CHAPTER 2

Antecedent Statements and Background Reports

'Everyone has a past, but that's just it – it's in the past.'

– Nicholas Sparks

After the accused has been convicted, the court needs to obtain information about him from various sources, so it can sentence on a correct basis. Much of the information will come from the prosecution and the defence, but the social services and others play an essential role. It is vital for the court to be aware of the history of the accused, and the word 'antecedents' is as 'wide as can be conceived': *R v Vallett* [1951] 1 All ER 231, 232. The court will be aware of the offence or offences committed by the accused and of the details, but if other offences committed by him are to be taken into consideration for the purposes of sentencing the court must have 'a proper understanding of the offences in question': *R v Pond* [2007] EWCA Crim 2383.

In *Law Chung-ki and Another v HKSAR* [2005] 4 HKC 405, 411, Bokhary and Chan PJJ said:

> an antecedent statement is an uncautioned statement taken from an accused by the police in order to enable them to inform the court of his antecedents for the purpose of sentence in the event of a guilty plea or a guilty verdict.

The antecedents of the accused include all aspects of his history, whether favourable or unfavourable. They include details of his background, past life, personal, family, social, employment and vocational circumstances, as well as of his current way of life and its interaction with the lives and welfare of others: *Jones v Morley* (1981) 29 SASR 57, 63. It has been described as a 'cardinal principle' that sentences which are imposed should be 'based on reliable, comprehensive information relevant to what the court is seeking to do'.[1] Out-of-court statements made by one accused about another accused to a probation officer do not begin to qualify for these purposes: *HKSAR v Wan Ka-kit* [2006] 3 HKLRD 9, 12.

Pre-sentence reports are an obvious means by which a court can understand the history of the accused and his situation: *Re J K Stonham* [1977–1979] HKC 287, 291. Such reports should inform the court not only of the background and position of the accused, but also of his attitude to the offence. They must advise the court of the facilities which are suitable for the accused and which are not, having regard to his needs and circumstances. The reports will often indicate if the accused is suitable for a particular sentence, be it custodial or otherwise. Reports, however, should not be sent for as a matter of course. In *HKSAR v Nguyen, Pauline* [2007] HKCU 858 (CACC 417/2006, 18 May 2007, unreported) McMahon J said:

1 *Report of the Interdepartmental Committee on the Business of the Criminal Courts*, HMSO (1960).

> What reports are called for prior to the sentencing of an offender is very much a matter for the discretion of the sentencing judge. It is only in cases where the judge by not ordering a specific report could be said to be clearly wrong that this court will intervene.

If a background report is called for, the question arises of whether the accused should be remanded in custody in the meantime. If psychiatric reports are required, a period of observation will be necessary, and a period of detention in the Siu Lam Psychiatric Centre may be unavoidable: *HKSAR v Tse Shek-fai* [2006] HKCU 1499 (HCMA 560/2006, 23 August 2006, unreported). But if an accused is held in custody, it may mean that he will already have served on remand the length of any sentence he ultimately receives. He will, therefore, have been obliged to serve a period of custody 'whatever the merits of his appeal against conviction or sentence': *HKSAR v Wong Chi-hung* [2005] HKCU 1420 (HCMA 171/2005, 14 October 2005, unreported). The remanding in custody of an accused whose offence does not call for an immediate custodial sentence has been called 'a misuse of the court's power': *HKSAR v Wong Lok-fu* [2007] HKCU 523 (HCMA 1063/2006, 26 March 2007, unreported).

In *HKSAR v Yan Kai-yip, Raymond* [2005] HKCU 913 (HCMA 95/2005, 8 July 2005, unreported) Carlson DJ said:

> I would wish to observe that a remand in custody should not be made before sentence unless it is very much on the cards that some form of custodial sentence is to be imposed, particularly in the case of someone of good character. If a remand in custody is ordered in cases where a custodial sentence is not likely then this may give the impression that the court is wanting to punish a defendant on an 'interlocutory' basis without ever having the intention of ultimately imposing a custodial sentence.

Pre-sentence reports should only be ordered if they might be of some practical value. The Court of Appeal has deprecated the 'give it a try' approach: *HKSAR v Cheung King* [2001] 3 HKLRD 68, 73. When a court sends for reports, it should give the accused a warning that all sentencing options remain open: *HKSAR v Lai Yip-sing* [2001] 2 HKLRD 601, 606. If that is done, it will avoid giving him a legitimate expectation that he is to be sentenced in one way rather than another: *HKSAR v Lee Chun-kit* [2004] 1 HKC 573, 579. Ultimately, it is for the court to decide what sentence is to be passed, and not the compiler of the report: *HKSAR v Lam Tsz-fung* [2008] HKCU 279.

If imprisonment is inevitable, 'reports should not, unless there be some quite exceptional circumstances, be called for as they serve no real purpose and impose an unnecessary burden on the probation service': *R v Wu Man-hon and Others* [1993] 2 HKC 267, 271. A community service report should not be sought if the offence is 'simply too serious to warrant such a course': *HKSAR v Townsend* [2014] HKCU 2720 (HCMA 141/2014, 31 October 2014, unreported). To call for pre-sentence reports in such circumstances is 'otiose, as well as unfair to the appellant': *HKSAR v Pak Wan-kam* [2002] 2 HKsC 465, 470. However, there is no rule that background reports ought not to be called for whenever the offence is serious: *HKSAR v Law Ka-kit and Others* [2003] 2 HKC 178, 184.

The criminal record of the accused is highly relevant to sentence. It forms part of the matrix of fact upon which he falls to be sentenced: *R v Bailey* [1988] Crim LR 628. The previous convictions of the accused and his failure to respond to previous sentences need to be assessed in the determination of the seriousness of the offence: *HKSAR v Cheung Kwok-yip, Peter* [2010] 3 HKC 470. A bad criminal history may justify the selection of a higher starting point for sentence: *HKSAR v Ngan Po-yuk*

[2002] 2 HKLRD 501, 508. In *R v Canfield* (1982) 4 Cr App R (S) 94, 96, Sheldon J said:

> A bad antecedent record may often make it impossible effectively to mitigate a sentence for an alleged offence, particularly if it displays a settled intention to ignore all warnings and to continue committing crime. However, such a record can also be of use in another way. It can show, not by his words but by his actions, that (he) has made determined efforts … to change his way of life for the better. In such a case, the court will be very ready to give him whatever help it can by imposing a sentence which is much less than his latest offence might otherwise deserve.

If defence counsel feels that a pre-sentence report will assist the accused, the court should be invited to send for one: *HKSAR v Pang Chi-wah* (HCMA 1243/1998, 22 January 1998, unreported). Background reports of that type are often useful where a first offender appears 'on a fairly serious charge': *HKSAR v Thapa Magdalena E* [2000] HKCU 709 (HCMA 1131/1999, 7 September 2000, unreported). That said, if a court is prepared to make every possible assumption in favour of an accused it is entitled to conclude that a pre-sentence report is not required before sentencing him to prison for the first time: *R v Armsaramah* [2001] 1 Cr App R (S) 467, 470. But if a background report is sent for, it is the duty of the court to evaluate it and determine whether it is adequate for sentencing purposes. Then, as it was put in *R v Okinikan* (1993) 14 Cr App R (S) 453, 456:

> Provided the report is in writing and is made or submitted by a probation officer or social worker and gives appropriate information about the offender in relation to the offences which bring him before the court, the judge is not obliged to ensure that every detail of information put before him by counsel is checked and confirmed in a further pre-sentence report or by way of addendum. If he considers that a further written report is required to confirm further information, he may of course adjourn the case, but he is not obliged to do so.

Previous convictions are usually ascertained through the Criminal Records Bureau of the Hong Kong Police Force. The duty of the prosecution is to ensure that an accurate criminal record is placed before the court for sentencing purposes: *Attorney General v Cheung Pit-yiu* [1989] 2 HKLR 12, 13. A properly prepared criminal record will contain details not only of convictions, but also of offences previously taken into consideration and warnings administered under the Superintendents' Discretion Scheme. There is no obligation on the defence to point to deficiencies in the criminal record placed before the court. In *Tam Hon-ho v R* [1967] HKLR 26, 41, Rigby J said:

> In accordance with the accepted principles of criminal jurisprudence under English law I have always presumed that a man was presumed to have a good character unless there was some evidence to the contrary and that it was for the prosecution, where necessary, to adduce that evidence to the contrary.

The duty of the court is to pass an appropriate sentence for the offence of which the accused has been convicted: *Secretary for Justice v Tse Sheung-kai and Others* [2001] 3 HKLRD 487, 500. That duty can only be properly discharged if all material relevant to sentencing is placed before it. The court will be aware of the nature of the offence, but it must, in assessing the object of its sentence, be apprised of the circumstances of the offender. That will facilitate an assessment of whether the accused is to be punished or reformed, as well as the decision of where exactly on the scale the starting point for sentence should be fixed. At this stage, 'the court must have regard to those matters which tell in his favour, and equally to those matters which tell against him': *R v Queen* (1981) 3 Cr App R (S) 245, 246.

Pre-sentence reports are based primarily upon information supplied by the accused. The prosecution is invariably in no position to challenge mitigation of a personal nature. Provided that the antecedent matters which are relied upon are not inherently implausible, the court may feel disposed to accept them. After conviction, any 'information which can be put before the court can be put before it in any manner which the court will accept': *R v Marquis* (1951) 35 Cr App R 33, 36. There may, that is, be some relaxation of the strict rules of evidence: *R v Cheung Hong-chung* [1995] 3 HKC 209, 211. Hearsay evidence may be admissible as mitigation, and leading questions may be tolerated. There is a recognition at this stage that courts are not to be denied access to information relevant to sentencing through the 'imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial interest of the offender is involved and the information obtained should be accurate and reliable': *R v Gardiner* (1982) 68 CCC (2d) 477, 514.

Once a pre-sentence report is available, the accused may challenge its contents. In that event, the court has two options. It may disregard the report, in which case this should be made clear to the parties. Alternatively, it may become 'the duty of the judge to inquire into it; if necessary he should adjourn the matter, and if it is of sufficient importance he may require legal proof of it': *R v Campbell* (1911) 6 Cr App R 131, 132. Whether or not the report is favourable, the accused is entitled to address the court upon its contents: *R v Au-yeung Ming* [1970] HKLR 193, 196. If the accused, having denied his guilt at trial, confesses to the probation officer after conviction, the court should be slow to treat this as indicative of remorse. As Litton VP explained in *R v Wu Chun-piu* [1996] 4 HKC 495, 500:

> We think therefore that use of such post-conviction 'admissions' should only be relied upon with caution and only where a court addresses that risk and is satisfied that there is a genuine admission of the offence with acceptance of the verdict.

If the accused advances a particular version of events to those responsible for compiling the pre-sentence reports, the court should not in general reject that version out of hand, even if it seems unlikely. An inquiry may be called for: *R v Oakley* [1998] 1 Cr App R (S) 100. Facts of relevance, however, need to be established by evidence which can be tested, and not through 'histories provided to third parties': *R v Niketic* [2002] NSWCCA 425. In *R v Schofield* (2003) 138 A Crim R 19, 33, Carruthers AJ said:

> This court has stressed over many years the undesirability of relevant facts for sentencing purposes being placed before the sentencing judge by medium of statements allegedly made by the offender to Probation and Parole officers, psychiatrists and the like.

If the version of the accused is ludicrous or is so obviously contradicted by other material before the court, it may be discounted. Sentencing proceedings 'must be both practical and fair': *R v Lobban (No 2)* (2001) 126 A Crim R 468, 473. In situations which are not clear-cut, the court should look further into the matter if what is asserted might be relevant. In *R v Cunnah* [1996] 1 Cr App R (S) 393, 396, Mitchell J said:

> When fresh, highly relevant material appears in a pre-sentence report of this nature, there must be a discussion between counsel and the judge, particularly in circumstances such as this, where pleas have been entered and accepted on a very narrow basis of the facts indeed. That discussion is necessary so everybody is aware from that moment onwards upon what basis the judge will thereafter proceed.

Particular care is required in the presentation of antecedent evidence. It is not proper to include information in the antecedent statement which gratuitously draws attention to the fact that the accused has been acquitted of previous similar offences. True, the general reputation of the accused 'is always relevant on the question of sentence': *Tam Hon-ho v R* [1967] HKLR 26, 41. But general observations of a derogatory nature about an accused are both unfair and undesirable: *R v Bibby* [1972] Crim LR 513. Whilst it is certainly open to the prosecution to present the court with material which is adverse to the accused, if issue is taken with it by the defence the officer who testifies thereto must be in a position to give evidence on the basis of direct knowledge. In other words, prejudicial material which cannot be substantiated ought not to be produced by an officer.

Counsel ought only to tender, and the court ought only to accept, evidence which is based on 'first-hand information about which the officer giving the evidence can be questioned': *R v Wilkins* (1977) 66 Cr App R 49, 53. The officer should not rely on hearsay or second-hand records, and it is necessary that 'the evidence is sufficiently particularised to make it possible for the accused to challenge it': *R v Robinson* (1969) 53 Cr App R 314, 317. That said, much of the antecedent material may have come from the accused himself, if not at the time of arrest then in the course of earlier dealings with police.

In *R v Van Pelz* [1943] KB 157, 160, Lord Caldecote CJ examined the parameters within which an officer who testifies about the antecedents of an accused operates:

> When a police officer is called to give evidence about a man who has been convicted, he should in general limit himself to such matters as [the] previous convictions, if any, and [the] antecedents of the prisoner, including anything that has been ascertained about his home and upbringing in cases where the age of the person convicted makes this information material. It is the duty of the police officer, we think, to inform the court also of any matters, whether or not the subject of charges which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the court. Police officers should inform the court of anything in the prisoner's favour which is known to [the police], such as periods of employment and good conduct.

The practice of the Bar of England and Wales is for prosecuting counsel to give defence counsel the opportunity to make representations to him about any contentious matters prior to the submission of the antecedent report to the judge. Such a practice has much to commend it in Hong Kong. In *R v Sargeant* (1974) 60 Cr App R 74, 79, Lawton LJ said:

> Defending counsel should read the antecedent report and, if there is anything in it which is disputed by the client, he should bring this matter at once to the attention of prosecuting counsel. Prosecuting counsel will then have to make up his mind whether to call admissible evidence to prove the disputed facts or to omit them from the evidence. That means, of course, that he must stop the police officer giving evidence about the disputed matters.

Section 109A of the Criminal Procedure Ordinance (Cap 221) makes the obtaining of antecedent material a prerequisite of the sentencing of some young offenders. It provides:

> (1) No court shall sentence a person of or over 16 and under 21 years of age to imprisonment unless the court is of opinion that no other method of dealing with such person is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information

before the court which is relevant to the character of such person and his physical and mental condition.

(1A) This section shall not apply to a person who has been convicted of any offence which is declared to be an excepted offence by the Third Schedule.

Although on its face mandatory, section 109A has been realistically construed. If the accused will be imprisoned no matter what the information garnered, it need not be complied with: *R v Yip Yuk-ching* [1987] 3 HKC 234, 236. In *Yip Yuk-ching*'s case, the court was concerned with the sentencing of young illegal immigrants from the Chinese Mainland. Wong J said:

> Reports from probation officers or the Commissioner of Correctional Services would not be of assistance to the court in deciding whether there are other methods to deal with young illegal immigrants where, by the very nature of the offence, sentences of imprisonment are inevitable.

Section 54A of the Dangerous Drugs Ordinance (Cap 134) requires the court in some circumstances to postpone sentence for some offences and to consider a pre-sentence report. Section 54A(1) provides that once an accused has been convicted of an offence of either unlawful possession of dangerous drugs, contrary to section 8, or unlawful possession of apparatus fit and intended for the smoking, inhalation, ingestion or injection of a dangerous drug, contrary to section 36, then:

> (1) Subject to subsection (1A), no sentence, other than a non-custodial sentence, shall be imposed on a person for an offence against section 8 or 36 unless the court has first considered a report of the Commissioner of Correctional Services on the suitability of such person for cure and rehabilitation and on the availability of places at addiction treatment centres.

Section 54A of the Dangerous Drugs Ordinance is mandatory: *Attorney General v Chan Ching-ho* [1994] 2 HKC 457, 458. It must be complied with no matter how many times an accused has previously been sentenced to the drug addiction treatment centre: *Attorney General v Chan Tak-king and Another* [1989] 2 HKLR 428, 436. Section 54A must equally be observed when a court of appeal sets aside a conviction for trafficking in dangerous drugs and substitutes a conviction for simple possession: *HKSAR v Yan Suk-yin* [2004] 1 HKLRD 677, [2003] 4 HKC 250. The exceptions in subsection (1A) are concerned with situations in which the accused is either convicted in the same proceedings of any other offence and is sentenced for that other offence to imprisonment for more than nine months, or is at the time of conviction serving a sentence of imprisonment in excess of nine months. When section 54A applies, the court must remand the accused for a period not exceeding three weeks as it considers necessary for the preparation of the report.

In the Court of First Instance, the practice in relation to antecedent statements is regulated by the Practice Direction entitled Criminal Proceedings in the Court of First Instance, under the subheading of *High Court* (*Antecedents)*.[2] This is, in some respects, more comprehensive than its English counterpart.[3]

The Practice Direction provides:

> 11. Before the date fixed for hearing of every Court of First Instance criminal trial the police should supply a list of the accused's previous convictions to the Court.

2 Practice Direction 9.3, 31 December 1998.

3 Practice Note (Crime: Antecedents) [1993] 4 All ER 863.

> 12. Such a list of convictions must also be supplied to the accused's solicitor on request. In order that the defence may be properly conducted, the accused's advisers must know whether they can safely put the accused's character in issue.
>
> 13. A proof of evidence should be prepared by a police officer containing particulars of the accused's age, education and employment, the date of arrest, and the date (if known) of the last discharge from prison or other place of custody. If known, it may also contain a short and concise statement as to the accused's domestic and family circumstances.
>
> 14. It is recognised that the police officer who prepares the proof of evidence will not always be in a position to state all the facts from his own personal knowledge. The proof may therefore contain statements of information or belief with the sources and grounds thereof. The presiding Judge will decide what weight, if any, to attach to such statements or whether to call for further evidence.
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> 15. This proof should be given either with his brief or at the outset of the case to counsel for the prosecution. Subject in any particular case to a direction by the presiding Judge to the contrary, counsel for the accused (or the accused if not legally represented) should be entitled to be supplied with a copy of such proof of evidence as relates to his client (or himself if not represented):
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> (a) in the case of a plea of guilty as soon as the jury retire to consider their verdict; and
>
> (b) in the case of a plea of guilty as soon as the plea is entered.
>
> 16. A copy of the proof shall be given to the court reporter when the officer is called to prove the contents. The court reporter may use it to check his note but must only transcribe so much as is given in evidence.

Since 20 June 1994, the police have provided antecedent statements in the District Court. The format of such reports mirrors that used in the Court of First Instance. However, a judge of the District Court does not have sight of either the previous convictions of the accused or of other background information until such time as there is a finding of guilt. Antecedent material, in other words, is, at that level, only placed before the court for the purposes of sentencing.

In the Magistrates Court, it is not common for the prosecution to produce an antecedent statement. The criminal record is invariably the only document to be tendered. The defence itself provides much of the background information which, at a higher level, would have been supplied by the prosecution. The court itself, if it requires additional information, may send for pre-sentence reports. However, if such reports are not appropriate, as where, for example, there is no prospect of the court acting upon them, the prosecution ought to be in a position to furnish background information: *R v Wong Lee* [1993] 2 HKC 264, 266. Young illegal immigrants, for example, cannot expect to be sent to a training centre or to be placed upon probation, and reports are otiose in such circumstances. In *R v Yip Yuk-ching* [1987] 3 HKC 234, 236, this led Wong J to remark:

> It would be of assistance to magistrates if the prosecution can compile and submit to magistrates before and for the purposes of sentencing, background and antecedent statements with as much details as they are able to gather.

If the antecedent report mentions factors which aggravate the offence, the prosecution must be in a position to prove them if there is any dispute about them. If an antecedent officer is required to testify, he may speak to matters which may or may not assist the accused. In *R v Crabtree* (1952) 36 Cr App R 161, 163, Lord Goddard CJ explained:

> This court has said that courts may properly receive evidence with regard to the prisoner's general associates, and so forth, because unless the police can give evidence of that sort, the court does not know whether it is dealing with a man who has committed one offence

CHAPTER 13

Criminal Bankruptcy Order

'Don't be afraid to take a big step if one is indicated.'

– David Lloyd George

The criminal bankruptcy order ('CBO') was introduced into the Criminal Procedure Ordinance (Cap 221) ('the Ordinance') in 1979. It was based upon the parallel English order.[1] After confiscation orders were deployed in England in order to catch the profits of serious crime, the CBO was abolished in that jurisdiction.[2] However, notwithstanding the enactment of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) in 1989, and the Organized and Serious Crimes Ordinance (Cap 445) in 1994, which each provide for the confiscation of the proceeds of crime in particular situations, the CBO has survived in its own right as a viable sentencing tool. The advent of the confiscation order in respect of particular categories of offence has reduced, but not removed the efficacy of the CBO. True, those Ordinances make their own provision for criminal bankruptcy in some situations.[3] But as regards generalised crime which falls outside the parameters of the two Ordinances, the CBO contained in the Ordinance still has a useful role to perform.

When Mr Reginald Maudling[4] introduced into the British House of Commons the criminal bankruptcy law upon which the Hong Kong provision is modelled, he described the proposal as being 'in the nature of an experiment'. He explained:

> It is designed to ensure that criminals who commit large-scale crimes, especially fraud, should not benefit from the fruits of their criminal activity. This provision will not be easy to enforce. It will involve a good deal of effort, particularly by the Director of Public Prosecutions, and possibly more staff. That is why we think it right, at any rate in the first instance, to limit it to substantial frauds. The figure we have suggested is £15,000. The purpose of the proposal is that the court should be able to make a criminal bankruptcy order, as a result of which the Official Petitioner, who will in practice be the Director of Public Prosecutions, will then be able to proceed in the normal way of bankruptcy proceedings by presenting a petition and ensuring that compensation through the bankruptcy is paid to the victims of the crime, who will be named in the criminal bankruptcy order … If it is successful, it will provide for many people a feeling of a new measure of justice. There is still a good deal of suspicion, some of it justified, that people can get away with things by spending a short time in prison and afterwards retiring to live gracefully on the proceeds of crime.[5]

1 Section 39(1), Powers of Criminal Courts Act 1973.
2 Section 101, Criminal Justice Act 1988.
3 Section 3(2)(a)(ii)(C), Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405); section 8(3)(a)(ii)(B)(III), Organized and Serious Crimes Ordinance (Cap 455).
4 Rt Hon Reginald Maudling MP, Secretary of State for the Home Department, 1970–1972.
5 *Hansard,* House of Commons, 1971.

In Hong Kong, the Official Petitioner's functions are exercised by the Secretary for Justice, not the Director of Public Prosecutions.

The philosophy which underpins the CBO is a basic one, and recognises that:

> the punishment which is most calculated to deter those who might be tempted to commit crimes which are actuated by a desire for acquisition of gain is the knowledge that upon conviction they will be deprived, as far as possible, of the benefits of their crime.[6]

Section 84A of the Ordinance provides:

> (1) Where a person is convicted of an offence before the court and it appears to the court that–
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> (a) as a result of the offence, or of that offence taken together with any other relevant offences, loss or damage (not attributable to personal injury) has been suffered by one or more persons whose identity is known to the court; and
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> (b) the amount, or aggregate amount, of the loss or damage exceeds $150,000,
>
> the court may, in addition to dealing with the offender in any other way (but not if it makes a compensation order against him under section 73), make an order, to be called a criminal bankruptcy order, against him in respect of the offence or, as the case may be, that offence and any other relevant offences.
>
> (2) In subsection (1) "relevant offences" means offences–
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> (a) of which the person in question is convicted in the same proceedings;
>
> (b) which the court takes into consideration in determining its sentence; or
>
> (c) which, whether or not they are specifically charged or admitted, a judge of the court is satisfied are proved by the evidence adduced by the prosecution in the same proceedings.
>
> (3) A criminal bankruptcy order shall specify–
>
> (a) the amount of the loss or damage appearing to the court to have resulted from the offence or, if more than one, the total amount appearing to have resulted from all the offences;
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> (b) the person or persons appearing to the court to have suffered that loss or damage;
>
> (c) the amount of that loss or damage which it appears to the court that person, or each of those persons, has suffered; and
>
> (d) the date which appears to the court to be the earliest date on which the offence or, if more than one, the earliest of the offences, was committed.
>
> (4) A criminal bankruptcy order may be made against 2 or more offenders in respect of the same loss or damage.
>
> (5) The Chief Executive in Council may by order amend subsection (1)(b) by substituting, for the amount specified therein, such amount as may be specified in the order.
>
> (6) In this section "court" includes the District Court.

In the same way that confiscation orders cannot be made in respect of cases adjudicated upon in the Magistrates Court, so also is the CBO not an option at the summary level.

When the CBO was introduced in the 1970s, there was a clear recognition by the legislature that those who engaged in crime which involved the potential for substantial profit would in all likelihood measure the risk of detection against the financial benefits likely to be enjoyed after any punishment which resulted was over. The rationale of the CBO was therefore threefold. First, there was the likely deterrent effect upon those minded to commit crime that upon release from prison they would be in no position to enjoy the fruits of their criminality. Second, there was a recognition that such a scheme once in place had to be vigorously pursued so that those subjected

6 Memorandum submitted by the Council of the Law Society of England and Wales to the Advisory Council on the penal system.

to criminal bankruptcy did not treat it with the insouciance sometimes associated with ordinary civil bankruptcy. Third, those subjected to criminal bankruptcy had to be subjected to a reverse onus provision, so that the obligation was squarely upon them to explain the source of their wealth.

The CBO constitutes a potent threat to those in the criminal fraternity disposed to acquisitive crime. That, in turn, is of benefit to the victims of crime. In *R v Michel and Others* (1984) 6 Cr App R (S) 379, 388, Purchas LJ explained:

> The making of an order thus gives to injured parties a comprehensive and far-reaching means of obtaining satisfaction. The defendant can not only be stripped off his ill-gotten gains, but obliged to make recompense for all loss which the injured party has suffered to the limit of his means. He can be compelled on pain of imprisonment to repatriate his foreign assets.

The pre-condition of the CBO is the conviction of the accused of an offence. Once an issue of criminal bankruptcy arises, the primary duty of the judge is to decide whether he has jurisdiction under section 84A(1) of the Ordinance to make an order. If he has, he must consider if the criteria are met, in the sense that as a result of the offence of which the accused has been convicted, loss or damage has been suffered by a person known to the court in an amount which exceeds $150,000. The next stage requires the judge to 'decide whether or not to make such an order': *R v Downing* (1980) 71 Cr App R 316, 320. Thus, in *R v Sisodia* (1979) 1 Cr App R (S) 291, 292, the court was confronted with a serious tax fraud which had been perpetrated over a substantial period of time and involved vast losses to the community. Having lamented the leniency of the sentence, Roskill LJ added that 'one might also be forgiven for thinking that this was a case which cried out for a criminal bankruptcy order'. In *HKSAR v Yam Kong-lai* [2008] 5 HKC 454, a convicted money launderer received a sentence of four years' imprisonment, and was made the subject of a criminal bankruptcy order.

The imposition of a CBO is a serious step, with potentially far-reaching consequences. It is always advisable for courts 'to invite counsel to address them upon the propriety of imposing a criminal bankruptcy order before the judge makes such an order': *R v Prefas and Pryce* (1988) 86 Cr App R 111, 116. If, having been alerted to that which is in contemplation, counsel elects not to object, and calls no evidence on the issue, the judge will be entitled to assume that the propriety of such an order is not questioned: *R v Mayer* [1984] Crim LR 633. However, the customary procedural safeguards of the accused are to be respected. A judge, that is, will need to be satisfied on the evidence to the normal criminal standard of proof that the accused can properly be said to be responsible for loss or damage to a person who is known to the court.

In *Secretary for Justice v Chan Yin-ming* [1999] 2 HKC 493, 499, the trial judge had been met with a defence submission that a CBO ought not to be made as there was nothing to prove that the losses sustained in the course of the carrying on a deposit-taking business without a licence were the result of the offence. In rejecting that contention, the judge explained:

> It is not necessary that the prosecution do prove this, but merely that it be shown that the losses 'appear to the court' to be such a result: subsection (1). In this case they do so appear to me to be a result, even though there may have been other extraneous causes such as the downturn in the economy. The losses were a direct and proximate result of the offence.

The judge's interpretation was not queried by the Court of Appeal, which affirmed that 'the criminal bankruptcy order will, of course, stand'. The issue of whether or not a CBO is called for is, at all times, a function of the sentencing process.

It is necessary for the jury at a trial on indictment, or for the District Court, to establish by its verdict the participation of the accused in the crimes which are the immediate cause of the loss resulting from conspiracies of which they are the overt acts. In construing the English equivalent of section 84(1) of the Ordinance, Lord Scarman, in *R v Cain* [1985] AC 46, 55, said it was clear that:

> The process of establishing whether the loss was the result of an offence only begins after the defendant has been convicted of the offence. The jury has finished its task before the court turns to consider sentence. It is at the sentencing stage that the court has to make up its mind whether the facts exist which enable a criminal bankruptcy order to be made and whether it should exercise its power to make the order. An order can properly be made if it appears to the court at this stage that the losses suffered by others were the result of any conspiracy of which the accused has been convicted.

A CBO may properly be made for an offence of conspiracy, provided consequential damage can be established: *R v Fung To-shan* [1990] 2 HKC 236, 237. If the acts upon which the conspirators agree are ones which are liable to cause loss to someone, and if those acts are done by the conspirators in pursuance of the conspiracy, then any loss or damage suffered as a result of those acts is loss or damage as a result of the conspiracy. As Kerr LJ observed in *R v Reilly* [1982] QB 1208, 1220:

> It therefore appears to me that both by reason of the wide words 'as a result of' in their ordinary meaning, and because the conspiracy continues to be in existence when the planned acts are done in pursuance of it – for both those reasons – any loss which results from the acts which the conspirators agree to do also results from the conspiracy itself.

For the purposes of subsection (1)(a) of section 84A, it has been held not to be necessary to import into the criminal law the concepts of causation which apply to the assessment of damages under the law of contract and tort: *Thomson Holidays Ltd* (1973) 58 Cr App R 429, 438. Instead, as May LJ put it in *R v Cannon and James* (1986) 82 Cr App R 286, 290:

> We must use common sense and see whether the losses to the various persons listed in the schedule to the criminal bankruptcy orders which were made can fairly be said to have resulted from the handling offences to which (the accused) pleaded guilty.

Subsection (1)(b) of section 84A provides the necessary triggering mechanism for a CBO. Once the loss or damage which the accused has caused has exceeded $150,000, a CBO becomes a sentencing option in a suitable case. However, the threshold figure notwithstanding, it is clear that a court may impose a CBO if it is passing sentence in respect of several indictments at the same time, provided that the aggregate loss sustained by the victims exceeds $150,000. It matters not that the monetary loss of the victims in each indictment taken individually is less than $150,000: *R v Riley* (1988) 87 Cr App R 125, 128.

Subsection (1)(a) of section 84A provides that a CBO may be made in respect of the offence of which the accused stands convicted, and also of any other 'relevant offences' which are 'taken together' with it. The definition of the phrase 'relevant offences' in subsection (2)(b) is such as to demonstrate that, in addition to the offences in the indictment, the court can take account of offences of which it decides, with the consent of the accused, to take cognizance. However, it is incumbent upon counsel representing the accused to make clear at an early stage if the other offences not included in the indictment are to be differentiated from those which have been included: *R v Anderson* (1978) 67 Cr App R 134, 138. Provided that the aggregate figure of the loss or damage on the substantive offences plus the offences taken into

consideration exceeds $150,000, then, once again, an order may properly be made and it matters not that individually the offences standing alone fall short of that figure.

Subsection (2)(c) of section 84A extends the definition of 'relevant offence' to the category of offences which are neither charged nor admitted, but which are 'proved by the evidence adduced by the prosecution in the same proceedings'. This is a tricky area, perhaps best left alone by the sentencer. True, at one time, there was a view that it was open to the court when sentencing to act upon evidence adduced at trial of other offences not charged and not admitted to by the accused. That view, however, is no longer good law: *R v Chow Tat-ming* [1997] 1 HKLRD 353, 355. In *R v Canavan, Kidd and Shaw* [1998] 1 Cr App 79, 83, Lord Bingham LJ declared that it was 'inconsistent with [the] principle that a defendant should be sentenced for offences neither admitted nor proved by verdict'. At the very least, so long as it remains upon the statute books, it is submitted that the court should approach subsection (2)(c) with the greatest of care. Although the subsection contains the word 'satisfied', it is the firm view of the authors that if recourse is to be had to this provision, then a court must be convinced beyond reasonable doubt that some other offence has indeed been committed by the accused. In a sentencing exercise of this type there is no room for any lesser standard of criminal proof.

Subsection (1)(b) of section 84A provides that a CBO cannot be coupled with a compensation order. That apart, the accused can still be sentenced 'in any other way'. That leaves open the possibility of imposing additional monetary penalties, such as orders of restitution or fines. There are clear reasons for making criminal bankruptcy and compensation orders, in whatever form, mutually exclusive: *R v James* (1984) 6 Cr App R (S) 370, 373. Compensation orders deal with compensation for injury, loss or damage to be assessed by the court and concern therefore unliquidated sums. Restitution orders under the Theft Ordinance (Cap 210) can only be made in respect of specific goods or funds, whether their ultimate effect is compensatory or not. Even where the combination of bankruptcy and other orders is open in law, a court may wish to pause for thought before proceeding down that route.

In *R v Michel and Others* (1984) 6 Cr App R (S) 379, 388, it was said that although there was nothing wrong in principle in a court imposing a CBO at the same time as it fined an accused, cases where that would be appropriate were 'likely to be infrequent'. In *R v Garner* (1986) 7 Cr App R (S) 285, 298, the court went further and concluded that it was only in 'very rare cases' that it would be appropriate to combine two such orders. The reason for this was that in cases where the government was not the creditor, the effect of a fine, if it was paid before a petition was presented, would be to reduce the funds available to compensate the victims named as creditors in the order. Hodgson J added that:

> a fine should never be imposed in such circumstances unless it is completely clear that even after the fine has been paid there will be ample funds to satisfy the creditor. To do otherwise would be to give priority to the fine over compensation.

If, on the other hand, the government is the creditor, it will usually be better to omit a criminal bankruptcy order if a fine is imposed and to leave it to the government to petition in bankruptcy for the tax avoided if it wishes to do so.

In *R v Hill* (1982) 4 Cr App R (S) 319, 321, the point was made that although there was nothing wrong in principle in making a criminal bankruptcy order at the same time as fining an accused, care had to be taken to ensure that there were assets which would allow the accused to pay his fine, so that where a bankruptcy order was imposed on sentencing, it did not strip him of his choice to pay the fine. If there was

reason to believe that there were other assets which might not be the subject of the bankruptcy order, because they were secreted in some foreign jurisdiction, there was nothing wrong in principle in making the order. A host of problems can, however, arise if a court proceeds on no more than a suspicion of hidden assets: *R v Tsui Fung (No 2)* [1996] 2 HKC 551, 554. A court will be assisted in focusing its mind upon these issues, and their implications, if the fine is imposed first, followed by the order of criminal bankruptcy.

A CBO does not of itself render the accused bankrupt. Until implemented, it has no practical effect. What the CBO does do is to provide conclusive proof of an act of bankruptcy upon which a criminal bankruptcy petition can be based without proof of insolvency. Upon the accused's adjudication, the Official Receiver becomes his trustee and all his property vests in him: *R v Michel and Others* (1984) 6 Cr App R (S) 379, 388. The accused has the rights of a debtor under the bankruptcy laws, including the civil right of appeal; this explains why no criminal right of appeal is provided.

An order of criminal bankruptcy must comply with the requirements of section 84A(3). It can only properly be made if it specifies the amount of loss or damage which has resulted from each offence. It needs to identify the persons who appear to the court to have suffered the loss. Also to be specified is the amount of the loss which it appears to the court has been suffered by each of the persons. The CBO should specify as well the date on which the earliest offence was committed. The form of a CBO is mandatory and to avoid difficulty, these discrete matters should be alluded to in the body of the order.

Section 84A(3), it may be noted, is not concerned with the jurisdiction of the court. It is concerned, instead, with the actual drawing up of the criminal bankruptcy order and, also, with its evidential effect. It is important for the judge who makes the order to ensure that the order can be settled in accordance with the provisions of the subsection in due course, and that may involve making available a schedule. A court will then decide whether realistically it has been sufficiently shown that the loss sustained by the losers listed in the schedule has resulted from the relevant offences. The schedule or form should always particularise the losses and the offences connected to the losses. The importance of specifying the amount in regard to each offence is due to the fact that the figure specified in subsection (1)(a) becomes for most practical purposes throughout the bankruptcy a statement of petitioning creditors' debts, there not being the usual machinery available for the petitioning creditor to call in his debt as he would have in an ordinary bankruptcy. If only one creditor is concerned, then a failure to link the losses to the offences may not be critical. However, if there is more than one creditor difficulties can arise.

In *R v Saville* (1980) 70 Cr App R 204, the accused pleaded guilty to various offences against his employers and he was sentenced to a term of five years' imprisonment in all. In addition, the trial judge made a criminal bankruptcy order for a global sum which did not specify the amount of the loss relevant to each of the offences. Some months later, when that omission was drawn to his attention, the judge purported to rectify the original order on the basis that it was still 'inchoate'. On appeal, it was decided that the judge had jurisdiction to rectify an inchoate order, and that, in any event, as only one creditor was involved, the alteration performed was one of 'total unimportance'. That, however, could not have been said had there been competing creditors, a situation contemplated by subsection (3)(b) of section 84A.

Once the judge has decided to make the order, it is quite legitimate for it to be perfected afterwards. That can be done by the judge himself, by a judicial clerk, by counsel for the prosecution, or by the person who can most readily work out and set

down on the form the particulars required by subsection (3). The process of writing out the order and filling in all of the details is essentially part of the mechanism which subsection (3) contemplates, and there is no justification for saying that the judge must himself perform that function in court at the conclusion of the trial: *R v Downing* (1980) 71 Cr App R 316, 320. It would be vastly inconvenient, and in some cases almost impossible for the judge to do that: *R v Anderson* (1978) 67 Cr App R 134, 140. There seems, in any event, to be no advantage to doing it that way, and there is no prejudice to the accused who has been declared bankrupt. However, counsel for the defence needs to be alert to the possibility that a criminal bankruptcy order may be on the cards. With that in mind he should recognise the importance of the fixing of the date of the first of the offences under subsection (3)(d) and, if the date is considered critical, he should mention this to the judge and, if need be, advance submissions if the matter is in any way to be the subject of dispute.

Section 84B(1) provides that no appeal lies against the making of a CBO. But the section is not as draconian as it may seem. Quite apart from the availability of a civil right of appeal, section 84B(2) provides that if a person succeeds on an appeal against his conviction of an offence by virtue of which such an order was made, the Court of Appeal shall rescind the order unless he was convicted in the same proceedings of another offence of which he remains convicted and a criminal bankruptcy order could have been made without reference to loss or damage caused by the first-mentioned offence. But where the Court of Appeal does not rescind the order it is required to amend it by striking out so much of it as relates to loss or damage caused by the offence in respect of which the conviction is quashed.

In *R v Fung To-shan* [1990] 2 HKC 236, 237, a suggestion is to be found that if the prosecution wants the order to be amended, but left in place, it should apply accordingly. Then section 84B(3) further provides that where on an appeal by an accused against his conviction of an offence by virtue of which a criminal bankruptcy order was made the Court of Appeal substitutes a verdict of guilty of another offence, the court is required either to set aside the order in its entirety if it could not originally have been made in respect of the substituted offence, or, in any other case, to amend the order so far as is necessary in consequence of the substituted verdict. However, quite apart from the statutory scheme, the accused who is made criminally bankrupt is not left devoid of remedy if minded to assail the legitimacy of the order itself.

If there is no jurisdiction in an appellate court to entertain an appeal, that is normally the end of the matter: *R v Tucker* [1974] 1 WLR 615. There are, however, exceptions: *R v Marquis* (1974) 59 Cr App R 228, 230. Initially, the courts limited the generality of the prohibition upon appealing by drawing a distinction between 'merits' and 'jurisdiction', and allowing an appeal to lie for want of jurisdiction: *R v Wehner* [1977] 1 WLR 1143, 1146. In *R v Anderson* (1978) 67 Cr App R 134,135, Ormrod LJ said that:

> it is plain that where the suggestion is that the order is a nullity, this court can adjudicate upon that matter as has been held in relation to other similar problems.

With that proposition, however, the House of Lords took issue in *R v Cain* [1985] AC 46, 55. Lord Scarman said that an order made by a superior court of record could not be treated as a nullity. The real question was whether the court had exceeded its power, and not so much its jurisdiction. It undermined the authority of the criminal law if orders made by the highest courts of trial in criminal matters could be disregarded on the basis they were nullities. Statutory prohibitions of appeal were not applicable to sentences not authorised by law. Lord Scarman added (at 56):

measure of comfort in terms of public protection': *HKSAR v Chiu Wai-kan, Vicken* [2011] 5 HKC 519, 530.

In 2013, a total of 7,728 adult males and 3,405 adult females were sentenced to imprisonment (down from 9,520 and 5,253 in 2009). Moreover, 267 young men, and 87 young women, under the age of 21, were sentenced to imprisonment.[1]

1 *Hong Kong Correctional Services Annual Review* (2013), available at http://www.csd.gov.hk/annualreview/2013/text/htm_en/01_ope.html.

CHAPTER 29

Life Imprisonment

'Who will rid me of this turbulent priest?'

– King Henry II

Life imprisonment, said Woolf LJ, is 'a crushing sentence': *R v Williams* (1986) 8 Cr App R (S) 480, 485. It is reserved for the most serious offences. If the offence is murder and the offender is of full years, a sentence of life imprisonment is mandatory. Life sentences imposed upon conviction for murder are fixed by law, 'and, in the circumstances, there can be no appeal against them': *HKSAR v Xu Shengqi* [2011] HKCU 1801 (CACC 463/2010, 31 August 2010, unreported).

A discretionary life term should only be imposed if the conditions are such that it is more appropriate than a determinate sentence. Life imprisonment may properly be imposed if the circumstances require a severe sentence based on the offence of the accused. But such a severe sentence is to be avoided wherever possible, as someone 'who is sentenced to life imprisonment does not know when he will be released; his future is uncertain': *R v Hercules* (1980) 2 Cr App R (S) 156, 158. When life imprisonment is imposed, no entitlement exists for the prisoner to know the length of the sentence: *HKSAR v Harman Preet* [2005] HKCU 358 (CACC 190/2004, 17 March 2005, unreported).

In April 1993, the Crimes (Amendment) Ordinance (No 24 of 1993) was enacted. This prescribed mandatory life imprisonment for only one offence, murder. When the European Court of Human Rights referred to the mandatory life sentence in the United Kingdom in *Wynne v UK* (1994) 19 EHRR 333, it noted that such a sentence was imposed 'because of the inherent gravity of the offence'. In *R v Bieber* [2009] 1 WLR 223, the English Court of Appeal held that the imposition of a whole life sentence did not result in inhuman or degrading treatment, contrary to Article 3 of the European Convention on Human Rights. The Court of Final Appeal decided in *Lau Cheong and Another v HKSAR* (2002) 5 HKCFAR 415, that the mandatory sentence of life imprisonment is not arbitrary. The Court said, at 453:

> The mandatory life sentence performs deterrent and denunciatory functions in support of the existing policy of the law. To return to the example of mercy killing, while it is in the nature of such an offence that a mandatory life sentence is unlikely to serve the object of protecting the public from the offender since he is unlikely to repeat the crime, such a sentence will undoubtedly have a considerable deterrent effect on others who may be contemplating what they perceive to be mercy killings. It is also a sentence conveying emphatic denunciation of what continues to be regarded in our society as the most serious of crimes.

Mandatory sentencing apart, it is the duty of a judge to decide for himself whether the offender is likely to represent a serious danger to the public for an indeterminate period such as to justify a discretionary life term: *R v Cobb* [2002] 1 Cr App R 67,

73. In *HKSAR v Chan Li-fat* [2010] 5 HKC 341, 349, a sentence of life imprisonment was held to be appropriate for a serial rapist on the basis that 'one may conclude that he may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence'. The judge is not bound to accept the assessment of the risk made by the psychiatrist: *R v De Havilland* (1983) 5 Cr App R (S) 109, 115. Even if the danger to the public is difficult to measure, a life sentence may be justified if the danger is real and immediate: *R v Allen* (1989) 9 Cr App R (S) 169, 173. A life sentence may be appropriate if the offender's conduct has 'manifested perverted or psychotic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time': *R v Billam* (1986) 8 Cr App R (S) 48, 50.

In *R v McPhee* [1998] 1 Cr App R (S) 201, 206, the court held that notwithstanding the seriousness of the offence for which the accused had to be sentenced (an offence of wounding with intent to cause grievous bodily harm), it could not be said that he was likely to represent a serious danger to the public for an indeterminate time. As such, a determinate sentence was more appropriate than a life term. In *R v Wilkinson* (1983) 5 Cr App R (S) 105, 108, Lord Lane CJ said:

> It seems to us that the sentence of life imprisonment, other than for an offence where the sentence is obligatory is rarely appropriate and must only be passed in the most exceptional circumstances. With a few exceptions … it is reserved … for offenders who for one reason or another cannot be dealt with under the provisions of the Mental Health Act, yet who are in a mental state which makes them dangerous to the life or limb of members of the public. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner's progress may be monitored by those who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large.

In *R v Hodgson* (1967) 52 Cr App R 113, 114, the English Court of Appeal held that if three conditions were satisfied a sentence of life imprisonment was justified. These were:

(1) where the offence or offences were in themselves grave enough to require a very long sentence;

(2) where it appeared from the nature of the offences or from the history of the offender that he was a person of unstable character likely to commit such offences in the future; and

(3) where if the offences were committed the consequences to others might be specially injurious, as in the case of sexual offences or crimes of violence.

Those criteria were reviewed in *Attorney General's Reference No 32 of 1996 (Whittaker)* [1997] 1 Cr App R (S) 261, 264. Lord Bingham CJ said:

> In our judgment the learned judge (at trial) was taking an unnecessarily narrow view of the circumstances in which a discretionary life sentence can be imposed. It appears to this Court that the conditions may be put under two heads. The first is that the offender should have been convicted of a very serious offence. If he (or she) has not, then there can be no question of imposing a life sentence. But the second condition is that there should be good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of the sentence. By 'serious danger' the court has in mind particularly serious offences of violence and serious offences of a sexual nature. The grounds which may found such belief will often relate to the mental condition of the offender. … It is therefore plain that evidence of an offender's mental state is often highly relevant, but the crucial question is whether on all the facts it appears that an offender is likely to represent a serious danger to the public for an indeterminate time.

The *Hodgson* criteria apply in Hong Kong. They were approved by the Full Court in *R v Fong Kung-fai* [1968] HKLR 249, 252, and, more recently, by the Court of Appeal in *HKSAR v Hui Mak-kwan* [2003] 4 HKC 443, 446 (see also *HKSAR v Liu Chun-yip* [2008] 3 HKC 70). In *Fong Kung-fai* (above), the accused was sentenced to life imprisonment in respect of the thirteen charges to which he had pleaded guilty. The first ten charges involved carnal knowledge of girls aged under 13 years of age. There was no evidence of mental abnormality. The court held that the offence showed, at the very least, mental instability in the character of the accused and this, coupled with the need to protect the public, warranted a discretionary life sentence. The Full Court approved this submission:

> Where you have an offence sufficiently serious in itself to justify the lengthy sentence of life imprisonment, then it is appropriate to impose that sentence in two classes of circumstances, one, where it is necessary to protect society from the individual in question, and the other when there are indications that the accused will benefit from treatment which he can receive or may receive either in prison or in hospital under secure conditions, and that it is necessary or desirable to review from time to time the effects of that treatment so that the appropriate moment for the accused's release may be determined in the light of any improvement which may have set in.

In *R v Cheung Hing-biu* [1984] HKLR 87, 94, the Court of Appeal described the *Hodgson* criteria as 'guidelines' not of rigid applicability. In response to the submission that all three conditions *had* to be present before the imposition of an indeterminate sentence was warranted, Silke JA said 'we think not'. The court nonetheless indicated that the very nature and multiplicity of the offences was such as to show that the offender was a person of unstable character likely to commit similar offences in the future. In *HKSAR v Cheung Lai-man* [2004] 2 HKLRD 473, 485, Yeung JA emphasised that it is 'of course not necessary for all the three criteria laid down in (*Hodgson*) to be present before an indeterminate sentence could be imposed'. Courts in Hong Kong, however, just as in England, have tended in recent times to apply more strictly the criteria necessary for the imposition of the life sentence: *R v Kelleci* [1995] 3 HKC 113, 118. In *R v Pang Chun-wai* [1994] 1 HKCLR 137, 142, a life sentence was set aside as only the first of the *Hodgson* criteria was present.

Medical evidence on the question of the mental state of the offender will usually be considered by a court which is considering a life sentence: *R v Pither* (1979) 1 Cr App R (S) 209. This provides the court with some insight as to whether the accused is unstable and whether he poses a risk to the public. In *Attorney General's Reference (No 34 of 1992) (Oxford)* (1994) 15 Cr App R (S) 167, 171, the 'unanimous opinion of the doctors that this man represents a high risk to women and one which is not at present treatable' was described as a factor of 'paramount importance'. In *R v Pang Chun-wai* [1994] 1 HKCLR 137, 142, the court held that the trial judge, who was aware only of the circumstances of the offences before the court, the previous convictions of the accused and his lack of remorse, had sentenced a robber to life imprisonment on the basis of inadequate information. It was said to be 'a settled principle in this court that in cases of this sort an indeterminate sentence, that is, a sentence of life imprisonment, should not be imposed unless there is clear evidence of mental instability as opposed to mental disorder which would indicate that the person was likely to be a danger to the public': *R v Blackburn* (1979) 1 Cr App R (S) 205, 207. However, medical reports are not essential.

A court may be justified in concluding that the accused is unstable and dangerous on the basis of a history of similar offences, or else of a series of like offences of

which he has been convicted on the same occasion: *R v Lee Shun-chung and Others* [1987] 1 HKC 128, 132. The prior convictions of the accused may be such as to leave the judge in no doubt that he 'constituted a serious danger to the public': *R v Powell and Horsford* [2002] 1 Cr App R (S) 199. In *Attorney General's Reference No 22 of 1995 (Semper)* [1996] 1 Cr App R (S) 401, 404, Lord Taylor CJ considered the *Hodgson* criteria and said:

> So far as (2) is concerned, it is well-established that there is no need for medical evidence to be led in order to show an unstable character such that the offender is likely to commit further offences of the same kind. It may be sufficient if previous convictions taken into consideration show in themselves a picture of continuing danger to the public such as to indicate that element of unstable character to which we have referred … Looking at the whole of the offender's history we have come to the conclusion that he constitutes a danger to female members of the public and is likely to remain so for an indefinite period. In those circumstances we have come to the conclusion that the proper sentence is one of life imprisonment.

A continuing risk to the public for the indefinite future does 'not require medical evidence suggesting irrationality, or instability of the personality, for this purpose. The danger could be represented by a wholly rational individual': *R v McNee and Others* [2008] 1 Cr App R 108, 117. There are exceptional cases which justify the imposition of an indeterminate life sentence even when there is no positive evidence of mental instability: *R v Chandler* (1993) 14 Cr App R (S) 586. It is 'open to the court sometimes to infer from the circumstances that there is something radically wrong with a defendant: wrong in the sense that he has a disturbed mind which, though a psychiatrist cannot put a label on it, amounts to a condition which satisfies one of the three main criteria for the imposition of a life sentence': *R v Stevenson* (1992) 14 Cr App R (S) 22, 25. The English Court of Appeal in *Stevenson* expressly disapproved the view that the existence of a degree of mental instability was something which could not be inferred solely from the particular circumstances of the offence of which the offender has been convicted. In *R v Easterbrook* (1990) 12 Cr App R (S) 321, 333, Watkins LJ said:

> There are exceptional cases to which (the *Hodgson*) guidelines have no application. This is just such a case. This is not a case of a man who has anything wrong with his mind in the medical sense – far from it. This is the case of a man who is a very skilful and dangerous criminal who has not been deterred from committing serious crimes, no matter how long the sentences which have previously been passed upon him. He comes into a very different category. No medical report was called for, and rightly. The judge plainly put him into the category which does not call for medical reports or anything like that. What was called for here was the necessity to indicate plainly how severe the punishment should be for a man who is willing to risk the life of himself and others to achieve the aim of gaining large sums of money.

In *R v Chapman* [2000] 1 Cr App R (S) 377, 385, Lord Bingham CJ emphasised that there was an interrelationship between the gravity of the offence before the court, the likelihood of further offending, and the gravity of further offending should such occur. The more likely it was that an offender would offend again, and the more grave such offending was likely to be if it did occur, the less emphasis might the court lay on the gravity of the original offence. There was, however, no ground for doubting the indispensability of the offence seriousness condition laid down in *Hodgson* and reaffirmed in *Attorney General's Reference No 32 of 1996 (Whittaker)* [1997] 1 Cr App R (S) 261. 'The crucial question', said Lord Bingham, at 266, is 'whether on

all the facts it appears that an offender is likely to represent a serious danger to the public for an indeterminate period'. This explains why the fundamental objective in imposing life imprisonment, as opposed to a long fixed term sentence, 'is to ensure that a person is not released upon a determinate date irrespective of whether he remains a continuing danger': *R v De Havilland* (1983) 5 Cr App R (S) 109, 116.

In *Attorney General's Reference No 34 of 1992 (Oxford)* (1994) 15 Cr App R (S) 167, 171, the court agreed with the prosecution on appeal that a sentence of eight years' imprisonment for an offender who had been convicted of wounding with intent and who posed a serious threat to women was unduly lenient. Lord Taylor CJ commented that 'the only sentence which could properly be imposed here, having regard to the need to protect the public, was an indeterminate sentence'. However, in *R v Simmonds* [2001] 2 Cr App R (S) 328, 335, Pill LJ said:

> We are concerned about the risk which the appellant poses to the public. However, that of itself is not sufficient to justify a life sentence. There are many cases where serious offences are committed and where any sentencing court will be troubled about what happens when the offender is released from prison. Something more has to be established before a life sentence can be justified. What has to be established emerges clearly from the statements of principle by Mckenna J (in *Hodgson*) and Lord Lane CJ (in *Whittaker*) to which we have been referred.

In *HKSAR v Cheung Lai-man* [2004] 2 HKLRD 473, 486, the point was made that the gravity of the offence and the injuries to the victim might not always be the most important factors in deciding if life imprisonment is appropriate. Yeung JA explained:

> An indeterminate sentence may well be appropriate for a less serious offence if there is evidence that the defendant represents a serious danger to the public and that his condition is not treatable and is likely to persist for an indefinite period.

If an offence is of sufficient seriousness, a life sentence may undoubtedly be justified: *R v Powell and Horsford* [2002] 1 Cr App R (S) 199. That is so even if the offenders are young: *HKSAR v Hui Chi-wai and Others (No 2)* [2003] 2 HKC 582. In *R v Lau Tak-ming and Others* [1990] 2 HKLR 370, 387, it was said that those who trafficked substantially in drugs must expect long prison sentences, 'bearing in mind that the maximum sentence provided for by the legislation is life'. In *R v So Ching-kwan* [1993] 1 HKCLR 156, 161, the court concluded that even in the absence of evidence of mental instability, a sentence of life imprisonment was appropriate due to the real risk of repetition. A life sentence which is otherwise appropriate is not precluded as an option simply because the offender has pleaded guilty: *R v Ho Tung-shing and Others* [1994] 2 HKC 404, 406. That the offender has shown remorse or otherwise co-operated with the authorities is of little relevance once the court has concluded that life imprisonment is appropriate: *R v Cheung Hing-biu* [1984] HKLR 87, 94.

Section 67B(1) of the Criminal Procedure Ordinance (Cap 221) provides:

> When imposing a discretionary life sentence on a person for an offence, the judge must specify as part of the sentence a minimum term that the person must serve for the offence.

The minimum term is to be determined in accordance with general sentencing principles, with full weight being given to the offender's culpability, and this, in turn, entails a consideration of the seriousness of the offence and of the circumstances of its commission: *HKSAR v Zeng Fanyong* [2006] 4 HKLRD 403. In *HKSAR v Chan Li-fat* [2010] 5 HKC 341, the accused was sentenced to life imprisonment with a specified minimum term of eighteen years. In his determination of the minimum term

the trial judge disregarded the fact that the accused would lose the benefit of a one-third remission for good behaviour. Of this, Tang VP said at [28]:

> The better approach which is reflected in the cases mentioned above is that in fixing a minimum term, the court should clearly have in mind the fact that a minimum term is the minimum term that has to be served and that the minimum term must not exceed what retribution and deterrence require. In deciding what retribution and deterrence require, one should take account of the fact that ordinarily, a prisoner may earn a discount of up to one-third for good behaviour.

A plea of guilty to murder, rare though it is, may have some impact on the length of the minimum term, although such a plea 'cannot warrant anything like the degree of recognition afforded in non-murder cases': *HKSAR v Liu Pak-shing* [2010] 2 HKC 342, 353. In *HKSAR v Hui Chi-wai and Others (No 2)* [2003] 2 HKC 582, the point was made that section 67B(1) is not designed to provide a sentence of imprisonment in lieu of a life term. Stock JA explained, at [591]:

> It is designed to draw from the court a minimum term of years which the convicted person must *actually* serve before release, remembering however, and this is an important caveat, that it is inherent in the phrase 'minimum term' that the court does not say that that is the stage at which the convicted individual is to be, or even should be, released. Those who are entrusted with the function of monitoring prisoners serving indeterminate sentences, or long determinate sentences, and with making recommendations, where appropriate, for release or for the conversion of indeterminate terms to determinate ones, may very well in individual cases decide against the prisoner's release at the end of the minimum term and, indeed, may decide that release is not permissible for some considerable time beyond that date, or indeed at all.

In *HKSAR v Cheung Lai-man* [2004] 2 HKLRD 473, 488, Yeung JA said the purpose of a discretionary life sentence with a minimum term was two-fold, and explained that:

> The minimum term is to serve the purpose of retribution and deterrence, to reflect the culpability of the accused. The life sentence is with the additional aim of protecting the public.

In *HKSAR v Tsui Chu-tin, John* [2005] 1 HKC 518, the offender posed a continuing danger to the community; his was 'a borderline case of diminished responsibility and, as such, was a most serious case of its kind'. A sentence of life imprisonment was imposed, with a minimum term of 12 years to be served. In *HKSAR v Liu Chun-yip* [2008] 3 HKC 70, 77, a life sentence with a minimum term of imprisonment of 16 years was passed on an accused convicted of manslaughter as he represented 'a potential long-term danger to the community'.

In *HKSAR v Hui Mak-kwan* [2003] 4 HKC 443, the accused, aged 78, pleaded guilty to manslaughter on the basis of diminished responsibility. Having considered psychiatric reports, the judge sentenced him to life imprisonment, with a minimum term of 30 years' imprisonment to be served. The judge commented that the minimum term was calculated on the basis that as things stood, there was no prospect of the accused not being a danger to the public, and that, unless things changed, 'life must mean life'. When the Court of Appeal quashed the 30-year minimum term and substituted a minimum term of 10 years' imprisonment, it noted that the judge, in making the assumption that it was for the sentencer to determine the long term danger to the public posed by the accused, was only correct in part, because this factor was recognised by the imposition of a life sentence. Stuart-Moore VP said at [449]:

> However, a minimum term which denies any realistic possibility of rehabilitation or recovery, however remote, must, with respect, be contrary to the spirit of the legislation when taken as a whole.

The choice a court will often confront when the offence is serious is between the imposition of a life sentence and a long prison term. As courts which impose discretionary terms of life imprisonment are now required to specify the minimum term to be served, a life sentence may actually represent a more merciful disposal of the case. When the court upheld a life sentence in *R v Cheung Hing-biu* [1984] HKLR 87, 94, it commented that 'if a determinate sentence were to be considered then one in the region of thirty five to forty years would properly be in contemplation'. The offender who, in *R v Hindawi* (1988) 10 Cr App R (S) 104, 105, received a sentence of 45 years' imprisonment for 'as horrible a crime as could possibly be imagined', might well find himself serving a longer term than if his penalty had been declared to be indeterminate. The offender who persuaded the appellate court in *R v Ng Muk-kam* (CACC 685/1993, 31 May 1995, unreported), to set aside his life sentence and to substitute a term of thirty five years' imprisonment might be forgiven for thinking his victory was pyrrhic. In *R v Herpels* (1979) 1 Cr App R (S) 48, 50, Bridge LJ said:

> Having regard to the wholly uncertain prognosis in this case, the view of this court is that this was a classic case for the imposition of a sentence of life imprisonment as being both the appropriate sentence for the protection of the public, and indeed much the most merciful sentence which can be passed in the interests of this appellant, for if the court was to substitute a fixed term of imprisonment it would undoubtedly in the circumstances have to be a very, very long one indeed.

The power contained in section 67B(1) of the Criminal Procedure Ordinance (Cap 221) to specify a minimum term is exercised in the context of the Long-term Prison Sentences Review Ordinance (Cap 524), which was enacted in June 1997 with the intention of enhancing the transparency, efficiency and fairness of the prison sentence review and remission systems: *Lau Cheong and Another v HKSAR* (2002) 5 HKCFAR 415, 446. The Ordinance established the Long-term Prison Sentences Review Board ('the Board'). Section 8 prescribes the matters the Board should consider in its review of indeterminate and other sentences. It provides:

> The Board must have primary regard to the following principles when exercising its functions or performing its duties in relation to a prisoner –
>
> (a) in any case where the prisoner has not been completely rehabilitated, the rehabilitative effect of releasing the prisoner from detention before the unremitted part of the prisoner's sentence is served;
>
> (b) the benefits to the prisoner and to the community arising from the prisoner being supervised after release with a view to securing, or increasing the likelihood of securing, the prisoner's rehabilitation (in any case where the prisoner has not been completely rehabilitated) and successful reintegration into the community;
>
> (c) whether the part of the prisoner's sentence already served is sufficient, in all the circumstances (in particular given the nature of the offence for which the prisoner is being detained), to warrant consideration being given to having the prisoner released from detention early;
>
> (d) the need to protect members of the community from reasonably foreseeable harm that could be inflicted by the prisoner as a result of having been released from detention early.

Although it may be apparent to a court that an offender is an obvious danger to society, at the time sentence is passed the court will not be in a position to assess the

issues in section 8(a), (b) and (d). The Board can recommend to the Chief Executive the substitution of a determinate sentence for an indeterminate sentence (section 15). It would, however, be illogical to compel the Board to provide an indication of how long the convicted person should be required to serve to meet the punitive part of the sentence in all reviews of mandatory life sentences. This is a judicial function which the Board cannot perform: *Tong Yu-lam v The Long-term Prison Sentences Review Board and Another* [2009] 4 HKC 133, 140. Whilst the Board needs to give reasons for its decision, if the offence is so serious that, notwithstanding the good behaviour of the prisoner and other personal factors, the serving of 15 years' imprisonment is not sufficient time to warrant the consideration of his early release, there is little more it can usefully say: *A v Chief Executive of the HKSAR* [2013] 4 HKLRD 404 [34].

The Board is required to examine each case at the regular intervals prescribed. Such reviews are conducted after no longer than five years in respect both of mandatory and discretionary life sentences (section 11). In this exercise, the Board is assisted by reports, which may include medical and psychiatric reports and social welfare reports (section 14). When it recommends a determinate term, or recommends release, the Board has regard to developments since sentence. The scheme operated by the Board 'suggests that when deciding upon a minimum term under section 67B, what the court is primarily addressing is the punitive and deterrent element dictated by the offence and the current circumstances of the offender. Those elements might be such as to require a very long minimum term': *HKSAR v Hui Chi-wai and Others (No 2)* [2003] 2 HKC 582, 592.

The minimum term is calculated according to the dictates of punishment or retribution: *R v Hollies* (1995) 16 Cr App R (S) 463, 468. The minimum term represents the period the offender is required to serve before he will be considered for release by the Board: *R v Fox* (1994) 15 Cr App R (S) 370. The *Practice Direction (Crime: Life Sentences)* [1997] 1 WLR 223, provides:

> (2) Thus the discretionary life sentence falls into two parts: (a) the relevant part which consists of the period of detention imposed for punishment and deterrence, taking into account the seriousness of the offence and (b) the remaining part of the sentence during which the prisoner's detention will be governed by considerations of risk to the public.

Just as the discretionary life sentence may be appealed against so also may the minimum term specified under section 67B(1): *Yau Kwong-man and Another v Secretary for Security* [2002] 3 HKC 457, 465. Section 80 of the Criminal Procedure Ordinance is sufficiently broad to permit of such a challenge, as it defines sentence as including 'any order made by a court in dealing with an offender'. By contrast, since the mandatory life sentence is fixed by law, there is no right of appeal solely against sentence (section 83G). However, a person convicted of murder and sentenced to mandatory life imprisonment is entitled to appeal to the Court of Appeal which may overturn the conviction and sentence: *Lau Cheong and Another v HKSAR* (2002) 5 HKCFAR 415, 464.

Section 67B(2) of the Criminal Procedure Ordinance provides:

> If, when imposing an indeterminate sentence of imprisonment on a person for an offence, the judge is of the opinion that there are matters relating to the person or the offence which should be recorded for the purpose of reviewing the sentence in the future, the judge must make a report in writing to the Chief Executive specifying those matters.

In *Lau Cheong and Another v HKSAR* (2002) 5 HKCFAR 415, 466, the Court of Final Appeal commented that any report made by a judge under section 67B(2) would be of assistance to those who review the sentence. It was important for the judge to consider whether to make a report. If he was so minded, 'the convicted person should, so far as is practicable, be given an opportunity to be heard, represented by counsel if possible, before the report is made'. Their Lordships added that unless there were exceptional circumstances, he should also be provided with a copy of any report which, in the event, is made.

Section 2 of the Offences Against the Person Ordinance (Cap 212) requires that any person convicted of murder shall be imprisoned for life. It provides, however, that if a person was under 18 years of age at the time of the offence, the court has a discretion as to whether to sentence him to imprisonment for life or to imprisonment for a shorter term. If a person aged under 18 years poses a long term danger to the public, this may justify a life sentence on the basis that this is 'a key fact': *HKSAR v Liu Pak-shing* [2010] 2 HKC 342, 351. Such a danger, however, is not a prerequisite, and in *HKSAR v Hui Chi-wai and Others (No 2)* [2003] 2 HKC 582, 588, Stock JA said:

> In our judgment it is not intended by section 2 that, in the case of those aged under 18 years at the time of the offence of murder, life imprisonment may only be imposed where the offender poses a long term danger to the public. Whilst age is an important factor, and whilst of course the court will have regard to the question of risk in the long term, the absence of such a risk does not in an appropriate case of itself preclude the court from imposing a life term.

The first person to take advantage of section 2 of the Offences Against the Person Ordinance after it was amended in 1997 by the Long-term Prison Sentences Review Ordinance (Cap 524), was a youth, aged 17 years at the date of offence, whose life sentence was substituted on appeal with a term of 28 years' imprisonment: *HKSAR v Cheng Yat-ming (No 2)* [1997] 3 HKC 365, 367. In *HKSAR v Vo Van Hung* [1998] HKCU 312 (CACC 417/1994, 6 March 1998, unreported), a youth, aged 17 years at the time of offence, had his life sentence substituted on appeal with a term of 29 years' imprisonment. In *HKSAR v Lee Kar-yeung* [1999] HKCU 1435 (CACC 315/1998, 15 October 1999, unreported), a 30-year fixed term was imposed upon a 15-year-old for a premeditated murder. In *HKSAR v Vu Thanh Binh* [2006] HKCU 573 (CACC 51/2005, 6 April 2006, unreported), a youth, aged 17 years at the time of offence, had his life sentence substituted on appeal with a term of 28 years' imprisonment. In situations where the court concludes that a life term is not required, the imposition of very long terms of imprisonment is the norm; when this proposition was challenged before the Appeal Committee, Chan PJ said 'there are good reasons for imposing heavy sentences in Hong Kong for this type of offence even on juvenile offenders': *Chu Yiu-keung and Others v HKSAR* [2011] 6 HKC 87.

When a discretionary sentence of life imprisonment is in contemplation, the practice of the courts is to alert counsel and to invite submissions as to the appropriateness of this course: *R v Pang Chun-wai* [1994] 1 HKCLR 137, 142.

> The applicants pleaded guilty at the retrial and these cannot be said to be truly timely pleas. They were each given a discount of one-quarter which is not an insubstantial discount. In these circumstances, we are not prepared to interfere with the judge's exercise of discretion.

It is now well settled that where a plea only materialises at a retrial, this can constitute an exceptional circumstance such as to justify a departure from the customary discount of one-third. It will not attract the same recognition as would a plea tendered timeously at the outset of the original proceedings. After a full discount of one-third was given to the accused who pleaded guilty at a retrial in *HKSAR v Wong Kwok-leung and Another* (CACC 389/2005, 21 November 2008, unreported), McMahon J remarked that this was 'perhaps over-generous'. Although the courts retain a discretion in this area, this, in practice, will often be exercised against the accused.

CHAPTER 41

Review of Sentence

'Thieves belong in jail.'

– Vladimir Putin

On the application of the Secretary for Justice, the Court of Appeal may review the sentence of a lower court. This power was introduced by the legislature in 1972, as a corrective measure. It is in the public interest that if a judge or magistrate imposes a sentence which is inappropriate or wrong, there should be a means of redress. At the heart of the procedure lies the public perception of the propriety of the sentence, and its confidence in the administration of justice: *Attorney General's Reference No 30 of 1993 (Stephen Saunders)* (1995) 16 Cr App R (S) 318, 322. The Secretary for Justice must authorise the application, either directly or indirectly, and the power has been delegated to the Director of Public Prosecutions. Although it is no light matter for the Court of Appeal to interfere with a sentence, an application by the Secretary for Justice is treated very seriously, not least because applications for review are so rarely pursued.

There are four bases upon which the Secretary for Justice may seek leave to review a sentence. First, where the sentence is deemed to be manifestly inadequate. Second, if it is felt to be manifestly excessive. Third, where it is considered to be wrong in principle. Fourth, if it is not authorised by law. That the Secretary may seek a review on the ground of manifest excessiveness, in itself the usual basis of an appeal against sentence by an accused, serves to underline the role of the prosecutor as a minister of justice, acting fairly and impartially in the public interest. Although no review has ever been sought on the ground of manifest excessiveness, such an application has been suggested: *So Wai-lun v HKSAR* (2006) 9 HKCFAR 530, 543. In any event, an accused who is aggrieved by his sentence will invariably himself appeal. (qv)

Section 81A(1) of the Criminal Procedure Ordinance (Cap 221) ('the Ordinance'), provides:

> The Secretary for Justice may, with the leave of the Court of Appeal, apply to the Court of Appeal for the review of any sentence (other than a sentence which is fixed by law) passed by any court, other than the Court of Appeal, on the grounds that the sentence is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate.

In deciding whether to seek a review of sentence, the prosecution will weigh competing considerations. Fairness to the accused is a factor, but so also is fairness to the public at large, and fairness to those sentenced for similar crimes. Even if the victim is not keen on there being a review, the prosecution must do what is just, as 'victims do not and cannot decide sentences': *R v Hall* [2013] EWCA Crim 1450 [86].

If a sentence is contrary to law, there may be little option but to seek a review, for it will mean that no lawful sentence has been imposed upon the accused. If a sentence

is manifestly inadequate, or is wrong in principle, or both, an application for review is likely to be instituted only in the most obvious and glaring of cases. But the grounds for seeking a review are discrete, and a sentence which is wrong in principle may not also be manifestly inadequate. For example, the duration of a term of imprisonment may be wholly appropriate, whereas its suspension is unwarranted and contrary to principle. As against that, a sentence may be manifestly inadequate but not wrong in principle: *Attorney General v Hsu Sai-man and Another* (CAAR 12/1986, 15 August 1986, unreported). A fine, for example, or a suspended sentence of imprisonment, may be correct as a matter of principle, but nonetheless manifestly inadequate, having regard, respectively, to the quantum or the length. That is not to say, however, that a sentence cannot be manifestly inadequate to such an extent as to reveal an 'error in point of principle': *Griffiths v R* (1977) 137 CLR 293, 310.

The court which extends undue leniency to an accused may do him a disservice. He may, in consequence, have to face re-sentencing by the Court of Appeal, after a review application has been made. Lord Taylor LCJ said that 'courts do no favours to defendants by imposing unduly lenient sentences upon them. In the end it usually worked to the offender's disadvantage': *Attorney General's Reference No 44 of 1994 (Steven Middleton)* [1996] 1 Cr App R (S) 256, 291. The imposition of an inappropriate sentence is 'more cruel to the offender than if the proper sentence had been passed': *Attorney General's Reference No 10 of 1994 (Kenneth Welch)* (1995) 16 Cr App R (S) 185, 190. In *Secretary for Justice v Wong Hong-leung* [2010] 1 HKLRD 226, 235, Stock VP said 'a sentence so out of line with one that could reasonably be considered appropriate is a sentence which does a defendant no favour'. In *R v Harmouche* (2005) 158 A Crim R 357, 374, Hulme J noted:

> Judges who fail to pass sentences properly reflecting the seriousness of offences as laid down by Parliament and the principles of sentencing as dictated both by that body and established by superior courts do no favour to those such as the respondent who must now have his life and rehabilitation interrupted yet again and be returned to custody.

It follows that when counsel mitigates on behalf of his client, the mitigation should be tempered and realistic. The imposition of an unduly lenient sentence may expose the accused to the risk of re-sentencing in due course: *Secretary for Justice v Wong Hong-leung* [2010] 1 HKLRD 226, 235 (see also *Secretary for Justice v Yu Yat-sang* [2011] 1 HKC 155). In *Attorney General's Reference No 44 of 2000 (Robin Peverett)* [2001] 1 Cr App R 416, 421, Rose LJ said:

> Someone who pleads guilty must, generally speaking, be taken to do so in the recognition that, if an unduly lenient sentence is passed, that may give rise to an Attorney General's Reference. It is to be expected that, generally speaking, counsel will advise a defendant of the risk of an Attorney General's Reference if, following pleas of guilty, there is an unduly lenient sentence passed.

It was not until 1988 that the Attorney General of England and Wales acquired the right to seek a review of sentence.[1] The sole basis, however, for the Attorney to challenge a sentence is that the sentence is deemed to be '*unduly lenient*'. In *Attorney General's Reference (No 4 of 1989)* (1989) 11 Cr App R (S) 517, 521, Lord Lane CJ provided guidance, which has since been approved in Hong Kong,[2] as to how the power of review is to be approached:

1 Section 36, Criminal Justice Act 1988.

2 *Attorney General v Tai Chin-wah* [1994] 2 HKCLR 81; *Secretary for Justice v Wong Hong-leung* [2010] 1 HKLRD 226; *Secretary for Justice v Yu Yat-sang* [2011] 1 HKC 155; *Secretary for Justice v Wong Chi-wai* [2012] 3 HKC 361.

> The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must be had of course to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However, it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.
>
> The second thing to be observed about the section is that, even where is considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase on unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned.

As to the mechanics of seeking a review of sentence, section 83Y(2)(h) of the Ordinance provides that the power of the Court of Appeal to give leave to the Secretary for Justice to apply for the review of a sentence may be exercised by a single judge of either the Court of Appeal or the Court of First Instance. If the single judge refuses to grant leave, the Secretary for Justice may invoke section 83Y(3) of the Ordinance and renew the application before a full bench of the Court of Appeal. On the only known occasion when the single judge refused to grant leave, the full Court of Appeal not only granted the Attorney General the leave sought, but quadrupled the term of imprisonment of which complaint was made: *Attorney General v Chuk Chi-hoi* [1988] 1 HKLR 341, 343.

Rule 40 of the Criminal Appeal Rules (Cap 221A) stipulates that the powers conferred by section 83Y of the Ordinance upon the single judge may be exercised by the judge 'on a written application and in the absence of the parties'. It is further provided that the judge can 'sit and act wherever and whenever may be convenient to him'. Given the *ex parte* nature of the proceedings, the accused will not ordinarily know that an application is being made. He will, that is, only usually become aware of the matter after leave to make the application has been granted. However, in *Attorney General v Tai Chin-wah* [1994] 2 HKCLR 81, 83, those representing the accused, having got wind that an application was imminent, wrote a letter to the court seeking to have the application heard upon an *inter partes* basis. That request was refused. In practice, all such applications are processed *ex parte* by the single judge. That most applications are approved by the single judge does not call into question the efficacy of the filtering mechanism; it is more a reflection of the care which the prosecution traditionally applies before invoking its powers under section 81A. Such care, however, was found to be absent in *Secretary for Justice v Law Siu-kuen* [2011] 2 HKC 157, and this could have torpedoed the substantive application, leave having been granted, although in the event the case failed on other grounds. Once leave is granted by the single judge, the accused who is aggrieved by the decision has a remedy.

Once the Secretary for Justice has been granted leave *ex parte* by the single judge, it is open to the accused thereafter to submit to a full bench of the Court of Appeal

that leave should not have been granted, and to ask for it to be set aside. As Silke VP observed in *Attorney General v Tse Ka-wah and Others (No 1)* [1992] 1 HKCLR 103, 107, when confronted with an application to set aside the leave granted by the single judge:

> Further, the granting of leave puts a respondent in peril. The apparent finality of the passing of sentence upon him is brought into question. If the Attorney General, as applicant/appellant, is given leave *ex parte* and there is later a contention that such leave should not have been given at all, then, in my judgment, it is open to this court to entertain a Notice of Motion in the terms of the ones we have before us.

This approach recognises that the *ex parte* procedure purports to deprive the accused of a valuable right, as it puts in peril the finality of the decision in his favour of the lower court. To preclude him from questioning its propriety would amount to a denial of justice. As the Privy Council made plain in *Krishnasami v Ramasami* [1917] AIR 179, 180:

> It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected.

It is clear from these dicta that the full bench can indeed entertain a motion to set aside the leave granted by the single judge. The contrary view, expressed in *Attorney General v Wu Kam-ming and Others* [1987] HKLR 364, that the full bench was bound by the decision of the single judge who, in granting leave, had exercised the power vested in the Court of Appeal, was, accordingly, not followed in *Attorney General v Tse Ka-wah and Others (No 1)* [1992] 1 HKCLR 103, 107.

As regards the form of an application of review, section 81A of the Ordinance provides:

> (1) The Secretary for Justice may, with the leave of the Court of Appeal, apply to the Court of Appeal for the review of any sentence (other than a sentence which is fixed by law) passed by any court, other than the Court of Appeal, on the grounds that the sentence is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate.
>
> (2) An application under subsection (1) shall –
>
> (a) be in writing signed by the Secretary for Justice;
>
> (b) be accompanied by the documents, or copies of the documents, specified in subsection (2A);
>
> (c) be filed with the Registrar within 21 days, or within such further time as the Court of Appeal may allow, after the date on which the sentence was passed or any proceedings for the review, under section 104 of the Magistrates Ordinance (Cap 227), of the sentence or of the conviction on which the sentence was passed, were withdrawn or disposed of.
>
> (2A) The following documents are specified for the purpose of subsection (2)(b) –
>
> (a) in the case of a sentence passed by a magistrate, a statement of the facts found by him or admitted before him and of the reasons for the sentence;
>
> (b) in the case of a sentence passed by a District Judge, the statement of the reasons for the verdict placed on record in accordance with section 80 of the District Court Ordinance (Cap 336) and a statement of the reasons for the sentence;
>
> (c) in the case of a sentence passed by a judge of the High Court, the record of the whole of the proceedings before him other than the evidence given in any trial that took place in those proceedings;
>
> (d) in any case, any report concerning the respondent which was before the court which passed the sentence.

> (2B) The documents, or copies of the documents, specified in subsection (2A) shall be delivered to the Secretary for Justice within 7 days of a request therefor being made in writing to the magistrate or District Judge who passed the sentence or, if the sentence was passed by a judge of the High Court, to the Registrar.
>
> (3) The Court of Appeal may order a respondent to be detained in custody until an order has been made under section 81B(1).
>
> (4) The Court of Appeal may, if it seems fit, on the application of a respondent admit, the respondent to bail pending the hearing of the application.
>
> (5) The Court of Appeal may, if it refuses an application, award against the Secretary for Justice such amount of costs as it may determine, save that the amount shall not, if the respondent is legally aided, exceed the total of the contributions which he is liable to make.
>
> (6) In this section and sections 81B and 81C –
> 'respondent' means a person on whom a sentence has been passed.

The time limits prescribed in section 81A must be respected. True, those limits, in so far at least as they relate to the making of the application, leave having been granted, can be extended. The time within which the court of trial is required to deliver the documents to the Secretary for Justice upon receipt of the request cannot, interestingly, be extended. That presents the difficulty invariably attendant upon a legislative practice of saying that something 'shall' be done, by which is meant that it 'must' be done, without stating what the consequences will be if it is not done. Given that the trial courts sometimes fail to comply with the 7 days specified in subsection (2B), this inevitably impairs the capacity of the Secretary for Justice to comply with the 21-day deadline imposed by subsection (2); at the very least, it means that compliance is often a close run thing. If there is a real danger that the time limit cannot be met, the better course is for the Secretary for Justice to alert the court to this, to give reasons, and to seek an extension. It is necessary, that is, as Silke VP put it in *Attorney General v Tai Chin-wah* [1994] 2 HKCLR 81, 91, for the Secretary 'to make full and frank disclosure'.

In *Secretary for Justice v Wong Tsz-kin* [1998] 4 HKC 32, the sentence was passed on 30 June 1998, and the application for leave was not made until 17 July, some four days before the expiration of the 21 days within which the application had to be made. Nazareth VP granted the application for leave on 20 July and ordered that the time for the filing of the application be extended by 14 days. The accused contended that the extension of time by the judge who granted leave was made without proper reason and was not a valid grant. In rejecting that submission, Power VP said:

> This, in our view, was a measured exercise of the court's discretion to ensure that its grant of leave was not rendered nugatory by the effluxion of time. It was not, as has been argued …, an extension without proper reason. The judge, having decided that the sentence was one which should be reviewed, was right to make an order to ensure that the grant of leave would not be frustrated and thus to ensure that the application would, in due course, come on for hearing.

A failure by the Secretary for Justice to mention in the body of the application that leave is being sought outside the 21 day time period provided for in subsection (2) will invariably result in the leave granted being set aside by a full bench if the point is later taken. Since the leave request is a filter, there has, in the interests of justice, to be a strict application of the requirements for time: if the court is not put on notice as to the actual position it cannot properly exercise its discretion. In *Attorney General v Tse Ka-wah and Others (No 1)* [1992] 1 HKCLR 103, 112, Silke VP said:

> I do not accept, as Mr Cross would have it, that the court must be taken to know the law in the sense of being aware that an application is out of time. I do not accept that the document 'spoke for itself'. Would the leave request have been granted if the court had been properly apprised that the application would be, inevitably, out of time? It may well be that the court would inevitably have done so. But, if the court is not alerted to the danger by the request for leave containing a further request for an extension of time, then I would think, as more probably than not happened here, the court will not be in a position to give its full mind to the exercise of its discretion. I view the leave granted here to have been granted under a misapprehension. An application of this nature demands full and fair disclosure.

If the Secretary for Justice requires an extension of time within which to lodge the application after leave has been granted, an explanation should be given for the delay. The single judge can then see if there has been delay in the making of the application by the Secretary, or if there has been delay by the judge or magistrate in supplying the Secretary with the court records. If such reasons are not provided, there is no material upon which the court can exercise its discretion to extend time: *Savill v Southend Health Authority* TLR 28 December 1994.

Although section 81A(2) of the Ordinance stipulates that the application for the review of the sentence 'shall' be accompanied by the documents specified in subsection (2A), that word, in this context, is directory, not mandatory: *Attorney General v Lau Shek-man and Others* [1987] 3 HKC 62, 63. Subsections (2) and (2A) are designed to ensure that the Court of Appeal has before it all the documents that are necessary for the hearing of an application for review of sentence. They expressly provide that the evidence given at the trial need not accompany the application. In view of that, it would not be realistic to conclude that it is mandatory to provide portions of the transcript concerning matters which would not assist the court in deciding whether or not the sentence is adequate.

Section 81A of the Ordinance does not require the Secretary for Justice to indicate in the written application why the sentence is considered to be objectionable. The single judge can, thus, only speculate as to the reasons which have prompted the application, and this may impair the ability to exercise the discretion of whether or not to grant the Secretary leave. In *Attorney General v Yim Yee-kwong* [1981] HKC 101, 105, therefore, Roberts CJ expressed the hope that:

> in future applications for review, the single judge, to whom the application for leave originally goes, and the court could be furnished with a general statement as to why the sentence is wrong in principle.

As a result, the authorities which establish sentencing principles are now invariably mentioned and relied upon in the Secretary for Justice's written application for leave to apply for review: *Attorney General v Jim Chong-shing* [1990] 1 HKLR 131, 147. Since the documents to be placed before the court by virtue of section 81A(2A) are extremely limited, Roberts CJ also indicated that, as a matter of standard practice, the materials accompanying the application should include the criminal record (if any), a list of any offences which were taken into account, and a copy of the charge sheet. Further, in *Attorney General v Lam Tai-kuen* [1987] 1 HKC 151, 153, Kempster JA said that a copy of the indictment and of the agreed statement of facts, if any, would 'furnish the absolute minimum of additional information required', together with 'any other matter thought relevant'. The Secretary for Justice should ask for all these materials, even though they are not mentioned in section 81A(2A), at the same time as the statutory documents are requested: *Attorney General v Tai Chin-wah* [1994] 2 HKCLR 81, 91.

Once the Registrar, the District Judge or the magistrate, as the case may be, receives the request for the court documents, section 81A(2B) requires these to be delivered to the Secretary for Justice within seven days. That request is not to be directed to the clerk of the court: *Attorney General v Tai Wai-hang* (CAAR 15/1984, 14 December 1984, unreported). A court should not purport to comply with the request by forwarding a holograph note of the proceedings: *Attorney General v Tsang Chu* [1987] 2 HKC 106, 107. Typed reasons for sentence are required. Once the request has been received, it is quite improper for the court to respond by impugning the actions of the *Secretary for Justice: Attorney General v Fung Chung-ping and Another* [1985] 1 HKC 429, 431. The court must confine itself to that which is required, and should certainly not indulge in criticisms of the law in question: *Attorney General v Tai Wai-hang* (CAAR 15/1984, 14 December 1984, unreported). However, if the District Judge or magistrate is no longer in a position to supply the documents specified in subsection (2A), then the absence of the mandatory statement renders any application for review unpursuable: *Attorney General v Tam Kin-hung* [1985] 1 HKC 606, 608.

Sentencing is not an exact science. In the quest for an appropriate sentence a court must apply the established principles of sentencing. These reflect competing factors and policies. They include the need to punish the offender, to protect society, to deter others, to compensate the victim and to rehabilitate those convicted of crime. Although no single sentence can be expected to achieve all of those objectives, the purposes of criminal punishment overlap and they should not be viewed in isolation from one another in the calculation of sentence. They are guideposts and, having weighed the principles carefully, the court must decide which has the greatest relevance in the circumstances of the case. The first instance court is usually best placed to conduct the delicate balancing exercise necessary to achieve a proper sentence. Provided that the sentence passed by the lower court is one which could reasonably have been passed, the Court of Appeal will 'be jealous to prevent encroachment on the discretion of judges and magistrates to impose as lenient a sentence as they may think appropriate': *Attorney General v Mutton, Graeme* [1992] HKCU 66 (CAAR 8/1991, 18 March 1992, unreported). In *Secretary for Justice v Dank and Another* [2008] 4 HKC 483, 490, Stock JA said it was:

> not the function of an appellate court upon a review of sentence instituted by the Secretary for Justice to substitute an increased sentence for that passed in the court below merely on the basis that it takes the view that the sentence passed was lenient or less than this Court would have imposed.

In England, it has been said that the 'test for intervention is not leniency, but undue leniency. Leniency where the facts justify it is to be commended, not condemned': *Attorney General's Reference No 8 of 2007 (Danielle Krivec)* [2008] 1 Cr App R (S) 1, 8.

The importance of appellate courts not allowing the system of reviews of sentence to circumscribe unduly the sentencing discretion of the lower courts was recognised in *Attorney General v Lau Chiu-tak and Another* [1984] HKLR 23, 25, when Huggins VP said:

> The power of review was conferred to correct errors in exceptional cases and the court will be jealous to prevent encroachment on the discretion of judges and magistrates to impose a lenient sentence as they may think appropriate, provided that the sentence is one which in all the circumstances could reasonably be passed.

Although an error which affects the sentence must be apparent before the Court of Appeal will intervene in a review by the prosecution or an appeal by an accused, a

review raises considerations which are absent when an accused seeks a reduction of sentence on appeal. That is why the appellate court will be more easily persuaded that a sentence is manifestly excessive than that it is manifestly inadequate. That is not because the criteria are different, but because there is a presumption *in favorem libertatis* which the prosecution has to overcome: *R v Bitter* (1981) 27 SASR 183, 185. The review procedure itself has been described by Barwick CJ as cutting across 'time-honoured concepts of criminal administration': *Peel v R* (1971) 125 CLR 447, 452. The procedure was not designed to subject persons to the risk of having their sentences increased, with all the anxiety that entails, merely because the appellate court, had it sentenced the accused in the first place, might have imposed a more severe sentence than was in fact imposed by the trial court. Applications for review are only appropriate in the most obvious of cases, and full weight ought always be given to the discretion of the judge or magistrate who has the 'feel' of the case.

In *R v Osenkwoski* (1982) 30 SASR 212, 213, King CJ explained:

> There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage in the offender's life might lead to reform. The proper role for prosecution appeals, in my view, is (1) to enable the court to establish and maintain adequate standards of punishment for crime, (2) to enable idiosyncratic views of judges as to particular crimes or types of crime to be corrected, and (3) occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.

In Hong Kong, however, the use of the words 'sense of shock or outrage' are, as Huggins VP indicated in *Attorney General v Lau Chiu-tak and Another* [1984] HKLR 23, 25, to be firmly discouraged. That is because the test of whether a sentence is out of line is, quite simply, whether it is 'manifestly inadequate'. These are plain words which require no refinement. That said, although the English legislation uses the test of 'unduly lenient', the Court of Appeal has indicated that the principle in Hong Kong is the same: *Attorney General v Tai Chin-wah* [1994] 2 HKCLR 81, 86. In the Irish case of *DPP v Byrne* [1995] 1 ILRM 279, 287, it was said that in order to establish undue leniency the prosecution had to demonstrate 'a substantial departure from what would be regarded as the appropriate sentence'. In the Scottish case of *HM Advocate v Weldon* 1999 JC 5, 21, Lord Johnson, having said that the phrase 'undue leniency' meant precisely what it said, added:

> First of all, it has to be shown that the sentence was lenient within what might be regarded as a general, relevant range, but, secondly, and obviously, that leniency must be undue in the sense that it is unwarranted and not capable of justification upon the facts of the case.

In *R v Sin Yau-ming* [1992] 1 HKCLR 127, 137, Silke VP emphasised that the Court of Appeal 'is not a fact-finding body and should not in the ordinary course be turned into one'. The point was accordingly made in *Attorney General's Reference (No 95 of 1998) (Highfield)* TLR 21 April 1999, that the issue of whether a sentence complained of on review was unduly lenient was a question which had to be decided not in the light of what was alleged but of what was proved or found to have been established. The Court of Appeal, so it was said, did not constitute itself as a court of first instance inquiring into facts which had not been pursued or proved at trial. This means in practice that on an application for review of sentence the prosecution cannot look to the appellate court to resolve a factual situation which ought properly to have been determined by the lower court: *Attorney General v Li Ah-sang* [1995] 2 HKCLR 239,

243. The court will not approach its task upon a factual basis which differs from that accepted at trial.

If the prosecution accepts the defence stance at trial, the prosecutor may be precluded from challenging it on review: *Secretary for Justice v Chan Yin-ming* [1999] 2 HKC 493, 501. In *R v Kostercoglou* (2002) 137 A Crim R 257, 263, the fact that the prosecution had presented its case before the sentencing judge in a particular way meant that 'the Crown should not be permitted to adopt a different stance in this Court'. There is, however, no absolute rule that the failure by the prosecution to properly discharge its duty and ensure that the sentencing judge is fully and properly informed, either as to the law or the relevant facts, prevents the prosecution from subsequently relying upon the sentencing error so induced: *R v Amohanga* (2005) 155 A Crim R 202. In *R v Roche* (2005) 188 FLR 336, 356, McKechnie J said:

> No case was cited to the judge. The fact that the judge was not provided with this assistance means that an error in sentencing discretion is not attributable solely to him. In appropriate cases, this lack of assistance might be decisive against a prosecution appeal.

The attitude of the prosecutor at trial may in some circumstances constitute a bar to a successful application for review of sentence: *Secretary for Justice v Law Siu-kuen* [2011] 2 HKC 157. In *Attorney General's Reference Nos 80 and 81 of 1999 (Thompson and Rogers)* [2000] 2 Cr App R (S) 138, the English Court of Appeal declined the Attorney General's application to review sentence in view of the apparent and manifest acquiescence by the prosecutor at trial in relation to events which gave rise to what might otherwise have been more readily characterised as unduly lenient sentences. Lord Bingham CJ, at 145, said:

> On behalf of both these offenders a large number of factors have been drawn to our attention. But the most powerful submission made, and a submission made on behalf of both offenders, is that it would be unjust and harsh having regard to the history of this matter, in particular the indications given by the judge and the unreserved acquiescence of the Crown, if these sentences were now to be reopened and increased. Counsel of course rely on the strong and repeated indications given by the judge over a period of months; but they rely on prosecuting counsel's acceptance of the line taken by the judge.
>
> The court is mindful of the tradition in this country that prosecutors do not behave like persecutors. Nonetheless it is clearly understood as a duty of prosecuting counsel to draw the judge's attention to authority of which the judge, in the submission of the prosecution, should be aware. There can never be any obligation to acquiesce in an indication given by the judge to which the Crown takes exception.

It is settled law that the prosecution cannot properly resile from a clear representation which has been made and on which an accused has relied: *Croydon Justices, ex p Dean* (1994) 98 Cr App R 76; *Secretary for Justice v Law Siu-kuen* [2011] 2 HKC 157. In *R v Allpass* (1993) 72 A Crim R 561, 565, however, the Court of Appeal of New South Wales indicated that the prosecution was not debarred when it challenged a sentence:

> from taking a stance different from that taken at first instance, but this court, in the exercise of its discretion, is entitled to take account of the fact that, at first instance, the (prosecutor) acquiesced in the course that was taken by the sentencing judge. The weight to be given to such a consideration depends upon the circumstances of the particular case, but it may be of considerable significance if the respondent was given a non-custodial sentence at first instance. Its weight may also vary with the degree to which the appellate court thinks the sentencing judge fell into error.

When the Court of Appeal of New Zealand considered this issue in *R v Tipene* [2001] 2 NZLR 577, Ellis J said at 584:

> We agree with the view expressed in *Allpass* that (the prosecution) is not barred, on appeal, from taking a stance different from that taken at first instance. However, the fact that (the prosecution) has taken a particular stance, with which the sentence imposed is not inconsistent, is relevant to the appearance of justice when the appropriateness of the sentence is considered on appeal. There may be occasions when, notwithstanding a perception of injustice on the part of (the prosecution) in changing its stance, an appellate court may be unable to avoid the conclusion that there is an even greater perception that justice has gone wrong because the sentence imposed is so manifestly inadequate.

If the prosecutor at trial has entered into agreements or acquiesced in arrangements which benefit the accused without authority, those responsible for the institution of reviews of sentence will usually find themselves bound by such conduct, even if it produces an unduly lenient sentence: *Secretary for Justice v Law Siu-kuen* [2011] 2 HKC 157. It cannot, that is, be contended that the appropriateness of a sentence is a matter outside the remit of the prosecutor. As Rose LJ explained in *Attorney General's Reference No 44 of 2000 (Robin Peverett)* [2001] 1 Cr App R 416, 423:

> If the Crown, by whatever means the Crown is prosecuting, makes representations to a defendant on which he is entitled to rely and on which he acts to his detriment by, as in the present case, pleading guilty in circumstances in which he would not otherwise have pleaded guilty, that can properly be regarded as giving rise to a legitimate expectation on his part that the Crown will not subsequently seek to resile from these representations.

Section 27 of the Organized and Serious Crimes Ordinance (Cap 455) recognises a role for the prosecution in the sentencing process. It confers the right to seek an enhancement of sentence in certain circumstances. That right, which is exercised within a defined ambit, supplements the common law right of the prosecution to draw relevant case law to the attention of the court, as described in *Attorney General v Jim Chong-shing* [1990] 1 HKLR 131. If the Secretary for Justice initiates a review in circumstances in which the prosecution did not avail itself of these rights, it might be said that this has contributed to the manifestly inadequate sentence, and the prosecution may find itself in difficulties. In *R v Wilton* (1981) 28 SASR 362, 367, King CJ indicated:

> In my opinion, this court should allow the prosecution to put to it, on an appeal against sentence, contentions not put to the sentencing judge, only in exceptional circumstances which appear to justify that course.

So if a court imposes a sentence which is manifestly inadequate due to the failure of the prosecution to avail itself of a statutory or common law right to draw something relevant to its attention, the Court of Appeal on review may be reluctant to intervene. This is something to which the prosecution should remain alert: *Attorney General v Lee Po-man, David* [1992] 2 HKCLR 70, 74.

The law recognises that the process of review may require the court to range beyond what occurred below. Section 81B(3) of the Ordinance provides that the Court of Appeal may exercise any of the powers conferred by section 83V. Section 83V enables the court to receive evidence if it thinks it necessary or expedient in the interests of justice. This may include evidence as to the true state of the offender's criminal record: *Attorney General v Cheung Pit-yiu* [1989] 2 HKLR 12, 14. In *Attorney General's Reference Nos 4 and 7 of 2002 (Lobban and Sawyers)* [2002] 2 Cr App R (S) 77, a question arose as to whether it was inappropriate to take into

account the fact that the judge who was responsible for sentencing was not aware of the extent to which the offences were committed on bail. The court disagreed with the view that in order to achieve fairness it should disregard matters of which the judge was not aware. Lord Woolf CJ explained that 'it would be unfortunate, once we decided to intervene, if we were to deal with an offender on other than the actual facts'. However, the prosecution cannot rely upon section 81B(3) to adduce fresh evidence with a view to persuading the court to enhance sentence. Section 83V(5) of the Ordinance makes clear that:

> In no case shall any sentence be increased by reason of or in consideration of any evidence which was not given at the trial.

Section 83V(5) is strictly applied, and the court will not allow the prosecution to introduce evidence which places the actions of the accused in a worse light on the pretext that it provides 'a more complete picture': *Secretary for Justice v Lau Sin-ting* [2010] 5 HKLRD 318. However, section 83V(5) was never intended 'to prevent the consideration by the Court of Appeal of evidence which, if utilised, would have the effect of putting the record straight in circumstances where a judge has been purposely misled into taking a lenient course of action as the result of material being placed before him which had been fraudulently obtained': *Secretary for Justice v Wong Kwok-kau* [2004] 3 HKLRD 208, 216. As a deceit had been practised upon the sentencing judge, fresh evidence was admitted by the court in that case for the purpose of giving consideration to it when deciding whether to increase the sentence and put to rights the travesty of justice which the respondent had caused before the sentencing judge.

One of the functions of an appellate court is 'to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons': *Griffiths v R* (1977) 137 CLR 293, 310. If the court decides to take advantage of the opportunity afforded by a particular review to issue sentencing guidelines, it may need to receive material on such issues as the prevalence of the offence and its consequences. Any such guidelines do not, however, affect the accused who happens to be before the court and whose case is simply the vehicle by which the promulgation of the guidelines is facilitated. Thus, for the purposes of advancing the argument that new guidelines were required for sentencing in cases of armed robbery, the prosecutor, in *Secretary for Justice v Ma Ping-wah* [2000] 2 HKLRD 312, 315, was permitted to adduce fresh evidence. That evidence consisted of the statement of a police officer, which showed that incidents of 'head-bashing' robberies had proliferated, and of a consultant neurosurgeon, whose statement indicated that such offences could result in traumatic brain injury. Having issued guidance to sentencers in respect of offences of that type, the court emphasised that the:

> new guideline as to sentence cannot, of course, apply to the present case as the deterrent effect it is intended to achieve can only apply to offences committed after this judgment has been delivered.

At the hearing of the application for review of sentence, the court will decide what the bounds of propriety are in each particular case. The applicant, whilst not breaching those bounds, is entitled to strongly advance the submissions in support of the application: *Attorney General v Tai Chin-wah* [1994] 2 HKCLR 81, 89. Counsel will doubtless bear in mind that in this type of proceeding, as at first instance, he is a minister of justice. Although guidelines are not appropriate to define precisely how