HKSAR v. Pearce, Matt James

香港特別行政區 對 Pearce, Matt James

HCMA 1029/2005；HCMA 313/2006

簡略案情

上訴人是一個名為“國際行動”的小規模政治團體的領袖。據稱，該組織的目的是“通過非暴力的方式喚醒公眾爭取社會公義、民主、人權和美好生活的意識。”於 2004 年 12 月 12 日，在沙田馬場的一個盛大年度賽馬比賽中，上訴人在公眾看台內身著馬形道具服裝，上寫著“現在就需要民主”的字樣，與在場人士接觸。當時在場的保安人員並沒有阻止。然而，在第 8 場比賽即將開始之前，上訴人突然衝入賽道奔跑，並與在場高叫和鼓掌的人士揮手。現場保安在很短時間內便把沒有作出反抗的上訴人制服，並交與在現場執勤的警員。

另一宗案件發生於“天安門事件”16 周年的前一天中午時分。上訴人裝扮成蜘蛛俠，並在沒有任何安全設施下攀爬到中環一棟商業大廈外牆的一個巨型電視螢幕上，同時展示了一幅 10 乘 16 尺的橫額，上面寫著“天安門 4-6-1989，公義必勝”的標語。事件擾攘兩個多小時，上訴人一直拒絕勸喻，堅持要在上面午餐後才離開；期間，警方需要封閉部份主要道路，所有途徑的車輛和行人也需要改道，消防人員奉召在該大廈外鋪設救生墊，防止意外發生，而且，吸引大批群眾圍觀，需要警員維持秩序。

在馬場這事件中，上訴人被控告破壞社會安寧和公眾滋擾罪；而在蜘蛛俠這件事中，上訴人被控告公眾滋擾罪。裁判法院經審訊後，三條控罪皆被判成立。上訴人遂向原訟庭提出上訴，他其中的一個論點，就是他的自由表達權應受《基本法》的保護。

裁決摘要

原訟庭法官在判詞內清楚提醒自己 Sedley L. J. 在 *Redmond-Bate v. Director Of Public Prosecutions* [1999] Crim LR 998 一案中的一段話，“不單非冒犯性的，言論自由還應包括刺激性的、具爭議性的、奇異的、不受歡迎的和挑釁性的，只要它不傾向引起暴力。”上訴人援引終審法院*楊美雲*一案中所說“僅僅因為集會、遊行和示威而引致通道的一些阻塞，不足以剝奪《基本法》第 27 條的保障。”並認為他的行為是合理地行使憲法權利，道路阻塞是由停下來的途人所引起的，原審裁判官錯誤地把合理性原則加於這些途人身上。對於這個論據，法官持不同的意見。法官認為上訴人應該預見他的行為會對公眾造成甚麼影響，這擁擠的情況完全由上訴人行為直接引起的。原訟庭法官也重申*楊美雲*的觀點，合理性是平衡個人與群眾間利益衝突的標準。最後，法官認為原審裁判官已經充分考慮了相關的法理和事實，尤其是衡量了上訴人行使其憲法權利的合理性，因此，否決了上訴人關於《基本法》的論點，並且駁回他最後一條公眾滋擾罪的上訴。

HCMA 1029/2005 &

HCMA 313/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO. HCMA 1029 OF 2005
(ON APPEAL FROM STS 5073 & 5074 OF 2005) and
MAGISTRACY APPEAL NO. HCMA 313 OF 2006
(ON APPEAL FROM ESS 26710 OF 2005)

Between:

HKSAR **Respondent**

- and -

PEARCE, MATT JAMES **Respondents**

Before: Hon Beeson J in Court

Date of Hearing: 11 April 2006

Date of Judgment: 28 April 2006

JUDGMENT

1. The Appellant appeals against his conviction and sentence on each of 3 charges which were dealt with in two separate cases heard by different Magistrates. The first in time was HCMA 1029/2005 in which on 2 November 2005, the Appellant was convicted after trial on 2 summonses. The particulars were that:

(1) On 12 December 2004, in a public place at the Shatin Race Course, New Territories in Hong Kong, he behaved in a disorderly manner with intent to provoke a breach of the peace or whereby a breach of the peace was likely to be caused, contrary to S. 17B(2) of the Public Order Ordinance, Cap. 245.

(2) On the same date, at the same place, he caused a nuisance to the public by unlawfully running on the race–track dressed in a mock horse costume just before the start of the televised horse race No. 8 for the Cathay Pacific Hong Kong Cup, contrary to common law.

On each summons he was sentenced to one month's imprisonment, suspended for 18 months, to run concurrently.

2. The second case, HCMA 313/2006 concerned one count of Public Nuisance, contrary to common law. It was alleged that on 3 June 2005, the Appellant caused a nuisance to the public by unlawfully climbing up a big TV screen dressed as Spiderman at Luk Hoi Tung Building at No. 31 Queen's Road Central.

3. On conviction after trial, he was sentenced to 21 days imprisonment. The Magistrate did not suspend the sentence but granted bail pending appeal.

FACTS OF EACH INCIDENT

4. In neither case was there any dispute about what had occurred on the day of the alleged offences. I shall summarise the facts briefly for each case.

Background

5. The Appellant is aged 30 and is the leader of a small group (8) of self–appointed political activists "International Action" – an all–embracing, suitably vague title for an organization which the Appellant told the Probation Officer "aims at propagandising social justice, democracy, human rights and betterment of society through non–violent action arousing the attention and concern of the public". Such a description allows the group to protest about anything and everything that might fall, conceivably, within these well meaning libertarian parameters.

6. The non–violent action appears to consist of the Appellant drawing attention to the cause of the moment by dressing in costume and making a nuisance or a spectacle of himself, in some manner which satisfies his undoubted exhibitionistic streak. He was assisted in these activities by other members of the group, none of whom feature in starring roles.

Race–Track Incident

7. On 12 December 2004, the Appellant attended a big race meeting at the Shatin race–course dressed in a horse costume which incorporated a yellow shirt bearing the words 'demand democracy now'. He amused the crowds in the Public Enclosure by prancing about. His purpose was apparently to promote public awareness of democracy, although the efficacy of such equine gambolling in bringing democracy to the minds of the populace must be questionable.

8. At about 1709 hours, just before the scheduled start of Race 8 at 1710, the Appellant was assisted to scale the barrier fence on to the track. He ran along the track heading away from the starting gate towards the winning post. He was pursued, at a distance, by security guards, who had tolerated his earlier antics in the Public Enclosure. As he ran the Appellant waved to the crowd, who were applauding and calling out – the Appellant claims they were approving – the Magistrate surmised that some were annoyed or angry. When, as was inevitable, the Appellant was caught, he was pushed to the ground by the security guards without offering any resistance. He was handed to police officers carrying out crowd control at the race–course and arrested.

9. The incident took about 2 minutes in all and though the start was delayed by one minute to 1711, the race was run without incident. It was not disputed that the Appellant's behaviour was peaceful at all times; nor was it disputed that the force used to apprehend him was reasonable.

10. Although at trial an argument was advanced that the race–track was not a public place, (an argument properly rejected by the Magistrate), on appeal it was agreed that it was. The race meeting was agreed to be the biggest in the Racing Calendar that season; the maximum crowd at the race–course was 48,000 and the race was to be televised to more than 13 countries. No doubt that was why the Appellant chose that date for his performance.

11. Whether the spectators at the track, or television viewers who watched the incident, could read the T–shirt message was not clear. It was written in Chinese and English, red on yellow with key letters/characters about 5 inches and others about 2½ inches high. Those who saw the Appellant close–up in the Public Enclosure would have been able to read the message without difficulty.

Spiderman Incident (HCMA 313/2006)

12. On 3 June 2005 the Appellant, dressed in a Spiderman costume

and with assistance from an acolyte, used a ladder to mount to the 1st floor Podium of Luk Hoi Tung Building, a commercial building at 31 Queen's Road Central. A large Television screen erected on the podium was used to show commercial messages to passers–by.

13. At 1245, having climbed up the screen, the Appellant hung a banner 16 ft x 10 ft in front of it, effectively obscuring any messages that might be shown. The message on the banner, in Chinese and English stated:

> "Tiananmen Square 4-6-1989
>
> Justice Must Prevail
>
> Injustice anywhere is a threat to Justice everywhere
> www.thebiggerpicture.hk"

14. The incident occurred the day before the 16th anniversary of the Tiananmen Square murders, an anniversary well–known to Hong Kong residents and, in all likelihood, one for which they need no reminder.

15. The banner produced by the Appellant was a practical one – if the top line was painted out the accompanying text could apply to any cause the Appellant or his group chose to publicise. The Appellant stayed on top of the screen, walking, sitting, waving, clapping his hands and generally drawing attention to himself. He was not confined in any manner, nor was he secured by any harness or safety belt.

16. Queen's Road Central at that time of day is notoriously crowded with pedestrians and heavy, slow–moving vehicular traffic; no doubt that was Appellant's reason for choosing the screen as his platform. Unsurprisingly, large pedestrian crowds gathered to watch him and police were needed for crowd and traffic control.

17. At 1348, Fire Services came and placed a rescue cushion below the screen, in case the Appellant jumped or fell. It was necessary at that stage to cordon off that part of Queen's Road and Theatre Lane which ran off it and in consequence vehicular traffic had to be diverted into Pedder Street and away from D' Aguilar Street which met Queen's Road Central as a T–junction at that spot. Traffic lights were suspended and police officers directed traffic. Traffic congestion lasted for about 2 hours. Movement was slow, drivers unhappy.

18. Pedestrians had to be directed by a circuitous route from the building through to Theatre Lane – Exhibits P.5 and P.8 showed the route by sketch and photographs respectively. Theatre Lane offers MTR access. Access to and from shops in the building was impeded, some shops closed and staff of the management company were needed to shepherd pedestrians along the route of the detour. Shops in the vicinity experienced reduced lunchtime business or had no business at all.

19. A Senior Fire Service officer (PW5) was raised to Appellant's level via the hydraulic platform of a fire engine brought to the scene. He asked the Appellant to come down, but the Appellant refused to do so unless he was fed with dim sum. Dim sum were provided, arriving about 30 mins afterwards. During that time the Appellant continued his posturing and at intervals affected to read a newspaper. The serious congestion was pointed out to him – the Appellant apologised but continued eating. He finished the food and left the screen with the officer. The screen eventually had stopped working because the Appellant's banner, positioned as it was, caused it to overheat. No permission for access was sought by the Appellant, or granted by the management company of the building or the owner of the screen. The Appellant knew the building and screen were private property and expected that the police and fire services would arrive to bring him down. He knew and expected a crowd to gather .He considered his action justified.

GROUNDS OF APPEAL

20. The Appellant appealed against conviction and sentence in each case. Originally the appeals were listed to be heard separately, but shortly before the date fixed for the hearing of the appeal HCMA l029/2005, it was decided that the appeals should be heard together as the basis of the cases was similar and some of the authorities relied on were applicable to both cases

21. In HCMA 1029/2005, the Amended Grounds of Appeal dated 3 April 2006 can be summarized as follows:

First Summons

(1) The Magistrate erred in finding that the Appellant's behaviour whilst not disorderly while within the public enclosure, became disorderly behaviour within the meaning of s. 17B(2), Public Order Ordinance, when continued on the race–track.

(2) Alternatively, the Magistrate erred in finding that the disorderly conduct of the Appellant was conduct likely to cause a breach of the peace. It was fanciful for the Magistrate to infer from the evidence that violence would ensue or that there was a real risk of violence ensuing.

Second Summons

(3) The Magistrate erred in finding that the Appellant's going on to the race–track and behaving in a disorderly manner was an act "not warranted by law" as it was neither prohibited by common law or by statute.

(4) The Magistrate erred in finding the Appellant's conduct in jumping on to the race–track at the start of a race upset and inconvenienced a section of the public such that it constituted an obstruction of rights common to all. The finding was speculative as no evidence supported it.

(5) The Magistrate failed to make a finding that the Appellant knew, or should have known, that his conduct would or could delay the start of the race. It was imperative that the Magistrate state whether he accepted or rejected the Appellant's evidence that he deliberately timed his actions so as not to disrupt the race.

22. In HCMA 313/2006, the Grounds of Appeal can be summarized as follows:

(1) The Appellant accepted that the Magistrate could have found public nuisance established by finding foreseen or foreseeable highway obstruction without reasonable excuse and common injury alone, but contended he had erred in finding that Appellant's acts had obstructed the public in rights other than free passage i.e.

   (a) their right to enter commercial premises and purchase goods or services; and

(b) the right of the screen owner to broadcast screen images and the right of the public to view them.

(2) The Magistrate found correctly that congestion of the highway for pedestrian user occurred and occurred as a result of Appellant's activity, but erred in holding that the Appellant was criminally responsible for the same, or that the congestion was an unreasonable user.

(3) The Magistrate failed to address a core issue, which was not whether the Appellant's conduct was reasonable, but whether any obstruction caused as a consequence of his foreseen or foreseeable acts was unreasonable.

REMINDER

23. In considering these appeals, I bore in mind the comments of Sedley L.J. in *Redmond–Bate v Director of Public Prosecutions* [1999] Crim LR 998:

> "Free speech includes not only the inoffensive but the irritating, the contentious, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence."

ANALYSIS–HCMA 1029/2005

First Summons

24. The Magistrate found the elements of 'public place' and 'disorderly conduct' established by the evidence. Despite the Appellant's contention to the contrary, the Magistrate was correct in finding that the appellant's conduct became disorderly when transferred to the race–track. The track was closed to anyone not specifically permitted to have access. That was particularly the case when races were being prepared for, or run. Such a measure was necessary for the good administration of the race meeting, particularly for ensuring the safety of jockeys, horse and spectators. Although the Appellant's behaviour on the track followed much the same pattern as his behaviour in the Public Enclosure, his repetition of such behaviour in proximity to horses and riders made it possible, or likely, that one or more horses would bolt and/or throw their riders. It was also possible that one or more horses would baulk at entering the starting gate(s). The Magistrate noted that for disorderly conduct in the context of the Public Order Act 1986:

> "There needs be no element of violence whether present or threatened; it covers conduct which is not necessarily, threatening abusive or insulting." [*Chambers and Edwards v DPP(unreptd)* 1995 Crim LR 896]

"disorderly conduct" is not defined in the Public Order Ordinance; it was a matter of fact for him to determine.

25. Having found that the Appellant's behaviour on the track was disorderly, the Magistrate considered whether the Appellant had the intention of provoking a breach of the peace and concluded he could not be sure he had such intention.

26. Thereafter he examined the question of whether a breach of the peace was likely to be caused by the Appellant's behaviour. Ultimately, he concluded that a breach was likely to be caused, because if the Appellant reacted violently to the efforts of the security guards to stop him, more guards would be called and a more violent response would occur. The Magistrate was also of the view that some spectators, angered by the delay to the start of Race 8, would be likely to jump down to the track in order to help subdue the Appellant.

27. Counsel for the Appellant contended on the basis of R v. Howell [1982] QB 416, that there must be violence or threatened violence apprehended, or likely to occur, for there to be a breach of the peace. The disorderly conduct must constitute a real provocation to third parties e.g. the security guards or disaffected spectators, to do harm to the Appellant or others through assault, affray, riot or some other kind of disturbance. Public alarm, excitement or disturbance is not of itself a breach of the peace unless it arises from actual or threatened violence. [Refd Smith & Hogan "Criminal Law" 11th ed. p. 573].

28. The Appellant at no time resisted capture and cooperated with the security guards, who themselves used only reasonable force to subdue him. The Respondent submitted that because the security guards were not police officers they could be equated with laymen, meaning that they were likely to be provoked to violence in the event the Appellant resisted them.

29. Clearly the security guards are not to be equated with laymen. They have specific duties to perform and are trained to deal with situations such as this incident. The head of RHKJC security was at the race–course supervising. It seems improbable that faced with a cooperative, non–resisting, unarmed, pantomime horse after a chase lasting less than 30 seconds, that security personnel would resort to violence. It is even less likely that they would resort to violence under the gaze of the head of security, 48,000 spectators and police officers dealing with crowd control.

30. As for angry spectators taking violent action against the Appellant, that appears even more unlikely. Given that Appellant's conduct was not directed at provoking, nor intended to provoke the public it would have been wholly unreasonable if any spectator had behaved as the Magistrate feared they might. The Magistrate had to be satisfied there was a real risk of a future breach of the peace, so any violence or the threat of violence must be a natural consequence of the conduct of the Appellant.

31. There was no specific finding made by the Magistrate about this matter. At best it is implicit in his comment:

> "Moreover, in case the defendant could not be subdued by security guards, certain angry spectators who longed to see the horse race start as soon as possible might jump on to the racetrack in order to help subdue the defendant."

The Magistrate does not set out cogent evidence from which he infers violence or likely violence–it appears that this comment is speculation.

32. As I cannot be satisfied with the basis for his finding that a breach of the peace was likely to be caused, I allow the appeal and quash the conviction on the First Summons.

HCMA 1029/2005 & HCMA 313/2006

Public Nuisance

33. "Public Nuisance" is defined as:

> "an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." (A Digest of Criminal Law (1877) Ch. XIX p. 108 Sir James Stephen)

34. That basic definition of the common law offence was more recently interpreted and applied by the House of Lords in R v Rimmington [2005] 2 WLR 982 which held it to be committed when

a person did an act not warranted by law, or omitted to discharge a legal duty, and the effect of the 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.

35. It was acknowledged that many offences once chargeable as common law offences, over the years had become the subject of express statutory provisions. Good practice and respect for the primacy of the statute required that unless there was a good reason, the statutory provision should be used. The court did not say that conduct falling within the confines of a statutory offence could never be prosecuted as a common law offence, although it expected future use of such offences to be rare.

36. An essential ingredient of the offence of causing a public nuisance was that it must cause common injury to the public – the community as a whole or a significant section of it. Individual acts causing injury to several different people could not constitute criminal public nuisance.

37. The mens rea which had to be proved against a defendant to convict him of causing a public nuisance was that he 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.

HCMA 1029/2005

Second Summons

Ground 3 – Act not warranted by law

38. The Magistrate found that a public nuisance had been established on the evidence. He was satisfied that the Appellant's act in running on the race–track constituted disorderly conduct not warranted by law. The Appellant's argument was that at most such behaviour may have amounted to a breach of the terms of the licence under which the Appellant gained entry to the course. Given the requirement that only persons specifically authorized could have access to the track, the Magistrate was correct in concluding that the Appellant's entering the track was "conduct unwarranted by law".

Ground 4–Common Injury

39. The magistrate fixed on the 1 minute delay in the start of Race 8 as the basis for finding "common injury". In Rimmington such injury was described as follows:

> "central to the content of the crime was the suffering of common injury by members of the public by interference with rights enjoyed by them as such."

40. The relevant consideration and ultimate finding by the Magistrate reads:

> "I am certain that a great number of the people seeing this mock horse running on the racetrack were bewildered and felt upset and/or angry, and that they were anxious and concerned about, during that one minute's interval, whether or not the real horse race would have to be delayed for a substantial period of time or even to be cancelled in the end, bearing in mind that they had betted on the horse race with expectations or great expectations."
>
> "I have no doubt that this one minute's interval had created material discomfort and concern to a great number of people who had an interest in the horse race on the material day and at the material time, and that the defendant had obstructed the people in the exercise of their enjoyment of the horse race on time and that he had caused much inconvenience to Hong Kong Jockey Club in the proper organization of the horse race." [S of F para 19]

41. With respect to the Magistrate that finding adopts an unduly sensitive view of what constitutes 'common injury'. Assuming, as he found, that the delay was caused by the Appellant, there was no evidence to show that the public were aware of the delay; that they experienced any problems with placing bets in consequence; that their enjoyment in watching the race had been interfered with; or that they had had any disappointed expectation that the race would begin precisely at the time fixed.

42. The evidence of PW1, Mr Neil Maconey, Manager of Integrity Services of HKJC, was that delays of one or two minutes at the start of a race were usual for a variety of reasons, although on this occasion he was aware only of Appellant's action as causing the delay. As delays were usual, it is highly improbable that the anxiety, concern, discomfort and disappointment which the Magistrate considered the likely result of one minute's delay, would have had time to manifest itself.

43. The position might have been different if in consequence of the Appellant's actions, the race had had a false start, or had had to be cancelled, or postponed for a significant period of time.

44. The finding that much administrative inconvenience had been caused to the Jockey Club personnel did not establish the significant number of persons required to be affected to substantiate common injury.

Ground 5–Mens Rea

45. Counsel for the Appellant, in this additional ground of appeal, contended that the Magistrate failed to make any finding that the Appellant had the requisite mens rea, i.e. that he knew, or ought to have known, that his action in running onto the track, would delay the start of the race. The Appellant had given evidence that he had not intended to delay or disrupt the race, but the Magistrate made no finding whether he accepted or rejected that evidence. Counsel submitted it was not clear therefore whether the Appellant had been convicted on the basis that he was responsible for the delayed start, or on the basis he had intended to, or should have known, he would delay the race.

46. The Magistrate in his Statement of Findings did not specifically state that he found mens rea established, but at para. 6(c) did repeat the evidence given by the Appellant relevant to that issue and at para. 18 made a finding that the Appellant's act caused the one minute's delay. He began his consideration of the evidence by reminding himself of the relevant case law and although he may not have spelled out therefrom the element of mens rea, implicit in his findings is that the Appellant knew, or ought to have known that his action in running on the track would delay the race.

47. In this context regard should be paid to the comments of Mortimer V-P:

> "··· it is usually preferable when a judge is assessing the evidence, that he or she should start by setting out the elements of the offence which are specifically in issue. Those usually relate to intention or the mental element. Where the judge is a professional judge sitting alone, however, it can be assumed, unless there are indications to the contrary, that the judge is well aware

> of the offence charged and that the reasons, pointing to where the evidence is accepted or rejected, are directed to those elements." (*HKSAR v. KWOK Chi–wah* [1999] 1 H.K.L.R.D. 481 @486)

48. For the reasons set out above I find that the Magistrate while correct in finding the Appellant's conduct was disorderly and not warranted by law, nevertheless erred in finding his delaying the start of the race amounted to public nuisance. On the evidence before him it was not possible to find the necessary common injury caused to the community as a whole, or to a significant portion of it. Although the Appellant was undoubtedly a tiresome nuisance, his behaviour cannot be characterised as constituting a public nuisance.

49. I allow the appeal in respect of the second summons. The convictions on each of the first and second summonses are quashed.

HCMA 313/2006

General

50. The prosecution contended that the Appellant's actions were not warranted by law, that they affected injuriously the exercise or enjoyment of rights of many people in the neighbourhood and that the Appellant knew, or ought to have known, the consequences of his actions.

51. It was inevitable that congestion would ensue as crowds gathered at the busiest time of the day either to watch the antics of the Appellant or to negotiate their way along Queens Road Central, and roads running off it in that area or both. The diverting of pedestrian and vehicular traffic, in an area with limited flexibility for alternative traffic on pedestrian flow was caused consequentially by the Appellant's actions.

52. The Appellant in giving evidence explained how his stunt was carefully planned. He had chosen the date, time and venue for maximum impact; had made no attempt to obtain permission either to use the screen or enter the building; was fully aware that police and fire services would try to dislodge him; that he had expected crowds and congestion and that he had intended to stay at the screen area for some time. Counsel for the Appellant at trial argued that the charge was misconceived given the circumstances, but that even if it were correct it was not clear that 'common injury' had arisen from the Appellant's acts.

ANALYSIS–HCMA 313/2006

Inappropriate Choice Of Charge

53. Counsel for the Appellant contended that the Appellant should not have been charged with the common law offence of public nuisance, when s. 4(28) Summary Offences Ordinance, Cap. 228 was 'tailor made' for the behaviour complained of. This submission appeared to rest on the disparity of the maximum penalties. If tried by a jury the offence of public nuisance has a maximum sentence of 7 years imprisonment plus a fine, whereas s. 4(28), Summary Offences Ordinance has a maximum of 3 months' imprisonment and a $5,000.00 fine. Counsel argued that the charge should not have been laid because even the limited penalty in the Magistracy was excessive when compared with the penalty under s.(2). As this case was tried in the Magistracy, the maximum sentence is 2 years imprisonment and a fine of $100,000.00, so it is difficult to see how the charge, or the venue can be considered inappropriate.

54. Counsel for the Appellant argued, on the basis of Rimmington, that if a statutory offence existed it should be used, rather than the common law equivalent, unless there was good reason not to do so. However as counsel for the Respondent pointed out the offence had not been abolished and could be charged in appropriate circumstances.

55. Article 63 of the Basic law provides:

> "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference."

56. The choice of charge and venue for trial is the responsibility of the Secretary for Justice and his designated officers. The prosecution has a wide discretion as to the charge or charges it may lay and in the absence of bad faith, abuse of process, or perverse decision a court is unable to question the decision. Charges are laid and venues chosen according to prosecution policy and guidelines taking into account the gravity of the offence, the elements that can be proved and other factors such as prevalence, deterrence community mores etc. The prosecutorial burden is a heavy one and it is for the Secretary for Justice to decide in what manner it is borne. Although the Appellant argued that the charge was inappropriate, it was not suggested that the common law offence was chosen, in the manner deprecated in *Rimmington*, to circumvent mandatory time limits, or limits on penalties.

57. The Respondent submitted that it was open to the Secretary for Justice to choose the charge, which, in the proper exercise of his discretion, he considered, properly reflected the gravity of the situation it was intended to deal with. Section 4(28) of the Summary Offences Ordinance, Cap. 228 was more commonly used to combat the mischief of hawkers or shop owners encroaching on and obstructing public space in some way, although it could be used, as it was in *Yeung May–wan and HKSAR* (2005) 8 HKCFAR 137, to deal with obstruction caused by demonstrators.

58. Nothing in the arguments put forward by counsel for the Appellant convinces me that the common law offence should not have been preferred. This ground of appeal fails.

USER OF THE HIGHWAY

59. Counsel for the Appellant submitted the Magistrate had erred by concentrating on whether Appellant's demonstration had caused congestion, rather than considering the reasonableness of the public stopping in the street to watch. He pointed out that the Appellant had not caused congestion by blocking the highway, or inciting others to do so, or by making a speech; rather the congestion was caused by people choosing to stop and look at the Appellant and his banner, which was a reasonable use of the highway.

60. Counsel was being disingenuous in submitting thus. As the Appellant knew or should have known, there was no need for him to do more than prance on top of the screen, safe in the knowledge that crowds would gather to see what was happening, read the banner, or, given that the Appellant was not restrained or secured in any way, simply watch in ghoulish hope or expectation that something more exciting such as a fall would occur. The crowds gathered as a direct consequence of and in response to the Appellant's activities.

61. No doubt there would be many pedestrians who stopped not because they had any interest in what was going on, but because the crowds watching the Appellant impeded their progress, or

blocked their access to shops, offices or MTR, or because the positioning of the Fire Services cushion obliged them to take a lengthy detour. The longer the Appellant remained aloft, the greater the crowds and congestion and the less reasonable their user of the highway.

62. Counsel for the Appellant in submitting that the Magistrate had focused in error, on the reasonableness of the Appellant's behaviour, rather than the reasonableness of the crowd's using the highway to observe him, referred to *Yeung May Wan & Others and HKSAR* (2005) 8 HKCFAR. There the Court of Final Appeal, examined a number of matters arising when Falun Gong demonstrators outside the Liaison Office of the Central Peoples Government had been charged and convicted under s. 4A of the Summary Offences Ordinance, Cap. 228 of obstruction of a public place and by doing an act whereby obstruction might accrue under s. 4(28) of the same Ordinance. The convictions were quashed.

63. The court's holding at (2) p. 138 was that:

> "for the purposes of s. 4(28) the defendants would only be guilty of such offence if they caused such obstruction without lawful excuse. The burden of proving that was on the prosecution. A person who created an obstruction was not acting without lawful excuse if his conduct involved a reasonable use of the public place. What was reasonable was a question of fact and degree depending on all the circumstances, including the obstruction's extent duration, time, place and purpose."

64. Further, he argued that the Appellant's acts were not unreasonable as he was simply exercising his right to demonstrate.

> "the mere fact that an assembly, a procession or a demonstration causes some interference with free passage along a highway does not take away its protection under Art. 27 of the Basic Law."

65. With those matters in mind the Magistrate examined the question of reasonableness in relation to the Appellant and the crowd. What the public can reasonably be expected to tolerate is a question of fact and degree and thus a matter for the Magistrate to weigh, balancing the rights of the Appellant to demonstrate peacefully, with the right of the public to freedom of the highway. The Magistrate spent some time considering the question of fact and degree. He concluded that the Appellant's demonstration lawful and peaceful as it was, was unduly lengthy, given the well–aired topic he wished to bring to public attention; the time and place chosen for the demonstration and the further lengthening of the time of disruption by his bizarre insistence on being fed as a condition of his leaving the podium.

66. He found that the Appellant's message, although important and legitimate, could have been conveyed within a much shorter time–frame than the 2 hours he was on top of the screen. The Appellant was aware before climbing to the top of the screen of the congestion his activities were likely to cause. Indeed it was an integral part of his demonstration that such congestion or disturbance would be caused. By refusing to come down when, after a lengthy period, congestion below was pointed out to him, he had extended the time by demanding dim sum. At a certain point the crowd's user becomes unreasonable – a direct result of Appellant's acts. That point is for the Magistrate to find.

67. *Rimmington* held that the mens rea which had to be established against a defendant on a public nuisance charge was that he knew or ought to have known, because the means of knowledge was available to him, the consequences of what he did or omitted to do. The Magistrate considered the question of Appellant's knowledge and drew what must have been an irresistible inference, that the Appellant had the requisite mens rea.

COMMON INJURY

68. To establish 'public nuisance'the effect of the act or omission must be shown 'to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise of rights common to everyone.'

69. Counsel for the Appellant submitted that the Magistrate erred in finding that the economic interest of the shopkeepers and the owner of the television screen were public rights and as such protected by the common law offence of public nuisance, when, at best, they gave rise to civil action in private nuisance. The Respondent did not attempt to argue otherwise on this appeal and the Magistrate's finding on these points is irrelevant for the purposes of this appeal.

70. The pertinent findings are at para. 59 and para. 64 of the Statement of Findings where the Magistrate excluded police, fire and ambulance personnel, management staff of the building and shop owners claiming economic loss from his consideration and found that:

> "the many road users and shopowners and customers in that vicinity plus the TV owner and customers as injuriously affected by Defendant's act to varying significant degrees were enough to constitute a substantial number of the public."

71. In fact the Magistrate could have found on the evidence before him that potentially all citizens, residents and visitors in Hong Kong could be regarded as suffering the public nuisance caused by the obstruction of the highway, which in normal circumstances was available for ordinary use by anyone as a pedestrian or driver. Such user was not limited to simple passing and re–passing.

72. In *D.P.P. v. Jones* [1999] 2 A.C. 240, Lord Irvine stated:

> "The public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway.
>
> Since the law confers this public right I deprecate any attempt artificially to limit its scope. It must be for the Magistrates in every case to decide whether the user of the highway under consideration is both reasonable in the sense defined and not inconsistent with the primary right of the public to pass and repass.
>
> ... provided an assembly is reasonable and non–obstructive, taking into account its size, duration and the nature of the highway on which it takes place, it is irrelevant whether it is premeditated or spontaneous: what matters is its objective nature ... to stipulate in the abstract any maximum size or duration for a lawful assembly would be an unwarranted restriction on the right defined. These judgments are ever ones of fact and

degree for the court of trial."

73. In *Yeung May–wan* – Bokhary PJ gave instances of how various uses of the road or footpath may impede other persons using the highway to some extent but the law regards such cases by seeking

> "to strike a balance between possibly conflicting interests of different users of the highway based on a requirement of reasonableness. Whether any particular instance of obstruction goes beyond what is reasonable is a question of fact and degree depending on all the circumstances, including its extent and duration, the time and place where it occurs and the purpose for which it is done." (para. 43 p.157)

74. The court reiterated, in various ways that where an obstruction resulted from a peaceful demonstration, it was essential that the constitutionally protected right to demonstrate, which was enshrined in Article 27 of the Basic Law, was recognised and given substantial weight.

CONCLUSION

75. I am satisfied that the Magistrate in evaluating the evidence had borne in mind the important matter of the Appellant's right to demonstrate. He was aware of the elements of the offence and had found those elements established. He was apprised of the relevant case law and had directed himself accordingly. In particular he carried out the balancing exercise required of him, in which the Appellant's right to demonstrate had to be balanced against the public right to use the highway, not just to pass and repass, but to use if for what might be described as social and community purposes.

76. I have heard and considered the arguments advanced on behalf of the Appellant but am not persuaded by them that this conviction was wrong, or should be disturbed.

77. This appeal against conviction is dismissed.

Appeal Against Sentence–HCMA 1029/2005

78. It follows from the allowing of the appeal against conviction that the sentences on these summonses are quashed also. In passing, I would comment that if the convictions had been upheld, in principle, the 1 month's imprisonment on each charge seems unduly harsh for a first offender, although I note they were concurrent and suspended.

79. The magistrate sentenced on the based of *R v Nguyen Quang Tong and Others* [1992] 2 HKCLR 10 where Silke, V-P said @p. 13:

> "We accept that, if there be a rule of sentencing practice that a deterrent sentence should not be passed on a man with a clear record, there are exceptions and offences against public order is one of them."

80. However, given the particular circumstances of this incident, it is not the type of public order case which calls for a deterrent penalty. The court in *Nguyen* was considering sentences imposed for offences of S. 17 Wounding and affray committed in a Detention Camp. These offences, qualitatively, were much less serious. In my view, given the extent of his activities, this Appellant could have been sentenced adequately, by the imposition of a substantial fine, or a Community Service Order.

Appeal Against Sentence–HCMA 313/2006

81. The Magistrate treated the Appellant as a man of clear record and noted his monthly earnings were around $7,000. He considered that the Appellant had caused substantial inconvenience to a large number of people and took the view that a financial penalty was inappropriate, in that it would lead others to "think they can pay for executing their belief, even to an unreasonable and excessive extent". The Magistrate might have added that the Appellant was in no position to pay the sort of substantial fine the offence merited.

82. A Community Service Order was considered as an alternative for the short prison sentence the Magistrate found to be appropriate. However the Appellant claimed he had no time to carry out a CSO programme, nor as was required, did he consent to such an order being imposed.

83. The Magistrate noted the maximum penalty for the offence was 2 years imprisonment. He adopted 28 days as the starting point, gave credit for Appellant's clear record and sentenced him to 21 days imprisonment. He did not find any reason to justify suspending the sentence.

84. When sentencing the Magistrate was aware of the sentences imposed on the Appellant for the race course incident. This offence was a more serious one in terms of the disruption.

85. I have considered the Magistrate's Reasons for Sentence and agree that in principle a short term of imprisonment, in all the circumstances, is a proper sentence. However I am of the view that justice would be served as well by suspending that sentence for a period of 18 months. This would recognise what is in effect a first offence, but would have a lasting deterrent influence.

86. According I allow the appeal against sentence to the extent that the sentence of 21 days imprisonment imposed by the Magistrate be suspended for a period of 18 months.

Judge of the Court of First Instance (C-M Beeson)

Mr Cheung Wai-sun, PGC (Ag) and Ms Winnie Lam, GC, of the Department of Justice for the Respondent

Mr DYKES Philip John, instructed by Messrs Vidler & Co., assigned by D.L.A., for the Appellant

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