CACC 246/2019

[2020] HKCA 624

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

criminal appeal no 246 of 2019

(on appeal from HCCC NO 265 of 2018)

|  |
| --- |
|  |

###### BETWEEN

|  |  |  |  |
| --- | --- | --- | --- |
| HKSAR | | | Respondent |
| and | | |  |
| Lam Kai Man (林介文) | | | Appellant |
|  |

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

Date of Hearing: 9 July 2020

Date of Judgment: 9 July 2020

Date of Reasons for Judgment: 27 July 2020

|  |
| --- |
| R E A S O N S F O R J U D G M E N T |

Hon Macrae VP (giving the Reasons for Judgment of the Court):

A. Introduction

1. The appellant was committed to the High Court for trial by a magistrate on 27 August 2018 in respect of a single count of rape, contrary to section 118(1) of the Crimes Ordinance, Cap 200 (“the Ordinance”). The trial was originally fixed before M Poon J (“the judge”) for 13 days beginning on 7 May 2019. However, a contested trial ultimately became unnecessary when, on 16 **‍**May **‍**2019, the appellant pleaded guilty on an amended indictment, dated 10 May 2019, to an additional count **‍**of procurement of an unlawful sexual act by threat, contrary to section **‍**119(1) of the Ordinance (Count 2), which was particularised as an alternative to the original count of rape (Count **‍**1)[[1]](#footnote-1).
2. On 11 June 2019, having called for psychiatric and psychological reports on the appellant, and a psychological report on the victim, whom we shall refer to as Ms X, the judge adopted a starting point of 6½ years’ imprisonment, which she reduced by just over 20% for his late plea, resulting in a sentence of 5 years and 2 months’ imprisonment.
3. The appellant sought leave to appeal against his sentence by way of a Form XI Notice of application for leave to appeal filed on 19 ‍August 2019. On 24 April 2020, the Single Judge[[2]](#footnote-2) granted the ‍appellant leave to appeal against sentence out of time as well as an Appeal ‍Aid ‍Certificate so that he might be represented at the appeal, while ‍further directing both parties to file fresh evidence in respect of the chain of events which led to the appellant pleading guilty and receiving a reduced discount for his plea. It is nevertheless important to understand, in light of what transpired before this Court at the hearing of the appeal, that despite his grant of leave to appeal on the issue of whether the appellant had been wrongly deprived of the full one‑third discount for his guilty plea, the Single Judge specifically noted that the appellant did not take issue with the starting point adopted by the judge, and further observed[[3]](#footnote-3):

“In reality this was a rape cruelly committed by an older man who showed himself capable of manipulating and taking advantage of his much younger victim. There is nothing in the circumstances of the offence or the circumstances of this applicant which attract the sympathy of the court.”

1. On 9 July 2020, when the matter came before this Court, the appellant withdrew his appeal against sentence and we formally dismissed the appeal. To understand the chain of events which led to the judge giving the appellant a discount of just over 20%, and to appreciate why the appellant ultimately withdrew his appeal, it is necessary to set out the facts, which were admitted by the appellant at the time of his plea, in some detail.

B. The facts

1. Ms X was an 18-year-old student living with her parents. She had enrolled on a Higher Diploma course and wished to pay the course fees herself rather than place the burden on her family. To that end, she had registered an Instagram account with a view to providing what has **‍**become euphemistically known as ‘compensated dating’. On 27 **‍**August **‍**2017, the appellant contacted Ms X on Instagram and arranged to meet her for two hours for a fee of $3,500. There was further communication between the appellant and Ms X via WeChat.
2. On 29 August 2017, the appellant met Ms X as arranged at Kwun Tong MTR station in Kowloon, and thereupon led her to a guesthouse nearby, which offered rooms for rent by the hour. A room was duly rented for two hours between 12:30 pm and 2:30 pm that afternoon.
3. Once inside the room, the appellant asked Ms X to show him her Identity Card, purportedly to confirm that she was over 18 years of age. When he then told Ms X that he needed to take a photograph of the Identity ‍Card, Ms X hesitated but eventually agreed, provided the appellant only took that part of the Identity Card showing her date of birth, with the other personal details obscured by a blank card. Ms X then asked the appellant to pay the full $3,500 in advance, but the appellant merely placed $500 on top of a cabinet inside the room. They then took a shower together, after which the appellant placed the balance of the $3,500 on the cabinet and asked Ms **‍**X to perform oral sex on him.
4. Whilst Ms X was administering oral sex on the appellant, he suddenly claimed to her that he was a police agent, albeit not an official police officer, who had been tasked by the police with collecting intelligence about ‘compensated dating’. He told her to produce her Identity Card again and provide her personal particulars, warning her that if she provided false information, she would be charged with a further offence. He then pretended to “seize” the $3,500 as an “exhibit” and placed it in a zipper bag he had brought with him.
5. Ms X was understandably alarmed by this turn of events and did not know what to do, since the appellant looked very serious and she believed by his conduct that he was acting on behalf of the police. She begged for mercy and pleaded with him to let her go. The appellant then told Ms X that while he had arrested some people, he had also let others off. To that end, he suggested that she would have to cooperate and have sexual intercourse with him, which event would also have to be recorded.
6. Ms X then became very frightened and began to cry. She said she did not want to have sexual intercourse with the appellant, but wanted to put her clothes back on and leave. However, the appellant refused to let her go and said he would not allow her to get dressed until the matter had been resolved. Ms X continued to refuse the appellant’s demands, whereupon he asked her obliquely if she wanted anything to happen to her. The appellant then told Ms X not to cry, since the recording was taking place. When he began to touch her body, Ms X pushed him away but to no avail. Feeling threatened and intimidated by what the appellant had said to her, Ms X engaged in sexual intercourse with him against her own free will. During intercourse, the appellant did not use a condom.
7. When the appellant had finished, and before leaving the room, the appellant told Ms X that she had to hold his hand as they left because there were colleagues watching. If she did not wish to be accused of engaging in ‘compensated dating’, she was to act as though she was his girlfriend. Ms X duly complied and held the appellant’s hand as they walked back to the MTR station.
8. Over the next few days, the appellant made further contact with Ms X, asking her to have sexual intercourse with him again, since she needed to prove that she was his girlfriend and was not engaged in ‘compensated dating’. Ms X told the appellant to leave her alone and that she was really scared that her information would be passed on to the police. The appellant assured her that all of her information would be deleted, but only in her presence. Ms X queried how she could believe him since he had not used a condom when they had had sexual intercourse.
9. Since she was scared of the appellant and worried that he ‍would cause her further trouble, Ms X took the initiative, on 1 ‍September ‍2017, of telephoning a charitable outreach organisation for young women. As a result of meeting with a social worker from the organisation on 5 September 2017, the social worker accompanied Ms X to make a complaint to the police.
10. On 8 September 2017, the appellant was duly arrested. Under caution, he maintained that he had found a girl for ‘compensated dating’ and paid her money. Upon recovery of the deleted files in the appellant’s mobile telephone, various audio- and video-recordings relating to the events of 29 August 2017 were discovered. We should say that we had available to us the relevant audio- and video-recordings, and the latter clearly depict the faces of Ms X and the appellant while digital and vaginal penetration is taking place. Moreover, they also reveal the appellant’s stern demeanour when, having stood up and claimed to be acting on behalf of the police, he appeared to rebuke Ms X by pointing his finger accusingly at her.

C. The appellant’s background

1. The appellant was 33 years of age and single. At one stage he had become a salesman for CSL earning up to $80,000 per month, including commission[[4]](#footnote-4). However, he had then been sent to prison for 6 years for an **‍**offence of rape. He was released from prison for that offence on 8 **‍**May **‍**2017, just over three months before the commission of the offence with which we are concerned, and was at the time under post-release supervision[[5]](#footnote-5). It was accepted by counsel on his behalf during mitigation that a recent previous conviction of a similar nature would affect the starting point for the present offence[[6]](#footnote-6). It is worth noting that the previous offence in question was committed by the appellant posing as a recruiting agent for a fictitious modelling agency. A copy of the Court of Appeal’s judgment dismissing his appeal against that conviction was produced to the judge prior to mitigation[[7]](#footnote-7). The Court on that occasion had found it an aggravating feature of the offence that the appellant had gained the victim’s trust and “created a trap and an environment which was favourable for assaulting (her)”[[8]](#footnote-8).

D. Events leading to the appellant’s withdrawal of the appeal

1. When the present matter came before us on appeal, it was our collective, but at that stage provisional, view that the judge’s starting point on the facts and circumstances we have just recited was a wholly inadequate reflection of the appellant’s culpability. As the Single Judge had rightly remarked, this offence was, in reality, a rape which had been cruelly committed on a young and impressionable girl by an older man with **‍**an **‍**obvious propensity for role-playing, as well as controlling and **‍**manipulating his victims into doing what he asked. The psychological **‍**report, helpfully provided by Mr ‍Jim HK Cheung of the Correctional **‍**Services Department, described the appellant as an “egocentric person” with a tendency “to be deceitful and manipulative” in order to obtain what he wanted. Mr Cheung was of the opinion that the appellant was sexually pre-occupied and that the future risk of his committing further sex offences was high[[9]](#footnote-9). The appellant’s previous conviction, in which he had similarly deceived a 17-year-old schoolgirl into providing him with sexual services, is ample confirmation of Mr **‍**Cheung’s opinion and would have justified the need for a strong element of personal and public deterrence in the sentence passed.
2. Given the aggravating features involved, namely, the aura of intimidation generated by the appellant as he warned an obviously frightened and much younger girl that she would be arrested if she did not do as he asked, the recording and filming of Ms X having sexual intercourse with him against her will, the refusal to let her leave the room until she had complied with his demands, the non-use of a condom (which **‍**was also held to be an aggravating feature in his previous case[[10]](#footnote-10)), his forcing her to hold his hand as they left so as to give the impression that she was his girlfriend, the attempt to secure further sexual favours in the days following by continuing his menacing pretence and the effective theft of $3,500, would, in our view, have merited a starting point of 7 years’ imprisonment.
3. This starting point ought to have been appropriately enhanced for the appellant’s recent, previous similar conviction for rape. In the recent decision of *HKSAR v Har Tsz Yui*[[11]](#footnote-11), we held that:

“… the aggravating feature of a defendant being a repeat offender, whatever the offence, is not susceptible of the arithmetical application of percentage enhancements. Much will depend on the nature and seriousness of the offence, the extent of the defendant’s criminal record and the need for personal and public deterrence”.

The Court went on to observe that “repeated similar offences within a short time of being released from prison might indicate that the defendant is making no effort to change his ways”[[12]](#footnote-12). The appellant’s previous similar conviction for rape clearly demonstrated the pressing need for someone with a high risk of re-offending, as well as an obvious disregard for the law, to be deterred. In all the circumstances, we deemed an enhancement of 1 **‍**year to be proportionate to the sentence for the substantive offence, thus making a notional sentence after trial of 8 years’ imprisonment.

1. It seemed to this Court that if were to accede to the appellant’s complaint that the judge’s discretion had miscarried and the appellant was entitled to a greater discount for plea than 20%, then we would be required to sentence afresh. That exercise would necessarily include a consideration of the correct starting point for this offence, from which the sentence would then be discounted by the appropriate percentage. If, in sentencing afresh, we were ultimately to adopt a notional sentence after trial of 8 years’ imprisonment as the correct enhanced starting point, the argument as to whether the appellant should have received a one-third discount was rather redundant and ran certain risks for the appellant. For, even if we were to accede to the submission that the appellant should receive a full one-third discount for plea, the resulting sentence would be 5 years and 4 months’ imprisonment from an enhanced starting point of 8 **‍**years. That would have been higher than the sentence he is currently serving.
2. On the other hand, if this Court were to conclude that the appellant should have received a discount of something between one-third and 20%, for example 25%, then the sentence it would be obliged to pass would be 6 years’ imprisonment, which would be significantly higher than the sentence he is currently serving. Either percentage discount would result in the appellant serving a longer sentence than the one to which he is presently subject.
3. It was for this reason that, at the outset of the hearing of the appeal, we advised Mr Sherry, who appeared for the appellant at the appeal but not the trial, that we were of the provisional view, subject to full argument on the matter, that the judge’s starting point, given the facts and the appellant’s antecedents, was far too low and that, even if he were to succeed on the appeal as to the question of discount, this Court might ‍feel ‍obliged to use its power under section 83I(3)(b) of the Criminal ‍Procedure ‍Ordinance, Cap 221 to increase the sentence. Accordingly, Mr Sherry asked for time to speak with his client, which we duly gave him. When the Court resumed, Mr Sherry informed the Court that he was instructed to withdraw the appellant’s appeal against sentence. We accordingly granted the application.

E. The wider issue in the appeal

1. However, we sought submissions from both parties on the wider issue engaged in this appeal, which had prompted the original grant of leave to appeal; namely, what a defendant is expected to do in order to obtain an appropriate discount where the verdict of the jury, or the plea eventually accepted by the prosecution, is that which he has previously offered to the prosecution by way of plea. The situation most often arises in murder cases, where the jury returns a lesser verdict of manslaughter; a verdict which the defence then contends was offered to the prosecution but rejected prior to trial. Sometimes, a plea of manslaughter will have been formally entered on the court record before a magistrate at committal, or before the trial judge either at a preliminary hearing or the commencement of the trial: more often than not, however, the matter will have been discussed orally or in writing between the parties, revealing various levels of commitment on the part of the defence, from exploratory enquiries of the possibility of the prosecution accepting such a plea to a firm offer of a plea to manslaughter on a specific basis, which is then rejected. The judge may not even know of these discussions between the parties.
2. However, the problem is not confined to cases of murder/manslaughter: the situation may arise in any case where there is a statutory or common law alternative to the count averred on the indictment; indeed, it could even arise where the defence offer a plea to another offence altogether, which is not a statutory or common law alternative, but which is consistent with the defence view of the facts or the defendant’s criminality as the defence see it. And, as we have earlier indicated, the question arose in the present case as the result of the appellant’s offer made through his instructing solicitors in correspondence with the prosecution to plead guilty to section 119(1) of the Ordinance as an alternative to the count of rape.
3. It is instructive to examine this particular case for what it reveals of the difficulties for the courts when matters are dealt with by way of correspondence rather than formally on the court record. To that end, we are grateful to Mr Sherry for his submissions, notwithstanding that the appeal against sentence had been withdrawn.

E.1 The attempts to plea-bargain in the present case

1. There were effectively three approaches by the then solicitors for the appellant to the prosecution in an attempt to plea-bargain for the appellant prior to committal, and three responses by the prosecution. The first approach was constituted by a letter dated 21June 2018, in which the solicitors wrote[[13]](#footnote-13):

“We are instructed to write to enquire whether the Prosecution is prepared to offer no evidence against the Defendant for the charge (of Rape) if he pleads guilty to the charge of Procurement of False Pretences, contrary to section 120 of the Crimes Ordinance (Cap 200) and admits the brief facts of the case to be prepared.

Please take instructions and revert.”

Not surprisingly, given that the maximum sentence for the offence offered, which is a statutory alternative to rape[[14]](#footnote-14), is only 5 years’ imprisonment, the prosecution replied, on 11 July 2018, that it would not accept the plea[[15]](#footnote-15).

1. The second approach followed immediately upon the prosecution’s reply of 11 July 2018. The appellant’s solicitors wrote again to the prosecution, on the same day, in almost identical terms, but offering instead a plea to an offence of ‘procurement by threat’, contrary to section 119 of the Ordinance, in place of the offence of rape[[16]](#footnote-16). The offence proposed is also a statutory alternative to the offence of rape. On the following day, that is 12 July 2018, the prosecution again rejected the offer[[17]](#footnote-17).
2. On 23 July 2018, the appellant’s solicitors made a third overture to the prosecution to lay the latter alternative charge to the offence of rape and cited another case in the High Court, *HKSAR v Lau Ka Shing*[[18]](#footnote-18), where that had happened on facts which were said to have been similar to the present case. They concluded their letter[[19]](#footnote-19):

“We can’t see any justification why the defendant in the (other) case and our client in the present case should have a different treatment. In the circumstances, we are writing to implore you to reconsider laying an alternative charge of ‘Procurement by threats or intimidation to do an unlawful sexual act’ contrary to section 119(1) of the Crimes Ordinance against our client.”

On 10 August 2018, the prosecution again declined to accept the appellant’s offer[[20]](#footnote-20). On 27 August 2018, the appellant duly pleaded ‘not **‍**guilty’ to the charge of rape before a magistrate and was committed to the High Court for trial[[21]](#footnote-21).

1. Pausing here, these three approaches are revealing of the difficulties that a court faces when plea-bargaining is conducted between the parties by way of correspondence only, in terms that are less than explicit. It is quite clear that the first approach was exploratory only: there was no firm offer, the appellant’s solicitors no doubt recognising that the possibility of the prosecution agreeing to such a course of action was highly unlikely.
2. However, the second and third approaches were more problematic. When the letter detailing the third approach was produced to the judge during mitigation, the following exchange took place[[22]](#footnote-22):

“COURT: Nowhere in that letter was it offered that ‘If you add that charge we are prepared to plead guilty to it’. It’s not said in that letter. Do we accept that?

DEFENCE COUNSEL: It’s poor drafting, my Lady, and …

COURT: Well, you can’t say it’s poor drafting. It’s drafted by a solicitor’s firm but nowhere in it was there any indication of pleading guilty.

DEFENCE COUNSEL: Not in words, no, my Lady. I accept that, my Lady.”

Accordingly, when she came to sentence, the judge held[[23]](#footnote-23):

“Counsel urged me to give him the full one-third discount on the basis that he had offered to plead to the present charge through his former lawyers by a letter dated 23 July 2018 before committal, which was rejected by the prosecution.

I have had sight of that letter, and I find that nowhere was it indicated in that letter that he’s offered to plead guilty for this charge. It was only implored on his behalf that in view of the similarity between this case and that of *Lau Ka Shing* whether the prosecution would lay this charge as an alternative to the rape charge, which was rejected by the prosecution.”

1. We do not have to resolve the issue of what was really meant by the letter of 23 July 2018 because Ms Lam, with her Mr Shiu, for the respondent, has conceded that the appellant did make an offer to the prosecution to plead guilty to the now alternative count by their second letter of 11 **‍**July 2018, which proposal was effectively repeated on 23 **‍**July **‍**2018. Unfortunately, neither the letter of 11 July 2018 nor its response from the prosecution on the following day, indicating that the prosecution would not accept the defendant’s “offer” to plead, were produced before the judge. Without a knowledge of those letters, the judge was technically correct that the third approach of 23 July 2018 did not actually make such an offer. However, the picture was incomplete.
2. If we accept, therefore, that there was an earlier offer on 11 **‍**July 2018 to plead guilty to the very offence which was eventually added to the indictment on 10 May 2019, the question then becomes whether the appellant was entitled to a one-third discount? In answering that question, however, one must look at the entire conduct of the defence, including what transpired after the prosecution’s rejection of the second and third approaches. The appellant did not in fact plead guilty at the first available opportunity, namely, at the committal on 27 August 2018, which took place some 17 days after the prosecution’s rejection of the third approach on 10 **‍**August. He could have done so, since the section 119(1) offence under the Ordinance is a statutory alternative to the offence with which he had been charged. Instead, he pleaded ‘not guilty’. Moreover, on 25 October 2018, counsel then acting on behalf of the appellant completed a case management questionnaire in which he summarised the issues at trial as, *inter* ***‍****alia*, (i) the credibility of the alleged victim; and (ii) consent[[24]](#footnote-24). On 9 **‍**January 2019, the case management hearing was held in which the judge asked the parties if the issue at trial hinged on the credibility of Ms X. Prosecuting counsel confirmed that it did, without demur from the defence[[25]](#footnote-25).
3. To complete the picture, on 8 May 2019, which was scheduled to have been the second day of trial[[26]](#footnote-26), the appellant’s new counsel again wrote to the prosecution, who were by then represented by counsel on **‍***fiat*, in the following terms[[27]](#footnote-27):

“Further to our conversation on 7 May 2019 I have taken instructions from my client today and he is willing to plead guilty to the offence of Procurement by threats or intimidation to do an unlawful sexual intercourse (*sic*), contrary to section 119(1) of the Crimes Ordinance, which carries a maximum sentence of 14 **‍**years’ imprisonment: in lieu of rape. In HCCC 266/2012 the court took a starting point of five years’ imprisonment.

The facts of the case show that the complainant only performed sexual acts with the accused after he intimidated her by claiming to be a person subcontracted by the police. There was no violence and from the accused’s point of view, the complainant was consenting to the act.

I look forward to your consideration of this offer.”

1. On 10 May 2019, prosecuting counsel advised the court of this development and indicated that, provided the appellant entered a plea of guilty to the proposed alternative count and agreed the Summary of Facts, the prosecution would accept the plea. To that end, the case was further adjourned to 16 May 2019, with the indictment being meanwhile amended by the prosecution, on 10 May 2019, so as to add an alternative count of procurement of an unlawful sexual **‍**act by threat, contrary to section 119(1) of the Ordinance. On 16 **‍**May **‍**2019, the appellant duly pleaded guilty to the alternative count and not guilty to rape, which plea was accepted by the prosecution.

E2. The utilitarian value of a guilty plea

1. To answer the question we have posed about the appellant’s discount in the circumstances we have set out, it is necessary to remind ourselves why the courts place such emphasis on early indications of pleas of guilty. In what is now the leading case on the court’s approach to pleas of guilty in this jurisdiction, namely *HKSAR v Ngo Van Nam*[[28]](#footnote-28), Lunn VP, giving the principal judgment of the Court, referred to what Yeung VP had said in *HKSAR v Lo Kam Fai*[[29]](#footnote-29):

“A defendant who enters a timely plea of guilty is normally entitled to a sentence discount of one third from the starting point because it is in the public interest to do so.”

Both Yeung VP and Lunn VP immediately went on to cite with approval, in their respective judgments in each case, the explanation of Kirby J in the High Court of Australia decision of *Cameron v R*[[30]](#footnote-30) as to how the public interest was engaged:

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

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

1. We have highlighted the final sentence of this classic statement of the utilitarian value of pleading guilty because it should be appreciated that Ms X would not have known until sometime on, or after, 7 **‍**May 2019 that she would not in fact be required to give evidence; which was more than 1 year and 8 **‍**months after the commission of the offence by the appellant. No doubt for much of that 20 **‍**months, she would have been dreading the ordeal which was to come[[31]](#footnote-31). From the prosecution’s point of view, they would have believed, at least from the case management discussions onwards, that the credibility of Ms X would be challenged at trial, and that consent was in issue. And from the court’s perspective, it would have assumed that a contested trial would take place for 13 **‍**days from 7 May 2019; indeed, it was not until 10 May 2019 that the judge was apprised of a possible plea-bargain. A significant number of court days were thereby wasted.
2. In these circumstances, the utilitarian value of the plea by the appellant was clearly not great, and certainly not as great as it would have been if he had pleaded guilty at the first available opportunity, that is upon his committal from the magistrate’s court. At least then, the victim, the prosecution and the court would each have known where they stood, the issues would have been **‍**suitably narrowed and it is very doubtful that the trial, had it even **‍**proceeded as a contested hearing, would have lasted 13 **‍**days. As Lunn VP put it in *Ngo* ***‍****Van* ***‍****Nam*[[32]](#footnote-32):

“There is no doubt that the utilitarian value of a plea of guilty is greater the earlier the plea of guilty is intimated or tendered. The authorities to which we have referred speak with one voice in that respect. We are satisfied that it is not only logical, but also fair to reflect that factor in sentencing, so that a defendant who pleads guilty at an earlier stage is to be afforded a greater discount in sentence than a defendant who pleads guilty at a later stage.”

1. There was some discussion before us whether, in the above passage, Lunn VP had intended, by his reference to “the plea of guilty being *intimated* or tendered”, that a plea could be indicated in less formal terms than a plea of guilty on the record. However, as one of the members of the Court in *Ngo Van Nam*, it was clear to me that Lunn VP was using the word in its primary sense, namely, to “make known formally, announce, state”[[33]](#footnote-33). Indeed, later in his judgment, he said[[34]](#footnote-34):

“We are satisfied that in cases committed for trial or sentence the stage at which a discount of a full one-third is to be afforded to the defendant is at the stage of committal described earlier. Usually, but subject to the overriding discretion of the judge in sentence, the opportunity to secure a one-third discount from the starting point for sentence occurs when the defendant is given the opportunity to plead guilty in the Magistracy, pleads guilty and is committed for sentence…”

E3. The position in England and Wales

1. The position in England and Wales, where pleas to alternative offences are offered, is now very clear-cut. By virtue of section F3 of the *Definitive Guideline* governing a ‘Reduction in Sentence for a Guilty Plea’ issued by the Sentencing Council for England and Wales in June 2017:

“If an offender is convicted of a lesser or different offence from that originally charged, and has earlier made an unequivocal indication of a guilty plea to this lesser or different offence to the prosecution and the court, the court should give the level of reduction that is appropriate to the stage in the proceedings at which this indication of plea (to the lesser or different offence) was made taking into account any other of these exceptions that apply. *In the Crown Court where the offered plea is a permissible alternative on the indictment as charged, the offender will not be treated as having made an unequivocal indication unless the offender has entered that plea*.” (Emphasis **‍**supplied)

Hong Kong does not have this sentencing framework and regime, and the question remains whether we should adopt such an absolutist approach for Hong Kong.

E4. The position in Scotland

1. By contrast, in Scotland, the relevant statutory provision governing sentencing on pleas of guilty is section 196(1) of the Criminal Procedure (Scotland) Act 1995:

“196. – (1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account

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

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

1. The Scottish Court of Appeal in *Balgowan v HM Advocate*[[35]](#footnote-35), in which Lord ‍Reed (now PSC and NPJ) presided, described the objective of this provision, in terms which resonate with the statement of Kirby J in Cameron, as[[36]](#footnote-36):

“…no more nor less than utilitarian in the sense that by encouraging pleas of guilty it was hoped that considerable amounts of public time and expense would be saved as well as sparing witnesses the trouble, expense and, on occasion, distress of attending court and giving evidence.”

The Court went on to observe[[37]](#footnote-37):

“It is to be noted that what is required is an indication of an “intention” to plead guilty, not merely an inquiry as to the Crown’s attitude in the event that a plea of guilty were to be tendered, or an indication of a possible willingness to plead guilty on a particular basis. The desirability for as early intimation as possible of that intention to plead guilty and for as much detail and clarity as possible in the expression of that intention, as also the importance of its remaining constant, is fully dealt with in *Spence* and we do not find it necessary to further elaborate on that aspect of the subsection other than to say that the clearest manifestation of that intention, as soon as it is available, will be a formal plea duly tendered and recorded.”

The Court later explained[[38]](#footnote-38):

“…if a rationale is required for insistence on a formal plea, as opposed to inquiries made of the Crown on a hypothetical basis or even an unambiguous offer to plead guilty, it is quite simply that neither of these courses of action carry with them the same implication as a recorded plea. On the contrary, if these overtures are rejected the assumption will be that what is in view is an unrestricted trial.”

1. There is a Commentary to this decision in the case report in Scottish Criminal **‍**Law[[39]](#footnote-39), to the effect that:

“The unequivocal indication by an accused, of an intention to plead guilty to a charge, as libelled or in part, can now only attract discount if the precise nature of the plea is recorded and its timing officially noted as part of the proceedings.”

The author goes on to refer to the previous decision of the Court in *HM* ***‍****Advocate v Simpson*[[40]](#footnote-40), albeit disapproved in *Balgowan* for other reasons we need not address, which we think is worth repeating[[41]](#footnote-41):

“We are satisfied that there are sound policy reasons for requiring a degree of formality to be attached to the intimation of any plea of guilty if there is to be any discount applied to the subsequent sentence. An absence of such formality leads to a lack of clarity about the nature of the plea tendered and the position of any narrative that might attach to the plea, and also creates abundant opportunity for misunderstandings to arise.”

1. In this regard, we should refer to the leading case in Scotland of *Spence v HM Advocate*[[42]](#footnote-42), which *Balgowan* followed. The appellant had been charged with murder. Prior to a preliminary hearing, a letter from those acting for the appellant was written to the prosecutor in the following terms, *inter alia*[[43]](#footnote-43):

“I am writing to enquire as to whether the Crown has considered its position in the event that a plea of guilty to culpable homicide[[44]](#footnote-44) were proposed.”

The approach was refused. The appellant duly appeared, legally represented, at the preliminary hearing and pleaded not guilty. He further indicated that he would be putting forward a defence of self-defence. The jury ultimately returned a verdict of culpable homicide.

1. On appeal as to the adequacy of the discount on sentence, the Court noted that the appellant could at the preliminary hearing have pleaded guilty to culpable homicide, in which case his plea, even if not accepted by the prosecution, would have been duly recorded. It considered that a letter in the terms indicated was of no value for the purposes of securing a discount for an early plea because “it does no more than enquire what would be the Crown’s position in the hypothetical event that a plea of guilty to culpable homicide were advanced”[[45]](#footnote-45). The Court went on to make clear[[46]](#footnote-46):

“What is required is ‘an unequivocal indication of the position of the offender’ (*HM Advocate v Booth*[[47]](#footnote-47), para 21). Moreover, to have value that intention must be adhered to throughout the proceedings and be appropriately vouched. That, as we have said, can be done, after the indictment has been served, by tendering the plea and having it recorded at the procedural hearing and adhering to that position thereafter. Prior to the service of the indictment an intention to plead guilty on a restricted basis can be intimated by letter. Such action is indicative of acceptance by the accused of guilt (albeit to a limited extent). By contrast, in the present case, the appellant not only adhered throughout the proceedings to his plea of not guilty but lodged and insisted on a defence of self-defence. The choice (to plead guilty to culpable homicide or to seek an acquittal) was open to the appellant. ‘That is the choice he must make. He cannot have it both ways.’ (*HM Advocate v Thomson* ***‍****and Dick*[[48]](#footnote-48), para 27.)”

1. The admonition that a defendant cannot have it both ways finds similar expression in Hong Kong. Bokhary PJ, giving the determination of the Appeal Committee of the Court of Final Appeal in *Sze* ***‍****Kwan Lung & Ors v HKSAR*[[49]](#footnote-49), put the matter in this way:

“Sometimes a defendant who faces a murder charge offers to plead guilty to manslaughter. If his offer is rejected by the prosecution, he has a choice. He can fight the case on the basis that he is not guilty of murder but guilty of manslaughter. Or he can fight the case on the basis that he is not guilty of any homicide. There is a considerable difference between these two courses. If the defendant is convicted of manslaughter after pursuing the first course, the full one-third discount is normally given. But if he is convicted of manslaughter after pursuing the second course, something less than a one-third discount is normal.”

1. There is one further case we should mention from the Scottish jurisdiction. In *Herd v HM Advocate*[[50]](#footnote-50), the appellant was originally charged with assault in that he did “fire an item from a crossbow at (the **‍**victim) striking him on the head”. The prosecution twice rebuffed two offers, both oral and in writing, from the appellant’s solicitor to plead guilty to assault, but without any reference being made to the appellant firing the crossbow. The offers were made both before and after the service of the indictment. At the trial, however, the plea which had been earlier offered was accepted by the prosecution, which agreed to delete the words to which the defence had taken objection. Nevertheless, the judge only gave the appellant a 10% discount for his guilty plea.
2. The Court in *Herd* acknowledged its previous decisions in *Spence*, that what was required was “an unequivocal indication of the position of the offender. It was also made plain that any such intention must be adhered to throughout the proceedings and be appropriately vouched”[[51]](#footnote-51); and in *Balgowan*, that a discount where the verdict was the same as the plea offered “would have to be predicated upon an earlier formal plea in similar terms having been rendered and recorded in court”[[52]](#footnote-52).
3. *Herd* does not, of course, concern the offering by the defence of a plea to a lesser or alternative offence. The charge of assault remained the same: the defence were concerned to minimise the seriousness of the particulars as to how the assault was carried out. The Court concluded that the circumstances were “a little different”[[53]](#footnote-53), and that the judge should have taken the dealings between the parties into account when determining the appropriate discount. Nevertheless, the Court held[[54]](#footnote-54):

“We would reiterate, as has been in previous cases, that the unequivocal intention of the offender can be vouched by tendering his plea and having it recorded at pre-trial hearings. If that is not done the circumstances in which the court can take account of pre-indictment indications may be limited, particularly, as was made clear in the case of *Balgowan*, if the case proceeds to trial.”

In the result, the Court allowed the appeal and determined that the discount for the appellant’s plea should have been 25%.

1. We have dealt in some detail with the position in Scotland because we consider that, unlike the position in England and Wales, in which the *Definitive Guideline* operates under a statutory regime, Scotland provides a similar context and framework in which to fashion common law principles applicable for Hong Kong. Indeed, it seems to us that section 196(1) of the Criminal Procedure (Scotland) Act 1995 effectively gives a statutory basis for the very approach which has been adopted and worked out in *Ngo Van Nam*.

E5. The position in Australia

1. We note that a similar approach has been adopted by the Supreme Court of South Australia. In *R v Hansen*[[55]](#footnote-55), the jury had acquitted the appellant of murder but convicted him of manslaughter, to which offence the defence had made an early offer by letter to plead guilty. Vanstone J, with whom Sulan J agreed, held[[56]](#footnote-56):

“In my view there is no rule of practice requiring that credit be given for such an offer in these circumstances. Had the appellant been able to point to a plea of guilty following the preliminary examination, or on an arraignment day, or at a subsequent hearing, then there is no doubt that, all things being equal, he would have been able to claim credit for that plea.

However, here there was a complicating factor. The appellant went to trial claiming that, at the time he struck the deceased, he was not adverting to the fact that he was holding the scissors. In other words, his defence was that he thought he was merely punching the deceased and that he was doing so in genuine self‑defence. Had that account been found by the jury to be reasonably possible, then he would have secured a complete acquittal. The departure from the terms of the earlier offer tends to suggest that the offer was made as a matter of tactics, rather than being a demonstration of contrition and remorse.

Particularly in circumstances where the appellant’s evidence at trial departs from the basis for the plea put in the letter of offer, I see no reason why a sentencing judge is obliged to give credit. Indeed, I would tend to equate the weight which might be attached to the offer to plead guilty here to that which might be afforded a defendant who is frank in interview with police about his involvement in the relevant event, but yet goes on to defend the charge. I do not consider that the judge was obliged to give any credit for the offer, or to mention it in his sentencing remarks in the context of arriving at a head sentence or non-parole period.”

1. In the later case of *R v Franklin*[[57]](#footnote-57), to which Ms Lam drew our attention, Sulan J explained that one of the reasons for there being no such rule of practice is that there may be an offer to plead guilty, but it is made on a factual basis which is unacceptable to the prosecution. He held[[58]](#footnote-58):

“In order to ascertain whether a sentence should be reduced, the court needs to know when the offer was made, the exact terms **‍**of **‍**the offer, the underlying factual basis to the offer, **‍**and **‍**any **‍**other relevant information. Correspondence between **‍**the **‍**defendant’s legal advisers and the Director (of **‍**Public **‍**Prosecutions) should be provided to the judge. The preferred position is for the defendant to plead guilty and for the Director to indicate why the plea is not accepted. The basis of the plea and the reasons for a refusal to accept it in answer to the information will be a matter of record.”

He concluded[[59]](#footnote-59):

“In my opinion, in an appropriate case, a sentencing judge may take into account an unaccepted offer to plead guilty to a lesser offence which matches the verdict at the trial. However, the preferable course for a defendant to take is to plead guilty before the judge. There can then be no doubt about the basis of the plea and, if rejected by the Director, the judge will know why it was rejected.”

1. Although the South Australian courts might seem more amenable to formal written offers to plead guilty, they nevertheless also emphasise that such offers, and the basis on which they are made, must be clear and unequivocal before they can be relied upon in support of a claimed entitlement to a discount for a guilty plea. While they may speak of a formal plea of guilty on the record being the “preferable course for a defendant to take”, we consider that if a written offer is being relied upon, the court will have to be persuaded that there was good reason for the plea to the lesser or alternative offence not being entered formally on the court record, and it will also have to be satisfied that the terms of the offer were clear and unequivocal and that the defendant’s conduct in the proceedings thereafter was *entirely* consistent with the proposed offer.

E6. Further principles in respect of the application of Ngo Van Nam

1. In light of these authorities to which we have referred, we consider that it is necessary to supplement what has been said in *Ngo* ***‍****Van* ***‍****Nam* in respect of the position in this jurisdiction where early pleas of guilty to lesser offences or alternative charges are offered by a defendant, which pleas either match the eventual verdict of the jury or are later accepted by the prosecution.
2. First, if a defendant wishes to plead guilty to a lesser or alternative charge, he should make a clear and unequivocal statement of his position in court and on the record. This should be done by formally entering a plea to the proposed charge on the court record, but it may also in certain circumstances be achieved by his legal representative stating, again formally on the court record, the defendant’s intention and the basis of his proposed plea.
3. Secondly, the defendant should adhere to his stated position for the remainder of the proceedings. By this, we do not in any way mean to limit the right of a defendant to a trial or to conduct his case in any way he sees fit. We are only concerned with how a court should assess a claim by a defendant to a sentencing discount as a result of his earlier offer of a plea of guilty.
4. Thirdly, we do not propose to close the door entirely on clear and unequivocal offers to plead guilty to lesser or alternative charges made in writing by the defendant’s legal representatives to the prosecution, which cannot for some good reason be entered formally on the record. However, the court should satisfy itself that there was good reason for the plea not being formally entered on the court record, and the onus will be firmly upon the defendant seeking the discount to show that he clearly and unequivocally offered the plea in question and the basis for the plea; and that such position had been adhered to for the remainder of the proceedings.
5. Finally, the extent of the discount will of course depend on the stage at which the proposed plea is clearly and unequivocally entered on the court record. Even then, it must be subject to the overriding discretion of the judge and the principles set out in *Ngo Van Nam*. However, that discretion must not be exercised in such a way as to compromise these principles.
6. It is here that we should say something of the position in murder cases where manslaughter is offered as an alternative by a defendant. In many, if not most, cases, adult defendants are understandably keen to offer a plea to manslaughter, if only to avoid the mandatory sentence of life imprisonment in the event of a conviction for murder. Invariably, negotiations are carried on between the defence and prosecution with a view to exploring that possibility. Sometimes, they take the form of informal oral discussions or written enquiries, sometimes more formal written proposals; yet, very often, the first the judge knows anything about them, or their terms and extent, is after the verdict when defence counsel refers to such negotiations in mitigation.
7. The scope for ambiguity is obvious in such cases, particularly where the alternative offence of manslaughter may be committed in a number of ways: whether by way of provocation, a dangerous and unlawful act, gross negligence or diminished responsibility; or, indeed, a permutation of any of these circumstances. In such cases, it is vitally important, if a particular discount is sought, that the defendant’s plea and the basis for the plea should be formally presented before the court on the record in clear and unequivocal terms. It will not be sufficient for counsel to inform the court, in the event of a verdict of manslaughter on a particular basis being recorded by the jury, that an offer to plead guilty to manslaughter *simpliciter* was offered to the prosecution in pre-trial discussions and rejected. Even if the verdict is in the terms of that which was offered by way of plea, the defendant will need to provide good reason why the plea was not entered on the record and to establish that its terms were adhered to by the defence for the remainder of the trial.

F. The further principles applied to the present case

1. If we apply the principles we have espoused to the circumstances of the present case, quite clearly the first approach by the appellant’s solicitors to the prosecution of 21 June 2018 was no more than an exploratory, and somewhat unrealistic, enquiry. We accept that the second and third approaches were more akin to offers to plead guilty to an alternative offence, although they could have been expressed in clearer, more unequivocal terms. Nevertheless, for present purposes, we shall accept the respondent’s concession that there was a formal written offer by the defence to plead guilty to an offence under section 119(1) of the Ordinance by way of letter of 11 July 2018, when read in conjunction with their further letter of 23 July 2018.
2. However, the fact is that the appellant did not enter a plea to a section 119(1) offence when he could and should have done so, consistent with the offer being made on his behalf: instead, he simply pleaded ‘not guilty’ before the magistrate upon committal. Moreover, he went on to instruct his counsel that consent and Ms X’s credibility were to be in issue at a contested trial. Since he did not enter a formal plea to the alternative count in any proceedings before the start of the trial, the utilitarian value of the offer was significantly less and he was not entitled to a full one-third discount, even though the prosecution apparently later changed its mind as to his plea.
3. In these circumstances, had we been called upon to do so, we would have assessed the appropriate discount for sentence in the appellant’s case at 25%. We have already indicated that the notional sentence after trial should have been 8 years’ imprisonment. Applying the correct discount to the notional sentence after trial, the resulting sentence passed on the appellant should have been one of 6 years’ imprisonment. Wisely, the appellant withdrew his appeal before we listened to full argument on the question of the court’s approach to discount. Had he not done so, we would have felt obliged to sentence him afresh in accordance with our conclusion.

G. Conclusion

1. Accordingly, we shall leave the appellant’s sentence of 5 **‍**years and 2 months’ imprisonment undisturbed and formally dismiss his appeal.

|  |  |  |
| --- | --- | --- |
| (Andrew Macrae)  Vice President | (Ian McWalters)  Justice of Appeal | (Kevin Zervos)  Justice of Appeal |

Ms Vinci Lam DDPP and Mr Ivan Shiu SPP (Ag), of the Department of Justice, for the Respondent

Mr James Sherry, instructed by Johnnie Yam, Jacky Lee & Co, assigned by the Director of Legal Aid, for the Appellant

1. Procurement of an unlawful sexual act by threats or intimidation, contrary to section 119, and procurement of an unlawful sexual act by false pretences or false representations, contrary to section **‍**120, are statutory alternatives to an offence of rape, under Schedule 1 of the Ordinance. [↑](#footnote-ref-1)
2. McWalters JA. [↑](#footnote-ref-2)
3. *HKSAR v Lam Kai Man* (Unrep., CACC 246/2019, 24 April 2020), *per* McWalters JA at [32]. [↑](#footnote-ref-3)
4. Written mitigation, AB, p 87, para 5. [↑](#footnote-ref-4)
5. AB, p 79, para 8. [↑](#footnote-ref-5)
6. AB, p 30N-O. [↑](#footnote-ref-6)
7. *HKSAR v Lam Kai Man* [2014] 5 HKLRD 871. [↑](#footnote-ref-7)
8. *Ibid.*, at [42]. [↑](#footnote-ref-8)
9. AB, p 80, paras 11-12. [↑](#footnote-ref-9)
10. *Lam Kai Man*, at [42]. [↑](#footnote-ref-10)
11. *HKSAR v Har Tsz Yui* (Unrep., CACC 18/2019, 29 November 2019), at [16]. [↑](#footnote-ref-11)
12. *Ibid.*, at [17]. [↑](#footnote-ref-12)
13. AB, p 48. [↑](#footnote-ref-13)
14. See footnote 1. [↑](#footnote-ref-14)
15. AB, p 49. [↑](#footnote-ref-15)
16. AB, p 50. [↑](#footnote-ref-16)
17. AB, p 51. [↑](#footnote-ref-17)
18. *HKSAR v Lau Ka Shing* HCCC 266/2012, 15 October 2013. [↑](#footnote-ref-18)
19. AB, p 53. [↑](#footnote-ref-19)
20. AB, p 67. [↑](#footnote-ref-20)
21. AB, pp 68-69. [↑](#footnote-ref-21)
22. AB, p 37P-T. [↑](#footnote-ref-22)
23. AB, pp 42T-43D. [↑](#footnote-ref-23)
24. AB, pp 70-74. [↑](#footnote-ref-24)
25. AB, p 108C-F. [↑](#footnote-ref-25)
26. The first day of trial, 7 May 2019, was taken up with the question of representation, which resulted in the appellant’s original counsel being discharged and the matter being adjourned to 10 May 2019 for new counsel to be instructed. [↑](#footnote-ref-26)
27. AB, p 75. [↑](#footnote-ref-27)
28. *HKSAR v Ngo Van Nam* [2016] 5 HKLRD 1, at [47]. [↑](#footnote-ref-28)
29. *HKSAR v Lo Kam Fai* [2016] 2 HKLRD 308, at [1]. [↑](#footnote-ref-29)
30. *Cameron v R* (2002) 187 ALR 65, at [66]-[67]. [↑](#footnote-ref-30)
31. The psychological report on Ms X records that she “expressed her anxiety and worry over the past few weeks for the court hearing. Coupled with her stress on study and work, she (was) admitted to hospital due to gastritis. She felt exhausted and stressed out that she worried the lawyers would ask difficult questions and she could not state herself clearly when overwhelmed by emotions”: AB, **‍**p 83. [↑](#footnote-ref-31)
32. *Ngo Van Nam*, at [198]. [↑](#footnote-ref-32)
33. See the Shorter Oxford English Dictionary definition. [↑](#footnote-ref-33)
34. *Ngo Van Nam*, at [211]. [↑](#footnote-ref-34)
35. *Balgowan v HM Advocate* [2011] HCJAC 2; [2011] SCCR 143. [↑](#footnote-ref-35)
36. *Ibid.*, at [3]. [↑](#footnote-ref-36)
37. *Ibid.*, at [5]. [↑](#footnote-ref-37)
38. *Ibid.*, at [8]. [↑](#footnote-ref-38)
39. *Balgowan v HM Advocate* (2011) SCL 418, at 422. [↑](#footnote-ref-39)
40. *HM Advocate v Simpson* [2009] SLT 513. [↑](#footnote-ref-40)
41. *Ibid.*, at [15]. [↑](#footnote-ref-41)
42. *Spence v HM Advocate* (2008) JC 174. [↑](#footnote-ref-42)
43. *Ibid.*, at [4]. [↑](#footnote-ref-43)
44. Culpable homicide is an alternative to murder under Scottish law. [↑](#footnote-ref-44)
45. *Spence*, at [10]. [↑](#footnote-ref-45)
46. *Ibid.*, at [10] [↑](#footnote-ref-46)
47. *HM Advocate v Booth* (2005) SLT 337; (2005) SCCR 6. [↑](#footnote-ref-47)
48. *HM Advocate v Thomson and Dick* (2006) SCCR 265. [↑](#footnote-ref-48)
49. *Sze Kwan Lung & Ors v HKSAR* (Unrep., FAMC 1 & 2/2004, 5 March 2004), at [1]. [↑](#footnote-ref-49)
50. *Herd v HM Advocate* (2017) SCCR 535. [↑](#footnote-ref-50)
51. *Ibid.*, at [12]. [↑](#footnote-ref-51)
52. *Ibid*., at [13]. [↑](#footnote-ref-52)
53. *Ibid.*, at [14]. [↑](#footnote-ref-53)
54. *Ibid.*, at [17]. [↑](#footnote-ref-54)
55. *R v Hansen* (2011) 206 A Crim R 54 [↑](#footnote-ref-55)
56. *Ibid.*, at [8] - [10]. [↑](#footnote-ref-56)
57. *R v Franklin* (2012) 114 SASR 206. [↑](#footnote-ref-57)
58. *Ibid.*, at [26]. [↑](#footnote-ref-58)
59. *Ibid.*, at [29]. [↑](#footnote-ref-59)