CAAR 3/2020

[2020] HKCA 939

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF APPEAL**

APPLICATION FOR REVIEW NO 3 OF 2020

(ON REVIEW FROM ESCC NO 700010 OF 2019)

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BETWEEN

|  |  |  |
| --- | --- | --- |
|  | SECRETARY FOR JUSTICE | Applicant |
|  | and |  |
|  | CMT | 1st Respondent |
|  | YYH | 2nd Respondent |

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Before: Hon Poon CJHC, Chu and Pang JJA in Court

Dates of Hearing: 30 October and 13 November 2020

Dates of Judgment: 30 October and 13 November 2020

Date of Reasons for Judgment: 13 November 2020

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REASONS FOR JUDGMENT

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Hon Poon CJHC (giving the Reasons for Judgment of the Court):

1. *Introduction*
2. On 12 May 2020, the respondents each pleaded guilty to a charge of unlawful assembly, contrary to sections 18(1) and (3) of the Public Order Ordinance,[[1]](#footnote-1) before Permanent Magistrate Ho Chun Yiu (“the Magistrate”) in the Eastern Juvenile Court. Having heard preliminary mitigation, the Magistrate called for a probation officer’s report and a social welfare officer’s report for each of the respondents and adjourned the case to 16 June 2020.
3. At the adjourned hearing, after reading the reports and hearing further mitigation, the Magistrate dismissed the charge against the respondents (“Dismissal Orders”) under section 15(1)(a) of the Juvenile Offenders Ordinance (“JOO”).[[2]](#footnote-2) He further committed them under section 34(1)(b) and (d) of the Protection of Children and Juveniles Ordinance (“PCJO”)[[3]](#footnote-3) to the care of their parents and placed them under the supervision of a social welfare officer for 12 months with special conditions (“CP Orders”).
4. On 3 July 2020, the Secretary for Justice applied for leave to review the Orders made by the Magistrate pursuant to section 81A of the Criminal Procedure Ordinance (“CPO”).[[4]](#footnote-4) She contended that the sentences were wrong in principle and/or manifestly inadequate because (1) the Magistrate accorded insufficient weight to the factors of punishment and deterrence in sentencing and the sentences were without any punitive element; (2) the Magistrate underjudged the culpability of the respondents; and (3) the resultant sentences were wrong in principle and/or manifestly inadequate. Leave was granted on 6 July 2020.
5. After hearing the parties on 30 October 2020, we allowed the application for review against both respondents, set aside the Dismissal Orders and the CP Orders, called for probation officer’s reports and community service order suitability reports for both of them and adjourned the case to 13 November 2020 for sentence.
6. On 13 November 2020, after considering the reports and hearing further submissions, we sentenced the 1st respondent to 12-month probation with the following conditions:
7. that she shall reside and study or work as directed by her supervising officer;
8. that she shall remain at her place of residence between 8:30 p.m. and 6:30 a.m., except with prior approval from the supervising officer or in her parents’ company;
9. that she shall receive psychiatric and/or psychological treatment as and when directed; and
10. that she shall obey directions regarding peer association.

We sentenced the 2nd respondent to 80 hours of community service with the following conditions:

1. that he shall reside and study or work as directed by his supervising officer;
2. that he shall remain at his place of residence between 8:30 p.m. and 6:30 a.m., except with prior approval from the supervising officer or in his parents’ company;
3. that he shall receive psychiatric and/or psychological treatment as and when directed.
4. We now hand down the reasons for our judgment.

*B. The prosecution case*

1. The unlawful assembly in question took place in the afternoon on 18 November 2019 at the junction of Wylie Road and Gascoigne Road, Kowloon. The prosecution case was based on the facts admitted by the respondents[[5]](#footnote-5) and online-sourced video footages capturing the incident.
2. According to the Admitted Facts:

“In the afternoon on 2019-11-18, Police officers including PW1-2 were deployed at the junction of Wylie Road and Gascoigne Road to form a checkline in preventing protestors from entering the cordoned area. About 100 protestors had assembled at the carriageways of Gascoigne Road. Despite repeated warnings, protestors continued to charge the police checkline by setting up barricades and throwing bricks and petrol bombs. Police officers had dispersed the protestors but the protestors assembled again after each dispersal.

2. After one of the dispersals at 1622 hours, PW1-2 found Deft1-2 sitting on a staircase outside No. 38 Gascoigne Road. PW1-2 enquired Deft1-2 who stated that they had just participated in the earlier protest occurred at Gascoigne Road and they were sitting thereat because their legs were hit and injured by a CS capsule. At 1625 hours, PW1-2 respectively arrested Deft1-2 for ‘Riot’. Under caution, Deft1-2 remained silent. E1-23 were seized from Deft1-2.

3. Online source video footage (E24) revealed that since 1500 hours on 2019-11-18, around 100 protestors had assembled in disorderly manners at Gascoigne Road and committed breach of the peace by unlawful acts, i.e. barricading and forming checklines at road carriageways, damaging road structures, charging the police checkline by throwing bricks and petrol bombs.

4. The footage also revealed that since 1509 hours (for Deft2) and 1510 hours (for Deft1), Deft1-2 had participated at front section of the protest among the crowd of around 100 protestors. Deft1 was captured holding an umbrella for covering other protestors who were moving barricades to charge the police checkline. Deft2 was captured moving forward at the forefront of the protestors and giving signals to other protestors by hand gesture. Deft1-2 were captured taking part in the protest until they were intercepted by PW1-2.

5. Throughout the period which Deft1-2 were depicted by video footages at the vicinity (about 15:09-16:16 hours), a total of 39 petrol bombs had been thrown by the protesters towards the police checkline.”

1. The Magistrate viewed the video footages referred to in the Admitted Facts before sentence to assess the scale of the unlawful assembly and the respondents’ participation in it.[[6]](#footnote-6)
2. *Sentence below*

*C1. Mitigation*

10. The 1st respondent was 14 years 10 months old at the time of the offence. At the time of appearing before the Magistrate, she was 15 years old. She was of clear record. She is a secondary school student in a Band 1 school with above-average grades. Her parents are a paramedic and a private car driver. The 1st respondent is a devoted Catholic and a teaching assistant in Sunday school. She has aspired to be a medical doctor. Mr Harris SC, for the 1st respondent, submitted that she was unlikely to re-offend. Dr Henry Kwok who attended the 1st respondent noted that she had a history of repeated self-harm and had been diagnosed with depression, generalised anxiety disorder and irritable bowel syndrome and had been on anti-depressant medication. Dr Kwok was of the opinion that the 1st respondent suffered from posttraumatic stress disorder with mild symptoms because of the criminal proceedings.

11. Mr Harris further submitted that the 1st respondent, being 14 years of age at the time of offence, was an “extremely young” offender within the meaning of *HKSAR v Law Ka-kit and Others* [2003] 2 HKC 178, at p.186. Referring to section 11 of JOO, which provided that a young person shall not be sentenced to imprisonment if he could be suitably dealt with in any other way, Mr Harris urged the Magistrate to bear in mind rehabilitation as opposed to retribution unless the offence was so serious that such an approach was not appropriate, citing *HKSAR v Chochanga Vabindra* [2003] 3 HKLRD 224, at p.228. Counsel suggested that the 1st respondent’s rehabilitation would be best assisted by the imposition of a care and protection order pursuant to section 34 of the PCJO and section 15(1)(e) of JOO.

12. The 2nd respondent was 14 years 1 month old at the time of the offence. He attends a reputable secondary school and has taken part in various extracurricular activities. The 2nd respondent had been diagnosed with attention deficit hyperactivity disorder (“ADHD”) at 7 or 8 years of age. Dr Cheung Wai Him who assessed the 2nd respondent on 11 January 2020 found his mood to be mildly depressed and that he had fleeting suicidal idea but without plan or actual attempt. Dr Cheung diagnosed the 2nd respondent to be suffering from adjustment disorder and ADHD.

13. Mr Ma, for the 2nd respondent, submitted that the 2nd respondent had been much affected by the daily reporting of the protests and on the date of offence he went to Gascoigne Road in answer to a call on social media, equipped with respirator, goggles and saline. He said that the 2nd respondent did not throw any petrol bomb but was only at the front section of the protestors, walked towards the police cordon, and made hand gestures to other protestors. He urged the Magistrate to deal with the 2nd respondent by way of a care and protection order.

14. The probation officer’s reports and social welfare officer’s reports spoke favourably of the respondents and recommended that they be dealt with by care and protection orders instead of probation orders. The reports further recommended that the respondents be committed to the care of their respective parents and be placed under the supervision of a Social Welfare Officer under section 34 (1)(b) and (d) of the PCJO for 12 months with special conditions attached.

*C2. Reasons for sentence*

15. The Magistrate first reminded himself of the sentencing principles and guidelines laid down by this Court in *Secretary for Justice v Wong Chi Fung* [2018] 2 HKLRD 699, which were endorsed by the Court of Final Appeal in (2018) 21 HKCFAR 35. In particular, the Magistrate referred to the principle that deterrence and punishment are to be given emphasis when sentencing large-scale unlawful assembly cases involving violence.

16. Having viewed the video footage, the Magistrate noted the nature and scale of the protest in question. About 100 protestors were involved in the unlawful assembly; most of them being passive by holding umbrellas and moving among the crowd but some of them threw bricks and petrol bombs towards the police checkline; the unlawful assembly lasted over an hour; properties were damaged but nobody was injured; the protestors were probably trying to obstruct the police from pushing forward instead of trying to injure the latter with their acts. The Magistrate concluded that the unlawful assembly as seen on the footage was not the most serious of its kind, though it definitely was a large-scale one involving violence. As such, the Magistrate stated that “in normal circumstances, the sentencing factors for punishment and deterrence should be given greater weight over other factors, such as personal circumstances of the offenders, their motives and their rehabilitation”.

17. However, the Magistrate emphasized that the respondents were juvenile offenders, were of clear record and were from very good background. With their pleas of guilty, the Magistrate believed the respondents were genuinely remorseful. The Magistrate observed that while some at the forefront of the unlawful assembly behaved violently, the respondents were never seen carrying out those acts and seemed to be relatively passive throughout the duration of the assembly. The Magistrate referred to *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837, where Tang PJ remarked at [141] that “a distinction must be drawn between a participant in an unlawful assembly who remains peaceful and one who himself engages in or encourages violence”. The Magistrate took the view that the respondents fell within the former type. Hence, he concluded that immediate custodial sentence was not the only option available in this case. Reminding himself of section 109A of the CPO, the Magistrate considered that rehabilitation should be given proportionally more weight over deterrence and punishment.

18. Referring to the favourable comments and adopting the recommendations in the reports, the Magistrate exercised his power under section 15(1)(e) of JOO and section 34(1)(b) and (d) of PCJO, committed the respondents to the care of their respective parents and placed them under the supervision of a social welfare officer for a period of 12 months with special conditions. Both respondents were given special conditions: (a) residing and studying or working as directed by his supervising officer; (b) remaining at their respective place of residence between 8:30 p.m. and 7:00 a.m., except with prior approval from the supervising officer or in their respective parents’ company; (c) receiving psychiatric and/or psychological treatment as and when directed; and (d) participating in any community programs or activities as directed by the supervising officer. The 2nd respondent was given the additional condition of obeying instructions regarding social activities and place of visit. The Magistrate called for progress reports in 4 months’ time.[[7]](#footnote-7) He finally clarified that no conviction was to be entered.

1. *Discussion*

*D1. Dismissal Orders and CP Orders solely focusing on rehabilitation*

19. Section 15(1) of the JOO enables the court to deal with an offender under the age of 16 found guilty of any offence by, among others, dismissing the charge[[8]](#footnote-8) and if the offender is in need of care and protection, by dealing with him under section 34 of the PCJO.[[9]](#footnote-9)

20. It is established that the recording of a conviction is in itself an element of punishment. It may encourage the offender not to engage in further criminal activity and may also act as a deterrence to others: *R v Brown, ex parte Attorney General* [1994] 2 Qd R 182, per Lee J at p.194. Dismissing a charge means that although the court is satisfied of the young offender’s guilt, no conviction will be recorded against him. It is the most lenient way of disposing of such offender. It leaves him with no stigma of a conviction thus allowing him to embark on a clean rehabilitation with the main focus on his welfare and development. It does not have any punitive element or deterrence effect, thus tilting the balance emphatically towards the offender’s rehabilitation. That being the case, the court generally speaking will be persuaded to dismiss the charge only if the offence is trivial; or the circumstances in which the offence was committed moderate or diminish the offender’s culpability significantly, such as where it involved no more than a fractional error of judgment or a sudden and wholly unexpected loss of control, or a single incident or act entirely out of the offender’s otherwise good character and behaviour; or there is very strong mitigation arising from the personal circumstances of the offender; and the offender is truly remorseful.

21. Section 34(1) of the PCJO empowers a juvenile court to deal with a child or a juvenile, that is, a person aged between 14 and 18,[[10]](#footnote-10) and a child or young person, that is, a person aged between 14 and 16,[[11]](#footnote-11) charged with any offence, if it is satisfied that he is in need of care and protection by appointing the Director of Social Welfare to be his legal guardian; committing him to care of any person, relative or not, who is willing to undertake the care of him or of any institution which is so willing; ordering his parent or guardian to enter into recognizance to exercise proper care and guardianship; or if necessary, subjecting him to supervision by a social welfare officer for not exceeding 3 years.

22. Pursuant to section 34(2), a child or a juvenile in need of care or protection means a child or a juvenile:

“(a) who has been or is being assaulted, ill-treated, neglected or sexually abused; or

(b) whose health, development or welfare has been or is being neglected or avoidably impaired; or

(c) whose health, development or welfare appears likely to be neglected or avoidably impaired; or

(d) who is beyond control, to the extent that harm may be caused to him or to others.”

Put simply, before dealing with a child or a juvenile under section 34(1), the court has to be satisfied that he falls within one or more of the four statutory criteria as set out in section 34(2).

23. A care and protection order seeks to protect a child or a juvenile in need of care or protection. As a sentencing option against a juvenile offender, its objective is solely rehabilitation.

24. Given their nature, the Dismissal Orders and the CP Orders focus exclusively on the respondents’ rehabilitation and accord no weight to punishment or deterrence.

25. We pause to make one observation.

26. In the present case, when recommending a care and protection order, the probation officers had not explained why the respondents were juveniles in need of care and protection as defined by section 34(2) of the PCJO. In their further mitigation, counsel for the respondents had not addressed the Magistrate on section 34(2) either. So the Magistrate was not assisted on the crucial threshold question of whether the respondents were juveniles in need of care and protection as statutorily defined before he adopted the recommendations of the probation officers and made the CP Orders. And in his reasons for sentence, the Magistrate had not identified the statutory criteria that he had in mind or articulated the reasons why the respondents fell within such criteria. It leaves us with the impression that nobody below had really focused their mind on the threshold question at all.

27. This is unsatisfactory.[[12]](#footnote-12) As the present application is not premised on whether, and in what way, the respondents fall within section 34(2), we shall say no more other than to emphasize this. Before a juvenile court decides to make a care and protection order, it must first consider and be satisfied that the offender is in need of care and protection within the meaning of section 34(2) of PCJO. Hence, where counsel advocates or a probation officer considers a care and protection order is appropriate, he should provide the necessary assistance to the court, including indicating how the statutory criteria is met in the circumstances of the case. It would not be sufficient to proceed simply on the basis that the offender needs care and protection in a general or loose sense.

*D2. The respondents’ culpability*

28. Continuing with the discussion at hand, it is the Magistrate’s finding that the respondents’ role was relatively passive. Significantly, this factual finding of the respondents’ culpability informed his approach to sentence and underpinned the Dismissal Orders and the CP Orders. It calls for a closer scrutiny of the evidence.

29. It is not in dispute and indeed cannot be disputed that the unlawful assembly in which the respondents participated was a large scale one involving considerable violence. It lasted for more than one hour. Some 100 protestors participated. Many of them were dressed in black and wore gears such as helmets, respirators, googles, gloves and masks, an indication that it involved some premeditation. Some made use of wooden boards, public road signs, and metal railings as shields or barricades. Many shielded themselves behind umbrellas to hide their and others’ identities. They targeted the police who had formed a check line to prevent them from advancing towards the direction of The Hong Kong Polytechnic University. While charging at the police check line, some protestors threw bricks and hurled 39 petrol bombs, thereby posing obvious and potentially lethal danger to the police, the protestors and other persons who happened to be at or near the scene. The protestors refused to disperse despite repeated warnings and use of teargas by the police. It all took place underneath Gascoigne Road Flyover, one of the busiest flyovers in Kowloon and in the vicinity of a hotel, a secondary school, some recreational clubs and court buildings. It had caused serious threats to the safety of the public and buildings nearby. It is a very bad case bordering on rioting.

30. In respect of the respondents’ role when participating in the unlawful assembly, the Magistrate said:

“I have also examined in detail the footage provided. While the two defendants were seen among the protestors, sometimes towards the front line of the assembly where some of the mentioned violent act were seen to be done by some protestors, the two defendants themselves were never seen doing these violent acts. They were not even seen to have encouraged or incited these violent acts. Overall, my impression is that they were relatively passive throughout the duration of the assembly even when some violent acts were done by others.

As per Tang PJ in his judgment in HKSAR v Chow Nok-hang, ‘a distinction must be drawn between a participant in an unlawful assembly who remains peaceful and one who himself engages in or encourages violence.’ In my opinion, the level of participation of these two defendants were more akin to the former category than the latter.”

31. The Magistrate’s finding that the respondents played a relatively passive role without engaging in violence or encouraging or citing others to commit violence is flatly contradicted by the evidence. As the Admitted Facts and the video footages showed:

1. Both respondents were seen at the front of the protestors for some time.
2. The 1st respondent used an umbrella to shield other protestors who were moving barricades to charge at the police check line from being identified. Her act must have the effect of emboldening, encouraging and reinforcing the violent behaviour of other protestors.
3. While positioning and walking at the forefront of the protestors, the 2nd respondent gave hand signals to those behind him, gesturing to them to halt or back off. They did pause but after a while continued with the charge at the police. In playing the role as he did, the 2nd respondent was actively involved in emboldening, encouraging and reinforcing the acts of other protestors, if not actually directing them. His culpability is more serious than the 1st respondent’s.

32. Mr Pun SC, for the 1st respondent, sought to support the Magistrate’s finding on her role by making three points.

33. He first submitted that before the Magistrate it was never suggested that the 1st respondent had participated in anything other than what had been suggested in the Admitted Facts. The prosecution never suggested that she had behaved violently or encouraged or facilitated the violent behaviour of others. It is therefore not open to the applicant to now contend that she had encouraged and facilitated the violent behavior of other participants in the unlawful assembly: *Secretary for Justice v Wong Chi Fung (CFA)* (2018) 21 HKCFAR 35, at [61].

34. It is trite that on a sentence review the Secretary for Justice is not entitled to rely on a factual basis different to that accepted by the prosecution below: *Wong Chi Fung (CFA)*, ibid. But that is not the case here. Properly understood, when the prosecution appeared to have accepted there was no evidence or suggestion that the respondents had “participated in anything other than that have been suggested in the brief facts”,[[13]](#footnote-13) this could not have precluded the drawing of proper inferences from what was stated in the Admitted Facts concerning the level of their participation and their role, as confirmed by the video footages which the Magistrate had viewed. The prosecution did not ask the Magistrate to adopt a blinkered approach to the evidence as suggested by Mr Pun. Thus contrary to his submissions, the applicant has not impermissibly gone beyond the factual basis on the 1st respondent’s participation as presented to the Magistrate below.

35. Mr Pun next submitted that in any event, the Magistrate made the findings as he did after he had the chance to properly examine the video footages and to assess the level of the 1st respondent’s participation. However, in evaluating the evidence on her participation, the Magistrate had failed to direct his mind to the effect of the 1st respondent’s act on the other protestors as pointed out at [31] above.

36. Finally, Mr Pun submitted that the Magistrate was entitled to rely on Tang PJ’s remarks in *Chow Nok Hang,* supra. However, the Magistrate’s reliance on it is entirely misplaced when his finding on the 1st respondent’s participation in the unlawful assembly is plainly wrong.

37. Mr Ma, for the 2nd respondent, submitted that the Magistrate is entitled to conclude that his role was relatively passive or minor. Counsel asked rhetorically if the Magistrate’s finding was something no reasonable magistrate could have made and submitted that the answer must be no. However, as already pointed out in [31], the Magistrate had failed to direct his mind on what was the effect of the 2nd respondent’s act on the other protestors. It cannot be said that his finding on the 2nd respondent’s role is what a reasonable tribunal, after properly evaluating all the evidence, would have made.

38. For the reasons given above, this is a serious case, and the Magistrate’s finding on the level of the respondents’ participation and their culpability cannot be supported. Misguided by the finding, his approach to sentence is also flawed. The factual basis underpinning the Dismissal Orders and CP Orders, which give no weight to punishment and deterrence, simply cannot stand.

*D3. Appropriate sentence*

*D3.1 Proper Approach - sufficient weight must be given to punishment and deterrence*

39. Recently in *Secretary for Justice v SWS* [2020] HKCA 788, this Court set out the general approach to sentencing juvenile offenders who have committed a serious offence, which was derived from earlier authorities including *Secretary for Justice v Wong Chi Fung* *(CA),* supra, approved by the Court of Final Appeal in *Secretary for Justice v Wong Chi Fung (CFA),* supra, thus:[[14]](#footnote-14)

“G. Discussion

G1. General sentencing principles for juvenile offenders

45. Section 11(2) of the Juvenile Offenders Ordinance provides that no young person (which means a person who is, in the opinion of the court having cognizance of any case in relation to such person, 14 years of age or upwards and under the age of 16 years), shall be sentenced to imprisonment if he can be suitably dealt with in any other way. In other words, imprisonment is the last resort when sentencing a young person. As regards the other suitable disposal, section 15(1) of the same ordinance provides for the options available to deal with convicted young persons including a probation order, detention in a reformatory school, imprisonment or detention in a training centre or detention in a rehabilitation centre, and detention in a detention centre where the offender is a male. These are all sentencing options alternative to imprisonment, which dove-tail with the provisions restricting the imprisonment of young persons for perfecting the sentencing regime in relation to such persons. For the statutory intention, see *Wong Chun Cheong v HKSAR* (2001) 4 HKCFAR 12, page 21C-D.

46. The Juvenile Offenders Ordinance requires that no court shall sentence a young person to imprisonment unless after consideration it is of the opinion that there is no other suitable way to deal with him. This is because in accordance with the established legal principle, the court will as far as practicable give primary consideration to the well-being of young offenders and endeavour to give young offenders in particular young persons, a chance to turn over a new leaf by passing a sentence which is predominantly rehabilitative in nature. Imprisonment, which prioritizes sentencing factors like punishment and deterrence over rehabilitation, is invariably the last option. As for alternatives to imprisonment, probation order is a non-custodial sentence which, far from punitive or deterrent, has rehabilitation as its main concern and purpose; reformatory school, training centre, rehabilitation centre and detention centre are on the other hand custodial in nature, which takes on board both the consideration and purpose of rehabilitation and sentencing factors such as punishment and deterrence. When considering the adopting of a non-custodial option in sentencing, the court is required to decide according to the relevant provisions, applicable legal principles and the actual circumstances of the case.

47. A sentencing court shall take into account all applicable factors, give proper weight to them and impose a commensurate sentence: see *Wong Chi Fung* (Court of Appeal), paragraph 108. This principle is applicable to sentencing a young person who committed a serious offence. Generally speaking, there are two main aspects for consideration. On the one hand is the interest of the public which requires the court to pass a sentence on a serious offence, commensurate with gravity and the circumstances of offending to achieve the effects of protecting the public, meting out penalties, open condemnation and deterrence. On the other hand is the young age of an offender, which is always a relevant mitigating factor: see *Wong Chi Fung* (Court of Final Appeal), paragraph 84. This is also borne of the public interest. The reason is that it not only takes care of the youngster’s well-being and future but also serves the interest of the community as a whole to divert him off the criminal path by encouraging his rehabilitation and reformation. Therefore, even for serious offences, a sentencing court must consider the young offender’s circumstances, background, well-being and rehabilitative needs. Caution must be taken in assessing all the relevant sentencing factors and their weights before arriving at the appropriate sentence.

48. In weighing the sentencing factors, the court, as aforesaid, will as far as practicable endeavour to give young offenders especially young persons a chance for rehabilitation. But this does not mean that youth is the sole object to the court’s sentence with no regard to the other sentencing factors. This is because the weight on youth varies with the gravity and circumstances of individual offences in individual cases. Where the public interest justifies a severe or deterrent sentence for an offender, given the gravity or circumstances of the offence, the weight accorded to youth or personal background will be very much limited, or even pales into insignificance*: Re Applications for Review of Sentences* [1972] HKLR 370, page 417; *Law Ka Kit*, paragraphs 27 and 29. The reason is that the need for punitive or deterrent effects far exceeds the need for rehabilitative treatment: see *Wong Chun Cheong*, page 22.

49. The above legal principles basically are similar to the UK Sentencing Council’s ‘Sentencing Children and Young People: Definitive Guideline’ and the ‘Beijing Rules’ cited by Mr Lee.”

40. Because the respondents had committed a serious offence, appropriate weight must be given to the sentencing factors of punishment, deterrence and condemnation despite their youth. In particular, since it was a large-scale unlawful assembly involving considerable violence, the guidelines enunciated by this Court in *Wong Chi Fung (CA),* supra, and approved by the Court of Final Appeal in *Wong Chi Fung (CFA),* supra, which emphasize punishment and deterrence, apply with full force.

41. On deterrence, Mr Ma submitted that as a large number of cases have been widely reported, especially over the past few months, regarding protestors in unlawful assemblies and riots being sentence to lengthy imprisonment of various terms according to the seriousness of each case. The message that violence is not to be condoned has been made crystal clear to the public. It is unnecessary to make use of cases like the present, which involves extreme youth of good character, who comes from a decent background, and is genuinely remorseful, for reiteration.

42. It may well be the case that the public has by now got the message that the courts take a serious view of large-scale unlawful assembly involving violence and those who actively participate in it should expect to be given a punitive and deterrent sentence. But it does not detract from the continuous and vigorous application of deterrent sentences for such an offence, which is, as pointed out by the Court of Final Appeal in *Wong Chi Fung (CFA)*, supra, essential to upholding the public interest involved in maintaining peace and safety in Hong Kong.

*D3.2 The Magistrate’s mistakes*

43. While the Magistrate had referred to the principles laid down in *Wong Chi Fung* (CA), supra, and *Wong Chi Fung* (CFA), supra, based on a misguided finding on the respondents’ culpability, he passed a sentence that gives no weight to punishment and deterrence.

44. The Magistrate further erred in failing to have regard to the guidance given by the Court of Final Appeal, namely, it is necessary to emphasize deterrence and punishment in large-scale unlawful assembly involving violence. In *Wong Chi Fung (CFA)*, the Court of Final Appeal said:

“2. In its judgment on the review application, the Court of Appeal took the opportunity to provide guidance to sentencing courts in the future regarding the sentences for unlawful assemblies, particularly emphasizing the need to take a much stricter view where disorder and any degree of violence was involved. … Like the Court of Appeal, we specially draw attention to the importance of taking a much stricter view where disorder or violence is involved. Naturally, it will be incumbent on the sentencing court to take into account the extent of the participation or involvement of the convicted person but where disorder or violence is involved, these are serious aggravating features. Hong Kong is on the whole a peaceful society and these elements are to be deterred.

…

120. … [It] was appropriate for the Court of Appeal to say that, in the circumstances now prevailing in Hong Kong including increasing incidents of unrest and a rising number of large scale public protests, it is now necessary to emphasise deterrence and punishment in large-scale unlawful assembly cases involving violence.

…

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

45. Both Mr Pun and Mr Ma prayed in aid the Magistrate’s experience in the Juvenile Court. They submitted that the Magistrate had already taken into account all relevant sentencing factors. As to what particular weight should be accorded to them, it is a matter for the Magistrate and the Court of Appeal should not lightly interfere.

46. In this regard, the Court of Final Appeal in *Wong Chi Fung (CFA),* supra, said:

“62. It is also not open to the Court of Appeal in a review of sentence to ascribe a different weight to a factor properly taken into account by the sentencing judge in arriving at a sentence that is otherwise within the range of sentences appropriate for the offence. If the judge has failed to take a relevant matter into account or has taken into account an irrelevant factor, that is an error of principle. However, the relative weight the sentencing judge ascribes to each relevant factor is a matter within the judge’s discretion and, unless that exercise results in the imposition of a sentence that is manifestly inadequate, the relative weight attributed to each individual relevant factor is a matter for the judge. Save where it concludes that the sentence is manifestly inadequate, the Court of Appeal is not entitled to ascribe more or less weight to a relevant factor than did the sentencing court.”

47. In our view, we are entitled to interfere because as explained, the Magistrate proceeded on the wrong factual finding on the respondents’ culpability, which is an error of principle. Further, as will be seen, even after balancing their personal circumstances against their culpability, the Dismissal Orders and the CP Orders are manifestly inadequate, falling outside the range of sentences appropriate for the offence.

*D3.3 Balancing against the respondents’ personal circumstances*

48. Following the established approach, we next balance the gravity of the offence and the respondents’ culpability against their personal circumstances. Both respondents had a clear record. They come from healthy, supportive and caring families. They do quite well at school. Two particular features arising from their personal circumstances merit closer attention.

49. First, both of them were of extreme youth at the time of the offence. The 1st respondent was 14 years 10 months old. The 2nd respondent was even younger. He was only 14 years 1 month old. This is a weighty mitigating factor in the present case. Arising from their extreme youth, especially in the 2nd respondent’s case, is their immaturity and impulsiveness, the susceptibility to undue influence through exposure to social media, the lack of sufficient self-discipline and control and the lack of careful thought about the serious consequences of breaking the law by committing the present offence. These considerations tend to moderate their culpability.

50. Second, as established by undisputed medical evidence, the 1st respondent has a history of mental health problems, including depression, generalized anxiety disorder and posttraumatic stress disorder with mild symptoms. Although there is no evidence to link her mental health issues with the commission of the present offence, we cannot ignore the real possibility that her mental conditions might significantly deteriorate and she might commit self-harm if a harsh sentence were to be imposed on her.

51. The respondents are genuinely remorseful. This is also a mitigating factor in their favour.

52. After balancing all relevant sentencing factors, we take the view that the appropriate sentence for the offence must have a sufficient punitive element and deterrence while at the same time take care of the respondents’ rehabilitation and well-being. As already pointed out, the Dismissal Orders and the CP Orders give no weight to punishment and deterrence. They are both wrong in principle and manifestly inadequate and are liable to be set aside.

53. In asking us to uphold the Dismissal Orders, Mr Pun and Mr Ma submitted that a criminal record will stigmatize the respondents’ and mar their development. They urged us to give them a clean rehabilitation. However, as pointed out in the course of the hearing, their conviction might be spent under the Rehabilitation of Offenders Ordinance.[[15]](#footnote-15) Mr Ma submitted that under the Ordinance, spent conviction must be disclosed for the purpose of joining certain professions,[[16]](#footnote-16) and may jeopardize the respondents’ respective aspiration of working as a doctor and an architect in the future. But he accepted that the professional bodies should have a discretion to ignore the effect of conviction in appropriate cases.

54. In any event, we do not consider the public interest in recording the conviction is outweighed by the respondents’ concern of its effect. Indeed, recording a conviction also forms part of the offender’s rehabilitation. As explained by Sofronoff P in *R v Patrick (a pseudonym), ex parte Attorney General (Qld)* [2020] QCA 51, unreported, 24 March 2020:

“[54] Part of Patrick’s rehabilitation must involve … him accepting responsibility for what he has done and what harm he has caused. Acceptance of responsibility is much more than an offender’s verbal acknowledgment of personal fault. It must involve an actual appreciation and acknowledgment of the community’s revulsion at the crime and its consequences. That revulsion is partly manifested by the public record that is a conviction. It is true, as counsel for Patrick urged, that the recording of a conviction may affect Patrick’s future employment prospects but in a case like the present, that does not outweigh the justification for recoding, as a conviction, the community’s denunciation of the offending act, notwithstanding that it was committed by a child in the circumstances in which Patrick found himself.”

55. Mr Pun took a further point. He submitted that it is necessary for the Magistrate to dismiss the charge so that he could make the CP Orders. However, after this Court referred him to section 15(1) of the JOO, he agreed that as a matter of law, a care and protection order could still be made even after conviction. He then submitted that as a matter of practice in the Juvenile Court, the magistrate would usually dismiss the charge before imposing a care and protection order. Assuming this is the case, such practice does not relegate the importance of applying the correct sentencing principles and the duty of the sentencing court to impose a sentence appropriate for the offence and proportionate in the overall circumstances of the case. As the Dismissal Orders fall foul of the principles identified in [20] above and are wrong in principle, they have no legal basis to stand on.

56. Both Mr Pun and Mr Ma then urged us to uphold the CP Orders even if we were to set aside the Dismissal Orders. They invited us not to impose a community service order even though it carries punishment and deterrence and at the same time takes care of the respondent’s rehabilitation. They argued that the curfew in special condition (b) of the CP Orders is also a kind of punishment as it is a restriction on liberty. They further submitted that under special condition (d) of the CP Orders, the respondents could be directed to do voluntary work. That is as good as a community service order. Counsel’s submissions are entirely misplaced.

57. Despite the special conditions, the CP Orders focus exclusively on the respondents’ need for care and protection. They remain in substance a rehabilitative sentencing option with no weight being given to punishment and deterrence. The kind of restriction imposed by special condition (b) is not a real curtailment on the respondents’ liberty. As to counsel’s reliance on special condition (d), they have missed the material distinction between special condition (d) and a community service order. Although under both the respondents would be directed to do voluntary community service, the consequences of breach if the respondents did not comply with such direction are significantly different. Under section 34D of the PCJO, the court may impose further appropriate direction under section 34C(2); whereas under section 8 of the Community Service Orders Ordinance (“CSOO”),[[17]](#footnote-17) the court may impose a fine of not exceeding HK$1,000 or even revoke the order and “resentence” them for the offence. This is a punitive element not found in section 34D of the PCJO. As such, special condition (d) does not turn the CP Orders into something relevantly similar to a community service order.

58. Mr Pun further submitted that it is necessary to keep special condition (c) so that the 1st respondent will continue to attend medical/psychiatric treatment. Since special condition (c) can only be imposed in a care and protection order but a community service order can specify conditions relating to community service only, the court should not disturb the CP Order. With respect, Mr Pun’s submission is plainly wrong.

59. Section 5(1)(a) of CSOO expressly empowers the court to “specify in the order conditions to be complied with by the offender during the period that the order is in force”. On a proper construction, the court must be entitled to impose a tailor-made condition that fits the particular needs and circumstances of the 1st respondent. The restriction on the court’s power as argued by Mr Pun is unwarranted.

60. Ms Lam, DDPP, for the applicant, on the other hand submitted that the court should impose an immediate custodial sentence. She even suggested that a short term immediate imprisonment is appropriate.

61. However, bearing in mind that it is an application for review and as mandated by section 11(2) of the JOO, if there are other suitable ways to deal with the respondents, who are under 16, we should not impose immediate custodial sentence on them. In this regard, we do not agreed with Ms Lam’s reading of section 11(2), namely a young person cannot be suitably dealt with in ways other than a sentence of imprisonment if the offence he committed is serious, irrespective of his personal circumstances: see *Secretary for Justice v SWS*, supra, at [45] to [49]. In order to ascertain if there are suitable alternatives other than immediate custodial sentence, we had decided to call for a probation officer’s report and a community service order suitability report on each of the respondents and adjourned sentence to 13 November 2020.

62. For the above reasons, we made the orders as set out at [4] above.

*D3.4 Sentencing the respondents*

63. The probation officer’s report cum community service order suitability report in respect of the 1st respondent stated:

“To conclude, the [1st respondent], aged 15, is a teenager coming from an intact family. She received adequate care and guidance from her parents and paternal grandmother. All along, she behaved well and performed satisfactorily at school. She suffered from mental illness since aged 10. She attended regular psychiatric follow up on schedule with good drug compliance. She strived hard to overcome her mental illness and worked hard to continue her studying in recent year. Her mental condition turned worse during present legal [proceedings]. She suffered from depression and Post-traumatic stress disorder (PTSD). She attended first psychiatric follow up in Queen Mary Hospital on 23.10.2020. Under the influence of social media and weak legal sense, [the 1st respondent] committed the present offence. She expressed deep remorse for getting involved in law-breaking act. She showed motivation to receive professional guidance to strengthen her legal sense during social enquiry. She wished to work anew and did not make trouble to her parents anymore. In view of [the 1st respondent’s] young age, clear record, strong family support and need for counselling in legal sense, probation supervision would be helpful and beneficial to her rehabilitation.”

The probation officer therefore recommended a 12-month probation with special conditions.

64. As the 1st respondent suffers from depression and posttraumatic stress disorder and her emotion may be affected by other community service worker on the work site, the probation officer did not recommend community service order.

65. Although the 1st respondent had committed a serious offence, given her personal circumstances, including extreme youth and mental conditions, we do not consider an immediate custodial sentence to be appropriate. Concerning community service, we agree with the probation officer’s assessment. In particular, we are concerned that community service work on the site may exacerbate the 1st respondent mental issues. Because of the 1st respondent’s very special circumstances, community service order is not suitable either. The remaining suitable option is probation. So we imposed a 12-month probation order on the 1st respondent with special conditions as set out at [5] above.

66. Turning to the 2nd respondent, the probation officer’s report cum community service order suitability report had this to say:

“The [2nd respondent] showed deep remorse for his wrongdoing which was observed by those who know him well. He asked the Court to grant him a non-custodial sentence so that he can keep his normal life and continue his study. The parents, the sister, the teachers, the social worker, the supervising officer and those people who wrote mitigation letters begged the Court to grant the [2nd respondent] a chance. Upon discussion with the [2nd respondent] and his family, it is believed that the [2nd respondent] is more suitable for [probation order] as he can continue to benefit from supervision like what he received under the [CP Order].”

The probation officer therefore recommended a 12-month probation with a list of special conditions.

67. Finally, the probation officer said that for this case a community service order is considered not as good as a probation order, without however articulating the reasons why. Relevantly, the probation officer did not say that a community service order is not suitable.

68. We are conscious of the 2nd respondent’s extreme youth, his need for rehabilitation and the progress he has made so far. Despite his culpability, an immediate custodial sentence is in our view too harsh. However, the probation order recommended is mainly rehabilitative in nature: see *Secretary for Justice v SWS,* supra, at [46]. Its principal aim is to allow the 2nd respondent to continue to benefit from supervision similar to the CP Order. As such, it is too lenient and fails to sufficiently reflect his culpability which as noted, is more serious than the 1st respondent’s. It is therefore not a suitable sentencing option.

69. In the circumstances of this case, a community service order is the most suitable sentence for the 2nd respondent, balancing fairly both punishment and deterrence on the one hand and rehabilitation on the other.

70. A significant feature of community service order is its purpose of both punishment and rehabilitation. It has been said that it fills the gap between a custodial sentence and a probation order: see *Cross and Cheung on Sentencing in Hong Kong*, 9th edition, at [8-3], p.125. In *Secretary for Justice* *v Li Cheuk Ming* [1999] 1 HKLRD 63, Chan CJHC (as he then was) explained at p.65E-G:

“A community service order is an alternative to custodial sentence. It 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 accused 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 behaviour’.”

71. On the materials before us, unlike the 1st respondent, there is no suggestion that the 2nd respondent is unsuitable to perform community service due to his personal circumstances. The 2nd respondent also agreed to a community service order. We therefore sentenced him to 80 hours of community service with special conditions as set out at [5] above.

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| --- | --- | --- |
| (Jeremy Poon) | (Carlye Chu) | (Derek Pang) |
| Chief Judge of the  High Court | Justice of Appeal | Justice of Appeal |

Ms Vinci Lam, DDPP and Mr Derek Lau, SPP of the Department of Justice, for the applicant

Mr Hectar Pun SC leading Mr Jason Ko instructed by SC Ho & Co., assigned by the Director of Legal Aid, for the 1st respondent

Mr David Ma leading Ms Tiffany Tin instructed by Cheung & Co., assigned by the Director of Legal Aid, for the 2nd respondent

1. Cap 245. [↑](#footnote-ref-1)
2. Cap 226. [↑](#footnote-ref-2)
3. Cap 213, formerly the Protection of Women and Juveniles Ordinance. [↑](#footnote-ref-3)
4. Cap 221. [↑](#footnote-ref-4)
5. Contained in the Brief Facts (Amended) dated 16 January 2020 (“Admitted Facts”). References to “Deft1” and “Deft2” in the Admitted Facts are references to the 1st and 2nd respondents respectively. [↑](#footnote-ref-5)
6. So did we at the hearing on 30 October 2020. [↑](#footnote-ref-6)
7. The progress reports were placed before us at the hearing on 30 October 2020 upon the respondents’ unopposed applications to adduce fresh evidence, which we allowed. They showed that both respondents are coping quite well so far. [↑](#footnote-ref-7)
8. Section 15(1)(a). [↑](#footnote-ref-8)
9. Section 15(1)(e). [↑](#footnote-ref-9)
10. See the definition of juvenile in section 2 of the PCJO. [↑](#footnote-ref-10)
11. See the definition of young person in section 2 of the JOO. [↑](#footnote-ref-11)
12. In fact, when the issue was raised with counsel at the hearing before us, both Mr Pun SC for the 1st respondent and Mr Ma for the 2nd respondent had some difficulty in explaining whether and how the statutory criteria is met in the 1st or 2nd respondent’s case. [↑](#footnote-ref-12)
13. This was the Magistrate’s comment in response to Mr Ma’s submission on the culpability of the 2nd respondent: see the transcript of the proceedings below at Hearing Bundle, p.33S-U. [↑](#footnote-ref-13)
14. The Judgment is in Chinese. The extract below is an English translation prepared by the Bilingual Court Documents Unit of the Department of Justice. [↑](#footnote-ref-14)
15. Cap 297. [↑](#footnote-ref-15)
16. Section 4. [↑](#footnote-ref-16)
17. Cap 378. [↑](#footnote-ref-17)