**FACC No. 2 of 2021**

**[2021] HKCFA 24**

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 2 OF 2021 (CRIMINAL)**

(ON APPEAL FROM HCMA NO. 303 OF 2018)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

|  |  |  |
| --- | --- | --- |
|  | **HKSAR** | **Respondent** |
|  | **and** |  |
|  | **LEUNG CHUNG HANG SIXTUS**  **(梁頌恆) (D1)** | **Appellant** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

|  |  |
| --- | --- |
| Before: | Chief Justice Cheung, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Stock NPJ and  Mr Justice French NPJ |
| Date of Hearing: | 22 June 2021 |
| Date of Judgment: | 16 July 2021 |

|  |  |  |
| --- | --- | --- |
|  | **JUDGMENT** |  |

Chief Justice Cheung:

1. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Ribeiro PJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Fok PJ:

***A. Introduction***

1. The certified question of law[[1]](#footnote-1) for which leave to appeal to this Court was granted by the Appeal Committee[[2]](#footnote-2) is:

“Which alternative set out in *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 shall be applicable in relation to the ‘likely to cause any person reasonably to fear’ limb of the offence created by section 18 of the Public Order Ordinance (Cap. 245)?”

1. The question arises out of the appellant’s conviction on a charge of taking part in an unlawful assembly, contrary to sections 18(1) and (3) of the Public Order Ordinance (Cap. 245) (“the POO”). The particulars of the charge materially read:

“On 2nd November 2016, [the appellant], Yau Wai Ching, Yeung Lai Hong, Chung Suet Ying and Cheung Tsz Lung, together with other persons took part in an unlawful assembly outside Conference Room 1, 2nd Floor, Legislative Council Complex, No. 1 Legislative Council Road, Central, Hong Kong, i.e. they assembled together and 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.”

1. The appellant was convicted of the charge before a magistrate on 11 May 2018[[3]](#footnote-3) and, on 4 June 2018, he was sentenced to four weeks’ imprisonment for the offence. The appellant appealed against his conviction and sentence to the Court of First Instance. On 2 September 2020, Wilson Chan J dismissed the appeal against both conviction and sentence.[[4]](#footnote-4) The appellant sought certification of questions of law for the Court of Final Appeal and, as already stated, His Lordship certified the question of law set out at [3] above.
2. The question of law raises an important point of law concerning the identification of a gathering as an unlawful assembly and, specifically, as to the mental element of the offence of taking part in such an assembly. The status of an assembly as unlawful is also an element in various other offences under Part IV (Unlawful Assemblies, Riots and Similar Offences) of the POO and relates to other important questions of law that will fall to be determined in the future. [[5]](#footnote-5) This Judgment only addresses the specific question raised in the certified question in this appeal.
3. As will be seen later in this Judgment, because of the magistrate’s findings of fact, upheld by the judge, the appellant’s appeal against his conviction must be dismissed regardless of the answer to the certified question of law. It is convenient to begin, however, with an analysis of the proper construction of the relevant offence creating section.

***B. An analysis of the statutory offence under section 18 of the POO***

1. The Court of Final Appeal has previously dealt with the proper approach to the construction of offence creating provisions, and specifically the mental element of such offences, in *Hin Lin Yee v HKSAR*[[6]](#footnote-6) (“Hin Lin Yee”) and *Kulemesin v HKSAR*[[7]](#footnote-7) (“Kulemesin”). In determining the certified question in this appeal, these authorities are to be applied.

***B.1 The principles laid down by* Hin Lin Yee *and* Kulemesin**

1. The required mental state of any given statutory offence is a matter of statutory construction.[[8]](#footnote-8) In that exercise, the principle of the presumption of *mens rea* may be engaged but it is important to note, as was pointed out in *Hin Lin Yee*, that not every case raises that presumption or involves consideration of the alternative categories identified in that decision (as later refined in *Kulemesin*). As Ribeiro PJ observed in *Hin Lin Yee*:

“What, if any, mental state is required is a matter of statutory construction. The statute may of course be specific, saying for instance that the act must be done ‘wilfully’, ‘knowingly’, ‘negligently’, ‘without due care and attention’ and the like. It may go further and lay down a requirement not merely of a basic intent but also a specific intent: the alleged burglar, for example, must be shown to have (intentionally) entered a building as a trespasser with the specific intent of stealing or committing one of the other named offences when inside. Such provisions pose no problems beyond having to resolve possible arguments as to the scope of the words used and their proper application to the facts.”[[9]](#footnote-9)

1. The principles discussed in *Hin Lin Yee* and *Kulemesin* are only applicable where “the provision which creates the offence is silent or ambiguous as to the state of mind required.”[[10]](#footnote-10) It is in those cases that the presumption of *mens rea* arises, with the starting point being “that the statute must be construed adopting the presumption that it is incumbent on the prosecution to prove *mens rea* in relation to each element of the offence” and, to that extent, supplementing the text of the statutory language.[[11]](#footnote-11)
2. However, the presumption is merely a starting point because it is “equally firmly established that a statute may, on its proper construction, displace the presumption of *mens rea* expressly or by necessary implication.”[[12]](#footnote-12) So the first question of construction arising is whether the presumption is to be maintained or displaced: *Hin Lin Yee* at [45] and [98]; *Kulemesin* at [40]. And if it is determined to be so displaced, *Hin Lin Yee* requires that a second question be considered in tandem, namely: “By what, if any, mental requirement is the supplanted requirement of *mens rea* to be replaced?”[[13]](#footnote-13)
3. As reformulated in *Kulemesin*, there are five constructional choices that present themselves as possible alternatives when asking, in tandem, the questions “has the presumption of *mens rea* been displaced” and “if so, by what”. Those five alternatives are:

“(a) First, that the *mens rea* presumption persists and the prosecution must prove knowledge, intention or recklessness as to every element of the offence (‘the first alternative’);

(b) Second, that the prosecution need not set out to prove *mens rea*, but if there is evidence capable of raising a reasonable doubt that the defendant may have acted or omitted to act in the honest and reasonable belief that the circumstances *or likely consequences* of his conduct were such that, if true, liability would not attach, he must be acquitted unless the prosecution proves beyond reasonable doubt the absence of such exculpatory belief or that there were no reasonable grounds for such belief (‘the second alternative’);

(c) Third, that the presumption has been displaced so that the prosecution need not prove *mens rea* but that the accused has a good defence if he can prove on the balance of probabilities that he acted or omitted to act in the honest and reasonable belief that the circumstances *or likely consequences* of his conduct were such that, if true, he would not be guilty of the offence (‘the third alternative’);

(d) Fourth, that the presumption has been displaced and that the accused is confined to relying on the statutory defences expressly provided for, the existence of such defences being inconsistent with the second and third alternatives mentioned above (‘the fourth alternative’); and

(e) Fifth, that the presumption is displaced and the offence is one of absolute liability so that the prosecution succeeds if the prohibited act or omission is proved against the accused, regardless of his state of mind regarding the relevant elements of the offence in question (‘the fifth alternative’).”[[14]](#footnote-14)

1. Thus, where the Court holds that the presumption of *mens rea*, in terms of intention, knowledge or recklessness, is displaced on the proper construction of the statute in a given case (i.e. that the first *Kulemesin* alternative does not continue to apply), it will then go on to decide as a further matter of statutory construction, which of the second, third, fourth or fifth *Kulemesin* alternatives applies. That construction will have regard to the nature and subject-matter of the offence, its seriousness in terms of penalty and social obloquy, the need to ensure protection of the public, the practicalities of prosecution and conviction, the extent to which the defendant might solely have access to relevant information, and so on. In *Hin Lin Yee*[[15]](#footnote-15) and *Kulemesin*[[16]](#footnote-16), there is discussion of these considerations as they related to the particular statutory offences in those cases.

***B.2 The text of section 18 of the POO***

1. Section 18 reads:

“(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.”

1. As will be apparent, section 18 begins by defining, in sub-section (1), what constitutes an unlawful assembly. Sub-section (2) clarifies that what determines the status of the assembly as unlawful is the conduct of the persons who have assembled, even if the assembly originated from a lawful assembly. If the assembly is unlawful as so defined, any person who takes part in the assembly commits an offence (section 18(3)).
2. The status of a gathering as an unlawful assembly is also material to the offence of riot, provided for in section 19 of the POO. However, as already noted at [4] above, this appeal is not concerned with that offence and it is unnecessary to address the provisions of that section in this Judgment.
3. The elements of the offence of unlawful assembly as statutorily set out in section 18 of the POO can conveniently be enumerated in the following seven separate steps:

[1] “When 3 or more persons,”

[2] “assembled together,”

[3] “conduct themselves in a disorderly, intimidating, insulting or provocative manner”

[4] “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,”

[5] “they are an unlawful assembly.” [Section 18(1)]

[6] “It is immaterial that the original assembly was lawful if being assembled, they conduct themselves in such a manner as aforesaid.” [Section 18(2)]

[7] “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 …”. [Section 18(3)]

1. So separated, the statutory language provides that, by [5], an unlawful assembly exists if elements [1] to [4] are established. [6] provides that an initially unlawful assembly may become an unlawful assembly if [1] to [4] should occur. [7] is the offence-creating provision which makes it an offence for any person to take part in an unlawful assembly.

***B.3 The two limbs of section 18(1) and the presumption of mens rea***

1. Section 18(1) has two limbs, divided by the words “*intended or likely*”, which create two forms of the offence committed by taking part in the unlawful assembly as provided for in section 18(3). Although these must be read together, they differ significantly from each other.
   1. The first is “the intended limb”, which provides that the offence is committed (by taking part):

“When 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner *intended* … to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace …” (emphasis added).

* 1. The second is “the likely limb”, which provides that the offence is committed (by taking part):

“When 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner … *likely* to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace …” (emphasis added).[[17]](#footnote-17)

1. The offence under the intended limb expressly requires *mens rea*, specifying explicitly that it requires proof of intention. The *actus reus* requirements in section 18(1) are: (1) for there to be 3 or more persons; (2) assembled together; and (3) who conduct themselves in the prohibited manner, i.e. in a disorderly, intimidating, insulting or provocative manner. Since “intended” here can only be understood to mean “intended by the assembled persons”, the intended limb lays down as part of the *mens rea* requirements of the offence that the assembled persons conducting themselves in the prohibited ways must *intend* to “cause any person reasonably to fear that the persons so assembled will commit a breach of the peace”. Thus, construing the intended limb, there is no need to embark on the exercise envisaged in *Hin Lin Yee* or *Kulemesin* since the statute is neither silent nor ambiguous as to the state of mind required. The offence created by the intended limb expressly spells out the required *mens rea* in relation to the consequence of causing a reasonable fear of a breach of the peace.
2. The likely limb stipulates the same three *actus reus* elements, namely: (1) for there to be 3 or more persons; (2) assembled together; and (3) who conduct themselves in the prohibited manner, i.e. in a disorderly, intimidating, insulting or provocative manner. But at this point, a crucial difference from the intended limb arises. The words which then follow, “*likely* to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace …”, do not address the mental state of the assembled persons. Instead, they refer to the quality or likely consequences of the prohibited conduct by the assembled persons as observed externally. Thus, the prohibited conduct must be of such a nature as to be likely to result in any person reasonably apprehending a breach of the peace by the assembled persons.
3. The phrase in section 18(1), “likely to cause [etc.]”, is properly to be read and understood purely as an additional *actus reus* element. The prohibited conduct must be of such a nature as to be likely to carry the consequence of causing any person reasonably to apprehend a breach of the peace by the assembled persons.
4. So understood, the offence created by the likely limb is silent as to what, if any, mental state must be proved against the defendants in relation to that likely consequence of their conduct. One must then embark on carrying out the *Hin Lin Yee/Kulemsesin* exercise. Doing so, one starts with the presumption that, normally, *mens rea* is required (see [10] above).
5. For the reasons that I shall develop, including consideration of the question of what alternative to *mens rea* might apply (see Section B.4 below), it is to be concluded that the presumption of *mens rea* has been displaced regarding the offence created by the likely limb. Since intention and thus *mens rea* is expressly required under the intended limb but deliberately omitted from the likely limb, the legislative intent cannot have been for the two offences to carry the same mental requirement, one introduced expressly and the other, redundantly, introduced by application of the presumption of *mens rea*. If it had been the legislative intent that the prohibited conduct must always be accompanied by an intention to cause the apprehension of a breach of the peace, the words “or likely” would simply have been left out. By inserting those words into section 18(1), and thereby creating the likely limb, the legislative intent must have been to create an offence which can be committed without proof of an intention to cause, or recklessness as to causing, the apprehension in question. Obviously, if such proof were available, liability would be established under the intended limb. But absence of proof of such intention clearly does not mean that liability cannot arise under the likely limb.
6. The question, then, is what, if any, mental state short of intention is needed for conviction under the likely limb. This will be addressed in the next section (B.4) below.

***B.4 The mental element, if any, relevant to the likely limb***

1. The approach to determining what, if any, mental element applies, as reformulated in *Kulemesin*, is set out at [12] above. From the parties’ printed cases and submissions in this appeal, the contest is between the first, second and fifth alternatives. The appellant’s contention is that either the first or second *Kulemesin* alternatives apply to the likely limb but that, in any event, the fifth should not apply.[[18]](#footnote-18) For the respondent’s part, it is contended that the likely limb of the offence falls within the fifth *Kulemesin* category.[[19]](#footnote-19)
2. The fourth *Kulemesin* category, which neither party has suggested applies, can be eliminated immediately, since there is no relevant statutory defence against liability for unlawful assembly.
3. In submitting that the first category (full *mens rea* embracing intention, knowledge and recklessness) should apply to the likely limb, the appellant relies on essentially two main arguments, which are also relied upon in support of the second, and against the fifth, categories. Before addressing those arguments, the contention that the first category is supportable has already been disposed of. As explained at [24] above, the first category can be ignored since that is provided for by the intended limb of the offence and it can be assumed that it was not intended by the Legislature to be duplicated in the likely limb. As a matter purely of context, the statutory language cannot sensibly be construed as imposing full *mens rea* on the likely limb. Nor, as will be seen, does the legislative purpose support that conclusion.
4. Accordingly, the appellant’s reliance on the first instance decision of Albert Wong J in *HKSAR v Leung Tin Kei*[[20]](#footnote-20) is misplaced. In that case, His Lordship held that the presumption of *mens rea* is not displaced. He held:

“Upon careful consideration, I am of the view that as far as the ‘causing the stipulated fear by an objective standard’ limb is concerned, the presumption of *mens rea* ought not to be displaced. I am also of the view that ‘knowledge’ or ‘recklessness’ is the appropriate *mens rea* in relation to the ‘causing the stipulated fear by an objective standard’ limb of the elements.”[[21]](#footnote-21)

“Upon careful consideration, I rule that in respect of the ‘causing the stipulated fear by an objective standard’ limb, the prosecution has to prove that: the defendant knew of or was reckless as to the ‘prescribed act or acts’ being likely to cause ‘the stipulated fear’.”[[22]](#footnote-22)

That construction, as already explained at [24] above, cannot be accepted. Moreover, it overlooks the evident purpose of the likely limb reflected in the word “likely” and “reasonably”, namely the prevention of behaviour which creates an objective risk of a breach of the peace. His Lordship’s construction, therefore, cannot be right, and for reasons which follow, the judgment in *HKSAR v Leung Tin Kei* as regards the mental element of the likely limb of the offence of unlawful assembly,[[23]](#footnote-23) must be overruled.

1. Turning to the contest between the second and fifth *Kulemesin* categories, the two main arguments advanced by the appellant as to the appropriate mental element for the likely limb of the offence are, in summary, that:
   1. It is necessary to construe section 18(1) consistently with the constitutional protection afforded to the freedoms of assembly and expression and accordingly one can discard absolute liability as a conclusion; and
   2. A culpable state of mind is required, and absolute liability should therefore not be imposed, because of the seriousness of the offence which is punishable on conviction on indictment by imprisonment for five years and on summary conviction by a fine and imprisonment for three years.
2. Neither of these arguments is convincing and both should be rejected.
3. As to the constitutional right of peaceful assembly, it is to be remembered that the Court held in *HKSAR v Chow Nok Hang:*[[24]](#footnote-24)

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

1. The significance of crossing the line separating constitutionally protected behaviour and conduct that may be visited by sanction under the criminal law has been emphasised recently in this Court’s judgment in *Kwok Wing Hang v Chief Executive in Council*.[[25]](#footnote-25) In the case of section 18(1), where the assembled persons, acting in concert, conduct themselves in the prohibited manner (i.e. in a disorderly, intimidating, insulting or provocative manner) with the objectively likely consequence of causing any person to have reasonable apprehension of a breach of the peace, their behaviour would inevitably involve the threat of a breach of the peace, taking them outside the scope of constitutional protection, whichever mental state may be required regarding the consequences of their conduct.
2. As to the argument based on the seriousness of the offence, this is undoubtedly a factor to be taken into account in the construction exercise, to be assessed together with all other relevant factors:

“… all five of the reformulated alternatives … should be considered as possible conclusions when construing statutory criminal offences – both serious and regulatory – which are silent or ambiguous as to the state of mind required in respect of the element of the offence under consideration.”[[26]](#footnote-26)

1. And, as pointed out in *Hin Lin Yee*,[[27]](#footnote-27) the Court “recoils”, especially in relation to an offence carrying substantial penalties, from imposing absolute liability which results in a person’s conviction regardless of the mental state accompanying that person’s conduct where he or she may have “acted in a reasonable, diligent and socially unblameworthy manner” so that the criminal law ends up “snaring the diligent and socially responsible”.
2. In the present case, however, other factors, including the nature and subject-matter of the offence and the statutory objectives, including the need to ensure protection of the public and the maintenance of public order, are critical.
3. Where defendants charged with unlawful assembly have acted in a manner constituting the *actus reus* elements of the likely limb of section 18(1), they will, in a group of at least three persons, have assembled together and conducted themselves in a disorderly, intimidating, insulting or provocative manner which, viewed objectively, will have been likely to cause any person reasonably to fear that the assembled persons would commit a breach of the peace. This Court has previously endorsed the view that a breach of the peace occurs including:

“… whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.” [[28]](#footnote-28)

1. Persons who so conduct themselves in concert thereby causing any other person reasonably to fear that the assembled persons are likely to cause such harm are far removed from persons who have acted in a reasonable, diligent and socially unblameworthy manner or as socially responsible persons. In the circumstances, it is appropriate that section 18(1) be construed as prohibiting such conduct under the criminal law without requiring an additional *mens rea* element to be established.
2. Such a construction would also reflect the purpose of the offence. As the Attorney-General stated, when moving the first reading of the Public Order Bill 1967 (which became the POO):

“The Bill seeks to confer adequate powers for the *prevention* and control of disorders at all stages, with particular emphasis upon dealing with them as early as possible”.[[29]](#footnote-29) (emphasis added)

And, as Lam JA (sitting at first instance) pointed out in *Secretary for Justice v Leung Kwok Wah*:[[30]](#footnote-30)

“It must be emphasised that s.18 is very much a preventive measure. There is no need for a breach of the peace to have occurred.”

1. An offence that is designed to deter conduct likely to cause any person reasonably to apprehend a breach of the peace, and thus to prevent breaches of the peace from happening, is not logically linked to whether the assembled persons do or do not foresee such reasonable apprehension as the consequence of their acts, but is focused on responding to the objectionable nature and quality of those acts. Unlawful assembly is a public order offence whose purpose is to protect the public from the harm of public disorder. Given this statutory purpose, the alternative of recklessness (as distinct from intention) contended for on behalf of the appellant can also be rejected as inappropriate in relation to the likely limb.
2. I would therefore conclude, as a matter of statutory construction, that the likely limb of the offence falls within the fifth *Kulemesin* category and so dispenses with any *mens rea* requirement in respect of the likely consequence of causing reasonable apprehension of a breach of the peace. Contrary to the appellant’s contentions inviting the Court to reject a construction that “overcriminalises” behaviour, the offence in fact has built-in requirements providing a firm basis for treating the conduct as culpable and deserving of criminal sanction. In this regard, the likely limb offence requires proof of *mens rea* in relation to the defendants assembling and acting together in performing the prohibited acts. It also requires their conduct, objectively assessed, to be of such a nature that it is likely to cause any person reasonably to apprehend that they will commit a breach of the peace. That such apprehension must be objectively reasonable on the part of any person, and not just a few overly-sensitive persons, underlines the requirement that their conduct must provide a substantial basis for regarding a breach of the peace as likely. In addition, the offence is complete only when, as stipulated in section 18(3), a person “takes part in” an unlawful assembly so defined. The taking part is an additional requirement which additionally militates against the possibility of an innocent person being inadvertently caught up in the assembly and thereby unfairly convicted.
3. Support for this construction of the likely limb of the section 18 offence can be found in the similarly structured offence of disorder in public places in section 17B of the POO. Section 17B(2) provides:

“Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine at level 2 and to imprisonment for 12 months.”

Like section 18(1), therefore, section 17B(2) has two forms, concerning prohibited disorderly conduct either (1) intended to provoke a breach of the peace, or (2) whereby a breach of the peace is likely to be caused.

1. Section 17B(2) was considered by this Court in *HKSAR v Chow Nok Hang* and, although the focus of that case was not on the mental requirements of the offence, the judgments proceed on the evident assumption that the likely limb of section 17B(2) involves a purely objective assessment of the likely consequences of the impugned behaviour without reference to any subjective foresight or mental state on the part of the defendant. [[31]](#footnote-31)
2. The appellant’s contention that this comparison was inapt because section 17B(2) is concerned with the likelihood to cause breach of the peace, whereas the offence under section 18 is concerned with the likelihood to cause a stipulated fear (“… likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace …”) is, in this context, a distinction without a difference. The exercise in respect of both likely limbs of the two offences still requires an external objective assessment of the likelihood of an anticipated outcome that will not in fact have yet happened.
3. As discussed at [41] above, there is a significant degree of blameworthiness incorporated in the likely limb of the offence. For that reason, and notwithstanding the conclusion that on its construction the likely limb falls within the fifth category of *Kulemesin*, it is inapt to use the term “strict or absolute liability” to describe the likely limb of the section 18 offence. Although some regulatory offences, which on their proper construction are held to be within the fifth category of *Kulemesin*, are truly strict or absolute liability offences, that description is not appropriate in a case like the present where only one element of the offence is construed as falling within that category.
4. It therefore follows, from the discussion above, that the appellant’s contention that the first or second, and not fifth, *Kulemesin* category should apply must be rejected.
5. Although neither party has argued in favour of the third *Kulemesin* category, the same reasoning applies to it. As a matter of construction, the likely limb focuses on the likely effect of the conduct objectively assessed and not on the effect contemplated by the assembled persons.

***C. The charge against the appellant***

1. The incident giving rise to the charge against the appellant arose from a melee involving the appellant and security staff of the Legislative Council (“LegCo”) when the appellant was seeking to force his way into a conference room where LegCo was meeting and from which he had been excluded.
2. The appellant had been elected to LegCo in September 2016 but he declined or neglected to take his oath on 12 October 2016.[[32]](#footnote-32) The appellant wanted to re-take his oath at the LegCo meeting to be held on 2 November 2016 but he was not permitted to take part in that meeting. A notice to this effect was posted outside the LegCo chamber. Notwithstanding this, the appellant attended the LegCo meeting but was ordered to leave. When he refused to do so, the meeting was adjourned to a conference room on the second floor. At about 11.55am, the appellant and others tried to enter the conference room but were prevented from doing so by security guards. The appellant left but returned at about 1pm with about 14 others. They attempted to enter the conference room but were blocked by a cordon of security guards.
3. That attempted forced entry gave rise to the charge against the appellant. It was the prosecution case that the appellant and his accompanying group rushed at the cordon and pushed against the guards in an attempt to enter the conference room. There was a concerted effort to coordinate a surge forward to breach the cordon. The appellant was described as being very agitated and having lost control of his emotions. He held onto the frame of the door to the conference room and, on several occasions, tried to haul himself over the guards to get past them. Other members of the group supported him by pushing and shoving. The incident lasted about 20 minutes. The LegCo meeting was then adjourned and the group left. There were various injuries to some of the guards, requiring them to be taken to hospital, although fortunately none of the injuries were major.
4. The appellant testified in his own defence. He claimed not to have seen the notice excluding him from the LegCo meeting on 2 November 2016 but admitted he was asked to leave after attempting to re-take his oath. He was aware the meeting had been adjourned to the second floor conference room. When he went there at about noon, there were members of the media outside and he went elsewhere to be interviewed. He returned at 1pm thinking there would be fewer people present and intending to enter the conference room to take his oath. He said he did not think the security guards would stop him. When he arrived outside the entrance to the conference room, the guards pushed him away. He told the guards it was an offence to obstruct a LegCo member from attending a LegCo meeting. He lost his balance but he did not lean forward or charge. There was some force behind him which pushed him forward towards the guards who pushed him back. He claimed he wanted to leave the scene but there had been no way out.

***C.1 The findings in the courts below***

1. The magistrate believed the prosecution evidence and rejected the appellant’s contention that he did not expect to see the security guards there and the claim that he wanted to leave but could not do so, and also his assertion that he did not charge the guards. The magistrate specifically found that: the appellant and the other defendants shared a common purpose to get past the cordon; they assembled together in the corridor outside the conference room; the appellant and the other four defendants and others charged the cordon and caused a disturbance outside the conference room for about 20 minutes in a confined area; the appellant tried to climb over the cordon and, each time he did so, his arm struck one of the guards, even if unintentionally; in the melee, several security guards were injured; and the conduct of the appellant and the other defendants was disorderly.
2. The magistrate was satisfied that the actions of the appellant and the other defendants were likely to cause any person reasonably to fear that they would commit a breach of the peace. She held that “whether such behaviour was likely to cause any person reasonably to fear that they (the persons so assembled) would commit a breach of the peace, the subjective intentions of each defendant do not matter. It is an objective criterion.”[[33]](#footnote-33)
3. The magistrate also addressed the defence of honest and reasonable belief that was advanced. She held that, even if the defence were available, it could not, on the evidence, assist the appellant and the other defendants because the circumstances were such that they must have known that their conduct was likely to cause apprehension of a breach of the peace[[34]](#footnote-34) and, in any event, their suggested honest and reasonable belief in their right in law to assemble and behave as they had was at odds with their contention that they had not behaved in that manner.[[35]](#footnote-35)
4. In the Court of First Instance, the main issue was the *mens rea* issue with which this appeal has been concerned. The judge held that the legislative intention was “to impose an absolute liability” and he construed the likely limb as falling within the fifth category of *Kulemesin*.[[36]](#footnote-36) In so deciding, the judge relied on the judgment of Lam JA in *Secretary for Justice v Leung Kwok Wah* (*supra.*) and declined to follow the judgment of Albert Wong J in *HKSAR v Leung Tin Kei* (*supra.*). However, the judge held that, even if the correct approach was that adopted in the latter case, it would not avail the appellant since the evidence was such that he must have known at the time of the melee that the group’s conduct was such as was likely to cause fear of a breach of the peace.
5. As will be apparent from Section B.4 of this Judgment, I respectfully agree with the conclusions of the magistrate and judge in respect of the mental element of the likely limb. However, for the reasons noted at [45] above, it would be preferable not to refer to the offence as being one of strict or absolute liability since it carries significant *mens rea* requirements in relation to important *actus reus* elements.

***C.2 No difference in outcome however certified question answered***

1. Given the findings of the magistrate, upheld by the judge, the appellant’s guilt in respect of the offence is inevitable regardless of the answer to the certified question. As the judge rightly held:

“Even if the Court is to adopt the Judgment of Hon Wong J in *Leung Tin Kei*, namely that the presumption of *mens rea* in Ingredient (3)(b) had not been displaced (the first alternative in *Kulemesin*), and that the Prosecution needed to prove the *knowledge* or *recklessness* as to the prescribed manner being likely to cause any person reasonably to have the stipulated fear, the Appellant would still have committed the offence given that the Magistrate ruled the Appellant must know the nature of their conduct and the circumstances at the time of the offence were likely to cause any person reasonably to fear that they would commit a breach of the peace.”[[37]](#footnote-37)

***D. Disposition of the appeal and conclusions***

1. For the above reasons, I would dismiss the appeal.
2. In answer to the certified question of law:
   1. The *actus reus* elements of the likely limb of section 18(1) of the POO are: (i) there must be “3 or more persons”; (ii) they must be “assembled together”; (iii) they must “conduct themselves in a disorderly, intimidating, insulting or provocative manner”; and (iv) their conduct, viewed objectively, must “cause any person reasonably to fear that [they] will commit a breach of the peace … or provoke other persons to commit a breach of the peace”.
   2. The prosecution will need to prove full *mens rea* on the part of the defendant in respect of each of elements (i) to (iii) above. No *mens rea* is required in respect of element (iv).
   3. The prosecution must also prove the defendant took part in the unlawful assembly within section 18(3) of the POO.
3. *HKSAR v Leung Tin Kei* as regards the mental element of the likely limb of the offence of unlawful assembly[[38]](#footnote-38) is overruled.

Mr Justice Stock NPJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice French NPJ:

62. I agree with the judgment of Mr Justice Fok PJ.

Chief Justice Cheung:

63. The appeal is unanimously dismissed and we set out answers to the certified question of law in paragraph 59 above.

|  |  |  |
| --- | --- | --- |
| (Andrew Cheung)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Joseph Fok)  Permanent Judge |

|  |  |
| --- | --- |
| (Frank Stock)  Non-Permanent Judge | (Robert French)  Non-Permanent Judge |

Mr Douglas Kwok, Mr Law Ka Sing and Mr Howard Tang, instructed by Cedric & Co., for the Appellant

Mr Jonathan Man DDPP (Ag.) and Mr Derek Lau SADPP (Ag.), of the Department of Justice, for the Respondent

1. [2020] HKCFI 2401, HCMA 303/2018, 11 September 2020 (Wilson Chan J). [↑](#footnote-ref-1)
2. [2021] HKCFA 6, FAMC 36/2020, 4 March 2021 (Ribeiro PJ, Fok PJ and Stock NPJ). [↑](#footnote-ref-2)
3. [2018] HKMagC 1, KCCC 2035/2017, 11 May 2018 (Ms Wong Sze Lai). [↑](#footnote-ref-3)
4. [2020] HKCFI 2152, HCMA 303/2018, 2 September 2020 (Wilson Chan J). [↑](#footnote-ref-4)
5. See, e.g., *HKSAR v Lo Kin Man* [2021] HKCFA 17, FAMC 12/2020, Determination, 17 May 2021, to be heard on 5 October 2021, together with the appeal in *HKSAR v Tong Wai Hung* [2021] HKCA 807, CASJ 1/2020 (in which leave to appeal to the Court of Final Appeal was granted in FAMC 21/2021). [↑](#footnote-ref-5)
6. (2010) 13 HKCFAR 142. [↑](#footnote-ref-6)
7. (2013) 16 HKCFAR 195. [↑](#footnote-ref-7)
8. (2010) 13 HKCFAR 142 at [38]-[39]. [↑](#footnote-ref-8)
9. *Ibid*. at [39] (footnotes omitted). [↑](#footnote-ref-9)
10. *Ibid.* at [40]. [↑](#footnote-ref-10)
11. *Ibid.* at [41]. [↑](#footnote-ref-11)
12. *Ibid.* at [43]. [↑](#footnote-ref-12)
13. *Ibid.* at [45]. [↑](#footnote-ref-13)
14. (2013) 16 HKCFAR 195 at [83] (emphasis in original). [↑](#footnote-ref-14)
15. (2010) 13 HKCFAR 142 at [140]-[166]. [↑](#footnote-ref-15)
16. (2013) 16 HKCFAR 195 at [88]-[90]. [↑](#footnote-ref-16)
17. The further alternative of provoking others to commit a breach of the peace (“or will by such conduct provoke other persons to commit a breach of the peace”) can be ignored for the purposes of the present analysis in respect of both “the intended limb” and “the likely limb”. [↑](#footnote-ref-17)
18. The Appellant’s Printed Case at [5], [71]-[78], [79]-[81] and [82]-[83]. [↑](#footnote-ref-18)
19. Case for the Respondent at [3], [60]-[63] and [72]. [↑](#footnote-ref-19)
20. [2018] HKCFI 2715, [2020] 1 HKLRD 1263. [↑](#footnote-ref-20)
21. *Ibid.* at [66]. [↑](#footnote-ref-21)
22. *Ibid.* at [73] (emphasis in original). [↑](#footnote-ref-22)
23. *Ibid.* at [78(4)]. [↑](#footnote-ref-23)
24. (2013) 16 HKCFAR 837 at [39]. [↑](#footnote-ref-24)
25. [2020] HKCFA 42, (2020) 23 HKCFAR 518 at [107] and [110]. [↑](#footnote-ref-25)
26. (2013) 16 HKCFAR 195 at [90]. [↑](#footnote-ref-26)
27. (2010) 13 HKCFAR 142 at [105], [110]. [↑](#footnote-ref-27)
28. *R v Howell* [1982] QB 416 at 427, referred to in *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [77]-[82]. [↑](#footnote-ref-28)
29. Hong Kong Legislative Council, Official Report of Proceedings (1 November 1967) at p.442. [↑](#footnote-ref-29)
30. [2012] 5 HKLRD 556 at [40]. [↑](#footnote-ref-30)
31. (2013) 16 HKCFAR 837 per Chan ACJ at [14] and Ribeiro PJ at [86], [93]-100]. [↑](#footnote-ref-31)
32. *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390 at [8]-[9], [15] and [28]. [↑](#footnote-ref-32)
33. Statement of Findings at [158] and [162]. [↑](#footnote-ref-33)
34. *Ibid.* at [166]. [↑](#footnote-ref-34)
35. *Ibid.* at [165]. [↑](#footnote-ref-35)
36. [2020] HKCFI 2152 at [36]-[44]. [↑](#footnote-ref-36)
37. *Ibid.* at [48]. [↑](#footnote-ref-37)
38. [2018] HKCFI 2715, [2020] 1 HKLRD 1263 at [78(4)]. [↑](#footnote-ref-38)