punish the accused and also to reward him for the help he has given, and thereby to demonstrate to others that it is worth their while to co-operate. In *R v Sivan* (1988) 10 Cr App R (S) 282, 286, the court was invited to make suggestions for the benefit of the Bar and the Judiciary as to how best to handle this exercise. With what his Lordship said was 'some reluctance', Lord Lane CJ 'cast out these suggestions':

> 'First of all it is, for obvious reasons, advisable that there should be before the court a letter from a senior officer – may be a serving officer of police or a senior officer from the Customs and Excise Department – unconnected with the case, who has examined all the facts and is able to certify that the facts are as reported by the officers conducting the investigation – that is of course the facts relating to the assistance given by the defendant in question. Secondly, as an obvious corollary to that, there must be a statement in writing from the officer in charge of the investigation setting out those facts which will be certified by the senior unconnected officer. Thirdly, we think it advisable in the more important cases that the officer in charge of the investigation should be available to give evidence if necessary, whether in court or in the judge's chambers as the situation may demand.'

In Hong Kong, the ICAC may also need to have resort to these procedures. Their use will place the court in a position whereby it can accurately assess the quality of the assistance. It is recognised that the *Sivan* procedures have to be tailored to meet the particular circumstances, which may vary greatly from case to case. That said, all such tailoring 'should be done in the realisation that the consequences of carelessness or non-compliance are potentially far-reaching and grave … It is the duty of counsel on both sides to be acquainted fully with these procedures so as to protect the identity of informers who require anonymity': *HKSAR v Tse Ka-wah* [1998] 1 HKLRD 925, 928.

CHAPTER 5

Binding Over Orders

'I just do not understand this.'

– Tony Blair

The process of requiring a person to keep the peace or to be of good behaviour is known as binding over. It involves the making of an order by a criminal court that someone shall formally agree to forfeit a recognizance in the event of a failure to keep the peace or to be of good behaviour. A person may be bound over to keep the peace *and* be of good behaviour. Alternatively, a person may be bound over to keep the peace *or* to be of good behaviour. The difference between the two has been defined in this way:

> 'A surety for good behaviour is more comprehensive than a surety of the peace, as good behaviour includes the peace. Whereas a surety of the peace may only be required where there is evidence of fear of personal danger, a surety to be of good behaviour is not so restricted.'[1]

The jurisdiction to bind a person over derives from a time when the justices of the peace and the King's Bench judges played a central role in the keeping of the peace, there being no police force in the fourteenth century. It is still relevant. Sir William Blackstone wrote in the eighteenth century that:

> 'This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour.'[2]

Courts derive their jurisdiction to bind persons over from section 109I of the Criminal Procedure Ordinance (Cap 221) ('section 109I'). This provides:

> 'A judge, a District Judge or a magistrate shall have, as ancillary to his jurisdiction, the power to bind over to keep the peace, and power to bind over to be of good behaviour, a person who or whose case is before the court, by

1 *Stone's Justices' Manual*, Vol 1, 2009, para 3-360.
2 *Commentaries on the Laws of England in Four Books.*

requiring him to enter into his own recognizance or to find sureties or both, and committing him to prison if he does not comply.'

Bind-over orders may be made in four different types of situation: *Lau Wai-wo v HKSAR* (2003) 6 HKCFAR 624, 637. First, where an accused has been acquitted. Second, where an accused has been convicted, as part of the means chosen by the court to deal with him; he may, for example, be bound over to come up for sentence. Third, a bind-over may be made against a witness who has testified, whether in a criminal or a civil case, and who is, therefore, before the court. Fourth, the prosecution sometimes agrees to a defence request to withdraw the charge prior to trial if the accused agrees to being bound over.

Section 109I supersedes the common law of England and the Justices of the Peace Act 1361. Its provenance lies in section 1(7) of the Justices of the Peace Act 1968, which states:

'It is hereby declared that any court of record having a criminal jurisdiction has, as ancillary to that jurisdiction, the power to bind over to keep the peace, and power to bind over to be of good behaviour, a person who or whose case is before the court by requiring him to enter into his own recognizances or to find sureties or both, and committing him to prison if he does not comply.'

The consent of the accused is not required before a bind-over order is made; his consent, however, is required to enter into the recognizance to be bound over. In *R v Lincoln Crown Court, ex p Jude* [1998] 1 WLR 24, the accused pleaded not guilty to an offence of affray. The trial could not proceed due to absent witnesses, but the judge concluded from the papers that there was material which justified the making of a bind-over order against the accused. After defence counsel was advised of this, counsel neither expressed the accused's consent to being bound over nor made any submission on the issue. After he was bound over in the sum of £500 to keep the peace for 18 months, the accused applied for judicial review of the judge's order. The Divisional Court identified section 1(7) of the Justices of the Peace Act 1968 as the basis of the bind-over power. Section 1(7), like section 109I, indicates that the bind-over power may be exercised by requiring the person to be bound over to enter into his own recognizances, and committing him to prison if he does not comply. Auld LJ, at 26, said:

'It is to be noted that the permission does not make the exercise of the power dependant on the consent of the person concerned. It is a power that the court may exercise by 'requiring' him to enter into the appropriate recognizance.'

A distinction is to be drawn between the order itself, which does not require consent, and the entry into the appropriate recognizance, which requires some volition on the part of the person concerned. In *Lau Wai-wo v HKSAR* (2003) 6 HKCFAR 624, 643, the Court of Final Appeal concluded that the position in Hong Kong, under section 109I, is the same as in England, under section 1(7) of the 1968 Act. It held:

(1) no consent is needed to the making of the bind-over order itself;
(2) the order will require the person against whom it is made to enter into

his own recognizances, or to find sureties, or both, with the sanction of committal to prison if he does not comply;
(3) if the person concerned expresses his consent to being bound over in the terms contained in the order, that consent may be taken to constitute his entry into his own recognizances and the bind-over will be effective with nothing more needing to be done;
(4) if the person concerned does not express his consent to the bind-over, and refuses or fails to enter into the recognizance that the order has required him to enter into, he will be in contempt and be liable to be proceeded against accordingly.

To that, Lord Scott added:

'It is, therefore, true to say that the bind-over cannot become effective without the consent of the person concerned. But it is not true to say that the s.109I bind-over order cannot be made without the consent of the person concerned.'

Section 58 of the Offences Against the Person Ordinance (Cap 212) states that if an accused is convicted of an indictable offence under that Ordinance, the court may, in addition to or in lieu of any other permitted penalty, impose a fine upon the accused and 'require him to enter into his own recognizances and to find sureties, or either, for keeping the peace and being of good behaviour'. If the accused cannot find sureties, he may be imprisoned for a period not exceeding one year. Section 58 is rarely used. It is an unusual provision. It is an example of the use of the bind-over as punishment. Although a conviction is required, consent is not. It should, however, be exercised in accordance with the general principles regulating the use of the bind over as indicated in *Ex parte Ankerson* [1989] 1 WLR 40. First, the court should ensure that there is sufficient material to justify the conclusion that there is a risk of a breach of the peace unless action is taken to prevent it. Second, it should indicate to the accused that it is the intention to bind him over and the reasons for that course so that he or his lawyer can make representations. Third, the court must inquire as to the means of the accused, before fixing the amount of the recognizance. Fourth, it should only impose a bind-over order which is finite.

In *Lau Wai-wo v HKSAR* (2003) 6 HKCFAR 624, 648, the conduct which justifies the making of different types of bind-over orders was considered. Lord Scott said:

'As to conduct which would justify a bind-over to keep the peace, we would adopt the approach of the English authorities cited in *Steel v United Kingdom* (1998) 5 BHRC 339, and hold that the conduct must involve violence to person or property, or the threat of such violence, or be conduct giving rise to a reasonable apprehension that such violence will take place. In the absence of conduct of the character described we do not think that a bind-over to keep the peace should be made. As to conduct that would justify a bind-over to be of good behaviour, we think the conduct must involve the commission of the *actus reus* of a criminal offence, or the threat of such an act, or be conduct giving rise to a reasonable apprehension of the commission of a criminal offence. In the absence of conduct of the character described above we do not think a bind-over

to be of good behaviour should be made.'

Lord Scott explained that in some circumstances a bind-over order to keep the peace and be of good behaviour may be made and in other circumstances a bind-over order to be of good behaviour may be made but not an order to keep the peace. His Lordship emphasised, however, that the 'traditional use of both types of bind-over together in all cases should not, in our opinion, be continued'.[3]

When a person is bound over he is required to enter into his own recognizance or to find sureties for his good behaviour, or both, for a period which does not normally exceed twelve months. The binding over should be for a finite period: *Ex parte Ankerson* [1989] 1 WLR 40, 44. Refusal to enter into a recognizance or failure to find sureties as required by the court can lead to a term of imprisonment. There is, however, no power to commit for breach of the recognizance. If a breach arises the recognizance is liable to forfeiture. The person involved cannot be sent to prison unless he is in default of payment following an order to enter into a recognizance or to raise sureties.

There is no limit upon the amount of the recognizance the court may set when it binds a person over. The sum, however, must be reasonable, having regard to the person's capacity. A court may bind a person over in a recognizance which exceeds the maximum fine which could be imposed for the offence which results in his being bound over: *Ex parte Williams* [1935] 2 KB 192. In some ways, the forfeiture of money upon default is a penalty indistinguishable from the imposition of a fine. If the consequence of a breach of a bind-over order is forfeiture of the recognizance, the application to estreat is a civil proceeding which attracts the civil standard of proof: *Ex parte O'Sullivan* [1983] 3 All ER 578.

The power to bind-over arises under section 109I in respect of 'a person who or whose case is before the court'. That phrase has been said not to apply to a person who was the victim of an assault as he was neither a party to, nor called as a witness in, the proceedings: *Ex parte Powttar Singh* (1984) 1 All ER 941. The court in that case accordingly quashed the binding over of a person who attended court in order to give evidence but who, in the event, was not required to testify after the accused had agreed to be bound over to keep the peace and the prosecution had offered no evidence against him. The point was further made that the binding over of a witness is a serious step which should only be taken where facts are proved by evidence which indicate a likelihood that the peace will not be kept. If an accused has been acquitted on the merits of the case, the use of the bind over may not be appropriate: *Ex parte Khan* [1997] COD 186, 187. The situation may differ if the acquittal arose on a technicality.

When an accused who has been acquitted is bound over it does not necessarily mean that the court is satisfied that his behaviour constitutes a breach of the peace. In *Hourihane and Another v Metropolitan Police Commissioner* TLR 27 December 1994, Beldam LJ said:

3 Professor Sir John Smith, [1995] Crim LR 715.

> 'They (the magistrates) need only have had material before them from which they could reasonably have considered that there was a risk of a breach of the peace in the future unless action were taken to prevent it, although they could not act capriciously. They might, however, be satisfied that there was such a risk even though the conduct of an acquitted defendant, if repeated, would not have amounted to a breach of the peace, provided his conduct might stimulate a breach by others. Where the reason for (their) action was not obvious they should explain to a defendant the reason why they proposed to bind him over … There might be many reasons why a defendant would prefer to agree to be bound over to keep the peace in future than to run the risk of a conviction. A convicted defendant might be bound over as part of his sentence. In that case it would form part of his antecedent records. If he was not convicted but bound over, it would not form part of his criminal record.'

If a court is minded to require a witness or some other person who has not been charged to be bound over, he should be given the opportunity to make representations: *Sheldon v Broomfield Justices* [1964] 2 QB 573. In *R v Li Wai-chu v R* [1983] 2 HKC 219, 222, de Basto J said:

> 'A person ought not, especially in the context of Hong Kong, to come to court to give evidence on behalf of the Crown as a complainant or as a witness and to leave court subject to a legal sanction unless (1) there are facts or the face of the record from which it can properly be inferred that there is a danger of such complainant or witness committing, in the future, a breach of the peace, and (2) the complainant or witness is apprised of those facts and given an opportunity to be heard as to why an order ought not to be made binding him over to keep the peace.'

In *Lau Wai-wo v HKSAR* (2003) 6 HKCFAR 624, 650, Lord Scott endorsed de Basto J's dicta, with one qualification. His Lordship said that it was not necessary for the facts found that justify the making of the bind-over order to be part of the order or to appear on the face of the record provided that they are set out in the judgment, or in a judgment delivered orally of which a transcript can be made available.

The power to bind a person over extends to complainants, informants, witnesses and any other person thought likely to disturb the peace. Provided that there is evidence which reasonably leads the court to fear that without a recognizance there might be a breach of the peace, the court may bind-over a person who is before it even if he has been acquitted or if the prosecution has been discontinued: *Ex parte Okunna* (1987) 87 Cr App R 295. But when this power is invoked, a court will invariably warn the person intended to be bound over, and give him the opportunity to meet the allegations made against him: *Ex parte Stogles* [1976] Crim LR 573. In *Ex parte Gorchein* [1973] 1 WLR 1502, 1504, the point was made that it is the easiest thing in the world for a court to say what it has in mind and to ask the intended recipient what he wishes to say. In *Lau Wai-wo v HKSAR* (2003) 6 HKCFAR 624, 650, Lord Scott said:

> 'It is, in our view, essential if a witness, or a litigant in a civil case, or an acquitted defendant is to be made the object of a bind-over order that the person concerned by given prior notice of the proposal (see *R v Lincoln Crown Court,*

know exactly how he has been sentenced, and those who advise him will be in a position to consider his prospects on appeal. In *HKSAR v Wong Mei-heung* [2010] HKCU 2438 (CACC 273/2010, 3 November 2010, unreported), Mackintosh J said that 'As a matter of fundamental principle, the starting point is directed at the offence and its seriousness, not at the offence and mitigating factors other than the guilty plea.'

When the court selects its starting point, it is necessary that, as Miles CJ put it in *R v Stafford* (1997) 97A Crim R 85, 92:

> 'The sentencer must strive to ensure that the sentence is just and appropriate and to that end other objectives, such as the protection of society, punishment, general deterrence (to the extent that they differ from each other) are to be taken into consideration.'

If a court is sentencing an offender in respect of a series of similar offences committed over a period of time, it will not normally be appropriate to increase the starting points for sentence in respect of the later offences simply on account of the constant repetition of the criminal activity, and not because they are more serious. It is not 'particularly helpful in the great majority of cases to choose what must be an essentially arbitrary point in time to increase the starting point by reason of repetition alone': *HKSAR v Li Wai-hung* [2009] HKCU 1096 (CACC 40/2009, 18 June 2009, unreported). Likewise, if the offender faces more than one offence of a like nature the sentences for each ought not to be increased simply on the basis that multiple offences are involved: *HKSAR v Ng Ngai-shan* [2008] HKCU 1743 (CACC 197/2008, 7 November 2008, unreported). The issue of persistence of criminal activity can more appropriately be dealt with in the application of the totality principle to achieve a proper relativity between the crimes and the penalties. (qv)

If a sentence of imprisonment is to be substantial, it should be measured in years or half years: *HKSAR v Shaer Chun-keung* [1998] 1 HKLRD 348, 349. The final figure, that is, should be expressed in round terms, rather than in odd days or weeks. It is not desirable to combine a very long sentence of imprisonment with a very short one: *R v Gorman* (1993) 14 Cr App R (S) 120, 121. But no assessment can be made as to whether a sentence has been accurately assessed if there is no clear indication as to the starting point taken for sentence: *R v Yeung Mei, Helen* [1996] 4 HKC 795, 797. Exactitude is required, and a starting point cannot properly be indicated in general terms: *R v Cheung Hon-ki* (CACC 28/1996, 19 June 1996, unreported). If aggravating factors exist, the extent to which these operate to increase the starting point should be indicated.

A failure to identify the starting point 'will not of itself found an appeal for the reduction of an appropriate sentence': *R v Wong Cho-chop* [1991] HKCU 172 (CACC 517/1990, 12 July 1991, unreported). In *HKSAR v Lam Kin-chung* [2007] 2 HKC 451, Lunn J, whilst regretting the failure of the lower court to indicate that the full discount of one-third had been applied after a guilty plea, said 'we have no doubt that such an experienced judge would have had that matter in mind when determining the appropriate

sentence'. But if the starting point is stated, 'it greatly assists the Court of Appeal when considering applications against sentence': *R v Lau Cheung-chan* [1999] HKCU 18 (CACC 192/1992, 12 March 1993, unreported).

In relation to the offence of manslaughter, however, where the sentence can range from probation to life imprisonment, a judge may not feel able to set a starting point: *HKSAR v Yip Kai-ming* [2010] HKCU 2371 (CACC 414/2009, 2 November 2010, unreported). Rather, he 'may well feel, having taken an overall view of the matter, that all he can finally do is to decide on the appropriate sentence': *R v Lee Sau-ping* (CACC 189/1995, 6 September 1995, unreported). This will involve a consideration of matters both of aggravation and of mitigation: *HKSAR v Lin Siu-lun* [2009] 6 HKC 308. In *HKSAR v Wong Shui-mouk* (CACC 239/2007, 12 June 2008, unreported), Stuart-Moore VP explained:

> 'This is one category of offences which can vary so greatly in gravity and can be affected by so many considerations, both adverse and favourable to a defendant, that a starting point becomes a hindrance and an irrelevance in the quest for a just resolution to this complicated task.'

In *HKSAR v Sin Kwai-ching* [2004] HKCU 1292 (CACC 176/2004, 2 November 2004, unreported), the accused pleaded guilty to manslaughter instead of murder on the basis of provocation, and the judge took a starting point of 15 years' imprisonment and sentenced him to ten. Stuart-Moore VP said:

> 'The judge was not required to take a starting point for manslaughter. It is no criticism of him that, in the event, she chose to do so.'

The duty of the courts is to pass appropriate sentences for the crimes of which offenders have been convicted: *Secretary for Justice v Tse Sheung-kai and Others* [2001] 3 HKLRD 487, 500. Courts must bear in mind that sentences are designed to protect the public, whether by punishing the accused or reforming him, or deterring him or others, or all of those things. In that exercise various matters fall for consideration, including the element of planning, the antecedents of the accused, the aggravating and mitigating factors, the attitude of the accused and, sometimes, of the victim, and the prevalence and seriousness of the crime. The ends of justice need to be met not only for the protection of society, but also after such consideration of the welfare of the accused as is his due: *R v Wilmott* [1967] 1 CCC 171, 179. In *R v Geddes* (1936) 36 SR (NSW) 554, 555, Jordan CJ pointed out that 'the judge should impose such judgment as, having regard to all the proved circumstances of the case, seems, at the same time, to accord with the general moral sense of the community in relation to a crime committed in such circumstances and to be likely to be a sufficient deterrent both to the prisoner and to others'.

When judges look at a set of circumstances with a view to passing a just and proper sentence, they are not expected to adopt a blinkered approach, removed from the realities of the case: *HKSAR v Wan Ka-cheung* [2002] HKCU 180 (CACC 264/2001, 22 February 2002, unreported). They are, on

the contrary, required to look at all the circumstances of the case. They should place the criminality in a broad context. In that exercise full regard must be had to the legislative view of the seriousness of the offence: *HKSAR v Chan Chi-kong* [1997] 3 HKC 702, 707. The gravity of a crime is to be judged by the penalty prescribed for it. In *R v Wong On-lin* [1995] 1 HKC 659, 661, Barnett J said 'the seriousness of the offence is reflected in the maximum sentence which the court may pass'.

In *Attorney General v Ho Chun-chau* [1985] 1 HKC 40, 45, McMullin VP said:

> 'We accept that the proper approach of the court should, when considering sentence, be to have regard to the intention of the legislature as indicated in the penalties provided and to measure the case before it against the kind of case capable of attracting the maximum penalty.'

It is not right for a court to shrug its shoulders when it considers the maximum penalty and to say 'never mind, this is what the defendant's conduct merits': *Chan Kwai-lai v R* [1968] HKLR 31, 41. Instead, as Lord Taylor CJ has explained, sentences should 'take their colour' from the maximum penalties which the law provides: *Attorney General's Reference No 1 of 1994 (ICK Day)* (1995) 16 Cr App R (S) 193, 195. However, the maximum sentence is in general reserved for the most serious offence of its type: *Attorney General v Cheung Kai-man, Dominic* [1987] HKLR 788, 793. The maximum penalty is deployed in the 'most truly exceptional cases, which are so serious that it is difficult to imagine a yet more serious example of the offence': *R v Pinto* [2006] 2 Cr App R (S) 579, 583. In *HKSAR v Tran Van Ha* [2002] HKCU 1506 (HCMA 1000/2002, 20 December 2002, unreported), it was said that when the maximum statutory sentence is low, 'it will more readily be that the facts of a particularly bad case are regarded as warranting the maximum statutory sentence'.

In *Ho Mui v R* [1963] HKLR 364, 367, Blair-Kerr J said:

> 'When a charge is brought before a court it is the duty of the judge, district judge or magistrate to look at the whole of the circumstances including what the legislature has said in regard to the maximum sentence for the offence and the limitations imposed upon the powers of the court in regard to sentence, and to pass a sentence which the court feels is commensurate with the gravity of the offence.'

When it considers all of the circumstances of the case, the court cannot take into account other offences with which the accused is not charged, unless the procedure for taking other offences into consideration is specifically adopted (qv). The sentence cannot be increased on the basis that the offence of which the accused has been convicted is a 'sample charge': *R v Chow Tat-ming* [1997] 1 HKLRD 353, 355. The general principle that the sentence imposed on the accused should take account of all the circumstances is subject 'to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted': *R v De Simoni* (1981) 5 A Crim R 329, 333.

The duty of the courts is to pass realistic sentences for serious offences:

HKSAR v Chan Kin-chung and Another [2002] 4 HKC 314, 326. Sentences which are unduly lenient do not inspire confidence in the administration of justice. This does not mean, however, that a court is prevented from extending to an accused such leniency as the circumstances allow, even if the offence is serious. But if a grave offence is not suitably punished, it can have an unfortunate knock-on effect. It may result in courts which are seized of less serious crimes having 'difficulty in giving appropriate effect to a scale of punishment laid down by statute': *Attorney General v Shamsudin* [1987] HKLR 826, 831. Guidance as to the deployment of the highest penalties was provided by Lawton LJ in *R v Ambler and Hargreaves* [1976] Crim LR 266:

> 'It is to be borne in mind that when judges are asking themselves whether they should pass the maximum sentence, they should not use their imaginations to conjure up unlikely worst possible kinds of case. What they should consider is the worst type of offence which comes before the court and ask themselves whether the particular case they are dealing with comes within the broad band of that type.'

In its calculation of sentence, the court should remember that one of the purposes of sentencing is the public denunciation of the conduct of the accused. But to be legitimate a sentence must be based upon a proper factual and legal analysis of the offence, and not upon judicial prejudice. Retribution is a legitimate consideration in the sentencing process. It is through the sentences they pass that the courts are able to show the repugnance which they, and the community, feel towards particular crimes. An important function of the criminal law is to assuage the feelings of those affected by crime, and the courts need to 'bear in mind that society has, in taking from the victims of crime and their relatives the satisfaction of vengeance, transferred to the courts the duty of ensuring that punishments are not so lenient that the victims or relatives will be tempted to take the law into their own hands': *R v Lui Wai-chun and Others* [1946-1972] HKC 111, 113. The challenge for the sentencer is to achieve an appropriate balance. If unnecessary harshness does not promote the interests of justice, undue leniency undermines respect for the law and its efficacy.

If the legislature decides to increase the maximum penalty for an offence, it follows that the courts should take a more serious view of the matter in the calculation of sentence: *Attorney General v Chan Ching-ho* [1994] 2 HKC 457, 460. After the legislature has indicated its view of the gravity of the offence, the corresponding duty of the courts is to administer the law faithfully on that basis: *Chan Kwai-lai v R* [1968] HKLR 31, 41. But the court must still make some assessment 'as to where within the range of seriousness the offence at hand lies': *HKSAR v Ding Yuk-kwan* [2009] 1 HKC 36, 42. Offences which involve no aggravating features may still be sentenced at the lower end of the scale: *Secretary for Justice v Lau Sin-ting* [2010] 5 HKLRD 381. Even where the maximum penalty for an offence is increased, it does not mean that 'heavy sentences should be imposed in the relatively minor cases of the same type': *HKSAR v Lei Tin-seng* [2010]

HKCU 1539 (CACC 271/2009, 30 June 2010, unreported).

In *Attorney General v Ho Yu-ping* [1996] 1 HKC 555, 560, Yang CJ endorsed that said by Moffit P in *R v Lawrence* (1980) 32 ALR 72, 110, namely:

> 'It is well recognised that the fixing by the legislature of a maximum sentence for a particular crime provides a legislative view of the seriousness of the crime in question. A legislative policy so indicated, as with any other legislative policy, should guide the court in the determination of the appropriate sentence to be imposed in a particular case. In order to give effect to this policy, it will normally be necessary to reserve the maximum for the more serious cases of the crime in question with the less serious cases being dealt with by imposition of a less penalty which gives due regard to the seriousness of the class of crime so indicated by the legislature. If there is a legislative amendment increasing the maximum sentence, this new view of the seriousness of the crime should be reflected in the sentence passed.'

If an offence is to attract the maximum sentence prescribed by law, 'the criminal conduct which is involved should fall at the top end of the range for this form of disposal even to be considered as an option': *HKSAR v Yau Wai-hang* [2001] HKCU 713 (CACC 80/2001, 7 August 2001, unreported). The duty of the court is to pay full regard to the nature of the offence committed and to its effect upon the public weal: *Yuen Chi-mo and Others v R* [1973] HKLR 84, 87. It has been called 'a cardinal principle of sentencing' that the court should take account of the consequences to the victim when it considers the gravity of the offence and the proper sentence: *R v Nottingham Crown Court, ex p DPP* (1996) 1 Cr App R (S) 283, 288. It is not the function of the court 'to sentence the offender and not the offence'. It is an aggravating feature of the offence of causing death by dangerous driving that 'two young teenagers died and another has been made a paraplegic as a result of the respondent's driving': *Secretary for Justice v Lau Sin-ting* [2010] 5 HKLRD 318. In *Secretary for Justice v Chau Wan-fun* [2006] 3 HKLRD 577, 584, Stuart-Moore VP said 'the courts cannot, and must not, lose sight of the gravity of an offence of serious violence'.

The public interest requires that those who commit really serious offences 'should be visited with condign punishment sufficient not only to achieve a substantial measure of retribution but also to protect the public by deterring others from committing this type of offence': *R v Ng Wah-kan* (CACC 475/1987, 23 February 1988, unreported). In *Re Applications for Review of Sentences* [1972] HKLR 370, 404, Huggins J said:

> 'Some find it all too easy to forget the demoralizing effects of criminal activities upon the immediate victims, let alone upon potential victims of crime, but this should not be. It must be remembered that failure by the courts to impose sentences which the thinking man in the street considers adequate may lead to various forms of self help both for protection and in retaliation. This, together with the effect of undue leniency on the criminally inclined, may eventually result in a breakdown of law and order.'

In its assessment of the culpability of an accused, the court is entitled to have regard not only to his previous convictions but also to any evidence

directly relevant to the gravity of the offence charged: *R v Chan Yuet-hung and Another* [1986] HKC 290. If the court considers that the case falls within the broad range of cases which can be described as the worst type of offence, there is no reason why it should not adopt the maximum sentence as the appropriate starting point: *HKSAR v Tin Siu-hong* [2006] 1 HKLRD 29, 33. In regard to each crime and each accused, the court has 'the right and the duty to decide whether to be lenient or severe': *R v Ball* (1951) 35 Cr App R 164, 165. Sentences may often have to be retributive in nature, 'a notion that reflects the community's expectation that the offender will suffer punishment and that particular offences will merit severe punishment': *R v R* (2001) 118 A Crim R 538, 551. However, as it was put in *R v Pearce* (1998) 103 A Crim R 372, 382:

> 'Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision. It is, then, all the more important that proper principle be applied throughout the process.'

It is no light matter to imprison an accused. In *Moore v Materna* (1996) 136 FLR 142, 146, Martin CJ commented that 'it must be determined that the imposition of a sentence of imprisonment is justified in all the circumstances of the case, after due consideration of other sentencing options'. Imprisonment comes into its own once all the other possible means of disposal have fallen away: *Lo Yu-bun v R* [1962] HKLR 312, 314. Imprisonment is a sanction of last resort, and there is obvious force in the view that 'if it is not necessary to send a man to prison for very long, it may not be necessary to send him to prison at all': *Attorney General v Ng Sai-man* [1994] 1 HKC 151, 154. In *Taib bin Gemok v Public Prosecutor* [1984] 1 MLJ 313, Rhind J observed that the modern sentencing tendency 'is not to try to fill the jails at every conceivable opportunity, but only to send people to prison where this is essential in the interests of society'. Some cases, inevitably, will be on the borderline.

In *R v Howells* [1999] 1 Cr App R (S) 335, 337, Lord Bingham CJ said that in deciding whether to impose a custodial sentence in borderline cases, the court would ordinarily take account of these matters relevant to the offender:

(1) Begin usually by considering the nature and extent of the accused's criminal intention and the nature and extent of any injury or damage caused to the victim. Premeditation is an aggravating factor. An unpremeditated offence, or one that involves an excessive response to provocation, will usually be less serious. Personal injury or trauma, particularly if permanent, will make an offence more serious, whereas if the loss is only financial the offence will usually be less serious.

(2) An admission of responsibility for the offence, particularly when combined with a timely guilty plea and genuine remorse as shown, for example, by an expression of regret or an offer of compensation, is mitigation to which the court will have due regard.

(3) Where the offence was fuelled by drink or drugs, any practical

genuine and self-motivated efforts by the offender to address his addiction will be looked upon favourably.

(4) Youth and immaturity will often justify a less severe penalty.

(5) Previous good character will usually attract some measure of leniency, the more so if there is evidence of positive good character such as a good employment record and the faithful discharge of family responsibilities.

(6) It will sometimes be appropriate to take account of family responsibilities, or physical or mental disability.

(7) There will be greater reluctance to impose a custodial sentence on somebody who has not previously been so sentenced.

(8) Courts must be mindful of the importance of maintaining public confidence in the sentencing system.

Once the court concludes that an offence is so serious that only a custodial sentence can be imposed, the sentence should be for no longer than is strictly required to achieve the penal purpose which the court has in mind. In some instances, a short sentence of the 'clang of the prison gates' variety may suffice as 'a sufficient measure of disapproval of what has been done and a suitable means of bringing that person to his or her senses': *R v Smedley* (1981) 3 Cr App R (S) 117, 118. Any policy, however, of keeping sentences short must be applied consistently with the duty to protect the public and to deter the criminal: *R v Bibi* [1980] 1 WLR 1193, 1194. If a sentence of imprisonment is inevitable, the court may, other things being equal, decide that its efficacy will be related directly to its length.

In *R v Ollerenshaw* [1999] 1 Cr App R (S) 65, 67, Rose LJ said:

> 'When a court is considering whether a comparatively short period of custody, that is about 12 months or less, it should generally ask itself, particularly where the defendant has not previously been sentenced to custody, whether an even shorter period might be equally effective in protecting the interests of the public, and punishing and deterring the criminal. For example, there will be cases where, for these purposes, six months may be just as effective as nine, or two months may be just as effective as four.'

The obvious candidate for a 'clang of the prison gates' sentence will be the offender of unblemished character, in middle age, with some social standing, who has committed an offence which is out of character. He will hear the prison gates shut behind him; he will don his prison garb; he will see the cell door slam. The whole experience will be utterly traumatic: *R v Roth* (1980) 2 Cr App R (S) 65, 67. He will suffer greatly from the humiliation of imprisonment: *R v Sargeant* (1974) 60 Cr App R 74, 77. Society need not feel that it has, in any way, been cheated of its pound of flesh in respect of such a person. The first six months of such a sentence will often be the worst: *Chan Chi-kong v R* (CACC 544/1969, 15 September 1969, unreported). The accused will be fresh to the experience and he will feel his punishment and his shame most keenly. Thereafter, he may gradually become inured to his circumstances.

Punishment of this type invariably involves a sentence not exceeding 12

months' imprisonment: *R v Smedley* (1981) 3 Cr App R (S) 117, 118. It is a bad sentencing practice for a court to talk about a 'clang of the prison gates' approach in the same breath as, say, a prison term of many months: *R v Joanne Mills* [2002] 2 Cr App R (S) 229, 233. Such a sentence will be inappropriate if there is a possibility that the accused will re-offend: *R v Leung Kwong* [1993] 2 HKCLR 224, 226. If the accused has previous convictions, is no stranger to prison, and is guilty of an offence involving violence, there can be no serious suggestion of imposing a sentence within this category: *Attorney General v Sit Shu-nam* (CAAR 11/1992, 18 November 1992, unreported). It ought equally to be excluded from consideration if the breach of trust by the accused takes the form of the sexual molestation of those in respect of whom he stands *in loco parentis: Attorney General v Ho Yu-ping* [1996] 1 HKC 555, 560.

An ideal candidate for a 'clang of the prison gates' sentence will be the offender who has committed a breach of trust in the pecuniary sense: *R v Ward* (1981) 3 Cr App (S) 350, 351. Such a sentence, quite apart from its impact upon the accused, will hopefully deter potential offenders: *R v Hitchcock* (1982) 4 Cr App R (S) 160. A 'short, sharp shock' sentence of imprisonment may be suitable for the accused who assaults a fellow motorist while under the influence of 'road rage': *HKSAR v So Ming* (HCMA 264/1998, 16 December 1998, unreported). The court, in this situation, will be as merciful as it can, and the period of imprisonment may be kept to a minimum: *R v Kelly* (1983) 5 Cr App R (S) 1, 2. This is because a prison term, even of short duration, will have a salutary effect upon the accused, and will also send the necessary message to the public: *Attorney General v Wai Yan-shun* [1991] 2 HKLR 209, 212. In such an exercise, as Silke JA observed in *Attorney General v Ma Lai-wu and Others* [1987] HKLR 744, 747, a 'balance has to be maintained as between the appearance of leniency to an individual and the effect a prison sentence may have on a defendant of hitherto unblemished character and who is of standing in the community'.

Circumstances can arise in which the sentence has to be greater to reflect the convictions of the accused upon a multi-count indictment. In such a situation the court may be required to impose not only the maximum sentence for each offence, but also sentences which are to run consecutively to one another: *R v Jordan* [1996] 1 Cr App R (S) 181, 185. If, for example, an accused has committed two separate and distinct trafficking offences on different days, then 'as a matter of sentencing principle consecutive sentences were called for': *HKSAR v Woo Chung-hing* [2002] HKCU 606 (CACC 19/2002, 2 May 2002, unreported). In *HKSAR v Liu Chi-keung* [1999] 2 HKC 235, 240, Nazareth ACJHC said:

> 'What is clear is that in appropriate cases, the aggregate sentence for consecutive offences of the same type may very substantially exceed the statutory maximum for the individual offence; this has not infrequently been done or approved by this court.'

The best course for a court to adopt in respect of multiple offences is to