

DCCC 480 of 2017
Mitigation for the 1st to 3rd Defendants

General

1. It is a fact that, as of now, no person has ever been sentenced to immediate imprisonment for an offence of public nuisance in Hong Kong.

Mitigation applicable to 1st to 3rd Defendants

2. The strongest mitigation factors here are:
 - 2.1. the underlying motivation for carrying out the acts which this Court has held to constitute a crime; and
 - 2.2. their constant advocacy for peaceful and non-violent acts, which this Court accepts.

Findings

3. The Court has found that the 1st to 3rd Defendants honestly believed in their cause.
4. They took steps to reopen footbridges to the CGO and maintained channels with Government officials so that the occupation could come to an end. But none of them was in control of the students and the situation.
5. They wanted the students to continue with the negotiations so that the occupation would come to an end. They took the view that if the negotiation would not come to any result, the occupiers should leave the scene. However, the students disagreed.
6. The 1st and 2nd Defendants stayed in the occupied area between 27 September and 27 October 2014, but the 3rd Defendant returned home due to his health conditions (which will be referred to below).
7. After 28 October 2014, the 1st and 2nd Defendants decided to resume teaching and faded out from the movement although they did not openly split with the students until 2 December 2014.

Motives

8. Their motive is not one of greed, lust or anger which underpin most of the offences dealt with regularly by the criminal courts.

9. As the name of the movement suggests, and as testified to by the 2nd Defendant, what motivated them to carry out these acts are their love of Hong Kong and their desire for peace.
10. They would not derive any personal gain or benefit from the “nuisance”.
11. As explained by the 2nd Defendant in his evidence, their motive is one of civil disobedience on conscientious grounds. They held an honest belief in the grounds for carrying out civil disobedience.
12. What they did can only be described as altruistic and selfless.
13. Their motive and motivation plainly impinge upon their moral culpability in the circumstances of this case, and the weight to be given to personal and general deterrence¹.
14. As Lord Hoffmann said in *R v Jones* [2007] 1 AC 136², the Court imposes on these offenders “sentences which take the conscientious motives of the protestors into account.” (¶89)
15. The Court of Final Appeal in *S-J v Wong Chi Fung* (2018) 21 HKCFAR 35³ was also of the opinion that behaviour of civil disobedience:

“... may be actuated by the offender’s conscientious objections and genuine beliefs and a sentencing court may properly take these into account as the motive for the offending, although the weight to be attached to that motive will necessarily vary depending on many other circumstances, including the facts of the offending and its consequences and the need for deterrence and punishment.” (¶ 71)

They are only liable for *intended* consequences – not strict liability.

16. In asking the Court to take motive into account, the 1st to 3rd Defendants are not asking the Court to evaluate the worthiness of the cause espoused by them, or to take side on political issues, or to prefer one set of social or other values over another. These are not the job of this Court.
17. As Lord Hoffmann said in *dicta* cited by the Court of Final Appeal in *Wong Chi Fung* (¶ 76), the task of the Court at this stage is to decide on utilitarian grounds whether to punish the offenders who have committed an offence on civic disobedience grounds. In deciding whether or not to impose punishment (and, if so, what punishment to impose), the most

¹ *S-J v Wong Chi Fung* (2018) 21 HKCFAR 35 ¶ 64.

² Item 57 of the joint list of authorities.

³ Item 73 of the joint list of authorities.

important consideration would be “whether it would do more harm than good.”

18. In *R v Roberts* [2019] Env LR 17, anti-fracking activists blocked a carriageway and caused substantial disruption to thousands of people. They were convicted of public nuisance and sentenced to imprisonment. The judge concluded that immediate imprisonment was unavoidable because they were unsuitable for rehabilitation given their unswerving beliefs against fracking.
19. The Court of Appeal, in allowing the appeal against sentence, said:
 - “45. Custody is only appropriate if the court considers that the offence (alone or in combinations with one or more other offences) is so serious that neither a fine nor a community sentence can be justified ... That judgement must be made in the light of all the circumstances. In our view, having regard to the good character of these appellants and *the underlying motivation for their criminal behaviour, even taking into account the widespread disruption for which they were responsible*, the custody threshold was not crossed ...
 46. But we respectfully part company with the judge’s unqualified view that these appellants will offend again. Time, of course, will tell.
 47. In concluding that the appellants were likely to reoffend, the judge was unimpressed by their expressions of remorse and good intent for the future. It was in this context that he referred to the deeply held beliefs of the appellants, and the certainty that they were right: ... We do not read the judge’s remarks as penalising the appellants for their beliefs. That would be wrong. However, to the extent that it is necessary for the purposes of sentencing to make a judgment about the risks of future offending, *underlying motivations can be of great significance.*” (emphasis added)
20. This Court may consider that the approach in *Roberts* is also applicable here.

Peaceful and Non-Violent Civil Disobedience

21. Unlike the facts in *Wong Chi Fung*, the Prosecution does not allege that the behaviour of the 1st to 3rd Defendants or the alleged “nuisance” incited by them was not peaceful or was of a violent nature. In fact, this Court accepts that the 1st to 3rd Defendants all along called for a peaceful and non-violent approach.

22. The fact that the 1st to 3rd Defendants advocated peaceful and non-violent civil disobedience is a powerful and dominating mitigating factor in this case.

The 1st and 2nd Defendants

23. On the ground that the acts complained of are totally selfless in nature, the 1st and 2nd Defendants do not invite the Court to consider their personal background.
24. They also do not intend to submit any mitigation letters written by themselves or others, contrary to a general practice with which this Court is all too familiar.
25. For reasons set out below, they only ask this Court not to impose an immediate custodial sentence on the 3rd Defendant.
26. In relation to them, charge 2 should carry a concurrent sentence with that on charge 1 as it occurred within the conspiracy period and could be seen practically as just a specific facet of it.
27. In any event, according to paragraph 404 of the reasons for verdict, the conspiracy only commenced on 18 September 2014. Prior to that, there was only an amorphous, non-specific and generic agreement with no concrete details.

The 3rd Defendant

28. It is of course open to the Court to differentiate the role played by a conspirator in sentencing. The Court would conclude that the 3rd Defendant had significantly more limited involvement in the execution of the on-going agreement.
29. The fact of his acquittal on charges 2 and 3 further demonstrates his limited role in the execution of the conspiracy.
30. The 3rd Defendant is aged 75. He dedicated his whole life to social justice. He is the minister of Chai Wan Baptist Church.
31. A bundle of mitigating letters accompanies these submissions. They testify to the service provided by the 3rd Defendant to the society, particularly persons in need (eg drugs addicts and HIV-carriers) and his commitment to social justice.
32. The Court is particularly invited to read the letter dated 28 February 2019 from Mr Lee Fai Ping, a former drug addict and member of triad society,

and the first former triad member to receive a Medal of Honour from the Government.

33. As evidenced by a letter dated 31 January 2019 from Dr Tang Chung Ngai, Chief of Service, Department of Surgery, Pamela Youde Nethersole Eastern Hospital, the 3rd Defendant is suffering from certain serious medical conditions which are not appropriate to be outlined in public because of obvious reasons.
34. In mitigation, the 3rd Defendant wishes to address the Court in person in Chinese.

Dated 9 April 2019

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