# DCCC 57/2020

[2020] HKDC 473

# IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

# CRIMINAL CASE NO 57 OF 2020

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HKSAR

v

YIU SIU HONG

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Before: Her Honour Judge A J Woodcock in Court

Date: 24 June 2020

Present: Miss Angela Wong, Public Prosecutor, for HKSAR/Director of Public Prosecutions

Mr Kwan Man Wai, Steven, instructed by O Tse & Co, assigned by the Director of Legal Aid, for the defendant

Offence: [1] Possession of offensive weapons in a public place（在公眾地方管有攻擊性武器）

[2] Attempted arson with intent（有意圖而企圖緃火）

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REASONS FOR SENTENCE

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1. The defendant pleaded guilty to 2 offences. He pleaded guilty to possession of offensive weapons in a public place, contrary to section 33 (1) and (2) of the Public Order Ordinance, Cap 245, Charge 1. On 13 October 2019, outside Tong Ming Street Park, Tong Ming Street, Tseung Kwan O, the defendant, without lawful authority or reasonable excuse, had with him offensive weapons, namely 2 petrol bombs.
2. He also pleaded guilty to attempted arson with intent, contrary to section 60 (2) and (3), 63 (1) and 159G of the Crimes Ordinance, Cap  200, Charge 2. On the same day and at the same location, without lawful excuse, the defendant attempted to damage by fire property belonging to himself or another, intending to damage such property, and intending thereby to endanger the life of another or being reckless as to whether the life of another would be thereby endangered.

*Facts of the case*

1. The defendant admitted the amended Summary of Facts including a background of the time and place where he was arrested. He agreed that in the afternoon of 13 October 2019 a few hundred protesters had assembled in the material area and committed various unlawful acts which included setting up barricades across roads and setting fires on main carriageways. By about 6:15 pm in the evening, around 40 to 50 protesters had set up barricades and blocked the junction of Tong Chun Street and Tong Ming Street. Police officers arrived to restore order and traffic at about 6:35 pm. When they arrived, some protesters dispersed.
2. At around 6:41 pm there were two layers of barricades across the road. The distance between them was the width of two vehicle lanes. Vehicles on Tong Ming Road were blocked by these barricades. The facts state that police officers were clearing those barricades when the defendant walked out from the direction of the second layer of barricades outside Tong Ming Street Park. He was holding a glass bottle containing petrol with a cloth inserted into the bottle in his right hand and a lighter in his left hand.
3. Four off-duty police officers were nearby and witnessed the defendant walk towards the police officers who were clearing the barricades on the road at that junction whilst he attempted to use the lighter to light the petrol bomb. They immediately approached him and one officer grabbed his right hand. There was a struggle and the defendant attempted to run away. He was pushed towards a roadside planter and subdued.
4. The defendant was dressed in a black jacket, a blue T-shirt, black long trousers, black cap, wearing gloves and a black balaclava. He was carrying a black rucksack. In that rucksack the police found another petrol bomb, a white cloth, a laser pointer, a helmet, a respirator, 15 plastic zip ties, a can of spray paint and a pair of forearm sleeves. There is no dispute that the petrol bombs contained petrol, a flammable liquid.
5. The defendant was arrested and cautioned. He remained silent under caution. On the following day a video recorded interview was conducted where he initially said nothing under caution. However, during this interview, he was shown the exhibits seized and then admitted possessing the petrol bombs. He admitted he was attempting to light the petrol bomb to throw towards the barricades when he was arrested. He admitted ownership of all the exhibits found on him and in his bag.
6. The defendant told the police under caution that he had bought the Naptha from a hardware store in Kwun Tong and poured the flammable liquid into two glass bottles. He intended to light and throw the petrol bombs towards the barricades to stop the police from proceeding during the confrontation. He admitted that he intended to use the lighter to light the cloth of the petrol bomb. He was wearing a black cap and a balaclava at the time to hide his identity during protests. He had the helmet, gloves, respirator and filters to protect himself during protests. He claimed that the laser pointer, red spray paint and plastic zip ties were for his work, in the stage design field.
7. The defendant admitted to the police that he was holding a petrol bomb in his right hand and a lighter in his left hand intending to light the petrol bomb and throw it at the barricades.
8. The defence submitted a photograph of the junction of Tong Chun Street and Tong Ming Street marked MFI-1. The defendant says where the photograph is circled in blue is where he was subdued. The two orange lines represent 2 rows of barriers erected by the protesters which disrupted traffic. He says that the area circled in green is where there were police vehicles parked that had arrived to restore order and assist vehicles affected by the barriers, including their own. The prosecution doesn’t dispute this description.

*Mitigation*

1. The defendant is now 23 years old and has a clear record. He is an only child and finished Form six education. He had hopes to further his studies in Taiwan but in 2015 his father suffered a work related injury and has not been in employment since. After that, they relied on as a family the defendant’s mother’s income as a clerk. Sadly, she was diagnosed with cancer in 2017 which could not be cured. In fact, the cancer spread all over her body and she succumbed to the disease on 26 May this year.
2. I have been told that the defendant was remanded in custody after his arrest in October last year but was granted bail because his mother by then was terminally ill. He was released on bail six days before she passed away.
3. The defendant’s best mitigation is his plea of guilty at the earliest opportunity. In mitigation, I have received a letter written by the defendant and others. They include his previous football coach, his present employer and several from his former teachers.
4. I don’t intend to repeat the contents of all the letters. The defendant explains how he became the breadwinner of the family after his father was injured and his mother was diagnosed with cancer. Instead of continuing his education in Taiwan, he found a job which he happily enjoyed and has been gainfully employed in for the past three years. He has worked in stage lighting with success and hopes to excel in this field. His employer praises his diligence and work ethics.
5. In the defendant’s letter, he also explains that he became involved in the social movement against the extradition bill. I quote, “in face of the social injustice and the underserved justice, the people around me and I were forced to voice out our opinion. I was deeply troubled about choosing between the social movement and my family.” Since his remand he has had time to reflect and understands that violence now cannot resolve issues.
6. The letters from his football coach from seven years ago and his teachers at school all stress he was a talented football player and represented the school often. He was respectful at school and polite to teachers. He had integrity and was kind to fellow students. Many comment on his attachment to his family; he is a filial son.
7. Mr Kwan for the defendant, has said all he can say on behalf of the defendant. In his written mitigation he described the defendant as being like other young people in Hong Kong with their own ideas of utopia and justifiable grievances against certain public policy. He however does not try to justify the use of violence to reflect anger. He makes this statement as an explanation for the defendant acts not as an excuse.

*Reasons for sentence*

1. There should be no doubt in anyone’s mind that an offence of this nature, irrespective of motive or reason is to be taken and viewed with the utmost seriousness. The Court of Appeal said in *The Queen v Li Mun Tong* CACC 309/1994 “Arson, because of the inherent danger in any uncontrolled fire, is always regarded as an offence of particular gravity. Arsonists exhibit reckless disregard for life and property.”
2. A section 60(2) offence is the far more serious charge for arson because it requires an additional mens rea, this being the intent, by the destruction or damage, to endanger the life of another or being reckless as to whether the life of another would be thereby endangered.
3. The defendant tendered his plea of guilty to charge 2 on the basis that he intended to damage barricades on the road with fire and was being reckless as to whether the life of another would be thereby endangered; he was not intending to endanger the life of another. The prosecution does not challenge this mitigation. The defendant’s culpability will be assessed on this basis. Mr Kwan submitted the defendant as he told the police under caution wanted to throw the petrol bombs towards the barricades to stop the police from proceeding during the confrontation.
4. Mr Kwan has referred me to *HKSAR v Wong Chun Kit* 2018 HKDC 360, a District Court case where the court sentenced a defendant suffering from mental illness who lit a fire on a rooftop of a multi-storey building and locked himself on the rooftop, denying access to others. The court reviewed the sentences of 5 cases from the District Court.
5. With respect, that case and those cases reviewed are of no assistance to me in passing sentence. None are remotely similar or comparable to the facts in this case.
6. I bear in mind that arson can attract a life sentence. Such a maximum sentence highlights the seriousness with which deliberately starting fires must be viewed. There is no tariff or guidelines for arson. Each case very much depends on its own facts and circumstances; these vary so much in cases of arson. In *HKSAR v Kung Pak Fu* 2008 2 HKCLRT 240 the Court of Appeal reviewed a number of arson cases and said at paragraph 23;

“….. arson is an extremely serious offence. That said, we do not consider it appropriate to lay down sentencing guidelines for this offence because its gravity differs from case to case, particularly in cases involving family disputes or souring of relationships. The court must impose a sentence which properly reflects the gravity of the particular case.”

1. Mr Kwan has also referred me to the appendix in Cross and Cheung’s “Sentencing in Hong Kong”, the eighth edition. That appendix refers to cases on quantum of sentence for certain offences. Under “Arson” on page 721 there are a list of cases and sentences imposed with a brief description of the facts. The learned authors comment that sentences tend to start at about 5 years’ imprisonment although they may be very much higher when life and property is seriously endangered by the actions of the arsonist. I take note that the Court of Appeal in *Chau Yuk Kuen v The Queen* CACC 402/1980 said “We feel that the tariff sentence for this type of appeal should be at least 4 to 5 years.”
2. Mr Kwan distinguishes those cases referred to in the appendix as they were usually either committed inside multi-storey buildings or at market stalls or in the dead of night in highly populated places. However, many of those cases occurred in domestic or other situations where the arsonist was in a highly emotionally charged state of mind meaning his conduct was due to emotional distress or mental distress. Here no such emotion was present except perhaps the dangerous emotion of malevolence and reprisal.
3. Defence counsel has asked me to consider the following factors as relevant and suggested that a sentence of 24 months or less would be appropriate for this arson charge. He highlights that this case was only an attempted arson; an incomplete offence. No property was actually damaged nor was anybody injured. The arson was attempted in an open space as opposed to inside a building or in a crowded area. The offence took place in the afternoon, during daylight when any fire would have been easily detected before it had a chance to spread. He also asked me to take into account the fact that the defendant did not stand to gain financially or personally from this offence and that it was the protests of that time that led to the defendant’s anger and him resorting to violence to vent his anger.
4. Mr Kwan stresses that the defendant attempted to commit arson in an open space on a road during daylight hours. He comments that the police officers who were at the barricades were wearing protective items of clothing and were more than likely equipped with fire extinguishers. If a fire had started, then there were enough officers around to deal with it in a swift manner. None of these factors make the offences less serious.
5. Sentencing guidelines for Public Order offences (including riot, violent disorder, affray and other offences in the Public Order Act 1986) in UK have been published by the Sentencing Council in October 2019. The purpose of the guidelines is to provide a clear framework to be used by all courts in England and Wales to ensure a consistent approach in sentencing offenders aged 18 years or over convicted of Public Order offences. The guidelines direct the court to first determine the offence category before finding an appropriate starting point and category range.
6. In order to determine the offence category, the court should assess both Culpability and Harm. Culpability can be divided into category A and category B. Category A is more serious and lists four factors which includes where an offender used or intended to use a petrol bomb or incendiary device. Category B includes any incident of riot not including category A factors.
7. Harm can be divided into category 1 and category 2. The level of harm is determined by weighing up all the factors of the case to determine the harm that has been caused or was intended to be caused. Examples of category 1 factors, which is more serious, includes an incident which results in serious physical injury or very serious fear and/or distress. An incident which causes serious disruption or severe detriment impact to community. An incident which involves attacks on police or public servants and incidents which results in extensive damage to property. There are other examples of category 1 factors listed in the guidelines. Category 2 would include all other cases.
8. If an offence consists of a category 1 Harm and a category A Culpability factor, the Sentencing Council in UK suggests a starting point of 7 years’ imprisonment and gives a category range of 6 to 9 years’ imprisonment. If an offence consisted of a category 2 Harm and a category B Culpability factor, the sentencing council suggests a starting point of 5 years’ imprisonment and gives a category range of 3 to 6 years’ imprisonment.
9. The guidelines suggest a list of aggravating factors which can increase a starting point. Those include, for example, an offender being masked or disguised to evade detection, like the defendant here.
10. The defendant has not been charged with a public order offence nor was there a riot or unlawful affray at that junction where he intended to throw that petrol bomb when the police were clearing away the blockades but the sentencing council’s guidelines give an insight into how serious the use of petrol bombs is viewed as is targeting police officers or public servants. In this case, throwing them in the direction of the police to prevent them carrying out their duty. The defendant did agree in his Summary of Facts that there were a few hundred protesters there that afternoon who had unlawfully built barricades and set fires on carriageways. Those protesters dispersed when the police arrived at the scene allowing the police to start to clear the barricades.
11. In Hong Kong there are no previous authorities with similar facts. The scenario where petrol bombs are thrown despite police being present is unprecedented here as far as sentencing is concerned. An attempt to intentionally damage by fire property belonging to another and being reckless as to whether the life of another would be thereby endangered is graver than conduct which is likely to cause serious damage to property and should therefore attract a higher and deterrent sentence.
12. Here, police officers near the barricades were trying to remove the barricades from the carriageway. The defendant says he intended to throw a petrol bomb to light barricades which were close to another line of barricades being cleared by police officers at that material time. He had no regard and was reckless as to whether police officers working there or nearby or perhaps other protesters would be hurt and injured. His culpability is high and the imminence of harm and the gravity of the threat are factors I consider relevant to sentence.
13. The defendant explained that he wanted to voice out his opinion against the Extradition Bill but to do it with petrol bombs is absolutely unacceptable. The Extradition Bill had been shelved months before 13th October 2019. That material day and in fact that period of time in Hong Kong was particularly violent with citywide conflicts, protests and destruction of property. Petrol bombs were being thrown indiscriminately. He was out on streets intending to commit the offence of arson. He was well-prepared to cause trouble which is obvious from the paraphernalia he had in his rucksack.
14. Such criminal acts should never be confused or associated with legitimate and peaceful protest. The defendant’s possession of petrol bombs and his intention to throw a petrol bomb with intent, a weapon that is notoriously unstable, makes him a criminal, not a protester and he should be treated as such.
15. The fact the defendant was of a previous good character does not carry significant weight when the intention is to cause serious damage to property and being reckless as to whether the life of another would be endangered. Such an intention and recklessness would be enough to warrant a sentence of significant length. Sentencing is a balancing act and in some cases the serious nature, circumstances and the prevalence of the offence recently requires a custodial sentence that serves as a deterrent to others and will therefore take priority over the personal details and mitigation of the defendant.
16. I have nevertheless, taken into account his age, previous clear record and mitigation put forward on his behalf. It was an arson not carried through to a conclusion thankfully due to eagle eyed off duty police officers. I take on board the observation that police officers would have been wearing protective gear and normally carry fire extinguishers.
17. In considering an appropriate starting point I find several features which places these facts in the range of the more serious cases of arson; higher than a five-year starting point.
18. This was a planned, calculated and premeditated offence; the defendant bought materials and made petrol bombs before he arrived at the scene. There was prior preparation, it was not an offence committed on the spur of the moment. This made the lack of emotion on his part palpable. Moreover, his manner of dress was deliberately designed to avoid identification and arrest.
19. It is an aggravating factor that for this arson offence the defendant intended to use petrol bombs to achieve his purpose. This was not a case of arson by setting fire to newspaper or rubbish or a curtain. The potential harm and mayhem that could have been caused was considerable because once a petrol bomb is ignited and thrown, it is quite impossible to foresee the possible or likely consequences. A petrol bomb is an unstable weapon in such a situation. It is also possible an already volatile situation could have been made much worse.
20. Lastly, the fact is, knowing police officers were clearing barricades, he wanted to set fire to them. It was because the police were there that he wanted to set fire to them. He acted with the utmost contempt and disdain for law and order. The police arrived to try and maintain public order. The defendant crossed the line, such a line exists to protect public order because society is prone to descend into anarchy if public order is not preserved.
21. The maximum sentence that can be imposed for charge 1 is 3 years imprisonment. In view of the facts, number of petrol bombs and his intention to use them, I will adopt a starting point of 2 years and 6 months for charge 1.
22. I will adopt a starting point of 6 years for charge 2. The defendant pleaded guilty at the earliest opportunity therefore, he will receive a one third reduction in his sentences. Other than this, there is nothing I find would warrant any further reduction in sentences.
23. For charge 1, 2 years and 6 months reduced by one third is 1 year and 8 months. For charge 2, 6 years reduced by one third is 4 years.
24. These offences are related in that the defendant attempted to commit charge 2 with an offensive weapon of charge 1. I take the view that an overall sentence of 4 years sufficiently reflects the defendant’s overall criminality and culpability. Therefore, I order the sentence of charge 1 to be served concurrently with that of charge 2, resulting in a total term of 4 years’ imprisonment.

( A J Woodcock )

District Judge