinance.

[82] S 18, Public Order Ordinance.

[83] S 19-21, Public Order Ordinance.

[84] Chapter 378, Laws of Hong Kong, effective from 1984.

[85] 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.

[86] I agree with the comments made by Pang JA on this point in paragraph 173 below.

[87] Reasons for Verdict paragraphs 40-42.

[88] See paragraph 120 above.