

# CHAPTER 1

## AGGRAVATING FACTORS

*'Do not get caught.'*

– Lord Palmerston

[1-1] In *R v P, R v Blackburn* [2008] 2 All ER 684, (2008) 2 Cr App R (S) 5, Sir Igor Judge P said 'The first factor in any sentencing decision is the criminality of the defendant, weight being given to such mitigating and aggravating features as there may be' [39]. As part of the sentencing exercise, the court must examine the seriousness of the offence, which involves having regard to the aggravating factors, if any, without necessarily treating them as determinative of its sentence. If such features are present, this may indicate either greater culpability on the part of the accused, or greater harm than usual arising from the offence, and sometimes both. Aggravating factors may, sometimes, be neutralised by the mitigating factors, if any.

[1-2] In *HKSAR v Minney* [2011] 4 HKC 136, 142, Fok JA said that what 'constitutes an aggravating feature for an offence will vary according to the category of offence, the particular dangers from which the courts must protect the public, and what deterrent signals, if any, are required'. In *HKSAR v Sandagdorj Altankhuyag and Anor* [2014] 1 HKC 206, 213, a case of theft, it was also noted that the categories of aggravating factors are not closed, that each case can generate its own factors, and that 'the values to be placed on different aggravating features are best assessed by the trial judge'. In *HKSAR v Ganbold Chinzorig* [2016] HKCU 1417 (HCMA 126/2016, 15 June 2016, unreported), the factors which justified a sentencing enhancement for theft by pickpocketing included the commission of the offence at night in a busy area frequented by Christmas shoppers, as well as recidivism and intoxication.

[1-3] The role of the appeal courts is not only to focus upon the quantum of sentence in a particular case, as there are also wider, more generalised responsibilities. In *R v MacAdam* (2003) 171 CCC (3d) 449, 475, McQuaid JA said of the appellate court's role:

It now has a policy role which will focus on specifically articulating and defining the objectives and principles of sentencing. For example, appellate courts can give direction on what should be considered as the proper mitigating and aggravating factors affecting the gravity of the offence.

[1-4] Whereas a mitigating factor may result in a reduction in the sentence for an offence, so might an aggravating factor result in its increase. The practical effect of such a factor is to entitle a court to select a starting point somewhere higher up on the sentencing scale for the offence than might otherwise have been appropriate. However, if a sentence is to be enhanced, it is important for the judge to make clear that any aggravating factors are not applied twice, both in the determination of the starting point and again in the assessment of the level of enhancement: *HKSAR v Kong Wai-chun* [2011] HKCU 1201 (CACC 252/2009, 20 May 2011, unreported). It is important for the starting point to be decided *before* the impact of the aggravating factors is considered: *HKSAR v Ganbold Munkh Erdene & Anor* [2015] 1 HKLRD 999, [2015] HKCU 196 (CA).

[1-5] In regard not only ‘to each crime, but in regard to each criminal, the court has the right and the duty to be lenient or severe’: *R v Ball* (1951) 35 Cr App R 164, 165. A circumstance which may properly be taken into consideration in aggravation of a sentence is the antithesis of a mitigating circumstance: *Chung Shing Garment Co Ltd v R* [1963] HKLR 940, 950, [1963] HKCU 127. Factors of this type generally place a different complexion upon the gravity of the criminality in question. There are, however, limits.

[1-6] In *R v De Simoni* (1981) 5 A Crim R 329, 333, Gibbs J said:

The general principle that the sentence imposed on an offender should take account of all the circumstances of the offence 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.

[1-7] The courts are required to take account of those factors which aggravate the seriousness of the offence in their calculation of a sentence. Such factors may mean that the conduct of the offender is more harmful, or that he is more culpable, or both. In an appropriate case, an accumulation of aggravating factors may, subject to totality, result in an enhancement of sentence by as much as 50%: *HKSAR v Le Van Tho* [2002] HKCU 1469 (HCMA 947/2002, 17 December 2002, unreported). Where, however, there is an accumulation of aggravating factors in a particular case, this may result in each having a lesser individual effect on sentence: *R v Billam* (1986) 8 Cr App R (S) 48. An aggravating factor may relate to the accused himself, or else to the offence or its mode of commission.

[1-8] If, as in *R v Tonti* [1989] HKLR 72, 75, [1989] HKCU 341 (CA), a verdict of a jury leaves open an issue which may operate in aggravation of sentence, the accused must not be deprived of his right to put the prosecution to proof. If there is controversy on any such issue, ‘the burden of proof is that of beyond a reasonable doubt in relation to the matters which the [prosecution] seeks to prove’: *R v Cheng Ching-kwong and Anor* [1986] HKC 109, 116. Facts relied upon by the prosecution in aggravation must be established by the prosecution, and relevant doubt will need to be resolved in favour of the offender: *R v Gardiner* (1982) 68 CCC (2d) 477, 514. That said, after a jury has convicted an offender the court may form its own opinion on the evidence as to the aggravating factors. This it can do despite the absence of an express finding from the jury in respect of them: *R v Clark* [1996] 2 Cr App R (S) 351, 356. The jury cannot be invited to explain their verdict.

[App-85]

**Gambling (Cap 148)**

**(1) Bookmaking (s 7)**

**Maximum penalty:** A fine of \$5,000,000 and 7 years' imprisonment on indictment; on summary conviction, a fine of \$5,000,000 and 2 years' imprisonment.

**Cases:** *Attorney General v Li Wai-ming and Anor* [1984] HKLR 324, [1984] HKCU 27; *R v Yip Kam-fai and Anor* [1993] 2 HKC 196; *HKSAR v Shum Chi-chung* [1998] HKCU 468 (HCMA 858/1997, 1 April 1998, unreported); *HKSAR v Chan Wing-hong* (HCMA 1252/2002, 28 January 2003, unreported); *HKSAR v Leung Chi-fai* [2013] 6 HKC 151.

**Customary sentence:** No tariff exists, but imprisonment is considered in all but minor cases, and this will often be coupled with a fine.

[App-86]

**(2) Cheating at gambling (s 16)**

**Maximum penalty:** A fine of \$1,000,000 and imprisonment for 10 years on indictment.

**Cases:** *R v Chan Tak-sang and Ors* [1987] HKLR 1203, [1987] HKCU 250; *R v Yeung Kwok-leung and Anor* (CACC 377/1993, 18 February 1994, unreported); *R v Tang Yu-bong and Ors* [1996] 4 HKC 432; *HKSAR v Chan Wai-sheung and Ors* [2007] HKCLRT 336.

**Customary sentence:** Imprisonment.

[App-87]

**(3) Gambling establishments (operating, etc) (s 5)**

**Maximum penalty:** A fine of \$5,000,000 and imprisonment for 7 years on indictment; on summary conviction, a fine of \$5,000,000 and imprisonment for 2 years.

**Cases:** *R v Tsoi Tak-shing* (HCMA 364/1994, 21 June 1994, unreported) (big operation; 25 persons present; stake money of over \$450,000; 6 months' imprisonment); *HKSAR v Tsang Ling-yim and Ors* (HCMA 1102/1999, 18 February 2000, unreported) (4 months' immediate imprisonment for the operators, and 3 months' imprisonment, suspended, for the assistant operators); *HKSAR v Wong Hing-lam* [2004] HKCU 114 (HCMA 69/2004, 28 January 2004, unreported) (3 months' imprisonment and a fine of \$15,000); *HKSAR v Ho Wai-keung* [2005] HKCU 699 (HCMA 59/2005, 13 April 2005, unreported) (4 months' imprisonment, suspended, and a fine of \$10,000); *HKSAR v Lui Kwan-ki and Ors* [2006] HKCU 1846 (CACC 222/2006, 6 November 2006, unreported) (sentences of, respectively, 8, 10 and 15 months' imprisonment); *HKSAR v Chiu Hoi-po* [2013] HKCU 2153 (HCMA 457/2012, 16 September 2013, unreported)