

SENTENCING IN HONG KONG

SIXTH EDITION

I Grenville Cross SBS, SC
Patrick WS Cheung



SENTENCING IN HONG KONG
SIXTH EDITION
2011

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Foreword

To the public, how an offender is punished for the wrong he had committed is as important as, and sometimes even more important than, bringing him to justice. To the offender, there are invariably some mitigating factors and his case is always distinguishable from previous cases in which sentences that he wants to avoid were imposed. The sentencing judge, in order to strike the right balance, has to consider not only the public interest in having offenders appropriately punished, but also the justice of each individual case. This is not always an easy task. But however difficult it may be, it is essential to the maintenance of public confidence in our criminal justice system that not only must the sentences imposed by courts be fair and just, the reasons given for such sentences must also be generally acceptable.

It is often tempting for mitigating lawyers and sometimes even sentencing judges to make comparison with decided cases of a similar nature. These cases are of course helpful, but only to a certain extent. This is because no two cases are exactly the same and circumstances always differ. To indulge in making comparison with other cases but to overlook the fundamental sentencing principles would be missing the whole object of sentencing. Previous cases can only serve as references and guidelines are not straitjackets, lest sentencing become an exercise which may easily end up in grave injustice. The correct approach is to start with the proper sentencing principles, bearing in mind any appropriate guidelines and to apply them to the facts of the case, with reference to other cases of a similar nature. *Sentencing in Hong Kong* suitably reminds us of this approach which is regrettably sometimes overlooked.

Sentencing in Hong Kong is an invaluable, concise and encyclopaedic collection of all relevant sentencing principles and available sentencing options, backed by reasoned discussions and supporting authorities from local and overseas jurisdictions. The Appendices contain a comprehensive glossary of the most common offences dealt with by the criminal court with reference to statutory maximums, guideline decisions and the most recent judicial discussions in relation to each of these offences. This work has served as an extremely helpful companion for the legal profession and judges for the last 16 years. This latest edition has included the most up-to-date decisions in this area of the law. It is, if I may say so, an indispensable reference book for criminal practitioners.

Mr Cross, Mr Cheung and Ms Elaine Tsui are to be congratulated for this wonderful work and their useful contributions to the development of the criminal justice system.

Patrick Chan
Permanent Judge
Court of Final Appeal

'When bad men combine, the good must associate; else they will fall one by one, an unpitied sacrifice in a contemptible struggle.'

– Edmund Burke

Preface to the Sixth Edition

By means of the sixth edition of *Sentencing in Hong Kong*, we seek to record the changes we have witnessed to the law, practice and procedure of sentencing since 2007. There have been some important developments, perhaps most notably in relation to road traffic offences, community service and wasted costs. Although the law in some areas has been quickly settled, in others it is still developing. That the issues of forfeiture of property, costs in criminal cases and levels of sentence after a retrial have been considered by the Court of Final Appeal has served to underscore the importance our legal system attaches to the proper disposal of criminal cases. Important new sentencing guidelines and tariff judgments have also been delivered, most obviously in relation to child pornography, dangerous drugs and the taking up of unlawful employment.

The law of sentencing is a work in progress. Quite apart from legislative amendments, the courts themselves have been active in recent times in defining the ambit of sentencing options, clarifying uncertainties, and making the case for change, as in relation to penalties which are inadequate or costs orders which are ineffective. Realistic sentencing is necessary if the public are to have confidence in the system, and popular discontent may manifest itself if the basis for particular sentences is not properly explained or rationalised. When mistakes have arisen, we have sometimes noticed that they could have been avoided if full regard had been had to this text, and we hope that in future all of those involved in the sentencing of offenders will keep close at hand their copy of *Sentencing in Hong Kong*.

Although we toyed briefly with the notion of altering the format of the sixth edition, we have chosen to retain the approach with which our readers are familiar, and which has survived the test of time. Whilst existing chapters have been updated or overhauled, or both, the parts of the book which deal with the impact on sentence of aggravating and mitigating factors have been expanded, to take account of features which, in our view, have assumed greater relevance of late. The Appendix contains the cases on quantum of sentence, and given the reliance now placed upon it by courts and counsel we have sought to develop this part in a way which is both clear and comprehensive. Although our focus has been on local case law, we have referred to jurisprudence from elsewhere where we felt that this might assist an appreciation of the point in issue.

We owe a significant debt of gratitude to Elaine YL Tsui, for without her contribution this work would not have materialised.

This book is up to date to 5 April 2011.

I Grenville Cross SBS, SC
Patrick WS Cheung
5 April 2011

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