CACC 145 and 217/2019

(Heard together)

[2023] HKCA 103

CACC 145/2019

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

criminal appeal no 145 of 2019

(on appeal from HCCC NO 398 of 2018)

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###### BETWEEN

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| HKSAR | | | Respondent |
| and | | |  |
| Nguyen Thang Loi | | | Appellant |
|  |

AND

CACC 217/2019

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

criminal appeal no 217 of 2019

(on appeal from HCCC NO 355 of 2018)

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###### BETWEEN

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| HKSAR | | | Respondent |
| and | | |  |
| Dang Hung Ngoc | | | Appellant |
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Before: Hon Macrae VP, Zervos JA and A Pang JA in Court

Dates of Hearing: 13 and 14 May and 28 July 2021

Date of Judgment: 20 January 2023

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| J U D G M E N T |

Hon Macrae VP and Zervos JA (giving the Judgment of the Court):

1. These two appeals have been consolidated for the Court to address the approach to be taken when sentencing for trafficking and large-scale commercial cultivation of cannabis.

Background of CACC 145/2019

1. On 10 January 2020, the appellant (Nguyen) was granted leave to appeal by a Single Judge[[1]](#footnote-1) against a total sentence of 7½ years’ imprisonment imposed on him by Li J (the judge) on 15 April 2019, following his pleas of guilty to two offences: one count of trafficking in a dangerous drug, namely 7,840 grammes of cannabis in the form of bundles of plants, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134 (Count 1); and one count of cultivation of cannabis plants, namely 67,154 grammes in the form of 184 ‍plants, 1,804.10 grammes in the form of 11 lumps of soil with cannabis in the form of a plant, 263.20 grammes of cannabis in the form of bundles of plants and 2.13 grammes of cannabis in herbal form, contrary to section ‍9(1) and (5) of the same Ordinance (Count 2). The appellant had entered pleas of guilty to the two counts at Eastern Magistrates’ Court on 17 December 2018.
2. Leave was granted on two grounds of appeal, namely: (1) the quantity of dangerous drugs in the two counts should have been considered together and the sentences on both counts ordered to run concurrently; (2) the appellant’s role in the cultivation operation at the premises had not been correctly assessed, resulting in a starting point that was manifestly excessive in all the circumstances.

Background of CACC 217/2019

1. On 13 March 2020, the appellant (Dang) was granted leave to appeal by a Single Judge[[2]](#footnote-2) against a sentence of 8½ years’ imprisonment imposed on him by the same sentencing judge as in Nguyen’s case, for a sole count of cultivation of cannabis plants, namely 552 plants and 195 saplings of the genus cannabis, totalling 747 pots with a total weight of 181.65 **‍**kilogrammes, and cut plants of the genus cannabis with a total weight of 28.84 kilogrammes. On 12 ‍November 2018, Dang’s case was committed to the High ‍Court for a trial fixed for 10 July 2019. However, having indicated his intention to plead guilty on 26 ‍March 2019, he was duly sentenced together with his co-accused on 10 July 2019.
2. The question at the leave hearing concerned the absence of clear sentencing guidelines for large-scale commercial cultivation of cannabis, which had also been raised in CACC ‍145/2019. Since both cases dealt with the same issues regarding starting point and culpability, they were consolidated to be heard together.

CACC 145/2019

Summary of facts

1. On 20 December 2017, at about 11 pm on Tai Po Road, police officers intercepted a vehicle in which Nguyen was the front seat passenger, and his co-accused (Hoang) was the driver. Two black plastic bags containing 7.84 kilogrammes of cannabis plants were found inside the vehicle. Nguyen and Hoang were arrested for trafficking in the quantity of cannabis plants particularised in Count 1.
2. After he was arrested, police officers found four keys in Nguyen’s possession. Upon further investigation, on 22 December 2017, they used one of the keys to gain entry to premises in Tai Po, New ‍Territories (the premises). A search of the premises uncovered the cannabis in herbal form particularised in Count 2, together with items and tools for the cultivation of cannabis, such as 2 electronic scales, 11 lamps, 9 thermometers, 3 fans, multiple packs of fertiliser and other tools used for cultivation. The estimated annual yield of all the cannabis plants seized was 492.30 kilogrammes of fresh cannabis leaves and flowers, or about 85.17 kilogrammes in dry herbal form, with an estimated market value of $23,592,000.
3. Upon further arrest and under caution, Nguyen admitted that he was recruited by a Chinese male, known as Hoi Suk, to cultivate cannabis at the premises, while another male, known as Yung Suk, paid him about $10,000 per month for the work. In a subsequent video recorded interview, Nguyen admitted that he entered Hong Kong illegally and was a Form 8 recognizance holder. He said he received a welfare allowance but had no other financial means. He said he met Hoang on the afternoon of 20 December 2017, and after socialising together, they boarded the vehicle in question. He thought he was being taken home. He confirmed that he lived on the premises and worked there, cultivating cannabis, for 6 to 7 months, following the instructions he received, and was paid between a few thousand and ten thousand dollars from time to time. When he first arrived, he used the tools already present to cultivate and harvest the cannabis. He would place the harvested cannabis in plastic bags, which someone else would then take away.
4. Nguyen admitted that at the material time, he possessed the cannabis particularised in Count 1 for the purpose of unlawful trafficking. He also admitted that he cultivated the cannabis plants particularised in Count 2.

Mitigation

1. Nguyen had been born in Vietnam, was aged 38 and married with two sons. He had come to Hong ‍Kong from Vietnam because he could not repay loans when his restaurant closed down. His counsel urged the judge to impose concurrent sentences[[3]](#footnote-3).

Reasons for sentence

1. Of Count 1, the judge noted that the concentration of tetrahydrocannabinol (THC), the principal psychoactive constituent in herbal cannabis, was about one-quarter of that of cannabis resin. He calculated that the amount of THC equivalent of cannabis resin for the herbal cannabis seized, in this case, was about 1.70 kilogrammes. Applying the sentencing guidelines for trafficking in cannabis resin in *Attorney General v Tuen Shui Ming & Anor*[[4]](#footnote-4), which suggested a starting point of 16 to 24 months’ imprisonment for trafficking in over 2 kilogrammes, he adopted a starting point of 16 months’ imprisonment. After the enhancement of 6 months for the aggravating factor of Nguyen’s status as a Form 8 recognizance holder and the reduction of 7 months for his guilty plea, the judge sentenced Nguyen to 15 ‍months’ imprisonment on Count 1.
2. Of Count 2, the judge considered the approach stated in *HKSAR v Nguyen Thu Ha*[[5]](#footnote-5) and accepted that the annual production of herbal cannabis was about 85 kilogrammes. He was of the view that although Nguyen was not the mastermind, his role was important to the operation on the premises, and he saw no reason to reduce the sentence further. Having considered all the circumstances of the case, he adopted a starting point of 10 years’ imprisonment, which he enhanced by 6 months for Nguyen’s status. After deducting 3 years and 6 months from the notional sentence for the guilty plea, he sentenced Nguyen to 7 years’ imprisonment on Count 2.
3. The judge considered that the two sentences to some extent overlapped since the conduct arose from the same criminal episode. Taking into account the totality principle, he ordered 6 months of the sentence on Count 1 to run consecutively to the sentence on Count 2. The total sentence, therefore, became 7 years and 6 months’ imprisonment.

CACC 217/2019

Summary of facts

1. In the afternoon of 26 December 2017, the police conducted a house search at a secluded, 3-storey villa in Clear Water Bay, New ‍Territories. They found Dang, who was in possession of a British passport, and his co-accused (Vu), with no identity document, in their separate bedrooms. The police found a key to the padlock of the main entrance in Dang’s room. It was observed that each of the floors was partitioned into multiple smaller rooms, with spotlights, ultraviolet lights, thermometers and fans installed, and fertiliser stored in the corridor. In total, 747 pots of cannabis plants and saplings, 6 bags of half-dried cannabis leaves, 2 bags of cannabis buds and hundreds of related items of apparatus (‍such as lights, fans, thermometers and ventilators) were seized by the police.
2. The Government Chemist confirmed that the plants and ‍saplings weighed a total of 181.65 **‍**kilogrammes. An officer from the Department of Agriculture and Fisheries gave his view that the indoor cultivation of cannabis plants was being carried out in the villa, in which 378 out of the 747 ‍cannabis plants were ready for harvesting with 177.34 kilogrammes of yield. It was estimated that an annual yield of 1,051.30 kilogrammes of fresh cannabis and flowers could be produced based on an estimate of three crops per year. As only 13.1% of the dry herbal cannabis harvested was suitable for consumption, the estimated annual yield for readily consumable herbal cannabis produced at the villa was calculated at about 137.70 ‍kilogrammes, with a street value of HK$38,142,900.
3. Under caution, Dang stated that he had retired and entered Hong Kong from the United Kingdom on 25 **‍**November 2017 on the strength of a visitor’s permit. He said ‍he had initially stayed in Sham **‍**Shui **‍**Po and intended to remain **‍**in **‍**Hong **‍**Kong for one month. However, on 16 December 2017, he had met a woman in Sham **‍**Shui **‍**Po who offered him a cleaning job, with food and accommodation provided, for ‍HK$2,000 to HK$3,000 per month, which he accepted. Accordingly, he was taken to the villa on the same day and given the key, which was later seized from his bedroom. He said he was only instructed to clean the villa outside, and Vu had arrived before him. He could detect the smell of cannabis after a week of being employed at the premises. He did not call the police because he was afraid and could not speak Chinese.
4. According to the records of Cathay Pacific Airlines, in addition to his flight ticket from the United Kingdom in late November 2017, Dang had also purchased tickets in his name from (i) Hong **‍**Kong to Hanoi, Vietnam, on 21 February 2018; (ii) Hanoi to Hong**‍** Kong on 6 March 2018; and (iii) Hong Kong to the United Kingdom on 18 November 2018.

Mitigation

1. Counsel for Dang submitted that although Dang had only decided to plead guilty following his committal for trial, a discount of about 25% was warranted since both the case management hearing and the trial could be vacated. Dang was a Vietnamese refugee, who had settled in the United Kingdom in the 1990’s, and retired in 2017. It was argued that Dang was not the prime mover in the offence, but a mere worker or helper, since the villa had clearly already been set up for the cultivation of cannabis well before he arrived in Hong Kong. Furthermore, there was no evidence that he came to Hong Kong in order to commit the present offences.

Reasons for sentence

1. The judge, although he accepted that Dang’s role was only that of a “gardener”, stated that this warranted no additional discount, given its importance to the production of the cannabis. In determining the appropriate starting point, the judge directed himself in accordance with the sentencing decisions in *Tuen Shui Ming*; *Secretary for Justice v Lee* ***‍****Siu* ***‍****Kei*[[6]](#footnote-6); and *Nguyen* ***‍****Thu* ***‍****Ha*. As the concentration of THC in herbal cannabis was about one-quarter of that of cannabis resin, the judge calculated that an annual production of 137.70 kilogrammes of herbal cannabis would produce about 34.40 kilogrammes of cannabis resin. Given the substantial quantity of plants and apparatus seized and that two men were employed to perform the cultivation, he was also satisfied that the scale of the operation was large and continuous and that it was undoubtedly being run for commercial purposes. Accordingly, he adopted a starting point of 11 years’ imprisonment in respect of both accused.
2. Considering that Dang had only indicated his intention to plead guilty some 4 months before his trial, the judge reduced the sentence by 2 years and 6 months, representing a reduction of about 23%. Dang was accordingly sentenced to 8 years and 6 months’ imprisonment.

The two appeals

1. Mr Martin Hui, SC, with him Ms Kamina Lai and Mr Benson Wong, represent the appellants in both cases. In CACC 145/2019, two grounds of appeal are advanced on behalf of Nguyen. The first ground complains that the judge erred in ordering partially consecutive sentences, which is said to be tantamount to “double counting” when the two counts arose from the same factual circumstances. The second ground is common to the sole ground of appeal in CACC 217/2019 and concerns the sentencing approach of the courts in cases of large-scale commercial cultivation of cannabis, including the appropriate starting point, levels of sentence, the role of the offenders and the factors relevant to culpability.
2. We will first deal with the issue of consecutive sentences in CACC 145/2019 and then address the common issue in the two appeals of the sentencing approach for the cultivation of cannabis plants, since that has involved this Court in receiving detailed evidence and information concerning cannabis, its properties and effects, and, finally, the formulation of appropriate sentencing guidelines.

*Consecutive sentences*

*Appellant’s submissions*

1. Mr Hui submitted that the judge’s sentencing approach in determining a starting point for Count 1 was inconsistent with *Tuen* ‍*Shui* ‍*Ming*. He argued that the judge should have taken the total amount of herbal cannabis, that is 7.80 kilogrammes, as the basis for calculation and applied the sentencing tariff, before reducing the sentence by up to 1 year. However, notwithstanding the erroneous approach adopted by the judge, he contended that the final sentence would not be affected given the much lengthier sentence on Count ‍2 and the overall sentence to be imposed under the totality principle.
2. Mr Hui submitted that the sentences should have been ordered to run concurrently, or the quantity of drugs under the two counts should have been considered together. He noted that the judge accepted that the two counts arose out of the same criminal plot, and the reality was one of overall possession. Hence, the appellant’s culpability would be more adequately reflected by imposing a wholly concurrent sentence, considering that the cultivation was on a commercial scale, which led to the inevitable conclusion that the end product was for the purpose of trafficking. He submitted that the cannabis plants in Count 1 must have been generated from the cultivation in Count 2. Accordingly, the judge failed to recognise the element of “double counting”, and thus the overall sentence was wrong in principle: see *HKSAR v Wan Lau Mei*[[7]](#footnote-7).

*Respondent’s submissions*

1. Ms Vinci Lam, SC, with her Ms Claudia Ng, for the respondent, agreed that the sentencing approach adopted by the judge in Count 1 was incorrect but that given the lengthy sentence on Count 2, the approach in respect of Count 1 did not substantially affect the ultimate sentence.
2. Ms Lam submitted that if the two sentences were completely concurrent, the ultimate sentence would fail to adequately address Nguyen’s overall criminality by performing the dual role of a trafficker and a cultivator. She submitted that *Wan Lau Mei* was a case concerning two charges of drug trafficking, involving the same criminality. She relied on *HKSAR v Chan Wang Mei*[[8]](#footnote-8) to argue that there was no risk of double punishment, and it was not wrong in principle to order part of the sentence to be served consecutively.

Discussion

1. In *Wan Lau Mei*, the appellant had been sentenced for two offences of trafficking in the two separate quantities of drugs he possessed at two different locations. In the circumstances, it was held that he should have been dealt with for the total quantity of drugs concerned, because the same criminality was involved, without any distinguishing features apart from the possession of the drugs in two different locations.
2. In the present case, however, the two offences Nguyen committed were separate and distinct, and the judge could not be criticised for making the sentences partially consecutive subject to the totality principle. In the first count, Nguyen was trafficking in the cannabis plants by delivering them to another person. In the second count, he was involved in cultivating cannabis plants, which constituted a separate offence.
3. Whilst the cannabis plants may have originated from the farming activities of Nguyen, the offence in the first count addressed a different and additional crime. It would not have been appropriate to simply add up the two quantities of cannabis plants without recognising that Nguyen had committed two separate crimes. The two counts involved undoubtedly distinct offences and Nguyen had the dual roles of cultivator and trafficker of cannabis plants. His role as a trafficker added to the criminality of a cultivator of cannabis plants and it was, in our judgment, perfectly in order for the judge to reflect his different and additional culpability in the sentence.

Sentencing approach for cultivation of cannabis plants

1. The common issue in both cases is the sentencing approach in large-scale commercial cultivation of cannabis, including the appropriate starting point, the levels of sentence, the role of the offenders and the factors relevant to culpability.

Sentencing background of cannabis

1. Cannabis refers to a group of three plants with psychoactive properties, known as *cannabis sativa*, *cannabis indica* and *cannabis ruderalis*. When the flowers of these plants are harvested and dried, they produce what is commonly referred to as cannabis or, sometimes, marijuana.
2. Cannabis is made up of a large number of components, which are known as cannabinoids. Two such components are THC and cannabidiol (CBD). THC is the main psychoactive compound in cannabis and is used recreationally for its euphoric effect. CBD is a psychoactive cannabinoid but is non-intoxicating and non-euphoric. It is also used for medical purposes.
3. The methods and techniques used to produce cannabis plants will vary depending on whether the cultivation is indoors or outdoors. There is an increasing trend in Hong Kong and elsewhere to cultivate cannabis plants indoors, using a hydroponic system and intensive artificial lighting. The present two cases involve the commercial production of cannabis plants, using modern and advanced techniques to maximize the yield of the cannabis plants and to enhance their concentration of THC.
4. It sometimes occurs that sentences imposed by the courts at first instance for a particular offence show a considerable variation in approach or a change of circumstances which warrant the Court of Appeal providing guidance or guidelines so as to ensure that future sentences are just and consistent. The growing trend of large-scale commercial production of cannabis now requires us to consider sentencing guidelines in such cases and the relevant factors that may be taken into account.
5. As mentioned by this Court in *Chan Chi Man*[[9]](#footnote-9), the guidelines for drug offences are not immutable. They may be revised to take into account, amongst other factors, the following:
6. the extent of any increase or decrease in the use of the drug concerned;
7. the availability of better evidence as to the dangerous effects of the particular drug; and
8. variations in the public interest that stronger measures should be taken to suppress the growth of abuse of drugs.

Development of the sentencing guidelines for trafficking in cannabis

1. In 1986, the Court in *Chan Chi Man* saw the need to distinguish sentences between cannabis in its three forms: herbal cannabis, cannabis resin, and cannabis oil. However, as we shall discuss in detail later, more has become known about the qualities and effects of cannabis as its use and form have developed and evolved over the years.
2. The Court in *Chan Chi Man* noted that the principal psychoactive constituent in the cannabis plant was THC, and its concentration in herbal cannabis was up to about 8% of the bulk weight; in cannabis resin, about 15%; and in cannabis oil, about 60%. The Court laid out sentencing guidelines for possession of cannabis resin for the purpose of unlawful trafficking by applying two-thirds of the guidelines for opium.
3. A decade later in 1995, the Court in *Tuen Shui Ming* revisited the sentencing guidelines for trafficking in cannabis. Evidence was presented to the Court concerning the trend and prevalence of the three different forms of cannabis at that time.
4. The Court in *Tuen Shui Ming* summarised the evidence of the government forensic scientist concerning the qualities of cannabis in its three forms:[[10]](#footnote-10)

“Mr. Chan Man-fai, a forensic scientist of the Government Laboratory, stated that the concentration of THC in herbal cannabis is mostly influenced by the plant and the degree of cultivation and that climate also plays a part. He said that in Hong Kong the typical percentage concentration levels of THC in recent herbal cannabis preparations analysed fell into the range of 0.8% to 2.5%, giving an average of 1.73%. This percentage is, however, only a rough approximation given the method of analysis used for herbal cannabis. He said that cannabis resin seizures submitted for analysis between January 1993 and April 1995 yielded a percentage THC concentration which ranged from 0.26% to 18.37% with an average of 6.65%. The THC content in cannabis resin was, therefore, 3.84 times stronger than in herbal cannabis. He said that cannabis oil, which is rarely encountered in Hong Kong, was reported to have a concentration range of 10% to 30%. He stated that 500 grammes of cannabis resin would make up to 2,500 cigarettes and that 500 grammes of herbal cannabis would make the same number but that the cannabis resin cigarettes would be approximately 4 times more concentrated in THC content than the herbal cannabis cigarettes.”

1. The Court also referred to the evidence of a government statistician, who said:[[11]](#footnote-11)

“… that the percentage of drug abusers reported to abuse cannabis ranged from 3.4% to 5.8% in the past five years and that cannabis after heroin was the second most popular drug of abuse. He stated that the proportion of persons under 21 years reported to abuse cannabis had been high but was declining. It had gone down from 31.6% in 1990 in a steady decline to 18.5% in 1994.”

1. Having taken into account current scientific evidence and data, the Court was of the view that the guidelines had to be recast. The Court explained:[[12]](#footnote-12)

“It is clear from the evidence before us that the concentrations referred to in *Chan Chi-man* are no longer correct. We are satisfied that a sentencing court must now bear in mind that cannabis resin has an average concentration of THC about four times higher than the average found in herbal cannabis and that cannabis oil has an average also about four times higher than the average in cannabis resin. Taking this into account a sentencing judge must adjust the tariff, which applies to cannabis resin when sentencing for trafficking in either herbal cannabis or cannabis oil. Any adjustment should, as we have already indicated, be within a range dictated by the starting point indicated in the tariff. Persons with herbal cannabis could, except perhaps in cases where very large amounts are involved, properly be given a discount of up to a year from the sentence that would have been imposed had they had a similar amount of cannabis resin. Should offenders be discovered with cannabis oil and we think an increase of at least that length would be warranted. These observations are not meant to fetter the judges' discretion particularly in the first band. Tariffs, as we have said in the past, are not a straightjacket. A judge must bear the tariff in mind when sentencing but must, in the outcome, arrive at a sentence which gives proper weight to the facts of the case before him. For example, selling cannabis in any form to children might well warrant a sentence well in excess of that suggested by the guidelines.”

1. The Court suggested the following sentencing guidelines for possession of cannabis resin for the purpose of unlawful trafficking:
2. under 2000 grammes - up to 16 months;
3. over 2000 grammes - 16 to 24 months;
4. over 3000 grammes - 24 to 36 months;
5. over 6000 grammes - 36 to 48 months;
6. over 9000 grammes - 4 years and upwards.
7. As explained by the Court, these guidelines had to be adjusted when dealing with herbal cannabis since cannabis resin had a narcotic content that was four times higher than herbal cannabis.

Sentencing for cultivation of cannabis

1. The guidelines in *Tuen Shui Ming* have been consistently applied in sentencing for cannabis cultivation. The Court of Appeal has considered their application in the context of the cultivation of cannabis in *Secretary for Justice v Cheung King Kong*[[13]](#footnote-13) and *HKSAR v Nguyen Thu Ha.*[[14]](#footnote-14)The current approach can be summarised as follows: in assessing the starting point for sentence for the offence of cultivation of cannabis plants, the annual yield of the cannabis cultivation operation should be estimated, and the guidelines for trafficking in cannabis resin in *Tuen Shui Ming* applied. Given that the potency of herbal cannabis was lower than that of cannabis resin, a discount of up to 1 year should be given in determining the starting point. Other relevant factors, such as the scale of the operation, the defendant’s role and the annual earnings generated, should be considered before arriving at the ultimate sentence.[[15]](#footnote-15)
2. After more than two decades, and in light of the growing body of research on the impact of the drug on individual users and society as a whole, and on the potency and cultivation methods of cannabis, this Court has been urged to review the sentencing regime for cannabis related offences. For such purposes, expert evidence in the relevant fields was adduced.

Harmful effects of cannabis on the individual

1. Professor Dr Tang Wai Kwong is a Professor of the Department of Psychiatry at the Chinese University of Hong Kong. He provided a comprehensive overview of the psychiatric effects which cannabis use could have on an individual.[[16]](#footnote-16) He said the short-term use of cannabis could lead to mild intoxication, which is self-limiting and requires no treatment. The responses to recreational doses of cannabis depend on the dosage of THC absorbed, the individual’s personality, the expectation of the user and the setting in which it is consumed. Initial effects range from euphoria, perceptual alterations and relaxation at a low dose, to depersonalization (an outside body experience), pressured speech, paranoia (persecutory beliefs) and manic psychosis at high doses. He said long-term and heavy cannabis use had been associated with chronic psychiatric disorders such as psychosis, bipolar disorders, depression, anxiety disorders and cannabis use disorder (addiction). Prospective studies report that the rate of cannabis use disorder (CUD) amongst cannabis users was between 25% and 37%, compared with 17.5% for alcohol use disorder among past-year alcohol users and 38% to 48% for tobacco use disorder among current tobacco users. The mean time from first use to the onset of CUD was about 3 years; the mean duration of a CUD episode among those who recovered from CUD was 33 months. The recurrence rate was 28%, whereas the annual remission rate was 17% compared with 10% to 20% for opioid use disorder, 5% to 13% for cocaine use disorder and 16% for stimulant use disorder, which suggested that quitting cannabis may be quite difficult. No pharmacotherapy has been approved for CUD treatment.[[17]](#footnote-17)
2. Professor Raymond Cheung is a Clinical Professor of the Division of Neurology in the Department of Medicine at the University of Hong Kong. He discussed the neurological effects of the use of cannabis.[[18]](#footnote-18) He explained that THC exerts its psychoactive and neurological effects mainly through CB1 receptors in the brain, where the endocannabinoids regulate the actions of neurotransmitters that play roles in cognition, emotion and memory. THC increases the release of dopamine mainly through CB1 receptors to produce euphoric effects, commonly described as a feeling of getting “high”.
3. Professor Cheung explained that acute neurological effects of cannabis include euphoria, disinhibition, altered senses, changes in mood, impaired body movement, difficulty with thinking and problem-solving, impaired memory, hallucinations, delusions and psychosis. Long-term cannabis use will reduce the number of CB1 receptors and may result in persistent or permanent impairments in thinking, memory and learning. He said there was no effective treatment.[[19]](#footnote-19) Withdrawal effects occur in individuals who use cannabis daily or nearly daily for at least a few months. Symptoms include grouchiness, sleeplessness, decreased appetite, anxiety and cravings. No medications are currently available, but behavioural support is effective.[[20]](#footnote-20) Professor Cheung considered that cannabis has evolved as an addictive and harmful drug and frequent cannabis consumption produces psychological and physical dependence.[[21]](#footnote-21)
4. Professor Ian Chi Kei Wong is a Professor of Pharmacy and holds a joint appointment with the Department of Pharmacology and Pharmacy at the University of Hong Kong and the School of Pharmacy at University College London. He set out in detail the short-term physiological, psychological and neurological effects, for example, sensory alterations, increased heart rate, anxiety, depression, panic attacks, altered moods and ways of thinking, impulsiveness and migraines, whereas the long-term effects included brain function impairment, substantially reduced attention span, impaired memory, lung cancer and psychotic disorders and other symptoms.[[22]](#footnote-22)

Harmful effects of cannabis on society

1. Professor Karen Laidler is a Professor of Sociology and the Director of the Centre for Criminology at the University of Hong Kong. She examined the sociological effects of cannabis use prevalent in Hong Kong society.[[23]](#footnote-23) She said that cannabis consumption had a relatively steady presence in the Hong Kong market despite the shifts in the drug scene over the past three decades with the emergence of new drugs and changes in distribution and supply methods.[[24]](#footnote-24) In school surveys conducted by the Narcotics Division from 2004/2005 to 2017/2018, she observed that despite a decline in the number of students ever having used a drug, the proportion of students using cannabis grew from 49% to 76%, and this did not include young people who did not attend school.[[25]](#footnote-25) Studies conducted by herself and others in 2020 suggested that cannabis users perceive cannabis as less harmful than other legal substances like alcohol and tobacco because its legal status in other countries is indicative of its non-harmful nature.[[26]](#footnote-26) She was of the view that taking into account the available official data from the Central Registry of Drug Abuse (CRDA), as well as seizures and arrests made by the Hong Kong Police Force (the Police) and the Customs and Excise Department (Customs), it is likely there will be an increased demand for cannabis in Hong Kong.[[27]](#footnote-27)
2. Dr Billy Li, a senior statistician, analysed statistics in relation to the trend of drug abuse including reports published by CRDA[[28]](#footnote-28), and emphasised that the number of reported cannabis abusers, while once on a decreasing trend in the first half of the 2010’s, had increased from 2015 to 2020, and became the most popular drug among newly reported drug abusers in 2020.[[29]](#footnote-29) For reported drug abusers aged under 21, the number of cannabis abusers increased substantially from 11.3% in 2015 to 52.7% in 2020, and it has become the most popular drug since 2019.[[30]](#footnote-30) There was also a 36.3% increase in the number of secondary school students and 86.9% increase in the number of post-secondary school students taking cannabis from 2014/2015 to 2017/2018, as revealed in the relevant student surveys.[[31]](#footnote-31)
3. From the statistics provided by the Police and Customs, it can be seen that although there was not a continuous upward trend regarding the quantity of seizures of different cannabis products, the quantities of seizures of herbal cannabis and cannabis resin have remained substantial in recent years.[[32]](#footnote-32) Further, a comparison of average retail prices in 2010 and 2020 revealed that on the one hand, the price of herbal cannabis had increased from HK$97 per gramme to HK$213 per gramme and that of cannabis buds from HK$131 per gramme to HK$224 per gramme; on the other hand, the price of cannabis resin had decreased from HK$100 per gramme to HK$63 per gramme.[[33]](#footnote-33)
4. In addressing the nature and prevalence of “skunk” (a species of cannabis plant containing higher levels of THC with a characteristically strong odour) in Hong Kong, Professor Tang confirmed that skunk is not currently popular among patients attending the substance abuse clinic at the Princes of Wales Hospital[[34]](#footnote-34). Professor Laidler also confirmed that none of the users in her studies reported the consumption of skunk[[35]](#footnote-35). Based on the limited information currently available, it would appear that skunk is not as prevalent as it is in other jurisdictions. However, it is a trend likely to be followed here, given the increased use and popularity of cannabis amongst young abusers and the usual market demands for providing greater levels of potency in respect of recreational drugs. It must also be recognised that cannabis is increasingly used for medical purposes.

Overseas materials provided by the appellants

1. There is no escaping the fact that cannabis is being treated differently elsewhere in the world, resulting in its decriminalization as a drug of abuse in some jurisdictions. Yet, this is at a time when THC concentrations worldwide are strengthening. However, how another jurisdiction perceives the harmful effects of cannabis or advocates for certain usages of cannabis is clearly influenced by a myriad of factors and issues, including those specific to the jurisdiction or jurisdictions in question.
2. As discussed in their expert reports, Professor Tang and Professor Cheung agreed with the conclusion of the United Nations Office on Drugs and Crime (UNODC) in its *Discussion Paper* on *Cannabis A Short Review* of 2012,that[[36]](#footnote-36):

“Recent data on smoking cannabis clearly shows that it is unhealthy and dangerous. Cannabis use is linked to addiction, cognitive impairment, motor skills deficiency, respiratory, cardiovascular and mental health problems, and it has been shown to be particularly damaging to maturing brains.”

Earlier in its Paper, the UNODC had observed that[[37]](#footnote-37):

“THC content and the potency of cannabis have been increasing over the past 30 years, which may cause users to develop heightened responses to the drug, as well as adverse effects. Higher THC content can increase anxiety, depression, and psychotic symptoms, and can increase the risk of psychotic symptoms, dependence, and increase adverse effects on the respiratory and cardiovascular systems in regular users.”

The Paper noted in this context that, “Young people are especially susceptible to cannabis addiction”.[[38]](#footnote-38)

1. Professor Tang, Professor Cheung and Professor Laidler also confirmed the short-term and long-term negative health effects of cannabis use, as elaborated upon in the 2016 World Health Organisation (WHO) report on *The Health and Social Effects of Nonmedical Cannabis Use.*[[39]](#footnote-39)
2. We have obtained the latest UNODC *World Drug Report* of June 2022, which has confirmed that[[40]](#footnote-40):

“…there is a clear long-term trend of increased THC content in seized cannabis herb in Europe and the United States. Average THC content of cannabis herb seized in Europe has increased by almost 40 per cent since 2009, and that of cannabis resin tripled, while the potency of cannabis herb seized in the United States rose by close to 50 per cent (to 14.35 per cent) over the same period…

…

Some of this increase in THC content is attributable to the growing importance of indoor cultivation of high-potency cannabis…

The rising THC content and falling CBD content in cannabis in Europe and North America are more harmful…”

The increased potency of cannabis products

1. Dr Lai Kam Ming, the Senior Chemist of the Forensic Science Division of the Hong Kong Government Laboratory, oversees the examination of controlled drugs and chemicals.
2. For the purpose of the present appeal, Dr Lai conducted a study of the THC contents in the herbal cannabis, cannabis resin and cannabis oil seizures of the Police and Customs from March to June 2021. A total of 108 herbal cannabis samples, 11 cannabis resin samples and 13 cannabis oil samples were analysed. The table below sets out his findings, which include the corresponding findings in *Tuen Shui Ming* in parenthesis.

|  |  |  |
| --- | --- | --- |
| Sample type | Range of concentration  in %w/w | Average concentration in % w/w |
| (*Tuen Shui Ming*’s findings[[41]](#footnote-41)) | |
| Herbal cannabis | 3.8% to 30.6%  (0.8% to 2.5%) | 19.2%  (1.73%) |
| Cannabis resin | 12.3% to 34.6%  (0.26% to 18.37%) | 19.7%  (6.65%) |
| Cannabis oil | 10.8% to 100%  (10% to 30%) | 64.5%  (Not available) |

1. This study primarily examined whether the 1:4 potency ratio accepted in *Tuen Shui Ming* in 1995 between herbal cannabis and cannabis resin remained valid today. Dr Lai explained that most of the samples used in the study were dried plants and mainly flowers, not the entire plant. It can be seen from his findings that since *Tuen Shui Ming*, there has been an increase in the average THC concentration in all types of cannabis products. Furthermore, the THC concentration level ratio between herbal cannabis and cannabis resin has been reduced from 1:4 to 1:1.2, which seems to be attributed to the more sophisticated techniques being employed through indoor cultivation to produce higher yield of THC levels in cannabis plants.
2. Dr Lai further explained that the government laboratory does not provide routine service for THC content determination because of technical restrictions, which explains why the sentencing guidelines here and abroad for herbal cannabis are based on the weight of the plants seized. The usual procedure implemented by the government laboratory to determine whether the plants in question are cannabis is as follows. For the examination of fresh plants from a farm, the plant would be extracted as a whole, including the root, stems, and flowers (the whole plant), or the plant would be cut down at soil level (the cut plant). For the cut plants, the chemist would measure the fresh weight and take representative samples from them for the identification of any THC content in those samples (not measuring the concentration). For the whole plant, the chemist would cut the plant down to the soil level, and then measure its fresh weight. The chemist would remove all the leaves and flowers, and measure their fresh weight. The samples would be dried under laboratory conditions and their dried weight would be measured. The chemist would then conduct an examination or identification of any THC content in those samples (not measuring the concentration) to determine if they were cannabis.[[42]](#footnote-42)

Appellants’ submissions

1. After listing numerous Hong Kong and United Kingdom authorities[[43]](#footnote-43), and summarising the approach in Australia and New ‍Zealand[[44]](#footnote-44), Mr Hui submitted that the starting points adopted for the offence of cultivation of cannabis plants in both cases were manifestly excessive. He argued that taking into account that the maximum penalty for the offence is 15 years’ imprisonment, the judge in each case failed to take sufficient account of the lesser role played by the appellants, which thereby constituted an error of principle.
2. Mr Hui advocated that new sentencing guidelines were needed for the cultivation of cannabis for three reasons: (1) the current approach in *Cheung King Kong* attached insufficient weight to the role of the offender; (2) the *Tuen Shui Ming* sentencing guidelines should not be directly imported as they are targeted at different criminal conduct, namely trafficking, and are designed with cannabis resin in mind instead of herbal cannabis; and (3) the guidelines for cultivation of cannabis should be set in terms of the size of operation and the role of the offender[[45]](#footnote-45).
3. Mr Hui urged us to adopt the sentencing regime in the United Kingdom for cultivation of cannabis plant under s.6(2) of the Misuse of Drugs Act 1971. He submitted that the *Drug Offences Definitive Guideline* of the Sentencing Council[[46]](#footnote-46) (the UK guideline) should be applied but modified to reflect the differences between Hong Kong and the United Kingdom in their sentencing practices and maximum penalties.[[47]](#footnote-47) The UK guideline comprises a two-factor table, where the court has to determine the offender’s culpability (role) and the harm caused by the drug (output or potential). There are three categories of role (leading role, significant role and lesser role), and four categories of harm, determined by indicative output or potential output, upon which the starting point is based.[[48]](#footnote-48)
4. In endorsing the UK guideline, Mr Hui submitted that it is more sensible to sentence based on annual yield and the size of cultivation operation rather than the THC content because of the diverse form and size of cultivation operations. This approach is in line with the current practice in sentencing for manufacturing a dangerous drug under s.6 of the Dangerous Drugs Ordinance.[[49]](#footnote-49)
5. By modifying the UK guideline, Mr Hui proposed the following sentencing approach for the offence of cultivation of cannabis:[[50]](#footnote-50)

|  |  |  |  |
| --- | --- | --- | --- |
| Scale | Leading Role | Significant Role | Lesser Role |
| Operation capable of producing industrial quantity for commercial use | Over 6 years imprisonment | Over 4 years imprisonment | Over 1 year imprisonment |
| Operation capable of producing significant quantities for commercial use | 4-6 years imprisonment | 1-4 years imprisonment | Up to 1 year imprisonment |
| 10-28 plants | 1-4 years imprisonment | Up to 1 year imprisonment | At the court’s discretion |
| Under 9 plants | Up to 1 year imprisonment | At the court’s discretion | At the court’s discretion |

1. Mr Hui argued that the more appropriate charge against Nguyen should have been s.9(2) instead of s.4 because the cannabis in question was in the form of bundles of plants[[51]](#footnote-51). He distinguished the trafficking in cannabis under the two provisions, submitting that they deal with different forms of cannabis: s.4 concerns “synthesized” forms of cannabis, for example, resin, oil, and skunk, which are likely to have a higher concentration of THC; while s.9(2) concerns all “unsynthesised” forms of cannabis, including the leaves and twigs, which are cut from plants[[52]](#footnote-52). It was further argued that this construction was more in line with the legislative history and intent and would result in a more logical demarcation in sentencing for the two provisions.[[53]](#footnote-53)
2. Mr Hui noted that the maximum sentence for the two offences is different. For s.9(2), the maximum penalty is 15 years’ imprisonment: for s.4, it is life imprisonment. He also noted that there are no sentencing guidelines for trafficking under s.9(2).[[54]](#footnote-54)
3. He advocated thatanynew guidelines for offences under ss.4 and 9(2) should be based on THC content (in grammes) instead of the total weight of the cannabis resin.[[55]](#footnote-55) On the assumption that the guidelines in *Tuen Shui Ming* took each gramme of cannabis resin to contain 2% THC[[56]](#footnote-56), Mr Hui converted the basis of the *Tuen Shui Ming* guidelines into THC content and expanded the bands to cover larger quantities. His proposed guidelines for both offences are basically the same, except the last band should reflect the respective maximum sentence for each offence.[[57]](#footnote-57) Under the proposal, there are nine bands, with the lowest band covering a quantity of under 40 grammes of THC with a sentence of up to 16 months’ imprisonment, and the highest band covering a quantity of over 5,400 grammes of THC with a sentence up to the maximum penalty provided in the relevant statutory provisions, namely 7 years or above for a s.4 offence (maximum of life imprisonment)[[58]](#footnote-58) and 7 years to 15 years for a s.9(2) offence (maximum of 15 years’ imprisonment)[[59]](#footnote-59).
4. To address the technical difficulty in determining the THC content in cannabis, Mr Hui proposed an alternative guideline based on the weight of cannabis resin, which was said to reflect the increase in the average THC content in cannabis resin from 15% at the time of *Tuen Shui Ming* (this figure is incorrect: it should be 6.65%) to 19% (as revealed in Dr Lai’s study). However, no conversion ratio from cannabis resin to herbal cannabis was suggested. [[60]](#footnote-60) Under this proposal, there are eight bands, with the lowest band covering a quantity of under 1,500 grammes of cannabis resin with a sentence of up to 16 months’ imprisonment, and the highest band covering a quantity of over 180,000 grammes of cannabis resin with a sentence of over 7 years’ imprisonment.
5. In response to various expert reports adduced by the respondent, Mr Hui submitted that the harmful effects of cannabis referred to in the reports were inconclusive (in relation to psychosis, bipolar disorder, depression, anxiety disorder, cannabis use disorder, neurological effects, the pharmacological effects on the brain and immune systems and the addictive and harmful effect of cannabis).[[61]](#footnote-61) Mr Hui emphasised that cannabis is a less harmful psychoactive drug compared with other dangerous drugs, and in some countries, recreational use of cannabis has been legalised (as, for example, in Canada, parts of the United States and the Australian Capital Territory) or decriminalised by limiting the sanction to a fine or allowing possession of a small amount of cannabis for self-consumption (as, for example, in Austria, Belgium, Chile, Colombia, Georgia, Italy, Portugal and Spain).[[62]](#footnote-62) It was submitted that the sentencing guidelines to be devised should take into account the recent global development in treating cannabis as a less harmful substance.[[63]](#footnote-63)

Respondent’s submission

1. The respondent submitted that the sentences imposed on Nguyen and Dang were neither wrong in principle nor manifestly excessive. In summarising the approaches in Hong Kong and other jurisdictions, including the United Kingdom, Australia and New Zealand, Ms Lam emphasised that different jurisdictions have different policy reasons and societal considerations for proscribing drugs, particularly cannabis. Given these differences, the referential value of the guidelines in other jurisdictions rests on the structure of the sentencing approach and identification of the relevant aggravating and mitigating factors rather than slavishly applying their scale of penalties directly to Hong Kong.
2. The approach in Hong Kong is first to calculate the estimated annual yield of herbal cannabis, applying the figure to the tariff set out in *Tuen Shui Ming* and making a corresponding downward adjustment to reflect the fact that herbal cannabis was involved rather than cannabis resin. Then, the court takes into account other relevant factors, including the offender’s role and the scale and sophistication of the cultivation.
3. It is a pertinent factor to be borne in mind that the statistics and analysis of total seizures of herbal cannabis, buds of cannabis and cannabis resin in Hong Kong in recent years, as confirmed by Customs, have revealed that the number of seizures in the first half of 2020 was the largest in a decade.

Applying the sentencing approach

1. For the present appeals, Ms Lam submitted that the two cases were by far the most serious, amongst all previous cases in Hong Kong, with the highest estimated ‍annual yield of herbal cannabis, namely 85.17 kilogrammes and 137.70 ‍kilogrammes respectively. Ms Lam distinguished the cases relied upon by the appellants and submitted that their referential value was minimal. For example, in *HKSAR v* *Hoang Thanh Son and Another*[[64]](#footnote-64), a sentencing decision at first instance, the District Court judge did not state the exact starting point nor the downward adjustment and extent of discount given for the defendant’s relatively minor role.
2. Despite the absence of comparable cases directly concerned with cultivation, it was submitted that since the current sentencing approach required cross-referencing the estimated annual yield of the cannabis plant with the sentencing bands in the *Tuen* ‍*Shui* ‍*Ming* guidelines, meaningful reference could be drawn from the cases of trafficking in cannabis. Certain cases were referred to in order to demonstrate that for trafficking in substantial quantities of herbal cannabis, a downward adjustment from the guidelines for cannabis resin was not an entitlement[[65]](#footnote-65).
3. Ms Lam observed that: (1) the lower courts in Hong Kong and overseas jurisdictions have consistently applied the concept of estimated annual yield in sentencing; and (2) the estimated annual yield is closely linked with the element of drug trafficking, since the yield was for commercial supply. Hence, the guidelines for cannabis trafficking are relevant in the sentencing for cultivation. Ms Lam pointed out that the judge faced difficulty in sentencing the two appellants because the highest sentencing band in *Tuen Shui Ming* was only up to 9 kilogrammes and there was a lack of sentencing authority for larger quantities. She invited this Court to endorse the current sentencing approach and to expand upwards the sentencing guidelines in *Tuen Shui Ming*.

Role of Nguyen and Dang

1. Ms Lam submitted that given the facts admitted, including Nguyen’s involvement in taking care of the premises to cultivate, package and sell cannabis, his role was a “manager/significant role”. As for Dang, since his activities clearly revealed that he had at least some awareness and understanding of the scale of the operation, his role was at the ‍higher end of “gardener/lesser role”, or the lower end of “manager/significant role”. Given all the facts and circumstances, she submitted that the starting points could not be said to be manifestly excessive.
2. The respondent submitted three propositions. First, there was a need to modify the existing sentencing approach for the offence of cultivation of cannabis, instead of forging a new one.[[66]](#footnote-66)
3. Secondly, the UK guideline suggested by the appellants should not be followed because, *inter alia*, the key sentencing factors, namely the role of the offender and the scale of the operation, remain difficult to define or are arbitrary; moreover, there is a lack of guidance from the authorities.[[67]](#footnote-67)
4. Thirdly, the use of estimated annual yield of herbal cannabis in grammes is the normal and preferred method for calculating the quantity of drug involved. The computation is usually provided by agricultural officers and government chemists. The formula has four components: (1) the number of cannabis plants; (2) the estimated quantity of THC in each cannabis plant; (3) the estimated number of crops per year (usually 2 to 4 crops); and (4) the calculated quantity of herbal cannabis that could be produced from a cannabis plant on average (in percentage terms). The benefit of this approach is that all relevant factors in relation to the growing cycle of cannabis plants can be taken into account, including the THC levels, which can address the more potent forms of cannabis in the future.[[68]](#footnote-68)
5. Having reviewed all cases in the District Court and Court of First Instance from 1 January 2003 to 26 August 2020, the respondent proposed the following new guidelines:[[69]](#footnote-69)

|  |  |
| --- | --- |
| Estimated annual yield of cannabis (grammes) | Range of sentence (term of imprisonment) |
| Below 5,000 | Below 2 years |
| 5,000 to 50,000 | 2 to 7 years |
| 50,000 to 150,000 | 7 to 10 years |
| Over 150,000 | Above 10 years |

1. In terms of the sentencing approach, Ms Lam explained that the sentencing court would identify the relevant applicable band, and then exercise its discretion to adjust the starting point within the band to reflect more appropriately the role of the defendant and take into account other relevant aggravating and mitigating factors, so as to ensure circumstances specific to the individual case can be properly considered.[[70]](#footnote-70)
2. The respondent disagrees with the appellants’ submission that s.4 concerns trafficking in a synthesised form of cannabis, while s.9(2) concerns trafficking in an unsynthesised form of cannabis. Ms Lam argued that: (1) the alleged distinction of “synthesised” and “unsynthesised” forms of cannabis lacked legal basis. It was inconsistent with, and ignored, the statutory definition of cannabis under s.2, which defines cannabis as “any plant, or any part of any plant, of the genus cannabis which contains THC and the viable seeds of any plant of the genus cannabis”; (2) s.9(2) covers both cannabis and opium poppy. The distinction contended for could not be equally applied to the opium poppy, and opium products; and (3) the appellants had failed to establish how the legislative history supported such a distinction.[[71]](#footnote-71)
3. The respondent maintained that Nguyen was appropriately charged in respect of Count 1 under s.4.[[72]](#footnote-72)
4. In response to the appellants’ first proposal, which was based on THC content in grammes, the respondent submitted that: (1) the 2% conversion rate in calculating the THC content in grammes of cannabis resin was incorrect and unrealistically low, bearing in mind that the Court in *Tuen Shui Ming* had already considered an average of a 6.65% THC concentration level in cannabis resin[[73]](#footnote-73); and (2) fatal to the appellants’ proposal were the technical restrictions involved in determining the THC level in every case, as explained by Dr Lai[[74]](#footnote-74).
5. In revisiting the *Tuen Shui Ming* guidelines, the respondent emphasised two important findings in Dr Lai’s study. First, there is an increase in average THC concentration levels in all types of cannabis. Secondly, the THC concentration level ratio between herbal cannabis and cannabis resin has reduced from 1:4 (when *Tuen Shui Ming* was decided)[[75]](#footnote-75)to almost 1:1 now (19.7%/19.2%=1.02).[[76]](#footnote-76)
6. The respondent proposed the following new sentencing guidelines:[[77]](#footnote-77)
7. The revised guidelines are to continue to be set with bands of quantities of cannabis (herbal/resin) trafficked;
8. The quantities stipulated in the bands are to be adjusted downwards in view of the general increase in the potency of cannabis. In other words, unlawfully trafficking in a smaller quantity of cannabis would justify the same sentence under the original guidelines;
9. The existing guidelines, which only go up to “over 9,000 grammes”, are to be expanded to provide further guidance to sentencing courts when dealing with cases involving larger quantities.
10. To address the issue of the conversion ratio of cannabis resin to herbal cannabis, the respondent submitted that adopting a 1:1 potency ratio between cannabis resin and herbal cannabis, which was supported by Dr Lai’s findings, eliminated the arbitrariness and uncertainty of adjusting the *Tuen Shui Ming* guidelines upward or downward.[[78]](#footnote-78)
11. Although the respondent preferred the model of a 1:1 ratio, it also set out the guidelines for a 1:2 ratio between cannabis resin and herbal cannabis as follows:[[79]](#footnote-79)

|  |  |  |
| --- | --- | --- |
| Quantities trafficked in  (grammes) | Preferred model  on 1:1 ratio  Range of sentence for both cannabis resin and herbal cannabis | Alternative model  on 1:2 ratio  Range of sentence for cannabis resin |
| Under 1,000 | Up to 16 months | Up to 12 months |
| 1,000 to 1,500 | 16-24 months | 12 to 18 months |
| 1,500 to 3,000 | 24 to 36 months | 18 to 27 months |
| 3,000 to 4,500 | 36 to 48 months | 27 to 36 months |
| 4,500 to 15,000 | 48 to 66 months | 36 to 49.5 months |
| 15,000 to 45,000 | 66 to 84 months | 49.5 to 63 months |
| 45,000 to 135,000 | 84 to 132 months | 63 to 99 months |
| 135,000 to 405,000 | 132 to 180 months | 99 to 135 months |
| Over 405,000 | 180 months upwards | 135 months upwards |

1. The respondent did not support using the THC content in grammes as a sentencing basis. However, should that basis be adopted, the respondent proposed the following terms for consideration[[80]](#footnote-80).

|  |  |
| --- | --- |
| THC (in grammes) | Range of sentence |
| Under 50 | Up to 16 months |
| 50 to 100 | 16-24 months |
| 100 to 150 | 24 to 36 months |
| 150 to 500 | 36 to 48 months |
| 500 to 1,000 | 48 to 66 months |
| 1,000 to 5,000 | 66 to 84 months |
| 5,000 to 7,500 | 84 to 132 months |
| 7,500 to 20,000 | 132 to 180 months |
| Over 20,000 | 180 months upwards |

1. In response to the appellants’ criticisms of the experts’ opinions on the harmful effects of cannabis consumption, the respondent submitted that the overall focus should be on health concerns and associated risk factors, as opposed to examining the percentages of different risk factors on the individual.
2. Concerning the extent of the harmfulness of cannabis consumption on society, the respondent contended that the emphasis should be on local studies and statistics, citing in particular the evidence of Professor Laidler and Dr Billy Li and the various statistics provided by the Police and Customs, which showed the actual or potential harm of cannabis consumption and provided important empirical data on the determination of appropriate sentencing guidelines. The respondent emphasised that the overseas materials relied upon by the appellants in relation to decriminalization of certain usages of cannabis in other parts of the world were of minimal value in devising the sentencing approach in Hong Kong; moreover, it is the legislature’s role to formulate appropriate policy in combatting the trade in dangerous drugs.[[81]](#footnote-81)

The suggested sentencing guidelines for cultivation of cannabis

1. The evidence before us reveals a disturbing and potentially dangerous trend in the increasing concentration of THC in cannabis plants through advanced and improved methods of cultivation. Whilst we accept that there may be genuine and effective benefits of cannabis for medical and other purposes, the offence provisions address its darker qualities as a potential drug of addiction.
2. When the sentencing guidelines were first fixed in *Chan Chi Man*, the concentration of THC in herbal cannabis was up to about 8% of the bulk weight, in cannabis resin about 15%, and in cannabis oil about 60%.[[82]](#footnote-82) Later, in *Tuen Shui Ming* the scientific evidence showed that the concentration of THC in cannabis resin was about four times higher (average of 6.65% of a range from 0.26% to 18.37%) than the average in herbal cannabis (average of 1.73% of a range from 0.8% to 2.5%). This resulted in new sentencing guidelines to reflect the difference in THC concentrations.[[83]](#footnote-83) The current scientific evidence has shown a dramatic increase in the THC concentration in herbal cannabis and cannabis resin, both having an average of about 19%. It requires that they be treated similarly for sentencing purposes and we shall adapt the guidelines accordingly.
3. Based on the information and material submitted before us, we consider that the guidelines should be revised. We maintain the universal practice of fixing the guidelines on the quantity of plants and the estimated annual yield of cannabis.
4. The *Tuen Shui Ming* guidelines, which are based on the weight of the cannabis seized, are revised to address trafficking cases so as to reflect the similar levels of THC in both herbal cannabis and cannabis resin and to deal with larger quantities.

(a) Under 2,000 grammes - Up to 16 months

(b) Over 2,000 grammes - 16 to 24 months

(c) Over 3,000 grammes - 24 to 36 months

(d) Over 6,000 grammes - 36 to 48 months

(e) Over 9,000 grammes - 48 to 66 months

(f) Over 15,000 grammes - 66 to 96 months

(g) Over 45,000 grammes - 96 to 120 months

(h) Over 90,000 grammes – 120 months or above.

1. The revised guidelines should, where necessary, be adjusted to cater for the different sentencing limits for offences brought under s.4 or s.9 of the Dangerous Drugs Ordinance. As already noted, under s.4, the maximum sentence is life imprisonment: under s.9, the maximum is 15 years’ imprisonment.
2. Relevantly, the phenomenon of the growing trade in cannabis and the increased concentration levels of THC have been the subject of concern in other jurisdictions. In Australia, the subject was extensively addressed by the Court of Appeal of South Australia in *R v Yavuz and Others*[[84]](#footnote-84). The court referred to a report from a committee of the Attorney-General for South Australia, which examined and made recommendations regarding the trafficking and cultivation of cannabis. A quoted passage from the report encapsulates an important observation which needs to be borne in mind when applying the guidelines to relatively small quantities of cannabis where minor criminality is involved. The passage reads:

“… trafficking in small quantities of the drug is widespread among a large population of generally law abiding people. There are significant social costs in stigmatising these individuals as drug traffickers. The need to minimise the harms resulting from enforcement of prohibitions against trafficking is particularly compelling when minor criminality involving cannabis is in question.

Though realistic distinctions between major and minor dealers are essential, quantitative measures of guilt provide a very rough guide indeed to the level of criminality of cannabis dealers. …”

1. The key criterion in sentencing cases for cultivating cannabis is the estimated annual yield rather than the weight of the cannabis plants: *Cheung King Kong*, at [51] and [54]. As stated in *Cheung King Kong*, cultivation of cannabis plants is a continuous course of conduct and therefore an estimate of the annual yield is required. This will include making a pragmatic assessment of the nature and size of the operation, the sophistication and method of cultivation and the number and type of crops in a year:  *Cheung King Kong*, at [45], [48] and [50].
2. The court in *Yavuz* made several pertinent observations for sentencing an offender for cultivating cannabis. In addition to the number of plants involved, the court emphasised that regard must be had to the nature of the cultivation and the motivation of the offender because the aim of the tiered offences and related penalties was to strike strongly at the commerciality of the offending. The court went on to say:

“… Accordingly, it will be important to know whether the venture was a purely commercial enterprise requiring significant capital outlay or was a more modest venture intended in the main to satisfy a personal habit. Was the cultivation part of a broader enterprise involving others and other cultivations? What was the role of the offender in the cultivation? Was the crop comprised of female plants or were the male plants yet to be culled? Were the plants seedlings or mature female plants that were flowering? Had the plants been tended in a manner intended to increase the yield per plant, or been left to mature and flower naturally? Was the plant type a variant with a greater cannabinoid or THC level than normal? What was the anticipated yield and related street value? The answers to these questions are all relevant to assessing the gravity of the offending. It is also important, as with trafficking, to note that the number of plants may be a matter of happenstance; circumstantial evidence may reveal the number of plants to be all that remains of a more significant crop or that the crop found is a second or third crop. ...”[[85]](#footnote-85)

1. We propose the following guidelines for the offence of cultivating cannabis, which is based on the estimated annual yield of cannabis plants, bearing in mind the maximum sentence of 15 years’ imprisonment. In estimating the annual yield, the sentencing judge will calculate the average weight of the plants, which is multiplied by the number of plants and then by the number of crops in the year. He should then identify the relevant band in the new guidelines after taking into account the gravity of the offence and the culpability of the offender.

|  |  |
| --- | --- |
| Estimated annual yield of cannabis (grammes) | Range of sentence (term of imprisonment) |
| Below 5,000 | Below 2 years |
| 5,000 to 50,000 | 2 to 7 years |
| 50,000 to 150,000 | 7 to 10 years |
| Over 150,000 | Above 10 years |

1. Factors that may be relevant in sentencing for offences of cultivation of cannabis are the role of the defendant[[86]](#footnote-86), the nature[[87]](#footnote-87) and scale[[88]](#footnote-88) of the operation, and any noticeable higher (or lower) levels in THC.
2. In applying the guidelines, the six step approach set out in *HKSAR v Herry Jane Yusuph*[[89]](#footnote-89)should be followed.

The sentences in the present cases

1. Following Dang’s guilty plea to the offence of cultivation of cannabis plants, the judge estimated that the annual yield of herbal cannabis was about 137.70 kilogrammes, which he calculated was the equivalent of 34.40 kilogrammes of cannabis resin. He then applied the *Tuen Shui Ming* guidelines, taking into account Dang’s role as a gardener and the scale of the operation involved, and adopted a starting point of 11 years’ imprisonment, which he then reduced by 23% for his guilty plea to 8 years and 6 months’ imprisonment.
2. If we were to apply the new guidelines, the estimated annual yield of 137.70 kilogrammes placed the sentence in the band of 50,000 to 150,000 grammes, which corresponds to 7 to 10 years’ imprisonment. However, the judge also took into account that there were a total of 552 cannabis plants, 195 saplings, and 2 bags of cannabis buds and that the scale of the operation was large and continuous, and clearly for a commercial purpose. Whilst the starting point would be 9 years and 7 months’ imprisonment for the estimated annual yield, there were other aggravating factors identified by the judge, which warranted an enhancement of sentence. In such circumstances, 11 years’ imprisonment as a notional starting point was not inappropriate. Dang received an appropriate discount for his guilty plea and there is no need to interfere with the resultant sentence for what was a very serious case.
3. Following his plea of guilty, Nguyen was sentenced for trafficking in 7.84 kilogrammes of herbal cannabis and cultivation of cannabis plants with an estimated yield of 85.17 kilogrammes. For the trafficking offence, the judge correlated the quantity of cannabis plants to cannabis resin, which was about 1.70 kilogrammes. He applied the sentencing guidelines in *Tuen Shui Ming* and adopted a starting point of 16 months’ imprisonment, which he enhanced by 6 months for Nguyen’s status as a Form 8 recognizance holder to 22 months’ imprisonment. He reduced the notional starting point by 7 months for Nguyen’s guilty plea to 15 months’ imprisonment. For the cultivation offence, the judge adopted a starting point of 10 years’ imprisonment, which he enhanced by 6 months for Nguyen’s status to 10 years and 6 months’ imprisonment, and then discounted the notional sentence by 3 years and 6 months for his guilty plea to 7 years’ imprisonment. He made 6 months for the trafficking consecutive to the cultivation sentence, resulting in a total sentence of 7 years and 6 months’ imprisonment.
4. If we were to apply the revised guidelines for trafficking, the quantity of herbal cannabis fell within the band of over 6,000 grammes with a corresponding sentence of 36 to 48 months’ imprisonment. As for the new guidelines for cultivation, the estimated annual yield would come within the band of 50,000 to 150,000 grammes, which corresponds with 7 to 10 years’ imprisonment. For an annual yield of 85.17 kilogrammes the corresponding starting point would be 8 years’ imprisonment. The judge considered Nguyen’s role important to the operation at the premises, which had an array of items and equipment for the cultivation of cannabis plants. He also possessed the keys to the premises. The judge said that for the quantity involved and other circumstances of the case, a starting point of 10 years’ imprisonment should be adopted. The enhancement of 6 months was for Nguyen’s status as a Form 8 recognizance holder, which was appropriate. Given the overall circumstances, particularly as he would have received a higher sentence for the trafficking offence under the revised guideline. There is no reason to interfere with the sentence imposed by the judge.
5. Accordingly, the appeals of both appellants against their sentences are dismissed.

|  |  |  |
| --- | --- | --- |
| (Andrew Macrae)  Vice President | (Kevin Zervos)  Justice of Appeal | (Anthea Pang)  Justice of Appeal |

Ms Vinci Lam SC, DDPP and Ms Claudia Ng, SPP, of the Department ‍of Justice, for the Respondent

Mr Martin Hui SC, Ms Kamina Lai and Mr Benson Wong, instructed by Tang, Lai & Leung (dates of hearing); and HY Leung & Co. LLP, Solicitors (date of Judgment), both assigned by the Director of Legal Aid, for the Appellants

1. Zervos JA. [↑](#footnote-ref-1)
2. Macrae VP. [↑](#footnote-ref-2)
3. Appeal Bundle (AB), p 18H. [↑](#footnote-ref-3)
4. *Attorney General v Tuen Shui Ming & Anor* [1995] 2 HKC 798. [↑](#footnote-ref-4)
5. *HKSAR v Nguyen Thu Ha* (Unrep., CACC 335/2013, 16 October 2013). [↑](#footnote-ref-5)
6. *Secretary for Justice v Lee Siu Kei* [2006] 1 HKC 499. [↑](#footnote-ref-6)
7. *HKSAR v Wan Lau Mei* [2014] 4 HKC 75. [↑](#footnote-ref-7)
8. *HKSAR v Chan Wang Mei* (Unrep., CACC 307/2019, 21 August 2020), at [44]. [↑](#footnote-ref-8)
9. *Attorney General v Chan Chi Man* [1987] HKLRD 22, at [56]. [↑](#footnote-ref-9)
10. *Attorney General v Tuen Shui Ming*, p 134, Line 45 – p 135, Line 10. [↑](#footnote-ref-10)
11. *Ibid*., p 135, Lines 11-16. [↑](#footnote-ref-11)
12. *Ibid*., p 135, Lines 27-43. [↑](#footnote-ref-12)
13. *Secretary for Justice v Cheung King Kong* [2020] 3 HKLRD 837. [↑](#footnote-ref-13)
14. *HKSAR v Nguyen Thu Ha* (Unrep., CACC 335/2013, 16 October 2013). [↑](#footnote-ref-14)
15. *Secretary for Justice v Cheung King Kong*, at [42]-[58]. [↑](#footnote-ref-15)
16. Professor Tang Wai-kwong, statement dated 2 March 2021. [↑](#footnote-ref-16)
17. Professor Tang’s statement, at [28]-[75]. [↑](#footnote-ref-17)
18. Professor Raymond T F Cheung, statement dated 16 March 2021. [↑](#footnote-ref-18)
19. Professor Cheung’s statement, at [13], [16], [24]-[27]. [↑](#footnote-ref-19)
20. *Ibid*., at [18]. [↑](#footnote-ref-20)
21. *Ibid*., at [30] and [33]. [↑](#footnote-ref-21)
22. Professor Wong Chi-kei Ian, statement dated 22 March 2021, at [11]-[24]. [↑](#footnote-ref-22)
23. Professor Karen Laidler, statement dated 22 March 2021. [↑](#footnote-ref-23)
24. Professor Laidler’s statement, at [5]. [↑](#footnote-ref-24)
25. *Ibid*., at [12]. [↑](#footnote-ref-25)
26. *Ibid.*, at [23]. [↑](#footnote-ref-26)
27. *Ibid*., at [35]. [↑](#footnote-ref-27)
28. Respondent’s Supplemental Submissions dated 21 January 2021 (“Respondent’s 1st Supplemental”), at [51]. [↑](#footnote-ref-28)
29. Dr Li Yeuk-goat Billy, statement dated 24 March 2021, at [3.6.4] and [3.6.5]. [↑](#footnote-ref-29)
30. *Ibid*., at [3.6.6]. [↑](#footnote-ref-30)
31. *Ibid*., at [4.5]-[4.7]. [↑](#footnote-ref-31)
32. Chief Inspector of the Police Lau Kai-pang, statement dated 19 March 2021, Table (vii) and Customs Senior Inspector Chan Chun-kei Kelvin, statement dated 12 March 2021, Annex II. [↑](#footnote-ref-32)
33. *Ibid*., Table (viii) and Annex VII. [↑](#footnote-ref-33)
34. Professor Tang’s statement, at [24]. [↑](#footnote-ref-34)
35. Professor Laidler’s statement, at [28]. [↑](#footnote-ref-35)
36. Professor Tang’s, at [80]; the UNODC Discussion Paper, at p 29. [↑](#footnote-ref-36)
37. The UNODC Discussion Paper, at pp 7-8. [↑](#footnote-ref-37)
38. *Ibid.*, at p 7. [↑](#footnote-ref-38)
39. Professor Tang’s statement, at [81]-[82], Professor Cheung’s statement, at [43]-[45], Professor Laidler’s statement, at [27]. [↑](#footnote-ref-39)
40. The UNODC World Drug Report 2022, at p 26. [↑](#footnote-ref-40)
41. *Tuen Shui Ming*, at [16]. [↑](#footnote-ref-41)
42. *Ibid*., transcript, 14I-15J. [↑](#footnote-ref-42)
43. In CACC 217/2019, Annex A and B respectively. [↑](#footnote-ref-43)
44. In CACC 145/2019, Annex C and D respectively. [↑](#footnote-ref-44)
45. Appellants’ 2nd Supplemental Submission, at [7]. [↑](#footnote-ref-45)
46. *Drug Offences Definitive Guideline* of the Sentencing Council, pp 17-22. [↑](#footnote-ref-46)
47. The maximum penalty in Hong Kong is 15 years’ imprisonment while in the United Kingdom it is 14 years’ imprisonment. [↑](#footnote-ref-47)
48. Appellants’ 2nd Supplemental Submission, at [48] and [49]. [↑](#footnote-ref-48)
49. Appellants’ 2nd Supplemental Submission, at [49]. See *R v Cheung Wai Kwong & Another* [1997] HKLRD 344, at 348F-G. [↑](#footnote-ref-49)
50. Appellants’ 2nd Supplemental Submission, at [49]. [↑](#footnote-ref-50)
51. Appellants’ 2nd Supplemental Submission, at [26]. [↑](#footnote-ref-51)
52. Appellants’ 2nd Supplemental Submission, at [50]. [↑](#footnote-ref-52)
53. See Dangerous Drugs Ordinance 1923, Dangerous Drugs Amendment Ordinance 1928 (ss.4 and 11) together with the first reading of the bill dated 29 March 1928, Dangerous Drugs Ordinance (s.2 (Indian Hemp) and s.21), Dangerous Drugs ordinance 1968 (ss.2 and 9), Dangerous Drugs (Amendment) Bill 1978 (ss.2 and 6). Appellants’ 2nd Supplemental Submission, at [42]. [↑](#footnote-ref-53)
54. Appellants’ 2nd Supplemental Submission, at [8]. [↑](#footnote-ref-54)
55. Appellants’ 2nd Supplemental Submission, at [8]. [↑](#footnote-ref-55)
56. Appellants’ 2nd Supplemental Submission, at [45]. [↑](#footnote-ref-56)
57. Appellants’ 2nd Supplemental Submission, at [46] and [51]. [↑](#footnote-ref-57)
58. S.4(3) of the Dangerous Drugs Ordinance, Cap 134. [↑](#footnote-ref-58)
59. S.9(5) of the Dangerous Drugs Ordinance, Cap 134. [↑](#footnote-ref-59)
60. Appellants’ letter dated 6 August 2021. [↑](#footnote-ref-60)
61. Appellants’ 2nd Supplemental Submission, at [10]-[34]. [↑](#footnote-ref-61)
62. Appellants’ 2nd Supplemental Submission, at [35]-[38]. [↑](#footnote-ref-62)
63. Appellants’ 2nd Supplemental Submission, at [39]. [↑](#footnote-ref-63)
64. *HKSAR v* *Hoang Thanh Son and Another*, DCCC 657/2011. [↑](#footnote-ref-64)
65. *Tuen Shui Ming*, p 135, Lines 33-37. [↑](#footnote-ref-65)
66. Respondent’s 2nd Supplemental Submission, at [13]. [↑](#footnote-ref-66)
67. Respondent’s 2nd Supplemental Submission, at [13]-[16]. [↑](#footnote-ref-67)
68. Respondent’s 2nd Supplemental Submission, at [13], [17]-[19]. [↑](#footnote-ref-68)
69. Respondent’s 2nd Supplemental Submission, at [23]. [↑](#footnote-ref-69)
70. Appellants’ 2nd Supplemental Submission, at [24]. [↑](#footnote-ref-70)
71. Respondent’s 2nd Supplemental Submission, at [34]-[38]. [↑](#footnote-ref-71)
72. Respondent’s 2nd Supplemental Submission, at [38]. [↑](#footnote-ref-72)
73. *Tuen Shui Ming*, p 132, line 13. Respondent’s 2nd Supplemental Submission, at [40]-[42]. [↑](#footnote-ref-73)
74. Respondent’s 2nd Supplemental Submission, at [43]-[44]. [↑](#footnote-ref-74)
75. *Tuen Shui Ming*, at [16]. [↑](#footnote-ref-75)
76. Respondent’s 2nd Supplemental Submission, at [45]-[47], Respondent’s 3rd Supplemental Submission, at [22]-[24]. [↑](#footnote-ref-76)
77. Respondent’s 2nd Supplemental Submission, at [48]. [↑](#footnote-ref-77)
78. Respondent’s 3rd Supplemental Submission, at [25]. [↑](#footnote-ref-78)
79. Respondent’s 3rd Supplemental Submission, at [25] and [27]. [↑](#footnote-ref-79)
80. Respondent’s 3rd Supplemental Submission, at [29]. [↑](#footnote-ref-80)
81. Respondent’s 2nd Supplemental Submission, at [6]-[12]. [↑](#footnote-ref-81)
82. *AG v Chan Chi Man* [1987] HKLR 221, 224-225. [↑](#footnote-ref-82)
83. As noted in *Tuen Shui-ming* THC in cannabis resin was 3.84 times stronger than in herbal cannabis, 135, lines 1-10. [↑](#footnote-ref-83)
84. *R v Yavuz and Others* (2018) 130 SASR 231. [↑](#footnote-ref-84)
85. *[R v Reiner](https://launch.westlawasia.com/document/I154f8970349e11e69e0fd18d932f6e2c?startChunk=1&endChunk=1)* [(1974) 8 SASR 102](https://launch.westlawasia.com/document/I7c6ed3f231d211e69e0fd18d932f6e2c?startChunk=1&endChunk=1) at 105 (Bray CJ). [↑](#footnote-ref-85)
86. Cultivators; managers or operators; organisers; controllers of a large network; operators of a large scale enterprise: see *Cheung King Kong*, at [52], citing the authority of *R v Xiong Xu* [2008] 2 Cr App R (S) 50. [↑](#footnote-ref-86)
87. Commercial; domestic; degree of sophistication of the cultivation methods: see *Cheung King Kong*, at [53]. [↑](#footnote-ref-87)
88. Small; medium; large scale: see *Cheung King Kong*, at [56]. [↑](#footnote-ref-88)
89. *HKSAR v Herry Jane Yusuph* [2021] 1 HKLRD 290. [↑](#footnote-ref-89)