CACC 143/2016

[2018] HKCA 602

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF APPEAL**

CRIMINAL APPEAL NO 143 OF 2016

(ON APPEAL FROM HCCC 392 OF 2015)

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BETWEEN

HKSAR Respondent

and

KILIMA Abubakar Abbas Applicant

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Before: Hon Lunn VP, Macrae VP and McWalters JA in Court

Dates of Hearing: 20 December 2016, 5 May 2017, 9, 14 and 20 March 2018

Date of Judgment: 18 September 2018

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J u d g m e n t

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Hon Lunn VP:

1. The applicant seeks leave to appeal against the sentence of 13 years and 8 months’ imprisonment imposed on him by Li J (“the judge”) on 21 March 2016 for an offence of unlawfully trafficking in dangerous drugs, namely 718 grammes of cocaine on 7 March 2015 at Hong Kong International Airport. Having pleaded guilty to that offence at the Eastern magistracy, the applicant was committed to the Court of First Instance for sentence on 25 September 2015.
2. At the very outset of his observations in sentencing the applicant, the judge said that he did so on the basis that the applicant had pleaded guilty to trafficking unlawfully in 780 grammes of cocaine. Obviously, that statement was incorrect, but neither counsel then representing the prosecution or the applicant at trial pointed out that error to the judge then or before he imposed sentence. Having said that he had regard to the guidelines for sentence articulated in the judgment of this court in *HKSAR v Abdallah*[[1]](#footnote-1), the judge stipulated a starting point for sentence of 21 years’ imprisonment, which he said he enhanced by one year’s imprisonment to reflect the “international element” in the commission of the offence. Then, the judge said that he deducted 7 years and 4 months’ imprisonment from that overall starting point for sentence to reflect “his plea”. That was a discount of one‑third from the enhanced starting point for sentence.
3. In sentencing the applicant, the judge adverted to submissions made in mitigation by counsel for the applicant and to statements in support of that mitigation made by Father John Wotherspoon:

“Counsel informed this Court that the defendant participated actively in a campaign in prison. He wrote letters explaining his situation to people in Africa. He also had constant contact with a social worker from Tanzania who helped to spread his warning message to others. Some of these letters were posted on the internet by Father John who set up a website to combat trafficking in dangerous drugs in Africa.

Father John informed this Court that his campaign had been a success: the number of traffickers from Africa arrested in Hong Kong had decreased substantially in the last 12 months. I thank Father John for explaining the details of his programme to me in court.”

1. Finally, the judge said:

“The defendant had offered to assist but the information he supplied was already known to the Customs and Excise Department. Nevertheless, I would still give him some discount. I would also give him some discount for his active role in Father John’s programme. In view of these factors, I would give him an additional 1 year reduction.”

1. The judge’s statement that the information the applicant had supplied to the authorities was already known to them was no doubt made on the basis of the applicant’s counsel submissions in mitigation to that effect.[[2]](#footnote-2) However, as is noted subsequently, that was incorrect.
2. It is to be noted that the judge did not distinguish in any way the discount afforded to the applicant for the provision of information or that afforded to the applicant for his active role in Father Wotherspoon’s programme. In the result, as noted earlier, the judge sentenced the applicant to 13 years and 8 months’ imprisonment.
3. The applicant gave notice of his application for leave to appeal against sentence out of time by filing Form XI with the court on 19 May 2016. In an accompanying affirmation, he said that at his request, made in a letter dated 8 April 2016, by letter dated 19 April 2016 the clerk to Li J had provided him with a copy of the reasons for sentence. Having noted the mistake made by the judge as to the quantity of cocaine in which he admitted that he had trafficked unlawfully, in a letter dated 26 April 2016 he wrote to the court asking that the mistake be rectified. He explained that he had been advised in a letter from the court, dated 3 May 2016, to file a notice of appeal against sentence and had done so on 19 May 2016. However, by that date he was out of time in giving notice, so that he applied for an extension of time to do so. The respondent did not oppose the application, which we grant.
4. The applicant was granted legal aid on 5 July 2016. On 2 September 2016, Perfected Grounds of Appeal against Sentence, settled by Mr Trevor Beel, which advanced a single ground of appeal only, were filed with the court. By ground 1, it was submitted that the judge had erred in sentencing the applicant on the basis that he had trafficked unlawfully in 780 grammes rather than 718 grammes of cocaine. The hearing on 20 December 2016 was adjourned to enable the applicant to file an affirmation in support of his application. The hearing of 5 May 2017 was adjourned to enable both the applicant and the respondent to file further affirmations. In the result, three affidavits made by Father Wotherspoon were filed with the court, on behalf of the applicant on 2 February and 15 August 2017 and 16 April 2018. In part, they spoke to the applicant’s contribution to Father Wotherspoon’s programme to discourage potential drug traffickers in Tanzania from doing so into Hong Kong.
5. Four affirmations were filed on behalf of the respondent, three made by Customs Inspector Lam Lok Sze and one by Woman Police Inspector Chan Yi Ting. In large part, they addressed the enquiries that had been made by the authorities in relation to information provided to them by the applicant.
6. In the afternoon of the hearing of 9 March 2018, the court acceded to an application made by Mr Andrew Bruce SC, on behalf of the applicant, to file Amended Perfected Grounds of Appeal against Sentence, by which grounds 2 to 4 were added to the existing grounds of appeal. As a result, the hearing was adjourned yet again.
7. By grounds 2 and 3 of the Amended Perfected Grounds of Appeal against Sentence, which are set out *in extenso* in the judgment of McWalters JA, Mr Bruce SC submitted that the sentence of imprisonment imposed on the applicant “was wrong in principle because it ought to have been reduced by reason of his role in the offence as a courier”, which was a matter of “substantial mitigation”. Mr Bruce contended that the judge ought to have taken into account in respect of the applicant that: his function was limited and he acted under direction; he performed his role as a result of economic coercion and exploitation; and he had no influence on those above him.
8. Further, Mr Bruce contended that the judgment of this court in *HKSAR v Leung Kwai Ping & Another (No 2)*[[3]](#footnote-3) was wrongly decided or ought not to be followed in light of developments in sentencing law and practice in respect of serious dangerous drug offences in other common law jurisdictions, namely England and Wales and Australia.
9. The only written submission advanced by Mr Bruce in support of those grounds of appeal was that:

“This Court is also respectfully invited and urged to consider as to whether now is the appropriate time to sentence drug trafficking on a proportionality basis adopted in England and Australia.”

1. In his oral submissions, Mr Bruce invited this court to note that in England and Wales, the Sentencing Guidelines Council, acting pursuant to powers granted to it pursuant to the Criminal Justice Act 2003 and section 120 of the Coroners and Justice Act 2009, had issued guidelines for sentencing for “Drug Offences”, which the courts were required to follow “unless the court is satisfied that it would be contrary to the interests of justice to do so.” [[4]](#footnote-4) It is to be noted that the sentencing judge is required to take a stepped approach to sentencing in which he is to “…determine the offender’s culpability (role) and the harm caused (quantity) with reference to the tables below.” The “category of harm” is determined by a combination of the weight and nature of the drug. In determining the offender’s culpability, the judge is required to determine, by reference to a non‑exclusive list of identified characteristics that may demonstrate the offender’s role, which of three roles the applicant performed, namely: Leading role; Significant role; and Lesser role. Quite clearly, the characteristics in the particulars identified by Mr Bruce in his grounds of appeal said to be applicable to the applicant are taken from the characteristics attributed to a person performing the ‘Lesser role’.
2. As an illustration of the operation of the guidelines, it is to be noted that for the offence of importing[[5]](#footnote-5) a Class A dangerous drug, eg cocaine, heroin and Ice, where the category of harm is Category 1,[[6]](#footnote-6) the starting point for sentence having regard to the role of the defendant, namely Leading, Significant and Lesser is 14, 10 and 8 years’ custody respectively, whereas the “category range”, in which sentence may be adjusted to reflect the aggravating or mitigating factors, is custody of 12 to 16 years, 9 to 12 years and 6 to 9 years respectively. On the other hand, it is to be noted that it is also provided that “Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.” [[7]](#footnote-7)
3. Although Mr Bruce also invited the court to have regard to the approach taken in the various Australian states, he did not refer the court to the judgment of any court nor did he identify any relevant Federal statutory provisions or any of the statutory provisions of any of the various states of the Commonwealth of Australia. Further, the extracts of the textbook to which he referred the court, namely “Australian Sentencing” by Bagaric & Edney, was dated November 2011 and bore the caveat “Sample pages from uncorrected proof edition. ‘JUDICIAL REASONING IN SENTENCING’ and ‘LARGE SCALE DRUG OFFENCES’.”
4. In addition, Mr Bruce referred the court to a publication of the Sentencing Advisory Council of the state of Victoria entitled “Major Drug Offences Current Sentencing Practices” published in March 2015. The document stated:

“The Sentencing Advisory Council is an independent statutory body established in 2004 under amendments to the Sentencing Act 1991. The functions of the Council are to:

* provide statistical information on sentencing, including information on current sentencing practices
* conduct research and disseminate information on sentencing matters
* gauge public opinion on sentencing
* consult on sentencing matters
* advise the Attorney General on sentencing issues
* provide the Court of Appeal with Council’s written views on the giving, or review of a guideline judgement.”

1. Clearly, it appears that the Victorian Sentencing Advisory Council performs a quite different role from the Sentencing Guidelines Council in England and Wales. Again, the court was not referred to any relevant judgment of the Court of Appeal of Victoria.
2. For the respondent, Ms Anna Lai SC opposed the submissions advanced by Mr Bruce. She submitted that it was well‑established by a long line of authorities that the guideline tariff laid down in *The Queen v Lau Tak Ming*[[8]](#footnote-8) were set for a defendant at the lowest level of culpability. The role of such a defendant neither reduces the starting point nor constitutes a mitigating factor. She submitted that sentencing guidelines, once in place, ought not to be altered lightly. Accordingly, the onus was on the applicant to demonstrate that it was appropriate to change well‑established guidelines.
3. Of Mr Bruce’s invitation to the court to have regard to the regime established in England and Wales by the Sentencing Guideline Council, Ms Lai invited the court to note that in England and Wales there existed a different statutory framework from Hong Kong and that no information had been put before the court of the consultations that had led to the articulation of those guidelines. Further, there was no evidence as to how effective that regime was in combating drug trafficking.
4. Having noted that, in not having the death penalty as a sentence for unlawfully trafficking in dangerous drugs, the sentencing regime in Hong Kong was already less harsh than in other Southeast Asian countries, Ms Lai expressed the concern that if the sentences of imprisonment imposed on couriers were to be reduced there was the risk of Hong Kong “becoming a haven for drug traffickers.”
5. In May 1990, in its judgment in *The* *Queen v Lau Tak Ming* this Court reconsidered the general tariffs applicable on conviction for the offence of possession of heroin for the purpose of unlawful trafficking and stipulated bands of sentencing, on conviction after trial, applicable to unlawful trafficking in different ranges of quantity of the narcotic. In the judgment of the court, Silke VP said:[[9]](#footnote-9)

“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.”

1. Then, he went on to say:[[10]](#footnote-10)

“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. By this we mean age and disability - though extreme youth may call for special consideration. Drug dealers are notorious for attempting to elicit sympathy from the Courts for their middlemen by the use of the blind, the maimed, the halt, the young and the aged in the carrying out of their nefarious trade.

This Court must guard against two things: First, the tailoring by the dealer of the quantities he sends out into the street and procures for his sellers to sell, his couriers to carry or his store‑keepers to keep so as to reduce, for them, the length of the inevitable custodial sentence which will be passed on conviction - playing the ‘Bands’ in other words.”

1. It is readily apparent, as this court has decided on numerous subsequent occasions, that the guideline which the court stipulated were set for the courier or storekeeper who was convicted of unlawfully trafficking in heroin. The reference to drug dealers was clearly a reference to those who organised and used couriers and storekeepers to deal in dangerous drugs. The culpability of such dealers was obviously greater.
2. In *The Queen v Leung Kim Wah*[[11]](#footnote-11), a powerfully constituted panel of this court [[12]](#footnote-12), rejected the submission that the judge had erred “in observing that being a courier was not a mitigating factor”. In the judgment of the court, having cited the paragraph from the passage of the judgment of Silke VP in *The Queen v Lau Tak Ming* set out earlier, in which reference was made to the fact that offences of unlawfully trafficking in dangerous drugs were “of the utmost gravity”, MacDougall JA said:[[13]](#footnote-13)

“Couriers cannot expect to receive a reduction in sentence simply because they are couriers.”

1. Having regard to the facts of the commission of the offence by the applicant, MacDougall JA went on to say “Moreover, the facts clearly reveal that the applicant was not a mere courier. He was storing large quantities of drugs and was apprehended with drugs, packaging and weighing implements in front of him.”
2. With respect, the court’s observation as to the role of the applicant was entirely justified. The applicant was sentenced in respect of a total of five offences of possession of dangerous drugs for the purposes of unlawful trafficking. Three offences were committed in 1991, in which he was found to be in possession of a total of 736 grammes of salts of esters of morphine when intercepted by police officers driving his car, at an address nearby in Tai Po Mei Village and at another address in Kowloon. The other two offences were committed in 1993, after he had absconded whilst on bail. The applicant was found to be in possession of 149 grammes of salts of esters of morphine and 51 grammes of Ice in premises in Kwun Tong, together with various packaging and weighing implements.
3. In the judgment of this court in *HKSAR v Manalo*[[14]](#footnote-14), Stuart‑Moore Ag CJHC rejected the suggestion “that a “simple courier” is deserving of less than a tariff sentence under the guidelines”, as stipulated in *The Queen v Lau Tak Ming*, for heroin and in the *A-G v Ching Kwok Hung*[[15]](#footnote-15) for Ice. In that case, the female applicant had been intercepted by police officers in the street and found to be in possession of 51 grammes of Ice. It was contended in the application that she had committed the offence “out of loyalty and gratitude to her boyfriend who provided her with lodging and lived with her for four months.” However, it is to be noted that in a separate judgment Leong JA, as Leong CJHC was then, rejected that claim and determined “she was not an innocent courier for the man. She was his partner in the trade of trafficking in dangerous drugs.” [[16]](#footnote-16)
4. Having quoted from the passage in the judgment of Silke VP in *The Queen v Lau Tak Ming* cited earlier, in which he made reference to the need of the court to guard against dealers “playing the ‘Bands’”, Stuart‑Moore Ag CJHC went on to say:[[17]](#footnote-17)

“It is quite apparent from this passage… that the court had no intention of treating couriers or storekeepers of heroin as if they were deserving of more lenient treatment than the guideline tariffs generally suggest.”

1. Then, having said that consistency in sentencing was the policy of this court in relation to drug trafficking offences and that consistency was “largely based upon the *weight* of the drugs being trafficked” he said:[[18]](#footnote-18)

“If this Court were to decide otherwise, the courts at first instance would find themselves endlessly being asked to consider the degree of culpability related to individual couriers and storekeepers. The guidelines, whilst of course not strait‑jackets, are there to provide and maintain consistency of sentence between all offenders who traffick in dangerous drugs. It is important for the courts to avoid distinctions, which will often be irrational or speculative, being drawn between drug traffickers who are couriers or storekeepers because the resulting disparity in the levels of sentence will understandably lead to feelings of grievance.”

1. Of the converse position, Stuart‑Moore Ag CJHC said that those who played “an aggravated role in the drugs trade” whom he identified as including manufacturers, wholesalers and the bosses who sent couriers out into the streets to traffick “… can all expect longer sentences than couriers and storekeepers”.[[19]](#footnote-19)
2. In the conjoined appeals in *HKSAR v Leung Kwai Ping & Another (No 2)*,having regard to the guidelines set out in *The Queen v Lau Tak Ming*, this court addressed yet again the issue of the weight, if any, that was to be given to the role of a defendant being sentenced for unlawfully trafficking in dangerous drugs. In the judgment of the court, Stock JA said:[[20]](#footnote-20)

“There is no basis for assuming that the fact of being a courier should be considered a mitigating feature. It never has been a mitigating feature. In 1993, in *R* *v Leung Kim Wah*… this Court… endorsed the sentencing judge’s contention that being a courier was not a mitigating factor and said, in terms, that ‘couriers cannot expect to receive a reduction in sentence simply because they are couriers’.”

1. Of the significance of the role of couriers, Stock JA said that it was “an essential part of the whole nefarious and devastatingly harmful business that is illegal drug trafficking.” Of the intention of this court in setting out guidelines in *The Queen v Lau Tak Ming*,he said:[[21]](#footnote-21)

“…there is no basis upon which to assume that… it intended anything other than that the courier would face a sentence based upon the weight of the drugs he or she was carrying, subject of course to such mitigating, aggravating factors that prevailed in a particular case.”

1. Of the regard to be had to the role of a defendant in unlawfully trafficking in dangerous drugs, Stock JA said:[[22]](#footnote-22)

“Others, taking *a more major role*, such as the wholesaler, or the importer or, of course the manufacturer, would expect an aggravation of sentence; if necessary beyond the limit of a particular band where weight alone would carry sentence to the top of the band. That is how role is distinguished and the fear that there is no room to reflect role is not, therefore, a well‑founded fear.” [Italics added.]

1. As Ms Lai pointed out, more recently in *HKSAR v Law Num Chun*[[23]](#footnote-23) this court has cited with approval the judgments in *HKSAR v Manalo* and *HKSAR v Leung Kwai Ping & Another (No 2)*.
2. In its judgment in *HKSAR v Abdallah*, this court provided modified guidelines to those stipulated in *The Queen v Lau Tak Ming*, in respect of sentences to be imposed on those convicted after trial of unlawfully trafficking in amounts greater than 600 grammes of heroin. It is to be remembered that, in the latter case, in stipulating bands and related ranges of sentences the court had done so up to 600 grammes and 20 years’ imprisonment, describing amounts above 600 grammes as falling into the category of “very large quantities”. Noting that in its judgment in *The Queen* *v Cheng Yeung*[[24]](#footnote-24) this court had said that the “cut‑off figure” for imposing a sentence in the region of 20 years’ imprisonment was 20 kilogrammes of salts of esters of morphine, Silke VP had said “…we consider that there can be an upward increase in the “cut‑off sentence” there suggested bearing in mind that the maximum sentence provided for by the legislation is life”. [[25]](#footnote-25)
3. In *HKSAR v Abdallah* this court stipulated three new bands for sentencing in relation to the unlawful trafficking of heroin or cocaine, namely: 600 to 1,200 grammes; 1,200 to 4,000 grammes and 4,000 to 15,000 grammes, for which the respective range of sentences of imprisonment was stipulated to be 20 to 23 years; 23 to 26 years; and 26 to 30 years. The court said that it was moved to do so because of the disparity in sentencing in amounts of over 600 grammes of heroin or cocaine by judges at first instance. In doing so, in the judgment of the court, Stuart‑Moore VP said that “…these guidelines do not take into account any aggravating circumstances which may be also involved.” [[26]](#footnote-26)
4. Then, he stipulated examples of “an aggravating factor calling for the enhancement of the starting point”, namely:[[27]](#footnote-27)

“(1) An international element is involved;

(2) The trafficker has previously been convicted of trafficking in dangerous drugs;

(3) The traffickers 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.”

Further, he concluded by stating:[[28]](#footnote-28)

“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.”

1. Given that the tariff established in *The Queen v Lau Tak Ming* is one that this court has said applies to a courier only, it follows that the court envisaged for example, that a defendant who was a courier who imported 4 kilograms of heroin into Hong Kong was liable to have a starting point fixed for sentence after trial of 26 years’ imprisonment, without regard to any other factors of aggravation in the commission of the offence. For the aggravating factor of importation, it would be increased to 28 years’ imprisonment. In *HKSAR* *v Abdallah* this court had regard to the review of the cases, in which defendants had been sentenced for trafficking unlawfully in amounts of heroin or cocaine greater than 600 grammes, conducted by a differently constituted division of this court in *HKSAR v Thattephin Tanyamon*.[[29]](#footnote-29) It is to be noted that no less than three of the thirteen cases examined there concerned more than 4 kilograms of heroin. So, sentencing for unlawful trafficking in those and greater amounts of heroin is a matter of practical reality.
2. In that context, it is to be noted that in his judgment in *Abdallah* Stuart‑Moore J said:[[30]](#footnote-30)

“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.

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.”

1. In *The Queen v Ng Muk Kam*[[31]](#footnote-31) this court quashed the sentence of life imprisonment imposed on the applicant by Stuart‑Moore J, as he was then, after trial for unlawfully trafficking in 306 kilograms of salts of esters of morphine. At about 3 o’clock in the morning, police officers observed bags being unloaded from a sampan in Aberdeen, in the vicinity of which a white van had pulled up with its rear doors open and at which area the applicant had arrived in a Mercedes Benz. The van was driven by an accomplice, who testified for the prosecution and who said that he had been recruited the previous day by the applicant to provide a vehicle and to assist in moving dangerous drugs.
2. In the judgment of the court, in quashing the sentence of life imprisonment, Power VP said:[[32]](#footnote-32)

“… we are satisfied that the proven involvement of this offender was not such as to place him in the category of most serious offender. We would only be called upon to consider whether a life imprisonment should be imposed if he was placed in that category. We are satisfied that he cannot be dealt (with) as an offender in the most serious category because on the fact he was not shown to be either the mastermind or the chief financier. He was however, clearly involved in a major way in the handling of this very large quantity of dangerous drugs.”

1. In those circumstances, the court substituted a sentence of 35 years’ imprisonment. In doing so, in describing the applicant as being involved “in a major way in the handling of this very large quantity of dangerous drugs”, very obviously the court treated that appellant, albeit falling short of being the mastermind, as occupying a major role. Certainly, that role was much more culpable than a mere courier.
2. In the judgment, the court did not advert to any issue as to whether or not the dangerous drugs had been imported into Hong Kong and, more particularly, whether or not the applicant was involved in that activity. On the other hand, Power VP did advert to having had regard to “…the proven involvement of this offender”.
3. That case has relevance in this respect. Following the upward revision of the guidelines, in consequence of the judgment in *HKSAR v Abdallah*, the room to reflect the difference of role between a mere courier, albeit of a very substantial quantity of heroin, and an offender, like the applicant in *The Queen v Ng Muk Kam*, who has been involved “in a major way” in the handling of a huge amount of dangerous drugs has narrowed very considerably indeed. Given that the sentence to be imposed on an applicant who is a courier is fixed by reference to the tariff, without regard to his role as such, but the role of others may be taken into account as aggravating their commission of the offence the result has become that the range of sentence available to reflect those aggravating factors has become very narrow.
4. It is clear that the effect of the guidelines stipulated in *The Queen* *v Lau Tak Ming*, as interpreted by subsequent judgments of this court, is that the tariffs are set for a defendant who is involved at the lowest level, namely courier or storekeeper. No regard is to be had to contended distinctions in the role of a courier or a storekeeper as a factor in mitigation reducing the tariff sentence. A courier whose commission of the offence involves factors of aggravation, including those identified in *HKSAR v Abdallah*, is liable to have the sentence arrived at by application of the tariff enhanced.
5. There is no doubt that the guidelines set in *The Queen v Lau Tak Ming* of 20 years’ imprisonment, for unlawfully trafficking in the upper limit of 600 grammes of heroin in the final stipulated band is “an extremely heavy punishment”, as Cheung JA noted in the judgment of this court in *HKSAR v Thattephin Tanyamon*.[[33]](#footnote-33) It is undoubtedly harsh and eschews any recourse to the quality of mercy, except perhaps in cases of “extreme youth”. But, it was identified as being necessary, in the circumstances obtaining in Hong Kong, to deal with offences that “…are of the utmost gravity”.[[34]](#footnote-34) Mr Bruce has not suggested that the determination was wrong, or that it does not hold good today in Hong Kong.
6. Ms Lai was correct to say that the court had not been provided with any information as to the consultations performed by the Sentencing Guidelines Council before they articulated their sentencing guidelines in respect of drug offences. Nevertheless, it is readily apparent from a quick recourse to their website [[35]](#footnote-35) that they conducted significant, widespread consultation [[36]](#footnote-36), in which comment was invited on draft guidelines before the Council formulated and published a ‘Response to Consultation’ [[37]](#footnote-37) and, finally, the guidelines. In the former document, the Council indicated that some of the guidelines had been refined in response to replies that had been received. Clearly, the guidelines reflected the consensus of the multiple views expressed of the needs of that society.
7. One of the topics addressed in the Consultation and the Response to Consultation was the identification in the guidelines of different roles in the commission of the offences.[[38]](#footnote-38) The Sentencing Guideline Council acknowledged that in respect of that topic they had received submissions from the Council of Circuit Judges, the Magistrates Association, the Prison Reform Trust, IDPC, Hibiscus, the Law Society, Drugscope, the Justice Select Committee and Release. Within that topic, consideration was given to the culpability of drug ‘mules’.
8. This court was not assisted by Mr Bruce in any way as to the process of consultation by the Council. Rather, the court was invited to have regard to the finished result, namely the guidelines themselves. Similarly, the court was given no information as to the effect, if any, of the sentencing regime in which drug traffickers were sentenced according to which of the three stipulated roles they fell and the related refinements of sentencing on the extent of unlawful drug abuse.
9. With respect to Mr Bruce, not having addressed the matter at all in his written submissions, he provided very little information of assistance to this court in his oral submissions as to the sentencing regimes obtaining in the different states of Australia and at the Federal level relevant to regard that is had by the courts to the issue of role in the commission of unlawful trafficking in dangerous drugs in sentencing such offenders.
10. In any event, as this court has said on numerous occasions in the past in respect of a range of offences, the sentencing regime that obtains in England and Wales is not of direct relevance to sentencing in Hong Kong. No doubt, that is a reflection of the different needs of different societies. As Ms Lai pointed out, in the judgment of this court *in HKSAR* *v Lee Tak Kwan*[[39]](#footnote-39), in quashing the sentence imposed on the applicant for having unlawfully trafficked in 733 grammes of ecstasy Mortimer VP said that the judge had erred in following the judgment of the Court of Appeal of England and Wales in *R v Warren & Beeley*[[40]](#footnote-40), in which the criteria for sentencing in heroin had been applied to ecstasy:[[41]](#footnote-41)

“In view of the disparity in the sentencing guidelines and the differences in the statutory framework between the two jurisdictions, there is no sound basis upon which the Hong Kong courts can regard the approach in *R* *v Warren and Beeley*…as appropriate in Hong Kong.”

1. In the context of the offence of manslaughter, in the judgment of this court in *The Queen* *v Lo Bing Sun*[[42]](#footnote-42), Silke VP said of the sentencing authorities relevant in England and Wales to manslaughter occurring in a pub row:[[43]](#footnote-43)

“That may well be the sentencing norm in United Kingdom. In my judgment such norms are seldom, if ever, are applicable to Hong Kong. Our circumstances and conditions are very dissimilar to those pertaining in England. These courts do not see the ‘pub row’ type of offence for that is not prevalent in Hong Kong. But this city is a very crowded and tense environment and the unlawful and dangerous act constituted by blows such as the one here must be deterred.”

Conclusion

1. Obviously, it cannot be said that the judgments of this court which have confirmed that the tariffs set out in *The Queen v Lau Tak Ming* are applicable to a courier or storekeeper are plainly wrong. On the contrary, that is what the court plainly intended. For the reasons set out earlier, no foundation has been laid and no case has been made out that the developments in England and Wales, in respect of the regard to be had to the role of an offender in sentencing defendants for the equivalent offence of unlawful trafficking in dangerous drugs, compel this court to determine that the reasoning behind the line of authorities, beginning with *The Queen v Lau Tak Ming*, is no longer valid in the circumstances obtaining in Hong Kong. Accordingly, in my judgment grounds 2 and 3 fail.

The enhanced starting point stipulated by the judge

1. As noted earlier, the judge stipulated a starting point for sentence of 21 years’ imprisonment, which he enhanced by one year’s imprisonment to reflect the international element in the commission of the offence. Clearly, the judge erred in identifying the starting point for sentence on the basis that the applicant had trafficked unlawfully in 780 grammes of cocaine. On an arithmetic calculation the starting point for sentence ought to have been 20 years and 7 months’ imprisonment. On the other hand, on an arithmetic calculation, the enhancement of sentence to reflect the international element in the commission of the offence ought to have been 1 year and 5 months’ imprisonment, not one year’s imprisonment. In my judgment, there was no good reason not to take an arithmetic approach to stipulating the enhanced starting point for sentence. Certainly, the judge gave no reason for not doing so. Indeed, he did not even address the issue. I am satisfied that the judge erred in enhancing the starting point for sentence by only one year’s imprisonment. It follows that, notwithstanding the judge’s errors in calculating the enhanced starting point for sentence, nevertheless serendipitously he was correct in stipulating that sentence to be 22 years’ imprisonment.

The applicant’s provision of information to the authorities and his participation in a programme to discourage unlawful drug trafficking

1. In addressing the remaining issues raised on appeal I have had the advantage of reading draft judgments of Macrae VP and McWalters JA.
2. In his judgment in the Court of Final Appeal in *Z v HKSAR*[[44]](#footnote-44), with which all the other judges agreed, Li CJ noted that it was the policy of the courts to recognise “…useful assistance to the authorities in mitigation of sentence”. Li CJ went on to identify the most important factors that were relevant to determining whether or not the assistance given by a defendant to the authorities merited a discount in sentence:

“Broadly speaking, the most important factors usually include:

(a) the nature and extent of the assistance. In relation to this, matters which are relevant include: the degree to which the defendant gave full and frank disclosure; *the truth and reliability of information*; the range and seriousness of the criminal activities disclosed; *the significance and usefulness of the information and the extent to which it could potentially assist or had actually assisted the authorities*; whether the authorities were already in possession of the information and whether the defendant believe this to be the case; the extent of the defendants assistance, in particular, whether he was prepared to give evidence.” [Italics added.]

1. The assistance it is contended that the applicant gave the authorities by the provision of information following his arrest and prior to sentencing, and the limited confirmation of its potential significance and usefulness, is set out in the judgment of McWalters JA. It is accepted that the information was not actually used by the authorities. Nevertheless, it is now clear that, in providing the authorities information through Father Wotherspoon in April 2015, namely the name and passport details of a drug courier, who the applicant said would traffick unlawfully in dangerous drugs into Hong Kong in April 2015, the applicant had provided information which, in an important and useful part, was true and reliable. A person travelling with the passport, the number of which the applicant had provided the authorities, was arrested for unlawful trafficking in dangerous drugs, namely 985.8 grammes of cocaine, by the Customs authorities at Baiyun Airport, Guangzhou on 21 November 2015. However, the person using that passport did so in a name other than the one provided by the applicant. Dangerous drugs were concealed in her body.
2. That information emerged in a response of Ms Anna Lai SC in a letter, dated 28 April 2017, to directions of the court given on 20 December 2016. Attached to the letter was a letter dated 18 January 2016 from the General Administration of Customs of the People’s Republic of China, which provided details of the arrest of a female, in the circumstances described above, travelling on a passport which bore the passport number that the applicant had provided to the authorities in Hong Kong in April 2015. Of that, Ms Lai said:

“The arrest had nothing to do with the information provided as the C&E had not passed the information (which related to importation of drugs to Hong Kong) to the Mainland authorities.”

1. Nevertheless, that information was true in an important respect, namely that a person unlawfully trafficking in dangerous drugs would travel on a passport bearing the specific number provided by the applicant. Obviously, that was not only of significance but also useful in that it was of potential assistance to the Hong Kong authorities in arresting a person travelling on that passport had she come to Hong Kong or passed through Hong Kong in transit to the Mainland. Further, it was information which obviously might well have been of potential assistance to neighbouring law enforcement authorities, and perhaps ought to have been shared with them.
2. The information which Ms Lai made available to this court, in her letter dated 28 April 2017, was not put before the judge. It ought to have been provided to the judge, either in the form by which it was provided to this court or in a statement of a Superintendent of the Customs and Excise, independent of the investigating officers. It is to be remembered that the arrest on the Mainland on 21 November 2015 of the drug trafficker travelling on the passport, the number of which the applicant provided the Hong Kong authorities, had occurred before either of the appearances of the applicant before Li J, namely on 30 December 2015 and 21 March 2016. It is an undisputed principle of long‑standing that the prosecution must disclose any material relevant to the sentence of an offender. Obviously, the prosecution must take the greatest possible care to ensure that the information put before the sentencing judge is accurate.
3. Notwithstanding the fact that he had not been provided with accurate information in respect of the assistance afforded to the authorities by the applicant, nevertheless the judge afforded the applicant a discount of sentence for that assistance. Having regard to the provision by the applicant of true information of potential significance and use, the judge was entitled to afford the applicant a discount in the sentence imposed on him. However, as noted earlier, it is not known what discount the judge afforded the applicant for the provision of information to the authorities, given that the judge did not stipulate what part of the one‑year discount reflected the provision of information and which part reflected participation in Father Wotherspoon’s programme.
4. As McWalters JA states in his judgment, the appropriate mechanism by which the applicant’s assistance to the authorities ought to have been reflected in sentencing was by way of an increase in the discount afforded the applicant for his plea of guilty. I agree with him that the appropriate discount that ought to have been afforded the applicant for that factor of mitigation was 9 months’ imprisonment. That would afford the applicant a total discount of 36.5 percent from the enhanced starting point stipulated for sentence and would have resulted in a sentence of 13 years and 11 months’ imprisonment.
5. The question of the appropriate approach to be taken by the trial judge or an appellate court where issue is taken as to the assessment by the prosecution of the value of the assistance provided by a defendant to the authorities, by way of information in respect of other criminal activities, is addressed in the judgments of both Macrae VP and McWalters JA. It has been considered by the Court of Appeal of England and Wales in *X (NO 2*) [[45]](#footnote-45) and *R v AXN*[[46]](#footnote-46)*.* However, those judgments were not referred to this court and no submissions were made by counsel on the issue. In any event, the prosecution having provided this court with accurate information by way of the letter from Ms Lai there is no live issue in this appeal. In those circumstances, it is not necessary to address the issue in this appeal.

The applicant participation in Father Wotherspoon’s programme

1. The applicant’s participation in Father Wotherspoon’s programme to discourage Tanzanians from unlawfully trafficking dangerous drugs into Hong Kong is to be regarded as conduct of a good or meritorious nature after the commission of the offence. It might be regarded as some measure of rehabilitation by way of making reparations. Certainly, it is to be encouraged. It is to be remembered that the element of remorse in a defendant is generally subsumed into the discount of one‑third afforded to him for his plea of guilty.
2. However, determining what, if any weight, ought to have been afforded the applicant in sentencing for his participation in Father Wotherspoon’s programme is fraught with considerable difficulties. At most, the applicant contributed to the simple message that Father Wotherspoon’s programme promulgated to Tanzanians, namely that very heavy sentences of imprisonment were to be expected by those who unlawfully trafficked dangerous drugs into Hong Kong. He did not thereby expose himself to any danger. It is simply not known whether the decrease in the arrests in Hong Kong of Tanzanian drug traffickers, to which statistics reference is made in the judgment of McWalters JA, is to be attributed in any way to the programme, let alone to the contribution of the applicant. The courts are ill equipped to make enquiries to make any such determination. To do so exposes the court to the dangers of indulging in speculation. As this court said in its judgments in *HKSAR v Odira Sharon Lensa*[[47]](#footnote-47) and *HKSAR v Akinyi Grace Sylvia*,[[48]](#footnote-48) assessing the value, if any, to Hong Kong of an applicant’s participation in Father Wotherspoon’s programme is a matter that the Executive is better equipped to perform.
3. Nevertheless, it lay within the judge’s discretion to afford the applicant a small additional discount in sentence to reflect this aspect of the applicant’s conduct. I am satisfied that in all the circumstances, in particular that the appropriate enhanced starting point for sentence was 22 years’ imprisonment, the judge was entitled to afford the applicant a discount of 3 months’ imprisonment for this factor of mitigation. That level of discount of sentence is to be regarded as the maximum discount to be afforded to an applicant in similar circumstances.

Conclusion

1. In the result, I am satisfied that the sentence of 13 years and 8 months’ imprisonment imposed on the applicant was appropriate.
2. Accordingly, for those reasons I would grant the application for leave to appeal against sentence, but dismiss the appeal.

Hon Macrae VP:

1. The practice and policy of sentencing will vary from country to country. It will necessarily take into account the prevalence of the particular offence in that country, the attitudes of the general public, the culture and traditions of its people and any other economic, social and political considerations peculiar to that community. In the context of Hong Kong, sentencing practice and policy will also have to reflect the fact that this is a city with its own legal system, whilst nevertheless part of a large country with a different legal system; and it will, as a matter of comity, want to bear in mind the attitudes of its neighbours to particular crimes and the seriousness with which those crimes are regarded by its neighbours.
2. Since the scourge of drug trafficking is a world‑wide problem, it can sometimes be useful to look at the way other countries choose to tackle the problem. However, each country will shape its own approach to suit its own conditions, the desires of its own people, its attitudes to punishment as well as the particular manifestation of the problem in its respective community. The “crowded and tense environment” of Hong Kong, about which Silke VP spoke in *R v Lo Bing Sun*, necessarily means that we must apply a policy suited to our own needs, which may be very different from those of the county towns of England or the leafy suburbs of Australia. The one thing that has struck me, having had to consider in the past few months the trends and statistics for the seizures, arrests and convictions in respect of a wide spectrum of dangerous drugs in Hong Kong since January 2015[[49]](#footnote-49), is that rather than being swamped by a problem which is out of control, as other countries seem to have been, the problem in Hong Kong is being steadily contained, if not, in certain respects, reduced. And since in this jurisdiction we do not have the death penalty for drug trafficking, unlike almost all of our neighbours, that position is in no small measure due to our own particular policy of law enforcement, backed up by harsh, but consistent, sentencing for drug trafficking.
3. None of this is cause for complacency, since appetites for dangerous drugs can quickly change as can the ingenuity of drug traffickers. But nor does it seem to me that there is any excuse to soften Hong Kong’s drug policy, which has been shaped by successive courts for almost 40 ‍years. Sentencing policy is not static, but it is firm and it aims at consistency. It may be remembered that one of the first guideline cases in this area of sentencing was *Chan Chi Ming v R*[[50]](#footnote-50) in 1979, which was concerned with what was then known as ‘No 3’ heroin. This led to a revision of the guidelines, with the advent of ‘No 4’ heroin, in *R v Cheng Yeung*[[51]](#footnote-51) in 1989 and, ultimately, to *R v Lau Tak Ming & Others*[[52]](#footnote-52) in 1990. The guidelines in *Lau Tak Ming* have stood the test of time for almost 30 ‍years, having been adopted along the way in respect of cocaine in *Attorney General v Pedro Nel Rojas*[[53]](#footnote-53) in 1994, and then extended for large quantities of both drugs in *HKSAR v Abdallah*[[54]](#footnote-54) in 2009. I might observe that this jurisdiction had sentencing guidelines for trafficking in dangerous drugs long before either the United Kingdom or Australia.
4. It is against that background that I will give my views on the matters raised by this appeal. It is clear, as both Lunn VP and McWalters JA also accept, that the consistent theme of successive Courts of Appeal over the years is that the guidelines, which are primarily based in this jurisdiction on the quantity of the dangerous drug concerned, are intended to apply to those least involved in the hierarchy of trafficking, that is to say, couriers. Where the courier is found to be carrying the drugs across Hong Kong’s border, additional considerations apply. The combined weight of authority on this issue of two future Permanent Judges and two future Non‑Permanent Judges of the Court of Final Appeal, one future Chief Judge of the High Court, five Vice Presidents of the Court of Appeal and two Justices of Appeal[[55]](#footnote-55) is a formidable body of judicial opinion for this court to be invited to overturn. I see no justification for doing so.
5. It follows from what I have said that the approaches of the Sentencing Guideline Council in England and Wales and the Sentencing Advisory Council of Victoria in Australia are not ones that are necessarily applicable to the circumstances prevailing in Hong Kong; but nor, with respect, do they appeal to me as an exercise in judicial sentencing. Firstly, the primary consideration in all sentencing guidelines in this jurisdiction is the quantity of the particular dangerous drug concerned. Absent clear admissions or, perhaps, accomplice evidence, a defendant’s precise role or place in the hierarchy of a drug trafficking organisation is always more difficult to establish[[56]](#footnote-56). Secondly, I find the terms of the English or Victorian guidelines, with respect, over‑prescriptive and, by virtue of that very over‑prescription, likely to lead to minute arguments as to where and how a particular type of trafficking fits or does not fit within their categorisations; particularly in a jurisdiction such as ours where sentences are generally much higher for trafficking in dangerous drugs.
6. In reality, in most cases it is very difficult to know how closely a defendant is linked with the original source of the drugs[[57]](#footnote-57), what his awareness and understanding of the scale of the operation might be[[58]](#footnote-58) or how limited his function really is[[59]](#footnote-59); questions which become even more difficult to answer with a foreign defendant who has travelled across the world on an elaborate itinerary from one country or continent to another before entering Hong Kong with cocaine secreted within his body worth hundreds of thousands, if not millions, of dollars. That is perhaps why we set the bar at the level of the courier, raising it if there is an international element and when the scale of the applicant’s role becomes clear.
7. For my part, I would not wish to alter the course of sentencing policy in this jurisdiction, which has been worked out, adapted and refined over the best part of four decades, resulting in the sort of steady containment of the problem which Hong Kong has achieved.
8. I turn next to the question of how the courts are to approach the question of discounting sentences for information or assistance given by defendants to the authorities, bearing in mind that such assistance may take many forms. I have no difficulty with the test proposed by McWalters JA as to whether assistance provided by a defendant is “of practical use” to law enforcement authorities, as distinct from previous articulations of “bearing fruit” or providing “tangible results”. As a description, it more clearly embraces those types of information or assistance which may not result directly in arrests or convictions but which nevertheless provide useful intelligence to the authorities. Such intelligence may take the form of steering law enforcement authorities in a particular direction or providing necessary confirmation of a line of enquiry. However, the term “of practical use” would clearly also be encompassed by the type of information which “could potentially assist or had actually assisted the authorities”, which is how the Court of Final Appeal described it in *Z v HKSAR*[[60]](#footnote-60). Whilst “of practical use” may be a more helpful term than “bearing fruit” or providing “tangible results”, as well as a convenient gloss on the notion of actual or potential assistance, I do not think it is necessary to improve on the Court of Final Appeal’s characterisation of what is useful.
9. A recent example of the type of information or assistance which steered the authorities in a particular direction and which could be said to have “potentially assisted the authorities” arose in *HKSAR v Tsang Ka Wing*[[61]](#footnote-61), where the applicant’s information led the police to arrest a particular person and place him on an identification parade for the applicant to identify. However, the arrested person absconded from police bail before the identification parade was due to take place. The information, which was believed by the police to be credible, had plainly led to an arrest but, through no fault of the applicant, she was deprived of the opportunity of converting her information into active assistance. Nevertheless, the court gave the applicant an overall discount of 38.5% (including one‑third for her timely plea), bearing in mind the quality of the information given, which the police considered to be accurate, in circumstances where they had previously known nothing of the particular conspiracy to traffic in dangerous drugs.
10. However, in *Tsang Ka Wing*, this court distinguished that applicant’s situation from someone who “has assisted in a controlled delivery by actively participating in a police operation which has ultimately come to nothing”[[62]](#footnote-62). Participation in a controlled delivery operation which comes to nothing nevertheless sees the defendant continuing to act out his part pursuant to a conspiracy to traffic in dangerous drugs: it is, if you like, a continuation of the *actus reus* of trafficking. It may take various forms and involve very different processes of engagement, as well as difficulties, tensions and dangers for the defendant participating, thereby attracting different types of recognition from the sentencing court. In *HKSAR v Smit Hector Edward*[[63]](#footnote-63), for example, this court gave the appellant a total discount of 37.85% (including the usual one‑third for his timely plea), where his participation in an unsuccessful controlled delivery operation involved making and receiving numerous telephone calls and trying to manoeuvre the conspirators either to the airport or a hotel where he took up position to meet them, a process which lasted in all some 6 hours.
11. By contrast, in *HKSAR v Chan Ka Yiu*[[64]](#footnote-64), this court refused an appeal where the applicant had received a discount of 36% (including one‑third for her timely plea) for her participation in an unsuccessful controlled delivery operation, where she had done little more than make telephone calls to people she claimed were involved and reveal details of an empty hotel room where the transaction was to take place, yet refused to follow up her cooperation by answering questions in interview, which might have explained who all these various contacts were.
12. The point to be derived from these and other cases is that it is difficult to have fixed discounts where the cooperation which results in an unsuccessful controlled delivery operation may be of very different quality and breadth. However, that quality and breadth will be even more diverse where information and assistance to the authorities are concerned. The factors to be taken into account in assessing the appropriate discount for sentence in cases of providing information or assistance to the authorities have already been articulated by the Court of Final Appeal in *Z*.
13. The problem may be accentuated where the information and assistance go not to the crime with which the defendant is charged but to unrelated conduct or other offences altogether. In *HKSAR v Kilima Yusuph Abbas*[[65]](#footnote-65), the applicant went even further and invited the court (unsuccessfully) to give him credit for having allegedly given assistance to the authorities in Tanzania leading apparently to two arrests there; a process to which the authorities in Hong Kong were not privy.
14. In my judgment, one must have a measure of faith and trust in the relevant authority in Hong Kong - absent an allegation of *mala fides* - that the information is or is not of any actual or potential assistance, if that is what the authority says, whatever the defendant may think or have hoped for. Otherwise, the courts will be drawn into endless debates with the authority concerned, and futile wrangling between defence and prosecution, as to whether information was or was not of any actual or potential assistance, how it was treated or how it should have been treated. Far from that being a normal line of enquiry for judges to make, it should not be one for the courts at all because it is fraught with problems if the courts step out from their role in trying cases to managing the way the police or the Customs & Excise department do their job.
15. Indeed, I would have thought it is likely to lead to the authority discouraging informants if, every time it receives information which, for operational or intelligence reasons, it does not wish to pursue or considers leads nowhere, it has to endure its decision being second-guessed by lawyers and must justify to a court why it did not conduct or follow up a particular line of enquiry. Police or Customs & Excise operations are invariably covert, and their intelligence necessarily classified and sensitive. It cannot be right for the courts to allow a free‑for‑all in accessing the reasons for the authority doing what it did or did not do, or examining why information was regarded or not regarded by the authority in a particular way.
16. In my judgment, if the authority concerned forms the view that the information was of no actual or potential assistance, then, unless the papers clearly suggest otherwise, that should normally be the end of the matter. A defendant is of course always entitled to take the matter up with the Department of Justice but, again, once the view is expressed that the information or assistance was of no actual or potential assistance, then it is not for the courts to embark on an enquiry as to the cogency and validity of that decision.
17. In *HKSAR v SK Hasnainzzaman*[[66]](#footnote-66), this court was confronted with allegations made at trial and on appeal by an applicant that the police had not followed up on the assistance he had provided to the police, thereby depriving him of extra discount on sentence. The trial judge had conducted *Sivan* proceedings to explore this allegation, which included receiving a letter from a Senior Public Prosecutor in the Department of Justice in short but clear terms explaining why the police did not consider the applicant’s information to be credible. The judge found no reason to gainsay that determination and we refused to interfere.
18. In respect of the assistance given to Father Wotherspoon’s campaign, I would like to make these preliminary remarks. I am full of admiration for the commitment and tenacity of Father Wotherspoon and his colleagues in their attempts to do something to stem the tide of couriers of dangerous drugs, often from impoverished circumstances, from Africa and South America into Hong Kong. However, I do not accept that such couriers do not know fully what they are doing when they ingest a large and potentially fatal consignment of dangerous drugs and/or carry it half way across the world to Hong Kong, or that they are not aware of the severity of the consequences if they are caught. As I have said, many countries in this region employ the death penalty for drug trafficking and I am not at all persuaded that traffickers are unaware of that ultimate punishment in some of the countries through which they pass, or that the offence of drug trafficking carries very severe sentences of imprisonment in Hong Kong.
19. Be that as it may, what concerns me about the so‑called ‘campaign’ conducted by Father Wotherspoon, however laudable it may be, is how a court can conscientiously award a discount of sentence to a prisoner who simply writes and has published on a website, or otherwise disseminates, letters to his fellow countrymen to discourage others from doing as he did. It seems to me artificial to regard such conduct, as some sentencing judges have done, as positive good character, while it is rather a stretch of language to regard it as a demonstration of remorse. The reality is that a defendant or applicant will participate in the ‘campaign’ to try to reduce an otherwise lengthy sentence of imprisonment. Participation in this ‘campaign’ is now almost routinely put forward by certain defendants from certain parts of the world, if not in mitigation, then on appeal. I do not wish to sound cynical, but what may have started as a ‘campaign’ has turned into a ‘bandwagon’.
20. Furthermore, the beneficial effect from writing such letters is far too vague and amorphous to form one of these recognised categories of mitigation. One letter to the right person may stop a potential courier from making a drug shipment, although the sad reality is that there will always be others to take his/her place. A hundred such letters may yield nothing. One can simply never know.
21. I understand the figures which suggest the reduction of the number of drug traffickers from Tanzania. But experience has taught me over years of sentencing and sitting on appeals that syndicates do not rigidly recruit their couriers from one country but use nationals from different countries, even different continents, if only to throw the authorities in Hong Kong off the scent. One may see, for example, from the consolidated statistics attached to the affirmation of Inspector Lam Lok Sze of the Customs & Excise Department that there have been a number of arrests of drug couriers at Hong Kong International airport since 2016 comprising nationals from Europe (Sweden, Latvia, Spain, Denmark, Poland, Portugal, Czech Republic and the United Kingdom). Yet, from 2010 to 2015 inclusive there were none from Europe at all[[67]](#footnote-67). And that leads me to wonder why these nationals should not also be catered for and receive a discount of sentence for writing letters to compatriots in their respective countries. Or, for that matter, why Mainland couriers who traffic drugs across the land or sea borders into Hong Kong should be deprived of that concession or advantage.
22. This court, comprising both of my two colleagues on this appeal, has already twice said that post-sentence participation in Father Wotherspoon’s campaign is a matter best left to the Executive[[68]](#footnote-68). I consider that is right for the reasons they have given and that this court should adhere to its earlier decisions on this matter. Nevertheless, I would still permit sentencing judges a discretion to allow a token discount for this factor. Although such contributions to Father Wotherspoon’s ‘campaign’ do not amount to either positive good character nor are they readily borne of remorse, it seems to me that it may still be in the public interest to encourage a prisoner’s efforts in this regard. That assessment must be in the absolute discretion of the court, an exercise with which this court will not lightly interfere, but I cannot for myself envisage any circumstances which might warrant a deduction of more than 3 months for this factor.
23. As I have said, the discount for this factor, if it is considered at all, should be no more than a token one. We must not forget that trafficking in dangerous drugs is a crime of the utmost gravity. As the judge himself sensibly and correctly held[[69]](#footnote-69):

“While I appreciate the effort of the defendant in spreading a warning message, this court must balance public interests in sentencing. Trafficking in a dangerous drug is a very serious offence. This court must not be too lenient.”

1. In the result, I would grant leave to appeal, given the error which the judge himself acknowledged in respect of the quantity. However, whilst the starting point was 7 months too long on an arithmetic approach of quantity to guideline, I agree with McWalters JA that there is no good reason to depart from an arithmetically calculated period of enhancement, which was 7 months too short. The result is the same sentence after trial, namely 22 years’ imprisonment.
2. That sentence should be reduced by one‑third to reflect the applicant’s early plea, taking it to 14 years and 8 months’ imprisonment. I would accept the further discount of 1 year granted by the judge in the exercise of his discretion. Although the applicant’s information did not in fact assist the authorities in Hong Kong, it might be said to have *potentially* assisted them and would almost certainly have led to an arrest had the person arrested on the Mainland in possession of almost a kilogramme of cocaine entered Hong Kong as he was expected to do. I would also accept that the judge was prepared in his discretion to give the applicant some discount for his contribution to Father Wotherspoon’s ‘campaign’, which is also included in that overall discount.
3. The result is that the sentence is therefore exactly the same as that passed by the judge, namely 13 years and 8 months’ imprisonment. Accordingly, whilst I would grant leave to appeal, I would dismiss the appeal.

Hon McWalters JA:

1. This case concerns a Tanzanian drug mule who travelled to Hong Kong from Bujumbura, Burundi via Nairobi, Kenya. At the Hong Kong International Airport he was refused permission to land by the Immigration Department and was then taken to Customs and Excise officers for customs clearance. As he was suspected to have drugs concealed inside his body, he was taken to North Lantau Hospital for a medical examination.
2. At North Lantau Hospital it was confirmed that the applicant did have foreign objects in his body. He was arrested and under caution he admitted he had swallowed 77 pellets of cocaine which a friend in Tanzania had given to him. He was transferred to Queen Elizabeth Hospital where he subsequently discharged 77 pellets which were found to contain 1.22 kilogramme of a solid containing 718 grammes of cocaine. The estimated street value of this cocaine was HK$1,301,740.
3. When interviewed under caution the applicant claimed that the cocaine in his body had been swallowed by him whilst he was still in Bujumbura and he was supposed to call the person who had given him the cocaine upon his arrival in Hong Kong. He said he had been promised a reward of US$5,000 upon his return to Tanzania if he could successfully deliver the cocaine.

The mitigation

1. At his sentencing hearing, the applicant was represented by Ms Diane Crebbin. She informed the judge that the applicant was born and raised in Tanzania and was aged 41, was married and had four young children. The youngest child was born in April 2015, after the applicant’s arrest for his present offence.
2. The applicant was the sole breadwinner of his family but as the businesses in which he was involved failed, he was unable to earn a stable income and he got into debt.
3. In order to support his family the applicant started borrowing money from people and one such person was the man who lured him into trafficking drugs.
4. Ms Crebbin emphasised that the applicant was remorseful and this was evident from his efforts to assist the authorities, albeit his efforts had not been fruitful. Ms Crebbin was here referring to the fact that the applicant had provided information which had already been received by the authorities from other sources. Nevertheless, Ms Crebbin submitted that, the information “did lead to at least one arrest”. She submitted that “where it’s clear that even if any assistance hasn’t borne fruit, that some defendant has done his very best to help stop or alleviate the drug trade in Hong Kong, that at least the court could take the lower end of the sentencing band rather than the higher end …”
5. Ms Crebbin then informed the judge of the applicant’s active participation in a campaign organised by Father Wotherspoon for the prevention of drug trafficking from Tanzania to Hong Kong. She said the applicant was trying his best to assist and wanted to further assist in this campaign. He felt that this was the best way that he could make atonement for what he had done and to prevent other people finding themselves in the same predicament as him.
6. In addition, the applicant wrote letters to African newspapers and to people he knew in Tanzania who might be tempted to earn money by trafficking, to urge them to rethink what they were intending to do. He also spoke to a female social worker from Tanzania and provided her with what information he had about the drug trafficking trade in Tanzania.
7. Ms Crebbin called Father Wotherspoon to testify about his campaign to discourage persons from Tanzania, and other East African countries, from being lured into trafficking dangerous drugs into Hong Kong.

The evidence of Father Wotherspoon before the judge

1. Father Wotherspoon said that in 2013 there were many people from Tanzania bringing drugs to Hong Kong. In the middle of 2013 there were 30 inmates at Lai Chi Kok Reception Centre (“Lai Chi Kok”) from Tanzania. They were arriving at the rate of one or more a week, sometimes three or four a week.
2. In response to this, Father Wotherspoon said he received permission from the Welfare Section at Lai Chi Kok to start a campaign on the internet to try to stop people coming. He received letters posted to him and he put them on his website. Within a few days his website had about 5,000 hits. It then became known by the media in Tanzania and went onto blog sites. He said all of this had an impact on the number of drug mules from Tanzania trafficking drugs to Hong Kong. Instead of there being one new arrest a week, for the next eight months there was only one.
3. The campaign continued with inmates writing letters and the media publicising the issue. In Father Wotherspoon’s words:

“It lit a fire in Tanzania. Security was tightened at the airports. Drug enforcement agencies increased their efforts. The word spread.”[[70]](#footnote-70)

1. Father Wotherspoon, himself, went to Tanzania where he spoke to inmates’ families and gave media interviews. He was of the view that as a result of his campaign drug trafficking out of Tanzania to Hong Kong “has virtually stopped. In the last 12 months, only one from Tanzania had been arrested at Hong Kong Airport.”
2. Father Wotherspoon explained how he continued with his campaign, extending its reach into Kenya and Uganda. He also detailed the particular efforts of the applicant which included providing Father Wotherspoon with letters and information which have been uploaded to the website. The Tanzanian social welfare worker with whom the applicant had been in contact was also helping Father Wotherspoon in spreading the message in Tanzania.

The judge’s Reasons for Sentence

1. The judge’s Reasons for Sentence are set out in the judgment of Lunn VP at paragraphs 2-6 of his judgment and so I shall not repeat them.

The Amended Perfected Grounds of Appeal

1. The first ground of appeal relied upon by the applicant is that the court erred in sentencing the applicant on the basis that the weight of cocaine unlawfully trafficked by the applicant was 780 grammes when the weight as particularised in the count in the indictment and set out in the Summary of Facts is 718 grammes.
2. The mistake by the judge is not disputed and so it becomes necessary to identify what the correct starting point should have been. However, what the starting point should have been is the subject of the applicant’s new grounds 2-4. They are:

“Ground 2

The sentence of the Applicant was wrong in principle because it ought to have been reduced by reason of his role in the offence as a courier and such role ought to have been recognised in fixing the starting point at a lower level than the learned sentencing judge fixed it at. In this regard, it will be contended that the Court ought to have analysed the role played by the Applicant taking into account that:

(1) his function was limited and under direction;

(2) he engaged in the role as a result of economic coercion;

(3) the role of the Applicant was brought about by exploitation;

(4) the Applicant had no influence on those above in a chain

In particular, it will be contended that *HKSAR v Leung Kwai Ping* CACC 101 & 114/2001, [2002] HKEC 38 (and the cases which follow it) is wrongly decided or ought not to be followed in the light of developments in sentencing law and practice in other common law jurisdictions relating to sentencing in serious drug offences.

Ground 3

Alternatively, if it be held that the critical factor for determining the starting point is the narcotic content of that which he carried, the Court ought to have approached the foregoing matters germane to the role of the Applicant as matters of substantial mitigation.

Ground 4

In addition to Grounds 2 or 3, the Court, in considering mitigating matters, ought to consider that the incident was a one-off incident and not part of an extended course of conduct, his previous good character and absence of convictions; that his economic vulnerability was exploited and his exemplary conduct following arrest.”

1. By these new grounds the applicant challenges both whether the existing drug trafficking sentencing guidelines are legally correct and also whether, in light of developments over the years since they were created, they continue to be an appropriate means of sentencing offenders.

The evidence adduced on appeal

1. Because the error by the judge that is the subject of the first ground of appeal is not disputed it is necessary for us to sentence the applicant afresh. This will require us to consider whether the judge was correct in awarding the applicant a further discount of one year, after discounting his enhanced starting point by one third to allow for the applicant’s guilty plea, on account of the applicant’s assistance to the authorities and his participation in Father Wotherspoon’s campaign.
2. To assist the court in dealing with these issues the parties filed evidence, by way of Notice of Motion, pursuant to section 83V of the Criminal Procedure Ordinance, Cap 221.

The applicant’s evidence on appeal

1. The applicant filed two affidavits by Father Wotherspoon, sworn on 1 February 2017 and 15 August 2017 and, with the leave of the court, an additional third affidavit sworn on 10 April 2018. In these affidavits Father Wotherspoon described the assistance provided by the applicant as follows:

(a) He first came to know the applicant in early 2015, at which time the applicant volunteered information to be put on Father Wotherspoon’s internet drug blog, informing and warning people in the countries from which the drug mules come of the consequences to them if detected and prosecuted in Hong Kong.

(b) On 13 March 2015, the applicant:

(i) gave Father Wotherspoon a photograph and telephone number of a Nigerian who organised Tanzanian and Kenyan drug mules to be sent to Hong Kong from Burundi;

(ii) told Father Wotherspoon that this person had a partner who operated in Hong Kong and received the drug mules arriving from Africa;

(iii) gave Father Wotherspoon information on another Nigerian drug lord which Father Wotherspoon passed to the head of the Tanzanian Anti-Drug Squad, a person with whom Father Wotherspoon has been in regular contact.

(c) On 10 April 2015, the applicant gave Father Wotherspoon information that a woman drug mule, whom he identified by name and passport number, was due to arrive in Hong Kong from Nairobi that day or the following day. Father Wotherspoon immediately informed Customs and Excise Department of this information. This person did not arrive in Hong Kong but in November 2015, a Tanzanian woman with a different name but using the same passport was arrested at Guangzhou airport with drugs concealed within her body. Customs, Hong Kong, had not passed to the Mainland authorities the information passed to them by the applicant.

(d) In November 2015 the applicant gave Father Wotherspoon a letter addressed to the head of the Tanzanian Anti-Drug Squad concerning the activities of another person. Father Wotherspoon forwarded this letter to the addressee.

(e) On 13 November 2015 the applicant offered to give a non-prejudicial statement to the police.

1. Father Wotherspoon stated how he approached the police to make reports, passing them the information from the applicant, including the photographs of two of the persons to whom the applicant had earlier referred.

The respondent’s evidence on appeal

1. The respondent filed three affirmations by Inspector Lam Lok Sze, all affirmed on 22 June 2017 and an affirmation of Woman Detective Inspector Chan Yi Ting affirmed on 3 August 2017. Inspector Lam is an Inspector of the Airport Investigation Group, Customs Drug Investigation Bureau, Customs and Excise Department. In her first affirmation she confirmed that the Customs and Excise Department had received replies from the Honorary Consul of the Consulate of Tanzania in Hong Kong which stated that neither the Tanzanian Government nor the Embassy of the United Republic of Tanzania in Beijing recognized, or was involved in, Father Wotherspoon’s campaign and that Father Wotherspoon has never been a part of Tanzanian Government agencies’ activities with overseas government agencies in fighting against drug trafficking.
2. As to the enquiry by the Customs and Excise Department seeking information on the identity of the person whom the applicant claimed was the head of the Tanzanian Anti-Drug Squad, the reply from the Honorary Consul was still pending.
3. In her second affirmation Inspector Lam detailed her unsuccessful efforts to verify the identity of the woman Grace who claimed to be a social worker and Probation Officer with the Tanzanian Government in the Ministry of Home Affairs.
4. In her third affirmation Inspector Lam provided statistics on the number of airport arrests of drug mules for each month of the years 2010-2017 with details of their country of origin. For each year the figures were as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| **Year** | **No of persons arrested** | **No of arrestees from Africa** | **No of arrestees from Tanzania** |
| 2010 | 64 | 43 | 12 |
| 2011 | 71 | 33 | 16 |
| 2012 | 88 | 46 | 28 |
| 2013 | 82 | 47 | 33 |
| 2014 | 45 | 20 | 12 |
| 2015 | 79 | 37 | 8 |
| 2016 | 73 | 23 | 4 |
| 2017  (Jan-Mar) | 9 | 2 | 1 |

1. Woman Detective Inspector Chan Yi Ting detailed in her affirmation the contact the police had with Father Wotherspoon when he contacted them on behalf of the applicant. Father Wotherspoon had attended Cheung Sha Wan police station on 13 March 2015 and been interviewed in respect of the information the applicant had given him about two particular individuals who recruited drug mules to traffic drugs to Hong Kong.

The applicant’s submissions

1. In a nutshell, Mr Andrew Bruce SC, who appeared with Mr Beel on this appeal, submitted that the current sentencing tariffs do not sufficiently allow the court to take into account the role of the offender in the commission of the offence, and other mitigating matters, when performing the sentencing task of assessing the culpability of the offender. Mr Bruce recognizes that the law in this jurisdiction, as laid down in *HKSAR v Manalo*[[71]](#footnote-71) and *HKSAR v Leung Kwai Ping*[[72]](#footnote-72) and subsequent cases, is that the appropriate starting point within each sentencing band is primarily to be determined by the quantity of narcotic and that being a courier is not a mitigating feature.
2. The effect of these and other decisions is that the starting point will apply to the person performing the most lowly role in the drug trafficking enterprise. A defendant performing a role greater than the lowest role may have his starting point increased to allow for his additional culpability. Mr Bruce contends that this is a wrong statement of the law or, in the alternative, ought not to be followed.
3. As the sentence is to be considered afresh, Mr Bruce submitted that following the sentencing guideline in *Abdallah*,an arithmetically calculatedstarting point for 718 grammesof narcoticis 20 years and 7 months. If the approach of the judge is employed then this starting point would be enhanced by 1 year to reach an overall starting point of 21 years and 7 months. After reducing this by one third for the guilty plea, the sentence would become 14 years and 5 months and if the judge’s one year discount for assistance to the authorities and participation in Father Wotherspoon’s campaign is granted to the applicant then the final sentence would become 13 years 5 months’ imprisonment.
4. Mr Bruce referred to the approach adopted in England to dealing with pre-sentence meritorious conduct by offenders. He submitted that meritorious conduct, or the performance of a positive act that benefits society, should be taken into account when passing sentence and is normally categorised as going towards the offender’s positive good character. He referred to case law in England and Wales but said of it:

“However no pattern emerges as to how a court should deal with such conduct and what weight to attach in determining any reduction of sentence arising from such conduct.

…

… what weight can be attached to such conduct is not really clear or articulated and rests upon the individual sentencing court to strike the right balance.”

1. Mr Bruce relied on the following statement by the Court of Final Appeal in *Z v HKSAR*[[73]](#footnote-73):

“10. The policy of the courts to recognise useful assistance to the authorities in mitigation of sentence is based on the public interest. It is in the public interest that appropriate punishment should be imposed on defendants convicted of criminal offences. But at the same time, the prevention, detection and prosecution of crime is also in the public interest. …”

1. These comments by the Chief Justice in *Z* were directed at the assistance provided to the authorities by criminals. Mr Bruce argued that an offender who participates in Father Wotherspoon’s campaign should also be viewed as advancing this public interest because, by his participation, he contributes to the prevention of crime.
2. In explaining how participation in Father Wotherspoon’s campaign contributed to the prevention of drug trafficking, Mr Bruce referred to the important role played by deterrence in Hong Kong’s drug trafficking sentencing regime. He then went on to argue that “a sentence does not deter unless it is widely known” and that “drug mules have no understanding of the stiff penalties that they would face should they be arrested.” From this position, Mr Bruce suggested that:

“Education as a form of prevention would therefore seem to be obvious.”

By educating persons in the countries from which drug mules are recruited, Fr Wotherspoon’s campaign complements, and increases the effectiveness of, the deterrent element in Hong Kong’s sentencing regime.

1. Mr Bruce referred to the figures of the arrests of drug mules from Tanzania and submitted that they revealed that there had been a dramatic decline in the number of drug mules originating from Tanzania between March 2015 and March 2017 and this coincided with Father Wotherspoon’s campaign which, in this time period, specifically targeted Tanzania. This led to Mr Bruce making the following submission:

“Accordingly it is demonstrably in Hong Kong’s interest to encourage offenders to assist the Father’s campaign and as such it is submitted that a reduction in their sentence should be a permanent feature when approaching sentence and not on an *ad hoc* basis that is taken now.”

1. If this court determines that participation in Father Wotherspoon’s campaign should be rewarded with a sentencing discount, then it becomes necessary to determine how such discount should be assessed. Mr Bruce recognised the difficulties in making this assessment, particularly in distinguishing one offender’s participation from another. He referred to various Hong Kong Court of First Instance decisions to demonstrate that a consistent approach has not been taken by judges on what, if any, sentencing discount should be awarded to an offender for his participation in Father Wotherspoon’s campaign.
2. Mr Bruce suggested the following solution:

“62. What reduction should be given? The difficulty is measuring the individual effect that one person had in assisting the campaign. One letter publicising an offender’s story may be as effective as three letters from another offender in deterring drug mules. Thereby quantity is not a reliable yard stick and measuring each individual’s contribution is problematic and time consuming and becomes particularly subjective.

63. A consistent approach would be to just reward participation *per se*, much in the same way a drug mule is sentenced irrespective of his individual culpability. Otherwise disparities will emerge, as they have done already (see above) with the inevitable consequences arising from an offender’s sense of injustice.

64. Adjustments can of course be made where there clearly has been exceptional assistance in accordance with the sentencing court’s discretion.”

1. In respect of this particular applicant’s contribution to Father Wotherspoon’s campaign Mr Bruce accepted that it was not “exceptional”. Nevertheless, as Father Wotherspoon himself described it, his contribution amounted to “substantial assistance.”

The respondent’s submissions

1. Ms Anna Lai SC, Deputy Director of Public Prosecutions leading Mr Franco Kuan, Senior Public Prosecutor, for the respondent, did not dispute the error of the judge that is the subject of the first ground of appeal but invited the court to note that the overall sentence imposed by the judge was not manifestly excessive since, although the miscalculation by the judge led to a difference of about 5 months, the applicant had benefited in other ways from the generosity of the judge.
2. I shall not refer to the submissions of Ms Lai on grounds 2 and 3 of the Amended Perfected Grounds of Appeal as they are set out in the judgment of Lunn VP.
3. Ms Lai did not dispute the starting point adopted by the judge but submitted that the enhancement of that starting point for the international element should have been, on an arithmetic calculation, around 1 year and 5 months for this quantity of narcotic. She also took issue with the one year reduction in sentence that the judge awarded the applicant for providing information already known to the authorities and for participating in Father Wotherspoon’s campaign.
4. In respect of the applicant’s provision of information to the authorities Ms Lai submitted that it did not qualify for a sentencing discount, or if it did, only a minimal discount, as it had not been useful information to the Hong Kong authorities.
5. Regarding the applicant’s active participation in Father Wotherspoon’s campaign, Ms Lai argued in her written submission:

“26. While what the Applicant has done is plainly not ‘assistance to authorities’ in the orthodox sense, it would appear that participation in the Campaign is a type of crime prevention, though in a more indirect way and difficult to quantify.

27. It is submitted that participation in Father Wotherspoon’s campaign does not come close to what the English Court and Hong Kong recognised as a meritorious conduct warranting significant reduction in sentence. Those causes usually involve the defendant disregarding his own safety and/or rescuing others life. This is not the case here.

28. Nevertheless, it is accepted that participation in the Campaign is in the public interest of, and of great benefit to, Hong Kong and should be encouraged. Participants should be encouraged to participate actively and continuously. As the Respondent has previously submitted, giving a discount at an early stage may be counter-productive to the success of the campaign.”

1. In terms of how a sentencing court should deal with it, she argued that the proper course is to follow the judgments of the Court of Appeal in *HKSAR v Odira Sharon Lensa*[[74]](#footnote-74) and *HKSAR v Akinyi Grace Sylvia*[[75]](#footnote-75)*,* and leave to the executive the decision of whether a prisoner’s post-sentencing participation in Father Wotherspoon’s campaign is worthy of a remission of part of the prisoner’s sentence. As was said by the Court of Appeal in those cases, the assessment of the value to Hong Kong of the prisoner’s actions within the framework of the campaign is a task which the executive will generally be better equipped to perform. She suggested that the executive already had in place a mechanism for assessing and rewarding post-sentence conduct in the form of the Long-term Prison Sentences Review Board.
2. In respect of pre-sentence participation in the campaign, Ms Lai referred to different approaches adopted by different sentencing judges; some of whom did not give any discount, and others of whom gave only a small discount. These were summarised in a table in the respondent’s written submissions which led to Ms Lai asserting that when sentencing judges did award discounts, they were usually less than 4 months. Therefore, she argued, in giving the applicant a one-year discount on top of the one-third discount for his plea of guilty, the judge had erred by being excessively generous.
3. Ms Lai further submitted that in view of the wider public interest, undue leniency should be avoided as the applicant had committed a very serious offence. Any discount awarded for participating in the campaign should, she argued, be only slight.

Discussion

1. Here the initial starting point was calculated in error by the judge using a weight of 780 grammes instead of 718 grammes. The first ground of appeal must succeed. The judge having himself accepted that he erred in his calculation of sentence, it now falls to this court to sentence the applicant afresh.
2. That brings me to the second and third grounds of appeal. The current law is to be found in the Court of Appeal’s judgment in *Abdallah*. In that case the Court of Appeal said that for 600 – 1,200 grammes of either heroin or cocaine a trafficker should be sentenced to between 20-23 years’ imprisonment.
3. Under the current law the first step for a judge is to determine where within the relevant sentencing band he should take his starting point. In determining this issue the judge will initially have regard to the weight of the narcotic. This purely arithmetically arrived at period of imprisonment is just an initial starting point and, in the exercise of his sentencing discretion, the judge may depart from it. However, as this court has said on a number of occasions, if the judge intends to depart significantly from this initial starting point he should say so and explain his reasons for so doing.
4. However, it is clear that on the present state of the law, a judge cannot depart from an arithmetically arrived at starting point to allow for the fact that the role of the offender in the drug trafficking was only that of a courier. The effect of *Manalo* and *Leung Kwai Ping* is that such a starting point is appropriate for couriers as it already takes account of their low level of involvement in the commission of the drug trafficking offence. A higher level of involvement in the offence will justify an upwards adjustment of the starting point.
5. By his second and third grounds of appeal the applicant challenges this approach to the sentencing of drug traffickers. Lunn VP in a separate judgment has thoroughly analysed the current state of the case law and for the reasons he sets out in his judgment he concludes that:

“Obviously it cannot be said that the judgments of this court which have confirmed that the tariffs set out in *The Queen v Lau Tak Ming* are applicable to a courier or storekeeper are plainly wrong. On the contrary, that is what the court plainly intended. For the reasons set out earlier, no foundation has been laid and no case has been made out that the developments in England and Wales, in respect of the regard to be had to the role of an offender in sentencing defendants for the equivalent offence of unlawful trafficking in dangerous drugs, compel this court to determine that the reasoning behind the line of the authorities, beginning with *The Queen v Lau Tak Ming*, is no longer valid in the circumstances obtaining in Hong Kong.”[[76]](#footnote-76)

1. I agree with Lunn VP’s analysis of the law and with his conclusion. At paragraph 45 of his judgment Lunn VP refers to the effect of *Abdallah* in narrowing the room for reflecting the difference in role between a mere courier and those involved in a more major way in the organization of the drug trafficking activity. This is a matter for concern. The sentencing regime must allow for the possibility that there will be large seizures of dangerous drugs and also for the possibility that persons, other than couriers, who are more heavily involved in this criminal activity, will be prosecuted. When these possibilities coincide, I fear that courts may find that the sentencing range available to them to reflect these aggravating factors may not enable them to adequately distinguish the culpability of the courier from that of the organizer.
2. The only other observation I wish to make is that I do not agree with the obiter dicta observations of Stuart-Moore Ag CJHC in *Manalo* on the underlying rationale for sentencing judges not having regard to the role of the offender in the commission of the drug trafficking offence. In *Manalo* Stuart-Moore Ag CJHC said at page 560D-I of the report:

“It is quite apparent from this passage in *The Queen v Lau Tak Ming &Others* [1990] 2 HKLR 370 that the Court had no intention of treating couriers or storekeepers of heroin as if they were deserving of more lenient treatment than the guideline tariffs generally suggest….

The policy of this this Court in relation to trafficking in drugs of these kinds has been to maintain a *consistent* level of sentencing under the guideline cases earlier mentioned so that potential traffickers, who are frequently couriers or storekeepers, will be deterred from engaging in such activities. Consistency, in this context, is related to sentences which are largely based upon the *weight* of the drugs being trafficked. If this Court were to decide otherwise, the courts at first instance would find themselves endlessly being asked to consider the degree of culpability related to individual couriers and storekeepers. The guidelines, whilst of course not strait-jackets, are there to provide and maintain consistency of sentence between all offenders who traffick in dangerous drugs. It is important for the courts to avoid distinctions, which will often be irrational or speculative, being drawn between drug traffickers who are couriers or storekeepers because the resulting disparity in the levels of sentence will understandably lead to feelings of grievance.

Whilst those who play an aggravated role in the drugs trade, such as the manufacturers, the wholesalers and the ‘bosses’ who send the couriers out onto the streets to traffick can all expect longer sentences than the couriers and storekeepers, the couriers and storekeepers themselves cannot expect to receive less than the tariff sentence.”

1. I have no objection to sentencing policy having as one of its goals, consistency of sentencing. That is always a laudable goal for it contributes to transparency in the sentencing process and leads to fairness in the sentencing outcome. Nor do I have any difficulty with the goal of consistency being achieved by basing the calculation of a starting point on the weight of narcotic. Nor do I have any difficulty with the need for sentences for drug trafficking being sufficiently severe that they will act as a deterrent to those that may be contemplating becoming involved in some way in the drug trade. Whether deterrence as a sentencing principle is as effective as we would like it to be is a matter on which many people may differ but this is not the time to engage in a discussion of this issue. For myself, I prefer to base the rationale for severe sentences on the sentencing principles of punishment and denunciation for the undoubted very great harm that drug trafficking does to our society.
2. What is of concern to me is the passage in *Manalo* which seeks to explain why it is necessary to avoid distinctions being drawn in the culpability of a particular offender:

“It is important for the courts to avoid distinctions, which will often be irrational or speculative, being drawn between drug traffickers who are couriers or storekeepers because the resulting disparity in the levels of sentence will understandably lead to feelings of grievance.”

1. These comments assume that consistency will be lost, or at least put at risk, if sentencing courts are allowed to distinguish the culpability of offenders in their commission of the offence and that once that happens the resulting disparity in the levels of sentence will then lead to feelings of grievance.
2. Mr Bruce argues that these are not proper reasons for not permitting judges to employ, when appropriate, an individualized sentencing approach. He argues that the difficulties judges would face in assessing culpability are not beyond them and are more imagined than real.
3. I agree with Mr Bruce. In my view the observations by Stuart-Moore Ag CJHC in *Manalo* are not a proper legal rationale for not distinguishing between the culpability of offenders. Sentencing courts are daily being called upon to assess the culpability of offenders. In doing so they listen to submissions advanced on behalf of defendants and have to form a view of the merit of those submissions. This is usually not an onerous task. It may become complicated by the need for a *Newton* enquiry but again that has become a regular feature of our sentencing process. I have complete confidence in the ability of our judicial officers to recognise irrational or speculative submissions being advanced on behalf of a defendant.
4. Nor do I think the aggrieved feelings of offenders is a reason for not allowing judges to accept a legitimate distinction in culpability and to sentence an offender accordingly, even if that means departing from the tariffs and imposing an individualized sentence. Offenders will always feel a sense of grievance with their sentences for the very simple reason that every offender wants a lower sentence.
5. Drug traffickers regularly argue in the Court of Appeal that, compared with other offenders their sentence is too high. But they also point to personal circumstances that distinguish them from others. On the one hand they want consistent sentences in the sense that they do not want to be punished more severely than others, and on the other hand they want individualized sentencing so that their sentences are less severe than others.
6. The courts, especially the appellate courts, are not concerned with whether an offender has a grievance with his sentence but whether he has a *justifiable* grievance.
7. Consequently, I do not find that either difficulties faced by sentencing courts, or concern at the feelings of offenders, provides a proper legal basis for not allowing a distinction to be made between the culpability of offenders when a legitimate distinction presents itself. That is not to say that I propound a completely open approach to the assessment of a drug trafficker’s culpability. I believe that there is a more principled basis for limiting the creation of the myriad distinctions in culpability that was of concern to Stuart-Moore Ag CJHC in *Manalo*.
8. Drug trafficking is the process of delivering a manufactured product, here a dangerous drug, to the end user, the drug abuser. Everyone involved in this process knows that he is part of a process that involves many others, the identity of most of whom will generally be unknown to him. That is to say, he knows he is part of a joint enterprise crime and that within this joint enterprise crime he, like the many others, will have a particular role to play. For some the role will be minor, for others it will be more involved and for a few it will be a leading role. But all know that they are part of a criminal enterprise whose goal is the delivery of dangerous drugs to the end user.
9. The courts have developed particular sentencing principles in relation to joint enterprise crimes. They are sensible and rational principles. They eschew placing too great an importance on the role of the offender for each offender knows that he is a party to a joint enterprise and that his role, no matter how minor, is important to the success of the criminal enterprise.
10. In *A-G v Sin Wai-lun*[[77]](#footnote-77) the Court of Appeal approved a statement by Roskill LJ in *R v Brett*[[78]](#footnote-78). The effect of this statement was said in *A-G v Tam Ka Lok*[[79]](#footnote-79) to be:

“… that ‘no distinction’ was to be drawn between different degrees of participation in a joint enterprise.”

1. This case involved a triad gang revenge attack on two members of a rival group. They were all convicted on their plea of one count of manslaughter and one count of assault occasioning actual bodily harm. How the five defendants should be sentenced for their forms of participation in this attack was addressed by Hunter JA, in giving the judgment of the Court of Appeal, as follows:

“All the defendants pleaded guilty to participating in a joint enterprise, embracing other armed young men, to attack and inflict physical harm on the two victims which resulted in the death of one and injury to the other. There is, we think some scope for discrimination between the culpability of these persons, but it is very limited, as all the sentences must reflect the same basic criminality. Thus we accept that an identified ‘ring leader’ or the striker of potentially fatal blows, such as D3, may properly receive a stiffer sentence. But between the others who have armed themselves and joined in the attack, we can see very little scope for discrimination. They could not all chase the same man and some may fail to catch either. That is chance. If death results, their true criminality is manslaughter. They should be sentenced for that, not for some lesser part or for such activities as they may later admit.”[[80]](#footnote-80)

1. This principle was applied by the Court of Appeal in *R v Lee Yuk Wah*[[81]](#footnote-81) where three persons committed a burglary and in the course of so doing attacked and killed the manager of the premises they were burgling. In rejecting a submission advanced on behalf of one of the defendants that his client did not strike the fatal blows to the manager and should therefore receive a lesser sentence, Power JA said:

“The jury has, by its verdict, made it plain that the evidence established that each participant harboured the same basic criminality and that each was equally culpable. There is, we are satisfied, no ground for distinguishing between them by reference to the part they played.”

1. In *SJ v Tso Tsz Kin*[[82]](#footnote-82) Stuart-Moore VP summarized the position in a clear statement of the legal principles. At paragraph 16 he said:

“It is trite that where two people set out to commit a crime together, each taking a different role, but with an awareness of what the other is proposing to do, there should be no distinction made between their sentences based on the roles they have played. Examples of this kind are commonly to be found in cases where a lookout is used at the scene of a crime or where the driver of a vehicle knowingly conveys the participants to and from the scene of the crime. Each plays a vital role in the joint venture and each is liable to be sentenced on an equal footing with the others engaged in the enterprise. If the mastermind of a sophisticated and serious criminal enterprise is revealed, he will, by reason of this additional factor, sometimes receive a heavier sentence than his accomplices.”

1. The sentencing principles applicable to joint enterprise crimes provide, in my view, the correct legal rationale for not usually distinguishing between those involved in drug trafficking by reason of the particular role they played. The joint enterprise sentencing principle is applied in much the same way as the drug trafficking sentencing regime is currently applied to drug traffickers. That is to say, all participants in the joint enterprise receive the same sentence unless they can be shown to have played a more serious or important role in the commission of the joint enterprise crime, in which case their sentence will be enhanced. An example of where this was done is *HKSAR v Law Chung Hin*[[83]](#footnote-83), a manslaughter case flowing from a triad gang attack, where the Court of Appeal distinguished the culpability of one of the defendants (D3) from that of his co-offenders and imposed on him a higher sentence.
2. The joint enterprise sentencing principle rationale also allows more flexibility to the sentencing judge for it does entitle him to recognise that a member of a joint enterprise may have a lesser culpability than other participants and to reflect that recognition in a lesser sentence. Although the occasions when such a distinction can be validly drawn may be rare, I would not like to say that it could never happen. There is no limit to the unusual circumstances in which individuals may be drawn into criminal activity and there should be room for the exercise of sentencing discretion to impose a more individualized sentence when the appropriate circumstances call for it. Having available such a sentencing discretion, not embracing the personal circumstances of the offender, such as poverty, financial need, medical conditions and family circumstances[[84]](#footnote-84), but limited to how the offender came to be involved in the offence and what he did in furtherance of it allows, to a very limited extent, the possibility for a more individualized sentence. Permitting this slight flexibility does not, in my view, detract from the severity and deterrent effect of the drug trafficking sentencing regime or put at risk the consistency of sentences imposed in application of it.
3. There is nothing in the circumstances of this applicant to warrant treating him any differently from any other drug courier.
4. The arithmetic starting point for 718 grammes of cocaine is 20 years 7 months’ imprisonment but this starting point has to be enhanced to allow for the presence of the aggravating factor of the international element. The judge only enhanced the starting point by 12 months and Mr Bruce urges us to do likewise. However, Ms Lai submitted that this enhancement was unduly lenient and there is no reason for us to depart from an arithmetically determined enhancement of 17 months’ imprisonment.
5. I agree with Ms Lai. I see no reason not to employ arithmetic as a tool to guide the sentencing court to an initial assessment of the amount of the enhancement. As I said in *HKSAR v Nwadiuto Samuel Joseph*[[85]](#footnote-85)when addressing the use of arithmetic to determine the appropriate starting point within the relevant sentencing band:

“43. The way in which the court demonstrates transparency and a key element in achieving consistency is to employ arithmetic as a first step in determining the appropriate starting point. Arithmetic will indicate where the starting point should be before the judge turns to the exercise by him of his sentencing discretion.  But, as has been emphasized on many occasions, the sentencing discretion can be used by a judge to depart from an arithmetically calculated starting point and to adopt a starting point elsewhere within the relevant sentencing band for the particular quantity of drug in which the offender was trafficking.

44. Transparency is, of course, part of the rationale for the duty to give reasons and will only be achieved if the judge, in compliance with this duty, explains why it is that he is departing from an arithmetically calculated starting point.  A reasoned departure from such a starting point not only informs the offender being sentenced of how and why the judge has reached a particular starting point but it also informs other convicted drug traffickers and the appellate courts of the reasoning behind the judge’s decision. Departures from arithmetically calculated starting points will, of course, impact upon the consistency of the sentencing regime and this could lead to a sense of grievance amongst offenders that they have been treated less fairly than others.  But *reasoned* departures should go a long way to preventing such aggrieved feelings from arising.  Even if such feelings do arise the appellate courts will be in a position to explain to applicants why their grievances are unjustified.”

I see no good reason for not employing the same approach to the initial determination of the amount of the enhancement.

1. In applying this approach, the sentencing court is not bound to adhere to this preliminary arithmetically calculated assessment and may depart from it when there are good reasons for so doing. However, when no such reasons exist it seems to me that the arithmetically calculated period of enhancement should prevail, thereby contributing to the goal of consistency in sentencing.
2. In respect of the applicant, I cannot see that there exists good reason to depart from an arithmetically calculated period of enhancement. Enhancing 20 years 7 months by 17 months results in a final starting point of 22 years’ imprisonment.
3. It then becomes necessary to address the factors in mitigation which may reduce this final starting point. In respect of this applicant they are:

(i) the plea of guilty;

(ii) assistance to the authorities; and

(iii) participation in Father Wotherspoon’s campaign.

1. By ground 4 of his Amended Perfected Grounds of Appeal the applicant contends that the sentencing judge should have taken into account as further mitigating his culpability that:

(i) the importation of the drugs into Hong Kong was a one-off incident;

(ii) he was previously of good character with no prior convictions;

(iii) because of his economic vulnerability he was a victim of exploitation; and

(iv) his exemplary post-arrest conduct.

1. I can shortly deal with this ground of appeal. The matters referred to in (i)-(iii) would normally all be encompassed by the one-third discount for the plea of guilty. Where an offender is sentenced after trial the Court of Appeal has consistently said that these kinds of personal circumstances count for very little and do not warrant a departure from the appropriate sentencing band. The Court of Appeal has recognised that such an approach may be severe but the gravity of the drug trafficking offence requires that a severe approach be taken.
2. As for the post-arrest conduct, this consists of the applicant’s attempt to assist the authorities and his participation in Father Wotherspoon’s campaign. These will now be separately addressed.
3. In the present case the judge allowed a discount of 12 months from his one-third discounted final sentence to take account of both the applicant’s provision of information to the authorities and his participation in Father Wotherspoon’s campaign. The judge explained his decision as follows:

“The defendant had offered to assist but the information he supplied was already known to the Customs and Excise Department. Nevertheless, I would still give him some discount. I would also give him some discount for his active role in Father John’s program. In view of these factors, I would give him an additional 1 year reduction.”

1. Assistance to the authorities is normally treated separately from other aspects of a defendant’s mitigation and, where a sentencing court wishes to recognise it, the usual practice is to increase the amount of the one-third discount that is awarded for the plea of guilty. However, here, that was not done.
2. The issues we have to address are whether the judge was correct to award a discount in respect of either of the two forms of assistance, one to the authorities and the other to Father Wotherspoon, and, if he was, whether, in now sentencing the applicant afresh, we should allow a similar amount. However, in addressing this latter issue it must be borne in mind that the judge allowed a global amount and did not indicate how he would apportion that amount as between the two different forms of assistance.
3. The first issue arises because the respondent disputes the applicant’s entitlement to any discount on the basis that the information provided by the applicant was of no value to Hong Kong’s law enforcement authorities as it did not “bear any fruit”. The respondent argues that as the information has not led to any tangible outcome, this court should not, consistent with authority, allow the applicant any further sentencing discount. When assistance does not bear any fruit, it matters not that the person attempting to assist has shown genuiness, persistence and determination in his efforts or even that the information he has provided has proven to be accurate.
4. The position in Hong Kong has long been that the provision of information which is not useful does not entitle the provider to a sentencing discount. In *R v Tam Yin Chung*[[86]](#footnote-86) Macdougall JA, in giving the judgment of the Court of Appeal, said:

“Moreover, credit should only be given for genuine cooperation which results in the furnishing of *reliable and useful information*. Offenders who simply tell the police what they already know or who give information which is merely vague or which relates to alleged offenders who are safely outside the jurisdiction, should not expect to receive a reduction in sentence on that account. Promises to cooperate do not justify any reduction. …

Having said that, we entirely agree that the intervention of some supervening event over which the offender has no control, such as the death of the person in respect of whom he had given reliable and useful information or had made a genuine undertaking to give evidence for the prosecution in a pending trial, should not prejudice his claim to a discount in sentence.” (Emphasis added.)

The Court of Appeal did not explain what is required of the information for it to qualify as “useful”.

1. This passage was quoted with approval by a differently constituted Court of Appeal in *Attorney General v So Chin Chiu*[[87]](#footnote-87)where it was said that the mere provision of the names of accomplices which was of no value to the police did not entitle the defendant to any sentencing discount. To require that the information has to be of value to law enforcement is both sensible and practical but it also begs the question of what is required of the information for it to be valuable.
2. In *HKSAR v Bin Kei Chi & Anor*[[88]](#footnote-88) Stuart-Moore VP, in giving the judgment of the Court of Appeal, said at paragraph 14:

“ We take this opportunity to emphasise once more, in the interests of parity in sentencing policy, that co-operation after arrest, where meaningful assistance provided has led to a *tangible* result, is rewarded by the courts but either an unfulfilled promise or an attempt to assist which is of no significant practical value at the sentencing stage does *not* carry with it the prospect of a reduced sentence.”

In this judgment, for the first time, and without referring to earlier authority, the Court of Appeal required that the assistance lead “to a tangible result” and that “an attempt to assist which is of no significant practical value” would not entitle a defendant to a sentencing discount.

1. In *HKSAR v W*[[89]](#footnote-89) Stock VP, as Stock NPJ was then, in giving the judgment of the Court of Appeal, at page 371, paragraph 8 and page 372, paragraphs 11-12 said:

“8. It has long been the approach in this jurisdiction not to accord credit for information which in the event bears no fruit …

…

11. So, where information provided in fact leads nowhere, the system opens itself to abuse if credit is given merely for the provision of detailed and specific information which in the event bears no fruit. And ‘fruit’ in such a case is not produced by mere identification without the assistance of the accused in actually securing, directly or indirectly, the prosecution and conviction of the person concerned.

12. That must be the general approach.”

1. Since the *Bin Kei Chi* judgment it has been assumed that what makes information “useful” or “of value” is that it leads to “a tangible result” or “bears fruit”. This has been understood as requiring that there be some kind of positive measurable outcome such as a prosecution. This definition of “useful” has the effect of rendering the motivation of the provider of the information, such as remorse, and the genuiness of the provider’s desire to assist, as irrelevant. No matter how well intentioned the provider of the information might be and no matter how keen he might be to assist, if his information is ultimately of no significant practical value in the sense of bearing fruit, then he will get no sentencing benefit from having provided the information.
2. But this definition of useful assistance is not employed when the assistance was not the provision of information but the participation in a controlled delivery operation which turns out to be unsuccessful. In this situation the courts have been willing to provide an additional sentencing discount. Examples of where this has been done are *HKSAR v Smit Hector Edward*[[90]](#footnote-90), where a total discount of 37.85% was allowed, and *HKSAR v Nkwo Nnaemeka Darlington*[[91]](#footnote-91)where the Court of Appeal did not interfere with an additional discount of 5.2% on top of the plea of guilty discount.
3. In the *Darlington* case Macrae JA said at page 700, paragraphs 33-35 of the judgment:

“33. As for any further discount for assisting the authorities in the controlled delivery, we do not accept that there is, or can be, any fixed percentage, or identifiable range of percentage, to be applied to such assistance. We agree with Ms Lam’s helpful submissions that neither a straitjacket approach nor the application of a percentage discount range is desirable, because the factors to which a sentencing judge should have regard will necessarily vary according to the unique circumstances of different cases. Such factors would include: (i) the nature and effect of any voluntary participation; (ii) the outcome of the assistance: was it successful in bringing to justice persons who would not otherwise have been brought to justice?; (iii) the degree or extent of assistance which had been provided; and (iv) the degree of risk to which the defendant had exposed himself or his family. It is a matter within the discretion of judges how these, and other possible, factors affect the discount to be accorded a defendant in a particular case. Accordingly, we do not accede to the invitation to lay down guidelines for such assistance.

34. Whilst we acknowledge that in the cases referred to by Mr Ross, the range of discount for participation in the controlled delivery was between 7.3% and 7.5% of the starting point, whereas the discount in the present case was 5.2%, the discount in *Saavedra Rosamarie Bernado*, the authority relied on by the respondent, was 5%. In that case, although the applicant’s participation in a controlled operation had initially led to the arrest of three other persons, nothing useful ultimately resulted.

35. As we say, every case is different and we do not accept that there can be a fixed percentage discount applied to all, or even similar, cases. In this particular case, the Judge was specifically addressed on this issue in mitigation by reference to two of the authorities on which Mr Ross places particular reliance, namely *Gopal Muthusamy* (where the discount was 7.3%), and *Jardin Rodela Maningas* (where the discount was 7.5%). In his discretion, however, the Judge adopted a discount of 9 months' imprisonment, which represented a further discount from the normal discount for plea of 5.2%. We also agree with Ms Lam that the facts in both cases, so far as the nature and extent of cooperation in the controlled deliveries were concerned, went further than the facts of the present case.”

1. I do not see why a different approach should be taken when the assistance takes the form of a controlled delivery operation from when the assistance takes the form of the provision of information. Participation in a controlled delivery operation may be a more overt form of assistance and may be thought to expose the participant to a greater risk of harm. But the provider of information is also at risk of harm as providing information is, after all, not a risk-free activity. Defendants who are drug traffickers are all long term prisoners and their assistance to the authorities does not usually take long to become known within the prison population. The persons against whom they are informing will frequently be triads or associated with triads and these persons will usually have the means to intimidate and harm any cooperating prisoner.
2. I accept completely that any system of sentencing discounts that rewards prisoners for assistance to the authorities will be at risk of being abused. Prisoners will exaggerate the value of their assistance and may even fabricate information in order to create the pretence of providing valuable assistance. Any claim will need very careful scrutiny to ensure that it is worthy of being rewarded and that may be particularly so when the assistance is only the provision of information. But that should not result in the provision of information being treated as amounting to useful assistance only if it is productive of a prosecution.
3. It must also be remembered that modern day law enforcement work is far less reactive and far more proactive than it used to be. Indeed, controlled delivery operations are a prime example of proactive law enforcement investigations and this type of investigation has now become commonplace. Proactive investigations rely on law enforcement officers acquiring intelligence from a number of different sources so that they may design and undertake what are referred to as “intelligence-led investigations”. The intelligence needed for these investigations may come from a number of sources, such as informants, telephone interception and covert surveillance. In my view, it is simply not correct to say that in modern day law enforcement, information, by itself, has no value.
4. Nor, in my view, is it correct to say that information provided by a defendant of which law enforcement is already aware, is information which, *necessarily*, does not have any value. The intelligence that law enforcement acquires may often be based on multiple hearsay, gossip or speculation. To have the accuracy of the information confirmed may, in these circumstances, be of practical value.
5. I prefer a simple test of whether the assistance provided by a defendant is of practical value to law enforcement. If it is, then the defendant will be entitled to a discount and the amount of the discount will be determined by the sentencing court after it has heard from law enforcement. In the area of law enforcement I am wary of too readily stating generalizations on the potential utility or value of information. I prefer to leave such assessments to the professionals to make on a case by case basis and I am satisfied this can be done fairly to a defendant within the existing *Sivan* procedure, a subject to which I shall return shortly.
6. In my view the decisions of the Court of Appeal on what is “useful assistance” when the assistance is the provision of information are in conflict with the decisions of the Court of Appeal on what is “useful assistance” when the assistance takes the form of a controlled delivery operation. I am also of the view that there is nothing in the earlier authorities which would justify the gloss put on the word “useful” by the Court of Appeal in the cases of *Bin Kei Chi* and *W* and such a gloss I find inconsistent with modern day law enforcement practices.
7. There is another reason why I would not follow the “must bear fruit” approach and that is because I believe that it actually undermines the judicial policy underlying it. The purpose of providing a sentencing discount is to reward the defendant assisting law enforcement by conferring a real and meaningful benefit on him. It is crucial to the success of the judicial policy of encouraging defendants to assist the authorities that they see a benefit from so doing.
8. In *R v Wong Wing Ching*[[92]](#footnote-92) Nazareth VP expressed it thus:

“In short the judge should tailor the sentence so as to punish the defendant but at the same time reward him so far as possible for the help he has given in order to demonstrate to others that it is worth their while to disclose the criminal activities of others for the benefit of the law-abiding public in general.”

1. Denying defendants a discount unless their assistance results in a prosecution seems to me more likely to discourage them from providing assistance rather than encouraging them to do so. For the judicial policy to be effective it must provide a meaningful opportunity to a prisoner to receive a sentencing discount. If the prisoner is not likely to perceive it as a meaningful opportunity, or, in the words of Nazareth VP, as “worth their while” then it will have lost the incentive characteristic that is crucial to its success.
2. Finally, I note that the Court of Appeal has created a number of exceptions to the “must bear fruit” policy. The first is the exception of a defendant pleading guilty in response to evidence provided by a cooperating accomplice. Secondly is the supervening event exception as articulated by Macdougall JA in *Tam Yin Chung* in the passage from that judgment that is quoted in paragraph 181 above. Thirdly is the culpable inaction by law enforcement exception that Stock VP referred to in the *W* case when he said at paragraph 12 of his judgment, after stating that the assistance must “bear fruit”:

“ That must be the general approach. There might be wholly exceptional cases where the specific information is demonstrated to be truthful and likely to be of significant assistance to a prospective investigation which can reasonably be expected as a result of the provision of the information; where it is clear that the accused intends to testify in the event of an arrest and prosecution; but where the provision of the information is shown to bear no fruit by reason of clearly culpable inaction on the part of the law enforcement authorities. In such circumstances - the burden of showing which would lie squarely on the accused - some credit may be due to the defendant. We apprehend that cases of that kind would be rare.”

1. Such an approach I find unattractive. It requires a court to find a way of pigeon-holing a defendant’s assistance into one of the exceptions or to create a new exception. In respect of the culpable inaction by law enforcement exception it requires a judicial enquiry and finding as to why the assistance has not borne fruit.
2. For all these reasons I would resolve the conflict in the present state of the authorities by adopting the broader approach to the meaning of “useful assistance” that was adopted by Macrae JA in his judgment in *Darlington*.
3. Once a defendant makes a claim of having assisted the authorities it falls to the judge to assess that claim and determine how the assistance should be reflected in the sentence the judge will have to impose. As I earlier indicated in this judgment it is my view that the appropriate mechanism that the judge should employ to assist him in this task is the *Sivan* procedure.
4. In *R v Sivan & ors*[[93]](#footnote-93), from which case the procedure takes its name, Lord Lane CJ described in his judgment the matters relevant to a judge’s assessment of the assistance provided. Interestingly, in doing so he did not restrict the entitlement of an offender to a sentencing discount to only those cases where the assistance had borne fruit. At page 287 he said:

“ Thirdly, it is not easy for the judge to determine exactly to what extent credit should be given for the information provided. Amongst matters to which he will pay regard are the following: the nature and effect of the information imparted – did it relate to trivial or serious offences? Was the information successful, bringing to justice persons who would not otherwise have been brought to justice, because that is one of the ways, as was pointed out in argument, of testing the veracity and accuracy of the information which has been given? Next, the degree of assistance which has been provided: was the defendant, for example, prepared, as Greenfield was prepared in this case, to give evidence if necessary in order to bring home the information which he had provided and to assist in the conviction of an offender? Also, again as illustrated in this case, the judge must take into account the degree of risk to which the defendant has, by his actions, exposed himself and his family.

Within those limits, necessarily very broadly, the judge must bring himself to tailor the sentence so as to punish the defendant, but at the same time reward him as far as possible for the help he has given and - this is as important as anything else - in order to demonstrate to offenders that it is worth their while to disclose the criminal activities of others for the benefit of law-abiding public in general.”

1. The *Sivan* procedure was first commended as appropriate for Hong Kong by the Court of Appeal in its judgment in *R v Chan Kwok Hung*[[94]](#footnote-94). It was, however, the subject of more detailed consideration by the Court of Appeal in *HKSAR v Tse Ka Wah*[[95]](#footnote-95) where, in giving the judgment of the court Stuart-Moore JA, as he then was, said at page 927C-I:

“… The whole purpose of the *Sivan* procedure, whether in a court of first instance or at the appeal stage, is to preserve confidentiality in situations where offenders have provided valuable information which they hope will be rewarded by an additional discount to their sentence. This cannot be considered in an open courtroom.

From a public point of view there is a threefold benefit from this procedure.

(1) Information which will have led to the detection of other criminals or the recovery of the proceeds of crime, or both, may well not have been forthcoming if the defendant believed that his role as an informer might be made public when he attempted to receive some benefit by way of a reduction of sentence in return for the information provided.

(2) The offender will be able to receive the credit he deserves to be given on sentence without the risk to him or his family of being subjected to physical harm.

(3) Other persons who are minded to come forward with valuable information will not be discouraged from doing so by the spectacle of another informer's public exposure where the shield of confidentiality has been breached.

Obviously, the *Sivan* procedure is not appropriate where an informer intends, for example, to give evidence at the trial of other accomplices, (see *R v Wood* [(1987) 9 Cr App R.(S) 238](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I7454A4E0E42811DA8FC2A0F0355337E9)), as it will be widely known that the defendant has provided the information.

…

… The procedure in *Sivan* (above) is designed to enable the sensitive material, which it is intended should not be broadcast to the outside world, to be heard in private with a record kept by a court reporter of what has been said in case of an appeal. This procedure is not meant to cover other aspects of the mitigation which should always be dealt with in open court in the normal way.”

1. An element of the *Sivan* procedure is that, in appropriate cases, it may be necessary for the officer in charge of the investigation to be available to give evidence and to be subject to cross-examination. I do not believe that this element of the procedure commonly occurs and I am very wary of it being used as means of luring the judge into conducting an enquiry into the merits of the investigator’s assessment and persuading him to reject that assessment and to replace it with his own. If the investigator sets out the details of the assistance provided and, in those cases where it did not lead to a prosecution, the reasons why there was no fruitful outcome from it, then in most cases that should be sufficient for the judge to assess the value of the defendant’s assistance. I say that because it is an essential element of the procedure that the assessment of the investigating officer is separately examined by a more senior officer independent of the investigation.
2. However, a problem arises when the law enforcement agency assesses the assistance as being of no practical value and the defendant disputes this. As we have not heard argument on how such disputes should be resolved it is not appropriate that we now lay down any particular regime for doing so. However, it seems to me that there are two matters which, if applied conscientiously, should significantly reduce the risk of such disputes occurring.
3. The first matter is that the *Sivan* procedure is employed as a platform for placing before the judge the assessment of the law enforcement agency. It is not clear whether the *Sivan* procedure has, in the past, always been employed when a dispute arises. It appears that on occasions the prosecutor has simply asserted from the bar table the unfavourable view of the law enforcement agency. In my view, where the defendant persists in seeking a discount for his assistance to the authorities then the *Sivan* procedure should be employed, even if there is no need for confidentiality. The check and balance provided by the involvement of an independent senior officer is a significant factor which lends credibility to the assessment by the law enforcement agency of the value of the assistance provided by the defendant. Furthermore, if the *Sivan* documents explain the reasons why the assessment is unfavourable to a defendant then that should also contribute to reducing the risk of a dispute occurring.
4. The second matter that should reduce the risk of disputes occurring is if the prosecutor assumes responsibility for the view taken by the law enforcement agency. The role of the prosecutor was adverted to by Stuart‑Moore in *Tse Ka Wah* when he was discussing the need to protect the confidentiality of the procedure. At page 930D-E he said:

“In the view of this court, the prime responsibility for ensuring that the sensitive material to be advanced in mitigation reaches the judge in circumstances of strict security lies with the prosecution. It is they who prepare and produce the letter for the court and it must be their duty, bearing in mind the resources at their disposal, to ensure that the judge is provided with it in circumstances of the strictest confidence.”

1. No doubt these comments were prompted by a recognition of the very important and special role played by the prosecutor in the sentencing process. That role is helpfully discussed by the authors of *Sentencing in Hong Kong, 8th edition*. At page 531 they describe the function of the prosecution and quote the relevant part of *The Prosecution Code*, issued by the Department of Justice:

“ The function of the prosecution in the sentencing process differs markedly to that of counsel for the defence. The prosecutor must ensure that proceedings do not miscarry at a critical point, and that matters of relevance are not overlooked. Operating as a minister of justice, the prosecutor has no particular interest in securing a more severe sentence by advocacy, but he plays a part in ensuring that an appropriate sentence is imposed. The Department of Justice views the role of the prosecutor in sentencing thus:

A prosecutor has an active role to play in the sentencing process by assisting the court to impose the appropriate penalty and to avoid appealable error; but a prosecutor should not attempt by advocacy to influence the court in relation to the quantum of sentence. A prosecutor should: (a) adequately (fully and accurately) present the relevant facts; (b) assist the court to avoid proceeding on any error of fact or law; (c) respond helpfully to any request by the court for relevant information; (d) fairly evaluate and, if necessary, test the opposing case and correct any apparent legal or factual error made by the defence in submissions; (e) provide information from previous relevant court decisions and official statistics; (f) where appropriate, make submissions on the type of sentence, but not quantum beyond providing a range supported by previous cases.”

1. At page 532 the authors succinctly sum up the position in this way:

“The duty of the prosecutor is to assist the judge to do justice to the accused who faces sentence, and this principle does not admit of compromise.”

1. Applying these principles to the *Sivan* procedure it seems to me that the prosecutor, in presenting the *Sivan* documentation to the court, is not acting in an adversarial capacity but rather in his capacity as a Minister of Justice, seeking to assist the court to reach a just sentence. In performing this duty, in this capacity, it is only right that the court should be able to assume that the prosecutor has satisfied himself, before he has tendered the *Sivan* documents, that he can properly invite the court to act on them.
2. I am, therefore, of the view that, irrespective of any need for confidentiality, the *Sivan* procedure is the appropriate means by which a sentencing judge should determine the value of any assistance provided by an offender and how that assistance should be reflected in the offender’s sentence.
3. Here, the applicant operated as an informant for the Police and the Customs and Excise Department and provided information to them and the Tanzanian Anti-Drug Squad. There is no reason to doubt the genuiness and sincerity of the applicant’s assistance.
4. It is clear also that the applicant was not providing Customs and Excise Department and the police with inaccurate information. Indeed one of the pieces of information about a drug mule turned out to be correct. The only problem for the applicant was that the drug mule, whose correct passport details the applicant provided, did not arrive as imminently as he expected and did not arrive in Hong Kong. The mule in question later entered the Mainland and, fortuitously, was detected there. Originally, it was thought that the applicant had provided this information to the authorities only after Mainland law enforcement officers had arrested the person travelling on this passport. But this misunderstanding, which prompted Ms Lai to downplay the assistance provided by the applicant, was corrected by the third affirmation of Father Wotherspoon.
5. Notwithstanding that the applicant’s information did not lead to the prosecution of any individual in Hong Kong I would nevertheless allow him a total sentencing discount of 36.5% for his plea of guilty and his efforts to assist Hong Kong’s law enforcement agencies in their investigation of drug trafficking. This would reduce the applicant’s starting point from 22 years to 13 years 11 months’ imprisonment.
6. It now becomes necessary to consider whether any discount should be awarded for the applicant’s participation in Father Wotherspoon’s campaign.
7. In the present case Father Wotherspoon testified on behalf of the applicant and affidavit evidence from him has been adduced on appeal. It is clear from what he said that his campaign has a number of elements to it, the key one being the posting of prisoner’s letters on his internet website. By this means he is able to publicise the harsh punitive reality that faces persons who may be contemplating trafficking drugs to Hong Kong. Of this applicant’s participation in his campaign Father Wotherspoon said:

“So the campaign has been very blessed, it’s been very successful, and I can say that Abbas has supported it by his letters and information to me which I’ve put on my website and passed on. He’s been in constant contact with the social worker mentioned by counsel here. That lady is a social worker in prisons in Tanzania and she helped keep contact with the families I met there, after I left, and she came to Hong Kong last year in October and visited all the Tanzanians in question. She visited Abbas. And since then, he has sent me many messages. He writes them, posts them; I scan them, I send them to her; she spreads the message in Tanzania, to the media as well. So he has taken an active part in that campaign and I would hope it might assist his case.” [[96]](#footnote-96)

1. The social worker whom Father Wotherspoon mentioned is a Probation Officer with the Tanzanian Government Ministry of Home Affairs known as Grace.[[97]](#footnote-97) In an email with a Hong Kong Customs Officer she explained that she came to Hong Kong in early September 2015 and visited all the prisons. In respect of her contact with the applicant she said:

“About Abbas kilima’s issue. Yes i did some campaign here in Tanzania about people should stop taking Drugs to Hong Kong course when I was in Hk i talked ti Him and he explained to me alot about how he has been tricked to take Drugs to Hk. So Kilima wrote a letter to me so that i can publish that letter to our local News papers how dangerous it is to take drugs to Hk and how he has been tricked and he was really regretinh.

I did my best ti help him support his Campaign about Stop Taking Drugs to Hk and I’m still doing it as a social worker people should stop taking Drugs to HK.” [[98]](#footnote-98)

1. The respondent has provided us, at our request, with statistics on the number of drug mule arrests from 2010 to March 2017, broken down by nationality. These show in each of these years the total number of drug mules arrested at the airport, and the total number of Tanzanians amongst them. The figures are set out at paragraph 123 of this judgment.
2. Whether Father Wotherspoon’s campaign has contributed to the decrease in drug mules coming from Tanzania can only be a matter of inference. I accept that there has been a dramatic decline in arrivals. Given the amount of effort that Father Wotherspoon has put into raising awareness in Tanzania of the consequences to drug mules who are prosecuted in Hong Kong, it seems to me, in the absence of any other explanation that could account entirely for this decrease, to be a reasonable inference that his efforts have contributed to this drop in numbers.
3. But, of course, it is not the applicant’s campaign, it is Father Wotherspoon’s. Nevertheless, the campaign would not enjoy any success if it was not for the active participation of serving prisoners, such as the applicant. As Mr Bruce put it, by joining the chorus, a prisoner makes the chorus louder.
4. However, the statistics also reveal that even though there was a significant drop in the number of Tanzanian drug mules trafficking drugs to Hong Kong, there was not an equally significant drop in the number of total arrests. But, there might well be if Father Wotherspoon’s campaign was extended to other countries whose citizens are the source of drug mules for the drug trafficking syndicates.
5. Ms Lai submits that the actions of the applicant should properly be characterized as simply evidence of positive good character. Positive good character is recognized as a mitigating factor and therefore a reason for reducing an offender’s sentence. But, positive good character, Ms Lai argued, would not normally merit a discount of as much as one year.
6. Insofar as it is necessary or helpful to label this conduct, then positive good character or meritorious conduct may suffice. The only difficulty I have with both of these labels is that willingness to participate in Father Wotherspoon’s campaign does not necessarily evidence remorse, bravery, selflessness or demonstrate that the participant has aspects of good character of which the sentencing court might otherwise have been unaware. I say this because it is not necessary that the offender’s conduct be motivated by remorse or a desire to do good in return for the harm he has already done. Like assistance to the authorities, it can be motivated solely by the self-interest of obtaining a reduction of sentence and, if it is, the offender will still be entitled to the discount.
7. It may be that it is more accurately described as a form of reparation with the defendant seeking to repair some of the harm he has caused by his drug trafficking activity. The sentence of the drug trafficker is a punishment imposed by the court for the harm the drug trafficker has done to Hong Kong by engaging in drug trafficking. By his participation in Father Wotherspoon’s campaign he is seeking to reduce the future harm that may be caused to Hong Kong by helping to reduce the volume of drugs trafficked into Hong Kong from Africa, specifically from Tanzania.
8. His acts of reparation are directly linked to the reason why he is before the courts being sentenced and, in my view, this is the reason why participation in Father Wotherspoon’s campaign should be treated as mitigating his culpability.
9. I agree with Mr Bruce that Hong Kong’s sentencing regime, with its strong emphasis on deterrence, cannot be effective unless people in the countries in which drug mules are recruited are aware of the punishment they will receive from our courts. Father Wotherspoon’s campaign is designed precisely to produce that awareness.
10. The question then becomes how to reward this form of meritorious conduct. In my view a court called upon to sentence a drug trafficker who seeks a sentencing discount for this form of assistance should first decide whether the actual assistance provided, over the time it has been provided, enables him to confidently form the view that the defendant has contributed meaningfully to Father Wotherspoon’s campaign. If it is too early for the judge to confidently form such a view then he should leave any sentencing discount to be subsequently assessed by the Executive.
11. If the judge forms the view that the defendant has made a meaningful contribution to Father Wotherspoon’s campaign then he should reward the defendant for the assistance he has provided to date.
12. This will always be a matter of discretion for the sentencing judge. In exercising that discretion the judge will take into account the nature and extent of the applicant’s participation in Father Wotherspoon’s campaign, whether that participation has exposed him, or members of his family in his home country, to any risk of harm and the benefit that has flowed to Hong Kong from the campaign. This is not intended as an exhaustive list of the relevant considerations.
13. In determining the amount of discount for this form of mitigation there must be taken into account the need to encourage serving prisoners to cooperate in this and any other effort whose goal is to make it harder for the international drug trafficking syndicates to recruit mules for the purpose of trafficking drugs into Hong Kong. In order to act as an incentive to defendants and serving prisoners the discount must be of a length that will be a meaningful reward. In the context of prisoners serving very lengthy sentences a discount of 2 or 3 months will not, in my view, be perceived as a meaningful reward.
14. I believe the minimum discount should be one of 6 months’ imprisonment which, in appropriate circumstances, can be increased up to 1 year. It is apparent from Father Wotherspoon’s evidence that the nature, extent and duration of participation in his campaign can vary. For example, some prisoners enlist the assistance of their families in their home country to contribute to his efforts to publicise the penal consequences that face drug mules who are prosecuted in Hong Kong. But where this participation continues past the completion of the sentencing process then it must be for the executive to decide whether the prisoner is worthy of any further discount in addition to that which may have been provided by the sentencing court.
15. I accept that through his active participation in Father Wotherspoon’s campaign and his cooperation in the efforts of the Tanzanian Ministry of Home Affairs, the applicant has made significant reparation to Hong Kong. His actions in conjunction with the actions of others have resulted in considerable benefit to Hong Kong. For this applicant I am of the view that an appropriate discount for his positive good character is 6 months’ imprisonment.
16. When the 13 years 11 months is reduced by this amount the final sentence becomes 13 years 5 months’ imprisonment and this is the sentence I would impose on the applicant.

Conclusion

1. For these reasons I would allow the application for leave to appeal and, treating the application as the hearing of the appeal, I would set aside the sentence imposed on the applicant by the trial judge and in its place sentence the applicant to 13 years 5 months’ imprisonment.

Hon Lunn VP:

1. We allow the application for leave to appeal against sentence. However, for the reasons given in the judgments of Lunn VP and Macrae VP, we dismiss the appeal.

|  |  |  |
| --- | --- | --- |
| (Michael Lunn) | (Andrew Macrae) | (Ian McWalters) |
| Vice-President | Vice-President | Justice of Appeal |

9, 14 and 20 March 2018

Ms Anna YK Lai SC, DDPP and Mr Franco Kuan SPP, of the Department

of Justice, for the respondent

Mr Andrew Bruce SC and Mr Trevor Beel, instructed by Boase, Cohen &

Collins, assigned by the DLA, for the applicant

5 May 2017

Ms Anna YK Lai SC, DDPP and Mr Franco Kuan SPP, of the Department

of Justice, for the respondent

Mr Trevor Beel, instructed by Boase Cohen & Collins, assigned by the

DLA, for the applicant

20 December 2016

Mr Franco Kuan SPP, of the Department of Justice, for the respondent

Mr Trevor Beel, instructed by Boase Cohen & Collins, assigned by the

DLA, for the applicant

1. *HKSAR v Abdallah* [2009] 2 HKLRD 437. [↑](#footnote-ref-1)
2. Appeal Bundle, page 10 I-L

   “ I understand that my client did do his best to assist the authorities. I’m allowed to say this. Unfortunately, some of the information he gave, by the time it was passed on, had already been received from other sources, so it wasn’t - I understand my learned friend accepts this - it wasn’t that he passed on dud information, it was just information that somebody else had already passed on…” [↑](#footnote-ref-2)
3. *HKSAR v Leung Kwai Ping & Another (No 2)* [2003] 2 HKC 575. [↑](#footnote-ref-3)
4. Section 125(1) of the Coroners and Justice Act 2009. [↑](#footnote-ref-4)
5. Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug, contrary to section 3 of the Misuse of Drugs Act 1971. [↑](#footnote-ref-5)
6. Category 1: heroin and cocaine, between 1 and 5 kilogrammes; amphetamine, between 4 and 20 kilogrammes. [↑](#footnote-ref-6)
7. Drug Offences Definitive Guideline, page 4. [↑](#footnote-ref-7)
8. *The Queen v Lau Tak Ming* [1990] 2 HKLR 370. [↑](#footnote-ref-8)
9. *The Queen v Lau Tak Ming*, page 386 E-F. [↑](#footnote-ref-9)
10. *Ibid*, page 386 F-H. [↑](#footnote-ref-10)
11. The *Queen v Leung Kim Wah* CACC 442/1992, unreported, 6 July 1993. [↑](#footnote-ref-11)
12. MacDougall, Litton and Bokhary JJA, as Litton PJ, Bokhary PJ and MacDougall NPJ were then. [↑](#footnote-ref-12)
13. *The Queen v Leung Kim Wah*, page 4. [↑](#footnote-ref-13)
14. *HKSAR v Manalo* [2001] 1 HKLRD 557. [↑](#footnote-ref-14)
15. *A-G v Ching Kwok Hung* [1991] 2 HKLR 125. [↑](#footnote-ref-15)
16. *HKSAR v Manalo*, page 559 A-B*.* [↑](#footnote-ref-16)
17. *Ibid*, page 560 D-E. [↑](#footnote-ref-17)
18. *Ibid*, page 560 F-H. [↑](#footnote-ref-18)
19. *Ibid*, page 560 I. [↑](#footnote-ref-19)
20. *HKSAR v Leung Kwai Ping & Another*, paragraph 11. [↑](#footnote-ref-20)
21. *Ibid*, paragraph 11. [↑](#footnote-ref-21)
22. *Ibid,* page 581 C-D. [↑](#footnote-ref-22)
23. *HKSAR v Law Num Chun* [2014] 5 HKLRD 500. [↑](#footnote-ref-23)
24. *The Queen v Cheng Yeung* [1989] 2 HKLR 258*.* [↑](#footnote-ref-24)
25. *The Queen v Lau Tak Ming*, page 387 E-F. [↑](#footnote-ref-25)
26. *HKSAR v Abdallah*, paragraph 40. [↑](#footnote-ref-26)
27. *Ibid*, paragraph 42. [↑](#footnote-ref-27)
28. *Ibid*, paragraph 43. [↑](#footnote-ref-28)
29. *HKSAR v Thattephin Tanyamon* [2008] 5 HKLRD 155. [↑](#footnote-ref-29)
30. *HKSAR v Abdallah*, paragraphs 37-38. [↑](#footnote-ref-30)
31. *The Queen v Ng Muk Kam* CACC 685/1993, unreported, 31 May 1995. [↑](#footnote-ref-31)
32. *Ibid*, page 8. [↑](#footnote-ref-32)
33. *HKSAR v Thattephin Tanyamon*,paragraph 10. [↑](#footnote-ref-33)
34. *The Queen v Lau Tak Ming*, page 386 F. [↑](#footnote-ref-34)
35. www.sentencingcouncil.org.uk [↑](#footnote-ref-35)
36. Drug Offence Guideline-Professional Consultation (March 2011); Drug Offence Guideline-Public Consultation (March 2011). [↑](#footnote-ref-36)
37. Drug Offences-Response to Consultation (January 2012). [↑](#footnote-ref-37)
38. Drug Offences-Response to Consultation, pages 17-19. [↑](#footnote-ref-38)
39. *HKSAR v Lee Tak Kwan* [1998] 2 HKLRD 46. [↑](#footnote-ref-39)
40. *R v Warren & Beeley* [1996] 1 Cr App R (S) 233. [↑](#footnote-ref-40)
41. *HKSAR v Lee Tak Kwan*, page 51 H-I. [↑](#footnote-ref-41)
42. *The Queen v Lo Bing Sun* CACC 660/1993, unreported, 23 May 1994. [↑](#footnote-ref-42)
43. *The Queen v Lo Bing Sun*, page 5. [↑](#footnote-ref-43)
44. *Z v HKSAR* (2007) 10 HKCFAR 183. [↑](#footnote-ref-44)
45. *X (NO.2)* [1999] 2 Cr. App. R. (S) 294. [↑](#footnote-ref-45)
46. *R v AXN* [2016] 1 WLR 4006. [↑](#footnote-ref-46)
47. *HKSAR v Odira Sharon Lensa* [2016] 5 HKLRD 249, paragraphs 50-51*.* [↑](#footnote-ref-47)
48. *HKSAR v Akinyi Grace Sylvia* CACC 324/2015, unreported, 5 May 2016, paragraph 39. [↑](#footnote-ref-48)
49. See *HKSAR v Chan Ka Yiu & Others* [2018] HKCA 410. The drugs, in respect of which statistics were provided to the court by the respondent, were Methamphetamine (“Ice”), Heroin, Cocaine, Ketamine, Ecstasy and Cannabis. [↑](#footnote-ref-49)
50. *Chan Chi Ming v R* [1979] HKLR 491. [↑](#footnote-ref-50)
51. *R v Cheng Yeung* [1989] 2 HKLR 258. [↑](#footnote-ref-51)
52. *R v Lau Tak Ming & Others* [1990] 2 HKLR 370. [↑](#footnote-ref-52)
53. *Attorney General v Pedro Nel Rojas* [1994] 2 HKCLR 69. [↑](#footnote-ref-53)
54. *HKSAR v Abdallah* [2009] 2 HKLRD 437. [↑](#footnote-ref-54)
55. *R v Leung Kim Wah* CACC 442/1992, unreported, 6 July 1993 (Macdougall, Litton and Bokhary JJA); *HKSAR v Manalo* [2001] 1 HKLRD 557 (Stuart-Moore Ag CJHC, Leong and Stock JJA); *HKSAR v Leung Kwai Ping & Anor (No 2)* [2003] 2 HKC 575 (Stuart-Moore and Mayo VPP and Stock JA); *HKSAR v Law Num Chun* [2014] 5 HKLRD 500 (Yeung and Lunn VPP and McWalters JA); *HKSAR v Chung Ka Lun* CACC 171/2016, unreported, 17 August 2018 (Macrae VP, McWalters and Zervos JJA). [↑](#footnote-ref-55)
56. A recent example where the Court upheld the judge’s sentence on the applicant for his higher role as an organiser of a conspiracy was *HKSAR v Chung Ka Lun* CACC 171/2016, unreported, 17 August 2018. In that case, an accomplice had given evidence as to the applicant’s role. [↑](#footnote-ref-56)
57. One of the criteria for the ‘Leading role’ category, under the Drug Offences Definitive Guideline of the UK Sentencing Council. [↑](#footnote-ref-57)
58. One of the criteria for the ‘Significant role’ category. [↑](#footnote-ref-58)
59. One of the criteria for the ‘Lesser role’ category. [↑](#footnote-ref-59)
60. *Z v HKSAR* (2007) 10 HKCFAR 183, paragraph 13. [↑](#footnote-ref-60)
61. *HKSAR v Tsang Ka Wing* CACC 97/2016, unreported, 1 November 2017. [↑](#footnote-ref-61)
62. *Ibid.*, paragraph 45. [↑](#footnote-ref-62)
63. *HKSAR v Smit Hector Edward* [2017] 1 HKLRD 287. [↑](#footnote-ref-63)
64. *HKSAR v Chan Ka Yiu* [2018] HKCA 410. [↑](#footnote-ref-64)
65. *HKSAR v Kilima Yusuph Abbas* [2018] 1 HKLRD 29. [↑](#footnote-ref-65)
66. *HKSAR v SK Hasnainzzaman* [2018] HKCA 374. [↑](#footnote-ref-66)
67. It is perhaps arguable whether the sole national from Turkey arrested in 2015 should be considered a European. [↑](#footnote-ref-67)
68. *HKSAR v Odira Sharon Lensa* [2016] 5 HKLRD 249 at paragraphs 50-51; *HKSAR v Akinyi Grace Sylvia* CACC 324/2015, unreported, 5 May 2016, paragraph 36. [↑](#footnote-ref-68)
69. Appeal Bundle, page 19P-R. [↑](#footnote-ref-69)
70. Appeal Bundle, page 14L-M. [↑](#footnote-ref-70)
71. *HKSAR v Manalo* [2001] 1 HKLRD 557 [↑](#footnote-ref-71)
72. *HKSAR v Leung Kwai Ping* CACC 101/2001, unreported, 14 December 2001. [↑](#footnote-ref-72)
73. *Z v HKSAR* (2007) 10 HKCFAR 183, paragraph 10. [↑](#footnote-ref-73)
74. *HKSAR v Odira Sharon Lensa* [2016] 5 HKLRD 249, paragraphs 45-47. [↑](#footnote-ref-74)
75. *HKSAR v Akinyi Grace Sylvia* CACC 324/2015, unreported, 22 April 2016. [↑](#footnote-ref-75)
76. Paragraph 54 of the judgment of Lunn VP. [↑](#footnote-ref-76)
77. *A-G v Sin Wai-lun* [1988] 1 HKLR 580 [↑](#footnote-ref-77)
78. Roskill LJ in *R v Brett*, unreported, 28 July 1975. [↑](#footnote-ref-78)
79. *A-G v Tam Ka Lok* [1990] 1 HKC 201, page 205H. [↑](#footnote-ref-79)
80. *A-G v Tam Ka Lok*, page205I-206C. [↑](#footnote-ref-80)
81. *R v Lee Yuk Wah* [1991] 2 HKC 97, page 101C-D. [↑](#footnote-ref-81)
82. *SJ v Tso Tsz Kin* [2004] 2 HKC 139, page 144C-E. [↑](#footnote-ref-82)
83. *HKSAR v Law Chung Hin* [2012] 1 HKLRD 450 [↑](#footnote-ref-83)
84. All of which are encompassed in the one-third discount for a plea of guilty. [↑](#footnote-ref-84)
85. *HKSAR v Nwadiuto Samuel Joseph* CACC 210/2016, unreported, 25 January 2017. [↑](#footnote-ref-85)
86. *R v Tam Yin Chung* CACC 84/1992, unreported, 15 July 1992, paragraphs 13 and 14. [↑](#footnote-ref-86)
87. *Attorney General v So Chin Chiu* [1994] 1 HKCLR 106, page 108, line 38 and page 109, line 2. [↑](#footnote-ref-87)
88. *HKSAR v Bin Kei Chi & Anor* CACC 181/2005, unreported, 23 September 2005. [↑](#footnote-ref-88)
89. *HKSAR v W* [2013] 4 HKLRD 369 [↑](#footnote-ref-89)
90. *HKSAR v Smit Hector Edward* [2017] 1 HKLRD 287 [↑](#footnote-ref-90)
91. *HKSAR v Nkwo Nnaemeka Darlington* [2016] 1 HKLRD 692 [↑](#footnote-ref-91)
92. *R v Wong Wing Ching* [1997] HKLRD 875, page 879B. [↑](#footnote-ref-92)
93. *R v Sivan & ors* (1988) 10 Cr App R (S) 282 [↑](#footnote-ref-93)
94. *R v Chan Kwok Hung* [1996] 4 HKC 559 [↑](#footnote-ref-94)
95. *HKSAR v Tse Ka Wah* [1998] 1 HKLRD 925 [↑](#footnote-ref-95)
96. Appeal Bundle, page 15A-F. [↑](#footnote-ref-96)
97. See also paragraph 121 ante. [↑](#footnote-ref-97)
98. Page 4 of Exhibit LLS-1 to the affirmation of Inspector Lam Lok Sze, filed on behalf of the respondent. [↑](#footnote-ref-98)