Press Summary (English)

Press Summary (Chinese)

FACC No 12, 13& 14 of 2012

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NOS12, 13 AND 14 OF 2012 (CRIMINAL)

(ON APPEAL FROM HCMA NO 193 OF 2012)

FACC No 12 of 2012

BETWEEN

HKSAR	Respondent
and	
CHOW NOK HANG（周諾恆）	Appellant

FACC No 13 of 2012

BETWEEN

HKSAR	Respondent
and	
WONG HIN WAI（黃軒瑋）	Appellant

FACC No 14 of 2012

BETWEEN

HKSAR	Appellant
and	
CHOW NOK HANG（周諾恆）	1st Respondent

WONG HIN WAI（黃軒瑋） 2nd Respondent

Court: Mr Justice Chan Acting CJ, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Litton NPJ and Lord Millett NPJ

Date of Hearing: 9 October 2013

Date of Judgment: 18 November 2013

J U D G M E N T

Mr Justice Chan, Acting CJ:

1. The freedom of expression may take many forms. As was involved in the present case, they include the freedom of speech, the freedom of assembly and the freedom of demonstration. The right to the freedom of expression is guaranteed by art 27 of the Basic Law and art 17 of the Bill of Rights. This is a fundamental right to enable any person to air his grievances and to express his views on matters of public interest. In a free and democratic society, there are bound to be conflicts of interest and differences in opinion. It is important that those who purport to exercise the right to the freedom of expression must also respect the rights of others and must not abuse such right. Conflicts and differences are to be resolved through dialogue and compromise. Resorting to violence or threat of violence or breach of the peace in the exercise of this right will not advance one's cause. On the contrary, this will weaken the merits of the cause and result in loss of sympathy and support. The means to achieve a legitimate end must not only be peaceful, it must also be lawful. Violent or unlawful means cannot justify an end however noble. It may also attract criminal liability.

2. The right to freedom of expression, like all fundamental rights and freedoms, must be given a generous interpretation. (See *Ng Ka Ling & others v Director of Immigration* (1999) 2 HKCFAR 4.) But this right is not absolute and may be subject to restrictions as prescribed by law in the interest of public order and for the protection of the rights and freedoms of others. See art 39(2) of the Basic Law and art 17 of the Bill of Rights. Any law which purports to restrict such right must be narrowly interpreted and the restriction must satisfy the test of necessity and proportionality. See *Yeung May Wan & others v HKSAR* (2005) 8 HKCFAR 137 and ***Leung Kwok Hung*** *v HKSAR* (2005) 8 HKCFAR 229 (which were cases on the right of assembly and the right of demonstration). In construing the relevant statutory provisions which have the effect of restricting such right, the court must have regard to competing public interests, including the maintenance of public order and the rights and freedoms of others. The right balance has to be struck between the preservation of public order and the exercise of the individual's rights and freedoms and between the competing rights and freedoms of individuals or groups of individuals.

3. As described in Mr Justice Tang PJ's judgment and shown on the videos, the conduct of the appellants was disgraceful. They showed absolutely no regard or respect for the rights of others and had abused the right to freedom of expression. The 1st appellant's conduct was, to say the least, distasteful and the 2nd appellant's conduct constituted a breach of the peace and an assault. Although they could have been charged with or guilty of some other offences, the question in these appeals is, however, whether their conduct also incurred criminal liability under s.17B of the Public Order Ordinance, Cap 245.

4. There is no challenge on the constitutionality of s.17B. It is clear from the language of this provision that s.17B(2) is aimed at preventing the outbreak of public disorder and s.17B(1) at protecting the rights and freedoms of others in transacting their normal business.

5. Both s.17B(1) and s.17B(2) require proof of disorderly conduct: "acts in a disorderly manner" in s.17B(1) and "behaves … in a disorderly manner" in s.17B(2). Although the 2nd appellant does not dispute his conduct was disorderly, the 1st appellant argues that what he did was not. I must say that this term has caused me some difficulty. I was initially attracted to Mr Justice Tang's analysis. But having considered the matter further, I would, with respect, prefer to adopt the approach taken by Mr Justice Ribeiro.

6. There is no definition in the statutory provision and no comprehensive definition by any court of this term "acts/behaves in a disorderly manner". Section 17B had its origin in s.5 of the Public Order Act 1936 in the UK. In *Brutus v Cozens* [1973] AC 854, which dealt with the meaning of "insulting words" in that section, Lord Reid said (at p.861) that the meaning of an ordinary word of a statute is a question of fact for the trial court. This approach was adopted by the Divisional Court in *Chambers v DPP* [1995] Crim L R 896 which held that "disorderly behavior" were to be treated as words in ordinary everyday use. This was followed by Beeson J in *HKSAR v Cheng Siu Wing* [2003] 4 HKC 471 who held that these words "are to be treated as words in everyday use and given their normal meaning". It was also accepted that the disorderly conduct in s.5 of the 1936 Act (s.17B of our Ordinance) need not involve any element of violence (*Chambers v DPP*) or amount to a breach of the peace (*Campbell v Adair* [1945] JC 29).

7. In New Zealand, disorderly behavior in a public place is an offence under s.4(1)(a) of the Summary Offences Act 1981 albeit punishable only with a maximum fine of $1000. Another section, s.3, creates a more serious offence which requires an element similar but not exactly the same as that in our s.17B(2). The Supreme Court of New Zealand in *Brooker v Police* [2007] 3 NZLR 91 held that disorderly behavior in s.4(1)(a) (the lesser offence) means behavior seriously disruptive of public order. This was followed in *Morse v Police* [2012] 2 NZLR 1. One would expect that the Supreme Court of New Zealand would give the same meaning to "disorderly behavior" in the more serious s.3 offence (similar to our s.17B(2)). It is however important to note that it was considered necessary by the Supreme Court of New Zealand to set a high threshold for disorderly behavior as an offence.

8. Unlike the position in New Zealand, it is not an offence in Hong Kong to behave in a disorderly manner in public. To constitute an offence under s.17B(1), an accused must have acted in a disorderly manner for the purpose of preventing the transaction of the business of a public gathering and for an offence under s.17B(2), he must have behaved in a disorderly manner either with the intent to provoke a breach of the peace or that a breach of the peace is likely to be caused by his conduct. The reasons in the New Zealand cases for imposing a higher threshold including constitutionality considerations do not necessarily apply with the same force in Hong Kong.

9. Further, not only is disorderly behavior by itself not an offence, s.17B(2) refers also to other types of behavior such as using, distributing, displaying writing containing threatening, abusive or insulting words. These other types of behavior do not necessarily involve a serious disruption of public order. Also, neither s.17B(1) nor 17B(2) requires proof that there is an actual serious disruption of public order, only that the disorderly behavior was done with the intent to provoke a breach of the peace or had the likely effect of causing a breach of the peace. It is unlikely and I do not believe that the legislature intends by "acts/behaves in a disorderly manner" in s.17B to mean conduct causing a serious disruption of public order.

10. Hence, I am more inclined to follow the English authorities and accept that the term "acts/behaves in a disorderly manner" should be given an ordinary and everyday meaning and that whether there is disorderly conduct for the purpose of s.17B is a question of fact for the trial court having regard to the nature and manner of the conduct and the circumstances of the case. As Gleeson CJ said in *Coleman v Power* (2004) 220 CLR 1, at para. 12:

> "Concepts of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs."

11. The s.17B(2) offence also requires the prosecution to prove that the accused in behaving in a disorderly manner has the intent to provoke a breach of the peace or that a breach of the peace is likely to be caused by his conduct. With regard to this element of the offence, I would like to make the following observations. For the sake of brevity, I would use the term disorderly conduct to include also using, distributing or displaying any writing containing threatening, abusive or insulting words.

12. First, as pointed out earlier, this offence is aimed at preventing an outbreak of public disorder. Although in most cases, the accused's disorderly conduct would probably have constituted a breach of the peace or some offence already, it is not necessary to show that his conduct has actually provoked or caused others to commit a breach of the peace. It is sufficient to show that there is a real or imminent risk that others would breach the peace or resort to violence as a result of the accused's disorderly conduct.

13. Secondly, the fact that the accused's disorderly conduct is a breach of the peace is not sufficient to establish the s.17B(2) offence. The language of the section clearly contemplates a breach of the peace by a person or persons other than the accused. (See *Secretary for Justice v Chiu Hin Chung* [2013] 1 HKLRD 227.) The first limb requires proof of an intent to *provoke* a breach of the peace and this clearly does not refer to the accused's own breach of the peace, although one cannot rule out the possibility that his breach of the peace was committed with the requisite intention to provoke others to breach the peace. The second limb is equally clear: it refers to the *likely effect* of the disorderly conduct on others. As McCulloch J in *Marsh v Arscott* (1982) 75 Cr App Rep 211 at 216 said of a provision similar to s.17B(2):

> "This section is describing breaches of the peace which are brought about, or are likely to be brought about, by other words or behavior occurring earlier, although usually not very long before. The phrase "whereby a breach of the peace is likely to be occasioned" indicates that Parliament was concerned with ***cause and effect*** i.e. with ***conduct which is likely to bring about a breach of the peace*** and ***not with conduct which is itself a breach of the peace and no more***." (emphasis added)

14. Thirdly, for the first limb of the s.17B(2) offence, it is necessary to consider the subjective intent of the accused and for the second limb, to assess objectively the likely effect of the disorderly conduct. The court has to examine all the circumstances of the case, including the conduct of the accused, the nature and manner of such conduct, the presence of other persons, such as persons holding opposing views, and the likely reaction of those present (see Viscount Dilhorne in *Brutus v Cozens* at p.865). The accused's knowledge of such circumstances is also relevant to the issue of his intention.

15. Fourthly, the accused's disorderly conduct may be aimed at another person or a group of persons or simply those who are present within the sight and hearing of his conduct. There might be persons who would not be affected but there might be others who would be easily provoked into violent retaliation. The accused has to take his "audience" or target as he finds him. (See *Jordan v Burgoyne* [1963] 2 QB 744.) There were suggestions in some cases that trained police officers are unlikely to be provoked to commit a breach of the peace (see *Marsh v Arscott* (1982) 75 Cr App R 21, *Coleman v Power* (2004) 220 CLR 1, and *R v Li Wai Kuen* (1973-1976) HKC 346) and hence if no other person is present or has been provoked, no offence under s.17B(2) has been committed. While this may be the case generally, I do not think one should rule out the possibility that even a trained officer might in some situations be provoked to react with violence to the disorderly conduct. It is interesting to note that Huggins J in *Li Wai Kuen* was careful in adding that "I would not suggest that there could never be a case where the abuse was so gross that even a police officer might be likely to be provoked into violence retaliation, particularly if the language used were also threatening …" .

16. With regard to the s.17B(1) offence, I would agree with the analyses in the judgments of Mr Justice Ribeiro and Mr Justice Tang and have nothing useful to add.

17. For the reasons given by Mr Justice Ribeiro and Mr Justice Tang, I would agree that the prosecution in this case had failed to substantiate the two charges against the appellants. I too would allow the appellants' appeals and dismiss the prosecution's cross appeal.

Mr Justice Ribeiro PJ:

18. The appellants were demonstrating against fare increases on the Mass Transit Railway. They attended at a prize-giving ceremony organized by the MTR in a public square at the conclusion of a sporting event that it had sponsored. The appellants did not content themselves with displaying placards and chanting protest slogans, as other demonstrators were doing. They decided to invade the podium where those officiating at the prize-giving ceremony were gathered. The appellants were charged with offences under sections 17B(1) and 17B(2) of the Public Order Ordinance.[1] I gratefully adopt the detailed account of the facts set out in the judgment of Mr Justice Tang PJ.

19. The public order offences in question can, of course, be committed without engaging any human rights issues. However, in the present case, the charges relate to conduct in the course of a demonstration and the argument has proceeded on the footing that the appellants' conduct must be judged in the context of the constitutional rights of peaceful assembly and freedom of demonstration.

20. Thus, although the constitutional validity of sections 17B(1) and 17B(2) has not been challenged and the disposal of the appeal turns on whether, in the events which have happened, the requisite elements of those offences have been proved against each appellant, it is necessary to consider the scope and limits of those constitutional rights and how they relate to cases like the present.

A. The offences and the decisions below

21. Section 17B is headed "Disorder in Public Places" and provides as follows:-

> (1) Any person who at any public gathering acts in a disorderly manner for the purpose of preventing the transaction of the business for which the public gathering was called together or incites others so to act shall be guilty of an offence and shall be liable on conviction to a fine at level 2 and to imprisonment for 12 months.
>
> (2) Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine at level 2 and to imprisonment for 12 months.

22. The Magistrate, Mr Marco Li,[2] convicted both appellants under section 17B(2) and sentenced them each to 14 days' imprisonment, granting them bail pending appeal. He did not consider it necessary to deal with the charges under section 17B(1) but indicated that he would equally have found them guilty under that section.

23. Their appeal to the Court of First Instance was heard by Barnes J,[3] who quashed their convictions under section 17B(2). However, her Ladyship found them guilty under section 17B(1) instead. In place of the sentence of imprisonment imposed by the Magistrate, she fined the 2nd appellant $3,000 and the 1st appellant $2,000.

24. The appellants were granted leave to appeal by the Appeal Committee on 17 November 2012.[4]

B. The right of peaceful assembly and freedom of demonstration

25. Hong Kong residents are justly proud of their tradition of peaceful demonstration. Marches involving tens or even hundreds of thousands of demonstrators have frequently been held without a single incident of public disorder or damage to property.

B.1 Article 17 of the Bill of Rights and Article 27 of the Basic Law

26. The right to hold such demonstrations is a fundamental constitutional right. Article 17 of the Bill of Rights,[5] which is given constitutional status by Article 39 of the Basic Law, states:

> "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

27. And Article 27 of the Basic Law states:

> "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."

28. It must be read together with Article 39 which relevantly provides:

> "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

29. The "preceding paragraph" referred to in Article 39 is the paragraph which accords constitutional status to the ICCPR as enacted in the Hong Kong Bill of Rights Ordinance.[6] Article 39 therefore endorses the right of peaceful assembly provided for by Article 17 of the Bill of Rights subject to the restrictions mentioned above.

30. As this Court has held,[7] there is no substantive difference between the right of peaceful assembly guaranteed by Article 17 of the Bill of Rights and freedom of demonstration enshrined in Article 27 of the Basic Law. I shall accordingly refer to the rights interchangeably and focus in this judgment on the text of Article 17 as setting out the scope and limits of the right.

B.2 The importance of those rights

31. The importance of the right to demonstrate, and of the closely related freedom of expression, is well-recognized. As this Court has acknowledged, they are rights which lie at the heart of Hong Kong's system. They guarantee freedoms which are of cardinal importance for the stability and progress of society – freedoms which promote the resolution of conflicts, tensions and problems through open dialogue and debate.[8]

32. The Court has emphasised that such fundamental rights must be given a generous interpretation so as to give individuals their full measure, and that restrictions on such rights must be narrowly interpreted.[9]

B.2 The limits of those rights

33. Demonstrators are therefore free to assemble and to convey views which may be found to be disagreeable, unpopular, distasteful or even offensive to others and which may be critical of persons in authority. Tolerance of such views and their expression is a hallmark of a pluralistic society. At the same time, it must be recognized that those freedoms are not absolute and demonstrators must ensure that their conduct does not go beyond the constitutional limits of those rights.

34. Such limits are set by the combined effect of the constitutional provisions themselves and compatible laws enacted by the legislature and developed at common law. Basing itself on the text of Article 17, the Court held in ***Leung Kwok Hung*** *v HKSAR*[10] that:

> "The exercise of the right of peaceful assembly, whether under the Basic Law or under BORO, may be subject to restrictions provided two requirements are satisfied:
>
> (1) The restriction must be prescribed by law (the 'prescribed by law' requirement).
>
> (2) The restriction must be necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others (the necessity requirement)."

No issue arises in the present case in relation to the "prescribed by law requirement".[11]

35. It is established that the "necessity requirement" involves the application of the proportionality test[12] which enables a proper balance to be struck between the interests of society on the one hand and the individual's right of peaceful assembly on the other.[13] Accordingly, limits may be set to the right of demonstration by validly promulgated laws provided that the restrictions they impose are for a legitimate purpose; are rationally connected with the pursuit of such legitimate purpose; and are no more restrictive than necessary to achieve that legitimate purpose.[14]

36. In relation to the right of peaceful assembly, the Court has held that Article 17, reflecting Article 21 of the ICCPR, exhaustively lists the only legitimate purposes for which restrictions on that right may be imposed.[15] Thus, restrictive laws may legitimately have as their purpose the safeguarding of national security, public safety, or public order (*ordre public*); the protection of public health or morals; or the protection of the rights and freedoms of others. Such laws are valid if they pass the proportionality test.

37. While it is conceivable that each one of those legitimate purposes might, in given circumstances, be relevant to setting limits on the freedom to demonstrate, for the purposes of this appeal, laws aimed at the maintenance of public order and laws aimed at protecting the rights and freedoms of others are of the most immediate relevance.

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. In ***Leung Kwok Hung*** *v HKSAR,**[16]*** having recognized that the interests of "public order (*ordre public*)" are listed by Article 17 as a legitimate purpose, the Court held that there is no doubt that such concept "includes public order in the law and order sense, that is, the maintenance of public order and the prevention of public disorder".[17] It concluded that a statutory scheme giving the Commissioner of Police discretion to regulate public processions with a view to maintaining public order was constitutionally valid after severance of certain objectionably vague words.[18]

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

40. The law therefore imposes bounds on the constitutionally protected activity of peaceful assembly. The need for such limits is sometimes dramatically illustrated in situations involving demonstrations and counter-demonstrations. It is not uncommon for one group, demonstrating in favour of a particular cause, to find itself confronted by another group demonstrating against that cause. The situation may be potentially explosive and the police will generally try to keep them apart. Obviously, if both remain within their lawful bounds, all will be well. But often, conflict and public disorder may result. Sometimes, both sides will have broken the law. But in some cases, the disruption of public order is caused only by one side. The task of the law enforcement agencies and the courts is then to identify the source of such disruption by identifying the demonstrators who have crossed the line into unlawful activity. They thereby avoid curtailing or punishing the constitutionally protected activities of the innocent group.

41. Such a situation arose in the classic common law case of *Beatty v Gilbanks*,[19] where charges of unlawful assembly were brought against the Salvation Army since they had gone ahead with their procession knowing from past experience that an opposing group calling themselves the "Skeleton Army" was likely to cause a breach of the peace. The Court dismissed those charges. It was not the Salvation Army whose conduct posed a threat to public order and their right of peaceful assembly was upheld. In contrast, in *Wise v Dunning*,[20] a Protestant preacher who used deliberately provocative language and gestures before a hostile Roman Catholic audience was held to have been properly bound over since a breach of the peace by members of his audience was the natural consequence of his acts. Sedley LJ put it this way in a more recent decision:[21]

> "... a judgment as to the imminence of a breach of the peace does not conclude the constable's task. The next and critical question for the constable, and in turn for the court, is where the threat is coming from, because it is there that the preventive action must be directed."

42. Lines also have to be drawn where a demonstrator's conduct impinges unacceptably upon the 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*,[22] where the Court had to decide whether the offence of obstructing a public place[23] was properly applied so as to curtail a static, peaceful demonstration by a small group of Falun Gong protesters which obstructed only part of the pavement, on the basis that they were interfering with the rights of other users of the public highway.[24] To take another example, the Court of First Instance[25] recently had to decide whether the right to demonstrate entitled protesters to take their demonstration into a private residential development without the consent of the owners, or whether that right was constrained by the need to respect the private property rights of the residents.

43. In practice, restrictions on the right to demonstrate are likely to be tested where a demonstrator is subjected to some form of restraining action by a law enforcement agency possibly, but not necessarily, leading to a criminal charge on account of the demonstrator's conduct. The law relied on to justify the action taken against the demonstrator may then require examination. In some cases, its constitutionality may have to be examined: Does it pursue one of the listed legitimate aims? If so, does it pass the proportionality test? If the law is constitutionally valid, the question becomes whether the demonstrator's conduct falls within the restriction imposed by the law, bearing it in mind that the restriction is narrowly construed while the constitutional right receives a generous interpretation.

C. The appellants' conduct

44. The appellants were fully entitled to protest against the MTR's fare increases in the exercise of their rights of peaceful assembly and demonstration. But to stay within their constitutionally protected sphere, they had to avoid committing a breach of the peace – a concept examined below – and they had to avoid infringing the rights and freedoms of others.

45. As McGrath J recently pointed out in the New Zealand Supreme Court:

> "Freedom of assembly is not limited to gatherings for the purpose of protest. It extends to formal and informal assemblies in participation in community life. Gatherings for purposes that are ostensibly less political are also important to citizens for forming opinions and, ultimately, for participating in the democratic process."[26]

46. That applies to the persons on the podium who were exercising their rights of peaceful assembly and free expression at the prize-giving ceremony.

47. The Court viewed video recordings showing the conduct of the appellants. The 1st appellant's conduct was comparatively mild. He climbed over the barriers and rushed onto the stage and, standing some distance away from the speaker, scattered "devil money" in the air as his form of protest. He then turned away and did not resist being marched off the stage by security staff. An employee of the MTR had unsuccessfully attempted to stop him and had suffered a minor injury to his elbow. The interruption to the ceremony was very brief and, although the speaker was obviously surprised by the 1st appellant's sudden appearance, she took it in her stride, laughing it off.

48. The 2nd appellant's conduct was significantly more intrusive and threatening. He leapt over the barriers surrounding the stage, dashed at speed onto the podium and lunged towards the speaker (the Secretary for Transport) who was addressing the crowd through a microphone. His conduct undoubtedly caused those on the stage to fear for the speaker's safety. Persons who had been seated at the back of the stage spontaneously leapt to their feet to try to intercept the 2nd appellant in her defence. The master of ceremonies suffered minor injuries in this process. Security staff swarmed onto the stage to bundle the 2nd appellant off the podium. The reaction of the persons on the stage was quite natural since no one could have known what the 2nd appellant's intentions were as he lunged towards the speaker. As it turns out, his object was to seize the microphone away from her and to use it to shout his protest slogans. The ceremony resumed about a minute after the 2nd appellant's intrusion.

49. In my view, the 2nd appellant's conduct crossed the line and was unacceptable as a form of demonstration. It put the persons on the podium in fear of one of them being harmed, constituting a breach of the peace. Those persons were entitled to exercise their constitutional rights of peaceful assembly and freedom of expression without being subjected to apparent threats of imminent violence. The 2nd appellant's actions may very well have constituted a common assault since he appears intentionally or recklessly to have caused another to apprehend immediate and unlawful personal violence.[27] And, as discussed below, he could have been arrested and bound over to keep the peace. The police have a duty to prevent such intrusions. The security personnel were entitled to act using reasonable force in the defence of others and in self-defence. If the law were to take a different view, the very constitutional rights now being invoked by the appellants would be at risk of being subverted in counter-demonstrations by thugs and bully boys seeking to suppress the expression of views they do not like.

D. The constitutionality of the public order offences charged

50. The appellants were not, however, charged with common assault. Nor was it sought to have them bound over. Instead, the decision was taken to bring charges under section 17B(1) and section 17B(2) of the Public Order Ordinance.[28] I turn now to consider whether those charges were made out.

51. There has rightly been no challenge to the constitutionality of those sections. As noted above, Article 17 recognizes the maintenance of public order and protection of the rights and freedoms of others as legitimate purposes capable of justifying a restriction on the right of peaceful assembly.

52. Section 17B(1) makes it an offence to act in a disorderly manner for the purpose of preventing the transaction of the business for which a public gathering was called together. It is obviously aimed at protecting the right of peaceful assembly exercised by others.

53. Section 17B(2) has two principal elements. It involves in the first place, proof of noisy or disorderly behaviour; or of the use of threatening, abusive or insulting words by the defendant. In the present case, the focus of the charges is on disorderly behaviour. Secondly, the offence requires proof that such conduct was performed with intent to provoke a breach of the peace, or in circumstances where such conduct was likely to cause a breach of the peace. It is therefore plainly an offence aimed at maintaining public order or preventing public disorder.

54. Restricting the right of peaceful assembly by setting the boundaries established by these two sections (and, indeed, by other offences which prohibit violence or the threat of violence) involves in my view, the rational and proportionate furthering of the aforesaid legitimate purposes. They set a proper balance between the interests of demonstrators exercising their right of peaceful assembly on the one hand, and the interests of public order and the rights and freedoms of persons affected by that exercise on the other. It should not ordinarily be necessary in future for a magistrate or judge to dwell on the constitutionality of these offences.

E. Was an offence under section 17B(1) proved?

55. The offence under section 17B(1) targets a "person who at any public gathering acts in a disorderly manner for the purpose of preventing the transaction of the business for which the public gathering was called together". The main issue which arises concerns the meaning of "preventing".

56. When indicating that he would, if necessary, also have convicted the appellants under section 17B(1), the Magistrate stated (in translation): "... the appellants' conduct satisfied the meaning of 'prevent' as they had disrupted or even brought the ceremony to termination". While I can see how the ceremony can be said to have been "disrupted", I am with respect unable to see any basis for suggesting that their conduct "brought the ceremony to termination". It was not in dispute that it resumed shortly after the interruptions. I can see no basis for inferring that they must have intended to prevent the ceremony from transacting its intended business, the obvious inference being that they merely wanted to interrupt it to dramatise their protest.

57. On appeal before Barnes J, Mr H Y Wong, counsel for the 1st appellant, submitted that the word "preventing" should be held to require proof that the gathering was "completely brought to an end" or "aborted", something that manifestly had not happened in this case. The Judge did not accept that argument. She pointed to various dictionary meanings and concluded that "preventing" in section 17B(1) covered situations where the gathering had "to stop for a moment due to hindrance". Her Ladyship added (in translation):

> "As a result of the 1st appellant's conduct, the Secretary's speech stopped for a few seconds. Shortly after she resumed speaking, the 2nd appellant snatched away the microphone, so that she was unable to continue with her speech. It is obvious that the appellants were preventing the prize presentation ceremony of the walking race from going on by behaving in that way in order to stay on the stage and capture everyone's attention for as long as they could, to fulfil their purpose of escalating the intensity of their protest."

58. I am with respect unable to agree with that construction of "preventing". In my view, both as a matter of language and of the evident statutory purpose of section 17B(1), a person only has the "purpose of preventing the transaction of the business for which the public gathering was called together" if his purpose is to make it impossible in practical terms to hold or continue with the gathering; or, at least, to interrupt the gathering for such a duration or by using such means as substantially to impair the intended transaction of business. It certainly does not apply where, as in the present case, the demonstrators' purpose evidently did not involve more than a brief interruption of the prize-giving.

59. The same result is arrived at on a purposive construction. As stated above, the evident purpose of section 17B(1) is to protect the exercise by others of their right of peaceful assembly. The need for such protection is obviously triggered where the defendant's purpose is to prevent the public gathering from happening or continuing; or substantially preventing it from transacting the intended business of the gathering. But an intrusion which must have been envisaged to cause only a minor interruption, with the gathering then resuming, cannot be said to have been intended to deny the people attending the gathering that right. It is not the statutory purpose to employ section 17B(1) to punish such minor interruptions.

60. As previously noted, restrictions on fundamental rights are narrowly construed. So if "preventing" can properly be given a range of meanings, the Court inclines towards adopting a meaning which preserves a wider ambit for the relevant rights.

61. For the abovementioned reasons, it is my view that the appellants' convictions under section 17B(1) must be set aside. I turn then to consider their possible liability under section 17B(2).

F. Did the appellants commit offences under section 17B(2)?

62. Section 17B(2) (set out in Section A above) is derived from the United Kingdom's Public Order Act 1936, section 5.[29] Focussing on the "disorderly behaviour" aspect of the offence,[30] the elements which the prosecution must prove under section 17B(2) are that the defendant:

(a) in a public place;

(b) behaved in disorderly manner;

(c) either

(i) with intent to provoke a breach of the peace; or

(ii) whereby a breach of the peace was likely to be caused.

63. It is common ground that the relevant incident occurred in a public place. And in the case of the 2nd appellant, Mr Martin Lee SC realistically accepted that his conduct was "disorderly". However, Mr H Y Wong did not accept that the behaviour of his client, the 1st appellant, could be so described.

64. Both appellants in any event deny that there is any evidential basis for holding that their conduct was either intended to provoke or was likely to cause a breach of the peace when those expressions are properly construed.

F.1 The meaning of "disorderly behaviour"

65. The courts have not attempted a definition of "disorderly behaviour". However, there have been attempts to relate that phrase to other familiar terms. Thus, in the Scottish case of *Campbell v Adair*,[31] it was held that "disorderly" indicates "less aggressive conduct than would be required to constitute a breach of the peace". In New Zealand, in *Kinney v Police*,[32] Woodhouse J said that "disorderly behaviour" meant "something more than unmannerly, or disturbing or annoying" behaviour. And the Divisional Court in England has held that there need not be any element of violence, present or threatened, nor proof of any feeling of insecurity, in an apprehensive sense, on the part of the public to establish disorderly conduct in a harassment case.[33] Moreover, it was pointed out that "disorderly behaviour" did not need to be threatening, abusive or insulting, since the Public Order Act deals separately with the use of words meeting that description. Similarly, in section 17B(2) the use of "threatening, abusive or insulting words" forms a separate limb of the offence.

66. In the same case, the Divisional Court held that the proper approach is that of the House of Lords in *Brutus v Cozens**[34]* where their Lordships decided that the meaning of "insulting behaviour" was a question of fact for the trial court. As Lord Reid held in *Brutus v Cozens*:

> "The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law."[35]

67. In my view, that is the approach which should be adopted in Hong Kong. As Gleeson CJ pointed out in *Coleman v Power*:[36]

> "Concepts of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs."

68. Such concepts are best left to the trial judge to be applied in their ordinary meaning to the time, place and circumstances of the conduct in question. In the present case, the Courts below held that the 1st appellant's conduct did constitute "disorderly behaviour". They were entitled to take that view. The 1st appellant climbed over barriers plainly intended to keep uninvited persons off the stage. He evaded interception by an MTR employee who attempted to stop him (and who consequently suffered a minor injury) and ran onto the stage where he momentarily interrupted proceedings with his "devil money" demonstration before being marched off the podium. As a matter of ordinary language, such behaviour is capable of being described as "disorderly".

F.2 "Disorderly behaviour" – the Australian and New Zealand cases

69. There was considerable discussion of the Australian High Court's decision in *Coleman v Power**[37]*. and the decisions of the New Zealand Supreme Court in *Brooker v Police**[38]*. and *Morse v Police*.[39] While there is much of interest to be found in those judgments and while the meaning of "disorderly behaviour" is extensively considered in the New Zealand decisions, those cases must be treated with caution in Hong Kong since their analysis and construction of the relevant statutory provisions (which are materially different from section 17B(2)) were undertaken to address a constitutional problem which we do not face. For the reasons which follow, in my view, they are decisions which have no immediate relevance to the present appeal.

70. As indicated in Section D above, the constitutionality of section 17B(2) is not in issue. It has two main elements, the first involving the defendant's conduct (relevantly "disorderly behaviour" in the present case) and the second involving a requirement that such conduct be intended to provoke or likely to cause a breach of the peace. Thus, the section 17B(2) offence can be accommodated as a justified restriction in pursuit of a legitimate purpose recognized by Article 17 as previously discussed.

71. In contrast, the three cases mentioned above were all concerned with offences which do not make liability dependent upon proof of an intention to provoke or the likelihood of causing a breach of the peace. Nor is liability dependent upon the defendant denying others the right of peaceful assembly. In *Coleman v Power*,[40] the offence[41] was constituted simply by any person, in any public place, using "any threatening, abusive or insulting words to any person". The Court was concerned with a defendant charged with using insulting words addressed to a policeman (asserting that he was corrupt). In *Brooker v Police*[42]and *Morse v Police*,[43] the offence[44] makes liable every person who simply "in or within view of any public place, behaves in an offensive or disorderly manner..." The Court in *Brooker v Police* was concerned with deciding how "behaves in [a] ... disorderly manner" should be interpreted where an individual staged a solo protest against police conduct outside the house of a constable who was trying to get some sleep. And in *Morse v Police*, it was concerned with "offensive behaviour" involving the burning of a New Zealand flag on ANZAC day.

72. Earlier versions of those offences, like section 17B(2), required proof of a second element involving a breach of the peace. But that requirement had been dropped, as Gleeson CJ explained:

> "Section 7 of the Vagrants Act replaced s 6 of the Vagrant Act 1851 (Qld). That section prohibited the using of threatening, abusive or insulting words or behaviour in any public street, thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned. The omission of the element relating to a breach of the peace, in the 1931 Act, was plainly deliberate.
>
> The legislative changes in Queensland in 1931 were similar to changes in New Zealand in 1927. In New Zealand, the Police Offences Act 1884 (NZ) made it an offence to use any threatening, abusive or insulting words or behaviour in any public place within the hearing or in the view of passers by, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned. By legislation in 1927, the provision was altered by omitting any reference to a breach of the peace, and by expanding the description of the prohibited conduct to cover behaving in a riotous, offensive, threatening, insulting or disorderly manner, or using threatening, abusive or insulting words, or striking or fighting with any other person."[45]

73. Having eliminated the breach of the peace requirement, the offences acquired an extremely wide reach and potentially came into conflict with constitutionally protected rights. In Australia, constitutional protection was conferred on the implied freedom of communication about government and political matters as laid down in *Lange v Australian Broadcasting Corporation*.[46] And in New Zealand, the constitutional rights were those protected by section 14 of the New Zealand Bill of Rights Act 1990, guaranteeing freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form, subject (as provided by section 19(3)) to reasonable restrictions prescribed by law which are necessary to protect other important interests, including public order and the rights and reputations of others.

74. Thus, the Australian High Court and the New Zealand Supreme Court were engaged in construing the concepts of "insulting words" and "disorderly behaviour" and "offensive behaviour" in their legislation to achieve compatibility with constitutionally protected rights.[47] In New Zealand, this was done by interpreting the "disorderly behaviour" offence as one aimed at maintaining public order and confining it to cases where the disorderly behaviour is disruptive of public order, interfering with others' use of public space;[48] although it was held that this did not mean that it had to lead to violence.[49] "Offensive behaviour" was given a like meaning. The majority in the Australian High Court drew similar lines, holding that by construing the offences as intended to suppress the disturbance of public order, they could be given a meaning compatible with the implied constitutional freedom. Thus, the expression "insulting words" was construed to mean words intended to or reasonably likely to provoke unlawful physical retaliation.[50]

75. In Hong Kong, for the reasons discussed above, there is no need to adopt such a particular construction in relation to the words "behaves in a ... disorderly manner" to make section 17B(2) compatible with Article 17.

76. The 2nd appellant accepts that his conduct was "disorderly" and, for the reasons given above, the Courts below were entitled to find that the same applies to the 1st appellant as a matter of ordinary language.

F.3 The requirement that a breach of the peace is likely to be caused

F.3a Meaning and consequences of a "breach of the peace"

77. To decide whether the second element of section 17B(2) has been made out against the appellants, it is necessary to consider the meaning of "breach of the peace". The modern authority is *R v Howell*,[51] where Watkins LJ explained the concept as follows:

> "... there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant."[52]

78. Approving that decision, Lord Bingham of Cornhill noted in *R (Laporte) v Chief Constable of Gloucestershire*,[53] that "the essence of the concept was to be found in violence or threatened violence" and it was on that basis that the European Court of Human Rights found that the concept possessed sufficient certainty in law.[54]

79. However, a person may provoke a breach of the peace without any violence or threat of violence on his part: "... it suffices that his conduct is such that the natural consequence of it is violence from some third party".[55] That third party need not be the person provoked or a by-stander, it could, for instance, be a member of the provoker's group.[56] The actual or feared harm must be unlawful[57] and, where the harm is anticipated, there must be a real risk and not the mere possibility of such harm.[58] Moreover, the anticipated harm must be imminent.[59]

80. As appears in the passage from *R v Howell* cited above, a breach of the peace or reasonable apprehension of an imminent breach of the peace gives rise to a common law power of arrest without warrant. It also gives rise to a power to take measures short of arrest to prevent such breach.[60]

81. Moreover, while a breach of the peace is not, as such, a criminal offence, it founds an application to bind over.[61] The jurisdiction to bind over dates back at least to the 1361 Statute of Edward III.[62] In Hong Kong, the jurisdiction is now conferred by the Criminal Procedure Ordinance,[63] with procedural provisions contained in the Magistrates Ordinance.[64] It is a jurisdiction aimed at preventing breaches of the peace in the future. A binding-over order may thus be made requiring a person to keep the peace where there are grounds for reasonably apprehending that he may become involved in a breach of the peace in future. That person may, for instance, have previously been involved in violence to a person or property; or may threaten such violence; or be guilty of conduct giving rise to a reasonable apprehension that such violence will take place.[65]

82. It was with these principles in mind that I expressed the view[66] that the 2nd appellant could have been arrested and bound over to keep the peace. His conduct whereby one or more of the persons on the podium were put in fear of being harmed amounted to a breach of the peace giving rise to a power of arrest and provided a basis for binding him over to prevent future breaches.

F.3b Section 17B(2)'s second element

83. But section 17B(2) is not designed to penalise persons who simply commit breaches of the peace. That is of central importance to the disposal of this appeal. The appellants would only be guilty of an offence under that section if their disorderly behaviour was either intended or likely to cause a breach of the peace by someone else. It is not enough to show that they were guilty both of disorderly behaviour and of committing a breach of the peace. This is a conclusion dictated by the language of section 17B(2) and reflected in the Hong Kong authorities and the authorities on section 5 of the United Kingdom's Public Order Act 1936 from which section 17B(2) is derived and which is structured in the same way.

84. There are two forms of the offence and each form involves proof of two elements.[67] For present purposes, the first element in both forms of the offence is disorderly behaviour which as discussed above, is established against both appellants.

85. The second element in the first form of the offence requires such disorderly behaviour to be carried out "with intent to provoke a breach of the peace". Plainly, the defendant's intent must be to provoke a breach of the peace (in the sense explained in *Howell* and discussed above) by another person or other persons as a consequence of his disorderly conduct. It cannot sensibly be applied to a case where the defendant is guilty of disorderly behaviour and where he alone commits a breach of the peace. In such a case, it would make no sense to speak of him acting "with intent to *provoke*" a breach of the peace. He would have simply have *committed* a breach of the peace.

86. The second element in the second form of the offence requires the disorderly behaviour to be such that "a breach of the peace is likely to be caused". Once again, such language is inapt for describing a situation involving the conduct of the defendant and no one else. This form of the offence requires an assessment of the likely reaction to the defendant's disorderly conduct by the persons who are affected by it.

87. This view has the support of the authorities. Thus, in *Jordan v Burgoyne*, [68] a case involving section 5 of the Public Order Act 1936, Lord Parker CJ put the focus firmly on the likely reaction of the crowd in Trafalgar Square to the defendant's pro-Hitler remarks:

> "...if words are used which threaten, abuse or insult - all very strong words - then that person must take his audience as he finds them, and if those words to that audience or that part of the audience are likely to provoke a breach of the peace, then the speaker is guilty of an offence."

88. In *Marsh v Arscott*,[69] McCullough J, sitting with Donaldson LJ in the English Divisional Court stated in relation to the said section 5:

> "The phrase 'whereby a breach of the peace is likely to be occasioned' indicates that Parliament was concerned with cause and effect, ie with conduct which is likely to bring about a breach of the peace and not with conduct which is itself a breach of the peace and no more. Were this the law every common assault occurring in a public place would also be an offence against this section. Many such assaults will in fact be likely to lead very quickly to a breach of the peace, and these will be within the section; but, without more it is not enough that conduct which is threatening, abusive or insulting is of itself a breach of the peace."

89. In *Parkin v Norman*,[70] a case involving the "threatening, abusive or insulting words" stream of the offence, McCullough J elaborated as follows:

> "The purpose of the Act was to promote good order in places to which the public have access ... It is clear, both from the long title and from sections 1, 2 and 4 that Parliament intended to prevent activities liable to lead to public disorder, regardless of whether or not those engaging in them intended that disorder should result. The use of the phrase 'whereby a breach of the peace is likely to be occasioned' in section 5 reflects this thinking. ... But not all threats, abuse or insults necessarily have this result. Qualifying words were therefore required, and conduct of this kind was only prohibited if it was likely to lead to a breach of the peace or, as was added, if it was so intended. It was the likely effect of the conduct on those who witnessed it with which Parliament was chiefly concerned. What is likely to cause someone to break the peace is his feeling that he has been threatened or abused or insulted, and this will be so whether or not the words or behaviour were intended to threaten or to abuse or to insult."

90. In *Percy v DPP*,[71] Collins J in the Divisional Court emphasised that the provocation had to be directed at others:

> "The conduct in question does not itself have to be disorderly or a breach of the criminal law. It is sufficient if its natural consequence would, if persisted in, be to provoke othersto violence, and so some actual danger to the peace is established."

91. The section 17B(2) offence therefore has a somewhat paradoxical feature. Whereas a defendant who acts in a disorderly fashion may commit the offence if he misbehaves in a situation where less than law-abiding people might react by breaching the peace, he escapes liability if he indulges in the same conduct in the presence of law-abiding and disciplined persons who are regarded as unlikely so to react.

92. The purpose of section 17B(2) is in other words, to prevent a person instigating public disorder involving others rather than simply punishing that person for his own misbehaviour. It therefore excludes from its ambit many situations where the defendant's disorderly behaviour or threatening, abusive or insulting words, and so forth, are not likely to produce such violence. In *Coleman v Power*,[72] Gleeson CJ described some such situations:

> "There may be any number of reasons why people who are threatened, abused or insulted do not respond physically. It may be (as with police officers) that they themselves are responsible for keeping the peace. It may be that they are self-disciplined. It may be simply that they are afraid. Depending upon the circumstances, intervention by a third party may also be unlikely. ... And if violence should occur, it is not necessarily unlawful. Depending upon the circumstances, a forceful response to threatening or insulting words or behaviour may be legitimate on the grounds of self-defence or provocation. Furthermore, at common law, in an appropriate case a citizen in whose presence a breach of the peace is about to be committed has a right to use reasonable force to restrain the breach."

F.3c The reaction of police officers and trained security personnel

93. The likelihood of a breach of the peace is assessed as a matter of fact, taking account of the nature of the disorderly behaviour and the circumstances in which such behaviour occurred.

94. As reflected in the passage cited from the judgment of Gleeson CJ, the courts have consistently regarded police officers generally as persons unlikely to react by breaching the peace. Since the police have a legal duty to keep the peace[73] the courts have recoiled from the suggestion that in taking measures to preserve public order they might be regarded as acting unlawfully by themselves committing breaches of the peace.

95. Thus, in *Marsh v Arscott*,[74] where a defendant directed threatening, abusive or insulting words at the police with no one else present, McCullough J held that:

> "...no breach of the peace was likely to have been occasioned. No other person was likely to have broken the peace, and all that the police were likely to do was arrest him, as they did."

96. Donaldson LJ pointed out that there were other offences that could be charged:

> "...there are a number of other offences which can be charged, where appropriate, and the most obvious of course is common assault or assault on the police in the execution of their duty, and it must never be forgotten in any event that the police, in pursuance of their duty to keep the peace, have a right and a duty to detain those who are threatening it."[75]

97. Similarly, in *Redmond-Bate v DPP*,[76] Sedley LJ pointed out that in *Percy v DPP*:[77]

> "...a bind-over on a woman who kept climbing over the perimeter fencing into a military base was quashed because there was no sensible likelihood that trained security personnel would be provoked by her conduct to violence."

98. A similar view has been taken in the Hong Kong courts.[78] In one such case, trained security staff of the Hong Kong Jockey Club were regarded as unlikely to have reacted to disorderly conduct by committing a breach of the peace, especially in full view of members of the racing public.[79]

F.3d Was it proved that a breach of the peace was likely to be caused in the present case?

99. Barnes J held that the section 17B(2) offence was concerned with "the effect or influence which the disorderly conduct is likely to produce on the people who witnessed the conduct in question at the scene".[80] She noted that the Magistrate had not analysed the evidence or made findings in respect of such influence or effect.[81] Her Ladyship held that the evidence showed that the MTR staff had acted in a "very restrained and professional manner" and that they "would not themselves breach the peace when, in the course of the performance of their duty, some people disrupted the order".[82] She concluded that it had not been established that the appellants' disorderly conduct was likely to cause other people present to breach the peace and quashed the section 17B(2) convictions.[83]

100. I respectfully agree with Barnes J's approach and conclusion. The only persons who were in the immediate vicinity of the appellants when they invaded the stage were the officiating guests and MTR staff on the podium, security guards and possibly the police. There was no evidential basis for suggesting that any of them might have reacted unlawfully by committing a breach of the peace in response to the intrusion. Neither was there any evidence that other members of the public present, whether the competing athletes or otherwise, might have been prone to reacting violently to the disorderly behaviour of the two appellants. It follows that Barnes J was right to overturn their convictions under section 17B(2).

G. Conclusion

101. For the foregoing reasons, I conclude that convictions both under section 17B(1) and section 17B(2) cannot be sustained against the appellants. I would therefore allow their appeals. I would direct that any submissions as to costs should be lodged in writing within 21 days from the date of this judgment and that in default of such submissions, there be no order as to costs.

102. Before leaving this judgment, I am anxious to reiterate that the 2nd appellant's acts described in Section C above are unacceptable and exceed the boundaries of the constitutionally protected right of peaceful assembly and demonstration. As it turns out, he was charged with offences that are designed to prevent the instigation of public disorder rather than individual disorderly behaviour. If he had been charged with common assault, he may very well have been convicted. He could in any event have been arrested and bound over to keep the peace. The 1st appellant's conduct was less objectionable, but he too behaved in a disorderly manner and a binding over order to keep the peace might very well have been justified in his case.

Mr Justice Tang PJ:

Introduction

103. On 10 April 2011, for the purpose of a prize presentation ceremony following a fund raising event,[84] a stage was erected on a drained pond at Statue Square. The prize presentation ceremony began at about noon. Persons including guests who were involved in the prize presentation ceremony were seated on the stage, among whom the Secretary for Transport and Housing Madam Eva Cheng ("the Secretary") and the Chairman of the MTR, Mr Raymond Ch'ien ("Mr Ch'ien"). We were told that because protests were expected, the MTR had deployed a total of 29 staff members and 20 contract security guards to maintain order. In addition, a significant number of police constables were strategically positioned. Measures[85] were taken to ensure that only authorised persons could enter certain areas, including the prize presentation stage.

104. The event was recorded on videotape by the MTR Corporation as well as by Cable TV. The police also carried out their own video recording. Four sections of video footage were produced as exhibits at trial. The video recordings show that while Chairman Ch'ien was speaking on the stage, demonstrators were shouting the slogan "Shame on MTR for their fare hike". The shouting continued even after the Secretary had begun to speak.

105. These appeals are concerned with what happened in the next minute or so, which were captured on video. The summary below is largely taken from the Statement of Findings of the trial magistrate, Mr Marco Li.

106. While the Secretary was speaking, Mr Chow Nok-hang (hereafter called the 1st appellant) rushed onto the stage from the left and scattered hell money. The Secretary was startled and cried out "wow" she then said "This is not some kind of sport. Children, you should not imitate that. Hahaha…". While the 1st appellant was being taken away, he shouted "Shame on MTR for their fare hike." Earlier, PW1 the organizer of the event was standing on the drained pond, had tried to stop the 1st appellant from going up onto the stage but he became unbalanced. He got hold of the 1st appellant's thigh but lost balance again, and his elbow was injured when he hit the kerb.

107. Immediately after that, Mr Wong Hin-wai (hereafter called the 2nd appellant) jumped onto the stage and ran towards the Secretary. Mr Ch'ien sprang up from his seat trying to stop him. The 2nd appellant snatched away the microphone placed in front of the Secretary and shouted the slogan "Shame on MTR for their fare hike" through the microphone. A large number of persons, presumably those involved with security, came forward. They separated the Secretary from the 2nd appellant and took him away together with the microphone. At about that time, a demonstrator wearing a black upper garment went towards the stage, he appeared to be trying to go onto the stage, but he was stopped by the staff. He raised his arm and shouted "Shame on MTR for their fare hike". The learned magistrate said:

> "PW2 … the MC … pulled his partner to his side fearing that she would be knocked down. … He tried to stop the second appellant but was not fast enough. He believed that the secondappellant had taken hold of Secretary Cheng's microphone and said something. Then a group of personnel together with him carried the secondappellant down the stage. He suffered minor injuries during the struggle: … The second appellant put up slight resistance but soon calmed down."

The charges

108. As a result the 1st and 2nd appellants[86] were each charged with one count of "Behaving in a disorderly manner in a public place", contrary to s17B(2) of the Public Order Ordinance Cap 245 ("POO") and an alternative count of "Acting in a disorderly manner at a public gathering" under s17B(1) of the Public Order Ordinance.

109. Section 17B provides :

> "(1) Any person who at any public gathering acts in a disorderly manner for the purpose of preventing the transaction of the business for which the public gathering was called together or incites others so to act shall be guilty of an offence and shall be liable on conviction to a fine of $5000 and to imprisonment for 12 months.
>
> (2) Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine of $5000 and to imprisonment for 12 months."

110. The particulars of the offence alleged that each of the appellants in respect of the s17B(1) offence "… acted in a disorderly manner for the purpose of preventing the transaction of the business of the 'MTR Hong Kong Race Walking 2011' for which the public gathering was called together." And in respect of the s17B(2) offence that each of them behaved "in a noisy[87] or disorderly manner, with intent to provoke a breach of the peace, or whereby a breach of the peace was likely to be caused."

111. The trial magistrate convicted them of the s17B(2) offence and sentenced each of them to 14 days imprisonment. He said, had it been necessary to do so, he would have also convicted them on the alternative charges under s17B(1).

112. On appeal Barnes J quashed their conviction under s17B(2) but convicted them on the alternative charges of "Acting in a disorderly manner at a public gathering" contrary to s17B(1). She set aside the prison terms and fined the 1st appellant $2000 and the 2nd appellant $3000. Both the appellants and the prosecution have appealed to us.

Public Order Offences

113. Section 17B(1) and (2) are public order offences[88], and may impact upon important freedoms, such as the freedom of speech, of assembly and of demonstration, which are fundamental freedoms protected by the Basic Law and the Hong Kong Bill of Rights Ordinance. The freedom of assembly, demonstration and speech are closely associated.[89] It is clear that at the material time the appellants were engaged in a public demonstration against a MTR fare hike. They were exercising their rights of free speech, assembly and demonstration.

114. In respect of such fundamental freedoms, this court has emphasized:

> "…It is well established in our jurisprudence that the courts must give such afundamental right a generous interpretation so as to give individuals its full measure. *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 at pp.28-29. On the other hand,restrictions on such a fundamental right must be narrowly interpreted. *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 at para.24. Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the Court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, *the courts* must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them."[90]

115. The reason for such approach was given by the majority earlier in their judgment when they said:

> "1. The freedom of peaceful assembly is a fundamental right. It is closely associated with the fundamental right of the freedom of speech. The freedom of speech and freedom of peaceful assembly are precious and lie at the foundation of a democratic society.
>
> 2. These freedoms are of cardinal importance for the stability and progress of society for a number of inter-connected reasons. The resolution of conflicts, tensions and problems through open dialogue and debate is of the essence of a democratic society. These freedoms enable such dialogue and debate to take place and ensure their vigour. A democratic society is one where the market place of ideas must thrive. These freedoms enable citizens to voice criticisms, air grievances and seek redress. This is relevant not only to institutions exercising powers of government but also to organizations outside the public sector which in modern times have tremendous influence over the lives of citizens. Minority views may be disagreeable, unpopular, distasteful or even offensive to others. But tolerance is a hallmark of a pluralistic society. Through the exercise of these freedoms minority views can be properly ventilated."

116. Their lordships went on to say that although these freedoms may be restricted as prescribed by law, such restriction must be necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others. Any restriction must be both necessary and proportionate.[91]

117. The possible impact on freedom of assembly and expression in connection with a charge of public obstruction was considered in *Yeung May Wan* where persons responsible for a largely static and peaceful demonstration and the display of a banner by between 4 and 16 persons outside the Liaison Office of the Central People's Government were charged with obstruction of a public place contrary to s4A of the Summary Offences Ordinance Cap 228 by setting out the banner (the 1st charge), and doing an act whereby obstruction might accrue to a public place contrary to s4(28) by assembling together and displaying the banner (the 2nd charge), and of wilfully obstructing a police officer contrary to s36(b) of the Offences Against the Person Ordinance Cap 212 (the 3rd charge) and assaulting a police officer contrary to s63 of the Police Force Ordinance Cap 232 (the 4th to 6th charges)(the wilful obstruction and assault charges). The Court of Appeal quashed the convictions on the public place obstruction charges but upheld those on the wilful obstruction and assault charges. The defendants' appeals to this court were unanimously allowed. In the joint judgment of Li CJ, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ they said:

> "31. Central to the case is the fact that the arrests were made and the charges of public place obstruction laid against the defendants because of their conduct in the course of a peaceful public demonstration. This was not a simple case of obstruction, for instance, by inconsiderate parking of a vehicle or by dumping waste building materials on the road or by a hawker impeding pedestrians on a pavement. Here, the fact that the defendants were at the time of arrest engaged in a peaceful demonstration meant that the constitutionally protected right to demonstrate was engaged. Indeed, a peaceful demonstration, may also engage the closely related guaranteed freedoms of opinion, expression and assembly. Such fundamental rights, when engaged, have an important bearing on the scope of the offence of obstruction and consequently on the scope of police powers of arrest on suspicion of that offence.
>
> …

> 44. where the obstruction in question results from a peaceful demonstration, a constitutionally protected right is introduced into the equation. In such cases, it is essential that the protection given by the Basic Law to that right is recognised and given substantial weight when assessing the reasonableness of the obstruction. While the interests of those exercising their rights passage along the highway obviously remain important, and where 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."[92]

Disorderly manner

118. The allegations of acts or behaviour in a disorderly manner was common to the offences under s17B(1) and (2). These offences are not unique to Hong Kong and have a long history. There are decisions from other common law jurisdiction on similar offences, which provide helpful illumination. I will refer to some of these decisions below.

119. In New Zealand, s3 and s4 of the Summary Offences Act 1981 dealt with offences involving disorderly manner behaviour. It was an offence under s3 punishable by three months imprisonment or a fine not exceeding $2000, for any person "who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue." Section 4(1)(a) created a lesser offence, punishable only by a fine not exceeding $1000, which did not require any such conduct to be "likely in the circumstances to cause violence against persons or property to start or continue."

120. In *Brooker v Police* [2007] 3 NZLR 91, a decision of the Supreme Court of New Zealand, the defendant, who believed that a constable had behaved unlawfully towards him, went to her home shortly after 9 am, knowing that she had been on duty all night, knocked on her door, and after she opened it and asked him to go away, retreated to the grass verge of the road where he sang songs in a normal voice and played his guitar. When the police, summoned by the constable, told the defendant to stop and go away he refused. The defendant whose conviction under s4(1)(a) was upheld by the Court of Appeal appealed to the Supreme Court on the ground that his behaviour could not be regarded as "disorderly" under s4(1)(a) when read in conformity with s14 of the New Zealand Bill of Rights Act 1990, which guarantee the right to freedom of expression. By a majority, his conviction was set aside.

121. Elias CJ was of the view at [34] that even this lesser offence was capable of significant impact upon important freedoms and that [24] "disorderly behaviour under s4(1)(a) means behaviour seriously disruptive of public order. Simply causing annoyance to someone else, even serious annoyance, is insufficient if public order is not affected." Thus, the disorderly behaviour must be seriously disruptive of public order. [42] to [47]. Moreover, "the value protected by the Bill of Rights must be specifically considered and weighed against the value of public order … As a result, public order will less readily be seen to have been disturbed by conduct which is intended to convey information or express an opinion than by other forms of behaviour."[59]

122. Blanchard J [56] said to fall within s4(1)(a), the behaviour must substantially disturb the normal functioning of life in the environs of that place. "It must cause a disturbance of good order which in the particular circumstances of time and place any affected members of the public could not reasonably be expected to endure because of its intensity or its duration or a combination of both those factors" Thus, no one should be convicted " unless there has been a substantial disruption of public order."

123. Tipping J said: [90] "Conduct in a qualifying location is disorderly if, as a matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear … Where … the behaviour concerned involves a genuine exercise of the right to freedom of expression, the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case."

124. McGrath J dissented on the facts. He said at [146] "The detriment to the complainant's privacy interests, because of the time, place and manner of the appellant's protest which sought to interrupt her from resting at her home, went well beyond what any citizen, public official or not, should have to tolerate in her home environment."

125. Thomas J also dissented, at [186] he said "Disorderly behaviour may range from behaviour which disrupts public order to behaviour which, because it is an annoyance, impacts on public order. Such behaviour may, or may not, implicate a right or rights. The Court's decision in any given case will depend on the time, location and circumstances and will essentially be a question of fact and degree."

126. *Morse v Police* [2012] 2 NZLR 1, another decision of the New Zealand Supreme Court, was concerned with offensive conduct under s4(1)(a)[93]. There were flag burning, horn blowing by a group of protestors, during a Dawn Parade on ANZAC Day, to attract attention to what they were doing. The head notes in the report stated that the Supreme Court of New Zealand held (unanimously) that "The offence … was concerned with public order. To be offensive under s4(1)(a), a behaviour … had to be productive of disorder". And by a majority (Elias CJ and Anderson J dissenting) to such an extent that it was beyond what could be expected to be tolerated by other reasonable people in a democratic society.

127. *Morse v Police* is important because it provides important insight on what persons subject to the impugned conduct could be expected to tolerate.

128. Blanchard J said the test is that of a reasonable person who, "must surely be a person who is sensitive to such values[94] and displays tolerance for the rights of the person whose behaviour is in question. In other words, the hypothetical reasonable person (of the kind affected) is one who takes a balanced, rights-sensitive view, conscious of the requirements of s5 (New Zealand Bill of Rights Act), and therefore is not unreasonably moved to wounded feelings or real anger, resentment, disgust or outrage, particularly when confronted by a protestor." [64]

129. Tipping J said at [70] “It cannot, however, be right that the unreasonable reactions of those who are affected by the behaviour can be invoked as indicative of a threat to public order. Hence those affected by the behaviour must be prepared to tolerate some degree of offence on account of the rights and freedoms being exercised by those responsible for the behaviour. It is only when the behaviour of those charged under s4(1)(a) causes greater offence than those affected can be expected to tolerate that an offence under s4(1)(a) will have been committed. And it is always necessary for the prosecution to demonstrate a sufficient disturbance of public order. [71] In this context public order is sufficiently disturbed if the behaviour in question causes offence of such a kind or to such an extent that those affected are substantially inhibited in carrying out the purpose of their presence at the place where the impugned behaviour is taking place. Only if the effect of the behaviour reaches that level of interference with the activity in which those affected are engaged is it appropriate for the law to hold that their rights and interests should prevail over the right to freedom of expression of those whose behaviour is in contention. That is the appropriate touchtone. [72] All relevant matters of time, place and circumstance must, however, be brought to account when applying the touchstone to the behaviour in question and thereby deciding whether the defendant's conduct is offensive in law. The application of the touchstone is contextual not abstract; but those affected are required, for the purpose of the necessary assessment, to be appropriately tolerant of the rights of others. Tolerance to the degree thought appropriate by the Court is the pivot on which the law reconciles the competing interests of public order and freedom of expression. A free and democratic society is justified in limiting freedom of expression at the point when public order is sufficiently disturbed.”

130. In Australia, in *Coleman v Power* [2004] 220 CLR 1, the High Court was concerned with s7(1)(d) of the Vagrants Act 1931 of Queensland, which provided that "any person who, in any public place or so near to any public place ... uses any threatening, abusive, or insulting words to any person … shall be liable to a penalty … "[95] Section 7(1)(d) was enacted to replace s6 of the Vagrant Act 1851, which prohibited the using of threatening, abusive or insulting words or behaviour in any public street … "with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned".[96]

131. The defendant was distributing pamphlets in a mall containing charges of corruption against several police officers. He was approached by a police officer who demanded a pamphlet. The defendant refused and said loudly "this is constable (BP) a corrupt officer". He then sat down wrapping his arms around a pole and violently resisted attempts to arrest him. His conviction under s7(1)(d) was set aside by a majority, which comprised Gummow, Hayne, Kirby and McHugh JJ.[97]

132. Gleeson CJ said "the removal in 1931 of the requirement concerning a breach of the peace undoubtedly gave rise to a problem of confining the operation of the legislation within reasonable bounds." He resolved that problem by interpreting as having been built into s7 a requirement related to serious disturbance of public order or affront to standards contemporary behaviour [23].

133. Gummow and Hayne JJ in a joint judgment said at [183], the insulting words which are proscribed are those which "are intended to provoke unlawful physical retaliation, or they are reasonably likely to provoke unlawful physical retaliation from either the person to whom they are directed or some other who hears the words uttered." Kirby J agreed.

134. Section 17B(2) has its English equivalent in s5 of the Public Order Act of 1936, which provided "any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence." In *Redmond-Bates v D*irector of *P*ublic *P*rosecutions [2000] HRLR 249, a decision of the English Divisional Court (Sedley LJ and Collins J) where the question was whether the conduct of the defendants was likely to provoke a breach of the peace. Although the Human Rights Act 1998 had not yet come into force, Sedley LJ considered the human rights dimension of such an offence. There, 3 women Christian fundamentalists preached from the steps of a cathedral and attracted a crowd some of whom were showing hostility. A policeman fearing a breach of the peace told the women to stop. They refused and were arrested for wilful obstruction of a police officer. The appellant was convicted. The issue on appeal was whether it was reasonable for the police officer, in the light of what he perceived, to believe that the appellant was about to cause a breach of the peace. Her appeal was allowed. At para 18, Sedley LJ[98] said:

> "…The question for PC Tennant was whether there was a threat of violence and if so, from whom it was coming. If there was no real threat, no question of intervention for breach of the peace arose. If the appellant and her companions were (like the street preacher in *Wise v Dunning*) being so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence he was entitled to ask them to stop and to arrest them if they would not. If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble (like the Salvation Army in *Beatty v Gilbanks*), then it was they and not the preachers who should be asked to desist and arrested if they would not.
>
> …
>
> 20. … What Speaker's Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear…"

135. Earlier at para 6, Sedley LJ explained:

> "… In *Beatty v Gilbanks* (1882) 9QBD 308, this Court (Field J and Cave J) held that a lawful Salvation Army march which attracted disorderly opposition and was therefore the occasion of a breach of the peace could not found a case of unlawful assembly against the leaders of the Salvation Army. Field J, accepting that a person is liable for the natural consequences of what he does, held nevertheless that the natural consequences of the lawful activity of the Salvation Army did not include the unlawful activities of others, even if the accused knew that others would react unlawfully."

136. In *Jordan v Burgoyne* [1963] 2 QB 744, the English Court of Appeal held that, a speaker who used words which threatened, abused or insulted, had to take his audience as he found it and, if the words spoken to that audience were likely to provoke a breach of the peace, the person could be convicted under s5 of the Public Order Act, 1936. Since the offence is concerned with the maintenance of public order, naturally, the likely reaction of the audience is highly relevant. Even so, as the passage from the judgment of Sedley LJ in *Redmond-Bate* quoted at para 134 above shows, if the threat of disorder or violence was coming from those who were taking the opportunity to react so as to cause trouble, it was they and not the speaker who should be asked to desist and arrested if they would not. In *Jordan*, Lord Parker CJ said, of the offending speech "I cannot myself, having read the speech, imagine any reasonable citizen, certainly one who was a Jew, not being provoked beyond endurance, and not only a Jew but a coloured man, and quite a number of people of this country who were told that they were merely tools of the Jews, and that they had fought in the war on the wrong side, and matters of that sort."[99] *Jordan* recognised that people may be so provoked that they lost control of themselves, and that as a matter of common sense, persons with certain attributes might reasonably be expected to react more strongly than those without. I have no doubt that a person who behaved in a manner which actually provoked persons present beyond reasonable endurance or might do so may be convicted under s17B(2).[100]

137. Although, unlike these appeals, *Brooker, Morse and Coleman* were concerned with offences which contained no express requirement of any likelihood to cause violence, I do not believe that diminishes the relevance of those decisions. They show that, notwithstanding the minor nature of the relevant offences, they must be judged according to their possible impact on fundamental rights. There is no suggestion in any of these cases that had the relevant offence required a likelihood of violence, a less exacting approach would be adopted in determining whether the impugned conduct was serious enough to satisfy the requirement of the offence. Elias CJ at [31] said that he did not think the "word 'disorderly' can have a different meaning in s3 and s4. The additional element of seriousness in s3 arises from the likelihood of violence". Indeed, the minority in *Brooker* in part explained their dissent by stressing the difference between s3 and s4. For example, McGrath J said " …Section 3 … addresses behaviour at an extreme point on the range of what is disorderly." Thomas J said "the use of the word 'disorderly' in s3 cannot have the effect of elevating the seriousness of the behaviour contemplated in s4(1)(a). They are different offences, the one more serious than the other." I believe, when, as here, the offence requires a likelihood of violence, the impugned conduct must indeed be serious. How then does one decide whether the conduct is sufficiently serious? To that question I now turn.

138. In the present case, the appellants were exercising their freedom of speech, of assembly and of demonstration in a public place and in the presence of a large number of the public. Freedom of expression, assembly or demonstration would be meaningless if they can only take place in private or away from persons who may find the views, ideas or claims that an assembly or demonstration or speech is promoting annoying or offensive. [101] However, as Gleeson CJ noted "it is often the case that one person's freedom ends where another person's rights begin."[102] The rights of those who may be affected by such conduct "obviously remain important" and the exercise of such rights by protesters must not exceed "the bounds of what is reasonable in the circumstances, (but) such bounds must not be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right."[103]

139. I would reconcile these competing rights, adopting the language used in the cases cited above, and say that those affected are expected to take a balanced, rights sensitive view, conscious of the requirement of the Hong Kong Bill of Rights, and would not be unreasonably moved to wounded feelings or real anger, resentment, disgust or outrage, particularly, when confronted by a protestor,[104] but the exercise of such rights by protesters must not exceed "the bounds of what is reasonable in the circumstances, (but) such bounds must not be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right." It is only when the conduct even when viewed against such a generous standard, "went well beyond what any citizen, public official or not, would have to tolerate", in the circumstances in which it occurred[105], can such conduct properly be regarded as disorderly conduct within the meaning of s17B(1) or (2).

Findings of Disorderly Conduct

140. In para 18 of the Statement of findings the learned magistrate said:

> "The appellants … rushed onto the stage at a highspeed. They should have anticipated resistance by the personnel and body clashes in the course of it. Eventually PW1 and PW2 indeed sustained injuries as a result. I am of the view that the appellants' behaviour was unruly and offensive and therefore they did behave in a disorderly manner. I do not accept that the first appellant was genuinely exercising his freedom of expression because the law only protects the freedom to express oneself 'peacefully'. The first appellant's behaviour was not peaceful at all by whatever standard."

141. Article 17 of the Hong Kong Bill of Rights[106] used the expression "right of peaceful demonstration". A similar expression is used in Article 11 of the European Convention on Human Rights. In this context, I would note the following passages from the guidelines on Freedom of Peaceful Assembly 2nd edition published by OSCE/ODIHR (Organisation for Security and Co-operation in Europe / Office for Democratic Institution and Human Rights) dated 25 October 2010:

> "25. Peaceful assemblies: Only peaceful assembly is protected by the right to freedom of assembly. The European Court of Human Rights has stated that "[i]n practice, the only type of events that did not qualify as 'peaceful assemblies' were those in which the organizers and participants *intended* to use violence."[107] Participants must also refrain from using violence (though the use of violence by a small number of participants should not automatically lead to the categorization as non-peaceful of an otherwise peaceful assembly – see para 164). An assembly should, therefore, be deemed peaceful if its organizers have professed peaceful intentions, and this should be presumed unless there is compelling and demonstrable evidence that those organizing or participating in that particular event themselves intend to use, advocate or incite imminent violence.
>
> 26. The term "peaceful" should be interpreted to include conduct that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote, and even include conduct that temporarily hinders, impedes or obstructs the activities of third parties. Thus, by way of example, assemblies involving purely passive resistance should be characterized as peaceful. Furthermore, in the course of an assembly, 'an individual does not cease to enjoy the **right to peaceful assembly** as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour'."

142. It appears that the learned magistrate took the view that because the appellants were not expressing their views peacefully, they were not entitled to the protection which the law extends to freedom of expression. Presumably, the learned magistrate's finding that they had not expressed their views peacefully proceeded from his view that they had behaved in a disorderly manner. With respect, he ought to have first considered whether their conduct was disorderly because they exceeded the bounds of what is reasonable in the circumstances, such that they could not reasonably be expected to be tolerated.

143. Moreover, he should have considered the conduct of each of the appellants separately. Mr McCoy SC accepted that it was not and never had been the prosecution case that the appellants had acted in concert, or that their conduct should not be considered independently.

The Appellants' conduct

144. In paras 106 and 107 above, I have substantially reproduced the learned magistrate's description of the disruption to the ceremony. We were shown the video recording at the hearing and I have watched the recording carefully since the hearing. They show that there were 10 persons on stage. They were seated in one single row. The Secretary was seated on the 5th chair from the left, between Sir Chung-kong Chow, at that time, the Chief Executive Officer of the MTR and Dr Ch'ien. Shortly after the Secretary had begun her speech, the 1st appellant stepped onto the stage. He was several feet away from the first person on the left (and I think well over 10 feet from the Secretary) when he scattered the hell money. It is obvious that he stepped onto the stage to scatter hell money, and that was his sole purpose. There was no apparent reaction from those seated on the stage. [108] After that was done he stood there quietly, waiting to be taken away. As he went peacefully, he shouted the slogan. The reaction of the Secretary has been recorded earlier. To complete the picture I should mention the finding that PW1 who was standing on the drained pond had tried to stop the 1st appellant and in doing so became unbalanced and hurt himself. The fact that the 1st appellant's conduct had provoked such a reaction may support a finding that his behaviour was disorderly within the meaning of s17B. I return to para 18 of the Statement of findings where the learned magistrate said:

> "The appellants being 'uninvited guests' rushed onto the stage at a high speed. They should have anticipated resistance by the personnel and body clashes in the course of it."

The learned magistrate had not distinguished between the appellants. It appears from the video recordings that the 1st appellant had not rushed onto the stage at a high speed. Unfortunately, the learned magistrate had not dealt with the 1st appellant's conduct separately from the 2nd appellant's conduct. Nor did he have in mind the need to reconcile the 1st appellant's right of demonstration and, for example, the right of the organizers of the event to stop people from approaching or ascending the stage. In such circumstances, I believe it is unsafe to treat para 18 as a sufficient finding of disorderly conduct on the part of the 1st appellant.

145. Since I have come to the conclusion that there was no disorderly behaviour on the part of the 1st appellant, his appeal must be allowed. In *Brutus v Cozens* [1973] AC 854, the appellant who went onto the Centre Court in Wimbledon during a match to protest against apartheid, was charged under s5 Public Order Act 1936 with "insulting … behaviour … whereby a breach of the peace was likely to be occasioned". His acquittal on finding that the behaviour was not insulting was upheld. So too in *R v Ambrose* (1973) Cr App R 538, where a young man was charged with using insulting words said to be likely to cause a breach of the peace under s5 of the Public Order Act of 1936. The Court held that the words complained of were incapable of being insulting words for the purposes of s5 prosecution and it was unnecessary to decide whether the fact that persons who were told about what was said were very angry and said that they would have felt like assaulting the appellant.

The 2nd appellant

146. Mr Martin Lee SC who represented the 2nd appellant rightly accepted that the conduct of the 2nd appellant was of a different character from the 1st appellant.[109] The video tapes showed clearly that the 2nd appellant ran at great speed towards the stage and directly at the Secretary. He grabbed the microphone[110] whilst it was being used by the Secretary. PW2, the MC said he pulled his partner "to his side fearing that she would be knocked down", as the learned magistrate said the video recording did not show that. The recording showed clearly that both Sir Chung Kong Chow and Dr Ch'ien stood up, and Dr Ch'ien actually came forward, clearly to protect the Secretary. The only reasonable inference is they were apprehensive of the 2nd appellant's intention. The fact that the 2nd appellant only took away the microphone which the Secretary was using only became apparent later. I believe in rushing onto the stage, directly at the Secretary and grabbing the microphone which she was using, the 2nd appellant's behaviour, even when viewed most generously, was disorderly. It went well beyond "what any citizen, public official or not, should have to tolerate", in the circumstances in which it occurred.[111] That being the case I go on to consider whether the charges or any of them has been made out.

Section 17B(1)

147. Section 17B(1) is concerned with disorderly behaviour "for the purpose of preventing the transaction of the business for which the public gathering was called together…" The two key words for consideration are "purpose" and "preventing".

148. The video recordings show that just under one minute elapsed from the scattering of hell money (The 2nd appellant came on the scene shortly thereafter) to the Secretary resuming her speech. The question is whether the 2nd appellant's conduct was for the purpose of preventing the transaction of the business for which the gathering was called. I will deal with preventing first.

149. Barnes J said at para 94 that "prevent" did not require that the transaction of the business to be brought completely to an end or being aborted. She said "because to stop for a moment due to hindrance also fits the (dictionary) definition. The magistrate's finding as to the meaning of 'prevent' is correct".

150. Mr McCoy submitted that an interruption of a gathering long enough to remove a heckler would be sufficient for the purpose of s17B (1).

151. Mr Martin Lee SC has traced s17B(1) to s1(1) of the English Public Meetings Act 1908 ("PMA 1908") which was enacted in response to the suffragettes' protests against Mr Lloyd-George, the Chancellor of the Exchequer, at Albert Hall, London in December 1908. A contemporary report in the New York Times described the incident in the following terms:

> "Some of the women were armed with whips, and they repelled vigourously every attempt to eject them. There were fierce tussles every few moments in different parts of the hall, and every time Mr Lloyd-George made an attempt to speak his voice was drowned with mingled groans and cheers. Finally the Chancellor, who for a quarter of an hour had been trying to get in a word, sat down, and the organist present tried to sooth the hysterical sisterhood by playing 'What Can the Matter Be?'. It was of no use; pandemonium still reigned/…/At the end of half an hour or more the opposition was worn out, and Mr Lloyd-George was able to continue his speech with only occasional interruptions."[112]

152. Mr Lee showed that there was vigorous debate in both Houses of Parliament on the impact the proposed law would have on the exercise of free speech, in particular when heckling and interjections frequently occurred at public or political meetings, and indeed, in the House of Commons. The debate showed that the proposed law was not directed at such conduct.[113]

153. Mr Lee told us that the predecessor of s17B(1) was first enacted as s5(1) of the Public Order Ordinance 1948 and in introducing the Public Order Bill before the Legislative Council in 1948, the Acting Attorney General said:

> "The past twenty years have witnessed the growth all over the world of political parties organized more thoroughly than has been the case before and prepared in some cases to enforce their views by forcible methods. Clauses 3-5[114] inclusive of the Bill, which are based on similar provisions in the United Kingdom, are designed to curb the activities of such political organisations while at the same time preserving and strengthening the right of public meeting of ordinary peaceful citizens."[115]

154. Since "preventing" also impacts on important freedoms, it should be interpreted so that it is confined within reasonable bounds. Here, too, it is necessary to balance the conflicting rights of the protestor and the rights of the persons at the gathering. I believe such rights should be reconciled in the way I suggested in para 137 above. I believe, properly construed "preventing" requires an interruption to an extent beyond what could be expected to be tolerated by other persons in a democratic society,[116] such as breaking up or a substantial interruption of a gathering.

155. Given the cardinal importance of the freedom of expression, demonstration and assembly I have no doubt that the interruption for a minute or so in this case is insufficient. Moreover, s17B(1) provides in terms of preventing the transaction of the business for which the gathering was called. That argues against a brief interruption of a gathering. But, I do not agree with Mr Lee that nothing short of an abortion of the gathering would suffice. I have set out the report from the New York times to show that Mr Lloyd-George was able to continue after a half hour or so. If Mr Lee is right Public Meeting Act 1908 would have been enacted in vain.

156. Section 17B(1) also requires that the disorderly behaviour was for the purpose of preventing the transaction of the business for which the gathering was called. Barnes J was of the view that because the gathering was interrupted that was the purpose of the disorderly conduct. With respect I do not agree.

157. In *Sweet v Parsley*[1970] AC 132, Lord Morris said in connection with s5 of the Dangerous Drugs Act, under which it was an offence for an occupier to permit premises to be used for the purpose of smoking cannabis, that it "denote a purpose which is other than quite incidental or causal or fortuitous: they denote a purpose which is or has become either a significant one or a recognized one though certainly not necessarily an only one. There is no difficulty in appreciating what is meant if it is said that premises are used for the purposes of a dance hall or a billiard hall or a bowling alley or a hair-dressing saloon or a café." I believe purpose under s17B(1) is used in a similar sense.

158. I see no basis for the conclusion that the 2nd appellant had as his purpose, the prevention of the transaction of the business for which the gathering was called.

159. For the above reasons, I would allow the 2nd appellant's appeal against his conviction under s17B(1).

Section 17B(2)

160. I turn to the s17B(2) offence. I start with the finding that the 2nd appellant's conduct was disorderly within the meaning of s17B(2), and go on to consider whether the 2nd appellant conducted himself in that way, "with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused".

161. Mr McCoy submitted that the 2nd Appellant's conduct was not only disorderly, it amounted to a breach of the peace. I agree. Indeed, if, as seemed to be the case, he intentionally or recklessly caused another to apprehend immediate and unlawful violence, he could be charged with common assault.

Breach of the Peace

162. What amounts to a breach of peace was settled by *R v Howell* [1982] QB 416. It is clear from *Howell* that violence is the central element in determining what amounts to a breach of the peace and:

> "an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks upon a person's body or property."

WatkinsLJ, delivering the judgment of the English Court of Appeal. [426G]

163. In *Percy v DPP* [1995] 1 WLR 1382, a decision of the English Divisional Court (Balcombe LJ and Collins J), the Divisional Court commented on the last sentence of Watkins LJ's judgment cited above, and said:

> "It is clear from the last sentence that harm to property will constitute a breach of the peace only if done or threatened in the owner's presence because the natural consequence of such harm is likely to be a violent retaliation. Thus *Reg v* Howell makes it clear that there must be violence or threatened violence for there to be a breach of the peace to justify an arrest."

164. I prefer to take the view that attacks or threatened attacks on property in the owner's presence are tantamount to threatened violence on the owner and for that reason, it is a breach of the peace. It is commonsense that this kind of conduct would put the owner in fear of violence.

165. The fact that the 2nd appellant's conduct amounted to a breach of the peace led to several submissions from Mr McCoy to which I will now turn.

166. Mr McCoy submitted that on the basis of the 2nd appellant's own breach of the peace he could be convicted under s17B(2). With respect, I cannot agree. In *Marsh v Arscott* (1982) 75 Cr App R 211, a decision of the English Divisional Court (Donaldson LJ and McCullough J), which was concerned with s5 of the Public Order Act 1936, McCulloch J said (with the agreement of Lord Justice Donaldson) at p216 "This section is describing breaches of the peace which are brought about, or are likely to be brought about, by other words or behaviour occurring earlier, although usually not very long before. The phrase 'whereby a breach of the peace is likely to be occasioned' indicates that Parliament was concerned with cause and effect, i.e. with conduct which is likely to bring about a breach of the peace and not with conduct which is itself a breach of the peace and no more. Were this the law every common assault occurring in a public place would also be an offence against this section. Many such assaults will in fact be likely to lead very quickly to a breach of the peace, and these will be within the section; but, without more it is not enough that conduct which is threatening, abusive or insulting is of itself a breach of the peace."

167. With respect, I agree. Indeed, the language of s17B(2) is so clear that I will say no more.

168. Mr McCoy also submitted that because the 2nd appellant's conduct would inevitably lead to his arrest, the arrest would itself be a breach of the peace which was caused by the 2nd appellant's conduct. He submitted that an arrest, however gentle, would involve some physical contact with the 2nd appellant by the trained personnel, which would technically be a breach of the peace. So, the 2nd appellant's conduct was likely to cause a further breach of the peace.

169. The strongest support for this submission comes from the judgment of Lord Denning MR in *Reg v Chief Constable of Devon and Cornwa*ll, Ex parte Central Electricity Generating Board (CEGB) [1982] QB 458, 471, where he said :

> "There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it. He is entitled by law peacefully to go on with his work on his lawful occasion. If anyone unlawfully and physically obstructs the workers -- by lying down or chaining himself to a rig or the like – he is guilty of a breach of the peace. Even if this were not enough, I think that their unlawful conduct gives rise to a reasonable apprehension of a breach of the peace. It is at once likely that the lawful worker will resort to self-help by removing the obstructor by force from the vicinity of the work so that he obstruct no longer. He will lift the recumbent obstructor from the ground. This removal would itself be an assault and battery -- unless it was justified as being done by way of self-help. Long years ago Holt CJ declared that 'the least touching of another in anger is a battery': see *Cole v Turner* (1705) 6 Mod. Rep. 149. *Salmon on Torts*, 17th edition (1977), p 120 adds that even anger is not essential: an 'unwanted kiss maybe a battery.' So also the lifting up of a recumbent obstructor would be a battery unless justified as being done in the exercise of self-help. But in deciding whether there is a breach of the peace or the apprehension of it, the law does not go into the rights or wrongs of the matter -- or whether it is justified by self-help or not. Suffice it that the peace is broken or is likely to be broken by one or another of those present. With the result that any citizen -- and certainly any police officer -- can intervene to stop the breach. "

170. I have quoted a longer passage because in *Percy* the court regarded the first two sentences quoted above as erroneous. The court said:

> "Neither Lawton LJ or Templeman LJ agreed with (Lord Denning's) observations. Indeed, it is in our view implicit in what each said that they took the view that some violence or threat of violence was necessary: see per Lawton LJ at 476 F-G and Templeman LJ at 480 A-C."

171. CEGE was concerned with protests at a possible site for a nuclear power station. The protestors obstructed entrance to the site. They were well organized, for example, after an injunction was obtained against some, others took their place. So injunction was not an effective remedy. The organizers issued a leaflet giving objectors detailed instructions about peaceful methods of protest and informing them that no attempt could legally be made to manhandle them. The board wrote to the chief constable asking for his assistance in enabling it to perform its statutory duties by preventing further obstruction. The chief constable replied that without "a more definitive legal mandate" the police will not remove the obstructors since there was no actual or apprehended breach of the peace, nor an unlawful assembly. The Board brought judicial review against the police's refusal to intervene because there was no imminent breach of the peace.

172. I believe the headnote, which did not reflect Lord Denning's remarks relied on by Mr McCoy, has correctly stated the basis of the decision, it stated that the police had power to remove or arrest obstructors if there was a breach of the peace or the reasonable apprehension of it, or an unlawful assembly; that by wilfully obstructing the operations of the board the obstructors were deliberately breaking the law, so that the board was entitled to use the minimum force reasonably necessary to remove those obstructing the exercise of its powers, that the use of self-help in such circumstances engendered the likelihood of a breach of the peace, and accordingly, the police were entitled to be present in order to intervene as necessary.

173. Moreover, it is implicit in the passages in the judgments of Lawton and Templeman LJJ referred to in *Percy* that they did not share Lord Denning's view. For example, Lawton LJ said "as soon as one person starts to, or makes to, lay hands on another, there's likely to be a breach of the peace." Lawton LJ did not say that as soon as one person lays hands on another there would be a breach of the peace. Templeman LJ said "The board and the police may instruct the obstructors to leave the site and warn them that if they do not leave the site and remain off the site the obstructors will be liable to be forcibly removed or arrested. If after such a warning the board enter the site with the object of completing the survey, the possibility of a confrontation with the obstructors will at once raise a danger of breaches of the peace when the board's workmen seek to carry out their work and find the obstructors lying in their path. An obstructor who will not leave the site unless he is forcibly removed presents a threat and danger of a breach of the peace even if he disclaims any intention of causing a breach of the peace." It is obvious that Templeman LJ did not regard the forcible (but justified) removal of the obstructors to be a breach of the peace.

174. I would add that in *Marsh*, after the passage quoted in para 166 above, McCullough J went on to say: "In the circumstances here, assuming the defendant to have been acting unlawfully in using threatening words and behaviour, no breach of the peace was likely to have been occasioned. No other person was likely to have broken the peace, and that the police were likely to do was arrest him, as they did. On that basis too an acquittal (of a charge under s5 of the Public Order Act) would, in my judgment, have been inevitable."

175. If Mr McCoy is right, a breach of the peace which is likely to result in a lawful arrest, though the arrest be unresisted and peaceful, would also constitute an offence under s17B. In other words, a breach of the peace committed in public would also be an offence under this section, and the offender would not only be exposed to being bound over he would liable to imprisonment for 12 month and a fine of $5000 under s17B(2). I do not agree.

176. Mr McCoy further submitted that the 2nd appellant's conduct was likely to cause a violent or unlawful reaction, from policemen or trained personnel responsible to keep order, which would itself be a breach of the peace. Such risk must be real and not a mere possibility.

177. In *R v Li Wai Kuen* [1973-1976] HKC 346, Huggins J (as he then was) said at 348 "There is a Canadian case which is in many respects similar to the present, where it was held to be unbelievable that the officer to whom the abuse was addressed could be provoked to commit a breach of the peace: *R vZwicker* (1938) 1 DLR 461. I myself had occasion to say something similar in this court in an unreported case some years ago. I would not suggest that there could never be a case where the abuse was so gross that even a police officer might be likely to be provoked into violent retaliation, particularly if the language used were also threatening, but it is to the credit of the police forces in those countries where the common law prevails that they conduct themselves with outstanding tolerance and good humour even in the face of provocation more grave than that in the present case." This has remained the sentiment in Hong Kong. I would also note that in *Coleman*, Gleeson CJ said in relation to insulting word to a policeman that "It may eliminate, for practical purposes, any likelihood of a breach of the peace."

178. I believe unlawful reaction from law enforcement officers and other trained personnel can be eliminated for practical purposes because of their training, discipline and professionalism. Moreover, the Community expects and the law requires no less. In the common-law world, I can say with confidence that, if they use excessive violence in effecting arrest, they will be visited with the full force of the law.

179. In para 22 of the Statement of Findings the learned magistrate said:

> "I am of the view that PW1, PW2 and other staff had shown restraint without over- reaction in stopping and removing the appellants. I find their action under those circumstances reasonable. Before the appellants took the actions, they must have reasonably anticipated obstruction, bodily clashes and even harm caused because of the use of force. I find that their behaviour involved violence breaching public order and the peace of society. In fact their conduct had provoked someone to follow suit. Therefore the only reasonable inference that I draw would be that they had the intent. I am satisfied that the prosecution had proved (with intent to provoke a breach of the peace, or whereby a breach of the peace was likely to be caused) beyond reasonable doubt."

180. I believe the learned magistrate has insufficiently considered whether there was a real risk of a breach of the peace from the trained personnel on the stage. Since, apparently, no more force than was required was used to subdue the 2nd appellant, there was no breach of the peace by anyone other than the 2nd appellant.

181. That was also Barnes J's view, she said:

> "67. I have repeatedly read the magistrate's Statement of Findings. I do not see he had any analysis or finding as to the inference or effect which the appellants' disorderly conduct might produce on other people at the scene who witnessed such conduct, except his description about members of the staff and the man dressed in black who, according to the magistrate, 'followed the appellants' example'.
>
> …
>
> 69. Leaving the man dressed in black for a moment, I have said earlier that the facts of this case showed that the staff members who intercepted the appellants exercised great restraint…"

182. As for the person said to have been provoked into following suit, the learned magistrate said at para 21(iv) "P3(d)(one of the tapes) showed that when the appellants were taken away, a protester dressed in black tried to get close to the stage but was stopped. The protester also shouted the same slogan as the 2nd appellant: 'MTR fare increase, shameful.' I can draw a reasonable inference that the protester was provoked or encouraged to follow the steps of the appellants." Earlier, when dealing with the video recordings at para 6, under P3(d) the magistrate noted "12:13:46 — the protestor dressed in black raised his arms and shouted 'MTR fare increase, shameful!' "

183. I have watched the recording most carefully, I see no evidence that the person dressed in black behaved in a disorderly manner, much less committed a breach of the peace. If that was the magistrate's finding he should state it clearly and explain how he arrived at that conclusion. As it is I find the Magistrate's finding difficult to follow and am unsure of his meaning. I place no reliance on it.

184. In relation to the man dressed in black Barnes J said:

> "76. … I do not think that the only reasonable inference is that the man was provoked by the 1st and/or 2nd appellants to try to go onto the stage … there was no solid ground on which the magistrate could find that the prosecution had proven that the 1st and 2nd appellants had the intent to provoke a breach of the peace."

With respect, I agree.

185. I therefore conclude that the learned magistrate had wrongly convicted the 2nd appellant under s17B(2). This is not a case where one could say that the 2nd appellant's conduct was likely to cause a breach of the peace by persons attending the prize giving ceremony. A protest against MTR fare hike was highly unlikely to arouse strong emotion in those attending the ceremony. Had the 2nd appellant seized a microphone from a speaker at a political rally, to silence the speaker or so that the 2nd appellant could express a contentious view, a finding that he behaved in a disorderly manner, with intent to provoke a breach of the peace, or such that a breach of the peace was likely to be caused, might be justified.

Disposition

186. For the above reasons, I would allow the appeals of the 1st and 2nd appellants and dismiss the cross appeals of the Government.

Mr Justice Litton NPJ:

Introduction

187. The question before this Court, as certified by the Appeal Committee on 27 November 2012, is as follows:

> "What are the elements of the offences created respectively by section 17B(1) and section 17B(2) of the Public Order Ordinance?"

188. The short answer, a complete answer, is this: The elements of those offences are those found in the statute itself: In the words used in the statute. Nowhere else.

189. The criminal law, here as elsewhere, is maintained by sanctions. Sanctions are imposed by words. Since the criminal justice system is largely codified, those words are found in statutes – Ordinances and subsidiary legislation – which regulate activities within the community, thus ensuring freedom for all under the law.

190. By far the largest number of criminal cases are tried in the magistrate courts. Day in, day out, magistrates apply the words in statutes to the facts of the case: To make a mystery of ordinary words in statutes is to grievously debase the rule of law, and make it an ineffective instrument of civil society. This is particularly so in a bilingual system[117] where obscurities could happen through translation. Nowadays, most cases in the magistrate courts are conducted in Chinese (as it was in the present case). The police force, given the duty of enforcing the law, operates almost exclusively in the Chinese language. When appellate courts give directions to the courts of trial, and to the law enforcement agencies, as to the meaning of words in criminal statutes, through the medium of the English language, they must be sensitive to this inherent disability.

191. The magistrate courts, governed by the Magistrates Ordinance, Cap 227, are courts of summary jurisdiction. That is clear from the long title. Words like “disorderly conduct” and “breach of the peace” have appeared in the statutes of Hong Kong for well over 100 years. Countless magistrates in myriad cases over the past century have applied those words to situations as found in court.

192. In the list of duties imposed on the police force under section 10 of the Police Force Ordinance, Cap 232, the very first is that of "preserving the public peace". And, as the English Court of Appeal in *R v Howell* [1982] QB 416 at 427 reminds us, when breach of the peace or the reasonable apprehension of such breach, happens in the ordinary citizen's presence, that citizen has the right to arrest the offender without warrant. It goes further: At common law, the citizen not only has such right, he has a *duty* to take reasonable steps "to make the person who is breaking or threatening to break the peace refrain from doing so, and those reasonable steps in appropriate cases will include detaining him against his will": See Lord Bingham's judgment in *R(Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105 at 125-6, quoting Lord Diplock in *Albert v Lavin* [1982] AC 546 at 565. When the common law imposes such a duty on the ordinary citizen, it may seem surprising that there could be doubt as to what "breach of the peace" means in law. And yet, as will be explained later, that is precisely the case.

193. What behaviour amounts to *disorderly conduct*, or when a situation constitutes a *breach of the peace*, or a threat thereof, depends on the circumstances of the time and place. The social context in which the events occur forms an important part of the picture. As the author of *Public Order: A guide to the 1986 Public Order Act* [Format Publishing 1987] at p.93 notes: The conduct of a football crowd would be disorderly if it were repeated in a theatre during a performance.

194. The question is one of degree. It is purely a question of fact, for the fact-finding tribunal to decide. The appellate courts would do the system, and the community, great harm if they interfered too readily in such fact-finding function, or added degrees of sophistication to such function which are unwarranted.

195. As Lord Reid said in *Cozens v Brutus* [1973] AC 854 at 861C, the meaning of an ordinary word of the English language is not a question of law. It is a matter for the fact-finding tribunal to consider, not as a matter of law, but as fact, whether in the whole of the circumstances the words of the statute do or do not apply to the facts which have been proved.

196. All that having been said, there is in fact a problem with the scope and meaning of the expression "breach of the peace" ("破壞社會安寧") and this is a case where the expression warrants close scrutiny.

"Breach of the peace"

197. There is no offence known to the criminal law as "breach of the peace"; a person cannot be charged with *breaching the peace*. And yet, under s 61 of the Magistrates Ordinance, he can be bound over to *keep the peace*[118], and is liable to be imprisoned in default of compliance with the order. The power given to magistrates under s 61 is to administer preventative justice: To prevent a future event happening when public order might be disturbed by a breach of the peace. But this brings us no further to defining the scope of the expression "breach of the peace", nor to identify with any precision when disorderly behaviour is likely to cause a breach of the peace, which lies at the heart of the offence created under s 17B(2) of the Public Order Ordinance, Cap 245.

198. Take the recent case of a demonstration by a group of people outside the Liaison Office of the Central People's Government at Connaught Road West, Hong Kong. *Secretary for Justice v Chiu Hin Chung* [2013] 1 HKLRD 227. Mills barriers had been erected outside the main gate. Police officers were stationed both inside and outside the barriers. There were security guards within the forecourt of the Liaison Office, as well as the manager of the security company. Outside, in the demonstration area, there were reporters present, apart from police officers, security personnel and, of course, the demonstrators themselves. The two defendants (like the appellants here) were charged with disorder in a public place under s 17B(2) of the Public Order Ordinance. Their disorderly conduct was the following:

> (i) The 1st defendant stood on a barrier and threw a placard and a bottle containing about 1.7 kg of cornstarch into the forecourt of the Liaison Office. A piece of paper was stuck to the bottle with the Chinese characters meaning "toxic melamine".

(ii) The second defendant threw a plastic bag containing cornstarch into the forecourt. The bag broke open and scattered the power, some landing on three people, two of whom complained of discomfort in the eyes as a result, and one of itchiness in the forehead.

199. Shortly after this episode, the demonstration was called off. The entire event, from beginning to end lasted about 18 minutes. Had they been arrested, taken away and brought before a magistrate to be bound over to keep the peace for, say, 18 months, under s 61 of the Magistrates Ordinance, that would most probably have been justified. The magistrate would have examined their past disorderly behaviour and considered whether such behaviour might, on a future occasion, lead to a breach of the peace. But they were charged under s 17B(2)[119], which looks to the actual situation on the ground at the time of the charge.

200. The question at trial then was whether, in light of all the circumstances, their conduct had produced a breach of the peace or was *likely to have caused a breach of the peace*?

201. The magistrate concluded that those present at the demonstration – the reporters, the security personnel, the police officers, the demonstrators themselves – were unlikely to react to the defendants' disorderly conduct by resorting to violence or riotous behaviour, and acquitted the defendants. The government's appeal to the High Court was dismissed. In short, the courts found that the public peace had not been disturbed or was likely to be disturbed: No-one was likely to engage in riotous behaviour as a result of the defendants' action: Their own disorderly behaviour had no significant impact on the behaviour of others, apart from the fact that they were arrested and taken away.

202. This line of reasoning follows cases of some antiquity: For example *Wise & Dunning* [1902] 1 KB167 where the question was whether the stipendiary magistrate had authority to bind over the appellant to keep the peace. He, a Protestant lecturer, had held meetings in public places in Liverpool, causing large crowds to gather. He used gestures and language highly insulting to the religion of the Roman Catholic inhabitants. The consequence of his acts at one meeting was to cause some of the listeners to rush towards him; the police intervened and got him away to safety. The appellant had not himself committed any offence. His conduct was not disorderly. But he had provoked a violent reaction from others. His counsel, F.E. Smith (later Lord Birkenhead LC) argued that as his conduct was lawful, and was not disorderly, he could not be bound over simply because the conduct of *others* might be unlawful. The court disagreed. He could be bound over to keep the peace if the natural consequence of his acts was that *others* might breach the peace.

203. This bears out the point that counsel makes in this case: For the offence under s 17B(2) to be established, the court looks not only to the acts of the accused but also to the natural reaction of others to his acts. This is always in the context of public order. The aim of the statute is to keep the public peace. In considering whether acts are likely to cause a breach of the peace, the following question is relevant: Are persons in the vicinity likely to engage in an affray, to behave riotously, to act violently or to threaten violence as a result of the behaviour of the accused?

Violence and Threat of Violence

204. As can be seen, this view of what constitutes "behaviour likely to cause a breach of the peace" focuses on violence and threats of violence on the part of others. That this seems to be the correct view is borne out by the judgments of Lawton and Templeman LJJ in *R v Chief Constable of Devon & Cornwall* [1982] 1 QB 458[120] where, at 476G Lawton LJ speaks of violence and tumultuous behaviour being apprehended by the police, justifying arrest for breach of the peace; and at 480C Templeman LJ used the memorable phrase: "Even Mahatma Gandhi discovered to his sorrow that in the conduct of ordinary mortals passive resistance remains passive only so long as the resistance is successful". The learned Lord Justice was here adverting to the possibility of the Electricity Board's workmen forcibly removing the objectors and the objectors resisting such removal, causing a breach of the peace: creating a situation where there would be a danger of a breach of the peace, even if the objectors disclaimed any intention of causing such breach.

205. Lord Denning M.R., in the same case at 471, would go further, and would give a wider meaning to the expression *breach of the peace*. He stated:

> "There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it. He is entitled by law peacefully to go on with his work on his lawful occasions. If anyone unlawfully and physically obstructs the worker – by lying down or chaining himself to a rig or the like – he is guilty of a breach of the peace."

This tends to suggest that breach of the peace occurs simply through act of the objectors unlawfully interfering with the work of the Electricity Board workmen, without considering whether those workmen might take physical steps to have them removed, producing a situation of violent confrontation, or the threat of violent confrontation. This is out of line with the mainstream of authority on the point: see for instance the later case of *R (Laporte) v Chief Constable of Gloucestershire* (supra) at 134: A case of preventive action to forestall a breach of the peace. At 134B Lord Rodger of Earlsferry speaks of arrangements to contain the demonstrators from reaching their destination (an airbase heavily used by the United States Air Force for hostile operations against Iraq): Should the demonstrators reach their destination, "there would be outbreak of violence. This would constitute a breach of the peace within the definition in *R v Howell* (*Errol*) [1982] QB 416, 427".

206. Lord Denning's view in *R v Chief Constable of Devon and Cornwall* was rejected by the Divisional Court in *Percy* v *D.P.P.* [1995] 1 WLR 1382 (Balcombe LJ and Collins J) where, at 1394, applying the definition in *R v Howell*, that court reiterated the proposition that breach of the peace necessarily involved violence or threats of violence. In *Percy*[121] there was no evidence to suggest that violence was the natural consequence of the defendant's action. The order made in the magistrate court binding her over to keep the peace was accordingly quashed.

Preventative Justice v Punitive Justice

207. For a charge under s 17B(2), the starting point in every case is whether the conduct of the defendant was disorderly. Even if it was not, as in *Wise v Dunning* then, if the defendant's action was *calculated to provoke* others into violence or acts of violence, and such acts (by others) is a real possibility, a binding over order under s 61 of the Magistrates Ordinance can properly be made. But no charge under s 17B(2) in such circumstance can possibly succeed, because *disorderly behaviour* is an ingredient of the offence. This underlines the difference between preventative justice under s 61 of the Magistrates Ordinance and punitive justice under s 17B(2) of the Public Order Ordinance.

208. Since violence or threat of violence is inherent in the concept of "breach of the peace", the next question must be: Where is the threat coming from? If it is only from the defendant himself, there can be no breach of the peace, though he would probably be guilty of an offence such as common assault, or worse.

209. Having (hopefully) defined the scope of "breach of the peace" in a charge brought under s 17B(2) of the Public Order Ordinance, I turn to the proceedings in the courts below.

The Magistrate's Findings

210. The actions of the two appellants, leading to the charges brought against them under s 17B(2) were almost simultaneous, but there is no suggestion that they acted in concert.

211. What happened was this. On 10 April 2011, a section of Statue Square in Central Hong Kong had been cordoned off by mills barriers. This was for a prize-giving ceremony organized by the MTR Corporation. A stage had been erected for the purpose. Persons involved in the prize-giving ceremony were seated on the stage including the prize-winners and, at a table in front of the stage, the dignitaries including the chairman of the MTR Corporation Mr Ch'ien and the Secretary for Transport and Housing Madam Eva Cheng. There were a number of MTR Corporation staff members and security personnel inside the barrier. There were also some police officers present, both inside and outside the barrier. Outside the barrier, some demonstrators were shouting slogans, protesting against fare increase by the MTR Corporation.

212. What then happened was this. The two appellants broke through the barrier, and rushed towards the stage where Madam Cheng was giving a speech in front of a microphone, with Mr Ch'ien sitting alongside. The 1st appellant rushed onto the stage and scattered "hell money" in the air and shouted "shame on MTR for their fare hike"[122]. After that, he stood there quietly and made no resistance when he was held. Almost simultaneously, the 2nd appellant dashed onto the stage; Mr Ch'ien pulled Madam Cheng to one side; the 2nd appellant got hold of Madam Cheng's microphone and shouted "shame on MTR for their fare hike" through the microphone.

213. PW1, the event organizer, had tried to tackle with the 1st appellant, got hold of his thigh but lost balance, falling down and hurting his left elbow. PW2, the master of ceremonies, likewise tried to grapple with the 2nd appellant and sustained minor injuries. As mentioned earlier, a number of guards came forward and held the 1st appellant, who put up no resistance. As regards the 2nd appellant, the security personnel separated Madam Cheng from the 2nd appellant; he put up a slight resistance and the guards took him away, with him holding the microphone.

214. At about this time another person, wearing a black upper garment ("man in black") managed to penetrate the barrier, went towards the stage, apparently trying to mount it, and was stopped by the staff. This person also shouted "Shame on MTR for their fare hike".

215. On these facts, the magistrate concluded that each of the appellants had behaved in a *disorderly manner* with *intent* to *provoke a breach of the peace* in terms of s 17B(2) and sentenced each of them to 14 days' imprisonment. He summed up his findings in this way (§22):

> "Before the appellants took the actions, they must have reasonably anticipated obstruction, bodily clashes and even harm caused because of the use of force. I find that their behaviour involved violence breaching public order and the peace of society. In fact their conduct had provoked someone to follow suit. Therefore the only reasonable inference that I draw would be that they had the intent."

216. As can be seen, the finding of intent to provoke a breach of the peace was based to a large degree on the action of the man in black. The magistrate concluded that the man in black had been provoked or at least emboldened by the action of the two appellants into breaching the barrier and attempting to mount the stage.

Appeal to Barnes J

217. On appeal to the High Court, the appellate judge Barnes J upheld the magistrate's finding of disorderly behaviour: a finding which could hardly be in doubt in this case. The behaviour of the appellants penetrating the barrier and rushing onto the stage was momentarily threatening; they brought the prize-giving ceremony to a halt, albeit for a short while. The focus of the appeal before Barnes J was therefore on the finding of *intent*: Intent to provoke a breach of the peace.

218. The judge held that whilst the 1st appellant's act of rushing onto the stage and scattering "hell money" was "very insulting", and that the 2nd appellant had acted in a violent manner in rushing onto the stage and snatching the microphone whilst Madam Cheng was speaking, their *intent* in both cases was to draw people's attention to their grievances: Moreover, the judge found that the action of the man in black was equivocal; there was no evidence to sustain the magistrate's conclusion that his action was the result of anything done by the appellants; accordingly the finding of *intent* to provoke a breach of the peace could not upheld.

219. The judge's approach was this: Were the persons within the enclosure – the staff, the security personnel, the persons on the stage – likely to be provoked by the appellant's disorderly behaviour to act violently and breach the peace? The judge framed the issue in this way: Whilst admittedly the behaviour of the appellants was violent and had caused minor injuries to two staff members, was "their conduct likely to cause the two injured persons or other people who might be injured by their conduct to *take revenge* and result in a breach of the peace?" (§61 of her judgment). She went on to say that the staff members had acted "in a very restrained and professional manner….They would not themselves breach the peace when, in the course of the performance of their duty, some people disrupted the order". The result was that Barnes J quashed the conviction on s 17B(2), but substituted for that a conviction on s 17B(1).

Section 17B(1)

220. Section 17B(1) provides:

> "(1) Any person who at any public gathering acts in a disorderly manner for the purpose of preventing the transaction of the business for which the public gathering was called together or incites others so to act shall be guilty of an offence and shall be liable on conviction to a fine of $5,000 and to imprisonment for 12 months."

221. In my respectful view, the substituted conviction under s 17B(1) cannot be sustained. As mentioned earlier (para 218) the judge had found that the appellants' *intent* was to draw people's attention to their grievances: This does not sit well with her finding that their *purpose* was to prevent the transaction of the business taking place. I agree with counsel's submission that for *purpose* under s 17B(1) to be made out, there has to be something more than a brief interruption to the business of the public gathering: There was no evidence here that either of the two appellants had set out to prevent the prize-giving ceremony taking place. The conviction of the two appellants under s 17B(1) must be quashed.

222. The matter must then be looked at afresh by this Court.

Section 17B(2)

223. As can be seen from footnote 119 above, where breach of the peace was *likely* to be caused by the appellants' disorderly behaviour, the offence is complete: Though, if the *intent* to *provoke* a breach of the peace was made out, a magistrate would obviously treat the offence as one of greater culpability.

224. The point that must be borne in mind in every case is this: Where a person behaves in a disorderly manner in a public place – a place where a large number of people are gathered – the result is often unpredictable.

The 1st Appellant

225. Whilst the action of the 1st appellant in rushing onto the stage might, momentarily, have been frightening, there was no finding by the magistrate that his behaviour was seen by any one as threatening violence. The magistrate's finding was that Secretary Cheng, then in the course of giving her speech, was startled rather than alarmed: Secretary Cheng's reaction to the 1st appellant's act of scattering "hell money" was to say: "This is not some kind of sport. Children, you should not imitate that….". The 1st appellant shouted "shame on MTR for their fare hike" and was almost immediately held by security personnel. He put up no resistance and was quietly led away.

226. The appellate judge, as mentioned earlier (para 218 above), concluded that the finding of *intent* to provoke a breach of the peace was wrong in law. It was not sustained by the evidence. I agree with that conclusion. The question still remains: Was it established beyond a reasonable doubt, on the facts as found, that the disorderly conduct of the 1st appellant was *likely to cause a breach of the peace*?

227. In my judgment, the answer is No. The fact that PW1 sustained a mild injury in trying to grapple with the 1st appellant is not enough. The magistrate said (§22) that the appellants must have anticipated "obstruction, bodily clashes and even harm caused because of the use of force" and therefore their behaviour had breached public order and "the peace of society". In my judgment, the brief episode whereby PW1 failed to physically stop the 1st appellant from mounting the stage is not enough to constitute a breach of the peace. There is no suggestion that it led to any kind of confrontation between them. It follows that his conviction under s 17B(2) cannot be restored.

The 2nd Appellant

228. The disorderly behaviour of the 2nd appellant was initially more menacing. When he jumped onto the stage and rushed towards Secretary Cheng, the reaction of those on the stage was one of alarm. Mr Ch'ien sprang from his seat as the 2nd appellant snatched away the microphone in front of Secretary Cheng. The magistrate's finding was to this effect:

> "PW2 ... the MC [master of ceremony]... pulled his partner to his side fearing that she would be knocked down. … He tried to stop the 2nd appellant but was not fast enough. He believed that the 2nd appellant had taken hold of Secretary Cheng's microphone and said something. Then a group of personnel together with him carried the 2nd appellant down the stage. He suffered minor injuries during the struggle: ... The 2nd appellant put up slight resistance but soon calmed down."

229. Plainly the 2nd appellant had, by his disorderly behaviour, caused a situation where persons on the stage had an immediate and real fear of physical harm. The proceedings on the stage – the prize-giving ceremony organized by the MTR Corporation – were interrupted and brought briefly into chaos. He was undoubtedly guilty of common assault.

230. But, in relation to a charge of public disorder causing (or likely so cause) a breach of the peace, the court looks beyond the misbehaviour of the accused to the reaction of others at the scene. As to this, the appellate judge said this (§67):

> "I have repeatedly read the magistrate's Statement of Findings. I do not see he had made any analysis or finding as to the influence or effect which the appellants' disorderly conduct might produce on other people at the scene who witnessed such conduct, except his description about members of the staff and the man dressed in black who, according to the magistrate, 'followed the appellants' example'."

231. I respectfully agree with her conclusion. It follows that, on the magistrate's findings of fact, no conviction for disorderly conduct *likely to cause a breach of the peace* can be sustained.

Conclusion

232. In my judgment, had the 2nd appellant been brought before a magistrate to be bound over to keep the peace under s 61 of the Magistrates Ordinance, such order would almost certainly be sustained. The case of the 1st appellant is more equivocal, depending on a magistrate's view of the matter overall, including any risk of future misconduct.

233. I have had the advantage of reading in draft Ribeiro PJ's judgment and am in total agreement with that judgment. I concur in the orders he proposed.

Lord Millett NPJ:

234. I agree with the Judgments of Mr Justice Chan, Acting CJ, Mr Justice Ribeiro PJ and Mr Justice Litton NPJ.

Mr Justice Chan, Acting CJ:

235. The Court unanimously allows the appellants' appeals and dismisses the HKSAR's appeal. The question of costs will be dealt with in accordance with para. 101 in Mr Justice Ribeiro's judgment.

(Patrick Chan)	(RAV Ribeiro)	(Robert Tang)
Acting Chief Justice	Permanent Judge	Permanent Judge

(Henry Litton)
Non-Permanent Judge

(Lord Millett)
Non-Permanent Judge

Mr Martin Lee SC, Mr Randy Shek and Mr Carter Chim, instructed by Ho Tse Wai, Philip Li & Partners, for Wong Hin Wai

Mr H Y Wong, instructed by Ho Tse Wai, Philip Li & Partners, for Chow Nok Hang

Mr Gerard McCoy SC, instructed by the Department of Justice and Mr Martin Hui, SADPP and Mr Derek Lau, PP of the Department, for HKSAR

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[1] Cap 245.

[2] ESCC 3256/2011 (11 January 2012).

[3] HCMA 193/2012 (20 July 2012).

[4] FAMC No 45/2012 (27 November 2012).

[5] Reflecting Article 21 of the International Covenant on Civil and Political Rights ("ICCPR").

[6] Cap 383.

[7] ***Leung Kwok Hung*** *v HKSAR* (2005) 8 HKCFAR 229 at §20.

[8] *Ibid*, at §§1 and 2; *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137 at §1.

[9] *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at 28-29; *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 at §24; ***Leung Kwok Hung*** *v HKSAR* (2005) 8 HKCFAR 229at §16.

[10] (2005) 8 HKCFAR 229 at §17.

[11] There is no difference between the Article 17 expression "in conformity with the law" and the Basic Law Article 39(2) expression "as prescribed by law": ***Leung Kwok Hung*** *v HKSAR* (2005) 8 HKCFAR 229 at §18. The requirement is explained in *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 and ***Leung Kwok Hung*** *v HKSAR* (2005) 8 HKCFAR 229 at §§25-29.

[12] *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 at 460; ***Leung Kwok Hung*** *v HKSAR* (2005) 8 HKCFAR 229 at §33.

[13] ***Leung Kwok Hung*** *v HKSAR* (2005) 8 HKCFAR 229 at §35.

[14] *Ibid* at §36.

[15] *Ibid* at §35.

[16] (2005) 8 HKCFAR 229.

[17] At §69, the Court adding that the concept of "public order (*ordre public*)" went further.

[18] ***Leung Kwok Hung*** *v HKSAR* (2005) 8 HKCFAR 229 at §95.

[19] (1882) 9 QBD 308.

[20] [1902] 1 KB 167.

[21] *Redmond-Bate v DPP* [2000] HRLR 249 at §6.

[22] (2005) 8 HKCFAR 137.

[23] Contrary to section 4A of the Summary Offences Ordinance (Cap 228).

[24] The Court held that since a constitutionally protected right was involved: "While the interests of those exercising their right of 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." (§44)

[25] *HKSAR v Au Kwok-kuen* [2010] 4 HKC 235.

[26] *Morse v Police* [2012] 2 NZLR 1 at §110.

[27] *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439 at 444; *R v Ireland, R v Burstow* [1998] AC 147 at 161-162.

[28] Set out in Section A above.

[29] "Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence."

[30] It not having been alleged that they were guilty of using threatening, abusive or insulting words.

[31] [1945] JC 29 at 33. The Court was concerned with the Glasgow Police Act, 1866, which by section 135(5), made it an offence if a person was "riotous, disorderly or indecent in his behaviour."

[32] [1971] NZLR 924 at 925. The defendant was charged under section 3D of the Police Offences Act 1927 which stated: "Every person commits an offence ... who, in or within view of any public place ... behaves in a riotous, offensive, threatening, insulting or disorderly manner ..."

[33] Under section 5 of the Public Order Act 1986: *Chambers v DPP* [1995] Crim LR 896.

[34] [1973] AC 854.

[35] At 861.

[36] (2004) 220 CLR 1 at §12.

[37] (2004) 220 CLR 1.

[38] [2007] 3 NZLR 91.

[39] [2012] 2 NZLR 1.

[40] (2004) 220 CLR 1 .

[41] Under section 7(1)(d) of the Vagrants, Gaming and Other Offences Act 1931 (Q).

[42] [2007] 3 NZLR 91.

[43] [2012] 2 NZLR 1.

[44] Under Section 4(1)(a) of the Summary Offences Act 1981.

[45] *Coleman v Power* (2004) 220 CLR 1 at §§5 and 6. See also *Brooker v Police* [2007] 3 NZLR 91 at §25.

[46] (1997) 189 CLR 520.

[47] As required, in New Zealand, by section 6 of the New Zealand Bill of Rights Act.

[48] *Brooker v Police* [2007] 3 NZLR 91 at §§31, 41 and 45 per Elias CJ, at §56 per Blanchard J, and at §90 per Tipping J; *Morse v Police* [2012] 2 NZLR 1 at §§2-3 and 36 per Elias CJ, at §§62 and 67 per Blanchard J, at §§69-71 per Tipping J and at §§102-§103.

[49] *Ibid*, at §§33 and 45.

[50] *Coleman v Power* (2004) 220 CLR 1 at §§183-184, 193-194 per Gummow and Hayne JJ (Kirby J agreeing).

[51] [1982] QB 416.

[52] At 427.

[53] [2007] 2 AC 105 at §§27-28.

[54] *Steel v United Kingdom* (1998) 28 EHRR 603.

[55] *Percy v DPP* [1995] 1 WLR 1382 at 1391, citing *Wise v Dunning* [1902] 1 KB 167; *R v Morpeth Ward Justices, Ex parte Ward* (1992) 95 Cr App R 215.

[56] *Read v Jones* (1983) 77 Cr App R 246 at 251-252.

[57] *McBean v Parker* (1983) 147 JP 205 (Div Ct).

[58] *Percy v DPP* [1995] 1 WLR 1382 at 1394.

[59] *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105.

[60] *Ibid* at §§39 and 45.

[61] *Ibid* at §28. However, under section 19 of the Public Order Ordinance (Cap 245), a participant in an unlawful assembly (defined by section 18) who commits a breach of the peace is made guilty of the offence of riot.

[62] 34 Edw 3.

[63] Cap 221, section 109I: "A judge, a District Judge or a magistrate shall have, as ancillary to his jurisdiction, the power to bind over to keep the peace, and power to bind over to be of good behaviour, a person who or whose case is before the court, by requiring him to enter into his own recognizances or to find sureties or both, and committing him to prison if he does not comply."

[64] Cap 227, sections 36, 61-63. See *Lau Wai Wo v HKSAR* (2003) 6 HKCFAR 624.

[65] *Lau Wai Wo v HKSAR* (2003) 6 HKCFAR 624 at §47.

[66] In Section C above.

[67] Leaving aside elements such as "in a public place" which are not presently controversial.

[68] [1963] 2 QB 744 at 749.

[69] (1982) 75 Cr App R 211 at 216.

[70] [1983] QB 92 at 98.

[71] [1995] 1 WLR 1382 at 1392.

[72] (2004) 220 CLR 1 at §§9-10.

[73] In Hong Kong, the first of the duties of the police listed in section 10 of the Police Force Ordinance Cap 232 is the duty "to take lawful measures for ... preserving the public peace ..." See also *R (Laporte) v Chief Constable of Gloucestershire* (HL(E)) [2007] 2 AC 105 at §66 on the duty of the police "to take whatever steps are reasonably necessary to prevent a breach of the peace".

[74] (1982) 75 Cr App R 211 at 216.

[75] *Ibid*.

[76] [2000] HRLR 249 at §9.

[77] [1995] 1 WLR 1382.

[78] *R v Li Wai Kuen* [1973-1976] HKC 346 at 348; *HKSAR v Morter* [2003] 2 HKLRD 510.

[79] *HKSAR v Pearce* [2006] 3 HKC 105 at §29.

[80] Judgment §64.

[81] Judgment §67.

[82] Judgment §62.

[83] Judgment §§82-83.

[84] Namely, the "MTR Hong Kong Race Walking 2011" which was jointly organised by the MTR and the Hong Kong Amateur Athletic Association.

[85] These included several mills barriers.

[86] The 1st appellant was a District Councillor Assistant and the 2nd appellant was a Councillor Assistant.

[87] At trial, there was no separate reliance on "noisy manner".

[88] As Mr McCoy SC for the prosecution rightly accepted.

[89] ***Leung Kwok Hung*** *and others v HKSAR* (2005) 8 HKCFAR 229 at p245 para 1 and *Yeung May Wan and Others v HKSAR* (2005) 8 HKCFAR 137 at p148 para 1.

[90] ***Leung Kwok Hung***, the majority judgment of Li CJ, Chan, Ribeiro PJJ and Sir Anthony Mason NPJ. Bokhary PJ dissented on the result, but his views on the importance of such rights were equally emphatic.

[91] ***Leung Kwok Hung*** at pp252-254.

[92] Bokhary PJ delivered a separate concurrent judgment. He said at 144 "what the public can reasonably be expected to tolerate is a question of fact and degree. But when answering that question, a court must always remember that preservation of the freedom in full measure defines reasonableness and is not merely a factor in deciding what is reasonable."

[93] Which, it will be remembered, does not have to be likely "to cause violence against persons or property to start or continue".

[94] Human right values.

[95] *Coleman* should be noted for the importance which the High Court placed on the impact which such an offence may have on the freedom of expression.

[96] As Elias CJ pointed out in *Brooker* at footnote 41, at p107, Gummow, Kirby and Hayne JJ held that s7(1)(d) required the likelihood of a breach of peace, but not Gleeson CJ, McHugh, Callinan & Heydon JJ who were "influenced in particular by the fact that the Australian Legislation had removed the earlier requirement of breach of the peace (as the New Zealand legislation had also done)."

[97] However, it should be noted that whilst McHugh J took the view that s7(1)(d) merely required that they be uttered in a public place and were calculated to hurt the personal feelings of Constable Power and they did so, he agreed that the conviction had to be set aside because [81] "the words used by the appellant were a communication on political or government matters", and s7(1)(d) which imposed an unqualified prohibition on the use of insulting words in public cannot be justified as compatible with constitutional freedom. McHugh J also expressed the view that [102] "Without seeking to state exhaustively the qualifications needed to prevent a infringement of the freedom of communication, the law would have to make proof of a breach of the peace and the intention to commit the breach elements of the offence. It may well be the case that, in the context of political communications, further qualifications would be required before a law making it an offence to utter insulting words would be valid."

[98] With the agreement of Collins J.

[99] At p 748.

[100] Of course, *Jordan* does not absolve those who reacted with violence or threat of violence from criminal liability.

[101] Sedley LJ famously said in *Redmond-Bate* "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having."

[102] *Coleman* at para 32, quoting the submission of the Solicitor General for Queensland.

[103] *Yeung May Wan* at para 44, see para 117 above.

[104] Per Blanchard J in *Morse* at para 64, see para 128 above.

[105] Per McGrath J in *Brooker* at [146], see para 124 above.

[106] Which is based on Art 21 of the International Covenant on Civil and Political Rights.

[107] Footnote 56 in the text referred to *Cisse v France*, a decision of the European Court of Human Rights 9.4.2002 at para 37.

[108] It seems that neither Sir Chung-kong Chow nor Dr Ch'ien was aware of the 1st appellant's presence until after he had scattered the hell money.

[109] Mr Lee also rightly accepted that the gathering was a public gathering and that it took place in a public place.

[110] The microphone was on a stand.

[111] Per McGrath J in *Brooker* at [146], see para 124 above.

[112] "Suffragettes Riot in Albert Hall", *New York Times*, 6th December 1908. See also House of Lords Hansard,18th December 1908 vol 198 cc2206-11.

[113] See House of Lords Hansard, 18th December 1908 vol 198 cc2206-11; and House of Commons Hansard, 19th December 1908 vol 198 cc2328-43.

[114] Clause 5 became s5(1) of the POO 1948.

[115] Legislative Council Hansard, 20th October 1948.

[116] Majority holding in *Morse*, see para 126 above.

[117] Article 9, Basic Law: "In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislative and judiciary of the Hong Kong Special Administrative Region".

[118] **61. Exercise on complaint of power to bind over to keep the peace**

> (1) The power of a magistrate, on complaint of any person, to adjudge a person to enter into a recognizance and find sureties to keep the peace or to be of good behaviour towards such first-mentioned person shall be exercised by an order upon complaint, and the provisions of this Ordinance shall apply accordingly, and the complainant and defendant and witnesses may be called and examined and cross-examined, and the complainant and defendant shall be subject to costs, as in the case of any other complaint.

> (2) The magistrate may order the defendant, in default of compliance with such last-mentioned order, to be imprisoned for 6 months.

[119] "(2) Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine of $5,000 and to imprisonment for 12 months."

[120] This was yet another case of protestors hindering the work of the Central Electricity Board by so-called passive resistance. The question was whether the Chief Constable should be ordered by mandamus to have the obstructors forcibly removed.

[121] *Percy* involved a woman repeatedly entering a military airbase, with the intention of protesting about the use of the base. She never threatened violence or did damage to property.

[122] At §73 Barnes J on appeal commented "In Hong Kong, a Chinese-dominated society, scattering paper money offerings is indeed a very insulting act…."