Sentence Quantum

Arms & Ammunition

CAs 137 & 138/97 YIP Kai-foon

Power & Mortimer VPP
Mayo JA

(23.4.99)

*I G Cross SC
Peter Chapman &
Chan Fung-shan

#Gary Plowman SC
& Eric Kwok

Escape from lawful custody/Use of firearms with intent/Possession of explosives with intent/Duty of court to pass deterrent sentences/Criminal gang virtually declaring war on society/Paraplegia and reduced life expectancy matter for Executive/Totality

逃離合法羈押 – 有意圖而使用火器 – 有意圖而管有炸藥 – 法庭有責任判處阻嚇性刑罰 – 犯罪匪幫實際上向社會宣戰 – 下身癱瘓及壽命縮短兩項因素留待行政機關考慮 – 整體刑期

The Applicant was convicted in October 1985 of two counts of handling stolen jewellery and two counts of possession of firearms. He received a total of 18 years' imprisonment on those counts, which was reduced to an overall sentence of 16 years on appeal. In 1989, he escaped from Queen Mary Hospital where he had been sent for medical attention while serving that sentence at Stanley Prison. When making his escape, he commandeered a van and kidnapped the van driver and his son. That gave rise to the counts in the indictment *HCCC 271/96*, being one of escaping from legal custody and two of kidnapping, contrary to common law.

From August 1989 to May 1996 the Applicant was at large.

In the early hours of 13 May 1996, the Applicant was among a group of men who were spotted by patrolling police officers. He exchanged shots with the police and all members of the group, except him, escaped. He suffered a gunshot wound which left him paralysed from the waist down. That incident gave rise to the counts in *HCCC 270/96*, which were possession of firearms, use of firearms with intent to resist arrest, possession of explosives with intent to endanger life or property and an alternative count of possession of explosives *simpliciter*.

HCCC 271/96

The Applicant pleaded guilty to the three counts in this indictment and was sentenced as follows :

(1) Escape from lawful custody - 2 years (the statutory maximum is 2 years);

(2) Kidnapping - 3 years;

(3) Kidnapping - 3 years.

The judge ordered that counts 2 and 3 be served concurrently but consecutive to count 1, making a total of 5 years. He also ordered that that sentence be consecutive to the overall sentence of 25 years, imposed on the counts in *HCCC 270/96*, and to the pre-existing sentence of 11 years and 3 months. That made a total of 41 years and 3 months.

HCCC 270/96

The Applicant pleaded not guilty to the three counts but was convicted after trial and sentenced to 13 years (maximum 14 years) on the possession of firearms count, to 20 years (maximum life imprisonment) on the use of firearms count, and to 18 years (maximum 20 years) on the count of possession of explosives with intent to endanger life or property. Counts 1 and 3 were ordered to be concurrent but 5 years of those concurrent sentences were ordered to run consecutively to count 2, making a total of 25 years. On appeal

Held :

(1) Although the offence of escape from legal custody was pursued with reckless determination, it did not involve outside assistance and appeared to have been *ex improviso*. Since the maximum penalty was 2 years - which seemed inordinately low - the maximum was not called for. The proper sentence would be one of 18 months to which the customary one-third for plea should be applied producing a sentence of 1 year;

(2) Although it was submitted that when the judge ordered that the concurrent kidnapping sentences be served consecutively to the escape from lawful custody he failed to take into account the fact that the offences were committed as part of one transaction, there was no merit to that submission. The transaction clearly merited a sentence, as adjusted, of 4 years;

(3) As regards the submission that the sentence of 20 years in respect of the offence of use of firearms with intent to resist arrest in *HCCC 270/96* was excessive, and that a sentence in the region of 15 to 18 years would have been appropriate, the judge was dealing with a criminal gang led by an escaped convict who, in the dead of night, while transporting explosives for an unknown but undoubtedly gravely serious criminal purpose, engaged in a fire fight with pursuing police officers in an endeavour to escape arrest. The offence was in the most serious band of such offences and it warranted the sentence of 20 years imposed by the judge. A court when sentencing in such circumstances must bear in mind the terrible risk to which police officers and, indeed, members of the public were exposed by such behaviour. Sentences must be imposed which expressed the emphatic denunciation by the community of such crimes;

(4) The explosives in count 3 of *HCCC 270/96* consisted of almost 2 kg of TNT. They had the capacity to inflict terrible damage to life and property in a crowded city such as Hong Kong. The sentence of 18 years was not excessive at all, and it was not excessive to order that 5 years be consecutive to the sentence of 20 years already imposed. A court would fail in its duty to the public if it did not impose heavy deterrent sentences in circumstances such as these;

(5) The court was not impressed by the submission that these offences were not the worst of their kind such as occurred when a criminal gang had, in effect, declared war on society. The actions of the Applicant and his gang came close to this. The sentence of 25 years overall was proper in *HCCC 270/96*;

(6) Although it was in the discretion of the court to give weight to the *ad miseracordiam* plea, which was based on the position of the Applicant as a paraplegic who had to endure grave hardship which was not the lot of the ordinary prisoner and his reduced life expectancy, such considerations should be left for the Executive;

(7) The overall sentence of 40 years and 3 months called for adjustment in accordance with the totality principle. The totality was excessive and the sentence could be varied to one of 36 years and 3 months. That would be achieved by ordering that the overall sentence of 29 years imposed on the two indictments should start to run four years prior to the expiration of the sentence which the Applicant was serving at the time when the later sentences were imposed.

Result - Appeal allowed. Sentence totalling 36 years and 3 months substituted for original sentence of 41 years and 3 months.

CA 525/98

LAW Wai-keung

Possession of offensive weapon/Late plea/Maximum penalty in very bad case/Reduced discount appropriate

管有攻擊性武器 – 後期認罪 – 極壞案件中的最高刑罰 – 削減減刑幅度是恰當的

Chan CJHC
Mayo &
Stuart-Moore
JJA

(25.5.99)

*Albert Wong

#Kenneth Chan

The Applicant pleaded guilty at a late stage of his trial in the District Court to being in possession of offensive weapons in a public place, contrary to s 33(1) of the Public Order Ordinance. The evidence showed that the Applicant and his three companions were in a car in Tsuen Wan when a police officer approached the Applicant, who was the driver. The other three men disembarked and ran off and were later apprehended and brought back. The car was searched and found to contain five large knives. The Applicant admitted knowledge of the knives and also knowledge of hoods and gloves found in the car and the false number plate. He was also aware of a planned revenge attack on someone who had offended a member of the group.

The judge took the view that this was a case which would justify the maximum sentence under the section of 3 years' imprisonment. Although the Applicant changed his plea after the judge ruled his cautioned statement to be admissible, he was not prepared to give any discount for plea in the circumstances.

On appeal, it was submitted that the maximum sentence was not justified and some discount for the plea ought to have been made.

Held :

(1) This was a very bad case. The Applicant could easily have been charged with a more serious offence. The Applicant also had a poor criminal record including convictions for robbery, burglary and dangerous drugs, and the probation report was unfavourable;

(2) Although the imposition of the maximum sentence was justified, the judge erred in declining to give any discount for the change of plea. There must be some incentive to defendants to plead guilty: *R v Chan Chi-sing* [1995] 3 HKC 325. In this case it should be much less that the customary discount of one-third, and a discount of 3 months would be appropriate.

Result - Appeal allowed. Sentence of 2 years 9 months' imprisonment substituted.

CA 164/99

YUNG Ting-chun

Possession of stun gun without licence/High voltage/Sentence after trial
無牌管有電槍 - 高電壓 - 經審訊後定罪的判刑

Chan CJHC
Nazareth VP
Wong JA

(3.8.99)

*P Madigan

#I/P

The Applicant was convicted after trial of possession of arms without a licence, contrary to s 13(1) and (2) of the Firearms and Ammunition Ordinance, Cap 238. The arm in question was a stun gun, which was capable of producing 75,000 volts. He was sentenced to 2½years' imprisonment. On appeal

Held :

The possession of such arms constituted a serious offence. Varying sentences had been imposed in previous cases and, in *R v Lai Chi-fai*, Cr App 480/95, a starting point of four years was adopted in respect of a stun gun that was only capable of producing 4,800 volts.

Result – Application dismissed.

Assault/Wounding

MA 264/98 SO Ming

Lugar Mawson DJ

(16.12.98)

*Gary Lam

#Tracy Chan

Road rage/Deterrent sentence required for motorist assaulting another road user/Community service not appropriate due to criminal record/Disparity considered
公路衝突事件 – 汽車司機襲擊另一名道路使用者，須判處阻嚇性刑罰 – 被告有刑事紀錄，不宜頒社會服務令 – 法庭曾考慮判刑上的差異

The Appellant was sentenced to two months' imprisonment after he pleaded guilty to an offence of assault occasioning actual bodily harm.

The facts showed that after a motor car cut in front of a motorcyclist, there was an altercation. The motorcyclist was then assaulted by the motorist and his three companions because he had, to them, the temerity to criticise their driving manner. The victim sustained multiple superficial injuries.

The magistrate commented that '*this was a wholly unjustifiable, sustained and violent attack …. (it mattered) little whether it was the conduct of the driver of the car or the motorcyclist that was the proximate cause of the assault …. conduct …. to be deprecated in very strong terms by the courts and which calls for a deterrent sentence*'. The community service order option was considered and rejected. On appeal

Held :

(1) Attacks by road users on other road users were not to be tolerated. Those who thought they could vent their anger at having their driving habits criticised by other road users by assaulting them could expect to be very severely punished. The short, sharp shock of a short prison sentence was the best way of treating such offenders, and would possibly nip such anti-social behaviour in Hong Kong in the bud;

(2) As the Appellant had previous convictions the magistrate was right to reject community service;

(3) Although another magistrate had sentenced other assailants to community service, the fact that they had received unduly lenient sentences was no reason for interfering on the basis of disparity with the proper sentence imposed upon the Appellant: *R v So Hung-lee and Another* [1986] HKLR 1049.

Result – Appeal dismissed.

MA 174/99 SHUICHI Ogawa

McMahon DJ

(13.4.99)

*Cheung Wai-sun

#T R W Jekyn-Jones

Assault on police/Gravity of offence/Effects of drink considered/Community service order a real and effective alternative to prison combining punishment and deterrence
襲擊警務人員 – 罪行的嚴重性 – 考慮到醉酒的影響 – 社會服務令是判處監禁以外的另一個判刑選擇，既實際有效，又具有懲罰和阻嚇作用

The Appellant, a 28 year old Japanese business executive resident in Hong Kong, pleaded guilty to an offence of assaulting a police officer in the due execution of her duty, contrary to s 36(b) Cap 212.

The facts showed that the offence occurred whilst the Appellant was in drink, and that he grabbed the neck of the officer whilst it was being sought to establish his particulars.

The magistrate sentenced the Appellant to 21 days' imprisonment. He treated drunkenness as an aggravating factor. On appeal

Held :

(1) Although the principle, as indicated in *R v So Kan-ming* MA 201/96, was that even for a first offence a sentence of imprisonment was appropriate for an accused who assaulted a police officer acting in the course of his duty, that principle was not a strait-jacket. The circumstances of each case required careful consideration. If there had been an intention to assault a police officer, the *So Kan-ming* principle would have applied. However, the Appellant was guilty of little more than a drunken and momentary holding of the officer by the neck which had produced no clear injury;

(2) Although drunkenness might be the underlying cause of an offence, that did not necessarily make it an aggravating factor. There had to be something in the consumption of alcohol which made the offence worse than otherwise it might have been or which facilitated the commission of the offence. Thus, in *R v Lindley* (1980) 2 Cr App R(S) 3, the accused's deliberate intoxication of himself and two girls, towards one of whom he owed a duty of care, and whom he abused, was regarded as an aggravating factor. But in the present case the Appellant committed the offence because he was already drunk and his drunkenness did not worsen the assault. He should have been sentenced for the assault itself, not for the condition he was in at the time of the assault;

(3) Given the mitigation, including the remorse, the guilty plea and the clear record, something other than a custodial sentence should have been considered. A community service order had been recommended, and this was a real and effective alternative to prison; its purpose was both punishment and deterrence.

Result - Appeal allowed. Community service order of 80 hours substituted for prison term.

CA 252/99 MA Man-ho

Nazareth VP
Wong &
Keith JJA

(20.8.99)

*Gavin Shiu

#Osmond Lam

Wounding with intent/Armed attack on lone woman by gang/Gravity of offence/Earlier decisions of little value as each case decided on own facts
有意圖而傷人 - 匪幫持械襲擊單身女人 - 罪行的嚴重性 - 以前的判例並不重要，因判案需視乎個別案情

The Applicant pleaded guilty to a count of wounding with intent, contrary to s 17, Cap 212. After the judge took 6 years as his starting point, the Applicant was sentenced to 4 years' imprisonment.

The facts showed that the victim, a 46 year old woman returning from Macau with a large amount of foreign currency, which she planned to deposit in the Po Sang Bank, was hit hard on the head by a man holding a water pipe, while three other men, likewise armed with water pipes, seized her bag. The Applicant, still with the pipe, was caught by security guards while his three confederates escaped.

The victim was treated for a fracture to the skull and other injuries. She was discharged from hospital after 24 hours.

On appeal, it was submitted that the starting point of 6 years was manifestly excessive, and that the Applicant had pleaded guilty and shown remorse. It was said that the starting point should have been between 4 to 5 years, and reliance was placed on *R v Fok Tin-yau* [1995] 1 HKCLR 351, *R v Low Wing-wah* [1996] 1 HKC 345, and *R v Nguyen Quang Thong and others* [1992] 2 HKCLR 10.

Held：

(1) The decisions cited were not of particular assistance. Circumstances varied from case to case and in very few cases were the facts identical. Each case must be decided on its own facts;

(2) As the judge rightly observed, this was a concerted, unprovoked, serious and cowardly attack on a woman who was not in a position to defend herself. It was sheer good fortune that the victim had not suffered more serious injury and had recovered so rapidly. Wounding with intent was a most serious crime which carried a maximum sentence of life imprisonment. The sentence was neither manifestly excessive nor wrong in principle.

Result - Application dismissed.

香港特別行政區訴劉大香
HKSAR v LAU TAI HEUNG

香港特別行政區
裁判法院上訴案件 1999 年第 619 號

***張永良**
Cheung Wing-leung

高等法院原訟法庭法官楊振權
一九九九年八月十九日

#上訴人自辯
Appellant in person

COURT OF FIRST INSTANCE OF THE HIGH COURT
MAGISTRCY APPEAL NO. 619 OF 1999
YEUNG J
19 AUGUST 1999

囚犯毆打懲教署人員 - 判處監禁是恰當的判刑

上訴人經審訊後被裁定一項普通毆打罪罪名成立，被判入獄六個月。刑期與上訴人因其他罪行而被判的七年刑期分期執行。

證據顯示上訴人在壁屋懲教所上課期間不守行為。當時上訴人是該處的一名囚犯。當監獄職員勸諫上訴人時，上訴人出拳打該名職員的胸部。之後，受害人感到胸部疼痛近兩小時。上訴人就判刑提出上訴。

裁定：

上訴人的行為極之狂妄，完全漠視懲教署的紀律。這樣的行為如果不受到阻嚇，會令懲教署的紀律蕩然無存。鑑於前述情況，以及之前被告人已被判處監禁，判處一段時間的監禁是唯一適當的做法。此外，刑期必須分期執行，這樣才能收阻嚇之效。判刑是完全恰當的。

上訴駁回。

[English Digest of MA 619/99, above]

LAU Tai-heung

Assault by inmate on CSD officer/Imprisonment appropriate

The Appellant was convicted after trial of an offence of common assault and sentenced to 6 months' imprisonment. That sentence was ordered to run consecutively to the sentence of 7 years' imprisonment which the Appellant was then serving for other offences.

The evidence showed that the Appellant misbehaved during a tuition class at the Pik Uk Correctional Institution, where he was an inmate, and that, when a prison officer remonstrated with him, the Appellant punched him on his chest. The victim felt chest pains for nearly two hours thereafter. On appeal

Held :

The Appellant had behaved in an unruly and reckless manner in total disregard of prison discipline. Such behaviour if not deterred would turn the prison into a place without discipline. In light of that and the prior imprisonment of the Appellant the only appropriate punishment was a term of imprisonment which had to be consecutive so as to have a deterrent effect. The sentence was entirely appropriate.

Result - Appeal dismissed.

Blackmail

CA 383/98

Power VP Mayo & Stuart-Moore JJA

(9.12.98)
*D G Saw SC & Chan Fung-shan

#S Wong I/P (1)
A Macrae (2)

(1) WONG Fu-wa
(2) CHAN Tak-wing

Blackmail/Extortionist gang operating in Wanchai/Severe view to be taken/Starting point of 4 years appropriate
勒索罪 - 灣仔區聯群結黨的敲詐活動 - 應從嚴處理 - 以四年為量刑起點是恰當的

The Applicants pleaded guilty in the District Court to blackmail, contrary to s 23(1) and (3) Cap 210. They were each sentenced to 3 years' imprisonment. A starting point of 5 years was adopted.

After an argument in the early hours at a bar in Wanchai, A1 introduced himself as the '*local bully*'. He said he belonged to 14K and was responsible for looking after the bars in the vicinity. Ten or fifteen other males (including A2) then came to the bar, and A1 told the manager that they were his brothers who would offer assistance at any time. After they left A2 stayed behind with A1.

A1 and A2 subsequently returned to the bar and met the proprietor. A demand for $10,000 was made. When the manager asked what would happen if she did not pay she was told '*you just think what would happen if you don't pay*'.

At a later meeting, a police inspector represented himself as the manager and negotiated the $10,000 a month down to $8,000 a month and two dozens bottles of beer per week.

The next day, A1 visited the bar and demanded $8,000 from the proprietor. She gave him the money in marked notes. When he left the bar he was arrested.

On appeal

Held :

(1) This was an entirely typical extortion exercise. It was rendered more serious on account of the mass of force initially demonstrated. Although heavier sentences had been imposed in recent times in such cases, it appeared that they had not had much deterrent effect;

(2) This type of offence was still quite prevalent. A serious view had to be taken of it. The sort of threats which were made either implicitly or explicitly caused fear and disquiet to victims. The courts had to demonstrate to offenders that such activity would not be tolerated. While the starting point of 5 years' imprisonment was too high, 4 years' imprisonment after trial was not excessive as a starting point;

(3) If 4 years was taken as the starting point, the sentences should be reduced to 2 years and 8 months after the usual one-third reduction for the pleas.

Result - Appeals allowed. Sentences reduced to 2 years and 8 months' imprisonment.

CA 345/98

WONG Kam-chan

Nazareth ACJHC
Stuart-Moore VP
Nguyen J

(30.6.99)

*Cheung Wai-sun

#Andy Hung

False imprisonment associated with blackmail/Abduction of persons to enforce payment prevalent/Very serious offence/ Concurrent and consecutive sentencing
與勒索有關的非法禁錮 - 擄拐他人迫使付款的案件普遍 - 非常嚴重的罪行 - 判予同期及分期執行的刑期

The Applicant was convicted of the offences of false imprisonment, blackmail and dealing with the proceeds of an indictable offence. He was sentenced to concurrent terms of imprisonment of, respectively, 4 years, 2½ years and 2½years.

The particulars of the offences were that in August 1997 in Hong Kong together with other persons, the Applicant unlawfully and injuriously imprisoned Ko Kai-hing and detained him against his will; second, also with other persons and with a view to gain for themselves, he made unwarranted demands for $1.1 million from Ko Kai-hing with menaces; and third, that in August 1997, knowing that property, namely, HK$1.1 million deposited into his bank account, in whole or in part represented the proceeds of an indictable offence, namely, false imprisonment, he dealt with that property.

On appeal, it was submitted that the judge erred in not mentioning a starting point, and that the sentence was excessive.

Held :

(1) The abduction and detention of persons to enforce payment whether of legitimate debts or improper demands was by any standard a very serious offence. It was also prevalent in Hong Kong. The judge identified the Applicant as the mastermind;

(2) The offence of unlawful imprisonment was associated with an offence of blackmail in which the menaces were addressed to the victim's sister. A large sum of money was obtained and handled by the Applicant. Had a proportion of the sentences for the latter two offences been made consecutive as could

properly have been done, the aggregate terms of imprisonment the judge imposed could easily have exceeded four years;

(3) There was no error of principle and the sentences, particularly the 4 year sentence for false imprisonment, were not excessive.

Result - Application dismissed.

MA 563/99 CHEUNG Siu-king

Yeung J

(18.8.99)

*Joseph To

#J Hemmings

Blackmail andtheft/Organizedsyndicatedtargeting prostitutes' clients/Need for deterrence

勒索罪及盜竊罪 - 有組織集團以嫖客為目標 - 需要阻嚇此類罪行

The Appellant was convicted of one charge of blackmail and one charge of theft, and sentenced to consecutive terms of imprisonment of, respectively, 9 months and 1 month.

The case arose out of a police operation targeting at a syndicate which preyed upon the customers of prostitutes. The undercover police officer asked for the service of an escort through an advertisement in a magazine. In response, the Appellant went to the hotel on the pretext of providing such service. The undercover officer asked for a change of girl. The Appellant then made a call to a man who over the phone said to the officer that unless he paid $5,000, he would be beaten up. The Appellant herself took up the threat that unless the officer agreed to pay $2,000, she would call her friends to beat the officer until he died. She eventually left with the $2,000, taken from the undercover police officer.

On appeal, the Appellant claimed to have been instructed to do what she did.

Held:

(1) Such offences were very serious. This was clearly a syndicated offence targeting people who could be described as extremely vulnerable. It was also a well-planned crime in that the offences involved putting up an advertisement in order to lure potential victims. Such offences had to be deterred;

(2) Although the magistrate might not have been entirely correct in saying that the blackmail charge would attract 18 months to 3 years' imprisonment, and although the sentence for this type of offence had to reflect the factual background to each individual case, ten months' imprisonment was not a day too long for such offences notwithstanding the guilty pleas, the absence of a similar previous conviction, and the other mitigation.

Result - Appeal dismissed.

Bribery/Corruption/ICAC

AR 6/98

Nazareth ACJHC
Mayo & Stuart-Moore JJA

(22.1.99)

*A E Schapel

#C Grounds & Cheung Kam-chuen (1)
A Watson-Brown (2)

SJ v (1) LAU Shiu-kong
(2) KI Yat-hiu

Commercial corruption/Agents using false documents and accepting advantages/Manifest breach of trust/Mandatory repayment not mitigation
商業舞弊 – 代理人使用虛假文件和收受利益 – 明顯的違反信託行為 – 強制還款並不構成減刑理由

The Respondents faced four charges of being agents using a false document to deceive their principal. These charges were laid under s 9(3) of the Prevention of Bribery Ordinance, Cap 201. They also faced 12 charges of accepting an advantage as an agent, contrary to s 9(1)(b) Cap 201. They were convicted after trial and sentenced, overall, to imprisonment for one year. The judge found himself unable to distinguish between the Respondents and imposed concurrent sentences on all charges of one year's imprisonment. In addition, pursuant to the mandatory requirement under s 12, Cap 201, he ordered them to pay HK$520,141.68 to their principal, Sansegal Incorporated, within one year, less the sum of US$15,000 already paid, being the amount of the advantages received by them.

On review, it was submitted that the total of 12 months' imprisonment in each case was wrong in principle and/or manifestly inadequate. The maximum penalty for any one of the offences was 7 years' imprisonment and a fine of $500,000.

The Applicant contended that these were very serious offences of their kind because the commission payments obtained were, somewhat unusually, themselves generated as the result of fraudulent misrepresentations made to Sansegal, the principal. The offences were in clear breach of trust as the Respondents, being the '*eyes and ears*' of Sansegal in Hong Kong, were relied upon to secure the required goods at the most competitive price. Offences of commercial corruption were properly likened to an insidious cancer secretly gnawing at the vitals of commerce : *AG v Leung Kin-wai* [1996] 4 HKC 588.

Held :

(1) The only positive factors in mitigation were that the Respondents had clear records and that US$15,000 had been repaid to Sansegal. However, as the judge merely took a starting point of 12 months for all the offences taken together, it was impossible for the court to assess what discount, if any, was given for these factors, or to what extent totality had reduced the original starting point that the judge must, or at least should, have had in his mind. Ultimately, having been reminded by trial counsel of the sum that had been repaid, the judge allowed this sum to be treated as part-payment of the order he made under s 12 Cap 201;

(2) The judge fell into error by failing to give sufficient weight to the manifest breach of trust involved in the commission of these serious offences. The correct starting point on each charge would have been four years' imprisonment. Taking into account the previous good character and the other mitigation, this could properly have been reduced to sentences of 3½ years' imprisonment;

(3) The judge was in error in appearing to have taken as mitigation the onerous repayment agreement. That had no bearing upon sentence. However, the repayment of US$15,000 before the offences were reported to the ICAC was valid mitigation, but that was taken into account on the mandatory aspect of the trial judge's order made under s 12 Cap 201, requiring the Respondents to pay a sum amounting to the value of the advantages received by them to Sansegal.

Result - SJ's review allowed. Sentences varied on each charge from concurrent terms of 12 months' imprisonment to concurrent terms of 3½ years' imprisonment on each. The order made under s 12 Cap 201 would stand.

Per cur - Section 12 appeared to be unsatisfactory as it lacked clarity as to what sanctions in the event of non-payment were envisaged. In such circumstances, the relevant authorities might wish to consider amending the legislation.

CA 118/98 NG Siu-chau

Nazareth VP
Mayo &
Stuart-Moore
JJA

(10.3.99)

*J R Reading

#C Y Wong
SC & M Poll

Offering advantage to public servant/Apprentice jockeys offered money to fix races/Serious implications of scheme/ Deterrence
向公職人員提供利益 – 向見習騎師提供金錢以操縱賽果 – 有關計劃後果嚴重 – 判刑需具阻嚇作用

The Applicant was convicted after trial of seven charges of offering advantages to public servants, contrary to s 4(1)(a) of the Prevention of Bribery Ordinance, and one charge of failing to comply with a notice to furnish information, contrary to s 14(4) of the Ordinance.

The seven charges of offering advantages related to the offering of sums of money to apprentice jockeys to manoeuvre their horses in such a way as to finish the races at placings designated by the Applicant.

The Applicant was sentenced to a total sentence of 3½ years' imprisonment. When he passed sentence the judge referred to the very large amounts of money which were being offered to the apprentices and the considerable temptation that would have constituted. He was also mindful of the fraud that it was proposed should be practised on the racing community at large. He considered that 3 years was an appropriate starting point for each of these offences and 4 years after taking into account the totality principle. In the event he gave the Applicant 6 months credit for his good character. He passed sentences of 2½ years for each offence and made one year of the sentences consecutive to the others so as to arrive at the final result. On appeal

Held :

(1) Having regard to the serious implications of the scheme, the large amount of the reward the Applicant was offering and the vulnerability of the apprentices it could not be said that the sentences were excessive;

(2) Even though the criminality was in the nature of an attempt it would have had far reaching implications had it succeeded. An element of deterrence was therefore required.

Result – Application dismissed.

CA 509/98

NG Tai-yung

Mayo, Leong & Stuart-Moore JJA

(5.5.99)

*I C McWalters

#I/P

Corruption offences/Concurrent sentences appropriate for soliciting and accepting offences/Correct individual sentences necessary as some convictions might be quashed on appeal

貪污罪行 – 對索取和接受利益罪行判予同期執行刑罰的做法恰當 – 必須按每項罪行判處正確的刑罰，理由是部分定罪判決在上訴時可能會被推翻

The Applicant, a branch manager of Hang Seng Bank Limited, was convicted after trial of one charge of soliciting an advantage as an agent, contrary to s 9(1)(a) of the Prevention of Bribery Ordinance, Cap 201; three charges of accepting an advantage, also contrary to s 9, and one charge of conspiracy to defraud, contrary to Common Law.

The judge considered 4 years' imprisonment to be appropriate to reflect the overall criminality of the Applicant. For charge 1 she imposed 2 years' imprisonment. For charge 2 she imposed 6 months' imprisonment, 3 months concurrent to charge 1. For charge 3, she imposed 9 months' imprisonment, 5 months concurrent to charges 1 and 2. For charge 4, she imposed 9 months' imprisonment, 5 months concurrent to charges 1, 2 and 3. For charge 7, she imposed 18 months' imprisonment, 11 months concurrent to charges 1, 2, 3 and 4. The total sentence achieved was 3½years' imprisonment.

The Applicant was also ordered to make restitution to the bank of $40,000 pursuant to s 12, Cap 201. That amount was ordered to be deducted from the bail money. On appeal

Held :

(1) It was undoubtedly true that the Applicant breached the considerable trust reposed in him. It was also true that the court must take a serious view of offences of that type;

(2) If the sentences on charges 2, 3 and 4 were looked at in isolation, the starting points adopted were too low. A sentence of the order of 18 months' imprisonment would have been appropriate;

(3) Although the judge doubtless had in mind totality, it was necessary to adopt the correct approach to each of the sentences because if any of the convictions were quashed on appeal the sentences on the remaining charges might then be distorted and the end result might be that an inappropriate sentence remained;

(4) A similar approach to that adopted in *Attorney General v Bow Ki-lun and Another* [1995] 2 HKCLR 168, was appropriate. In *Bow's* case it was held that where an accused was convicted of both soliciting and accepting bribes the sentences for those offences should be served concurrently. Adopting that approach, the sentence of 2 years' imprisonment on charge 1 would remain, but sentences of 18 months' imprisonment would be substituted on charges 2, 3 and 4 and each of those sentences would be served concurrently with that imposed on charge 1. The sentence of 18 months on charge 7 would remain, with 7 months of that sentence to be served consecutively to the sentence on charge 1. The total sentence to be served by the Applicant would be reduced from 3½ years to 2 years and 7 months;

(5) The restitution order made by the judge would be amended and the amount reduced from $40,000 to $16,000.

Result - Appeal allowed.

AR 1/99

Stuart-Moore VP
Mayo & Keith JJA

(30.6.99)

*A Sham & Alex Lee

#A Mitchell-Heggs (1)
Ng Kin-man (2)
C Draycott (3)

SJ v
(1) KWAN Chi-cheong
(2) CHAN Wai-cheung
(3) YEUNG Yuk-ming

Corruption/Offering and agreeing to offer advantage to agent/ Deterrent sentence required in public interest/Community service not appropriate in absence of exceptional circumstances

貪污－向代理人提供利益及同意向代理人提供利益－為了公眾利益需要有阻嚇性的刑罰－由於沒有特殊情況，社會服務令並不適合

R1 pleaded guilty to eight offences with which he was solely charged and, jointly with R2 and R3, to a further seven offences. The offences comprised one of agreeing to offer and fourteen of offering an advantage to an agent, all contrary to s 9(2)(a) of the Prevention of Bribery Ordinance, Cap 201.

The Respondents were partners of Hopewell Company which provided cargo packing and transportation services to AEPCL. In December 1992 they became registered partners of Hopewell Company. R1 agreed to offer advantages to another person - D1 at trial – in return for securing orders for the company. R1 subsequently discussed this with R2 and R3 and they all agreed to offer a monthly rebate at the rate of $0.30 per cubic foot of outbound cargoes packed and transported by Hopewell Company for AEPCL to D1 in return for D1's awarding packing and transportation orders to Hopewell Company. Thereafter, on 14 occasions, R1, either alone or together with R2 and R3, offered advantages in cash and deposited such cash into D1's bank account or telebet account with the Hong Kong Jockey Club. In monetary terms, the joint charges involving all three Respondents amounted to $40,600, while those involving R1 alone amounted to $41,673. These amounts, totalling $82,273, were spread over several years. It was accepted at trial that despite the difference between the number of charges faced by R1, little distinction could be drawn between the Respondents because they were all effectively in the scheme of corruption together.

Having concluded that this was '*an exceptional case*', and having read the background and community service reports which spoke well of the Respondents, the magistrate ordered that in each case they should do 160 hours community service for each offence to run concurrently.

On review, it was submitted that although there had been an increasing use of community service orders in the magistracy for certain corruption offences, it had been made plain in *SJ v Li Cheuk-ming* [1999] 1 HKLRD 59, that the option of imposing such an order should not be excluded for serious crime such as corruption provided there existed '*exceptional circumstances*'. Here, it was said, there were no such exceptional circumstances.

Held :

(1) The Prevention of Bribery Ordinance was intended to be draconian in its effect. Bribery, whether in its acceptance or by the offering of an advantage, was an evil which could strike at the heart of commercial and public life if left unchecked. A punishment that failed to deter would produce all the wrong signals, just as sentences which acted as a deterrent would reinforce the community's efforts to rid itself of corruption;

(2) Even a first offender charged with an offence of corruption under the POBO must, unless the breach was technical, expect a deterrent sentence. That would almost invariably involve a sentence of immediate imprisonment;

(3) In *Sargeant* (1975) 60 Cr App R 74, Lord Lane identified the four classic principles of sentencing as retribution, deterrence, prevention and rehabilitation, and in corruption cases, where an advantage was offered or accepted, it was difficult to envisage a situation where public interest did not

require deterrence to predominate. The personal circumstances of the offender would carry less weight. That should apply whether the corruption was in the public sector or the private sector. In some public sector corruption cases the offences would be more serious but that was a matter which could be reflected in the length of sentence rather than the mode of sentence;

(4) It would be most unfortunate if it was not generally understood in the community that dire consequences would ensue where corruption was established. This was not a case where community service was appropriate however suitable for community service the candidates themselves might have been. The circumstances would have to be wholly exceptional. It followed that the personal backgrounds of the Respondents, their pleas of guilty and the risk to them of economic loss if they did not accede to D1's exploitation of themselves were not factors, even in combination, which could justify a non-custodial sentence;

(5) There were no exceptional circumstances to justify the suspension of the sentences. Immediate sentences of imprisonment of not less than 9 months' imprisonment after trial were merited. Taking into account the normal discount for pleas of guilty, the fact that the Respondents had all satisfactorily completed their community service and, lastly, that this was a review of sentence, necessarily resulted in the imposition of prison sentences following the non-custodial orders made in the magistrates' court, it was proper to impose on each Respondent a sentence of 3 months' imprisonment.

Result - SJ's review allowed. Sentences of 3 months' imprisonment substituted for community service orders.

AR 9/98

Nazareth VP
Stuart-Moore VP
Mayo JA

(25.6.99)

*K Zervos

#L Lok SC &
Sterling Tsu

SJ v
(1) LEUNG Yat-ming
&
(2) LEUNG Suk-fong

Agent using false document with intent to deceive/General and specific trust distinguished/Contribution to society/Loss of position and pension/Effect of long delay upon review
代理人使用虛假文件意圖欺騙－一般及特別信託的分別－對社會的貢獻－失去職位及退休金－在覆核時考慮長時間延誤的影響

R1 was convicted of an offence under section 9(3) of the Prevention of Bribery Ordinance, Cap 201, and R2 was convicted of two offences under the section.

On the first and second charges R2 received a sentence of 9 months' imprisonment which was ordered to be suspended for 2 years. In addition R2 was ordered to repay $1,258,000, being the moneys she had received from the Chinese University as a rent allowance for the relevant periods.

R1 received a similar sentence on the third charge and was ordered to repay $286,370, being the rent allowance he had received from the Hong Kong University.

All three charges were framed in a similar manner save for the details as to who was charged, the date of the alleged offences and the particulars of the institution concerned. The first charge, of being an agent using a false document with intent to deceive the principal, contrary to section 9(3) POBO, accused R2, as an agent of the Chinese University, namely, a lecturer, of using, with intent to deceive her principal, a document, namely, an application for a private tenancy allowance ('PTA'), in respect of which that university was interested, and which contained a false statement that the leased accommodation was not owned by herself, her spouse and/or a relation of either herself or her spouse and neither she, her spouse nor any of her spouse's relations had a

financial interest in it, and which to her knowledge was intended to mislead the university.

The evidence showed that in 1986 a shelf-company, Marble Shine Ltd, was purchased by R1 who owned and controlled it through nominee shareholders and nominee directors provided by Michael Secretarial Services which also provided secretarial services to the company. In 1986 Marble Shine purchased a flat at Scenery Garden, Fo Tan, Shatin, which was sold in October 1990. In November 1990 Marble Shine purchased a flat in Savanna Garden, Tai Po. R1 and R2 were the authorised signatories of the company's bank account and guarantors of the mortgage loan that had been secured over the Savanna Garden property.

R2 applied for PTA in relation to the Scenery Garden property in April 1986 (Charge 1) and in relation to the Savanna Garden property in November 1990 (Charge 2). R2 submitted in each instance a lease agreement signed by Marble Shine and R2 and subsequently rental receipts for reimbursement. She received PTA totalling $588,600 in relation to the Scenery Garden property and $669,400 in relation to the Savanna Garden property. The PTA for the Savanna Garden property ceased when she joined the Hospital Authority and was therefore no longer eligible for it.

R1 applied for PTA in relation to the Savanna Garden property in June 1993 (Charge 3). R1 submitted a lease agreement signed by Marble Shine and R1 and subsequently rental receipts for reimbursements. He received PTA totalling $286,370 in relation to the Savanna Garden property.

The judge concluded that Marble Shine was bought by R1 as a '*vehicle to buy and rent these properties to himself and his wife*'. She accepted that there was sufficient evidence from which she could be satisfied that R1 had a financial interest in the properties owned by the company and was aware of that fact. Also, R2 knew of R1's interest in the properties. The judge also accepted that both Respondents had the necessary intention to deceive their principals. On that basis, the Respondents were convicted of the various charges.

On review, it was submitted that the sentences were wrong in principle and/or manifestly inadequate.

Held :

(1) This was a wholly exceptional case. The overall criminality was rather less than was immediately evident. That was on account of the particular nature of the regulations which were infringed. While it was undoubtedly true that the institutions in question did lose substantial amounts of money it was equally true to state that it would have been a simple matter for the Respondents to have obtained comparable benefits if they had let their flats on the open market and then themselves rented alternative premises and claimed the relevant benefits;

(2) The Respondents had a general trust reposed in them. But they had no special trust and certainly not one they specifically breached by their conduct. That distinguished their case from the situation envisaged in cases such as *R v Barrick* (1985) 7 Cr App R (S) 142;

(3) The character and background of the Respondents was important. From the glowing letters written by a large number of people it emerged that the Respondents had made quite outstanding contributions to society in their respective fields. They had also most generously given of their time and also on occasion their financial support to worthy causes;

(4) Although the sentences imposed were lenient, the suspended sentences were imposed on 21 July 1998, almost a year prior, and for most of the time the Respondents had lived in the shadow of this review. It would be a severe punishment to send them to prison at this stage, little short of devastating;

(5) The Respondents had lost their positions and had forfeited valuable pension rights in consequence. They had also repaid the moneys as ordered;

(6) It would have been far easier to have imposed a custodial sentence immediately after trial than following a review of sentence when the Respondents had been at liberty for a substantial period;

(7) In these very exceptional circumstances it would be unduly harsh at this late stage to order that immediate sentences be imposed. That, however, was not in any way to reject the submissions of the Applicant.

Result – SJ' s application refused.

MA 1138/98 FUNG Ka-nok

V Bokhary J

(25.5.99)

*Vivien Chan

#Sterling Tsu

Corruption/Teenage offender/Use of term '*adult*'/Comments on gravity of offence of bribing an officer to refrain from taking action against someone for an offence which he was going to commit/Efficacy of detention centre for young offenders

貪污 – 青少年罪犯 – '*成年人*'一詞的使用 – 就賄賂公職人員以使他不對即將作出犯罪行為的人採取行動這種罪行的嚴重性提出意見 – 勞役中心對青少年犯有效用

The Appellant pleaded guilty to an offence of offering an advantage to a public servant, contrary to s 4(1)(a) of the Prevention of Bribery Ordinance, Cap 201.

The Appellant operated a shop which sold counterfeit compact and video compact discs. He sold eleven discs to a police officer at a special discount in the hope that the officer would not take any enforcement action against him for selling counterfeit discs in the future. The Appellant when sentenced was 18 years old, single, and had no job at the time he sold counterfeit discs.

Having sent for background, training centre and detention centre reports, the magistrate concluded that the Appellant was genuinely remorseful and that he had a concerned and supportive family. In sentencing him to detention in the detention centre, the magistrate observed :

> *An aggravating feature of the offence was that the offer of advantage had been made so as to enable the Appellant to continue with criminal activity: namely the operating of a shop selling counterfeited discs. Even taking into account his youth, clear record, plea of guilty and co-operation, willingness to be a prosecution witness and the other mitigation put forward, I was not of the view that this was an exceptional case. In my view it was a serious offence which struck at the core of the administration of justice and called for an immediate custodial sentence.*

On appeal

Held :

(1) When directing his mind to whether or not the circumstances were exceptional, the magistrate was probably thinking of that said by Roberts CJ in *Lai Yuk-kui v R* [1981] HKLR 691, 694, namely, that '*where an adult is convicted of an offence against section 4(1) or 4(2) of the Prevention of Bribery Ordinance, an immediate custodial sentence should normally be imposed, whether the offender is a public officer or not*.' That, however, was said in 1981 long before the commencement of the Age of Majority (Related Provisions) Ordinance, Cap 410, on 1 October 1990, when the age of majority was lowered from 21 years to 18 years and when the expression '*adult*' came to mean someone who had attained the age of 18. Roberts CJ would not have had in mind a teenager like the Appellant;

(2) In terms of the sentence to pass, bribing an officer to refrain from taking action against someone for an offence or offences which he was going to commit was much more serious than bribing an officer to refrain from taking action against someone for an offence or offences which he had already committed, for it would be the action of a man who intended to offend in future, probably again and again, and was trying to buy what amounted to a licence to do so;

(3) When it came to taking youngsters who had gone off on the wrong track and setting them on the right track, there was something considerably more positive about detention in a detention centre, where appropriate, than imprisonment.

Result - Appeal dismissed.

Burglary

CA 447/98 CHOW Chak-man & Another

Nazareth VP
Mayo &
Rogers JJA

(23.4.99)

*Cheung Wai-sun

#C Remedios

Burglary/Community service order not precluded/Guidance on offender best suited to community service order
入屋犯法罪 – 不應排除判處社會服務令的可能性 – 就最適合判處社會服務令的罪犯作出界定的指引

The Applicant, Chow Chak-man, was convicted in the District Court of one charge of burglary. He was sentenced to 2½years' imprisonment.

Although the judge sent for pre-sentence reports, which recommended a community service order, he decided that the gravity of the offence was such that '*an immediate custodial sentence is inevitable*'.

The facts showed that the burglary was committed in early morning and that goods with a value of $60,000 were stolen.

On appeal, it was submitted that the judge erred in regarding a community service order as not being open to him upon the basis that the burglary was a serious offence and also upon the basis of the gravity of the offence. Moreover, it was said, in reliance upon *Sentencing in Hong Kong*, 2nd ed., that community service orders had been imposed in respect of burglary offences on a significant and increasing scale.

Held :

(1) The judge appeared to have regarded himself as precluded from imposing a community service order upon the basis that burglary was a serious offence and that a custodial sentence was inevitable. It was plain from section 4 of the Community Service Orders Ordinance, and *SJ v Li Cheuk-ming* [1999] 1 HKLRD 63, that a community service order was an alternative to a custodial sentence. The judge had erred in principle and his conclusion could not stand;

(2) The Applicant met the criteria set down in *R v Brown* (1981) 3 Cr App R(S) 294, to qualify for a community service order. He was a first offender. He came from a stable home background. He had a good work record. He operated a transport business himself. He had shown a measure of remorse by abandoning his appeal against conviction and accepting the conclusion of the court. There was no more than a slight risk of re-offending. The Applicant was very likely to reform himself.

Result - Appeal allowed. Community service order substituted for sentence of imprisonment.

CA 216/99 TONG Fuk-sing

Nazareth &
Stuart-Moore
VPP
Woo J

(7.7.99)

*Albert Wong

#I/P

Burglary sentencing/Unlawfully remaining/Not sufficient to pay lip-service to guidelines/Clear record of illegal immigrant meaningless/Medical grounds seldom relevant to sentence for serious crime/Degree of discount/Increase of sentence on appeal
入屋犯法罪的量刑 - 非法留在香港 - 表面上依循上訴法庭的指引是不足夠的 - 非法入境者無犯罪紀錄是沒有意義的 - 就嚴重罪行的量刑而言健康理由不是相關因素 - 減刑的幅度 - 上訴時加重刑罰

The Applicant was convicted after trial of an offence of domestic burglary. He pleaded guilty to a second charge of remaining in Hong Kong without authority after having landed unlawfully in Hong Kong. He was sentenced, respectively, to 18 months' imprisonment and to 12 months'

imprisonment, of which only 6 months were ordered to run consecutively, making 2 years *in toto*. On appeal

Held :

(1) It was not sufficient for a judge to recite a principle, by merely paying lip-service to the guidance offered by the Court of Appeal, and then to depart from it without giving sound reasons for doing so. Whilst the judge was right to say that the starting point for domestic burglary was 3 years' imprisonment, this burglary was, although the judge did not mention it, aggravated by having been committed in the early hours of the morning at a time when the house was occupied and when anyone would clearly have expected it to be occupied;

(2) The judge ought not to have reduced sentence on account of a saving of court time. This was a straightforward case where little time was to be saved in any event and that was an immaterial consideration;

(3) The judge ought not to have taken into account the Applicant's clear record, for the clear record of an illegal immigrant was, for practical purposes, a matter of almost no consequence: *R v Lo Shui-lun* Cr App 109/95. The Applicant had been in Hong Kong for only two days and was not slow to resort to burglary;

(4) The judge ought not to have taken into account the Applicant's physical difficulties, for medical grounds would seldom, if ever, be a basis for reducing the sentence for crimes of this gravity: *R v Suen Shek and Others* [1988] 1 HKLR 524, *R v Ho Mei-lin* Cr App 217/96;

(5) In the result, the judge erred in reducing the sentence by 50%. That, in principle, was the kind of reduction given to a defendant who had not merely pleaded guilty but had given some considerable assistance to the police, such as providing information, and who had backed this up by giving evidence against the culprit. The Applicant had contested the case and there was no entitlement to any discount of any kind;

(6) The judge was correct to say that 15 months was the appropriate sentence for the second charge after a guilty plea: *R v So Man-king* [1989] 1 HKLR 142. Furthermore, unless there existed some compelling circumstances, such as strong humanitarian reasons, this sentence should normally be imposed consecutively to the sentence imposed for the offence which accompanied it: *HKSAR v Wong Tin-wah* Cr App 153/97;

(7) The Applicant should have received 3 years' imprisonment on the first charge, and 15 months to be served consecutively on the second. He had, however, received under half the total sentence which should have been imposed;

(8) The Applicant was aware of, and had been reminded of, the terms of section 83I(3) Cap 221. That allowed the Court of Appeal, when it considered that an appellant should be sentenced differently, to quash the original sentence and to '*pass such sentence …as it thinks appropriate for the case (whether more or less severe)* …'. In the light of that power, the sentence on the first charge of 18 months would be quashed and replaced with a sentence of 3 years. The sentence of 6 months consecutive on charge 2 would stand.

Result - Appeal allowed. Order in terms.

CA 290/99 CHAN Po

Chan CJHC
Keith JA

(11.8.99)

*P Madigan

#I/P

Attempted burglary and unlawful remaining/Pregnancy of wife, death of brother, and situation of elderly parents not humanitarian considerations of such weight as to warrant interference
企圖爆竊和非法留港 - 妻子懷孕、兄弟去世、雙親年邁等人道理由的比重不足以使上訴庭干預判刑

The Applicant pleaded guilty to two charges: one of attempted burglary and one of remaining in Hong Kong without the lawful authority of the Director of Immigration. He was sentenced to 2 years' imprisonment on the charge of attempted burglary, and to 15 months' imprisonment on the immigration charge, to be served consecutively, making 3 years and 3 months *in toto*.

The facts showed that the Applicant came to Hong Kong clandestinely, i.e. otherwise than through an immigration control point. The attempted burglary was committed in the small hours of the following morning. He had climbed into a residential development on the Peak and was seen hiding outside a house. He ran off and, in the ensuing chase, he fell and injured himself. He had a bag with him containing a screwdriver, a pair of pliers, a wire-cutter and a torch. The Applicant admitted he had intended to break into one of the houses, but claimed he was only going to take some food.

The judge took 3 years' imprisonment as her starting point on the attempted burglary charge, in line with the tariff for burglaries of residential homes, although an aggravating feature was that the offence occurred at night while the occupants might have been there. She reduced the term to two years' imprisonment to reflect the guilty plea, and then imposed a consecutive sentence for the offence of remaining in Hong Kong unlawfully in accordance with the tariff for offences of that kind.

The Applicant was aged 22 years at the time of the offences, and had twice come to Hong Kong clandestinely before; he had previously been imprisoned for the offence of burglary.

On appeal, the Applicant referred to his wife's pregnancy and claimed to be a reformed man. He said his brother had died in a tragic accident and that, although that had occurred before he came to Hong Kong, it was not something about which he had known at the time. He said his other brothers had also died and his elderly parents looked to him for support.

Held :

The considerations advanced by the Applicant did not render the sentences which the judge imposed unduly excessive, nor did his domestic circumstances amount to considerations of a humanitarian nature of sufficient weight to justify a departure from the guideline sentence for illegal immigrants laid down in *R v So Man-king* [1989] HKLR 142. The tragedy which befell his brother did not affect the appropriateness of the sentences which the judge passed.

Result – Application dismissed.

CA 572/98 CHOW Chu-tak

Stuart-Moore VP
Wong JA,
Findlay J

(19.8.99)

*Eddie Sean

#I/P

Burglary sentencing / Non-domestic premises / Starting point after trial
入屋犯法罪的量刑 - 非住宅處所 - 經審訊後定罪的量刑起點

The Applicant was convicted after trial of a charge of burglary and sentenced to 2½years' imprisonment.

The facts showed that the Applicant entered commercial premises and stole a mobile phone.

On appeal, the court had to decide whether the starting point of 2½years adopted by the judge was correct.

Held :

(1) In *R v Fu Kwok-leung* Cr App 246/85, a case in which there was a burglary of non-domestic premises and nothing was stolen, it was held that the proper starting point after trial was 2½years.

(2) In *R v Tang Ping* Cr App 95/88, it was held that the starting point for one offence of simple burglary in commercial premises should be 2½ years in circumstances where the offender entered unoccupied commercial premises at night and stole less than $1,000;

(3) A sentence of 2½years on the Applicant, who was convicted after trial, was entirely warranted.

Result – Application dismissed.

C & E

MA 785/98 WONG Wan-chu

Jackson DJ

(17.12.98)

*Wong Wing-sum

#Wong Po-wing

Infringing copyright/Numerous compact discs/Eight months' imprisonment not excessive after guilty plea
侵犯版權 - 大批雷射碟 - 在被告人認罪後判處八個月監禁並非過重

The Appellant was convicted on her own plea of an offence of offering for sale infringing copies of copyright works for the purpose of trade or business without the licence of the copyright owner, and she was sentenced to a term of 8 months' imprisonment.

The magistrate took a starting point of 18 months' imprisonment, which was reduced to 12 months after the guilty plea, and then to 8 months as the Appellant had co-operated with the authorities and had not previously offended.

The infringing copies consisted of no fewer than 415 music compact discs and 2,211 video compact discs.

The Appellant, aged 31, was the owner of the shop from which the business was run and she admitted that the infringing copies in her shop were on sale at $20 per disc.

On appeal, it was said that a sentence of 6 months' imprisonment would have been proper.

Held :

The sentence imposed was a lenient one and there were no exceptional circumstances justifying its suspension. The sentence was not too severe having regard to recent authorities.

Result - Appeal dismissed.

Per cur - It was not the function of the court to tinker with sentences imposed by magistrates on the basis that it would not have passed the very same sentence.

MA 1243/98 PANG Chi-wah

Gill DJ

(22.1.98)

*Hayson Tse

#William Allan

Copyright offences/Deterrent sentences required/No obligation to send for background reports in absence of request
侵犯版權的罪行 – 須判處阻嚇性刑罰 – 在無人提出要求的情況下，裁判官沒有義務索取背景報告

The Appellant pleaded guilty to two offences. The first was one of offering for sale 597 CD Roms which were infringing copies of copyright works without licence from the copyright owner. The second was one of possession for sale of 2,300 CD Roms to which a forged trademark was applied. He was sentenced to 6 months' imprisonment on each charge, to be served concurrently. On appeal

Held :

(1) There had of late been no reduction in this sort of offending. It behoved the courts to send the message that deterrent sentences must be

expected. Hong Kong's reputation had to be protected: *R v Ng Wai-ching* MA 1310/96; *R v Lee Wan-kei & Another* Cr App 13/97;

(2) Although it was said that the magistrate should have called for a background report, he was not invited to do so at trial. Although the Appellant was young, he was not so young that reports were necessary as a matter of course;

(3) The starting point of 12 months for each offence, reduced by a third for the co-operation and the plea, was appropriate. A further reduction of two months for the clear record, and the concurrence of the sentences because of a common criminality, produced an overall sentence of 6 months which was neither wrong in principle nor manifestly excessive.

Result - Appeal dismissed.

AR 4/99

SJ v LAM Chi-wah

Chan CJHC
Stuart-Moore VP & Leong JA

(7.10.99)

*R G Turnbull

#A C Macrae SC

Forged trade mark offences/Trade Descriptions Ordinance offences akin to Copyright Ordinance offences/Damage to reputation of Hong Kong/Deterrent sentences necessary/ Sentences of hawker and wholesaler considered

偽造商標罪行 - 《商品說明條例》的罪行與《版權條例》的罪行相似 - 破壞香港的聲譽 - 必需判處阻嚇性刑罰 - 同時考慮小販和批發商的刑罰

The Respondent pleaded guilty to two charges: possession for sale of goods to which a forged trade mark was applied, contrary to s 9(2) of the Trade Descriptions Ordinance, Cap 362, and possession for the purpose of sale of goods to which a false trade description was applied, contrary to s 7(1)(b) of that Ordinance. On the first charge he was fined $140,000 and sentenced to 4 months' imprisonment, suspended for 2 years, and, on the second charge, he was fined $10,000.

The admitted facts indicated that the Respondent rented premises in Tai Kok Tsui wherein, in May 1998, Customs Officers seized goods to which forged trade marks had been applied and other goods bearing false trade descriptions. He admitted renting the premises mainly for storing those goods which he had purchased in China at $50 per item and which he would sell to hawkers in Hong Kong at $70 per item. He knew they were counterfeit goods. The total value of the goods was $498,930.

The Respondent had four previous convictions of a similar nature. On the last occasion, he was given a sentence of 6 weeks' imprisonment suspended for 12 months and a fine of $4,000. In passing the sentences, the judge referred to a number of factors which, he said, when taken together, '*saved the respondent from prison*'.

The judge's approach was this: in *SJ v Yip Chi-tung* [1998] 3 HKC 214, the Court of Appeal indicated that if the respondent had been a man with no previous convictions, he would have expected to be dealt with by a fine in the region of about 30% of the value of the goods. The fact that he had been a hawker who had been convicted on four previous occasions of similar offences did not, in light of his personal circumstances, call for an immediate custodial sentence. The judge apparently relied on *Yip Chi-tung*, in which the Court of Appeal did not consider it necessary to impose a custodial sentence on the defendant in that case who had no previous conviction and accepted '*in general terms the validity of the suggested guidelines laid down in R v Kwok Chiu and Tak Fat Swimwear Manufacturing (MA 1406 – 1408/89), that where a*

defendant with a clear record pleads guilty at an early opportunity, fines should be of the order of 30% of the value of the goods'. The judge in *Kwok Chiu* appeared to follow the earlier case of *AG v Marvels Clothing Company Limited and Eagle's Eye (HK) Limited* [1987] HKLR 839.

On review, it was submitted that the sentences were wrong in principle and manifestly inadequate.

Held :

(1) The so-called '*guidelines*' in the *Marvels* case and in *Kwok Chiu*, which the court accepted in *Yip Chi-tung*, related only to offences under the Import and Export Ordinance, and not offences under the Trade Descriptions Ordinance. In *Yip Chi-tung*, the court did not rule out the possibility of a prison sentence for offences under the Trade Descriptions Ordinance, but considered that a custodial sentence was not required for the respondent in that case since it was his first offence. It was therefore doubtful whether *Yip Chi-tung* should be regarded as setting any guidelines for offences under the Trade Descriptions Ordinance;

(2) Offences under the Trade Descriptions Ordinance were more akin to offences under the Copyright Ordinance, Cap 528, than those under the Import and Export Ordinance. Offences under s 118(1) of the Copyright Ordinance were of a similar nature as offences under sections 7 and 9 of the Trade Descriptions Ordinance with which the present case was concerned. In both types of offences, the offender took advantage of the reputation of the owner of the copyright or the trade mark. In copyright cases, the offender copied the products of the owner of the copyright and made a profit out of selling infringing copies. Similarly, the offender under the Trade Descriptions Ordinance copied the products and the trade mark of the owner. Offences under both ordinances covered a variety of goods and products, although compact discs were mostly the subject matter in copyright cases and clothing in trade description cases. However, there was a certain amount of overlapping between the two types of offences because in some cases the copyright owner would also have a trade mark for his products. Hence it was possible to charge a person with offences under either or both ordinances;

(3) It was to be noted that in cases involving offences under s 118(1) of the Copyright Ordinance, the courts usually had no hesitation in imposing custodial sentences, particularly in cases involving the possession and sale of infringing CDs in large quantities: *SJ v Choi Sai-lok and another* AR 2/99. However, the maximum sentence for an offence under that section was a fine at level 5 ($50,000) for each infringing copy and imprisonment for 4 years, whereas the maximum penalty for offences under sections 7 and 9 of the Trade Descriptions Ordinance was a fine of $500,000 and imprisonment for 5 years. Hence, while offenders under s 118(1) of the Copyright Ordinance, which carried a lower maximum penalty, were often sent to prison depending on the quantity of the infringing copies, offenders under sections 7 and 9 of the Trade Descriptions Ordinance, which carried a higher maximum penalty, appeared to have a '*better deal*' if the so-called '*guidelines*' accepted by the court in *Yip Chi-tung* were adopted. The rationale behind this could not be seen;

(4) For sentencing purposes cases other than *Marvels* and *Kwok Chiu* were of greater assistance. In *HKSAR v Wu Wei-cheng* Cr App 173/99, the Court of Appeal confirmed a 3-year sentence with regard to an offence under s 118(1)(d) of the Copyright Ordinance, in a case involving 92,242 VCDs which infringed copyright works;

(5) Over many years, offences involving counterfeit goods under both the Copyright Ordinance and the Trade Descriptions Ordinance were becoming more prevalent and damaged the reputation of Hong Kong. If they became more widespread, Hong Kong would be regarded as a haven for counterfeit goods. Even if, in the past, fines might have been considered as adequate punishment for such offences, much tougher and more severe sentences would be required in the future. Deterrent sentences would have to be imposed;

(6) Although this case was not the appropriate opportunity to set any guideline for offences under the Trade Descriptions Ordinance, a serious warning for potential offenders was appropriate. For hawkers and small traders of counterfeit goods, heavy fines which did not necessarily need to be linked to the value of the goods might have to be imposed in future. The purpose of such fines would be to deliver the message that this type of crime did not pay, and to take away profits. For a repeat offender, an immediate custodial sentence might have to be seriously considered. On the other hand, wholesalers would have to face prison terms unless there were special circumstances. Financial difficulties and a clear record would be unlikely to constitute special circumstances;

(7) The Respondent was a persistent offender who had turned from bad to worse by moving from being a hawker of counterfeit goods to a wholesaler. He had over 14,000 pieces of counterfeit goods of different trade marks in his premises, and the offences could not have been committed without any planning or connection in the Mainland. That the offences were committed because of the economic downturn which had caused the Respondent to suffer heavy losses was not a mitigating factor or an excuse for committing the same offences which he had committed on four separate occasions as a hawker, especially as he had become a wholesaler;

(8) Hong Kong suffered locally and internationally if it was perceived that these types of counterfeit goods were widespread and tolerated in Hong Kong and were punishable only by fines which represented only a certain percentage of the value of the goods. Apart from the damage to the international reputation of Hong Kong and the confidence of its trading partners elsewhere, this type of offence would also ruin the industry and integrity of honest and diligent traders and manufacturers;

(9) The size of the operation was not small, and on the last occasion he had received a 6-week suspended sentence. Bearing in mind the maximum penalty and taking the cases of *HKSAR v Fung Kin-chung* Cr App 213/97 (10 months' imprisonment for possessing 12,000 fake VCDs) and *HKSAR v Wu Wei-cheng* Cr App 173/97 (3 years' imprisonment for an operation on a much larger scale) as references, an overall prison sentence of 8 months after plea, taking a starting point of 12 months, would have been appropriate. This, however, was an application for review of sentence, and the Respondent would now have to serve a prison term.

Result - SJ's application allowed. Concurrent sentences of imprisonment of, respectively, 6 months and 1 month substituted.

AR 2/99

Nazareth
Stuart-Moore
VPP &
Keith JA

(8.9.99)

*K Zervos

#Juliana Chow

SJ v
(1) CHOI Sai-lok
(2) MAK Wai-hon

Copyright infringement/Custodial sentences appropriate unless circumstances exceptional/Proprietors receive longer sentences than employees/Culpability of storemen, packers, delivery men and salesmen not much different

侵犯版權 - 除非有例外情況，否則判處監禁是恰當的 - 東主被判的刑期比僱員長 - 倉務員、包裝員、送貨員及營業員應受的懲處沒有重大分別

The Respondents pleaded guilty in the District Court to charges relating to the possession of infringing copies of copyright works. They were sentenced to suspended terms of imprisonment.

The charges were laid under s 118(1)(d) of the Copyright Ordinance, Cap 528, which provided:

> *A person commits an offence if he, without the licence of the copyright owner, … possesses for the purpose of trade or business with a view to committing any act infringing the copyright …an infringing copy of a copyright work.*

That Ordinance came into force in June 1997, and replaced an earlier Copyright Ordinance (Cap 39) which had been enacted in 1973.

When the original Ordinance had been enacted, the maximum sentence for the offence equivalent to s 118(1)(d) of the new Copyright Ordinance was a fine of $1,000 in respect of each infringing copy and imprisonment for 12 months. In those days, the imposition of fines tended to be the norm. The maximum was increased in May 1995 when the old Copyright Ordinance was amended. From then on, the maximum sentence for the offence equivalent to s 118(1)(d) of the new Copyright Ordinance was:

(a) in the case of a first conviction for such an offence, a fine at level 4, i.e. $25,000, for each infringing copy and imprisonment for 2 years, and

(b) in the case of a second or subsequent conviction for such an offence, a fine at level 5, i.e. $50,000, in respect of each infringing copy and imprisonment for 4 years.

The maximum sentence was again increased in June 1997 when the offence created by s 118(1)(d) of the new Copyright Ordinance was enacted. The distinction between first and subsequent offences disappeared, and by s 119(1) a person who committed an offence under s 118(1)(d) was liable to a fine at level 5, i.e. $50,000, in respect of each infringing copy and to imprisonment for 4 years. Offences related to the manufacture of equipment for making infringing copies were punishable with a fine up to $500,000, and imprisonment for 8 years. Those increases in the maximum sentences reflected the escalating gravity with which offences under s 118(1)(d) had come to be viewed. The judge when sentencing observed:

> *It is clear by the enhancement in June 1997 of the maximum punishments for such offences that the authorities considered the problem of copyright piracy to be a continuing and major problem to Hong Kong's good reputation in the world.*

R1 and R2 were each intercepted by police while carrying, respectively, two cartons and one carton. The two cartons which R1 had were found to contain 719 video compact discs, all infringing copies. That led to his being charged with a single offence relating to the video compact discs in the two cartons. When interviewed, R1 admitted that he worked for a man called '*Ah*

Hung', and that he was paid $350 a day for delivering compact discs, which he knew to be pirated copies.

The carton carried by R2 contained 544 video compact discs and 100 music compact discs, all infringing copies. The police retrieved a bunch of keys from R2 which enabled them to gain access to the mezzanine floor of the nearby building. There they found a substantial number of video compact discs, together with paraphernalia used for labeling, pricing and packing them. Of those compact discs, 21,763 of the video compact discs and 1,200 of the music compact discs were found to be infringing copies. R2, also said he worked for '*Ah Hung*' and that he was paid $350 a day for packing whatever compact discs '*Ah Hung*' wanted and delivering them to designated delivery point. He also admitted knowing that the compact discs were pirated copies. R2 faced two separate charges relating to (a) the compact discs found in the carton he had been carrying, and (b) the compact discs in the nearby building.

The prosecution did not challenge the truth of what the Respondents had said when they were interviewed, and that was therefore the factual basis on which they were sentenced.

The judge took 18 months' imprisonment as his starting point for R1, and 2 years' imprisonment as his starting point for R2. Those were the starting points he would have taken had they pleaded not guilty. Having considered their personal circumstances, and as their '*status*' in this business was that of '*transportation workers*' rather than '*owners*' or '*salesmen*', the judge concluded that justice could be served by imposing suspended terms of imprisonment. He therefore sentenced R1 to 18 months' imprisonment suspended for 2 years, and ordered him to pay $5,000 towards the costs of the prosecution. He sentenced R2 to 18 months' imprisonment on the second charge and to 2 years' imprisonment on the third charge. They were to be served concurrently with each other but were also to be suspended for 2 years. He was ordered to pay $8,000 towards the costs of the prosecution. The judge did not reduce his starting points to take into account the pleas of guilty, and he took the view that the pleas of guilty should be reflected in the suspension of the terms of imprisonment. On review

Held :

(1) A distinction should be drawn between the proprietors of retail outlets and warehouses who committed these offences, and the persons employed by them. The former should receive longer sentences than the latter. But the judge erred in drawing a distinction between salesmen on the one hand and couriers on the other. The roles played by storemen, packers, delivery men and salesmen might be different, but there was not much difference between them in terms of criminal culpability. What would justify differences in sentences between them would be, for example, the number of infringing copies involved, the length of time in which they had been engaged in the trade and factors personal to them such as pleas of guilty;

(2) An assertion by a defendant that he was a mere employee in the business would not warrant the suspension of an otherwise appropriate sentence of imprisonment: *R v Ng Wai-ching* MA 1309/96;

(3) The judge erred in principle in suspending the sentences of imprisonment. There were no exceptional circumstances which justified the course the judge took. The correct starting point for R1 would have been 12 months' imprisonment, and for R2 18 months' imprisonment. The pleas of

guilty and other mitigating factors justified reducing those sentences by one-third, bringing them down to 8 months and 12 months respectively. As this application for review involved the Respondents having to serve sentences of imprisonment which they would not otherwise have had to serve, a further discount of one-quarter was appropriate.

Result - SJ's application allowed. For R1, a sentence of 6 months' imprisonment substituted. For R2, concurrent sentences of 9 months' imprisonment substituted.

Obiter - The preparation of a case of this kind for trial involved considerable effort in locating the copyright owners of the infringing copies, and obtaining confirmation from them that they were indeed copyright owners and that the copies seized were not produced under licence. The court endorsed that said in *R v Li Wan-kei* Cr App 13/97:

> *It may be that … if there is a full indication of an intention to plead guilty at the very outset which avoids all the elaborate preparation and expense for trial, this also will be reflected in the sentence passed.*

MA 1208/98 MA Kwok-hung

Z E Li DJ

(7.9.99)

*Grace Chan

#G Watson

Possession of goods to which forged trade mark applied/ Recent trend towards custodial sentence/Still scope for suspended sentence for first offender

管有應用偽造商標的貨品 - 近期趨向判處監禁 - 初犯者仍有獲緩刑的餘地

The Appellant was convicted after trial of an offence of possession of goods to which a forged trade mark was applied. He was the proprietor of a shop in which Customs Officers seized a quantity of CD ROMs containing SEGA electronic games. He was sentenced to 12 months' imprisonment. On appeal

Held:

The recent trend was towards the imposition of custodial sentences. In *R v Li Wan-kei and another* Cr App 13/98, and *Secretary for Justice v Yip Chi-tung* AR 11/97, the Court of Appeal had suggested the appropriateness of prison terms without coming down definitely in favour of immediate incarceration. There was still room for a suspended sentence for a first offender. This was also apparently the first case that involved a forged trade mark which was not immediately visible to the offender. There was a burden on traders to go a little further in future to test the goods.

Result - Appeal allowed. Sentence of one year's imprisonment, suspended for two years, plus a fine of $10,000, substituted.

Dangerous Drugs

MA 967/98 WONG Tso-hsin

Gall J

(7.12.98)

*D G Saw SC & Wesley Wong

#Andy Hung

Simple possession of midazolam maleate tablet/ Midazolam and methaqualone contrasted/Sentencing considerations
單純管有咪達唑侖馬來酸鹽藥片 - 比較咪達唑侖馬來酸鹽及甲喹酮 - 判刑須考慮的事宜

The Appellant pleaded guilty to a charge of possession of a dangerous drug, namely, one tablet containing 15 milligrams of midazolam maleate. He was sentenced to 6 months' imprisonment. The magistrate gave him credit for his plea.

The facts showed that when the Appellant was stopped and searched one tablet was found in his possession. He had 30 previous convictions, of which 8 were similar. He was found to be unsuitable for DATC treatment, having been admitted there previously.

On appeal, it was said that for a small seizure such as this, the tariff should be at the discretion of the court, but not more than 6 months' imprisonment after trial. Counsel arrived at that tariff by a consideration of the similarity between midazolam maleate and methaqualone - the tariff for the latter for trafficking having been fixed in *R v Chan Chi-man* [1987] HKLR 221. The tariff in that case for methaqualone for up to 2,000 tablets or 500 grams of powder, was as the court saw fit; and over those quantities on an ascending scale starting at 6 months.

Held :

(1) There were similarities in the nature of methaqualone and of midazolam maleate, and it was held in *HKSAR v Luk Yun-shing* CACC 357/98, that for sentencing purposes in that case methaqualone was no different from midazolam maleate. However, an analysis of the evidence in respect of the two drugs was conducted in *HKSAR v Yiu Chi-wai* MA 624/97, and indicated noticeable differences between the drugs. Midazolam was a short acting tranquilliser, whilst methaqualone was a depressant having hypnotic and sedative qualities; methaqualone had greater addictive effects;

(2) In *R v Li Ming-yiu* MA 834/96, it was found that the incidence of possession of midazolam maleate was increasing and that it was a common concomitant of heroin abuse. Notwithstanding the ruling in *Luk Yun-shing*, it was clear that, in practical terms, from its nature, growing use and use with heroin, midazolam might in some cases warrant a sentence different from that which was appropriate for a similar quantity of methaqualone;

(3) A mathematical approach was not appropriate and, at the lower end of the scale, a mathematical calculation could not be made to determine the penalty for small quantities of heroin or any other similar drug;

(4) It was conceded that for possession of small quantities of midazolam maleate, for the purpose of trafficking, the sentence should be at the discretion of the court, but not more than 6 months' imprisonment. In most cases of simple possession of the drug, the same sentencing scale would apply on a lesser basis;

(5) As the Appellant possessed for his own use only one tablet, containing 15 milligrams of the drug, an appropriate starting point would have been four months' imprisonment, reduced to three months after the plea.

Result - Appeal allowed. Sentence of 3 months' imprisonment substituted.

CA 35/98

Nazareth ACJHC Mayo & Stuart-Moore JJA

(28.1.99)

*Albert Wong

#A Hoosen (1) A2: I/P

(1) WONG Ka-kuen
(2) LEUNG Yui-kwong

Discount of one-third to be given for timely plea/Being caught '*red-handed*' not a reason to disallow the usual discount
及時認罪可獲減刑三分一 – 「*當場*」被捕並不構成不給予慣常減刑的理由

A2 pleaded guilty to one count of trafficking in heroin hydrochloride and one count of manufacturing the same. He was sentenced to 19 years' imprisonment after the judge declined to give him the full one-third discount to which he felt he was entitled. The judge withheld that discount since '*in view of the evidence there was against you, it would be difficult to see what other alternative you would have had apart from pleading guilty*.'

On appeal

Held :

It had been stressed on frequent occasions that in the absence of good reason where a timely plea had been entered, a defendant was entitled to his full one-third discount. Being caught '*red-handed*' was not a sufficient reason to disallow the full discount.

Result - Appeal allowed. Sentences totalling 18 years substituted.

MA 862/98

Lugar-Mawson DJ

(17.12.98)

*Eddie Sean

#I/P

LAU Kan

Possession of small quantity of heroin/Sentencing policy required meaningful sentence/Late plea reduced discount
管有少量海洛英 – 量刑政策要求判處有意義的刑期 - 延遲認罪導致削減所減免的刑期

The Appellant pleaded guilty to a charge of possession of a dangerous drug, namely, 0.21 gramme of a mixture of which 0.16 was heroin.

The Appellant was in his early fifties, and had a long string of convictions for possession of dangerous drugs dating back to 1976.

The magistrate took 12 months' imprisonment as his starting point, and sentenced the Appellant to 9 months' imprisonment. On appeal

Held :

(1) The sentencing policy of the Court of Appeal was that those who possessed dangerous drugs should expect to be sent to prison for meaningful periods of time. In light of the Appellant's record for abuse of dangerous drugs, even though the amount he possessed was small and probably represented no more than one '*fix*', it could not be said that 9 months was in any way manifestly excessive;

(2) The magistrate only reduced the starting point by one quarter because the Appellant had entered a late plea. The Appellant was not entitled to a one-third discount and the magistrate in no way departed from principle in his approach.

Result - Appeal dismissed.

MA 765/98 YUEN Hing-yu

Lugar-Mawson DJ

(17.12.98)

*Eddie Sean

#I/P

Late plea/Waste of court time and police resources/Duty on magistrates to reduce one-third discount/Effect of prior conviction
延遲認罪 – 浪費法庭時間及警方資源 – 裁判官有責任把三分一的刑期減免削減 – 過往被定罪的影響

The Appellant pleaded guilty to an offence of possession of a dangerous drug, namely, 17 grammes of a mixture with a heroin content of 16.82 grammes.

The magistrate accepted that the quantity represented the Appellant's own personal supply of dangerous drugs. The Appellant was a drug addict, with previous convictions for possession of dangerous drugs. He had twice been sent to a drug addiction treatment centre.

In sentencing the Appellant to 27 months' imprisonment for a '*belated plea*', the magistrate adopted a starting point of 3 years' imprisonment after trial, such being the maximum sentence a magistrate could impose. He treated it as a worst case scenario, deserving of the maximum sentence. On appeal

Held :

(1) The plea was belated in the sense that the Appellant did not plead guilty at the earliest opportunity, and his earlier plea of not guilty had resulted in a date for trial being set. The lists in the magistracy had been cleared to accommodate a contested case. By entering the plea of guilty on the date set down for trial the time of the magistrate was wasted, as were the human resource assets of the police;

(2) Although a discount of one-third was customary after a guilty plea, this was not automatic. It was incumbent on magistrates to take into account the fact that a defendant had wasted resources and to reflect that in a reduced discount;

(3) Had the Appellant been a first-time offender he might, notwithstanding having entered a late plea of guilty, have been given a higher discount.

Result – Appeal dismissed.

CA 331/98 HO Lee-nam

Nazareth VP Mayo & Stuart-Moore JJA

(9.3.99)

*A A Bruce SC & Anthea Pang

#Wong Po-wing

Trafficking in dangerous drugs/MBDB/Same group of compounds as '*ecstasy*' (MDMA) but with indications of similarity and dissimilarity in relevant factors/Insufficient evidence to set guidelines or adopt '*ecstasy*' tariff
販運危險藥物 – MBDB – 與「*忘我*」(MDMA)屬同一類化合物,但兩者在相關的因素方面有相似和相異之處 – 沒有足夠證據供制訂指引或採用「*忘我*」*我*的判刑準則

The Applicant pleaded guilty to five counts of trafficking in dangerous drugs. The drugs were as follows: 6th count, 1 tablet containing 43 milligrammes of MDMA (i.e. 3, 4-methylenedioxy methamphetamine); 7th count, 2 tablets containing 42 milligrammes of MDMA; 8th count, 1 tablet containing 127 milligrammes of MDMA; 10th count, 8,838 tablets containing 1,338.83 grammes of MBDB; and 12th count, 6.60 grammes of cannabis.

The Applicant was sentenced to a term of imprisonment of 3 months imprisonment in respect of each of the 6th, 7th and 8th counts, two months in respect of the 12th count and 8 years in respect of the 10th count. All the sentences were ordered to run concurrently.

There was expert evidence before the trial court to the effect that MBDB was a chemical variant of a dangerous drug known as MDE which, in turn, was classified as a phemethylamine, an hallucinogenic amphetamine. The most well known member of that category of dangerous drugs was MDMA or '*ecstasy*'. MDMA appeared to be a milder, less potent drug than MDMA or '*ecstasy*'.

In sentencing the Applicant, the judge after careful consideration adopted the guidelines in *HKSAR v Lee Tak-kwan* [1998] 2 HKLRD 46 for the drug '*ecstasy*'. He took a starting point of 12 years for count 10, and gave the Applicant the full one-third discount for the guilty plea and imposed a sentence of 8 years.

On appeal, the Applicant submitted that since MBDB was a far milder and less potent drug than '*ecstasy*', a lower starting point than that indicated in *Lee Tak-kwan* was appropriate.

The Respondent contended that MDMB belonged to the same class of compounds termed phenethylamines as MDMA. There were over a thousand compounds within that group. MBDB was only one such compound. Both MDMA and MBDB were at the milder end of the spectrum of potency within the group while the others were very much stronger.

Held :

(1) There was so little known about the effects of MBDB. In *Lee Tak-kwan,* the court reached firm conclusions as to the status of '*ecstasy*'. There was no evidence before the court that the factors relevant to '*ecstasy*' obtained with reference to MBDB, no evidence of recent increased abuse of the drug in either the West or Hong Kong, nor of wide abuse or ready availability or of any associated deaths. There was also the difference that MBDB did not appear to be hallucinogenic. In so far as the effect of enhanced empathy and interaction might be similar, it appeared to be milder in MBDB. There was a questionable basis for treating the two drugs as the same, given the general paucity of information particularly as to the effects of MBDB, which were suggested to be different;

(2) Although the court accepted in principle that it was undesirable to have a multiplicity of tariffs and sub-tariffs for different drugs, there was insufficient material upon which to adopt in relation to MBDB the '*ecstasy*' guidelines or to formulate new guidelines;

(3) The complaint as to the severity of the sentence had to be addressed therefore in terms of the usual criterion of whether it was manifestly excessive. Having regard to the relatively large quantity of the drugs imported, the Applicant's willingness to use young adults, the relative sophistication and organisation involved, the sentence on the 10th count while severe, was not manifestly excessive or wrong in principle.

Result - Application dismissed.

MA 3/99 SO Muk-chi

Gill DJ

(10.3.99)

*David Chan

#I/P

Drugs in prison/Appropriate sentence considered/Totality and consecutive sentencing examined

偷運毒品入監獄 – 考慮適當的刑罰 – 審閱整體刑期和分期執行的刑期

The Appellant pleaded guilty to the offence of unlawful possession of dangerous drugs, namely, a small quantity of heroin. He was sentenced to 12 months' imprisonment. Of that term, 3 months was ordered to run concurrently with an existing sentence of 8 months for another offence he was then serving, resulting in a further 9 months overall.

The facts showed that the Appellant was in detention following his earlier conviction of a dangerous drugs offence in respect of which he had been sentenced to 8 months' imprisonment. Whilst there, he was found to possess the drugs, the subject of the appeal, and which he had attempted to smuggle into prison.

The magistrate regarded prison as the appropriate sentence, in light of *Attorney General v Au Kwok-chai* [1996] 3 HKC 192. He first considered a DATC report. On appeal

Held :

(1) The sentence imposed was one which the Court of Appeal considered in *Au Kwok-chai* to be appropriate after plea for the offence of smuggling a small quantity of dangerous drugs into prison. It could not be faulted;

(2) The extent to which the magistrate ordered the sentence to run consecutively with the term already imposed recognised the deterrent element that such a sentence had to carry without offending the totality principle;

(3) The submission of the Appellant that he had four children, was remorseful and wanted to be given a chance, did not raise factors which warranted a reduction in a sentence that was otherwise appropriate.

Result – Appeal dismissed.

CA 578/98 LI Kam-sang

Power VP
Mayo &
Stuart-Moore
JJA

(23.3.99)

*A Luk &
Laura Ng

#K
Ramanathan

Simple possession of '*ice*'/Degree of latent risk enhancement/ Relevance of quantity possessed

單純管有'冰' – 因潛在危險而提高刑期的程度 – 管有的數量是相關因素

The Applicant pleaded guilty to a count of simple possession of '*ice*', namely, 27.16 grammes of a crystalline solid containing 26.61 grammes of methamphetamine hydrochloride. He was sentenced to imprisonment for 2 years and 8 months. On appeal

Held :

(1) When assessing the starting point, the judge should have been looking at the accepted range of sentence for simple possession which was imprisonment of from 1 year to 18 months. Having done that, he should then have assessed the proper enhancement for latent risk;

(2) The judge appeared to have proceeded upon the basis that *Lam Wai-ip* Cr App 214/97, had not, when it spoke of a sentence of 3 years, already taken

into account the enhancement factor. In that he was in error as that factor had already been taken into account;

(3) The latent risk enhancement adopted by the judge was one of 100%, ie from 2 years to 4 years. That approach derived some support from *Lau Chi-chiu* Cr App 395/98, in which the judge employed such an enhancement percentage and the Court of Appeal stated the judge could not be criticised. However, the judge was there dealing with a quantity of 65.33 grammes of '*ice*' containing 63.38 grammes of narcotic content. Whilst it might be proper to double the sentence because of latent risk where as large a quantity as that was involved, where there was a smaller quantity, doubling would not be appropriate. The latent risk factor merited additional imprisonment for one year and the judge should have taken as his starting point for simple possession a sentence no higher than 18 months. That would make the eventual sentence one of 30 months-18 months for the offence of simple possession plus another 12 months because of the latent risk factor. The Applicant would then be entitled, because of the plea, to a one-third reduction bringing the sentence to 20 months. The sentence imposed would be varied accordingly.

Result – Appeal allowed. Sentence of 20 months' imprisonment substituted.

CA 411/97

Power VP
Mayo &
Stuart-Moore
JJA

(30.4.99)

*A A Bruce SC
& P Chapman

#G Plowman SC
& J Matthews
(1) & (2)
G J X McCoy SC, R Donald
& R Pierce (3)

(1) LAU Kwok-ching
(2) LAU Kwok-hung
(3) MAK Kam-chuen

Conspiracy to manufacture dangerous drugs/Sentencing to accord with practice prevailing at time of offence/Little sympathy in drug operations for minor players
串謀製造危險藥物 – 判刑不應偏離案發時法庭的量刑常規 – 在毒品活動中擔當次要角色的罪犯不應獲得寬大處理

The Applicants were convicted after trial of one count of conspiracy to manufacture a dangerous drug, heroin. A1 and A2 were each sentenced to imprisonment for 30 years, while A3 was sentenced to 20 years.

The evidence showed that the period of the conspiracy ran from March 1986 to November 1986. Manufacturing took place at two locations, first of all at Wu Kai Sha, and then later at Fairview Park. There were at least seven occasions when manufacturing occurred, and on each occasion 70 pounds of heroin were made: at a conservative estimate 400-500 pounds were made.

The judge concluded that A1 and A2 were major organisers of the manufacturing, and that they shared the proceeds. A3 came into the venture at a fairly late stage, and was a paid assistant.

On appeal, it was argued that each of the sentences were manifestly excessive having regard to the sentencing practice prevailing in 1986 for the commission of large scale drug offences. It was also said that the judge ought to have given greater weight to the lesser roles of A1 and A3.

Held :

(1) Sentences should be in accord with the sentencing practice prevailing at the time of the commission of the offence;

(2) At the time of the offence, dangerous drug offences in the most serious band attracted sentences which were not in excess of 20 years. The sentence imposed on A2 was, given the sentencing practice prevailing at the time, excessive and would be varied to 20 years;

(3) A1 was only involved in the manufacturing at Fairview Park and he should be sentenced in the same way as A2. His sentence would also be reduced to 20 years;

(4) Although A3 played a lesser role than A1 and A2, and was only recruited halfway through the operation at Fairview Park, it had repeatedly been said in the past that those who involved themselves in dangerous drug operations could expect little sympathy upon the basis that they were minor players. However, he was entitled to a sentence substantially less than that imposed on A1 and A2, and a sentence of 14 years would be substituted.

Result - Appeal allowed.

CA 593/98 YIP Pik-kwai

Liu,
Mayo &
Stuart-Moore
JJA

(27.4.99)

*Anna Lai

#I/P

'*Ice*' and heroin seized/Normal practice to sentence for total quantity of dangerous drugs rather than on individual smaller quantities/Progression of respective guidelines not the same

檢獲「冰」及海洛英 – 慣常做法是以毒品總數量而不是以每類毒品的較小數量作為量刑基準 – 該兩類毒品的量刑指引所定的刑罰遞進等級有所不同

The Applicant pleaded guilty to one count of trafficking in dangerous drugs, one count of possession of dangerous drugs and two counts of theft. She was sentenced to a total of 8 years' imprisonment.

When police intercepted the Applicant, she was found to have a plastic bag containing 21.16 grammes of a crystalline solid containing 20.45 grammes of '*ice*', and 30 bags containing 15.67 grammes of a mixture containing 12.05 grammes of heroin hydrochloride. She said the '*ice*' was for her own consumption.

On the basis of the applicable guidelines the tariff for the quantity of '*ice*' was about 7 years and for the heroin about 5 years. The judge added the two terms of imprisonment together, consecutively, making a starting point on count 1 of 12 years.

The judge gave the Applicant credit for her plea, thus arriving at the sentence of 8 years. He passed a 4 month sentence for the possession of the small amount of dangerous drugs and for the two thefts and ordered that all the sentences be served concurrently. On appeal

Held :

(1) In the event of separate parcels of dangerous drugs being found by the authorities it was normally the practice to sentence an accused on the total quantity of dangerous drugs rather than on the individual smaller quantities. That could be a matter of significance as the sentencing guidelines did not increase at a constant rate. There was no reason why a different approach should be adopted simply because the two separate parcels of dangerous drugs were of a different nature, namely, '*ice*' and heroin;

(2) A slight problem which arose was that although both heroin and '*ice*' attracted heavy sentences the progression of the scale in respect of the respective guidelines was not the same. Having regard to the amounts involved it would appear that if the dangerous drugs had either been all heroin or all '*ice*' the total sentence for the trafficking offence should have been somewhere in the region of 9 years' imprisonment. When the Applicant was

given the benefit of her plea that would reduce the sentence to 6 years' imprisonment. That was the fairest approach to this case.

Result - Appeal allowed. Sentence of 6 years' imprisonment substituted for the 8 years imposed on the first count. Other sentences to remain.

CA 767/97 CHAN Chi-yu

Mayo &
Stuart-Moore
JJA
Keith J

(13.5.99)

*Cheung
Wai-sun

#J Matthews

Guilty plea late in trial/Substantially reduced discount appropriate
審訊後期才承認控罪 – 大幅削減可扣減的刑期實屬恰當

At a late stage in his trial for the offence of trafficking in dangerous drugs, the Applicant changed his plea from one of not guilty to guilty.

At the conclusion of the trial the Applicant was sentenced to 5 years 3 months' imprisonment. His co-accused who maintained his position to the end of the trial was sentenced to 6 years' imprisonment.

The quantity of heroin involved was 25.54 grammes of a mixture containing 23.12 grammes of narcotic content.

On appeal, the Applicant raised the question of the amount of the discount the judge gave the Applicant for changing his plea.

Held :

(1) Had the Applicant pleaded guilty at an early stage he would have been entitled to receive a discount of 33% or 2 years off the sentence;

(2) The judge referred to the small amount of time saved and the little remorse the Applicant had demonstrated in light of the serious allegations he had made against prosecution witnesses, and he could not be faulted for coming to the conclusion that where an accused had chosen to vigorously contest proceedings the discount he should receive should be substantially reduced. That was a matter within the discretion of the judge.

Result - Application dismissed.

CA 706/97 CHAN Pui-chi

Stuart-Moore VP Mayo & Leong JJA

(10.6.99)

*W Lam

#H Y Wong

Previous offences of same or similar kind/Aggravation of crime for purposes of sentence/Deterrence need for persistent re-offending to protect the public

先前犯下相同或類似的罪行 – 就量刑而言會令罪行嚴重程度有所增加 – 為保護公眾而要阻嚇持續再犯罪的人

The Applicant was sentenced to 14 years' imprisonment for two offences of trafficking in heroin hydrochloride. The narcotic content particularised in count 1 was 37.34 grammes and, in count 2, it was 223.43 grammes, amounting in all to 260.77 grammes.

On appeal, it was said that as the guidelines in *Lau Tak-ming* showed that from 200 to 400 grammes of narcotic content would normally produce a sentence of between 12 to 15 years' imprisonment, the starting point should have been at the lowest end of the scale. It was specifically stated that 223.43 grammes was the amount for which the Applicant fell to be sentenced.

Held :

(1) In situations such as this it had frequently been said that the overall narcotic content had to be taken into account in order to avoid the unfair result of consecutive sentencing on another count. The judge rightly treated the two amounts of narcotic as one for the purposes of sentence on count 2;

(2) Fourteen years was undoubtedly on the high side as the total narcotic content was 260.77 grammes. Thirteen years might have been more strictly in accordance with the tariff bracket. However, tariffs were not strait-jackets;

(3) Whilst the judge said nothing to indicate what was in his mind when passing sentence, no mitigation had been advanced on behalf of the Applicant at the conclusion of the trial. That was not surprising as the Applicant had 22 previous convictions and had previously, in 1988 and 1992, been sentenced respectively to 5 years' and 6½ years' imprisonment for trafficking in dangerous drugs. His criminal record showed several other drug-related offences including others for trafficking;

(4) The fact that the Applicant had a criminal record could not by itself necessarily increase his sentence, but the plain fact remained that he, like any other accused with previous convictions, was being sentenced against the background of that record. If the Applicant had been sentenced on a clear previous record, there would have been no obvious reason for the judge to have departed from the normal tariff of about 13 years' imprisonment which the Applicant might well have expected. However, that was not the case;

(5) Whilst it was always important for the sentencer to bear in mind the general principle that an accused was being sentenced for the offence which had brought him before the court and not for previous offences for which he had already served the penalty, the constant repetition of the Applicant's trafficking in dangerous drugs had itself increased the gravity of these offences as far as sentence was concerned. The sentences he had received in the past had proved to be no deterrent at all, and prevention of further repetition was demonstrably in the public interest;

(6) There was nothing original about the notion that an accused, with previous convictions of the same or a similar kind as the offence for which he was due to be sentenced, might receive a longer sentence than an accused with none. If it were otherwise, the man of good character standing next to the recidivist in the dock on a joint charge, with equal culpability for the time, would plainly have to be sentenced to the same terms of imprisonment subject probably to a small reduction in the case of the former to take account of his good character. In *R v Billam* (1986) 82 Cr App R 347, Lord Lane CJ included

among the aggravating factors which would substantially increase the starting point for sentence for rape the '*previous convictions for rape or other serious offences of a violent or sexual kind*'. Extending that principle to another more common example, in theft by shoplifting the courts would often impose a very moderate financial penalty for a first offender, but if such offence was repeated, a heavier sentence was likely to be imposed for repetition;

(7) Trafficking in dangerous drugs was no exception to the general rule that re-offending in the same or a similar way might aggravate the offence, at least so far as sentence was concerned. That would have the result that the starting point which would have been adopted for a man of good character would sometimes need to be increased to take into account the aggravating features of persistence and the failure of previous sentences to deter on the one hand, and the court's duty to protect the public on the other. The court, in other words, was passing a deterrent sentence on the persistent offender, from whom the public needed protection, which was often unnecessary on a first or even sometimes a second-time offender. Much might depend on the gravity of the crime. The graver the crime, the more obvious became the need for a deterrent sentence on repetition in order that the public were properly protected. In drug trafficking cases that was clearly recognised in *Lau Tak-ming* where the court said:

> *Within the suggested bands, factors which the sentencing judge may properly take into account are: ..<u>his previous history of narcotic offences</u> and matters of mitigation which may be advanced on his behalf …*

The Applicant's previous history of offences was appalling and his mitigation was non-existent. His sentence was well within the general bounds which were set for offences of this gravity.

<u>Result</u> - Application dismissed.

MA 238/99 LAI Siu-ming

McMahon DJ

(31.3.99)

*Johnny Chan

#I/P

<u>Simple possession of small quantity of heroin/Recidivist with experience of DATC/Twelve months appropriate after trial</u>
<u>單純管有少量海洛英 – 積犯曾入住戒毒所 – 審訊後判刑十二個月是恰當的</u>

The Appellant pleaded guilty to an offence of unlawful possession of dangerous drugs, namely, 0.15 grammes of heroin. He was sentenced to 8 months' imprisonment.

The DATC report was not favourable. The Applicant had 43 previous convictions of which 10 were drug related, and had been sent to the DATC on five occasions. Although the last DATC order had been imposed 12 years earlier, it was the opinion of the reporting officer that the Appellant was not suitable for further DATC treatment.

The magistrate referred to authorities which indicated that the starting point for possession of a small quantity of heroin was 12 months after trial: *R v Li Siu-man* MA 248/96, *R v Lam Wai-ping* MA 239 & 240/97. On appeal

<u>Held</u> :

The magistrate quite properly adopted 12 months as the appropriate starting point and reduced that to 8 months due to the guilty plea. There was no merit in the appeal.

<u>Result</u> - Appeal dismissed.

MA 769/99 CHAN Ping-chi

Woo J

(21.9.99)

*Jonathan Man

#I/P

Possession of dangerous drugs in prison/Small quantity/ Twelve months' imprisonment after plea
在監獄內管有危險藥物 - 少量毒品 - 認罪後被判處 12 個月監禁

The Appellant pleaded guilty to an offence of unlawful possession of drugs, namely, one plastic straw packet of 0.29 gramme of a mixture containing 0.23 gramme of heroin hydrochloride, at the Lai Chi Kok Reception Centre, Sham Shui Po, Kowloon. He was sentenced to 12 months' imprisonment.

In his sentencing, the magistrate pointed out that the Appellant had 14 previous convictions, 6 of which were drug related. He relied on *AG v Au Kwok-chai* [1996] 3 HKC 192, as authority for the proposition that it was well settled that a person taking drugs into a custodial environment could expect an immediate custodial sentence. He also relied on that authority to hold that the proper sentence was one of 12 months' imprisonment after a guilty plea. On appeal

Held :

The narcotic content of the drug possessed by the Appellant was 0.3 gramme of heroin hydrochloride and the circumstances were almost identical to those in *Au Kwok-chai*. That authority was as binding on the court as it was on the magistrate. The magistrate's reasons could not be faulted.

Result - Appeal dismissed.

MAs 761 & 762/99 NG Chun-wing

Woo J

(21.10.99)

*Chan Fung-shan

#Andy Hung

Simple possession/Appropriate starting point/Guilty plea/ Repetition of same offence within short time span/Genuine remorse/Entitlement of one-third discount
單純管有 - 恰當的量刑起點 - 承認控罪 - 在短時間內重犯同一罪行 - 真有悔意 - 有權獲減免三分一刑期

The Appellant, on his own pleas, was convicted of two charges of simple possession of a dangerous drug. The two offences took place within three weeks and 20 packets containing 3.10 grammes and 50 packets of 6.45 grammes of narcotics were, respectively, found in the Appellant's possession.

In sentencing, the magistrate adopted starting points of, respectively, 21 months and 27 months. The Appellant was sentenced to 18 months' imprisonment for the offence which was first in time, and, for the second, he was sentenced to 21 months. Taking into account the totality principle, a sentence of 27 months' imprisonment was imposed.

On appeal, it was submitted, *inter alia*, that the Appellant was not a persistent offender and that the magistrate failed to give the usual one-third discount for the guilty plea.

Held :

(1) The length of an imprisonment term must depend on the facts of each case and the relevant factors included the amount of narcotics involved, the number of packets found, the latent risk in a case where the quantity of drugs was not insignificant, the addiction of the defendant, the previous character of the defendant, whether there was a history of multiple offences involving dangerous drugs and his personal circumstances: *R v Leung Moon-wah* MA 643/96 and *R v Chiu Hung-wong* [1994] 1 HKCLR 184 considered. The respective starting points for the two offences should be 15 months and 24 months;

(2) The one-third discount for a guilty plea was only given to those who were genuinely remorseful and who saved the court's time and everybody's time by a plea at the earliest possible stage. Being caught red-handed was not a sufficient reason to disallow the full discount of one-third for the guilty plea: *R v Lee Kwong-wing* MA 282/96, *HKSAR v Poon Ki-chiu* MA 209/99 and *HKSAR v Wong Ka-kuen & Another* CA 35/98 considered;

(3) Although the two offences were committed within a span of three weeks, the plea to each of them was entered on the first opportunity and that was indicative of genuine remorse. The higher starting point of sentence adopted by the magistrate in relation to the second offence had apparently taken into account the larger quantity of drugs involved and also the closeness of the date of commission of that offence after the first offence. If a full reduction of one-third was not given for his guilty pleas, the commission of the two offences within three weeks would have been taken into account twice and that would appear to be unfair to the Appellant.

Result - Appeal allowed. A total of 20 months' imprisonment substituted.

MA 905/99 LAM Kwok-hung

Pang J

(27.10.99)

*C Ko

#Wilson Chan

Possession of dangerous drugs/Latent risk factor/Accused not to be sentenced on basis of possible trafficking in part of narcotic
管有危險藥物 - 潛在危險因素 - 不應因被告可能把部分毒品作販運用途而以這點作為量刑基準

The Appellant pleaded guilty to a charge of unlawful possession of 8.44 grammes of heroin hydrochloride. He was sentenced to 18 months' imprisonment. In sentencing, the magistrate said:

> *The drugs involved were quite substantial for personal use, and I could not ignore the fact that some of the drugs may have been used by others*.

On appeal, it was submitted that the magistrate was sentencing the Appellant on the basis that some of the drugs might have been for trafficking. Reliance was placed upon *R v Lee Sai-leung* [1995] 2 HKCLR 248, for the proposition that although a judge was entitled to consider the latent risk factor, he was not entitled prior to doing so to take the view that at the time of apprehension the accused had some of the drugs in his possession for personal consumption and some for another purpose, i.e. some form of trafficking.

Held :

The magistrate could rightly enhance the sentence by taking into account the latent risk factor. But it appeared he had erred by suggesting that he was sentencing the Appellant for trafficking in some of the drugs.

Result - Appeal allowed. Sentence of 12 months' imprisonment substituted.

Deposit Taking

AR 13/98

SJ v CHAN Yin-ming

Power VP, Mayo & Stuart-Moore JJA

(2.3.99)

*Peter Chapman & David Leung

#C Y Wong SC & David Ma

Unlawfully carrying on the business of deposit taking/Massive losses to depositors/Gravity of offence
非法經營接受存款業務 – 存款人損失巨大 – 罪行嚴重程度

The Respondent pleaded guilty to a charge of carrying on a business of taking deposits, without being an authorised institution, contrary to s 12(1) and (6) of the Banking Ordinance. The judge took 18 months as his starting point, and sentenced the Respondent to 6 months' imprisonment. A criminal bankruptcy order was also imposed.

The Banking Ordinance regulated banking business and the business of taking deposits; it made provision for the supervision of authorised institutions so as to provide a measure of protection to depositors. It was enacted to promote stability and the effective working of the banking system. Section 12(1) provided that '*no business of taking deposits shall be carried on in Hong Kong except by an authorised institution*'.

The Hong Kong Monetary Authority was set up to promote the general stability and effective working of the banking system in Hong Kong. It did so mainly through the supervision of authorised institutions which were authorised under the Banking Ordinance to engage in banking business or the business of taking deposits. Since 1995, the Authority had been the licensing authority responsible under the terms of the Banking Ordinance for the authorisation, suspension and revocation of all three types of authorised institutions - banks, restricted licence banks and deposit-taking companies.

The Ordinance set out minimum criteria for authorisation. One of the principal requirements was that an authorised body corporate should have adequate financial resources and liquidity to meet its obligations. The Authority maintained a register of authorised institutions, by which it could ascertain whether a company was or was not an authorised institution. The register was kept in the office of the Authority and was open to the public.

The Respondent, and the company of which he was Chairman, Billion International Holdings Ltd, were not registered under the Banking Ordinance and had never applied for registration. He carried on the business of deposit taking and money lending in defiance of the statutory requirements. The interest rates he offered far exceeded those of the authorised institutions. However, Billion failed to meet withdrawal requests. When told by senior staff that there were insufficient funds to meet projected withdrawals by depositors, the Respondent told them to '*secure more deposits to solve the problems*'. The company collapsed, causing a huge loss of depositors' money. The criminality involved a course of deceitful conduct over 33 months involving a loss of about $100,000,000 to 364 members of the public.

On review, it was submitted that the sentence of 6 months was manifestly inadequate and wrong in principle. It was said that a sentence was required which would adequately demonstrate to the community that the courts were not prepared to tolerate any such bogus banking practice as had been revealed in the present offence.

Held :

(1) The Respondent deliberately flouted the provisions of the Banking Ordinance, placing at risk the savings of those who had entrusted their money to him. There was considerable force in the submission that deterrence was not given proper weight;

(2) The gravamen of the offence charged was that the Respondent, driven by reckless greed and ambition which had no regard for the rights of those who entrusted their money to him, had caused massive loss to the depositors. This was an offence of very considerable gravity in the upper band of offences of this kind;

(3) The starting point should have been 4 years. A one-third discount, to 32 months, was appropriate because of the guilty plea. The sentence could be further discounted to one of 29 months as the sentence on review was greatly in excess of the original sentence: *Attorney General v Wong Kwok-wai* [1991] 2 HKLR 384.

Result - SJ's application allowed. Sentence of 6 months varied to one of 29 months. Criminal bankruptcy order to stand.

Obiter - It was to be doubted that it was open to the prosecution to submit that the judge erred in taking into consideration the submission of defence counsel that the Respondent had not stolen or misappropriated any money. In the admitted facts theft or misappropriation were not alleged. Defence counsel at trial made that submission without demur from the prosecution.

Escape from Custody

CAs 137 & 138/97 YIP Kai-foon

Power & Mortimer VPP Mayo JA

(23.4.99)

*I G Cross SC Peter Chapman & Chan Fung-shan

#Gary Plowman SC & Eric Kwok

Escape from lawful custody/Use of firearms with intent/Possession of explosives with intent/Duty of court to pass deterrent sentences/Criminal gang virtually declaring war on society/Paraplegia and reduced life expectancy matter for Executive/Totality

逃離合法羈押 – 有意圖而使用火器 – 有意圖而管有炸藥 – 法庭有責任判處阻嚇性刑罰 – 犯罪匪幫實際上向社會宣戰 – 下身癱瘓及壽命縮短兩項因素留待行政機關考慮 – 整體刑期

The Applicant was convicted in October 1985 of two counts of handling stolen jewellery and two counts of possession of firearms. He received a total of 18 years' imprisonment on those counts, which was reduced to an overall sentence of 16 years on appeal. In 1989, he escaped from Queen Mary Hospital where he had been sent for medical attention while serving that sentence at Stanley Prison. When making his escape, he commandeered a van and kidnapped the van driver and his son. That gave rise to the counts in the indictment *HCCC 271/96*, being one of escaping from legal custody and two of kidnapping, contrary to common law.

From August 1989 to May 1996 the Applicant was at large.

In the early hours of 13 May 1996, the Applicant was among a group of men who were spotted by patrolling police officers. He exchanged shots with the police and all members of the group, except him, escaped. He suffered a gunshot wound which left him paralysed from the waist down. That incident gave rise to the counts in *HCCC 270/96*, which were possession of firearms, use of firearms with intent to resist arrest, possession of explosives with intent to endanger life or property and an alternative count of possession of explosives *simpliciter*.

HCCC 271/96

The Applicant pleaded guilty to the three counts in this indictment and was sentenced as follows :

(1) Escape from lawful custody - 2 years (the statutory maximum is 2 years);

(2) Kidnapping - 3 years;

(3) Kidnapping - 3 years.

The judge ordered that counts 2 and 3 be served concurrently but consecutive to count 1, making a total of 5 years. He also ordered that that sentence be consecutive to the overall sentence of 25 years, imposed on the counts in *HCCC 270/96*, and to the pre-existing sentence of 11 years and 3 months. That made a total of 41 years and 3 months.

HCCC 270/96

The Applicant pleaded not guilty to the three counts but was convicted after trial and sentenced to 13 years (maximum 14 years) on the possession of firearms count, to 20 years (maximum life imprisonment) on the use of firearms count, and to 18 years (maximum 20 years) on the count of possession of explosives with intent to endanger life or property. Counts 1 and 3 were ordered to be concurrent but 5 years of those concurrent sentences were ordered to run consecutively to count 2, making a total of 25 years. On appeal

Held :

(1) Although the offence of escape from legal custody was pursued with reckless determination, it did not involve outside assistance and appeared to have been *ex improviso*. Since the maximum penalty was 2 years - which seemed inordinately low - the maximum was not called for. The proper sentence would be one of 18 months to which the customary one-third for plea should be applied producing a sentence of 1 year;

(2) Although it was submitted that when the judge ordered that the concurrent kidnapping sentences be served consecutively to the escape from lawful custody he failed to take into account the fact that the offences were committed as part of one transaction, there was no merit to that submission. The transaction clearly merited a sentence, as adjusted, of 4 years;

(3) As regards the submission that the sentence of 20 years in respect of the offence of use of firearms with intent to resist arrest in *HCCC 270/96* was excessive, and that a sentence in the region of 15 to 18 years would have been appropriate, the judge was dealing with a criminal gang led by an escaped convict who, in the dead of night, while transporting explosives for an unknown but undoubtedly gravely serious criminal purpose, engaged in a fire fight with pursuing police officers in an endeavour to escape arrest. The offence was in the most serious band of such offences and it warranted the sentence of 20 years imposed by the judge. A court when sentencing in such circumstances must bear in mind the terrible risk to which police officers and, indeed, members of the public were exposed by such behaviour. Sentences must be imposed which expressed the emphatic denunciation by the community of such crimes;

(4) The explosives in count 3 of *HCCC 270/96* consisted of almost 2 kg of TNT. They had the capacity to inflict terrible damage to life and property in a crowded city such as Hong Kong. The sentence of 18 years was not excessive at all, and it was not excessive to order that 5 years be consecutive to the sentence of 20 years already imposed. A court would fail in its duty to the

public if it did not impose heavy deterrent sentences in circumstances such as these;

(5) The court was not impressed by the submission that these offences were not the worst of their kind such as occurred when a criminal gang had, in effect, declared war on society. The actions of the Applicant and his gang came close to this. The sentence of 25 years overall was proper in *HCCC 270/96*;

(6) Although it was in the discretion of the court to give weight to the *ad miseracordiam* plea, which was based on the position of the Applicant as a paraplegic who had to endure grave hardship which was not the lot of the ordinary prisoner and his reduced life expectancy, such considerations should be left for the Executive;

(7) The overall sentence of 40 years and 3 months called for adjustment in accordance with the totality principle. The totality was excessive and the sentence could be varied to one of 36 years and 3 months. That would be achieved by ordering that the overall sentence of 29 years imposed on the two indictments should start to run four years prior to the expiration of the sentence which the Applicant was serving at the time when the later sentences were imposed.

Result - Appeal allowed. Sentence totalling 36 years and 3 months substituted for original sentence of 41 years and 3 months.

False Imprisonment

CA 345/98

WONG Kam-chan

Nazareth ACJHC
Stuart-Moore VP
Nguyen J

(30.6.99)

*Cheung Wai-sun

#Andy Hung

False imprisonment associated with blackmail/Abduction of persons to enforce payment prevalent/Very serious offence/ Concurrent and consecutive sentencing
與勒索有關的非法禁錮 - 擄拐他人迫使付款的案件普遍 - 非常嚴重的罪行 - 判予同期及分期執行的刑期

The Applicant was convicted of the offences of false imprisonment, blackmail and dealing with the proceeds of an indictable offence. He was sentenced to concurrent terms of imprisonment of, respectively, 4 years, 2½ years and 2½years.

The particulars of the offences were that in August 1997 in Hong Kong together with other persons, the Applicant unlawfully and injuriously imprisoned Ko Kai-hing and detained him against his will; second, also with other persons and with a view to gain for themselves, he made unwarranted demands for $1.1 million from Ko Kai-hing with menaces; and third, that in August 1997, knowing that property, namely, HK$1.1 million deposited into his bank account, in whole or in part represented the proceeds of an indictable offence, namely, false imprisonment, he dealt with that property.

On appeal, it was submitted that the judge erred in not mentioning a starting point, and that the sentence was excessive.

Held :

(1) The abduction and detention of persons to enforce payment whether of legitimate debts or improper demands was by any standard a very serious offence. It was also prevalent in Hong Kong. The judge identified the Applicant as the mastermind;

(2) The offence of unlawful imprisonment was associated with an offence of blackmail in which the menaces were addressed to the victim's sister. A large sum of money was obtained and handled by the Applicant. Had a proportion of the sentences for the latter two offences been made consecutive as could properly have been done, the aggregate terms of imprisonment the judge imposed could easily have exceeded four years;

(3) There was no error of principle and the sentences, particularly the 4 year sentence for false imprisonment, were not excessive.

Result - Application dismissed.

False Instruments

CA 402/98

Power &
Mortimer VPP
Stuart-Moore
JA

(8.12.98)

*M Lunn SC
&
K Zervos

#J Griffiths SC
Richard Wong
&
Richard Leung

CHIM Pui-chung

Conspiracy to make false instruments/Elaborate attempt to mislead intended to achieve substantial benefit/Immediate custodial sentence required/Starting point to be indicated/ Effect of good character on sentence

串謀製造虛假文書 - 案件經精心策劃以誤導他人意圖獲得可觀利益 - 須判以即時監禁 - 須說明量刑起點 - 品格良好對判刑的影響

The Applicant was convicted after trial of the offence of conspiring with other persons unknown to make false instruments with the intention that the documents be used to induce others to accept them as genuine. He was sentenced to 3 years' imprisonment. On appeal

Held :

(1) The judge was wrong not to have indicated a starting point. A starting point should be indicated when sentencing so that it could be seen on appeal whether credit given for mitigating factors was properly assessed;

(2) Although the Applicant had to be dealt with on the basis that the motive for the convoluted deception had not been established, there was clearly an elaborate and calculated attempt to mislead the authorities which, given the effort and planning involved, must have been intended to achieve some substantial benefit;

(3) The judge, who was right to have said that an immediate custodial sentence was called for, must have started with a sentence of 3½ years which was out of proportion to the criminality involved. A sentence of 15 months would have been appropriate and this could properly be discounted for good character by 3 months, making a sentence of 12 months.

Result : Appeal allowed. Sentence of 12 months substituted.

MA 219/99 KHALIL Ahmed

Woo J

(31.3.99)

*P Madigan

#I/P

Possession of forged travel document/Isolated use of false passport by person unconnected with Hong Kong or China/Seriousness of offence
管有偽造旅行證件 – 與香港或中國沒有任何關聯的人在香港僅有的一次使用偽造護照 – 罪行的嚴重性

The Appellant pleaded guilty to the offence of possession of a forged travel document, namely, a forged Malaysian passport.

The magistrate, having taken account of *R v Bhagwant Singh-Padda* MA 1447/88, took 9 months' imprisonment as his starting point. That sentence was reduced to 6 months to reflect the early plea and the clear record.

The magistrate adopted that said in *Bhagwant Singh-Padda* to the effect that the isolated use of a false passport by persons unconnected with Hong Kong or China, whilst not as serious as other false passport offences, nonetheless constituted a serious offence which merited a prison sentence which would indicate that the Hong Kong courts were alive to the dangers of tolerating the unauthorised use of travel documents in an era of worldwide terrorism.

Held :

The decision of the magistrate was neither wrong in law or in principle. The sentence of 6 months was not excessive.

Result - Appeal dismissed.

Forging Bank Notes

CA 6/98 MO Shiu-sing

Power ACJH
Mayo &
Stuart-Moore
JJA

(19.3.99)

*D G Saw SC
& Vivien Chan

#C Grounds

Forged banknote offences/Large quantities of apparently genuine notes produced/Mainland connection/Criminal enterprise spanning several months/Case of medium seriousness
偽造紙幣的罪行 – 製造大量表面上看來是真實的紙幣 – 與內地有聯繫 – 犯罪集團已運作了數個月 – 中度嚴重的案件

The Applicant was convicted after trial of three offences, namely, forgery of banknotes, contrary to s 70(1)(c) Cap 200, possession of forged banknotes, contrary to s 76(1) Cap 200, and possession of implements for forgery, contrary to s 76A Cap 200.

The Applicant was found to have engaged in a joint enterprise with others to produce banknotes at his flat where forged currency was found by the police. There was a mainland connection to the operation. Whilst the forgeries were not highly sophisticated, the ordinary recipient would probably be fooled, as intended. As the precise role of the Applicant was not clear, he was not to be treated as the prime mover. That said, he was entirely involved in the operation, and his fingerprints were found on notes in the flat, and in the safe deposit box, and on the notes found in his briefcase in his room. All the offences were alleged to have occurred in a 6-month period between September 1990 and March 1991. Police found forged currency at the flat worth more than $1,000,000 at face value.

On the first and third counts of forgery of banknotes and possession of implements for forgery, the judge took 9 years as his starting point, and reduced those sentences to 7½ years on each. On the second count of possession of forged banknotes the starting point of 6 years was reduced to 5 years. The sentences were ordered to run concurrently, making 7½years *in toto*.

On appeal, it was submitted that the starting points taken by the judge were too high. It was said that the authorities showed that sentences in the region of 6 years were often appropriate for distributors of forged banknotes.

Held :

(1) There were no guideline cases as such for distributors or forgers. The closest case to provide assistance was *R v Suchai Pruksachattaworn* Cr App 316/90, which involved possession of forged US travellers cheques valued at over HK$1,000,000, and where the court concluded that 5 years was a proper starting point. Substantially higher sentences were approved in *R v Yip Moon-kwan and others* Cr Apps 220 & 210/94, where a sophisticated conspiracy to make counterfeit currency was charged and 13 years' imprisonment was taken as an appropriate starting point;

(2) This case was in a medium range of seriousness. It lacked the sophistication of *Yip Moon-kwan's* case, but an examination of the banknotes found at the Applicant's premises showed that they were quite capable of passing as genuine unless carefully inspected;

(3) The starting point of 9 years' imprisonment was at the top end of the range and clearly on the high side, but not wholly inappropriate. The discount of 1½ years given to the Applicant in respect of his good character and on account of the comparatively low sentences imposed on his co-accused, one of whom pleaded guilty, was far too generous. The overall result, perhaps for the wrong reasons, nevertheless achieved a just and proper sentence for what on any view was a serious case. Large quantities of forged banknotes were produced; there was a mainland connection; the criminal enterprise had extended over several months.

Result - Application dismissed.

Homicide

CA 364/98

Nazareth ACJHC Mayo & Stuart-Moore JJA

(19.1.99)

*Cheung Wai-sun
#J Mullick

FUNG King-nin

Indeterminate detention in psychiatric centre/Poor prognosis/ When hospital order without limit of time appropriate
無限期羈留在精神病治療中心 – 治癒機會差劣 – 在何種情況下才適合作出無時限的入院令

The Applicant was charged with murder, but pleaded guilty to manslaughter on the basis that the act in question was an involuntary act. He was sentenced to detention in the psychiatric centre for an indeterminate period, pursuant to s 45, Cap 136.

The facts showed that the Applicant pushed a pedestrian into the path of a van, the driver of which was unable to avoid colliding with the pedestrian who sustained fatal injuries. Other pedestrians detained the Applicant who was heard to say '*it was because he all the time called me an idiot*'. It was an agreed fact that the Applicant and the deceased were not known to each other.

There were medical reports from three psychiatrists, Dr Yuen and Dr Ng for the prosecution, and Dr Singer for the Applicant.

There was essential agreement between the doctors that the Applicant had an intelligence quotient in the region of 52-55 and that he should be classified as a mild to moderate mental defective. In addition he was said to suffer from what was described as a behaviour disorder.

The Applicant had been a patient in mental institutions in Hong Kong and China as an in-patient and as an out-patient. He had been treated with Neuroceptics with mixed success. He was under treatment at the Siu Lam Psychiatric Centre.

The doctors gave evidence adopting their detailed reports and were cross-examined. A conflict emerged between the Government psychiatrists on the one part and Dr Singer on the other as to the extent to which the Applicant constituted a danger to the public.

On appeal, the Applicant said the term of imprisonment *(sic)* was too long.

Held :

(1) The Government doctors who had seen a lot more of the Applicant than had Dr Singer had referred to the unpredictable nature of his behaviour. They expressed the view that his prognosis was poor. They also opined that he required close supervision and that he constituted a moderate danger to himself and others. They based this partly on the fact that he had a very poor capacity for judgment and that this was a serious matter when taken in conjunction with his behaviour disorder;

(2) There was a further complication in that his medical records indicated that when he had been an out-patient it had been noted that he had regularly failed to take the medication which had been prescribed to alleviate his condition;

(3) The trial judge had particularly considered *R v Lung Fan-wa* [1994] 3 HKC 106, where it was said that if the psychiatrists could not predict with confidence how long the accused needed to be treated before release into the

community, it was in his interests and those of the community that the hospital order be made without limit of time.

Result – Application dismissed.

CA 41/99

Mayo Leong & Stuart-Moore JJA

(21.5.99)

*Chan Fung-shan

#Petrus Chan

(1) KONG Yiu-kam
(2) LO Wai-ming

Manslaughter/Killing after revenge attack by gang/Death caused by kicks to head/Starting point of nine years not excessive
誤殺 – 糾黨報復襲擊釀成殺人事件 – 頭部被踢致死 – 九年的量刑起點並非過重

The Applicants were charged with murder. After trial, they were found guilty of manslaughter. A1 was sentenced to 6 years' imprisonment and A2 to 7 years.

The evidence showed that the deceased and both Applicants were drug addicts. After a dispute between A1 and the deceased over the quality of some dangerous drugs, the deceased assaulted A1 with his fists. The next day, A1, A2 and a group of men attacked the deceased and beat him with their fists. A1's role was to hold the deceased's arms while the other men beat him. After some time the deceased fell to the ground. The men continued to kick the deceased on the head while he was on the ground. The deceased was taken to hospital where an operation was performed on him. He died the following evening. The cause of death was brain damage which had been occasioned by the kicks which had been administered to his head.

The single ground of appeal was that the judge adopted too high a starting point when he selected this at 9 years. It was submitted that there should be some internal consistency of sentence in manslaughter cases and that in general terms sentences in the region of 6 to 8 years were appropriate for gang revenge attacks depending upon the surrounding circumstances: *R v Ko Kam-hung* [1991] 2 HKLR 433, *R v Kan Wah-cheung* [1991] 1 HKLR 595.

Held :

(1) This was an ugly revenge attack of a cowardly nature. The most significant aspect of the attack was that the men continued kicking the deceased on the head after he was lying on the ground;

(2) Although this case was at the upper end of the range having regard to the continued nature of the attack, a sensible distinction could be drawn between this attack and an attack with knives. Although a starting point of 9 years was on the high side, the sentences did not lend themselves to interference.

Result - Application dismissed.

CA 227/99

Stuart-Moore VP
Mayo & Leong JJA

(3.9.99)

*A A Bruce SC
& Ned Lai

#J McNamara

LAU Kwok-leung

Manslaughter in course of robbery/Sentence of 12 years proper for killing/Concurrent sentences more appropriate for separate offences inextricably linked
在搶劫過程中犯誤殺罪 - 就殺人事件而言 12 年監禁是適當的刑期 - 個別的罪行如有不可分割的關連則較適宜判以同期執行的刑期

The Applicant was convicted after trial of manslaughter by reason of lack of intent, and acquitted of murder. He had pleaded guilty to manslaughter at the outset of the trial and to the count of robbery. The judge imposed sentences of 8 years for manslaughter and 4 years consecutive for robbery, making 12 years *in toto*.

The evidence showed that the Applicant strangled the victim, a 66 year old female, after he awoke her in her hut. He stole $20,000 and a necklace. On appeal

Held :

(1) Where any person went into the home of another in order to steal and, for whatever reason, ended up killing an innocent occupant in circumstances amounting to manslaughter, the court would be slow to interfere with a sentence in the region of 12 years;

(2) In *R v Lee Sau-ping* Cr App 189/95, it had been said that manslaughter was one class of offence where a judge might well not be able conscientiously to fix a starting point. There was a wide range of sentence from probation to life imprisonment, and a sentencing judge might feel after having taken an overall view of the matter that all he could finally do was to decide on the appropriate sentence;

(3) The judge appeared to have been concerned to achieve a just result of the crimes when taken together. However, the offences were inextricably linked and the better sentencing practice would have been to impose an appropriate sentence on each of the counts making the sentences concurrent. While the proper sentence for manslaughter in such circumstances was 12 years' imprisonment, the proper sentence for the robbery might well have been in the region of 7 years. However, the sentences imposed were not a day too long.

Result – Application dismissed.

CA 118/99

Stuart-Moore VP & Mayo JA

(22.9.99)

*Winnie Ho

#J McGowan

LAM Wai-man

Cruelty to child/Manslaughter due to gross negligence/Very grave case of its kind
虐待兒童 - 由嚴重疏忽導致的誤殺 - 在同類案件中屬於非常嚴重

The Applicant pleaded guilty to one count of cruelty to a child, and to one count of manslaughter on the basis of '*gross negligence*.'

The count of cruelty to a child, contrary to s 27(1) of the Offences Against the Person Ordinance, Cap 212, stated that the Applicant:

> *between the 1st day of November, 1997 and the 24th day of December, 1997 in Hong Kong, being a person who had attained the age of 16 years and having the custody, charge or care of one*

> *Cheung Lap-yin, a child under the age of 16 years, wilfully ill-treated the said child in a manner likely to cause the said child unnecessary suffering or injury to his health.*

The second count of manslaughter stated that the Applicant unlawfully killed the victim, Cheung Lap-yin, on 5th January 1998.

The judge took 9 years as an appropriate starting point for the cruelty offence and 12 years for the manslaughter offence stating that he felt the totality of the sentences should be 9 years. So giving appropriate discounts for the pleas of guilty, he imposed 6 years for the first offence and 8 years for the second and ordered that 1 year on count 1 should run consecutively to the 8 years he had imposed on the manslaughter count.

When passing sentence the judge said:

> *This is not a case of a mother standing by and failing to prevent or to remove a child from the scene of assault by another. It is a case in which you were pro-active in abusing the boy and you created or you assisted in creating the atmosphere of abuse which this unfortunate child was made to endure.*
>
> *In my judgment, therefore, even if you did not yourself inflict all the injuries which were found upon the boy, you bear significant responsibility for them in any event. The injuries were extensive; his body was covered in injuries. His head, his face, his inner lip, shoulders, chest, knees, buttocks and burn marks to the soles of his feet – there are 36 items referred to by the pathologist ..... and even some of those individual items describe more than one injury.*
>
> *The suggestions made by you and by your boyfriend that the child was prone to rebelliousness and to throwing himself about and falling and hurting himself by accident are suggestions which are contradicted by the medical evidence ..... as well as by the evidence of the boy's health and behaviour before he was moved into your household. I reject the suggestion that the injuries were caused by the child falling off a toy vehicle or by hitting his head against a cabinet or any such accidental fall. The injuries were deliberately caused.*

Earlier the judge had said:

> *For the purpose of the exercise of sentencing you, I am bound to assume in your favour that you were not the sole assailant of this child and I do not sentence you on the footing that you struck the blow which caused the child's death.*

In dealing with the manslaughter, the judge later said:

> *The act of gross negligence in not having this child treated was a grave dereliction of your duty. I am also bound to take into account, as I have previously intimated, the context in which the injuries which you failed to have treated occurred, namely that those injuries were deliberate injuries; you knew they were deliberate; and you yourself had created or significantly contributed to the climate of abuse in which those deliberate injuries were caused.*

Held :

This was a very grave case of its kind. The cruelty had continued for some time and was deservedly reflected in a partly consecutive sentence. Legislation had in recent years increased the maximum sentence for ill-treatment or neglect by those in charge of a child from two years to ten years in order to enable the courts to be equipped to deal with cases as grave as this one. There was no reason of any kind to interfere with the sentences imposed. To find otherwise, in circumstances such as these, would be to ignore a cardinal principle of sentencing which was to take into account the consequences to the victim. There could be no shrinking from the plain act that this very young victim eventually died at the end of what amounted to various forms of torture spread over about a fortnight while he was in the care of the Applicant. The sentencing judge took this into account when concluding that the Applicant was deserving of a sentence for cruelty after trial which was only a year short of the maximum. He was fully entitled to do so. The starting point for manslaughter in such circumstances was justifiably longer. The judge's approach to the sentences he imposed was entirely appropriate.

Result – Application dismissed.

CA 315/98 LEE Kar-yeung

Nazareth & Stuart-Moore VPP
Gall J

(15.10.99)

*Anna Lai

#J Matthews

Murder/Accused aged 15 years at time of offence/Premeditated and brutal circumstances/Sentence of 30 years' imprisonment appropriate
謀殺 - 被告犯案時只有 15 歲 - 有預謀和手法殘忍 - 30 年監禁是適當的刑期

The Applicant was convicted of murder and sentenced to 30 years' imprisonment.

The facts showed a clearly premeditated murder. The victim was referred to as a sometime money lender or a benevolent loan-shark who loaned money to two of the persons convicted (not the Applicant). He was lured to a flat and murdered in brutal circumstances compounded by the clumsy methods used by the accused persons. The body was never found. The Applicant was aged only 15 years and 10 months at the time of the offence.

On appeal, it was submitted that the sentence of 30 years' imprisonment was both manifestly excessive and wrong in principle in that the Applicant was likely to remain in custody for a period longer than he would had he been sentenced to a life term. Life prisoners, it was said, normally served no more than 25 years although they became eligible for parole after 12 to 14 years. They were on occasion released on parole a few years prior to having served 25 years.

Held :

(1) There was no reason to believe that life prisoners normally served no more than 25 years, or that they became eligible for parole after 12 to 14 years;

(2) The authorities did not support any submission that sentences of the order of 22 or 20 years were called for in the circumstances of young offenders even at the age of 15. They showed that the determinate sentences imposed were of the order of 28 or 29 years. The sentences previously imposed in cases involving persons of the same sort of age as the Applicant were not dissimilar to that imposed upon him. There was no error of principle: *HKSAR*

v Cheng Yat-ming [1997] 3 HKC 365; *HKSAR v Vo Van-hung* CA 417/94, *HKSAR v Lau Kin-hung* CA 357/97;

(3) This offence was clearly premeditated. The methods used were unquestionably brutal. The sentences imposed in the earlier cases were not only indistinguishable in principle but also in any significant terms of duration from the sentence of 30 years imposed here. The sentence was not manifestly excessive.

Result – Application dismissed.

Immigration

CA 539/98 CHEUNG Chun

Mayo Leong & Stuart-Moore JJA

(8.1.99)

*Cheung Wai-sun & P Daryanani

#I/P

Captain of ship bringing unauthorised entrants to Hong Kong/No life saving and fire fighting equipment on board/No financial gain/Need to keep job not a mitigating factor
船長接載未獲授權進境者進入香港 – 船上沒有救生和滅火設備 – 無收取金錢利益 – 為保存工作並非減刑理由

The Applicant pleaded guilty to one offence of being a member of a crew of a ship which entered Hong Kong with unauthorised entrants on board. He was sentenced to 3 years and 4 months' imprisonment.

The Applicant was on board a fishing vessel in Hong Kong waters and, upon interception, the police found three illegal immigrants in the hold. The Applicant admitted he was the acting captain of the vessel and he carried the three illegal immigrants into Hong Kong to find jobs on the instruction of his boss and he received no extra money for bringing them. The vessel normally transported old motor car tyres and it came to Hong Kong four to five times a month. There was no life saving equipment and fire fighting equipment on board.

The judge referred to *R v Ng Kit-yuen* [1992] 1 HKCLR 170, and took five years as his starting point. After giving a one-third discount for the plea, he arrived at the sentence of 3 years and 4 months.

In *Ng Kit-yuen* the court considered that where the illegal immigrants were concealed in a place from which escape would have been difficult or the vessel was of poor maintenance or age in an unseaworthy condition, 9 years would be appropriate. Otherwise the sentence of 5 years indicated in *R v Lam Hon-man* Cr App 329/90 would not have been inappropriate.

In *R v Wong Yin-lung* [1995] 1 HKCLR 151, the court considered 5 years was an appropriate starting point where the accused was a captain or otherwise in charge of the vessel.

On appeal, the Applicant submitted that he had to act as his boss told him or he would lose his job on the vessel and that would cause financial difficulty. He had a wife and small children and an aged grandmother to look after.

Held :

As the Applicant was acting captain of a vessel in the hold of which were hidden three illegal immigrants, and as there was no life saving and fire fighting equipment on board, the starting point of 5 years' imprisonment adopted by the judge could not be regarded as inappropriate. The judge accepted that the Applicant did not carry the illegal immigrants for extra money, and otherwise he could have taken a higher starting point. The fact that he committed the offence in order to keep his job was not a mitigating factor.

Result - Application refused. Three months loss of time ordered.

MA 947/98 NGUYEN Van-hien

Jackson DJ

(22.1.99)

*Robert KY Lee

#J McGowan

Breach of deportation order/Consecutive term of imprisonment appropriate/Separate and distinct offence
違反遞解離境令 – 監禁刑期予以分期執行是正確的 – 個別及不同的罪行

The Appellant, having pleaded guilty to the offences of possessing a false instrument, remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully, and breach of a deportation order, was sentenced to terms of imprisonment of, respectively, 6 months, 15 months and 6 months. The sentences for the first two offences were ordered to run concurrently, while the 6 months for the breach of deportation offence was ordered to run consecutively, making 21 months *in toto*.

The Appellant had been deported in 1994 following the completion of a 15 month prison sentence imposed on him for the offence of unlawful wounding.

On appeal, it was submitted that while the individual sentences were proper, the totality of 21 months was excessive and all sentences ought to have been made concurrent.

Held :

The offence of remaining in Hong Kong without authority was plainly a single offence, but if the offender came to Hong Kong in direct contravention of a deportation order that was another offence which was both separate and distinct, and a consecutive sentence of imprisonment was appropriate.

Result - Appeal dismissed.

MA 1008/98 LAU Chi-kwong

Stock J

(8.12.98)

*Wesley Wong

#I/P

Unlawful entrant using another's identity card and stealing/Family circumstances a matter for defendant, not court
非法進境者使用他人身分證和偷竊 – 家庭狀況是被告人而非法庭須考慮的事

The Appellant came to Hong Kong unlawfully and had an identity card belonging to another. He also had a pager and some other stolen property.

The Appellant pleaded guilty to the immigration offence and the theft offence, and was sentenced to consecutive terms of imprisonment of 15 months and 3 months.

On appeal, the Appellant submitted that he had children in the mainland, his wife had left him, and his aged parents were ill.

Held :

(1) These were all family circumstances of which the Appellant was aware when he decided to come to Hong Kong unlawfully. The blame for the situation in which he and his family found themselves lay at his door and should not be put at the door of the court;

(2) The sentences were within the customary range.

Result - Appeal dismissed.

CA 427/98 LEE Yau-tak

Nazareth VP
Liu & Mayo JJA

(20.4.99)

*Peter Chapman

#Wong Man-kit

False representations to Immigration Authorities/Catastrophic personal losses to accused/Loss of position as police officer/ Relatively insignificant gain
向入境事務處作出虛假申述 – 被告蒙受重大的個人損失 – 喪失警務人員一職 – 相對微不足道的得益

The Applicant, a police officer, was convicted after trial on 21 July 1998 of four offences contrary to s 89 Cap 221, and s 41(1)(a) Cap 115.

The first and third charges alleged that the Applicant aided, abetted, counselled or procured a Filipina to make representations to an immigration officer on four occasions between 1994 and 1997. The Applicant signed two employment contracts indicating that he was the employer of the Filipina. On another occasion he signed documentation intended for the Immigration Authorities that the Filipina was still employed by him, thereby facilitating extensions of her visas, and these constituted the second and fourth charges. In fact, there was never any intention of the Filipina being employed by him, and she was never in fact so employed. She supported herself by part-time employment.

The Applicant was sentenced to 2½ years' imprisonment. On appeal

Held :

(1) The Applicant would suffer catastrophic loss in financial terms because of the conviction. He would lose a sum of the order of $6-700,000 in provident fund payments and also a pension in the order of $4-5,000 per month;

(2) That he had lost, at the age of 41, a job which he could have expected to hold until the age of 55, had a significant impact on the severity of the sentence he received;

(3) Having regard to the total loss of retirement benefits, the loss of job, the relatively insignificant gain from the offences, and the fact that he had a clear disciplinary record together with a favourable background report from the Commissioner of Police, and also to the acceptance by the judge that he was a decent family man, the sentence imposed upon the Applicant was manifestly excessive.

Result - Appeal allowed. Sentence varied to allow of the Appellant's immediate release.

MA 100/99 YEUNG Chau-fong

Power VP
Mayo &
Stuart-Moore
JJA

(1.4.99)

*A A Bruce
SC
& E Brook

#I/P

[Reserved
pursuant to
s 118(1)(d)
Cap 227]

Sentencing for overstayer/No change in approach since 1997
對逾期居留人士應判處的刑罰 – 法庭對有關罪行的立場自一九九七年開始並沒有改變

The Appellant pleaded guilty to the offence of being a person who, having been permitted to land in Hong Kong, contravened a condition of stay, namely, that whereas her stay was limited until 8 June 1997, she remained in Hong Kong after that date. She was fined $2,000 and ordered to be imprisoned for two months, which sentence was suspended for 3 years.

The facts showed that the Appellant was arrested on 22 November 1998 by the police for overstaying and the matter was then referred to the Immigration Department. Inquiries revealed that she had come to Hong Kong on 28 March 1997 on a permit which allowed her to remain until 8 June 1997. By the time of her arrest, the Appellant had been overstaying for about 1 year and 5 months.

In mitigation before the magistrate, the Appellant said that she had stayed in Hong Kong to look after her children and this was true. The magistrate when sentencing the Appellant noted that this was her third conviction and said that while he was sympathetic, he had no choice but to impose a sentence which would deter her from overstaying in Hong Kong again.

When she appealed to the Court of First Instance, the Appellant repeated that she wished to remain in Hong Kong to look after her children. However, the judge directed:

> '*Bearing in mind the social circumstances that might have changed after the resumption of the exercise of sovereignty by China over Hong Kong, and that there is no tariff or guideline set by any court in respect of offences of a similar nature, I consider this is a proper case for me to reserve the appeal to the Court of Appeal pursuant to s 118(1)(d) of the Magistrates Ordinance*' .

Held :

(1) The Court of Appeal had no more power than had the Court of First Instance to authorise the continued presence of the Appellant in Hong Kong. The position since 1 July 1997 was no different from that which obtained prior to that date. The statistics indicated that fines rising for repeated offences to suspended sentences had usually been imposed in such cases as the present;

(2) Although the plight of the Appellant engaged sympathy, the order of the magistrate was a proper one. It was one which recognised the law which applied and which must be applied in Hong Kong.

Result - Appeal dismissed.

MA 76/99 CHEN Xi-chun

Woo J

(30.3.99)

*J To

#I/P

Possession of forged identity card/Sentence of fifteen months appropriate after guilty plea

管有偽造身分證 – 十五個月刑期對承認控罪的罪犯是恰當的刑罰

The Appellant pleaded guilty to two offences, one of breach of condition of stay, and the other of using a forged document of identity, contrary to the Immigration Ordinance.

When sentencing the Appellant, the magistrate considered *R v Nawaz, Shamin* MA 804/93, and passed concurrent sentences of, respectively, 14 days and 15 months. On appeal

Held :

The guidelines demonstrated that a sentence of 15 months' imprisonment was appropriate in respect of an accused who pleaded guilty to possession of a forged identity card: *AG v Lam Ping-chung* [1989] 1 HKLR 161, *R v So Man-king* [1989] 1 HKLR 142.

Result - Appeal dismissed.

MA 197/99 CHAN Chi-hoi

Woo J

(21.4.99)

*Johnny Chan

#I/P

Eighteen months' imprisonment for unlawful remaining/ Guilty plea by recidivist/Venereal disease no basis for lesser sentence

非法留在香港判處監禁 18 個月 – 累犯認罪 – 患有性病並不是減刑理據

The Appellant pleaded guilty to an offence of unlawfully remaining in HongKong,andwas sentencedto 18 months' imprisonment.

The magistrate stated that the Appellant was aged 25 years, and had three previous similar convictions. He also stated that there was no humanitarian factor. In accordance with *R v So Man-king & Others* [1989] 1 HKLR 142, *R v Chan Wun-sang & Another* [1993] 1 HKCLR 46, and *R v Tse Choi-shing* MA 104/91, the magistrate concluded that a sentence of 18 months' imprisonment for an illegal immigrant with three similar convictions was lenient.

On appeal, the Appellant submitted that there had been an earthquake in his native village, that he was suffering from venereal disease, and that he wished to be released earlier for the purpose of informing his girlfriend in Shenzhen of the possibility of her having contracted the same disease.

Held :

(1) The sentencing approach of the magistrate was correct;

(2) The grounds of appeal advanced could not found any basis for interference with the sentence.

Result - Appeal dismissed.

MA 181/99 NG Chi-kwong

Woo J

(27.4.99)

*Louisa Lai

#Albert Luk

Employing person not lawfully employable/Fifteen months starting point after trial/Employee employed *outside* Hong Kong/Short period of unlawful employment

僱用不可合法受僱的人 – 經審訊定罪的量刑起點是 15 個月監禁 – 僱員於香港以外地方受僱 – 短期的非法僱用

The Appellant pleaded not guilty to an offence of employing a person not lawfully employable, contrary to s 17I(1) of the Immigration Ordinance, Cap 115. Having taken 15 months' imprisonment as his starting point, the magistrate sentenced him to 8 months' imprisonment. In reaching that sentence, he took account of the guilty plea, the fact that the Appellant stupidly thought that hiring an illegal immigrant on the high seas was not an offence, the fact that the two employed illegal immigrants had never left the Appellant's boat, and the absence of exploitation of the two employees. On appeal

Held :

(1) The offence was obviously a serious one. Fifteen months' imprisonment as a starting point after trial had been set down in *R v Wong Mok-din* [1994] 2 HKCLR 96, and followed in *R v Tsang Kam-loong* [1997] 2 HKC 490;

(2) The magistrate failed to take into account that the Appellant employed the two illegal immigrants outside the territorial waters of Hong Kong and that therefore they were not illegal immigrants in Hong Kong at the time of the employment, although, once they were brought into Hong Kong, they became such. The magistrate treated the point as neutral. Although the mitigating effect of this factor was slight, this was not a case where people who had no right to enter and stay in Hong Kong were employed in Hong Kong; therefore, it did not have the effect of an encouragement to people coming to Hong Kong illegally to seek employment;

(3) The magistrate omitted to take into consideration that the employment of the two persons was at most for three days, and that was a mitigating factor. An analogy could be drawn with illegal overstaying cases where a longer period of overstaying would attract a more severe sentence;

(4) That the Appellant's wife had become stressful and had ailments affecting her physical state and temper, and that his absence was causing hardship to the family, could not be a basis for interfering with sentence. There was nothing special in this kind of hardship to any family if the father and breadwinner had to serve a term of imprisonment for an offence.

Result - Appeal allowed. Sentence reduced from 8 to 7 months' imprisonment.

Kidnapping

CAs 137 & 138/97 YIP Kai-foon

Power & Mortimer VPP
Mayo JA

(23.4.99)

*I G Cross SC
Peter Chapman &
Chan Fung-shan

#Gary Plowman SC
& Eric Kwok

Escape from lawful custody/Use of firearms with intent/Possession of explosives with intent/Duty of court to pass deterrent sentences/Criminal gang virtually declaring war on society/Paraplegia and reduced life expectancy matter for Executive/Totality
逃離合法羈押 – 有意圖而使用火器 – 有意圖而管有炸藥 – 法庭有責任判處阻嚇性刑罰 – 犯罪匪幫實際上向社會宣戰 – 下身癱瘓及壽命縮短兩項因素留待行政機關考慮 – 整體刑期

The Applicant was convicted in October 1985 of two counts of handling stolen jewellery and two counts of possession of firearms. He received a total of 18 years' imprisonment on those counts, which was reduced to an overall sentence of 16 years on appeal. In 1989, he escaped from Queen Mary Hospital where he had been sent for medical attention while serving that sentence at Stanley Prison. When making his escape, he commandeered a van and kidnapped the van driver and his son. That gave rise to the counts in the indictment *HCCC 271/96*, being one of escaping from legal custody and two of kidnapping, contrary to common law.

From August 1989 to May 1996 the Applicant was at large.

In the early hours of 13 May 1996, the Applicant was among a group of men who were spotted by patrolling police officers. He exchanged shots with the police and all members of the group, except him, escaped. He suffered a gunshot wound which left him paralysed from the waist down. That incident gave rise to the counts in *HCCC 270/96*, which were possession of firearms, use of firearms with intent to resist arrest, possession of explosives with intent to endanger life or property and an alternative count of possession of explosives *simpliciter*.

HCCC 271/96

The Applicant pleaded guilty to the three counts in this indictment and was sentenced as follows :

(1) Escape from lawful custody - 2 years (the statutory maximum is 2 years);

(2) Kidnapping - 3 years;

(3) Kidnapping - 3 years.

The judge ordered that counts 2 and 3 be served concurrently but consecutive to count 1, making a total of 5 years. He also ordered that that sentence be consecutive to the overall sentence of 25 years, imposed on the counts in *HCCC 270/96*, and to the pre-existing sentence of 11 years and 3 months. That made a total of 41 years and 3 months.

HCCC 270/96

The Applicant pleaded not guilty to the three counts but was convicted after trial and sentenced to 13 years (maximum 14 years) on the possession of firearms count, to 20 years (maximum life imprisonment) on the use of firearms count, and to 18 years (maximum 20 years) on the count of possession of explosives with intent to endanger life or property. Counts 1 and 3 were ordered to be concurrent but 5 years of those concurrent sentences were ordered to run consecutively to count 2, making a total of 25 years. On appeal

Held :

(1) Although the offence of escape from legal custody was pursued with reckless determination, it did not involve outside assistance and appeared to have been *ex improviso*. Since the maximum penalty was 2 years - which seemed inordinately low - the maximum was not called for. The proper sentence would be one of 18 months to which the customary one-third for plea should be applied producing a sentence of 1 year;

(2) Although it was submitted that when the judge ordered that the concurrent kidnapping sentences be served consecutively to the escape from lawful custody he failed to take into account the fact that the offences were committed as part of one transaction, there was no merit to that submission. The transaction clearly merited a sentence, as adjusted, of 4 years;

(3) As regards the submission that the sentence of 20 years in respect of the offence of use of firearms with intent to resist arrest in *HCCC 270/96* was excessive, and that a sentence in the region of 15 to 18 years would have been appropriate, the judge was dealing with a criminal gang led by an escaped convict who, in the dead of night, while transporting explosives for an unknown but undoubtedly gravely serious criminal purpose, engaged in a fire fight with pursuing police officers in an endeavour to escape arrest. The offence was in the most serious band of such offences and it warranted the sentence of 20 years imposed by the judge. A court when sentencing in such circumstances must bear in mind the terrible risk to which police officers and, indeed, members of the public were exposed by such behaviour. Sentences must be imposed which expressed the emphatic denunciation by the community of such crimes;

(4) The explosives in count 3 of *HCCC 270/96* consisted of almost 2 kg of TNT. They had the capacity to inflict terrible damage to life and property in a crowded city such as Hong Kong. The sentence of 18 years was not excessive at all, and it was not excessive to order that 5 years be consecutive to the sentence of 20 years already imposed. A court would fail in its duty to the public if it did not impose heavy deterrent sentences in circumstances such as these;

(5) The court was not impressed by the submission that these offences were not the worst of their kind such as occurred when a criminal gang had, in effect, declared war on society. The actions of the Applicant and his gang came close to this. The sentence of 25 years overall was proper in *HCCC 270/96*;

(6) Although it was in the discretion of the court to give weight to the *ad miseracordiam* plea, which was based on the position of the Applicant as a paraplegic who had to endure grave hardship which was not the lot of the ordinary prisoner and his reduced life expectancy, such considerations should be left for the Executive;

(7) The overall sentence of 40 years and 3 months called for adjustment in accordance with the totality principle. The totality was excessive and the sentence could be varied to one of 36 years and 3 months. That would be achieved by ordering that the overall sentence of 29 years imposed on the two indictments should start to run four years prior to the expiration of the sentence which the Applicant was serving at the time when the later sentences were imposed.

Result - Appeal allowed. Sentence totalling 36 years and 3 months substituted for original sentence of 41 years and 3 months.

Money Lending

香港特別行政區訴黃國財
HKSAR v WONG Kwok-choi

香港特別行政區
高等法院上訴法庭 – 高院刑事上訴 1998 年第 636 號

*陸貽信
及萬德豪
Arthur Luk
& Jonathan
Man

#王志光
C. K. Wong

高等法院首席法官陳兆愷
高等法院上訴法庭法官梁紹中
高等法院原訟法庭法官胡國興
聆訊日期：一九九九年七月九日
宣判日期：一九九九年七月三十日

COURT OF APPEAL OF THE HIGH COURT
CRIMINAL APPEAL NO. 636 OF 1998
CHAN CJHC, LEONG JA AND WOO J
Date of Hearing : 9 JULY, 1999
Date of Judgment : 30 JULY, 1999

以過高利率貸出款項 - 罪行的嚴重性 - 加重刑罰的因素 - 多項控罪的量刑方法

申請人在區域法院先後承認 11 項以過高利率貸出款項罪，違反香港法例第 163 章《放債人條例》第 24(1)及(4)條。法官採用 9 個月監禁為量刑起點，判申請人其中 10 項罪名每罪入獄 6 個月，該 10 項控罪是申請人於控方舉證完畢後認罪的，而法官對另一項罪名則判申請人入獄 5 個月，該項控罪申請人於開審時已經認罪。法官准每項刑期中 4 個月同期執行，總刑期為 25 個月。

申請人刊登廣告招攬他人借款。一切貸款及還款均透過銀行辦理，申請人與借款人並無見面。從 1997 年到 1998 年，申請人先後 11 次貸款給不同人士，其中兩名借款人為警方的臥底探員。申請人所收取的利息為年息 900%，所涉及的貸款每次由 1,000 元至 10,000 元不等。根據案情，申請人實際借出的款項為 27,000 元，但收取之利息及還款共約 57,000 元，其中包括有些借款人只付利息而沒有歸還欠款。在整個過程中，申請人曾在電話中用粗言穢語催促借款人還款，並作出恐嚇。

1994 年，這類罪行的刑罰已大大提高。第 163 章第 24(4)條經修訂後，訂明任何人循簡易程序定罪，可處罰款 $500,000 及監禁 2 年；另外，凡循公訴程序定罪，可處罰款 $5,000,000 及監禁 10 年。

裁定：

(1) **高利貸已經不單是一個社會問題，而是一個可以導致一連串其他嚴重罪案的原因，對社會造成深遠的影響及不良的後果。由於高利貸的利息太高，向高**

利貸借款的人根本無力償還，經威迫利誘後便步上犯罪之途。為了反映這個社會問題，遏止高利貸活動及防止因高利貸而引起的非法行為造成社會不安，加重刑罰實屬必要：*R v Lui Sau-cheong* [1993] 2 HKCLR 298 一案予以考慮。

(2) 如果貸款的活動部分是有組織的經營，或收取較法定的最高利率高出極多的利率，即使沒有涉及其他加重刑罰的因素，除非有特殊情況，每項控罪經審訊後一般量刑起點應該是 9 個月至 1 年。如果涉及黑社會、暴力、恐嚇的犯法行為或一些不正當的行為或手段，即使沒有其他控罪，量刑起點也該相應提高。牽涉非法行為或不正當手段越多，刑期便越高。這樣才可以反映這種罪行的嚴重性和收阻嚇作用。

(3) 由於申請人的活動是有系統的、公開的，而所收取的利息為每年 900%，也曾恐嚇受害人。因此，法官採取 9 個月為量刑起點並沒有犯錯。雖然申請人在控方舉證完畢後才承認其中 10 項控罪，但是法官還是給予 20%的折扣，並因為申請人沒有犯罪紀錄，再度給予減刑，可見法官已是非常寬鬆了。

(4) 雖然辯方陳詞指法官沒有考慮總刑期的原則，但法官沒有就每項控罪被其他同樣控罪增加嚴重性而提高刑期；法官根據 *HKSAR v Wong Lou-tak* [1998] 2 HKC 607 一案的判例是可以這樣做的。他只按每項控罪個別判處一個合適的刑期，再按總體量刑的原則酌量判處部分刑期同期執行，部分刑期分期執行。故此法官最終所判的 25 個月總刑期並沒有明顯過重。

拒絕申請。

[English digest of CA 636/98, above] WONG Kwok-choi

Money lending at excessive rate/Gravity of offence/ Aggravating factors/Approach to sentencing for multiple offences

The Applicant pleaded guilty in the District Court to 11 charges of lending money at excessive rates of interest, contrary to s 24(1) and (4) of the Money Lenders Ordinance, Cap 163. The judge took a starting point of 9 months' imprisonment, and the Applicant was sentenced to 6 months' imprisonment on each of the 10 charges to which he pleaded guilty at the end of the prosecution case, and to 5 months' imprisonment on the other charge, to which he pleaded guilty *ab initio*. The judge ordered that 4 months of each of the terms run concurrently, making a total of 25 months' imprisonment.

The Applicant used advertisements to solicit people to borrow money from him. Loans and repayments were all handled through banks. The Applicant and the borrowers did not meet each other. In 1997/1998 he advanced loans to different persons on eleven occasions, two of those persons being undercover police officers. Interest charged by the Applicant on those loans was at the rate of 900% per annum, and the amount of the loans varied from $1,000 to $10,000. The facts revealed that although the actual money lent by the Applicant was $27,000, the principal repaid together with the interest obtained by him was about $57,000. Some borrowers only repaid interest

without making any repayment of the actual loan. In the course of his dealings, the Applicant used foul language on the phone to intimidate and press the borrowers for repayment.

In 1994, the penalties for this offence were increased significantly. S 24(4), as amended, provided a maximum penalty on summary conviction of a fine of $500,000, and imprisonment for 2 years, and, on conviction on indictment, a fine of $5,000,000, and imprisonment for 10 years.

Held :

(1) Loan-sharking was not simply a social problem. It was something that might cause other more serious crimes and had far-reaching consequences and adverse effects on society. As the interest charged was so high it was beyond the ability of the borrowers to make repayments, and they would be driven to commit offences under inducement and coercion. To reflect this social problem, to discourage loan-sharking activities and to prevent the social unrest caused by illegal acts arising out of such activities, it was necessary to increase sentences: *R v Lui Sau-cheong* [1993] 2 HKCLR 298, considered;

(2) If the money lending activity was part of a systematic operation, or if the interest charged was substantially higher than the maximum permitted by law, the general starting point should be 9 months to 1 year even in the absence of other aggravating factors, unless there were exceptional circumstances. If criminal acts in connection with triad societies, violence and intimidation, or other improper acts or means were involved, the starting point should be increased even in the absence of other offences. The more illegal acts or improper means involved the higher the sentence. That was the only means to reflect the gravity of the offence and to deter it;

(3) As the activities of the Applicant were systematic and open, and as he charged interest at 900% per annum, and threatened his victims, the judge did not err in adopting a starting point of 9 months. Although the Applicant only pleaded guilty to 10 of the charges at the end of the prosecution case, the judge had been very lenient in still giving him a discount of 20% with a further discount for a clear record;

(4) Although it was submitted that the judge had not taken into account totality, he did not increase the length of sentence on each offence - as he might have done, on the authority of *HKSAR v Wong Lou-tak* [1998] 2 HKC 607 - on account of the fact that it was aggravated by other similar offences. He simply imposed an appropriate sentence on each individual offence, and made the sentences partly concurrent and partly consecutive after taking into account totality. The final sentence of 25 months was not manifestly excessive.

Result – Application dismissed.

Obscene Articles

MAs 1119 & 1120/98

MOK Kwok-wing

Lugar Mawson DJ

(13.1.99)

*Chan Fung-shan

#I/P

Selling obscene video discs/High degree of obscenity/Reduced discount if caught red-handed/Effect of repeating offence on bail/Prevalence of offence
出售淫褻電影光碟 – 高度淫褻 – 如犯案時當場被捕，刑期減免將會減少 – 保釋期間再犯罪行的影響 – 罪行的普遍程度

The Appellant pleaded guilty to two offences of possession of obscene articles for the purposes of publication. He was imprisoned for 9 months on each offence.

The facts showed that on two separate days in September 1998 in a shop in the Kwun Tong Plaza, the Appellant was found by an undercover officer to be selling obscene video compact discs. On the first occasion he had 223 such discs, and, on the second, 234.

The magistrate viewed a selection of the discs and concluded that the degree of obscenity shown in each was towards the higher end of the scale.

The magistrate noted that this type of offence was prevalent and that the Plaza in question was notorious for the sale of such discs. Further, the shop itself was notorious for the sale of obscene articles, and had been the location of many offences dealt with by the magistrates at Kwun Tong in the 9 months prior to sentence.

The magistrate stated in his reasons for sentence that the magistrates at Kwun Tong had been issuing warnings since early 1998 that immediate custodial sentences would be imposed even on first offenders in view of the prevalence of such offences in that area.

Having reminded himself that the maximum penalty for the offence was 3 years' imprisonment and a fine of $1 million, the magistrate concluded that as there were almost 500 discs with a relatively high degree of obscenity, 12 months' imprisonment was the appropriate starting point for sentence after trial in respect of each offence. He allowed a reduction for the plea of guilty, but not the usual one-third as the Appellant was caught red-handed and had chosen to repeat the offence. On appeal

Held :

(1) The sentences were entirely correct. The courts had made it very clear that those who chose to sell such obscene articles must expect to receive immediate sentences of imprisonment, even if first offenders;

(2) As the Appellant was caught red-handed, and as he committed the second offence whilst on bail for the first, he was only entitled to a discount of 25%, rather than to the usual one-third;

(3) The magistrate rightly took into consideration the totality principle, and ordered that 6 months only of the second sentence should run concurrently to the first, thereby making a total of 12 months for the two offences.

Result – Appeal dismissed.

MA 1225/98 NGAI Yuk-ning

Woo J

(18.3.99)

*Simon Tam

#Y L Cheung

Possession of obscene VCDs/Customary starting point/ Prevalence of offence relevant/Efficacy of training centre order
管有淫褻視像光碟 – 慣常的量刑起點 – 罪行的普遍程度是相關因素 – 教導所令對被告有效用

The Appellant was jointly charged with another person for the offence of possession of obscene articles for the purpose of publication, contrary to s 21(1)(b) of the Control of Obscene and Indecent Articles Ordinance. The articles in question were 354 obscene VCDs. He was convicted after trial, and sentenced to detention in the training centre.

Before passing sentence, the magistrate considered pre-sentence reports. No credit was given for a clear record, as the Appellant had three previous convictions, albeit dissimilar. The magistrate took the VCDs at issue at the bottom end of the obscenity scale when considering sentence. He noted that not a day passed at the Eastern Magistracy without at least one case of this type having to be dealt with, and that the address in the charge was itself notorious for this sort of trade. On appeal

Held :

(1) Recent sentencing authorities indicated that the magistrate had not erred. Starting points for sentence of 12 months for such offences had recently been approved: *HKSAR v Chan Kin-hung* MAs 1025 & 1026/98, *HKSAR v Poon Leung-tak* MA 1195/98;

(2) It was proper for the magistrate to take into account the prevalence of the offence. The sentence was not only deterrent in nature, but would also enable the Appellant to develop more insight into his problems.

Result - Appeal dismissed.

MA 209/99 POON Ki-chiu

Woo J

(31.3.99)

*P Madigan

#J Kwong

Sentencing for possession of obscene VCDs/One-third discount appropriate where accused caught red-handed
對管有淫褻視像光碟罪行應判處的刑罰 – 被告即使當場被捕也獲三分一刑期減免的做法是恰當的

The Appellant pleaded guilty to the offence of possession of obscene articles for the purpose of publication.

The admitted facts showed that the Appellant was shouting slogans to entice customers to go into a shop in Kwun Tong Plaza, a place notorious for such offences. Upon arrest he admitted that he was the person in charge of selling obscene VCDs. The number of obscene VCDs involved was 429.

The magistrate took a starting point of 12 months' imprisonment, and allowed a reduction to recognise the plea of guilty. He imposed a sentence of 9 months' imprisonment. The magistrate declined to reduce the sentence by the customary one-third because he considered that the Appellant had been caught red-handed.

On appeal, it was submitted that the magistrate erred in not adopting the usual reduction of one-third of the starting point. To this the Respondent replied that the sentence imposed was appropriate as the starting point was on the low side and, taking into account the difference of one month, the sentence of 9 months should be upheld.

Held :

(1) The adoption of a starting point of 12 months was appropriately imposed in the circumstances, including the 429 obscene VCDs which were involved;

(2) The usual reduction from the starting point by one-third should be maintained, even where the accused was caught red-handed: *R v Yu Man-wu* Cr App 214/95, *HKSAR v Wong Ka-kuen & Another* Cr App 35/98. The Appellant took the first opportunity before the magistrate to enter a guilty plea.

Result – Appeal allowed and sentence of 8 months substituted.

MAs 704, 777, 779 & 795/99

Beeson J

(8.10.99)

*Polly Wan

#M Panesar

(1) YU Man-lung
(2) LAM Siu-wah
(3) KWAN Shiu-chung
(4) CHU Sai-pun

Publishing obscene VCDs/Deterrent sentences required/ Sentencing considerations/Object of legislation/Comments on whether necessary for court to view VCDs when obscenity described in admitted facts
發布淫褻影像光碟 - 須判阻嚇性刑罰 - 判刑時須考慮的事宜 - 立法目的 - 就控辯雙方承認事實陳述書內已述說影像光碟的淫褻內容而法庭是否仍有需要觀看有關影像光碟一事作出評論

Each of the Appellants appealed against sentences of 8, or, in the case of A1, 9 months' imprisonment, imposed on them in the North Kowloon Magistracy, by the same magistrate, for a single offence of publishing obscene articles.

The facts of each case were almost identical. Police entered four shops in each of which one of the Appellants was apparently looking after the business. Using marked money the officers bought a few VCDs, the number varying from 3 to 5. In each case the VCDs were obscene and admitted by the Appellants to be so. Each Appellant was charged with one offence of publishing an obscene article, contrary to s 21(1)(a) of the Control of Obscene and Indecent Articles Ordinance, Cap 390.

The officers noted the number of VCDs in each shop, which was 2,000, 10,000, 700 and 300 respectively, but did not apparently seize or examine their contents. Each Appellant told the officers that the VCDs in those numbers were also obscene, but no charges of possession were laid in respect of them. All Appellants pleaded guilty to the publishing charges, either prior to the date of trial or on the date fixed for trial. All admitted the obscene nature of the VCDs the subject of the charge and did not dispute the facts. The differences in the circumstances and the records of the Appellants were not such as to warrant any of them being treated with particular leniency or differently from the others.

In assessing a proper starting point, the magistrate noted that the catchment area for the North Kowloon Magistracy was notorious for offences of this type. He referred to the existence of various premises, clearly known to the courts and to law enforcement officers, as perennial venues for such sales and commented on the prevalence of the offence of this nature in the area.

For sentencing purposes, the magistrate took the degree of obscenity at the lowest level based, not on his own viewing of the tapes, but on the admissions made by the Appellants under s 65C, Cap 221. In each case the Appellant had watched the tapes with the police officers and agreed to the brief descriptions of the obscene activities. In adopting this procedure the magistrate made it clear that he was aware of the admonition in *AG v Chow Kun-lap* [1996] 2 HKC 600, but that as he dealt with an average of 65-75 cases a day there was insufficient time to view even a selection of offending VCDs.

In fixing the starting point for sentence for the Appellants the magistrate considered two judgments of March 1999, which examined various cases on sentences for the offences of publishing and possession of obscene articles. In *HKSAR v Ngai Yuk-ning* MA 1255/98, a training centre order was approved for possession of 354 articles, and in *HKSAR v Poon Ki-chiu* MA 209/99, where possession of 429 articles was involved, a starting point of 12 months was approved for this offence.

Each of the Appellants submitted that a starting point of 12 months was too high given the small number of VCDs for each of the publishing charges; that the level of obscenity was low and that the Appellants were not shop owners or persons-in-charge, but merely sales persons. Complaint was also made that no account was taken of the fact that police acted as undercover agents in making these purchases. It was additionally said that the magistrate sentenced the Appellants on the basis of the shop stock that was not seized, as if all those items had been obscene articles, although the Appellants did not know what the contents were and although they were not seized. The nub of the appeals was that the number of VCDs sold should affect the length of sentence, that the publication of 3 or 5 VCDs merited a shorter sentence than the sale of 50, or 100, or 1,000. An analogy was drawn with the tariff guidelines for dangerous drugs and it was suggested that just as the quantity of narcotic affected the length of sentence, so too should the number of VCDs published or possessed of offences of this nature in the area.

Held :

(1) There was no validity to the complaint that no account was taken of the fact that police acted as undercover agents in making these purchases. The police were entitled to investigate in that manner when they were trying to stamp out illegal transactions. The acts of officers did not force the Appellants to do acts which they would not otherwise have been prepared to do;

(2) The magistrate did not sentence the Appellants for the unseized and unexamined stock, but merely noted the presence of other VCDs as an indication that the premises were being operated as a retail sales outlet, which was a proper inference to draw from the facts;

(3) Although the number of articles was one factor that could be taken into account, there was no Court of Appeal case which stated that as the chief criterion. In publishing charges the number of articles purchased was, of necessity, arbitrary one, depending as it must to a certain extent on the amount of cash given to the purchasing officers and to the number of items they were instructed, or thought expedient, to buy at any one time;

(4) It was necessary to consider the purpose of the Ordinance and the punishments set out thereunder. The maximum sentence for this offence was 3 years and a maximum fine of $1m. The legislation existed not just for the purpose of regulating the sale and supply of obscene articles, but for the purpose of stopping such trade altogether. Just as narcotics dealers could not continue their nefarious work without the assistance of couriers and petty traffickers, the trade in obscene VCDs could not continue without the assistance of those who were prepared to take the risk of working in shops and on stalls selling such items;

(5) Longer sentences of imprisonment had recently been passed on offenders. However, the trade appeared still to flourish. The rewards for the '*Mr Bigs*' who ran the trade were so great that they could afford to reopen sales venues almost as soon as they were raided. It was noticeable that some of the salesmen were arrested and then rearrested for similar offences even before the

court had had time to deal with the earlier cases. Shops returned to the same venue under slightly different guises. Fear of the penalties they might suffer and, for repeat offenders, the fact of imprisonment, did not appear to be sufficient to deter people from taking posts as salesmen. Although the court had power under the Ordinance to impose heavy fines for these offences, such fines, in reality, could not be imposed on the generally impecunious salesmen who appeared before the court for these offences. Only by truly deterrent sentences could these salesmen, without whom the trade would largely fold, be discouraged from taking up or continuing this work;

(6) A sentencing court would take into account the number of articles, the level of obscenity, the circumstances of the sale, the sophistication of the method of sale, and the prevalence of the offence, as well as the factors personal to the offender. However, deterrence, not just for the offender himself but also for others who found the trade so lucrative, was the main consideration: *R v Lam Pak-ying* MAs 636 & 637/97;

(7) The magistrate was entitled to take the starting point that he did. The sentences were not excessive. However, as A1 had not received the usual one-third discount for his guilty plea, his sentence would be reduced to one of 8 months.

Result - Appeal of A1 allowed. Appeals of A2 and A3 dismissed.

Per cur - The case of *AG v Chow Kun-lap* (supra) appeared, at first reading, to suggest that a magistrate was required to watch all allegedly offending items before reaching any decision. However, the real requirement to be drawn from that case was that a magistrate must make a finding as to the level of obscenity of the offending item, for sentencing purposes. In *Chow Kun-lap* the magistrate failed to make such a finding. Given that in all these cases the Appellants had admitted the items were obscene and that there was material in the form of admitted facts under s 65C on which the magistrate could make a finding and from which he could assess the level of the obscenity, it appeared unnecessary for him to have viewed the material himself. The described acts in the admitted facts indicated that those tapes covered heterosexual intercourse, shots of male and female genitalia and heterosexual acts of cunnilingus and fellatio. A blanket requirement that a magistrate view all offending VCDs, even when they had been viewed by a defendant in company of a police officer and admitted to be obscene and when the described obscenity was couched as admitted facts, appeared otiose and to impose an unduly heavy burden on magistrates, particularly given the proliferation of these cases. What was necessary was that there existed sufficient evidence on which a magistrate could, and did, make findings both as to the existence of obscenity and as to the level thereof. Where a defendant challenged the degree of obscenity the magistrate would be required to make his own assessment of that obscenity, but that need not necessarily involve him watching tapes from beginning to end: the judicious use of a fast-winding device would be sufficient to establish the obscene nature of most tapes.

Offences under LegCo Ordinance

香港特別行政區訴梁國雄
HKSAR v LEUNG Kwok-hung

***陳雨舟**
Johnny Chan

高等法院原訟法庭 – 高院裁判法院上訴 1999 年第 561 號

高等法院原訟法庭法官胡國興
聆訊日期：一九九九年十一月八日
宣判日期：一九九九年十一月十五日

#上訴人自辯
I/P

COURT OF FIRST INSTANCE OF THE HIGH COURT
MAGISTRACY APPEAL NO. 561 OF 1999
WOO J
Date of Hearing: 8 NOVEMBER, 1999
Date of Judgment: 15 NOVEMBER, 1999

引起混亂致令立法會的會議程序相當可能中斷 - 有同類犯罪紀錄和藐視程度都是相關的考慮因素 - 判予緩刑恰當

上訴人被控一項罪名，指他在立法會大樓內，在立法會舉行會議時，引起擾亂，致令立法會的會議程序相當可能中斷。上訴人經審訊後被裁定罪名成立，判處入獄 14 天，緩刑一年。上訴人不服判罪的上訴被駁回。至於判刑上訴方面：

裁決：
(1) **不可以因上訴人有同類犯罪記錄或有犯同類罪行的傾向而處以較重的刑罰。如果他沒有前科，法庭可以姑念他初犯而對他比較仁慈，處以較輕的刑罰，但對於一個對某類犯罪有經驗又決意一犯再犯的人，這會是加重刑罰的因素：***HKSAR v Ng Chi-man* [1999] 1 HKC 632。

(2) **就此案案情來說，案發時特區首長在立法會中正進行與他的施政報告有關的答問，上訴人引起擾亂，致令會議中斷。上訴人的行為不僅使與會人士失去集中力，招致休會，使會議延長，耗費人力及公帑，更且藐視立法會。基於上訴人的行為及藐視的程度，判刑是適當的。**

上訴駁回。

[English digest of MA 561/99 above]

LEUNG Kwok-hung

Creating a disturbance likely to interrupt the Legislative Council proceedings/Relevance of previous conviction of similar offence and extent of contempt/Suspended sentence appropriate

Woo J

(15.11.99)

*Johnny Chan

The Appellant was convicted after trial of one charge of creating a disturbance which was likely to interrupt the proceedings of the Legislative Council while the Council was sitting inside the Legislative Council Building. He was sentenced to 14 days' imprisonment suspended for one year. His appeal against his conviction was dismissed. On appeal against sentence

#I/P

Held :

(1) The punishment imposed on the Appellant should not be more severe only because he had a previous conviction of a similar offence or had an inclination to commit a similar offence. If he had a clear record, he could be treated leniently and given a lighter sentence. However, for a determined offender experienced in certain kinds of offence, that would be an aggravating factor: *HKSAR v Ng Chi-man* [1999] 1 HKC 632;

(2) According to the facts of this case, at the material time, the Chief Executive of the HKSAR was answering questions in relation to his Policy Address at the Legislative Council. The disturbance created by the Appellant interrupted the meeting. Not only had the Appellant's conduct distracted the attention of the people attending the meeting, caused the meeting to be adjourned and hence extended, and wasted human resources and public money, it was also an expression of contempt of the Legislative Council. In view of the Appellant's conduct and the extent of contempt, the sentence was appropriate.

Result - Appeal dismissed.

OSCO

MA 501/99

Burrell J

(4.10.99)

(1) LOK Kar-win
(2) CHAN Chi-keung
(3) WAI Kwan-lung

*A A Bruce SC & G Di Fazio

#L Lok SC & David Ma (1)
Cheng Huan SC & Leo Chan (2)
Gary Plowman SC & P Duncan (3)

Dealing with proceeds of indictable offence/Enhancement of starting point/Principal witness convicted of conspiracy to cheat at gambling/Sentencing considerations
處理從可公訴罪行的得益 - 提高量刑起點 - 主要證人串謀在賭博時行騙被判罪名成立 - 判刑時須考慮的事宜

The Appellants were each convicted of an offence of dealing with the proceeds of an indictable offence, contrary to s 25(1) of the Organized and Serious Crimes Ordinance, Cap 455.

The case for the prosecution was that the Appellants, who were professional footballers, were involved in a match-fixing scheme when they represented Hong Kong against Thailand in a World Cup qualifying match in Bangkok in 1997. It was alleged that they were parties to a plan whereby Hong Kong would lose the match, preferably by a score of 2-0, and they would then collect gambling winnings as a result. The convictions under s 25(1) were based on the fact that they received $30,000 each as winnings upon their return to Hong Kong.

The magistrate sentenced each Appellant to 22 months' imprisonment. He took as a starting point 18 months and added 4 months for aggravating factors. The two aggravating factors were expressed as being, first, the international aspect of the case, which had the potential to damage Hong Kong's international sporting reputation and seriously impugned the reputation for integrity of Hong Kong sportsmen and women, and, second, the acts of the accused were a gross breach of the trust reposed in them by the selection committee on behalf of the people of Hong Kong. A1 and A2 were also fined $30,000.

On appeal, it was submitted that 22 months was wrong in principle and manifestly excessive. It was said that the aggravating features were either not aggravating or, if they were, should have been taken into account in deciding a starting point for this case and did not merit an increase of almost 25% on the magistrate's starting point.

Held :

(1) In passing a deterrent sentence on first offenders and increasing the sentence because of features which were either not aggravating or, if they were, should not have merited a 25% enhancement, the magistrate erred;

(2) Anybody convicted of this type of offence in such circumstances could expect a prison sentence to add to the devastation which resulted from the almost inevitable loss of career;

(3) PW1, the prime prosecution witness and the prime mover in the scheme, pleaded guilty to conspiracy to cheat at gambling and was sentenced to 12 months' imprisonment - it was reasonable to suppose the starting point for sentence was 18 months. As it was appropriate to assess the relative criminality of the Appellants from that starting point to avoid any sense of grievance, a proper sentence for one of PW1's recruits convicted after trial for the offence of conspiracy to cheat at gambling would be 15 months' imprisonment. The offence contrary to s 25(1), Cap 455, should be regarded with the same seriousness even though proof of that offence was complete merely on proof of receipt of the winnings in Hong Kong with the requisite knowledge. A sentence of 15 months was just and proper for A1 and A2, but not for A3, who was only recruited at the last minute, and who only played for ten minutes and had resisted previous similar approaches by PW1.

Result - Appeals allowed. Sentences of 15 months, 15 months and 12 months substituted for, respectively, A1, A2 and A3. The fines of $30,000 remained.

Public Order Offences

MA 1222/98 TUNG Wai-cheong

McMahon DJ

(25.3.99)

*G Lam

#A C Macrae

Unlawful assembly/Offence committed in disregard of law and order/Intimidatory behaviour attracts deterrence
非法集結 – 所犯罪行漠視法紀 – 恐嚇行為應判處阻嚇性刑罰

The Appellant was convicted after trial of an offence of unlawful assembly, contrary to s 18(3) of the Public Order Ordinance, Cap 245, and sentenced to 4 months' imprisonment.

The maximum penalty for the offence was, on summary conviction, 3 years' imprisonment and, on indictment, 5 years.

The facts showed that the Appellant and others gathered in Wanchai late at night in a manner which caused alarm to the management of a local bar. When police arrived, the group attempted to flee.

The Appellant was aged 29 years at the time of the offence, and had prior convictions. There was little that could be said for him in mitigation apart from his family history and even that gave no rise to significant mitigation. On appeal

Held :

Any sentence for an offence of this nature depended very much on the facts of the individual case. The present offence was serious and committed in complete disregard for law and order. The magistrate was right to say that intimidatory behaviour of this sort had to attract a sentence involving deterrence.

Result – Appeal dismissed.

Road Traffic

MA 310/98 LEUNG Wing-fai

Nguyen J

(30.6.98)

*Johnny Chan

#Ernest Lim

Reckless driving causing death/Speeding/Sentences to reflect tragic consequences/Imprisonment proper
魯莽駕駛引致他人死亡 – 超速駕駛 – 判刑須反映被告人所造成的悲慘後果 – 判處監禁是適當的

The Appellant pleaded guilty to a charge of reckless driving causing death. He was sentenced to 6 months' imprisonment.

The Appellant was driving along the Island Eastern Corridor at about midnight on 20 August 1997. He was driving at a speed of about 100 kph when the speed limit was 70 kph. He was following a private car driven by the 42 year old deceased. In the adjacent lane was a goods vehicle going in the same direction. In an endeavour to overtake the goods vehicle and also the vehicle driven by the deceased, the Appellant changed lanes from the lane of the deceased's vehicle to the lane where the goods vehicle was going. In the course of changing lanes, the Appellant's vehicle collided into the rear of the deceased's vehicle and caused the deceased's vehicle to surge forward and mount the southern concrete barrier. The deceased's vehicle spun clockwise and slid along the first lane of the Island Eastern Corridor. It caught fire and exploded. The deceased was trapped inside his vehicle and was later rescued by firemen. He was severely burnt and was certified dead the next morning.

The goods vehicle which was being overtaken also could not stop on time, and collided with the Appellant's vehicle. Its nearside front collided into the nearside rear of the Appellant's vehicle. The driver of the goods vehicle lost control of his vehicle and the offside rear of the goods vehicle grazed the concrete central embankment. On appeal

Held :

(1) It was quite properly conceded that the magistrate was entitled to take into account the fact that as a result of the reckless driving by the Appellant an innocent motorist was killed;

(2) The Appellant was clearly speeding when he was travelling at 100 kph. Whether or not the magistrate was right to say that the petrol storage tank of the deceased's car posed a danger, the fact remained that it was obviously because of the collision that the gas storage tank exploded and caused the fire;

(3) The act of reckless driving by the Appellant caused danger to the occupants of two other vehicles, and the Appellant, at the time he changed lanes in the manner that he did, must have realised that he was causing danger to the drivers of the two other vehicles. The sentence imposed was not excessive;

(4) Drivers who drove on the roads of Hong Kong in a reckless fashion had to be warned that if they carried on driving in that way and tragic consequences arose, they had to bear the consequences of that bad driving. Unless everyone drove with extreme care, dangers would be posed to motorists and to pedestrians.

Result - Appeal dismissed.

MA 1124/98 LAU Shu-wing

Stock J

(8.12.98)

*Wesley Wong

#J Cheung

Driving with alcohol concentration above limit/Concentration over twice permitted limit/Period of suspension properly related to level of alcohol
駕駛時酒精濃度超出限制 – 濃度超過准許限制兩倍 – 按酒精濃度判處停牌期是恰當的

The Appellant drove his vehicle along a slip road to the Island Eastern Corridor and was involved in a collision with two other vehicles. He was given a breath test which proved positive, showing 87 micrograms of alcohol in 100 millilitres of breath. At the police station there was another test, an '*evidential breath test*', which revealed 76 micrograms of alcohol in 100 millilitres of breath, more than twice the permitted level of 35 micrograms. He was charged with driving with an alcohol concentration above the prescribed limit.

The Appellant pleaded guilty and was fined $7,000 and disqualified from driving for 18 months. The magistrate assumed in his favour that he was blameless in the accident.

In determining the length of the disqualification, the magistrate was motivated largely by the very high alcohol concentration which was over twice the permitted limit.

On appeal, it was said that the sentence was too severe given, in particular, that the drinking in fact led to no danger and was not said to be bad.

The attention of the court was drawn to the fact that according to the statistics and known practice, first offenders who pleaded guilty to offences of this kind were normally fined and suspended from driving for 12 months, and it was said that such a period of suspension was appropriate in this case.

Held :

The magistrate was perfectly entitled to take a more serious view the higher the level of alcohol in the breath, and where it was over two times the permitted level it would be surprising if the disqualification were not higher than 12 months, regardless whether an accident had been occasioned and regardless whether the driver had caused an accident.

Result – Appeal dismissed.

MA 854/98 LIU Wai-ho

Recorder Lok SC

(11.12.98)

*Vincent Wong

#Ching Y Wong SC & H Au Yeung

Driving while disqualified/Effect of emergency/Whether flagrant breach of disqualification order/Effect of previous convictions
在駕駛資格被取消期間駕駛 – 緊急情況的影響 – 是否公然違反駕駛資格取消令 – 犯罪紀錄的影響

The Appellant pleaded guilty to offences of driving while disqualified, driving a motor vehicle without third party insurance, and driving in a prohibited zone.

In his reasons for sentence, the magistrate referred to the '*dreadful driving record*', by which he meant the three previous disqualifications from driving ordered under s 12(2)(b) of the Road Traffic (Driving-Offence Points) Ordinance. He referred to *R v Chan Hon-kiu* MA 913/86, where it was said that provided that the breach of the disqualification order was not '*flagrant*', it was not necessary to impose an immediate custodial sentence for the breach.

The case of the Appellant at trial was that he drove while disqualified because he had received a telephone call to request him to take a friend to a destination because the girlfriend of that friend was attempting suicide. It had not been possible to get a taxi.

On appeal against the sentence of 7 days' imprisonment imposed for the offence of driving while disqualified, it was said that as the '*dreadful driving record*' referred to by the magistrate was that of three previous disqualification orders under s 12(2)(b) of the Road Traffic (Driving-Offence Points) Ordinance, there had never been any previous convictions for driving while disqualified, and the present case was not a flagrant breach.

Held :

(1) It was a well-established sentencing principle that previous convictions merely disentitled a defendant to any sympathy from the court. They were not a ground for increasing the normal sentence for that offence: *R v Ng Fung-king, Cinderella* [1993] 2 HKCLR 219; *R v Queen* [1981] 3 Cr App R (S) 245;

(2) Although the magistrate did not regard the explanation as amounting to an emergency which would have justified the act of driving, it was not clear that the breach was flagrant. The flagrancy of a breach depended on such factors as the reasons for driving, the manner of driving, etc. It was not realistic to lay down any hard and fast rule.

Result - Appeal allowed. Sentence of 7 days' imprisonment suspended for 6 months.

MA 684/98 LIU Chung-kan

Lugar Mawson DJ

(16.12.98)

*Gary Lam

#I/P

Driving while disqualified/Taking sick spouse to hospital/ Special reason not to order disqualification considered
在駕駛資格被取消期間駕駛 – 載送患病配偶到醫院 – 法庭曾考慮沒有執行取消駕駛資格處分的特殊原因

The Appellant was convicted of the offence of driving while disqualified. He was disqualified from driving for 12 months.

The facts showed that the Appellant's wife needed to be taken to hospital urgently, and he drove her there. Having delivered his wife safely into the hands of the doctors, he started to drive back when he was stopped. On appeal

Held :

What the Appellant should have done was to have abandoned the car at the hospital, or ask somebody to drive it for him, rather than have attempted to drive it back himself. Although the act of driving to the hospital might be regarded as excusable and as a special reason not to impose the mandatory minimum period of disqualification of 12 months, the special reason passed as soon as the wife was safe at the hospital.

Result - Appeal dismissed.

MA 510/99 WONG Chi-ming

Yeung J

(13.8.99)

*Jonathan Man

#Joseph Tse

Driving while disqualified and using vehicle without insurance/Gravamen of offence/Sentencing considerations
於取消駕駛資格期間駕駛和沒有保險而使用汽車 - 罪行要點 - 量刑的考慮因素

The Appellant pleaded guilty to a charge of driving while disqualified and using a vehicle without insurance. He was sentenced to 4 months' imprisonment on each charge, to run concurrently. A suspended sentence of 2 months for identical offences was activated and ordered to run consecutively. On appeal

Held:

The offences of driving whilst disqualified and of driving without insurance were very serious. Their seriousness lay in the possibility that victims in traffic accidents might be left without any compensation. The Appellant had been disqualified on four previous occasions. He also had previous convictions of using a vehicle without insurance and driving whilst disqualified. At the time of the present offences, he was under a suspended sentence of imprisonment for identical offences. The Appellant's conduct was a flagrant breach of the court's order, and a total sentence of 6 months was proper.

Result - Appeal dismissed.

MA 617/99 LEUNG Kam-fung

Yeung J

(25.8.99)

*Sin Pui-ha

#Peter Cosgrove

Driving vehicle with excess alcohol concentration/Accident caused by carelessness not alcohol/Excess alcohol level not high/Length of period of disqualification
在血液含酒精濃度過高的情況下駕駛車輛 - 意外是由不小心而非酒精所引致 - 逾限的酒精濃度不高 - 取消駕駛資格的期限

The Appellant pleaded guilty to an offence of careless driving and an offence of driving a vehicle with excess alcohol concentration. In respect of the first charge she was fined $2,000, and, in respect of the second, she was fined $3,000 and disqualified for 18 months. On appeal, it was submitted that the period of disqualification from driving was excessive.

The facts showed that a traffic accident occurred due to the carelessness of the Appellant. She entered a lane she should not have and caused a minor accident with a taxi. She was subsequently found to have an alcohol concentration which exceeded the permitted level by 37%. The Appellant had a clear record and the offence was said to have been caused by social drinking after work. There was no suggestion that the excessive alcohol concentration caused or contributed to the traffic accident.

Held:

(1) The offence of driving with an excessive alcohol concentration was serious as the consequence could be catastrophic;

(2) This was not a very bad case of its type. The excessive level of alcohol concentration was not high. The Appellant had a clear record and pleaded guilty;

(3) The traffic accident was minor and no one was injured. The accident was not the result of any recklessness on her part and the offence was committed because the Appellant perhaps failed to notice the traffic signal. Further, the alcohol concentration did not cause or contribute to the accident;

(4) It was not likely that the offence would be repeated. There was justification for reducing the period of disqualification, particularly as a substantial fine had been imposed.

Result - Appeal allowed. Disqualification order of 12 months substituted.

MA 1020/99 CHEUNG Sik-wai, Terry

Beeson J

(23.11.99)

*P K Madigan

#I/P

Driving whilst disqualified/Repeat offender subject to suspended sentence/Imprisonment appropriate
在取消駕駛資格期間駕駛 - 再犯者曾被判處的緩刑刑期還未屆滿 - 判監恰當

The Appellant pleaded guilty to three charges, namely, driving in excess of the speed limit, driving whilst disqualified, and using a vehicle without third party insurance. For the offence of driving whilst disqualified, he was sentenced to 4 months' imprisonment - the maximum penalty being imprisonment for 12 months and a fine of $10,000. A suspended sentence of 2 months for an identical offence was activated. On appeal

Held :

(1) The magistrate took all matters into consideration and also noted the Appellant's shocking driving record. The offence was committed only 9 months after the Appellant had been given a sentence of 2 months' imprisonment suspended for 36 months for an identical offence. The suspended sentence was activated, as it should have been, and ordered to run consecutively to this sentence. The Appellant clearly adopted a cavalier attitude both to road regulations and the penalties imposed on him by the court.

Result - Appeal dismissed.

Robbery

CA 591/98

Power VP & Stuart-Moore JA

(11.2.99)

*B Moorfoot

#I/P

LAU Kwun-wing

Training centre order/Complaint of sentencing disparity/ Persistent offender out of control/Failure of probationary orders
教導所令 – 投訴判刑不一致 – 屢犯不改的慣犯 – 感化令對被告欠缺作用

The Applicant was convicted of charges of robbery and of attempted robbery. He was sentenced to detention in a training centre.

The facts showed that the Applicant, together with a companion, accosted students whom they punched and robbed.

At first instance, the Applicant complained that he would feel a sense of grievance if he was sent to a training centre as he would be receiving the same punishment as the other offender who had committed more serious offences than he had. The judge told him that he had to realise that, quite apart from the rehabilitation aspect of the training centre, he was older than the other offender and had a worse criminal record having been before the court on five previous occasions. It was explained to the Applicant that although he had been put on probation on several occasions that had not deterred him from committing more serious offences. The judge told the Applicant that the amount of time he spent in the training centre was up to him, in the sense that if he applied himself diligently to the courses there he would be able to learn a trade and might be approved for earlier release.

On appeal, it was submitted that the sentence was too severe, particularly as the other offender received the same punishment.

Held :

There was no merit to the submissions. The Applicant was a persistent offender who was clearly out of control. The judge had no option but to act as she did, making the training centre order which it was to be hoped would bring home to him the gravity of his conduct.

Result - Application dismissed.

CA 594/98

Power VP Mayo & Stuart-Moore JJA

(23.3.99)

*A Luk & Laura Ng

#S Cotsen

CHAN Ka-wah

Criminal record/Court in error in scaling down customary discount after guilty plea
刑事記錄 – 法庭削減被告因認罪而可得的慣常刑期減免是錯誤的

The Applicant pleaded guilty to one count of robbery and one count of attempted robbery. He was sentenced to consecutive terms of imprisonment of, respectively, 4½years and 6 years.

When passing sentence, the judge observed:

> *'Now, the defendant has pleaded guilty to both the charges and he is entitled to leniency on that account. He has a long record, unfortunately, which is something which usually tends to go to reduce the amount of leniency which can be extended to one who pleads guilty, and he did not plead guilty at the first available opportunity. I do not think that the full one-third discount can be given for the plea in this situation. I think a quarter is probably the most that can be permitted here.'*

On appeal, it was submitted, *inter alia*, that that the judge incorrectly took into account the bad record.

Held :

The judge was wrong to scale down the discount on plea on account of the bad record. In some circumstances a bad record could enhance the seriousness of the offence, but that was a separate matter. Allowing a full one-third discount, the Applicant was left with a sentence of 9 years and 8 months and, bearing in mind totality, justice would be served by the sentence being further reduced to 8 years' imprisonment.

Result – Appeal allowed.

Sexual Offence

CA 537/98

Power VP
Mayo &
Stuart-Moore
JJA

(30.3.99)

*A A Bruce
SC
& Winnie Ho

#I/P

CHAN
Yue-pan

Indecency with child/Community service order not appropriate
與兒童作出猥褻行為 – 對此種罪行判處社會服務令並不恰當

The Applicant was convicted after trial of two offences of indecency with a child, and one offence of indecent assault on a person. The complainant, a boy of 9 years, was the same in each of the charges. The Applicant was sentenced to imprisonment for 3 years.

On appeal, it was submitted that the 3 year sentence imposed was excessive, and that a community service order was appropriate.

Held :

A community service order was not appropriate. These were three separate bad offences in which the Applicant abused his position of authority and took advantage of a boy of tender years. Three years overall was by no means excessive.

Result - Application dismissed. Three months loss of time ordered.

AR 3/99

Nazareth
Stuart-Moore
VPP &
Keith JA

(10.9.99)

*I G Cross SC
& Chan Fung-
shan

#P Ross

SJ v
LAU
Yun-leung

Attempted rape/Relevance of *Billam* guidelines to Hong Kong/Effect of alcohol on sentence/Sentencing considerations/ *Billam* factors not exhaustive/Duty of courts to public
企圖強姦 - *Billam* 一案的指引在香港的適用程度 - 受酒精影響犯案對刑罰的影響 - 判刑考慮因素 - *Billam* 一案所述的因素並非詳盡無遺 - 法庭對公眾的責任

The Respondent aged 27 years, pleaded guilty to an offence of attempted rape, contrary to sections 118(1) and 159G of the Crimes Ordinance, Cap 200. He was sentenced to 30 months' imprisonment.

The victim, a 19 year old female, was walking home at about 2.30 am when the Respondent, a stranger, approached and attacked her. He pulled her head down and, using his knees, hit her four or five times in the face. Then the Respondent dragged the victim into some thick grass just off the pathway and pushed her to the ground where he squeezed her breasts. He pulled her jeans and underclothing down to her knees. At that moment two patrolling police

officers arrived and saw the Respondent squatting at the victim's knees with his trousers open and punching her head. He attempted to flee but was quickly captured. He smelt strongly of alcohol. When he was asked what had happened he replied '*she gazed at me. I then kicked her*'. The Respondent said he could not remember what happened after that.

In mitigation, it was said that the Respondent was an alcoholic, and this prompted the judge to send for reports. The assessment result from the '*psychological and psychosexual evaluation*' revealed no indication that the Respondent was a '*psychopathic aggressor or a paraphiliac who would resort to violence to satisfy his sexual needs*'. He was found to be overwhelmed by '*feelings of worthlessness and hopelessness*' but was motivated towards receiving psychological help.

In light of the reports, the mitigation was to the effect that alcohol was the key element in an offence that was out of character. It was submitted that prevention and rehabilitation should be the principal sentencing considerations, rather than retribution and deterrence, as the Respondent had the support of his family and was prepared to seek treatment. It was further argued that five years' imprisonment was the tariff for rape in the absence of aggravating factors, that there was no '*real*' aggravating factor in the present case, and that, in such circumstances, the sentence for attempted rape should usually be less. Reliance was placed upon *R v Billam & others* (1986) 82 Cr App R (S) 48, and *R v Cheung Ming-lim* [1989]1 HKLR 415.

In passing sentence, the judge observed:

> *I accept.....that there are no real aggravating features in this case. Now, the bruises and cuts on the victim, although appearing to be the result of excessive violence on the victim in the attempt to undress and subdue her, but they could also be the result of a simple physical assault under the influence of alcohol, rather than assault with sexual motivations.*

On review, it was contended that the sentence was manifestly inadequate. Reliance was placed upon *R v Lau Yuk-ming* [1994] 2 HKCLR 256, and *R v Sung Kwok-man and Another* [1994]1 HKCLR 164, which indicated that the five-year starting point in England for a rape without any aggravating features under the guidelines in *Billam* should not necessarily be adopted in Hong Kong.

The Applicant further submitted that the judge fell into error by failing to take into account two factors which aggravated the offence, namely, the violence used by the Respondent over and above that which was necessary to carry out his intended purpose, and the time and place in which the offence occurred which must, it was said, have added to the mental trauma and distress of the victim.

Held :

(1) The cases of *Lau Yuk-ming* and *Sung Kwok-man and Another* properly reflected the approach to be taken in Hong Kong towards sentence in rape and attempted rape cases. Some cases would call for a higher starting point than five years, even in the absence of aggravating factors, depending on all the circumstances;

(2) The Court in *R v Ng Yuk-wing* Cr App 406/94, confirmed that said in *Billam*, namely that any of the eight aggravating factors there set out would '*substantially*' increase the starting point;

(3) That the Respondent had taken drink, or that it was an attack which he had not planned in advance, made no difference. The courts had just as much of a duty to protect women from the unwanted, drunken attentions of such men as the Respondent as from men who acted in a similar fashion when sober. If drunkenness was a factor which led to violence over and above the force necessary to commit rape, drunken violence would nevertheless aggravate the offence with the result that the sentence would be increased;

(4) Although the Respondent might well have been able to put this matter out of his mind as he purported to do when asked what he had done to the victim, for the victim this would have been a terrifying event that she was unlikely to forget for the rest of her life. It was hard to imagine, realistically, that she would ever be able to go out at night again on her own without being concerned for her safety having regard to the traumatic effect this event must inevitably have had upon her. The Respondent had committed a sustained attack on the victim right up to the point when police arrived at the scene. That was an aggravating feature which called for a substantially higher sentence than would otherwise have been passed. The trial judge erred in concluding that the offence was not aggravated because the assaults could have been '*a simple physical assault under the influence of alcohol, rather than assault with sexual motivations*'. That was a wholly artificial distinction to have been made in circumstances where attempted rape was admitted;

(5) The judge was in error in stating that the starting point for the '*basic attempted rape should be lower*' than '*the starting point for a basic completed rape*'. Although that would normally be so, particularly if it was desisted in at an early stage, an '*attempted rape may be made by aggravating features into an offence even more serious than some examples of the full offence*': *R v Cheung Ming-lim* [1989] 1 HKLR 415, 417. In the present case there was no question of the Respondent voluntarily desisting from the conduct he had embarked upon;

(6) This was on any view a violent and cowardly sexual assault on a lone woman under cover of darkness and at a time of the night when very few people would be expected to be in the vicinity. Whilst time and place (other than the residential address of the victim) were not amongst the aggravating features mentioned in *Billam,* these could not have been intended to be exhaustive. There might well be other factors in addition to those listed in *Billam* which might aggravate the offence. The circumstances of this case in relation to time and place taken together in combination were factors which aggravated the offence;

(7) The courts owed a duty to the public to show that such grave conduct would not be tolerated and to reflect the abhorrence of right-minded people towards this kind of offence. Not only did such offenders need to be punished but others had to be deterred from committing similar offences. It seemed the judge might have allowed the gravity of the case to become obscured from his view by considerations that were almost exclusively favourable to the offender;

(8) The sentence was manifestly inadequate. A starting point of 10 years, had the full offence been committed, would have been proper. This was an attempted rape and despite the fortuitous way in which this was prevented from being the full offence, that could properly be reflected by taking a lower starting point of 8 years. The Respondent was entitled to a full discount for his plea of guilty, making 5 years and 4 months, and as this was a review, and as that term represented more than double the sentence he received, a further small reduction was appropriate.

Result - SJ's application allowed. Sentence of 5 years' imprisonment substituted.

CA 165/99

Stuart-Moore VP
Leong & Wong JJA

(13.10.99)

*I G Cross SC & Chan Fung-shan

A C Macrae SC

WONG Ying-ho

Indecent assault by doctor on child patient/Gross abuse of trust/Exemplary sentence required

醫生猥褻侵犯患病的兒童 - 嚴重不當地利用別人對他的信任 - 有必要作出懲罰性的判刑

The Applicant, a doctor of medicine aged 29 years, was sentenced in the District Court to 2½ years' imprisonment for indecent assault, contrary to s 122(1) of the Crimes Ordinance, Cap 200, on a girl aged 8 years. The Applicant had earlier pleaded guilty.

The facts showed that the victim was taken by her mother to a clinic in Tuen Mun for medical treatment for her back. Having examined the child's back in the presence of her mother and her younger brother, the Applicant said there was some inflammation on the victim's skin and that he would prescribe some ointment. The Applicant, having told the mother and the brother to leave the room, did not call for a nurse, and locked the door. He told the victim to remove her underpants and to spread open her private parts for several minutes. He then spread open her buttocks and felt her anus for about one minute. Then the Applicant told the victim to touch his penis, and forced her to place it in her mouth. Subsequently the victim complained to the mother, and a report was made to police.

The judge imposing sentence took a starting point of 4 years' imprisonment and discounted this by a little more than the usual one-third.

On appeal, it was submitted that the starting point was manifestly excessive in light of the judge's finding that this was an unpremeditated offence which was completely out of character. It was also said that the discount itself (37.5%) was insufficient in view of the early plea of guilty which had, in its turn, saved the victim from having to re-live the trauma of her ordeal at the hands of the Applicant which, as the judge had expressed it, '*warranted an even greater discount than the normal one-third*'. The Applicant submitted that the discount was insufficient, having regard to three factors accepted by the judge: that the Applicant was genuinely remorseful, that he had a previous unblemished record, and that the extra judicial punishment would affect his ability to practise as a doctor. Those three factors, it was said, should have resulted in a greater reduction in sentence than that which the judge actually gave if they were really taken into account over and above the early plea which had spared the young victim from having to testify.

Held :

(1) None of the last three factors carried any weight. In particular in an offence of this kind the previous good character of an accused could only be of minor significance. The prime importance of character, in the context of a sexual offence, was where an offender had previously committed a serious sexual offence because that might aggravate the offence so far as sentencing was concerned;

(2) As regards the Applicant's fall from grace, and the consequent loss of his ability to practice as a medical doctor in Hong Kong, the judge rightly concluded that a serious view had to be taken of an indecent assault on a young girl in such circumstances as these. Although it was a personal tragedy for the Applicant, it was inevitable, having brought this on himself and having violated his position of trust, that he would suffer hardship above and beyond the punishment imposed by the court: *Attorney General v Chan Chi-yin and Another* [1988] HKC 44;

(3) Considerable trust and responsibility were placed upon those in the medical profession in their duty of care towards their patients. Where a child was entrusted to a doctor for medical treatment, the duty to uphold the high standards of the medical profession which was cast upon any doctor was grotesquely violated when activity took place of this kind. A sentence was needed which adequately marked the gravity of the Applicant's criminality. The Applicant took advantage of his trusted position to take the opportunity to satisfy his own depraved impulses;

(4) The position of a medical practitioner was not dissimilar to that of a school teacher who indecently assaulted a young student. Both held a high position of trust so far as the children in their care were concerned. Parents were entitled to know, when they left their children in professional hands, that the well-being of their children was, as far as possible, guaranteed. A child was just as much likely to be dominated by a doctor as by a school teacher, and it was not realistic to draw any distinction between cases of indecent assault committed by school teachers as opposed to those committed by doctors;

(5) Where this kind of breach of trust was involved, there was a natural sense of public outrage. Exemplary sentences were called for to deter such behaviour and to redress the grievance of victims, relatives and the public alike by imposing sentences that adequately reflected public abhorrence of crimes of this sort. That inevitably applied with particular emphasis when a special duty of care was owed by a professional person towards a child who had been placed in his care;

(6) The judge concluded that not only had there been a '*gross breach of trust*', but also that there was '*no telling what long-term effects there might be*' on the victim. On that basis he took a starting point of 4 years. The Applicant had indulged in a number of indecent acts occupying about 10 minutes with the victim. His depravity was of such seriousness as to have justified a sentence in that range and the starting point might well have been higher.

Result – Application dismissed.

CA 627/98 KWOK Kau-kan

Chan CJHC
Wong JA
Yeung J

(21.10.99)

*Cheung Wai-sun & V Chan

#Wong Po-wing

Indecent assault/12 year old girl/Abuse of confidence/Consent of victim
猥褻侵犯 – 12 歲女童 - 不當地利用別人對他的信任 - 受害人同意

The Appellant, aged 77 years, was convicted after trial in the District Court of five charges of indecent assault. He was sentenced to imprisonment for 3 years on each charge, with 6 months of each of the sentences for the second and subsequent charges to run consecutively to the sentence for the first charge and to one another, making a total of 5 years. On appeal, convictions on the 3rd and 4th charges were quashed (q.v.) On appeal against sentence

Held :

The consent of the victim was not a mitigating factor. Nor was the Appellant's old age. There was the aggravating factor that the Appellant had corrupted the mind of a girl of tender age by paying her after the event. The Appellant had inspired confidence in the victim and had abused that confidence. These were very serious offences.

Result - Appeal allowed. Sentences of 1½ years each for the 1st and 2nd charges, concurrent, and 2½ years for the 5th charge, one year of such sentence to run concurrently with the sentences on the 1st and 2nd charges substituted, making 3 years in total.

Theft/Handling/Deception

CA 328/98 LAM Nga-wai

Theft and dishonesty offences/Restitution made in full by time of sentence/Impact of restitution on sentence
盜竊罪和不誠實的罪行 - 判刑時財產已全數復還 - 復還財產對判刑的影響

Power VP Mayo & Stuart-Moore JJA

(27.11.98)

*J R Reading

#A C Macrae

The Applicant pleaded guilty to an offence of obtaining property by deception, three offences of theft and three offences of using an identity card relating to someone else. Having taken 24 months as the starting point, the judge gave a one-third discount and sentenced her to imprisonment for terms which totalled 16 months.

When passing sentence, the judge said they were premeditated offences. The Applicant was aged 24, with previous good character, and had made full restitution of the amount that was owed to the finance companies by the time the matter came to be dealt with in court.

On appeal, it was submitted, *inter alia*, that the sentence of 16 months was manifestly excessive having regard to the circumstances in which the offences were committed, the pleas of guilty, the clear record and the co-operation after arrest.

Held :

Although the judge made reference to restitution, she did not give any greater discount than a defendant who pleaded guilty in these circumstances would normally have received. That was wrong in principle. This was not merely a promise that had been made to pay restitution. It had actually been paid. Taking into account this important factor, together with all the other matters raised in mitigation, a discount of 50% was appropriate.

Result - Appeal allowed. Sentences reduced to 12 months' imprisonment.

MA 1008/98 LAU Chi-kwong

Unlawful entrant using another's identity card and stealing/Family circumstances a matter for defendant, not court
非法進境者使用他人身分證和偷竊 – 家庭狀況是被告人而非法庭須考慮的事

Stock J

(8.12.98)

*Wesley Wong

#I/P

The Appellant came to Hong Kong unlawfully and had an identity card belonging to another. He also had a pager and some other stolen property.

The Appellant pleaded guilty to the immigration offence and the theft offence, and was sentenced to consecutive terms of imprisonment of 15 months and 3 months.

On appeal, the Appellant submitted that he had children in the mainland, his wife had left him, and his aged parents were ill.

Held :

(1) These were all family circumstances of which the Appellant was aware when he decided to come to Hong Kong unlawfully. The blame for the situation in which he and his family found themselves lay at his door and should not be put at the door of the court;

(2) The sentences were within the customary range.

Result – Appeal dismissed.

AR 7/98

SJ v WONG Kay-din

Stuart-Moore VP Mayo & Leong JJA

(24.6.99)

*J R Reading SC & G Goodman

#Annie Lai

Theft of $3 m/Multiple charges/Breach of trust/Comments on sentencing in respect of multi-count indictment
盜竊 300 萬元 – 多項控罪 – 違反信託 – 就多項控罪的判刑作出評論

The Respondent was convicted of nine charges of theft, contrary to s 9 of the Theft Ordinance, Cap 210. The judge sentenced the Respondent to 3 years' imprisonment on all the charges and ordered that all the sentences be served concurrently.

The Respondent held a position of trust in the Tin Lok Baptist Church. A limited liability company was formed in 1983 for the management of the church's property and finance. Of that company the Respondent was a director, and he assumed a prominent role in its affairs.

The Respondent contributed to the church's finances while his own separate business interests prospered. However, when his business interests faltered he withdrew moneys from the church. The moneys he withdrew were far in excess of the amounts he contributed. The way he did that was to mortgage property owned by the limited company and to apply part or all of the proceeds thereof for his own benefit. The total amount involved was $2,976,661.00. The period covered by the charges was from June 1993 to January 1996.

The judge when sentencing observed:

> *This was a gross breach of trust by a man who should have known better. You acknowledged in the trial that you appreciated your duty to keep your affairs and those of the company separate. These convictions arise against a background of you consistently treating the company property as your own, conduct which you hid from your co-directors and carried off with arrogance and deceit … There is no merit in complicated overlapping of the terms of imprisonment here. In the conventional way, I order that there be a sentence of 3 years' imprisonment on each of the charges of theft, all to run concurrently with each other.*

On review, it was submitted, that the total sentence imposed was manifestly inadequate and did not reflect the assessment the judge had made of the Respondent's criminality. Reliance was placed upon *R v Barrick* (1985) 81 Cr App R 78, and *R v Clark* [1998] 2 Cr App R 137.

Held :

(1) A proper sentence, bearing in mind that almost $3 million was involved, and applying *Clark*, would have been about 4½years;

(2) There was nothing in the personal circumstances of the Respondent to justify a reduction from 4½years. The Applicant had shown no remorse and it was inevitably the case that where someone had been put in a position of trust he would have an exemplary character;

(3) The sentences were manifestly inadequate.

Result - SJ's review allowed. Sentences of 4½ years' imprisonment substituted.

Per cur - Although the judge had been criticised for deciding what the appropriate sentence should be taking into account totality, and then imposing that sentence on all the charges and ordering that they be served concurrently, a large measure of discretion must remain for the sentencer so as to enable him to achieve the desired result. Unless that approach was adopted there was a risk that if for any reason some of the convictions were quashed on appeal there would be a distorted or unrealistic sentence if each charge did not carry the proper sentence. [This issue is considered further in *Sentencing in Hong Kong*, 2nd ed, at 260: Ed.]

MA 7/99 (1) RANG Zhi-tai
(2) LAI Mau-sum

McMahon DJ

(25.3.99)

*Gary Lam

#I/P

Theft/Organised gang/Eighteen months' imprisonment appropriate
盜竊罪 – 有組織的匪幫 – 十八個月監禁刑罰是恰當的

The Appellants were jointly convicted of an offence of theft.

The facts showed that they were members of a gang which stole the handbag of a female Japanese tourist from a table inside Delifrance in Queensway Plaza, Central.

Each Appellant was sentenced to 2 years' imprisonment and, on appeal, it was submitted that the sentences were too severe.

Held :

(1) That the Appellants were organised and professional thieves constituted an aggravating factor;

(2) In the absence of aggravating factors, an appropriate starting point for sentence in such a case as this, where the value of the property was over $3,000, was 15 months' imprisonment: *R v Lee Wan-king* [1991] 1 HKLR 122;

(3) The starting point would have been appropriately increased to 18 months' imprisonment to take account of the professional nature of the offence. The sentences of 2 years were too severe.

Result - Appeals allowed. Sentences of 18 months' imprisonment substituted.

CA 45/98

Chan CJHC
Leong JA
Woo J

(9.7.99)

*A Luk & J Man

#N De Boinville

LAI Yun-cheong

Handling stolen cars/Syndicated car theft and smuggling operation/Enhancement of sentence of 50% under s 27 of OSCO appropriate
處理被竊的車輛 - 集團式的偷車及走私行動 - 根據《有組織及嚴重罪行條例》第27條把刑期增加百分之五十是恰當的

The Applicant was convicted after trial in the District Court of two charges of handling stolen goods and one charge of possession of apparatus for radio communications without a licence.

The brief facts were that a BMW car, the stolen property in the first charge, and a Mercedes-Benz car, the stolen property in the second charge, disappeared from their parking places on 23 November 1996. Subsequently, police officers keeping watch outside a warehouse saw both cars being driven into a warehouse. When police raided the warehouse they found that the BMW and two other private cars had been loaded into a container. The Applicant was sitting in the driving seat of the Mercedes-Benz and there was a radio communication receiver in the car. The Applicant was arrested as he made to escape. He admitted that he knew the BMW and the Mercedes-Benz to be stolen, and said that he was hired to drive the two cars to the warehouse for $2,000 each and the radio equipment was for communicating with people in the warehouse.

The judge sentenced the Applicant to 4½years' imprisonment on the first handling charge, and to two years' imprisonment on the second handling charge, one year of which was to be consecutive, and to 6 months consecutive on the communication apparatus charge. The total sentence was 6 years.

The judge, following *R v Law Hoi-fu and Others* [1996] 2 HKDCLR 1, considered that as luxury cars were stolen and loaded into containers for illegal shipment abroad, the court had to take a serious view of the case for the protection of the public from organised criminal activities. She concluded that even though the Applicant was not the mastermind, an enhancement of 50% should be made.

On appeal, although it was not denied that this was a case in which it was appropriate for the judge to enhance the sentence under s 27 of the Organized and Serious Crimes Ordinance, Cap 455, it was submitted that the judge erred in enhancing sentence by 50%. Reliance was placed on *HKSAR v Tam Wai-pio* [1998] 2 HKLRD 949.

Held :

(1) The Applicant was employed to ferry the stolen cars from where they were stolen to the warehouse for loading into containers, thereafter to be smuggled outside Hong Kong. As he had the radio communication apparatus with him it was to be assumed that that was to ensure that the operation went smoothly. The remuneration of $2,000 for each car he drove was not a minor sum and it appeared that the operation was an on going syndicated car theft and smuggling operation. The Applicant's role was not purely ministerial. Enhancement of 50% was not wrong in such circumstances;

(2) Although all the offences occurred at the same time, making them all concurrent would not have reflected their total criminality. The total sentence for the two offences of handling must be expected to be more than the sentence for a single offence. For these two handling offences, the sentence before

enhancement had to be at least 4 years, having regard to the normal starting point for a single offence that would have attracted at least 3 years. Thus, after enhancement of 50%, 6 years' imprisonment would not have been inappropriate. The radio communication apparatus offence was an offence of a different nature. However, there was evidence that it might have been used in connection with the handling of stolen cars on that occasion and a concurrent sentence could have been imposed rather than a consecutive sentence. That notwithstanding, the final sentence of 6 years' imprisonment was not incorrect.

Result - Application dismissed.

MA 547/99 HO Minh-cong

Beeson J

(23.9.99)

*Cheung Wai-sun

#I/P

Attempted theft/Pickpocketing by gang/Eighteen months proper after trial
企圖盜竊罪 - 匪徒糾黨扒竊 - 經審訊後判刑十八個月是恰當的

The Appellant was convicted after trial of the offence of attempted theft. He was sentenced to 18 months imprisonment. On appeal, he submitted that the sentence was manifestly excessive.

The evidence showed that there was an attempted theft from a handbag. Police observed the Appellant and three others following passers-by in Nathan Road, and paying attention to their handbags and rucksacks. Two of the men, one of whom was the Appellant, acted in concert while the victim's handbag was unzipped. The Appellant was seen to use his jacket as a shield to conceal the actions of his companion. The men were arrested at the scene.

In considering sentence, the magistrate took account of the average range of sentence for an ordinary offence of pickpocketing of 12 to 15 months. However, the magistrate was aware from the authorities, in particular *R v Vy Van-Kien and Another* [1991] 1 HKLR 422, that the basic sentence could be increased if there were aggravating factors. Here the magistrate considered that the aggravating factor was that this was an apparently professional operation involving at least two, and possibly four, men. For that reason, she increased the average sentence by 3 months.

Held :

(1) The Appellant was not entitled to any discount from the starting point of 18 months as he pleaded not guilty;

(2) The Appellant had six previous convictions, of which three were similar. He was accordingly not entitled to the usual discount or consideration given to somebody who had a clear record.

Result - Appeal dismissed.

MA 603/99 CHAN Yiu-ming

Beeson J

(23.11.99)

*P K Madigan

#I/P

Attempted theft/Customary sentencing range/Custodial sentence appropriate for first offender
企圖盜竊罪 - 慣常的判刑 - 把初犯者判監是恰當刑罰

The Appellant was convicted after trial of one charge of attempted theft, by pickpocketing, and one charge of assault occasioning actual bodily harm. He was sentenced, respectively, to concurrent terms of imprisonment of 6 months and 1 month.

On appeal, the Appellant submitted that he should have been given credit as a first offender. It was said that if the sentence was not suspended he would face difficulties in caring for his mother and by losing his job.

Held :

The normal sentence for an offence of attempted theft was in the region of 12 to 15 months' imprisonment. The magistrate was right not to suspend the sentence.

Result - Appeal dismissed.

Vice

MA 800/98 NG Tsz-fung

Nguyen J

(24.9.98)

*C Ko

#David Boyton

Managing a vice establishment/Large profits and organised crime involvement/Establishment not large and no young girls employed
管理賣淫場所 – 涉及豐厚利潤和有組織罪行 – 場所規模並不龐大，而且並無僱用年幼女童

The Appellant pleaded guilty to an offence of managing a vice establishment. He was sentenced to 6 months' imprisonment and fined $20,000.

The facts showed that undercover police officers visited private residential premises. The Appellant let them in. Eight women were there and two agreed to provide sexual services. There was no evidence of forcible detention or of underaged girls.

In his Reasons for Sentence, the magistrate mentioned the enormous potential profit from such businesses. He also mentioned that these establishments were often controlled ultimately by organised crime. On appeal

Held :

(1) It was incontrovertible that large profits could arise from such businesses, and it was realistic to note the involvement of organised crime;

(2) In light of *R v Kwan Wah-sang* MA 1324/88, in which the establishment was not large and no young girls were involved, a starting point of 6 months would have been proper, reduced to 4 months for the mitigation. The fine was appropriate.

Result - Appeal allowed. Sentence of 4 months substituted.