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DCCC 480/2017
[2019] HKDC 450

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO 480 OF 2017**

HKSAR

v

TAI YIU TING (D1)
CHAN KIN MAN (D2)
CHU YIU MING (D3)
CHAN TANYA (D4)
SHIU KA CHUN (D5)
CHEUNG SAU YIN (D6)
CHUNG YIU WA (D7)
WONG HO MING, RAPHAEL (D8)
LEE WING TAT (D9)

Before: His Honour Judge Johnny Chan
Date: 9th April 2019
Present: Mr David C Y Leung, SC, DPP, Mr Lui Tsz Ming Ira, SADPP
and Mr Lau Tak Wai Derek, Senior Public Prosecutor, for
HKSAR / Director of Public Prosecutions

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Dr Gerard McCoy, SC, Mr Steven M W Kwan, Mr Albert N B Wong, instructed by Tang, Wong & Chow, for the 1st to 3rd defendants

Mr Ching Y Wong, SC, leading Ms Fiona H Y Nam and Ms Adgie N K Chan, instructed by CLY Lawyers, for the 4th defendant

Mr Robert Pang, SC leading Mr Timothy T Y Lam, instructed by Ho, Tse, Wai & Partners, for the 5th defendant

Mr Hectar H Pun, SC, leading Mr Anson Y Y Wong, instructed by Kenneth Lam, assigned by the Director of Legal Aid, for the 6th defendant

Mr Dykes Philip John, SC, leading Mr Tam Chun Kit, instructed by Kenneth Lam, assigned by the Director of Legal Aid, for the 7th defendant

Mr Lawrence Lok, SC, leading Mr Chan Wai Yin Joe, instructed by Ho, Tse, Wai & Partners, assigned by the Director of Legal Aid, for the 8th defendant

Mr Edwin Choy, SC, Ms Senia Ng and Ms Chow Hang Tung, instructed by Ho, Tse, Wai & Partners, for the 9th defendant

Offence: [1] Conspiracy to commit public nuisance (串謀犯公眾妨擾罪) – D1-D3

[2] Incitement to commit public nuisance (煽惑他人犯公眾妨擾罪) – D1-D7

[3] Incitement to incite public nuisance (煽惑他人煽惑公眾妨擾罪) – D1-D7

[4] Incitement to commit public nuisance (煽惑他人犯公眾妨擾罪) – D8

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[5] Incitement to incite public nuisance (煽惑他人煽惑公眾
妨擾) – D8

[6] Incitement to commit public nuisance (煽惑他人犯公眾
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INTRODUCTION

1. Charge 1 concerns a campaign known as “Occupy Central with Love and Peace” or “Let Love and Peace Occupy Central” launched by D1 to D3 in or about March 2013 (the “OCLP”). D1 to D3, in a press conference on 27th March 2013, together announced the commencement of the OCLP. Through the OCLP, D1 to D3 strived for their advocated form of universal suffrage in the election of the Chief Executive of the Hong Kong Special Administrative Region.

2. The OCLP, as announced in the said press conference, was a four stages campaign: signing of the covenant; the deliberation day; citizen authorization process, and finally, the act of civil disobedience.

3. It is the prosecution case that D1 to D3 had agreed to obstruct unlawfully public places and roads in or in the neighbourhood of Central. The proposed occupation of the public thoroughfares would be an unreasonable one and would amount to a common injury to the public or a significant section of the public, hence what was agreed was a conspiracy to commit public nuisance.

4. After the press conference in March 2013, following events relevant to Charge 1 took place:-

- (i) On 30th April 2013, D1 to D3 together appeared on a radio programme in which they talked about the OCLP;

(ii) On 1st July 2013, at a public gathering at Chater Garden, D1 to D3 gave speeches about the campaign of OCLP and the civil disobedience to occupy Central;

(iii) In a street forum on a day between June and October 2013, D3 gave a speech about the OCLP.

5. On 31st August 2014, the Standing Committee of the National People's Congress ("NPCSC") promulgated its decision on issues relating to the election of the Chief Executive of the HKSAR by universal suffrage in 2017 ("the Decision on 31st August").

6. Following the Decision on 31st August, certain protestors held a number of protests against it.

7. By a Notification of Intention to Hold a Public Meeting ("Notification") dated 18th September 2014,¹ D3 notified the Police that a public meeting would be held in two parks and a section of Chater Road in Central on 1st to 3rd October 2014. An insurance policy² was taken out and a meeting was held with the police on 25th September 2014.³ In respect of Exhibit D3-1, the police issued a Letter of Prohibition.⁴ As the events developed, the proposed public meeting on 1st to 3rd October did not take place.

¹ Exhibit D3-1

² Exhibit D2-13

³ Exhibit D3-2

⁴ Exhibit P153

8. On 22nd September 2014, the Hong Kong Federation of Students (“HKFS”) and Scholarism launched class boycotts against the Decision on 31 August.

9. It was against the above background that two notified public meetings were held at Tim Mei Avenue, Admiralty on 26th September 2014. In respect of these two public meetings, two Notifications were given to the police on 23rd September 2014, one by Mr. Lai Man Lok of Scholarism⁵ and the other one by Mr. Wong Jun Ian of Civic Party.⁶ The police issued two Letters of No Objection (“LONO”) for the two meetings⁷ on 24th and 25th respectively.

10. On 26th September 2014, Mr. Wong Jun Ian submitted a Notification⁸ to hold a public meeting at Tim Mei Avenue on 27th September 2014, which was a continuation of the public meeting on 26th September, i.e. the subject matter of Exhibits P150 and P151. The police issued a LONO⁹ on the same day.

11. At about 5:30 p.m. on 26th September 2014, PW2 Senior Superintendent Wong Kei Wai ordered that the west side carriageway of Tim Mei Avenue be cordoned off for safety reasons. There is evidence that the east side carriageway of Tim Mei Avenue was also cordoned off later in the evening on the same day, i.e. at the junction of Tim Mei Avenue and Harcourt Road.

⁵ Exhibit P148

⁶ Exhibit P150

⁷ Exhibit P149 and P151

⁸ Exhibit P1

⁹ Exhibit P2

12. At about 10 p.m. on 26th September 2014, certain students at the public meeting at Tim Mei Avenue charged into the East Wing Forecourt of Central Government Offices (“CGO”) to “reclaim” the said forecourt, also known as “Civic Square” and some student leaders were arrested. Some protestors who had entered Civic Square occupied the flagstaff platform therein and refused to leave.

13. After midnight on 27th September 2014, the assembly at Tim Mei Avenue continued. A large number of people gather at Tim Mei Avenue. There were speakers on the stage with a green backdrop asking people present to stay and call upon more people to come to Tim Mei Avenue to support those students who had been arrested and those inside Civic Square who were about to be arrested.

14. The unchallenged evidence of Senior Superintendent Lam Hing Chuen (PW3) shows that at around 00:15 a.m., the southbound and northbound lanes of the carriageway of Tim Mei Avenue were fully occupied by people standing, so was the western pavement of Tim Mei Avenue adjacent to the Civic Square. The unchallenged evidence of Superintendent Yau Nai Keung (PW6) shows that at about 8:30 a.m., mills barriers were seen on both directions of the carriageway of Tim Mei Avenue. For the crowd in Tim Mei Avenue, there were more than 100 people during the course of the day, the number of people swelled during the day. However, when the night fell, there were less people. Traffic on both sides of Tim Mei Avenue was suspended on 27th September 2014.

15. On 27th September 2014, Mr. Wong Jun Ian further submitted a Notification¹⁰ to hold a public meeting at Tim Mei Avenue on 28th September 2014, the proposed public meeting was a continuation of the public meeting on 26th September 2014. Superintendent Wong Kei Wai (PW2) issued a Letter of Prohibition¹¹ on 28th September 2014.

16. In the early hours of 28th September 2014, D1 to D3 appeared on the stage at Tim Mei Avenue and announced the launch of “Occupy Central” and the human and material resources of the OCLP would “come in completely”.

17. It is the prosecution case that at the public meeting at Tim Mei Avenue on 27th and 28th September 2014, D1 to D7, by the words they used when they spoke on the main stage:-

(i) D1 to D7 had unlawfully incited the persons present at Tim Mei Avenue to cause a public nuisance to the public by unlawfully obstructing public places and roads at and in the neighbourhood of Tim Mei Avenue (Charge 2);

(ii) D1 to D7 had unlawfully incited the persons present at Tim Mei Avenue to incite other persons to cause a public nuisance to the public by unlawfully obstructing public places and roads at and in the neighbourhood of Tim Mei Avenue (Charge 3).

¹⁰ Exhibit P3

¹¹ Exhibit P152

18. Speeches made by D1 to D7 at the public meeting at Tim Mei Avenue were recorded on videos and produced as evidence.

19. It is the Prosecution case that the alleged conspiracy to commit public nuisance began in or about March 2013, continued in the year of 2014 and subsisted until 2nd December 2014 when D1 to D3 publicly announced their common intention to surrender to the police.

20. D8 was at Fenwick Pier Street at the material times of Charge 4 and Charge 5.

21. It is the Prosecution case against D8 that by the words D8 said to the crowd present at Fenwick Pier Street on 28th September 2014, D8 incited those present at Fenwick Pier Street to cause a public nuisance by urging those who were already on the carriageway of Fenwick Pier Street to stay on the road and urging other people standing on the nearby pavements to go and sit on the carriageway of Fenwick Pier Street.

22. It is the Prosecution case against D8 that by the words D8 said to the he crowd present at Fenwick Pier Street on 28th September 2014, he also incited the people present at Fenwick Pier Street to call up more people to come and obstruct the relevant section of Fenwick Pier Street.

23. The Prosecution case against D8 is that he directed the people present to move westward closer to the section of Fenwick Pier Street near Lung Wui Road and sit closer to the police cordon. The people present did as D8 directed.

24. What D8 said to the people present at Fenwick Pier Street, which forms the subject matters of complaint of Charge 4 and Charge 5, was recorded on videos by the police and produced as evidence.

25. The Prosecution called Mr. Tong Wai Tung (PW5), Assistant Divisional Officer of Fire Services Department to show how the obstruction of Fenwick Pier Street on 28th September 2014 had blocked a vehicle of the Fire Services Department at Kong Wan Fire Station from using Fenwick Pier Street to attend to a reported case of “Multiple Casualties Incident” at Admiralty Centre.

26. D9 was at Harcourt Road in the afternoon on 28th September 2014.

27. Charge 6 against D9 concerns what happened in the afternoon at Harcourt Road on 28th September 2014.

28. It is the Prosecution case that at about 3:45 p.m. on 28 September 2014, D9 urged the crowd of people gathering at the junction of Lung Wo Road and Fenwick Pier Street to go to Harcourt Road and conduct civil disobedience there. At around 4:03 p.m. on the same day, D9 was at the junction of Tim Mei Avenue and Harcourt Road. By then, a large crowd of protesters had walked onto the carriageway of Harcourt Road and the traffic thereon was obstructed as a result. D9 urged the crowd of people gathering on the southern pavement of Harcourt Road (outside Admiralty Centre) and those on the northern pavement of Harcourt Road (near Tim Mei Avenue) to walk across the carriageway, join together on

the road and occupy all 6 carriageways of Harcourt Road, and to hold an assembly to support the students.

29. What D9 said in the afternoon of 28th September 2014 was recorded on videos and produced as evidence.

30. The appropriateness and the constitutionality of the offences of “Conspiracy to commit public nuisance” in the context of peaceful demonstration, “Incitement to commit public nuisance” and “Incitement to incite public nuisance” are challenged by the defence.

31. It is the case of the respective defendants what they said and did at the material times were lawful as they were exercising their right of free speech, right of assembly and right of demonstration, protected by the law and hence the essential ingredient of “not warranted by the law” could not be made out.

32. It is the case of the respective defendants that given what transpired at the material times, the relevant defendants could not have had the intention to cause public nuisance/to incite others present at Tim Mei Avenue to cause a public nuisance/to incite others to incite others present at Tim Mei Avenue to cause a public nuisance, hence, the relevant defendants did not have the mens rea required.

33. It is the case of the defence that no obstruction was caused by the words of the relevant defendants, and in any event, the Prosecution fails to prove that there was common injury to the public or a significant section of the public.

34. It is the defence case that, given that Tim Mei Road had been cordoned off by the police since 26th September 2014, it was impossible for the relevant defendants to commit Charge 2 and Charge 3.

35. It is the defence case that the use of tear gas by the police against the crowd gathered at Harcourt Road on 28th September 2014 was an improper use of force and it was the improper use of tear gas which caused the extensive and prolonged occupation of the roads and public places in Admiralty and Central afterwards.

36. It is the defence case that the OCLP initiated by D1 to D3 and what happened in late September 2014 and thereafter until 2nd December 2014 was a movement of Civil Disobedience.

THE CHARGES

37. The following charges are preferred against D1 to D9:-

Charge 1: Conspiracy to commit public nuisance (against D1 to D3), contrary to Common Law and section 159A of the Crimes Ordinance, Cap 200 and punishable under section 159C of the Criminal Procedure Ordinance, Cap 221.

The particulars of offence allege that D1 to D3, between about March 2013 and 2nd December 2014, in Hong Kong, conspired together and

with other persons to cause a nuisance to the public through the unlawful obstruction of public places and roads in or in the neighbourhood of Central.

Charge 2: Incitement to commit public nuisance (against D1 to D7), contrary to Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap 221.

The particulars of offence allege that D1 to D7, between the 27th and 28th of September 2014, in Hong Kong, unlawfully incited persons present at Tim Mei Avenue, Admiralty to cause a public nuisance to the public by unlawfully obstructing public places and roads at and in the neighbourhood of Tim Mei Avenue.

Charge 3: Incitement to incite public nuisance (against D1 to D7), contrary to Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap 221.

The particulars of offence allege that D1 to D7 allege that D1 to D7, between the 27th and 28th of September, 2014, at Tim Mei Avenue, Admiralty, in Hong Kong, unlawfully incited persons at Tim Mei Avenue, Admiralty, in Hong Kong,

unlawfully incited persons present at Tim Mei Avenue, Admiralty to incite other persons to cause a public nuisance to the public by unlawfully obstructing public places and roads at and in the neighbourhood of Tim Mei Avenue.

Charge 4: Incitement to commit public nuisance (against D8 only), contrary to Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap 221.

The particulars of offence allege that D8, on 28th September, 2014, at Fenwick Pier Street, Admiralty, in Hong Kong, unlawfully incited persons present at Fenwick Pier Street, Admiralty, to cause a public nuisance to the public by unlawfully obstructing the carriageway of Fenwick Pier Street.

Charge 5: Incitement to incite public nuisance (against D8 only), contrary to Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap 221.

The particulars of offence allege that D8, on 28th September, 2014, at Fenwick Pier Street, Admiralty, in Hong Kong, unlawfully incited persons present at Fenwick Pier Street,

Admiralty, to incite other persons to cause a public nuisance to the public by unlawfully obstructing the carriageway of Fenwick Pier Street.

Charge 6: Incitement to commit public nuisance (against D9 only), contrary to Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap 221.

The particulars of offence allege that D9, on 28th September, 2014, at Harcourt Road near Tim Mei Avenue, Admiralty, in Hong Kong, unlawfully incited persons present at Harcourt Road and Tim Mei Avenue, Admiralty, to cause a public nuisance to the public by unlawfully obstructing the carriageway of Harcourt Road.

WITNESSES

38. The Prosecution called 7 witnesses, they are:-

- (i) PW1 Senior Superintendent Tse Ming Yeung;
- (ii) PW2 Senior Superintendent Wong Kei Wai;
- (iii) PW3 Senior Superintendent Lam Hung Chuen;
- (iv) PW4 PC 9298 Lam Sau Chung;
- (v) PW5 Mr. Tong Wai Tung;
- (vi) PW6 Superintendent Yau Nai Keung; and

(vii) PW7 Sergeant 58012 Kwok Si Wai.

39. After the Prosecution closed its case, I found that each of the defendants had a case to answer on the charge(s) against him/her.

40. D1 elected not to give evidence or call any witness.

41. D2 elected to give evidence. 6 witnesses testified in his defence, they are:-

- (i) DW1 Mr. Wu Chun Him;
- (ii) DW2 Mr. Leong Sze Chung James;
- (iii) DW3 Ms. Tsang Wai Kwan;
- (iv) DW4 Mr. Lo Wai Ming;
- (v) DW5 Cardinal Joseph Zen Ze Kiun; and
- (vi) DW6 Professor Lee Lap Fung Francis.

42. D3 elected not to give evidence or call any witness.

43. D4 elected not to give evidence or call any witness.

44. D5 elected not to give evidence or call any witness.

45. D6 elected not to give evidence but called one witness, namely:-

- (i) DW7 Mr. Au Kwok Kuen.

46. D7 elected not to give evidence or call any witness.

47. D8 elected not to give evidence or call any witness.

48. D9 elected not to give evidence or call any witness.

GOOD CHARACTER DIRECTIONS

49. D1 to D7 and D9 are all persons with clear criminal record, as persons of good character, their propensity to commit the offence(s) under complaint is low.

50. D2, with his good character, is more likely to tell the truth in his evidence.

ADMITTED FACTS & SECTION 65B STATEMENTS

51. At trial, admitted facts and statements were prepared and tendered as evidence under section 65C and section 65B of the Criminal Procedure Ordinance, Cap 221 respectively.

52. Facts contained in the documents titled Admitted Facts I and Formal Admission, dated 19th November 2018 and 5th December 2018 respectively, were agreed between the Prosecution and D1 to D3.

53. Facts contained in the document titled Admitted Facts II, dated 19th November 2018, were agreed between the Prosecution and D1 to D7.

54. Facts contained in the document titled Admitted Facts III, dated 19th November 2018, were agreed between the Prosecution and D8. Facts contained in the document titled Admitted Facts IV, dated 19th November 2018, were agreed between the Prosecution and D9.

55. A statement of Mr. Leong Sze Chung James (DW2) was admitted pursuant to section 65B of Cap 221.

56. A statement of Chief Superintendent Rupert T.A. Dover¹² was produced pursuant to section 65B of Cap 221.

57. A statement of Madam Liang Shuk Ling Tracy¹³ and a statement of Mr. Lui Lok¹⁴ each with a video footage were produced by D2 and D5 respectively pursuant to section 65B of Cap 221.

58. Three computer certificates respectively prepared by New World First Bus Services Limited, City Bus Limited and Kowloon Bus Co (1933) Limited¹⁵ were produced to show the extent of the effect of the occupation had on the bus services during the occupation period.

¹² Exhibit P156

¹³ Exhibit D2-7

¹⁴ Exhibit D5-1

¹⁵ Exhibits P145 to P147

LEGAL PRINCIPLES

Conspiracy

59. Charge 1 faced by D1 to D3 is a statutory conspiracy, not a common law one. By virtue of section 159A (1)(a) of the Crimes Ordinance, Cap 200, a person is guilty of conspiracy to commit an offence in question if he/she agrees with any other person or persons that a course of conduct shall be pursued which if the agreement is carried out in accordance with their intentions, will necessarily amount to or involve the commission of the offence in question.

60. The actus reus of a statutory conspiracy requires proof of the agreement between two or more persons, which, if carried out, would necessarily amount to or involve the commission of an offence in question.

61. The mens rea required for a statutory conspiracy is that the defendant had an intention to be a party to the agreement to do the unlawful act under complaint. The offence was complete once agreement was formed.

Public Nuisance

62. A public nuisance is a common law offence. In *R v Rimmington* [2006] 1 AC 459, the House of Lords held that the offence has the following actus reus:-

(a) Doing an act not warranted by law, or omitting to discharge a legal duty, and

(b) The effect of such act or omission was to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise of rights common to everyone.

63. The House of Lords in *Rimmington* held that the requisite mens rea is that the accused knew, or ought to have known (because the means of knowledge were available to him) the consequence of what he did or omitted to do.

64. In the present case, it is immediately apparent from the Prosecution case that this case concerns positive act, i.e. obstruction of public places and roads, not omission to discharge a public duty. The effect under complaint is that the public would be obstructed in the exercise of rights common to everyone, i.e. the use of public carriageways.

65. The offence requires proof that the suffering of common injury by members of the public by interference with rights enjoyed by them as a class of the public.

66. It is a finding of fact whether the number of persons affected is sufficient to constitute a class of public.

67. The common law offence of public nuisance covers a wide and diverse range of activities, it was held in *Rimmington* that obstructing public highways is also covered.

The Reasonableness Test

68. As this case concerns a citizen's exercising of his/her right of free speech, right of assembly and right of demonstration, the "reasonableness test" as expounded by the Court of Final Appeal in *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137 comes into play. I have to consider and find whether the Prosecution can prove beyond reasonable doubt that the demonstrators' conduct impinged unreasonably on the rights of others.

69. In *Yeung May Wan*, the relevant offences were public obstruction offences contrary to sections 4(28) and 4A of the Summary Offences Ordinance, Cap 28, these offences require proof that the obstruction was "without lawful authority or excuse". The common law offence of public nuisance, the predicate offence for all charges in the present case, requires proof that the act which forms the actus reus is not warranted by law.

70. The Court of Final Appeal held in *Yeung May Wan*, at Para. 42 of the judgment, that a person who creates an obstruction could not be said to be acting "without lawful excuse" if his conduct involves a reasonable use of the highway or public places.

71. As for the application of the reasonableness test in any case of obstruction, the Court of Final Appeal held that it is essentially a question of fact and degree depending on all the circumstances, including the extent and duration of the obstruction, the time and place where the obstruction occurs, as well as the purpose for which the obstruction is done.

72. The Court of Final Appeal held in *Yeung May Wan* that, where the obstruction in question results from a peaceful demonstration, in applying the reasonableness test, the court should recognize the protection given by the Basic Law to the right to peaceful demonstration and give it substantial weight in the balancing exercise. In assessing the reasonableness of the obstruction, while the interests of those exercising their right of free passage along the highway obviously remain important, and while exercise of the right to demonstrate must not cause an obstruction exceeding the bounds of what is reasonable in the circumstances, such bounds must not be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right (Para. 44 of the judgment).

73. In the present case, the locations of the obstructed places concern public places and roads in or in the neighbourhood of Central (Charge 1), public places and roads in or in the neighbourhood of Tim Mei Avenue (Charge 2 and Charge 3), the carriageway of Fenwick Pier Street (Charge 4 and Charge 5) and the carriageway of Harcourt Road (Charge 6). It is important to note that, in *Yeung May Wan* [2004] 3 HKLRD 797, the Court of Appeal held at 848 that:-

“As one so often sees in newscasts from around the world, pavements or plazas outside government buildings or embassies

are regularly used for protests, and the reason for the choice site is clear, namely, that they are the natural or most obvious sites for demonstrations, precisely because demonstrating “down the road” is less likely to bring home the intended message either to government or embassy officials or to passers-by.”

74. Hence, the court must recognise the right to express views extends to the manner in which the protestors wish to express their views as well as the location(s) where they wish to do so.

Incitement to commit public nuisance and Incitement to incite public nuisance

75. In *HKSAR v Jariabka Juraj* [2017] 2 HKLRD 266 (CA), the Court of Appeal cited the judgment of Tuckey LJ in *DPP v Armstrong* [2000] Crim LR 379 as to the elements of the offence of incitement:-

“63. Of the offence of incitement, Tuckey LJ said:
The actus reus of the offence is the [incitement] by the defendant of another to do something which is a criminal offence. He must do so with the intention that if the other person does as he asks he will commit a criminal offence. That is the mens rea. On this analysis the intention of the person incited is entirely irrelevant.

64. He noted that the editors of *Archbold* asserted “to solicit another to commit a crime is indictable at common law, even though the solicitation or incitement is of no effect”.

65. Tuckey LJ went on to say:
The nature of the offence of incitement is accurately defined in the draft Criminal Code produced by the Law Commission in their paper No 177 at Clause 47 which says:

A person is guilty of incitement to commit an offence if:

- (a) *He incites another to do or cause to be done an act or acts which, if done, will involve the commission of the offence or offences by the other; and*
- (b) *He intends or believes that the other, if he acts as incited, shall or will do so with the fault required for the offence or offences.”*

76. In *Young v Cassells* (1914) 33 NZLR 852 (CA), it was held that “incite” means “to rouse; to stimulate; to urge or spur on; to stir up; to animate” in the ordinary meaning of the word. It was held in *Invicta Plastics Ltd v Clare* [1976] RTR (DC) that an incitement may involve the “suggestion”, “proposal” or “inducement” to commit an offence.

77. An incitement can be directed to the public at large, for example, by advertisement and newspaper article, as in the cases of *Invicta Plastics Ltd v Clare* (*supra*) and *R v Most* (1881) 7 QBD 244 (CCCR) respectively. It is necessary to prove that incitement was communicated to and received by the incitee(s).

78. It is a question of fact in each case whether the acts or words under complaint amount to an incitement to commit an offence.

79. The Prosecution is correct to point out that though the offences of “Incitement to commit a public nuisance” and “Incitement to incite public nuisance” both concern causing a public nuisance by the unlawful obstruction of public places and roads, “Incitement to commit a public nuisance” and “Incitement to incite public nuisance” are separate and difference offences with different ingredients.

80. The actus reus required for the offence of “Incitement to commit a public nuisance” is that the defendant incited a person (i.e. the incitee) to do an act which would involve the commission of the offence of “public nuisance”.

81. The mens rea required for the offence of “Incitement to commit a public nuisance” is that the defendant intended or believed that the incitee would do the act with the mens rea required for the offence of “public nuisance”.

82. The actus reus required for the offence of “Incitement to incite public nuisance” is that the defendant incited the incitee to do an act which would involve the commission of the offence of incitement, i.e. inciting a public nuisance.

83. The mens rea required for the offence of “Incitement to incite public nuisance” is that the defendant intended or believed that the incitee would do the act with the mens rea required for the offence of incitement, i.e. an intention to incite.

ASSESSMENT OF EVIDENCE

Section 65B Statements

84. No issue is taken as to the reliability and credibility of the statements admitted under section 65B, Cap 221. I have considered the contents of the statements and attach full weight to the contents contained therein.

Live Witnesses

PW1 Senior Superintendent Tse Ming Yeung

85. I accept the evidence of PW1 that at the material times, he was responsible for the processing of Notifications of Intention to Hold a Public meetings in Wanchai Division, which included the Wanchai Section of Harcourt Road, which stretched from Arsenal Street to Fenwick Pier Street. All Notifications of Intention to Hold Public Meeting pursuant to the Public Order Ordinance, Cap 245 within the purview of Wanchai Division would be delivered to PW1 for consideration and handling. After a Notification for the Intention to Hold a Public Meeting had been processed, a Letter of No Objection (“LONO”), with or without condition would be issued by the Police if the Police did not object to the holding of the proposed public meeting. All notifications and LONOs issued were properly recorded.

86. I accept as true and reliable the evidence given by PW1 as to how a Notice of Prohibition for the Holding of a Public Meeting under Cap. 245 would be issued by the police. Such notice must be given in writing and it must state the ground(s) of prohibition. The notice should be served on the organizer at least 48 hours before the holding of the meeting, provided that the Notification of the Intention to Hold a Public Meeting was handed in 7 working days prior to the intended public meeting.

87. I accept as true and reliable PW1’s evidence that for the period between 26th September and 11th December 2014, no notification was

received for public meetings at either Fenwick Pier Street or the Wanchai section of Harcourt Road was received by the Police.

PW2 Senior Superintendent Wong Kei Wai

88. I accept the evidence of PW2 that, as the Assistant District Commander of Central District of the Police between February 2014 and March 2016, one of PW2's duties was to process Notifications of Intention to Hold Public Meeting in Central District.

89. I accept PW2's evidence that irrespective of which police station a Notification of the Intention to Hold a Public Meeting in the Central District was given, it would be delivered to PW2 for consideration and processing. On the subject of the issuing of LONOs or Letters of Prohibitions for public meetings in the Central District, apart from PW2, the Hong Kong Island Headquarters also had the power to handle notifications concerning the Central District.

90. I accept also PW2's evidence that after processing, the Police could issue a LONO, with or without conditions, or a Letter of Prohibition. For the notifications processed and LONOs issued, including the ones not handled by PW2 personally, e.g. the ones handled by the Hong Kong Island Headquarters, they were all recorded properly by the Police and the Central District would have copies of the same.

91. Given that the notifications processed and LONOs issued were properly recorded with copies sent to Central District, I am satisfied PW2 was in a position to say, and I accept as true and reliable his evidence

that, between 26th September and 11th December 2014, PW2 had not received any Notification of the Intention to Hold a Public Meeting on the carriageways of the Central District section of Harcourt Road, Tim Mei Avenue and Lung Wui Road. Though not explicitly asked if PW2 had checked the records kept, PW2 would not have said he had not received any such notification if he had not checked the records kept by the Central District. Furthermore, in re-examination, PW2 was asked about his 4th witness statement¹⁶, I accept as true and reliable PW2's evidence that the main purpose of making that statement was to mention all the Notifications of the Intention to Hold a Public Meeting in relation to Harcourt Road, Tim Mei Avenue and Lung Wui Road that he had handled during the relevant period.

92. I accept as true and reliable PW2's evidence that the purpose of making that statement was to identify all Notifications of the Intention to Hold a Public Meeting that he had handled during the relevant period in relation to Harcourt Road, Tim Mei Avenue and Lung Wui Road.

93. Questions were asked of PW2 about the firing of tear gas on 28th September 2014 and it was put to PW2 that it was the use of excessive force by the police in the evening on 28th September 2014 which incited people to occupy the public roads in Central or Admiralty. It is clear from PW2's evidence that he was not at the scene at the time and it was not his decision to use tear gas on 28th September 2014. In my judgment, any view or comment made by PW2 in his evidence on this issue is only an opinion of PW2. I exclude from my consideration any opinion expressed by PW2

¹⁶ Exhibit D6-3

on the issues of the appropriateness of the force used by the police and causation of the occupation of public roads.

94. Mr. Choy SC for D9 suggested to PW2 that he deliberately concealed his presence at the scene on 26th September 2014 in his witness statement in which PW2 only accounted for the lack of LONO for the meeting on 28th September 2014. PW2 firmly denied the suggestion. In my judgment, if the absence of a LONO was the only matter that PW2 wanted to address in his witness statement, the fact that he did not mention in the statement he was present at the scene did not constitute deliberate concealment. PW2 was a witness in the trial of Joshua Wong, he could not possibly control what questions prosecuting counsel or defence counsel would ask of him and thus he could not conceal his presence at the scene if it was a relevant issue in that trial.

95. I accept PW2's evidence that in processing a notification, PW2 would strike a balance between the organizer's freedom of expression and the right of other members of the public that might be affected by the holding of the public meeting.

96. I accept the evidence of PW2 that he had been asked to go through the records to check in respect of the notifications to hold public meeting in Tim Mei Avenue. I accept PW2's evidence as to his processing of the 2 notifications to hold public meeting, i.e. Exhibits P148 and P150 and his issuing of the two respective LONOs, i.e. Exhibits P1 and P2.

97. I accept the evidence of PW2 as to how he handled the Notification for Intention to Hold a Public Meeting at Tim Mei Avenue on

28th September 2014 submitted by Mr. Wong Jun Ian on 27th September 2014.

98. The proposed public meeting was obviously a continuation of the public meeting held on 27th September 2014. PW2's reasons for issuing a Letter of Prohibition¹⁷ were valid, as the public meeting on 27th September 2014 was an unlawful assembly, it would be wholly inappropriate to allow it to proceed on 28th September 2014. I accept PW2's evidence that he had considered the factors of public safety and public order and he came to the conclusion that it was inappropriate for a public meeting to be held at Tim Mei Avenue on 28th September 2014.

99. PW2 impresses me as an honest and fair witness, he made no attempt to hide from the court things that he did not have a clear memory, thus he gave evidence that according to his recollection, he signed the Exhibit P152 during daytime on 28th September 2014. PW2 believed that the same had been delivered to Mr. Wong Jun Ian by his colleagues.

100. PW2 also frankly admitted that he had no independent recollection of handling the Notification of Intention to Hold a Public Meeting on 1st to 3rd October 2014 given by D3 on 18th September 2014¹⁸ and the meeting between the Police and D3 on 25th September 2014 as recorded in the Notes of Meeting.¹⁹

101. I accept as true and reliable the evidence of PW2 as to what he saw and did while he was at Tim Mei Avenue between around 5:00 p.m.

¹⁷ Exhibit P152

¹⁸ Exhibit D3-1

¹⁹ Exhibit D3-2

on 26th September and around 9:00 a.m. to 10:00 a.m. on 27th September 2014. When PW2 was at the western pavement at Tim Mei Avenue outside CGO shortly before 5:00 p.m. on 26th September 2014, there was a stage set up outside the Legislative Council and a public meeting was in progress with many people participating.

102. At 5:30 p.m., as many people were walking onto the carriageway of Tim Mei Avenue, PW2 decided to cordon off the western carriageway of Tim Mei Avenue for safety reasons.

103. I accept as true and reliable the evidence of PW2 as to how the demonstrators forced their way into the Civic Square (the Forecourt of the CGO) at around 10:00 p.m. on 26th September 2014, the deployment of police officers to handle the incident and what happened in the Civil Square afterwards. Some demonstrators managed to rush into the Civic Square and shut the metal gate. Some demonstrators climbed over the fences into the Civic Square. Around 150 demonstrators gathered around the flag-post, surrounded by police officers. At around 11:30 p.m. on 26th September, a decision was made by the Police to allow demonstrators in the Civil Square to leave but not many took the opportunity to leave.

104. In cross-examination, questions were asked of PW2 about the use of tear gas by the police on 28th September 2014 and it was put to PW2 that it was the excessive force by the Police that incited people to occupy the public carriageways. It is clear from PW2's evidence that he was not involved in the decisions in relation to the firing of tear gas and its cessation, any comment or opinion PW2 expressed on the issue is not something I should take into consideration.

PW3 Senior Superintendent Lam Hung Chuen

105. PW3 was the Assistant District Commander of Central District of the Police between May 2013 and October 2015. His evidence concerns what happened on 27th September 2014.

106. PW3 arrived at Tim Mei Avenue near Harcourt Road at around 00:15 a.m. on 27th September 2014. At that time, both the southbound and northbound carriageways of Tim Mei Avenue and the western pavement of Tim Mei Avenue adjacent to the Civic Square were fully packed by people standing. PW3 went to the CGO via Tin Wa Avenue. Inside the Civic Square, PW3 saw over 100 protestors sitting near the flag-post. As the situation was being handled by PW2, PW3 went to Tim Mei Avenue with a team of PTU officers.

107. PW3 and his officers encountered some 50 to 60 protestors at the junction of Tim Mei Avenue and Harcourt Road. The protestors raised their arms and blocked PW3 and his officers. After a standstill of 5 to 10 minutes, PW3 and his officers walked to Tim Wa Avenue and Tamar Park but they were blocked by 20 to 30 protestors raising both their arms. Warnings were given to the protestors but ignored.

108. PW3 then noticed some 20 to 30 people walked towards the glass door of the Legislative Council Building. PW3 instructed his officers to rush down to form a cordon line in front of the glass door. Then some 40 to 50 protestors gathered and lingered in front of the cordon line, some of the protestors pointed at and accused the Police. The number of

protestors increased to approximately 100, PW3 called for reinforcement to enhance the cordon line. PW3 stayed there for around 30 minutes. Eventually, PW3 left the scene when the protestors began to disperse and only 10 to 20 remained.

109. PW3 later returned to CITIC Tower near junction of Lung Wui Road and Tim Mei Road. At that time, the western pavement of Tim Mei Avenue was fully packed of people who PW3 believed to protestors. PW3 noticed that a lot of mills barriers had been placed on the southbound and northbound carriageways of Tim Mei Avenue and the road near the west side and on top of the roundabout. There were mills barriers blocking the junction of Tim Mei Avenue and Lung Wui Road.

110. PW3 then received instructions to assist colleagues from the Crime Department of the Headquarters to escort an arrested person away from a stage outside the carpark entrance of the Legislative Council Building. When PW3 and his officers reached the carriageway of Tim Mei Avenue, they were blocked by some 50 to 60 people believed to be protestors. The protestors bumped against the officers forcefully and prevented PW3 and his officers from reaching the stage.

111. Eventually the Police escorted the arrested person to a police vehicle on the carriageway outside CITIC Tower at Lung Wui Road. A cordon line was formed in front of the police vehicle but the cordon line was charged by some 8 to 10 protestors. PW3 instructed his officers to stay and guard the cordon line to protect the police vehicle and the arrested person.

112. PW3 stayed until 6:30 a.m., when he was relieved of his duties by other officers. By the time PW3 left, there were around 1,000 persons remaining at the pavement and carriageway of Tim Mei Avenue. The place was less packed than before as it was almost dawn.

113. There was no cross examination of PW3 by the Defence.

114. PW3 gave his evidence in a straightforward manner and there is nothing unreasonable or inherently improbable in his evidence. I find PW3 an honest and reliable witness.

PW4 PC 9298 Law Sau Chung

115. Sometime after 3 p.m. on 28th September 2014, PW4 was at Fenwick Pier Street near the back of the Academy for Performing Arts to assist in traffic control. PW4 marked his position on Exhibit P144 (PW86).

116. PW4 gave evidence that initially, the traffic condition there was normal on both the inbound and outbound lanes. PW4 carried on his observation of the traffic there for some 20 minutes, then he noticed that more than 100 people spilled out onto the carriageway, including the flyover, of Fenwick Pier Street from all directions. They all sat on the carriageway. PW4 tried to ask them to leave the carriageway and go back to the pavement but they did not comply. The number of persons sitting on the carriageway increased in time, PW4 advised them to leave the carriageway but they ignored him. PW4 then reported the situation to the consul and he was instructed to leave. During PW4's stay at Fenwick Pier Street, he did not have any physical contact with the people there.

117. There was no cross examination by the Defence.

118. There is nothing inherently improbable in PW4's evidence. I accept gave a true and accurate account of what he saw at Fenwick Pier Street in the afternoon of 28th September 2014.

PW5 Mr. Tong Wai Tung

119. On 28th September 2014, PW5 was an Assistant Divisional Officer of the Fire Service Department attached to Kong Wan Fire Station at No 14 Harbour Road.

120. At 4:17 p.m. on 28th September 2014, the Fire Services Control Centre received a report of "Multiple Casualties Incident" which took place at Admiralty Centre. The report was routed to the nearest Fire Station, i.e. Kong Wan Fire Station.

121. PW5 and his colleagues boarded a "elevating platform" vehicle and set off from Kong Wan Fire Station. PW5 originally took the normal and most direct route, i.e. to go straight from the station along Harbour Road then onto Fenwick Pier Street and Harcourt Road. However, upon when PW5's vehicle reached the Academy for Performing Arts near Fenwick Pier Street, PW5's vehicle was blocked by large number of people gathering at Lung Wo Road and Fenwick Pier Street. There were more than 1,000 people on the carriageway and the road was completely blocked. At the time, both the siren and the alarm lights of his vehicle were turned on and PW5 and his colleagues asked the people blocking the

carriageway to give way but the people on the carriageway ignored the plea by PW5 and his colleagues and refused to give way. PW5 was not sure whether Fenwick Pier Street was blocked as a result of instructions given by anyone. PW5 did not hear any words or incitement or instructions to block his vehicle. PW5 said what happened to his vehicle was consistent with the video footage in Exhibit P84.

122. As the normal and most direct route could not be taken, PW5's vehicle made a U-turn at Harbour Road and travelled along Fleming Road, Lockhart Road, Fenwick Pier Street, Hennessy Road and Queensway. The vehicle then turned into eastbound Queensway upon reaching Lippo Centre. It entered Rodney Street and then Drake Street. PW5 and his colleagues arrived at Admiralty Centre at 4:31 p.m. and attended to 17 injured persons, i.e. 13 police officers and 4 civilians.

123. PW5 agreed that when he set off, he had not been informed that there was traffic obstruction at Fenwick Pier Street.

124. For the arrival time at Admiralty Centre, PW5 agreed that he had made no written record of the incident in his notebook. However, PW5 compiled an Incident Report on 19th October 2014²⁰, which contained the arrival time at Admiralty Centre. The arrival time was based on the information supplied to PW5 by the Fire Services Department. The departure time and arrival times of the vehicle used on 28th September 2014 were electronically recorded by the Fire Services Department. When PW5 set off from the station and when he arrived at Admiralty Centre he pressed

²⁰ Exhibit D8-1

a button on his vehicle and the times would be recorded. PW5 said there was nothing abnormal in the recording system on 28th September 2014.

125. There were different performance pledges for a built-up area and a dispersed and isolated area. Admiralty Centre would fall into the category of a built-up area. For a built-up area, the performance pledge was 6 minutes from the time the report was received. For a dispersed and isolated area, the performance pledge was 9 to 23 minutes. However, the performance did not strictly apply to a report of “Multiple Casualties Incident”.

126. In PW5’s experience, a fire engine from Kong Wan Fire Station should be able to reach Admiralty Centre within 6 minutes.

127. I find PW5 an honest and reliable witness. What he said happened at Fenwick Pier Street is consistent with the video footage in Exhibit P84.

128. I accept the evidence of PW5 that, in his experience, a fire engine from Kong Wan Station should be able to reach Admiralty Centre within 6 minutes via the normal and most direct route, i.e. to go straight from the station along Harbour Road then onto Fenwick Pier Street and Harcourt Road. The time estimate of 6 minutes is reasonable. I am aware of PW5’s evidence as to how he obtained the departure time and arrival time from the Fire Services Department. I am sure that PW5, who was onboard the fire engine throughout the journey to Admiralty Centre, was in a good position to tell whether the detour he had to take had taken him a longer than the normal time to arrive at Admiralty Centre without having

to resort to any information in relation to the departure and arrival time provided by the Fire Services Department. I accept PW5's evidence that on that day the detour had taken him a longer time at arrive at Admiralty Centre.

129. I do not find the comparison of the performance pledge of 6 minutes and the actual time spent by PW5 and his colleagues helpful in assessing the effect of the traffic obstruction at Fenwick Pier Street had on the fire services, as PW5 very fairly pointed out, the said performance pledge did not apply to the report of "Multiple Casualties Incident" at Admiralty Centre.

PW6 Superintendent Yau Nai Keung

130. PW6 was a member of the Crime, Mass Processing Mechanism and Legal Support Working Group in September to December 2014, responsible for handling the Occupy Central Movement.

131. The evidence of PW6 concerns what happened between 27th September 2014 up to the firing of tear gas at around 6:00 p.m. on 28th September 2014 and what happened after the firing of tear gas up to the operation for the opening of the roads carried out by the Police on 11th December 2014.

132. Mr. Leung SC, in Para. 6 his reply submissions, made it clear that:-

“... The Prosecution does not seek to prove the intention of D5 when making the incitements by reference to the events that

happened after 28th September 2014. The evidence of Superintendent Yau Ngai-keung (PW6) as to the obstruction to public places and roads in Admiralty after 28th September 2014 was adduced to show the consequences of the offences which are relevant to the culpability of the accused.”

133. The evidence of PW6 as to what happened after 28th September 2014 should thus be read in the light of the above stated position taken by the Prosecution.

134. I accept the evidence of PW6 as to what he witnessed between 27th and 28th September 2014. There is nothing inherently improbable in the evidence of PW6, which he gave in a straightforward manner. The evidence of PW6 as to what happened at Harcourt Road before the firing of tear gas on 28th September 2014 is also consistent with the video footage in Exhibit P84 played to him.

135. When PW6 arrived at Admiralty at 8:30 a.m. on 27th September 2014, he saw over 100 protesters on the pavement and carriageway between Harcourt Road and Tim Mei Avenue. Further down Tim Mei Avenue there were over 1,000 protesters. There were layers of mills barriers on the pavement and carriageway. PW6 observed that the number of protesters grew beyond 1,000 during the day but the number dropped when the night fell. Traffic was suspended on both sides of Tim Mei Road on 27th September 2014.

136. PW6 witnessed a sweeping action by the uniformed police officers at CITIC footbridge at around dusk time on the 27th September 2014. Police officers equipped with shields pushed forward and forced more than 200 to 300 protesters to leave the footbridge. The protesters

retreated to Rodney Street near Queensway Plaza and United Centre. The CITIC footbridge was closed by the Police in the afternoon on 28th September 2014. The closure of the footbridge, however, did not deter protesters from joining the protestors at Tim Mei Avenue. Large number of protestors proceeded to Tim Mei Avenue from the direction of the Academy of Performing Arts via the northern pavement of Harcourt Road.

137. At around 7 p.m. on 27th September 2014, the protestors at Tim Mei Avenue near junction of Harcourt Road behaved in a peaceful manner. As for the protestors at the green stage, in general they were not violent, except for the few who tried to climb over the fences into the Civic Square. According to PW6, when he left on 27th September 2014, vehicles could still travel on Harcourt Road. There were crowds on Tim Mei Avenue all the way to the roundabout at the north of Tim Mei Avenue, i.e. the roundabout outside CITIC Tower.

138. At around 11 a.m. on 28th September 2014, the traffic on both lanes of Tim Mei Avenue was still suspended. There were many mills barriers placed irregularly on Lung Wui Road. These mills barriers were not guarded by the police and they extended to the pavement and carriageway of Lung Wui Road. The traffic of Lung Wui Road was suspended.

139. The number of protestors in Admiralty swelled between 11:00 a.m. and 6:00 p.m. on 28th September 2014. The protestors did not listen to Police instructions and rushed out onto the carriageway of Harcourt Road. The Police tried but failed to stop the protestors from doing so. Eventually the entire Harcourt Road, from the elevated walkway over

Harcourt Road to the Red Cross Headquarters, was blocked and occupied by the protestors. Both the eastbound and westbound carriageway of Harcourt Road were blocked by protestors standing on the carriageways. The video footage in Exhibit P84, shows the situation at 5:12 p.m. and 5:32 p.m. on 28th September 2014.

140. At around 6:00 p.m. on 28th September 2014, Police used tear gas against the protestors, but the vehicular access to Harcourt Road was still blocked by protestors, who started to place objects on the carriageway. Objects like plastic fences, mills barriers, garbage bins, bamboo sticks and road signs from construction sites were stacked at Harcourt Road at the east side of CITIC footbridge and on the Fenwick Pier Street down Harcourt Road at the bottom of the flyover near Harcourt Road. Upon the firing of tear gas cannisters, protestors who were on Tim Mei Avenue and Harcourt Road left the locations to avoid the effect of tear gas but people gathered very quickly again in those locations after the effect of each round of cannisters of tea gas was over. PW6 could not tell if the people who gathered again were the same people who had dispersed earlier on.

141. PW6 could not tell whether there was a substantial difference in number about the protestors at Tim Mei Avenue and Harcourt Road before and after the use of tear gas.

142. PW6 agreed that there were no tents and barricades on Harcourt Road before the firing of tear gas on the night of 28th September 2014. Tents and barricades were only set up by protestors on the carriageways of Tim Mei Avenue and Harcourt Road afterwards.

143. I accept the evidence of PW6 as to what he observed on 3rd-4th & 13th -14th October 2014 and 11th December 2014.

144. I would not set out in detail the evidence of PW6 which concerns what happened after 28th September 2014 in the light of the Prosecution's position as to the relevance of the evidence of PW6 concerning what happened after 28th September 2014. The evidence of PW6 as to what happened after 28th September up to 11th December 2014 has been summarized in Para. 67 to 76 of the Prosecution Closing Submissions. I find the summary of the evidence a fair and accurate one.

PW7 Sergeant 58012 Kwok Si Wai

145. The evidence of PW7 concerns how he delivered a Letter of Prohibition²¹ on 29th September 2014.

146. I accept PW7's evidence that he tried to look for D3 or Mr. Lo Wai Ming (DW4) at 8th Floor, Good Hope Building, No. 618 Nathan Road, i.e. the address of Hong Kong Professional Teachers' Union, that was also the address provided in the Notification of the Intention to Hold a Public Meeting.²² PW7 was told neither D3 nor Mr. Lo was there and PW7 was asked to go to 7th Floor of Chung Kiu Commercial Building. PW7 went to Chung Kiu Commercial Building and found out that the address was also used by Hong Kong Professional Teachers' Union, neither D3 nor Mr. Lo were there, and PW7 was received by a Mr. Chan Hung. After some enquiries made with Mr. Chan and after Mr. Chan indicated he could

²¹ Exhibit P153

²² Exhibit D3-1

receive the document on D3 and Mr. Lo's behalf, PW7 delivered Exhibit P153 to Mr. Chan and obtained a written acknowledgement from the latter.

147. Issue was taken by counsel for D1 to D3 as to whether the service of the Letter of Prohibition complied with the legal requirements. In my judgment, as the proposed public meeting on 1st to 3rd October 2014 did not take place, the propriety or otherwise of the service of the Letter of Prohibition has no bearing on the important issues in the present case. It is clear from the evidence of D2, he was aware of the Letter of Prohibition when he was at Tim Mei Avenue, though he could not recall when he became aware of it.

148. The relevance of the Notification of Intention to Hold a Public Meeting on 1st to 3rd October 2014 goes to the issue of the extent of obstruction that the proposed meeting would cause and the intention of the Trio, i.e. whether they intention to cause a public nuisance by the launching of the OCLP after the notified public meeting. The non-compliance of the requirements of the service of Exhibit P153, in my judgment, is not relevant to the disputed issues in this case.

149. In any event, having heard the evidence of PW7 and all matters taken into consideration, I find PW7 an honest and reliable witness. There was no mala fide on the part of PW7 for not trying to contact D3 or Mr. Lo by phone or to look for D3 in Admiralty on 29 September 2014. I accept also PW7's evidence that he was unaware of the deadline time of the service of Exhibit P153, i.e. before 3:00 p.m. on 29th September 2014. It is not in dispute that it was his first time to serve a Letter of Prohibition, it is therefore not surprising that he was not aware of the relevant legal

requirements. In my judgment, there was no reason for deliberate non-compliance by the Police, and for that matter PW7, when a decision had been made by the Police not to allow the public meeting on 1st to 3rd October 2014 to go ahead.

D2 Professor Chan Kin Man

150. D2's evidence started on day 8 and finished on day 11. I shall not recite in detail every aspect of D2's evidence, suffice to say I have considered his evidence and the exhibits referred to in his evidence.

151. The evidence of D2 in relation to his personal and professional background is not an issue in dispute. I accept also the evidence of D2 as to his views on and beliefs in genuine universal suffrage. In so accepting D2's evidence, I express no view on the correctness or otherwise on D2's views and beliefs on the subject. I accept as a matter of fact, D2 had those views and held the beliefs he stated in his evidence on the issue.

152. I also accept D2's evidence as to his relationship with D1 and D3. He had been a friend of D3 for many years. He was not familiar with D1 at the beginning of 2013. In early 2013, D2 read about a newspaper article written by D1 and he did not agree totally with it. Later D1 named D2 and D3 as candidates for leading a occupy movement in Hong Kong. D2 then had a dialogue with D1 and D2 came to understand that civil disobedience was only the last resort of D1 in the campaign to strive for genuine universal suffrage.

153. D2 referred to a newspaper article he wrote entitled “May Love and Peace Occupy Central” published on 4th March 2013.²³ In that article, D2 stated, among other things, that participants in the movement should surrender themselves to the Police and there is no need to defend in Court. D2 explained why D1 to D3 entered pleas of not guilty to the charges in this case despite that they had surrendered to the Police. They consider the charges unreasonable and may have a long-term effect on the freedom of speech. D2’s view of the reasonableness of the charges and for that matter, the appropriateness of the charges and the constitutionality challenge to the charges are matter that I have to consider and deal with, but the reasons of D2 to defend his case in court is **not** something I shall take into consideration in assessing the credibility and reliability of his evidence.

154. D2 stressed in his evidence that the essence of civil disobedience was to raise public awareness on the unjust situations and hence the Trio (D1 to D3) insisted on peaceful and non-violent protest. On the evidence before me, I find that the D1 to D3 all along called for a peaceful and non-violent approach.

155. The Prosecution submitted that D2 agreed under cross-examination that there was a possibility of members of public participating in Occupy Central without signing the Letter of Intent²⁴ and there was still chance that some participants might get violent despite all the means and measures taken to reduce the chance of violence.

²³ Exhibit D2-3

²⁴ Exhibit D2-6

156. In my judgment, the fact that there was chance of outbreak of violence would not alter the nature of the movement that D1 to D3 advocated for. The chance outbreak of violence by some participants in the OCLP movement planned and agreed by D1 to D3 should not turn the movement into a non-peaceful or even violent one. By the same token, a fortuitous incident of football hooliganism in an otherwise properly organized football match should not affect the peaceful nature of the sport event. The “not warranted by law” element for the offence of public nuisance cannot be proved by the possibility that some participants might turn violent during the OCLP movement.

157. D2 said in his evidence that the essence of civil disobedience was to raise public awareness on the unjust situations. Whilst it is not for this court to find whether the situations were unjust, I am prepared to find that D1 to D3 saw the situations were unjust.

158. On the evidence before me, it is an understatement to say that the essence of civil disobedience that D1 to D3 was advocating, i.e. the OCLP, was to raise public awareness on their perceived unjust situations. The evidence shows that they D1 to D3 wanted to successfully fight for a form of election system that suited their criterion for genuine universal suffrage through the OCLP movement. D2 agreed under cross-examination, in Exhibit D2-11, the “OCLP Basic Tenets”, it is stated that “Should tens of thousands (In the Chinese version, it is “Several hundreds of thousands”) turn out to Occupy Central, the primary concern of the authorities would have to be different. Then it would not be a matter of arresting or dispersing the protestors. It would be a matter of moving towards introducing genuine universal suffrage,”. Under cross-

examination by the Prosecution, D2 agreed that by announcing the inclusion of stage 4 of occupation in the Manifesto,²⁵ the chance of success for the first three stages would be increased.

159. I accept D2's evidence as to how he met with D1 and D3 following Exhibit D2-3. D1 to D3 agreed that the movement would consist of 4 stages, namely (1) deliberation, (2) authorization, (3) negotiation and (4) occupation. I accept also D2's evidence that it was agreed between D1 to D3 that civil disobedience by way of occupation would only take place after all legal ways had been exhausted. The civil disobedient that D1 to D3 had in mind was dependent on the results of negotiations with the Central or HKSAR Government. D2 gave evidence that at that stage, though D1 to D3 had a plan to occupy a place or places, their intention did not extend beyond Central, in fact they had a very specific location in mind, i.e. Chater Road.

160. I accept the evidence of D2 that on 27th March 2013, the Trio announced a Manifesto,²⁶ jointly prepared by the three, at Union Church, Kowloon. D2's evidence as to what happened on 27th March 2017 is consistent with the video footages in Exhibits P96 and P98 to P100. It should be noted that D2 said under cross-examination, at that time in March 2017, i.e. at the time Exhibit D2-4 was published, it had been decided that occupation could be carried out in Central but the specific location and duration were yet to be discussed. D2's evidence on the location where occupation would be carried out is different from his evidence given in chief that the Trio had a very specific location in mind, i.e. Chater Road,

²⁵ Exhibit D2-4

²⁶ Exhibit D2-4

when they agreed on the four stages plan. In my judgment, given the long lapse of time since March 2014 and the minor nature of the aforesaid discrepancy, the discrepancy does not affect the credibility of D2. I accept the evidence of D2 that though he could not recall the exact time when the Trio first agreed to carry out occupation in the pedestrian precincts at Chater Road, the location must have been agreed by 1st July 2014.

161. I accept the evidence of D2 as to what was done in respect of stage 1 of the four phases, namely deliberation, from June 2013 to May 2014. A series of meetings called “Deliberation Days” were held to discuss the movement and the proposal(s) for constitutional reform. D2’s evidence on what was done in relation to the first “Deliberation Day” is consistent with the video footages in Exhibits P116 and P117.

162. I accept D2’s evidence that the second Deliberation Day consisted of a series of deliberation conferences held in different communities. I accept D2’s evidence that the 3,000 people who attended the third Deliberation Day had participated in the previous Deliberation Days. Proposals which met the international standard for universal suffrage were put forward for the participants to choose from.

163. I accept D2’s evidence as to what was done in relation to stage 2, i.e. the authorization stage. Between 20th and 29th June 2014, D1 to D3 organised a civil referendum. In short, the proposal from the “Alliance for Genuine Universal Suffrage” had support from 792,000 voters who voted in the referendum. The said proposal, together with a veto proposal were agreed upon following the holding of the referendum.

164. I accept D2's evidence as to the position D1 to D3 took in respect of the occupation by students of part of Central on 1st July 2014. The students called the said occupation, which was short in duration, a rehearsal of Occupy Central. D1 to D3 disagreed with the students' views but respected them. The Trio ("D1 to D3") took the view that as Stage 3, i.e. negotiation was then not yet complete, they did not want to start civil disobedience.

165. I accept D2's evidence as to the contact between the Trio and the Government on the issue of constitutional reform, what happened during the short meeting with and the response from the then Secretary for Administration Carrie Lam and Secretary Lau Kong Wah on 29th July 2014. The meeting yielded no result and there was no further meeting arranged.

166. I accept D2's evidence that the Decision on 31st August represented the critical date on which they decided that Stage 4 of occupation would be implemented. I accept also D2's evidence as to what D1 to D3 did after the promulgation of the Decision on 31st August, they held meetings and jointly took the view that there was no room for discussion any more. The three agreed that the Occupy Central Movement would be commenced on 1st October 2014. As a result, on 18th September 2014 they gave the Police a Notification of Intention to Hold a Public Meeting.²⁷ The proposed public meeting was to be held (i) at the pedestrian area of Chater Garden from 3:00 p.m. to 11:59 p.m. on 1st October 2014 and from 7 a.m. to 11:59 p.m. on 2nd October 2014; and (iii) at Chater Garden and Statute Square from 3:00 p.m. on 1st October 2014 to

²⁷ Exhibit D3-1

11:59 p.m. on 3rd October 2014. Though D2 had not seen Exhibit D3-1 before it was submitted to the Police as D2 and D1 had left the logistics of filling in the Notification to D3, the Trio had agreed on the location, commencement date and approximate duration of occupation. They agreed to occupy the pedestrian precincts of Chater Road from 1st October 2014 for probably a few days. If a LONO was issued by the Police, they would start the civil disobedience part of the movement by staying behind after the notified meeting was over.

167. I accept D2's that the Trio hoped that a LONO would be issued as the OCLP could attract more participants if the initial stage was a legal one.

168. I accept the evidence of D2 as to what D1 to D3 planned to do if no Letter of Prohibition was received from the Police. They would stay behind after the lawful part of the meeting, ie the notified meeting, as it would not be civil disobedience if one only stays for the notified period, ie everything is done lawfully. D1 to D3 had slightly different estimates as to the time of staying after the notified period. Whilst all three agreed that the occupation would end in a few days, their estimates of the time might not be the same. D2 thought that it might end on or around 5th October 2014, i.e. he planned to stay on for 3 more days after the notified meeting. The intention was to occupy the area as set out in D3-1. D1 to D3 shared similar views as to estimated number of people attending, it would be from several thousand to 10,000 people. D1 to D3 were confident that if the number of participants were as they estimated, they could keep the crowd within the pedestrian area of Chater Road. In my judgment, by "the pedestrian area of Chater Road", D2 obviously meant the carriageway

of Chater Road designated as pedestrian area during public holidays and not the pedestrian pavements on both sides of Chater Road.

169. I accept D2's evidence that that the Trio had a discussion on the scenario where the Police issued a Letter of Prohibition to the proposed meeting. If the Police prohibited the meeting, people would still go the planned location, sit and remain there after the public holidays and commence civil disobedience there.

170. For Exhibit D2-9, i.e. "OCLP – Manual of Disobedience", shown to D2 by Mr. Pang SC in cross-examination, D2 confirmed that a large part of the manual was devoted to arrest and what one should do before, during and after arrest. D2 said the whole idea was to be arrested within a fairly short time. In Exhibit D2-9, two scenarios were mentioned, firstly how the police would effect arrest of a protestor who would get on a police vehicle voluntarily; and secondly, how the Police would effect arrest of a protestor who insisted on staying. In the second scenario, the protestor would be lifted by a group of four officers each lifting one of the limbs of the protestor. In order words, the Trio appreciated that the arrest of just one protestor who was not willing to get on a police vehicle would require the joint effort of 4 police officers.

171. In Exhibit D2-10, i.e. the "Press Release by OCLP", D2 stated it was hard to predict how long the occupy action will last but "recommend participants to prepare enough food for two or three days."

172. In Exhibit D2-11, i.e. the "OCLP Basic Tenets", it was stated therein that "Given the strength of the Hong Kong Police establishment,

the government has the capacity to arrest all the protestors in a matter of one or two days without resorting to force.”

173. It should be noted that in the press conference on 27th March 2013, D2 said:-

“If, by then, we sit on the road surface in Central, if he/she comes to arrest us, we won’t put up resistance; we’ll let (him/her) carry us on board a police vehicle, and then go to the police station. So, actually, if he/she is not going to let Central be paralysed, it is actually very easy (to do so). He/She just arrests us and that’ll do.”²⁸

174. In the said press conference, D2 was obviously talking about the second scenario, not the first one. Given the Trio’s estimate that there would be several thousand to 10,000 people parting part in the OCLP, I reject D2’s evidence that there he thought/believed the arrest action to OCLP could be completed with ease, be it the occupation of Chater Road in Central or the one which actually took place at Tim Mei Avenue and the public places and roads in the neighbourhood of Tim Mei Avenue.

175. On the part of D5, there is no evidence that he was aware of the contents of Exhibit D2-9 or that he addressed the crowds at the material times on the basis the contents of D2-9. I do not see how Exhibits D2-9, D2-10 and D2-11 can assist D5, or other defendants jointly charged with the Trio under Charge 2 and Charge 3.

176. I accept D2’s evidence he was aware of the launch of class boycott by HKFS and Scholarism on 22 September 2014.

²⁸ Exhibit P100, page 603

177. I accept also D2's evidence that the Trio had a meeting with organizers of OCLP on 26th September 2014 and detailed arrangements for 1st October were discussed during the meeting. It was after the meeting that the Trio became aware of the storming of the CGO to reclaim Civic Square by some students and the arrest of some student leaders. Upon knowing that, it was still the intention of the Trio to continue with the notified meeting on 1st October 2014.

178. I accept D2's evidence that on 27th September 2014, he received a call from D1 in the morning. D1 said the situation was urgent and asked D2 to accompany him to Admiralty. The two met up in Admiralty and went to the CGO together. On their way, youngsters urged them to launch Occupy Central immediately. D2 gave evidence that D1 to D3 later met up and they had a discussion in the afternoon. They considered whether the Occupy Central Movement should start early. They also considered whether the occupation starting at Tim Mei Avenue could extend to Harcourt Road and after some time, the Trio agreed that traffic at Harcourt Road was heavy and people going onto the carriageway might get hurt. The Trio agreed to first ask people to go to Tim Mei Avenue. Pausing here, it should be noted that, firstly, when D1 addressed the crowd in the presence of D2 on 27th September 2014 at Tim Mei Square, he said amongst other things:-

*".....Let's over-cram Admiralty first. Where shall (we) over-cram next? Central! We must be able to see the arrival of genuine universal suffrage in Hong Kong!"*²⁹

²⁹ Exhibit P20, page 1107

In the said address, D1 asked for the over-cramming of Admiralty and Central, a geographical ambit much wider than the location of Tim Mei Avenue. Secondly, from what was discussed between D1 to D3, they were not talking about abandoning the OCLP movement and participate in another movement, ie the one started and run by the students. Thirdly, a decision had been made by D1 to D3, after their discussion in the afternoon, as to how the occupy movement should develop, i.e. the over-cramming of Admiralty, followed by Central.

179. I accept the evidence of D2 that, before the announcement of the launching of the OCLP, there was no misunderstanding between HKFS and the Trio following the discussion between student leaders of HKFS and the Trio. The video clips show that the announcement was made together with the students. No students had expressed their disagreement before D1 announced the launching of OCLP and those who raised their objections after the announcement were not representatives of HKFS. From the video footage in Exhibit P44, one can see that when D1 made the announcement, D2, D3, D6, D7 and the two student leaders of HKFS present in the meeting with the Trio were all on the stage. Both D6 and the two student leaders clapped in support of the announcement. As for D7, he echoed D1 by holding up his fist and chanting.

180. On the evidence before me, despite what D2 said in his evidence, i.e. he considered that the possibility of the suggested misunderstanding between the Trio and HKFS was not high but he would not rule it out, I am satisfied that there was no misunderstanding between the Trio and HKFS that an announcement of the commencement of Occupy Central would be made by the Trio after the meeting between the Trio and

student leaders of HKFS. The crowds present at Tim Mei Avenue reacted negatively to the announcement. D6 and D7 tried to stop the departure in their addresses. What happened was a misjudgment of people's response to the announcement of the commencement of Occupy Central, but not a misunderstanding between the Trio and HKFS as suggested, i.e. the Trio wanted to announce the commencement of Occupy Central whereas HKFS only wanted the support from OCLP in the form of PA system, marshals and volunteers.

181. I accept the evidence of D2 that when tear gas cannisters were discharged at Harcourt Road and smoke was coming towards Tim Mei Avenue, D2 asked D5 to instruct the protestors to leave immediately. The evidence of D2 in this aspect is consistent with what D5 said in the video footage.³⁰

182. In my judgment, at the time when tear gas cannisters were being fired, it was only natural that people who had a role to play in the occupy movement would want the protestors to leave the site at Tim Mei Avenue. The evidence of D2 and Exhibit LL-1 could not impinge on the Prosecution case. In determining whether a defendant had the intent to cause a public nuisance, to incite a public nuisance or to incite others to cause one, how that defendant reacted to the firing of tear gas cannisters had little bearing on the issue of intent, whether the charge under consideration is conspiracy to cause a public nuisance, incitement to cause a public nuisance or incitement to incite a public nuisance.

³⁰ Exhibit LL-1

183. The response of D2 to the use of tear gas on 28 September 2018 was consistent with what he said at the time the announcement was made as recorded in Exhibit P44. At the time, D2 addressed the people at Tim Mei Avenue that “If the police disperse us with tear gas, we, the rally, will make an announcement about the location where everyone, citizens who got scattered, can gather afterwards. We will tell everyone about these measures very soon.” The evidence of D2 in this respect and the video footage captured in Exhibit LL-1 do not, in my judgment, undermine the Prosecution case.

184. D2 did not agree to the suggestion put to him by the Prosecution that the Tim Mei Avenue movement was merely a modified plan of the original plan of OCLP. D2 considered the movement at Tim Mei Avenue a very thorough modification. On this issue, one should note what D1 said at the time of the announcement of the launch of Occupy Central and what he said immediately after.³¹

185. When D1 announced the launch of Occupy Central, he said, amongst other things “I am going to make a very important announcement here, which is a – an announcement that everybody has long been waiting for. Does everybody know what this announcement is? It is announced here and now that the ‘Occupy Central’ formally begins. ‘Occupy Central’ formally begins”.³² In my judgment, what D1 meant by “an announcement that everybody has long been waiting for” must be the OCLP that the Trio had been planning since March 2013 and the one that they had planned to start on 1st October 2014. Had the Trio intended to abandon the OCLP and

³¹ Exhibit P124

³² Exhibit P124, page 741

start another movement, D1 would not have said what he said in the announcement at 1:36 a.m. Furthermore, in a press interview held immediately after the announcement, D1 was asked if the launch of Occupy Central at Tim Mei Avenue involved any change in the plan, D1 said, amongst other things, that “Actually, the impact is not really that big, actually it concerns just some technical arrangement, for example, the management of manpower, the management of the sites, this is because our original plan was based on a certain point in Central, all the planned sketches are ready. And now we are going to make the changes, but I think this concerns only technical issues”.³³ The only reasonable inference to be drawn from what D1 said in Exhibit P124 is that the Trio did not see the announcement at 1:36 am as the launching of a different movement but that the launching of the movement that they had been planning was put forward from 1st October 2014 to 28th September 2014.

186. D2 gave evidence as why he considered the movement the Trio planned to commence on 1st October 2014 at Chater Road was different materially from the one they announced to commence at 1:36 a.m. on 28th September 2014. He identified four major areas of difference, ie (1) theme, (2) management and leadership, (3) organizational method and (4) composition of participants.

187. I shall not go onto the evidence of D2 on this topic in great length. It is clear to me that the planned movement at Chater Road and what took place at Tim Mei Avenue both involved occupation of public places and public roads. D1 to D3 all along considered the planned

³³ Exhibit P124, page 757

movement at Chater Road and the one at Tim Mei Avenue a civil disobedience.

188. On the theme of occupation, the withdrawal of the Decision on 31st August and the reboot of political reform were common in both the planned movement at Chater Road and what took place at Tim Mei Avenue. Whilst it is true that the themes such as reopening of the Civic Square and the request for the release of the arrested students were not in the planned movement to occupy Central, it should be noted that the class boycotts, the attempt to recapture Civic Square and the arrest of student leaders were all related one way or the other to the common themes of the withdrawal of the Decision on 31st August and the reboot of political reform.

189. On the question of management and leadership, D2 said the OCLP was there to support the students and that marshals of the OCLP were expected to follow the instructions of HKFS. D2 also said they were soon marginalized. However, given the evidence of D2 that the Trio only faded out from the movement after the Government's negotiation with the students and that D2 still regarded the Trio as one of the major components of the movement at Tim Mei Avenue, it is difficult to see how the difference in management and leadership perceived by D2 can assist the case of D1 to D3. Charge 2 and Charge 3 concern words said by the relevant defendants between 27th and 28th September 2014, during the said period of time, the Government's negotiation with the students had yet to take place; the Trio had yet to fade out; there was no marginalization of the Trio and the Trio still considered themselves one of the major components of the movement at Tim Mei Avenue.

190. As for Charge 1, from the totality of the evidence, it is fair to describe D1 to D3 as the important figures of the OCLP. I have explained in the preceding Para. why I found the Trio did not see the announcement at 1:36 a.m. on 28th September 2014 as the launching of a different movement. What they did at 1:36 a.m. was to put forward the launching of the movement that they had been planning was put forward from 1st October 2014 to 28th September 2014.

191. I accept the evidence of D2 as to the difference between HKFS and OCLP in terms of organization method. HKFS did not agree with OCLP's way of disobedience to await arrest. Instead, a more proactive approach was adopted by HKFS, it kept mobilizing people to block off the major points of access. However, it should be noted that when D2 addressed the crowd shortly after the announcement, he still asked the participants to lie down, interlinked their arms, lighten their bodies so that the Police had to lift them up in order to effect arrest.³⁴ Later on during daytime on 28th September 2014, D2 addressed the crowd at Tim Mei Avenue and said amongst other things:-

"Every er, voluntary picket (and) supporter of 'Occupy Central with peace' We suggest each voluntary picket, citizen should adopt the effective protest approach adopted by the Hong Kong Federation of Students in these few days. If anyone sees that the main stage or the local commanders need our help, we are required to block certain important accesses, strongholds, or similar to what had happened just now, we are required to block some vehicles ...".³⁵

³⁴ Exhibit P44, page 1329, Exhibit P124, page 750

³⁵ Exhibit P64, page 1482-1483

In the said address, D2 was asking the voluntary pickets and supporters of OCLP to adopt the protest approach of HKFS, i.e. the blocking of important points of access. The said address shows a modification of the original plan, not the cessation of it.

192. As Mr. Leung SC pointed out, D2 agreed under cross-examination that with the additional party of students running the movement, such difference would inevitably exist. Even if the Occupy Central Movement were to start in Central, certain organizational methods had to be adapted to suit the situation.

193. On composition of participants, D2 said OCLP contemplated participants comprising mostly of people who had signed the Letter of Intent, and 3,000 people had done so. He accepted, however, for the Occupy Movement to start on 1st October at Chater Road, the Trio did not intend to exclude participants with no Letter of Intent as OCLP did not have the power to stop them from joining. I accept D2's evidence that for the several thousand people at Tim Mei Avenue at the time of the announcement, one could not be sure how many of them had signed a Letter of Intent and would accept OCLP's way of resistance. D2 accepted that by launching the Occupy Central Movement, they were launching it to the whole of Hong Kong population and not only to those 3,000 who had signed the Letter of Intent.

194. On the issue of the composition of participants, in my judgment, it was the intention of D1 to D3 to merge the voluntary pickets and supporters of OCLP and the participants at Tim Mei Avenue by announcing the commencement of Occupy Central. The addresses they

made after the announcement show that they wanted the movement to be expanded hence they asked more people to join the movement. In other words, they wanted to ride with the tide, i.e. to make the best use of the events that took place after the commencement of class boycotts, e.g. the storming of the Civic Square and arrest of student leaders. I accept that D1 to D2 wanted to support the student protestors and the arrested student leaders but it was obviously also their intention to make the best use of the development of the events. It should be noted that the two demands made by D1 at the time of the announcement were the withdrawal of the Decision on 31 August and a reboot of constitutional reform.³⁶

195. D2 said in his evidence that the Trio had assumed that people would come to Tim Mei Avenue where the supporters in the number of several thousand to 10,000 could be accommodated or managed. D2's evidence that the Trio had assumed that people would come to Tim Mei Avenue is at odd with what D1 said on 27th September 2014 when he address the crowd in the presence of D2 and D4 at Tim Mei Square:-

*".....Let's over-cram Admiralty first. Where shall (we) over-cram next? Central! We must be able to see the arrival of genuine universal suffrage in Hong Kong!"*³⁷

On the same occasion, immediately after D1's address, D4 said amongst other things:-

"Hey, let's go to occupy Admiralty now. Thank you, Benny. 'Chung' (transliteration), now it is the 'Chung' (transliteration) of 'Kam Chung' (transliteration) (the name of Admiralty in

³⁶ Exhibit P124, page 742-743

³⁷ Exhibit P20, page 1107

*Chinese). Later, it will be the ‘Chung’ (transliteration) of ‘Chung Wan’ (the name of Central in Chinese).....”.*³⁸

In my judgment, the above address of D1 shows that firstly, it was never the intention of D1 to D4 that the supporters joining the movement at Tim Mei Avenue would just come to Tim Mei Avenue; secondly, the Trio hoped that the number of supporters would be large enough to over-cram Admiralty, which is closer to Tim Mei Avenue, and then Central, thus the order “.....Let’s over-cram Admiralty first. Where shall (we) over-cram next? Central!” The evidence of D2 that by launching the Occupy Central Movement, they were launching it to the whole of Hong Kong population and not only those 3,000 who had signed the Letter of Intent should be read in this light.

196. D2 said in his evidence that the documentary film “Umbrella Diaries: The First Umbrella³⁹ is an accurate representation of the incident. In my judgment, in order to have a balanced view of the incident, one must not just look at Exhibit D2, which shows things mostly from the view point of the protestors. One can have a more balanced and accurate picture of the incident when both the video clips recorded by the police and the ones produced by the defence⁴⁰ are considered.

197. I have considered the evidence of D2 as to what happened in relation to the Occupy Movement and what the Trio did after 29th September 2014 up to the announcement by the Trio on 2nd December 2014 of their intention to surrender themselves on the following day. D2

³⁸ Exhibit P20, page 1107

³⁹ Exhibit D2-2

⁴⁰ including Exhibit D2-2

testified that he was worried on 29th September 2014 because he was trapped in Tim Mei Avenue yet the Police did not arrest him, he was worried what the Government intended to do and wondered if the Government wanted to create a status of anarchy. In my judgment, D2 might be worried on 29th September 2014, given what happened on the previous night. But it could not be reasonably argued that the Police did not arrest D2 because of some ulterior motives. If the Police were to arrest D2 the day after the firing of tear gas, when emotions of protesters still went high, as evidenced by the increase in the numbers of protestors on Harcourt Road, such arrest action might just stir up further reaction that the Police did not want to see. There is simply no evidential basis to suggest the Government or the Police wanted to create a status of anarchy. In any event, the evidence of D2 as to the worry he had on 29th September 2014 has no bearing on the important issues in this case.

198. I accept the evidence of D2 as to the contact between the Trio and Government officials like Carrie Lam and Yau Tang Wah sometime between 30th September and 2nd October 2014. D2 testified that Carrie Lam gave a negative reply about Chief Executive Leung Chun Ying and Commissioner of Police Tsang Wai Hung stepping down but her attitude about an independent investigation committee to investigate the use of tear gas was positive. As D2 said he could not recall details of the conversation with Carrie Lam, the evidential value of the Trio's contact with Carrie Lam and Yau Tang Wah is limited, apart from showing that D1 to D3 were trying to establish a dialogue with the Government.

199. I accept D2's evidence as to what took place between 2nd October and 21st October 2014. On 2nd October 2014, the Government

announced that it would have a dialogue with the students. The students called off the dialogue after some triad members assaulted the protestors in Mongkok on 3rd October 2014. There was a discussion with Yau Tang Wah focusing on how to restore the dialogue between the Government and the students. The Government called off the dialogue when pan-democrats suggested an all-citizen resistance. It was only after some twists and turns that a dialogue between the Government and the students finally took place on 21st October 2014. In the said dialogue, the Government designated HKFS as counterpart for negotiation.

200. I accept the evidence of D2 that between 2nd October and 21st October 2014, OCLP took steps to re-open footbridges to CGO by talking to occupiers known as “villagers”, as there were different occupied areas known as “villages”. The villagers would not just accept instructions from OCLP and OCLP had to talk to the “village heads” of the villages in question. The evidence of D2 on this issue shows that D1 to D3 had little control over the protestors (“villagers”) between 2nd October and 21st October 2014. What happened between 2nd October and 21st October 2014 concerns Charge 1 but not Charges 2 to 6. As for Charge 1, in my judgment, whether D1 to D3 were in control of the Occupy Movement between 2nd October and 21st October 2014 is one thing, whether there was still a conspiracy to cause public nuisance, if one ever existed, is another matter. What is in dispute is if such conspiracy ever existed, and if so, when did it come into existence and when did it cease to exist.

201. I accept the evidence of D2 as to stance taken by the Trio as regard the dialogue between the Government and the students. D1 to D3 wanted the students to continue with the negotiation so that the occupation

could come to an end after some result was achieved. D1 to D3 also took the view that if the students were of the view that negotiation would not come to any result, the occupiers should leave the scene. The Trio suggested a de facto referendum could be triggered by the resignation of Legislative Councillor Albert Ho. The voters, through the election held as a result, could reflect their opposition to the Decision on 31st August. The Occupy Movement could then be transformed into a community movement. The students disagreed to withdraw by the way the Trio suggested. In my judgment, despite the suggestion made to the students, D1 to D3 did not openly split with the students until 2nd December 2014.

202. I accept D2's evidence that D1 and D2 stayed at the occupied area between 27th September and 27th October 2014. As for D3, he returned home due to his health conditions. D2 said in his evidence that on 28th October 2014, D1 and D2 decided to resume teaching and fade out from the movement. I accept that D1 and D2 decided to resume teaching on 28th October 2014. D2's evidence in that regard is consistent with what D1 said in a press interview on 28th October 2014.⁴¹ D2 said that the Trio decided to withdraw because they could no longer influence the students, who took the stance that they would not negotiate with the Government or withdraw from the occupied area. D2 said the Trio did not openly split with the students until a press conference held in early December 2014. It is obvious that the press conference in early December 2014 that D2 mentioned was the one held on 2nd December 2014.⁴²

⁴¹ Exhibit P130 and P131

⁴² Exhibit P134

203. The evidence of D2 that D1 to D3 decided to fade out from the movement should be read in the light of the undisputed evidence that:-

(1) On 3rd October 2014, D1 urged the protestors who had been protesting in Mongkok to join the occupy movement in Central;⁴³

(2) On 8th October 2014, in a press interview, D2 stated that the OCLP had provided support on the basic operation of the occupied area in Admiralty, and the OCLP would give advice to the student protestors at appropriate times. D2 also stated that OCLP hoped that the protestors would stay as far as possible until the dialogue with the Government yielded a result.⁴⁴

(3) On 10th October 2014, in a speech given at Harcourt Road, D1 stated that he would continue to stay in the occupied area together with other protestors.⁴⁵

(4) In the press interview on 28th October 2014,⁴⁶ D1 also stated that the workers of OCLP would still stay in the occupied area. He stated also that with some adaptation, they could have the capability to stay for a longer period of time.

⁴³ Exhibit P120

⁴⁴ Exhibit P110, P112 and P126

⁴⁵ Exhibit P128

⁴⁶ Exhibit P130 and P131

204. In my judgement, the totality of the evidence shows that D1 to D3 did not withdraw from the movement until they announced their intention to withdraw from the movement on 2nd December 2014.

DW1 Mr. Wu Chun Him

205. Mr. Wu was a demonstrator present at Tim Mei Avenue on 26th September 2014. He left the site before some students climbed into the Civic Square in the evening. Upon learning that some student leaders had been arrested, Mr. Wu returned to Tim Mei Avenue and stayed until the morning on 27th September 2014. He returned to Tim Mei Avenue until the morning on 28th September 2014.

206. At about 1:30 am on 28th September 2014, Mr. Wu was at the roundabout near CITIC Tower at the junction of Tim Mei Avenue and Lung Wui Road, Mr. Wu was shocked upon learning from other that D1 had announced the launching of the OCLP. He considered this as a change of events because the OCLP was not supposed to be launched at Tim Mei Avenue there and then. He described the reaction of the people at Tim Mei Avenue after D1's announcement, some 70% people left within 1 or 2 hours. Mr. Wu left the site later.

207. Mr. Wu was at Harcourt Road outside Admiralty Centre in the evening on 28 September 2014. There he saw the carriageway was completely blocked by protestors. Mr. Wu stayed there until after the firing of tear gas. He then went into the Academy for Performing Arts and stayed there until the small hours of 29th September 2014.

208. Mr. Wu gave evidence that during the period from 29th September to mid-December 2014, he would occasionally return to Harcourt Road and spent the night there. He saw himself one of the occupiers on Harcourt Road but he considered his decision to participate in the occupy movement had not been affected by D1 to D3.

209. I find Mr. Wu an honest and reliable witness. I accept his evidence as to what he did and witnessed. For the evidence as to why Mr. Wu attended the public meeting at Tim Mei Avenue and took part in the occupation of Harcourt Road, Mr. Wu can speak for himself only, the evidence of Mr. Wu on this issue does not shed light on why others attended the public meeting at Tim Mei Avenue and took part in the occupation of Harcourt Road.

DW2 Mr. Leong Sze Chung James

210. Mr. Leong's evidence concerns the documentary entitled "Umbrella Diaries: The First Umbrella" produced as Exhibit D2-2.

211. Mr. Leong was one of the 4 executive directors of D2-2, most of the footages were shot by Mr. Leong.

212. Of the 64 minutes of D2-2 played in court, only about 4 minutes were filmed by others, i.e. the contributors whose names appear in the "Credit" section of D2-2.⁴⁷ The 64 minutes of D2-2 played in court came from an original footage of around 40 hours in length, excluding footages filmed by others. Background music was added to the footages.

⁴⁷ Exhibit P158 is the relevant screen capture

213. When Mr. Leong did the editing of the original footage, he extracted parts that he considered sufficient to tell the story and to show the incident that was Mr. Leong considered interesting.

214. The final product, i.e. D2-2, is “almost all chronological”, except for 1 to 2 minutes for the events on 28 September 2014.

215. I accept the evidence of Mr. Leong as true and reliable. I accept that D2-2 was shot and produced in the way Mr. Leong told us. In considering D2-2, I shall exclude from my consideration any effect created by the background music.

DW3 Ms. Tsang Wai Kwan

216. Ms. Tsang gave evidence as to why she took part in the occupation movement in question.

217. Ms. Tsang was aware of the civic movement of D1 to D3 but she had not decided to join the movement and had not signed the Letter of Intent.

218. Between 22nd and 25th September 2014, Ms. Tsang took part in the class boycott organised by students as she wanted to fight for genuine universal suffrage and to show her care for the students.

219. On 26th September 2014, upon learning that students were climbing into the Civic Square, Ms. Tsang went to and stayed at Tim Mei

Avenue between around midnight and 10 a.m. on 27th September 2014. She went to Tim Mei Avenue to show her support for the students inside Civic Square who had not yet been released.

220. Ms. Tsang returned to Tim Mei Avenue at around midnight on 28th September 2014 and witnessed D1 announcing the commencement of the Occupy Central Movement at 1:30 a.m. The people present reacted differently to the announcement. Some were thrilled but some were angry. One student pointed at and accused D1 for his lateness in starting the movement.

221. Ms. Tsang did not consider herself a participant of OCLP because all along her understanding of OCLP was that the participants would “attend a banquet” on 1st October 2014 in Central. She felt the public meeting at she attended at Tim Mei Avenue was an extension of the student’s class boycott.

222. Ms. Tsang occasionally returned to the occupied area from 28th and 29th September 2014 and spent most of the nights there. She did not, however, consider herself taking part in OCLP for the same reasons stated in the preceding Para.

223. Ms. Tsang impressed me as an honest and reliable. However, I do not see how Ms. Tsang’s view of the effect of D1’s announcement and her reasons for taking part in the public meeting at Tim Mei Avenue on 27th and 28th September 2014 and her participation in the subsequent occupied movement can shed light on the important issues whether a

conspiracy to cause a public nuisance among D1 to D3 existed at the time and whether there were incitements from the relevant defendants.

DW4 Mr. Lo Wai Ming

224. Mr. Lo was the Deputy Chief Executive of the Hong Kong Professional Teachers' Union at the material time in 2014. He had been assisting D3 in his work relating to OCLP since March 2013. D3 was the Chairman of the HKDDN and the registered address of HKDDN was at 8th Floor, Good Hope Building, No 168 Nathan Road.

225. I accept Mr. Lo's evidence that, with the instructions given by D3, he helped D3 to prepare the Notification for Intention to Hold a Public Meeting on 1 to 3 October 2014⁴⁸ and submitted the same to Mongkok Police Station on 18th September 2014.

226. I accept also Mr. Lo's evidence he arranged for a public liability insurance on behalf of HKDDN which covered 2 places in Central for the period from 1st to 3rd October 2014.⁴⁹

227. Mr. Lo gave evidence that he told the police at the meeting on 24th September 2014 that he intended to pack up and leave Chater Garden and Statute Square by 11:59 p.m. on 3rd October 2014. At one point I was puzzled by Mr. Lo's evidence on this issue given that he had been assisting D3 in his work relating the OCLP since 2013, but then the aforesaid evidence of Mr. Lo made more sense to me when understood in the light

⁴⁸ Exhibit D3-1

⁴⁹ Exhibit D2-13

of his evidence that he was responsible for the lawful aspect of the OCLP, i.e. he was not to be involved in the part of OCLP that would involve breaking the law for the purpose of civil disobedience.

228. I accept Mr. Lo's evidence that Mr. Chan Hung was an executive committee member of the Hong Kong Professional Teachers' Union. It is Mr. Lo's evidence that Mr. Chan Hung had never informed him of the Letter of Prohibition.⁵⁰ In my judgment, whether Mr. Lo was aware of the existence of Exhibit P153 is not crucial to the determination of the disputed issues in this case. As the events unfolded, the proposed public meeting on 1st to 3rd October 2014 did not take place. In my judgment the proof of the element "not warranted by law" required for the offence of public nuisance does not depend on the existence of Exhibit P153.

229. Given the fact that Mr. Lo had been assisting D3 in his work relating to the OCLP since 2013 and was aware of the OCLP advocated by D1 to D3, notwithstanding the fact that Mr. Lo was only responsible for the lawful aspect of the OCLP, e.g. the taking out of the insurance policy and attending meeting with the Police, I reject the evidence of Mr. Lo that he did not know D1 to D3 had the intention to stay beyond the notified period. The duration of the public meeting as stated in Exhibit D3-1 could not have been the duration of the meeting in Mr. Lo's mind, Exhibit D3-1 only states the duration of the notified public meeting, clearly Mr. Lo knew that it was the intention of D1 to D3 to stay beyond the notified period.

⁵⁰ Exhibit P153

DW5 Cardinal Joseph Zen Ze Kiun

230. The evidence of Cardinal Joseph Zen was not challenged by the Prosecution and D4 to D9.

231. I accept as true and reliable Cardinal Zen's evidence as to his participation in the OCLP movement and how he took part in the organization of a civil referendum, the putting forward of a "veto proposal", the walkathon and his support for the class boycott organised by students in September 2014.

232. I accept as true and reliable what he testified he did and witnessed at Tim Mei Avenue between 27th and 29th September 2014. After D1 to D3 ("the Trio") announced the commencement of the Occupy Central Movement at 1:33 a.m., Cardinal Zen saw students disagreeing with the announcement and accusing the Trio had hijacked the student movement.

233. I accept as true and reliable Cardinal Zen's evidence as to his subsequent visits to the site after 29th September 2014 and his view of the development of the movement. Cardinal Zen was worried that no one was leading and no one was in control.

234. There is nothing to cause me to doubt the evidence of Cardinal Zen that the Trio impressed him as very devoted persons.

DW6 Professor Lee Lap Fung Francis

235. Professor Lee gave evidence as an expert witness on matters relating to public survey. His professional qualifications are set out in detail in Exhibit D2-14.

236. Professor Lee, with the help of some student helpers, conducted two surveys during the occupation movement in October and November 2014.

237. The survey in October 2014 was conducted on 4th and 5th October 2014 and the one in November 2014 was conducted on 2nd November 2014. The survey methodology is set out in Exhibit D2-15. Exhibit D2-17 is the survey result of the October survey and Exhibit D2-19 is the survey result of the November survey, both titled “Basic Information about the Studies”.

238. In the questionnaires used in the two surveys enclosed in the section 65DA statement,⁵¹ various reasons for participation in the occupation movement were provided and an interviewee was asked to weigh the importance of each of the reasons. Six options were given for each reason: “Very Important”, “Important”, “Average”, “Not Important”, “Very Unimportant” and “Don’t Know”.

239. For the October survey, a total of 969 interviewees were interviewed; for the November survey, 273 interviewees. The results of the two surveys show that 6.2% and 7.7% of the interviewees gave “Call

⁵¹ Exhibit D2-16

from OC Trio” (D1 to D3) as a reason for their participation in the occupation movement in October and November 2014 respectively. In the survey questionnaires, these 6.2% and 7.7% indicated that they turned up in Admiralty because they considered the “Call from OC Trio” Very Important.

240. At the request of the Prosecution, Professor Lee also complied Exhibit D2-19. The first two Pg. of D2-19 are the same as Exhibit D2-17. Professor Lee stated that he would not consider an answer of “Don’t Know” to a question asked a valid answer for the reason that there might have been many reasons why people chose an answer of “Don’t Know”. Professor Lee also stated that if an interviewee chose “Average” as an answer to a relevant question, he would not see it as a reason for participation as the interviewee did not recognise it as important.

241. Professor Lee agreed that it is possible to include in his results interviewees who chose “Important” and “Very Important” for an item.

242. Professor Lee also agreed that if one were to gauge the ineffectiveness of a particular reason, one could look at the percentage of people choosing “Very Unimportant” for it, it would be another way to look at the data.

243. I find Professor Lee’s evidence as to how the two surveys were conducted in October and November 2014 honest and reliable. The only issue is what weight that the survey results should carry.

244. Given Professor Lee's evidence that it is possible to include in his results interviewees who chose "Important" and "Very Important" for an item, the use of the answers "Very Important" but the answers "Important", in my judgment, would give a very incomplete picture. The absence of the data of the interviewees who chose "Not Important" and "Very Unimportant" adds to the incompleteness of the picture.

245. Some of the reasons listed out in the questionnaires were also expressly or implicitly advocated by D1 to D3 in their speeches or the literature in relation to the OCLP placed before the court, e.g. "Fight for election", "Fight for civil nomination", "Protect Hong Kong's liberty", "Support and protect students" and "Empower the Movement". In all the speeches made by D1 to D3 and the literature in relation to the OCLP, D1 to D3 never asked the public to take part in the OCLP or any occupation movement **because** of the call from the Trio. In my judgment, it cannot be reasonably argued that because the percentage of those who considered "Call from OC Trio" as a very important reason for their participation in the occupation movement was low, therefore at the material times, D1 to D3 did not have the intention or could not have the intention to conspire to cause a public nuisance.

246. Of the 14 reasons given in the questionnaires, they can be divided into two group.

247. The first 8 reasons, ie "Fight for election without filter", "Fight for civil nomination", "Protect Hong Kong's liberty", "The use of tear gas", "Police's handling of the protest", "Support and protect students", "Empower the movement" and "Experience mass protests",

concern the reasons that motivated an interviewee to participate in the movement.

248. The remaining 6 reasons, i.e. “Mobilized by friends”, “Mobilized by family members”, “Call from HKFS”, “Call from OC Trio” and “Call from other organizations” concern by whom/organization an interviewee was motivated to participate in the movement.

249. In my judgment, these two group of reasons cannot be compared like-for-like. The amalgamation of these 2 groups of conceptually different reasons yields an unintended result which, at best, cannot not reflect the true picture, and at worst, is a contortion of the truth.

250. The same analysis applies to the incitement charges and other defendants in as much as reliance is placed on the survey results. It should be noted that two of the 14 reasons, i.e. “Mobilized by friends” and “Mobilized by family relatives” are consistent with the case of Prosecution that there were incitements to cause public nuisance and incitements to incite public nuisance by the defendants.

251. In any event, when D1 to D3 announced the launch of the Occupy Central movement at 1:36 a.m. on 28th September 2014, they did not have the benefit of seeing the survey results of Professor Lee. What they intended to achieve and what they thought they could achieve was not based on the survey results.

252. For the above reasons, I attach no weight to the survey results.

DW7 Mr. Au Kwok Kuen

253. Mr. Au was a full-time committee member of the Land Justice League, a local non-governmental organization. He was responsible for assisting Scholarism and HKFS to arrange for audio systems and stages used for the public meeting at Tim Mei Avenue on 26th September 2014. He also assisted in arranging civil classes at Tim Mei Avenue on that day. He walked around the vicinity of Tim Mei Avenue to see to it that the classes were run smoothly.

254. I accept Mr. Au's evidence that the video footage in Exhibit D6-1 and the photographs in Exhibits D6-2A and D6-2B show the events that took place in the afternoon or evening of 26th September 2014.

255. I accept Mr. Au's evidence that the northbound lane and southbound lane of Tim Mei Avenue were closed by the Police in the afternoon and in the evening of 26th September 2014. Mr. Au's evidence about the closing of the northbound carriageway is consistent with the evidence of PW2, who ordered the closure of the northbound lane at 5:30 p.m. on 26th September 2014. It is not clear whether the Police closed the carriageways because of Mr. Au's requests to Station Sergeant Ma but from the evidence of PW2 and Mr. Au, it is clear that the closure of the northbound and southbound lane of Tim Mei Road was due to safety reasons as many protestors had walked onto the carriageway of Tim Mei Avenue.

CONSIDERATION

CIVIL DISOBEDIENCE

256. It is the case of D1 to D3 that the OCLP that they planned was a civil disobedience movement. It is the case of all 9 defendants that the occupy movement that happened on 27th and 28th September 2014 and thereafter at and in the neighbourhood of Tim Mei Avenue was a civil disobedience movement.

257. My attention is drawn to the judgment of the Court of Final Appeal in *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 34. At Para. 70 of the judgment, the Court of Final Appeal endorsed the definition of civil disobedience put forward by John Rawls in *A Theory of Justice* (Revised Edition 1999) at Pg. 320:-

Civil disobedience is “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”

258. My attention is also drawn to a passage of Lord Hoffmann’s judgment in *R v Jones (Margaret)* [2007] 1 AC 136. At Para. 89 of the judgment, Lord Hoffmann said:-

“civil disobedience on conscientious grounds has a long and honourable history in this country.”

In *Wong Chi Fung*, the Court of Final Appeal with Lord Hoffmann as the non-permanent judge accepted the concept of civil disobedience is equally recognized in Hong Kong.

259. D2 stressed in his evidence that the Trio had borne in mind the concept of proportionality throughout their civil disobedience movement, be it at the time they planned to launch at Chater Road in October 2014 or when they announced to launch Occupy Central at Tim Mei Avenue on 28th September 2014.

260. On the issue of proportionality, it should be noted that in *Wong Chi Fung*, the Court of Final Appeal further cited a passage of Lord Hoffmann's judgment in *R v Jones (Margaret)*, "[T]here are conventions which are generally accepted by the law-breakers on one side and the law enforcers on the other. The protestors behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by law."

261. It should be noted that, much as the defendants rely on the concept of civil disobedience, civil disobedience does not constitute any defence to a criminal charge brought against a defendant. Even if a defendant is prosecuted for an offence committed in the course of civil disobedience, civil disobedience is not a defence in law. It is no function of the court to adjudicate the merits of the political cause behind the civil disobedience in the trial. The court should focus on the ingredients of the offence and the issues in dispute.

262. Dr McCoy SC submitted that the Trio's purpose of "civil disobedience" was to cause a "civic awakening" and not to "paralyse" the city, as D2 stated in 2 articles published in Ming Pao⁵² published on 4th

⁵² Exhibit D2-3 and D2-5

March 2013 and 23rd August 2013 respectively. In both articles, D2 emphasized that it was not the objective of the movement to paralyze Central or the financial hub of the city.

263. In the press conference of 27th March 2013, when answering questions from the press, D2 said amongst other things:-

“...many people feel that we want to paralyze Central....So, actually, if he/she is not going to let Central be paralyzed, it is actually very easy (to do so)/He/She just arrests us and that’ll do.”⁵³

264. As Lord Hoffmann pointed out in *R v Jones (Margaret)* proportionality in the context of civil disobedience requires the protestors to behave with a sense of proportion and not to cause excessive damage or inconvenience. There is a big difference between (i) calling for restraint on the part of protestors that they should behave with a sense of proportion and not to cause excessive damage or inconvenience and (ii) that the obstruction caused should not lead to paralysis of a district or financial hub. For the offence of public nuisance, the obstruction caused does not have to be severe enough to paralyze a district or a financial hub, the test is a much lower threshold of reasonableness.

265. What D2 wrote in Exhibits D2-3, D2-5 and what he said in Exhibit P100 show that at the times he wrote the articles and spoke on the subject, he was harbouring the thought that any obstruction that the OCLP would cause would be proportionate as long as Central would not be paralyzed as a result.

⁵³ Exhibit P100, page 603

266. In another article published in Ming Pao, D2 wrote:-

“The interference caused by civil disobedience may be greater than regular demonstrations, and participants must think about the balance between that and the damage of other people’s rights. In this regard, in addition to adhering to the principle of non-violence (not subjecting law enforcers and opponents to physical and verbal attacks) and being willing to bear legal consequences to avoid harming the rule of law, civil disobedience must prove that its appeal is in accordance with the principle of justice, and that its influence on others must be ‘proportionate’ so as to avoid excessive interference.”⁵⁴

267. What D2 wrote in mid-November 2014 about proportionality in civil disobedience was in line with what Lord Hoffmann said in *R v Jones (Margaret)*. It should be noted, however, that Exhibit D2-12 was published on 18th November 2014, when in a fortnight’s time, the Trio were to announce the cessation of Occupy Central movement.

268. Under cross-examination, D2 said:-

“To arouse public attention. But causing disruption was not the core of civil disobedience. The most important part was self-sacrifice. Because if you are merely causing disruption, you did not have to do it using civil disobedience. So it already implied that the disruption we caused had to be proportionate. By achieving the goal of arousing public attention, that would be very enough.”

269. D2 did not, however, explained what he meant by ‘proportionate’. He shed some light on what he meant by proportionate disruption when he admitted that once occupation of public road started, there must be inconvenience. He also accepted that Chater Road, as a major thoroughfare, was more busy than Tim Mei Avenue. D2 said the

⁵⁴ Exhibit D2-12

plan of the Trio was to occupy the designated pedestrian zone and hence the redirection of traffic would not be too serious. D2 further said that they, i.e. the Trio anticipated disruption **but not the entire area being paralyzed**. In my judgment, the articles written by D2 in relation to the OCLP,⁵⁵ what D2 said in Exhibit P100 and his evidence under cross-examination show that at the time when the Trio were considering the impact of the occupation would have on the traffic, even if they had in mind the concept of proportionality, the test/yardstick they used was whether the area would be paralyzed by the occupation. The test/yardstick they used was totally wrong. They planned to launch the Occupy Central movement at Chater Road and they considered the impact of the occupation would be acceptable as long as Central/the financial hub would not be paralyzed. In my judgment, that was not what Lord Hoffmann meant by the protestors should act with restraint and they should behave with a sense of proportion and not to cause excessive damage or inconvenience. It was only until 18 November 2014 that D2 spoke of proportionality in a way that was in line with Lord Hoffmann's statement in *R v Jones (Margaret)* i.e. the influence on others must be proportionate, so as to avoid excessive inconvenience to others. In my judgment, the awakening came much too late.

270. It should be noted that whilst *Wong Chi Fung* was decided in 2018, i.e. after the occurrence of all the relevant events in the present case, *R v Jones (Margaret)* was decided in 2007.

271. On 27th and 28th September 2014, when D1 to D3 called for the over-cramming of Admiralty and Central and announced to launch the

⁵⁵ Exhibits D2-2 and D2-3

Occupy Central movement at Tim Mei Avenue, though the Trio emphasized that the purpose of the movement was fight for universal suffrage for the election of the Chief Executive of the HKSAR and the movement was a non-violent one, there was no sense of proportion in the scale of occupation in the plea to occupy CGO, Admiralty and Central. I am sure the Trio knew that excessive inconvenience would necessarily be caused to the general public as a result of the large scale occupation.

272. After 28th September 2014, the occupation movement continued until 11th December 2014. The Trio did not severe their participation in the movement until 2nd December 2014. As the movement continued, D1 to D3 were able to see the excessive obstruction and inconvenience caused by the occupation of public places and roads in and in the neighbourhood of Central.

273. As said, civil disobedience is not a defence to a criminal charge.

274. D2 and D3 submitted that it was all along the emphasis of the OCLP to take legal responsibility and allow oneself to be arrested. It was also submitted that at no stage was there ever an intention to prolong conflict with arresting authorities by engaging in confrontation or resistance (Para. 63 of D2 and D3's Closing Submissions).

275. In my judgment, the way a participant should allow oneself to be arrested as advocated by the OCLP means that it would require several officers to lift one protestor and move him/her to a police vehicle to effect an arrest. Given the estimated number of participants for the movement at

Chater Road and the number of people at Tim Mei Avenue on 27th and 28th September 2014, it would be wholly unrealistic to suggest that the Police would be able to arrest all the protestors within one or two days. Whilst the Trio did not have an intention to prolong conflict with arresting authorities by engaging in confrontation or resistance, they certainly intended to prolong the time required for the arrest action. The evidence of PW6 shows that it had taken the police almost 5 hours to arrest 242 people on 11th December 2014.

276. It is also unrealistic to suggest that “should tens of thousands turn out to Occupy Central, the primary concern of the authorities would not be a matter of arresting or dispersing the protestors. It would be a matter of moving towards introducing genuine universal suffrage and therefore removing any further need to cause disruption in accordance with the proportionality principle”. It is naïve to suggest that a concession to introduce the form of universal suffrage advocated by the Trio could be made by the government overnight with a click of fingers, it is equally naïve to suggest a mass protest of tens of thousands of people could be dispersed overnight even if a positive response were to come from the authorities. There is no basis to suggest that should tens of thousands turn out to Occupy Central, “that mass expression of resolve was anticipated to have been sufficient to achieve the desired result and therefore removing any further need to cause further disruption in accordance with the proportionality principle”.

277. D2 drew reference from the Anti-National Education protests and said the only foreseeable outcome of a tens of thousands turnout was that the government would accede to the wishes of the people. In my

judgment, the reference to Anti-National Education protests is not an apt one. The subject matters of protests were entirely different. D2 had no basis to assume that the government's reactions to the large turnout in the Anti-National Education protests and an equally large or even larger turnout in the protest in relation to the election of the Chief Executive of the HKSAR would be the same.

278. In considering the offences that concern this case, i.e. "Conspiracy to cause public nuisance", "Incitement to cause a public nuisance" and "Incitement to incite a public nuisance", which all concern the common law offence of public nuisance, I have to consider the application of the reasonableness test expounded in *Yeung May Wan* and in the context of obstruction caused as a result of a peaceful demonstration, I have to bear in the forefront of my mind the protection given by the Basic Law to the right to peaceful demonstration and give it substantial weight in the balancing exercise.

APPROPRIATENESS AND CONSTITUTIONALITY OF THE CHARGES

The Use of the Common Law offence of Public Nuisance Instead of Appropriate Statutory Offences

279. It is contended that the Prosecution should not bring charges of public nuisance when there are appropriate statutory offences that can be used against the defendants. D1 cited the judgment of Lord Hoffmann in *R v Jones (Margaret)* and submitted that prosecutors have conventions to follow in a case of civil disobedience and should behave with restraint. D1 also cited a passage of "Public Nuisance – A Critical Examination,"

Cambridge Law Journal 48(1), March 1989, pp 55-84, at p 77 by J R Spencer. The learned author observed in the article that:-

“...almost all the prosecutions for public nuisance in recent years seem to have taken place in one or two situations: first, where the defendant’s behaviour amounted to a statutory offence, typically punishable with a small penalty, and the prosecutor wanted a bigger or extra stick to beat him with, and secondly, where the defendant’s behaviour was not obviously criminal at all and the prosecutor think of nothing else to charge him with.”

280. The above criticisms of J R Spencer were endorsed by Lord Bingham in *Rimmington* at Para. 37 of the judgment.

281. It is trite law that the preferring of charges is the sole prerogative of the Prosecution.

282. The common law offence of public nuisance covers a diverse range of activities, including obstructing public highways. Other examples of public nuisance include carrying on an offensive trade, keeping a disorderly house, selling food unfit for human consumption and throwing fireworks about in the street. It is true that in many cases such conduct will now be covered by a specific statutory offence and where this is so a criminal prosecution should normally be brought for that rather than at common law. Having said that, one can easily contemplate a scenario where a charge of statutory offence cannot adequately reflect the serious consequences of the conduct under complaint, take the example of throwing of fireworks about in the street, if the act had led to catastrophic result to the public, a charge of public nuisance cannot be said to be inappropriate. Dr. McCoy SC, with his usual fairness, drew my attention to the recent decision in *R v Stockli* [2018] 1WLR 5609 (CA) the England

Court of Appeal examined the statement in *Rimmington* that a charge of public nuisance should not be brought when other lesser crimes were available, but held that in the case before it, it was appropriate to bring the charge of public nuisance.

283. In my judgment, whether the prosecutor can “beat a convicted defendant with a bigger or extra stick” in the event of conviction depends on the findings of the court on the culpability of a convicted defendant. It cannot be said just because a charge of public nuisance is used, a prosecutor can use a bigger or extra stick to beat the defendant in the event of a conviction.

284. In my judgment, if the Prosecution takes the view that the case it seeks to prove reveals a level of culpability so high that calls for a punishment that no appropriate statutory offence can meet, the Prosecution is entitled to use the common law offence of public nuisance. Whether there is sufficient evidence to prove the charge and whether the facts proved reveal the level of culpability that the Prosecution contends are of course different matters.

Conspiracy to Cause a Public Nuisance

285. It is contended that the common law offence of public nuisance, when used in amalgamation with the concept of criminal conspiracy in cases concerning freedom of expression, freedom of speech, freedom of procession and freedom of demonstration, could have the effect of curtailing a free exercise of these rights.

286. In *Rimmington*, the House of Lords decided that the common law offence of public nuisance meets the requirement of certainty prescribed by the European Convention on Human Rights.

287. The offence of public nuisance requires proof that the obstruction under complaint is “not warranted by law”. In the context of the offence of public nuisance, applying the reasonableness test of *Yeung May Wan*, an obstruction could not be said to be “unwarranted by law” if it is a reasonable use of the highway or public places.

288. In *Yeung May Wan*, the Court of Final Appeal held that the application of the reasonableness test in any case of obstruction is essentially a question of fact and degree depending on all the circumstances, including the extent and duration of the obstruction, the time and place where the obstruction occurs, as well as the purpose for which the obstruction is done.

289. Relevant to the constitutional challenge in the present case is that in *Yeung May Wan*, the Court of Final Appeal held that, where the obstruction in question results from a peaceful demonstration, in applying the reasonableness test, the court should recognize the protection given by the Basic Law to the right to peaceful demonstration and give it substantial weight in the balancing exercise. In Para. 44 of the judgment, the Court of Final Appeal reckoned that in assessing the reasonableness of the obstruction, while the interests of those exercising their right of free passage along the highway obviously remain important, and while exercise of the right to demonstrate must not cause an obstruction exceeding the bounds of what is reasonable in the circumstances, such bounds must not

be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right.

290. In order words, if the obstruction in question is the result of a peaceful demonstration, the “not warranted by law” element requires the court to consider and recognise the protection given by the Basic Law to the right to peaceful demonstration and give it substantial weight in the balancing exercise. On the other hand, if the demonstration is not a peaceful one, then it would not have the protection given by the Basic Law.

291. In applying the reasonableness test to the facts of this case, I have borne in mind the protections given by the Basic Law to civil liberties. Article 27 of the Basic Law provides that: “*Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike*”.

292. I do not see how the offence of conspiracy to cause a public nuisance could have the undesirable effect of curtailing or suppressing civil disobedience at its formation stage or suppressing human rights as the defendants allege. If the agreement under complaint is one to occupy public roads by way of peaceful demonstration which would result in obstruction, if the Prosecution fails to prove the element of “not warranted by law”, the offence of conspiracy to cause a public nuisance cannot be made out. If the Prosecution is able to prove that if the agreement under complaint is carried out in accordance with the intentions of the defendants, the demonstration in question would result in obstruction which is unreasonable according to the reasonableness test, and hence not warranted

by law, those who are in the agreement cannot complain if a charge of conspiracy to cause public nuisance is brought against them. The court in determining whether the obstruction is unreasonable, is required to have the protection given to peaceful demonstration given by the Basic Law in the forefront of its consideration. It cannot be reasonably argued that a charge of conspiracy to cause public nuisance would generate a chilling effect in society, and many legitimate speeches will be silenced.

Incitement to Commit a Public Nuisance and Incitement to Incite a Public Nuisance

293. Mr. Pang SC for D5 argued that the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance” are unconstitutional. Mr. Pang SC’s complaints are:-

- (1) The offences are not sufficiently certain as to be “prescribed law” (Para. 89 to 106 of D5’s Closing Submissions) in that the offence of incitement is complete at the time of the incitement regardless of its actual effect and consequence whereas the offence of public nuisance is a result-based offence, whether an act under complaint amounts to a public nuisance is a question of fact contingent on all the known circumstances surrounding the act under complaint. It is impossible for an inciter to know or foresee at the time of the incitement that public nuisance was the subject of his communication with the incitee, thus both offences of “Incitement to commit public nuisance”

and “Incitement to incite public nuisance” would offend the requirement for legal certainty as the inciter could not have regulated his conduct in advance to prevent criminal liability.

- (2) The offences violate the “principle of non-retroactivity” of criminal law (Para. 107 to 111 of D5’s Closing Submissions). It is submitted that in any case of the prosecution charging an incitement to commit public nuisance, the judge is required to look beyond the words uttered by the defendant and take into consideration what had actually occurred after the alleged incitement. In the present case, the Prosecution is asking the court to take into consideration the actual circumstances of the protests/demonstrations up until 11th December 2014, which is after the relevant period of the alleged incitement of D5, i.e. the period between 27th and 28th of September 2014, to determine the content and the scope of the incitement under complaint. Mr. Pang SC submitted that the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance” together with the use of the application of the evidence of what happened after the alleged incitement necessarily lead to the extension of criminal liability to cover conduct which is not criminal, contrary to the principle of non-retroactivity under Art 12 of the BOR.

(3) As a result of (1) and (2), there would be a Draconian “chilling effect” on the exercise of the fundamental rights to freedom of speech and freedom of free expression (Para. 112 of D5’s Closing Submissions). “Incitement to commit public nuisance” and “Incitement to incite public nuisance.”

294. Mr. Dykes SC adopted Mr. Pang SC’s submissions and further submitted that the present case is the first time in Hong Kong that the offence of incitement to commit public nuisance and incitement to incite public nuisance had been used against factual situations concerning the exercise of a constitutional right to peaceful assembly. Courts should therefore be very slow to find that such a hybrid of a common law offence and inchoate offences would be precise enough to cover the new factual situation.

295. Mr. Choy SC for D9 took issue with the legality of the offences of causing public nuisance and incitement to commit public nuisance in Para. in 52 to 57 of D9’s Closing Submissions.

296. Mr. Choy SC submitted that to charge a defendant with the offence of causing public nuisance for the disruption caused in a mass demonstration when, in particular, the defendant is not a position to know all the circumstances, curtails citizens’ right to demonstrate and assembly in a vague and uncertain manner and fall foul of the “prescribed by law” requirement for not being formulated with any precision or clarity as regarded to the individual defendant’s conduct or knowledge.

297. Mr. Choy SC further submitted that the problem is compounded when the offence of public nuisance is used together with the inchoate offence of incitement. Mr. Choy SC questioned when the line be crossed between “inciting demonstration”, which is perfectly legal, as opposed to “inciting public nuisance.” A vaguely defined charge of incitement to commit public nuisance risks imposing a burden on organisers and participants of demonstration.

298. As said, the House of Lords held in *Rimmington* that the common law offence of public nuisance meets the requirement of certainty prescribed by the European Convention on Human Rights. The House of Lords held that the definition of the offence was clear, precise, adequate and based on a rational discernible principle so that it had the certainty and predictability to meet the requirement of legal certainty. It should be noted that the ruling in *Rimmington* was applied by the Court of Final Appeal in *Leung Tsang Hung v Incorporated Owners of Kwok Wing House* (2007) 10 HKCFAR 480, albeit in civil context.

299. In my judgment, there is no basis for the submission that the offence of public nuisance in the context of disruption caused in a mass demonstration would fall foul of the “prescribed by law” requirement. As stated before, whether an obstruction under complaint goes beyond what is reasonable and amounts to a public nuisance that involves a common injury, the reasonableness test as laid down in *Yeung May Wan* requires that all the circumstances of the obstruction, including the extent, duration, time, place and purpose of the obstruction should be taken into consideration. Hence, for the common law offence of public nuisance, if the obstruction under complaint was the result of a peaceful demonstration,

in determining whether the obstruction under complaint was unreasonable, the entire circumstances of the obstruction, including the extent, duration, time, place and purpose of the obstruction should be taken into consideration.

300. It was held in *Rimmington* that the actus reus of the offence of public nuisance requires proof that:-

- (a) Doing an act not warranted by law, or omitting to discharge a legal duty; and
- (b) The effect of such act or omission was to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise of rights common to everyone

301. The actus reus required is the same whether the act under complaint is one of carrying on an offensive trade, keeping a disorderly house, selling food unfit for human consumption and throwing fireworks about in the street or obstructing public highway as result of demonstration.

302. It was held in *Rimmington* that the mens rea required for the offence of public nuisance requires proof that the accused knew, or ought to have known (because the means of knowledge were available to him) the consequence of what he did or omitted to do. In my judgment, there is nothing imprecise or unclear about the mens rea required for the offence of public nuisance in the context of obstruction resulted from a mass demonstration.

303. For the requirement that “the suffering must be the suffering of common injury by members of the public by interference with rights enjoyed by them as such”, the principle is trite and well settled. As Lord Bingham pointed out in Para. 6 of the judgment in *Rimmington*, interference with the use by members of the public of a public highway is the most typical example of common injury. In my judgment, there is nothing in the complaint that the use of the common law offence of public nuisance in for disruption or obstruction resulted from mass demonstration falls foul of “prescribed by law” requirement.

304. Mr. Leung SC is right to point out that for the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance”, the respective mental requirements do not depend on the circumstances of any subsequent obstruction actually caused by the incitee. The Prosecution made it clear that the evidence of PW6 as to what happened after 28th September 2014 was adduced to show the consequences of the offences which are relevant to the culpability of the accused. For the respective mental requirements for the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance”, I agree with Mr. Leung SC that the focus should be on the intention on the part of the incitor at the time when the incitement is made. It was held in *HKSAR v Jariabka Juraj* [2017] 2 HKLRD 266, the actual intention on the part of the incitee is entirely irrelevant. In my judgment, there is nothing in the complaint that the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance” offend the principle against retroactivity.

305. The actus reus and mens rea required for the offence of “Incitement to commit public nuisance” are that of the person charge, i.e. the incitor; so is the offence of “Incitement to incite public nuisance”. There is nothing uncertain about the elements of the offences. The legal principles on inchoate offence of incitement and the common law offence of public nuisance are well settled. The consideration of the offences of the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance” involves an application of some well settled legal principles.

306. I agree with the analysis of the Prosecution that, once the elements for the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance” are properly understood, the issue for the offence of “Incitement to commit public nuisance” is whether, at the time the incitement is made, the defendant (the incitor) intends or believes that if the incitee (B) does the act incited under the circumstances that are known or believed by the defendant (the incitor), the incitee (B) would commit the offence of public nuisance with the requisite mens rea. For the offence of “Incitement to incite public nuisance”, the issue is whether, at the time of the incitement, the defendant (the incitor) intends or believes that if the incitee (B) does the act incited under the circumstances that are known or believed by the defendant (the incitor), the incitee (B) would commit the offence of incitement with the requisite mens rea, namely, that the incitee (B) intended to incite another person or persons (C and so on), knowing that those other person(s), if they acted upon the incitee’s (B) incitement, would commit the offence of public nuisance.

307. Both arguments (1) and (2) of Mr. Pang SC fail for the reasons given, it follows that argument (3) also fails, the offences do not give rise to any “chilling effect” on the exercise of the fundamental rights to freedom of speech and freedom of peaceful assembly.

308. The constitutional challenge to the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance” thus fail for the above reasons.

PROPORTIONALITY

309. Mr. Choy SC submitted that “a blanket criminalization of demonstrators who have participated in a demonstration that caused unreasonable obstruction is a disproportionate means to attempt to deal with the disruptive impact of a demonstration” (Para. 65 of D9’s Closing Submissions). D9 contends that a very onerous burden would be placed on individual demonstrators if a demonstration can cause no more than “reasonable” obstruction.

310. The Court of Final Appeal held in *HKSAR v Chow Nok Hang* (2013) 16 HKAFAR 837 that

“38. Article 17 allows a line to be drawn between peaceful demonstrations (where, as noted above, full rein is given to freedom of expression) and conduct which disrupts or threatens to disrupt public order, as well as conduct which infringes the rights and freedoms of others...

39. Once a demonstrator becomes involved in violence or the threat of violence – somewhat artificially 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 freedom of others.

.....

42. Lines also have to be drawn where a demonstrator's conduct impinges unacceptably upon rights of others (which may or may not be constitutionally protected rights) Such a line had to be drawn, for instance, in *Yeung May Wan v HKSAR*, where the Court had to decide whether the offence of obstructing a public place was properly applied so as to curtail a static, peaceful demonstration by a small group of Falun Gong protestors which obstructed only part of the pavement, on the basis that they were interfering with the rights of other users of the public highway..."

311. It is clear from the judgment of the Court of Final Appeal in *Yeung May Wan* and *Chow Nok Hang* that when the obstruction under complaint is the result of a demonstration, the "reasonableness" test only applies if the demonstration is a peaceful one which does not involve violence or threat of violence ("breach of the peace"). In the present case, the Prosecution does not contest the demonstration that took place was a peaceful one. In fact it is because the demonstration in the present case was a peaceful one that necessitates the consideration and application of the reasonableness test.

312. In my judgment, the reasonableness test in *Yeung May Wan* has subsumed into it the consideration of proportionality. As said, it was held in *Yeung May Wan* that a person who creates an obstruction could not be said to be acting "without lawful excuse" if his conduct involves a reasonable use of the highway or public places.

313. As stated above, the Court of Final Appeal held that the application of the reasonableness test in any case of obstruction is

essentially a question of fact and degree depending on all the circumstances, including the extent and duration of the obstruction, the time and place where the obstruction occurs, as well as the purpose for which the obstruction is done.

314. In *Yeung May Wan*, the Court of Final Appeal had not overlooked the impact that the “reasonableness” test might have on mass demonstrations. It was held that, where the obstruction under complaint resulted from a peaceful demonstration, in applying the reasonableness test, the court should recognize the protection given by the Basic Law to the right to peaceful demonstration and give it substantial weight in the balancing exercise. The Court of Final Appeal further held that in assessing the reasonableness of the obstruction, while the interests of those exercising their right of free passage along the highway obviously remain important, and while exercise of the right to demonstrate must not cause an obstruction exceeding the bounds of what is reasonable in the circumstances, such bounds must not be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right.

315. I agree with the Prosecution’s submission in reply that the application of the reasonableness test for the offence of public nuisance in respect of obstruction of public roads is a proportionate response to protect the exercise of the constitutional right to peaceful demonstration by the protestors on one hand, and on the other hand, the rights and freedoms of other members of the public. The protection of these competing interests should be approached with care taken to balance the competing rights of the protestors and the rights of other members of the public, and when the obstruction under complaint is resulted from a peaceful demonstration, in

applying the “reasonableness” test, the court should not define the bounds of reasonableness so narrowly as to devalue or unduly impair the ability to exercise the constitutional right.

316. In my judgment, a proper application of the reasonableness test allows the right balance be struck between the competing rights of the protestors in a peaceful demonstration and the rights of other members of the public without infringing the exercise of the constitutionally protected rights of the protestors. The offences of “Conspiracy to commit public nuisance”, “Incitement to commit public nuisance” and “Incitement to incite public nuisance” require proof of not only that the obstruction under complaint has exceeded the bounds of reasonableness such that it falls outside the ambit of constitutionally protected right, the offences also require proof of “a common injury to the public”. The deployment of these offences in a case of mass demonstration does not constitute any “blanket criminalization”.

317. In my judgement, the offences of “Conspiracy to commit public nuisance”, “Incitement to commit public nuisance” and “Incitement to incite public nuisance” satisfy the proportionality requirement for the restriction of the fundamental rights to freedom of speech and freedom of peaceful assembly.

THE EFFECT OF CORDONING OFF TIM MEI AVENUE BY THE POLICE ON 26 SEPTEMBER 2014

318. The evidence of PW 2 shows that the west side (northbound) carriageway of Tim Mei Avenue was cordoned off at 5:30 p.m. on 26th

September 2014. PW2 decided to cordon off the northbound carriageway because at that time there were many people walking onto the carriageway. PW2 gave evidence that he made the decision after he had considered the number of people, the public safety and public order. He considered that there was a need to close Tim Mei Avenue so that the public meeting could be conducted safely.

319. The evidence of DW7 Mr. Au shows that at around 8:30 p.m. on 26th September 2014, the southbound carriageway of Tim Mei Avenue was also cordoned off by the Police.

320. Submissions were made by the defence that, because of the cordoning off of Tim Mei Avenue by the Police:-

- (i) The relevant defendant(s) could not have incited public nuisance by obstructing the vehicular passage of the carriageways of Tim Mei Avenue;
- (ii) The occupation of the carriageways by the participants in the public meetings at Tim Mei Avenue was lawful;
- (iii) The relevant defendant(s) who allegedly incited the crowds at Tim Mei Avenue to (i) commit public nuisance and (ii) incite others to commit public nuisance could not have the requisite mens rea to cause unreasonable obstruction “not warranted by law”;

(iv) As the alleged incitements in respect of Charge 2 and Charge 3 were made between 27th and 28th September 2014, i.e. at a time when Tim Mei Avenue had already been cordoned off by the Police, it was impossible that the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance” could have been committed by the relevant defendant(s).

321. The Prosecution submitted that the closure of the carriageways of Tim Mei Avenue has no bearing on the important issues in this case. Mr. Leung SC submitted that the evidence shows that the defendants were asking the people to go to Tim Mei Avenue through the alternative route from the Academy for Performing Arts, Wanchai. The fact that the Police decided to block the passages from Admiralty to Tim Mei Avenue was no reason or excuse for any member of the public to go through the relevant carriageways of Harcourt Road to Tim Mei Avenue and stay thereon.

322. In my judgment, the fact that the Police cordoned off the carriageways of Tim Mei Avenue on 26th September 2014 should give no reason or excuse for any member of the public to stay on the carriageways indefinitely. The closure of the carriageways of Tim Mei Avenue should not be taken as a carte blanche for the protestors to occupy the carriageways indefinitely. PW2 cordoned off the carriageways to enable the public meeting to carry on safely, not indefinitely. It should be noted that, on the issue of the intended duration of the public meeting under complaint, Mr. Pang SC submitted that as the Prosecution had clarified, upon the request of D5, the words “prolonged or indefinite period of time” referred to in the

Opening mean an “undetermined period of time in the future”, the Prosecution’s Closing Submissions are an unexplained departure from the further particulars provided as the Prosecution continually referred to a prolonged period (e.g. Para. 262, 277, 301). He submitted that the Prosecution should be held to the particulars supplied on the basis of which the evidence was heard. My record shows that at the hearing on 19th November 2018, Mr. Bruce SC accepted what Mr. Pang said on the issue, Mr. Bruce SC took the view that the difference between prolonged and indefinite carry with it the same meaning, an undetermined time in the future.

323. However, with the closure of the carriageways of Tim Mei Avenue, those who incited the people at Tim Mei Avenue to walk onto and stay on the roads after the closure might think that they were not inciting people to cause unreasonable obstruction to the road as long as it remained cordoned off by the Police. For the same reasons, those who incited the people present at Tim Mei Avenue to incite other people to come and occupy Tim Mei Avenue might think that they were not inciting the people at Tim Mei Avenue to incite others to cause unreasonable obstruction as long as Tim Mei Avenue remained cordoned off by the Police.

324. In short, the relevant defendant(s) who incited the people at Tim Mei Avenue on 27th and 28th September 2014 to (i) occupy the carriageways of Tim Mei Avenue and/or (ii) to incite other people to occupy the carriageways of Tim Mei Avenue might think that they were not inciting anyone present to cause any unreasonable obstruction to the road or inciting those present at Tim Mei Avenue to incite others to cause any unreasonable obstruction to the road.

325. In the circumstances, the closure of the carriageways of Tim Mei Avenue by the Police has a bearing on the issue whether the relevant defendant(s) knew or believed that the incitement(s) under complaint would result in a public nuisance, i.e. unreasonable obstruction of the carriageways of Tim Mei Avenue amounting to a suffering of common injury by members of the public.

326. It follows from the above analysis that D1 to D7 should have the benefit of doubt in so far as the pleas made by them to the people at Tim Mei Avenue to (i) occupy the carriageways of Tim Mei Avenue and (ii) incite other people to occupy the carriageways of Tim Mei Avenue are concerned.

327. Despite my findings of the effect that the closure of Tim Mei Avenue by the Police on 27th and 28th September 2014 had on Charge 2 and Charge 3, in my judgment, Charge 2 and Charge 3 do not fail.

328. It is useful to recapitulate the particulars of Charge 2 and Charge 3:-

The particulars of Charge 2 “Incitement to commit public nuisance” allege that D1 to D7, “between the 27th and 28th of September, 2014, in Hong Kong, unlawfully incited persons present at Tim Mei Avenue, Admiralty to cause a public nuisance to the public by unlawfully obstructing **public places and roads at and in the neighbourhood of Tim Mei Avenue.**” (Emphasis added)

The particulars of Charge 3 “Incitement to incite public nuisance” allege that D1 to D7, “between the 27th and 28th of September, 2014, at Tim Mei Avenue, Admiralty, in Hong Kong, unlawfully incited persons at Tim Mei Avenue, Admiralty, to incite other persons to cause a public nuisance to the public by unlawfully obstructing **public places and roads at and in the neighbourhood of Tim Mei Avenue.**” (Emphasis added)

329. It is immediately clear from the reading of the particulars of Charge 2 and Charge 3 that the complaints of the charges are that the relevant defendants incited persons present at Tim Mei Avenue to (i) cause a public nuisance to the public (Charge 2); (ii) incite other persons to cause a public nuisance to the public (Charge 3), by unlawfully obstructing **public places and roads at and in the neighbourhood of Tim Mei Avenue** (Charge 2 and Charge 3).

330. The evidence shows that amongst the pleas made by D1 to D7 between the 27th and 28th of September 2014, apart from pleas to occupy Tim Mei Avenue and pleas to ask/invite others to do the same, there were also pleas to occupy Admiralty, Central and Wanchai and pleas to ask/invite others to occupy Admiralty, Central and Wanchai. The following pleas to occupy Admiralty, Central and Wanchai clearly went beyond the scope of occupying Tim Mei Avenue which had been cordoned off since 26th September 2014:-

(1) In the afternoon on 27th September 2014, when D6 addressed the people at Tim Mei Avenue, he said:

“now we hope that everybody, yes, can really ask more people to come out and over-cram Tim Mei Avenue, also,

it is hoped that the nearby carriageways will also be over-crammed, and (we) continued to extend the area of our civil disobedience.” (Emphasis added)⁵⁶

- (2) On 27th September 2014, when D1 addressed the crowd in the presence of D2, D4 and D6 at Tim Mei Square, he said, amongst other things,

*“.....Let’s over-cram **Admiralty** first. Where shall (we) over-cram next? **Central!** We must be able to see the arrival of genuine universal suffrage in Hong Kong!” (Emphasis added)⁵⁷*

- (3) On the same occasion, immediately after D1’s address, D4 echoed D1 (“Benny”) and said in the presence of D1, D2 and D6:

*“Hey, let’s go to occupy **Admiralty** now. Thank you, Benny. ‘**Chung**’ (transliteration), now it is the ‘**Chung**’ (transliteration) of ‘**Kam Chung**’ (transliteration) (the name of **Admiralty** in Chinese). Later, it will be the ‘**Chung**’ (transliteration) of ‘**Chung Wan**’ (the name of **Central** in Chinese).....” and “We hope to over-cramming Tim Mei Avenue, right? Over-cram Tim Mei Avenue! Over-cram Tim Mei Avenue! Over-cram Tim Mei Avenue! Over-cram **Admiralty!** Over-cram **Admiralty!** Over-cram **Admiralty!** Good!” (Emphasis added)⁵⁸*

- (4) In the evening on 27th September 2014, in the presence of D4 and D7, D6 addressed the people at Tim Mei Avenue and said:

⁵⁶ Exhibit P17, page 1102

⁵⁷ Exhibit P20, page 1107 and Appendix I of the Prosecution’s Closing Submission

⁵⁸ Exhibit P20, page 1107 and Page 1111 and Appendix I of the Prosecution’s Closing Submissions

“Right, well, let me tell you a piece of good news rather than always listening to those things that (make you feel) heavy (-hearted). Well, we, now **on the bridge outside Admiralty**, it is still full of people all over the footbridge (there). They are in the direction of our side, coming towards us here, right. Our (activity) today, should be the largest Civil Disobedience (activity) over the years, certainly, the number of people, we have not yet got the largest of people, but (we) hope that the members of the public would not remain at our current achievements (attained), let us keep asking more people to come, over-cramming **Admiralty**.”

“Well! As what we have seen, actually, there are huge crowds of people everywhere. Well! We, **starting from Harcourt Road to the entire Tim Mei Avenue, all were (packed with) people, the open space of the Legislative Council is also full of people, so everybody keeps asking people to come!**” (Emphasis added)⁵⁹

- (5) In the afternoon on 28th September 2014, when D7 spoke on the main stage at Tim Mei Avenue in the presence of D1, D2 and D5 (on stage) and D3 (below stage), he said, amongst other things,

“....However, we know that roughly more than ten thousand citizens have **blocked the road (from) the Admiralty Centre, the whole of KFC to Rodney Street**. At the same time, **at the Hong Kong Academy ‘Centre’ (sic) of Performing Arts, Wanchai**, there are ten thousand people. Adding (them) up, (we’ve) got a total of about thirty thousand people here. Here, I am appealing to all the citizens in Hong Kong to come together – no matter whether (you) can enter the area or not, go to **Admiralty**, go to **Wan Chai**. Let us fill up the whole of Admiralty (and) **Wan Chai**. Together, (we) can **besiege the whole of Central Government Offices from the side of Rodney Street, from the side of the Hong Kong Academy ‘Centre’ (sic) of Performing Arts**. We demand --.....Let us fill up **Admiralty and Wan Chai** together....” (Emphasis added)⁶⁰

⁵⁹ Exhibit P40, page 1244-1245, and Appendix I of the Prosecution’s Closing Submissions

⁶⁰ Exhibit P69, pages 1545-1546 and Appendix I of the prosecution’s Closing Submissions

It should be noted that the locations mentioned by D7 in the said address, i.e. Admiralty Centre, the Central Government Offices, Rodney Street, the Academy for Performing Arts are all located in the neighbourhood of Tim Mei Avenue.

(6) In the afternoon on 28th September 2014, when D5 and D7 addressed the people at Tim Mei Avenue in the presence of D1 and D3, D5 and D7 said amongst other things:

“D5:Our –our friends who gather round here to watch have already over-crammed two more roads.

D7: Hurray!

*D5: (The crowd) has already over-crammed **two roads (outside) the Hong Kong Academy for Performing Arts.***

D7: And more citizens are coming successively. (Let’s) continue to occupy the roads together.

*D5: We are asking more friends to come here, (we are asking) more friends to come here. Let’s over-cram **Admiralty.** (Let’s) over-cram **Wan Chai.** (Let’s) over-cram **Central.***

D7: Friends on that side, keep it up. We know that some friends there have already prepared to dash out to occupy the road(s). Let’s cheer them on, shall we?

*D5: Comrades, let’s over-cram **Wan Chai** together. (Let’s) over-cram **Admiralty.** (Let’s) over-cram **Central.**.....” (Emphasis added)⁶¹*

⁶¹ Exhibit P74, pages 1588-1589 and Appendix 1 of the Prosecution’s Closing Submissions

(7) Not long afterwards, D5 and D7 spoke on the main stage at Tim Mei Avenue in the presence of D1 and D2 (on stage) and D3 (below stage) and said:

*“D7: We have got news that.... On the side of **Harcourt Road**.. many friends have already gone out onto the road! (They) have already occupied the road! Hurray!*

D5: Occupy the road!

D7: Occupy the road!

D5: Occupy the road!

D7: Occupy the road!

D5: Occupy the road!

D7: Occupy the road!

D5: Hurray!

D7: Hurray!

D5: Hurray!

D7: Hurray!”

*(Emphasis added)*⁶²

(8) Shortly afterwards, D5 and D7 spoke on the main stage at Tim Mei Avenue in the presence of D3 (below stage) and said:

*“D5: Our picket has just made a report that the 6 carriageways of **H-Harcourt Road bound for Central as well as Causeway Bay**, the 6 carriageways have already been over-crammed (with people) sitting (there)! We have already over-crammed 6 carriageways (with people) sitting (there). Keep coming! Keep coming! Keep coming!*

*D7: Keep coming” (Emphasis added)*⁶³

⁶² Exhibit P74, pages 1591-1592 and Appendix 1 of the Prosecution’s Closing Submissions

⁶³ Exhibit P74, page 1593 and Appendix 1 of the Prosecution’s Closing Submissions

(9) Later in the same afternoon, when D7 spoke on the main stage at Tim Mei Avenue in the presence of D5 (on stage) and D3 (below stage), he said:

*“We are here to call for more people to come out to over-cram **Admiralty** (and) to over-cram **Wan Chai** with us. (Let’s) carry on with the Occupy (movement).”*
(Emphasis added)⁶⁴

(10) Later in the same afternoon, when D7 spoke on the main stage at Tim Mei Avenue in the presence of D2 (on stage), he said:

*“We are here to appeal to our friends who have not yet come to join us, come quickly to over-cram **Admiralty and Wan Chai**, and to occupy this Hong Kong that belongs to us.”* (Emphasis added)⁶⁵

331. It is clear that D1, D4, D5, D6 and D7 each had called for occupation or over-cramming of places “at and in the neighbourhood of Tim Mei Avenue”.

332. In my judgment, the closure of Tim Mei Avenue by the Police on 26th September 2014 could not have made the relevant defendant(s) think that “over-cramming” of the public places and roads “in the neighbourhood of Tim Mei Avenue Admiralty, Central and Wanchai” was not “unwarranted by law”. The relevant defendant(s) could not have thought that any obstruction caused by over-cramming of Admiralty and Central was not unreasonable. The relevant defendant(s) could not have

⁶⁴ Exhibit P74, page 1594 and Appendix 1 of the Prosecution’s Closing Submissions

⁶⁵ Exhibit P74, page 1598 and Appendix 1 of the Prosecution’s Closing Submissions

thought that as the Police had cordoned off Tim Mei Avenue, no additional obstruction would be caused by over-cramming those parts of Admiralty, Central and Wanchai not at, but within the neighbourhood of Tim Mei Avenue.

THE APPLICATION OF THE CO-CONSPIRATORS RULE

333. The Prosecution invokes and relies on the co-conspirators rule under Charge 1 against D1 to D3. In order to understand the evidence that the Prosecution relies on to invoke the co-conspirators rule and the extent that Prosecution seeks to rely on the rule. It is necessary to set out the relevant parts of the Prosecution's Opening in full:-

*"2. In a press conference held at what appeared to be a church on 27th March 2013 (the "**March 27 Press Conference**", as captured on Exhibits **P-96, P-98, P-99 and P100**), D1, D2 and D3 together announced the commencement of the OCLP. The Prosecution case is that D1, on behalf of the three, read out what they described as their Manifesto (信念書) setting out the aim of the campaign, namely, to strive for the form of universal suffrage they advocated in the election of the Chief Executive of the HKSAR in 2017. D1 stated, amongst other things, that:-*

- (1) "The campaign consists of four steps: signing the covenant; the deliberation day; citizen authorization process, and finally, the act of civil disobedience";*
- (2) "After the deliberation day and authorization by citizens, the campaign will put forward a concrete proposal on the election of the Chief Executive in 2017. **If the authorities concerned show no regard for the democratic demands of the citizens, and bring up some election methods which do not meet the international standards of universal suffrage, we shall, at a suitable time, carry out civil disobedience in terms of Occupy Central**", [Emphasis by the undersigned] and*
- (3) "There are three ways for citizens to participate in the Occupy action: to provide support to those who carry out the acts of civil disobedience without breaking any law themselves, to carry out the act of civil disobedience without giving up to the authorities, but we hope that*

there would still be substantial number of citizens may choose to carry out the act of civil disobedience, gives themselves up to the authorities, and file no defence in the trial. We expect there will be at least 10,000 people who follow the conscience and participate in different aspects of this campaign: let love and peace occupy Central."

3. In the same press conference, D3 stated, amongst other things, that:-

"So, by way if violating the law and civil disobedience, we've revealed that justice failed to be served. By defying the law ourselves, we've also highlighted the injustice of the system inside the underlying framework that is thought to be legal."

4. D2, when answering a question from the press, stated:-
"If, by then, we sit on the road surface in Central, if he/she comes to arrest us, we won't put up resistance; we'll let (him/her) carry us on board a police vehicle, and then go to the police station. So, actually, if he/she is not going to let Central be paralyzed, it is actually very easy (to do so)."

5. The March 27 Press Conference is the public manifestation of a meeting of minds amongst D1, D2 and D3 in forming a conspiracy to commit public nuisance through the unlawful obstruction of public places and roads in or in the neighbourhood of Central.

6. Thereafter, D1, D2 and D3 continued to publicly introduce the campaign of the OCLP on various occasions:-

(1) On 30 April 2013, D1, D2 and D3 together appeared on a radio programme named "On a Clear Day" (as captured on Exhibit P-104) in which they discussed about the campaign of the OCLP. During the programme:-

(a) When asked by the programme host if the people participating in Occupy Central would be guilty of the offence of unlawful assembly, D1 said they would "only sit on the carriageway" and would not charge at anything to break the order;

(b) D1 stated that they would be holding the "first deliberation day" ("**D-Day I**") of the OCLP at the University of Hong Kong on 9 June 2013, to get the people engage in discussions on what methods to be used in carrying out civil disobedience through Occupy Central. D1 further stated that they would be holding further deliberation days in future, and they had been preparing for a deliberation day with an estimated number of participants of 10,000 people, and

(c) D2 stated that the OCLP would have a street booth during the protest on 1 July 2013 when they would provide information

to citizens who had questions about the campaign of OCLP and would also be holding a fund raising for the campaign. D3 also stated that there would be a bank account for the volunteers to make donations for the campaign.

(2) On 9 June 2013, D1, D2 D3 held the first deliberation day of the OCLP (i.e. “**D-Day 1**, as captured on **Exhibits P-116 and P-117**) at the University of Hong Kong. During the said event, which appear to be a public event to the audience at that event:-

(a) D1 reiterated the goal of the OCLP to strive for their advocated form of universal suffrage in the election of the Chief Executive by way of civil disobedience, and stated that the campaign had now proceeded from “gestation period” (醞釀期) to “organizational preparation period” (組織裝備期). The aim of the deliberation day was to set the agenda and identify the major issues that might be encountered in the campaign (for example, when Occupy Central happened, how the participants would respond to the police’s deployment) in order to enable the OCLP to achieve the goal successfully. D1 summarized the campaign of OCLP in the following words: “democratic deliberation, civic authorization, proposal formulation, civil disobedience, occupy Central, fight for universal suffrage”(民主商討、公民授權、確立方案、公民抗命、佔領中環、爭取普選);

(b) D2 explained the concept of civil disobedience, which he said was an “active refusal by the citizens to abide by unreasonable laws, demands or commands without turning to violent means”. D2 stated that the existing electoral system of Hong Kong was unjust, and they would fight for a just political system by means of civil disobedience; and

(c) D3 stated that the gathering on the day was for the participants to make determinations together to enable them to strive for their advocated form of universal suffrage in the election of the Chief Executive in 2017. D3 stated that he was willing to stay with the participants to achieve the goal even up to the stage of civil disobedience.

(3) On 1 July 2013, D1, D2 and D3 together attended a public gathering at Chater Garden at which they gave speeches on a stage (as captured on Exhibits **P-106** and **P-122**). During the event:-

(a) D1 stated, amongst other things, that he wrote an article in the beginning of the year suggesting one to strive for universal suffrage by way of civil disobedience by occupying Central. D1 then decided that he would take part in the civil disobedience himself, and asked D2 and D3 to join him for the campaign;

(b) D3 stated, to the persons gathered at the meeting, amongst other things, that when D1 asked him to take part in the civil disobedience to occupy Central, he phoned D2 and asked

if D2 would join. D2 then told D3 that he would take part in the campaign; and

(c) D2 also acknowledged to the persons gathered at the meeting that he had participated in the campaign of OCLP.

(4) On a day between June and October 2013, D3 gave a speech at a street forum (as captured in Exhibit **P-108**). D3 stated, amongst other things, that:-

(a) The crux of OCLP was a civic awakening movement, to encourage everyone “to step forward, to speak out your mind”;

(b) The “three of us” [the Prosecution case is that he was referring to himself and D1 and D2] had attended events in various districts explaining the campaign of the OCLP and collecting citizens’ opinions on the campaign; and

(c) The OCLP held the first deliberation day on 9 June 2013, and held the second deliberation day in November 2013. The OCLP hoped to hold a meeting in December 2013 gathering the participants in the first and the second deliberation days together.

7. The Prosecution relies on the co-conspirators rule whereby evidence of the acts and declarations of one or more conspirators in furtherance of a conspiracy may be adduced to prove the extent and degree of participation if others in the conspiracy and the nature and extent of the conspiracy. The reasonable evidence for invoking the co-conspirators rule in the 1st Charge against D1, D2 and D3 are the relevant speeches made by D1, D2 and D3 respectively as captured in the above videos. Pursuant to the co-conspirators rule, the speeches made by each of D1, D2 and D3 in the above videos will be adduced to prove the extent and degree of their participation in the conspiracy of the two other Defendants who did not make those speeches.

8. The case for the Prosecution is that the foregoing speeches made by D1, D2 and D3 constitute evidence of the meeting of minds amongst D1, D2 and D3 in the conspiracy to commit public nuisance through the unlawful obstruction of places and roads in or in the neighbourhood of Central. The Prosecution alleges that the proposed action of “Occupy Central” by D1, D2 and D3 was an unlawful one, conducted by way of the occupation of public thoroughfares in unreasonable way that would amount to a common injury to the public or a significant section thereof, in an attempt to strive for their advocated form of universal suffrage. The choice of the location of Central was calculated to make an impact by creating an unreasonable obstruction in the centre of the city, thereby forcing the authorities to respond to their demands.

.....

37. *In addition, as regards the 1st Charge of conspiracy against D1, D2 and D3, the Prosecution relies on the co-conspirators rule as stated in Para. 7 above. Pursuant to the co-conspirators rule, the speeches made by each of D1, D2 and D3 in the above videos during the gathering at Tim Mei Avenue on 27 and 28 September 2014 will be adduced to prove the extent and degree of participation in the conspiracy of the other two Defendants who did not make those speeches."*

334. Exhibits P96, P98, P99 and P100 concerned the statements made by the relevant defendants in the March 27 Press Conference held on 27th March 2013, Exhibits P104 concerned a radio programme on which D1 to D3 appeared on 30th April 2013, Exhibits P116 and P117 concerned the statements made by the relevant defendants on D-Day 1 on 9th June 2013, Exhibits P106 and P122 concerned the statements made by the relevant defendants on 1st July 2013 when the Trio attended a public gathering at Chater Garden on 1st July 2013, Exhibit P108 concerned a speech made by D3 at a street forum on a day between June and October 2013. The videos referred to and relied on by the Prosecution in Para. 37 of the Prosecution's Opening pursuant to the co-conspirators rule are:-

- (i) Exhibit P20 (Para. 21);
- (ii) Exhibit P44 (Para. 27);
- (iii) Exhibit P124 (Para. 30 and 31(1));
- (iv) Exhibit P64 (Para. 32);
- (v) Exhibits P66 to P68 (Para. 33); and
- (vi) Exhibits P74 and P75 (Para. 33).

335. In other words, the statements and the Prosecution relies upon under the co-conspirators rule were made between 27th March 2013 and 28th September 2014.

336. In my judgment, the evidence adduced does not support the Prosecution case that a conspiracy to commit public nuisance was formed in or about March 2013 and the March 27th Press Conference was a public manifestation of a meeting of minds amongst D1, D2 and D3 in forming a conspiracy to commit public nuisance through the unlawful obstruction of public places and roads in or in the neighbourhood of Central” (Para. 5 of the Prosecution’s Opening and Para. 256 of the Prosecution’s Closing Submissions).

337. It is true that what happened up to 27th March 2013 was an agreement amongst D1 to D3 that the campaign of “Occupy Central” would be a “civil disobedience”, i.e. law would be violated in the course of the campaign. But as discussed, on a charge of public nuisance which involves obstruction of public places and/or highways, the “not warranted by law” element of offence is not to be judged by examining whether there is any illegality in the act or obstruction under complaint, e.g. whether a LONO had been issued for the public meeting concerned. As held by the Court of Final Appeal in *Yeung May Wan*, a person who creates an obstruction could not be said to be acting “without lawful excuse” if his conduct involves a reasonable use of the highway. In my judgment, in considering whether a defendant’s obstruction of the highway is “not warranted by law”, the same consideration applies. A defendant’s obstruction of the highway could not be said to be “not warranted by law” if his conduct involves a reasonable use of the highway.

338. In *Yeung May Wan*, the Court of Final Appeal held that the application of the reasonableness test in any given case of obstruction is

essentially a question of fact and degree depending on all the circumstances, including the extent and duration of the obstruction, the time and place where the obstruction occurs, as well as the purpose for which the obstruction is done.

339. As discussed in the earlier part of this judgment, if the obstruction under complaint is the result of a peaceful demonstration, the court, in applying the reasonableness test, should recognize the protection given by the Basic Law to the right to peaceful demonstration and give it substantial weight in the balancing exercise. There is no dispute that the OCLP agreed and planned by D1 to D3 did not involve use of violence or threat of violence.

340. The evidence relied upon by the Prosecution under the co-conspirators rule shows that D1 to D3 had agreed to start the campaign of OCLP, they saw it as a movement of civil disobedience. Being a movement of civil disobedience, the law would be violated, hence in the March 27 Press Conference, D3 said, amongst other things,

“...by way of violating the law and civil disobedience, we’ve revealed that justice failed to be served”

and D2 said, amongst other things,

“we sit on the road surface in Central...”

and D1 said they expected there would be at least 10,000 people who would participate in different aspects of the campaign of OCLP.

341. On the evidence, it is not clear whether by the time of the March 27th Press Conference D1 to D3 had agreed upon the location where in Central the occupy movement would take place. There is no evidence by that time the 3 defendants had agreed on when to commence the occupy movement. In applying the reasonableness test to the facts in this case, at a time when the exact location and the time of the commencement of the occupy movement had yet to be decided, it is difficult to find that by 27th March 2013, the agreement reached by D1 to D3 must amount to a conspiracy “to commit public nuisance through the unlawful obstruction of public places and roads in or in the neighbourhood of Central” In my judgment, the obstruction that would be caused by an occupation of a road or roads that takes place during a long public holidays would be different greatly in degree and extent from an occupation that takes place on some usual business days that people have to work. Added to that uncertainty is the exact road(s) where the occupy movement had not been decided by the time of the March 27th Press Conference. I cannot reach a conclusion that in March 2013, the obstruction that D1 to D3 contemplated would eventually be caused by the OCLP must be unreasonable and not warranted by law according to the principles in *Yeung May Wan*.

342. In my judgment, what had been agreed upon by D1 to D3 in March 2013 was an agreement to pursue a plan, which might develop into a conspiracy to commit public nuisance. In my judgment, by 27th March 2013, what had been agreed upon by D1 to D3 did not yet amount to a conspiracy to commit a public nuisance.

343. It is the Prosecution case that the speeches made by D1, D2 and D3 on 30th April 2013⁶⁶, 9th June 2013⁶⁷ and a day between June and October 2013⁶⁸ constitute evidence of meeting of minds amongst D1, D2 and D3 in the conspiracy to commit public nuisance through the unlawful obstruction of public places and roads in or in the neighbourhood of Central. For the same reasons given in the preceding Para., there is insufficient evidence to support a finding that during the period of time from 30th April 2013 to the end of October 2013 when the speeches in Exhibits P-104, P-116, P-117 and P-108 were made by the relevant defendants, the obstruction that D1 to D3 contemplated would eventually be caused by the OCLP must be unreasonable and not warranted by law according to the principles in *Yeung May Wan*.

344. Likewise, in my judgment, the agreement that D1 to D3 had agreed in March 2013 had developed during the period from 30th April 2013 to the end of October 2013, i.e. during the time the aforementioned speeches relied on by the Prosecution were made, what had been agreed upon by D1 to D3 during the said period was an agreement to continue pursue the OCLP, hence D-Day 1 was held, and the appearance of the Trio on the radio programme, which might develop into a conspiracy to commit public nuisance. In my judgment, by the end of October 2013, what had been agreed upon by D1 to D3 in March 2013 did not still yet amount to a conspiracy to commit a public nuisance.

345. In my judgment, the use of the co-conspirators rule is the present case is limited.

⁶⁶ Exhibit P-104

⁶⁷ Exhibits P-116-117

⁶⁸ Exhibit P-108

346. The evidence shows that the location of where the occupy movement would be carried out, i.e. Chater Road and the time to commence the OCLP, i.e. 1st October 2014 were decided by D1 to D3 in September 2014, i.e. after the Decision on 31st August. I shall consider whether what D1 to D3 had agreed upon in September 2014 amounted to a conspiracy to commit public nuisance through the unlawful obstruction of public places and roads in or in the neighbourhood of Central.

INDIVIDUAL CHARGES

Charge 1: Conspiracy to Commit Public Nuisance (against D1 to D3)

347. I accept the evidence of D2 that D1 to D3 agreed to implement Stage 4 of the OCLP, i.e. occupation, after the Decision on 31st August. The Trio held meetings and jointly took the view that there was no room for discussion any more. The Trio reached an agreement that the Occupy Central Movement would be commenced on 1st October 2014. As a result, on 18th September 2014, the Trio gave the Police a Notification to Hold a Public Meeting.⁶⁹ It was agreed by D1 to D3 that the notified public meeting would take place (i) at the pedestrian area of Chater Garden from 3 p.m. to 11:59 p.m. on 1st October 2014 and from 7 a.m. to 11:59 p.m. on 2nd October 2014, and (ii) at Chater Garden and Statute Square from 3:00 p.m. on 1st October 2014 to 11:59 p.m. on 3rd October 2014.

348. D1 to D3 had also agreed that after the notified meeting was over, they would start the civil disobedience part of the OCLP by the

⁶⁹ Exhibit D3-1

occupation of the pedestrian precincts of Chater Road. D1 to D3 all agreed that the occupation would end in a few days but they had slightly different estimates as to the time of staying after the notified period. D2 thought the occupation might end on or around 5th October 2014, i.e. he planned to stay on for 3 more days after the notified meeting was over.

349. The Trio had discussed and agreed that in the event a Letter of Prohibition was issued against the proposed meeting on 1st October 2014, the OCLP would go ahead at the planned location, the participants would sit and remain there after the public holidays and commence civil disobedience there.

350. I accept the evidence of D2 that D1 to D3 estimated that there would be around several thousand to 10,000 people attending, with that number of participants, D1 to D3 were confident that the participants could be kept within the pedestrian precincts of Chater Road. I agree with the Prosecution submissions that a turnout of several thousand to 10,000 would be more than enough to give rise to a substantial disruption to the public.

351. On the question of the effect of the occupation, i.e. whether obstruction would be caused as a result, and the extent and degree of the obstruction. It is an admitted fact that 1st October was a Wednesday and public holiday, 2nd October was a Thursday and a public holiday. During 1st and 2nd October, the section of Chater Road between Pedder Street and Jackson Road would have been a Pedestrian Area. The 3rd October 2014 was not a public holiday, it was a normal working day and there would have been no Pedestrian Area.

352. As discussed in the earlier part of the judgment, it is unrealistic for D2 to suggest that with the estimated number of participants to be in the region of several thousand to 10,000, if the Trio remained on Chater Road on 3rd October 2014, they would be arrested on 5th October, if not on 3rd October 2014. I do not agree with Dr McCoy SC's submissions that "In the event that the Trio are not arrested on 3rd October 2014, it being a Friday and the single day between 2 public holidays and the weekend, the disruption would not have been a disproportionate one".

353. For a mass demonstration and occupation movement with several thousand to 10,000 people participating, it is unrealistic to suggest that the Police would take arrest action as soon as the notified meeting is over and the movement enters into its civil disobedience stage, i.e. the occupation of the road(s). Contact would be made with the organisers to persuade the protestors to disperse, the protestors would be given time to retreat, warning(s) would be given by the Police; it is unrealistic to suggest the Trio would be arrested by the Police on 5th October, if not on 3rd.

354. D2 said the effect of the occupation was comparable to the effect caused by a typhoon. Whilst a typhoon is an occurrence of nature which citizens cannot avoid, measures can still be taken to minimize the damage and inconvenience caused by it. For the obstruction and inconvenience that would be caused by an occupy movement, a lot can be done by the organizers to keep the obstruction and inconvenience within bounds of reasonableness.

355. On the evidence before me, by the time Exhibit D3-1 was prepared in September 2014, D1 to D3 had agreed to pursue a course of

conduct, i.e. the occupation of Chater Road, whether or not a LONO could be obtained.

356. I balance the rights of a citizen to exercise his/her right of free speech, right of assembly and right of demonstration and the rights of others. I recognize the protection given by the Basic Law to the right to peaceful demonstration and give it substantial weight in the balancing exercise.

357. I apply the application of the reasonableness test to the facts in the present case. It was the plan of D1 to D3 to occupy the entire section of the carriageway of Chater Road with or without a LONO after the public holidays on 1st and 2nd October 2014. In my judgment, if the Trio wanted to achieve the civil disobedience aspect of the OCLP by breaking the law, it was not necessary to occupy the entire section of the carriageway of Chater Road. They could have called for the occupation of part of, but not the entire carriageway of Chater Road. The obstruction that would result from the occupation of part of the carriageway would be much less severe, as traffic on the relevant section of Chater Road would not be blocked completely. The obstruction that would be caused to the traffic would be much more acceptable to the public if part of the relevant section of Chater Road would still be open to traffic.

358. For the duration of the occupation, it was the intention of the Trio that the occupation of the carriageway of Chater Road would last a few days, the Trio and the participants would stay on the roads until police officers lift them up and move them onto police vehicles. Given the Trio's estimate that there would be 3,000 to 10,000 people participating in the

occupy movement, it would be unrealistic to contemplate or suggest that the clearance action could be completed within a short period of time. The lifting up of the protestors and moving them onto police vehicles would be a drain on the manpower resources of the police. Given that it was the plan of the Trio that they would start the legitimate part of the public gathering on 1st October 2013, by the time of the commencement of the civil disobedience part of the movement, the public gathering at Chater Road would have been going on for 2 days. In the circumstances, it would be unreasonable for the Trio to plan and call for an occupation of the carriageway of Chater Road even for just a few days. The civil disobedience aspect of the movement could be effectively signified by an occupation of the carriageway for a much shorter time, that the occupation of the carriageway should cease, and demonstrators should disperse in the early morning of 3rd October 2014.

359. The location of the Occupy Movement, i.e. Chater Road, is in the core centre of Central, I accept the evidence of D2 why the Trio chose Chater Road as the location to launch the Occupy Central in October.

360. I accept and take into consideration the importance of the purpose of the OCLP, i.e. to fight for the form of universal suffrage in relation to the election of the Chief Executive advocated by D1 to D3.

361. I have given substantial weight to the protection given by the Basic Law to the right to peaceful demonstration in the balancing exercise. I have reminded myself that the bounds of what was reasonable in the circumstances in the present case must not be narrowly defined.

362. All matters taken into consideration, bearing in mind the estimated number of people participating in the occupation, the extent and the estimated time and duration of the occupation, I find the obstruction that D1 to D3 planned to carry out an unreasonable use of the carriageway of Chater Road.

363. Applying the reasonableness test in *Yeung May Wan*. In my judgment, the obstruction in the planned occupation of Chater Road by demonstrators after the public holidays on 1st and 2nd October 2014 that D1 to D3 agreed to pursue, if carried out, would impinge unreasonably upon the rights of others. The unreasonableness of the obstruction was such that the significant and protected right to demonstrate should be displaced. The act was one not warranted by law.

364. In my judgment, the number of persons that would be affected by the obstruction caused by the planned occupation of Chater Road after the public holidays on 1st and 2nd October would be sufficient enough to constitute a class of public. The obstruction that would be caused would amount to a suffering of common injury by members of the public by interference with rights enjoyed by them as a class of the public.

365. In my judgment, D1 to D3 each knew what the consequence of the occupation of Chater Road would have on the traffic if their plan was implemented. They could not have failed to appreciate what the effect of the occupation of the carriageway of Chater Road would have on the traffic on 3rd October 2014 and the days after. The state of affairs that D1 to D3 intended to bring about as a result of their agreement would

necessarily amount to or involve the commission of the offence of public nuisance.

366. As said, the OCLP was started by D1 to D3 in March 2013, by September 2014, i.e. by the time Exhibit D3-1 was prepared, D1 to D3 had reached an agreement which, if carried out in accordance with their intentions, would necessarily amount to or involve the commission of the offence of public nuisance by one or more of the parties to the agreement.

367. By September 2014, D1, D2 and D3 intended to be parties to the agreement, if carried out, would give rise to a common injury to the public or a significant section of the public such as to constitute a public nuisance.

368. In my judgment, the OCLP which D1 to D3 started in March 2013, had developed into a conspiracy to commit public nuisance by September 2014. D1 to D3 were parties to the said conspiracy.

369. As the events developed, the planned public gathering at Chater Road in October 2014 did not take place.

370. In the early hours on 28th September 2014, the Trio made an announcement to launch the movement at Tim Mei Avenue.

371. In the earlier part of the judgment, I have examined the evidence of D2 as to what he considered to be the four major areas of difference between the movement the Trio planned to commence on 1st October 2014 at Chater Road and the one they announced to commence at

1:36 a.m. on 28th September 2014. In my judgment, the movement that D1 to D3 announced to commence at Tim Mei Avenue was a modified plan of the original plan of OCLP, i.e. the one that the Trio planned to commence on 1st October 2014 at Chater Road.

372. I now turn to consider whether the agreement amongst D1 to D3 to cause public nuisance continued when they announced the launch of Occupy Central in the early morning of 28th September 2014, i.e. whether with the modifications, the agreement was still an agreement “to cause public nuisance to the public through the unlawful obstruction of public places and roads in or in the neighbourhood of Central” (Particulars of Charge 1).

373. I agree with the analysis of Mr. Leung SC on this issue. D1 said when he announced the launch of Occupy Central:

“Occupy Central, will begin with occupying the Central Government Offices”.⁷⁰

In a press interview held shortly after the announcement, D1 was asked if the launch of Occupy Central at Tim Mei Avenue involved any change in the plan, D1 said amongst other things:

“Actually, the impact is not really that big, actually it concerns just some technical arrangement, for example, the management of manpower the management of the sites, this is because our original plan was based on a certain point in Central, all the planned sketches are ready. And now we are going to make the changes, but I think this concerns only technical issues”.⁷¹

⁷⁰ Exhibit P124, page 742

⁷¹ Exhibit P124, page 757

D1 further said their first step was to “fortify” the defence of the occupied site at Tim Mei Avenue”.⁷² I agree with the Prosecution submissions that the above remark of D1 shows that the plan of D1 to D3 was to take steps to ensure the continued occupation of Tim Mei Avenue for an indefinite period. It should be noted that when the Trio announced the cessation of the movement and their parting with the student protestors on 2nd December 2014, D1 said, amongst other things, that the occupation took place at Harcourt Road had:

*“developed into something completely different from the Occupy Central Movement we planned after we actually, er, launched, er it in the small hours of the morning on er, September 28. Well, it was also quickly replaced by the Umbrella Movement as we now call it....”*⁷³

The above statement of D1 shows that D1, from his own point of view, considered the movement they launched on 28th September 2014 was the same movement they planned, it only developed into something completely different afterwards.

374. Dr McCoy SC’s submitted that the words said by D1

“Occupy Central, formally begins”

at 1:36 a.m. on 28th September 2014 must be interpreted in their context. According to the evidence of D2, the students and their main leaders were exhausted. The OCLP had the logistical and material resources to support the existing student movement. It was through the abandonment of the original plan that the volunteers and other forms of help could be mobilised

⁷² Exhibit P124, page 754

⁷³ Exhibit P134, page 850-851

to support the students. In my judgement, the announcement made by D1, properly understood, was an announcement to launch the Occupy Central at Tim Mei Avenue. If the Trio just wanted to support the students with their logistical and material support, they did not have to announce the launch of Occupy Central. For the reasons given in the preceding Para., the original plan was only modified, but not abandoned, by the Trio when they announced the launch of Occupy Central at 1:36 a.m. on 28th September 2014.

375. I have explained in the earlier part of the judgment the effect of the closure of Tim Mei Avenue by the Police on 26th September 2014 has on Charge 2 and Charge 3. As said, D1 to D7 should have the benefit of doubt for the incitements to occupy the carriageways of Tim Mei Avenue and/or to incite others to occupy the carriageways of Tim Mei Avenue.

376. As I pointed out in the earlier part of the judgment that on 27th September 2014, D1 had asked the crowd at Tim Mei Avenue "...Let's over-cram Admiralty first. Where shall (we) over-cram next? Central!".⁷⁴

377. The references to Admiralty and Central made by D1 on 27th September 2014 must be understood in the context of what was happening at that time, D1 was then addressing the crowd at Tim Mei Avenue. Obviously D1 must be referring to the public places and roads in Admiralty and Central in the neighbourhood of Tim Mei Avenue. The references to Admiralty and Central in Exhibit P20 fit in with the particulars of offence for Charge 1, i.e. "public places and roads in or in the neighbourhood of

⁷⁴ Exhibit P20, page 1107

Central” as well as the particulars of offence for Charge 2 and Charge 3, i.e. “public places and roads at and in the neighbourhood of Tim Mei Avenue”. Although there were changes made to the plan, i.e. the location was changed from Chater Road to Tim Mei Avenue, it was still the agreement of D1 to D3 to occupy public places and roads in or in the neighbourhood of Central. In my judgment, the fact that D1 announced at Tim Mei Avenue that Occupy Central would begin with ‘occupying the CGO’ suggests that D1 to D3 were prepared to change the location of the occupy movement to adapt to the development of events since the launch of class boycotts. I agree with the Prosecution submissions that, in any event, Tim Mei Avenue and Harcourt Road in Admiralty were still public places and roads “in the neighbourhood of Central”.

378. Dr McCoy SC submitted that if the police had allowed the participants to go to Tim Mei Avenue on 28th September 2014, public nuisance might or might not have resulted (Para. 18 of D2 and D3’s Closing Submissions). It should be noted that when D1 announced the launch of the movement at Tim Mei Avenue at around 1:36 a.m. on 28th September 2014, he said amongst other things “Occupy Central will begin with occupying the CGO”. The action of the Police was a natural response to the Trio’s plea to occupy the CGO. As stated by Chief Superintendent Dover in his statement,⁷⁵ he reported duty at 0600 hours on 28 September 2014 and was the commanding officer during the cordoning off of Tim Mei Avenue that day. The purpose of the exclusion plan was to ensure the integrity of the CGC by restricting access. In my judgment, given the appeal made by D1 to the people at Tim Mei Avenue that Occupy Central would begin with occupying CGO, the action taken by the police was a

⁷⁵ Exhibit P156

natural and reasonable response. It would be absurd for the Trio to suggest that with the plea and threat to occupy CGO, the Police action taken by Chief Superintendent Dover came as a surprise to them. The exclusion plan was the natural and direct consequence of D1's plea to begin Occupy Central with occupying the CGO.

379. I am satisfied so that I am sure that D1 to D3 knew that occupation of public places and roads in or in the neighbourhood of Central pursuant to the modified plan would result in obstruction of public places and roads.

380. In my judgment, when D1 called for the over-cramming of Admiralty and Central on 27th September 2014 and when he said in the press interview after the announcement on 28th September 2014 that the first step was to fortify the defence of the occupied site at Tim Mei Avenue, on both occasions, D1 was talking about the same occupy movement. It was the intention of the Trio that the occupy movement at Tim Mei Avenue and other parts of Admiralty and Central in the neighbourhood of Central would be a continued occupation for an indefinite period. Furthermore, when D1 announced the launch of Occupy Central at Tim Mei Avenue on 28th September 2014, a demand was made that the then Chief Executive Leung Chun Ying should re-submit a report on constitutional reform failing which the Occupy Central movement would be escalated. According to D1, failure or refusal to meet the demand would result in escalation of the Occupy Central movement, not cessation of it. D1 to D3 must knew that it would take time for the Government to consider the demand and it would certainly take time for a report on constitutional reform be prepared and re-submitted, should the Government be prepared

to meet the demand. In my judgment, the aforesaid demand made by D1 reinforces my conclusion that it was the intention of D1 to D3 to occupy public places and roads for an indefinite period.

381. The 3 Computer Certificates prepared respectively by representatives of New World First Bus Services Limited, City Bus Limited and Kowloon Motor Bus Co (1933) Limited⁷⁶ show the number of public bus routes that had to be diverted or suspended from service during the occupation period. These certificates also show the number of passengers who would be affected by the blockage of the roads obstructed. I do not agree with Dr McCoy SC's submissions that as there is no evidence as the usual passengers who could not get to their destinations via different routes about as efficiently as before, there is no evidence that members of public were inconvenienced. The fact that the passengers who took the bus routes covered by Exhibits P145 to P147 in the past had to switch to other bus routes or means of public transport and were deprived of the use of the roads affected was in itself an obstruction of the public in the exercise of rights common to everyone. From Exhibits P145 to P147, one can see the number of passengers that took the relevant bus routes in the past, the fact that they could not take the same bus routes they used to take amounted to a suffering of common injury by members of the public by interference with rights enjoyed by them as such.

382. The submission of D2 and D3 that "On the contrary, for the period of occupation, never has Harcourt Road been so effectively used by the public for "social and community purposes" (Para. 55 of D2 and D3's

⁷⁶ Exhibits P145 to P147

Closing) shows a considerable amount of apathy to the inconvenience and suffering caused to others by the blockage of the road.

383. It is clear, from the evidence of D2, that in the afternoon on 27th September 2014, D1 to D3 had considered whether the occupation starting at Tim Mei Avenue could extend to Harcourt Road after some time. The statement made by D1 to “over-cram Admiralty first, and then Central”⁷⁷ reflects the decision reached by D1 to D3. D1 to D3 had agreed to pursue a course of conduct, i.e. the occupation of public places and roads in or in the neighbourhood of Central which, if the agreement was carried out in accordance with their intentions, would necessarily amount to or involve the commission by them the offence of public nuisance.

384. I balance the rights of a citizen to exercise his/her right of free speech, right of assembly and right of demonstration and the rights of others. I recognize the protection given by the Basic Law to the right to peaceful demonstration and give it substantial weight in the balancing exercise.

385. I apply the application of the reasonableness test to the facts in the present case.

386. In my judgment, if the Trio wanted to achieve the civil disobedience aspect of the OCLP by breaking the law, it was not necessary to call for an extensive occupation of public places and roads in Admiralty and Central in the way D1 advocated in Exhibit P20. They could have called for the occupation of part of, but not the entire carriageway of a road

⁷⁷ Exhibit P20

in or in the neighbourhood of Central. The obstruction that would have resulted from the occupation of part of the carriageway would be much less severe, as traffic on the relevant section of the road would not be blocked completely. The obstruction that would be caused to the traffic would be much more acceptable to the public if part of the road occupied would still be open to traffic.

387. For the duration of the occupation, from the above discussion, it was the intention of the Trio that the occupation of the public places and roads in or in the neighbourhood of Central would last for an indefinite period. As I pointed out, the plea made on 27th September 2014 to “over-cram Admiralty first, and then Central” was made by D1 after the Trio had a discussion in the afternoon. The plea to “over-cram Admiralty first, and then Central” was clearly related to what D1 said immediately after the plea, i.e. “We must be able to see the arrival of genuine universal suffrage in Hong Kong!” In the announcement on 28th September 2014. D1 demanded that the then Chief Executive Leung Chun Ying should re-submit a report on constitutional reform failing which the Occupy Central movement would be escalated.⁷⁸ In my judgment, it is obvious that D1 made the announcement and demand on behalf of D2 and D3. From the evidence, I am sure that D1 to D3 intended that the occupy movement in or in the neighbourhood of Central would be for an indefinite period.

388. It should be noted the speech by D2 to the crowd at Tim Mei Avenue shortly after the announcement on 28th September 2014 as to how the protestors should face the Police arrest action was similar to what he

⁷⁸ Exhibit P124

had said back in March 2013.⁷⁹ What D2 said in relation to how the participants should respond to Police arrest is also relevant to the consideration of the intended duration of the occupation. The Trio, in announcing the launch of the Occupy Movement at Tim Mei Avenue, obviously wanted to merge the supporters for the OCLP with those participating in the public gathering at Tim Mei Avenue. With the putting in the resources by the OCLP into the movement at Tim Mei Avenue as declared by D1,⁸⁰ it was clearly the intention of the Trio that the population of the people participating in the movement at Tim Mei Avenue would swell after the announcement. It is true that, to the disappointment of D2, many participants left the site after the announcement. But it was never the intention of the Trio to drive people away from the movement at Tim Mei Avenue by the announcement. In fact, as D2 said in his evidence, he felt very touched when he saw many people on Harcourt Road at around 4:00 p.m. on 28th September 2014.

389. In my judgement, given the way that the OCLP had been asking the participants how they should respond to Police arrest, given that D1 to D3 intended to merge the supporters for OCLP with the participants in movement at Tim Mei Avenue, it must be clear to the Trio that a Police clearance action could not be completed within a short period of time, hence D1 called for the participants to fortify the defence of the occupied site at Tim Mei Avenue, so that the occupy movement would last for an undetermined period of time in future.

⁷⁹ Exhibit P44, page 1329 and Exhibit P100, page 603

⁸⁰ Exhibit P444, page 1318

390. Given that the notified public meetings at Tim Mei Avenue started on 26th September 2014, even with the additional purposes to support and protect the students, the civil disobedience aspect of the movement could be effectively signified by an occupation of the public places and roads in or in the neighbourhood of Central for a much shorter time. After the announcement was made in the early hours on 28th September 2014, D1 to D3 witnessed how the events developed, the firing of tear gas cannisters and the extensive continued occupation of public places and roads, e.g. Harcourt Road, by protestors. D1 to D3 witnessed the effect of the blockage of the roads had on the traffic. Yet they did not withdraw from the Occupy Central movement that was causing obstruction to the public until the announcement to withdraw on 2nd December 2014. In my judgment, if D1 to D3 wanted to keep the obstruction caused by the occupy movement within the bounds of reasonableness and if D1 to D3 really had in mind the concept of proportionality in their advocated civil disobedience movement, they should have agreed on a movement of a much smaller scale and duration.

391. Dr McCoy SC submitted that the use of the tear gas by the Police on the protestors which prompted more people to occupy public roads could not have been in the contemplation of D1 to D3 at the time when the agreement was initially reached in 2013 and the use of tear gas on 28th September 2014 was an intervening event (Para. 22 and 23 of D2 and D3's Closing Submissions).

392. In the early hours on 28th September 2014, when D2 addressed the people at Tim Mei Avenue, he said, amongst other things:

*“If the police disperse us with tear gas, we, the rally, will make an announcement about the location where everyone, citizens who got scattered, can gather afterwards. We will tell everyone about these measures very soon”.*⁸¹

In my judgment, the use of tear gas by the Police was something that the Trio clearly had in mind when they decided to make the announcement at Tim Mei Avenue on 28th September 2014. It is possible that when the agreement was initially reached in March 2013, the use of tear gas by the Police was not in the contemplation of the Trio, but as I said, the agreement that D1 to D3 had reached in 2013, as the OCLP had developed through the 4 stage-process, only became a conspiracy to commit public nuisance in September 2014 when the Trio decided to launch the Occupy Central movement at Chater Road in October 2014.

393. I disagree with Dr McCoy SC’s submissions that the use of tear gas prompted more people to occupy public roads and it was something which could not have been in the contemplation of D1 to D3. When D1 called for the over-cramming of Admiralty first, and then over-cramming of Central on 27th September 2017, he must have had in mind a number of turnout which would be enough to over-cram Admiralty and Central. A turnout which could over-cram Admiralty and Central was something the Trio were looking for. In fact, as the events unfolded and as the occupy movement continued, with more people occupied public roads in or in the neighbourhood of Central after the use of tear gas, D1 to D3 did not call for the cessation of the movement. In my judgement, the Trio wanted to ride with the tide of events, i.e. with a large number coming out to occupy public roads, the Trio wanted to make the best use of the

⁸¹ Exhibit P44, page 1329

circumstances to the advantage of the movement. The speech made by D1 on 10th October 2014 provides a good example of how the Trio saw the development of the movement up to 10th October 2014.⁸² In my judgement, the use of tear gas by the Police did not break the chain of causation.

394. The location of the Occupy Central, i.e. Chater Road, is in the core centre of Central, I accept the evidence of D2 why the Trio chose Chater Road as the location to launch the Occupy Central in October.

395. Dr McCoy SC submitted that the reason for the Trio being present at Tim Mei Avenue from 27th September 2014 onwards was consistent all along: To support the students (Para. 75 of D2 and D3's Submissions).

396. In my judgment, whilst one of the reasons the Trio turned up at Tim Mei Avenue from 27th September 2014 was to show their support for the students, it is clear from their evidence that the Trio wanted to make the best use of the developing situation at Tim Mei Avenue to fight for their advocated form of universal suffrage for the election of the Chief Executive of the HKSAR, thus in the announcement made at around 1:36 a.m., D1 made the demand, apart from words of support for the students, that the then Chief Executive Leung Chun Ying "must re-submit a report on constitutional reform which can reflect Hong Kong citizens' true wish. If he fails to do so, the "Occupy Central" action will be escalated." It is clear from the evidence that it was one of the purposes of the Trio to fight for the constitutional reform through the movement at Tim Mei Avenue. In

⁸² Exhibit P128, page 791-794

applying the reasonableness test, I accept and take into consideration the importance of the purposes of the Trio to launch the Occupy Central movement at Tim Mei Avenue on 28th September 2014, i.e. to fight for the form of universal suffrage in relation to the election of the Chief Executive advocated by D1 to D3 and to support and protect the students.

397. I have given substantial weight to the protection given by the Basic Law to the right to peaceful demonstration in the balancing exercise. I have reminded myself that the bounds of what was reasonable in the circumstances in the present case must not be narrowly defined.

398. All matters taken into consideration, in my judgment, given the estimated number of people participating in the occupation and the fact that there were a large number of participants at Tim Mei Avenue at the time of the announcement, given the extent and the intended time and duration of the obstruction, the obstruction that would be caused by the occupation that D1 to D3 announced to carry out on 28th September 2014 made the obstruction an unreasonable use of the carriageway in or in the neighbourhood of Central.

399. Applying the reasonableness test in *Yeung May Wan*. In my judgment, the occupy movement that D1 to D3 had agreed to pursue and that they announced to launch at Tim Mei Avenue on 28th September 2014, if carried out, would necessarily cause obstruction. D1 to D3 knew at the time that the obstruction caused by the occupy movement would impinge unreasonably upon the rights of others. The unreasonableness of the obstruction was such that the significant and protected right to demonstrate

should be displaced. The obstruction of carriageways in or in the neighbourhood of Central was an act not warranted by law.

400. In my judgment, the number of persons that would be affected by the obstruction caused by the occupation of the public places and roads in or in the neighbourhood of Central between the period 28th September 2014 and 2nd December 2014 was sufficient enough to constitute a class of public. The obstruction caused amounted to a suffering of common injury by members of the public by interference with rights enjoyed by them as a class of the public.

401. In my judgment, D1 to D3 each knew the implementation of their agreement, i.e. the occupation of the public places and roads in or in the neighbourhood of Central between the period 28th September 2014 and 2nd December 2014 would lead to blockage of roads and extensive obstruction to traffic. I am sure D1 to D3 each knew what the effect of the occupation of the carriageways would have on the traffic in or in the neighbourhood of Central before the announcement on 28th September 2014. After the announcement on 28th September 2014 and until the cessation of the agreement on 2nd December 2014, the effect that the obstruction of the roads had on the traffic was there for them to see as each day passed. I am sure the state of affairs that D1 to D3 intended to bring about as a result of their modified agreement to launch the Occupy Central movement at Tim Mei Avenue on 28th September 2014 would necessarily amount to or involve the commission of the offence of public nuisance.

402. As said, the OCLP was started by D1 to D3 in March 2013, by September 2014, i.e. by the time Exhibit D3-1 was prepared, D1 to D3

had reached an agreement which, if carried out in accordance with their intentions, would necessarily amount to or involve the commission of the offence of public nuisance by one or more of the parties to the agreement. By 28th September 2014, D1 to D3 had modified the agreement, but the modified agreement was one which, if carried out in accordance with their intentions, would still necessarily amount to or involve the commission of the offence of public nuisance by one or more of the parties to the agreement.

403. In my judgment, by the time Exhibit D3-1 was prepared, i.e. on or around 18th September 2014 till the cessation of the Trio's participation in the Occupy Movement on 2nd December 2014, the agreement that D1 to D3 had reached, be it the original agreement to occupy Chater Road or the modified agreement to launch the occupy movement at Tim Mei Avenue, if carried out in accordance with their intentions, would necessarily amount to or involve the commission of the offence of public nuisance by one or more of the parties to the agreement. D1, D2 and D3 intended to be parties to an agreement which, if carried out, would give rise to a common injury to the public or a significant section of the public such as to constitute a public nuisance.

404. In my judgment, the OCLP which D1 to D3 started in March 2013, had been developed into a conspiracy to commit public nuisance on or around 18th September 2014. The conspiracy remained one of conspiracy to cause public nuisance and it continued to be so despite the modifications made after the announcement made on 28th September 2014. D1 to D3 were parties to the said conspiracy throughout the period from September 2014 till the cessation of the conspiracy on 2nd December 2014.

405. The evidence of adduced by the Prosecution and that of D2 show that D1 to D3 had been acting as a group throughout, i.e. from the time the OCLP was formed in March 2013 till the cessation of the movement on 2nd December 2014. As said, the agreement that D1 to D3 had formed in March 2013 had developed into a conspiracy to commit public nuisance in that the state of affairs intended by D1 to D3 to be brought out as a result of the unlawful obstruction of public places and roads in the neighbourhood of Central would necessarily amount to or involve public nuisance. D1 to D3 each intended that public places and roads would be obstructed by large crowd of people resulting in unreasonable obstruction blockage of roads and traffic during the indefinite period of occupation.

Conclusion on Charge 1

406. I find all the elements of Charge 1 proved against D1 to D3.

Charge 2: "Incitement to commit public nuisance" and Charge 3: "Incitement to incite public nuisance" (against D1 to D7)

407. For the reasons given in the earlier part of the judgment, D1 to D7 should be given the benefit of doubt for the incitements made to the persons present at Tim Mei Avenue to obstruct the pedestrian pavements and carriageway of Tim Mei Avenue and the incitements made to the persons present at Tim Mei Avenue to incite others to obstruct the pedestrian pavements and carriageway of Tim Mei Avenue.

408. As said, the ambit of the particulars of offence of Charge 2 and 3 are wider than that, the particulars of offence for both Charge 2 and Charge 3 refer to the “public places and roads at and in the neighbourhood of Tim Mei Avenue”, not just confined to the pedestrian pavements and carriageway of Tim Mei Avenue. The condoning off of Tim Mei Avenue since 26th September 2014 by the Police could not avail a defendant if what the defendant did was to incite the persons present at Tim Mei Avenue to cause a nuisance to the public by unlawfully obstructing places and roads at and in the neighbourhood of Tim Mei Avenue **and not just** Tim Mei Avenue (“Incitement to commit public nuisance”) or what the defendant did was to incite the persons at Tim Mei Avenue to incite others to cause a nuisance to the public by unlawfully obstructing places and roads at and in the neighbourhood of Tim Mei Avenue **and not just** Tim Mei Avenue (“Incitement to commit public nuisance”).

409. Amongst the addresses/speeches made by D1 to D7 on the main stage at Tim Mei Avenue between 27th and 28th September 2014, the defendants, apart from appealing to the people present to occupy Tim Mei Avenue and to ask/invite others to do the same, there were also pleas to occupy Admiralty, Central and Wanchai, and pleas to ask/invite others to occupy Admiralty, Central and Wanchai. The following pleas by the relevant defendant(s) to occupy Admiralty, Central and Wanchai clearly went beyond the scope of occupying Tim Mei Avenue, which had been cordoned off by the Police since 26th September 2014, i.e. before Charge 2 and Charge 3 allegedly took place:-

- (1) In the afternoon on 27th September 2014, when D6 addressed the people at Tim Mei Avenue, he said:

“now we hope that everybody, yes, can really ask more people to come out and over-cram Tim Mei Avenue, also, **it is hoped that the nearby carriageways will also be over-crammed, and (we) continued to extend the area of our civil disobedience.**” (Emphasis added)⁸³

In my judgment, the above statement of D6 amounted to an incitement to the persons present at Tim Mei Avenue to over-cram the nearby carriageway.

(2) On 27th September 2014, when D1 addressed the people at Tim Mei Avenue **in the presence of D2, D4 and D6**, D1 said, amongst other things:

“....Let’s over-cram **Admiralty** first. Where shall (we) over-cram next? **Central!** We must be able to see the arrival of genuine universal suffrage in Hong Kong!” (Emphasis added)⁸⁴

I agree with the Prosecution submissions that ““Incite”, in its ordinary meaning, means “to rouse, to stimulate, to urge or spur on; to stir up; to animate”. An incitement may involve the “suggestion”, “proposal” or “inducement” to commit an offence. It is a question of fact in each case to decide whether the impugned acts or words amounted to an incitement to commit an offence” (Para. 245 of the Prosecution’s Closing). The authorities cited in support are *Young V Cassells* (1914)

⁸³ Exhibit P17, page 1102

⁸⁴ Exhibit P20, page 1107 and Appendix I of the Prosecution’s Closing Submission

33 NZLR 852 (CA), 854 and *Invicta Plastics Ltd v Clare* [1976] RTR 251 (DC), 258.

In my judgment, the above statement of D1 amounted to an incitement to the persons present at Tim Mei Avenue to over-cram Admiralty first, and then Central.

(3) On the same occasion, immediately after D1's address, D4 echoed D1 ("Benny") and said in the presence of D1, D2 and D6:

*"Hey, let's go to occupy **Admiralty** now. Thank you, Benny. '**Chung**' (transliteration), now it is the '**Chung**' (transliteration) of '**Kam Chung**' (transliteration) (the name of **Admiralty** in Chinese). Later, it will be the '**Chung**' (transliteration) of '**Chung Wan**' (the name of **Central** in Chinese)....." and "We hope to over-cramming Tim Mei Avenue, right? Over-cram Tim Mei Avenue! Over-cram Tim Mei Avenue! Over-cram Tim Mei Avenue! Over-cram **Admiralty**! Over-cram **Admiralty**! Over-cram **Admiralty**! Good!"* (Emphasis added)⁸⁵

In my judgment, the above statement of D4 amounted to an incitement to the persons present at Tim Mei Avenue not only to over-cram Tim Mei Avenue, but also to over-cram Admiralty and then Central. D4 was echoing the plea made by D1 to over-cram Admiralty, and then Central.

⁸⁵ Exhibit P20, page 1107 and Page 1111 and Appendix I of the Prosecution's Closing Submissions

(4) In the evening on 27th September 2014, in the presence of D4 and D7, D6 addressed the people at Tim Mei Avenue and said:

*“Right, well, let me tell you a piece of good news rather than always listening to those things that (make you feel) heavy (-hearted). Well, we, now **on the bridge outside Admiralty**, it is still full of people all over the footbridge (there). They are in the direction of our side, coming towards us here, right. Our (activity) today, should be the largest Civil Disobedience (activity) over the years, certainly, the number of people, we have not yet got the largest of people, but (we) hope that the members of the public would not remain at our current achievements (attained), **let us keep asking more people to come, over-cramming Admiralty.**”*

*“Well! As what we have seen, actually, there are huge crowds of people everywhere. Well! We, **starting from Harcourt Road to the entire Tim Mei Avenue, all were (packed with) people, the open space of the Legislative Council is also full of people, so everybody keeps asking people to come!**” (Emphasis added)⁸⁶*

In my judgment, the above statement of D6 amounted to an incitement to the persons present at Tim Mei Avenue to incite others to over-cram Admiralty.

(5) In the afternoon on 28th September 2014, when D7 spoke on the main stage at Tim Mei Avenue, in the presence of D1, D2 and D5 (on stage) and D3 (below stage), he said, amongst other things:

*“....However, we know that roughly more than ten thousand citizens have **blocked the road (from) the Admiralty Centre, the whole of KFC to Rodney Street.** At the same time, **at the Hong Kong Academy ‘Centre’***

⁸⁶ Exhibit P40, page 1244-1245, and Appendix I of the Prosecution’s Closing Submissions

(sic) of Performing Arts, Wanchai, there are ten thousand people. Adding (them) up, (we've) got a total of about thirty thousand people here. Here, I am appealing to all the citizens in Hong Kong to come together – no matter whether (you) can enter the area or not, go to Admiralty, go to Wan Chai. Let us fill up the whole of Admiralty (and) Wan Chai. Together, (we) can besiege the whole of Central Government Offices from the side of Rodney Street, from the side of the Hong Kong Academy 'Centre' (sic) of Performing Arts. We demand --.....Let us fill up Admiralty and Wan Chai together...." (Emphasis added)⁸⁷

In my judgment, the above statement of D7 amounted to an incitement to fill up Admiralty and Wanchai.

It should be noted that the locations mentioned by D7 in the said address, e.g. Admiralty Centre, the Central Government Offices, Rodney Street, the Academy for Performing Arts are all located in the neighbourhood of Tim Mei Avenue.

- (6) In the afternoon on 28th September 2014, when D5 and D7 addressed the people at Tim Mei Avenue in the presence of D1 and D3, D5 and D7 said amongst other things:

"D5:Our –our friends who gather round here to watch have already over-crammed two more roads.

D7: Hurray!

D5: (The crowd) has already over-crammed two roads (outside) the Hong Kong Academy for Performing Arts.

D7: And more citizens are coming successively. (Let's) continue to occupy the roads together.

D5: We are asking more friends to come here, (we are asking) more friends to come here. Let's over-cram

⁸⁷ Exhibit P69, pages 1545-1546 and Appendix I of the Prosecution's Closing Submissions

Admiralty. (Let's) over-cram Wan Chai. (Let's) over-cram Central.

*D7: Friends on that side, keep it up. We know that **some friends there have already prepared to dash out to occupy the road(s). Let's cheer them on, shall we?***

*D5: Comrades, **let's over-cram Wan Chai together. (Let's) over-cram Admiralty. (Let's) over-cram Central.....*** " (Emphasis added)⁸⁸

In my judgment, the above statements of D5 and D7 amounted to (i) an incitement to the persons present at Tim Mei Avenue to over-cram Admiralty, Wanchai and Central in the neighbourhood of Tim Mei Avenue; and (ii) incitement to the persons present at Tim Mei Avenue to incite others to overcram Admiralty, Wanchai and Central in the neighbourhood of Tim Mei Avenue.

(7) Later on, D5 and D7 spoke on the main stage at Tim Mei Avenue in the presence of D1 and D2 (on stage) and D3 (below stage) and said:

*"D7: We have got news that.... On the side of **Harcourt Road.. many friends have already gone out onto the road!** (They) have already occupied the road! Hurray!*

D5: Occupy the road!

D7: Occupy the road!

D5: Occupy the road!

D7: Occupy the road!

D5: Occupy the road!

D7: Occupy the road!

D5: Hurray!

D7: Hurray!

D5: Hurray!

D7: Hurray!"

⁸⁸ Exhibit P74, pages 1588-1589 and Appendix 1 of the Prosecution's Closing Submissions

(Emphasis added)⁸⁹

In my judgment, the above statements of D5 and D7 amounted to an incitement to the persons present at Tim Mei Avenue to occupy the carriageways of Harcourt Road. It should be noted that Harcourt Road where the occupation took place in Exhibit P74 is in the neighbourhood of Tim Mei Avenue.

- (8) Later on, D5 and D7 spoke on the main stage at Tim Mei Avenue in the presence of D3 (below stage) and said:

*“D5: Our picket has just made a report that the 6 carriageways of **H-Harcourt Road bound for Central as well as Causeway Bay**, the 6 carriageways have already been over-crammed (with people) sitting (there)! We have already over-crammed 6 carriageways (with people) sitting (there). Keep coming! Keep coming! Keep coming!*

D7: Keep coming” (Emphasis added)⁹⁰

In my judgment, the above statements of D5 and D7 amounted to an incitement to the persons present at Tim Mei Avenue to occupy the carriageways of Harcourt Road in the neighbourhood of Tim Mei Avenue.

- (9) Later in the same afternoon, when D7 was on the main stage at Tim Mei Avenue, he spoke in the presence of D5 (on stage) and D3 (below stage) and said:

⁸⁹ Exhibit P74, pages 1591-1592 and Appendix 1 of the Prosecution’s Closing Submissions

⁹⁰ Exhibit P74, page 1593 and Appendix 1 of the Prosecution’s Closing Submissions

“We are here to call for more people to come out to over-cram Admiralty (and) to over-cram Wan Chai with us. (Let’s) carry on with the Occupy (movement).” (Emphasis added)⁹¹

In my judgment, the above statement of D7 amounted to an incitement to overcram the public places and roads in Admiralty and Wanchai in the neighbourhood of Tim Mei Avenue.

(10) Later in the same afternoon, when D7 was on the main stage at Tim Mei Avenue, he spoke in the presence of D2 (on stage) and said:

“We are here to appeal to our friends who have not yet come to join us, come quickly to over-cram Admiralty and Wan Chai, and to occupy this Hong Kong that belongs to us.” (Emphasis added)⁹²

In my judgment, the above statement of D7 amounted to an incitement to overcram the public places and roads in Admiralty and Wanchai in the neighbourhood of Tim Mei Avenue.

410. The above incitements must be understood in the context of the fact that they were made by the relevant defendants at Tim Mei Avenue on 27th and 28th September 2014 during a continuous gathering at Tim Mei Avenue. When the incitements were made, there were already many participants at the scene. The districts/locations that the relevant

⁹¹ Exhibit P74, page 1594 and Appendix 1 of the Prosecution’s Closing Submissions

⁹² Exhibit P74, page 1598 and Appendix 1 of the Prosecution’s Closing Submissions

defendant(s) asked to be over-crammed or filled up must be understood in context. The defendants were then participating in a public gathering at Tim Mei Avenue. When a defendant referred to over-cramming or filling up of Admiralty/Central/Wanchai, he or she must be referring those parts of Admiralty/Central/Wanchai in the neighbourhood of Tim Mei Avenue. Take Wanchai for example, whilst it made sense for a defendant to ask supporters to over-cram the roads outside the Academy for Performing Arts, it did not make sense if a defendant were to ask people to overcram Wanchai Road or Morrison Hill Road in Wanchai.

411. The incitements were made at a time when the pedestrian pavements and carriageway of Tim Mei Avenue were occupied by protestors. When the defendants asked people to overcram or fill up Admiralty/Central/Wanchai, he/she must be referring to occupation of public places, e.g. pedestrian pavements and roads.

412. From the evidence of PW1 and PW2, I am satisfied that no notification had been made to the Police for the holding of public meeting on the carriageways of Harcourt Road (both Wanchai and Central section), Fenwick Pier Street and Lung Wui Road for the period between 26th September 2014 and 11th December 2014.

413. For the effect of the absence of notification of intention to hold a public meeting, I do not agree with the Prosecution that on a charge of public nuisance or public nuisance related offence, “in the absence of prior notification made to the Police, any demonstration or continued demonstration on those carriageways (all being major thoroughfares linking Wanchai and Central District), which were to be open for traffic

and public use, would be unreasonable in disrupting the traffic and the passage of the public, and would give rise to a common injury to the public or a significant section thereof.” (Para. 295 of the Prosecution’s Closing)

414. In my judgment, the absence of notification is one of the factors, but not the only factor, to be considered in determining whether the obstruction caused by an unnotified public meeting is unreasonable. In considering the degree of reasonableness of an obstruction caused by an unnotified public meeting, the absence of proper notification is relevant to the extent that the Police and the relevant government department(s), e.g. the Transport Department, would not be able to devise any measures or make proper arrangements to militate against any obstruction or inconvenience that might be caused by the public meeting in the absence of proper notification. That said, in the context of the common law offence of public nuisance, to hold that ‘just because a public meeting is an unnotified one, therefore any obstruction caused as a result must be unreasonable’ would have the unwanted effect of inhibiting the exercise of the citizens’ right to demonstrate. The application of the reasonableness test in *Yeung May Wan* requires the court to take into consideration all the circumstances, including the extent and duration of the obstruction, the time and place where the obstruction occurs, as well as the purpose for which the obstruction is done. For obstruction caused by a public meeting without proper notification, the absence of notification is a relevant factor, but not the only factor, to be considered.

415. Likewise, in considering whether an obstruction caused by a peaceful but unnotified demonstration on public highways is “not warranted by law”, the issue is not to be determined by the illegality arising

from the absence of notification, but whether the conduct under complaint involves a reasonable use of the highways or public places.

416. For an obstruction caused by a peaceful demonstration, the protection given by the Basic Law to the right to peaceful demonstration kicks in, as the Court of Final Appeal held in *Yeung May Wan*.

417. For the above reasons, the fact that the demonstration on the carriageways was without any prior notification made to the Police would not by itself make the disruption or obstruction to the traffic unreasonable. The entire circumstances should be considered before a finding on the issue made.

418. I have set out the statements made by the relevant defendants which amounted to incitement to over-cram/fill up Admiralty, Central and Wanchai and incitement to incite others to do the same. It should be noted that whilst D1 to D7 should be given the benefit of doubt for their appeal to the persons at Tim Mei Avenue to occupy the carriageway of Tim Mei Avenue and their appeal to the persons at Tim Mei Avenue to incite others to do the same, some of the speeches made by the relevant defendants during the period between 27th and 28th September 2014 are also relevant to the consideration of their pleas to over-cram/fill up Admiralty, Central and Wanchai. As the House of Lords held in *Rimmington*, it is a requisite mens rea for the offence of public nuisance that the accused knew, or ought to have known (because of the means of knowledge were available to him) the consequence of what he did or omitted to do. What a defendant had said before or around the time the incitement(s) under complaint might reveal what that defendant knew or ought to have known. What was said

by another defendant in the presence of a defendant might constitute means of knowledge available to the latter. Thus, it is necessary to consider the relevant defendants had said other than the incitements under complaint, i.e. the ones relating to over-cramming of the public places and roads in the neighbourhood of Tim Mei Avenue.

D1

Exhibit P32

419. At around 8:04 p.m. on 27th September 2014, when D1 was on the main stage with D2, D3 and D5, D1 addressed the people at Tim Mei Avenue and said they were going to have the largest scale of implementation of civil disobedience. He asked the participants to bear in mind safety, peace, trust, and hope.⁹³

420. In my judgment, the above speech of D1 shows that D1 knew that the public meeting which involved occupation of public places and the carriageway of Tim Mei Avenue was the largest in terms of scale, what D1 said in Exhibit P32 sheds light on: (i) the intended scale of the occupation of Admiralty and Central that he vowed for in the afternoon on 27th September 2014;⁹⁴ and (ii) the occupy movement that he announced to launch at 1:36 a.m. on 28th September 2014.⁹⁵

⁹³ Exhibit P32, page 1160-1161

⁹⁴ Exhibit 20

⁹⁵ Exhibit P44

Exhibit P59

421. Shortly before mid-day on 28th September 2014, when D1 was together with D2, D5 and D7 on the main stage (with D3 below stage) at Tim Mei Avenue, D1 addressed the people present and said amongst other things: (i) tens of thousands of citizens had participated in the Civil Disobedience Movement on 27th September 2014; (ii) the OCLP fully supported the occupy movement of the students; and (iii) the announcement of the launch of Occupy Central movement was not an act to hijack the movement of the students as the OCLP all along stood behind the students.⁹⁶

422. In my judgment, what D1 said in Exhibit P59 shows that he was aware of the negative effect of the announcement he made had on the occupy movement in progress at Tim Mei Avenue, people were leaving after the announcement. D1 thus wanted to reassure the participants of the movement that the Trio were not hijacking the occupy movement in progress. D1's speech in Exhibit P59 also shows that he was aware at the time when he called for over-cramming of Admiralty first and then Central on 27th September 2017, there were already tens of thousands of participants in the occupy movement in progress. In my judgment, D1 intended the scale of occupy movement to escalate and the number of supporters to swell when he called for over-cramming of Admiralty first and then Central in Exhibit P20.

⁹⁶ Exhibit P59, page 1457-1458

D2

Exhibit P64

423. At around noon time on 28th September 2014, when D2 was on the main stage with D1, D5 and D7 and D3 below stage, D2 addressed the people at Tim Mei Avenue and said:

*“Every, er, voluntary picket (and) supporter of ‘Occupy Central with Peace’, perhaps today is the first day that you people, the citizens, come to support this movement. (I) hereby have to make an appeal to you all. This is because in the past few days, the Police took some unreasonable measures, (used) excessive violence to deal with the protestors. We suggest that each voluntary picket, citizen should adopt the effective protest approach used by the Hong Kong Federation of Students in these few days. If anyone sees that **the main stage** or the local commanders needs your help, **we are required to block certain important accesses, strongholds, or similar to what had happened just now, we are required to block some vehicles which we think that ‘you’ may affect our entire movement.** I hope that you all follow the instruction given by - - the pickets and our commanders. If there is probably any conflict, we will raise both hands because we definitely have no intention to harm the bodies of the law enforcers. This is still a non-violent protest. **However, it’s a more aggressive non-violent protest.** Well, therefore, today, we state clearly to our voluntary pickets and the citizens who participate in it that we continue to adopt an effective approach that was used in these several days. However, this approach of protest is definitely to remain peaceful and non-violent. Thank you.”* (Emphasis added)⁹⁷

424. In my judgment, what D2 said in Exhibit P64 and the way he said it show that the Trio considered that they were key players in the Occupy Central movement they launched in the early hours on 28th September 2014. The pickets of the OCLP were in action and the Trio

⁹⁷ Exhibit P64, page 1482-1483

were able to influence them. The speech of D2 also shows the importance of the main stage from the perspective of the Trio. What D2 said in Exhibit P64 also shows that the Trio were prepared to adapt the original plan to the situation, hence they were willing to follow the “the effective approach” that had been used by the students.

Exhibit P66

425. Shortly after 1 p.m. on 28th September 2014, when D2 followed on D7’s plea to exhaust the manpower of the police to the greatest extent, D2 addressed the people at Tim Mei Avenue on the main stage, he said amongst other things:

*“Civil disobedience means non-cooperation. Therefore, we’ll not get up and board a police vehicle ourselves to get arrested directly.....Just keep your body in a very relaxed state and then your body would become very heavy indeed.**We must stay until the last moment.** Stay for one more minute, and we will triumph for one more minute, right?.....” The other defendants present were: D7, D3 and D5 (on stage); D1 and D3 (below stage) (Emphasis added)⁹⁸*

426. What D2 said in Exhibit P66 shows that it was the common intention of the Trio, D5 and D7 to drain the manpower of the Police so that the protestors could stay, and the Occupy Central movement could last, until the last moment.

⁹⁸ Exhibit P66, page 1522-1523

D3

Exhibit P32

427. At around 8:04 p.m. on 27th September 2014, when D3 was on the main stage with D1, D2 and D5, D3 addressed the people at Tim Mei Avenue after D1. D3 asked the participants not to be intimidated by the threatening means used by the police at the road junctions. D3 said:

“We, just like our guidelines, are sitting arm in arm. We should not be afraid of this police authority...” (Emphasis added)⁹⁹

428. What D3 said in Exhibit P30 shows that the Trio and D5 were asking the participants to follow the guidelines, i.e. the planned action of the OCLP. D3’s plea that the participants should sit arm in arm is also similar to what D2 said in Exhibit P66 as discussed above. In my judgment, the purpose of protestors sitting arm in arm at the time of arrest was to drain the manpower of the Police so that the Occupy Central movement could last for an indefinite period of time.

D4

Exhibit P7

429. In the case of D4, in the morning on 27th September 2014, when D4 addressed the people at Tim Mei Avenue, as recorded in Exhibit P7 (Pg. 1015-1018), she called for more people to join the movement at

⁹⁹

Tim Mei Avenue and more material supplies for the support of the movement at Tim Mei Avenue.

Exhibit P9

430. At around noon time on 27th September 2014, as recorded in Exhibit P9, D4 addressed the people at Tim Mei Avenue on the stage (in the presence of D1 and D2, who were on and below the stage at various points of time). In the said address: (i) D4 asked for more people to join the movement at Tim Mei Avenue; (ii) she asked for specific items in support of the movement (iii) she appealed to the people at Tim Mei Avenue to hold on to the defence lines; (iv) she stated that “*All in all, as long as the police did not retreat we will insist on staying here*”; (v) she said the people at the main stage had been trying to collect information from all parties all along; (vi) she instructed the people at Tim Mei Avenue how they should respond to Police arrest; (vii) amongst the demands made by D4 was a demand for genuine universal suffrage and rejection of bad proposal.¹⁰⁰

Exhibit P10

431. In the afternoon of 27th September 2014, as recorded in Exhibit P10, D4 addressed the people at Tim Mei Avenue on the stage (in the presence of D2 and D3, who were on and below the stage at various points of time). In the said address: (i) D4 told the crowd how they should guard the defence lines against the police officers; (ii) D4 asked the protestors to pay attention to the side of Admiralty Centre and CITIC

¹⁰⁰ Exhibit P9, page 1044-1050

Pacific; (iii) D4 asked the people at other defence lines to monitor the movement of the police and report to the main stage through the picket leaders (iv) D4 continued to ask for more people to join the movement at Tim Mei Avenue and bring with them appropriate supplies; (v) she instructed the people at Tim Mei Avenue how they should respond to Police arrest; (vi) D4 told the crowd that:

“(we) heard that more and more citizens are coming for reinforcement, coming to support us”;

(vii) D4 told the crowd that it was possible that the police officers were going to carry the student protestors out from the Civic Square; (viii) D4 warned the crowd that the police officers on the side of the entrance to Tim Mei Avenue might be ready to take action any time; (ix) D4 asked the people at the front of Tim Mei Avenue to open umbrellas or put up their hands and to cover their eyes with cling wrap; (x) D4 continued to ask for more supporters to come to Tim Mei Avenue with material supplies she specifically asked; (xi) When D4 asked the crowd to leave a passage for an ambulance so that it could attend to someone fallen sick, she said, among other things:

“Disobedience – is not about one or two days, or one or two minutes...”¹⁰¹

Exhibit P11

432. In the afternoon of 27th September 2014, as recorded in Exhibit P11, D4 addressed the people at Tim Mei Avenue on the stage in the presence of D2. In the said address: (i) D4 asked everyone to

¹⁰¹ Exhibit P10, page 1051-1063

participate in civil disobedience; (ii) D4 asked everyone to ask more people to come to Tim Mei Avenue; (iii) D4 asked the people at Admiralty Centre and on the bridge to guard the post as the police might need the access at Admiralty Centre after the people in the Civic Square had been carried up there; (iv) D4 asked the protestors to continue to guard various defence lines against the police (v) D4 asked the people in the Civic Square to stay arm in arm and shout out their names upon arrest; (vi) D4 said:

“...according to our understanding now, civic square has already been cleared. Friends in the civic square have been carried away. But, never mind, we will go on staying here. Also, there is a piece of news,As said just now, Wong Chi Fung has been rejected bail and is charged with three offences, three offences, thereforeWe – but we have to stay here. We have to uphold our strong will to show our determination. Shall we continue to stay here. Let’s us applause for ourselves, cheer ourselves up, okay?”¹⁰²

Exhibit P16

433. In the afternoon of 27th September 2014, as recorded in Exhibit P16, D4 and D5 addressed the people at Tim Mei Avenue on the stage (in the presence of D1 and D2, who were on stage and below stage at different points of time, and D3, who was below stage). In the said address: (i) D4 told the crowd that yellow flags had been held up but everyone should get prepared and guard his/her post at various defence lines, e.g. the ones at CITIC Tower, Lung Wui Road near the roundabout; (ii) D4 told the crowd how supporters could go to the venue via Tamar Park and the footbridge at CITIC Tower; (iii) D4 said they were not alone as many supporters were going to the venue to support them; (iv) D4 said, because

¹⁰² Exhibit P11, page 1064-1068

of live TV broadcast, a lot of citizens were going to the venue with material supplies to support the movement; (v) D4 specifically asked the supporters going to the venue should equip themselves with umbrellas, bottled water, hats, sunglasses or goggles; (vi) D4 asked the crowd to sit in a way that a male protestor should sit next to a female protestors and they should link their arms for the purpose of increasing the cost of the police carrying them away; (v) D4 said she believed the era of disobedience battle had already begun.¹⁰³

Exhibit P20

434. In the afternoon of 27th September 2014, D4 addressed the people at Tim Mei Avenue, as recorded in Exhibit P20, in the said address, apart from calling for the over-cramming of Admiralty and then Central, also asked the people at Tim Mei Avenue to continue to ask more friends to go to the venue at Tim Mei Avenue, she said:

“....Sometimes it is necessary (for us) to be divided into batches. The policemen will work in shifts, well, it also applies to us. Not everyone has to sleep here for two, three, four, five, six (or) seven days, right?... Well, if everyone (wants) to keep staying (here), well, (you) certainly can. Well, if you intend to go, er, prepare better supplies, (you) are also very welcome (to do so).”¹⁰⁴

435. It should be noted that Exhibits P7, P9-P11 and P16 were recorded between 7:10 a.m. and 4:01 p.m. on 27th September 2014 whereas Exhibits P20, in which D4 called for the over-cramming of Admiralty,

¹⁰³ Exhibit P16, page 1083-1097

¹⁰⁴ Exhibit P20, page 1108

followed by Central, was recorded between 4:08 p.m. and 5:57 p.m. on the same day (Para. 4, 5, 8 and 9 of Admitted Facts II).

436. The speeches made by D4 in Exhibits P7, P9-P11 and P16, show amongst other things, that D4 intended the public assembly in progress at Tim Mei Avenue to become a demonstration with mass participation and continuous material supplies from the public. D4 knew that there were many supporters going to join the public assembly at Tim Mei Avenue. She emphasized the importance of the main stage and specific instructions were given to the people present to defend various defence lines. It was clear from D4's speeches that constitutional reform remained an important issue of the movement. The instructions given by D4 in respect of how a protestor should conduct himself/herself in an arrest action shows that D4 intended to increase the cost of the police in any arrest action so that the occupy movement could carry on for an indefinite [eriod of time.

Exhibit P32

437. At around 8:34 p.m. on 27th September 2014, when D4 was on the main stage with D2 and D5, she told the people at Tim Mei Avenue that at that moment, there were about thousands of people gathering on the footbridge of Admiralty Centre. She said supporters could enter the venue of Tim Mei Avenue via Tamar Park or the Academy for Performing Arts and the people at Tim Mei Avenue should tell their friends so if they were asking their friends to go to the venue. D4 also called for material support

of items needed at the venue. D4 also called for release of the arrested persons and over-cramming of Civic Square.¹⁰⁵

Exhibit P33

438. At around 9:00 p.m. on 27th September 2014, when D4 was on the main stage with D2 and D5, she told the people at Tim Mei Avenue who did not have a post to go to defend the footbridge of Admiralty Centre. D4 also asked the people who wanted to join the assembly at Tim Mei Avenue to bring with them enough food and water.¹⁰⁶

439. At around 9:20 p.m. on 27th September 2014, when D4 was on the main stage with D5, she told the people at Tim Mei Avenue to support the defence lines at the footbridges at Tim Mei Avenue and Admiralty Centre. D4 also asked the people at Tim Mei Avenue to swap the shifts with protestors who had been guarding at various defence lines for a long time.¹⁰⁷

Exhibit P35

440. Later at around 9:48 p.m. in the same evening, when D4 was on the main stage with D2, D5 to D7, D4 to D7 each addressed the people at Tim Mei Avenue, when D5 said that it was already filled with seated people over at the Legislative Council, D4 echoed what D5 said.¹⁰⁸

¹⁰⁵ Exhibit P32, page 1164-1168

¹⁰⁶ Exhibit P33, page 1169-1170

¹⁰⁷ Exhibit P33, page 1174-1175

¹⁰⁸ Exhibit P35, page 1189

Exhibit P38

441. At around 10:56 p.m. in the same evening, when D4 was on the main stage with D6 and D7, she addressed the people at Tim Mei Avenue. D4 stressed the importance of the main stage and asked the crowd to protect the main stage from the police.¹⁰⁹

Exhibit P41

442. Shortly after midnight on 28th September 2014, when D4 was on the stage with D6, she told the people at Tim Mei Avenue that the police had refused to issue a LONO for the public meeting at Tim Mei Avenue on Sunday (28th September), hence the assembly in progress was an unauthorized assembly.¹¹⁰

Exhibit P43

443. Shortly before 1 a.m. on 28th September 2014, when D1 was with D1 to D3 on the main stage, D4 asked the people at Tim Mei Avenue who did not have any post to go to reinforce the defence lines on **the footbridge of United Centre, Lung Wo Road** and where Tim Mei Avenue connected with Gloucester Road. D4 also called for more people to go to provide reinforcement as “a relatively meaningful number of citizens present here, the Police will not take any action precipitately.” (Emphasis added)¹¹¹

¹⁰⁹ Exhibit P38, page 1224

¹¹⁰ Exhibit P41, page 1259

¹¹¹ Exhibit P43, page 1306-1308

Exhibit P44

444. Shortly after 2 a.m. on 28th September 2014, when D4 was on the main stage with D2 and D7, she addressed the people at Tim Mei Avenue. In her address, D4 spoke of the importance of the main stage:

*“..., it is our **long-term need** that there are friends sitting right in front of the main stage”. (Emphasis added)¹¹²*

D5

Exhibit P16

445. In the case of D5, when he addressed the crowd at Tim Mei Avenue on the stage in the presence of D1, D2 and D4 (all on stage) in the afternoon on 27th September 2014, he said he was there to support the student protestors with a group of teachers at different tertiary institutions, they approved and applauded what the students had done.¹¹³

Exhibit P27

446. In the evening of 27th September 2014, when D5 addressed the crowd at Tim Mei Avenue on the stage in the presence of D2 and D6 (both on stage), D5 said:

“It comes to an era of protest, everyone is a p...protestor, everyone is an athlete, everyone is a picket, everyone is a knifeman who fights for the maximum space.....”¹¹⁴

¹¹² Exhibit P44, page 1337

¹¹³ Exhibit P16, page 1082

¹¹⁴ Exhibit P27, page 1126

447. On the same occasion, when D5 addressed the crowd at Tim Mei Avenue on the stage in the presence of D6 and D7 (both on stage), he said:

“All along we have many friends, so nice – so nice – to tell us the present progress. We know how the situation is in general. Please co-operate with our main stage....”

He said the HKFS demanded that: (i) all the people arrested should be released; (ii) the Chief Executive Leung Chun Ying should respond to the class boycotts and the demand for genuine universal suffrage; (iii) the police should apologize. D5 said it was a smart move lately on the part of the protestors to counter surround the police. He asked the people at Tim Mei Avenue to use their own way to try to ask their friends to go to the venue at 10 p.m. D5 said they would continue to stay behind at the venue and he called for the recapture of the Civic Square. Henceforth, they had entered an era of universal struggle and people from all walks of life were engaging in universal struggle. D5 also said there would be different programmes on the main stage after 8 p.m.¹¹⁵

448. On the same occasion, in the presence of D2 and D6 (both on stage), D5 told the people at Tim Mei Avenue that **the main stage would process and sort out the information supplied to it and would make the distribution afterwards. He asked everybody to pay attention to the arrangement made by the main stage.** D5 asked the people present to keep calm and continue to participate in the assembly rationally. He

¹¹⁵ Exhibit P27, page1129-1132

asked the people present at the assembly to continue to ask more people to come to the Civil Square. (Emphasis added)¹¹⁶

449. The above speeches of D5 show that he was not just a supporter for the student protesters. He was in fact performing the role of a Master of Ceremonies of the assembly in progress. D5's speeches also show the importance of the main stage. The plea made by D5 to the people that they should stay behind in the struggle for universal suffrage and the demand that the then Chief Executive Leung Chun Ying should respond to the demand for genuine universal suffrage show that D5 intended the movement in progress would be for an indefinite period. The fact that D5 had such intention in the evening on 27th September 2014 is also relevant to the issue whether he intended the incitements under complaint for Charge 2 and Charge 3 would result in obstruction of public places and roads in the neighbourhood of Tim Mei Avenue for an indefinite period. The other defendants who were present were also aware of the situation.

Exhibit P28

450. On the same occasion, D5 told the people present at Tim Mei Avenue (also in the presence of D2 and D6) that according to the news round-up of RTHK, the Police had declared at around 7:08 p.m. that the assembly at Tim Mei Avenue was an unlawful assembly which would affect public safety and the Police appealed to the participants and the people on the footbridge to leave in a peaceful and orderly manner as soon as possible.¹¹⁷

¹¹⁶ Exhibit P27, page 1135-1137

¹¹⁷ Exhibit P28, page 1140-1141

451. Later that evening, at around 8 p.m., when D5 addressed the people at Tim Mei Avenue on the stage in the presence of D1, D2 and D6, he told the crowd that 27th September marked the beginning of an era. D5 announced the evening meeting formally started at 8 p.m. D5, together with D6 asked the people present to hang in to the end. D5 also asked the participants to put on all equipment for preventing pepper spray.¹¹⁸

452. The above speeches of D5 show that despite the fact the Police had declared that the public meeting in progress was an unlawful assembly, in the evening on 27th September 2014, D2 still asked the participants to hang in to the end even if use of pepper spray by the Police was by then imminent.

Exhibit P32

453. At around 8:30 p.m. on 27th September 2014, when D5 was on the main stage with D4, he asked the people present at Tim Mei Avenue to get more friends to join the assembly at Tim Mei Avenue as far as possible.¹¹⁹

454. At around 8:34 p.m. on 27th September 2014, when D5 was on the main stage with D2 and D4, D5 echoed D4 and called for release of all the arrested persons and demanded the Chief Executive Leung Chun Ying to give an explanation about his views in respect of the class boycotts

¹¹⁸ Exhibit P28, page 1143-1144

¹¹⁹ Exhibit P32, page 1163

and the arrests of protestors and genuine universal suffrage. D5 also said the police should apologize.¹²⁰

455. The address of D5 shows that constitutional reform in relation to universal suffrage was an important issue in the mass demonstration in progress.

Exhibit P33

456. At around 9:17 p.m. in the same evening, when D5 was on the main stage with D2, D4 and D6, D5 made an announcement for the organizers that a large amount of googles and raincoats were badly needed, and he asked the people present to ask their friends to bring these items to the venue.¹²¹

Exhibit P35

457. Later at around 9:48 p.m. in the same evening, when D5 was on the main stage with D2, D4, D6 and D7, D4 to D7 each addressed the people at Tim Mei Avenue, D5 said that:

“It’s already filled with seated people over at the Legislative Council.....It’s already filled with our seated people over at the Legislative Council. however, I still need to ask for more people to come, come again, come again after ten o’clock.”¹²²

¹²⁰ Exhibit P32, page 1165-1166

¹²¹ Exhibit P33, page 1173

¹²² Exhibit P35, page 1189

458. Later at around 10:04 p.m. in the same evening, D5 and D6 addressed the people at Tim Mei Avenue in the presence of D2 (on stage) and D3 (below stage), D5 and D6 said amongst other things:

“Encirclement is strength”.

D5 also said it was a conservative estimate that there were 50,000 people participating at Tim Mei Avenue. D5 said amongst other things:

“We have fifty thousand people here, fifty thousand people, fifty thousand people. Let me see how you are to clear away fifty thousand people? Let me see how you are to lock up fifty thousand people?”¹²³

459. The speeches of D5 in Exhibit 35 show that when D5 later asked for the over-cramming and occupation of the carriageways of Harcourt Road in Exhibit P74, not only did he know that the carriageways were already full of protestors, he also knew that on the night before, i.e. 27th September, there was a huge turnout of at least 50,000 people at Tim Mei Avenue. He also believed for a mass demonstration with a huge turnout, it would be difficult for the Police to clear the site and carry out arrest action.

Exhibit P57

460. In the morning of 28th September 2014, when D5 was on the main stage. He addressed the people at Tim Mei Avenue, apart from asking the participants to contact their family members and them to join the assembly at Tim Mei Avenue, D5 also told said the Police refused to let

¹²³ Exhibit P35, Page 1192-1193

some audio equipment be moved into the venue on the ground that the public meeting in progress was an unlawful assembly.¹²⁴

Exhibit P61

461. In the same morning, when D5 was on the main stage with D2, D5 addressed the people at Tim Mei Avenue and said the fight they were putting up in civil disobedience was a “**fight in relays**”. He asked each participant leaving the venue should invite two friends to join the movement at the venue.¹²⁵

462. What D5 said in Exhibit P61 shows that he intended the mass demonstration in progress at Tim Mei Avenue to carry on for an indefinite period.

Exhibit P59

463. Shortly before mid-day on 28th September 2014, when D5 was together with D1, D2 and D7 on the main stage and D3 below stage, D5 addressed the people at Tim Mei Avenue. He asked the participants to intercept a police vehicle at Lung Wui Road as there were some legislative councillors arrested and taken on board the police vehicle.¹²⁶

464. In my judgment, whatever the effect of cordoning off Tim Mei Avenue might have on the defendants, D5 had no reason to believe that the

¹²⁴ Exhibit P57, page 1447 and 1450

¹²⁵ Exhibit P61, page 1465-1466

¹²⁶ Exhibit P59, page 1456

cordoning off provided a justification for the intercepting a police vehicle at Lung Wui Road.

Exhibit P64

465. Shortly after mid-day on 28th September 2014, when D5 addressed the people at Tim Mei Avenue, he asked the people present to ask their friends to come out to counter-besiege the police defence. D1 to D3 and D7 were below stage during the said address.¹²⁷

466. At around 12:15 p.m., when D5 was on the main stage with D2, he gave directions to the people present to reinforce the defence at Tim Mei Avenue at the direction of Admiralty. He thanked everybody for co-operating with the main stage. D1 and D7 were below stage during the address.¹²⁸

Exhibit P66

467. At around 12:36 p.m., when D5 was on the main stage with D2 and D7, D5 asked the people at Tim Mei Avenue to fill up the spaces for each other. He said amongst other things:

“....., if we can mobilize (our) people further, we will make the mobilization.”¹²⁹

¹²⁷ Exhibit P64, page 1485

¹²⁸ Exhibit P64, page 1486

¹²⁹ Exhibit P66, page 1517

468. What D5 said in Exhibits P64 and P66 shows that the main stage was used as a command centre. D2 and D7 were present at the time.

D6

Exhibit P17

469. In the case of D6, when he addressed the crowd at Tim Mei Avenue on the stage in the afternoon of 27th September 2014¹³⁰, he asked the people at Tim Mei Avenue to call for more supporters to go to Tim Mei Avenue even though Tim Mei Avenue was already all full. D6 also said the purposes of the assembly at Tim Mei Avenue were: (i) to ask the then Chief Executive of the HKSAR Leung Chun Ying to give an explanation on what was then happening and on the matter of supporting a predetermined political reform; and (ii) to wait for the release of the protestors arrested inside the Civic Square. D6 criticized the Decision on 31st August and asked for the breaking through of the gate of the Civil Square as the first step to break through the framework of the Decision on 31st August. D6 said the civil disobedience which was taking place required mass participation to make it a large-scale civil disobedience. He said what was going on was probably civil disobedience in progress as road was already being occupied. D6 said the number of people was still not enough and he asked the people present to ask more friends to join. D6 said:

“now we hope that everybody, yes, can really ask more people to come out and over-cram Tim Mei Avenue, also, it is hoped that the nearby carriageways will also be over-crammed, and

¹³⁰ Exhibit P17

(we) continued to extend the area of our civil disobedience.”
(Emphasis added)¹³¹

470. The speech of D6 in Exhibit 17 shows that constitution reform was an important topic for the mass demonstration in progress at Tim Mei Avenue. D6 also called for mass participation in the movement and the plan to over-cram the nearby carriageways. What D6 said in Exhibit P17 reflects the scale and duration of the mass demonstration he had in mind on 27th September 2014. The plea made by D6 in Exhibit P40 (Pg. 1244-1245) to the people at Tim Mei Avenue that they should keep asking people to come to over-cram Admiralty, properly understood, must mean the over-cramming of the public places and roads in the neighbourhood of Tim Mei Avenue.

Exhibit P27

471. Later in the evening, when D6 addressed the people at Tim Mei Avenue on the stage in the presence of D2 and D5 (both on stage), he said, amongst other things: (i) that according to the LONO received from the police, the assembly in progress would last until 11 p.m., therefore the police would be breaking its promise if they were to take action against the assembly before that time. D6 said the assembly in progress was a lawful one with a LONO issued. The police had the duty to assist the members of the public in exercising their civic rights and it was necessary to open more areas for the assembly instead of dispersing the people. D6 asked the people present to ask more friends to go to the venue at Tim Mei Avenue to express their support.¹³²

¹³¹ Exhibit 17, page 1198-1102

¹³² Exhibit 27, page 1138-1139

Exhibit P28

472. Later at around 7:57 p.m. in the same evening, when D6 addressed the people at Tim Mei Avenue on the main stage in the presence of D1 and D2 (both on stage), D6 said that a red banner was raised at the “Chiu Mun” (transliteration) of United Centre. He asked the people present to continue to appeal to their friends to keep going to the venue at Tim Mei Avenue.¹³³

473. Later at around 8 p.m. in the same evening, when D5 announced the evening meeting started at 8 p.m., D5 and D6 asked the people present to **hang in till the end**.¹³⁴

Exhibit P33

474. Later at around 9:16 p.m. in the same evening, when D6 addressed the people at Tim Mei Avenue in the presence of D2, D4 and D5 (all on stage), D6 asked the people present to keep providing reinforcement at the bridge of Admiralty Centre. D6 said:

“Well, everyone, please keep asking your friends on Facebook, asking your relatives (and) friends to keep, er, providing reinforcement?”¹³⁵

475. The above speeches of D6 in Exhibits P28 and P33 show that it was the intention of D6 that the mass demonstration in progress at Tim

¹³³ Exhibit 28, page 1142

¹³⁴ Exhibit 28, page 1143-1144

¹³⁵ Exhibit P33, page 1172

Mei Avenue should last for an indefinite period. In my judgment, it follows that the intended duration of the over-cramming of “nearby carriageways” and Admiralty in Exhibits P14 and P49 must also be indefinite.

Exhibit P32

476. Later at around 9:48 p.m. in the same evening, when D6 was on the main stage with D2, D4, D5 and D7, D4 to D7 each addressed the people at Tim Mei Avenue, D6 said amongst other things, that it was the main stage which drew most people’s attention. He asked the people present to listen carefully to the information disseminated by the main stage. He advised how new supporters could enter the venue at Tim Mei Avenue.¹³⁶

477. The above speech of D6, said in the presence of D2, D4, D5 and D7, shows the importance of the main stage.

Exhibit P35

478. Later at around 10:04 p.m. in the same evening, D5 and D6 addressed the people at Tim Mei Avenue in the presence of D2 (on stage) and D3 (below stage), D5 and D6 said amongst other things “*Encirclement is strength*”. D6 also said the number of participants at Tim Mei Avenue, estimated to be 50,000 people, marked a new record high for civil disobedience. He asked if the people present were afraid of being arrested.¹³⁷

¹³⁶ Exhibit P32, page 1185-1186

¹³⁷ Exhibit P35. Page 1192-1193

479. The speech of D6 in Exhibit P35 was made before D6's plea to over-cram Admiralty. In other words, when D6 asked the people at Tim Mei Avenue to keep asking more people to join the movement to over-cram Admiralty, he knew that there were already 50,000 people at Tim Mei Avenue.

Exhibit P37

480. Later at around 10:24 p.m. in the same evening, when D5, D6 and D7 addressed the people at Tim Mei Avenue in the presence of D1, D2 and D4 (all on stage), D6 said amongst other things:

"All right, and, er, the friends by the sides, please pay attention. This's because we are going to command the friends by the sides, probably some duties of causing obstruction. Regarding the people at er, Lung Wui Road, near Lung Wui Road, and the people near CITIC Tower, well, try - - (you) can try to make use of the resources nearby to cause obstruction."

D6 said the protestors must defend the stage and would not leave until the arrested student leaders were released.¹³⁸

Exhibit P38

481. At around 10:56 p.m. in the same evening, when D6 was on the main stage with D4 and D7, D6 addressed the people at Tim Mei Avenue. D6 told the people present that more people were needed at Lung

¹³⁸ Exhibit P37, page 1212-1213

Wui Road near Legislative Council and he asked supporters who were available to help to move over there.¹³⁹

482. At around 11:06 p.m. in the same evening, when D6 was on the main stage with D4 and D7, D6 told the people how they should conduct themselves to slacken the speed of clearing the site by the police.¹⁴⁰

483. What D6 said in Exhibits P37 and P38 in the presence of D1, D2 and D7 were just a few of the many incidents the main stage was used as a command centre in the movement.

Exhibit P44

484. After the announcement to launch the Occupy Central movement made by D1 at around 1:36 a.m. on 28th September 2014, D6 chanted slogans with D1 to D3 and D7 on the stage, amongst the slogans chanted by D6 was “Occupy Central formally begins”, chanted twice by D6. D6 also addressed the people at Tim Mei Avenue, in the presence of D2 and D4, and he said amongst other things:

*“....Well, everyone just heard **the official announcement**. We move on a new chapter of democratic movement. Everyone, let us, ask more people to come out.” (Emphasis added)¹⁴¹*

¹³⁹ Exhibit P38, page 1225-1126

¹⁴⁰ Exhibit P38, page 1230

¹⁴¹ Exhibit P44, page 1332

Exhibit P45

485. In the early hours on 28th September 2014, when D6 was on the main stage with D2, D4 and D7, D6 addressed the people at Tim Mei Avenue and said amongst other things “I think, here, the understanding everyone has today about this movement, why I - - we - - **our class boycott this time successfully made Occupy Central start earlier.**” (Emphasis added)¹⁴²

486. The speeches made by D6 in Exhibits P44 and P45 show that it was the intention of the HKFS and the Trio to announce the launch of the Occupy Central at 1:36 a.m. on 28th September 2014.

Exhibit P48

487. On the issue whether the main stage was used as a command centre, it should be noted that at around 3:42 a.m. on 28th September 2014, when D6 was on the main stage with D1 to D3 and D7, D6 addressed the people at Tim Mei Avenue. In the said address, D6 said the main stage would still be used as a **command centre** after the assembly was over. The **command centre**, i.e. the main stage, would give directions to the people present as to where they should keep guard.¹⁴³

¹⁴² Exhibit P45, page 1370

¹⁴³ Exhibit P48, page 1399

D7

Exhibit P27

488. In the case of D7, when he addressed the crowd on the stage in the presence of D2, D5 and D6 (all on stage) at Tim Mei Avenue in the afternoon of 27th September 2014, he said: (i) he was a representative of the HKFS and he thanked all those who stayed at Tim Mei Avenue; (ii) he condemned the police for the attack on the protestors the night before; (iii) that the then Chief Executive of the HKSAR Leung Chun Ying had not responded to the demand made by HKFS earlier that morning, ie he should give an explanation for his decision to attack the citizens and that all arrested persons should be released; (iv) D7 asked the participants at Tim Mei Avenue to stay with the HKFS until the Government responded to these two requests; (vi) D7 called for the people at Tim Mei Avenue to continue to appeal to their friends and relatives to go to the venue at Tim Mei Avenue to support the movement; (vii) D7 called for material supplies be brought to the venue; (viii) D7 asked the people at Tim Mei Avenue to ask others to counter-besiege the police:

“even though (they) cannot enter the venue, (I) hope (you) would ask your relatives and friends to come and counter-besiege ,...”¹⁴⁴

489. The speech of D7 shows that the tactic of counter-besieging the Police he advocated in the presence of D2, D5 and D6 was to besiege the police officers who were besieging the venue from outside.

¹⁴⁴ Exhibit P27, page 1127-1128

Exhibit P35

490. At around 9:48 p.m. on 27 September 2014, when D7 was on the main stage with D2, D4, D5 and D6, D4 to D7 each addressed the people at Tim Mei Avenue, D7 said amongst other things; (i) although the police had stated that the assembly at Tim Mei Avenue was an illegal one, D7 believed the people at the venue were not frightened. The HKFS appealed to the people at Tim Mei Avenue to consider whether they would stay at the venue after considering and balancing the pros and cons; (ii) D7 appealed to the people present to ask their friends to go the venue via Tamar Park; (iii) D7 also said:-

*“Here, we want to appeal to everyone, to ask more friends to come, bringing over all the supplies and **counter-circle the Government**. Would you all be frightened of the ruling power?”*
(Emphasis added)¹⁴⁵

491. In Exhibit P35, D7 advocated once again the move of counter-besieging, this time in the presence of D2, D4, D5 and D6. By that time, D7 knew that the Police had declared the assembly in progress was an unlawful assembly. D2, D4, D5 and D6 who were present, were also aware of the situation.

Exhibit P38

492. At around 10:55 p.m. on 27th September 2014, when D7 was on the main stage with D4 and D6, D7 asked the people at Tim Mei Avenue to go to the end of Lung Wui Raod to counter-besiege the police. D7 said

¹⁴⁵ Exhibit 35, page 1186-1187

it was necessary to build an effective defence line at Legislative Council and Lung Wu Road.¹⁴⁶

493. In Exhibit P38, D7 advocated once again the use of the tactic of counter-besieging the police, this time he did it in the presence of D4 and D6.

Exhibit P40

494. At around 11:24 p.m. in the same evening, when D7 was with D4 and D6 on the main stage, he said to the people at Tim Mei Avenue:-

“Well! As what we have seen, actually, there are huge crowds of people everywhere. Well! We, starting from Harcourt Road to the entire Tim Mei Avenue, all were (packed with) people, the open space of the Legislative Council is also full of people, so everybody keeps asking people to come!” D7 echoed and said “But, let’s not be satisfied with the current situations because we got quite a lot of news that the police were trying to make some attacks at different areas....” (Emphasis added)¹⁴⁷

495. What D7 said in Exhibit P40 shows that as D7 urged the supporters to counter-besiege the Police, he also continued to ask for more supporters to join the movement. Bearing in mind the essence of the tactic of counter-besieging was that the supporters should counter-besiege the Police from outside, an increase in the numbers of supporters at various places, e.g. Harcourt Road and the Academy for Performing Arts, meant that there would be more people gathering outside the venue at Tim Mei

¹⁴⁶ Exhibit P38, page 1222 and 1125

¹⁴⁷ Exhibit P40, page 1244-1245

Avenue. In my judgment, D7 was aware of the situation, so were D4 and D6, who were present.

Exhibit P43

496. At around 1:33 a.m. on 28th September 2014, when D7 was with D1 to D3 and D6 on the main stage, D7 addressed the people at Tim Mei Avenue, in his speech, D7 explained how the constitutional reform was related to the civil disobedience movement in progress, with 10,000 citizens participating. D7 also said:-

“Here, we are making history. Today. We are going to - - we are going to make an announcement a moment later.”¹⁴⁸

Exhibit P44

497. At around 1:36 a.m. on 28th September 2014, immediately before the announcement by D1, D7, who was on the stage with D1 to D4 and D6, addressed the people at Tim Mei Avenue and said:-

*“The Occupy Central trio will put their resources into this movement and promote this movement for democracy together with us, with the students and with every citizens. Disobedience or deliberation on our city’s future is not (something) that can be undertaken by one exclusive group, by the Occupy Central trio, by HKFS, or by Scholarism.....We, students, **hereby make an announcement today: today will be our disobedience – it’s the day of community-wide civil disobedience. From here, together we will get ready to occupy Central.** Without the support of everyone of you here, this movement would not have been possible. Here, we appeal to the many of (you) that starting from tomorrow, call upon all your friends and relatives to join*

¹⁴⁸ Exhibit P43, page 1316-1317

us, to come out to overthrow this autocratic constitutional system together, okay?” (Emphasis added)¹⁴⁹

498. In my judgement, the above speeches of D7 in Exhibits P43 and P44 show: (i) constitution reform remained an important theme of the movement in progress at Tim Mei Avenue, together with other themes, e.g. to support the arrested protestors. As said, it would take time for the Government to respond to the demand for constitutional reform on issue as important as the universal suffrage for the election of the Chief Executive of the HKSAR; and (ii) the announcement referred to by D7 in Exhibit P43 must be the announcement D7 made in Exhibit P44, i.e.

“...We, students, hereby make an announcement today: today will be our disobedience – it’s the day of community-wide civil disobedience. From here, together we will get ready to occupy Central.”

499. The above announcement of D7 shows that the HKFS was prepared to launch the Occupy Central movement, which they saw as a civil disobedience movement, with the OCLP, that was why D7 said they would get ready “to occupy Central”. If it was all along the understanding of D7 that the HKFS only expected the OCLP to put in the resources of the OCLP in support of the movement in progress in Tim Mei Avenue without announcing the launch of the Occupy Central movement, I do not think D7 would say what he said in Exhibits P43 and P44.

500. It should also be noted that immediately after the announcement by D1, D6 and D7 chanted with D1 to D3, amongst the

¹⁴⁹ Exhibit P44, page 1318-1319

slogans chanted was “Occupy Central formally begins”¹⁵⁰, D7 then addressed the people at Tim Mei Avenue and said:-

“Here, I want to say (something) to everyone here(:) with the many of (us) having come forward, everyone, do (you) still think the Police is able to continue to attack us, the citizens? Let us go down this path of democracy together, okay? No civic nomination...then (go for) civil disobedience. No civic nomination...then (go for) civil disobedience.”

D6 and D7 showed considerable comradeship with the Trio and the OCLP at the time and immediately after the announcement of the launch of the Occupy Central movement.

Exhibit P45

501. In the early hours on 28th September 2014, D7 addressed the people at Tim Mei Avenue in the presence of D4, D5 and D6. D7 said amongst other things:-

*“... Are we able to safeguard every one of us again, (and) hold this defence line today? (I) hope that (you), friends, will continue to provide reinforcement to the key locations, I repeat once again, including Harcourt Road, that is the stronghold at Harcourt Road off Tim Mei Avenue, including the stronghold (from) the exit of the Legislative Council (Complex) car park to this, CITIC Tower; including friends at the roundabout on Lung Wui Road on that side, and also including the exit of the Legislative Council Demonstration Square...” and “**It’s everyone in the crowds here who has enabled Occupy Central to start today. As long as we can persevere (with it), the next step will be the road to universal suffrage....**” (Emphasis added)¹⁵¹*

¹⁵⁰ Exhibit P44, page 1321-1326

¹⁵¹ Exhibit P45, page 1342 and 1347

502. The above speech of D7, said in the presence of D4 to D7, apart from showing a strong determination to carry on the occupy movement after the announcement by the Trio at 1:36 a.m., it also shows that D7 of the HKFS saw they had launched the Occupy Central movement with the Trio and they were fighting for their advocated form of universal suffrage, not just for the protection of student leaders arrested. It should be noted that the part of Harcourt Road referred to by D7 was the part of Harcourt Road off Tim Mei Avenue, the location where there was a flower bed.

Exhibit P48

503. On the issue whether the main stage was used as a command centre, it should be noted that at around 3:49 a.m. on 28th September 2014, when D7 was on the main stage with D1 to D4, D7 said amongst other things:-

*“S-starting from this part... ... our stage will turn into a **command centre** from a spotlight one. We’ll keep releasing information about the defense deployment of the police to you.” D7 also said “Well, you should do what I have just said when you expect that you may be arrested.....However, if, unfortunately, (you) are carried away; when you are being carried away, remember to fold your arms and legs, **only by doing so could (you) obstruct the police power...**” (Emphasis added)¹⁵²*

¹⁵² Exhibit P48, page 1400-1401

Exhibit P53

504. In the morning of 28th September 2014, when D7 was on the main stage with D1 to D3 and D5, D7 addressed the people at Tim Mei Avenue. He appealed to more people to participate in the movement. He suggested that many spontaneous activities could be organized at the venue. He said:-

“By the time we’ve got sufficient people to come out, we can go on to fight for the constitutional future and the constitutional democracy that belong to Hong Kong.” He said with reinforcement by supporters, “..we can put down roots here...after we have occupied the place, how are we going to do when it comes to giving this place its meaning?” (Emphasis added)¹⁵³

505. In the above speech of D7, he showed once again constitutional reform was an important purpose of the movement in progress. The suggestion by D7 that the participants could “put down roots” at the venue shows that D7 intended the occupation movement at Tim Mei Avenue to be an indefinite one. It follows that when D7 asked the people to fill up Admiralty and Wanchai and when he asked the people to give encouragement to the people dashing out to occupy the road(s),¹⁵⁴ the intended duration of the over-cramming of Admiralty and Wanchai must also be for an indefinite period. D1 to D3 and D7, who were present, were aware of the content of D7’s speech and the situation.

¹⁵³ Exhibit P53, page 1423-1425 and 1427-1428

¹⁵⁴ Exhibit P69 (pages 1545-1546) and Exhibit P74 (pages 1588-1598)

Exhibit P66

506. At around 12:32 p.m. on 28th September 2014, when D7 was on the main stage with D2 and D5, D7 addressed the people at Tim Mei Avenue and asked them to keep on asking more friends to come **to counter-besiege the cordon line** of the police.¹⁵⁵

507. At around 12:55 p.m. on 28th September 2014, when D7 was on the main stage with D2 and D5, D7 addressed the people present and asked them to call for more friends to go counter-besiege the police. D1 was below stage during the said address.¹⁵⁶

508. The plea made by D7 in Exhibit P66 was not to ask the new supporters joining the movement to enter the venue at Tim Avenue, but to counter-besiege the cordon line of the police. D1, D2, D5 and D7 were aware of the plea made by D7 and the situation.

509. Shortly after 1 p.m. on 28th September 2014, when D7 addressed the people at Tim Mei Avenue on the main stage, he said amongst other things:-

*“However, if a comrade is being carried away from the site, we should sprawl out (and) relax your body, it’s because **this is the way to exhaust the manpower of the police to the greatest extent.**” (Emphasis added)¹⁵⁷*

510. In my judgment, it was the clear intention of D7 that the occupy movement should last for an indefinite period of time, hence he

¹⁵⁵ Exhibit P66, page 1515

¹⁵⁶ Exhibit P66, page 1520

¹⁵⁷ Exhibit P66, page 1522

asked the people to conduct themselves in a way that would have the effect of exhausting the manpower of the police to the greatest extent.

Exhibit P67

511. At around 1:34 p.m. on 28th September 2014, when D7 was on the main stage with D1 to D3 and D5, D7 spoke in the presence of D1 to D3 and D5, he said:-

*“Here, we are appealing to all (our) friends, **for those of (you) who are watching the live broadcast**, if you want to come and support (us), the bridge at Admiralty (Centre) has been closed already, we appeal to all of you (our) friends to go to, **go to Lung Wui Road from another bridge to do a counter besiege. Go to the Academy for Performing Arts from another bridge and then counter-besiege the police on Lung Wui Road.**”*
(Emphasis added)¹⁵⁸

512. At around 1:45 p.m. on 28th September 2014, when D7 was on the main stage with D1, D2 and D5, D7 addressed the people at Tim Mei Avenue and said:-

*“Here, we are appealing to all of you (our) friends in Hong Kong, friends who are seeking democracy in Hong Kong, no matter if you are willing to bear the criminal responsibility or not, I will also appeal to you, come here as soon as possible, to this place **to counter-besiege the police**, it’s because counter-besieging the police does not amount to an act of disobedience, it is not necessary to bear such legal risk. Certainly, if the police can show (and) say that you have obstructed (them) in their duty, that will certainly be another story. However, we believe **if sufficient people come out to counter-besiege the police, the police will have no way to clear the site.**”* (Emphasis added)¹⁵⁹

¹⁵⁸ Exhibit P67, page 1529-1531

¹⁵⁹ Exhibit P67, page 1533

Exhibit P68

513. At around 2:34 p.m. on 28th September 2014, when D7 was on the main stage, he addressed the people at Tim Mei Avenue that the crowds supporting the movement at Lung Wui Road had already spread to the Hong Kong Academy for Performing Arts. Other defendants present were: D1, D2 and D5 (on stage); D3 (below stage).¹⁶⁰

514. The above speech of D7 in Exhibit P68 shows that at around 2:34 pm, D7 knew that there were a lot of supporters at the Academy for Performing Arts; the Trio were also aware of the situation at the time as they were present.

515. When D7 addressed the people again at around 3:27 p.m., in the presence of D1, D2 and D5 (on stage) and D3 (below stage), D7 knew there were roughly more than 10,000 people blocking “the road from Admiralty Centre, the whole of KFC to Rodney Street” and there were another 10,000 people the Academy for Performing Arts, it was against this background that D7 spoke on the main stage at Tim Mei Avenue and called for the filling up of the whole of Admiralty and Wan Chai, and the besiege of the Central Government Offices from the side of Rodney Street and from the side of the Academy for Performing Arts.¹⁶¹

516. From the video evidence and transcripts before me, I am aware that there were many instances where people at Tim Mei Avenue were asked by the relevant defendants to fortify various defence lines at

¹⁶⁰ Exhibit P68, page 1539

¹⁶¹ Exhibit P69 and P74

Tim Mei Avenue, e.g. the junction of Harcourt Road and Tim Mei Avenue and the roundabout at the junction of Tim Mei Avenue and Lung Wui Road.

517. Given my findings of the possible effect of the cordoning off the carriageway of Tim Mei Avenue had on D1 to D7. I find that the Prosecution fails to prove that D1 to D7 had the mens rea (i) to incite the people present at Tim Mei Avenue to cause public nuisance at Tim Mei Avenue; (ii) to incite the people present **at Tim Mei Avenue** to incite others to cause public nuisance **at Tim Mei Avenue**.

518. However, the pleas by the relevant defendants to the people at Tim Mei Avenue to occupy the public places and carriageway of Tim Mei Avenue is relevant to the consideration of the intended duration of the occupation of the roads in Admiralty, Central and Wanchai **in the neighbourhood of Tim Mei Avenue**. In my judgment, if the relevant defendants intended the occupation of Tim Mei Avenue should be for an indefinite period, when they incited the incitees or incited the incitees to incite others to occupy public places or roads in Admiralty, Central and Wanchai **in the neighbourhood of Tim Mei Avenue**, it must be the intention of the relevant defendants that the occupation of these public places and roads should also be for an indefinite period of time, bearing in mind the importance of the tactic of “counter-besieging the police” emphasized in the speeches of the relevant defendants.

519. I now turn to the incitements made by the relevant defendants to obstruct public places and roads in the neighbourhood of Tim Mei Avenue.

The Words of Incitement by D1 in Exhibit P20

520. At around 4:10 p.m. on 27th September 2014, when D1 addressed the people at Tim Mei Avenue **in the presence of D2, D4 and D6**, D1 said, amongst other things:-

*“....Let’s over-cram **Admiralty** first. Where shall (we) over-cram next? **Central!** We must be able to see the arrival of genuine universal suffrage in Hong Kong!”*
(Emphasis added)¹⁶²

521. In my judgment, the above statement of D1, which amounted to an incitement to the persons present at Tim Mei Avenue to over-cram Admiralty first and then Central, was made to the people at Tim Mei Avenue and heard by those within the audibility range of the public address system.

522. It was all along the plan of the Trio that their Occupy Central movement when implemented, would involve occupation of the public roads by protestors. By calling for the over-cramming of Admiralty and Central, D1 clearly meant the occupation of the public places and roads in Admiralty and Central. As discussed, the occupation D1 incited was not an occupation of **any** public place or road in Admiralty and Central, but the occupation of “*public places and roads in the neighbourhood of Tim Mei Road*”. It was through the occupation of the public places and roads in the neighbourhood of Tim Mei Road that the student movement at Tim Mei Avenue would be supported.

¹⁶² Exhibit P20, page 1107

523. In my judgment, the reference to “*the arrival of genuine universal suffrage*” in Hong Kong in the incitement shows that the occupation was intended to be for an indefinite period. As discussed, it would take time for the Government to consider and respond to the demand for constitutional reform.

524. I have taken onto consideration all the circumstances leading to the making of the incitement by D1 in Exhibit P20. In my judgement, the scale of the occupation was extensive, both Admiralty and Central were important commercial districts and the roads in the district were important thoroughfares, as they always have been. The intended occupation was for an indefinite period. On the other hand, I am aware that the occupation advocated was a peaceful one and the purpose of the occupy movement was to strive for universal suffrage. In my judgment, what D1 incited the people at Tim Mei Avenue in Exhibit P20 to do was not a reasonable use of the roads in Admiralty and Central in the neighbourhood of Tim Mei Square. The obstruction to the traffic and inconvenience caused to the public would be so serious that would exceed the bounds of reasonableness and the protection given by the Basic Law to the right to peaceful demonstration. I find that the obstruction that would be caused was not warranted by law.

525. From the computer certificates,¹⁶³ I am satisfied that the over-cramming of the public places and roads in the neighbourhood of Tim Mei Road would result in the suffering of common injury by common member of the public.

¹⁶³ Exhibits P145-147

526. From the evidence, I am sure that when D1 made the incitement in Exhibit P20, he intended that the incitees, i.e. the people at Tim Mei Avenue would do the act incited by him, i.e. obstructing public places and roads in the neighbourhood of Tim Mei Avenue, with the mens rea of public nuisance, i.e. the incitees knew, or ought to have known (because of the means of knowledge were available to him) the consequence of what they did. In this case the incitees were the people participating in the public assembly at Tim Mei Avenue, and hence, they must be aware of what was going on at the time of the incitement and what the effect of an indefinite obstruction of the roads in the neighbourhood of Tim Mei Avenue would be if they acted as incited.

527. In my judgment, on the basis of what D1 said in Exhibit P20, i.e.:

“....Let’s over-cram Admiralty first. Where shall (we) over-cram next? Central! We must be able to see the arrival of genuine universal suffrage in Hong Kong!”,

D1 had unlawfully incited persons at Tim Mei Avenue, Admiralty to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue without need to resort to the doctrine of joint enterprise as a basis for liability.

The Words of Incitement by D4 in Exhibit P20

528. At around 4:10 p.m. on 27th September 2014, after the incitement by D1, D4 addressed the people at Tim Mei Avenue **in the**

presence of D1, D2, and D6, D4 echoed D1 (“Benny”) and said, amongst other things:-

*“Hey, let’s go to occupy **Admiralty** now. Thank you, Benny. ‘**Chung**’ (transliteration), now it is the ‘**Chung**’ (transliteration) of ‘**Kam Chung**’ (transliteration) (the name of **Admiralty** in Chinese). Later, it will be the ‘**Chung**’ (transliteration) of ‘**Chung Wan**’ (the name of **Central** in Chinese).....”* and *“We hope to over-cramming Tim Mei Avenue, right? Over-cram Tim Mei Avenue! Over-cram Tim Mei Avenue! Over-cram Tim Mei Avenue! Over-cram **Admiralty**! Over-cram **Admiralty**! Over-cram **Admiralty**! Good!”* (Emphasis added)¹⁶⁴

529. In my judgment, the above statement of D4 which amounted to an incitement to the persons present at Tim Mei Avenue to over-cram Admiralty first and then Central, was made to the people present at Tim Mei Avenue and heard by those within the audibility range of the public address system.

530. The use of the word “over-cram” shows the number of participants intended by D4 would be enough to over-cram Admiralty and Central. The words used by D4, i.e. ‘**Chung**’ (transliteration), now it is the ‘**Chung**’ (transliteration) of ‘**Kam Chung**’ (transliteration) (the name of **Admiralty** in Chinese). Later, it will be the ‘**Chung**’ (transliteration) of ‘**Chung Wan**’ (the name of **Central** in Chinese).....” show that D4 intended the occupation would last for a period of time. D4 was clearly echoing what D1 had said about “*the arrival of genuine universal suffrage*” as a result of the occupy movement. What D4 said in Exhibit P20 was consistent with what she had said earlier, i.e. the speeches in Exhibits P7, P9 to 11 and P16. For the reasons given in my foregoing analysis, it is

¹⁶⁴ Exhibit P20, page 1107 and Page 1111

clear from the speeches made by D4 in these exhibits that she intended to prolong the occupy movement as long as possible. In my judgment, D4 was inciting the people at Tim Mei Avenue to occupy the public places and roads in the neighbourhood of Tim Mei Avenue for an indefinite period.

531. It should be noted that the incitement by D4 in Exhibit P20 was made at a time when the carriageway of Tim Mei Avenue was occupied by protestors and the traffic of Tim Mei Avenue was completely blocked. By calling for the over-cramming of Admiralty and Central, D4 clearly meant the occupation of the public places and roads in Admiralty and Central. Given the use of the words ‘occupy’ and ‘over-cramming’ and the fact that the protestors at Tim Mei Avenue were on both the pavements and the carriageway of Tim Mei Avenue, in my judgment, a clear message was sent to the audience at Tim Mei Avenue that they were asked to over-cram not just public places, but also roads of Admiralty and Central in the neighborhood of Tim Mei Avenue.

532. As discussed, the occupation that D4 incited was not an occupation of any public place or road in Admiralty and Central, but the occupation of “*public places and roads in the neighbourhood of Tim Mei Road*”. It was through the occupation of the public places and roads in the neighbourhood of Tim Mei Road that the student movement at Tim Mei Avenue would be supported.

533. Mr. Ching Y Wong SC submitted at Para. 4.1.2 of D4’s Closing Submissions “Thus to prove that ‘by remaining at and occupying TMA’ a nuisance would be caused, the Prosecution needs to prove that for 27th and 28th, D4 knew when she incited, that there were no proper

notifications given for these days or if such notifications were given, that they were properly prohibited by the COP.” (Commissioner of Police).

534. It is clear from the video evidence that D4 was aware that the public meeting in progress at Tim Mei Avenue. In fact, shortly past midnight on 28th September 2014, she warned the people present that the public meeting at Tim Mei Avenue was an unauthorized one.¹⁶⁵ It should also be noted that in Exhibit P11, D4 asked everyone to participate in civil disobedience, which denoted the law would be violated. As said, the “warranted by law” element required for the offence of public nuisance cannot be proved by the absence of proper notification.

535. More importantly, the incitement made by D4 in Exhibit P20 concerns the plea to occupy Admiralty and Central, not just Tim Mei Avenue. Given the use of the word “over-cram’ and the plea to occupy Admiralty and Central, I am sure D4 knew there was no notifications given to the Police for a public gathering to occupy Admiralty and Central on 27th and 28th September 2014.

536. Mr. Ching Y Wong SC submitted that the Letter of Prohibition (Exhibit P152) was ultra vires and was thus of no effect. I have explained in the earlier part of the judgment why Exhibit P152 was valid. Given my findings on the effect of cordoning off Tim Mei Avenue by the Police on Charge 2 and Charge 3, the incitements that could form the subject matters of complaint of Charge 2 and Charge 3 are those related to obstruction of public places and roads in the neighbourhood of Tim Mei Avenue, not the ones at Tim Mei Avenue.

¹⁶⁵ Exhibit P41, Pages 1259-1260

537. I have taken onto consideration all the circumstances leading to the making of the incitement by D4 in Exhibit P20. In my judgement, the scale of the occupation that D4 incited was extensive; both Admiralty and Central were important commercial districts and the roads in the district were important thoroughfares, as they always have been. The intended occupation was for an indefinite period. On the other hand, I am aware that the occupation advocated was a peaceful one and the purpose of the occupy movement was to strive for universal suffrage. In my judgment, what D4 incited the people at Tim Mei Avenue in Exhibit P20 to do was not a reasonable use of the roads in the neighbourhood of Tim Mei Square. The obstruction to the traffic and inconvenience caused to the public would be so serious that would exceed the bounds of reasonableness and the protection given by the Basic Law to the right to peaceful demonstration. I find that the obstruction that would be caused was not warranted by law.

538. From the computer certificates,¹⁶⁶ I am satisfied that the over-cramming of the public places and roads in the neighbourhood of Tim Mei Road would result in the suffering of common injury by common member of the public.

539. From the evidence, I am sure that when D4 made the incitement in Exhibit P20, she intended that the incitees, i.e. the people at Tim Mei Avenue would do the act incited by her, i.e. obstructing public places and roads in the neighbourhood of Tim Mei Avenue, with the mens rea of public nuisance, i.e. the incitees knew, or ought to have known (because of the means of knowledge were available to him) the consequence of what they did. In this case the incitees were the people

¹⁶⁶ Exhibits P145-147

participating in the public assembly at Tim Mei Avenue and hence, they must be aware of what was going on at the time of the incitement and what the effect of an indefinite obstruction of the roads in the neighbourhood of Tim Mei Avenue would be if they acted as incited.

540. In my judgment, on the basis of what D4 said in Exhibit P20, i.e.:

*“Hey, let’s go to occupy **Admiralty** now. Thank you, Benny. ‘**Chung**’ (transliteration), now it is the ‘**Chung**’ (transliteration) of ‘**Kam Chung**’ (transliteration) (the name of **Admiralty** in Chinese). Later, it will be the ‘**Chung**’ (transliteration) of ‘**Chung Wan**’ (the name of **Central** in Chinese).....” and “We hope to over-cramming Tim Mei Avenue, right? Over-cram Tim Mei Avenue! Over-cram Tim Mei Avenue! Over-cram Tim Mei Avenue! Over-cram **Admiralty**! Over-cram **Admiralty**! Over-cram **Admiralty**! Good!” (Emphasis added)¹⁶⁷*

D4 had unlawfully incited persons at Tim Mei Avenue, Admiralty to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue without need to resort to the doctrine of joint enterprise as a basis for liability.

The Incitements by D5 and D7 in Exhibit P74 (Pg. 1588-1589, 1591-1592 and 1593)

541. At around 3:35 p.m. on 28th September 2014, when D5 and D7 addressed the people at Tim Mei Avenue in the presence of D1 and D3, D5 and D7 said amongst other things:-

¹⁶⁷ Exhibit P20, page 1107 and Page 1111

*“D5:Our –our friends who gather round here to watch have **already over-crammed two more roads.***

D7: Hurray!

*D5: (The crowd) has already over-crammed **two roads (outside) the Hong Kong Academy for Performing Arts.***

*D7: And more citizens are coming successively. **(Let’s) continue to occupy the roads together.***

*D5: We are asking more friends to come here, (we are asking) more friends to come here. **Let’s over-cram Admiralty. (Let’s) over-cram Wan Chai. (Let’s) over-cram Central.***

*D7: Friends on that side, keep it up. We know that **some friends there have already prepared to dash out to occupy the road(s). Let’s cheer them on, shall we?***

*D5: Comrades, **let’s over-cram Wan Chai together. (Let’s) over-cram Admiralty. (Let’s) over-cram Central.....”***
(Emphasis added)¹⁶⁸

542. In my judgment, the above statements of D5 and D7 in Exhibit P74 at Pg. 1588-1589 amounted to (i) an incitement to the persons present at Tim Mei Avenue to over-cram Admiralty, Wanchai and Central in the neighbourhood of Tim Mei Avenue; and (ii) incitement to the persons present at Tim Mei Avenue to incite others to overcram Admiralty, Wanchai and Central in the neighbourhood of Tim Mei Avenue.

543. I am sure the above incitements were made to the people at Tim Mei Avenue and heard by those within the audibility range of the public address system.

544. Later on, at around 4:06 p.m. on 28th September 2014, D5 and D7 addressed the crowd at Tim Mei Avenue in the presence of D1 and D2 (on stage) and D3 (below stage) and said:-

*“D7: We have got news that.... On the side of **Harcourt Road..** many friends have already gone out onto the road! (They) have already occupied the road! Hurray!*

¹⁶⁸ Exhibit P74, pages 1588-1589

D5: *Occupy the road!*
D7: *Occupy the road!*
D5: *Occupy the road!*
D7: *Occupy the road!*
D5: *Occupy the road!*
D7: *Occupy the road!*
D5: *Hurray!*
D7: *Hurray!*
D5: *Hurray!*
D7: *Hurray!*”
(Emphasis added)¹⁶⁹

545. I am sure the above statements of D5 and D7, which amounted to an incitement to occupy the carriageways of Harcourt Road, were heard by those who were within the audibility range of the public address system. It should be noted that Harcourt Road is in the neighbourhood of Tim Mei Avenue.

546. I am not sure, however, if the targeted audience of the incitement in Exhibit P74 at Pg. 1591-1592 were the people at Tim Mei Avenue. Looking at the contents of what D5 and D7 said at Pg. 1591-1592, D5 and D7 were telling the people at Tim Mei Avenue what was happening at Harcourt Road. It seems to me D5 and D7, by their repeated utterances of “Occupy the road” and “Hurray” at Pg. 1591-1592, were encouraging, hence inciting the persons at Harcourt Road who had already occupied the road, i.e. **people who were not at Tim Mei Avenue**, to continue with their occupation of the carriageways of Harcourt Road.

547. For these reasons, the incitement in Exhibit P74 at Pg. 1591-1592 cannot be said to be an incitement made to “*the persons present at Tim Mei Avenue*” as particularized in Charge 2.

¹⁶⁹ Exhibit P74, pages 1591-1592

548. Later on, at around 4:10 p.m. on 28th September 2014, D5 and D7 addressed the people at Tim Mei Avenue in the presence of D3 (below stage) and said:-

*“D5: Our picket has just made a report that the 6 carriageways of **H-Harcourt Road bound for Central as well as Causeway Bay**, the 6 carriageways have already been over-crammed (with people) sitting (there)! We have already over-crammed 6 carriageways (with people) sitting (there). Keep coming! Keep coming! Keep coming!
D7: Keep coming” (Emphasis added)¹⁷⁰*

549. I am sure that the above statements of D5 and D7 in Exhibit 74 at Pg. 1593 amounted to an incitement to occupy the carriageways of Harcourt Road in the neighbourhood of Tim Mei Avenue. I am sure that the above statements were heard by those within the audibility range of the public address system.

550. Likewise, I am not sure, however, if the targeted audience of the incitement were the people at Tim Mei Avenue. Looking at the contents of what D5 and D7 said at Pg. 1593, they were telling the people at Tim Mei Avenue what was happening at Harcourt Road. In my judgment, the repeated utterances of the words “Keep coming” show that the defendants were not inciting the persons **who were already present** at Tim Mei Avenue. It seems to me D5 and D7 were encouraging, hence inciting, people who were not at Tim Mei Avenue to come and sit on the carriageways of Harcourt Road to over-cram it. For these reasons, the incitement at Pg. 1593 cannot be said to be an incitement made to “*the persons present at Tim Mei Avenue*” as particularized in Charge 2.

¹⁷⁰ Exhibit P74, page 1593

551. In my judgment, of the various incitements made by D5 and D7 in Exhibit P74 (Pg. 1588-1589, 1591-1592 and 1593), only the incitements at Pg. 1588-1589 were made to “*the persons present at Tim Mei Avenue*”, i.e. the incitees particularised in Charges 2 and 3.

552. The incitements at Pg. 1588-1589 were made by D5 and D7 at around 3:35 p.m. on 28th September 2014, when D5 and D7 addressed the people at Tim Mei Avenue in the presence of D1 and D3. D5 and D7 said:-

“D5:Our –our friends who gather round here to watch have already over-crammed two more roads.

D7: Hurray!

D5: (The crowd) has already over-crammed two roads (outside) the Hong Kong Academy for Performing Arts.

D7: And more citizens are coming successively. (Let’s) continue to occupy the roads together.

D5: We are asking more friends to come here, (we are asking) more friends to come here. Let’s over-cram Admiralty. (Let’s) over-cram Wan Chai. (Let’s) over-cram Central.

D7: Friends on that side, keep it up. We know that some friends there have already prepared to dash out to occupy the road(s). Let’s cheer them on, shall we?

D5: Comrades, let’s over-cram Wan Chai together. (Let’s) over-cram Admiralty. (Let’s) over-cram Central.....”
(Emphasis added)¹⁷¹

553. In my judgment, what D5 and D7 said at Pg. 1588-1589 amounted to (i) incitement to commit public nuisance; and (ii) incitement to incite public nuisance.

¹⁷¹ Exhibit P74, pages 1588-1589

Incitement to Commit Public Nuisance (Charge 2)

554. In my judgment, at Pg. 1588-1589, D5 and D7 were not only encouraging the protestors who had prepared to dash out to occupy the road(s), they were also inciting the people present to over-cram Admiralty, Wanchai and Central. Given the intended duration of the occupy movement, protestors who were at a location (e.g. Tim Mei Avenue) at one point of time might move to another location (e.g. Harcourt Road) at another point of time. The words “*Let’s*” used by D5 and D7 show that the incitements were directed to the persons present at Tim Mei Avenue as well as those at Harcourt Road.

555. The use of the word “over-cram” by D5 at Pg. 1588-1589 shows the numbers of participants intended by D5 would be sufficient to over-cram the roads in Wanchai, Admiralty, Central and Harcourt Road. Although D7 did not use the word “over-cram”, he was obviously echoing D5’s plea to over-cram the roads in Wanchai, Admiralty, Central in general and Harcourt Road in particular.

556. I am sure the “road(s)” referred to in D7’s utterance of “: *Friends on that side, keep it up. We know that some friends there have already prepared to dash out to occupy the road(s). Let’s cheer them on, shall we?*” meant the road(s) in the neighbourhood of Tim Mei Avenue but not Tim Mei Avenue. It is clear from what D7 said the location he referred to was not far away from the main stage at Tim Mei Avenue. It is also clear from what D7 said the location he referred to was not Tim Mei Avenue. Tim Mei Avenue had been cordoned off by the police since 26th September 2014, it was unnecessary for protestors to “dash out” to occupy

Tim Mei Avenue at around 3:35 p.m. on 28th September 2014, by that time, Tim Mei Avenue had already been an occupied area of the Occupy Central movement for almost 2 days.

557. In my judgment, the fact that the word “over-cram” was used in the incitement at Pg. 1588-1589 shows that the number of participants intended by D5 and D7 in their pleas to over-cram Wanchai, Admiralty and Central and Wanchai would be sufficient to over-cram the roads in the districts they mentioned. Reading the statements of D5 and D7 in context, the roads in Wanchai, Admiralty and Central they referred to must be the roads in the neighbourhood of Tim Mei Avenue, e.g. Harcourt Road.

558. What D5 said at Pg. 1588-1589 was consistent with what he had said in some of his speeches earlier, i.e. that they had entered an era of universal struggle and people from all walks of life were engaging in universal struggle;¹⁷² that more supporters were needed at Tim Mei Avenue¹⁷³ and that the demonstration in progress at Tim Mei Avenue was one to last indefinitely, i.e. it was “*a fight in relays*”.¹⁷⁴

559. Mr. Pang SC drew my attention to what D5 said in a pre-OCLP gathering on 1st July 2013 (Exhibit P122/Pg. 703). He said at the time: “***We will be arrested. We will then make a second move. We will then submit to arrests peacefully. We will have surrendered ourselves, we will not defend. We (will) stretch out a pair of hands, (as if saying) make the arrests if you please. Let us chant together, (c) Occupy Central. Civil Disobedience. Occupy Central. Civil Disobedience. Arrest me if you***

¹⁷² Exhibit P27

¹⁷³ Exhibit P32

¹⁷⁴ Exhibit P61

please. I myself will bear the consequence. I myself will bear the consequence (.) Let's keep this as a record. Thank you everybody, thank you to the Trio.” (Emphasis added)

560. Mr. Pang SC also drew my attention to what D5 said at around 7:23 p.m. – 7:25 p.m. on 27th September 2014, as recorded in Exhibit P28 at Pg.1133-1134. D5 was telling people to send their personal details to an arrest support team to prepare for their arrests.

561. Mr. Pang SC submitted that what D5 said in Exhibits P122 and P28 shows that the actual intention of the defendants was all along to get arrested by the police after a few days of arrest.

562. In my judgment, the fact that D5 asked for the over-cramming of places beyond Tim Mei Avenue, i.e. the over-cramming of the public places and roads in Wanchai, Admiralty and Central in the neighbourhood of Tim Mei Avenue, taken together with what D5 said in Exhibit P61, i.e. that the demonstration at Tim Mei Avenue was “a fight in relays”, and what he said in Exhibit P35, i.e. he challenge the Police to clear and lock up a turnout of 50,000 people. I am sure that D5 intended that the occupation he incited would be a continued occupation for an indefinite period. I do not see how Exhibit P122 can assist D5. The speech was made by D5 in July 2013, though he was talking about arrest for participation in the civil disobedience launched by D1 to D3. The details of the Occupy Central movement had yet to be decided. The fact that he anticipated he would be arrest for his participation in the civil disobedience movement launched by D1 to D3 in no way shows that he thought at the time of Charge 2 and Charge 3 he would be arrested after a few days of protest. If it was the intention of D5 at the time of Charge 2 and Charge 3 he would be arrested

after a few days of protest, there was nothing to prevent D5 from surrendering himself to the Police after a few days of protest, as he said he would do in Exhibit P122.

563. In my judgment, the fact that there was an arrest support team to prepare for the arrest of protestors on 27th and 28th September 2014 is neither here nor there. A large scale occupy movement was in progress, there were defence lines to defend at the venue (Exhibit P59, Pg. 1456), participants were asked to ask their friends to come out to counter-besiege the police defence (Exhibit P64, Pg. 1485) and participants were asked to intercept a police vehicle (Exhibit P59, Pg. 1456). I am not at all surprised that there was an arrest support team to handle the arrests of protestors. The fact that there was an arrest support team does not, however, shows that D5 anticipated that he would be arrested after a few days of protest.

564. Mr. Pang SC submitted that the fact that there was no tent, or any permanent or semi-permanent set ups on the road in Tim Mei Avenue and its vicinity before the discharge of tear gas on 28th September 2014 can show that the protestors were not intending to stay for a substantial period of time before the firing of tear gas. For the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance”, the actual intention held by the incitee is irrelevant. What is relevant is the intention of the incitor, i.e. the defendant.

565. For the offence of “Incitement to commit public nuisance”, the requisite mens rea is that at the time of the incitement, the defendant (the incitor) intends or believes that if the incitee does the act incited under the circumstances that are known or believed by the defendant (the incitor), the incitee would commit the offence with the requisite mens rea of the

offence of public nuisance. The mens rea required is that of the defendant (the incitor).

566. For the offence of “Incitement to incite public nuisance”, the requisite mens rea is that at the time of the incitement, the defendant (the incitor) intends or believes that if the incitee does the act incited under the circumstances that are known or believed by the defendant (the incitor), the incitee would commit the offence of incitement with the requisite mens rea required for the offence of incitement. Again, the mens rea required is that of the defendant.

567. In other words, the firing of tear gas on 28th September 2014 was not a circumstance that was known to or believed by the relevant defendants when the incitements in respect of Charge 2 and Charge 3 were made. The relevant circumstances were those known to or believed by the defendants at the time the incitements were made, not something that took place afterwards. In assessing whether a defendant had the requisite mens rea for Charge 2 and Charge 3, I have not taken into account the events that took place after the alleged incitements were made.

568. In the case of D7, what he said at Pg. 1588-1589 was consistent with what he had said in some of his speeches earlier, i.e. the deployment of the tactic of counter-besieging the Police by supporters who could not enter the venue at Tim Mei Avenue¹⁷⁵ and that D7 intended the occupy movement in progress at Tim Mei Avenue to continue for an indefinite period, hence he asked the participants to “put down roots” at the venue.¹⁷⁶

¹⁷⁵ Exhibits P27, P35 and P38

¹⁷⁶ Exhibit P53

569. For the reasons given in my foregoing analysis, it is clear from the speeches made by D5 and D7 in these exhibits that each of D5 and D7 intended that the occupy movement should last as long as possible. In my judgment, D5 and D7 were inciting the people at Tim Mei Avenue to occupy the public places and roads in the neighbourhood of Tim Mei Avenue for an indefinite period.

570. The incitements by D5 and D7 at Pg. 1588 and 1589 were made at a time when the carriageway of Tim Mei Avenue was occupied by protestors and the traffic of Tim Mei Avenue was completely blocked; the 6 carriageways of Harcourt Road were also occupied by protestors and the traffic of Harcourt Road was blocked as a result. By calling for the over-cramming of the roads in Wanchai, Admiralty and Central, D5 and D7 clearly meant the occupation of the public places and roads in Wanchai, Admiralty and Central in the neighbourhood of Tim Mei Avenue. As discussed, the obstruction that D5 and D7 incited was not an occupation of any public place or road in Wanchai, Admiralty and Central, but the occupation of “*public places and roads in the neighbourhood of Tim Mei Road*”. It was through the occupation of the public places and roads in the neighbourhood of Tim Mei Road that the student movement at Tim Mei Avenue would be supported.

571. Given the fact that at the time the incitement at Pg. 1588-1598 was made, the number of protestors was swelling. The carriageway of Tim Mei Avenue was occupied by protestors and the traffic of Tim Mei Avenue was completely blocked; the 6 carriageways of Harcourt Road were also occupied by protestors and the traffic of Harcourt Road was blocked as a

result. I am sure that the incitement by D5 and D7 at Pg. 1588-1589 was made with a sense of certainty that the persons at Tim Mei Avenue would carry out a public nuisance.

572. Mr. Dykes submitted that the existence of ‘checkline’ and ‘counter enclosing’ measures does not prove that a public nuisance existed at the time. He submitted that if the police had been intending to clear Tim Mei Avenue then and were being prevented from doing so, then the proper charge would have been obstruction by preventing performance of the relevant duties under section 10 (e)-(g) Police Force Ordinance, Cap. 232. Mr. Dykes SC further submitted that the fact that the Police did not clear the area until much later suggests that the assembly did not constitute a public nuisance.¹⁷⁷

573. In my judgment, whilst the existence of checklines does not prove the existence of a public nuisance, a defendant’s exhortations to defend various ‘checklines’ of the venue at Tim Mei Avenue shows that the defendant in question intended that the demonstration at Tim Mei Avenue would last for an indefinite period.

574. For the exhortations to ‘counter-enclose’ or ‘counter-besiege’ the police, it should be noted that by definition, an act of counter-enclosing or counter-besieging must take place outside cordon lines of the Police, i.e. outside the venue at Tim Mei Avenue, otherwise the act/move not amount to one of counter-enclosing or counter-besieging. When additional public places and roads, e.g. Harcourt Road was obstructed for the sake of counter-besieging the Police, the issue that I have to decide is whether the

¹⁷⁷ Para. 96-98 of D7’s Closing Submissions

obstruction of additional public place(s) or road(s) for the sake of counter-besieging the Police was a proper use of the road.

575. Mr. Dykes submitted that “Be that as it may, the court cannot discount the fact that the failure of the police to disperse crowds after using teargas resulted in the massive build-up of crowds in the Admiralty area that went on for 2 ½ months. The use of tear gas cannot be ruled out as an intervening act which was responsible for the mass occupation of the roads in Admiralty.”¹⁷⁸

576. Given the undisputed fact that the use of tear gas took place at around 6 p.m. on 28th September 2014, i.e. after all the alleged incitements for Charge 2 and Charge 3 had been made on 27th and 28th September 2014, I do not see how the use of tear gas could constitute an intervening act as far as Charge 2 and Charge 3 are concerned. If all the elements of the offences of “Incitement to commit public nuisance” and “Incitement to incite public nuisance’ can be proved, the offence were complete upon the making of the incitement under complaint, whether a nuisance did occur as a result of the incitement is neither here nor there.

577. With respect to Mr. Dykes SC, I do not agree with his submissions that the fact the Police did not clear the area until much later suggests that the assembly did not constitute a public nuisance. the Police did not clear the area until much later suggests that the assembly did not constitute a public nuisance. Whether the assembly in question constituted a public nuisance is determined by the application of the principles laid

¹⁷⁸ Para. 103 of D7’s Closing Submissions

down in Rimmington to the facts proved, not by the degree of tolerance shown by the Police.

578. I have taken into consideration all the circumstances leading to the making of the incitements by D5 and D7 at Pg. 1588-1589 of Exhibit P74. In my judgement, the scale of the occupation that D5 and D7 incited was extensive; Wanchai, Admiralty and Central were all important commercial districts and the roads in the district, e.g. Harcourt Road and Fenwick Pier Street, were important thoroughfares, as they always have been. The intended occupation was for an indefinite period. On the other hand, I am aware that the occupation advocated was a peaceful one and the purpose of the occupy movement was to strive for universal suffrage. In my judgment, what D5 and D7 incited the people at Tim Mei Avenue in at Pg. 1588-1589 to do was not a reasonable use of the roads in Admiralty and Central in the neighbourhood of Tim Mei Square. The 6 carriageways of Harcourt Road had already been occupied by protestors yet D5 and D7 still asked for more protestors to over-cram and occupy the roads in Wanchai, Admiralty and Central in the neighbourhood of Tim Mei Avenue. The obstruction to the traffic and inconvenience caused to the public would be so serious that would exceed the bounds of reasonableness and the protection given by the Basic Law to the right to peaceful demonstration. I find that the obstruction that would be caused was not warranted by law.

579. From the computer certificates,¹⁷⁹ I am satisfied that the over-cramming of the public places and roads in the neighbourhood of Tim Mei

¹⁷⁹ Exhibits P145-147

Road would result in the suffering of common injury by common member of the public.

580. From the evidence, I am sure that when D5 and D7 incited the people present at Tim Mei Avenue to over-cram Wanchai, Admiralty and Central (words of incitement said by D5) and to occupy the roads together (words of incitement said by D7) at Pg. 1588-1589 of Exhibit P74, each of D5 and D7 intended that the incitees, i.e. the people at Tim Mei Avenue would do the act incited by them, i.e. obstructing public places and roads in the neighbourhood of Tim Mei Avenue, with the mens rea of public nuisance, i.e. the incitees knew, or ought to have known (because of the means of knowledge were available to him) the consequence of what they did.

581. In this case the incitees were the people participating in the public assembly at Tim Mei Avenue and hence, they must be aware of what was going on at the time of the incitements and what the effect of an indefinite obstruction of the roads in the neighbourhood of Tim Mei Avenue would be if they acted as incited. I am sure that D5 and D7 intended or believed that the incitees, i.e. the people present at Tim Mei Avenue, would know or had the means to know that if they acted as incited, they would commit a public nuisance.

582. In the present case, D5 and D7 expressly asked the people at Tim Mei Avenue (i) to over-cram Wanchai, Admiralty and Central; and (ii) to ask more friends to come out to do so. I do not agree with Mr. Pang SC's submissions at Para. 80 of D5's Closing Submissions that "At best, therefore, it could only be said that D5 had by his spoken words incited a

state of affairs which may or may not become a public nuisance depending on how the events will unfold”.

583. Mr. Dykes SC submitted that the use of pepper spray and tear gas in the present case constituted the use of arms under s. 22(1)(d) of Firearms and Ammunition Ordinance, Cap. 238 and no evidence has been led about the protocols about the use of both pepper spray and tear gas, therefore it cannot be said that the use was lawful, i.e. the use of one or both was “no greater than was necessary required” to cause dispersal under s. 46(1) Public Order Ordinance.¹⁸⁰

584. The use of tear gas took place at around 6 p.m. on 28th September 2014, i.e. after the incitements under complaint were made by the relevant defendants. I do not see the relevance of the legality or otherwise of the use of tear gas by the police have on the issues that concern Charge 2 and Charge 3.

585. For the use of pepper spray, I see no reason why the Prosecution, in order to prove its case against D7 and the other defendants facing Charge 2 and Charge 3, should lead evidence to prove the use of pepper spray was lawful. In fact, what D5 and D7 said in Exhibit P74 at Pg. 1588-1589 had nothing to do with the use of pepper spray by the police.

586. In my judgment, on the basis of the above incitements by D5 and D7 in Exhibit P74 at Pg. 1588-1589, D5 and D7 each had unlawfully incited persons at Tim Mei Avenue, Admiralty to cause a nuisance to the public by unlawfully obstructing public places and roads in the

¹⁸⁰ Para. 100-102 of D7’s Closing Submissions

neighbourhood of Tim Mei Avenue without need to resort to the doctrine of joint enterprise as a basis for liability.

Incitement to Incite Public Nuisance (Charge 3)

587. In my judgment, what D5 said in Exhibit P74 at Pg. 1589:-

“D5: We are asking more friends to come here, (we are asking) more friends to come here. Let’s over-cram Admiralty. (Let’s) over-cram Wan Chai. (Let’s) over-cram Central.” (Emphasis added),

amounted to an incitement made to the people at Tim Mei Avenue to incite more friends to join the movement by over-cramming Admiralty, Wanchai and Central. The above statement was made to the people at Tim Mei Avenue and heard by those within the audibility range of the public address system.

588. My analysis and findings made in respect of the incitements to commit public nuisance made by D5 in Exhibit 74 are also applicable the analysis of the incitement made by D5 at Pg. 1589.

589. The use of the word “over-cram” by D5 in the above statement at Pg. 1589 shows the numbers of participants intended by D5 would be sufficient to over-cram the roads in Wanchai, Admiralty and Central.

590. Immediately before the incitement at Pg. 1589, D5 told the people at Tim Mei Avenue that *“(The crowd) had already over-crammed two roads (outside) the Hong Kong Academy for Performing Arts”* (Pg. 1588). Reading D5’s statement at Pg. 1589 in its proper context, D5 was

asking for the over-cramming of the public places and roads in Wanchai, Admiralty and Central in the neighbourhood of Tim Mei Avenue.

591. What D5 said at Pg. 1589 should be read in the light of what he had said in some of his speeches earlier, i.e. that they had entered an era of universal struggle and people from all walks of life were engaging in universal struggle;¹⁸¹ that more supporters were needed at Tim Mei Avenue¹⁸² and that the demonstration in progress at Tim Mei Avenue was one to last for an indefinite period, i.e. it was “*a fight in relays*”.¹⁸³

592. For the reasons given in my foregoing analysis, it is clear from the speeches made by D5 in these exhibits that D5 intended that the occupy movement should last as long as possible. In my judgment, D5 was inciting the people at Tim Mei Avenue to incite other persons to occupy the public places and roads in the neighbourhood of Tim Mei Avenue for an indefinite period.

593. The incitement by D5 at Pg. 1589 was made at a time when the carriageway of Tim Mei Avenue was occupied by protestors and the traffic of Tim Mei Avenue was completely blocked; the 6 carriageways of Harcourt Road were also occupied by protestors and the traffic of Harcourt Road was blocked as a result. By calling for the people at Tim Mei Avenue to incite other persons to over-cram the roads in Wanchai, Admiralty and Central, D5 clearly meant the occupation of the public places and roads in Wanchai, Admiralty and Central in the neighbourhood of Tim Mei Avenue. It was through the occupation of the public places and roads in

¹⁸¹ Exhibits P27

¹⁸² Exhibit P32

¹⁸³ Exhibit P61

the neighbourhood of Tim Mei Road that the student movement at Tim Mei Avenue would be supported.

594. I have taken onto consideration all the circumstances leading to the making of the incitement at Pg. 1589 by D5. In my judgement, the scale of the occupation that D5 incited was extensive; Wanchai, Admiralty and Central were all important commercial districts and the roads in the district, including Harcourt Road, were important thoroughfares, as they always have been. The intended occupation was for an indefinite period. On the other hand, I am aware that the occupation advocated was a peaceful one and the purpose of the occupy movement was to strive for universal suffrage. In my judgment, what D5 incited the people at Tim Mei Avenue to do, i.e. to incite other persons to cause an obstruction to the public places and roads in the neighbourhood of Tim Mei Avenue, was not a reasonable use of the roads in Admiralty and Central in the neighbourhood of Tim Mei Square. The 6 carriageways of Harcourt Road had already been occupied by protestors yet D5 still asked for more protestors to occupy the road. The obstruction to the traffic and inconvenience caused to the public would be so serious that would exceed the bounds of reasonableness and the protection given by the Basic Law to the right to peaceful demonstration. I find that the obstruction that would be caused was not warranted by law.

595. From the computer certificates,¹⁸⁴ I am satisfied that the over-cramming of the public places and roads in the neighbourhood of Tim Mei Road would result in the suffering of common injury by common member of the public.

¹⁸⁴ Exhibits P145-147

596. In my judgment, by the above utterance, D5 had incited the incitees, i.e. the people present at the Tim Mei Avenue, to do an act which would involve the commission of the offence of incitement, i.e. inciting a public nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue, i.e. the actus reus for the offence of “Incitement to incite public nuisance”.

597. I am sure that when D5 made the above utterance, he intended or believed that the incitees (the persons at Tim Mei Avenue) would incite other persons (the friends of the incitees) to do the act incited, i.e. to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue and that the incitees (the people at Tim Mei Avenue) would do the act with the mens rea requirement for incitement, i.e. an intention to incite.

598. In my judgment, on the basis of the above incitements made by D5 in Exhibit P74 at Pg. 1589, D5 had unlawfully incited persons at Tim Mei Avenue, Admiralty to incite other persons to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue without need to resort to the doctrine of joint enterprise as a basis for liability.

599. The utterances which amounted to an incitement to the persons at Tim Mei Avenue to incite others to commit public nuisance at Pg. 1589 was made by D5 in the presence of D7. I shall consider the application of the doctrine of joint enterprise in the latter part of the judgment.

The Words of Incitement by D6 in Exhibits P17 and P40: Incitement to Incite Public Nuisance (Charge 3)

600. At around 3:38 pm in the afternoon on 27 September 2014, when D6 addressed the people at Tim Mei Avenue, he said amongst other things:-

“now we hope that everybody, yes, can really ask more people to come out and over-cram Tim Mei Avenue, also, it is hoped that the nearby carriageways will also be over-crammed, and (we) continued to extend the area of our civil disobedience.”¹⁸⁵

601. In my judgment, the above utterance by D6 in Exhibit P17 amounted to an incitement to the people at Tim Mei Avenue to incite other persons to come out and over-cram Tim Mei Avenue and the nearby carriageways. I am sure that the incitement was made to the people at Tim Mei Avenue and heard by those within the audibility range of the public address system.

602. At about 11:24 p.m. in the evening on 27th September 2014, in the presence of D4 and D7, D6 addressed the people at Tim Mei Avenue and said:-

*“Right, well, let me tell you a piece of good news rather than always listening to those things that (make you feel) heavy (-hearted). Well, we, now **on the bridge outside Admiralty**, it is still full of people all over the footbridge (there). They are in the direction of our side, coming towards us here, right. Our (activity) today, should be the largest Civil Disobedience (activity) over the years, certainly, the number of people, we have not yet got the largest of people, but (we) hope that the members of the public would not remain at our current*

¹⁸⁵ Exhibit P17, page 1102

achievements (attained), let us keep asking more people to come, over-cramming Admiralty."

"Well! As what we have seen, actually, there are huge crowds of people everywhere. Well! We, starting from Harcourt Road to the entire Tim Mei Avenue, all were (packed with) people, the open space of the Legislative Council is also full of people, so everybody keeps asking people to come!" (Emphasis added)¹⁸⁶

603. In my judgment, the above utterances by D6 in Exhibit P40, which amounted to incitement to the people at Tim Mei Avenue to incite other persons to over-cram Admiralty, was made to the people at Tim Mei Avenue and heard by those within the audibility range of the public address system.

604. The repeated use of the word "over-cram" by D6 in Exhibits P16 and P40 shows the number of participants intended by D6 would be sufficient to over-cram the roads in Admiralty.

605. It should be noted that immediately before the incitement at Pg. 1102, D6 told the people at Tim Mei Avenue that "..., even though Tim Mei Avenue is already all full, well, but everybody still has to keep asking friends to come out...".¹⁸⁷ Reading D6's statement at Pg. 1102 in its proper context, D6 was asking for the over-cramming of the public places and roads in Admiralty in the neighbourhood of Tim Mei Avenue at a time when Tim Mei Avenue was already full of protestors.

606. What D6 said in Exhibit P40 should be read in the light of what he had said in some of his other speeches made before Exhibit P40:

¹⁸⁶ Exhibit P40, page 1244-1245

¹⁸⁷ Pg. 1098

(i) in Exhibit P28, D6, together with D5, asked the people at Tim Mei Avenue “to hang in till the end”(ii) in Exhibits P27 and P33, D6 asked the people at Tim Mei Avenue to ask for more friends to go the venue at Tim Mei Avenue to express their support (iii) in Exhibit P35, D6 spoke of the importance of “counter-besieging” the Police (“Encirclement is strength”) and the fact that there were already 50,000 protestors at Tim Mei Avenue.

607. For the reasons given in my foregoing analysis, what D6 had said in Exhibits P27, P28, P33 and P35 shows that at the time D6 intended that the occupy movement should last as long as possible. In my judgment, D6 was inciting the people at Tim Mei Avenue to incite other persons to occupy the public places and roads in the neighbourhood of Tim Mei Avenue for an indefinite period.

608. Mr. Pun SC submitted in Part F of D6’s Closing Submissions that the persons present at Tim Mei Avenue, if acted as incited, would only stay for a limited period of time to wait for the release of the student leaders arrested by the Police. It is immediately clear from the passage relied upon by Mr. Pun SC, i.e. Exhibit P17 at Pg. 1098-1099, that apart from calling for the people present at Tim Mei Avenue to wait for the release of the student leaders, D6 also made it clear that the purposes of the public assembly included a demand that the then Chief Executive of the HKSAR should give an explanation on the current situation and on the matter of supporting a predetermined political reform. D6 also criticized the Decision on 31st August and asked for the breaking through of the gate of the Civil Square as the first step to break through the framework of the Decision on 31st August. Properly understood, what D6 said in Exhibit

P17 does not support Mr. Pun SC's submissions that the incitees, if acted as D6 incited, would only stay for a limited period of time.

609. The incitements by D6 in Exhibit P17 were made at a time when Tim Mei Avenue was already all full. In other words, the road was occupied by protestors and the traffic of Tim Mei Avenue was completely blocked. By calling for the people at Tim Mei Avenue to incite other persons to over-cram the "*nearby carriageways*", D6 made it clear that it was the plan of the occupy movement to extend the area for the civil disobedience D6 said was in progress. D6 had made it clear that it was the plan of the occupy moment to expand beyond the occupied area of Tim Mei Avenue.

610. Bearing in mind what D6 had said in Exhibit P17, i.e. the over-cramming of Tim Mei Avenue and the nearby carriageways, the location that D6 referred to in his incitement in Exhibit P40 was any public place or road in Admiralty, but the occupation of "*public places and roads in the neighbourhood of Tim Mei Road*". It was through the occupation of the public places and roads in the neighbourhood of Tim Mei Road that the student movement at Tim Mei Avenue would be supported.

611. Mr. Pun SC submitted that in Section G of D6's Closing Submissions that no public nuisance would be caused by the incitements made by D6 to the incitees to reclaim the Civic Square as Civic Square was a "private premises not open to the public" as confirmed by PW2 Senior Superintendent Wong Kei Wai. It should be noted that Charge 2 and Charge 3 concern obstruction of public places and roads at and in the neighbourhood of Tim Mei Avenue, not just the Civil Square at Tim Mei

Avenue. Given my findings on the effect of the cordoning off by the Police of Tim Mei Avenue, the relevant locations where public nuisance would be caused were the public places and roads **in the neighbourhood of Tim Mei Avenue**, not the obstruction of the carriageway of Tim Mei Avenue. In any event, unlike the obstruction of a public highway, the occupation of Civic Square was not something which would result in “the suffering of common injury by members of the public”. In my judgment, the issue whether the Civic Square was a private premises or a public place is academic in the present case.

612. Mr. Pun SC’s submissions on the issue of whether the obstruction incited by D6 was warranted by law (Section E of D6’s Closing Submissions) focused only on the issues whether the incitements by D6 were made at a time when there was a Notification of Intention to Hold a Public Meeting and whether D6 was aware of the Notice of Prohibition issued by the Police during the daytime on 28th September 2014.

613. As I pointed out in the earlier part of this judgment, the “not warranted by law” element for the common law offence of public nuisance is not to be determined by a search for illegality in the demonstration which resulted in the obstruction, e.g. the absence of prior notification or the issuance of a Notice of Prohibition. The absence of prior notification or the presence of a Notice of Prohibition is one of the factors, but not the only factor to be considered. In determining whether a defendant’s obstruction of the highway is “not warranted by law”, the important issue to be resolved is whether the defendant’s conduct under complaint involves a reasonable use of the highway, as the Court of Final Appeal pointed out in *Yeung May Wan*, a person who creates an obstruction could not be said

to be acting “without lawful excuse” if his conduct involves a reasonable use of the highway.

614. I take into consideration all the circumstances leading to the making of the incitements in Exhibits P17 and P40 by D6. In my judgement, the scale of the occupation that D6 incited was extensive; Admiralty was an important commercial district and the roads in the district, including Harcourt Road, were important thoroughfares, as they always have been. The intended occupation was for an indefinite period. On the other hand, I am aware that the occupation advocated was a peaceful one and the purpose of the occupy movement was to strive for universal suffrage. In my judgment, what D6 incited the people at Tim Mei Avenue to do, i.e. to incite other persons to cause an obstruction to the public places and roads in the neighbourhood of Tim Mei Avenue, was not a reasonable use of the roads in Admiralty in the neighbourhood of Tim Mei Square. The entire Tim Mei Avenue had already been occupied by protestors yet D6 still asked for more protestors to occupy the nearby carriageways and to extend the area for the occupy movement. The obstruction to the traffic and inconvenience caused to the public would be so serious that would exceed the bounds of reasonableness and the protection given by the Basic Law to the right to peaceful demonstration. I find that the obstruction that would be caused was not warranted by law.

615. From the computer certificates,¹⁸⁸ I am satisfied that the over-cramming of the public places and roads in the neighbourhood of Tim Mei Road would result in the suffering of common injury by common member of the public.

¹⁸⁸ Exhibits P145-147

616. In my judgment, by the above utterances in Exhibits P17 and P40, D6 had incited the incitees, i.e. the people present at the Tim Mei Avenue, to do an act which would involve the commission of the offence of incitement, i.e. inciting a public nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue, i.e. the actus reus for the offence of “Incitement to incite public nuisance”.

617. D6, when he uttered the incitements in Exhibits P17 and P40, intended that the incitees (the persons at Tim Mei Avenue) would incite other persons (the friends of the incitees) to do the act incited, i.e. to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue and that the incitees (the people at Tim Mei Avenue) would do the act with the mens rea requirement for incitement, i.e. an intention to incite.

618. In my judgment, on the basis of the above incitements D6 in Exhibits P17 and P40, D6 had unlawfully incited persons at Tim Mei Avenue, Admiralty to incite other persons to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue without need to resort to the doctrine of joint enterprise as a basis for liability.

Words of Incitements by D7 in Exhibits P69 (Pg. 1545-1546) and P74 (Pg. 1593 and 1598)

619. In the afternoon on 28 September 2014, when D7 spoke on the main stage at Tim Mei Avenue, in the presence of D1, D2 and D5 (on stage) and D3 (below stage), he said, amongst other things:-

*“....However, we know that roughly more than ten thousand citizens have **blocked the road (from) the Admiralty Centre, the whole of KFC to Rodney Street.** At the same time, **at the Hong Kong Academy ‘Centre’ (sic) of Performing Arts, Wanchai,** there are ten thousand people. Adding (them) up, (we’ve) got a total of about thirty thousand people here. Here, **I am appealing to all the citizens in Hong Kong to come together – no matter whether (you) can enter the area or not, go to Admiralty, go to Wan Chai. Let us fill up the whole of Admiralty (and) Wan Chai. Together, (we) can besiege the whole of Central Government Offices from the side of Rodney Street, from the side of the Hong Kong Academy ‘Centre’ (sic) of Performing Arts. We demand --.....Let us fill up Admiralty and Wan Chai together....**” (Emphasis added)¹⁸⁹*

620. At Pg. 1545-1546, D7 was asking the people who were not at Tim Mei Avenue to join the movement by filling up Wanchai and Admiralty. More will be said about the intended incitees of this incitement in the later part of the discussion.

621. In my judgment, the above statement of D7 amounted to an incitement to fill up Admiralty and Wanchai.

622. As I mentioned before, the locations mentioned by D7 in the said address, e.g. Admiralty Centre, the Central Government Offices,

¹⁸⁹ Exhibit P69, pages 1545-1546

Rodney Street, the Academy for Performing Arts are all located in the neighbourhood of Tim Mei Avenue.

623. Later in the same afternoon, when D7 was on the main stage at Tim Mei Avenue, he spoke in the presence of D5 (on stage) and D3 (below stage) and said:-

“We are here to call for more people to come out to over-cram Admiralty (and) to over-cram Wan Chai with us. (Let’s) carry on with the Occupy (movement).” (Emphasis added)¹⁹⁰

624. At Pg. 1594, D7 was asking more people to come out to over-cram Admiralty and Wanchai with the protestors already at Tim Mei Avenue. More will be said about the intended incitees in the above incitement.

625. In my judgment, the above statement of D7 in Exhibit P74 at Pg. 1594 amounted to an incitement to overcram the public places and roads in Admiralty and Wanchai in the neighbourhood of Tim Mei Avenue. It was not an incitement to incite the people at Tim Mei Avenue to incite other persons join the venue.

626. Later in the same afternoon, when D7 was on the main stage at Tim Mei Avenue, he spoke in the presence of D2 (on stage) and said:-

*“We are here to appeal to our friends who have not yet come to join us, come quickly to over-cram **Admiralty and Wan Chai**, and to occupy this Hong Kong that belongs to us.”* (Emphasis added)¹⁹¹

¹⁹⁰ Exhibit P74, page 1594

¹⁹¹ Exhibit P74, page 1598

627. In Exhibit P74 at Pg. 1598, D7 was appealing to the people who had not yet join the venue at Tim Mei Avenue to come to over-cram Admiralty and Wanchai. More will be said about the intended incitees in the above incitement.

628. In my judgment, the above statement of D7 in Exhibit P74 at Pg. 1598 amounted to an incitement to overcram the public places and roads in Admiralty and Wanchai in the neighbourhood of Tim Mei Avenue. It was not an incitement to incite the people at Tim Mei Avenue to incite other persons join the venue.

629. As I have explained in the earlier part of the judgment, the above incitements, i.e. the incitements in Exhibits P69 and P74¹⁹² must be understood in the context of the fact that they were made by D7 at Tim Mei Avenue on 27th and 28th September 2014 during a continuous gathering at Tim Mei Avenue. When the incitements were made, there were already many participants at the scene. The districts/locations that the relevant defendant(s) asked to be over-crammed or filled up must be understood in context. The defendants were then participating in a public gathering at Tim Mei Avenue. When a defendant referred to over-cramming or filling up of Admiralty/Central/Wanchai, he or she must be referring those parts of Admiralty/Central/Wanchai which fall within the neighbourhood of Tim Mei Avenue.

¹⁹² Pg. 1594 and 1598

630. I have considered both the contents of what D7 said in Exhibits P69 and P74¹⁹³ and the relevant video clips. Whilst it is possible that the people at Tim Mei Avenue were amongst the targeted audience, i.e. the incitees, there is a real possibility that D7 was not addressing the people present at the venue but those who were watching the live broadcast. I am not sure that the people at Tim Mei Avenue were amongst the targeted audience of D7's incitements in Exhibits P69 and P74.¹⁹⁴ It should be remembered that at around 1:34 p.m. on 28th September 2014, when D7 spoke on the main stage, his targeted audience were the people watching the live broadcast (*"Here, we are appealing to all (our) friends, for those of (you) who are watching the live broadcast, if you want to come and support (us)..."*)¹⁹⁵

631. A finding on the targeted audience of the incitements in Exhibits P69 and P74¹⁹⁶ is important as the particulars of Charge 2 and 3 clearly allege that the incitements under complaint were made to *"persons present at Tim Mei Avenue"* and not any other persons, e.g. people who were watching the incitements on live broadcast.

632. In fairness to the Prosecution, of the many incitements made by D7 in all the speeches he made, many of them were clearly made to the people present at Tim Mei Avenue and heard by those within the audibility range of the public address system, but the incitements targeting those present at Tim Mei Avenue were either incitements to commit public nuisance **at Tim Mei Avenue** or incitements to incite others to commit

¹⁹³ Pg. 1594 and 1598

¹⁹⁴ Pg. 1594 and 1598

¹⁹⁵ Exhibit P67, pages 1529-1531

¹⁹⁶ Pg. 1594 and 1598

public nuisance **at Tim Mei Avenue**. Given my findings on the effect of the cordoning off Tim Mei Avenue on Charge 2 and Charge 3, the relevant defendants should be given the benefit of doubt for their incitements to commit public nuisance at Tim Mei Avenue or incitements to incite others to commit public nuisance at Tim Mei Avenue.

633. The locations referred to by D7 in the incitements he made in Exhibits P69 and P74¹⁹⁷ fit in with the particulars “*in the neighbourhood of Tim Mei Avenue*”. However, given my findings that D7 might be addressing, and hence inciting, those who were watching the live broadcast of the public assembly in progress, it cannot be proved beyond doubt that D7, by the incitements in Exhibits P69 and P74,¹⁹⁸ incited the “persons present at Tim Mei Avenue” as particularised in Charge 2.

634. The problem arising from the targeted audience cannot be cured by amending the particulars of offence by adding after “*persons present at Tim Mei Avenue*” the words “*and/or the persons watching the live broadcast of the public assembly in progress*” or words to that effect as there was no evidence that there were people watching the live broadcast when D7 made the incitements in Exhibits P69 and P74,¹⁹⁹ hence it cannot be proved that the incitements had reached the targeted incitees. It does not help the Prosecution case that the people at Tim Mei Avenue heard the incitements in Exhibits P69 and P74²⁰⁰ if it cannot be proved that they must be the people D7 intended to incite and to whom the incitements were made.

¹⁹⁷ Pg. 1594 and 1598

¹⁹⁸ Pg. 1594 and 1598

¹⁹⁹ Pg. 1594 and 1598

²⁰⁰ Pg. 1594 and 1598

635. For the above reasons, the incitements in Exhibits P69 and P74²⁰¹ are not covered by the particulars of Charge 2.

636. However, for the reasons given in the earlier part of the judgment under the heading “*The Incitements by D5 and D7 in Exhibit P74 (Pg. 1588-1589, 1591-1592 and 1593)*”, on the basis of the incitements made by D7 and the ones he made with D5 jointly in Exhibit P74 at Pg. 1588-1589, D7 had unlawfully incited persons at Tim Mei Avenue, Admiralty, to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue (Charge 2); on the basis of the incitement made by D5 in Exhibit P74²⁰² and the incitement by D6 in Exhibit P40²⁰³, by the application of the doctrine of joint enterprise, D7 had unlawfully incited persons present at Tim Mei Avenue to incite other persons to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue (Charge 3).

Joint Enterprise

637. I am aware that D2 and D3 had not asked the people at Tim Mei Avenue to over-cram public places or roads of Admiralty, Central or Wanchai at or in the neighbourhood of Tim Mei Avenue, nor did they ask the people at Tim Mei Avenue to incite others to do so, the issue is whether by the application of the joint enterprise rule, the relevant speeches made by D1 and D4 to D7 can be used against D2 and D3.

²⁰¹ Pg. 1594 and 1598

²⁰² Pg. 1589

²⁰³ Pg. 1244

638. The Prosecution relies on the joint enterprise rule. The reasonable evidence relied upon by the Prosecution for invoking the joint enterprise rule in Charge 2 and Charge 3 against D1 to D7 are the relevant speeches made by D1 to D7 respectively as captured on the videos during the gathering at Tim Mei Avenue on 27th and 28th September 2014. The Prosecution submits that, pursuant to the joint enterprise rule, the Prosecution seeks to use the speeches made by each of the seven defendants in the videos to prove the extent and degree of participation in the joint enterprise of the other defendant who did not make those speeches.²⁰⁴

639. At the request of counsel for D4 to D7, Mr Bruce SC for the Prosecution provided further written particulars for the direct liability and liability on the basis of joint enterprise for D4 to D7. Mr Bruce submits, in respect of joint liability on the basis of joint enterprise, submits that in various of the videos relied upon by the Prosecution, D4 to D7 were present with each other and all of the other defendants (although not all at the same time) when one or more of those defendants uttered words which the Prosecution contends were acts of incitement to persons to commit Charge 2 and Charge 3. The Prosecution contends that D4 to D7 assented to what was said in his/her presence and, in the circumstances, justifies the conclusion that D4 to D6 were either individually or collectively with other defendants. The Prosecution contends not the least basis for this is that the utterances attributed to the defendant under consideration reveal a clear resemblance to that said by other defendants in that locality and in those

²⁰⁴ Para. 19 of the Prosecution's Opening

circumstances provide a basis for the conclusion that the defendant under consideration was in a joint enterprise with those defendants.

640. As no request for further particulars was made by D1 to D3, the written particulars concerned only D4 to D7. I see no reason why the Prosecution's contention for liability on the basis of joint enterprise should be different for D1 to D3.

641. On 27th and 28th September 2014, D3 was not present when the other defendants made the incitements which amounted to an incitement to commit public nuisance within the terms of Charge 2.²⁰⁵

642. On 27th and 28th September 2014, D1 to D3 were not present when the other defendants made the incitements which amounted to an incitement to incite public nuisance within the terms of Charge 3.²⁰⁶

643. As the Prosecution only seeks to attribute liability to a defendant for words said in his/her presence by another defendant(s) which constitute words of incitement. There is no basis to attribute liability to D3 on the basis of joint enterprise for incitement to commit public nuisance (Charge 2) said by other defendants in his absence.

644. For the same reasons, there is no basis to attribute liability to D1, D2 and D3 on the basis of joint enterprise for incitement to incite public nuisance (Charge 3) said by other defendants in their absence.

²⁰⁵ Exhibits P20 and P74, Appendix I of the Prosecution's Closing

²⁰⁶ Exhibits P17, P40 and P74

645. I have explained why on the evidence before me, each of D1, D4, D5 and D7 was criminally liable for the incitement to commit public nuisance (Charge 2) they made without the need to resort to the doctrine of joint enterprise.

646. I have explained why on the evidence before me, each of D5, D6 and D7 was criminally liable for the incitement to incite public nuisance (Charge 3) they made without the need to resort to the doctrine of joint enterprise.

647. I apply the doctrine of joint enterprise to the facts proved in this case.

Joint Liability of D1, D2, D4 and D6 for the incitements in Exhibit P20 at Pg. 1107 and 1111 (Charge 2)

648. When D1 and D4 made the respective incitements in Exhibit P20 at Pg. 1107 and 1111, D2 and D6 were also present on the main stage at Tim Mei Avenue incitements in Exhibit P20 at Pg. 1107 and 1111.

649. It should be noted that from the evidence of D2, the incitement made by D1 in Exhibit P20 was clearly made after the Trio's discussion in the afternoon. D2 was present on the stage with D1 when the latter make the incitement in Exhibit P20, he did not take issue with what D1 had said in Exhibit P20 in any of his speeches afterwards. I am satisfied that the speech of D1 in Exhibit P20 reflected the common intention of the Trio and what the Trio had agreed in the discussion took place that afternoon,

i.e. the Occupy Central should start with the over-cramming of Admiralty, and then the over-cramming of Central.

650. D2 was present on the main stage with D1 and D6 when D4 made the incitement in Exhibit P20. The incitements made by D4 in Exhibit P20 at Pg. 1107 and 1111 were similar and consistent with the incitement made by D1 in Exhibit P20 at Pg. 1107.

651. After the respective incitements made by D1 and D4 in Exhibit P20, D2 was present on the main stage when D1 announcement the launch of the Occupy Central movement at around 1:36 a.m. on 28th September 2014.

652. The incitement by D4 at Pg. 1107 was made immediately after the incitement made by D1 at Pg. 1107, the incitements made by D1 and D4 were similar in content.

653. The incitements made by D1 and D4 in Exhibit P20 were similar to the pleas made by D6 in Exhibit P17 at Pg. 1102 and P40 at Pg. 1244-1245.

654. I am sure that D1, D2, D4 and D6 had a common intention to incite the persons present to over-cram the public roads in the neighbourhood of Tim Mei Avenue. Each of them had the requisite mens rea required for the offence of incitement to commit public nuisance in terms of the particulars pleaded in Charge 2. By the application of the doctrine of joint enterprise, I find that D1, D2, D4 and D6 had acted in a

joint enterprise with each other in making the incitements in Exhibit P20 at Pg. 1107 and 1111 (Charge 2).

Joint Liability of D5 and D7 for the incitements in Exhibit P74 at Pg. 1588-1589 (Charge 2 and Charge 3)

655. The respective utterances which amounted to an incitement to incite persons present at Tim Mei Avenue to cause a public nuisance in the neighbourhood of Tim Mei Avenue (Charge 2) were made by D5 and D7 together when they were on the main stage at Tim Mei Avenue. It is clear from the utterances in Exhibit P74 at Pg. 1588-1589 that what was said by D5 or D7 reveals a clear resemblance to those said by the other defendant, i.e. D5 and D7 were in effect echoing each other. In my judgment, D5 and D7 had acted in a joint enterprise with each other in making the incitements alleged in Charge 2.

656. The utterances by D5 at Pg. 1589 which amounted to an incitement to the persons present at Tim Mei Avenue to incite others to commit public nuisance (Charge 3) was made in the presence of D7, both D5 and D7 were addressing the people at Tim Mei Avenue at the time. In my judgment, what they said in Exhibit P74 shows that they shared a common purpose, i.e. the over-cramming of the roads in the neighbourhood of Tim Mei Avenue. The respective utterances made by D5 and D7 in the foregoing analysis show that they were in effect echoing each other. As D5 called on the persons at Tim Mei Avenue to ask more friends to join the movement in progress and over-cram Admiralty, Wanchai and Central, D7 asked the people present at Tim Mei Avenue to cheer on the protestors who were prepared to dash out to occupy the roads.

In my judgment, D5 and D7 had acted in a joint enterprise with each other in making the incitement alleged in Charge 3.

657. I am sure that D5 and D7 had a common intention to incite the persons present to incite other people to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue. Each of them had the requisite mens rea required for the offence of incitement to incite public nuisance in terms of the particulars pleaded in Charge 3.

658. By the doctrine of joint enterprise, I find that D5 and D7 had acted in a joint enterprise with each other in making the incitements in Exhibit P74 at Pg. 1588-1589 (Charge 2 and Charge 3).

Joint Liability of D4, D6 and D7 for the incitements in Exhibit P40 at Pg. 1244-1245

659. The utterances made by D6 at about 11:24 pm in the evening on 27th September 2014 amounted to an incitement to incite the persons present at Tim Mei Avenue to incite others to commit public nuisance.²⁰⁷

660. D4 and D7 were present on the main stage when D6 made the incitement in Exhibit P40. What D6 said in Exhibit P40 bears a strong resemblance to what D4 and D7 said in their own speeches, i.e. D4's plea to over-cram Admiralty and Central in Exhibit P20²⁰⁸ and D7's plea to occupy the roads in Exhibit P74²⁰⁹. What D4 and D7 respectively said in

²⁰⁷ Exhibit P40 at pages 1244-1245

²⁰⁸ Pg. 1107 and 1111

²⁰⁹ Pg. 1588-1589

Exhibits P20 and P74 show that they shared a common intention to incite the persons present at Tim Mei Avenue to cause a public nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue. Each of D4 and D7 had the requisite mens rea required for the offence of incitement to commit public nuisance in terms of the particulars pleaded in Charge 2. The other speeches made by D4, D6 and D7 also bear strong resemblances with each other, e.g. they shared the common political objectives, they each called for more supporters to join the occupy movement in progress at Tim Mei Avenue and each of them intended the occupy movement in progress at Tim Mei Avenue to be for an indefinite period. When it comes to the words said by D6 which amounted to an incitement to incite public nuisance²¹⁰, I am sure that D4, D6 and D7 had acted in a joint enterprise with each other in making the incitement in Exhibit P40 at Pg. 1244-1245.

661. For the reasons given, by the application of the doctrine of joint enterprise, D4, D6 and D7 had unlawfully incited persons at Tim Mei Avenue, Admiralty to incite other persons to cause a nuisance to the public by unlawfully obstructing public places and roads in the neighbourhood of Tim Mei Avenue (Charge 3).

Conclusions Reached on Charge 2 and Charge 3

662. In my judgment, there is ample evidence to prove all the elements of Charge 2 beyond reasonable doubt against D1, D4, D5 and D7 on the basis of the utterances made by each of them individually; there is ample evidence to prove Charge 2 beyond reasonable doubt against D1,

²¹⁰ Exhibit P40 at Pg. 1244-1245

D2, D4, D5, D6 and D7 by the application of the doctrine of joint enterprise.

663. For the reasons given, I find D1, D2, D4, D5, D6 and D7 guilty of Charge 2.

664. I find D3 not guilty of Charge 2.

665. In my judgment, there is ample evidence to prove all the elements of Charge 3 beyond reasonable doubt against D5, D6 and D7 on the basis of the utterances made by each of them individually; there is ample evidence to prove Charge 3 beyond reasonable doubt against D4, D5, D6 and D7 by the application of the doctrine of joint enterprise.

666. For the reasons given, I find D4, D5, D6 and D7 guilty of Charge 3.

667. I find D1, D2 and D3 not guilty of Charge 3.

Charge 4: Incitement to Commit Public Nuisance and Charge 5: Incitement to Incite Public Nuisance (against D8)

668. Charge 4 and Charge 5 concern words said by D8 at Fenwick Pier Street, Admiralty on 28th September 2014.

669. The words that were said by D8 and relied upon the Prosecution to prove the charges were captured on videos and produced as evidence.

670. It should be noted that in Admitted Facts III reached by the Prosecution and D8, video clips which captured speeches made by other defendants at other locations on 27th and 28th September 2014 were also produced. Those speeches are not the subject matters of complaint of Charge 4 and Charge 5, they were produced to show the background against which the alleged incitements were made by D8 at Fenwick Pier Street on 28th September 2014.

671. At around 3:42 p.m. on 28th September 2014, D8 addressed the people gathering at Fenwick Pier Street. He said amongst other things:-

*“D8: Bail is still not granted. Actually, do you think it is fair?....Protect the students. **Everyone goes to the carriageway, goes to the carriageway. Go to the carriageway. Go to the carriageway..... Counter-besiege. Go to the carriageway. Counter-besiege.** Well, we – **why are we at this place today(?)** Why are we here at Lung King Street, Fenwick Pier (?) We have to sit here, this is because.....Well, **as he wants to clear our – no, he has to clear the students, then (they) definitely have to pass by our place here first. Therefore, if we want to protect the people inside, first of all, he has to clear our place here.** Therefore, in order to protect the people inside, we – we, at the previous position, standing here, standing under the footbridge is not able to protect the people inside, right? Well, as we, at this place. We defend here, well, we –alright, (we) all can move a little forward. **More people move a bit forward....** No need to panic now, I am here, (you) all hurry up and ask more people to come over, please. Everybody, being here, being here, right.....Well, remember we are here, we now – now don’t act on our own initiative to have -- conflict with these frontline police officers, we don’t need to do so, sit down here—we have already defended (it), understand or not? We don’t need to come into conflict with him, (we) just have to defend here.....Thus, now, **everybody, please send messages to tell your friends (you) are here. Take photos to tell your friends that we are here, ask him/her (to go to) Exit F, go past this Harcourt Park, and then go past Police Headquarters, walk across the footbridge our place here, or come here by making a detour around (the Hong Kong Academy for) Performing Arts, we are at this place, okay? Tell your friends, okay? Ask more people to come, okay?** Well, the people on the*

pavement....I hope (we) all could come out together, could come out together. Originally, as we said today, (those) who came out, well, some of (them) might simply want to have an assembly, but most of us here, once (we) all, one – as (we) have out here, we are ready for Civil disobedience, right. Right? Civil disobedience.... Without fear. Civil disobedience..... Without fear. Well, on the night before last, Therefore, well, friends, (I) hope if you support this campaign, support Hong Kong, we need to have an equal political right, civil nomination. We have to abolish the functional constituencies. We have to carry out civil disobedience. If, like what we did in the past, everything's over after the rally, do you want that? In fact we haven't make any improvement, change. Today we hope everybody put one more step, hope everybody go onto the road. Of course, doing so, for sure, we would cause obstruction to a certain extent. For that, (I) hope the passengers on board Route 18 bus today would – understand us. Well, now the police are putting more reinforcement, but we need not feel nervous. At his place, what's most important for us is to stay calm, be restraint. We need to be more courageous than her, but not be agitated. Can you do that? Well, as you said, you can. You promise. Therefore if she comes later, she comes to remove people – well, please move a bit forward, move a bit forward, to confront (them),.....Er, people are sitting all over on the whole Performing Arts Avenue. Well, I hope you may come out, come out to the road, to the road. Shall we give them some encouragement, shan't we? (I) hope you come out. Well, if you don't come out, never mind. If you don't come out, never mind. Get some resources to us, okay? Go and get some resources, or ask others to come over, okay? Go over to help them. Ask more people under the footbridge to come over, ask more people to come over, okay? Okay? Or help us bring some resources, bring some water. We don't have sufficient resources here,With more friends coming out, more friends coming out, this place can be safeguarded. Well, if later she pushes us, she pushes us, we sit still, sit still, sit still, with our arms in arms. Lie down here. There's no other way. We let her carry (us away)..... ”
(Emphasis added)²¹¹

672. At around 3:56 p.m. on 28th September 2014, D8 addressed the people gathering at Fenwick Pier Street. He said amongst other things:-

²¹¹ Exhibit P86, pages 1661-1667

“D8: Would (you) people stay away from him/her? I believe that it still takes some time for the ambulance to arrive. If, when the clearance (operation) is carried out, (you) all (should) sit properly arm in arm instead of holding each other’s hands in this way……We (should be) arm in arm by holding our – that’s, er, this part, okay, can be easily held (and) linked, okay, okay?……Hence, well, we will not walk ourselves. Just let him/her move (us away). They, in a group of four, move away one of us……Well, we do not need to make resistance….Well, hence, (I) hope that we all hold fast to our posts…The greater number of people sitting here, the more difficult for them to carry out clearance…”
(Emphasis added)²¹²

673. At around 4:03 p.m. on 28th September 2014, D8 addressed the people gathering at Fenwick Pier Street. He said amongst other things:-

“D8: ……..However, we guard this place. More people go to the carriageways, let’s applaud. Go to the carriageways. Go to the carriageways. Go to the carriageways. Civil disobedience. No fear. Orr, bring those for giving to the cops. Does anyone want to send them the gifts? Well, someone does. Let me tell (you) what to do. Well, you people make the decision yourself. I am not interested. Well, everybody, I heard that Harcourt Road was blocked by us also. Therefore, you must guard here. Well, we don’t go everywhere. Let’s guard here. Let’s have more people sitting here (and) see how (they) clear out us. If he/she further clear out (us), (if) he/she further besiege (us), I besiege him/her again, counter-besiege, okay? Well, later on I may be arrested (and) taken away. Well, later on I may be arrested and taken away, ….it’s not surprising, because he/she said I would incite you people to do such-and-such. However I think that you were not incited by me. You people have your own will. Right?……Therefore, can everybody hold fast to the post? Well, you promise me. Hold fast to the post. Hold fast to the post. Remain restraint. However, we (remain) restraint while we stand firm, right? Very firm. Unswerving. Civil disobedience. Unswerving. Civil disobedience. No fear. Unswerving. Civil disobedience. No fear. I want civil rights. Abolish the functional constituencies.

²¹² Exhibit P86, pages 1668-1672

Overthrow the (‘)Committee of Privilege(‘). Overthrow the (‘)Committee of Privilege(‘). LEUNG Chun-ying steps down.”

(Emphasis added)²¹³

674. At around 4:07 p.m. on 28th September 2014, D8 addressed the people gathering at Fenwick Pier Street. He said amongst other things:-

*“D8: Well, this is our demand, that is, civil disobedience without fear, (we) are not afraid of you at all, right?..... We are – **I now briefly talk about some basic procedures**, alright? The basic procedures, well, I hope everyone listen carefully, if you are (participating) in civil disobedience, alright? Well, if he/she wants to clear out (site) later, we defend here. **When (he/she) comes to clear our (site), we link arms, lie down with arms interlinked. The closer, the better. More people sitting close together will be better, okay? Brunch together, well, well, sit here, link arms and lie down.** No need to bump against him/her because we are unable to bump against (them), okay? We just sit here to defend, right? Well, then while we are defending, he/she will come to lift us slowly.Well, we are here, **our duty is to stall his/her clearance (operation).** We will try our best to increase -- increase our cost. You lift (us), let’s see how many you can lift. **We, here – you can lift two hundred (people) here, (but) there are still a thousand (people) inside, right? Is that right? Alright, let’s see how you lift (the people).** Y – You come quickly to lift us.....Well, everybody, remember we don’t listen to them. We relax our limbs..... We just lie down for them to lift (us)... If you are large in size, you alone will be lifted by six to eight persons....Listen, I heard that...we got a piece of information....Gloucester Road was also blocked.....er, people who are not sitting, I hope (you) all can do one thing for me.....Okay, **the present incumbent Convener YEUNG Ching-yin. Well, he --, er, --, er, bring everyone to take the mill barriers. We will make some, make some barricades, alright? We have to help him.** Well, we sit here and don’t move, don’t move. We sit here, well, and wait for him to speak. YEUNG Ching-yin:
D8: Alright, let’s thank YEUNG Ching-yin,,,,,,,,, People help him – people follow him to help in bringing the mill*

²¹³ Exhibit P86, pages 1673-1675

barriers here,Everyone takes a rest, well, everyone takes a rest, (everyone) really needs to take a rest, because if (you) don't get some rest now, it's really toilsome. As we are having a long-term battle, so everyone really needs to take a rest now..."
(Emphasis added)²¹⁴

675. I have considered the contents of the aforementioned speeches made by D8 and viewed the video clips. I am satisfied that the intended audience of D8 in all the speeches he made at Fenwick Pier Street were the persons present at Fenwick Pier Street. D8 used a loud speaker when he addressed the people at Fenwick Pier Street, I am sure that the speeches of D8 were heard by those within the audibility range of the loud speaker.

676. In Exhibit P86, amongst other things, D8 asked the persons present at Fenwick Pier Street to: (i) occupy the carriageways of Fenwick Pier Street; and (ii) to ask other people to go to Fenwick Pier Street to occupy the carriageway. I am sure that the impugned words in Exhibit P86 were said for the purpose of rousing, stimulating, urging and stirring up the persons present to do what they were asked to do. Suggestions and proposals were clearly made to the persons present: (i) to occupy the carriageway of Fenwick Pier Street; and (ii) to ask other persons to go to Fenwick Pier Street to do the same. In my judgment, the impugned words said by D8 in Exhibit P86 amounted to incitement.

677. In his speeches at Pg. 1661 to 1667, 1668 to 1672, 1673 to 1675 and 1676 to 1682, D8 asked the persons present at Fenwick Pier Street to go to the carriageway to counter-besiege the police. He made it

²¹⁴ Exhibit P86, pages 1676-1685

clear that the purpose was to stop the police from clearing the students at Tim Mei Avenue.

678. In my judgment, what D8 said at Pg. 1661 to 1667 amounted to an incitement made to the persons present at Fenwick Pier Street to occupy the carriageway of Fenwick Pier Street.

679. In D8's speech at Pg. 1661 to 1667, D8 also asked the persons present at Fenwick Pier Street to ask their friends to go to Fenwick Pier Street. D8 made it clear that he expected most of the people who came out would take part in civil disobedience. In my judgment, there were two types of participants anticipated by D8 in his speech, firstly those who would take part in a public assembly without civil disobedience, and secondly, those who would take part in civil disobedience. D8 made it clear that he expected most of the participants would take part in civil disobedience. Putting what D8 said in its proper context, I am sure what he meant by taking part in civil disobedience was that the participants go to the carriageway to counter-besiege the Police. In fact, D8 made it clear in his speech at Pg. 1673 to 1675 that the protestors should sit on the carriageway.

680. I am satisfied what D8 said in Exhibit P86 at Pg. 1661 to 1667 amounted to an incitement to the persons present at Fenwick Pier Street: (i) to occupy the carriageway of Fenwick Pier Street; and (ii) to incite other persons to go to Fenwick Pier Street to do the same.

681. D8 and his targeted incitees were both present at Fenwick Pier Street at the time, I am sure that they knew what effect of the obstruction

would have on the traffic on Fenwick Pier Street if the carriageway was fully occupied and obstructed. In fact, in his speech at Pg. 1661 to 1667, D8 made it clear to the persons present that traffic would be obstructed and bus service on Fenwick Pier Street, i.e. route number 18 would be affected. I am sure D8 understood and knew what the effect of the obstruction of the carriageway of Fenwick Pier Street would have on the traffic, and the persons present at Fenwick Pier Street were also aware of the same.

682. It is clear that the purpose of the occupation of the pavement and carriageway of Fenwick Pier Street was to counter-besiege the Police so that the Occupy Central movement in progress at Tim Mei Avenue could last indefinitely. That being the case, it must also be the intention of D8 that the carriageway of Fenwick Pier Street would be occupied as long as the Occupy Central movement at Tim Mei Avenue was in progress. In order words, the occupation of the carriageway of Fenwick Pier Street would also be for an indefinite period.

683. Given the instructions given by D8 to the persons present as to how they should prolong the occupation in the event of a clearance action, i.e. the protestors should relax their bodies, brunch together and link their arms, it would be very difficult for the police to lift all the protestors away within a short period of time. As D8 said defiantly:-

“...let’s see how many you can lift. We, here – you can lift two hundred (people) here, (but) there are still a thousand (people) inside, right? Is that right? Alright, let’s see how you lift (the people)..”

D8 also manifested his intention that the occupation of the carriageway would be for an indefinite period when he asked the people present to make

some barricades as defence work. By what D8 said to the people present, D8 had made known his intention that he wanted the carriageway of Fenwick Pier Street to be occupied for an indefinite period of time, and by what he said, he had made his intention known to his audience.

684. I accept the protest that took place at Fenwick Pier Street was a peaceful one.

685. The incitements made by D8 in Exhibit P86 were made at a time when he knew Harcourt Road was blocked by protestors and Fenwick Pier Street was filled up with protestors. Fenwick Pier Street is a major thoroughfare in Wanchai and Admiralty.

686. The public assembly at Fenwick Pier Street on 28th September 2014 took place without any notification made to the Police, hence no measures could be taken in advance to militate against the obstruction and inconvenience that would be caused by the obstruction of the carriageway.

687. I am aware that the purpose of the occupation was to protect the Occupy Central movement in progress at Tim Mei Avenue. D8 called for the occupation of the pavements and carriageway to counter-besiege the Police who were cordoning off the venue at Tim Mei Avenue. In my judgment, no matter how effective the tactic of counter-besieging the Police was in safeguarding the Occupy Central movement at Tim Mei Avenue, the tactic of counter-besieging the Police would inevitably lead to obstruction of more public places and roads. As protestors counter-besieged the Police who were besieging the venue at Tim Mei Avenue,

Harcourt Road and Fenwick Pier Street would be occupied by protestors, hence more obstruction and inconvenience would be caused to the public.

688. D8 also made it clear in his speech his objectives were:

“I want civil rights. Abolish the functional constituencies. Overthrow the (‘)Committee of Privilege(‘). Overthrow the (‘)Committee of Privilege(‘). LEUNG Chun-ying steps down.”

689. I have taken into consideration all the circumstances leading to the making of the incitements by D8 in Exhibit P86. In my judgment, the scale of the occupation D8 called for was extensive. Fenwick Pier Street was an important thoroughfare linking Wanchai and Admiralty. The intended occupation was for an indefinite period.

690. I have borne in mind the protection given by the Basic Law to the citizens to participate in peaceful demonstration and the demonstration at Fenwick Pier Street on 28th September 2014 was a peaceful one. I have borne in mind the purpose of the demonstration at Fenwick Pier Street and Tim Mei Avenue.

691. Mr. Lok SC submitted that PW5 Tong Wai Tung “gave evidence that the fire engine concerned could still reach the destination by detouring. The delay caused is a few minutes. Inference could be drawn that the traffic inconvenience caused by the people’s gathering at Fenwick Pier Street may not be very substantial”.²¹⁵

²¹⁵ Para. 24 of D8’s Closing Submission

692. It should be noted that PW5 also gave evidence that with the detour the fire engine had taken, when the fire engine reached Queensway westbound outside the High Court, it had to make a U-turn at Lippo Centre against the traffic in order to reach its destination at Admiralty Centre, in other words, the fire engine had to travel on a carriageway exactly opposite to the ordinary carriageway for one to travel on. The length of delay must be understood in the light of the fact that the fire engine had to make a U-turn against the traffic. In my judgment, the severity of the obstruction and inconvenience caused to the public cannot be reflected by the delay occasioned to PW5's fire engine.

693. Mr. Lok submits that "it is not the prosecution case and there is no evidence that when people gathered at the carriageway of Fenwick Pier Street, the district in the vicinity would be blocked".²¹⁶ In my judgment, given the severity and the intended duration of the obstruction caused by the occupation of the carriageway of Fenwick Pier Street and other factors identified in the judgment of *Yeung May Wan*, there is ample evidence to support a finding that the traffic inconvenience caused by the blockage of the carriageway was substantial. In my judgment, to cause substantial traffic inconvenience, the district in the vicinity did not have to be blocked.

694. Mr. Lok SC drew my attention to D8's reaction to the appearance of PW5's fire engine in Exhibit P86 at Pg. 1685 to 1686 and submitted that D8's speech upon seeing the fire engine shows that he never told anyone to do anything to block fire engines from passing through Fenwick Pier Street. Instead D8 asked the pickets/marshals to understand

²¹⁶ Para. 24 of D8's Closing Submissions

the matter and he warned people not to force their way over to the fire engine. Mr. Lok SC submitted that what D8 did was consistent with what he had previously told the people, i.e. they should only disallow police cars to go through and they must let ambulances to go through.²¹⁷

695. In my judgment, though D8 did not ask the crowd to block the passage of PW5's fire engine, D8 still asked the marshals to understand and then tell him what the matter was at a time when the siren of the fire engine was on. He insisted to know the reason for the fire engine's appearance. Eventually, PW5's fire engine left to take a detour. What D8 asked the crowd and the marshals to do, i.e. that enquiry be made and D8 be told the reason for the fire engine's appearance, would take time to complete, it would be wholly unreasonable for D8 to require the firemen on PW5's fire engine on call to a 'Multiple Casualties Incident' with its siren on to explain to the crowd/marshals why they had to travel pass Fenwick Pier Street and seek permission from them to do so. D8 and the crowd might not know PW5 and his colleagues were on call to a 'Multiple Casualties Incident', but they certainly knew that the fact that the siren was on signified the urgency of the matter. I am sure D8 was mature enough to know, so were the people present at Fenwick Pier Street, as the siren of the fire engine was on, every minute counted for the firemen on board the fire engine and the people awaiting the arrival of the fire engine at Admiralty Centre.

696. In my judgment, what D8 incited the people to do at Fenwick Pier Street was not a reasonable use of the carriageway of Fenwick Pier Street. The obstruction to the traffic and inconvenience caused to the

²¹⁷ Para. 26 of D8's Closing Submissions

public would be so serious that would exceed the bounds of reasonableness and the protection given by the Basic Law to the right to peaceful demonstration. I find the obstruction that would be caused was not warranted by law.

697. From the computer certificates produced, I am satisfied that the obstruction of the carriageway of Fenwick Pier Street would result in the suffering of common injury by common members of the public.

698. From the evidence, I am satisfied that when D8 repeated urged the people at Fenwick Pier Street to occupy the carriageway of Fenwick Pier Street in Exhibit P68, he intended that the incitees, i.e. the persons present at Fenwick Pier Street who heard the incitements, would do the act incited by him, that is to say, to cause obstruction to public places and the carriageway of Fenwick Pier Street, with the mens rea of public nuisance, i.e. the incitees knew, or ought to have known (because of the means of knowledge were available to them) the consequence of the obstruction of the carriageway of Fenwick Pier Street.

699. In this case, the incitees were present at Fenwick Pier Street when the incitements were made, they must be aware of what was going on at the time of the incitements and what the effect of an indefinite obstruction of the carriageway of Fenwick Pier Street would have on the traffic if they acted as D8 incited.

700. In my judgment, the utterances made by D8 in Exhibit P86 urging the people present to occupy and sit on the carriageway of Fenwick Pier Street amounted to an unlawful incitement to cause a public nuisance

to the public by unlawfully obstructed the carriageway of Fenwick Pier Street.

701. From the evidence, I am satisfied that when D8 urged the people at Fenwick Pier Street to ask their friends to come to Fenwick Pier Street and occupy the carriageway of it, he intended that the incitees, i.e. the persons present at Fenwick Pier Street who heard the incitement, would do an act which would involve the commission of the offence of incitement, i.e. inciting a public nuisance to the public by unlawfully obstructing the carriageway of Fenwick Pier Street, i.e. the actus reus for the offence of “incitement to incite public nuisance”.

702. I am sure that when D8 made the above incitement, he intended or believed that the incitees (the persons present at Fenwick Pier Street) would incite other persons (the friends of the incitees) to do the act incited, i.e. to cause a nuisance to the public by unlawfully obstructing the carriageway of Fenwick Pier Street and that the incitees (the persons present at Fenwick Pier Street) would do the act with the mens rea required for incitement, i.e. in this case, an intention to incite their friends.

703. In my judgment, on the basis of the incitement made by D8 in Exhibit P86, D8 had unlawfully incited the persons at Fenwick Pier Street to incite other persons by unlawfully obstructing the carriageway of Fenwick Pier Street.

Conclusions on Charge 4 and Charge 5

704. I find all the elements of Charge 4 and Charge 5 are proved against D8 beyond reasonable doubt.

705. I find D8 guilty of Charge 4 and Charge 5.

Charge 6: Incitement to Commit Public Nuisance (against D9)

706. Charge 6 concerns words said by D9 at Harcourt Road near Tim Mei Avenue on 28th September 2014.

707. The words that were said by D9 and relied upon by the Prosecution to prove the charge were captured on videos and produced as evidence.

708. It should be noted that in Admitted Facts IV reached by the Prosecution and D9, video clips which captured speeches made by other defendants at other locations on 27th and 28th September 2014 were also produced.²¹⁸ Those speeches do not form the subject matters of complaint of Charge 4 and Charge 5, they were produced to show the background against which the alleged incitements were made by D9 at Harcourt Road on 28th September 2014.

709. It should be noted that though D9 appeared in Exhibit P71 and P72, he was then at Fenwick Pier Street, not Harcourt Road, hence D9 was

²¹⁸ Para. 4 to 27 of Admitted Facts IV

not addressing the people at Harcourt Road when he spoke at around 3:09 p.m. at Fenwick Pier Street.²¹⁹

710. The alleged incitements which form the subject matters of Charge 6 are contained in the speeches made by D9 at Harcourt Road in the afternoon on 28th September 2014.

711. At around 3:13 p.m. on 28th September 2014, D9 addressed the people gathering at Harcourt Road, he said:-

*“D9: Was (it) received at that position? The people, the members of the public on that side, the right-hand side, please move backwards for 50 steps as far as possible to occupy the space at the back. This is because (it) starts to be cramped, many people are coming. Good! **All (people) here, everybody moves backwards slowly and orderly, occupy the entire carriageway and the lawn at the back.** Reserve an open area here for the members of the public who are coming. Some (people) have started coming [indistinct] (You) all can take (your) time to come (here), don’t hurry. Move backwards slowly, move to the back, thank you very much.”*
(Emphasis added)²²⁰

712. A few minutes later, at around 3:15 p.m., D9 addressed the people gathering at Harcourt Road and said:-

*“D9: Well! (We) continue to appeal to the people on the right-hand side here. (You) can move backward as far as possible because we still see many members of the public coming. We want to gather more people before we decide the next steps, okay(?) Everybody, (please) give a helping hand, move backward (from) here as far as possible. Everybody, thank you very much.”*²²¹

²¹⁹ Exhibit P71, Pg. 1557 to 1558

²²⁰ Exhibit P71, page 1559

²²¹ Exhibit P71, page 1560

713. At around 3:32 p.m., D9 addressed the people gathering at Harcourt Road and said:-

“D9: Well! Here, an access is maintained here for our people to walk over there! As far as possible, avoid moving backward. Everybody, thank you very much!”²²²

714. At around 3:35 p.m., D9 addressed the people gathering at Harcourt Road and said:-

“D9: The headquarters of the organizer has notified us that the police have cordoned off all the entrance and exit passages including Admiralty Centre and the ...er...exit of Liberation Army (Building). However, [indistinct] part of the crowds of people have sat on Harcourt Road to block the road leading to Central. Anyway, firstly [indistinct] now the (traffic) on (the section) of Harcourt Road from Sai Wan towards Central (and) towards Admiralty has probably slowed down or even at a standstill. Secondly, the crowds in Admiralty Centre haven’t moved. Some people amongst them attempted to jump from a bridge. (They) didn’t jump then. Well, fire engines have placed four to five air mattresses (there). The (traffic) going from east to west on Harcourt Road was also closed. Long live the power of people. Long live the power of people, long live the power of people, long live the power of people, Everyone keeps it up.” (Emphasis added)²²³

715. At around 3:39 p.m., D9 addressed the people gathering at Harcourt Road and said:-

“D9: Well, (we) have just received a phone call from LAI Chee-ying. Ai, he seldom calls us. LAI Chee-ying said there were more than ten thousand people in the LegCo, they [indistinct] sacrificed (themselves), and the morale amongst them was very high. (I) said I would not get inside, I would live and die together with these crowds, Okay? [Indistinct] (We have to) think of some strategies. In a word, (we) have to (persist in our)

²²² Exhibit P71, page 1561

²²³ Exhibit P71, page 1562

protest until the end, everybody hangs on.”
(Emphasis added)²²⁴

716. At around 3:46 p.m., D9 addressed the people gathering at Harcourt Road and said:-

*“D9: Listen, I remind (you), LEUNG Chun-ying just held a press conference on that side at three o’clock. However, these things were said again. Now, in the next stage, about three thousand and two (hundred) people are assigned to nominate the Chief Executive of Hong Kong Special Administrative Region. Do (you) agree? (We) don’t listen to (him) saying these things, that is, saying this rubbish again. [Indistinct] LEUNG Chun-ying, **all besiege the entrance on Harcourt Road**, wait for ‘Ho Ming’ (transliteration) to come back, then we will take action! Okay? Everybody waits for a moment!”*
(Emphasis added)²²⁵

717. At around 3:51 p.m., D9 addressed the people gathering at Harcourt Road and said:-

*“Listen, everybody, can (you) hear me? Listen, we have a suggested action for everybody’s consideration, everybody sees that there are crowds of people standing by the side of the flower bed on Harcourt Road at the back. Well, er, as what we have said, at Admiralty Station, Harcourt Road, there are crowds sitting on a road suspending the traffic. **I have a very bold suggestion – listen, our people in the front now start walking to the flower bed outside, and then sit on the road to carry out civil disobedience, Okay? Everybody follows me**, well, I have just said, I have just said, I have just said that **those (people) who don’t prepare for civil disobedience, don’t need to follow my action.** You can continue to sit in the front road, okay? **Those (people) who don’t prepare for being arrested by the police, please come forward first, because you can withstand them here.** Our people at the back go to the back, okay? Those crowds stand up (here) first. Those crowds, who don’t move, stand up first.”* (Emphasis added)²²⁶

²²⁴ Exhibit P71, page 1563

²²⁵ Exhibit P71, page 1564

²²⁶ Exhibit P71, page 1565-1566

718. At around 3:57 p.m., D9 addressed the people gathering at Harcourt Road and said:-

“D9: All people come over here! Come over! Come over!..... [Indistinct]Come over! Come over! I haven’t {Indistinct}..... Come over! All come over! Al come over! Come over! Come over!”²²⁷

719. At around 3:59 p.m., D9 addressed the people gathering at Harcourt Road. He said:-

“D9: All come over, come over..... All come over, all come over. All come over, all come over here. All come over, all come over. Come over, all come over, all come over...”

D9 also asked everybody present to support the students.²²⁸

720. At around 3:59 p.m., D9 addressed the people gathering at Harcourt Road and said:-

*“D9: **People opposite to Admiralty Centre, can you hear (me)? People opposite to Admiralty Centre, (if) you can hear (me), leading by your leader, come over together, okay? Come over, come over, come over, come over.....Our crowd can walk over there to join them, okay? The crowd on our side, walk across the road slowly, join (the people) on the opposite side, okay? Come over, come over, come over, come over. Those opposite to Admiralty (Centre), come over here slowly. Let’s meet together and have an assembly, okay? We have an assembly on – on the road, assembly on the road. The crowd on the opposite side of Admiralty (Centre), walk over here, walk over here slowly. Our crowd here, walk over there slowly, to join them, okay?”** (Emphasis added)²²⁹*

²²⁷ Exhibit P79, page 1621

²²⁸ Exhibit P79, page 1622-1623

²²⁹ Exhibit P79, page 1624-1625

721. At around 4:05 p.m., D9 chanted the slogan “*Support the students*” with the people at Harcourt Road and said:-

“D9: People opposite to Admiralty Centre, can you hear?..... as led by your leader, (let’s) come over together, okay? Come over, come over,.....come over.” (Emphasis added)²³⁰

722. At around 4:09 p.m., D9 addressed the people gathering at Harcourt Road and said:-

“D9: Everybody at CGO, the road is open! It’s us, the crowd! It’s us, members of public (who) opened the road! Long live the power of people! Long Live the power of people! Long live the students! Long live the students! Support the students! Support the students!.....Keep it up! Keep it up!.....Friends, if you are on the six lanes of Harcourt Road, I suggest that you may sit down peacefully and have the assembly here. Sit down peacefully, sit down peacefully, have the assembly here. Support the students. Sit down here....., show LEUNG Chun-ying that we have over 100,000 people in support of the students, sitting down here. Sit down, and then allow the crowd to come in... inside, to the six lanes, and sit down. Support the students. Don’t go away. Support the students. Don’t go away. Thank you, friends at the front. Gradually ask the people behind to take their time to sit down. Sit all over the six lanes. Sit all over on the six lanes, to support the students. Sit all over on the six

lanes, sit all over the six lanes. Support the students. Okay.” (Emphasis added)²³¹

723. At around 4:12 p.m., D9 addressed the people gathering at Harcourt Road and said:-

“D9: Open the road! Open the road! Open the road! Open the road!.....Look, I know that some people among us (come

²³⁰ Exhibit P80, page 1640-1641

²³¹ Exhibit P79, page 1626-1627

here to) support the students, (and) have brought materials here. Now, please pass them on slowly, er, to the lawn where the materials will be placed. Thank you everybody. Everybody, please sit down or stand on these six lanes, don't stand on these six lanes, don't move, support the students, thank you everybody." (Emphasis added)²³²

724. At around 4:15 p.m., D9 addressed the people gathering at Harcourt Road and called for the release of Wong Chi Fung and Chow Yong Kang.²³³

725. At around 4:38 p.m. and 4:43 p.m., D9 addressed the people gathering at Harcourt Road and demanded the Police to open the road.²³⁴

726. At around 4:49 p.m., D9 addressed the people gathering at Harcourt Road and demanded the Police to remove the Mill barriers.²³⁵

727. At around 5.52 p.m., D9 addressed the people gathering at Harcourt Road and shouted "Rush! Rush! Rush! Rush!...." with the people present.²³⁶

728. I have considered the contents of the aforementioned speeches made by D9 and viewed the relevant video clips. I am satisfied that the intended audience of D8 in all the speeches he made at Harcourt Road were the persons present at Harcourt Road. D9 used a loudspeaker when he made his addresses. I am sure that the speeches of D9 were heard by those

²³² Exhibit P79, page 1628

²³³ Exhibit P80, page 1629

²³⁴ Exhibit P80, page 1630-1631

²³⁵ Exhibit P79, page 1644

²³⁶ Exhibit P84, page 1645

who were within the audibility range of the loud speaker. In fact, D9 was careful to make sure that the loud hailer was working.²³⁷

729. In Exhibits P71, P79 and P80, amongst other things, D9 asked the persons present on both sides of Harcourt Road to go out to the carriageways, sit down and occupy all six carriageways of Harcourt Road. I find that the impugned words in Exhibits P71, P79 and P80 were said for the purpose of rousing, stimulating, urging the people on both sides of Harcourt Road to do what D9 asked them to do. Suggestions and proposals were clearly made to the people present (i) to walk out to the road and sit on the road to carry out civil disobedience; (ii) to besiege the entrance on Harcourt Road. In fact, D9 called what he was about to tell the people on both sides of Harcourt to do a “*suggested action*”.²³⁸

730. I am satisfied that the incitements made by D9 in Exhibits P71, P79 and P80 amounted to incitements made to the persons present at Harcourt Road to occupy the 6 carriageways of Harcourt Road.

731. D9 and his targeted audience were both present at Harcourt Road at the time, I am sure that they knew what obstruction would be caused to the traffic on Harcourt Road if all 6 carriageways were occupied and obstructed.

732. Mr. Choy SC submitted that the Prosecution fails to prove that the assembly at Harcourt Road was held without a Notification of Intention to Hold a Public Meeting. For the reasons given in my analysis of PW1

²³⁷ Exhibit P79, page 1622

²³⁸ Exhibit P71, page 1565

and PW2's evidence, I find that the assembly at Harcourt Road on 28 September 2014 was held without notification. In fact, what was said by D9 in Exhibit P71 reveals that he knew for a fact the assembly he was asking the people to hold on the road was without any notification.

733. At the time, D9 said:-

"...listen, our people in the front now start walking to the flower bed outside, and then sit on the road to carry out civil disobedience, Okay? Everybody follows me, well, I have just said, I have just said, I have just said that those (people) who don't prepare for civil disobedience, don't need to follow my action. You can continue to sit in the front road, okay? Those (people) who don't prepare for being arrested by the police, please come forward first, because you can withstand them here."

734. In the above address, D9 was conscious to ask only the protestors who were prepared to take part in civil disobedience to sit on the road. If D9 believed a Notification of Intention to Hold a Public Meeting had been served, he would not have thought that the assembly on the carriageways of Harcourt Road would involve civil disobedience.

735. Mr. Choy SC submitted *"People arriving from every direction tried to find all sorts of ways to get as close to Tim Mei Avenue as possible. The closest spot they could get to was the junction between Tim Mei Avenue and Harcourt Road. Being blocked from proceeding any further, the crowd gradually built up at the junction. As the crowd swelled, the blocking of Harcourt Road became inevitable. The fact that the blocking started at the junction and not anywhere else shows that the protesters'*

*intention was not to stay on Harcourt Road, but were merely trying to find a way into Tim Mei Avenue”.*²³⁹

736. It should be noted that amongst others things said by D9, he asked the people present at Harcourt Road to besiege the entrance on Harcourt Road: “..., *all besiege the entrance on Harcourt Road,...*”.²⁴⁰ He also asked the people gathering on Harcourt Road to have an assembly on the road: “*Let’s meet together and have an assembly, okay? We have an assembly on – on the road, assembly on the road.*”²⁴¹ D9 told the crowd that he learnt that there were more than ten thousand people at the Legislative Council but he would not go into the venue at Tim Mei Avenue and would “*live and die together with these crowds...*”, i.e. the people gathering on Harcourt Road.²⁴²

737. On the other hand, in Exhibit P80 at Pg. 1931, D9 together with the protestors demanded that the Police should open the road; in Exhibit P84 at Pg. 1544, D9 demanded the Police to remove the mills barriers.

738. It is clear to me that whilst at one point D9 was looking for the opportunity to merge the protestors and the occupied area at Harcourt Road with the protestors and the venue at Tim Mei Avenue, hence the demand for the opening of the road and the removal of the mills barriers; on the other hand, D9 was also prepared to continue to occupy the 6 carriageways of Harcourt Road as a measure to counter-besiege the Police hence he vowed that he would not enter the venue. D9 made it clear in

²³⁹ Para. 72 of D9’s Closing Submissions

²⁴⁰ Exhibit P71, Pg. 1564

²⁴¹ Exhibit P79, Pg. 1624 to 1625

²⁴² Exhibit P71, Pg. 1563

many of his speeches he wanted to support the students. It is clear that the purpose of the occupation of the carriageways of Harcourt Road was to counter-besiege the Police whether or not D9 and the Protestors could enter and join force with the public assembly in progress at Tim Mei Avenue. It must also be the intention of D9 that the carriageways of Harcourt Road would be occupied as long as the Occupy Central movement at Tim Mei Avenue was in progress and required counter-besieging of the Police. I am sure that the occupation of the carriageways of Harcourt Road would also be for an indefinite period.

739. In Exhibit P71 at Pg. 1563, D9 asked the people at Harcourt Road to persist in their protest until the end; in Exhibit P79 at Pg. 1628, he made arrangement for the material supplies brought to Harcourt Road. These utterances by D9 at the time reinforce my finding that D9 intended the occupation of the carriageways of Harcourt Road would be for an indefinite period and he had made known his intention to the people present at Harcourt Road.

740. Mr. Choy SC submitted that the Police, instead of fulfilling their positive duty to facilitate the demonstration which was likely to go on for a longer period of time, decided to adopt a policy of prohibiting access to the CGC, i.e. the Exclusion Plan implemented by Senior Superintendent Dover. He submitted in Para. 71 of D9's Closing Submissions that "*The cordoning off of the CGC was unwarranted and is an unconstitutional interference of the protesters right to demonstrate. P has not produced any credible evidence to show why such measure was necessary and proportionate in the circumstances, nor why it was even legal. The*

Exclusion Plan thus fails both the requirement of legality and proportionality.”

741. The Exclusion Plan of the Police must be understood in the light of what D1 said when he announced the launch of Occupy Central at around 1:36 a.m. on 28th September 2014. D1 said, amongst other things: “*Occupy Central will begin with occupying the Central Government Offices*”.²⁴³ The Exclusion Plan that Senior Superintendent Dover implemented on 28th September 2014 was a necessary and proportionate measure to the threat to occupy the Central Government Offices. There were a large number of protesters at Tim Mei Avenue, there were incitements made to call for more people to join the movement in progress at Tim Mei Avenue. It would be most irresponsible if the Police were to take the threat to occupy the CGC lightly. In my judgment, it was reasonable and lawful for the Police to prohibit protestors’ access to the CGC in order to protect the integrity of the CGC, which had been expressly made a target of occupation in the early hours on 28th September 2014.

742. In my judgment, the decision to cordon off Tim Mei Avenue made by PW2 on 26th September 2014 shows that the Police had fulfilled their positive duty to facilitate the holding of the demonstration in progress at Tim Mei Avenue at a time when the number of demonstrators swelled and demonstrators began to demonstrate on the carriageway of Tim Mei Avenue. After a threat was made to occupy the CGO and given the fact that there was a large number of demonstrators appearing at Harcourt Road near the CGO, it was unreasonable to expect and demand the Police to

²⁴³ Exhibit P44 at Pg. 1321, Para. 18 of Admitted Facts IV

cordoned off yet another road, i.e. Harcourt Road to facilitate the holding of a demonstration there.

743. I accept the public assembly and protest that took place at Harcourt Road was a peaceful one.

744. Harcourt Road is a major thoroughfare linking Wanchai, Admiralty and Central. The incitements of D9 in the afternoon of 28 September 2014 were made at a time when he knew part of the crowds were people sitting on the carriageway of Harcourt Road to block the westbound traffic of Harcourt Road, he also knew that the eastbound traffic had probably slowed down or even at a standstill as a result²⁴⁴ and there were over 10,000 protestors at Tim Mei Avenue.²⁴⁵

745. As said, I find that the public assembly at Harcourt Road on 28th September 2014 took place without any prior notification made to the Police, hence no measures could be taken in advance to militate against the obstruction and inconvenience that would be caused by the blockage of the 6 carriageways of Harcourt Road.

746. I am aware that the purpose of the occupation was to support the students and protect the Occupy Central movement in progress at Tim Mei Avenue. D9 called for the occupation of the six carriageways of Harcourt Road to counter-besiege the Police who were cordoning off the venue at Tim Mei Avenue.

²⁴⁴ Exhibit P71, page 1562

²⁴⁵ Exhibit P71, page 1563

747. In my judgment, no matter how effective the tactic of counter-besieging the Police was in safeguarding the Occupy Central movement at Tim Mei Avenue, the tactic of counter-besieging the Police would inevitably lead to obstruction of more public places and roads. As protestors occupied the carriageways of Harcourt Road to counter-besiege the Police who were cordoning off the venue at Tim Mei Avenue, further obstruction and inconvenience caused would be caused to the public.

748. I have taken into consideration all the circumstances leading to the making of the incitements by D9 in Exhibits P71, P79 and P80. In my judgment, the scale of the occupation D9 called for was extensive. He called for the occupation of all six carriageways of Harcourt Road, a major thoroughfare linking Wanchai, Admiralty and Central. The intended occupation was for an indefinite period.

749. I have borne in mind the protection given by the Basic Law to the citizens to participate in peaceful demonstration and the demonstration at Harcourt Road on 28th September 2014 was a peaceful one. I have borne in mind the purpose of the demonstration at Harcourt Road and Tim Mei Avenue.

750. In my judgment, what D9 incited the persons to do at Harcourt Road was not a reasonable use of the carriageways of Harcourt Road. The obstruction to the traffic and inconvenience caused would be so serious that would exceed the bounds of reasonableness and the protection given by the Basic Law to the right to peaceful demonstration. I find the obstruction that would be caused was not warranted by the law.

751. From the computer certificates,²⁴⁶ I am satisfied that the occupation of the six carriageways of Harcourt Road would result in the suffering of common injury by common members of the public.

752. From the evidence, I am satisfied that when D9 repeatedly urged the people on both sides of Harcourt Road to occupy the six carriageways of Harcourt Road, he intended that the incitees, i.e. the persons present at Harcourt Road who heard the incitements, would do the act incited by him, that is to say, to cause obstruction to the carriageways of Harcourt Road by going out to the carriageways from both sides, joining together and sitting on the road to hold a public assembly, i.e. the incitees knew, or ought to have known (because of the means of knowledge were available to them) the consequence of the obstruction of the carriageways of Harcourt Road.

753. In this case, the incitees were present at Harcourt Road, they must be aware of what was going on at Harcourt Road at the time of the incitements and what the effect of an indefinite obstruction of all the carriageways of Harcourt Road would be if they acted as D9 incited.

754. In my judgment, the utterances made by D9 to in Exhibits P71, P79 and P80 urging the people to occupy and sit on the six carriageways of Harcourt Road amounted to an unlawful incitement to cause a public nuisance to the public by unlawfully obstructed the carriageway of Fenwick Pier Street.

²⁴⁶ Exhibits P145-P147

Conclusion on Charge 6

755. I am satisfied that all the elements of Charge 6 are proved against D9 beyond reasonable doubt.

756. I find D9 guilty of Charge 6.

THE VERDICT

757. On Charge 1 “Conspiracy to Commit a Public Nuisance” (against D1 to D3), I find D1 to D3 guilty.

758. On Charge 2 “Incitement to Commit Public Nuisance” (against D1 to D7), I find D1, D2, D4, D5, D6 and D7 guilty of Charge 2.

759. I find D3 not guilty of Charge 2.

760. On Charge 3 “Incitement to Incite Public Nuisance” (against D1 to D7), I find D4, D5, D6 and D7 guilty of Charge 3.

761. I find D1 to D3 not guilty of Charge 3.

762. On Charge 4 “Incitement to Commit Public Nuisance” (against D8 only), I find D8 guilty of Charge 4.

763. On Charge 5 “Incitement to Incite Public Nuisance” (against D8 only), I find D8 guilty of Charge 5.

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764. On Charge 6 “Incitement to Commit Public Nuisance”
(against D9 only), I find D9 guilty of Charge 6.

(Johnny Chan)
District Judge

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