HKSAR

and

Abdallah

(Court of Appeal)

(Criminal Appeal No 304 of 2008)

Stuart-Moore V-P, Stock JA and McMahon J

16 December 2008, 6 February, 12 March 2009

Criminal sentencing — dangerous drugs — trafficking — guidelines — above 600 g of heroin and cocaine — tariffs laid down to supplement those in R v Lau Tak Ming — aggravating factors

判刑 — 危險藥物 — 販運 — 量刑指引 — 超過600克海洛英及可卡因 — 訂立刑期指引，以補充女皇訴劉德明一案的指引 — 加刑因素

D pleaded guilty to trafficking in a dangerous drug. He arrived in Hong Kong from Tehran *via* Doha, with 142 packets of a mixture containing 1,218.86 g of heroin concealed in his body. The estimated retail value was HK$960,984. D stated he was promised a US$7,000 reward for importing the heroin. The Judge adopted a 25-year starting point, reduced it by one-third for plea and sentenced D to 16 years and 8 months' imprisonment. D applied for leave to appeal against sentence.

Held, granting the application, treating the hearing as the appeal and dismissing the appeal, that:

(1) The guidelines in *R v Lau Tak Ming* applied to trafficking in heroin and cocaine of up to 600 g (*R v Lau Tak Ming* [1990] 2 HKLR 370 followed). (See para.4.)

(2) The time had come to modify the *R v Lau Tak Ming* guidelines for trafficking in amounts greater than 600 g of heroin or cocaine. Accordingly, the following, which did not take into account any aggravating circumstances and were subject to enhancement, were guideline starting points for traffickers *after trial* (*R v Lau Tak Ming* [1990] 2 HKLR 370 not followed; *HKSAR v Thattephin Tanyamon* [2008] 5 HKLRD 155 disapproved). (See paras.4, 9, 19–23, 40–41.):
   (a) 600 to 1,200 g — 20 to 23 years' imprisonment;
   (b) 1,200 to 4,000 g — 23 to 26 years' imprisonment;
   (c) 4,000 to 15,000 g — 26 to 30 years' imprisonment; and

(d) Over 15,000 g — at the sentencer's discretion.

(3) The presence of any aggravating factor called for the enhancement of the starting point, for example:

(a) An international element was involved (*HKSAR v Hong Chang Chi* [2002] 1 HKLRD 486 applied);

(b) The trafficker had previously been convicted of trafficking in dangerous drugs;

(c) The trafficker was shown to be a mastermind or senior player, such as a financier, in a syndicate; or

(d) The offender was shown to have engaged a young person to assist in the trafficking (*HKSAR v Lam Kam Kwong* [2002] 1 HKC 541 approved). (See paras.32, 35–39, 42.)

For amounts above 1 kg, the enhancement would not be less than 2 years' imprisonment in addition to the new guideline tariffs set out. (See para.43.)

(4) Given the grievousness of the offence, meaningful mitigation, apart from a plea of guilty, was rarely available. (See para.32.)

(5) The new guidelines did not have retrospective effect. But the sentence D would have received under the new guidelines would have been exactly the same as the one imposed by the Judge in accordance with modern authority. The starting point under the new guidelines would have been 23 years with enhancement by not less than 2 years to take into account the international element. (See para.44.)

Application for leave to appeal against sentence

This was an application for leave to appeal against sentence for trafficking in heroin imposed by Louis Tong J on 16 August 2007. The facts are set out in the judgment.

Mr Kevin Zervos SC, Deputy Director of Public Prosecutions and Ms Winsome Chan, Senior Public Prosecutor, for the Director of Public Prosecutions.

Mr Jackson Poon, instructed by the Director of Legal Aid, for the appellant.

Legislation mentioned in the judgment

Dangerous Drugs Ordinance (Cap.134) ss.4(1)(a), 4(3), 56A(1)(b)(ii), 56A(2)(d)

Cases cited in the judgment

Attorney General v Pedro Nel Rojas [1994] 2 HKCLR 69, [1994] 1 HKC 342

HKSAR v Badua (unrep., CACC 327/2006, [2007] HKLRD (Yrbk) 347, [2007] HKEC 414)

HKSAR v Chan Wan Cheung [2007] 4 HKLRD 606
HKSAR v Chow Tak Fuk (unrep., CACC 428/2004, [2005] HKEC 227)
HKSAR v Garcia Palacios Marco Antonio (unrep., CACC 154/2007, [2008] 2 HKLRD D5, [2008] HKEC 354)
HKSAR v Hong Chang Chi [2002] 1 HKLRD 486
HKSAR v Lam Kam Kwong [2002] 1 HKC 541
HKSAR v Lau Suk Han [1999] 3 HKC 513
HKSAR v Leang Sze Keong (unrep., CACC 566/1997, [1998] HKLRD (Yrbk) 255)
HKSAR v Lee Kwok Keung (unrep., CACC 5/1999, [1999] HKEC 802)
HKSAR v Ng Sai Ho (unrep., CACC 528/1997, [1998] HKLRD (Yrbk) 254)
HKSAR v Thattephin Tanyamon [2008] 5 HKLRD 155
HKSAR v Tse Sun Wong (unrep., CACC 188/2001, [2002] HKLRD (Yrbk) 324, [2001] HKEC 1482)
HKSAR v Wong Ping Kay (unrep., CACC 274/2007)
R v Ho Chi Ming [1995] 2 HKCLR 29
R v Lau Tak Ming [1990] 2 HKLR 370
R v Newton (Robert John) (1983) 77 Cr App R 13
R v Ng Muk Kam (unrep., CACC 685/1993, [1995] HKLY 428)

Other material mentioned in the judgment
Cross and Cheung, *Sentencing in Hong Kong* (5th ed., 2007) p.195

Stuart-Moore V-P

Background

1. On 16 August 2007, the appellant, aged 37, confirmed the plea of guilty he had entered in the Magistrates' Court when he appeared before Tong J on a charge of trafficking in a mixture containing 1,218.86 g of heroin hydrochloride, contrary to s.4(1)(a) and 4(3) of the Dangerous Drugs Ordinance (Cap.134). The Judge adopted a 25-year starting point and, having reduced this by a third to reflect the appellant's plea, he imposed a sentence of 16 years and 8 months' imprisonment.

2. The appellant applied for leave out of time to appeal against his sentence. His reason for doing so was expressed in a homemade ground in which he stated that he had since found out that his sentence was a "harsh punishment compared to other people who had [trafficked in a greater] quantity of drugs".

3. This application, which was duly supported by legal aid, involves an important issue of sentencing policy in major cases

involving trafficking in heroin. In the circumstances, therefore, leave is granted and we have treated the hearing as the appeal itself.

4. It hardly needs to be said that there is a general policy on the part of the courts to make every attempt to achieve parity in the treatment of prisoners serving sentences for comparable crimes. This policy applies as much to traffickers of drugs as it does to other offenders but it is apparent that, because of the disparity which has arisen in the sentencing of a number of traffickers to terms of more than 20 years' imprisonment for quantities in excess of 600 g of heroin (or cocaine), the time has now come to address this problem. In saying this, and for the avoidance of any doubt, we should add that the guidelines in *R v Lau Tak Ming* [1990] 2 HKLR 370 at p.387 for trafficking in quantities involving a narcotic weight of up to 600 g should continue to be applied.

5. The appellant's complaint in the instant case, that his sentence is out of line with the more lenient sentences imposed on a number of other traffickers in similar circumstances to his own, is to some extent supported by a recent decision of this court (differently constituted) in *HKSAR v Thattephin Tanyamon* [2008] 5 HKLRD 155 to which we shall turn in detail in due course. In that case, where the facts were similar to those in the instant appeal, the Court of Appeal reduced a starting point of 24 years to 21 years' imprisonment in respect of a trafficker who had imported a mixture containing heroin with a narcotic content weighing 1,345.33 g.

6. When the instant case first came before this Court on 16 December 2008, it was, in the light of the decision in *HKSAR v Thattephin Tanyamon* and because of some disparities in sentencing which have otherwise arisen, adjourned for consideration to be given to the appropriateness of sentencing guidelines to supplement those in *R v Lau Tak Ming* for trafficking in amounts of heroin (or cocaine) above 600 g. We are grateful to both counsel for their assistance in this regard. Mr Zervos SC, for the respondent, provided us with a detailed submission in which he advocated the promulgation of further guidelines and Mr Poon, for the appellant, did not seek in any way to dissuade us from taking such a course.

The facts

7. Turning now to the facts of this case, the appellant was intercepted after his arrival at Hong Kong International Airport. He was in possession of a Tanzanian passport and had travelled to Hong Kong from Tehran via Doha. His luggage revealed nothing of an incriminating nature but observation of the appellant's behaviour gave rise to suspicion. Later, an X-ray confirmed the presence of objects concealed in the appellant's body. He had, in fact, swallowed a total of 142 packets consisting of a mixture weighing 1,792.88 g.

The 1,218.86 g of heroin found to be contained in this mixture had an estimated retail value of $960,984.

8. In mitigation, aside from a number of family matters which were touched upon, it was stated that the appellant normally earned US$30 a month as a minibus driver and that he had succumbed to the promise of a reward of US$7,000 for bringing this quantity of heroin into Hong Kong. The Judge rightly indicated that he regarded the only mitigation which carried any weight to have been the appellant's guilty plea.

The Lau Tak Ming guidelines

9. The current sentencing guidelines for heroin traffickers in *R v Lau Tak Ming* have also been adopted for offences of trafficking in cocaine (see *Attorney General v Pedro Nel Rojas* [1994] 2 HKCLR 69) and all references to heroin trafficking in this judgment apply equally to cocaine traffickers. The suggested tariffs in *R v Lau Tak Ming* (at p.387) are as follows:

(a) up to 10 g of narcotic — 2 to 5 years' imprisonment;
(b) between 10 g and 50 g — 5 to 8 years;
(c) between 50 g and 200 g — 8 to 12 years;
(d) between 200 g and 400 g — 12 to 15 years;
(e) between 400 g and 600 g — 15 to 20 years.

10. The Court made no attempt to categorise what it called the "very large quantities" above 600 g in terms of the appropriate lengths of imprisonment to be served by such traffickers but merely stated that it considered "that there can be an upward increase in the 'cut-off sentence' [ie 20 years] bearing in mind that the maximum sentence provided for by the legislation is life [imprisonment]".

11. It may be that because of advances in technology in the years since 1990, when the guidelines in *R v Lau Tak Ming* were given, that arrests for quantities of heroin weighing more than 600 g have become more frequent. Whether or not that is so, we have been able to observe from the figures kept by the Customs and Excise Department which were produced for us by Senior Inspector Lau Wai Lung that, in recent years, seizures of heroin weighing more than 600 g are by no means infrequent.

The Court of Appeal's approach in HKSAR v Thattephin Tanyamon

12. The foundation for the present appeal arises from the decision, on 18 June 2008, in *HKSAR v Thattephin Tanyamon* (above), as

to which we have been supplied with an English translation of the judgment. As we have already indicated, the facts in that case were similar to those in instant case. Thattephin, a Thai national, was intercepted at the airport after her arrival in Hong Kong on a flight from Delhi and found to be in possession of 1,345.33 g of heroin hydrochloride. She then pleaded guilty in the Magistrates' Court although, in a later development with which we shall deal immediately, Thattephin sought to reverse her guilty plea when she appeared in the Court of First Instance for sentence. In due course, following several adjournments, this application was rejected. Deputy Judge M Poon, who ultimately dealt with Thattephin, took 24 years as the appropriate sentence after trial. The Deputy Judge then gave a discount of 25%, instead of the usual one-third, to reflect the fact that the appellant's plea was qualified by her later attempt to change her plea.

(i) Approach to loss of discount in HKSAR v Thattephin Tanyamon

13. As we shall have to deal at some length with the decision in *HKSAR v Thattephin Tanyamon*, it is convenient to deal with one aspect of that case before returning to the central issue in this appeal. We have noted the approach taken by the Court of Appeal towards the loss of discount resulting from the appellant's attempt to change her plea to one of "Not Guilty" when she first appeared in the Court of First Instance. The Court of Appeal agreed with the Judge's decision to reduce the appellant's discount because the appellant had "actually wasted time and manpower to process [her] application for reversal of plea". However, before coming to this conclusion, Cheung JA had stated (at para.12):

> 12. Generally speaking, if a defendant does not waste the court's time by simply pleading guilty, [he] can receive a one-third reduction in sentence. When a defendant pleads guilty, but disputes the facts, resulting in the court holding a hearing to investigate, and finally the court does not accept the defendant's version, then, the court can choose not to give him [a] full one-third discount and just give him [a] one-fourth discount. The reason being that the court requires time for the hearing and investigation. When courts decide whether to give a defendant the full one-third reduction, instead of considering the nature of the application put forward by the defendant (eg, disputing facts or application of withdrawing the previous guilty plea), should consider whether the defendant did or did not waste the court's time in processing his application.

14. Whilst, of course, the waste of time occasioned by unmeritorious disputes about the facts is part of the reason why a discount for a plea of guilty may be reduced from one-third to a lower level of discount (although not necessarily a quarter), it is not the only reason for so doing. 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.

15. One reason for giving a reduced sentence discount will arise when a defendant has tried to obtain a heavily discounted sentence on a false basis by confessing to a crime, but then trying to avoid the full consequences in a *Newton* hearing.

16. "Confess and avoid" is well illustrated in *HKSAR v Chan Wan Cheung* [2007] 4 HKLRD 606, where three men pleaded guilty to an attempt to rob the driver of a valuable load of electrical equipment. One of the gang (D2) pointed a loaded pistol at the driver and two other pistols were recovered from the getaway car driven by D1. For such offences, accompanied by the aggravating feature of the possession of firearms, condign punishment is usually to be expected. In that case, the Judge took a 15-year starting point for each defendant. However, it was suggested on behalf of D1 and D3 in the course of the *Newton* hearing which followed their guilty pleas, that they had no knowledge of the firearm in the possession of D2. If this suggestion had been accepted by the Judge, this would, in the case of those two robbers, effectively have reduced their culpability in the offence to taking part in an unarmed attempt to rob a van driver by physical force. As such the offence, highly organized though it was, would probably have carried for D1 and D3 no more than a 7-year starting point. Their story, however, was rejected and Bokhary J's decision to give a discount reduced from a third to about 13% to each of these robbers was upheld by this Court.

17. In short, therefore, the "time" factor, when either an unsuccessful application has been made by way of a challenge to the factual basis of the prosecution's case in a *Newton* hearing following a plea of guilty or when a defendant seeks to change his plea based upon a version of the facts which is rejected, is not the

only point at issue. Importantly, in cases such as *HKSAR v Chan Wan Cheung* (above), an attempt will have been made to obtain a massive reduction in sentence by putting forward mitigation which is wholly false. In any such case, a defendant has given up the right to be treated as someone who has owned up and taken full responsibility for his crime. He has taken only limited responsibility and should be sentenced with a suitably reduced discount, having made a failed attempt to mislead the court into giving him a lenient sentence on a false premise. Similarly, where a defendant has pleaded guilty but then seeks to persuade the court that it ought to allow the plea to be reversed, and the grounds put forward for allowing a reversal of plea are rejected, the "time" factor involved in hearing the application is only one of the circumstances to be considered.

(ii) Approach to disparity in HKSAR v Thattephin Tanyamon

18. Returning now to the appellant's complaint that his sentence exceeded the sentences imposed on others for similar offences, the issue of disparity in the treatment of heroin and cocaine traffickers for quantities above 600 g was a matter that also concerned the Court of Appeal in *HKSAR v Thattephin Tanyamon*. In this regard, the parties presented to that Court a number of cases relating to trafficking in large amounts of drugs. The total number of cases examined by the Court on that occasion was 13. However, given the suggestion by the respondent in the instant case that some disparity in sentencing continues and that there is an element in the 13 cases examined by the Court in *HKSAR v Thattephin Tanyamon* which may not have been brought to its attention, and given, furthermore, the invitation that this Court should, by the mechanism of the present appeal, seek to resolve these disparities, a very comprehensive exercise in research has been carried out by counsel for the respondent. In the result, we have been presented with over 50 previous decisions concerning major trafficking in heroin or cocaine. What in particular has been highlighted in the presentation to us is the distinction that has consistently been drawn between, on the one hand, cases involving an international drug element and those that might, on the other hand, be described as "local" trafficking cases in the sense that there was no direct evidence linking them to the importation or exportation of heroin or cocaine. This distinction was not highlighted in respect of the 13 cases examined by the Court in *HKSAR v Thattephin Tanyamon*.

19. In *HKSAR v Thattephin Tanyamon*, Deputy Judge M Poon had taken a 24-year starting point which the Court considered to be manifestly excessive and reduced to 21 years' imprisonment. The judgment of Cheung JA (in the English translation) states as follows:

Sentence for "[huge] amount" of drugs

7. According to *R v Lau Tak Ming* [1990] 2 HKLR 370, trafficking 400 to 600 g of heroin hydrochloride should result in a starting point of 15 to 20 years' imprisonment, whereas for more than 600 g of heroin, which falls within the "[huge] amount" category, should result in upward adjustment of the 20 years' imprisonment sentence. Even though *R v Lau Tak Ming* has not given a firm guideline for drugs of more than 600 g, the Court has ruled that the upward adjustment should not be mathematically proportional to the increase in quantity.

8. In this case, both the applicant and the respondent have submitted a number of cases in relation [to] trafficking in huge amount of drugs. The Court also listed out a number of cases involving huge amount of drugs in *HKSAR v Wong Ping Kay* (CACC 274/2007). The following are those cases:

		Nature of Drugs	Amount	Starting Point
1.	HKSAR v Leang Sze Keong (CACC 566/1997)	Heroin Hydrochloride	889 g	25 years
2.	HKSAR v Yau Po Hung (CACC 245/1998)	Heroin Hydrochloride	3,058.25 g	24 years
3.	HKSAR v Lau Ka Wing (CACC 120/1999)	Heroin Hydrochloride	5,825.57 g	24 years
4.	HKSAR v Li Lap To (CACC 639/1999)	Heroin Hydrochloride	> 5,000 g	24 years
5.	HKSAR v Shek Chi Chiu (CACC 217/2000)	(a) Heroin Hydrochloride	2,108.43 g	25 years
		(b) Heroin Hydrochloride	625.43 g	21 years
6.	HKSAR v Ban Ping Yu (CACC 102/2000)	Heroin Hydrochloride	2,298.09 g	24 years
7.	HKSAR v Chiu Ho Chung [2001] 1 HKLRD 697	Heroin Hydrochloride	4,938.95 g	25 years
8.	HKSAR v Hong Chang Chi [2002] 1 HKLRD 486	Cocaine*	3,000 g	27 years
9.	HKSAR v Lam Kam Kwong [2002] 1 HKC 541	Heroin Hydrochloride	1,477.33 g	24 years

* Sentences for trafficking cocaine and heroin are the same.

		Nature of Drugs	Amount	Starting Point
10.	HKSAR v Jocelyn Sanchez Badua (CACC 327/2006)	(D1) Heroin Hydrochloride	1,800 g	21 years
		(D2) Heroin Hydrochloride	1,710 g	21 years
11.	HKSAR v Fang Hui Ping (CACC 473/2006)	Heroin Hydrochloride	2,230 g	25 years
12.	HKSAR v Garcia Palacios Marco Antorno (CACC 154/2007)	Cocaine	857.37 g	22 years
13.	HKSAR v Wong Ping Kay (CACC 274/2007)	Cocaine	810.77 g	22 years

9. By looking at the sentence of the above cases, even though the starting points of 24 to 25 years of imprisonment were adopted for two cases involving drugs of 1,500 g or less, in general, the court would only adopt 24 years or more as the starting point in cases involving more than 2,000 g of drugs. The final sentence for each case was decided with regard to the facts of that case.
10. In the case of *R v Lau Tak Ming*, this Court stated that 20 years' imprisonment is an extremely heavy punishment. This shows that the court should not, in sentencing cases of over 600 g of drugs, adjust the sentence upwards [mathematically] proportional to the increase in quantity. After considering the quantity of drugs in this case, this Court is of the view that the starting point of 24 years' imprisonment in this case is manifestly excessive.
11. This Court [does] not have evidence to show that the applicant was the main instigator of the drug trafficking or was a repeat offender. This Court is of the view that the appropriate starting point is 21 years' imprisonment.

20. Plainly, a concern of the Court in *HKSAR v Thattephin Tanyamon* was that if 24 to 25 years could be taken as a starting point for heroin (or cocaine) weighing less than 2 kg, there would be little flexibility to allow for lengthier sentences in cases where even larger quantities were involved. We share this concern and will later return to it. However, what does not emerge from that judgment is that, on the schedule, cases (1), (6), (8), (10), (11), (12) and (13) all concerned international drug couriers. The remainder were "local" trafficking cases with no proven international element.

21. It has long been accepted that the international element in trafficking, whether by importation or by exportation, is to be regarded as a factor in material aggravation of the offence for sentencing purposes, whereas "local" offences, confined to trafficking in Hong Kong, will usually result in lower starting points for about the same quantity of heroin or cocaine. As a result, therefore, it is not surprising to find that generally, although not always, a starting point of either 24 or 25 years, to which the court in the scheduled cases (and in para.9 of its judgment) in *HKSAR v Thattephin Tanyamon* case was referring, was applied in cases of trafficking with an international element.

22. It is helpful, we consider, to go back further in time than the cases mentioned in the schedule in *HKSAR v Thattephin Tanyamon*. One case of importance, which does not appear to have been drawn to that Court's attention, is *R v Ho Chi Ming* [1995] 2 HKCLR 29 in which, incidentally, the Court of Appeal was dealing with a quantity of heroin close to the amount in the present case and in *HKSAR v Thattephin Tanyamon*. That case involved the trafficking of 1,213 g of salts of esters of morphine (heroin) at Kai Tak Airport which the applicant was intending to take with him on a flight to Taiwan. The argument centred on whether a 25-year starting point was appropriate. Litton V-P, giving the judgment of the Court, said (at p.31):

> Counsel has also drawn our attention to the judgment of this Court in *R v Lau Yau Yuen* [1991] 2 HKLR 278 which concerned a person who played a leading role in an international conspiracy to import a huge quantity of heroin into Australia. The starting point adopted by the trial judge in that case was 25 years' imprisonment. At p.284H Clough JA made the observation that that starting point was, "whilst undoubtedly high, appropriate having regard to the circumstances of the particular case". Counsel asks us to consider the disparity in the criminality between the case of *Lau Yau Yuen* and the facts of the present case. In our judgment a comparison of that kind is inappropriate. Courts are entitled to apply experience in sentencing and it is clear that attitudes have hardened in the courts since the case of *Lau Yau Yuen* decided over four years ago.
>
> A sentencing judge is perfectly entitled to have regard to the fact that deterrence is necessary in order to abate the incidence of serious crime. There is no doubt that the present case is serious. In our judgment there is nothing wrong in principle in adopting, as the Judge did, a starting point of 25 years' imprisonment.

23. As might well be expected following the decision in *R v Ho Chi Ming*, although no general guidance had been provided to sentencers for future cases of that kind, the endorsement of the Court of Appeal of a starting point in the region of 24 or 25 years

after trial for offences of trafficking in more than a kilogramme, where an international element was involved, thereafter tended to provide a sentencing benchmark in such cases.

24. In the event, we are bound respectfully to suggest that had the Court in *HKSAR v Thattephin Tanyamon* had the advantage of the very extensive research placed before us and of the decision in *R v Ho Chi Ming*, the result may have been different but, in any event, if Thattephin Tanyamon was the beneficiary of a sentence which was light, that cannot avail this appellant if his sentence was a proper one in all the circumstances. This accords with well-established principle.

25. Sentence disparity is given careful attention in *Sentencing in Hong Kong* (5th ed., 2007) p.195 where, in the opening paragraph, the learned authors have concisely paraphrased the kind of anxiety likely to be experienced by an offender when there has been a sentencing decision which seems to favour one defendant over others in a similar position to himself. This passage reads:

> The fair and consistent application of criminal sanctions promotes confidence in the justice system as a whole. The policy of the courts is to seek to administer punishments which are aligned to offenders whose culpability is broadly the same or similar. Quite apart from the issue of public expectation, the offenders themselves will be perplexed if they are not treated equally, at least in the absence of good reason.

Later (at p.200), there is a citation taken from Stock JA's judgment in *HKSAR v Chow Tak Fuk* (unrep., CACC 428/2004, [2005] HKEC 227), which reads:

> It seems to us that the applicant's brother was the beneficiary of an extraordinarily light sentence and what this applicant now seeks is the benefit of the same windfall. According to established principle, he is not entitled to that windfall.

This, of course, remains the principle to be applied and, we should add, once it is appreciated that a single decision, whether by the Court of Appeal or the Court of First Instance, is out of line with proper authority, any justification there might have been for a prisoner to harbour a genuine grievance at not being the beneficiary of a similar decision in his favour will be lost.

The judgments scheduled in HKSAR v Thattephin Tanyamon

26. A general pattern is discernible from the thirteen examples chosen for the schedule in *HKSAR v Thattephin Tanyamon* (para.19 above) amongst the cases which involved an international element where the quantities being trafficked were below 6 kg but above 1

kg. With the exception of case (10) *HKSAR v Badua* (unrep., CACC 327/2006, [2007] HKLRD (Yrbk) 347, [2007] HKEC 414), where the Judge in the Court of First Instance adopted a 21-year starting point, all of the other trafficking cases with an international element carried a comparatively high starting point when set alongside all but one of the "local" trafficking cases involving about the same quantity of heroin. The "local" example providing the exception is case (9) *HKSAR v Lam Kam Kwong* [2002] 1 HKC 541, which requires specific comment later on.

27. We need to go into a little detail to illustrate the point, aside from our earlier comments in regard to *R v Ho Chi Ming* , that international couriers have almost always been given longer prison terms than couriers in similar quantities whose offences have not involved an established international element.

28. In case (8), *HKSAR v Hong Chang Chi* [2002] 1 HKLRD 486, which involved just over 3 kg of cocaine brought into Hong Kong through the airport at Chek Lap Kok from Peru via Tokyo, a starting point of 27 years was adopted by the sentencing Judge. Counsel of considerable seniority accepted that there were "no arguable grounds of appeal against the sentence imposed", a view with which the Court of Appeal agreed having observed that the quantity of cocaine involved was approximately three times the amount of drugs with which the Court had been concerned in *R v Ho Chi Ming*. The Court described this starting point as "on the high side" but did not interfere.

29. There is a noticeable difference between the 25-year starting point which was upheld in *HKSAR v Leang Sze Keong* (unrep., CACC 566/1997, [1998] HKLRD (Yrbk) 255) (case (1) on the schedule) and the starting point taken by this Court in the more recent decision in *HKSAR v Garcia Palacios Marco Antonio* (unrep., CACC 154/2007, [2008] 2 HKLRD D5, [2008] HKEC 354) (case (12) on the schedule) where a starting point of 22 years was substituted for the 25-year starting point taken by the sentencing Judge. In the latter case, Yeung JA made reference (at para.12) to the respondent's argument that a foreign element was an aggravating factor, giving as an example how, in *HKSAR v Tse Sun Wong* (unrep., CACC 188/2001, [2002] HKLRD (Yrbk) 324, [2001] HKEC 1482), involving 985 g of heroin hydrochloride, the starting point of 25 years was reduced to 22 years precisely because there had been no evidence of a foreign element or manufacturing. In the judgment in *HKSAR v Garcia Palacios Marco Antonio* (at para.21), this Court once again accepted that a foreign element in trafficking was an aggravating factor but it felt that, for this quantity of cocaine (857.37 g), a 22-year starting point was adequate to reflect the gravity of the offence "even taking into consideration the aggravating feature of the 'foreign element'".

30. Dealing with the international element in the trafficking of dangerous drugs, which will include trafficking across the border with the Mainland, we digress to add that in *HKSAR v Hong Chang Chi*, this Court said:

> 22. When it comes to importing drugs from other jurisdictions into Hong Kong, the public interest demands that the message should be made more clearly than in almost any other situation. Drug traffickers from abroad, importing drugs into Hong Kong, should plainly understand that they will receive no sympathetic consideration whatsoever on account of their status as foreigners or, as in this case, on account of their incarceration some distance from home. On the contrary, in cases of this kind, the very act of importation from abroad, is an aggravating factor. Those who live outside this jurisdiction, such as the applicant in the present case, must be disabused of any notion that Hong Kong is anything other than resolute in dealing with such offences.

31. That the international element in trafficking constitutes an aggravating feature was a fact expressly articulated as long ago as in *R v Lau Tak Ming* and almost certainly before then. There is a comment in *HKSAR v Wong Ping Kay* (unrep., CACC 274/2007) (case (13) in the *HKSAR v Thattephin Tanyamon* schedule) which, we understand, has been used, or is at risk of being used, to suggest otherwise. That was a case in which the defendant had to be sentenced for the importation of just over 810 g of cocaine and the Court said:

> 13. As far as the offence of trafficking in a dangerous drug is concerned, the starting point is determined mainly by reference to the quantity of the drug in question. Other aggravating or mitigating factors, though not entirely irrelevant, should not be accorded significant weight in the sentencing process. As the courts have repeatedly emphasized, drug trafficking is a serious offence which causes grave social harm and, as such, calls for deterrent sentences. Those who are minded to commit the heinous offence of drug trafficking should be made aware of the consequences they will inevitably face once they are caught, so that they will not bet on their luck. For this reason, the sentencing guidelines laid down by the Court of Appeal for this type of offences should be followed as closely as possible and should not be departed from due to particular aggravating or mitigating factors.

32. We are satisfied that the Court in *HKSAR v Wong Ping Kay* did not intend to depart from the well-recognized approach to sentencing traffickers where there are aggravating circumstances and was no doubt seeking to do no more than to emphasize that the seriousness of drug trafficking was such that there is likely to be available less effective mitigation than in other categories of offence. There are a number of factors that must go in aggravation of this offence including, but not limited to, the international element, the organising role played by the offender, the use by the offender of the young or otherwise vulnerable, and the fact that the trafficker has engaged in trafficking on a previous occasion. As for mitigation, the grievousness of the offence — a description that is born of the recognition of the dreadful misery caused to victims and their families and the serious harm to society generally — dictates that meaningful mitigation, apart from the plea of guilty, is rarely available. The message must consistently be delivered, even to the vulnerable such as the relatively young and those who say they need money whether for themselves or for the benefit of family members who are ill, that the vast majority of vulnerable people do not succumb to pressure and do not resolve their problems by engaging in this illicit and dreadful trade.

33. In this regard, it is worthwhile remembering the way Silke V-P expressed some of the considerations to be kept in mind when sentencing heroin traffickers from amongst his concluding remarks in *R v Lau Tak Ming* (at p.386):

> Within the suggested bands factors which the sentencing judge may properly take into account are: the profit which, because of adulteration, the place of ultimate sale, or otherwise, may reasonably be expected to be derived from trafficking in the quantities of dangerous drugs involved; the number of packets; the type of mixture containing the narcotic; the degree of involvement of the offender; his previous history of narcotic offences and matters of mitigation which may be advanced on his behalf. It must be borne in mind that these are offences of the utmost gravity which may well result in mitigating factors which, for less serious offences could lead to a discount, having little weight.

34. We should deal with one other case amongst those appearing in the schedule in *HKSAR v Thattephin Tanyamon*. It is case (9), *HKSAR v Lam Kam Kwong* [2002] 1 HKC 541, where, in a decision at first instance, the Judge took a starting point of 24 years' imprisonment as being appropriate for trafficking in 1,477.33 g of heroin hydrochloride. In making this finding, the Judge relied not only on *R v Ho Chi Ming* (above) and *HKSAR v Lau Suk Han* [1999] 3 HKC 513, which involved an international element, but also *HKSAR v Ng Sai Ho* (unrep., CACC 528/1997, [1998]

HKLRD (Yrbk) 254), and *HKSAR v Lee Kwok Keung* (unrep., CACC 5/1999, [1999] HKEC 802) which were purely related to local trafficking. No criticism in these circumstances attaches to the Judge but it is to be noted that the case with which he was dealing had no "international" element.

35. *R v Lau Tak Ming* was decided almost 19 years ago and, with the passage of time, with the advent of a steady number of cases of trafficking in very substantial quantities of drugs, and with an increasing danger of disparity in sentencing for large quantities, disparity of a kind that is understandably causing grievance amongst those sentenced, a need has been demonstrated to rationalize the sentences for those who have trafficked in large quantities of heroin, taking into account whether there has or has not been an international element and, equally importantly, whether other aggravating factors are present (such as those itemized at para.42 below). In this regard, it is necessary to address the extent to which aggravating circumstances should lead to enhanced sentences in order to reflect the general policy of the courts to impose greater sentences on those who import or export heroin or cocaine and on those, to take two other examples, who have trafficked in dangerous drugs on a previous occasion or who have played an organizing role in such activities above the level of mere couriers and storekeepers.

36. In a submission with which we agree, Mr Zervos stated that it was important, at this level of trafficking, that there should be a meaningful distinction between traffickers who deal in 600 g of heroin and those who are caught trafficking in twice that quantity. Equally, a distinction needs to be drawn between those whose offences are aggravated for the purposes of sentence by other factors which call for an enhancement of sentence and those who have no aggravating circumstances to be taken into account against them.

37. An important consideration in our thinking has been that the courts should have sufficient flexibility to deal with cases where even larger quantities of heroin are trafficked than that in the present case. The maximum sentence available to the courts is life imprisonment and in *R v Ng Muk Kam* (unrep., CACC 685/1993, [1995] HKLY 428), which involved trafficking in over 306 kg of heroin in Hong Kong without a proven international element, this Court quashed a sentence of life imprisonment and substituted a 35-year sentence after trial.

38. We have in mind, therefore, not merely as a theoretical possibility but as a matter of practical reality, that room must be left for heroin trafficking sentences which fall into the highest range. Furthermore, the courts need to take into account not only the actual quantities involved but also such aggravating circumstances as may add to the sentence which would otherwise be imposed.

39. It is additionally to be noted, in relation to the existence of aggravating circumstances, that s.56A(2)(d) of the Dangerous Drugs Ordinance makes specific provision, amongst other things, for the sentencing of offenders who "intentionally or unintentionally" employ, hire, use, persuade, entice or coerce "a minor in the commission of the offence or the avoidance of detection or apprehension of such an offence". In such circumstances, pursuant to s.56A(1)(b)(ii) "the court may, if it thinks fit, pass a sentence on the person for that offence that is more severe than the sentence it would, in the absence of such information, have passed."

Guidelines to supplement to R v Lau Tak Ming

40. We consider, for the reasons we have given, that this is an appropriate time to issue further guidelines to supplement those in *R v Lau Tak Ming*. The sentencing guidelines for up to and including 600 g of heroin after trial, as set out in *R v Lau Tak Ming*, will remain in place but as these do not provide sentencing guidance for heroin traffickers in amounts above 600 g, we propose to extend the guidelines to cover the most serious trafficking offences of this kind. These guidelines do not take into account any aggravating circumstances which may also be involved.

41. The guideline starting points for traffickers *after trial*, subject to enhancement, will be as follows:

(i) 600 to 1,200 g — 20 to 23 years' imprisonment;
(ii) 1,200 to 4,000 g — 23 to 26 years' imprisonment;
(iii) 4,000 to 15,000 g — 26 to 30 years' imprisonment;
(iv) Over 15,000 g — At the sentencer's discretion.

42. It will be an aggravating factor calling for the enhancement of the starting point where, for example:

(1) An international element is involved;
(2) The trafficker has previously been convicted of trafficking in dangerous drugs;
(3) The trafficker is shown to be a mastermind or senior player, such as a financier, in a syndicate; or
(4) The offender is shown to have engaged a young person to assist in the trafficking.

43. We do not envisage that the enhancement, for any of the reasons we have itemised, for amounts above 1 kg will be less than 2 years' imprisonment in addition to the new guideline tariffs we have set out.

Conclusion

44. The new guidelines cannot have retrospective effect, but it is immediately apparent that the sentence the appellant would have received under them would have been exactly the same as he received from Tong J. The starting point under these guidelines would have been 23 years' imprisonment with enhancement by not less than two years to take into account the international element. It is apparent, also, that the sentence imposed by Tong J accorded with all modern authority which has addressed a quantity of drugs similar to that involved in this case as well as the aggravating feature of an "international" element in the commission of the offence.

45. We have, therefore, concluded that the appellant's sentence was not manifestly excessive and, accordingly, his appeal is dismissed.

Reported by Shin Su Wen