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Author(s)	Heilbronn, GN
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Hardship and Humanitarian Considerations in Mitigation of Sentence

In Hong Kong, as elsewhere, a fairly standard set of grounds is relied upon in sentencing offenders.¹ This is especially the case in what are referred to as tariff offences, where a term of imprisonment is usually imposed.² In such cases, the courts will generally ignore the personal or family needs of the offender. For example, the fact that the offender's family would be left without support if he were sent to prison is not a relevant consideration.³

However, increasing recognition has recently been given to the effect of what might loosely be described as 'hardship' and 'humanitarian' considerations to achieve a fairer treatment of persons committing certain kinds of offences. This represents a clear departure from the approach evident in *R v Lam Sai-ying*.⁴ There, Leonard J relied upon *R v So Man-king*⁵ in refusing to deviate from a tariff sentence and allowing an order for a suspended sentence to stand, when an illegal immigrant had come to Hong Kong to earn money to pay for medical expenses of a sick relative in China. It was also asserted that the death or impending death of a close relative would be a not uncommon event, and likewise not a good reason for setting aside a proper sentence, though it was recognised that the proper sentence could be set aside when some unexpected disaster strikes such as the severe illness of the offender or a close relative.

Many arguments are of course available to lessen the severity of the sentence imposed on a person convicted of a criminal offence, though they primarily involve the offender's attitude both to the offence and to the criminal justice system. Most important is remorse — indicated by the offender's voluntary surrender to the police or other authorities,⁶ the extent of co-operation with them,⁷ and pleading guilty at an early stage, though the extent of the discount

¹ See, eg, C J Emmins, *A Practical Approach to Sentencing* (London: Financial Training, 1985).

² Naturally, certain categories of offenders, such as young persons, drug addicts, and first offenders, usually receive special treatment, and considerable account is taken of their individual circumstances and potential for rehabilitation.

³ This is on the unhappy basis that the offender should have thought of that before committing the crime: see *R v Tang Kwok-man* (1983) CA, Cr App No 75 of 1983; *R v Kwok Yuk-lam* (1985) CA, Cr App No 384 of 1985; *R v Chan Chun-yin* (1988) CA, Cr App No 72 of 1988; *R v Yeung Kit-yung* (1993) CA, Cr App No 15 of 1993.

⁴ Mag App No 811 of 1991 (Leonard J); 12 February 1992).

⁵ [1989] 1 HKLR 142.

⁶ The fact that a person voluntarily surrenders to the police warrants a substantial discount, as in *AG v Chan Wai-ming* (1991) CA, Applic for Rev No 4 of 1991.

⁷ Full co-operation with the police indicates remorse and a recognition of personal responsibility for the wrongdoing, as well as saving police time and money, as in *Lai Wai-keung v R* (1982) CA, Cr App No 174 of 1982 (Hooper J); *Chan Fu-kui v R* (1986) 16 HKLJ 459; and *R v Siwan* (1988) 87 Cr App R 407, CA. Even as much as a 50 per cent reduction in sentence may be given when the offenders take part in a police operation to make further arrests and also subsequently testify for the prosecution: see *R v Roberto Eduardo Baptista and Wong Hon-man* (1991) CA, Cr App No 362 of 1992, with a further possibility of two-thirds or more reduction when the offender attains the status of 'supergrass,' depending on the extent and value of the co-operation: see *R v Chan Fu-kui* [1986] HKLR 967; *R v King* (1986) 82 Cr App R 120; and *R v Lau Yau-yuen* (1991) CA, Cr App No 337 of 1990.

from the sentence which this may justify depends very much on the offender's sincerity and motivation for pleading guilty,⁸ as well as the relative strength of the prosecution case.⁹ For example, about 20 per cent discount was considered appropriate when the plea of guilty was indicated early, and there was an offer to give evidence against co-conspirators, even if this assistance is eventually of no value to the police, such as when the other suspect absconds.¹⁰ Other grounds include: the previously clear record of the offender,¹¹ attempts made by the offender to rectify the wrong done,¹² that the offender was influenced by another person (especially an older person),¹³ or, in appropriate cases, that injuries were suffered by the offender in the course of the crime.¹⁴ Naturally, the extent and effect of time spent in prison on remand are also taken into account.¹⁵

Recently, however, the Hong Kong courts have clearly shown a willingness to take into account factors more closely connected to the offender's personal and family needs, especially when the type of offence committed is in the nature of a 'victimless crime.' For example, in *R v Lee Yuk-ying; Lam Lai Hong and Chan Lai Ya*,¹⁶ in relation to charges of remaining in Hong Kong without authority, Litton JA took into account the personal hardship of the accused women and ordered their release so that they could give birth, in China, to the children they were carrying. Similarly, in *R v Cheng Wing-tai*,¹⁷ a prisoner who was suffering from cancer and needing regular treatment had his sentence reduced and release ordered. The offender had been serving a nine months prison term for possession of a dangerous drug. However, it should be noted that in both these cases, at the time of the appeals, the offenders had very little of their sentences left to serve, and the nature of the offences indicated that the offenders were not a danger to the community.

⁸ See *R v De Haan* [1967] 3 All ER 618. Up to 30 per cent reduction can be hoped for, if the accused can show clear remorse and co-operation with the police: see *Li Mau-lam v R* [1981] HKLR 600, though only as little as 10 per cent for the bare fact that the offender pleaded guilty: *R v Ip Tin-yan* (1983) 13 HKLJ 433.

⁹ Pleading guilty and showing remorse can be especially important if the prosecution case is not very strong, as the efficient administration of justice is not served by wasting time and money on lengthy trials, so guilty pleas are, and should be, encouraged in the proper cases: *Yeung Wai-ming v R* (1986) CA, Cr App No 437 of 1985.

¹⁰ See *R v Chu Tsz-hei* (1991) CA, Cr App No 338 of 1990. Up to 30 per cent reduction can be hoped for, if the defendant can show clear remorse and co-operation with the police: see *Li Mau-lam v R* [1981] HKLR 600, though as little as 10 per cent reduction for the bare fact that the offender pleaded guilty: *R v Ip Tin-yan* (1983) 13 HKLJ 433.

¹¹ *Chau Chi-mun v R* [1980] HKLR 703, though it was noted that the accused is not being sentenced for his record.

¹² *R v Kwok Lai-ling* (1988) CA, Cr App No 253 of 1988.

¹³ *R v Sang* [1979] 2 All ER 1222; *Lee Ah-ling v R* (1985) 15 HKLJ 254; and *R v Kwok Yuk-lam* (1985) CA, Cr App No 384 of 1985.

¹⁴ *Li Siu-chor v R* (1978) CA, Cr App No 395 of 1978.

¹⁵ See s 67A of the Criminal Procedure Ordinance, which applies both to judges and to magistrates, as well as s 86 of the District Court Ordinance and s 57 of the Magistrates Ordinance. When the time on remand is spent outside Hong Kong, for example, while awaiting extradition, then the court has a discretion to take it into account.

¹⁶ (1992) SCt, Mag App No 786 of 1992 (Litton JA).

¹⁷ *R v Cheng Wing-tai* (1993) CA, Cr App No 304 of 1993.

There have even been occasions when more overtly 'humanitarian considerations' were taken into account, especially in less serious offences. For example, in *R v Ho Yeung-yau*¹⁸ Chan J reduced the twelve-month sentences of the offenders to six months for unlawfully obtaining travel documents and making false statements to an immigration officer, in view of their need to return to China to take care of parents who had just fallen critically ill. Also, 'humanitarian considerations' have been relied upon in a number of other such cases, such as *R v Tsang Kwai-leung*,¹⁹ where the offender was an illegal immigrant sentenced to fifteen months imprisonment and a magistrate granted leave to appeal out of time for 'humanitarian reasons' which were not before him at the time of sentencing, namely that the appellant's wife was suffering from schizophrenia and receiving hospital treatment and the appellant's eighty year old mother had to look after her grandchildren aged two to thirteen years.

These cases seem to indicate a more flexible approach to 'hardship' and 'humanitarian' considerations and a departure from the approach adopted in *R v Lam Sai-ying*,²⁰ referred to above. In this context, however, issues as to the proof of the offender's actual family circumstances may also arise, especially when the person concerned is not in Hong Kong. Though most prosecutors and judges do exhibit a healthy dose of scepticism towards such submissions, it would seem very difficult to obtain proof that a foreign medical certificate or other such evidence is unreliable.

In the past few years, some Hong Kong judges have shown how to temper justice with mercy in embracing this new and more flexible so-called approach to 'hardship' and 'humanitarian' considerations in sentencing in a number of cases, at least for less serious kinds of offences, especially victimless crimes. However, it remains to be seen whether or not this approach will take hold and become an accepted and regularly relied-upon justification for reducing or avoiding custodial sentences in a wider variety of offences.

Gary N Heilbronn*

¹⁸ (1993) SCt, Mag App No 690 of 1993 (Chan J).

¹⁹ (1993) SCt, Mag App No 1211 of 1992 (Jones J) which cited *R v Tin Fei* (1992) SCt, Mag App No 1168 of 1992 (Jones J) and *R v Ng Chau-mui* (1992) SCt, Mag App No 145 of 1992 (Jones J) as well as *R v Chu Yuk-hang* (1991) SCt, Mag App No 1226 of 1990 (Barnes J).

²⁰ (1992) SCt, Mag App No 811 of 1991 (Leonard J).

* Senior Lecturer, Department of Professional Legal Education, University of Hong Kong.