**Lecture 9: Citizens and Criminal Justice – Sentencing**[[1]](#footnote-1)

**9.1 Introduction**[[2]](#footnote-2)

Sentencing is to a degree, ‘more an art than a science’ if one is to achieve ‘justice’. Traditionally, the populace at large tends to favour harsher sentences than well-educated elites, often simply for the reason that the former are more in danger from acts of criminals. Over the centuries, not only in common law jurisdictions, but also in the world generally, we have seen more humanitarian punishments employed to deal with crime.

For over two thousand years in Great Britain, the ghastliest punishments were routinely, systematically and publicly administered for what we would regard today as fairly minor offences, some of which might not automatically result in a prison sentence. It was only in the nineteenth century that more ‘humane’ deterrents began to be employed.

A very rough vertical timeline of punishment on page 2 (applying to Great Britain) gives some indication of the degree to which human nature is susceptible to ‘barbaric’ punishment.[[3]](#footnote-3)

**TIMELINE IN RELATION TO SENTENCING IN GREAT BRITAIN**

|  |  |  |  |
| --- | --- | --- | --- |
| Roman Times | Crucifixion | Torture | Gladiatorial combat |
| Anglo Saxon | Hanging/ beheading | Facial mutilation | Body flayed alive |
| Norman | Less use of death penalty (so disfigured criminals could be seen to act as a deterrent) | Facial mutilation | Castration (for rape) |
| Tudors | Increase in capital punishment | Hang, drawing and quartering (males) | Burning alive (females) |
| 19th century | 1817 – public whipping abolished | 1833- Death penalty abolished for shoplifting and replaced by transportation | 1868 – end of public executions |
| 20th century | 1948 – corporal punishment generally abolished in prisons | 1967 –Introduction of parole | 1969 – abolition of death penalty |

It can be seen that it was not until the 19th century that the UK began to uniformly adopt a more sympathetic approach to offenders. More starkly, it has been little more than 50 years (or less than the period of popular music) that many reforms which we take for granted have been introduced. Furthermore, in Hong Kong, corporal and capital punishment were not formally abolished until 1990 and 1993 respectively.[[4]](#footnote-4)

**9.2 Sentencing principles**[[5]](#footnote-5)

**9.2.1 Just deserts or retribution principles**

Key points are:

* Offenders should receive punishment for their crimes.
* Criminals should be ‘censured’ for the act in the form of hard treatment.
* Matters relating to the seriousness of the crime include:
* The type of offence
* The harm caused
* The degree of moral blameworthiness.[[6]](#footnote-6)
* Nevertheless, harsh treatment should be proportionate to the nature of the offence, i.e. ten years imprisonment for stealing a bike would clearly not be a proportionate sentence for that particular crime.
* Put simply, the offender gets his or her ‘just deserts’.
* An example of a disproportionate response arose in *HKSAR* v *Wong Chun Cheong*[[7]](#footnote-7) – a 16-years-old boy sentenced to detention in a training centre for unauthorized participation in a Lion Dance.
* Proportionality is enshrined in Article 28 of the Basic Law whereby persons are protected from “arbitrary or unlawful…detention or imprisonment”.

Because of the vicious nature of attacks where there is a charge of wounding with intent to cause grievous bodily harm pursuant to s.17 OAPO, retribution will also be a sentencing principle in these cases: *HKSAR* v *Chiu Wai Ka.*[[8]](#footnote-8)

**9.3 Deterrence principles**

The aim is to deter others from committing certain crimes through:

* + Specific deterrence
  + General deterrence.

**9.3.1 Specific deterrence**

Key points are:

* Repeat offenders may need harsh punishment so they get the message to stop committing crimes
* First time offenders, less so.

**9.3.2 Analysis of specific deterrence**

The classic phrase used to advance the efficacy of the use of specific deterrents is the “the short, sharp clang of the prison gates”. The reasoning here is that if someone experiences an unpleasant sensation then they will be deterred from re-offending. This is consistent with the theories of the behavioral psychologist, BF Skinner.

Much of course depends on factors such as:

* The support system of the offender
* The negative effects of labelling
* The possibility that the offender may learn criminal behaviour while incarcerated
* The effect that imprisonment may have on the offender’s ability to reintegrate back into society.

**9.3.3 General deterrence**

On this basis, a harsher punishment than that merited by the ‘just deserts’ approach can be justified if it prevents people from engaging in undesirable behaviour. An example might be unusually heavy fines for littering offences.

**9.3.4 Analysis of the general deterrence principle**

It is generally thought that this kind of sentencing works well to deter certain offences like littering, versus murder, which involves ‘crimes of passion’. In general, there is much greater evidence of a link between the likelihood of punishment and deterrence, rather than between severity of sentences and crime rates.[[9]](#footnote-9)

However, that is not to say that sentences of general deterrence are limited to offences of this nature. In *HKSAR* v *Tang Ho Cho*,[[10]](#footnote-10) the defendant ultimately plead guilty to unlawfully and maliciously wounding his live-in-girlfriend pursuant to the lesser offence of s.19 OAPO,[[11]](#footnote-11) after earlier being charged with intent to cause grievous bodily harm pursuant to s.17 OAPO. Logically, the following principles concerning deterrent sentences probably apply to both offences. In this case, the defendant suffered from schizophrenia, although this was caused by drug abuse. The defendant attacked and struck his girlfriend with his chopper during a psychotic state that was caused by his imbibing of drugs. As his state of mind was self-induced, this did not negative the mens rea of the offence. Dufton J stated at [14], *The courts take a serious view of domestic violence. Offences of domestic violence cannot be tolerated and are strongly to be deprecated for which deterrent sentences are appropriate. Deterrent sentences are required not only to deter the individual but also to deter those persons like-minded to use violence to resolve domestic disputes. (See for example HKSAR v Lee Kin Wah HCMA 990/2009).*

Quoting further from Dufton J at 15: *Madam Chan was admitted to hospital for 6 days having suffered lacerations to the left arm, left wrist and the left side of the back; and bruising to the left eye and the left side of the throat. The laceration to the left wrist was deep with the artery and nerve cut and multiple tendons cut. The laceration to the left arm was also deep with partial triceps muscle cut. These lacerations required emergency surgery for repair and suturing. Photographs showing the scars have been submitted to court. I am told Madam Chan has fully recovered from her injuries.*

The defendant received a sentence of one year and eight months (after the one-third discount for pleading guilty) which was further reduced to one year and six months after taking into account the victim’s forgiveness of the defendant.

**9.4 Rehabilitation principle**

Key points are:

* The aim is to treat offenders in a way that will allow them to change.
* The rationale is that certain offenders can change.
* Examples of such sentencing would be seen in:
* Suspended sentences
* Community service orders
* Probation
* Discharge orders.[[12]](#footnote-12)

As can be seen, rehabilitation is not a relevant factor when imposing relatively lengthy prison sentences.[[13]](#footnote-13)

**9.5 Incapacitative sentencing/public protection principle**

Key points are:

* The purpose is to lock away dangerous people to prevent them causing harm.
* It is seen in life sentences.

It can also be seen in heavier sentences administered in relation to ‘stranger danger’ type attacks pursuant to wounding with intent under s.17 OAPO: see *HKSAR* v *Chung Chi Fai*[[14]](#footnote-14) and the facts of which are discussed further below at 9.9.

**9.6 Denunciation principle**

In this case, the courts vent society’s outrage at particularly terrible crimes with an especially lengthy sentence. In some cases, the nature of crimes like manslaughter and rape may be such that the defendant could receive a similar sentence under incapacitation or even desert theories. An interesting case arose of *HKSAR v Yip Kai Foon*.[[15]](#footnote-15) Here, the defendant and his gang behaved like bandits or outlaws (engaging in a battle with police involving guns and explosives) and the defendant subsequently received 30 years imprisonment.

Denunciation will also will be a factor in domestic violence cases including wounding with intent per s.17 OAPO: *HKSAR* v *Chan Chun Tat*.[[16]](#footnote-16)

The applicant was a ketamine addict who:

* strangled his wife
* stabbed his wife with screwdriver and knife
* was seemingly high on Ketamine
* did not act in a premeditated manner.

The starting point for sentence was reduced from 12 years to 8 years. As a result of the guilty plea, his sentence was reduced to 5 years and 4 months.

The Court of Appeal stated in relation to the victim’s injuries: *12. The injuries to the applicant’s wife were serious and required a number of operations and her hospitalization for 13 days. She suffered from the following:*

*(i) about 20 stab wounds in 3-8 mm in size, with different depths of penetration over the left upper back; 3 similar wounds at the left anterior upper chest and 6 similar ones at the left shoulder and the posterior aspect of the left upper arm;*

*(ii) a subcutaneous surgical emphysema over the left chest wall, clinically a left pneumothorax;*

*(iii) an anterior upper neck superficial laceration with suspected ligation mark; and*

*(iv) a laceration of the right hand index and middle finger with the tendon exposed.*

*13. In addition to surgery on her left chest wall she also underwent further operations by the Orthopaedic surgeons for her right hand laceration for repair of the flexor tendon of that hand. All wounds healed well and she was discharged on 27 June 2011.*

The Court of Appeal, per the Hon McWalters J (giving the reasons for judgment of the court), stated at [57] that this was not the “typical type of domestic violence case”. Although it was not entirely clear as to what Court’s line of reasoning was on this point, it appeared to relate to the spontaneity of the attack and the effect of the drugs on the applicant.

**9.7 Aggravating factors**[[17]](#footnote-17)

A sentence may be increased if there are factors that worsen the nature of the act.

**9.7.1 Types of aggravating factors**

Aggravating factors include:

* 1. Pre-meditation.
  2. Done to a vulnerable victim.
  3. Violence or weapons were used.
  4. Prevalent; the more common an offence, the greater the sentence which might be imposed.
  5. Domestic violence.

**9.7.2 Prior criminal record**

Key points are:

* It is a ‘gravely aggravating’ factor in HK. It leads to a higher starting point in the sentencing.
* How does this fit in with notion of just desert theory and proportionality?[[18]](#footnote-18)
* If someone is previously punished for a crime; is that irrelevant?
* There are links between recidivism and economic deprivation. The Governor of Mountjoy Prison in Dublin, Ireland, noted that 80% of its inmates all come from the same postal address.[[19]](#footnote-19)
  1. **Mitigating factors**

These are factors which reduce the sentence, such as the offender’s background.[[20]](#footnote-20) For example, if they are very young or old, are of good character, were provoked or have serious mental health problems.

In particular, defendants who enter a plea of guilty at the committal hearing are entitled to a discount of one-third off the sentence. In the case of matters to be heard in the CFI, a plea entered after that time will attract lesser deductions, ranging from 25% to 20% (entered on the first day of the trial) and a lesser amount than 20% after that date: *HKSAR* v *Ngo Van Nam*.[[21]](#footnote-21) The rationale for this discount is provided in this case as follows in the quotation from Lunn VP: *“47. In the judgment of this Court, similarly constituted, in HKSAR v Lo Kam Fai, Yeung VP noted that, “A defendant who enters a timely plea of guilty is normally entitled to a sentence discount of one third from the starting point because it is in the public interest to do so.” Yeung VP went on to cite with approval the judgment of Kirby J in the High Court of Australia in R v Cameron in which under the rubric of* *‘The consideration of the public interest’*, *he said:*

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

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

As far as the starting point is concerned (before the one-third discount is applied) the Court of Appeal in *HKSAR* v *Wong Mei Heung* has stated, per the Hon Mackintosh J, giving the judgment of the court at 8:[[22]](#footnote-22) “As a matter of fundamental sentencing principle, the starting point is directed at the offence and its seriousness, not at the offence and mitigating factors other than the guilty plea.” So, in other words, a sentencing judge should not take into account mitigating factors as the judge’s starting point.[[23]](#footnote-23)

A detailed example of how this process works was set out in the case of *HKSAR v Wong Siu Kwan.*[[24]](#footnote-24) In that case, the applicant pleaded guilty to a charge under [s 29(c)](http://www.hklii.hk/eng/hk/legis/ord/212/s29.html) OAPO in that she threw sulphuric acid into her (then) husband’s face and neck. The husband suffered 2nd degree burns to about 20% of his face. On appeal, the Court of Appeal substituted the trial judge’s original sentence of 5 years and 6 months (that had a starting point of 10 years and which was then discounted after the one-third discount for the guilty plea and mitigating circumstances) with a starting point of 5 years, which was then further discounted to 40 months imprisonment. Quoting from the Court of Appeal, per Woo JA at paragraph 27, delivering the judgment of the Court:

“*27. In his reasons for sentence, the Judge merely referred to the victim's presence in court and the letter by him as underlining the applicant's previous good character. He did not pay sufficient* *regard to the victim's admission that the incident was mainly caused by his conduct and behaviour towards the applicant, for which he was mostly to be blamed. It is not surprising that the applicant, who had been subjected to her mother-in-law's rejection and her husband's seeking a divorce from her without any apparent reason, thought that the victim had gone for another woman. The parties had been living together for all the times since 1995 when the applicant came to Hong Kong to live in the matrimonial home, despite their divorce in July 1998, up to about a month before the incident. It was her nature and culture that she always allowed her own wish to live with and care for the ex-husband and the family to be overborne by his demands, reasonable or not, even to the extent of agreeing to his proposal of a divorce. During the last month before the incident, pressure, distress and anger had built up because the husband had left home to live in the restaurant quarters. She had taken a lot of sleeping pills for the insomnia that had developed. It was under such circumstances that she took the step which was entirely out of her character. This is quite similar to* ***Wong Sau-lai****, referred to above, but the circumstances in the instant case surrounding the applicant's situation appeal more to one's sympathy. Moreover, while the applicant in* ***Wong Sau-lai*** *threw acid onto her husband's face and eyes while he was asleep, the applicant in the instant case only threw a small quantity of acid onto the victim while the victim was entirely alert. The injuries suffered by the victim in* ***Wong Sau-lai*** *were much more serious than the injuries suffered by the victim in the instant case. All these show that the culpability of the applicant is not as serious as that of the applicant in* ***Wong Sau-lai****. In that case, the sentence of 4 years after a guilty plea approved by this Court was reduced from a starting point of 7 years. In all the circumstances, we are of the view that a proper starting point in the instant case should be 5 years' imprisonment, instead of the 10 years adopted by the Judge. The various mitigating factors, such as genuine remorse, clear record and previous good character, the offence being committed wholly out of character, the fact that her mental function was severely impaired and her family circumstances, which had mostly been taken into account by the Judge, should also be considered as having the effect of reducing the sentence from the starting point. A one-third discount from the starting point is called for because of the guilty plea, reducing the sentence to 40 months' imprisonment. Considering all the remaining mitigating factors, we are of the view that a sentence of 2 years' imprisonment is proper and appropriate for this case.”*

We will consider some of these factors below.

* + 1. **Age of offender**

No young person should be sent to prison if the person can be dealt with in any other way.[[25]](#footnote-25)

**9.8.2 Provocation**

In *Secretary of Justice* v *Chau Wan-fun,*[[26]](#footnote-26) the defendant was charged with wounding her husband with intent under s.17 of OAPO. In this case, after a number of provocative incidents, including resigning from his job without consulting her, and which necessitated having to move out of their premises, the wife discovered that her husband had pawned her remaining jewelry to pay his gambling debts.

On appeal, the defendant’s sentence of 9 months was increased to 3 ½ years after 6 years was taken as the starting point and the one-third discount applied. In this case, there were two attacks on the victim with a kitchen knife and he was left in a permanently vegetative state.

**9.8.3 Mental disorder**

In another case of *R* v *Tsui Mei-ying,*[[27]](#footnote-27) the appellant was charged with wounding with intent to cause grievous bodily harm under s.17 of OAPO. Here the person, who was suffering from depression, carried out a savage mutilation of her husband’s genitalia while he was asleep. In this case, the appellant’s depression followed the discovery by her that her husband was having an affair. Initially, she received 4 ½ years’ imprisonment. The applicant sought leave to appeal against sentence, contending that the trial judge had failed to give sufficient consideration to the medical evidence as to her state of mind. The sentence was reduced to 2 years.

The Court of Appeal in *HKSAR* v *Chiu Peng Richard,*[[28]](#footnote-28)gave the following commentary as to the relevance of mental disorders, per **Hon Woo JA** (giving the judgment of the Court):

*“16. If an accused is suffering from mental illness which played a part in the commission of the offence, the court may properly allow a discount of sentence. See* Cross and Cheung: Sentencing in Hong Kong*, 3rd Ed, pp 308-309 and the cases cited thereat. The reasoning was described as "allowing a diminished role for the element of deterrence to reflect the mental condition in* ***Parnis v R***[*[1993] FCA 624*](http://www.austlii.edu.au/au/cases/cth/FCA/1993/624.html)*;* [*(1994) 126 ALR 423*](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281994%29%20126%20ALR%20423)*, 426. That, as we understand, means that while the sentence normally imposed by the court is for deterring an accused unaffected by any abnormal mental condition in the commission of the offence and for general deterrence, the necessity for both kinds of deterrence is reduced because the accused was not operating under a normal mental condition. While this reasoning has its attraction, we prefer to lay emphasis on the justification for a discount of sentence in these circumstances as a reflection of diminished criminality or culpability on the part of the accused who has committed a crime under an abnormal state of mind. He knew that it was wrong to commit the crime, but he did not appreciate that the commission was as serious as it was: the degree of culpability was thus lessened. Or, as in this case, the accused's mental illness made him gullible and easily susceptible to persuasion by the perpetrator of the crime, reducing his responsibility for participating.”*

**9.8.4 Forgiveness**

The rendering of forgiveness by the victim may also be a mitigating factor, including in wounding with intent cases under s.17 OAPO, although it has to be a much lesser factor than the aggravating nature of the severity of the incident: *Secretary for Justice and* *Hung Kar Chun*.[[29]](#footnote-29)

**9.9 Guideline judgments**

Key points are:

* The Court of Appeal in HK may lay down sentencing guidelines or tariffs.
* It helps to promote general fairness and consistency, although no two cases are ever absolutely alike.

There is no tariff for assault occasioning grievous bodily harm under wounding with intent per s.17 OAPO, so there is greater opportunity for discretion in the sentencing process after taking into account mitigating and aggravating factors. Quoting from the headnote (there is a problem with the clarity of the image in the corresponding paragraph in the body of the reported judgment as sent to the author of this chapter) of *Secretary for Justice and* *Hau Ping Chuen*:[[30]](#footnote-30)*“*There were a host of wounding with intent decisions which might be used in favour of a lenient view whereas others favoured a stricter view. At the end of the day, the sentencing court obtained a “feel” for the appropriate result by regard to the attitude of courts over a period of time to a great variety of circumstances.”

It has been said in *Attorney General* v *Low Wing Wah*,[[31]](#footnote-31) per Mortimer JA (giving the judgment of the Court), that in wounding with intent under s.17 OAPO that “the trial judge has a very wide discretion in the sentence which he imposes. He is in most circumstances the best person to judge the facts and to assess the proper sentence.”

Compare the lengths of sentences in the cases of *R* v *Tsui Mei-ying* and *Secretary of Justice* v *Chau Wan-fun* with the following four cases in which the appellant was convicted and sentenced pursuant to that section. However, it was said in *Secretary for Justice* v *Hau Ping Chuen*,[[32]](#footnote-32) that in wounding with intent under s.17 OAPO at [17] that since *R* v *Tsui Mei-ying* and *Secretary of Justice* v *Chau Wan-fun*, “it might be said that the attitude of the courts towards offences of violence has changed with the result that they are now dealt with more severely. It was also said in *HKSAR* v *Wong Luk Sau,*[[33]](#footnote-33) per **Barnes J,** (giving the reasons for judgment of the Court) at [18]: that, “For the offence of wounding with intent, the circumstances of the offence and the background of the offenders differ from case to case, and other decided cases are, in our view, of limited value.” Having said this, the Court of Appeal in this case rejected cases with different facts and in other cases has considered cases with similar facts when formulating its judgments.

The following extract from *HKSAR* v *Chan Chun Tat* (see further above at (9.6)), is also instructive:

*44 “ …is difficult to derive very much in legal principle from the decided cases. This court has said on innumerable occasions that the sentences for this offence are very much case and fact specific and hence the wide range of 3-12 years for the usual type of wounding with intent. Of course there will always be cases which, for one reason or another, require a starting point beyond this range. Likewise, although cases attracting a starting point towards the top of this range will often be cases involving severe injuries and/or severe residual disabilities it cannot be said that only cases with these features are appropriate candidates for such a high starting point.*

*45. Consequently, we are of the view that little is to be gained in embarking upon a comparative analysis of other cases. We believe it is more helpful to identify the relevant sentencing principles and by properly applying them arrive at a just sentence. The starting point for this is an examination of the offence itself.*

*46. The reason that offences contrary to* [*section 17*](http://www.hklii.hk/eng/hk/legis/ord/212/s17.html) *are serious is because they are committed with the intention of inflicting grievous bodily harm on the victim. In helping the lay person to understand what this legal phrase means the courts have said that it means not just serious bodily harm but “really serious bodily harm”, laying emphasis on the qualifying word “really”* *[[1]](http://www.hklii.hk/eng/hk/cases/hkca/2013/169.html" \l "_ftn1" \o ") It must be remembered that an intent to inflict this level of harm will have the consequence, should the victim die from the assault, of rendering the assailant liable to conviction for murder. In upholding the grievous bodily harm rule as a basis of liability for murder the Court of Final* *Appeal in Lau Cheong & Anor v HKSAR* [*[2002] HKCFA 46*](http://www.hklii.org/chi/hk/cases/hkcfa/2002/46.html)*;* [*(2002) 5 HKCFAR 415*](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%282002%29%205%20HKCFAR%20415) *made the important point that an assailant intending to inflict this level of harm may not be able to control the consequences to the victim. At page 437 C - D it said:*

*“A person may not subjectively intend or even foresee that he will cause death. He may desire to limit the consequences of his actions to the infliction of grievous bodily injury. However, as a matter of commonsense it is impossible to predict that the consequences of an intentional infliction of really serious bodily harm will necessarily be successfully limited and will not prove to be life threatening.”*

*47. It is hardly surprising, therefore, that the offence is regarded as such a serious one. Indeed, the fact that the usual range of sentence is 3 ‑ 12 years’ imprisonment reflects that very seriousness. For this range indicates that not only will imprisonment usually be the norm but also that the minimum period of imprisonment will usually be 3 years.*

*48. Thus in determining the gravity of the offence, the factor of primary importance is the intent of the assailant to cause the victim really serious bodily harm. Whether that intent was fully realized in the injuries sought to be inflicted has been said to be of “secondary significance”.**[[2]](http://www.hklii.hk/eng/hk/cases/hkca/2013/169.html" \l "_ftn2" \o ") That must be so for, as the Court of Final Appeal pointed out in the Lau Cheong case, the consequences to the victim may not be as the assailant intended. Tragically, they may be worse, but even when they are not or they are not as bad as the assailant hoped to achieve that may not lessen the gravity of the offence. For the failure of the offender to achieve the level of harm he intended may be due to resistance by the victim, the intervention of others, speedy medical attention or purely unanticipated fortuitous circumstances. That is why, even though the consequences to the victim will always be an important factor, the gravity of the offence lies in the deliberate resort to violence with the intent by the offender to inflict by such violence really serious harm on the victim.*

*49. Consequently, many of the factors to which a court will have regard in determining the gravity of a* [*section 17*](http://www.hklii.hk/eng/hk/legis/ord/212/s17.html) *offence and the culpability of the offender will relate to the type of harm intended to be inflicted, the means by which that harm was inflicted and the circumstances generally surrounding the assault. Thus, without attempting to exhaustively identity all the relevant factors, the usual ones will be the extent to which the assault was premeditated, the reasons or motivation underlying the assault upon the victim, the mental or emotional state of the assailant at the time of the assault, whether alcohol or drugs contributed to the actions of the assailant, whether the assault was committed by the assailant alone or as part of a group, the type of weapons employed, the level of force or aggression and the persistence with which the assault was pressed home, the injuries caused to the victim and the effect of the assault upon the victim and those close to him or her.*

*50. In arriving at an appropriate sentence the court will have regard not just to the need to punish the offender for his conduct, but also to the sentencing principles of deterrence, both general and individual, and, in appropriate cases, the need to denounce the resort to violence. Of course deterrence and denunciation are always important when there is resort to violence but there may be particular situations that call for greater deterrence, such as in triad gang or contract attacks, or more denunciatory sentences, such as in domestic violence cases.”*

In *HKSAR* v *Ying Tung*,[[34]](#footnote-34) the appellant attacked the victim in the head with an iron bar, for reasons which are not entirely clear, but possibly because the victim accidentally bumped into him. The victim, who was much older (aged 65) and smaller than the assailant (aged 40), amongst other things, fell into coma for 5 days and suffered from ongoing cognitive damage relating to his memory. Because of the seriousness of the victim’s injuries and the relative vulnerability of the victim, the Court of Appeal held that seven years imprisonment was an appropriate sentence, reducing the sentence on appeal from 8 years. The appellant had no previous record.

In *HKSAR* v *Chung Chi Fai*,[[35]](#footnote-35) the applicant stabbed the victim in the neck with a knife in what seemed to be another motiveless crime, but may have been related to mental and psychological disorders caused by the applicant’s long, illegal drug taking history. The victim suffered ongoing numbness in his right shoulder and a 25-centimeter scar. The applicant ultimately received a sentence of 15-years, as a starting point, on the basis that this was a similar sentence to one ultimately handed down in another very serious act of unprovoked violence, being a case where a defendant pushed a commuter onto train tracks in the face of an oncoming train (‘the train case’). The victim in the train case was extremely fortunate to escape serious injury, aside from a crushed left hand. Clearly, in both cases, an important similarity was the significant danger posed to the public by the people perpetrating these attacks. On appeal, the Court of Appeal distinguished the usual range of sentences (between 3-12 years at that time) handed down in cases involving s.17 OAPO where there was provocation or retaliation present.

In *HKSAR* v *Tsang Ho Wai and Others*,[[36]](#footnote-36) the 22-year-old stepmother of a seven-year-old boy arranged for a gang of 5 men to attack the boy and try to chop his right hand off with a chopper. The motive behind the attack was one of jealousy and hatred of the boy. The attack did not succeed in severing the boy’s hand and after surgery, it returned to close to full permanent functioning. The stepmother was not suffering from any relevant psychological or mental disorder. The stepmother received an 18-year sentence, which was reduced to 12 years after the one-third discount was applied on a plea of guilty.

The Court of Appeal in *HKSAR* v *Wong Luk Sau*[[37]](#footnote-37)later ruled that, despite the earlier decision in *HKSAR* v *Chung Chi Fai*, that a sentence of less than 3 years could be imposed in OAPO cases, because no specific tariff applied to these types of matters. In this case, the applicant was a 72-year-old man who had got into a dispute with a 78-year-old neighbor, over, of all things, a chess game which had occurred a few days earlier. The applicant chased the victim about 60-70 meters with a knife before stabbing him in the chest and left hand. While the wounds were not particularly serious, this was the result of good fortune. In addition, the actions of the applicant were premeditated; he had taken the knife to meet the victim with the apparent intent of using it on him. There were several mitigating factors concerning the applicant. He was aged 72, had suffered from heart problems and he only had one previous conviction, being a gambling offence. The applicant was also of good character, having carried out charitable works. The Court of Appeal, taking all these matters into account, reduced his sentence from 3 years imprisonment to 2 years and 3 months.

In *The Queen* and *Nguyen Thang-Loi,*[[38]](#footnote-38) the applicant was found guilty of wounding with intent under s.17 OAPO. Namely, following an argument over whether he had stolen money from her, repeatedly stabbing his de facto wife in the right eye and thereby permanently blinding her. The applicant appealed against the starting point of his sentence of 7 years imprisonment.

The Court of Appeal, in dismissing his appeal and upholding the sentence, Power, J.A delivering the judgment of the Court stated that, “*What we have said of the facts makes it plain that this was a vicious wounding deliberately directed at the right eye of the victim. It resulted, as the applicant must have realized it very likely would, in her being blinded in that eye. These, in our view, are aggravating circumstances of particular weight. We are, as we have been urged by Mr. Poll to be, conscious of tensions resulting from prolonged confinement but these can be given little weight in mitigation in the circumstances of this attack. We have not been assisted by sentences in other cases to which we have been referred with quite different facts. We do bear in mind that the incident was between persons who were cohabiting but reject entirely any suggestion that this was, in any sense, a lovers' quarrel. The applicant had stolen money from the victim and it was out of this theft that the disagreement arose. The sentence was a severe one but was not so outside the proper range as to require our interference.”*

**9.10 Non-custodial sentences**

These are sentences that do not involve the incarceration of the offender.

**9.10.1 Suspended sentences**[[39]](#footnote-39)

Key points:

* The offender is sentenced to imprisonment.
* These apply to sentences of not more than 2 years.
* These cannot be applied to more serious offences such as rape or manslaughter.
* The term is suspended for between 1 and 3 years.
* If the offender does not breach the terms of the suspended sentence or commit a further offence he/she is not imprisoned but the converse will probably apply.

**9.10.2 Community service order**[[40]](#footnote-40)

Key points:

* Courts are allowed to make orders requiring offenders to perform up to 240 hours of unpaid work in the community e.g. work in hospitals.
* These can be imposed where a person of or over 14 years of age is convicted of an offence punishable with imprisonment.
* These allow the offender to put something back into the community.

These have a strong rehabilitative function.

* + - 1. **Types of offenders**

Generally, the type of offender who is suitable for this type of order is one who:

* Is a 1st offender or has a ‘light’ criminal record.
* Has a stable background or family life.
* Possesses a good work record.
* Either is in employment or has some chances of obtaining it.
* Has a demonstrated genuine remorse; and
* Only has at most a slight risk of re-offending.
* It tends to apply to less serious offences.[[41]](#footnote-41)

**9.11 Other non-custodial sentences**

* Fines
* Absolute Discharge
* Conditional Discharge
* Probation.

**9.11.1 Fines**

This involves a monetary penalty. The amount will depend on the seriousness of the offence and the ability of the offender to pay that fine. Fines must not go beyond the means of the offender. Also, fines should not operate as a means of allowing a rich offender to buy their way out of jail. The rationale of fining is for it to operate as an effective general deterrent. This would be suitable in a case of an offence of theft (such as shoplifting) where the offender had no prior record.

**9.11.2 Discharge**

**9.11.2.1 Absolute discharge**[[42]](#footnote-42)

Here the appearance in court is considered enough punishment. It is rarely used as it is regarded as too much ‘of a slap on the wrist’. It might be applied to a:

* ‘Trivial offence’
* Very old offender with no criminal conviction record and charged with a less serious offence.

**9.11.2.2 Conditional discharge**[[43]](#footnote-43)

E.g., a discharge with a good behaviour bond, where the court does not consider any immediate punishment is needed. It operates as a warning to keep out of trouble.

**9.12 Probation**[[44]](#footnote-44)

Key points are:

* The offender must be under supervision of a probation officer for between 1 and 3 years.
* The offender must adhere to certain conditions e.g. reside at particular address.
* The aim is to rehabilitate by ensuring good conduct of offender for a given period.
* It is relevant for less serious offences.

1. Because the offence of wounding with intent to cause actual bodily harm under s.17 Offences Against the Person Ordinance (Cap. 212) (“OAPO”) is used in the tutorial exercise relating to this area of the course, it will occupy a prominent part in these notes. This section states: *Any person who—(a)unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to any person; or(b)shoots at any person; or(c)by drawing a trigger or in any other manner, attempts to discharge any kind of loaded arms at any person, with intent in any of such cases to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for life*. [↑](#footnote-ref-1)
2. These notes contain some information distributed by previous course leaders. [↑](#footnote-ref-2)
3. John Hostsettler, *A History of Criminal Justice in England and Wales* (UK: Waterside Press 2009). [↑](#footnote-ref-3)
4. Simon N M Young, “Sentencing” Chapter 15 in Wing Hong Chui and T Wing L (eds.), *Understanding Criminal Justice in Hong Kong* (Devon: Willan Publishing 2017) 269. [↑](#footnote-ref-4)
5. Andrew Ashworth & Julian Roberts, “Sentencing: Theory, Principle, and Practice” *Oxford Handbook of Criminology*(Fifth Edition Oxford: Oxford University Press 2012) Chapter 29. [↑](#footnote-ref-5)
6. Young (n 4) 178. [↑](#footnote-ref-6)
7. [2001] 4 HKCFAR 12. [↑](#footnote-ref-7)
8. [2014] HKDC 827; DCCC 97/2014. [↑](#footnote-ref-8)
9. Andrew Ashworth, “Sentencing” Chapter 9 in Mike Maguire, Rod Morgan and Robert Reiner (eds.) *The Oxford Handbook of Criminology* (Fourth Edition Oxford: Oxford University Press 2007) 993-994. [↑](#footnote-ref-9)
10. [2015] HKDC 267; DCCC 724/2014 (24 March 2015). [↑](#footnote-ref-10)
11. Any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for 3 years. [↑](#footnote-ref-11)
12. Young (n 4) 170. [↑](#footnote-ref-12)
13. Grenville I Cross SBS, SC and Patrick WS Cheung, *Sentencing in Hong Kong* (Ninth Edition. Hong Kong: LexisNexis 2020) 113. [↑](#footnote-ref-13)
14. [2014] HKCA 72; [2014] 3 HKLRD 538; CACC 497/2012 (13 February 2014) at paras 41– 48. [↑](#footnote-ref-14)
15. [2000] 3 HKCFAR 31. [↑](#footnote-ref-15)
16. [2013] HKCA 169; [2013] 6 HKC 225; CACC 317/2012 (11 April 2013). [↑](#footnote-ref-16)
17. Cross and Cheung (n 13) Chapter 1. [↑](#footnote-ref-17)
18. P Flahery, *Sentencing the Recidivist: Reconciling Harsher Treatment for Repeat Offenders with Modern Retributivist Theory* (CIL 2006/2007) 319. [↑](#footnote-ref-18)
19. Ibid. [↑](#footnote-ref-19)
20. Young (n 4) 282. [↑](#footnote-ref-20)
21. [2016] HKCA 396; [2016] 5 HKLRD 1; [2016] 5 HKC 231; CACC 418/2014 (2 September 2016). [↑](#footnote-ref-21)
22. [2010] HKCA 348; CACC 273/2010 (3 November 2010). [↑](#footnote-ref-22)
23. Ibid. [↑](#footnote-ref-23)
24. [2001] HKCA 64; CACC 166/2001 (17 October 2001). [↑](#footnote-ref-24)
25. Section 11(2) Juvenile Offenders Ordinance (Cap. 484). [↑](#footnote-ref-25)
26. [2006] 3 HKLRD 577, 584. [↑](#footnote-ref-26)
27. [1987] Cr App 409/87. [↑](#footnote-ref-27)
28. [2002] HKCA 116; [2002] 1 HKLRD 185; [2002] 1 HKC 401; CACC 287/2001 (29 January 2002). [↑](#footnote-ref-28)
29. [2008] 4 HKLRD. [↑](#footnote-ref-29)
30. [2008] 4 HKLRD. [↑](#footnote-ref-30)
31. [1996] 1 HKC at 348[D]. [↑](#footnote-ref-31)
32. [2008] 4 HKLRD. [↑](#footnote-ref-32)
33. [2012] HKCA 384; [2013] 2 HKLRD 194; CACC 2/2012 (13 September 2012). [↑](#footnote-ref-33)
34. [2003] HKCA 31. [↑](#footnote-ref-34)
35. [2014] HKCA 72. [↑](#footnote-ref-35)
36. [2008] HKCA 167. [↑](#footnote-ref-36)
37. [2013] 2 HKLRD 194. [↑](#footnote-ref-37)
38. (crim App. 335/91 unreported). [↑](#footnote-ref-38)
39. Sections 109B-109G CPO. [↑](#footnote-ref-39)
40. Community Service Orders Ordinance (Cap. 378). [↑](#footnote-ref-40)
41. The Law Reform Commission of Hong Kong, *Report. Community Service Orders. Topic 7* (1983) paras 16.1-16.11, available at https://www.hkreform.gov.hk/en/docs/rcommunity-e.pdf. [↑](#footnote-ref-41)
42. Section 36(1)(a) Magistrates Ordinance (Cap. 227). [↑](#footnote-ref-42)
43. Section 36(1)(b) Magistrates Ordinance (Cap. 227). [↑](#footnote-ref-43)
44. Probation of Offenders Ordinance (Cap. 298). [↑](#footnote-ref-44)