

Sentencing Celebrities and Punishing Professionals

The punishment must fit the crime. But does it always fit the criminal? The Director of Public Prosecutions considers the sentencing of those who are prominent in society

'Be you ever so high', said Lord Denning, *'the law is above you'*. But is it? Sometimes, when celebrities and others who are prominent in our community find themselves before the courts, suggestions are made that at the point of sentence they receive preferential treatment. Different standards, it is said, apply. Such perceptions, fortunately, do not withstand close scrutiny.

Offenders, be they high or low, rich or poor, famous or obscure, must expect to receive parity of treatment. The notion that status in society somehow provides the offender with an advantage over others is alien to our system of justice, just as it is to related systems. Legislative Councillor Chim Pui-chung found himself serving twelve months' imprisonment after he was convicted in 1998 in the High Court of an offence of conspiring to make a false instrument (CACC 402 of 1998). Best-selling author and Tory politician Jeffrey Archer, a member of the House of Lords, faced the full force of the law after he was convicted in 2001 at the Old Bailey of the offence of perjury and imprisoned for four years (*R v Archer* [2003] 1 Cr App R(S) 446). Such examples, however, do not mean that it is not open to courts to consider mitigating factors simply because the offender happens to be prominent.

A court which sentences an offender is concerned not only with the character of his crime but also with his individual circumstances as revealed in his age, antecedents, good works, and criminal background, if any. That is so no matter what his station in life. If, therefore, the offender is young, such as singer Nicholas Tse, who was convicted in 2002 of an attempt to pervert the course of justice, or is an unknown of similar age, the policy of the law is to use imprisonment, to the extent

that this is feasible, as a sanction of last resort. At the same time, it is desirable, where possible, for the courts to pass a sentence on a person in a good position which mirrors that on a person in a different position who is guilty of the same type of offence. Although the sentence may be worse for such a person, the offence, by reason of the offender's position, may also be said to be worse.

The courts are sometimes prepared to consider in mitigation the consequences of the conviction upon the position of the offender. The weight to be given to such matters is, however, very much a matter for judicial discretion in the particular circumstances of the case. In *R v Canavan* [1998] 1 Cr App R(S) 79 at 83, Lord Bingham CJ acknowledged the good character of an errant teacher and said he bore in mind '*the devastating effect upon him of the fact of conviction with the consequent loss of career and reputation*'. A doctor whose crime had ruined his career was told by the court in *R v Richards* (1980) 2 Cr App R(S) 119 at 121, that this was a factor which '*must be borne in mind*'. Professional and prominent people, however, can lay no claim to leniency as a matter of right.

In *HKSAR v Pak Wan-kam* [2002] 2 HKC 465 at 471, a socialite sought to capitalise upon her prior good character by supplying the court with testimonials as to her worth from several eminent citizens. But to no avail. In upholding a sentence of four months' imprisonment for offences of tax evasion, Lugar-Mawson J commented that although the offender was fortunate to have such loyal friends, their support could not '*assist an offender who consistently and deliberately defrauded the Revenue over a period of years*'. The character of the crime, that is, had to be given full weight. The need for punishment in such situations is the predominant factor in the sentencing process.

Public policy requires that serious offences receive proper penalties. This is quite distinct from the consequences to the offender, perhaps devastating, which might result from the fact of conviction. Professional people and those in public life have a duty to uphold the standards of their profession or calling as well as the standards of society (*Attorney General v Tai Chin-wah* [1994] 2 HKCLR 81 at 93). The

deterrent element of the sentence may have to take precedence over other factors. If so, an offender who points in mitigation to loss of position and benefits may be bluntly told by the court that '*he brought these matters upon himself*' (*R v MacLennan* [1996] 4 HKC 507 at 514).

Those who are prominent in society are the ones who set its tone. They are people who enjoy advantages denied to others and much may be expected of them. They are looked up to by young people and others. They act as role models. It is a serious matter when those who are well placed, well regarded or well circumstanced let the community down. In *Attorney General v Chan Chi-yin and Another* [1988] HKC 44 at 46, Kempster JA explained :

We would also hesitate to give currency to the notion that an offender coming from a good and comfortable background is entitled to more favourable treatment by this court than the one who has not enjoyed such advantages and, very often, is subject to much greater pressures. The culpability of a person coming from a good background may, indeed, be regarded as the greater, particularly, if he is a person to whom others look for an example.

The status of the offender as a police officer is a factor which makes '*the offence on his part particularly serious*' (*R v Wong Pui-kei* CACC 62 of 1995). If law enforcement officers who abuse their positions are not punished severely the confidence of the public cannot be maintained (*HKSAR v Lau Kwok and Others* CACC 529 of 2001). High standards, after all, are required of those who hold public office, who are employed in the civil service, and who serve as law enforcers (*Attorney General v Shamsudin* [1987] HKLR 826 at 833). That is why a criminal misuse of office may have to be treated as an '*aggravating factor*' (*Secretary for Justice v Musa* [2001] 1 HKC 14 at 20). Prominence in society, therefore, may actually count against the offender in the determination of penalty.

The good character of a person who holds high office and

commits a crime related to the performance of his office cannot be regarded as the basis for the same mitigation of sentence as in the case of an ordinary citizen who commits a crime. That is because the public are entitled to expect that those who are placed in high office will be persons whose character made them fit for that office in the first place. When a prisons minister convicted in Australia of conspiring to accept bribes for the early release of prisoners pointed in mitigation to his loss of position, the court replied that this was '*not a matter which can advance the respondent any more than if he had been some hard working person carrying on a menial occupation*' (*R v Jackson* (1988) 33 A Crim R 413 at 436).

The stark reality is that those who abuse office in order to commit crime, or else use their good character in order to increase their chances of completing the offence, will usually receive little sympathy from sentencers. If, however, the person who misconducts himself faces, due to his position, much greater vilification, adverse publicity, public humiliation, and personal, social and family stress, than would have been the lot of an ordinary person, injustice might arise if all of this is set at nought. In *R v R* (2001) 118 A Crim R 538 at 581, Callinan J explained :

To ignore such matters would be as unjust to a prominent person as it would be, in the case of a menial person, to ignore disadvantages to him peculiar to his position, such as a likely greatly reduced, if not utterly destroyed capacity on release from prison, to find any remunerative employment at all.

The sentencing of offenders is rarely a straightforward exercise. A multitude of factors may have to be considered, evaluated and, if possible, resolved. The situations of offenders differ so much, and there is no simple formula which can be applied to produce a sentence which is automatically acceptable to all. It can, however, be said with certainty that the courts endeavour as a matter of principle to ensure that all of those who break our laws receive their just deserts.

Although not every offender is punished in precisely the same way, this has nothing to do with inequality of treatment. It is, rather, a recognition that no two cases are ever exactly the same and that the judge or magistrate, who is invariably best placed to determine the effect of aggravating and mitigating factors, has applied his knowledge, wisdom and common sense in order to achieve a sentence which, in all the circumstances, he considers to be just. Lord Denning, as usual, was right.