CACC 418/2014

**IN THE HIGH COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

# **COURT OF APPEAL**

CRIMINAL APPEAL NO. 418 OF 2014

(ON APPEAL FROM DCCC NO. 909 OF 2012)

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BETWEEN

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| --- | --- |
| HKSAR | Respondent |
| and |  |
| NGO VAN NAM (吳文南) | Appellant |

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CACC 327/2015

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF APPEAL**

CRIMINAL APPEAL NO. 327 OF 2015

(ON APPEAL FROM HCCC NO. 458 OF 2014)

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BETWEEN

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| HKSAR | Respondent | |
| and |  | |
| ABDOU MAIKIDO ABDOULKARIM | | | Applicant |

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Before : Hon Yeung, Lunn VPP and Macrae JA in Court

Dates of Hearing : 19, 20 April and 4 May 2016

Date of Judgment : 2 September 2016

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CRIMINAL APPEAL NO. 418 OF 2014

Hon Yeung VP :

The Facts

The appellant (Ngo Van-nam) was intercepted by a police officer at Kwai Fong MTR Station on 25 July 2012 and he failed to produce any identification document. Upon enquiry, the appellant admitted that he had sneaked into Hong Kong from the Mainland on 25 July 2012 and that he had committed a robbery case in Tuen Mun in March 2012. The appellant was arrested.

In the subsequent interviews by the police, the appellant further admitted the following:

1. Two days before he committed the robbery in March 2012, he came to Hong Kong and met two Vietnamese friends “Ninh” and “Quang” and the three of them decided to rob a taxi.
2. They took a taxi from Tung Chung to Tuen Mun and he sat at the left-side back passenger seat. Upon arrival at Tuen Mun, “Ninh” grabbed the taxi-driver’s neck and declared “robbery” and “Quang” took his money, mobile phone, watch and ring.
3. He then pulled away the wire of the walkie-talkie of the taxi before he fled with the others.
4. “Ninh” gave him the mobile phone and some money. The proceeds were used for purchasing dangerous drugs.
5. He then surrendered himself to the Police Station as an “Illegal Immigrant”, while his two friends had sneaked back to Vietnam.
6. He sneaked into China and then to Hong Kong by hiding underneath a truck on 25 July 2012.
7. He intended to come to Hong Kong for curing his addiction to dangerous drug.

The appellant was charged with (1) Robbery; and (2) Remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully in Hong Kong.

On 9 November 2012, the appellant appeared before H.H. Judge Geiser in the District Court and pleaded guilty to both charges. In connection with the robbery charge, he admitted the following facts:

“ At about 10:00 p.m. on 13 March 2012, three males (one of them was the appellant) boarded PW1’s taxi outside Tung Chung MTR Station, one of them sat next to PW1 while the other two sat at the back. PW1 was asked to go to Fu Tei Road, Tuen Mun, NewTerritories.

Upon reaching Tuen Mun Fresh Water Primary Service Reservoir, Fu Tei Road, near lamppost No. DP 3572, the one sitting at PW1’s right-side back gripped PW1’s neck from behind, pointed at his neck with an 8 inches long knife and declared “Robbery”. The one sat at the left-side back of PW1 asked PW1 not to move. The one sat next to PW1 ordered PW1 to switch off all the lights of the taxi, used his hand to break the walkie-talkie and asked PW1 to take out all the money.

PW1 handed in HK$1,200 banknotes to the male sitting at the front passenger seat, he then took away HK$200 coins (approximately) from the front seat; PW1 also handed in his watch (HK$500), mobile phone (HK$1,500) and silver ring (HK$100) to him. The three males then left.

PW1 suffered no injuries and reported the case to police.”

The appellant sought leave to appeal against sentence out of time and his application was granted by McWalters JA sitting as a single judge of the Court of Appeal on 16 July 2015.

The appellant’s background and mitigation

The appellant, aged 26 and single, used to live in Vietnam, and was educated up to Form 5. He had a sister who was married to a Hong Kong citizen, but his parents were living in Vietnam. The appellant had a clear record although he had entered Hong Kong illegally on two previous occasions.

It was submitted that the appellant had surrendered himself and had revealed voluntarily to the police the robbery offence when he was intercepted on 25 July 2012. The suggestion was that without his co-operation, the appellant could not be caught and would not be charged with robbery. The appellant claimed that he had followed his sister’s advice and decided to reveal everything to the police.

The undisputed facts showed that the appellant had surrendered himself to the police three days after committing the robbery in March 2012, but on that occasion he had only briefly revealed his illegal immigrant status without mentioning the robbery case. The appellant was not charged, but was repatriated to Vietnam directly.

The appellant suggested that he just followed two older people to commit robbery and that he was remorseful. It was argued that the offence was not the worst case of the type as the amount involved was not large and that only minimum force was used with no injury to the victim at all.

The Sentence by the judge

The judge rejected the suggestion that the appellant had voluntarily surrendered to the police, pointing out that he was in fact intercepted by the police. In the course of mitigation, the following exchange between the judge and counsel for the appellant (Mr Li) took place:

“ Court: Because I do not consider this being a situation where he voluntarily surrendered himself to the police. Were it not for the fact of his interception outside the MTR station, he would not have been caught.

Mr Li: Yes, indeed. Your Honour, I mean, I tend to agree with that, I mean, that observation. I mean, there is a difference between the two…

Court: You can say that he co-operated by telling the police all about what had happened in relation to the robbery in March... But I don’t think it’s right to say that he surrendered himself, because he didn’t.

Mr Li: …not in the traditional manner …as you walk into the police station… ‘I killed somebody,’ and then giving the details. I mean, that--I must say that is the normal or the standard way of doing things, sometimes accompanied by lawyers...

…it is my submission that, in essence, it is the same thing, in the sense that but for his voluntary disclosure…there is no way he can be caught or even charged for this offence…”

The judge accepted that the appellant had volunteered the information regarding the robbery case to the police and that in the absence of such admission, his involvement would never have come to light. The judge also took into account the appellant’s guilty plea to the charges.

The judge, having referred to *R v Tran Van Anh* [1993] 2 HKCLR 122; and *Secretary for Justice v Tso Tsz Kin* [2004] 2 HKC 139, took the view that a starting point of 7 years’ imprisonment for the robbery charge should be adopted. The judge reduced the starting point by one-third on account of the guilty plea and gave a further discount of three months because the appellant had volunteered details of the robbery to the police. The judge sentenced the appellant to 53 months’ imprisonment on the robbery charge.

The judge sentenced the appellant to 15 months’ imprisonment on the unlawful remaining charge and ordered 10 months of the 15 months to run consecutively to the 53 months, making a total sentence of 5 years and 3 months’ imprisonment.

The Appeal

In presenting his argument before McWalters JA, the appellant claimed that he came back to Hong Kong because he wanted to confess to the robbery offence. McWalters JA took the view that if the appellant’s claim was accepted, he would have a strong arguable case for saying that he should have received a greater discount and that no part of the unlawful remaining offence sentence should have been ordered to be served consecutively. McWalters JA reminded the appellant that if he wished to adduce further evidence to support his claim, he had to apply for leave to adduce further evidence before the Court of Appeal. There was no such application from the appellant.

Grounds of Appeal

Mr Clive Grossman SC leading Mr Andy Hung for the appellant initially suggested that the appellant came back to Hong Kong because he wanted to surrender and confess to the robbery offence. When confronted with the judge’s findings that the appellant did not voluntarily surrender to the police, Mr Grossman said he was happy to proceed with the appeal only on the basis that but for the appellant’s volunteered confession, his involvement in the robbery would not have come to light.

Mr Grossman did not suggest that the starting points of 7 years and 15 months adopted by the judge for the two offences were manifestly excessive or wrong in principle. Mr Grossman’s only complaint was that the judge had not given a sufficient discount for the appellant’s volunteered confession. He emphasized that the appellant confessed to the robbery when his complicity was neither known to nor suspected by the police.

Mr Grossman suggested that the judge had not directed himself that it was in the public interest to encourage criminals such as the appellant to assist the law enforcement authorities to clear up crimes which would not otherwise have been brought to justice.

Discussion

When he surrendered himself in March 2012, the appellant did not reveal to the police the robbery that he had committed shortly beforehand, but only revealed his illegal immigrant status and he was immediately repatriated. He then went to the Mainland and sneaked back to Hong Kong a few months later.

When he was in Hong Kong, the appellant did not on his own volition surrender himself to the police. Rather, he was intercepted by the police in the street. The appellant did not tell the police or the judge that he returned to Hong Kong from the Mainland in July 2012 because he wanted to surrender to the police in connection with the robbery that he had committed in March 2012.

The appellant’s assertion that he came back to Hong Kong because he wanted to surrender and confess to the robbery offence was highly improbable and most unconvincing. In any event, the applicant’s assertion was rejected by the judge. As such an assertion was no longer relied on by Mr Grossman, we would say no more about it.

Mr Grossman’s complaint that the judge had not given heed to the need of encouraging criminals to assist law enforcement authorities was misplaced. It was such an obvious matter that the judge could not have overlooked it. If the judge had not given heed to the appellant’s volunteered confession, he would not have given him the additional 3 months’ discount of sentence.

The only issue that concerned us was whether the judge’s decision of not giving the appellant a larger sentence discount than the 3 months for his volunteered confession was appealable.

Mr Grossman suggested that where a person confessed to a crime, the commission of which was unknown to the authorities or confessed his complicity in a known crime when his complicity was neither known nor suspected, he should be given an additional discount over and above the one-third discount for a guilty plea as an added element of leniency. Mr Grossman, in his written submissions, relied heavily on *HKSAR v Hui Chi Tong* (unreported CACC 414/2007), *HKSAR v Tsang Kai On* [2011] 2 HKLRD 340 and *HKSAR v Choi Ka Kin Seraphim* (unreported CACC 377/2012).

In para. 25 of the judgment of *Hui Chi Tong* (supra), the Court of Appeal said:

“ But for the voluntary confession, the applicant would not have been found guilty of (the) 1st charge. Such voluntary admission, coupled with a plea later, showed genuine remorse. It is in the public interest to encourage an offender to ‘own up’ to his misdeed and to face the consequence. The most effective way of giving encouragement is to give a greater than normal discount upon a plea.”

In *Tsang Kai On* (supra), the Court of Appeal made similar comments in para. 14 of the judgment:

“ That the applicant still voluntarily pleaded guilty notwithstanding a lack of sufficient evidence from the prosecution showed that he was genuinely remorseful. In these circumstances, the Court should give a further discount to the applicant as an encouragement. This is also in the public interest…”

In both *Hui Chi Tong* (supra) and *Tsang Kai On* (supra), the Court of Appeal had not examined the theoretical basis and the logical foundation of the further discount other than saying that it was in the public interest to do so. The Court of Appeal did not indicate the appropriate extent of the further discount either.

In *Choi Ka Kin Seraphim* (supra), the Court of Appeal suggested that a total sentence discount of 40% would be appropriate when the defendant not only pleaded guilty to the charge, but also gave useful information to the police resulting in the arrest and successful prosecution of another defendant as well as voluntarily admitted to other offences for which he had not been arrested.

However, it was the policy of the courts to take into account in mitigation of sentence useful assistance given by the defendant to the authorities. The well established extent of reduction for a defendant who pleaded guilty and provided assistance to the authorities is 40% to 45%. (See *HKSAR v Ng Shek Yu* CACC 178/2000)

The Court of Final Appeal in *Z v HKSAR* (2007) 10 HKCFAR 183 affirmed such an approach when Li CJ said at p 194 of the judgment of the court:

“ The Court of Appeal is well placed to consider the range of reductions of sentence for co-operation with the authorities. It has used various percentages of discounts for different degrees of assistance. It has applied a usual discount of 40% (including the one-third reduction for a guilty plea) for an appellant who had provided assistance to the authorities without testifying against those about whom they had provided information. *HKSAR v Y* [2005] 3 HKC 337 at p.340. (Compare its earlier decision in *HKSAR v Ng Shek Yu* (unrep., CACC 178/2000, [2001] HKEC 243) referring to a discount of between 40% to 45% as usually appropriate in such circumstances.)…

…

In the present case, the relevant figure is the usual discount of about 40% as the appellant had provided useful information but had not given evidence. Its appropriateness had not been questioned in this appeal…”

If the Court of Appeal in *Choi Ka Kin Seraphim* (supra) had intended to give the defendant who pleaded guilty and gave useful information an additional sentence discount because he had voluntarily admitted to other offences, the discount should have been more than 40%.

Mr Grossman also relied on English authorities such as *R v Claydon* (1994) 15 Cr App R (S) 526, *R v Hoult* (1990) 12 Cr App R (S) 180, *R v Ellis* (1986) 6 NSWLR 603, *R v Mitsuaki Richard Mirchandaney* [2003] EWCA Crim 336and suggested that the appellant should be given a discount of sentence of more than one-third.

Quite apart from the fact that there were other relevant statutory provisions regulating sentences, the cases relied on by Mr Grossman all concerned defendants who voluntarily surrendered to the police and admitted the offences when the police had no evidence to connect them to the offences.

In *Claydon* (supra), the defendant surrendered to the police sometime after the offence and admitted the offence. In *Hoult* (supra), the defendant went to a police station and admitted his part in a robbery despite the fact that police inquiries were unsuccessful and the crime was treated as unsolved.

In *Mirchandaney* (supra), the defendant committed robbery and one week later, he made an anonymous call to the police seeking to confess his part in the robbery. He was told that the police would not take anonymous telephone calls. He then handed himself in to the police station one day after the telephone call and disclosed his part in the robbery.

In *Ellis* (supra), the defendant, having committed a series of robberies between September and November 1984, attended a minister of religion in December 1984 and confessed his involvement in those offences. He was advised to see a solicitor to make a clean breast of them. He then consulted a solicitor and was interviewed by the police following upon his solicitor having telephoned them and informed them that he had a client who wished to disclose his guilt.

We accept that in individual cases where a conscience-stricken defendant voluntarily surrendered to the authorities and admitted the offences despite a total lack of evidence against him, the court could grant him a sentence discount of more than one-third for such exceptional remorse. However, this was not such a case.

The judge had found and it was no longer disputed that the appellant did not voluntarily surrender himself to the police, but was intercepted and arrested for a separate offence before he confessed to the robbery offence.

The question of whether a defendant who voluntarily confessed and pleaded guilty to certain offences notwithstanding a lack of evidence from the prosecution to link the offences to him should be given a discount of more than one-third has recently been examined by this court in *HKSAR v Ma Ming* [2013] 1 HKLRD 813.

The Court disapproved of the suggestion in *Hui Chi Tong* (supra) and *Tsang Kai On* (supra) that a defendant who voluntarily confessed and pleaded guilty despite a lack of evidence against him would be entitled to a sentence discount of more than one-third. The Court wrote in its judgment of *Ma Ming* (supra) the following:

“ 27. A discount of one-third is quite a substantial discount. One of the main purposes of the court giving this one-third discount to a defendant who pleads guilty is to encourage a guilty person to own up to the crimes he committed, so as to conserve the resources of the community and to ensure that justice can be administered more efficiently and matters can be concluded in the most expeditious manner.

…

29. In view of this, when giving the one-third discount the approach taken by the court is a firm and broad-brush approach. It gives a defendant who timely pleads guilty the one-third discount, which is substantial, without regard for niceties, in order to discourage excessive arguments and to prevent wasteful use of resources of the community.

30. In *Secretary for Justice v Lee Chun Ho Jeef* [2009] 6 HKC 471, this court gave a clear exposition of this stance. At A-C on page 44 [sic] 7 of the judgment the Court of Appeal pointed out that:

‘ The Court of Appeal have repeatedly emphasized that the one-third discount is “usually to be regarded as the high watermark of the discount given to a defendant pleading guilty in good time.” The respondent’s co-operation with the police referred to by the judge was his admission of the offence to the police, both at the scene of the crime and at the police station. Such “cooperation” is just part and parcel of the respondent’s admission of his guilty, albeit at the first available opportunity. This mitigating factor should be subsumed within the one-third discount.’

31. The applicant cooperated with the police and after he was arrested he frankly confessed. This led to his being charged with the 1st charge. We are of the view that this factor should also be subsumed within the one-third discount, and should not be treated as a reason for giving any discount of more than one-third. Otherwise, it would be in conflict with the policy and purpose of giving the one-third discount. Not only would it create uncertainty but also it would give rise to disputes, and so it is against public interest.

32. When dealing with individual cases and when considering the totality of the sentence, the court, in exercising its discretion, can take into account the fact that the frank confession of the defendant provides the only evidence which support the charge of charges and therefore make minor adjustments to the total sentence. To this we do not object. However, this factor does not support the argument that this kind of defendant must be given a further discount over and above the one-third discount. If the court does not give such defendants any discount in addition to the one-third discount, that does not constitute an arguable ground of appeal. (Emphasis added).”

The same point was made in *HKSAR v Chu Kwok Chu* [2013] 6 HKC 357 at p 362 F-H:

“ The fact that a judge may, in the exercise of his discretion, give a defendant, who voluntarily confesses to the offence and without whose confession the prosecution would have no evidence against him or who voluntarily pleads guilty notwithstanding a lack of sufficient evidence, a further discount of sentence other than the usual one-third does not mean that where a judge refuses to do so, the defendant will have a legitimate complaint and can successfully appeal against such a refusal.”

We remain of the same view. Despite the fact that the appellant, after his arrest for failing to produce an identification document, had confessed to the robbery charge, the judge was not obliged to give him a discount over and above the one-third discount upon his pleading guilty to the charges. Such a mitigating factor was subsumed within the one-third discount.

In any event, the judge did give the appellant an additional three-month discount and ordered only part of the sentence on the unlawful remaining charge to run consecutively to the sentence on the robbery charge. The judge’s approach was in fact a lenient one and the appellant cannot have any legitimate complaint. The total sentence is neither manifestly excessive nor wrong in principle.

The only ground of appeal put forward on behalf of the appellant was without merit and the appeal against sentence is therefore dismissed.

I agree with the judgments of Lunn VP in CACC 418/2014 and CACC 327/2015 and of Macrae JA in CACC 327/2015.

CRIMINAL APPEAL NO. 418 OF 2014 and

CRIMINAL APPEAL NO. 327 OF 2015

Hon Lunn VP :

At the hearing of CACC 418/2014 on 21 January 2016, we adjourned proceedings to 19 and 20 April 2016 in order to receive submissions as to the general practice of affording a discount in sentence to a defendant for his plea(s) of guilty, directed the Registrar to brief leading counsel to act as an *amicus curiae* and invited the Director of Legal Aid and the Director of Public Prosecutions, to brief leading and junior counsel for the appellant and respondent respectively to assist the court. In addition, we directed that the application for leave to appeal against sentence in CACC 327/2015 be heard together with the appeal in CACC 418/2014.

The two cases before this Court afford the Court an opportunity generally to reconsider its policy of affording a discount of sentence to those defendants who plead guilty to the charges brought against them. In doing so, we have been assisted greatly by the submissions of the *amici curiae*, Mr Robert Pang SC and Ms Maggie Wong, together with the detailed and helpful submissions of the Director of Public Prosecutions, Mr Keith Yeung SC and those of Mr Michael Blanchflower SC.

In the judgment of this Court, similarly constituted, in *HKSAR v Lo Kam Fai*,[[1]](#footnote-1) Yeung VP noted that, “A defendant who enters a timely plea of guilty is normally entitled to a sentence discount of one third from the starting point because it is in the public interest to do so.” Yeung VP went on to cite with approval the judgment of Kirby J [[2]](#footnote-2) in the High Court of Australia in *R v Cameron*[[3]](#footnote-3) in which under the rubric of *‘The consideration of the public interest’*, he said:

“ The main features of the public interest, relevant to the discount for a plea of guilty, are “purely utilitarian”. They include the fact that a plea of guilty saves the community the cost and inconvenience of the trial of the prisoner which must otherwise be undertaken. It also involves a saving in costs that must otherwise be expended upon the provision of judicial and court facilities; prosecutorial operations; the supply of legal aid to accused persons; witness fees; and the fees paid, and inconvenience caused, to any jurors summoned to perform jury service. Even a plea at a late stage, indeed even one offered on the day of trial or during a trial, may, to some extent, involve savings of all these kinds.

… it is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease the congestion in the courts that delay the hearing of such trials as must be held. It also encourages the clear-up rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws. A plea of guilty may also help the victims of crime to put their experience behind them; to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered. Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim’s family and friends the ordeal of having to give evidence.”

Having noted that this Court had observed in *HKSAR v Ma Ming* [[4]](#footnote-4)that, “Difficulties and disputes may arise in carrying out this policy of giving a one-third discount and in deciding what a timely plea of guilty is”,[[5]](#footnote-5) Yeung VP said:[[6]](#footnote-6)

“ In order to avoid uncertainty, delay and unnecessary expense arising out of arguments over niceties and subtleties, *the court, as a matter of policy, would normally give a defendant a sentence discount of one-third from the starting point as long as he pleads guilty before the trial starts.* *Such a policy can be abused.*

Defendants who plead guilty at a very late stage when they should plead guilty at much earlier stages still get the full one-third discount and very often defendants deliberately wait until the last moment before pleading guilty, resulting in a wastage of huge public resources. The policy that a defendant will get the full one-third discount as long as he pleads guilty at any time before the trial starts may have to be adjusted to deal with such an abuse, but it is not a matter that should affect the outcome of this appeal.” [Italics added.]

Macrae JA also expressed concerns about the fairness of the policy of affording the same discount in sentence to defendants who pleaded guilty at different stages in the proceedings and articulated his misgivings of the blurring of the notion of a “timely plea”:[[7]](#footnote-7)

“ However, the notion of a “timely plea” has become somewhat distorted, and regrettably devalued, by the way our courts have over many years come to accord the one-third discount to any plea, however untimely, as long as it is entered before the trial is due to begin.

Thus, the defendant on a rape charge, who indicates his intention of contesting his guilt, thereby obliging the case to be fully prepared with expert DNA and other scientific evidence and fixed for trial before the High Court, with the jury about to be empanelled and the traumatised victim poised to give evidence, will receive the same discount if he pleads guilty at arraignment as the drug trafficker who tenders a plea of guilty in the magistrate’s court and is committed to the High Court for sentence. The defendant who obliges the prosecution to prepare a complex fraud case over months, sometimes years, with flow charts, schedules, banker’s affirmations and expert accounting evidence, on the basis that he will plead not guilty but then changes his plea on the first day of a trial set down for several months, will generally receive the same discount for that plea as the defendant who acknowledges his guilt from the outset, cooperates with the authorities and demonstrates genuine remorse.”

*The Prison Rules*

In his written submissions, Mr Yeung SC identified what he described as, “clear motivations” for a defendant to delay pleading guilty until the commencement of his trial if, nevertheless, he was to be afforded a one-third discount from the starting point taken for sentence. As he pointed out, the *Prison Rules*[[8]](#footnote-8) differentiate between, “prisoners awaiting trial” and a person who is a “convicted prisoner”. Prisoners awaiting trial are defined in rule 188(1) as including persons committed to prison for safe custody in any of the following circumstances:

“ (a) on their committal for trial for any indictable offence;

(aa) on their detention pursuant to an order of transfer made under section 88 of the Magistrates Ordinance;

(b) on their detention pending the hearing before a magistrate of a charge against them on an indictable offence;

(c) on their detention pending the hearing of an information or complaint against them;”

The rules make for separate treatment for prisoners awaiting trial, so that he:

1. may procure for himself, or receive at proper hours, food and malt liquor;[[9]](#footnote-9)
2. shall not, during any period of 24 hours, receive or purchase more than one pint of malt liquor or cider, or more than half a pint of wine;[[10]](#footnote-10)
3. may wear his own clothes if sufficient and fit for use;[[11]](#footnote-11)
4. shall have the option of employment in the service or industries of the prison at his election;[[12]](#footnote-12)
5. shall, subject to the order of the Superintendent, be permitted to be visited by one visitor, or if circumstances permit, by two at the same time, for a quarter of an hour on any week day, during such hour as may from time to time be appointed;[[13]](#footnote-13)
6. may send and receive letters at all reasonable times and shall be furnished by the Superintendent with a reasonable amount of paper and other writing materials for purpose of communicating with his friends or for preparing his defence.[[14]](#footnote-14)

By contrast, in respect of a prisoner:

* He is required to engage in useful work for not more than 10 hours a day, of which so far as practicable at least 8 hours shall be spent in associated or other work outside the cells, rooms, dormitories or wards.[[15]](#footnote-15)
* No persons, other than the relatives and friends of a prisoner, shall be allowed to visit him, except by special authority…

(a) they shall be allowed to visit a prisoner twice a month and no more than 3 persons shall be allowed at one time;

(b) … limited to 30 minutes on each occasion.[[16]](#footnote-16)

Nevertheless, by operation of section 67A of the Criminal Procedure Ordinance, Cap. 221, the sentence imposed on a defendant is reduced by the period he was detained in custody as a prisoner awaiting trial by an order of a court.[[17]](#footnote-17)

*Statistics*

At the outset of the hearing, as intimated in a Notice of Motion filed by the Department of Justice, the Court received affirmations from Aaron Lee Man Kie, the Chief Court Prosecutor of the Prosecutions Division, and Chow Sze Yu, the Senior Law Clerk of the Prosecutions Division, in which they provided statistical information about the manner in which cases were dealt with in the Magistracy, District Court and Court of First Instance for the calendar years 2014 and 2015. Together with a Notice of Motion, filed by the Department of Justice on 15 July 2016, without objection from any of the parties, the Court received an affirmation of Kei Wing Cheong, a law clerk of the Court of First Instance unit of the Prosecutions Division, Department of Justice, which provided statistical information in relation to cases committed to the Court of First Instance.

*The Magistracy*

In 2014, of 10,862 defendants whose trials were fixed upon their pleas of ‘Not guilty’, 4,232 (38.96%) pleaded guilty to some or all of the charges brought against them at or after commencement of the trial. In 2015, of 9,811 defendants whose trials were fixed upon their pleas of ‘Not guilty’, 3,657 defendants (37.27%) pleaded guilty to some or all of the charges brought against them at or after commencement of the trial.

*The District Court*

In 2014, of the 556 cases fixed for trial, upon an indication of a plea of ‘Not guilty’ at the Plea Day hearing, in 411 cases (73.92%) some or all of the defendants pleaded guilty to some or all of the charges at the commencement of the trial. In 2015, of the 474 cases fixed for trial, upon an indication of a plea of ‘Not guilty’ at the Plea Day hearing, in 345 cases (72.78%) some or all of the defendants pleaded guilty to some or all of the charges at the commencement of the trial.

*The Court of First Instance*

*Committals for sentence*

In 2014 and 2015, 202 and 172 cases respectively were committed to the Court of First Instance from the Magistracy for sentence.

*Committals for trial: subsequent pleas of guilty*

In 2014 and 2015, 284 and 301 cases respectively were committed for trial in the Court of First Instance from the Magistracy. Of the “defendants pleading guilty to some or all of the charges after the committal proceedings”, 41.15% and 46.30% did so in 2014 and 2015 respectively.

*The discount of sentence to be afforded to a defendant for plea of guilty*

A review of the judgments of this Court over the past 40 years demonstrates changes in the policy of affording a discount in sentence to a defendant on his plea(s) of guilty to the charges laid against him. As is readily apparent, in the 1980s it was the practice to distinguish between those defendants who tendered a plea of guilty at the earliest “practical stage”[[18]](#footnote-18), “earliest possible moment”[[19]](#footnote-19), “first opportunity” [[20]](#footnote-20) and those who pleaded guilty at a later stage in the proceedings, including the “first morning of trial”.[[21]](#footnote-21) A discount from the starting point taken for sentence of up to 25% was afforded to the former and up to 20% for the latter.[[22]](#footnote-22) The strength of the prosecution case was one of the factors taken into account in reducing the discount given to a defendant who pleaded guilty.[[23]](#footnote-23) Later, it was said that a discount of one-third [[24]](#footnote-24) from the starting point taken for sentence was to be afforded to the former and a reduced discount afforded to the latter. Then, the practice of reducing the discount given to a defendant, who pleaded guilty, to reflect the strength of the prosecution case was rejected.[[25]](#footnote-25) Subsequently, it was stated that it was now the practice of the Courts, subject to limited exceptions, to afford the defendant a discount of one-third from the starting point taken for sentence, even if the defendant tendered his plea only on the first day of his trial.[[26]](#footnote-26)

*Discounts in sentence for the timing of a plea of guilty: up to 20% and up to 25%.*

In the *Queen v Chan Chi Yuen*[[27]](#footnote-27), this Court allowed an application for review of sentence imposed on the respondent on his conviction on his pleas of guilty to four charges of robbery, in which the applicant was one of two or more robbers, one of whom was armed with a knife, and imposed sentences of 2 years and 9 months’ imprisonment on each of the four charges, which sentences were ordered to be served concurrently. In the judgment of this Court, McMullin VP said that the appropriate sentence for the offences after trial was in the range of 5 to 6 years’ imprisonment. Having noted that the judge had accepted that, “…responsibility for none of these offences would ever have been laid to the Respondent’s door but for his own confessions”, McMullin VP said that, “a considerable discount should be allowed for that.” However, he went on to say:

“ Even in cases where there is an abundance of evidence available for trial and there has been a plea of guilty, *it has been a familiar practice in these courts to allow as much as 25% for the plea. That of course depends upon the quality of the plea and the point of time at which it is offered*.” [Italics added.]

In the judgment of this Court in the *Queen v Leung Yiu Hung & Others,*[[28]](#footnote-28) Yang JA, as Yang CJ was then, declined “to lay down certain guidelines and discounts where pleas of guilty are entered.” He said:

“ We do not think it would be helpful to lay down such guidelines because each case must be dealt with on its individual merits, depending on the circumstances of the case and the circumstances which led an accused plead guilty.”

In the judgment of this Court in the *Queen v Wong Ping Yu & Another* [[29]](#footnote-29)*,* Roberts CJ observed that it was appropriate for the Court to afford a greater discount to a defendant, who had pleaded guilty in the Magistracy and who had been committed for sentence to the High Court, than that afforded to a defendant who pleaded guilty on the first morning of trial:

“ *It is common for discounts of up to a fifth to be allowed in serious cases if there is a plea on the first morning of trial*. In this instance, there was a plea at the earliest practical stage, that is to say, when the defendants appeared before the Magistrate, as a result of which they were merely committed to the High Court for sentence.

This is a practice which is to be encouraged in the public interest, and *we feel that it should be recognized by a greater discount than a plea on the first morning of a trial* some weeks later would justify.

*We think that an appropriate discount would have been approximately 25%.*” [Italics added.]

In the *Attorney General v Han Man Fai & Another*[[30]](#footnote-30),on arraignment the two applicants had pleaded guilty to a count of unlawful trafficking in, and another count of possession of, dangerous drugs. Having stipulated a starting point for sentence of 9 years’ imprisonment for the former count, the judge afforded them a discount of one-third for their pleas of guilty and sentenced each of them to 6 years’ imprisonment. Having adverted tothe *Queen v Chan Chi Yuen* and the *Queen v Leung Yiu Hung & Others*,in the judgment of this Court, Cons VP said:[[31]](#footnote-31)

“ We do not wish to be drawn into any mathematical discussion. We would only say that judges do appear to us to give discounts, depending of course on the circumstances of the individual case, which are generally in the region of 25%.”

In the result, having determined that the appropriate starting point to be taken for sentence was 12 years’ imprisonment, and having noted that pleas had been indicated at the pre-trial hearing, Cons VP said, “… indications at that stage should be encouraged.” Of the starting point, Cons VP said that it [[32]](#footnote-32):

“ ... could properly have been discounted to 9 years for their pleas of guilty.”

Of course, that was a discount of 25% from the starting point taken for sentence. Having regard to the fact that the application was one of review of sentence, in quashing the original sentences of 6 years’ imprisonment the Court imposed concurrent sentences of 8 years’ imprisonment on each of the counts against each of the applicants.

In the *Queen v Kwok Chi Kwan and Another*[[33]](#footnote-33),the two applicants had pleaded guilty at Plea Day in the District Court to four and five counts of robbery respectively. Nevertheless, the judge sentenced them to the maximum sentence, namely 7 years’ imprisonment, which can be imposed on the District Court. In allowing their applications for leave to appeal against sentence and imposing sentences of 6 years’ and 6½ years’ imprisonment respectively, in the judgment of the Court, Silke VP addressed the rationale for allowing discounts from otherwise appropriate sentences to defendants who plead guilty:[[34]](#footnote-34)

“ Pleas of guilty are to be encouraged for various well known reasons: to give allowance for the remorse indicated by such a course - though of course “remorse” can take many forms, from the genuine sorrow to an acceptance of the inevitable -; to assist in the saving of time - thus bringing more speedily to trial cases waiting in the lists and expense: to avoid the necessity for the bringing of witnesses to Court - thus avoiding disruption in the daily lives of those involved. *Pleas made at the earliest possible moment deserve greater encouragement*.” [Italics added.]

In the *Queen v Leung Tin Man*[[35]](#footnote-35), this Court refused an application for leave to appeal against a sentence of 14 years’ imprisonment imposed on the applicant on his plea of guilty to a count of unlawful trafficking in dangerous drugs. The judge had stipulated a starting point for sentence of 16 years’ imprisonment, and afforded the applicant a discount of 2 years’ imprisonment only. Of the observation in the judgment of McMullin VP in the *Queen v Chan Chi Yuen* that, “…it has been a familiar practice in these courts to allow as much as 25% for the plea”, in the judgment of the Court Silke VP said: [[36]](#footnote-36)

“ …it has been made clear that the words “as much as” do not mean that in every single case that discount on a plea of guilty must be 25%. The quantum is a matter within the discretion of the trial judge and in exercising that discretion he would no doubt bear in mind the strength of the evidence and any other matter affecting either the offence or the offender in coming to the discount he thinks proper to give up on a plea of guilty. As we indicated this applicant was caught red-handed. ”

In the *Attorney General v Wong Kwok Wai*[[37]](#footnote-37), this Court allowed an application for a review of a sentence of 10 years’ imprisonment, imposed on the respondent following his plea of guilty in the Magistracy and his committal for sentence in the High Court for an offence of unlawful trafficking in dangerous drugs, and said that a sentence of 15 years’ imprisonment would have been appropriate. However, given that the application was for a review of sentence, the Court substituted a sentence of 14 years’ imprisonment. The judge had taken a starting point for sentence of 17 years’ imprisonment, and said that he assessed the appropriate discount of sentence to be 40%, to reflect the plea of guilty and the assistance given to the authorities.

This Court determined that the appropriate starting point was 20 years’ imprisonment. Noting that the information provided to the authorities had not proved fruitful and that the applicant had merely offered to give evidence if there were arrests made in the future, this Court said that was “not something which should be considered in mitigation”. Silke VP in the judgment of the Court said:[[38]](#footnote-38)

“ This court does not encourage mathematical calculations of discount. Such a method can well lead to submissions in subsequent cases that one man got, say 35%, and “I got only 30%, please give me “the same” or to a form of fixed percentage which becomes immutable. Each case must depend entirely on its own facts and no doubt a sentencing judge in the exercise of his discretion will bear in mind all the many factors - or the lack of them - which permit him to reduce his starting point sentence.”

In the result, Silke VP concluded:[[39]](#footnote-39)

“ Had the trial judge, giving *all due allowance for the plea at (the) first opportunity* which, as we have said, was the major mitigation in this case coupled with the frank admissions from the outset, adopted a starting point of 20 years, and imposed a sentence of 15 years imprisonment he would not have been wrong.” [Italics added.]

Of course, that discount of sentence was 25% from the starting point taken for sentence that this Court said was appropriate.

In giving the judgment of this Court in the *Queen v Law Hon Chung* [[40]](#footnote-40), allowing the appeal against a sentence of 10 years’ imprisonment imposed for a conviction for robbery and imposing a sentence of 8 years’ imprisonment, Silke VP said that the Court was not prepared to say that the starting point of 12 years’ imprisonment stipulated by the judge was wrong. However, he went on to say that:[[41]](#footnote-41)

“ …the trial judge does not seem to have given full consideration to the effect of that which the applicant said after his arrest which led, as we have indicated earlier, to the arrest of his confederates and the recovery of the property.”

In that case, having been arrested, the defendant “gave a full confessional statement in the course of which he named his co-defendants and gave details of the planning of the robbery. Resulting from that information the other four persons were arrested and all the property was recovered.” Then, he pleaded guilty in the Magistracy and had been committed for sentence to the High Court.

Of those circumstances, Silke VP said:[[42]](#footnote-42)

“ *People who plead guilty at the earliest possible moment, as did the applicant here, are entitled to a greater discount than that which normally attaches to a plea of guilty.* In all the circumstances here, and with particular reference to the information which the applicant had given and his very early plea, we consider the sentence of eight years imprisonment would have been appropriate.” [Italics added.]

Clearly, the discount of one-third from the starting point that this Court afforded the appellant, reflected not only his early plea of guilty in the Magistracy but also the assistance that he had rendered the authorities, which had resulted in the arrest of others and the recovery of stolen property.

In the *Queen v Lai Kwok Hung* [[43]](#footnote-43),this Court allowed an appeal against a sentenceof 9 years’ imprisonment imposed on the applicant in the High Court, on his committal to that court for sentence, following his plea of guilty in the Magistracy to a single count of unlawfully trafficking in dangerous drugs. The judge stipulated a starting point for sentence of 11 years’ imprisonment and, affording the applicant a discount of 2 years’ imprisonment for his “plea and his admission at an early stage, but having regard also to the fact that his plea ofguilty could be regarded as little more than a recognition of the inevitable.”

In the judgment of this Court, Mortimer JA noted that it was submitted on behalf of the applicant that:[[44]](#footnote-44)

“ it is disappointing to see a judge, giving credit for a plea of guilt at an early stage but taking away from the applicant much of the benefit by saying that it could be regarded as ‘little more than a recognition of the inevitable’. He submits that pleas of guilty are to be encouraged. He submits - and *we accept - that there is no such thing as an inevitable plea nor an inevitable conviction.*” [Italics added.]

Mortimer JA went on to say:[[45]](#footnote-45)

“ *If courts do not recognise that an early plea is an expression of remorse and if those who plead guilty and save time and expense to the public are not given full credit, there will be little benefit for an accused to plead guilty.* For our part, we also recognise that a failure to give proper weight to a plea puts counsel in difficulty in the advice he is to give to those who may be inclined to be remorseful and accept their guilt.” [Italics added.]

In the result, this Court substituted a sentence of 7 years’ imprisonment, “to reflect the plea that was tendered at an early stage.” That represented a discount from the starting point of 36.6%.

*A one-third discount for a plea of guilty*

In the *Queen v Chan Leung*[[46]](#footnote-46) this Court refused an application for leave to appeal against sentence by an appellant who had been sentenced to 2 years and 3 months’ imprisonment for an offence of attempting to export four motor cars on an unnumbered Mainland vessel from Hong Kong without lawful excuse. On being intercepted by the police, as motor cars were being loaded on to his vessel from a lighter, the applicant had attempted to escape in the vessel. Having taken a starting point for sentence of 3 years’ imprisonment, the judge discounted sentence, for the plea of guilty, by 9 months’ imprisonment only. That was a discount of 25%. Of the suggestion that the judge erred in not affording the applicant a discount of one-third from the starting point, in the judgment of this Court Liu JA said:

“ …there is no inflexible rule that a discount of one-third should be granted where there is a plea of guilty.”

In the *Queen v Ng Wing Kwong*[[47]](#footnote-47), this Court refused an application for leave to appeal against sentence by an applicant who had been sentenced to 15 years’ imprisonment, having pleaded guilty at his re-trial to a single count of unlawfully trafficking in dangerous drugs. In the first trial, the applicant had pleaded not guilty but, on being convicted, had been sentenced to 20 years’ imprisonment. The judge took 20 years as a starting point for sentence in the re-trial. So, the discount afforded to the applicant was 25% only. In the judgment of this Court, Mayo JA said:

“ One of the matters complained of is that the trial judge failed to give the applicant sufficient discount for his guilty of plea. While the question of the amount of discount is very much a matter for the consideration of the trial judge there was a complication in the present case.

The trial was a retrial. On the previous occasion the applicant had pleaded not guilty to the offence and had been sentenced to 20 years’ imprisonment. *It is in these circumstances that the trial judge did not give a discount of 33% of the term.*

We do not think that the trial judge’s approach in this respect can be faulted.”

In the *Queen v Wong Ngai Hung* [[48]](#footnote-48), this Court allowed an appeal against a sentence of 5½ years’ imprisonment and substituted a sentence of 4½ years’ imprisonment. The judge had taken a starting point of 6½ years’ imprisonment, following the appellant’s plea of guilty in the District Court to a charge of unlawfully trafficking in heroin, and reduced it by one year’s imprisonment only. He did so, first because the plea of guilty had not been made at the first possible opportunity, but only on the first day of trial and, secondly because it had been made in the face of overwhelming evidence. In the judgment of this Court, Mortimer JA said:

“ *This Court has said on many occasions that - other things being equal - credit for a plea of guilty ought to be in the range of one-third reduction* but the matter is within the discretion of the sentencing judge when he takes into account all the surrounding circumstances. *It is therefore not wrong for him to take into account the time when the plea is made*.” [Italics added.]

Of the fact that the plea of guilty was tendered at the first day of trial, he said:

“ … it *appears* that in the District Court an accused person will appear first on a plea day. It is an opportunity for him to plead guilty if he wishes. But in this particular case, had the judge made inquiries, he might have discovered that there was some confusion in the applicant’s mind at the time of that plea day and that the advice which was then available to him was limited. It may well be the point taken against the applicant by the judge that he had not made a plea on the first opportunity is not sound. But in any event, *the merit of a plea of guilty, even just before the commencement of a trial, is considerable. Credit should be given even at (that ?) time because there is still saving of time and expense although obviously not as much as if a plea is made at an earlier stage*.” [Italics added.]

Of the fact that the plea of guilty had been tendered in the face of overwhelming evidence, he went on to say:

“ Again, that is a matter that the judge can take into account. What weight it should be given depends upon all the circumstances. But even if the evidence is overwhelming, it does not mean that there should be minimal credit. It is rightly said that there is no such thing as an open-and-shut case. This is particularly so in drugs cases. The entering of a plea — even with overwhelming evidence — is of more than minimal weight.”

The discount from the starting point taken for sentence afforded by this Court was 30.8%.

In *R v Lo Chi Man*[[49]](#footnote-49), this Court allowed an appeal against a sentence of 4 years and 9 months’ imprisonment imposed on the applicant following his plea of guilty to a charge of robbery and substituted a sentence of 4 years’ imprisonment. In November 1993, the victim had been threatened with a knife and tied up with tape by three robbers. Having stipulated a starting point for sentence of 6 years’ imprisonment and having noted that the applicant had absconded to Macau and remained at large until September 1995, the judge said:

“ The only mitigation in your favour is your plea of guilty, although you cannot expect the same discount for plea as you would have received if you had pleaded at the same time and your companion in crime.”

In the judgment of this Court, Nazareth VP said:

“ In recent times particularly, *this Court has repeatedly stressed the importance of giving an adequate discount for pleas of guilty, it should be of the order of one-third.* The discount not merely recognises remorse, but the considerable benefit that enures to the courts and the expeditious administration of justice. The latter is served no less if the plea comes to be made long after the crime.” [Italics added.]

In the result, Nazareth VP concluded:

“ The appellant’s full admission to the police followed by his plea saved the police, the prosecution and the courts the work and time that would otherwise have been required. We are unable to see any good reason for denying the applicant *the usual discount of one-third*.” [Italics added.]

In the *Queen v Lau Kin Hong*[[50]](#footnote-50), a Magisterial appeal, Chan J, as Chan NPJ was then, dismissed an appeal from a sentence of 14 months’ imprisonment imposed for an offence of theft, which the magistrate treated as a case of pickpocketing, and for which he had stipulated a starting point for the sentence of 15 months’ imprisonment. In doing so, the magistrate noted that the plea of guilty had been tendered at a late stage and there was no indication of remorse. Chan J said:

“ *The usual one-third discount is, in my view, reserved for those cases where the defendant pleads guilty at the earliest possible opportunity, has shown genuine remorse and has saved the court and everybody some time*. *In the present case, the appellant appeared to have pleaded guilty only at the very last moment* - on two previous available occasions, he did not. It is also quite clear that there was no sign of any genuine remorse on the appellant.” [Italics added.]

In the *Queen v Wu Yau Man*[[51]](#footnote-51) this Court set aside a sentence of 2 years and 6 months’ imprisonment imposed on the applicant following his plea of guilty in the District Court to a charge of unlawful possession of heroin hydrochloride and ordered that the applicant continue to be the subject of an existing Drug Addiction Treatment Centre Order. Having stipulated a starting point for sentence of 3 years’ imprisonment, the judge afforded the applicant a discount of 6 months’ imprisonment only. In the judgment of this Court, Nazareth VP said:

“ The judge’s failure to accord the appellant *the full one-third discount this Court has repeatedly affirmed in recent times as the usual discount*, notwithstanding his reference to the appellant’s early admission of possession, only served to increase our disquiet.”

In the *Queen v Lun Nai Kin*[[52]](#footnote-52)this Court allowed an appeal against a sentence of 2½ years’ imprisonment imposed on the applicant after his conviction after trial in the District Court of unlawful possession of heroin hydrochloride and substituted a sentence of 2 years’ imprisonment. The judge acquitted the applicant of the charge of unlawfully trafficking in that amount of dangerous drugs. At all times the appellant had been prepared to plead guilty to the charge of possession only. Having stipulated a starting point for sentence of 3 years’ imprisonment, the judge reduced that sentence to 2½ years’ imprisonment only, reflecting the fact that the applicant had admitted possession of dangerous drugs, but also having regard to the fact that he had been caught red-handed.

In the judgment of this Court, Power CJ (Ag.) said:

“ *We have said more than once that an appropriate discount for plea is a discount of one-third.* We have also said that the question of discount is a matter for the discretion of the trial judge, but that this discretion must be exercised upon some rational basis which the trial judge should advert to in his Reasons for Sentence. The trial judge did not give any reason why he was not giving the full one-third discount in this case and we, having considered the facts, are unable to discover any reason why that discount should not have been given.” [Italics added.]

In the *Queen v Guo Jun*[[53]](#footnote-53) this Court refused an application for leave to appeal against a total sentence of 16 years’ imprisonment imposed on the applicant following his pleas of guilty to an offence of attempted robbery, false imprisonment and possession of arms and ammunition without a licence. The judge had taken a global starting point for sentence of 20 years’ imprisonment. Of the discount afforded to the applicant, having noted that it was agreed that the applicant had “tried to plead guilty at an early stage”, in the judgment of the Court, Yeung J, as Yeung VP was then, said:

“ It is true to say that there has been a practice in the courts in Hong Kong, *in order to encourage accuseds in appropriate cases to plead guilty, that a guilty plea will reduce the sentence by one-third.* But this practice is not a strait-jacket rule. In our view, the trial judge must be given some discretion on matters of this kind.” [Italics added.]

In *HKSAR v Leung Kwai Sing*[[54]](#footnote-54), this Court allowed the applicant’s appeal against a sentence of 3 years’ imprisonment and substituted a sentence of 2 years and 8 months’ imprisonment for an offence of unlawful possession of heroin hydrochloride. On the first day of his trial the applicant pleaded not guilty to a charge of unlawfully trafficking in the dangerous drugs, but guilty to possession of those dangerous drugs. Having stipulated a starting point for sentence of 4 years’ imprisonment, the judge said that he afforded the applicant “a reduction of 25% for his plea on the day of trial”.

In the judgment of this Court, Power VP said:

“ We appreciate the approach which the judge took. He was following the line, which is one not infrequently followed and is a quite proper one, that *if a person delays his plea until the day of trial he is not entitled to the full one-third discount*. However, in the present case he was only given the opportunity to plead to the charge of simple possession on the day of trial and he did, therefore, enter his plea at the earliest available opportunity. It is our view that, in such circumstances, he should receive the full one-third discount.” [Italics added.] [[55]](#footnote-55)

*Overwhelming evidence: relevance to a plea of guilty*

The substantial reservations expressed by this Court in the judgments of Mortimer JA in the *Queen v Wong Ngai Hung* andthe *Queen v Lai Kwok Hung* as to the validity of the practice of reducing the discount afforded to a defendant for his plea of guilty, for the reason that the evidence against him was overwhelming, were taken further by the judgments of this Court in *HKSAR v Wong Ka Kuen*[[56]](#footnote-56)and in *HKSAR v Yeung Kin Man* [[57]](#footnote-57), delivered respectively by Stuart-Moore VP and Leong JA.

In *HKSAR v Wong Ka Kuen*, this Court allowed an appeal against a total sentence of 19 years’ imprisonment, imposed after the 2nd appellant pleaded guilty, to a count of unlawful trafficking in heroin hydrochloride and of manufacturing heroin hydrochloride, and substituted a sentence of 18 years’ imprisonment. The 2nd appellant pleaded guilty “at the outset” [[58]](#footnote-58), whereas his co-defendant stood trial on that count and another count, but was convicted of both. The judge had stipulated a starting point for sentence of 27 years’ imprisonment, but as Stuart-Moore VP noted in the judgment of the Court, the judge went on to say:[[59]](#footnote-59)

“ In (a) normal case, a full credit for plea of guilty would be a one‑third discount. In the present case, in view of the evidence there was against you, it would be difficult to see what other alternative you would have had apart from pleading guilty.”

Of that reasoning, Stuart-Moore VP said:[[60]](#footnote-60)

“ The judge had already indicated that he accepted the mitigation that it had always been D2’s intention to plead guilty. *This Court has stressed on frequent occasions that in the absence of good reason where a timely plea has been entered, a defendant is entitled to his full one‑third discount. Being caught “red‑handed” is not, in the view of this Court, a sufficient reason to disallow the full discount*. Accordingly, the sentences imposed on D2 were wrong in principle.” [Italics added.]

In *HKSAR v Yeung Kin Ma*, this Court allowed an appeal against a sentence of 20 years’ imprisonment imposed on the applicant on his conviction on his pleas of guilty to two counts of unlawfully trafficking in heroin hydrochloride, and substituted a sentence of 18 years’ imprisonment. The judge had taken a starting point for sentence of 27 years’ imprisonment.

In the judgment of this Court, Leong JA noted that the applicant had accepted that not only had the dangerous drugs in question been found in a car driven by the applicant and at his home but also his fingerprints had been found on the material wrapping the dangerous drugs. Further, on both occasions the applicant admitted that the dangerous drugs belonged to him. Of the judge’s reasons for sentence, Leong JA said that the judge explained that he, “…considered that substantial credit was due to the applicant for his guilty plea and full cooperation but, as the evidence was “overwhelming”, he would give a discount of 7 years only.” [[61]](#footnote-61)

Having noted that, having regard to the judgment of this Court in *HKSAR v Wong Ka Kuen*, counsel for the respondent, “… concedes that the Deputy Judge was wrong not to have given the full one-third discount to the applicant” [[62]](#footnote-62), Leong JA cited with approval the passage of the judgment of Stuart-Moore VP set out earlier in the judgment, including “Being caught “red-handed” is not in the view of this Court sufficient reason to disallow the full discount.” In the result, he concluded:[[63]](#footnote-63)

“ We are of the opinion that the settled practice is that in *Wong Ka Kuen and Another…* and the Deputy Judge was wrong to have given a lesser discount solely by reason of the overwhelming evidence against the applicant.”

In *HKSAR v Chui Chi Chi & Another (No 2)*[[64]](#footnote-64), this Court allowed the appeals of two appellants against sentences of 9 years’ and 12 years’ imprisonment respectively, imposed on their pleas of guilty to one and two counts respectively of trafficking unlawfully in dangerous drugs and substituted sentences of 7½ years’ and 10 years’ imprisonment respectively. The former sentences were imposed at a re-trial, their earlier convictions after a trial having been quashed by this Court. The judge took a starting point for sentence of 12 years’ imprisonment and imposed sentences of 9 years’ imprisonment on each of the counts. In respect of the 2nd applicant, the judge ordered that 3 years’ imprisonment in the sentence imposed for the 2nd count be served consecutively to the sentence of imprisonment imposed for the 1st count.

This Court said that the starting points taken for sentence by the judge were too high. Of the discount afforded to the applicants by the judge, in the judgment of this Court, Wong JA said:[[65]](#footnote-65)

“ The Judge declined to give a full one-third discount to the applicants, despite the pleas of guilty, because he took the view that the pleas were tendered at the retrial and not at the first trial. He gave each of them a discount of one-quarter.”

Having cited the passage from the judgment of Mayo JA in *R v Ng Wing Kwong* quoted earlier, Wong JA went on to say:[[66]](#footnote-66)

“ Since the decision of *Ng Wing-kwong* in 1995, *this Court has on a number of occasions in recent years pronounced that a full one-third discount is the norm rather than the exception for a timely plea of guilty and it is only in exceptional circumstances that a lesser discount than one-third should be given.* It is advisable for sentencing judges and magistrates to take heed and bear this in mind when passing sentence in cases where pleas of guilty have been entered.

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.” [Italics added.]

In the result, having stipulated starting points for sentence for each count of 10 years’ imprisonment, Wong JA said, “A discount of one-quarter for each applicant will be taken into account to calculate the actual sentences.”

In *HKSAR v Lee Man Ki*[[67]](#footnote-67), this Court allowed the applicant’s appeal against a total sentence of 4½ years’ imprisonment imposed for two charges of robbery and substituted a total sentence of 4 years’ imprisonment. The District Court judge had taken starting points for sentence for the two charges of 2 years’ and 4 years’ imprisonment respectively. Although the applicant had pleaded guilty “at the very outset of the trial”, nevertheless the judge afforded the applicant a discount of only 25%, imposing sentences of 1½ years’ and 3 years’ imprisonment respectively. He ordered the sentence of 3 years’ imprisonment to be served consecutively to the sentence of 1½ years’ imprisonment. In the judgment of the Court, Wong JA said:[[68]](#footnote-68)

“ … It is also correct that a discount of one third would normally be given for early pleas of guilty. There are, however, circumstances that may warrant a discount of less than one third, such as a late plea or that the accused had absconded from bail during trial. But this case is not one of them. The judge has not given any reason as to why he did this.

The applicant had pleaded guilty at the very outset of the trial and there were no circumstances that he should not be accorded a full discount. In our view, the judge was wrong.”

In *HKSAR v Lo Chi Yip*[[69]](#footnote-69), the 1st applicant pleaded guilty on the first day of his trial to a charge of wounding with intent, but not guilty to a charge of blackmail. After a trial, he was found guilty of the latter charge. He was sentenced to 6 years’ imprisonment for the charge of wounding with intent and 2 years’ imprisonment for the charge of blackmail. One year of the sentence of imprisonment imposed in respect of the blackmail charge was ordered to be served consecutively to the sentence of 6 years’ imprisonment imposed for the wounding charge. So, the 1st applicant was sentenced to a total of 7 years’ imprisonment. This Court allowed his appeal against the sentence of 6 years’ imprisonment imposed for the wounding charge and substituted a sentence of 4 years and 8 months’ imprisonment.[[70]](#footnote-70)

The judge had stipulated a starting point for sentence of 7 years’ imprisonment and afforded the 1st applicant a discount of one year’s imprisonment only “because it was only tendered at the last minute” [[71]](#footnote-71) and because he had been “caught ‘red-handed’.” [[72]](#footnote-72)

Of the circumstances in which the 1st applicant had pleaded guilty, in the judgment of the Court, Leong JA said:[[73]](#footnote-73)

“ The first applicant had pleaded to the charge of wounding on the first available opportunity, that is, on the first day of the trial. Mr Tolliday-Wright submits that in the District Court, normally on a plea day, a defendant would not have much opportunity for the purpose of considering a plea in the sense that he has time to fully understand the implications of a plea and proceed to plead guilty.”

Leong JA went on to say:[[74]](#footnote-74)

“ *This* *Court* *has* *indicated* *in* *HKSAR* *v* *Wong* *Ka Kuen* *&* *Another* (*unrep.* *Crim.* *App.* *No.* *35 of 1998)* *that* *a* *full* *one-third* *discount* *should* *be* *given* *for* *a* *timely* *plea.* The practice of giving one-third discount for a timely plea has now been settled in the recent case of *HKSAR v Yeung Kin Man* [2000] 2 HKLRD 821. We do not think that the first applicant’s plea was untimely. The fact that the Judge only gave him a one-year discount instead of the full one-third is not in accordance with this settled practice.” [Italics added.]

Of the judge’s statement that he afforded the applicant a reduced discount because he had been caught “red-handed”, in his judgment Stuart-Moore VP said:[[75]](#footnote-75)

“ Although this was once considered to be a good ground for refusing the discount that would otherwise have been given, this has not been so for quite some time …”

Stuart-Moore VP went on to say:[[76]](#footnote-76)

“ Apparently, the principle that being caught red-handed is not a sufficient reason to disallow the full discount where an offender pleads guilty needs to be stated again. Counsel must be able to advise their clients with full confidence as to this aspect of sentencing, and it is neither fair nor sensible that this principle should be dependent upon the whim of the judge before whom the offender appears as to whether the full discount or less than the full discount should be given merely because an offender has been caught red-handed or, putting it another way, has been caught in the act. Counsel cannot properly advise his client that he will receive a discount of one-third if, before one judge, it may be decided that being caught red-handed deserves a discount short of one-third and yet, before another judge, it may be decided that the full discount is appropriate. This is no more than a statement of common sense, but it is an important rule of practice in order to achieve fairness and parity towards all defendants.”

Stuart-Moore VP concluded:[[77]](#footnote-77)

“ The recent authorities on this aspect of sentencing are copious and the sentencing practice which used to allow for reduced discounts in cases where the offender was caught red-handed have long since been disapproved. It suffices to make reference to the case of *HKSAR v Wong Ka-kuen & Another* CACC 35/1998.”

Of the discount to be afforded to the applicant for pleading guilty at the first day of this trial, Stuart-Moore VP said:[[78]](#footnote-78)

“ *The other ground for justifying a reduced discount was said to be the late plea entered on “the very first day of the trial”. In some circumstances, that might have been a justification for slightly reducing the discount although we do not seek to encourage that view. This will entirely depend on all the circumstances of individual cases*, particularly when considering whether a plea at court on the first day of trial has been a technical manoeuvre resulting in frightened or reluctant witnesses being forced to come to court, or resulting in a prolongation of an investigation that could have been curtailed far earlier if a plea had been indicated at the first opportunity. These are examples and by no means do they provide an exhaustive list.” [Italics added.]

In *HKSAR v Lee Kwok Chuen*[[79]](#footnote-79), the applicant was sentenced to a total of 4 years’ imprisonment for three charges of burglary of domestic premises. For the first two burglaries, which were committed on the same day in neighbouring flats, the judge took a starting point for sentence of 3½ years’ imprisonment. For the third burglary, committed nine months later, he took a starting point for sentence of 3 years’ imprisonment. He said that he afforded the applicant a discount of one-third from those starting points. However, in addition, he afforded the appellant a further discount of 4 months’ imprisonment to reflect his previously clear record. The sentence of 22 months’ imprisonment imposed for the third burglary was ordered to be served consecutively to the sentences of imprisonment imposed in respect of the other two burglaries.

Of the fact that the judge had afforded the applicant a further discount of 4 months’ imprisonment, in excess of the one-third discount afforded for the applicant’s pleas of guilty, in the judgment of the Court, Stuart-Moore VP said that the judge had been wrong to do so not only because he had described the applicant as having “made a career out of burglaries for a year” but also because, in any event:[[80]](#footnote-80)

“ … the judge had already given a discount of one-third which is usually to be regarded as *the high watermark* of the discount given to a defendant pleading guilty in good time.” [Italics added.]

In *HKSAR v Li Tak Yin*[[81]](#footnote-81) this Court allowed the appeal against the total sentence of 5 years and 3 months’ imprisonment imposed on an applicant on his pleas of guilty on the first day of trial to offences of burglary, handling stolen goods and unlawful possession of dangerous drugs. This Court substituted a total sentence of 4 years and 8 months’ imprisonment. His plea of guilty to the offence of handling stolen goods was to a lesser offence than that charged, namely robbery.

The applicant had been found in possession of dangerous drugs and then made admissions which, together with property recovered from his home, formed the basis of the other two charges. The judge took 4 years’ imprisonment as the starting point for the first two offences and 8 months’ imprisonment for the third offence. Although the judge acknowledged that, “It has now become the practice to allow a one-third reduction where an accused enters such a plea at the earliest opportunity”, nevertheless he afforded the applicant a discount of 25% only from that taken as the starting points for sentence.

In the judgment of the Court, Stock JA noted that in not affording the applicant a one-third discount, the judge said:[[82]](#footnote-82)

“ …you did not enter your pleas until what may well be regarded as the last possible practical time. At a recent pre-trial review you indicated that you would plead guilty to the drugs charge but at the same time additional trial time was sought due to your indication that you would challenge the admissibility of certain statements made by you.”

Stock JA went on to say:[[83]](#footnote-83)

“ It is established that “in the absence of good reason where a timely plea has been entered, a defendant is entitled to a full one-third discount.” See *HKSAR v Wong Ka Kuen* (unrep. Crim App No 35 of 1998, [1999] HKEC 112); and see also *HKSAR v Lo Chi Yip* [2002] 3 HKLRD 270 at p. 275, and *HKSAR v Yeung Kin Man* [2002] 2 HKLRD 821at p. 823.

*The fact that a guilty plea has been tendered on the first day of trial where it could have been tendered earlier is generally not, of itself, without more, sound reason for reducing the discount normally given*; although there will be cases and circumstances where a delay or last minute plea might well warrant such a reduction.” [Italics added.]

Having cited the passage from the judgment of Stuart-Moore, quoted earlier, in *HKSAR v Lo Chi Yip*, Stock JA said:[[84]](#footnote-84)

“ This is the current approach. In this particular case, the judge emphasised the fact that the plea was not entered at “the earliest opportunity”. We accept that there have been cases in the past in which that phrase has been used, but of late the courts have rather been using the phrase “a timely plea” and the judge’s approach is one which might suggest that it is exceptional rather than normal to deduct one-third if the plea of guilty is offered on the first day of trial. We emphasise that the one-third discount is not a rigid rule, for there are instances where *a lesser discount will be, and as the cases show have been, warranted, and there are many examples provided by the cases. But there should, in our judgment, be some sound reason or circumstance, over and above the mere fact that the plea is only tendered on the first day of trial.* We do not see that such sound reason existed in this case.” [Italics added.]

Stock JA went on to note that, although the history of the circumstances in which the applicant pleaded guilty to the alternative charge of handling stolen goods was, “not clear”, nevertheless it appeared that, “… following discussions with the prosecution before the date of arraignment … the applicant offered a plea to handling, which was accepted.” In the result, this Court quashed the sentences of imprisonment imposed by the judge and imposed sentences of imprisonment that afforded the applicant a discount of one-third from that taken as the starting point for sentence.

In *HKSAR v Ting Chiu & Another*[[85]](#footnote-85),this Court quashed the sentences of 45 months’ imprisonment that the judge had imposed on each of the applicants on their pleas of guilty to an offence of robbery on the first day of the trial and, in substitution, imposed sentences of 32 months’ imprisonment. This Court determined that the judge erred in stipulating a starting point for sentence of 5 years’ imprisonment, rather than 4 years’ imprisonment, and in affording the applicants a discount of only 25%, “because it was only today that the plea of guilty was indicated to the first charge [robbery]. This was a plea not tendered at the first available opportunity.” [[86]](#footnote-86)

In the judgment of this Court, Woo JA, as Woo VP was then, said:[[87]](#footnote-87)

“ A reduction of one-third from the starting point to give credit to a guilty plea has been a well-settled practice in recent years.”

Having cited a passage from the judgment of Stuart-Moore in *HKSAR v Lo Chi Yip & Another*, confirming that it was the practice of the Court “to accord a defendant the customary one-third discount for a plea of guilty where no good reason was shown for a departure from the practice”, Woo JA said:[[88]](#footnote-88)

“ Stuart-Moore VP intimated that the rationale behind the adherence to this general practice was that “counsel must be able to advise their clients with full confidence as to this aspect of sentencing” (at 277A), and “it is an important rule of practice in order to achieve fairness and parity towards all defendants” (at 277D).

It is also pertinent to note that a failure to follow the practice would, save in most exceptional circumstances, inevitably lead to interference by the Court of Appeal, thus increasing costs and wasting resources for all concerned.”

Having cited other passages from that judgment, and passages from the judgment of Stock JA in *HKSAR v Li Tak Yin*, describing the limited circumstances in which a judge might decline to afford the full one-third discount to a defendant on his plea of guilty to a charge, Woo JA said: [[89]](#footnote-89)

“ … the judge merely said that the pleas by the applicants, which were made on the first day of the trial, were not tendered at the first available opportunity, as a basis for his not adopting the normal one-third discount. We cannot discern any reason or circumstance which would justify the normal reduction not being applied.”

In conclusion, Woo JA noted that, in any event, the pleas of the applicants were not “untimely”, given that in a *Newton* hearing they had successfully contested the issue of whether or not a knife was produced in the course of therobbery:[[90]](#footnote-90)

“ However, the applicants’ pleas did not in any event qualify as “untimely”, because they made no difference to the requirement for the victims to attend court to give evidence as they had to give evidence on the question whether a knife was produced in the course of the robbery, which resulted in a *Newton* Inquiry. The applicants were well justified in raising that question since the Inquiry was resolved in their favour. If it had been otherwise, there might have been material for the judge to consider to reduce the normal discount for plea.”

In *Yu Fai Tat v HKSAR*[[91]](#footnote-91) the magistrate had stipulated a starting point for sentence of 15 months’ imprisonment for an offence of possession of obscene articles for publication, contrary to section 21(1)(a) of the Control of Obscene and Indecent Articles Ordinance, Cap. 390. Although the Court of Final Appeal determined that the magistrate was in error in affording the defendant a discount of 2 months’ imprisonment, in addition to the one-third discount, “because he admitted the obscenity of the discs, without requiring their examination and determination by the Obscene Articles Tribunal”, nevertheless it determined that, at the hearing of the appeal, the single judge had erred in increasing the sentence of imprisonment by two months without having afforded the applicant an opportunity to address the Court on that issue.

In the judgment of Sir Derek Cons NPJ, with whom the other judges agreed, the policy of the courts of discounting sentences by reason of a plea of guilty was addressed:[[92]](#footnote-92)

“ … there are several factors that have influenced courts to the policy of discounting sentences by reason of a plea of guilty. But the most influential are in general the saving of judicial time and dispensing with the need for the attendance and examination of witnesses. These factors may of course vary greatly between individual cases, both in quantity and quality. A complex fraud may take far longer to try than a simple possession of drugs; the victim of a theft is unlikely to suffer the trauma that a rape victim may undergo in having to give evidence in open court. *Nevertheless a standard one third discount is customary nowadays*. It is by no means an absolute figure, and courts will vary it for good reason. Examples of reason to increase that we have been referred to are full and early restitution of large sums of stolen money: *HKSAR v. Leung Shuk Man* [2002] 3 HKC 424 and the giving of evidence by an accomplice: *HKSAR v. Chan Sau Hing* CACC 211/2001. There are also the well known “supergrass” cases.” [Italics added.]

*Factors subsumed in the one-third discount*

In the *Secretary for Justice v Lee Chun Ho, Jeff* [[93]](#footnote-93) this Court allowed an application by the Secretary for Justice for the review of sentences imposed on the respondent on his conviction on his pleas of guilty to offences of robbery and using an imitation firearm with intent to resist or prevent lawful arrest and substituted sentences of 6 years’ and 4 years’ imprisonment respectively, ordering that six months of the latter sentence of imprisonment was to be served consecutively to the former. The respondent was caught in a pursuit initiated by the victim, assisted by a passerby and then police officers. He admitted the offences, pleaded guilty in the Magistracy and was committed for sentence to the Court of First Instance.

In sentencing the respondent, the Recorder had taken 6 years’ imprisonment as the starting point for sentence for each offence, which he had discounted by one-third, “…on account of the guilty pleas and then by a further 6 months to 42 months for the appellant’s pleading guilty at the magistrates’ court and for his cooperation with the police, both at the scene of crime and in the police station.” [[94]](#footnote-94)

Of the discount from the starting point taken for sentence, over and above the one-third discount, afforded to the respondent, in the judgment of this Court, Yeung JA said:[[95]](#footnote-95)

“ The Court of Appeal have repeatedly emphasized that the one-third discount “is usually to be regarded as the high watermark of the discount given to a defendant pleading guilty in good time.” The respondent’s co-operation with the police referred to by the judge was his admission of the offence to the police, both at the scene of the crime and at the police station. Such a “co-operation” is just part and parcel of the respondent’s admission of his guilt, albeit at the first available opportunity. This mitigating factor should be subsumed within the one-third discount.

We agreed with Mr Lee’s submission that the judge should not have given a further six-month discount on top of the one-third discount for the guilty pleas.”

In *HKSAR v Chow Yuen Fai*[[96]](#footnote-96) this Court dismissed an application for leave to appeal against sentences imposed for an array of sexual offences involving children of which the applicant had been convicted on his own pleas of guilty in the District Court. Of the issue of whether or not in such circumstances a defendant ought to be afforded a discount in addition to the one-third discount, to reflect the fact that the victims did not have to undergo the ordeal of giving evidence, in the judgment of this Court Ma CJHC, as Ma CJ was then, said:[[97]](#footnote-97)

“ Here, our attention has been drawn by Mr McGowan to a number of cases in which the courts appear to have given more than a one‑third discount for the plea of guilty. In *HKSAR v See Tak Man* [1998] 1 HKLRD 794, in relation to a charge of indecent assault (the victim was 12 years old; the offence involved oral sex and various other acts falling short of attempted buggery and also ejaculation into the boy’s mouth), the Court of Appeal reduced the starting point by “little more than one‑third” in view of the accused being a first time offender and also the victim being spared the ordeal of having to give evidence. We were also referred to *Wong Ying Ho* (see para 28 above [[98]](#footnote-98)) where the Court of Appeal left undisturbed a discount of 37.5%.

In our judgment, however, these and other cases which suggest that an additional discount may be given where a victim is spared the ordeal of giving evidence (and therefore having to recount the traumatic incident or incidents in question) must now be viewed against the general principle that the one‑third discount is usually to be regarded as the high watermark of the discount for pleading guilty in good time : see *HKSAR v Wen Zelang* [2006] 4 HKLRD 460; *HKSAR v Ng Ngok Wai* (吳岳威) [2008] 1 HKLRD 546 (this case involved an indecent assault on teenage children). *Only in exceptional cases should a discount of more than one‑third be given for a timely plea*.” [Italics added.]

In the judgment of this Court in *HKSAR v Tsang Cho Kiu*[[99]](#footnote-99), D Pang J, as Pang JA was then, cited the passage quoted from the judgment of Ma CJHC with approval and as representing “the current position in law”.

In *HKSAR v Ma Ming*[[100]](#footnote-100) this Court rejected the applicant’s submission that he was entitled to a discount, in addition to the one-third discount for his plea of guilty, to reflect his co-operation with the police and his admissions which had led to a charge of conspiracy to procure the transfer to another of travel documents, in addition to the substantive charge of the same nature. In the judgment of this Court, Yeung VP said:[[101]](#footnote-101)

“ Since the mid 1990s the courts in Hong Kong have adopted the sentencing policy that if a defendant enters a timely plea of guilty, as a rule he is entitled to one third discount on the sentence he would otherwise receive. In *HKSAR v Chui Chi Wai & Another (No. 2)* [2000] 1 HKLRD 704, the Court of Appeal had this to say on page 707 E-F:

“Since the decision of *R v Ng Wing Kwong* (unrep CACC 62/1995) in 1995, this Court has on a number of occasions in recent years pronounced that a full one-third discount is the norm rather than the exception for a timely plea of guilty and it is only in exceptional circumstances that a lesser discount than one-third should be given.”  ”

Of the rationale for the policy of affording a discount to a defendant for a plea of guilty, Yeung VP said:[[102]](#footnote-102)

“ If unfruitful contest, delay and unnecessary expense of resources can be avoided, so that the court’s time can be allocated to cases which warrant more of its attention, thus ensuring that judicial proceedings will proceed more expeditiously and more efficiently, then giving the defendant who timely pleads guilty a one third discount is a policy decision which serves the public interest.

A discount of one third is quite a substantial discount. One of the main purposes of the court giving this one third discount to a defendant who pleads guilty is to encourage a guilty person to own up to the crimes he committed, so as to conserve the resources of the community and to ensure that justice can be administered more efficiently and matters can be concluded in the most expeditions manner.”

Of the difficulties for a court to determine “what a timely plea of guilty is”, Yeung VP said:

“ Since there is a period of time between the moment when a suspect is put under arrest and the time when he appears in court to face the charge or charges, what happened during that period of time and the attitude taken by the suspect might influence the sentencing decision. If the court has to take into account all these factors before passing sentence, not a few disputes may arise and the sentence that will be passed ultimately would become uncertain. To give one example:

‘ Is a defendant who admits his guilt forthwith at the outset and cooperates with the prosecution entitled to a larger discount on his sentence when compared with a defendant who makes up his mind to plead guilty only when the trial begins?’

Many people will think that the answer is yes and, on the face of it, it seems reasonable. However, in order to put this kind of thinking into practice, the court may very likely have to go into fine distinctions and subtle differences between different cases and adjust the sentences according to such niceties and subtleties. Such an approach would lengthen and complicate the court proceedings, increase costs, adversely affect court efficiency and delay the handling of cases which genuinely require the court’s attention. It not only goes contrary to the policy and basic objective of giving a one third discount, but is also against public interest.” [Question indented.]

In the result, Yeung VP concluded that:

“ … when giving the one third discount the approach taken by the court is a firm and broad-brush approach. It gives a defendant who timely pleads guilty the one third discount, which is substantial, without regard for niceties, in order to discourage excessive arguments and to prevent wasteful use of the resources of the community.”

*Other jurisdictions: approach to a discount in sentence for a plea of guilty*

In their most helpful submissions, Mr Yeung and Mr Pang have provided the Court with an overview of the approach taken in other jurisdictions in affording a defendant a discount in sentence for a plea of guilty. In doing so, they have referred the Court to the sentencing regimes obtaining in England and Wales, Scotland, Australia and New Zealand. Two things stand out. First, all of them, save for the exception of Tasmania, have their own statutory sentencing regimes. Secondly, none of them afford a discount of one-third to a defendant who first intimates a plea of guilty as late as the first day of the trial.

*England and Wales*

Section 144(1) of the Criminal Justice Act 2003 provides that:

“ (1) In determining what sentence to pass on an offender who has pleaded guilty to an offence before the court or another court, a court must take into account-

(a) the stage in the proceeding for the offence at which the offender indicated his intention to plead guilty, and

(b) the circumstances in which this indication was given.”

Section 172 of the Act provides that every court must have regard to any sentencing guidelines issued by the Sentencing Guidelines Council, now Sentencing Council, when sentencing. Its definitive guideline ‘Reduction in Sentence for a Guilty Plea’ (Revised 2007) identifies the purpose of the practice of affording a defendant a discount in sentence for a plea of guilty:[[103]](#footnote-103)

“ A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence. The reduction principle derives from the need for the effective administration of justice and not as an aspect of mitigation.”

In *R v Caley*[[104]](#footnote-104), in the context of those Sentencing Guidelines, the Court of Appeal of England and Wales addressed a number of different questions associated with the practice in sentencing which recognises that, “a distinction should ordinarily be drawn between a defendant who admits his guilt and one who does not.” [[105]](#footnote-105)

Of the purpose of the sentencing guidelines, articulated in paragraph 2.2, Hughes LJ, as Lord Hughes was then, said in the judgment of the Court:[[106]](#footnote-106)

“ In order of importance, plainly the first is the benefit for victims and witnesses. The impact of crime on its victims can be enormous or slight, but whether it is large or small the knowledge that a defendant has accepted his guilt and that punishment will follow normally reduces that impact substantially and thus brings significant benefit to the victim. It is generally worse for the victim when the offender, although guilty, is defiant. The same applies to the impact on those who may have to give evidence; they include, but are not confined to, the victim. A few may relish it, or think that they will, but for most the process is normally stressful and often unavoidably uncomfortable. Moreover the anticipation may often be painful, sometimes even more than the actuality. *For both victims and witnesses the benefit from a plea of guilty remains even when it comes late, but generally speaking the later it is the less the benefit.*

The second major reason for the practice is a more pragmatic one but it is nevertheless vital in the public interest. The expenditure in public time and money on trials and on preparation for trials is considerable. The case must be thoroughly prepared so that the exacting standard of proof rightly required in a criminal case can be met. *Further investigation is likely to be necessary, as may the assembly of a good deal more evidence, lay and expert. Such steps are necessary, but expensive. They are avoided or much reduced by an admission of guilt. The public’s limited resources can then be concentrated on those cases where a trial will really be necessary, and such cases will not be delayed, often with accused persons in custody.* At present something of the order of 75% of all Crown Court cases result in pleas of guilty; if in all those cases the defendants were out of defiance or otherwise to insist on each detail of the case being proved to the hilt the administration of criminal justice would be in danger of collapse. ” [Italics added’]

Having acknowledged that a plea of guilty may be an indication of remorse, but equally might be borne out of a realisation that there was no way out of the consequences of the prosecution, Hughes LJ noted that the sentencing scheme afforded a discount to both categories of defendant and did so, “by reducing the sentence which would have been imposed for trial by a proportion, on a sliding scale depending on when the plea of guilty was indicated.” The Sentencing Guideline provides for a reduction of about one-third from the sentence that would have been passed after a trial for those who indicate a plea of guilty at the “first reasonable opportunity; when this occurs will vary from case to case”. Of that provision, Hughes LJ said:[[107]](#footnote-107)

“ The SGC Guideline rightly makes it clear that the question of when the defendant’s first reasonable opportunity arose is a matter for the sentencing judge. Individual cases may call for individual decisions about this. But it is obviously desirable for there to be a baseline of broadly consistent approach if justice is to be done between different offenders, in all parts of the country. Equally such consistency is necessary if proper advice is to be given to accused persons.”

Of the difficulties arising from an interpretation of that phrase, Hughes LJ said:[[108]](#footnote-108)

“ There is sometimes confusion in argument between (i) the first reasonable opportunity for *the defendant* to indicate his guilt and (ii) the opportunity for his lawyers to assess the strength of the case against him and to advise him on it. It is obvious that the second depends on the evidence being assembled and served. The first, however, frequently does not. There will certainly be cases where a defendant genuinely does not know whether he is guilty or not and needs advice and/or sight of the evidence in order to decide. We do not attempt to define them, and they do not arise in the present appeals. They might however include cases where even if the facts are known there is a need for legal advice as to whether an offence is constituted by them, or cases where a defendant genuinely has no recollection of events. *There may be other cases in which a defendant cannot reasonably be expected to make any admission until he and his advisers have seen at least some of the evidence. Such cases aside, however, whilst it is perfectly proper for a defendant to require advice from his lawyers on the strength of the evidence (just as he is perfectly entitled to insist on putting the Crown to proof at trial), he does not require it in order to know whether he is guilty or not; he requires it in order to assess the prospects of conviction or acquittal, which is different.* Moreover, even though a defendant may need advice on which charge he ought to plead guilty to, there is often no reason why uncertainty about this should inhibit him from admitting, if it is true, what acts he did. If he does so, normally the public benefits to which we have referred will flow.” [Italics added.]

In a Consultation conducted between 11 February and 5 May 2016, the Sentencing Council in the United Kingdom sought views on their Draft Guideline ‘Reduction in sentence for a guilty plea’. Of the draft guidelines, the Sentencing Council said:[[109]](#footnote-109)

“ The Council has designed the revised guideline for guilty plea reductions to clarify the levels of reduction appropriate for the different stages at which the plea is entered. *The revised guideline seeks to encourage those defendants who are aware of their guilt to enter a plea as early in the court process as possible.* When this occurs, victims and witnesses are spared having to appear at court to testify and the police and Crown Prosecution Service can apply their resources to the investigation and prosecution of other cases. Offenders who accept their responsibility in this way benefit from receiving a modest reduction in their sentence. ” [Italics added.]

Of the purpose of affording a reduction in sentence for pleas of guilty, the Sentencing Council said: [[110]](#footnote-110)

“ The purpose of reducing sentences when offenders plead guilty is to encourage them to admit their guilt as early as possible.

By bringing forward the point at which some offenders plead guilty the proposed guideline will generate, to a greater or lesser degree, the following benefits:

* Overall, victims and witnesses in many cases will be informed earlier than in the past that their testimony is not required as the defendant has pleaded guilty. The earlier the plea is entered, the sooner victims and witnesses can be reassured that the offender has accepted responsibility for the offence and that they will not have to worry about having to go to court. In addition, victims will also benefit from seeing a more consistent approach to determining sentence reductions; and
* There will be resource savings for the police, the Crown Prosecution Service (CPS), the Legal Aid Agency and Her Majesty’s Courts and Tribunals Service. These savings in turn benefit victims and witnesses in that they allow more time and resources to be concentrated on investigating and prosecuting other cases. ”

The Sentencing Council noted that the Draft Guideline did not use the phrase “first reasonable opportunity”, rather it referred to “first stage of the proceedings”. Of the stages identified in the Draft Guideline, it went on to state:[[111]](#footnote-111)

“ Where a plea is indicated at the first stage of the proceedings a reduction of one-third (and not more than one-third) should be made (subject to the exceptions in section F). The first stage will be the first point at which the charge is put to the offender in court and a plea (or indication of plea) is sought. ”

Of the subsequent stages, it said:[[112]](#footnote-112)

“ After the first stage of the proceedings the maximum level of reduction is one-fifth (subject to the exceptions in section F).”

Detailed provisions were stipulated according to the jurisdiction in which the trial was held and, where appropriate, where the proceedings began.

Of the sliding scale of reduction that was applicable thereafter, it said:[[113]](#footnote-113)

“ The reduction should be decreased from one-fifth to a maximum of one-tenth on the first day of trial proportionate to the time when the guilty plea is first indicated relative to the progress of the case and the trial date (subject to the exceptions in section F). The reduction may be decreased further, even to zero, if the guilty plea is entered during the course of the trial.”

Of factors of personal mitigation, the Sentencing Council stated:[[114]](#footnote-114)

“ The purpose of reducing the sentence for a guilty plea is to yield the benefits described above and the guilty plea should be considered by the court to be independent of the offender’s personal mitigation. Thus factors such as admissions at interview, co-operation with the investigation and demonstrations of remorse should not be taken into account in determining the level of reduction. Rather, they should be considered separately and prior to any guilty plea reduction, as potential mitigating factors.”

Furthermore, and contrary to the existing guidance[[115]](#footnote-115), the Sentencing Council said:[[116]](#footnote-116)

“ The benefits apply regardless of the strength of the evidence against an offender. *The strength of the evidence should not be taken into account when determining the level of reduction*.” [Italics added.]

*Scotland*

Section 196 of the Criminal Procedure (Scotland) Act 1995, as amended, first recognised in legislationthe principle of sentence discounting, providing that:

“ In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court may take into account-

(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and

(b) the circumstances in which that indication was given.”

In *Gemmell v HM Advocate*[[117]](#footnote-117) the High Court of Justiciary considered that legislation and related principles of sentencing in seven appeals against sentence. In his judgment, Lord Justice Clerk Gill described the discounting process as involving three stages, namely: [[118]](#footnote-118)

“ (1) to decide what the sentence would be if no question of a discount arose; (2) to decide whether there should be a discount, and (3) if so, to decide what the amount of it should be.”

Lord Justice Clerk Gill described the legislative provision as, “statutory encouragement of early pleas.” Of the basis for the provision, he said:[[119]](#footnote-119)

“ It is based on the objective value of an early plea in the administrative and other costs, and the personal inconvenience, that it saves.”

He described those benefits as including:[[120]](#footnote-120)

“ In some cases, there is a saving of inconvenience to complainers and witnesses. In a small minority of cases there is a saving in jury costs. There is also a benefit to the criminal justice system in the avoidance of undue delay between arrest and sentencing. But the primary benefit that is realised in every case is the saving of administrative costs and the reduction of the court’s workload.”

*The court’s discretion*

Of the approach to be taken in sentencing a defendant on his plea of guilty, Lord Justice Clerk Gill said:[[121]](#footnote-121)

“ … an accused is not entitled to any particular discount in return for a plea of guilty. The level of discount, if any, is and must always be a matter for the discretion of the sentencer …

Moreover, even in a discretionary matter such as this, it is desirable that the court should exercise its discretion in accordance with some broad general principles.”

Of the level of discount to be afforded to such a defendant, Lord Justice Clerk Gill said:[[122]](#footnote-122)

“ In my opinion the sliding scale approach exemplified in the Definitive Guideline carries a risk of rigidity. That approach was favoured by this court in *Spence* v *HM Advocate*, but with the clear reservation that the amount of the discount, if any, would depend in every case on the circumstances (paragraph [15]).”

He went on to say:

“ In my view, the broad principle that, in general, the discount will be the greater the earlier the plea is probably a sufficient statement of guidance for most purposes.”

Of the approach to be taken to what he identified as the three stages of sentencing in those circumstances, Lord Justice Clerk Gill said:[[123]](#footnote-123)

“ the assessment of the headline sentence and the assessment of any discount are separate processes governed by separate criteria. When the headline sentence is assessed at the first stage of the sentencing process, the sentencer makes a judgment from a consideration of numerous sentencing objectives, such as retribution, denunciation, public protection and deterrence. But when he considers the matter of a discount, the only relevant consideration, in my view, is how far the so-called utilitarian benefits of the early plea have been achieved. That is an objective consideration unrelated, in my opinion, to the moral values on which the headline sentence is fixed.”

Of the approach to be taken to the discount to be afforded to the defendant, Lord Justice Clerk Gill said:[[124]](#footnote-124)

“ the two questions to be answered are how early the plea was tendered and the extent to which the tendering of it furthered the objective justifications set out in *Du Plooy*.[[125]](#footnote-125) ”

Earlier in his judgment, Lord Justice Clerk Gill referred to the judgment of the High Court of Justiciary in *Du Plooy* as giving guidance, “as the basis of, and the scope for, an allowance in the sentencing of an accused in respect of the fact that he has pled guilty”. Of that, he said that an allowance was to be given:[[126]](#footnote-126)

“ … for the fact that the tendering of a plea of guilty was likely to save public money and court time, and in general to avoid inconvenience to witnesses; or, in certain types of cases, to avoid the additional distress that could be caused by their having to be precognosced or to give evidence.”

Lord Justice Clerk Gill noted that in reaching that determination, the Court adopted:[[127]](#footnote-127)

“ … the language of Spigelman CJ in a decision of the Court of Appeal of New South Wales (*R* v *Thomson; R* v *Houlton* (2000) 49 NSWLR 383) and Kirby J in the High Court of Australia (*Cameron* v *R* (2002) 187 ALR 65), the court said that these specific considerations gave “utilitarian value” to the plea (paragraph [16]).”

Of the obvious implied relevance of an early plea of guilty, given the statutory provision, Lord Justice Clerk Gill said:[[128]](#footnote-128)

“ the essential consideration is how early in the proceedings the accused has indicated his intention to plead guilty. In any given case, the discount will be greater the earlier the plea is tendered. ”

*What is an early plea of guilty?*

Of what constituted an early plea of guilty, Lord Justice Clerk Gill said:[[129]](#footnote-129)

“ We have become familiar in this court with the argument that the accused is justified in withholding an early plea yet invoking s. 196 where there has been a delay in obtaining Crown disclosure, police statements, forensic reports and the like; or where investigations have been carried out by the defence. This is a specious argument. I repeat what I said in *HM Advocate* v *Thomson (2006 S.C.C.CR. , p.271, para 27*):

‘ If an accused person has committed the crime charged, he can plead guilty to it at the outset and benefit from his plea by way of discount when the sentence is assessed; or he can defer pleading until he is sure that the Crown have a corroborated case, in the knowledge that a sentence discount may be reduced or refused altogether. That is the choice that he must make. He cannot have it both ways’ (paragraph [27]);”

*The strength of the prosecution case*

Of the decisions of the Court that the strength of the prosecution case restricts the discount afforded to the defendant, Lord Justice Clerk Gill said:[[130]](#footnote-130)

“ I have come to the view that this approach is unsound. For the court to refuse or to minimise a discount on this basis is for the court to decide what the outcome would have been if the accused had gone to trial. In my view, there are dangers in that approach. It is the common experience of practitioners that criminal trials regularly produce the unexpected. Moreover, it is undesirable in my view that in determining the sentence the court should become involved in an appraisal of the strength of the Crown case based mainly on the Crown narrative. Experience shows that Crown witnesses do not always live up to their precognitions and that on occasions even the strongest cases come to grief. I also agree with the point made by Lord Eassie that in many cases the strength of the Crown case results from the accused’s frankness with the police. In some cases, without the accused’s own admission, the Crown would be in difficulty in finding corroboration. It is illogical, in my view, to withhold a discount from the accused in such circumstances. *I conclude therefore that the strength of the Crown case ought not to be treated as a factor influencing the amount of the discount.*” [Italics added.]

In agreeing with Lord Justice Clerk Gill, that the strength of the prosecution case was not a material factor to be taken into account in determining sentence, Lord Eassie said that not only did he have “reservations in principle” but also there were practical problems:[[131]](#footnote-131)

“ More generally, it is in my view wholly undesirable that on a plea of guilty the court should begin to entertain competing submissions at the respective strengths of the Crown and defence case. A narration of agreed facts tendered at a plea is no basis for assessment of actual strengths and weaknesses of the parties’ positions and to inquire beyond that, as a matter relevant to the giving or extent of any discount on account of the timing of the plea of guilty, would, in my view, put in jeopardy the practical working of our system of criminal procedure in disposing of cases in which an accused pleads guilty. Ultimately, the strength of the prosecution case can only be tested by trial.”

*Assistance to the authorities*

Of the factor of assistance to the authorities given by a defendant, Lord Justice Clerk Gill described as “confused” the reasoning of the Court in *Du Plooy* that it was a matter to be taken into account in the discount of sentence. Rather, he said:[[132]](#footnote-132)

“ Any assistance that the accused may have given to the police or the Crown in the investigation and prosecution of the offence is properly a matter of mitigation and, as such, a matter to be taken into account in the assessment of the headline sentence.”

*Remorse*

Lord Justice Clerk Gill said that, in his opinion, the remorse of a defendant, “cannot…be a proper justification for a sentence discount.” He went on to say:[[133]](#footnote-133)

“ My own view is that there is seldom any sure criterion for assessing whether the accused is truly remorseful; but where there is convincing evidence of remorse, the sentencer may make allowance for it, as an aspect of mitigation, in deciding on the starting figure (Sentencing Guidelines Council Revised Guideline, *Reduction in Sentence for a Guilty Plea* (2007), para 2.4; …”

*Australia*

In the judgment of the majority [[134]](#footnote-134) in the High Court of Australia in *Cameron v The Queen*[[135]](#footnote-135), the basis on which it was permissible to afford a defendant a discount in sentence following his plea of guilty was addressed:[[136]](#footnote-136)

“ It is well established that the fact that an accused person has pleaded guilty is a matter properly to be taken into account in mitigation of his or her sentence. In *Siganto v The Queen*[[137]](#footnote-137)it was said:

‘ a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.’

It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice.”

Of the issue of discrimination against a defendant who availed himself of the right to trial, the majority said: [[138]](#footnote-138)

“ Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial [[139]](#footnote-139). The distinction between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction, albeit one the rationale for which may need some refinement in expression if the distinction is to be seen as non-discriminatory.

It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if, in otherwise comparable circumstances, another’s plea of guilty results in a reduction of the sentence that would otherwise have been imposed on the pragmatic and objective ground that the plea has saved the community the expense of a trial. However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.

*Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.*” [Italics added.]

In that appeal, from the Court of Criminal Appeal in Western Australia, initially the dangerous drug had been described wrongly, by its chemical composition, as what is known commonly as ‘Ecstasy’, not ‘Speed’. In consequence, the appellant’s first intimation of a plea of guilty was more than six months after he had been arrested and charged and, thereafter, repeatedly remanded by the courts. The judge had reduced the appellant’s sentence by 10% to reflect his plea of guilty. At issue was whether or not the appellant’s plea was to be regarded as a “fast track” plea of guilty, for which the practice was to afford a discount in sentence of “between 20-25 per cent up to 30-35 per cent depending on the circumstances” of the plea. Of the statutory provision, namely the Sentencing Act 1995 (WA), the majority said:[[140]](#footnote-140)

“ The [Sentencing Act](http://www.austlii.edu.au/au/legis/wa/consol_act/sa1995121/), which sets out sentencing principles applicable to all persons convicted of an offence, specifies, in [s 8](http://www.austlii.edu.au/au/legis/wa/consol_act/sa1995121/s8.html), mitigating factors to be taken into account on sentence. One such factor is that the offender pleaded guilty. By [s 8(2)](http://www.austlii.edu.au/au/legis/wa/consol_act/sa1995121/s8.html) it is provided that “the earlier in proceedings that [the guilty plea] is made, or indication is given that it will be made, the greater the mitigation.” Provision is also made in [s 7](http://www.austlii.edu.au/au/legis/wa/consol_act/sa1995121/s7.html) with respect to aggravating factors. The fact that the offender pleaded not guilty is expressly excluded from those aggravating factors by [s 7(2)(a)](http://www.austlii.edu.au/au/legis/wa/consol_act/sa1995121/s7.html) of the [Sentencing Act](http://www.austlii.edu.au/au/legis/wa/consol_act/sa1995121/).”

Of the resolution of the reconciliation of the two provisions, the majority said:[[141]](#footnote-141)

“ [s 8(2)](http://www.austlii.edu.au/au/legis/wa/consol_act/sa1995121/s8.html) must be read as allowing that a plea of guilty may be taken into account in mitigation for the reason that a guilty plea evidences a willingness to facilitate the course of justice and not simply because the plea saves the time and expense of those involved in the administration of criminal justice. That being so, the relevant question is not simply when the plea was entered but, as was accepted by the Court of Criminal Appeal in this matter, whether it was possible to enter a plea at an earlier time.”

In the result, the majority concluded:[[142]](#footnote-142)

“ ... the rationale for the rule a plea may be taken into account in mitigation, namely, that, being a sign of remorse and acceptance of responsibility, (is) the cooperative consideration of willingness to facilitate the course of justice. And once that rationale is accepted, the respondent’s suggestion that the extent to which a plea of guilty may be taken into account in mitigation may vary according to whether it was or was not a “fast-track” plea must be rejected. Rather, *the issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity.*” [Italics added.]

As noted earlier in this judgment, in his judgment Kirby J said that “The main features of the public interest”, relevant to the discount for a plea of guilty, are “purely utilitarian”. Thereafter, he enumerated those features. Of the relevance of the stage in the proceedings at which the plea of guilty was the first intimated, Kirby J said:[[143]](#footnote-143)

“ Obviously, the timing of any plea of guilty has a large bearing on the credit that should be given to the prisoner. A plea of guilty at the last moment (as on the day set down for the trial) will ordinarily attract a smaller discount in sentence than one that is entered at the first reasonable opportunity. But even a belated plea will normally attract a discount.”

*The submissions of the amici curiae*

Mr Pang submitted that most common law jurisdictions recognise that an early plea of guilty should give rise to a greater reduction in sentence than a late plea. It was suggested that the most persuasive reason advanced was the resulting utilitarian value. By contrast, the utilitarian value of a plea of guilty at trial was greatly reduced.

Of the issue of the identification of the time at which an early plea is to be recognised, the Court was invited to note that different jurisdictions approached the matter differently. England and Wales have adopted sliding scales, with very specific sentencing discounts applied at specific stages in the criminal justice process when a plea is indicated. Other jurisdictions leave the extent of reduction in discount for a plea, and the point in the criminal justice process at which a reduction in discount for plea should be applied, to the unfettered discretion of the sentencing judge.

Mr Pang submitted that a sliding scale, with specific defined discounts at defined ‘waypoints’ in the criminal justice process, has the benefit of certainty. However, such certainty carries with it a rigidity, which may create unfairness. A defendant’s plea may result in the same utilitarian benefit, but he might receive a lesser discount simply because he has missed a particular ‘waypoint’. In summary trials in the Magistrate’s courts, the time between first appearance and trial may be so short that a defendant may not have sufficient time to make a considered decision on plea and may therefore forfeit what would otherwise be an appropriate sentencing discount.

Mr Pang suggested that, by contrast, a broad discretion in determining the discount to be afforded to a defendant on his plea of guilty might lead to uncertainty, making it less attractive to an accused to enter a plea of guilty. Also, it might lead to an increase in appeals against sentence.

Rather than adopting a full sliding scale with a number of specific ‘waypoints’, Mr Pang submitted that the full sentencing discount ought to be afforded for a defendant’s “timely” plea, and lesser discounts afforded for pleas which are not “timely”. Timeliness should not be determined by reference only to a specific stage in the proceedings. Rather, a defendant should be accorded sufficient time to receive and consider appropriate legal advice before indicating his plea. If allowance is not made for a defendant to receive proper legal advice before tendering his plea, there may well be justifiable complaints of derogations to the right to trial and the right to legal advice.

Mr Pang contended that a “non-timely” plea occurs only when, having had the opportunity to receive and consider legal advice, a defendant does not then indicate or tender a plea.

It was contended that a discount of sentence based only on a consideration of the utilitarian value ignores other legitimate and relevant factors, such as remorse. Accordingly, Mr Pang submitted that a further discount, over and above that afforded for the utilitarian value of a plea, was to be afforded to reflect those factors. By contrast, Mr Pang acknowledged that the current practice in sentencing subsumes the defendant’s remorse, his acceptance of responsibility and administrative convenience of a timely plea within the current one-third discount. He suggested that in order to properly reflect such mitigating factors, either the effective “cap” of a discount of one-third of the starting point could be removed or the discount afforded for the purely utilitarian value of the plea could be reduced from one-third. However, he said that consideration ought to be given to whether adopting the latter process might prove unattractive to defendants and result in a reduction in those pleading guilty and an increase in those seeking trial.

Finally, Mr Pang submitted that there should not be a return to the practice of reducing the discount afforded to a defendant for his plea of guilty if it was made in the face of overwhelming evidence. Quite apart from the difficulties in assessing whether the available and unchallenged evidence was actually “overwhelming”, such an approach ignored the utilitarian value of a plea of guilty.

*General submissions : Abdou Maikido Abdoulkarim*

In his submissions in respect of the general policy of affording a defendant a discount for a ‘timely’ plea of guilty, Mr Blanchflower SC invited the Court to note that the practice had developed that a plea tendered up and until the first day of trial was regarded as ‘timely’. The one-third discount was the “high-water mark” and subsumed all mitigation, other than exceptional factors such as full and early restitution, giving evidence against a co-defendant or the “supergrass” cases.

Mr Blanchflower submitted that separating the one-third discount into subjective and objective components is contrary to the current practice in Hong Kong. In the judgment of this Court in *HKSAR v Abdallah Anwar Abbas*, Stuart-Moore VP described the one-third as subsuming a “combination” of mitigating reasons.[[144]](#footnote-144)

Furthermore, Mr Blanchflower contended that there was a long line of judgments of this Court in which it had been held that the strength of the prosecution case was irrelevant to the discount to be afforded to a defendant for his plea of guilty.

Mr Blanchflower suggested that this Court should not adopt the approach of affording a defendant a reduced discount for his plea of guilty taken in England and Wales and articulated in the Sentencing Guidelines Council’s Definitive Guidelines. To do so, would be to punish a defendant by reducing the discount afforded to him because he might have delayed exercising his right to waive his constitutional rights to a fair trial and presumption of innocence. In any event, reducing the incentive to plead guilty would encourage some defendants to plead not guilty and “try their luck”.

Finally, Mr Blanchflower submitted that before the Court should contemplate a material change in practice there must be strong policy reasons supported by clear, compelling evidence. They were absent.

*General submissions: Ngo Van Nam*

In his submissions in respect of the general policy of affording a defendant a discount for a ‘timely’ plea of guilty, Mr Grossman SC invited the Court to note that the practice had developed that exceptional circumstances had to be shown to withhold a discount of one-third from the starting point for sentence for a defendant who pleaded guilty before or at the first day of trial. Such circumstances included the fact that it was a retrial or the need to hold a *Newton* hearing.

Of the practice in England and Wales, Mr Grossman said that it was clear that the one-third discount afforded in such circumstances was separate and distinct from all other mitigating factors. The Court should distinguish between artificial remorse, theoretically attributable to a plea of guilty, when the defendant was caught red-handed on the one hand and a genuine and demonstrable remorse evidenced by a volunteered confession to the offence.

*The submissions of the Department of Justice*

*Discount of sentence upon a plea of guilty*

In summarising his submissions, Mr Yeung said that the Courts’ practice of discounting a defendant’s sentence upon a plea of guilty accords with the public interest. It was an acknowledgement of the utilitarian value of a plea of guilty, the defendant’s remorse and his acceptance of responsibility. He contended that the full one-third discount should be afforded only to those defendants who entered a timely plea and are genuinely remorseful.[[145]](#footnote-145)

Of what was to beregarded as a timely plea, he submitted that it was, subjectively, to what extent the plea was indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice and, objectively, the utilitarian value of the plea.[[146]](#footnote-146) He contended that a significant factor was the timing of the plea. In that respect, the appropriate question to pose was when it was reasonable, in all the circumstances and as a matter of practicality, to have expected a plea of guilty to have been tendered or indicated.

Mr Yeung contended that the line of judgments of this Court to the effect that a full one-third discount should normally be afforded to a defendant, even for a plea of guilty made on the first day of trial, is at odds with the policy reasons for granting a discount for a plea and at variance with an earlier and even longer line of authorities of the Court, in which court-door pleas were not afforded the full discount. He submitted that court-door pleas ought not to be afforded the full one-third discount and invited this Court to clarify the conflict in the judgments of this Court.

Mr Yeung suggested that all mitigating factors that flow from the utilitarian value of a plea of guilty and the subjective factor of remorse, other than exceptional remorse, are subsumed in the one-third discount.

Of the approach taken by the then Sentencing Guidelines Council in England and Wales, namely the provision of a sliding scale from a full discount of one-third afforded to a defendant who pleaded guilty at the“first reasonable opportunity” to not more than one-tenth for a court-door plea, Mr Yeung said that whilst this Court has always regarded the timeliness of a plea as relevant, it had never set any guiding percentage to be applied mechanically by reference to the stage of the proceedings at which a plea was made. The question of discount has been a matter for the discretion of the trial judge.

Finally, Mr Yeung submitted that the approach in England and Wales of having pre-set percentage discounts to be applied mechanically depending principally upon the stage at which the plea was entered was not to be supported. The issue of what constituted the “first reasonable opportunity” had proved to be controversial and had led to many appeals against sentence.

*A consideration of the submissions*

*Discount for a plea of guilty: strength of the prosecution case*

As we indicated in the course of the hearing, the practice of not having regard to the strength of the prosecution case in determining the discount to be afforded to a defendant for his plea of guilty is not only well established and of long-standing in Hong Kong but also this Court has provided cogent reasons for the change from the earlier practice, where regard was had to that factor.

As noted earlier, powerful support for that approach is to be found in the judgments of Lord Justice Clerk Gill and Lord Eassie in *Gemmell v HM Advocate*[[147]](#footnote-147)and, albeit necessarily to a lesser extent, given the sentencing guidelines, in the judgment of Hughes JA in *R v Caley.* In the latter case, Hughes JA said:[[148]](#footnote-148)

“ The various public benefits which underlie the practice of reducing sentence for plea of guilty apply just as much to overwhelming cases as to less strong ones. Next, judges ought to be wary of concluding that a case is “overwhelming” when all that is seen is evidence which is not contested. Thirdly, even when the case is very strong indeed, some defendants will elect to force the issue to trial, as indeed is their right. It cannot be assumed that defendants will make rational decisions or ones which are born of any inclination to co-operate with the system, but those who do merit recognition.”

Earlier in his judgment, Hughes JA had cited with approval an observation of Lord Judge CJ in his judgment in the Court of Appeal of England and Wales in *R v Wilson* [[149]](#footnote-149), in which the Court held that the judge was wrong not to afford the appellant any discount in stipulating the minimum term of imprisonment to be served for sentences of life imprisonment for his pleas of guilty, notwithstanding the judge’s finding that the prosecution case was overwhelming. Lord Judge CJ said “Even in an overwhelming case the guilty plea has a distinct public benefit. The earlier that it was indicated, the better for everyone.” [[150]](#footnote-150)

Furthermore, as noted earlier, in England and Wales the Sentencing Council has proposed in its Draft Guideline to remove the requirement that, in affording a defendant a discount of sentence for his plea of guilty, consideration be given to the factor of the strength of the prosecution case. In making that recommendation, the Sentencing Council said that the benefits flowing from a plea of guilty “apply regardless of the strength of the evidence against an offender”. Further, they noted that research indicated that “withholding the guilty plea reduction is not applied consistently”. Of that issue, it was said, “What amounts to an overwhelming case is necessarily a subjective judgment and courts have interpreted it differently.”

In contrast to the cogent reasons advanced in a number of judgments of this Court, which resulted in the eventual resolution of the Court that the strength of the prosecution case was not to be taken into account in reducing the discount afforded to a defendant for his plea of guilty, with great respect, nothing in the way of analytical reasoning has been advanced in the judgments of this Court to explain the change from a discount of about 25% for an early plea of guilty to the current situation in which a defendant is afforded a discount of one-third for his plea of guilty up to and until the commencement of the trial. As noted earlier, Hong Kong is the only jurisdiction to which we have been referred in which a discount of one-third is afforded to a defendant on the first day of trial.

*The stage of a plea of guilty: a range of discount*

There is no doubt that the utilitarian value of a plea of guilty is greater the earlier the plea of guilty is intimated or tendered. The authorities to which we have referred speak with one voice in that respect. We are satisfied that it is not only logical, but also fair to reflect that factor in sentencing, so that a defendant who pleads guilty at an earlier stage is to be afforded a greater discount in sentence than a defendant who pleads guilty at a later stage. That was the practice to which Roberts CJ referred in the *Queen v Wong Ping Yu & Another.* There, it was said that the practice was that a discount of up to 20% from the starting point for sentence was afforded to a defendant who pleaded guilty on the first day of trial, whereas a discount of up to 25% was afforded to a defendant who pleaded in the Magistracy and was committed for sentence.

We are satisfied that, subject to the overriding discretion of the judge in sentence, a discount of 20% from that taken for the starting point for sentence is the appropriate discount to be afforded to a defendant who pleads guilty only on the first day of trial. In broad terms it reflects the reduced utilitarian value of the plea of guilty, in comparison to a plea of guilty intimated at an early stage. On the other hand, although it was the practice of times gone by to afford a discount of up to 25% from the starting point taken for sentence to a defendant who pleaded at an early stage in the proceedings, and although no reasons or explanations were articulated in the judgments of this Court in which it was said that the practice had changed to one affording a discount of one-third to those who pleaded guilty at that early stage, we acknowledge that the practice is not only very well established but also working effectively, in that it encourages those who are guilty to plead guilty. Accordingly, we are satisfied that, subject to the overriding discretion of the judge in sentence, a one-third discount is appropriate in those circumstances. That range of discount in sentence, reflecting the stage at which a plea of guilty is indicated, affords those who wish to plead guilty an appropriate incentive to intimate a plea of guilty at an early stage.

*Factors of mitigation subsumed in a one-third discount*

In contrast to the approach in sentencing in Scotland and Australia, as evidenced in the judgments of the Courts of those jurisdictions, in Hong Kong to a considerable extent this Court has elided the difference between the utilitarian value of a plea of guilty and the subjective factor of remorse. So, other than in exceptional circumstances, the remorse of a defendant who pleads guilty is taken to be subsumed in the discount of one-third afforded for a plea of guilty. As noted earlier, this Court has used the phrase the “high water mark” in a number of judgments in reference to the one-third discount to describe the fact that remorse is subsumed in that discount. Notwithstanding that the practice does not reflect a pure, principled approach to sentencing, we are satisfied that it is not only well established but also working in practice. Accordingly, we are satisfied that it is appropriate to continue sentencing on that basis.

*Knowledge of the facts of the prosecution case and receipt of legal advice*

As noted earlier, in the judgments of the Court of Appeal of England and Wales in *R v Caley* and that of Lord Justice Clerk Gill in *Gemmell v HM Advocate* in the High Court of Justiciary of Scotland, in determining what was the “first reasonable opportunity” for a defendant to indicate his guilt or what was “an early plea” respectively, a distinction was drawn between that stage of proceedings and the separate and different stage at which a defendant exercised his undoubted right to avail himself of the opportunity, “for his lawyers to assess the strength of the case against him and to advise him on it.” [[151]](#footnote-151) Of the different circumstances, Hughes LJ said “… the second depends on the evidence being assembled and served. The first, however frequently does not.” However, he acknowledged that “… there will certainly be cases where a defendant genuinely does not know whether he is guilty or not and needs advice and/or sight of the evidence in order to decide.” Nevertheless, he went on to conclude:[[152]](#footnote-152)

“ Such cases aside, however, whilst it is perfectly proper for a defendant to require advice from his lawyers on the strength of the evidence (just as he is perfectly entitled to insist on putting the Crown to proof at trial), *he does not require it in order to know whether he is guilty or not*; he requires it in order to assess the prospects of conviction or acquittal, which is different.” [Italics added.]

In our judgment, with respect, there is considerable force in those observations.

*An early plea*

1. *The Court of First Instance*

In practice, almost all cases that are heard in the Court of First Instance are committed to the Court from the Magistracy, either for trial or for sentence. We understand from the most helpful submissions of Mr Pang that, on their first appearances in the Magistracy, those defendants who are not legally represented privately are usually represented by the Duty Lawyer Scheme. It is the practice in the Magistracy to inform those defendants whose cases are to be committed to the Court of First Instance, by service of a form entitled ‘Important Notice’, that the Duty Lawyer Service will not represent them in committal proceedings and that they may instruct lawyers privately or apply for legal aid.

*The appointment of the ‘Return Day’*

Section 80 A of the Magistrate’s Ordinance makes provision for the appointment of a Return Day by the Court for the continuation of committal proceedings, which is to be not less than 10 days and not more than 42 days from the date of the appointment of the Return Day. Upon reasonable cause being shown, the Court may appoint another Return Day. On the appointment of the Return Day, the Magistrate is required to inform the accused:

“ (a) of his right to apply for legal aid;

(b) that not less than 7 clear days before the [return day](http://www.hklii.hk/eng/hk/legis/ord/227/s71a.html#return_day) he will receive a copy of the complaint made or [information](http://www.hklii.hk/eng/hk/legis/ord/227/s2.html#information) laid together with copies of witness statements and any documentary evidence in support thereof, being the statements and evidence upon which the prosecutor will seek the accused’s [committal](http://www.hklii.hk/eng/hk/legis/ord/227/s71a.html#committal);

(c) on the [return day](http://www.hklii.hk/eng/hk/legis/ord/227/s71a.html#return_day), he will have the right to require a [preliminary inquiry](http://www.hklii.hk/eng/hk/legis/ord/227/s71a.html#preliminary_inquiry) and, if he does so require, he may, at the inquiry, call witnesses to give evidence on his behalf;

(d) where there is more than one charge that, in the event of his requiring a [preliminary inquiry](http://www.hklii.hk/eng/hk/legis/ord/227/s71a.html#preliminary_inquiry) on any charge, the inquiry will be held into all the charges against him and that only at the conclusion of the inquiry will he have the opportunity to plead guilty to any charge;

(e) if he does not require a [preliminary inquiry](http://www.hklii.hk/eng/hk/legis/ord/227/s71a.html#preliminary_inquiry), he will be committed for trial without an inquiry unless he pleads guilty to the charge, in which case he will be committed for sentence on that charge.”

The Court was informed by Mr Pang that it was normally after the appointment of the Return Day that defendants apply for legal aid and that normally the Legal Aid Department process those applications within 10 days. Similarly, we were informed that it was commonplace for adjournments to be sought by the prosecution and granted by the Court to enable the prosecution to serve the requisite material on the defendant. Furthermore, that again it was commonplace that the Legal Aid Department received that material only shortly before the Return Day so that, on the application of the Legal Aid Department, proceedings were often adjourned yet again. Mr Pang said that adjournments of that kind were sought so that the Legal Aid Department could consider the papers with a view to determining whether there is a *prima facie* case disclosed in the papers, to advise the defendant on the mode of committal and to deal with other pre-committal notice *-* such as bail applications.

Mr Pang informed the Court that Legal Aid counsel “attended” defendants on the Return Day and before their committal. Helpfully, we were provided with a *pro forma* used in such interviews, entitled “Matters to be dealt with in Committal Interview”. The acronym ‘A/P’ used in the form appears to refer to the aided person. The form states, *inter-alia*:

“ 1. when A/P received papers? Consent to abridgement of less than 7 days? If no papers, case will be adjourned and A/P consents to adjournments? Does AP require translation of papers other than English before/after committal?

2. A/P was given an opportunity to view non-documentary exhibits? Want it if not?

3. A/P read the papers? A/P understands charge he is facing?

4. A/P’s intended plea. In case of A/P pleading guilty, matters normally adjourned 4 weeks for Summary of facts to be agreed and plea.

5. Counsel’s advice given to A/P re whether Prima facie case & mode of Committal.

6. A/P understands the advice and takes counsel’s advice?

7. Yes cautioned statement given involuntarily, does A/P once had complained to be registered with CAPO?

8. Alibi warning explained.

9. Bail application. Instructions and advice.

10. Post Committal Procedure explained.

11. Any other matters.”

*Procedure on the Return Day*

Section 80 C of the Magistrate’s Ordinance requires the Magistrate to inform the accused on the Return Day that, unless he elects to have the charge heard at a preliminary hearing, he will be committed without such an inquiry. Further, provision is made that, if the defendant does not make or is deemed to make such an election, the Magistrate shall inform the accused that:[[153]](#footnote-153)

“ (a) he is not obliged to say anything in respect of the charge but that he may plead guilty to the charge and that such a plea will result in his being committed for sentence on that charge; ”

It is in those circumstances that a defendant is committed to the Court of First Instance, either for trial or for sentence.

*The Indictment*

Section 14(1)(a) of the Criminal Procedure Ordinance requires the Secretary for Justice to file an indictment within seven days of the committal of the defendant to the Court of First Instance for trial.[[154]](#footnote-154)

*The Listing Judge*

After an indictment is filed with the Court of First Instance, the matter is fixed for hearing before the Listing Judge. Usually, that takes place within four to six weeks of the committal having occurred.

Mr Pang informed the Court that, after a hearing date is fixed before the Listing Judge, the Legal Aid Department arranges for one of its clerks to take further instructions from the defendants whom they represent: (i) to take listing instructions; and (ii) to ascertain whether he intends to plead guilty or not. Whether or not the defendant indicates that he wishes to plead guilty or proceed to have a trial, legal aid counsel represents the defendant at the Listing hearing. In the event that the defendant maintains his instructions to plead not guilty and only after trial dates are fixed does the Legal Aid Department take steps to assign solicitors and counsel to represent the defendant at trial.

*Solicitors and counsel assigned by the Legal Aid Department*

As is to be expected, after they have been assigned by the Legal Aid Department to represent a defendant, arrangements are made by solicitors to take full instructions from the defendant, so that they are able to brief counsel.

*A one-third discount*

We are satisfied that in cases committed for trial or sentence the stage at which a discount of a full one-third is to be afforded to the defendant is at the stage of committal described earlier. Usually, but subject to the overriding discretion of the judge in sentence, the opportunity to secure a one-third discount from the starting point for sentence occurs when the defendant is given the opportunity to plead guilty in the Magistracy, pleads guilty and is committed for sentence to the Court of First Instance. Obviously, that is an event of importance to a defendant. So, those representing a defendant who is to be committed to the Court of First Instance must advise a defendant of his options, so that he is in a position to make an informed choice. As noted earlier, that does not require that a defendant is given an assessment of “the prospects of conviction or acquittal”. At issue only, is whether or not in his instructions the defendant acknowledges that he performed the acts, with the accompanying mental element, proof of which is required to establish the offence.

*A 25% discount*

We are satisfied that, if the defendant indicates to the Court or prosecution that he wishes to plead guilty after he has been committed to the Court of First Instance for trial, but up to and until dates are fixed for his trial by the Listing Judge, the appropriate discount for sentence from the starting point for sentence, subject to the overriding discretion of the judge in sentence, is 25%.

*Plea of guilty at the first day of trial: a 20% discount*.

Further, we are satisfied that, subject to the overriding discretion of the judge in sentencing, it is appropriate that the Courts revert to the previous practice of affording a defendant who pleads guilty on the first day of his trial a discount of 20% from the starting point taken for sentence.

*An indication of a plea of guilty after the fixing of trial dates but before the first day of trial: 25% to 20% discount*

Next, we are satisfied that, subject to the overriding discretion of the judge in sentencing, the range of discount to be afforded to a defendant who indicates to the Court or the prosecution that he intends to plead guilty after trial dates have been fixed but before the first day of trial, lies between the 25% discount to be afforded to the defendant who indicates that he wishes to plead guilty up to and until dates are fixed for his trial by the Listing Judge and the 20% discount to be afforded to the defendant for a plea of guilty on the first day of trial. In determining the appropriate discount to be afforded to the defendant in those circumstances, the judge will have regard to the time at which the indication was given and to all the other relevant circumstances.

*A plea of guilty after arraignment and during the trial*

Finally, we are satisfied that, subject to the overriding discretion of the judge in sentencing, the discount to be afforded to a defendant who pleads guilty after arraignment but during the trial itself would usually be less than the 20% afforded to the defendant who pleads guilty on the first day of trial and will reflect the circumstances in which the plea was tendered. Often, it will follow the holding of a *voir dire*. In those circumstances, it may be that the nature of the challenge to the admissibility of the evidence will be relevant. In other circumstances, it may occur in circumstances where the defence has sought to test some other aspect of the prosecution case. The discount to be afforded to the defendant in those circumstances is pre-eminently one for the trial judge.

*(ii) The District Court*

By contrast to the procedure obtaining for committal of a defendant to the Court of First Instance, a defendant who is transferred to the District Court from the Magistracy has no opportunity to tender a plea of guilty in the Magistracy.

Mr Pang informed the Court that, apart from those who are privately legally represented, other defendants, if they wish to be so represented, may be represented by the Duty Lawyer Scheme. On the day of their transfer to the District Court defendants are informed by the Duty Lawyer Service by service of a notice entitled ‘Important Notice’ that the Duty Lawyer Service will not be available to them in the District Court but that, if they are not to be represented privately, they may apply for legal aid, so that they may be represented in the District Court. The recipients of such notices are enjoined to take steps to be represented “well before” the date for their first appearance in the District Court. Mr Pang informed the Court that the processing of such applications for legal aid takes about 10 working days.

*Plea Day*

Although the first day of hearing of cases transferred from the Magistracy to the District Court is uniformly known as the “Plea Day” no pleas are in fact tendered. Rather, it is a hearing at which an indication may be given of what pleas are to be tendered and at which dates may be fixed for trial.

Mr Pang informed the Court that it was estimated that 85% of defendants appearing in the District Court did so having been granted legal aid. However, he said that often legal aid counsel first saw those defendants who had been granted legal aid in the dock in the Plea Day Court. It appears that unsatisfactory situation arises because of a combination of factors: the time taken in processing the applications for legal aid following transfer to the District Court; the lack of manpower in the Legal Aid Department and the fact of the short time gap between transfer from the Magistracy to the Plea Day hearing. As a result, the Court was informed that in about 30% of the cases the proceedings were adjourned to a second Plea Day hearing. There was no dispute that in those circumstances adjournments were readily granted by the judge presiding in the Plea Day hearing.

In taking instructions from defendants who have been granted legal aid, the law clerks of the Legal Aid Department make use of a *pro forma* entitled “General Instructions” (Bail applications/Plea Day cases). Amongst the information sought is that in respect of the defence:

“ (a) no knowledge of existence/substance

(b) no intention

(c) wrongly identified by witnesses

(d) fabricated by witnesses

(e) fingerprint/DNA

(f) exhibits

(g) possession of DD your own consumption

(h) with consent”

Elsewhere the form addresses issues in respect of cautioned statements; identification evidence; trafficking in dangerous drugs; defence witnesses; medical evidence; fingerprint evidence; and the chain of evidence.

*An indication of a plea of guilty at Plea day: one-third discount*

We are satisfied that, subject to the overriding discretion of the judge in sentencing, a one third-discount from the starting point taken for sentence is to be afforded to those defendants who indicate at the Plea Day that they intend pleading guilty. That is to be the case whether that is done on the first of such hearing dates or on a subsequent Plea Day, necessitated in order to obtain adequate instructions and provide a defendant with appropriate advice. A lesser discount is to be afforded to a defendant who pleads guilty thereafter.

*Plea of guilty at the first day of trial*: *20% discount*

If the plea of guilty is tendered at the first day of trial, subject to the judge’s overriding discretion in sentencing, the appropriate discount for sentence is 20% of that taken as the starting point.

*An indication of a plea of guilty after the fixing of trial dates but before the first day of trial*

Subject to the overriding discretion of the judge in sentencing, a defendant who gives the Court or the prosecution an indication of a plea of not guilty at the Plea Day after which trial dates are fixed, who then indicates to the Court or the prosecution before the first day of trial that he wishes to plead guilty, is to be afforded a discount between 25% and 20% of that taken as the starting point for sentence. In determining the appropriate discount to be afforded to the defendant in those circumstances, the judge will have regard to the time at which the indication was given and to all the other relevant circumstances.

*A plea of guilty during the trial*

We are satisfied that, subject to the overriding discretion of the judge in sentencing, the discount to be afforded to a defendant who pleads guilty after the plea is taken and during the trial itself would usually be less than the 20% afforded to the defendant who pleads guilty on the first day of trial and will reflect the circumstances in which the plea was tendered. The discount to be afforded to the defendant in those circumstances is pre-eminently one for the trial judge, having regard to all the circumstances including those mentioned in paragraph 215.

*The Magistracy*

In the Magistrates Courts the Duty Lawyer Service covers some 300 statutory and common law offences. However, it does not encompass committal proceedings; hawking offences; traffic summonses and regulatory offences, such as summonses issued by the Environmental Protection Department, Inland Revenue Department and the Fire Services Department

Legal representation is provided to defendants for their first appearance in court without means testing. That representation is available by application to the Court Liaison office at each of the Magistrates Courts. The Court Liaison office makes contact with all defendants who are remanded in custody. Subsequent representation is subject to a means test, for which the financial eligibility limit is set at a gross annual income of $185,810. Having passed the means test, a defendant is required to pay a fixed handling fee of $540, which encompasses all hearings no matter how long the trial lasts. The Administrator of the Duty Lawyer Service has the discretion to waive the means test if she is of the view that it is in the interests of justice so to do.

Mr Pang informed the Court that at the first hearing of a case in the Magistrates court the prosecution make available to the magistrate and the Duty Lawyer a copy of the charge(s) and a document entitled ‘Brief Facts’ which, as its title suggests, gives a short summary of the prosecution case in respect of circumstances of the commission of the offence. Armed with that document the Duty Lawyer takes instructions from the defendant with the assistance of a *pro forma*. At the beginning, that document provides for information to be set out of the “Offence Charged” and the “Defendant’s Plea”. Also, it provides for the provision of further details under the headings “Personal Particulars”; “Any outstanding case?”; “Convictions”; “Bail” and “Mitigation”.

There is no dispute that often a Duty Lawyer is called upon to represent multiple defendants at any given hearing day. As a result, it is often the case that application is made by the Duty Lawyer for an adjournment to obtain material from a prosecution or to obtain better instructions, which applications are usually granted by the Magistrate. Often, the prosecution indicates to the Court that they are not ready for a plea to be taken from the defendant. That may occur, for example, because the prosecution requires a Government Chemist’s certificate in respect of the analysis of dangerous drugs. So, in many cases there is an adjourned hearing before the prosecution asks for a plea to be taken from the defendant, and the defendant indicates whether or not he pleads guilty or not guilty. In the latter case, trial dates are fixed. In the former case, it may be that the case can be dealt with that day or, if not, a date is fixed for sentencing.

In cases where a defendant is represented privately by a lawyer, it is to be expected that at the first hearing day, if the defence is not in a position to tender a plea to the charge, for whatever reason, an application would be made for an adjournment. On the other hand, if the defence is ready to proceed with tendering a plea to the charge, the case can proceed and, if the plea is one of not guilty, trial dates can be fixed.

It follows that, in common with the practice in the higher courts a defendant is afforded not only the opportunity to be informed of the charge and, by provision of the Brief Facts, made aware of the prosecution case in summary but also has the opportunity to seek legal advice before being called upon to tender a plea to the charge. As is to be expected it is clear that, on the request of the defence, the Courts grant adjournments to those defendants who are not in that position.

*Plea of guilty: the one-third discount*

In those circumstances we are satisfied that, usually, but subject to the overriding discretion of the magistrate in sentencing, the opportunity to secure a one-third discount from the starting point for sentence occurs when the defendant is asked to tender a plea to the charge. If he pleads not guilty and trial dates are fixed that opportunity is lost.

*Plea of guilty at the first day of trial*

If the defendant pleads guilty at the first day fixed for his trial usually, but subject to the overriding discretion of the magistrate in sentencing, the discount to be afforded to the defendant is 20% of the starting point for sentence.

*An indication of a plea of guilty after the fixing of trial dates but before the first day of trial*

If the defendant indicates to the Court or to the prosecution in advance of the date fixed for trial that he wishes now to tender a plea of guilty, followed by a plea of guilty, the discount to be afforded tothe defendant, subject to the overriding discretion of the magistrate in sentencing, lies between 25% and 20% of the starting point for sentence. In determining the appropriate discount to be afforded to the defendant in those circumstances the magistrate will have regard to the time at which the indication was given and to all the other relevant circumstances.

*A plea of guilty during the trial*

We are satisfied that, subject to the overriding discretion of the judge in sentencing, the discount to be afforded to a defendant who pleads guilty after the plea is taken and during the trial itself would usually be less than the 20% afforded to the defendant who pleads guilty on the first day of trial and will reflect the circumstances in which the plea was tendered. The discount to be afforded to the defendant in those circumstances is pre-eminently one for the trial magistrate, having regard to all the circumstances including those mentioned in paragraph 215.

The revised practice of affording discounts of sentence for pleas of guilty is to be applied only to those who, in future, reach the stages in criminal proceedings identified in this judgment at which revised discounts of sentence for pleas of guilty are identified. So, for example, the revised practice applies to a defendant currently in the magistracy who, in the future, is committed to the Court of First Instance for trial. On the other hand, for example, a defendant in respect of whom trial dates have been fixed in the Court of First Instance who pleads guilty on the first day of his trial is to benefit from the existing practice of affording a discount of one-third from that taken as a starting point for sentence.

A draft of this judgment was circulated to all other members of the Court of Appeal, all of whom have indicated that they support the revision of the general practice of affording a discount of one-third on a plea of guilty, set out in paragraphs 193-236 of this judgment.

I agree with the judgments of Yeung VP in CACC 418/2014 and Macrae JA in CACC 327/2015.

CRIMINAL APPEAL NO. 327 OF 2015

Hon Macrae JA :

The applicant (Abdou Maikido Abdoulkarim), a Nigerian national aged 35 at the time of the offence, pleaded guilty on 17 September 2015 before Deputy Judge Beeson in the High Court to one count of trafficking unlawfully in a dangerous drug, namely 2,410.28 grammes of a crystalline solid containing 2,357.23 grammes of methamphetamine hydrochloride (commonly known as ‘Ice’).

*The facts*

The applicant had arrived at 21:05 hours on 7 April 2014 at the Shenzhen Bay Control Point, New Territories, Hong Kong from the Mainland. He was escorted to the Customs departure hall for immigration clearance. Upon inspection and investigation of his luggage, a total of 24 packages of ‘Ice’ were found concealed in the lining of six ladies’ handbags, which, amongst other things, he was carrying inside his backpack. Following his arrest and caution, the applicant was asked who owned the drugs, to which he replied: “I don’t know, my friends give me to bring six handbags to his girlfriend in Hong Kong.” When asked whom he meant by “his friends”, he said he did not know and was waiting for someone to call him after he arrived.

In a subsequent video recorded interview, the applicant denied knowing that there were dangerous drugs inside the six handbags, or that there were handbags inside his backpack. However, the applicant admitted before the judge when he pleaded guilty that he had trafficked in the drugs particularised in the indictment.

The retail value of the dangerous drugs as at April 2014 was HK$980,983.

*The judge’s reasons for sentence*

The judge adopted an initial starting point of 22 years’ imprisonment for the narcotic concerned after extrapolating the guidelines of this Court in *Attorney-General v Ching Kwok Hung* [[155]](#footnote-155), the facts giving rise to his arrest having occurred about two months before the revised guidelines for ‘Ice’ in *HKSAR v Tam Yi Chun* [[156]](#footnote-156) were handed down. She duly enhanced the starting point for sentence by 2 years’ imprisonment for the international element in trafficking more than 2 kilogrammes of ‘Ice’ across the border into Hong Kong. She then reduced the notional sentence of 24 years’ imprisonment after trial by 25%, resulting in a sentence of 18 years’ imprisonment.

In her reasons for sentence, the judge explained the reasons for her departure from the one-third discount for plea as follows:

“ When considering the discount, I note that the defendant was arrested on 8 April and first appeared in the Magistracy on 9 April 2014. On 17 October 2014 he pleaded guilty at committal. On 14 January 2015 he appeared for sentence in the High Court and told the court that he did not know that the dangerous drugs were in the bag he carried. He also told the court that he wanted to be sentenced anyway for the offence on that day, but the deputy High Court judge who was presiding clearly could not accept that plea and explained why that was so to the defendant. The plea of guilty was vacated and conviction set aside.

A ‘For Mention’ hearing date followed on 16 April 2015 and indicated an adjournment for plea. On 6 May 2015 a plea of not guilty was entered and the case was ordered to be re-listed.

On the 27 July 2015, a pre-trial review proceeded and the trial dates were fixed from 7 September 2015 with eight days allotted. On 14 September, three days before the trial was due to start, the court was advised by letter that the defendant would plead guilty to the charge.

I set out this timetable to illustrate the waste of court time and public money that has been caused by the defendant’s dilatory behaviour, and I have considered whether this would justify my reducing the usual one-third discount for plea.

I note that the defendant has been legally advised throughout these proceedings. I note too that on all occasions after his arrest, an Igbo Interpreter has been made available to him.

His initial plea was admitted as being made voluntarily and with a full understanding of the charge. On its face it was an unequivocal plea of guilty.

I am quite aware of the one-third discount for plea being an important factor in court sentencing. However, the norm is that the one-third discount is given for a timely plea. It is not right that a discount remain available at its full range and in all cases, especially when there has been delay.

A three day window before the trial advising his plea means that an eight-day trial has been wasted as it is not possible for a comparable case to be slotted into those days as would be desirable. He has also had a long gap between the arrest and the initial plea to have legal advice. There was further opportunity for legal advice between 14 January and the pre-trial review. Between the pre-trial review and the start of the trial that has been further time for him to get advice, or to consider giving information.

I consider that some note should be taken of the fact of this delay. I take the 24-year sentence and discount it by one-quarter to 18 years.”

*The appeal*

Mr Blanchflower SC takes a single ground of appeal on behalf of the applicant, namely that the judge erred in finding that the plea of guilty tendered by the applicant was not a “timely” one and that he was not therefore entitled to the full one-third discount, thereby rendering the sentence manifestly excessive. He argues that not only was the reduced discount of 25% inconsistent with prevailing sentencing principles applicable at the time of sentence, but the judge gave no warning of what she proposed to do, thus depriving the applicant’s counsel of the opportunity of making submissions on the issue and, if necessary, referring to relevant authorities.

*Discussion*

This Court can well understand the frustration of the courts and those whose responsibility it is to list cases for trial when defendants prevaricate or change their minds and instructions about their pleas resulting in trials that are aborted and ensuing hearing dates that are rendered useless. The applicant’s conduct in this particular case exemplifies how the utilitarian value of a timely plea was minimal. One should not forget that when an 8-day trial in the High Court is aborted at short notice, not only is the time of the courts and witnesses wasted, but other defendants who are in custody patiently waiting for their own trials to take place are also disadvantaged, particularly so if ultimately they are acquitted.

Unfortunately, however, the judge did not draw her entirely proper concerns to defence counsel’s attention at any stage prior to passing sentence, and it seems evident from the transcript of proceedings that he was completely unaware of what she had in mind. Indeed, he had based his mitigation on an assumption, which he articulated at the outset of his remarks as follows:

“ The defendant has obviously pleaded guilty and seeks the one-third discount on the sentence of imprisonment which must follow.”

The judge did not demur or engage counsel on his submission at all. No doubt counsel would have sat down at the conclusion of his plea in mitigation, satisfied that his assumption was correct and that his client would receive a full one-third discount from whatever the starting point was found to be. Had the judge voiced her misgivings about the timetable of the applicant’s plea and raised the possibility that she was considering adopting a reduced discount in view of it during mitigation, counsel may well have sought a brief adjournment and pointed to some of the authorities to which we have referred earlier in this judgment; in particular, *HKSAR v Lo Chi Yip* [[157]](#footnote-157); *HKSAR v Li Tak Yin* [[158]](#footnote-158). Whether his submissions on the issue were or were not ultimately accepted, the matter would at least have been canvassed and he would have had the chance to try and persuade the judge out of the course she was indicating.

It might be suggested from the timetable of the applicant’s plea that counsel should have anticipated that the judge might well have been considering a reduced discount for plea and that he should not have assumed, therefore, that his client would receive the full discount. There would be some force in that observation. However, here counsel raised his expectation that the full one-third discount would follow at the outset of his mitigation and issue was not joined with the proposition by the court. In those circumstances, we think counsel was entitled to assume from the judge’s silence when directly confronted with the submission, particularly given the state of the authorities which we have discussed, that she was not going to depart from the usual one-third discount for plea.

In the particular circumstances, therefore, we feel that we should allow the appeal and give the applicant what we think his counsel evidently anticipated and what he would no doubt have told his lay client to expect, namely the conventional one-third discount from the starting point for pleading guilty. In the circumstances, we are prepared to grant the application for leave, and treating the hearing of the application as the hearing of the appeal, we allow the appeal and reduce the starting point (about which no complaint is made) by one-third, resulting in a sentence of 16 years’ imprisonment in place of 18 years’ imprisonment.

To that extent, the appeal is allowed.

I agree with the judgments of Yeung VP in CACC 418/2014 and Lunn VP in CACC 418/2014 and 327/2015.

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| --- | --- | --- |
| (Wally Yeung)  Vice President | (Michael Lunn)  Vice President | (Andrew Macrae)  Justice of Appeal |
|  |  |  |

Mr Keith Yeung, SC, DPP, Ms Christal Chan, SPP, Ms Rosa Lo, SPP and Mr Ivan Cheung PP, of the Department of Justice, for the respondent

Mr Clive Grossman, SC and Mr Andy Hung, instructed by Augustine C.Y. Tong & Co., assigned by Director of Legal Aid, for the appellant (in CACC 418/2014)

Mr Michael Blanchflower, SC and Mr Michael Arthur, instructed by Krishnan & Tsang, assigned by Director of Legal Aid, for the applicant (in CACC 327/2015)

Mr Robert Pang, SC and Ms Maggie Wong, appointed as Amicus Curiae by the Court

1. *HKSAR v Lo Kam Fai* (CACC 374/2014; unreported, 2 February 2016). [↑](#footnote-ref-1)
2. *R v Cameron,* in which, for different reasons, Kirby J concurred with the joint judgment of Gaudron, Gummow and Callinan JJs. [↑](#footnote-ref-2)
3. *R v Cameron* [2002] 209 CLR 339. [↑](#footnote-ref-3)
4. *HKSAR v Ma Ming* [2013] 1 HKLRD 813, at 820. [↑](#footnote-ref-4)
5. *HKSAR v Lo Kam Fai*, paragraph 5. [↑](#footnote-ref-5)
6. *HKSAR v Lo Kam Fai*, paragraphs 6 and 7. [↑](#footnote-ref-6)
7. *HKSAR v Lo Kam Fai*, paragraphs 87-8. [↑](#footnote-ref-7)
8. *Prison Rules*, Cap. 234A, rule 188. [↑](#footnote-ref-8)
9. *Prison Rules*, rule 192. [↑](#footnote-ref-9)
10. *Prison Rules*, rule 195. [↑](#footnote-ref-10)
11. *Prison Rules*, rule 196. [↑](#footnote-ref-11)
12. *Prison Rules*, rule 201. [↑](#footnote-ref-12)
13. *Prison Rules*,rule 203*.* [↑](#footnote-ref-13)
14. *Prison Rules*, rule 206. [↑](#footnote-ref-14)
15. *Prison Rules*, rule 38. [↑](#footnote-ref-15)
16. *Prison Rules*, rule 48. [↑](#footnote-ref-16)
17. “The length of any sentence of imprisonment imposed on a person by a [court](http://www.hklii.hk/eng/hk/legis/ord/221/s67a.html#court) shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a [court](http://www.hklii.hk/eng/hk/legis/ord/221/s67a.html#court) made in connection with any proceedings relating to the sentence or the offence for which it was passed, or with any proceedings from which those proceedings arose…” [↑](#footnote-ref-17)
18. The *Queen v Wong Ping Yu & Another* (CACC 16/1987; unreported, 12 March 1987). [↑](#footnote-ref-18)
19. The *Queen v Kwok Chi Kwan and Another* [1990] 1 HKLR 293. [↑](#footnote-ref-19)
20. *Attorney General v Wong Kwok Wai* [1991] 2 HKLR 384. [↑](#footnote-ref-20)
21. The *Queen v Wong Ping Yu & Another* (CACC 16/1987; unreported, 12 March 1987). [↑](#footnote-ref-21)
22. The *Queen v Wong Ping Yu & Another.* [↑](#footnote-ref-22)
23. The *Queen v Leung Tin Man* (CACC 411/1990, unreported, 19 April 1991). [↑](#footnote-ref-23)
24. The *Queen v Wong Ngai Hung* (CACC 596/1995; unreported, 3 April 1996). [↑](#footnote-ref-24)
25. *HKSAR v Wong Ka Kuen* (CACC 35/1998; unreported, 28 January 1999). [↑](#footnote-ref-25)
26. *HKSAR v Wong Ka Kuen.* [↑](#footnote-ref-26)
27. The *Queen v Chan Chi Yuen* (CAAR 8/1983; unreported, 8 July 1983). [↑](#footnote-ref-27)
28. The *Queen v Leung Yiu Hung & Others* (CACC 452/1984; unreported, 23 November 1984). [↑](#footnote-ref-28)
29. The *Queen v Wong Ping Yu & Another* (CACC 16/1987; unreported, 12 March 1987). [↑](#footnote-ref-29)
30. *Attorney General v Han Man Fai & Another* (CAAR 7/1988, unreported, 14 September 1988). [↑](#footnote-ref-30)
31. *Attorney General v Han Man Fai & Another*, page 5. [↑](#footnote-ref-31)
32. *Attorney General v Han Man Fai & Another*, pages 5 and 6. [↑](#footnote-ref-32)
33. The *Queen v Kwok Chi Kwan* [1990] 1 HKLR 293. [↑](#footnote-ref-33)
34. The *Queen v Kwok Chi Kwan*, page 296 A-C. [↑](#footnote-ref-34)
35. The *Queen v Leung Tin Man* (CACC 411/1990, unreported, 19 April 1991). [↑](#footnote-ref-35)
36. The *Queen v Leung Tin Man*, page 5. [↑](#footnote-ref-36)
37. *Attorney General v Wong Kwok Wai* [1991] 2 HKLR 384. [↑](#footnote-ref-37)
38. *Attorney General v Wong Kwok Wai*, page 387 C-D. [↑](#footnote-ref-38)
39. *Attorney General v Wong Kwok Wai*,page 387 E-F. [↑](#footnote-ref-39)
40. The *Queen v Law Hon Chung* (CACC 548/1990; unreported, 25 February 1992). [↑](#footnote-ref-40)
41. The *Queen v Law Hon Chung*, page 5. [↑](#footnote-ref-41)
42. The *Queen v Law Hon Chung*, page 5. [↑](#footnote-ref-42)
43. The *Queen v Lai Kwok Hung* [1994] 1 HKC 283 (4 May 1994). [↑](#footnote-ref-43)
44. The *Queen v Lai Kwok Hung*, page 285 A-B. [↑](#footnote-ref-44)
45. The *Queen v Lai Kwok Hung*,page 285 B-C. [↑](#footnote-ref-45)
46. The *Queen v Chan Leung* (CACC 347/1994; unreported, 17 January 1995). [↑](#footnote-ref-46)
47. The *Queen v Ng Wing Kwong* (CACC 62/1995; unreported, 1 September 1995). [↑](#footnote-ref-47)
48. The *Queen v Wong Ngai Hung* (CACC 596/1995; unreported, 3 April 1996). [↑](#footnote-ref-48)
49. *R v Lo Chi Man* [1996] 4 HKC 699 (22 May 1996). [↑](#footnote-ref-49)
50. The *Queen v Lau Kin Hong* (HCMA 355/1996; unreported, 11 July 1996). [↑](#footnote-ref-50)
51. *The Queen v Wu Yau Man* (CACC 27/1996; unreported, 29 October 1996). [↑](#footnote-ref-51)
52. The *Queen v Lun Nai Kin* (CACC 652/1996; unreported, 18 April 1997). [↑](#footnote-ref-52)
53. The *Queen v Guo Jun* (CACC 366/1996; unreported, 30 January 1997). [↑](#footnote-ref-53)
54. *HKSAR v Leung Kwai Sing* (CACC 484/1999; unreported, 11 February 1999). [↑](#footnote-ref-54)
55. *HKSAR v Leung Kwai Sing*, page 2. [↑](#footnote-ref-55)
56. *HKSAR v Wong Ka Kuen* (CACC 35/1998; unreported, 28 January 1999). [↑](#footnote-ref-56)
57. *HKSAR v Yeung Kin Man* [2000] 2 HKLRD 821. [↑](#footnote-ref-57)
58. *HKSAR v Wong Ka Kuen*, page 2. [↑](#footnote-ref-58)
59. *HKSAR v Wong Ka Kuen*,page 9. [↑](#footnote-ref-59)
60. *HKSAR v Wong Ka Kuen*,page 9. [↑](#footnote-ref-60)
61. *HKSAR v Yeung Kin Man*, page 822 G. [↑](#footnote-ref-61)
62. *HKSAR v Yeung Kin Man*, page 923 D-E. [↑](#footnote-ref-62)
63. *HKSAR v Yeung Kin Man*, page 823 G-H. [↑](#footnote-ref-63)
64. *HKSAR v Chui Chi Chi & Another (No 2)* [2000] 1 HKLRD 704. [↑](#footnote-ref-64)
65. *HKSAR v Chui Chi Chi & Another (No 2)*, page 706 F-G. [↑](#footnote-ref-65)
66. *HKSAR v Chui Chi Chi & Another (No 2)*,page 707 E-G. [↑](#footnote-ref-66)
67. *HKSAR v Lee Man Ki* (CACC 66/2000; unreported, 18 April 2000). [↑](#footnote-ref-67)
68. *HKSAR v Lee Man Ki*, pages 2 and 3. [↑](#footnote-ref-68)
69. *HKSAR v Lo Chi Yip* [2000] 3 HKLRD 274 (21 July 2000). [↑](#footnote-ref-69)
70. *HKSAR v Lo Chi Yip*, page 275 H-J. [↑](#footnote-ref-70)
71. *HKSAR v Lo Chi Yip*, page 274 G-H. [↑](#footnote-ref-71)
72. *HKSAR v Lo Chi Yip*,page 275 E-F. [↑](#footnote-ref-72)
73. *HKSAR v Lo Chi Yip*,page 275 F-G. [↑](#footnote-ref-73)
74. *HKSAR v Lo Chi Yip*, page 275 G-H. [↑](#footnote-ref-74)
75. *HKSAR v Lo Chi Yip*, page 276 E-F. [↑](#footnote-ref-75)
76. *HKSAR v Lo Chi Yip*,page 277 A-D. [↑](#footnote-ref-76)
77. *HKSAR v Lo Chi Yip*,page 277 F-G. [↑](#footnote-ref-77)
78. *HKSAR v Lo Chi Yip*,page 276 F-H. [↑](#footnote-ref-78)
79. *HKSAR v Lee Kwok Chuen* (CACC 445/2000; unreported, 10 August 2001). [↑](#footnote-ref-79)
80. *HKSAR v Lee Kwok Chuen*, paragraph 11. [↑](#footnote-ref-80)
81. *HKSAR v Li Tak Yin* [2003] HKLRD 519 (6 February 2003). [↑](#footnote-ref-81)
82. *HKSAR v Li Tak Yin*;page 521 G-K, paragraph 7. [↑](#footnote-ref-82)
83. *HKSAR v Li Tak Yin*;page 522 E-G, paragraphs 12 and 13. [↑](#footnote-ref-83)
84. *HKSAR v Li Tak Yin*; page 523 A-D, paragraph 14. [↑](#footnote-ref-84)
85. *HKSAR v Ting Chiu & Another* [2003] 3 HKLRD 378 (14 August 2003). [↑](#footnote-ref-85)
86. *HKSAR v Ting Chiu & Another*; page 383 J, paragraph 17. [↑](#footnote-ref-86)
87. *HKSAR v Ting Chiu & Another*; page 384 C, paragraph 18. [↑](#footnote-ref-87)
88. *HKSAR v Ting Chiu & Another*; page 384 E-G, paragraphs 19-20. [↑](#footnote-ref-88)
89. *HKSAR v Ting Chiu & Another*; page 385 I-J, paragraph 23. [↑](#footnote-ref-89)
90. *HKSAR v Ting Chiu & Another*; page 386 A-C, paragraph 23. [↑](#footnote-ref-90)
91. *Yu Fai Tat v HKSAR* (2004) 7 HKCFAR 293. [↑](#footnote-ref-91)
92. *Yu Fai Tat v HKSAR*; page 297 G-J, paragraph 9. [↑](#footnote-ref-92)
93. *Secretary for Justice v Lee Chun Ho, Jeff* [2010] 1 HKLRD 84 (3 November 2009). [↑](#footnote-ref-93)
94. *Secretary for Justice v Lee Chun Ho, Jeff*; page 87, paragraph 9. [↑](#footnote-ref-94)
95. *Secretary for Justice v Lee Chun Ho, Jeff*; pages 90-1, paragraph 37. [↑](#footnote-ref-95)
96. *HKSAR v Chow Yuen Fai* [2010] 1 HKLRD 354 (8 December 2009). [↑](#footnote-ref-96)
97. *HKSAR v Chow Yuen Fai*: page 367, paragraphs 30-1. [↑](#footnote-ref-97)
98. *HKSAR v Wong Ying Ho* [1999] 4 HKC 825*.* [↑](#footnote-ref-98)
99. *HKSAR v Tsang Cho Kiu* (CACC 42/2014; unreported, 27 October 2014). [↑](#footnote-ref-99)
100. *HKSAR v Ma Ming* [2013] 1 HKLRD 813. [↑](#footnote-ref-100)
101. *HKSAR v Ma Ming*, paragraph 23. [↑](#footnote-ref-101)
102. *HKSAR v Ma Ming*, paragraphs 26 and 27. [↑](#footnote-ref-102)
103. ‘Reduction in Sentence for a Guilty Plea’ (Revised 2007), at paragraph 2.2. [↑](#footnote-ref-103)
104. *R v Caley* (2013) 2 Cr App R (S) 305. [↑](#footnote-ref-104)
105. *R v Caley*; page 310, paragraph 1. [↑](#footnote-ref-105)
106. *R v Caley*; page 311, paragraphs 5 and 6. [↑](#footnote-ref-106)
107. *R v Caley*; page 312, paragraph 9. [↑](#footnote-ref-107)
108. *R v Caley*; page 313, paragraph 14. [↑](#footnote-ref-108)
109. Draft Guideline ‘Reduction in Sentence for a Guilty Plea Guideline’ Consultation, page 5. [↑](#footnote-ref-109)
110. Draft Guideline ‘Reduction in Sentence for a Guilty Plea Guideline’ Consultation, page 7. [↑](#footnote-ref-110)
111. Draft Guideline ‘Reduction in Sentence for a Guilty Plea Guideline’ Consultation, page 41. [↑](#footnote-ref-111)
112. Draft Guideline ‘Reduction in Sentence for a Guilty Plea Guideline’ Consultation, page 41. [↑](#footnote-ref-112)
113. Draft Guideline ‘Reduction in Sentence for a Guilty Plea Guideline’ Consultation, page 41. [↑](#footnote-ref-113)
114. Draft Guideline ‘Reduction in Sentence for a Guilty Plea Guideline’ Consultation, page 40. [↑](#footnote-ref-114)
115. ‘Reduction in Sentence for a Guilty Plea’ - Definitive Guideline Revised 2007, paragraphs 5.3 and 5.4. [↑](#footnote-ref-115)
116. Draft Guideline ‘Reduction in Sentence for a Guilty Plea Guideline’ Consultation, page 40. [↑](#footnote-ref-116)
117. *Gemmell v HM Advocate* [2012] S.C.L. 385; SLT 484. [↑](#footnote-ref-117)
118. *Gemmell v HM Advocate*, paragraph 27. [↑](#footnote-ref-118)
119. *Gemmell v HM Advocate*, paragraph 33. [↑](#footnote-ref-119)
120. *Gemmell v HM Advocate*, paragraph 34. [↑](#footnote-ref-120)
121. *Gemmell v HM Advocate*, paragraphs 31-2. [↑](#footnote-ref-121)
122. *Gemmell v HM Advocate*, paragraph 78. [↑](#footnote-ref-122)
123. *Gemmell v HM Advocate*, paragraph 37. [↑](#footnote-ref-123)
124. *Gemmell v HM Advocate*, paragraph 38. [↑](#footnote-ref-124)
125. *Du Plooy v HM Advocate* [2003] S.L.T. 1237. [↑](#footnote-ref-125)
126. *Gemmell v HM Advocate*, paragraph 8. [↑](#footnote-ref-126)
127. *Gemmell v HM Advocate*, paragraph 8. [↑](#footnote-ref-127)
128. *Gemmell v HM Advocate*, paragraph 41. [↑](#footnote-ref-128)
129. *Gemmell v HM Advocate*, paragraph 42. [↑](#footnote-ref-129)
130. *Gemmell v HM Advocate*, paragraph 48. [↑](#footnote-ref-130)
131. *Gemmell v HM Advocate*, paragraph 149. [↑](#footnote-ref-131)
132. *Gemmell v HM Advocate*, paragraph 50. [↑](#footnote-ref-132)
133. *Gemmell v HM Advocate*, paragraph 51. [↑](#footnote-ref-133)
134. Gaudron, Gummow and Callinan JJ [↑](#footnote-ref-134)
135. *Cameron v The Queen (2002)* 209 CLR 339. [↑](#footnote-ref-135)
136. *Cameron v The Queen*, paragraph 11. [↑](#footnote-ref-136)
137. *Siganto v The Queen* (1998) 194 CLR 656 at 663-664 [22], per Gleeson CJ, Gummow, Hayne and Callinan JJ. [↑](#footnote-ref-137)
138. *Cameron v The Queen*, paragraphs 12-14. [↑](#footnote-ref-138)
139. *Siganto v The Queen* (1998) 194 CLR 656 at 663 [22], per Gleeson CJ, Gummow, Hayne and Callinan JJ. See also *R v Gray* [1977] VR 225 at 231. [↑](#footnote-ref-139)
140. *Cameron v The Queen*, paragraph 17. [↑](#footnote-ref-140)
141. *Cameron v The Queen*, paragraph 19. [↑](#footnote-ref-141)
142. *Cameron v The Queen*, paragraph 22. [↑](#footnote-ref-142)
143. *Cameron v The Queen*, paragraph 65(4). [↑](#footnote-ref-143)
144. *HKSAR v Abdallah Anwar Abbas* [2009] 2 HKC197, paragraph 14.

     “It has sometimes been said that a full discount of one-third is given in order to reflect a defendant’s ‘remorsefulness’. Perhaps these days this is more to be regarded as a convenient, if not antiquated, label to describe the attitude of someone who, by pleading guilty, not only shows some degree of remorse but also provides for himself powerful mitigation by reason of the saving of court time and public funds which would otherwise be expended on a trial and by obviating the need on the part of witnesses to testify which may often represent for them a considerable ordeal. *The combination of these reasons* will almost inevitably lead to the defendant being rewarded with a substantial discount, normally by a reduction of a third from the starting point, unless there is proper justification for departing from this practice.” [Italics added.] [↑](#footnote-ref-144)
145. *R v Lau Kin Hong* (HCMA 355/1996), paragraph 8. [↑](#footnote-ref-145)
146. *Cameron v The Queen*, paragraphs 22, 74 & 75. [↑](#footnote-ref-146)
147. *Gemmell v HM Advocate*, paragraphs 48 and 148. [↑](#footnote-ref-147)
148. *R v Caley*,paragraph 24. [↑](#footnote-ref-148)
149. *R v Wilson* [2012] 2 Cr. App. R.(S) 440. [↑](#footnote-ref-149)
150. *R v Wilson*, paragraph 29. [↑](#footnote-ref-150)
151. *R v Caley*; page 313, paragraph 14. [↑](#footnote-ref-151)
152. *R v Caley*; page 313, paragraph 14. [↑](#footnote-ref-152)
153. Section 80C(a) of the Magistrates Ordinance. [↑](#footnote-ref-153)
154. (1) The Secretary for Justice, if he sees fit to institute criminal proceedings, shall institute such proceedings in the [court](http://www.hklii.hk/eng/hk/legis/ord/221/s2.html#court) against the accused person as to him may seem legal and proper-

     (a) in the case of a committal for trial under [section 80C(4)](http://www.hklii.hk/eng/hk/legis/ord/227/s80c.html) of the [Magistrates Ordinance](http://www.hklii.hk/eng/hk/legis/ord/227) ([Cap 227](http://www.hklii.hk/eng/hk/legis/ord/227)), within 7 days of such committal; [↑](#footnote-ref-154)
155. [1991] 2 HKLR 125. [↑](#footnote-ref-155)
156. [2014] 3 HKLRD 691. [↑](#footnote-ref-156)
157. [2000] 3 HKLRD 274. [↑](#footnote-ref-157)
158. [2003] 1 HKLRD 519. [↑](#footnote-ref-158)