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- (3) especially traumatic effect on the victim;
- (4) professional planning organisation or execution;
- (5) vandalism of the premises in excess of the damage generally associated with the standard burglary;
- (6) racial aggravation; and
- (7) a vulnerable victim deliberately targeted.

[1-33] Medium level aggravating factors included:

- (1) a vulnerable victim, although not targeted as such;
- (2) the victim being at home;
- (3) goods of high value, whether economic or sentimental, were taken; and
- (4) burglars working in a group.

Child abuse

[1-34] The courts have a particular responsibility to protect children. Child abuse, which may take various forms, is reprehensible conduct for which a court 'must express public abhorrence': *R v Lam Wai-mei* [1995] HKCU 184 (CACC 197/1995, 17 August 1995, unreported). Violence towards children needs to be deterred, and, said Lord Lane CJ, 'this sort of behaviour will result in condign punishment': *R v Durkin* (1989) 11 Cr App R (S) 313, 315.

[1-35] Those who abuse children sexually will face the full wrath of the law: *HKSAR v Chan Ching-ho* [2000] 3 HKLRD 476, [2000] HKCU 545 (for grooming and related aggravating factors, see *Attorney-General's Reference; R v Gormer* [2016] EWCA Crim 1773, [2016] All ER (D) 62 (Nov)). A teacher who excessively chastises a child must expect imprisonment: *Secretary for Justice v Choi Shuk-kan* [2007] 3 HKLRD 421. There is a need for the courts to protect the vulnerable and to deter abuse: *HKSAR v Ding Yuk-kwan* [2009] 1 HKC 36. The factors which can result in an enhanced sentence were reviewed in *HKSAR v Tsang Chiu-tak* [2013] 1 HKLRD 427, [2012] HKCU 1216, and include such things as the extent to which the sexual abuse has caused physical or psychological abuse to the victim, and the impact of the crime upon the victim's family members.

[1-36] In *RK and AK v United Kingdom* [2009] 1 FLR 274, [2008] All ER (D) 143 (Oct), [72], the European Court of Human Rights noted:

Child abuse is also a form of criminal conduct peculiarly hard to combat, because it is extremely difficult to discover. Babies and young children are unable to complain, older children too frightened. If the source of the child abuse is the parent, the child is at risk from his primary and natural protector within the privacy of his home. This both increases the risk of abuse and means that investigation necessitates intrusion into highly sensitive areas of family life, with the added complication that the parent who is responsible for the abuse will give a false account of the child's history.

Child pornography

[1-37] The Prevention of Child Pornography Ordinance (Cap 579) came into operation in January 2004. It prohibits the production, possession and publication

[1-41] It is a cardinal principle of sentencing that, in assessing the gravity of the offence, the court should consider the consequences to the victim: *R v Nottingham Crown Court, ex p DPP* [1996] 1 Cr App R (S) 283, 288. The punishment may have to be severe if the consequences of the crime to the victim are catastrophic: *Secretary for Justice v Chau Wan-fun* [2007] 1 HKC 423, [2006] 3 HKLRD 577. In *Secretary for Justice v Nones Carmelita Galay* [2023] 1 HKC 139, [2022] 5 HKLRD 400, [2022] HKCA 1081, involving a breach of trust by an employee, the ‘trauma and effect on the husband and wife, particularly the wife, who was emotionally shattered by the incident’, was relevant as an aggravating factor [77].

Credit card fraud

[1-42] If an accused from elsewhere brings forged credit cards into Hong Kong for fraudulent purposes, then this amounts to an ‘aggravating international element for sentencing purposes’: *HKSAR v Loh Joo-hooi* [2014] 3 HKC 301, 306. Given the nature of the offence, deterrent sentences are required, both where counterfeit credit cards are used and also where stolen genuine credit cards are used: *HKSAR v Lam See-chung, Stephen* [2013] 5 HKLRD 242, [2013] HKCU 2043, [39].

Criminal record³

[1-43] If the accused has previous convictions, this may constitute ‘a gravely aggravating factor’: *HKSAR v Tam Kam-mun* [2002] HKCU 468 (CACC 327/2001, 22 April 2002, unreported). This is particularly so when the earlier offence is identical or similar: *R v Lau Tak-ming and Ors* [1990] 2 HKLR 370, 386, [1990] HKCU 399; *HKSAR v Ho Siu-man* [2004] 2 HKC 147, 151. Although an accused should not be sentenced twice for the same offence, ‘the fact of repetitive offending for the same type of offence might warrant aggravation of sentence’: *HKSAR v Cheung Kwok-yip, Peter* [2010] 3 HKC 470, 474.

[1-44] The starting point for sentence may 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’: *HKSAR v Chan Pui-chi* [1999] 3 HKC 848, 851, [1999] 2 HKLRD 830, 833. An accused who repeatedly enters Hong Kong unlawfully and repeatedly offends must expect to face a higher sentence because he has ‘treated Hong Kong, its citizens and its laws with contempt’: *HKSAR v Song Jianhua* [2007] HKCU 840 (CACC 362/2006, 10 May 2007, unreported).

[1-45] Where a court relies upon previous offending as an aggravating feature, it does not necessarily require ‘more than a single previous instance of similar offending’: *HKSAR v Chau Hon-kwong* [2011] 1 HKLRD 630, [2010] HKCU 2718, [33]. But the ‘aggravating feature of a defendant being a repeat offender, whatever the offence, is not susceptible of the arithmetical application of percentage enhancements. Much will depend on the nature and seriousness of the

3 See also ‘Criminal Record’, Chapter 14.

drink that 'he must have known that he put himself in the way of temptation', and the sentence was accordingly enhanced.

[1-53] As regards narcotics, a like approach is invariably applied. In *Secretary for Justice v Ko Wai-kit* [2001] 3 HKLRD 751, 757, [2001] HKCU 1103, [19], it was said to be 'an aggravating factor that this respondent drove whilst under the influence, and heavily so, of drugs'. (As a result of the Road Traffic (Amendment) Ordinance 2011, which became operational on 15 March 2012, specific offences now exist for driving offences involving narcotics: see sections 39J, 39K, 39L of the Road Traffic Ordinance (Cap 374).)

[1-54] In *R v Priestley* (2002) 137 A Crim R 289, 292, [2002] SASC 438, a case of dangerous driving causing death, Debelle J said:

There are only two possible reasons for the respondent's conduct. One is that he was so drunk that he did not know he had collided with Mr Watkins and did not hear the side tray scraping along the ground. The other is that the respondent did not wish to stop because he knew he had been drinking and that he was driving while disqualified from holding a licence and did not wish to be apprehended. Either alternative only serves to aggravate the seriousness of this offending.

[1-55] The Road Traffic (Amendment) Ordinance 2010 became operational on 17 December 2010 (and was itself amended by the Road Traffic (Amendment) Ordinance 2011, which became operational on 15 March 2012), and this makes provision for enhanced penalties where there are 'circumstances of aggravation'. The meaning of this is either that the proportion of alcohol in the offender's breath, blood or urine was at a high level (tier 3) when the offence occurred, or that, either in his blood or urine, he had any concentration of a specified illicit drug, namely, heroin, ketamine, ice, cannabis, cocaine or ecstasy. The Ordinance's Explanatory Memorandum indicates that 'a circumstance of aggravation is to be distinguished from aggravating factors that are taken into account on sentencing'.

False allegations

[1-56] False allegations at trial do not usually affect sentencing. The general rule is that if an accused person levels serious allegations of impropriety against prosecution witnesses as part of his defence at trial, he will not receive any additional punishment if he is disbelieved. This reflects the notion that an accused must be free to run his defence as he wishes, and should not be deterred by the risk of possible repercussions in the event that his version of events is disbelieved or otherwise discounted.

[1-57] In *HKSAR v Leung Chi-kei* [2009] 5 HKC 261, 264, a magistrate was said to have erred for having suggested that 'the conduct of the defence was a feature of aggravation'. As Hogan CJ noted in *Lau Ping-kwai v R* [1962] 4 HKLR 584, 586, [1962] HKCU 78, an accused 'is not to be punished for the manner in which he conducts his defence'. Even if the accused injures himself in an attempt to discredit the police, he will not receive a higher sentence on that account: *Mohammad Yusuf v R* (CACC 553/1982, 6 July 1982, unreported).

App R (S) 22, 82 (cited with approval in *HKSAR v Xiao Wei* [2004] 1 HKC 520, 524, and in *Secretary for Justice v Cheng Chi-wai* [2012] 4 HKC 590, [2012] 4 HKLRD 360). These include:

- (1) the closeness of the handler to the primary offence;
- (2) particular seriousness in the primary offence;
- (3) high value of the goods to the loser, including sentimental value;
- (4) the fact that the goods were the proceeds of domestic burglary;
- (5) sophistication in relation to the handling;
- (6) a high level of profit made or expected by the handler;
- (7) the provision by the handler of a regular outlet for stolen goods;
- (8) threats of violence or abuse of power by the handler over others, for example, an adult commissioning criminal activities by children, or a drug dealer pressurising addicts to steal in order to pay for their habit; and
- (9) the commission of an offence while on bail (something which is provided for by statute in England).

[1-64] See also *HKSAR v Tumurbaatar Enkhbaatar* [2010] 4 HKC 211, for a small scale operation involving the handling of recently stolen telephones, and *HKSAR v Cheng Chi-wai* [2012] 4 HKC 590, [2012] 4 HKLRD 360, for a professional handler providing professional service to professional criminals in respect of stolen motor vehicles, and the need for the sentence to adequately reflect culpability.

[1-65] If there is a cross-border dimension involved in the handling of stolen goods, this will aggravate the offence: *HKSAR v Ho Wing-yin* [2010] 2 HKLRD 343, 345, [2010] HKCU 565, [6].

Homosexual buggery and indecent assault

[1-66] The offences of buggery with a young male and of indecent assault with or towards a child aged under 16 years are aggravated by factors such as: a big difference in age between the defendant and the victim; a breach of trust; the use of threats or inducements to make the victim succumb; the number and duration of offences; if violence was used and harm caused to the victim; if the victim has been caused physical or psychological trauma; if the defendant was involved in other inappropriate behaviour, such as inciting/permitting other people to watch or take photos/videos; if the defendant was psychologically disturbed or paedophilic; and if there is a likelihood of re-offending: *HKSAR v Lee Hon-wah* [2011] 4 HKLRD 319, 333.

Indecent assault⁴

[1-67] In *R v Clifford* [2014] EWCA Crim 2245, [2015] 1 Cr App R (S) 32 (p 242), it was said that the offence of indecent assault was aggravated because of: the number of victims (four) one of whom was under 16; the offending occurred

4 See also the segment entitled 'Rape and sexual assault', below.

for *Justice v Wan Kwok-keung* [2012] 1 HKLRD 201, [2011] HKCU 946. The offence is also aggravated if the accused came to Hong Kong from the Mainland to commit the crime: *HKSAR v Cen Huakuo* [2015] 2 HKLRD 951, [2014] HKCU 1594, [23]–[24].

Motoring offences

[1-74] In *HKSAR v Sheung Kun-hoo, Daniel* [2011] 1 HKC 199, 221, it was said, in the context of a sentence of three years and six months' imprisonment imposed after trial of a driver for causing a death by dangerous driving, that 'the judge was correct in aggravating the sentence which otherwise would have been warranted, by reason of the grossly excessive amount of alcohol in the applicant's body at the time of his driving'. In *HKSAR v Yip Sing-yeung* [2022] HKCU 406, [2022] HKCA 175, the trial judge was held to have correctly adopted a starting point of 30 months' imprisonment for an offence of dangerous driving, including a 50 per cent enhancement, and duly reduced to 20 months for the guilty plea, after saying he bore in mind 'the need for deterrence and instilling social responsibility in drivers, and the aggravating factors of the applicant's criminal record, the presence of "Ice" in his body and his attempt to flee the scene' [10].

[1-75] In *R v Boswell* [1984] 3 All ER 353, [1984] 1 WLR 1047, 1052, the English Court of Appeal indicated that the offence of reckless driving causing death could be aggravated if certain features were associated with the driving. Lord Lane CJ said these included:

- (1) consumption of alcohol or drugs;
- (2) racing: competitive driving against another vehicle on the public highway; grossly excessive speed; showing off;
- (3) disregard of warnings from passengers;
- (4) prolonged, persistent and deliberate bad driving;
- (5) other offences committed at the same time and related offences, namely, driving without ever having had any licence, driving whilst disqualified, driving whilst a learner driver without a supervising driver, and so on;
- (6) previous convictions for motoring offences, particularly offences which involved bad driving or offences which involved the consumption of excessive alcohol before driving;
- (7) several people killed as a result of the reckless driving;
- (8) behaviour at the time of the offence, for example, failure to stop, or even more reprehensible, the driver who tried to throw off the victim from the bonnet of the car by swerving in order to escape; and
- (9) causing death in the course of reckless driving carried out in an attempt to avoid detection or apprehension.

[1-76] Lord Lane's approach in *Boswell* was endorsed by the Court of Appeal in *Attorney-General v Chung Yim-chow* [1986] 1 HKLR 109. The consequence of that approach is that in a serious case related to the actual manner of driving, a sentence of two or more years' imprisonment should be imposed, and that a community service order or a suspended sentence will rarely be appropriate:

More recently, in *Secretary for Justice v Chu Wing Yin Christine* [2020] 1 HKC 258, [2020] 1 HKLRD 771, [2019] HKCA 1459, [45], Macrae VP, following legislative amendments to the Road Traffic Ordinance (Cap 374) in 2010 (see [1-82]), cited with approval the aggravating factors enumerated by Spigelman CJ for this offence in the Guideline Judgment of *R v Juriscic* (1998) 45 NSWLR 209, namely:

- (1) the extent and nature of the injuries inflicted;
- (2) the number of people put at risk;
- (3) the degree of speed;
- (4) the degree of intoxication or of substance abuse;
- (5) whether there was erratic driving;
- (6) whether there was competitive driving or showing off;
- (7) the length of the journey during which others were exposed to risk;
- (8) whether there was any ignoring of warnings; and
- (9) whether the defendant was escaping police pursuit.

However, Macrae VP explained that the aggravating factors identified in the authorities did not 'represent an exhaustive list', adding that 'the value to be placed on any particular factor will vary according to the circumstances of each case' [57].

[1-79] If an offender's persistent bad driving evinces a reckless, selfish disregard for the safety of other road users, a court is required 'to give appropriate weight to that factor in aggravation of the commission of the offence': *Secretary for Justice v Wade* [2016] 3 HKC 274, 286. The fact that dangerous driving has led to 'a more serious consequence in itself can justify a heavier sentence': *HKSAR v Chan Ying-keung, Andy* [2010] HKCU 1546 (CACC 356/2009, 7 July 2010, unreported). In *Secretary for Justice v Lam Siu-tong* [2009] 5 HKLRD 601, 612, [2009] HKCU 1425, [13], it was held that the killing of a pedestrian at a pedestrian crossing aggravated the offence of dangerous driving causing death. Ma CJHC endorsed the view that 'the courts will not show leniency to any driver who has endangered the lives and safety of other road users', at 610.

[1-80] In *Secretary for Justice v Lau Sin-ting* [2011] 1 HKC 234, [2010] 5 HKLRD 318, the court said the trial judge had attached insufficient weight to the aggravating factor that 'two young teenagers died and another has been made a paraplegic as a result of the respondent's driving'. In *HKSAR v Lee Yau-wing* [2013] 1 HKC 572, where grievous bodily harm was caused by the offender's driving, it was said that 'it is the culpability of the applicant's driving that will be the main determinant of the severity of the sentence' [586]. This was endorsed in *Secretary for Justice v Chu Wing Yin Christine* [2020] 1 HKC 258, [2020] 1 HKLRD 771, [2019] HKCA 1459 where Macrae VP said that the 'dominant factor' in sentencing for this offence is 'the defendant's culpability', which, in turn, involves two related assessments, 'the first is the objective dangerousness of the defendant's driving; the second is his moral culpability' [53].

[1-81] Causing a death in consequence of driving a vehicle whilst not alert through lack of sleep or otherwise is a factor which is 'regarded as an aggravating one in other jurisdictions (see, for example, *R v Cooksley* [2003] 3 All ER 40, 48J, [17]) and, in our view, rightly so': *Secretary for Justice v Tsang Ho-pong* [2009] 6 HKC 389, 394. A 'conscious degree of recklessness' in the manner of

Cheung Fai-ho [2022] HKCU 422, [2022] HKCFI 223. If a sentence is not to be enhanced, despite the existence of a recognised aggravating factor, reasons should be provided: *HKSAR v Chan Kam-fai* [2016] 3 HKLRD 1, [2016] HKCU 1049.

[1-85] If a courier (or storer) is also ‘heavily involved in the packaging and dissemination of dangerous drugs’, this makes the crime yet more serious: *HKSAR v Islam Azharul* [2020] 1 HKLRD 644, [2020] HKCU 79, [2020] HKCA 29. Manufacturers of dangerous drugs and wholesalers who send couriers out onto the streets play more serious roles and face longer sentences than couriers and storekeepers, whose own sentences will depend on their exact roles: *HKSAR v Manalo Burnales* [2000] 4 HKC 636, 640, [2001] 1 HKLRD 557, 560; *HKSAR v Herry Jane Yusuph* [2021] 1 HKC 458, [2021] 1 HKLRD 290, [2020] HKCA 974. The extent to which an ‘international element’ aggravates the offence ‘is a question of fact and degree which needs to feature in the conduct of the defendant for the offence for which he has been convicted’, and there are ‘a variety of circumstances and shades of degree in which it may arise’: *HKSAR v Fong Yau-heung* [2022] 2 HKLRD 99, [2022] HKCU 1041, [2022] HKCA 258, [36].

[1-86] In *HKSAR v Yim Hung-lui, Ricky* [2012] HKCU 333 (CACC 266/2011, 13 February 2012, unreported), it was said that if an accused has trafficked in a variety of drugs, this will be regarded as an aggravating factor ‘because in such a situation the trafficker is able to cater to a far wider market than the trafficker in only one drug’ (see also *HKSAR v Islam Azharul* [2020] 1 HKLRD 644, [2020] HKCU 79, [2020] HKCA 29). If the accused has access to different types of dangerous drugs in large quantities, this is also an aggravating factor as the potential harm to Hong Kong is ‘much greater’: *HKSAR v Butt Muhammad Gulzar* [2020] 3 HKLRD 805, [2020] HKCU 2239, [2020] HKCA 597, [37]. An offence will also be treated more seriously if the accused sells different drugs to drug addicts from premises in circumstances which are akin to operating a divan: *HKSAR v Tsang Ka-man* [2019] 2 HKLRD 602, [2018] HKCU 1738, [2018] HKCA 277.

[1-87] In *HKSAR v Mahabul Alam Khan* [2017] HKCU 2286 (CACC 116/2016, 8 September 2017, unreported), the fact that a drug trafficker was a Form 8 recognizance holder and a non-refoulement claimant was described as a ‘serious aggravating feature’, justifying an enhanced sentence. The enhancement for being a Form 8 recognizance holder must also be substantial, for ‘otherwise it has no deterrent value’: *HKSAR v Butt Muhammad Gulzar* [2020] 3 HKLRD 805, [2020] HKCU 2239, [2020] HKCA 597, [32]. This message was reiterated in *HKSAR v Lee Ming Ho* [2024] 1 HKC 722, [2024] 1 HKLRD 1186, [2024] HKCA 150, [70].

[1-88] If the trafficking in dangerous drugs takes the form of unlawful dealing in Part 1 poisons at a licensed pharmacy by an employee, this will be treated with great seriousness: *HKSAR v Lau Shui-kwan* [2003] HKCU 305 (HCMA 9/2003, 11 March 2003, unreported). The personnel of such facilities are trusted to deal with prescription-only dangerous drugs according to the law. In *R v Siu Yuen-fong and Anor* [2002] 4 HKC 699, 710, a case involving the unlawful sale of Part 1 poisons and drugs in a registered pharmacy, Stock J said:

It is a most significant aggravating factor in this case that those selling were doing so on a regular basis, and much more seriously, were doing so in the course of

trafficking carried on by him or another'. When it assesses an accused's proceeds from an offence, a court may consider the amount of benefit received, not only the profit: *HKSAR v Lin Kei-tat* [2016] 1 HKLRD 482, [2015] HKCU 518.

[11-17] If section 4(1)(a)(i) is to apply, then, as it was put by the Court of Final Appeal in *HKSAR v Tsang Wai-lun, Wayland and Ors* [2014] 4 HKC 101, 103, (2014) 17 HKCFAR 319, [30] (per Ribeiro and Fok PJJ):

... the payment must be envisaged to be received 'in connection with the commission of' the predicate offence. But, contrary to the prosecution's submission, the section requires more than just some general, unspecified connection between the payment and the offence. Due weight must be given to the words 'or other reward' in the phrase 'payments or other rewards'. As a matter of language, those words make it clear that the contemplated payment must be in the nature of a reward. It must in particular be a payment having the quality of a reward received in connection with commission of the relevant offence.

[11-18] Section 4(1)(b) provides that the value of a person's proceeds of drug trafficking is the aggregate of the values of: (1) the payments or other rewards; (2) that property; and (3) that pecuniary advantage. Payments received by an accused include not just the sum he receives, but also the payments he passes on to another: *R v Simons* (1994) 15 Cr App R (S) 126, 130. The reference to the 'value of the person's proceeds of drug trafficking' is to be taken as connoting the aggregate of the accused's payments or other rewards, not the net profits: *R v May* [2008] UKHL 28, [2008] 1 AC 1028, 1045.

[11-19] Since the definition of 'property' includes money, any interest an accused has earned from the payment or other reward he has received in connection with drug trafficking is liable to confiscation. That is because it is derived indirectly from the 'payments or other rewards' contemplated by section 4(1)(a)(ii) of the DTROP. The whole amount of the payments received by the accused is the proceeds of the drug trafficking, not merely the amount he retains after others have been paid off: *R v Simons* (1994) 15 Cr App R (S) 126, 130.

[11-20] Section 4(2) of the DTROP entitles the Court of First Instance and the District Court to make certain assumptions for the purpose of determining whether an accused has in fact benefited from drug trafficking. These assumptions, in fairness to the accused, can only properly be made on the basis of facts which have been established by the prosecution. They can be made save to the extent that the accused or, if he is dead, his personal representative, shows that any of the assumptions are not in fact correct in his case. The burden is placed squarely upon the accused to prove, on a balance of probabilities, that the assumptions are incorrect: *Secretary for Justice v Lee Chau-ping and Anor* [1999] 2 HKC 103, 113, [2000] 1 HKLRD 49, 68. The section 4 assumptions are, moreover, discretionary, not mandatory. They are, that is, 'not ones the judge must make, they are ones that he may make when it is rational and realistic for him to make them in the context of the established facts': *HKSAR v Shing Siu-ming and Ors (No 2)* [2000] 3 HKC 83, 95.

[11-21] If, therefore, an accused gives a credible explanation for his possession of drugs which indicates that they were not the proceeds of drug trafficking and

defendant shows on the balance of probabilities that in respect of each item of property and expenditure the assumptions are in his case incorrect, they can no longer be relied upon as evidence that that item of property or expenditure was part of the defendant's proceeds of drug trafficking. In so far as any of them survive they will, together with any evidence which the judge may accept, assist the judge to decide whether he is satisfied so as to feel sure that the prosecution have made out their case. Thus the initial heavy burden on the prosecution is greatly lightened by the potential assumptions.

[11-24] In *R v Redbourne* [1992] 1 WLR 1182, 1189, it was explained that Lord Lane's words were intended to do no more than acknowledge that:

[U]nrebutted assumptions might cover only part of the prosecution's case; and that other evidence might well be needed to convince the judge that other aspects of that case — on which assumptions had been rebutted or where facts in issue were never covered by an assumption in the first place — were proved to the criminal standard.

[11-25] It should be noted that throughout the course of the confiscation proceedings the judge acts on a mere balance of probabilities. This means, in the context of the assumptions, that the prosecution will need to establish to the civil standard the facts on which the assumption is to be based. Once that is done, the court is required to make the assumption unless it is shown not to be correct in the case of the accused, or if the court concludes that there would be a serious risk of injustice in his case if the assumption were to be made.

[11-26] The question sometimes arises of whether confiscation proceedings are truly civil or criminal in nature. In *Phillips v The United Kingdom* [2001] Crim LR 817, a case before the European Court of Human Rights involving the procedure under the 1994 Drug Trafficking Act, it was held that the confiscation procedure under that Act did not involve the determination of a criminal charge but was properly regarded as part of the sentencing procedure of the court after conviction. The Privy Council decided likewise in *McIntosh v The Lord Advocate* [2001] UKPC D1, [2003] 1 AC 1078. Section 7A (now repealed) of the Criminal Justice Act 1988 stated:

The standard of proof required to determine any question arising under this Part of this Act as to—

- (a) whether a person has benefited as mentioned in subsection (2)(b)(i) above;
 - (b) whether his benefit is at least the minimum amount; or
 - (c) the amount to be recovered in his case by virtue of section 72 below,
- shall be that applicable in civil proceedings.

[11-27] This same standard is to be found both in section 3(12) of the DTROP, and in section 8(8B) of the OSCO. When the English Court of Appeal construed section 7A in *R v Levin* [2004] 2 Cr App R (S) 323, it held:

- (1) the standard of proof is the civil burden;
- (2) the court can make far-reaching assumptions;
- (3) the court can require the accused to provide information and can draw inferences from the failure to do so; and

The learned judge does not appear to have considered the question whether, in the light of his earlier finding to the criminal standard, the assumption that the drugs represented benefit had been shown to be incorrect and therefore displaced. Had he done so, it seems to us he would have found that the assumption was displaced since the second finding by a logical imperative, must have followed the first.

[11-32] In a commentary on *Johannes*,¹ DA Thomas has explained that there is nothing necessarily illogical about an apparent inconsistency between the findings of a court in a *Newton* hearing and the findings made in the same case in a drug trafficking inquiry. Whereas the former is confined to the facts of the offence of which the accused has been convicted and involves the criminal standard of proof, the latter concerns an investigation of the whole of his life — the court is charged to investigate whether he has received a benefit from drug trafficking ‘at any time’. If a court found in a *Newton* hearing that the prosecution had not proved that the accused was actively involved in dealing, and was therefore, as in *Johannes*, required to sentence him on the basis that he was a minder, it would not be illogical for the court in a drug trafficking inquiry to find that money or assets found in his possession were the proceeds of earlier unspecified drug trafficking by him.

[11-33] Section 5(1) of the DTROP enables the prosecution to ‘tender and serve a statement which would virtually exact a response from the accused convicted on pain of adverse findings. For example: the tendered statement served on a convicted person may even include the core question as to whether he has benefited from drug trafficking’: *Chun Yeung v HKSAR* [1998] 1 HKC 247, 250, [1998] 1 HKLRD 343, 345. Although section 5(2) indicates that if the accused accepts any allegation in any statement which is tendered such acceptance is to be treated as conclusive, the position is different if he can show that his acceptance resulted from a mistake of law or fact. However, the accused bears the burden of proving any such assertion: *R v Emmett* [1998] 1 Cr App R 247, 253. The point was also made in *Emmett* that since the powers of the Court of Appeal extend to cases when a plea was entered on a mistaken view of the law or fact, it was difficult to see what rational basis there could be to exclude a right of appeal in such circumstances. Lord Steyn said that ‘[e]ven drug traffickers have rights and they too are entitled to justice’. There is, in any event, nothing in section 5 which either expressly or by necessary implication ousts the right of appeal.

[11-34] Once it has been determined that the accused has benefited from drug trafficking, it is necessary for the court to assess the amount to be recovered from him. Section 6 of the DTROP provides:

- (1) Subject to subsection (3), the amount to be recovered in the defendant’s case under the confiscation order shall be the amount the Court of First Instance or the District Court, as the case may be, assesses to be the value of the defendant’s proceeds of drug trafficking.
- (2) If the court is satisfied as to any matter relevant for determining the amount that might be realised at the time the confiscation order is made (whether by an acceptance under section 5 or otherwise), the court may issue a certificate giving the court’s opinion as to the matters concerned and shall do so if satisfied as mentioned in subsection (3).

¹ [2002] Crim LR 148.

that the amount that might be realised is less than the amount of benefit: *R v Carroll* (1991) 13 Cr App R (S) 99. It does not suffice for an accused to seek to discharge his burden by asserting simply that he has no property apart from that found by the police: *R v Lee* [1996] 1 Cr App R (S) 135, 141.

[11-38] The DTROP does not contemplate joint penalties even if there has been a joint venture. In assessing benefit as between co-accused, the court must determine the respective shares of any joint benefit that they may have received as a result of drug trafficking. In the absence of any evidence, be it from the accused or elsewhere, a court is entitled to assume that the co-accused were sharing equally. When the court comes to determine the amount to be recovered under the confiscation order, section 6(3) makes it plain that, if the means of the co-accused differ, the amount of the confiscation order can be tailored to those means: *R v Porter* (1990) 12 Cr App R (S) 377. Where only one accused has been convicted and has sufficient control to realise the property, there is no reason why an order in the total sum should not be made against him.

[11-39] Central to the determination of the amounts that might be realised at the time a confiscation order is made is the definition of 'realisable property' in section 7(1) of the DTROP. That term is defined as:

- (a) any property held by the defendant;
- (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Ordinance; and
- (c) any property that is subject to the effective control of the defendant.

[11-40] The word 'property' is defined in section 2 of the DTROP as including both movable and immovable property, within the meaning of the Interpretation and General Clauses Ordinance (Cap 1).

[11-41] The effect of the legislative framework created by the DTROP is that in determining whether an accused has benefited from drug trafficking and the amount of such benefit, a judge will have regard to four matters after trial: *HKSAR v Shing Siu-ming and Ors* (No 2) [2000] 3 HKC 83, 93. These are:

- (1) the evidence in the trial;
- (2) the material in statements made by the prosecution and the defence under section 5;
- (3) the section 4(3) assumptions; and
- (4) the evidence led in the confiscation hearing.

[11-42] If, however, the accused pleads guilty, the assessment will be made differently: *R v Ko Chi-yuen* (No 1) [1993] 2 HKCLR 101, [1993] HKCU 660. In these circumstances, the judge is entitled to base his decision as to whether the accused has benefited from drug trafficking upon:

- (1) the summary of admitted facts;
- (2) the antecedent statement;
- (3) the statements made by the accused to the police; and
- (4) such other evidence as may have been adduced after conviction and before sentence.

[11-47] Section 7(4) indicates that the value of property (other than cash) in relation to any person holding the property is its 'market value'. This has been held to mean its net market value after the inevitable costs have been deducted from the gross sale price of the property: *R v Cramer* (1991) 13 Cr App R (S) 390. The DTROP does not, however, explain exactly what is meant by the term 'market value'. In *R v Islam* [2009] UKHL 30, [2009] 3 WLR 1, 5, Lord Hope said:

[The] essence of market value is simply that it is the price that would be paid for the goods as between a willing buyer and a willing seller. The nature of the goods, and the context in which the assessment is to be made, will determine the nature of the market to which one should go to determine their market value. If the only market in which such a transaction can take place is an illegitimate one it should, unless the context shows otherwise, nevertheless be one to which regard can be had to determine the price that the goods would fetch.

[11-48] To be excluded from the calculation of the amount that is to be realised is usually the accused's share in the matrimonial home, if the enforcement of a confiscation order calculated on the basis of market value would result in its sale: *R v Taigel* [1998] 1 Cr App R (S) 328, 331. After all, a 'matrimonial home plays a significant role in a married couple's life': *HKSAR v Lo Wai-man* [2011] 6 HKC 205, [42], [2011] 5 HKLRD 295, 312. If there is a line to be drawn under the legislation, it is to be found at the point where the consequence of a harsh approach is to render the family homeless, or to confiscate property which the accused's spouse already owns. Even in circumstances where a spouse knows that money used to pay a mortgage was not legitimately earned, there is no freestanding public policy which deprives the wife of her interest in the property: *Gibson v Revenue and Customs Prosecution Office* [2008] EWCA Civ 645, [2009] QB 348. If the half beneficial interest of an accused's spouse was acquired from the time of the acquisition of the property because of the shared intention of the parties which has not changed, 'the public policy consideration that those who traffic unlawfully in drugs should be deprived of the proceeds does not provide the basis for confiscating her interest': *HKSAR v Lo Wai-man* [2011] 6 HKC 205, [46], [2011] 5 HKLRD 295, 314.

[11-49] If a court is minded to make a confiscation order in relation to the equity in the matrimonial home, it ought to proceed with great caution: *R v Gregory* TLR 31 October 1995. When property is owned jointly by a husband and wife, the proper course for the court to take when assessing the extent to which the property can be taken into account in determining the 'amount that might be realised' is to determine the beneficial interest of each, and then to ascertain whether the beneficial interest of the spouse who is not an accused is a gift caught by the Ordinance on account of its having been made by the spouse who is a defendant: *R v Buckman* [1997] 1 Cr App R (S) 325.

[11-50] If the judge orders confiscation, section 8 of the DTROP requires him also to make an order fixing a term of imprisonment which the accused is to serve if any of the amount which he is liable to pay under the order is not duly paid or recovered. Such a prison term is not designed to punish the accused for benefiting from drug trafficking, but to enforce the order for payment: *HKSAR v Shing Siu-ming and Ors (No 2)* [2000] 3 HKC 83, 99. The imposition of a default term is

remain sufficient means to meet them that an order of costs should additionally be made: *R v Hopes* (1989) 11 Cr App R (S) 38.

[11-54] Section 3(2) of the DTROP indicates that a confiscation order is ancillary to sentence. However, section 3(11) provides that an order is deemed to be a sentence for the purposes of any Ordinance conferring rights of appeal in criminal cases. This means that it is open to an aggrieved offender to take advantage of the appeal provisions contained in Part IV of the Criminal Procedure Ordinance (Cap 221).

[11-55] Section 15 of the DTROP entitles an offender to make an application to the Court of First Instance for a variation of the amount of the confiscation order if it transpires that he has been ordered to make a payment larger than his assets realise. This mitigates somewhat the impact of legislation which makes no specific provision for the reduction of the amount of an order to reflect capacity to pay, and which instead leaves it either to the offender to find the money or to the prosecution to seek to realise his assets. However, section 15 can cut both ways, and if a confiscation order is made in an amount less than the amount of the offender's proceeds of drug trafficking, because the amount that might be realised is less than that figure, and he subsequently acquires assets, the provision entitles the prosecution to apply to the Court of First Instance for an order substituting a greater sum for the original amount: *R v Tivnan* [1999] 1 Cr App R (S) 92. Either way, if the court accedes to the application, it is required also to vary the term of imprisonment imposed originally in default of compliance with the order. If the offender is given time to pay the compensation order, he will not be committed to prison in default of payment during that period. That, however, will not prevent the prosecution seeking the appointment of a receiver to realise his assets immediately.

Organized and Serious Crimes Ordinance (Cap 455)

[11-56] In 1994, the Organized and Serious Crimes Ordinance (Cap 455) ('OSCO') was enacted. As explained in *HKSAR v Musah Hakeem Tahiru* [2018] 1 HKLRD 352, [2017] HKCU 3150, [23], it provides a regime for the confiscation of the proceeds of serious crime. Although the essential structure of its confiscatory regime is similar to DTROP's, there are important differences. There is, for example, a distinction in the criminal conduct underlying the confiscation order in the two regimes. Under the DTROP, the court has to determine whether the person has benefited from 'drug trafficking'; whereas under the OSCO, it is a question of whether the person has benefited from any specified offence or, if that offence is an organised crime, from all organised crime he has committed.

[11-57] Section 25(1) of the OSCO makes it an offence if a person 'knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property'.

[11-58] The OSCO makes provision for the confiscation of the proceeds of crime. Its regime runs in parallel to that contained in the DTROP, and the case

- (i) any payments or other rewards received by him at any time (whether before or after 2 December 1994) in connection with the commission of that offence;
- (ii) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and
- (iii) any pecuniary advantage obtained in connection with the commission of that offence.

[11-63] In *HKSAR v Tsang Wai-lun, Wayland and Ors* [2014] 4 HKC 101, 113, (2014) 17 HKCFAR 319, [30], it was held that, on a true construction of section 2(6)(a), the payments in question must be in the nature of a reward connected to the predicate offence, and must, in particular, 'be a payment having the quality of a reward received in connection with commission of the relevant offence'. The Court of Final Appeal rejected the prosecution's contention that section 2(6)(a) widened the concept of 'proceeds of an offence' in section 25(1) to extend to money or property received in circumstances in which such receipt may be said to be 'in connection with' the commission of an indictable offence even if that money or property was known to be tainted as a benefit received on account of the commission of such offence; this wide interpretation was rejected because the ordinary meaning of 'proceeds' was money or property derived from the commission of the offence. The target of section 2(6) was 'tainted money' which derived from or resulted from a predicate offence, but not 'clean money'.

[11-64] Section 2(6)(b) indicates that the value of the person's proceeds of the offence is the aggregate of the values of:

- (i) the payments or other rewards;
- (ii) that property; and
- (iii) that pecuniary advantage.

[11-65] Section 2(7)(a) indicates that for the purposes of the OSCO, a person's proceeds of organised crime are:

- (i) any payments or other rewards received by him at any time (whether before or after 2 December 1994) in connection with the commission of one or more organized crimes;
- (ii) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and
- (iii) any pecuniary advantage obtained in connection with the commission of one or more organized crimes.

[11-66] Section 2(7)(b) provides that for the purposes of the OSCO, the value of the person's proceeds of organised crime is the aggregate of the values of:

- (i) the payments or other rewards;
- (ii) that property; and
- (iii) that pecuniary advantage.

[11-67] The court, therefore, is concerned with the payments made to the accused in connection with organised crime, and not just with the profit element in those payments: *R v Simons* (1994) 15 Cr App R (S) 126, 130. The legislation is intended to deprive the accused of the benefit received from relevant criminal conduct, regardless of whether the benefit has been retained: *HKSAR v Tsang Wai-lun Wayland and Ors* [2014] 4 HKC 101, (2014) 17 HKCFAR 319, [58]. In *HKSAR*

was something which indicated a willingness to facilitate the course of justice, and was thus deserving of recognition. The mitigation, it felt, did not lie in the fact that the plea had saved the community the expense of a contested hearing.

[26-45] The manner in which the accused conducts his defence at trial is also not a matter to be used against him at the time of sentencing: *Siu Hei-nam and Ors v R* [1977–1979] HKC 421, [1979] HKLR 188, 190. The accused is not to be punished for the way in which he has conducted his case: *R v Cheung Man-kit* (HCMA 379/1993, unreported). In *R v Yu Chi-ming* (CACC 769/1995, 17 May 1995, unreported), the trial judge treated as ‘aggravating’ the fact that the accused had cast ‘aspersions against the police investigating this case, which I disbelieved’. This approach, said Sears J, was ‘wrong in principle’, because ‘a person is only sentenced for the offence which is committed’ [5].

[26-46] In *HKSAR v Leung Chi-kei* [2009] 5 HKC 261, 264, a magistrate was said to have erred for having suggested that ‘the conduct of the defence was a feature of aggravation’. Even if the accused injures himself with a view to discrediting the police, such false allegations ought not to affect the determination of the sentence: *Mohammad Yusuf v R* (CACC 553/1982, 6 July 1982, unreported). In *Lau Ping-kwai v R* [1962] 4 HKLR 584, [1962] HKCU 78, 586, Hogan CJ said:

Although regret and consciousness of error, particularly when coupled with a sincere intent not to offend again, may well be taken into account in determining a sentence, an accused is not to be punished for the manner in which he conducts his defence.

[26-47] The accused who is convicted after trial cannot, of course, expect to receive the discount customarily awarded to those who acknowledge their guilt from the outset: *R v Chan Wai* [1994] 2 HKC 204, [1994] 2 HKCLR 75, 80. There may, in fact, be no entitlement to any discount: *HKSAR v Tong Fuk-sing* [1999] 3 HKC 332, 336, [1999] 3 HKLRD 710. There is no remorse, and no saving of time and expense. As it was put in *R v Lui Koon-man and Ors* [1991] HKCU 7 (HCMA 1751/1990, 11 January 1991, unreported):

It is the right of every person before a court to plead not guilty; he disentitles himself to the credit which a plea of guilty brings, but he must not be punished, nor appear to be so, for pleading not guilty.

[26-48] The accused who contests his guilt necessitates a trial, which may be lengthy, and also requires the attendance of the witnesses, including the victim, if any, at the court. All the advantages which the criminal justice system derives from a timely plea are absent in the event of a trial. This, accordingly, is the basis upon which the accused falls to be sentenced. He may, however, still pray in aid such other mitigation as may be open to him.²

[26-49] If, prior to trial, an accused, in an attempt to assert his innocence, publicly traduces his victims, this may be treated as an aggravating factor in sentencing: *R v Hall* [2013] EWCA Crim 1450. However, denials of guilt, even if forceful, do not, without any other aggravating factors, warrant additional punishment: *R v Clifford* [2014] EWCA Crim 2245, [2015] 1 Cr App R (S) 32, 242.

² See also ‘Mitigating Factors’, Chapter 30.

[27-19] The Castle Peak Hospital offers an environment to the patient which is less restrictive and more immediately rehabilitative than that on offer at the Siu Lam Psychiatric Centre. Although section 45 of the Ordinance allows the court to order that the accused be sent to either institution, in practice those subject to hospital orders are invariably sent to the psychiatric centre. The main difference historically between the two institutions was that the psychiatric centre was more secure and, therefore, more appropriate for the reception of the more dangerous patient. In *HKSAR v Chan Tak-kuen* [2018] HKCU 4155, [2018] HKCFI 2621, an accused who had been violent towards others while detained in Castle Peak Hospital was then ordered to be detained for six months in the psychiatric centre after being convicted of assault occasioning actual bodily harm. If the accused is sent to the psychiatric centre, he can, by virtue of section 47(1A) of the Ordinance, be discharged therefrom with the consent of the Chief Executive, irrespective of whether or not the order is for a fixed term. Section 47(1A) of the Ordinance indicates that an accused who has been admitted to the psychiatric centre is to be treated for the purposes of the Prisons Ordinance (Cap 234) as if he has been lawfully detained in a prison.

[27-20] A person who is subject to a hospital order which is of indeterminate length will have his situation reviewed annually by the Mental Health Review Tribunal ('MHRT'): *HKSAR v Lee Wong-chiu* [2009] HKCU 156 (CACC 282/2008, 3 February 2009, unreported). This comprises a panel of psychiatrists, and they will consider when he may safely be released back into the community: *R v Kong Sing-ping* (CACC 34/1992, 5 March 1992, unreported). The job of the panel is 'to ensure that no patient is detained for longer than is absolutely necessary': *R v Lin Jun* [2012] HKCU 2121 (CACC 135/2012, 26 September 2013, unreported), [8]. The MHRT is required to determine not only the date of discharge, but also whether the patient needs to be discharged on particular conditions.

[27-21] An assertion by the accused who is subject to an indeterminate order that he is 'feeling better because of an improvement in his condition should not in itself be regarded as a ground for interference with such an order': *HKSAR v Wan Pak-sing* [2004] 3 HKC 283, 287. However, in *HKSAR v Fan Wai-kong* [2005] HKCU 142 (CACC 475/2004, 28 January 2005, unreported), [10], Burrell J stressed: 'If and when, within the provisions of the Mental Health Ordinance, he is no longer a risk to the public and it is safe to release him, he will be granted his liberty'.

[27-22] If the Chief Executive is satisfied from the report of the medical superintendent that a patient who is detained for a specified time no longer requires treatment, section 59 of the Ordinance empowers him to direct that the person be detained in prison for any period which does not exceed that specified in the hospital order. Conversely, if a person develops a mental disorder while serving a term of imprisonment, section 52 of the Ordinance entitles the Chief Executive to direct that he be transferred to a mental hospital. If, prior to the conclusion of the term of imprisonment, such a person is cured he may be returned to the prison to serve out the remainder of his sentence.

[27-23] A magistrate may impose a hospital order under section 45(1)(a)(iii) of the Ordinance without first proceeding to conviction: *Ho Chun-wah v R*

Criminal Procedure Ordinance (Cap 221) applies, provided that it is satisfactorily established that the person is mentally incapacitated to a nature or degree which so warrants, and provided as well that such a course is necessary in the interests of the accused or for the protection of others. However, even then, the court or magistrate is further enjoined, before making a guardianship order, to have regard 'to the circumstances of the case', and these include the nature of the act or omission attributed to the accused, his character and antecedents, the other available methods of dealing with him, and the advice of the Director of Social Welfare as to the suitability of the order and, where applicable, the availability of a suitable person to exercise the guardianship. Once this exercise is complete, a guardianship order may be imposed if that is 'the most suitable method of disposing of the case'.

[27-28] Section 44D of the Ordinance enables a court or a magistrate to make a supervision and treatment order in respect of an accused to whom section 76(1) of the Criminal Procedure Ordinance (Cap 221) applies. This, however, is dependent on it being satisfactorily established that he is mentally incapacitated to a nature or degree which warrants his receiving supervisory treatment, that his mental incapacity is susceptible to treatment, and that it is necessary in the interests of the accused or for the protection of others that he should be so supervised and treated. But before concluding that a supervision and treatment order is 'the most suitable method of disposing of the case', the court must have regard to 'the circumstances of the case'. This means the nature of the act or omission attributed to the accused, his character and antecedents, the other available methods of dealing with him, and the advice of the Director of Social Welfare as to the suitability of the order and, where applicable, the availability of a suitable person to exercise the guardianship, and also, if there is to be an order, the arrangements that will need to be made for the contemplated treatment.

[27-29] The effect of a supervision and treatment order made under section 44D of the Ordinance is that the supervised person is placed under the supervision of the Director of Social Welfare, or a person acting under his authority, for a specified period, not exceeding two years, and he is required to submit, during the whole or such part of that period as may be specified, to treatment by or under the direction of a medical practitioner with a view to the improvement of his mental condition. Before imposing such an order, the court or magistrate must first consider a social inquiry report from the supervising officer. The court or magistrate must explain to the person to be supervised the effect of the proposed order, and the supervised person must keep in contact with the supervising officer and act in accordance with his instructions: *R v Lam Ka-yiu* [1997] 1 HKLRD 445, 448, [1997] HKCU 1086.

[27-30] An offender who is aggrieved by the imposition of a hospital order may avail himself of section 48 of the Ordinance, which enables an appeal against the order to be pursued.

from the defendant, the sentence should be enhanced': *HKSAR v Har Tsz-yui* [2020] 1 HKLRD 307, [2019] HKCU 4480, [2019] HKCA 1336, [18]. The court should expressly state the starting point, and the extent of any discount (or enhancement): *HKSAR v Lin Yu and Anor* [2005] 3 HKLRD 127. Provided this is done, the accused will 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: 'As a matter of fundamental sentencing principle, the starting point is directed at the offence and its seriousness, not at the offence and mitigating factors other than the guilty plea'.

[28-14] When the court selects its starting point, it is necessary that, as Miles CJ put it in *R v Stafford* (1997) 97 A 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.

[28-15] 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 the sentence in respect of 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 offence should not 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 an offence is committed whilst on bail for an earlier offence, this is a seriously aggravating factor which justifies an enhanced starting point for sentence: *HKSAR v Leung Ting-fung and Anor* [2015] 1 HKC 290, 297.

[28-16] In *HKSAR v Chong Hung-shek* [2019] 3 HKC 284, [2019] 2 HKLRD 937, [2019] HKCA 451, it was explained that a global approach to sentencing for multiple charges is to be avoided as it results in inappropriate sentences on each of the charges the accused faces, which can cause difficulties on appeal. An overall view of his conduct can still be taken, but this will be after, and not before, the imposition of individual sentences. It is, however, quite legitimate, said McWalters JA, to take a global view of the accused's culpability, as this is 'an essential tool when sentencing for multiple offences', but this is quite different from a global approach to sentencing, which is impermissible [50].⁴

[28-17] 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,

4 Generalised and globalised sentences are considered in Chapter 24.

indicated, this would 'help bring focus to a sentencer's reasons for sentence, and should assist the sentencer in crafting well thought-out and carefully analysed reasons for sentence'. Although there are difficulties in sentencing manslaughter offenders, McWalters JA has said 'we would not, ourselves, discourage judges from indicating a starting point' [110].

[28-22] 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 Ors* [2001] 4 HKC 263, [2001] 3 HKLRD 487, 500. If a 'crushing' sentence is required, the duty of the courts is to impose one: *HKSAR v Lee Ming Ho* [2024] 1 HKC 722, [2024] 1 HKLRD 1186, [2024] HKCA 150, [85]. Courts must bear in mind that sentences are designed to protect the public, whether by punishing the accused or reforming them, or deterring the accused 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. However, as the High Court of Australia cautioned in *Muldock v R* (2011) 244 CLR 120, 140, (2011) 281 ALR 652, [2011] HCA 39, [60]:

A fundamental precept of the criminal law is that a sentence should not be increased beyond that which is proportionate to the crime in order to extend the period of protection of the community.

[28-23] 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:

[T]he 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.

[28-24] 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 for the legislative view of the seriousness of the offence: *HKSAR v Chan Chi-kong* [1997] 3 HKC 702, 707.

[28-25] The gravity of a crime is to be gauged, at least in part, by the penalty prescribed for it. In *R v Wong On-lin* [1995] 1 HKC 659, 661, Barnett J said that 'the seriousness of the offence is reflected in the maximum sentence which the court may pass'. In *HKSAR v A male known as Boma Amoso* [2012] 1 HKC 504, 513, Stock VP said: 'The first factor to which any sentencing court should in this context have regard is the maximum penalty available'.

Experience suggests that mitigation advanced sometimes takes the form of a mantra in our courts; with the courts being told of the age, health circumstances and number of an offender's family members and of other matters which have little to do whatsoever with what has led the particular offender to the commission of the offence and what circumstances peculiar to the offender go in mitigation of sentence. There are certain offences — and these are well-known — in which personal circumstances and the circumstances leading to an offence will count much less than in others, because those offences demand, as a matter of public protection, deterrence as an overwhelming consideration. That said, the circumstances of this case provide an opportune moment in which to stress the need for individual justice having regard, of course, to the policy considerations that might dictate in a category of case a stern general approach but never forgetting the fact that the courts are on each sentencing occasion dealing with an individual whose peculiar circumstances, if they exist, always deserve careful attention. Consistency in sentencing is important but consistency does not dictate blindness to individual circumstances of a case and to those of an offender. An overly rigid pre-occupation with uniformity can be inimical to individual justice.

[30-8] In regard not only to each crime but also in relation to each accused, the court has 'the right and the duty to be lenient or severe': *R v Ball* (1951) 35 Cr App R 164, 165. If an accused wishes the court to place reliance upon a mitigating factor, the matter should be established, at least on a balance of probabilities: *R v Storey* (1996) 89 A Crim R 519, 531. It is 'always open to a judge to accept or reject an assertion made by a defendant': *HKSAR v Cheung Wai-kong* [2002] HKCU 666 (CACC 142/2001, 22 May 2002, unreported). If, however, mitigation is to be rejected, the accused should be told: *HKSAR v Lai Yip-sing* [2001] 2 HKLRD 601, 604, [2001] HKCU 608.

[30-9] A starting point for sentence must invariably be set, not least because this enables an accused to see what weight, if any, has been placed upon his mitigation. The fixing of a starting point 'allows the judge to focus upon the point from which deductions for the mitigating circumstances can be made and, should there be an appeal, it allows the appellate court immediately to comprehend the judge's approach to sentencing': *Attorney General v Bow Ki-lun and Anor* [1995] 2 HKCLR 168, [1995] HKCU 409. The starting point for sentence 'is directed at the offence and its seriousness, not at the offence and mitigating factors other than the guilty plea': *HKSAR v Wong Mei-heung* [2010] HKCU 2438 (CACC 273/2010, 3 November 2010, unreported). The proper approach is to consider all the mitigation at the same time when assessing the overall discount from the notional sentence after trial, as this is 'least likely to lead to confusion, disparity and the distortion of the sentence': *HKSAR v Herry Jane Yusuph* [2021] 1 HKC 458, [2020] HKCA 974, [78]. If the court accepts the mitigation, this can result in a reduction from the starting point in excess of the one third customarily granted to somebody who pleads guilty: *HKSAR v Wong Siu-kwan* [2001] HKCU 1042 (CACC 166/2001, 17 October 2001, unreported). But before matters can be relied upon in mitigation of sentence, a proper foundation should be laid.

[30-10] When considering mitigation, the court will be guided by what, in *Chung Shing Garment Co Ltd v R* [1963] HKLR 940, 950, [1963] HKCU 127, was called 'the principle of relevance'. Blair-Kerr J explained:

comment. If a short speech in mitigation can, as in this case, be anticipated, it is a better practice to leave all comments until counsel has concluded his remarks.

Absolute liability

[30-14] See segment on 'Moral culpability' (below, at [30-248]).

Academic achievements

[30-15] Although the youth of an offender may sometimes avail an accused in mitigation (qv), good educational results do not of themselves necessarily do so. In *HKSAR v Cheung King Sang Kinson and Ors* [2023] HKCU 4536, [2023] HKDC 1463, [129], Judge AN Tse Ching said:

The defendants were all outstanding students and have continued in their academic pursuits after they were arrested. However, being a good student is not a mitigating factor, as one cannot by virtue of his education claim preferential treatment. In addition, courts should, in each case, give proper weight to the public interest and not simply regard the welfare of the defendants as the paramount consideration: *R v Caird* [1970] 54 Cr App R 499.

Addiction

[30-16] In *R v Henry* (1999) 106 A Crim R 149, 183, Spigelman CJ said that 'self-induced addiction at an age of rational choice establishes moral culpability for the predictable consequences of that choice', and this was approved by Stock VP in *HKSAR v Chiu Wai-kan, Vicken (No 2)* [2011] 5 HKC 519, [2011] 5 HKLRD 422, [30]–[35]. In *HKSAR v Husnain Safdar* [2020] 6 HKC 241, [2021] 3 HKLRD 509, [2020] HKCA 454, [106], McWalters JA noted that 'what Stock VP called the choice factor is particularly relevant where there may be no other explanation for the offender's continued addiction to drugs'. However, 'addiction calls in question the effectiveness of deterrence, in the same way that a mental health issue may do': *Zhang Jing Yuan v R* [2019] NZCA 507, [146].

[30-17] In *R v Lawrence* (1988) 10 Cr App R (S) 463, the accused was a heroin addict who committed a series of burglaries with the sole purpose of financing his addiction. The court commented on the lack of authority on the question of whether, and to what extent, the fact that the motive for the offences was solely to feed drug addiction could be a mitigating circumstance. Simon Brown J said:

Let this appeal henceforth stand as that authority if in truth it be needed. We cannot make too plain the principle to be followed. It is no mitigation whatever that a crime is committed to feed an addiction, whether that addiction be drugs, drink, gambling, sex, fast cars or anything else. If anyone hitherto has been labouring under the misapprehension that it was mitigation, then the sooner and more firmly they are disabused of it the better.

[30-18] Evidence of addiction to gambling will rarely affect the importance of general deterrence: *R v Martin* (1994) 74 A Crim R 252. In *R v Luong* [2005] VSCA 94, the sentencing judge declined to accept the accused's gambling addiction as a mitigating factor to any significant extent. Winneke P said:

the commission of the offence, unless the guideline or tariff has become lower by the day of sentence (see art 12(1) of the Hong Kong Bill of Rights (Cap 383) and *R v Chan Ka-wai* CACC 530/1988).

[30-20] It by no means follows that, because an offence occurred many years previously, a lesser sentence will be imposed once the case is tried. A sexual assault, for example, may have lifelong consequences on the victim, and the fact that the offence is old may not shield the offender from condign punishment: *R v Hall* [2013] EWCA Crim 1450. In *Bennett v R* [2019] NZHC 728, where the accused had indecently assaulted a young female 33 years prior, Brewer J said 'the passing of time does not lessen the severity of Bennett's offending' the reason being that it was a 'serious example of offending of a serious kind, involving a vulnerable young person and a severe breach of trust' [24]. In *Secretary for Justice v Leung Yuet-hung* [2014] 5 HKC 68, [2014] 3 HKLRD 304, 325, a case of historic attempted rape which occurred 19 years previously when the accused was aged 21 and the victim 19, the court said that 'the passage of time of itself is of some but not much significance', with some regard being had to the accused's 'blameless life' since the offence, and the fact that concern for the safety of others was not 'a material factor' [60].

[30-21] Sometimes offences do not come to light until long after their commission, perhaps because an offender's high standing and reputation shield him or divert suspicion elsewhere, and mere length of time 'is a factor of limited weight': *FGC v Western Australia* (2008) 183 A Crim R 313, 341, [2008] WASCA 47.²

Age of offender

[30-22] In *Secretary for Justice v Wong Chi-fung and Ors* [2018] 2 HKC 50, (2018) 21 HKCFAR 35, [2018] HKCFA 4, [84], it was said that the 'age of an offender, whether youth or advanced age, is always a relevant mitigating factor in sentencing'. The court added that, in light of section 109A of the Criminal Procedure Ordinance (Cap 221) (which enjoins a court not to sentence a person between the ages of 16 and 21 to imprisonment unless 'no other method' of dealing with him is appropriate), the imprisonment of a young person is 'a sentencing measure of last resort' [86]. Although it is an offender's age at the time of sentence which is relevant under section 109A, if 'a young person has turned 21 years of age between the date of offending or conviction and the date of sentence, the fact of his youth will be a powerful factor in determining the appropriate sentence for him': *Secretary for Justice v Leung Hiu-yeung and Ors* [2018] 6 HKC 99, (2018) 21 HKCFAR 421, [2018] HKCFA 43, [76]. The reason for this is that 'the broad conceptual approach of a sentencing court does not undergo a fundamental change simply because the offender passes his twenty-first birthday': *R v Danga* (1992) 13 Cr App Rep (S) 408.

[30-23] In *Secretary for Justice v Chau Tsz-tim and Ho Wan-chiu* [2015] 2 HKC 88, 93, [2015] 1 HKLRD 853, Yeung VP said:

2 See also segment on 'Conduct since offence', below.

HKSAR v Abdallah Anwar Abbas [2009] 2 HKC 197, 210, [2009] 2 HKLRD 437. In *HKSAR v Bayanmunkh* [2012] 2 HKC 233, 238, McWalters J said the courts were at pains 'to make it clear that no special consideration will be accorded to the young, the aged, the ill or disadvantaged or the financially impoverished who are recruited to become drug couriers'.

[30-27] In *Re Applications for Review of Sentences* [1972] HKLR 370, 417, it was explained that: 'The personality, youth or personal circumstances of the offender may pale into insignificance because of the magnitude or prevalence of the offence in question'. If serious crimes are committed by young persons, they cannot expect to turn their age to their advantage upon conviction. The courts, instead, must be prepared to 'steel themselves, unless there are particularly powerful and peculiar contrary reasons attaching to the circumstances of the offender and his involvement in the offence, to the imposition of substantial prison terms': *HKSAR v Law Ka-kit and Ors* [2003] 2 HKC 178, 187.

[30-28] In *Attorney General v Li Chi-ko* [1987] 6 HKLR 1233, 1235, [1987] HKCU 254, it was said that, in the case of serious robbery, a term of imprisonment is inevitable in the absence of exceptional circumstances, and 'youth of itself is not such an exceptional circumstance, although extreme youth might be'. This approach is of general application: *HKSAR v Bugaay* [2008] 6 HKC 326, 331. Such extreme youth, the court added in *Li Chi-ko*, could be claimed by an offender aged 15 years. In *Attorney General v Yau Wing-hong* [1995] 3 HKC 95, 98, the court emphasised that 'a person older than that cannot plead "extreme youth"'. In *HKSAR v Wong Tsz-hin* [2013] 1 HKC 239, 244, a 16-year-old student who pleaded guilty to a robbery in the less serious category was adjudged to be more suitable for detention in a training centre than for imprisonment, as it was of importance that the applicant should be rehabilitated and a long term of imprisonment may not have been the best answer for his rehabilitation.

[30-29] In *HKSAR v Law Chung-hin and Anor* [2012] 1 HKLRD 450, [2011] HKCU 2228, a case involving a death during a fight between rival gangs of youths, Stock VP said, at [42]:

Those who join in triad related attacks, let alone attacks that result in someone's death, must not be allowed to hope for lenience at the hands of a court on account of age; for it behoves the courts to send to the youth of this jurisdiction a strong deterrent message. Extreme youth will sometimes warrant sentencing recognition.

[30-30] In *R v Wong Pit-shing and Anor* [1997] 2 HKC 136, 142, it was submitted that due to the built-in tolerance of an accused, whose precise age was unclear, the bone test which was conducted on him might not indicate his exact age and that there were therefore dangers in treating extremely young offenders on a simple calendar basis. The court declined to construe earlier cases as supporting the proposition that extreme youth ceased to be a potentially mitigating factor or exceptional circumstance at exactly 15, and reiterated its disapprobation of a mathematical approach to sentencing. Having indicated that it was simply not realistic to differentiate age in a sharp way, Mayo JA added:

[30-34] In some circumstances, the advanced age of the accused will count for little, as in *HKSAR v Kwok Sau-chun* [2010] HKCU 1901 (HCMA 543/2010, 18 August 2010, unreported), where the 82-year-old offender, a recidivist, committed the offence 'with eyes wide open'. In *R v Clarke; R v Cooper* [2017] EWCA Crim 393, [2018] 2 All ER 333, the English Court of Appeal, in considering cases involving accused aged 101 and 97, held that although an offender's life expectancy, age, health and prospect of dying in prison were factors legitimately to be taken into account in sentencing, they had to be balanced against the gravity of the offending (including the harm done to the victims), and the public interest in seeing adequate punishment for very serious crimes. In *R v Alden and Wright* [2001] 2 Cr App R (S) 401, 405, a case of buggery, Henriques J said: '[W]e do not feel that by reason of age alone that a man aged 66 when sentenced can expect a 15-year sentence to be reduced. He is liable to be released aged 76'.

[30-35] In *R v Chen Chun-yeh* [1997] HKCU 144 (CACC 513/1996, 12 February 1997, unreported), an 88-year-old heroin trafficker who challenged his sentence of 15 years' imprisonment was told that there was nothing the Court of Appeal could do as leniency would encourage the syndicates to recruit aged persons. A 78-year-old drug trafficker received short shrift when he sought to pray in aid his age as mitigation in *HKSAR v Wong Wan* [2001] HKCU 117 (CACC 384/2000, 20 February 2001, unreported) (see also *HKSAR v Lau Wai-ping* [2009] HKCU 1914 (CACC 303/2008, 30 October 2009, unreported)). Were it otherwise, 'those who are inveigled into taking part in the manufacture and trafficking of dangerous drugs will be the lame, the halt, the blind, the young and the old — people who may have some ground for pleading for the mercy of the court if they are in fact arrested': *Lam Hak-hung v R* (CACC 724/1972, 20 March 1973, unreported), as approved in *Attorney General v Chan Chi Mei-wah* [1990] 1 HKLR 190, 193, [1990] HKCU 284.

[30-36] In *HKSAR v Lau Wai-ping* [2009] HKCU 1914 (CACC 303/2008, 30 October 2009, unreported), Yeung JA said 'the judge took the view that old age was of no or little weight in drug trafficking cases. The judge was right'. (See also *HKSAR v Cheng Wing-shui* [2004] HKCU 906 (CACC 169/2004, 6 August 2004, unreported); *R v Aramah* (1982) 76 Cr App R 190; *R v Hanouda* (1982) 4 Cr App R (S) 137.)

[30-37] In *R v Hall* [2013] EWCA Crim 1450, an 83-year-old man was convicted on his own pleas of a series of offences against children and young girls, and on review the sentence imposed at first instance of 15 months' imprisonment was doubled to 30 months.

Alcohol and drugs

[30-38] The policy of the law is not to give an accused a sentencing reduction on the basis that he was drunk when he committed the offence: *R v Rosenberger, ex p Attorney General* (1994) 76 A Crim R 1. He must instead expect to receive the sentence his offence merits: *R v Paton* [1982] Crim LR 58. In *HKSAR v Chiu Wai-kan, Vicken (No 2)* [2011] 5 HKC 519, [2011] 5 HKLRD 422, [31], Stock VP explained that 'where an accused has become addicted to alcohol or drugs