Yap Keng Ho and others *v* Public Prosecutor
[2011] SGHC 41

Case Number : Magistrate's Appeals Nos 68-70 and 84 of 2010

Decision Date : 22 February 2011

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : The appellants in person; Nor'Ashikin Samdin and Ng Yiwen (Attorney-General's Chambers) for the respondent.

Parties : Yap Keng Ho and others — Public Prosecutor

Criminal Law

Constitutional Law

22 February 2011 Judgment reserved.

Woo Bih Li J:

Introduction

1 The appellants, namely Yap Keng Ho ("Yap"), Chee Siok Chin ("CSC"), Ghandi s/o Karuppiah Ambalam ("Ghandi") and Chee Soon Juan ("Dr Chee") had each been convicted by a District Judge of an offence punishable under r 5 of the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R1, 2000 Rev Ed) ("MOR") read with s 511 of the Penal Code (Cap 224, 1985 Rev Ed) ("Penal Code (1985 Rev Ed)"). The charge against each appellant read as follows:

> You, [name of appellant] are charged that you on 16 September 2006, at about 12 noon, at the vicinity of Speakers' Corner, Hong Lim Park, North Canal Road, Singapore, which is a public place, together with others including [Tan Teck Wee, Jeffrey George, Teoh Tian Jin and the three other appellants] did attempt to participate in a procession from the vicinity of Speakers' Corner to Parliament House intended to demonstrate opposition to the actions of the Government, when you ought reasonably to have known that the intended procession would have been held without a permit under the [MOR], and you have thereby committed an offence punishable under Rule 5 of the [MOR] read with section 511 of the [Penal Code (1985 Rev Ed)].

The District Judge sentenced each appellant to a fine of $1,000 (in default one week's imprisonment). The appellants have served their default sentences. All the appellants appealed against their conviction and sentence. For completeness, I mention that Teoh Tian Jin had filed a notice of appeal but did not lodge his petition of appeal within the extended time that I had allowed. His appeal is deemed to be withdrawn under s 247(7) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed).

The law

2 The MOR was repealed on 9 October 2009. Rule 5 of the MOR provided as follows:

> 5. Any person who participates in any assembly or procession in any public road, public place or

place of public resort shall, if he knows or ought reasonably to have known that the assembly or procession is held without a permit, or in contravention of any term or condition of a permit, be guilty of an offence and shall be liable on conviction to a fine not exceeding $1,000.

A procession to which the MOR applied was defined in r 2 of the MOR as follows:

2. —(1) Subject to paragraph (2), these Rules shall apply to any assembly or procession of 5 or more persons in any public road, public place or place of public resort intended —

(a) to demonstrate support for or opposition to the views or actions of any person;

(b) to publicise a cause or campaign; or

(c) to mark or commemorate any event.

3 Section 511 of the Penal Code (1985 Rev Ed) stated:

Punishment for attempting to commit offences

511. Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence:

Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.

Illustrations

(*a*) *A* makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(*b*) *A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z*'s pocket. *A* fails in the attempt in consequence of *Z*'s having nothing in his pocket. *A* is guilty under this section.

The *mens rea* of an attempt to commit an offence is the intention to commit the substantive offence whilst the *actus reus* requires an attempter to have "embarked on the crime proper" (*Chua Kian Kok v Public Prosecutor* [1999] 1 SLR(R) 826 at [30], [31] and [36]).

4 The charge against each appellant (see [1] above) in the present case would be made out if it was proven that the appellant had (a) intended to and had embarked on the crime proper of participating in a procession (b) of five or more persons (c) in a public road, public place or public resort in order to demonstrate opposition to the actions of the Government (d) where the appellant knew or ought reasonably to have known that the intended procession would have been held without a permit.

The facts

5 Before 16 September 2006, Dr Chee had applied for a permit for the proposed procession on

16 September 2006. He was informed by the police that his application had been rejected.

6 At around 12 noon on 16 September 2006, the appellants had gathered together at Hong Lim Park, just outside the Speakers' Corner boundary. Dr Chee, CSC and Ghandi did not deny having an intention to march to Parliament House and the District Judge accepted the evidence of police witnesses, adduced at trial, that Dr Chee, CSC and Ghandi had gathered at Hong Lim Park for the immediate purpose of carrying out a march to Parliament House (see [31] of the District Judge's Grounds of Decision in *PP v Chee Soon Juan and others* [2010] SGDC 128 ("the DJ's GD")). The District Judge noted that Dr Chee had admitted under cross-examination that the purpose of the march was to protest against government policies and actions (see [46] of the DJ's GD). Additionally, the District Judge stated that there was ample evidence to show that the appellants were aware that Dr Chee's application for a permit to carry out the proposed march had been rejected and that on 16 September 2006 a warning had been given that the march was illegal (see [47] – [49] of the DJ's GD). The District Judge also found that the conduct of the accused persons was not merely preparatory but consisted of acts directed towards fulfilment of the objective of marching to Parliament House (see [57] of the DJ's GD).

7 The District Judge's findings on the sequence of events on 16 September 2006 were as follows (at [30] of the DJ's GD):

> 30.1 Sometime around 11am, Dr Chee and a group of persons (which did not include Mr Yap) arrived at Hong Lim Park and entered the Neighbourhood Police Post ("NPP") to register to speak at Speakers' Corner.
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> 30.2 After they left the NPP, they proceeded to Speakers' Corner and congregated at a park bench that was subsequently discovered to be just outside the gazetted boundaries of Speakers' Corner.
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> 30.3 Dr Chee stepped onto the park bench to address the crowd and media present. This was followed by speeches by Mr Ghandi and Mr Tan. Mr Teoh Tian Jin and Mr Jeffrey George were seen standing behind carrying placards and [CSC] was next to them.
>
> 30.4 After Mr Tan completed his speech, Dr Chee got onto the park bench again and asked those present to follow him on the march to Parliament House. Dr Chee then got down and proceeded towards North Canal Road. He was followed by a group of people which included [CSC], [Ghandi], Mr Teoh, Mr Tan, and Jeffrey George. [Yap] was not seen following Dr Chee at this point. However, they were stopped by DSP Hassan and Inspector Patrick Lim after a few metres.
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> 30.5 After an exchange between DSP Hassan and Dr Chee, Dr Chee and some others with him recited the pledge, and then sat down and sang "we shall overcome." There was no evidence that [Yap] was part of the group that recited the pledge and sang "we shall overcome."
>
> 30.6 After that, Dr Chee and the others returned to the park bench. The five defendants including [Yap], together with Tan Teck Wee and Jeffrey George, were seen either at the bench or table. Dr Chee told the crowd that the police were stopping them from marching to Parliament [H]ouse but they would not give up. While Dr Chee was speaking to the crowd, the other defendants, including [Yap], were seen talking to each other at the bench for 5 – 10 minutes. For avoidance of doubt, this is a summary and should not be taken as an exhaustive account of [Yap's] role [which was considered in more detail in a separate part of the District Judge's judgment].

30.7 After the discussion ended, Dr Chee told the crowd that they would still be trying to march to Parliament House. The group then proceeded towards the direction of North Canal Road and they were stopped by DSP Hassan again. At this point, Inspector Patrick Lim used a loud hailer to announce that there was an illegal procession and that if anyone was not part of the group, they should leave.

30.8 Dr Chee then made an about turn and walked away from DSP Hassan and Insp Lim. DSP Hassan and Insp Lim had difficulties following because of the crowd. Instead, Dr Chee and his group were stopped by DSP Tan Teck Kee. At this point, DSP Tan Teck Kee heard Mr Yap shouting "why are the police stopping us from proceeding." Mr Yap was to the left of DSP Tan when he started shouting but he then moved and stood beside Dr Chee. The group continued to try to get past DSP Tan but the latter stood his ground.

30.9 As Dr Chee's group was not able to proceed further, Dr Chee and the group including [Yap] returned to the park table where they had a further discussion. After this discussion, Dr Chee addressed the crowd and told them they will never give up on the march to Parliament House and the fight for democracy. Dr Chee then told the crowd to meet him and his group at Parliament House in 15 minutes. After this announcement was made, the group split up and left the park bench.

The appellants did not challenge the findings of the District Judge as set out above.

8 With regard to Yap's conduct on 16 September 2006, the District Judge stated (at [74] of the DJ's GD):

74 However, as the DPP pointed out, even if Mr Yap went to Speakers' Corner without the intention of joining the march, it was possible for him to change his mind and join in. In my view, the evidence clearly supported the inference that Mr Yap had at a certain point decided to participate in the procession to Parliament House:

74.1 The evidence shows that Mr Yap had abandoned (or rather, the media had abandoned) his own event when Dr Chee arrived. Thereafter, Mr Yap proceeded to the park bench where Dr Chee and the other defendants were congregating.

74.2 Mr Yap even interrupted the speeches of other members of the group such as Tan Teck Wee in order to make his own announcements. ...

74.3 After Dr Chee announced that he was going to march and attempted to march out of Hong Lim Park, Mr Yap followed. During one of the attempts, he even exclaimed "why are the police stopping us from marching." Even if Mr Yap claimed that these words were not carefully chosen but just uttered at the spur of the moment, it was still consistent with Mr Yap forming an intention on the spur of the moment to join the march. Later, when the defendants split up, Mr Yap followed [CSC].

74.4 Even though Inspector Patrick Lim had made an announcement that all those who were not part of the unlawful assembly should disperse, Mr Yap did not disperse but continued to move together with the crowd and the defendants. There was … also … no evidence that Mr Yap informed the police officer that he was actually not part of the unlawful assembly.

The issues

9 At the hearing before me on 3 December 2010, Dr Chee (speaking on behalf of CSC and Ghandi) did not challenge the District Judge's findings of fact. Rather, he raised constitutional law arguments against the appellants' conviction. Dr Chee submitted that:

(a) The appellants' constitutional rights to freedom of speech and assembly under Art 14 of the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution") had been infringed as the police had a standing policy of not allowing any outdoor demonstrations or processions and the appellants' application for a permit had been rejected; and

(b) The appellants' constitutional rights to equality under Art 12 of the Constitution had been infringed as the National Trade Union Congress ("NTUC") and the Consumer Association of Singapore ("CASE") have conducted marches whereas the appellants were prevented from carrying out the intended procession.

10 Yap disputed the District Judge's finding that he had intended to participate in the march organised by Dr Chee. Yap argued that the police had equated his disagreement with their enforcement of the law on 16 September 2006 with an intention to participate in a procession that the police was trying to prevent, *ie*, Dr Chee's proposed march. He also complained that the police had imposed an illegitimate state of emergency or curfew at the Speakers' Corner on 16 September 2006 and asked the court to declare that the police had exceeded their powers.

Decision

The appeals against conviction

The constitutionality of the standing policy of the police of not allowing outdoor demonstrations or processions

11 On or around 22 August 2006, Dr Chee had applied for a permit to conduct a march and rally from 14 to 20 September 2006, which date coincided with the World Bank and International Monetary Fund ("WB-IMF") meeting then taking place in Singapore. The route of the proposed march was Speakers' Corner, Parliament House, Suntec City, and ending at the Istana. Dr Chee's application was rejected and he was notified of such rejection by post and e-mail on 28 August 2006. At the trial, the licensing officer who had processed Dr Chee's application explained that the application was rejected for two reasons:

(a) the police's policy position on outdoor demonstrations and processions was one of disallowance regardless of whether or not there was a major meeting taking place;

(b) the route of the proposed march would cover some important national buildings as well as the main venue of the WB-IMF.

12 Dr Chee acknowledged that there are times when the freedom of speech and assembly can and must be curtailed but submitted that any curtailment on such right must be backed up by information that there would be an imminent, real and immediate threat to public disorder. Dr Chee submitted that the charge against each appellant was unsustainable because the standing policy of the police not to grant permits for all outdoor demonstrations and processions was unconstitutional and inconsistent with customary international law and the right to freedom of speech, association and assembly enshrined in Arts 19 and 20 of the Universal Declaration of Human Rights ("UDHR").

13 The constitutional law argument raised by Dr Chee in the present appeal about the policy of the police is similar to that which he raised in Magistrate's Appeals Nos 101-108, 110-111 of 2010 ("MA 101-108, 110-111 of 2010") and which was addressed at [8] – [21] of my judgment in those appeals.

14 The charges considered in MA 101-108, 110-111 of 2010 were brought under s 5(4)(b) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("MOA") for failure to comply with paragraph 2 of the Miscellaneous Offences (Public Order and Nuisance) (Prohibition of Assemblies and Processions – Parliament and Supreme Court) Order (Cap 184, O1, 2004 Rev Ed) ("MO(PAPPSC)O"). Section 5(4)(b) of the MOA, read with paragraph 2 of the MO(PAPPSC)O, made it an offence for a person to participate in an assembly or procession consisting of two or more persons in any public road, public place or public resort in or within the area described in the Schedule to the MO(PAPPSC)O or in or near any public road forming the boundary of that area where he knew or ought reasonably to have known that *he had not obtained a permit* from the Deputy Commissioner of Police in writing. This operated in the same way as r 5 of the MOR which is being considered in the present appeals insofar as the offences in both *s* 5(4)(b) of the MOA (read with paragraph 2 of the MO(PAPPSC)O) and r 5 of the MOR were constituted when a participant in an assembly/procession which required the prior permission of the Deputy Commissioner of Police in writing under paragraph 2 of the MO(PAPPSC)O and r 5 of the MOR respectively, knew or ought reasonably to have known that no permit had been granted for the assembly/procession.

15 The discussion at [8] – [21] of my judgment in MA 101-108, 110-111 of 2010 was on the issue of whether the constitutionality of the police's decision not to grant the appellants a permit for their assembly and procession was relevant to the appellants' conviction for offences under s 5(4)(b) of the MOA read with paragraph 2 of the MO(PAPPSC)O. In my opinion, it was irrelevant and I apply the same reasoning in the present case. In summary, the law relating to offences under r 5 of the MOR was not that the appellants could participate in a procession (caught by r 5 read together with r 2) at any time without a permit subject to such restrictions as may be imposed or directions as may be given by the police. If this had indeed been the case, then if such restrictions or directions were wrongly imposed, that might have afforded a valid defence to the appellants subject to the consideration as to whether the judicial review claim could have been brought as a defence in criminal proceedings before the District Judge. To the contrary, an offence under r 5 of the MOR was committed once a person participated in an assembly or procession where he knew or ought reasonably to have known that no permit had been granted for such assembly or procession. Since the appellants knew that they did not have a permit when they participated in the attempted procession, they were rightly convicted and sentenced under r 5 of the MOR read with s 511 of the Penal Code (1985 Rev Ed) regardless of the constitutionality of the rejection of their application for a permit to hold the rally and march on 16 September 2006.

16 Whilst Dr Chee claimed that customary international law provides for freedom of expression for all citizens everywhere, he also stated that customary international law does not tolerate bans that are "massive, arbitrary and disproportionate". Articles 19 and 20 of the UDHR state that everyone has a right to freedom of opinion, expression, peaceful assembly and association. Art 14 of the Constitution respects the right of every citizen of Singapore to such freedoms as stated in Arts 19 and 20 of the UDHR subject to laws imposed by Parliament to impose restrictions on such rights in the following manner:

> **Freedom of speech, assembly and association**
>
> 14. — (1) Subject to clauses (2) and (3) —

(a) every citizen of Singapore has the right to freedom of speech and expression;

(b) all citizens of Singapore have the right to assemble peaceably and without arms; and

(c) all citizens of Singapore have the right to form associations.

(2) Parliament may by law impose —

(a) on the rights conferred by clause (1) (*a*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;

(b) on the right conferred by clause (1) (*b*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and

(c) on the right conferred by clause (1) (*c*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.

(3) Restrictions on the right to form associations conferred by clause (1) (*c*) may also be imposed by any law relating to labour or education.

As mentioned above (at [12]), Dr Chee had acknowledged that the constitutional right to freedom of speech and assembly under Art 14 of the Constitution can and must be curtailed in certain instances. He submitted, however, that the Constitution must be construed, where possible, to be consistent with customary international law which, according to him, does not tolerate bans that are massive, arbitrary and disproportionate. The appellants' real complaint was not with the state of the law under the Constitution, the MOA and/or the MOR, but with the exercise of discretion by the police in their implementation of a policy not to grant permits for all outdoor demonstrations and processions. This was apparent from Dr Chee's submissions at the hearing before me as follows:

> A sweeping ban, one that presumptively eliminates ... the right of free expression cannot possibly be one that is genuinely and rationally targeted at any mischief that Parliament can lawfully address. Moreover, the Constitution of Singapore must be construed, where possible, to be consistent with customary international law. The latter provides for free expression for all citizens everywhere. It doesn't tolerate bans that are massive, arbitrary and disproportionate. Still less does the administrative law of Singapore permit the exercise of executive discretion in a manner that is harshly, arbitrarily and disproportionately inimical to freedom of expression and assembly.
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> *The across the board refusal of the executive to issue permits is not consistent with the rule of administrative law which requires rationality and good faith in the exercise of discretion*, a willingness to consider situations on their merits rather than *adopting rigid rules that have no basis in enabling legislation, and* the interpretation and application of legislation in a manner that is consistent with the basic principles of human rights, customary international law, Singapore's solemn international commitments, and parliamentary democracy. [note: 1]
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> [emphasis added]

Dr Chee also submitted, in oral reply submissions at the hearing before me, that "if a parent Act or a by-law or a subsidiary legislation and *in this case a policy* ... is unconstitutional then no one ... would be deemed to have committed ... an offence". As discussed in my judgment in MA 101-108, 110-111

of 2010, if Dr Chee felt that the police had acted unconstitutionally in rejecting the application for permit, the proper recourse was to apply for judicial review of the exercise of discretion by the police. Unfortunately for the appellants, this was not done.

17 Dr Chee's argument that the standing policy of the police did not allow them to consider whether there was an imminent, real and immediate threat to public disorder before refusing to issue a permit or taking action against the appellants was based on the case of *Regina (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105. That was a case he relied on in Magistrate's Appeals Nos 432-434 of 2009 and I have addressed it in [17] to [18] of my judgment for those appeals.

The allegation of unlawful discrimination

18 Dr Chee further argued that the application of the policy was unconstitutional and in breach of Art 12 of the Constitution as it was not equally applied to all organisations in that NTUC was allowed to hold a demonstration in 1988 against the Embassy of the United States of America and CASE was allowed to conduct two marches in 2007 and 2008.

19 However, the facts regarding the two examples he gave were not clearly established. In the appeals before me, Dr Chee was not certain whether a permit had been given in respect of each example and, if so, the reason for giving it or whether it was a case of the police not taking any action against the participants and, if so, the reason for the non-action.

20 Furthermore, if a permit had been issued, then this might have been relevant if an application for judicial review was made for the refusal to issue a permit for the procession on 16 September 2006. However, no such application was made.

21 In the circumstances, the appellants did not establish sufficient facts to support the allegations of unlawful discrimination or the relevance of the allegations.

Whether the District Judge had erred in finding that Yap had intended to participate in the procession to Parliament House

22 Yap raised the following points before me to support his claim that the District Judge had erred in finding that he had intended to participate in the procession (also referred to as a march) to Parliament House on 16 September 2006:

(a) Yap had arrived alone, before the other appellants, at the Speakers' Corner on 16 September 2006;

(b) Yap had, independently of the other appellants, registered to speak at the Speakers' Corner for the whole period of the WB-IMF meeting (from 16–30 September 2006) and had also made other applications (which were rejected and which rejections he did not pursue) to hold processions on dates different from 16 September 2006;

(c) Yap was not in the same attire as the other appellants on 16 September 2006;

(d) Yap had a different agenda from the other appellants on 16 September 2006;

(e) Yap had conducted his own independent activity prior to the arrival of the other appellants – his speech was on the 2006 General Election;

(f) Yap did not take Dr Chee's invitation on 16 September 2006 to go on a march seriously as he did not believe that Dr Chee would be able to pull it off;

(g) Any participation in Dr Chee's activity would compromise the legitimate status of Yap's planned activity during the WB-IMF (see (b) and (e) above);

(h) Yap's activity was disrupted by the actions of the other appellants and the reaction of the police to such actions; and

(i) Yap had tried to speak to DSP Hassan on 16 September 2006.

Yap claimed that his focus on 16 September 2006 was to carry out his own activity at the Speakers' Corner and that the police had wrongly equated Yap's disagreement with the actions of the police with an attempt to follow the other appellants in their procession.

23 In my opinion, the District Judge (at [61] – [79] of the DJ's GD) had adequately considered Yap's contentions as outlined above. Having considered Yap's claims that he had attended at the Speakers' Corner for purposes wholly unrelated to the planned procession and had not intended to participate in the planned procession, as well as Yap's account of the events that had taken place on 16 September 2006, the District Judge gave Yap the benefit of the doubt concerning his original intention in going to Speakers' Corner (see [73] of the DJ's GD). Nevertheless, the District Judge held that even if Yap went to Speakers' Corner without the intention of joining the procession, the evidence clearly supported the inference that Yap had at a certain point decided to participate in it. The District Judge found that Yap had not adduced evidence to support his assertions that he had joined up with Dr Chee's group in order to act as an "observer" and that, given the nature of the evidence against Yap, Yap's bare assertions were not sufficiently credible to raise a reasonable doubt (see [75] of the DJ's GD). The District Judge did not believe Yap's evidence that he had no intention to join the procession because Suntec City was heavily fortified and therefore the procession would not succeed (see [76] of the DJ's GD). The District Judge held that it was not necessary that Yap's objectives in proceeding to Parliament House had to be identical to that of Dr Chee and that whilst Yap's "key agenda" on 16 September 2006 may well have been to talk about the progress package and election fraud while Dr Chee may have wanted to demonstrate opposition to another aspect of the Government's actions or policies, what was necessary was for the prosecution to show that Yap was aware that the procession was intended to show opposition to the Government and that he formed the intention to participate in the procession. The District Judge found that Yap had decided to follow Dr Chee not as an "observer" but as a participant with the intention of marching to Parliament House.

24 The District Judge had inferred, from the actions of Yap, that Yap had abandoned any plan to

carry out his own activity and had intended to participate in the attempted procession with the other appellants on 16 September 2006. At the hearing before me, Yap did not raise any issue as to the facts (as set out at [7] above and at [74] of the DJ's GD) upon which the District Judge had drawn this inference, apart from denying that he had intended to participate in the attempted procession. I see no reason to disagree with the District Judge's finding that Yap had attempted to participate in the procession on 16 September 2006 and had thereby contravened r 5 of the MOR.

Yap's claim that the police had exceeded their powers on 16 September 2006

25 Yap's allegation that the police had exceeded their powers in reacting to the appellants' speeches on 16 September 2006 was irrelevant to the issue of whether the appellants had breached r 5 of the MOR. As such, I will not consider such allegations in this judgment.

The appeals against sentence

26 The District Judge had sentenced each appellant to the maximum prescribed punishment for the offence because the offence involved "a deliberate disregard of the law and a refusal to heed the warnings of police officers who informed those present that they would be committing an offence if they proceeded with their planned activities since they did not have a permit" (see [6] of the DJ's Grounds of Decision on sentence in *PP v Chee Soon Juan and others* [2010] SGDC 129). The appellants made no submission on sentence. They did not express or demonstrate any regret that they had broken the law. I am of the view that the sentence imposed on each appellant by the District Judge is not manifestly excessive.

Conclusion

27 The appeals against conviction and sentence are dismissed.

[note: 1] Notes of Evidence, 3/12/2010 p 8