

Institute of Criminology

Pen1603

John Richard READING
Homerton College,
Cambridge.

Supervisor: Dr. Tim Coupe



***A critical analysis of sentences imposed for
serious drug trafficking offences in Hong Kong***

Submitted in part fulfilment of the requirements for the Master's Degree
in Applied Criminology, Penology and Management.

Number of Words: 17,904

Year: 2017

Abstract

This study of sentencing for serious drug trafficking in Hong Kong had three principal objectives. These were to establish the guidelines used for drug sentencing and to trace their origins by examining Hong Kong's Court of Appeal decisions about drug cases; to describe the sentencing distributions and to understand how they vary according to offence characteristics (notably drug type and offender role), suspects' pleas and offenders' demographic and ethnic characteristics; and to assess how severe Hong Kong's drug sentencing regime is compared with other countries that do not have the death penalty for drug trafficking.

The three parts of the study draw on different sorts of data using different methodological approaches. The evaluation of the sentencing regime and process is based on the analysis of a series of decisions by the Court of Appeal since the 1990s. A six year population of 2387 convicted drug offenders was collected from the online Hong Kong judiciary website, on which is kept the sentencing judges' reasons for sentence for all offenders convicted of all offences in the High Court. This provided data on the offence and the offenders, the suspects' pleas and the resulting sentences. An international self-completed questionnaire survey of 47 selected countries was conducted to elicit information on comparative sentencing. With a response rate of only 38%, it may be cautiously viewed as providing insights into drug sentence severity in Hong Kong compared with other nations without the death penalty.

The findings are based on these three distinctive data sources. Although there is no formal set of rules for drug sentencing as there are, for example in England and Wales, there are guidelines that can be seen to result in the imposition of lengthy starting sentences, based on the narcotic content of the drugs the offender was trafficking. Case law showed that this heavy sentencing regime emanated from appellate court judges' views that punitive sentences would deter future offending. There was also a view that the importation of drugs was a more serious offence than carrying or supplying it locally, so that foreign couriers were viewed as deserving of far higher or enhanced sentences for what the courts called the *international element*. Again, this was viewed as deterring foreign nationals from bringing drugs into Hong Kong. The system as it is allows little scope for the exercise of judicial discretion so that personal and individual mitigating factors play a limited role in sentencing. This results in little allowance for young offenders or those with dependent children.

Few drug cases referred to the Court of Appeal have led to changes in the drug sentencing process during the study period. There have been c. 400 drug convictions a year, not guilty pleas have risen a little between 2012-2017 and the numbers of South Asians convicted have risen strikingly between 2012-2017.

The outcome of applying these guidelines to a drug offending population is that sentences were lengthy, averaging over 10 years with the 5% most punitive extending up to 37 years. This places Hong Kong at the highest of

the 18 countries surveyed which do not use the death penalty for drug trafficking. The oldest group of offenders with an average age in excess of 69 years had the longest sentences at 15.6 years, while those under 20 years had the shortest, averaging 8.8 years.

The majority of offenders – 92% - were couriers, 61% local and 31% foreign couriers. Given the Appeal Court guidelines, foreign couriers' sentences were 63% longer than those of local couriers. Foreign couriers also particularly trafficked in cocaine, heroin and ice, whereas local couriers dealt with ice and ketamine. This also disposed towards higher sentences for foreign couriers. Fewer convicted foreign couriers than local offenders had also entered guilty pleas and this boosted the formers' sentences. The tendency of older offenders to receive lengthier sentences also reflected the fact that foreign couriers, who more often trafficked drugs with higher narcotic content, were older. The result of this was that foreign nationals were allocated far longer sentences than ethnic Chinese offenders. South Americans' sentences were 63% longer than the average Chinese drug offenders', while the sentences of Africans and South Asians were 40% longer than the Chinese offenders' sentences. Given offender and offence characteristics, the sentencing system and process, therefore, work to the disadvantage of offenders of non-Chinese ethnicity. This might be taken into account in any revisions to the way the sentencing system works.

These sentencing disparities between ethnicities have their origins in a belief among Hong Kong's Court of Appeal judges that more severe sentences deter drug trafficking. Given the weak academic evidence

supporting the deterrent effectiveness of severe sentencing and the ethnically unequal outcomes it produces in Hong Kong, it would appear beneficial for participants in the criminal justice system, judges and prosecutors, to perhaps consider if there is justification for modifying the present drug trafficking sentencing regime.

Drug sentences in Hong Kong were of the order of ten times longer than countries, such as Norway and Iceland, after reductions for guilty pleas. While most other countries surveyed, like Hong Kong, made sentencing discounts, often generous ones, for guilty pleas and had final sentences that were shorter than sentencing starting points, some others, including Czech Republic, Portugal, and Sweden where sentences are notably lower, do not do so.

Whilst little allowance is made for personal or individual mitigation, the regime does ensure consistent and predictable sentencing outcomes for those convicted of serious drug trafficking in Hong Kong.

Declarations

I declare that this thesis, excluding the abstract, the acknowledgments, references and appendices, is no more than 18,000 words in length.

I further declare that, except as indicated by references or by acknowledgements to other sources or assistance, this thesis is my own original work, and that the thesis is not being submitted for any purpose other than the M.St. examination.

A handwritten signature in black ink, appearing to read 'John Reading', with a horizontal line underneath it.

John Reading
2nd January 2020

Acknowledgements

I wish to acknowledge the assistance and support of a number of people. Firstly I am grateful to my supervisor, Dr. Tim Coupe, for his considerable guidance and counsel, and to Dr. Ben Crewe and the academic and administrative staff of the Institute for their invaluable support.

Secondly, I thank the International Association of Prosecutors and in particular, its Immediate Past President Mr. Gerhard Jarosch, and its former General Counsel, Mr. Rasmus Wandall, for providing me with contact details for the various prosecuting authorities that are members of the association, and for their letter of introduction.

I am also grateful to the representatives of the 18 prosecuting agencies who took the time to complete the surveys concerning sentences for drug trafficking in their respective jurisdictions, which included Mr. Frank Veltro, Senior Crown Prosecutor, of the New South Wales Office of the Director of Public Prosecutions, and His Honour Judge Pedro Bossi, from Brazil who also studied at the Institute.

My thanks also to the law students and pupil barristers who assisted me in extracting the statistical information concerning the 2,265 cases from the Hong Kong Judiciary website 'Reasons for Sentence – High Court,' that were considered in the course of writing this paper. A number of the reasons for sentence were written in Chinese, and as I do not read Chinese, the assistance I received in respect of those cases was essential. I acknowledge too, the assistance I received from Cindy Li [in identifying the gender of many of the Chinese offenders, where there was often no indication of gender in the reasons for sentence and gender was not

apparent from the given names of the offenders], and special thanks to Emille Kohl, who produced several of the graphics included in the thesis. I thank my wife, Terry, for putting up with my frequent absences either whilst I was at Cambridge or working on essays and this paper, and for her constant support.

Finally, I want to acknowledge one further person, who I suppose could be regarded as the inspiration for this thesis and that is Tam Yi Chun [see Appendix I, table 2 – Tariffs for ‘Ice’]. Ms. Tam was convicted by a jury of drug trafficking when she was about 30 years of age and she is currently serving a sentence of 24½ years imprisonment. She had asserted she was deceived by her boyfriend and that she did not know the professionally packaged boxes of purported tea she was carrying actually contained 1.9 kgs of the drug ‘ice’. The jury did not believe her. I represented her on appeal and the best I could achieve for her was to have her original sentence of 25 years reduced by just six months. Allowing for the usual 1/3 remission for good behaviour, she will not be eligible for release until sometime after her 45th birthday.

Table of Contents

Abstract	2
Declarations.....	6
Acknowledgements	7
Chapter One: Introduction	10
What's it all about?	10
I. Drug Trafficking cases heard in the High Court	14
II. Summary of Thesis Objectives.....	15
Chapter Two: Literature Review	18
I. Introduction.....	18
II. Individualized Sentencing and Personal Mitigation.....	18
III. Deterrence Theory, Punishment and Proportionality	21
IV. The Relevance of Public Opinion to Sentencing Policy.....	28
V. Age, Ethnicity and Gender in drug trafficking.....	32
VI. Summary	33
Chapter Three: Methods	37
I. Introduction.....	37
II. Collection and Analysis of Evidence from sentencing case law	37
III. Sentenced Drug Offender study.....	38
IV. Survey of other Prosecuting Agencies.....	41
Chapter Four: Findings	46
I. Introduction.....	46
II. The Sentencing Process and the Guidelines	46
III. Analysis of the Offender Population	59
IV. Detailed Analysis of the Data.....	65
V. An Analysis of the International Survey of drug sentencing	88
Chapter Five: Conclusions	94
I. Introduction.....	94
II. Sentencing System Findings	94
III. Principal Findings for Sentence Population Study.....	96
Limitations of the Study	100
IV. Value of the Study	101
References:	103
List of Appendices	106
Appendices	107

CHAPTER 1 – INTRODUCTION

I. What's it all about?

The objectives of this thesis are to understand the nature and origins of the sentencing guidelines for serious drug offenders in Hong Kong and to consider what sentencing distributions result in practice from their application to the drug offender population. Drug offenders differ in terms of their role in trafficking drugs, whether local or foreign couriers, storekeepers or organisers, in terms of the types and quantities of drugs trafficked and according to whether the suspects plead guilty or not guilty. Offender and offence characteristics can vary for different demographic and ethnic groups and this is likely to result in differences in sentence length according to age, whether the offender is a child or an adult, gender and in terms of ethnicity differences.

There has been little if any research into the ways in which sentences differ among drug offenders of different demographic and ethnic status, and none for convicted offenders in Hong Kong. This study aims to address this by examining the offences and offender characteristics of a population of 2387 serious drug offenders committed to the High Court between 2012 and 2017 and assessing the implications of the Hong Kong sentencing guidelines for the sentences of offenders of differing demographic and ethnic status . A secondary objective is to gain insights into how punitive in terms of sentence length Hong Kong's criminal justice system is compared

with a selection of other countries which do not have the death penalty for trafficking in serious drugs. A self-completed questionnaire survey of prosecutors in 18 other countries is used as the basis for providing a perspective on the relative harshness of Hong Kong's drug sentencing regime.

There is no doubt that the offence of trafficking in a dangerous drug is regarded as an offence of the utmost seriousness in Hong Kong, because of the consequences that the offence brings to those who use the drugs that the traffickers supply and who may become addicted to them, to their families and to society as a whole as the Court of Appeal recognized in the first of the current guideline cases, *R. v. Lau Tak Ming and Others*¹ (Lau Tak Ming 1990:382).

Thus, it must be accepted, because of the Hong Kong Court of Appeal's views about the gravity of the offence, that those who commit the offence and are convicted should expect to be subjected to heavier sentences than those committing many other crimes. But how long are the sentences imposed in Hong Kong and how do they vary according to the offences committed and what are the resulting sentences for offenders of different gender, age and ethnicity?

¹ See Appendix I, Table 1.

Background to sentencing of drug trafficking offenders in Hong Kong

Although Hong Kong, a former British colony, has, since 1 July 1997, been a Special Administrative Region of the People's Republic of China, it retains the common law legal system that prevailed under the previous administration [See Article 8 of the Basic Law] and judicial precedent remains an essential feature of that system.

Unlike England and Wales, New Zealand and some states in the USA, there is no sentencing council or other public body guiding sentencers towards the imposition of *consistent and predictable penalties* for criminal offences [Ashworth and Roberts 2013:1] in Hong Kong. However, for some categories of offences the Court of Appeal has provided guidance by specifying a range of guideline sentences, called tariffs, for those offences which judges of inferior courts are expected to follow when imposing sentence. One such category is the offence of trafficking in illegal narcotics or, as they are called in Hong Kong, dangerous drugs.

It is an offence under section 4 of the Dangerous Drugs Ordinance, Chapter 134, Laws of Hong Kong ['Cap. 134'], to traffic in dangerous drugs, and the interpretation section of Cap. 13² extends the definition of 'trafficking' to include 'importing, exporting, procuring, supplying, dealing with dangerous drugs and possession of

² Section 2.

dangerous drugs for trafficking.’ The maximum sentence provided for the offence is life imprisonment³.

The Court of Appeal has provided in particular, guidelines or tariffs for the dangerous drugs commonly known as heroin, cocaine, ice (i.e. methamphetamine hydrochloride) ketamine and ecstasy.

For each type of drug, the Court has specified a number of sentencing bands, which correspond to a range of quantities of the particular drug. For example, if the drug the subject of the charge is *ice* and the narcotic content in the drug mixture is between 10 and 70 grams, the corresponding sentence band is from 7 to 11 years imprisonment. The tariff is regarded as the starting point, which may be subject to aggravating factors such as an international element in the offence, which will increase the starting point, or mitigating factors, such as a timely plea of guilty, which will reduce the sentence.

Just as the Sentencing Council guidelines are binding upon sentencing judges in England and Wales, the Court of Appeal tariffs for the drug trafficking offence are binding on sentencers in Hong Kong.

³ Section 4.

Consequently, every day that the Court of First Instance of the High Court [which I will refer to hereafter as ‘the High Court’]⁴ sits in Hong Kong judges of that court are sentencing offenders to many years of imprisonment for the offence of trafficking in dangerous drugs.

This study examines an entire population consisting of *all* the 2387 offenders convicted and sentenced for *serious* drug trafficking over the period of 6 years from 2012-2017. In the study the levels of sentences imposed on the offenders are firstly examined on an annual basis over the 6 year period, and then in greater detail to identify the effects of the combinations of different factors which impact on the sentencing process. For the purposes of the study, ‘serious’ drug trafficking offences are those that are committed to and determined in the High Court. In considering the sentences imposed, factors which influence a judge’s sentencing decision and which may have caused the judge to increase or decrease the sentence from the appropriate tariff are considered.

II. The Drug trafficking cases that are determined in the High Court

In Hong Kong, there are some offences which can be tried in any one of the three levels of first instance [or trial] court⁵; trafficking in dangerous drugs is one such offence. It is the prosecution which will

⁴ Hong Kong’s senior trial court.

⁵ That is, the Magistrates Court, the District Court or the High Court.

select the level of court of trial, but the decision as to the appropriate level is based on established principle, that is to say, the likely sentence that will be imposed on the offender after trial, having regard to the sentencing tariffs. In practice, because the next level of Court, the District Court, has a maximum sentencing limit of 7 years imprisonment⁶, any offence that, according to the tariff, may attract a sentence of more than 7 years imprisonment after trial, will be committed by a Magistrate, upon the application of the prosecutor, to the High Court.

III. Summary of thesis objectives

The principal objectives of the study are, first, to explain the guidelines for sentencing serious drug offenders in Hong Kong and to trace their origins in case law since the 1990s; second, to achieve an understanding of the variations in the severity of the sentences imposed on offenders committing serious drug trafficking offences in Hong Kong during the 6 year period identified and to assess how the demographic, ethnic and offence characteristics [drug type] of drug offenders relate to the lengths of sentences. By these means, the study also aims to assess how the sentencing guidelines in Hong Kong translate, in practice, into sentences of varying lengths and punitiveness for drug offenders of differing demographic and ethnic status, having regard to differences in the roles of offenders, the types of drugs transported and the pleas entered.

⁶ Section 82(2) of the District Court Ordinance, Cap. 336

A third objective is to assess the harshness of sentences imposed for serious drug trafficking in Hong Kong when compared to sentences imposed for similar conduct in other countries. This is achieved by taking as a base line for comparative purposes, the sentence that a judge in Hong Kong would impose for the offence of trafficking in 1 kg of *ice* after trial, i.e. where an offender has pleaded not guilty and has been convicted by a jury, and comparing that sentence with the sentences imposed by Courts in 18 other jurisdictions for similar misconduct. The penalties imposed in the more than 30 other places where capital punishment is a sentencing option [Gerry and Sherwill 2016:269] are not considered simply because the death penalty is not a sentencing option in Hong Kong for any offence. The fact that the death sentence is not used in Hong Kong indicates that punishments for drug offending in Hong Kong are less severe than the countries where it is used.

It is expected that Hong Kong will feature among the countries imposing harsher sentences. This is because the Court of Appeal regularly refers to the sentences for drug trafficking as *deterrent sentences* and also argues that there should be heavy sentences in order to severely punish the offender, as the Court of Appeal recognized in *Lau Tak Ming* (1990), when it said [493]

“...the main considerations must be the punishment of the offender himself and the deterrence of others who might be” minded to take part in this lucrative and wicked trade.”

These views regarding the need to punish offenders and the belief in the effects of severe sentences in deterring further offending underpin the guidelines or tariffs for sentencing decisions relating to serious drug offenders in Hong Kong.

As a consequence of examining the sentencing process for serious drug trafficking, it is anticipated that ways of adjusting sentences will be recommended, such as by allowing sentencers more discretion in varying the sentences for the bulk of offenders who are couriers or mules to take account of mitigating circumstances.

Chapter 2 – LITERATURE REVIEW

I. Introduction

In this chapter I discuss a number of topics and concepts which impact upon or are of some relevance to the imposition of severe sentences for serious drug trafficking. These include sentencing guidelines and their effect on individualised sentencing and personal mitigation, deterrence theory, punishment and proportionality, the relevance of public opinion to sentencing policy, and race and gender and the drug trafficker.

II. Individualized sentencing and personal mitigation in the light of sentencing guidelines

One of the aims of sentencing guidelines, is to ensure consistency in the sentencing of offenders for who have committed similar crimes, and to facilitate the predictability of sentences for like [mis]behaviour [Ashworth and Roberts 2013:1].

The stated aim of the imposition of heavy sentences for serious drug trafficking in Hong Kong is to deter and to punish, but in passing the Court of Appeal also observed [Lau Tak Ming 1990:383] that the tariffs would also *“assist trial courts in achieving consistency and fairness in sentencing and the profession in the giving of advice to lay clients”*

As far back as 1967 Thomas [455] observed that *“the leading tendency in the development of judicial sentencing was the growing recognition by the courts of individualization of sentence.”*

Individualized sentencing is sentencing an offender according to what is regarded as the best for the offender, with the emphasis being on rehabilitation rather than punishment. Thomas did point out that for more serious offences, individualized sentencing was not appropriate; it was only appropriate where the rehabilitation of the offender was given high priority. For serious offences, where imprisonment was the inevitable penalty, it was considered then, and perhaps even more so now, that individualized sentencing is not an option. It appears that this principle reflects the position in Hong Kong in respect of serious offences of drug trafficking.

Lengthy sentences are also imposed for the offence in other places, such as England and Wales and in Australia and the United States (and how lengthy the sentences imposed in those places will be compared with Hong Kong sentences) .

In regard to the guidelines in England and Wales, Cooper [2013:159], commenting on the reduced importance of personal mitigation, referred to the ‘tick box’ approach to sentencing, which he considered resulted from some of the guidelines. He said that because *“seriousness is the overwhelming determinant of sentencing severity, the influence of personal mitigation had been reduced to the extent that it hardly gets a reference in any guidelines.”* He warned that *“the diminishing of the role of personal*

mitigation to such an extent” may not only result in an offender being inappropriately sentenced but would impact on society as a whole.

This study briefly considers the extent to which personal mitigation affects sentences for offenders who are convicted in Hong Kong of serious drug trafficking offences.

Sentencing has sometimes been described as one of the most difficult tasks that a judge will be required to undertake. In the Atlantic Monthly back in January 1960, the American Jurist, Irving R. Kaufman wrote

“If the hundreds of American judges who sit on criminal cases were polled as to what was the most trying facet of their jobs, the vast majority would almost certainly answer ‘Sentencing’...”

More recently, in the preface to *Cross and Cheung* [2015] Hong Kong’s Chief Justice wrote that *“no one should mistakenly assume that sentencing is somehow less important or any easier for the judge than the trial process.”*

When it comes to calculating sentences for serious drug trafficking offences, it would not seem to be a particularly difficult task, having regard to the way in which judges strictly adhere to the guidelines, and faithfully follow Cooper’s [2013] ‘tick box’ approach.

To be fair to the Hong Kong judges however, they would be very much aware that if they imposed a sentence in a serious drug

trafficking case, and they were to stray too far from the tariffs, that the Secretary for Justice, as the chief prosecutor, is likely to apply to the Court of Appeal in accordance with section 81A of the Criminal Procedure Ordinance, Cap. 221, to review the sentence on the grounds that it is manifestly inadequate or wrong in principle because it was inconsistent with the guidelines.

Something similar happened in Canada in 2003, where a judge in sentencing two female couriers who had brought drugs to Ontario from Jamaica took into account the social context which resulted in the offenders resorting to drug trafficking out of desperation and imposed lenient non-custodial sentences. The prosecution appealed, and the appellate court substituted sentences of immediate imprisonment. As the offenders had almost completed their conditional sentences, the court did not require the offenders to serve those sentences. In an article in which the authors examined these cases, Lawrence and Williams [2006: 286] observed that *“the conventional view that severe punishment of couriers is necessary to achieve deterrence and protect society”* had *“encountered resistance from some sentencing judges in a few jurisdictions.”* They observed that these judges had *“criticized guidelines that produce harsh penalties, sought to modify these norms and sometimes refused to invoke them.”* What the judge in these cases had done was to treat couriers as less culpable than other traffickers, but the appellate court clarified that deterrent

sentences involving imprisonment should be imposed despite the role played by the offender.

It is generally accepted that some offences are so serious that the only proper punishment is a substantial period of imprisonment, and in these circumstances personal mitigation plays an insignificant part in the judge's task of imposing sentence.

It is generally recognized that the offence of trafficking in dangerous drugs is a serious one, because of the harm that results from such activities, and that deterrent sentences involving severe punishment are required. This would also appear to be consistent with the position of the judges of the Court of Appeal.⁷

Advocates of Sentencing Guidelines emphasize the positive effects thereof. As noted above, Ashworth and Roberts [2013:1] point out that sentencing guidelines provide a means of achieving "*great consistency and predictability*" and under sentencing guidelines it is also recognized that the more serious the offence, the less relevant will be personal mitigation. This study looks at the role personal mitigation plays in the sentencing process.

Whilst the consequences of guidelines are that calculating the appropriate sentence may not be difficult, it is not suggested that

⁷ see *Lau Tak Ming* 1990: and *Abdallah* 2009:

sentencing any offender, especially children, to many years of imprisonment is an easy task for judges.

III. Deterrence Theory, Punishment and Proportionality

Given the importance of deterrence in framing drug sentencing guidelines in Hong Kong, this section defines the concept and evaluates evidence regarding the extent to which sentencing is able to deter future offending.

There are many definitions of the term 'deterrence.' One such definition is 'the use of threats of harm to prevent someone from doing something you do not want him to do (Morgan 1977: 17)'. In the criminal justice context deterrence may be defined as simply 'the avoidance of criminal acts through fear of punishment (von Hirsch *et al* 1999:5).'

Deterrence is usually considered from two aspects, namely, *individual* deterrence and *general* deterrence. Individual deterrence is deterrence of the offender – because he will be punished for his crime he will be deterred from reoffending. General deterrence relates society as a whole; the sending of a message that if you do wrong you will be liable to the same punishment as the offender. Much of the literature concerns general deterrence, and when criminologists write about deterrence theory they are usually referring to the general deterrent effect of the threat of punishment.

Ashworth and Roberts mention that ‘there is little modern literature on individual deterrence (2012:868), and Lacey also refers to the paucity of conclusive empirical evidence relating to individual deterrence (1988:32)’

Deterrence theory then, concerns the effectiveness of sanctions, in deterring both individuals and the community at large from engaging in conduct the state, on behalf of its citizens has rendered unlawful.

Golash suggests that having regard to the many *“factors that militate against effective deterrence, we cannot know a priori whether punishment has any net deterrent effect at all”* (Golash 2005: 25). Other scholars do not necessarily subscribe to this position (for example, Nagin 1998: 346, von Hirsch *et al* 1999:1).

In 1998 Nagin considered that the *“collective actions of the police, courts and prison system’ generated a combined deterrent and incapacitation effect”* (ibid. 366).

In 1999 von Hirsch and his colleagues, in a study commissioned by the Home Office, examined in detail, recent research on criminal deterrence and severity of punishment, during which they considered a substantial number of earlier works on deterrence theory. They found that *‘the criminal justice system as a whole exercise[d] a deterrent effect’* and that *‘crime would be much more*

prevalent then it is today were almost all offences to go undetected and unpunished.'(ibid 1).

Dölling and his associates wide-ranging analysis of research methods (2009), found that the assessments of the authors they studied and the comparison of their estimations demonstrated that those researchers who decided that deterrence was not effective in reducing crime, were in the minority, but even where researchers found that their evidence supported the effectiveness of deterrence, the results were quite low (2009:222).

Paternoster observed that the limited literature that he had seen, in respect of *"the specific deterrent effect of imprisonment (whether those who are punished do not return to crime when released)...does not suggest that either imprisonment itself or the length of imprisonment is effective in deterring crime for those who experience it"* (2010:818)

Some offenders will commit crime because of economic necessity and therefore are unlikely to be deterred by the fear of punishment (Berger 2005:86). From the reasons for sentence for the cases reviewed in this study, it is not unusual, particularly in respect of foreign couriers, that economic necessity is often advanced as the reason for committing the offence.

Cutler, in her study of the effectiveness of severe sentences for drug offenders, including traffickers in the state of Arizona in the United States [2009:417] referred to a Department of Justice report, that *“drug offenders are one of the highest categories of recidivating offenders”* from which it could be inferred that severe sentences are mostly not effective in deterring offenders from reoffending

Ashworth, in discussing the effectiveness of deterrence theory in reducing crime [2015:84] referred to the Halliday Report [2001:129], and to a study by Doob and Webster [2003:143]; the conclusion in both studies was to the effect that evidence did not establish that the imposition of severe sentences had an effect on crime levels.

The Court of Appeal in Hong Kong has said when specifying tariff sentences for the offence, that the reason harsh penalties are required for drug trafficking offences is deterrence. However, Tonry [2006:14], whilst referring to the position in the United States, observed that *“guidelines for drug crimes were a major exception to the ‘empirical approach,’ with the result that the guidelines prescribed much harsher punishments for drug crimes than for violent crimes that most people consider more serious and thereby violated widely held proportionality notions.”*

In discussing the sentencing process generally and the concept of deterrence, Tonry [2006:34] observed that an implication arising from research on deterrence *“is that it is more important that crimes have consequences than that the consequences be severe.”* However, neither Tonry nor other authors consider how sentence lengths vary between countries, an aspect this research addresses; nor have other studies considered how well or otherwise sentences match the recommended guidelines.

It would seem that the argument in favour of the effectiveness of the application of deterrent theory for sentencing in general, and for drug offences in particular is a weak one.

Serious crimes attract heavier sentences, and because of the serious nature of the crime with attendant serious harm, such sentences are inevitably punitive. In 2017, in sentencing an ‘ice’ trafficker to 37 years imprisonment, the judge⁸ observed that *“the Court of Appeal has determined sentences for trafficking in dangerous drugs in large amounts shall be punitive.”*

Another approach to sentencing is what is called the proportionality principle and Ashworth [2015:112] points out that in the White Paper published in 1990, which led to the enactment

⁸ HCCC 367 of 2016.

in England and Wales of the Criminal Justice Act, 1991, the authors argued that both “*rehabilitation and deterrence [were] purposes of sentencing.*” Whilst it was intended that the statute would require that punishment should be inflicted on offenders in accordance with the seriousness of the offence, Ashworth [2015:113] considered that this message was not conveyed and this led to the enactment of the 2003 Act, which set out the five purposes to which sentencers must have regard, which included punishment, the reduction of crime, and rehabilitation of offenders.

As Brooks [2012:15] states, proportionality, together with desert “*form the conceptual core of most retributivist theories.* He states later [17] that on one view, “*a criminal deserves punishment in strict proportion to the harm he causes others.*”

Whilst deterrence might be one of the [stated] reasons for the harsh sentences for drug trafficking in Hong Kong, what the Courts are also doing is applying a level of punishment that is proportional to the serious harm that drug trafficking causes. But this is a judiciary-led policy; what view does the public take of the harsh penalties imposed?

IV. The relevance of Public Opinion to Sentencing Policy

It is important that sentencing systems do take into account public opinion because ultimately, crime affects the public at large as much as it affects the individuals who are directly harmed by the

misconduct, as the Court of Appeal pointed out in *Abdallah* [2009: 451].

However, there has been limited research on what public opinion is or, indeed, in gauging public opinion. Roberts and Doob [1990: 453] commented on the lack of knowledge that the public had at that time, about the sentencing process and sentencing trends. In the same article [454] they emphasized that public opinion was as important as the role of the media, because public opinion is often put forward by politicians as the basis for harsher penalties. With modern technology and a more sophisticated media it might be expected that the public would be better informed about sentencing and the process of sentencing. However, according to Ashworth [2015: 110], public knowledge of the subject is still low and the public remains ill-informed about sentencing.

Lovegrove [2010: 321] published a paper in the Cambridge Law Journal, describing research that he undertook in Victoria, Australia, assessing public opinion about proportionality of sentence and the relevance of personal mitigation in achieving justice, from a sample of 471 participants. He provided the participants with background information about the sentencing process, and said in his paper that the explanation he gave took about 70 minutes. His research involved providing the facts of several cases, which included background information about the offenders. He invited participants to provide a sentence for each

offender. He concluded that his assessment showed the public's opinion as to the significance of personal mitigation was closer to the position taken by Tonry and others [2010: 328 and 344], namely, that personal mitigation was still a significant factor in sentencing, although it was accepted that personal mitigation played a diminishing role depending on the seriousness of the offence.

Roberts and colleagues [2011:524] responded to the Lovegrove article, in a piece published in the Criminal Law Review, wherein they characterised his research methods as flawed and a mere *"demonstration project."*

Whatever the value of Lovegrove's work, Jacobson et al [2011], having been commissioned by the [England and Wales] Sentencing Council, conducted a similar project specifically in respect of sentences for drug offences, in an attempt to assess public opinion about such sentences. The project involved 15 focus groups, with a total of 121 participants. The participants were required to complete a questionnaire and then in discussion the members of each focus group were introduced to six different case histories. They were then invited to suggest an appropriate sentence in each case and to provide reasons for the sentence that they specified. The difference between simple possession of drugs by drug users, and trafficking in drugs was explained to participants, and they were instructed to take into account both aggravating and

mitigating factors. They appeared to follow a similar path to the participants in the Lovegrove project. In respect of the significance of the personal circumstances of the offenders, the responses were mixed with some suggesting that sentencing should be individualized; but more were resistant to the concept of sentencers taking personal circumstances into account [2011: 32].

Spohn and Holleran [2002] conducted a comprehensive study of drug offenders sentenced to imprisonment in Jackson County, Missouri, in 1993, and concluded that rather than deterring offenders, drug offenders who had been incarcerated exhibited higher rates of recidivism than those who had not been detained. This was a sample from a single county in one state in the United States, and the study was over 17 years ago, however, the results are consistent with other studies concerning the effectiveness of imprisonment imposed in accordance with deterrence theory to crimes generally [see for example Doob and Webster 2003:143, Dölling 2009:222, and Akers and Sellers 2009:44].

Looking at the Hong Kong position, whilst the Court of Appeal in *Lau Tak Ming* said [1990: 381] that “*guidelines are a matter of legitimate public interest*,” in fact, the public is not usually consulted about policy in relation to matters such as the level of sentencing for drug traffickers. In the cases of *Ching Kwok Hung*

and *Nel Rojas*, it was the Attorney General⁹, purportedly representing the public interest, who initiated the proceedings by applying to review the sentences imposed by the trial courts. However, usually the initiative in such matters comes at the instance of the Court itself, although the Court of Appeal does hear evidence before specifying guidelines.

V. Age, Ethnicity and Gender in drug trafficking

There have been relatively few studies of the relationship between sentence length and the demographic and ethnic status of convicted drug traffickers. The studies reviewed here have been undertaken in respect of ethnicity and gender in the criminal context. However, they are only marginally relevant to the present study.

Most studies concerning the race of offenders, relate to the perceived disproportionate imprisonment of persons of particular ethnicity, and raise issues concerning equality before the law. Ashworth [2015:253] refers to a number of studies both in Britain and elsewhere. Referring to a paper by Phillips and Bowling [2012], he notes that black offenders had an imprisonment rate “*of about 10 times that of white people.*” With reference to studies concerning ethnicity in places such as Canada and Australia,

⁹ In July 1997, the Secretary for Justice became the Government’s Senior Law Officer, with the same functions and powers at the pre-July 1997 Attorney-General.

Ashworth points out that these studies often concern the incarceration rates of indigenous racial groups [255].

The studies mentioned are of limited relevance, since foreign couriers who transport drugs from Africa and South America and elsewhere often do so for economic reasons. In contrast, the subjects of the aforementioned studies are usually from the lower socio-economic sectors of their communities, can involve the excessive use of alcohol, and sometimes drugs is often a contributing factor.

In regard to gender studies, studies usually concern whether female offenders have been discriminated against in the sentencing process [Ashworth 2015:257].

There is substantial literature on the association between age and offending, and the age-crime curve is a distinctive feature of offender populations in Western and other countries. Moffit (1993) identified 'adolescence-limited' offenders who exhibit criminal behavior only during adolescence, and the 'life-course-persistent' offenders, who begin to commit crimes and behave antisocially early in childhood and continue this behaviour into adulthood. There are few, if any, specific studies into the age profiles of drug offender populations. While not delving into the sources of offenders' criminality, this study will report on the proportions of convicted drug offenders who are children and adults, their age

distribution and the sentences received by those of different ages, including youths and, in offending terms, those who rank as very old, namely up to 69 years of age.

Typically, only c. 15% of offenders are female and more youthful female offenders desist and desist earlier than males (Moffit, 1993). Females are especially involved in prostitution, shop-lifting, fraud, as well as in drug trafficking. There are fewer involved in violent crime, robbery, car theft and burglary, particularly aggravated burglary. This thesis will consider the role of female offenders in trafficking drugs in Hong Kong and, in particular, the sentences they receive, and the extent to which their family status is considered in the sentencing process.

In their 1999 study concerning female drug offenders in the United States, Mauer and colleagues discussed the consequences to women of the “war on drugs” campaign and the huge increase in females imprisoned following the introduction of the policies targeting drug offences [4]. They also discussed the disproportionate number of women from minorities, specifically black and Hispanic women, incarcerated following the introduction of the policies [3].

The issues of the sentences given to females compared with males, Chinese traffickers compared with those of non-Chinese ethnicity, and the sentences of convicted offenders of different ages,

including children compared with adults will be addressed in this thesis.

V. Summary

Guidelines for drug offences in Hong Kong ensure that trial courts impose severe sentences for serious offences and individual sentencing is not usually a consideration when sentencing offenders for serious drug trafficking, as rehabilitation is a low priority, and personal mitigation is of little assistance to the offender, because of the seriousness of the offence and the harm done.

The research supporting the effectiveness of deterrent sentences for serious offences in deterring the offender or others from [re]offending is inconclusive. With respect to the effects of heavy sentences, supporting evidence is less positive. In adhering to guidelines, Hong Kong courts impose severe punishment. There may however, be a need to consider proportionality in the sentencing process in relation to some offenders or some classes of offenders, including children.

In regard to the relevance of public opinion in formulating sentencing policy, there has not been much of research, and it would seem that the views of members of the public are rarely canvassed. In the Hong Kong context, public input is limited to those rare occasions when the chief prosecutor, ostensibly on

behalf of the public, challenges what is perceived to be an inadequate sentence, because policy in regard to sentencing for serious drug offences is formulated by the Court of Appeal.

Academic research into race and gender generally focus on discrimination against ethnic groups and females and is likely to be of limited assistance in the context of this study, although the possibility of discrimination, including indirect discrimination against some racial groups will be considered.

There has been little research on the lengths of sentences for drug trafficking, and how these sentences vary depending on the type and quantity of drug. Also, little has been written on the effect of aggravating and mitigating factors, such as pleas of guilty and a lack of previous convictions, on the ultimate sentence imposed for *serious drug trafficking*. Similarly, there is only limited information on demographic and other profiling of drug offenders, such as their ethnicity. These issues are considered in this paper.

Further, the length of sentences for the offence have not been reviewed and compared across different jurisdictions, and again this issue is considered.

Chapter 3 – METHODS

I. Introduction

The thesis has three main objectives: to outline the Hong Kong serious drug sentencing guidelines, such as they are, and to trace their origins; to understand the characteristics of drug offences and how these result in sentences of differing lengths for offenders of different demographic and ethnic status; to provide insight into how lengthy serious drug sentences are in Hong Kong compared with other countries that do not use the death penalty for these offences.

As a consequence, the study involves the use of three distinctive methodological approaches for collecting and analysing the data for the different parts of the thesis. These are documentary analysis; the collection and quantitative analysis of population data on 2387 convicted drug offenders; and an international self-completed questionnaire survey of prosecuting agencies in order to establish the severity of sentences in Hong Kong compared with other countries.

II. Collection and analysis of evidence from sentencing case law

The first section of the study describes the Hong Kong sentencing guidelines, and traces their origins. It is based on drug sentencing

case law published on the Judiciary website¹⁰. Relevant cases, especially those which established a precedent in sentencing serious drug offenders were analysed and are discussed chronologically.

III. Sentenced drug offender study

Research design

This was the principal part of the thesis. It was based on the population of 2265 serious drug cases committed to the High Court between 2012 and 2017, in which 2387 offenders were convicted and sentenced. These cases represent 80% of all cases committed to the High Court in Hong Kong over that period, where convictions were recorded.

Whilst information is not available for the conviction rates for drug offenders, the Department of Justice publishes annually a review of its work¹¹, which includes statistics for conviction rates for all levels of court¹². The conviction rate for cases determined in the High Court is consistently in excess of 90%, mostly those resulting from pleas of guilty. Of those accused who elected to plead not guilty the conviction rate is c.70%.

¹⁰ Most of the relevant cases were subsequently reported in the Law Reports. Those cases are listed in the References.

¹¹ Titled *Prosecutions Hong Kong 20XX*. By way of example the conviction rate in the High Court in 2017 was 94% with 70.8% offenders convicted after trial.

<https://www.doj.gov.hk/eng/public/pdf/pd2018/statistics.pdf>

¹² This information relates to convictions during the stated year, which is

Data relating to cases was collected from the Hong Kong Judiciary website which contains details of the "[Judges'] Reasons for Sentence". This contains reasons for sentence for all offenders convicted and sentenced in the High Court. Accessing data on this site was very time-consuming. For many cases, the reasons for sentence were in Chinese. Data was almost complete for the type of drug involved (99.6% of cases), the sentence, plea, offender ethnicity (99% of cases), offender role (99%) and gender (98.8%) - some data concerning ethnicity was 'missing' because some Chinese given names may be male or female. There were more cases missing age data, although this was available for 82.7% of cases. Although some descriptions of reasons for sentencing are brief, partly due to the limited role played by mitigation and offenders being convicted after pleading not guilty (indicating a lack of remorse), others were quite detailed.

Cases were selected on the basis of the year of committal which would not necessarily be the year in which the Court dealt with the case.

Description of the data

Data was collected on the type and quantity of drug, whether the offender had pleaded guilty or had been convicted after trial, the starting point for sentence specified by the sentencer and the eventual sentence imposed, the gender and age of the offender,

the ethnic background of the offender, and the role the offender played i.e. courier, storekeeper or organizer. The role of courier was further subdivided into foreign couriers, that is couriers who brought drugs into Hong Kong or attempted to take drugs out of Hong Kong [and were thus liable for an enhanced sentence], and local couriers i.e. someone who was caught either actually dealing in drugs or in possession of drugs for the purpose of trafficking, in Hong Kong.

The other roles played by offenders included storekeepers and organizers. The usual factual scenario, where storekeepers were involved, was that the offenders were stopped in the street and found in possession of a quantity of drugs, and keys to premises. They would be taken back to the premises and a further stash of drugs would be found there.

Organizers are those who control the couriers or have financed the drug trafficking enterprise.

I devised a table into which was inserted, information about each serious drug trafficking case that appeared on the website and thus had resulted in a conviction, for the 6 year period.¹³ Information was extracted from the table and compared for each year. Thereafter the information for the entire 6 years was analysed using SPSS statistical software.

¹³ A sample of the table is at Appendix II.

Analysis of data

Since there is a population of convicted drug offenders for the years 2012-2017, it was not necessary to use significance tests since these are used to draw inferences about populations from samples. Therefore, descriptive statistics such as means and percentages are cited for comparison and for measuring effect sizes. Cohen's *d* and Cramer's *v* are also used to indicate effect size or importance of differences between groups. Values of Cohen's *d* may generally be interpreted as follows: $d=0.2$ indicates a small effect size, $d=0.5$ a medium, and $d=0.8$ a large effect size. Cramer's *v* is relied upon for the interpretation of cross-tabulations with greater than 1 degree of freedom and may be interpreted in a similar way to Cohen's *d* but on a scale that ranges between 0 and 1.0.

However, both significance test results and effect size measures are cited to address any concerns that the former ought to have been included.

Various graphs were produced to illustrate specific findings.

IV. Survey of other Prosecuting Agencies

Research design

The sampling frame for this survey consisted of Prosecuting Agencies from 47 International Association of Prosecutors ('IAP') member countries that did not include the death penalty as a

punishment for drug trafficking. 33 countries with the death penalty as a sentencing option for serious drug trafficking offences were first excluded from the total of 170 IAP member organizations, and from the remaining agencies 47 were selected randomly, some from each continent.

With the assistance of the General Counsel of the International Association of Prosecutors [‘the IAP’], I obtained contact information¹⁴ and distributed a questionnaire, accompanied by a letter of introduction from the President of the IAP, to the 47 selected prosecuting agencies. Self-completed surveys with closed questions were used as a research instrument. Telephone interviews were viewed as time-consuming while not allowing respondents sufficient time to reflect on their answers to the key question on sentencing for trafficking in ice.

Eighteen completed questionnaires were returned, representing a response rate of 38%¹⁵. Given this response rate, there is a risk of non-response bias since some missing countries may have markedly more or less severe sentences. The data, nevertheless, enables insights to be gained into the severity of Hong Kong sentences compared with a sample of other countries, which cannot,

¹⁴ i.e. email addresses

¹⁵ English and French are the languages commonly used by the IAP for the purpose of communication with member countries. The survey was in English only and, on reflection, this may have contributed to the relatively low response rate.

however, be regarded as fully representative of countries which do not use the death penalty for drug trafficking.

In Appendix III is

- A. a sample of the questionnaire - the questions therein were factual and designed to elicit information on sentence length for a conviction for trafficking in *ice*.
- B. The letter of introduction from the IAP
- C. A table summarizing the information provided by 18 Prosecuting agencies in completing the questionnaire.

At the time I distributed the questionnaire, it appeared from a preliminary examination of the information I had gathered, that the most prevalent 'hard' drug of abuse in Hong Kong in the relevant period was *ice*, and comparative information was sought from the 47 agencies. The agencies were invited to provide information as to the likely sentence that would be imposed upon an offender who is convicted after trial, of trafficking in 1kg of *ice*.

In comparing the severity of sentences imposed in Hong Kong with sentences for similar criminal conduct in other places, it was important to distinguish between the sentence imposed by the Court and the sentence that the offender was likely to serve. In Hong Kong if a prisoner is industrious and is otherwise of good

conduct he or she is entitled to receive a remission of one-third from the sentence imposed by the court.¹⁶

To demonstrate the point - if an offender, is charged with trafficking in 1 kg of *ice*, the starting point or tariff would be in the region of 22 years imprisonment. Assuming there are no aggravating factors, and the only mitigating factor is a timely plea of guilty, he will be sentenced to 14 years 8 months imprisonment. If, whilst serving his sentence, he is industrious and of good conduct, he can expect to be released after serving about 9 years and 9 months, which in this instance is less than half the tariff.

When considered in context and compared with the time actually served by offenders in other places, ascertaining the sentences that incarcerated offenders actually served was an important consideration in determining whether the idea that Hong Kong imposed the harshest sentences for drug trafficking was proven. The questionnaire invited information that would enable this comparison to be made.

In summary, relying on the information obtained from the questionnaires, descriptive statistics were used to compare the sentences imposed and the sentences actually served in other jurisdictions, although, because of variables within each system, some agencies were not prepared to estimate the period of time

¹⁶ Section 69 of the Prison Rules.

the offender would actually serve. The answers were based on the estimates of prosecutors with considerable expertise and knowledge of drug sentencing in their jurisdictions.

In regard to the important question, namely, the likely sentence after trial for trafficking in 1 kg of ice, some respondent's provided a range, and where a range of sentences was provided, then the top of each range was used to make the comparison.

Chapter 4 - FINDINGS

I. Introduction

The material in this chapter is sequenced so as to respond to the key research questions posed in the Introduction Chapter. The information and data were collected from the sources mentioned in the Methods Chapter. The data was analyzed and reviewed, and relevant statistical information was summarized.

II. The sentencing process and the Guidelines

The object of this section is to outline chronologically the origins of the key elements of the current regime for sentencing offenders for drug trafficking in Hong Kong. It consists of a review of the cases that most influenced current sentencing practice; a further review of the cases that shaped any mitigating or aggravating factors that can be taken into account when sentencing convicted drug offenders; finally, there is a summary of the guidelines resulting from these reviews available to High Court judges in Hong Kong when determining the sentences of serious drug offenders.

Review of principal cases affecting sentencing practice

In the 1980s heroin was the most popular drug of abuse in Hong Kong, and by the time *the product* was sold on the street, it had been cut or adulterated with other substances such as *codeine*, thus creating a less toxic drug mixture. At that time guidelines did exist, but they were based on the total weight of the drug mixture. There

were then basically two types of heroin mixture, one of which was more diluted and thus more suitable for sale directly to the consumer, and the other less adulterated mixture which usually needed to be further diluted before it was distributed on the street. The sentences imposed were, nevertheless substantial.

Whilst those earlier Court of Appeal cases specified guidelines which the Court expected sentencers to follow, it seems that the Court allowed sentencers more discretion than they presently have. For example, in the case of *R. and Chan Chi Ming* [1979 '*Chan Chi Ming*'], the Court of Appeal presided over by the Chief Justice, said [page 493], that "*the tariff is intended for the guidance of the courts, to be generally applied. It is not intended to prevent them from imposing greater or lesser punishments in the special circumstances of any case.*" The tariffs applied to trafficking in what the Court called 'hard drugs.' There were only 4 bands and the upper band, prescribing the penalty for trafficking in a drug mixture above 1 kg, was 8 to 12 years imprisonment, which was to be used "*save in cases of an unusually serious nature.*" At the time that this judgment was published on 11 September 1979, according to the Chief Justice [page 493], the heavy penalties imposed for drug trafficking seemed to have resulted in a steady decrease in the numbers of such cases.

Ten years on, and it had become apparent that heroin was being sold or supplied in mixtures that varied in narcotic content. It also became apparent that drug trafficking offences were on the increase. To

avoid unfairness in the sentencing process, in 1989 the Court of Appeal revisited the tariffs for trafficking in heroin.

In its judgment in *R. v. Lau Tak Ming and Another* [1990 '*Lau Tak Ming*'] the Court of Appeal specified bands of sentences, which corresponded with ranges of quantities of pure heroin, having regard to the narcotic content in the drug mixture.¹⁷

By way of an example, the Court said [page 387] that 10 grams of the narcotic was approximately equivalent to 300 grams of what was called No. 3 heroin mixture [the less pure type] or 11 grams of No. 4 heroin mixture [the purer form].

In 1991 the Court of Appeal handed down judgment in *Attorney General and Ching Kwok Hung* ['*Ching Kwok Hung*'], which similarly provided tariff sentences for trafficking in *ice*.¹⁸

In 1994 the Court of Appeal in *Attorney General and Pedro Nel Rojas* ['*Nel Rojas*'], an appeal by the Attorney General by way of an application for review of sentence, determined that the *Lau Tak Ming* guidelines for heroin should also apply to similar quantities of cocaine.¹⁹

¹⁷ See Appendix I, table 1.

¹⁸ See Appendix I, table 2.

¹⁹ See Appendix I, table 3.

In 2009 the Court of Appeal in *Secretary for Justice v. Hii Siew Cheng*, another application for review of sentence appeal, provided common guidelines for trafficking in the drugs ketamine and ecstasy.²⁰

Also in 2009, because of an increase in the number of seizures of large quantities of heroin by Police and Customs officials, the Court of Appeal in *HKSAR and Abdallah* [*Abdallah*], created additional sentencing bands to cover large quantities, namely, quantities over 600 grams.²¹

Similarly, in 2014, because of an increase in the numbers of seizures of large quantities of *ice* the Court of Appeal in *HKSAR and Tam Yi Chun* [*Tam Yi Chun*] adopted the sentencing bands in *Abdallah* [which related to heroin] so that they also applied to quantities of *ice* in excess of 600 grams.²²

In arriving at what the Court considered to be appropriate guidelines in each instance, the Court of Appeal relied on a number of sources of evidence, including evidence as to the prevalence of the offence and street value of the drug in question and medical evidence as to the abuse and effect of the drug on the abuser.

²⁰ See Appendix I, table 4.

²¹ Also in Appendix I, table 1.

²² Also in Appendix I, table 2.

In 2018 in *HKSAR v Chan Ka Yiu and Others* [*‘Chan Ka Yiu’*]²³ the Court of Appeal, in respect of the drug Ketamine, declined to extend guidelines for trafficking in large quantities of the drug because the Court considered that the evidence did not indicate an increase in such cases, and in the few cases in which the Court of Appeal had considered sentences for trafficking in large quantities, the sentencers had adequately dealt with the cases and did not require further guidance.

Review of Other Sentencing Principles derived from the Case Law: Aggravating and Mitigating Factors

The Court of Appeal in *Lau Tak Ming* [1990] not only specified tariff sentences for trafficking in heroin, but also made several other important observations relating to the principles of sentencing, which were adopted in the later tariff cases.

The Court emphasized that these offences called for deterrent sentences and for less weight to be accorded to mitigating factors [page 386], because of the serious nature of the offences and the considerable harm that such offences caused.

This study will consider whether or not there appears to be any evidence of sentencing concessions for “extreme youth”.

²³ Also in Appendix 1, table 4.

In extending the sentencing bands provided in *Lau Tak Ming*, for trafficking in heroin, in light of increased seizures of larger quantities, the Court of Appeal in *Abdallah* [page 453], identified a number of aggravating factors which would justify increasing the starting point from the tariff, factors which have continued to influence the sentencing process to the present day. The Court identified four aggravating factors, namely:

- I. *“An international element is involved;*
- II. *The trafficker has previously been convicted of trafficking in dangerous drugs;*
- III. *The trafficker is shown to be a mastermind or senior player, such as a financier, in a syndicate; or*
- IV. *The offender is shown to have engaged a young person to assist in trafficking²⁴.”*

Earlier, in the same judgment [page 451], mitigating factors were referred to in the following terms:

“As for mitigation, the grievousness of the offence – a description that is born of the recognition of the dreadful misery caused to victims and their families and the serious harm to society generally – dictates that meaningful mitigation, apart from the plea of guilty, is rarely available.”

Although the Court of Appeal in *Chan Ka Yiu* [2018] declined to extend the tariffs for ketamine to cover large quantities of the drug,

²⁴ In fact, section 56A of Cap. 134 authorizes sentencers to impose a more severe sentence where the offender uses a minor in the commission of the drug offence.

the Court did specify the periods of imprisonment to be added to the starting point where the offence involved an international element.

Since *Abdullah* the Court of Appeal has recognized some other factors as either increasing the starting point or reducing the overall sentence.

Over the last few years some visitors to Hong Kong have applied for asylum ['asylum seekers'], usually claiming that if they returned to their home countries they would be tortured. Most of these applications are refused but the claimants are entitled to have their claims reviewed by an appeal board. This takes time. In the meantime the asylum seekers, upon signing a recognizance, are permitted to remain and are paid a small allowance, but are not permitted to work. The majority of asylum seekers come from countries in the Indian sub-continent. A number of them turn to criminal conduct, including drug trafficking. Because of the increase in the number of asylum seekers committing serious crime, the Court of Appeal in *HKSAR v. Shah Syed Arif* [2016:673] made the following observation:

".....those who are privileged to be permitted to remain in Hong Kong and to be at liberty whilst their various claims for asylum are being determined by the authorities, are required to behave themselves and abide by the laws of this jurisdiction. If they abuse that licence by deliberately engaging in serious criminal activities.... then that is a factor capable of aggravating the seriousness of their crime."

The period to be added to the sentence starting point was left to the discretion of the sentencer, the determinant factor being the extent of the impact of the offence on the community. In *Shah Syed Arif* [2016], a drug trafficking case, the Court of Appeal approved an enhancement of 1 year of imprisonment to be added to the tariff sentence²⁵.

Father John Wotherspoon is a Prison Chaplain in Hong Kong. Many of the prisoners he supports and counsels are foreign drug traffickers serving lengthy prison sentences, particularly from Africa and South America.²⁶ Father John's 'campaign' was described by the Court of Appeal in 2016 in *HKSAR v. Odira Sharon Lensa* [2016] as follows:

[The] campaign has a number of elements to it. It firstly makes use of inmates' contact with their families and friends in their home countries. The inmates write to their relatives and friends and ask them to spread the message of not taking part in drug trafficking. Secondly, he uses the letters of inmates on his websites to reach a greater number of people via the internet. Thirdly, he travels to various countries and engages with government officials and the media to obtain further assistance in publicizing his anti-drug trafficking message.

Judges routinely allow a small reduction in sentence of a few months, where offenders have participated in Father John's program, which serves to publicize in offenders' own countries, the severe penalties for drug trafficking in Hong Kong. Thus,

²⁵ 8 years, 8 months.

²⁶ I interviewed Father John in July 2017.

participation in the initiative has been recognized as a mitigating factor.

Offenders who are able to prove that some of the drugs in their possession were for their own use, will also receive a small reduction from their sentence.²⁷

It is thus apparent that the principal elements of the sentencing regime for the offence of drug trafficking²⁸, have their origins in case law dating from the 1990s.

Summary of the sentencing guidelines and of the principal points arising from the sentencing case analysis

Lau Tak Ming [1990] revolutionised the sentencing process for drug traffickers by introducing sentencing guidelines based on the narcotic content of the drugs being carried. Whilst that case concerned trafficking in heroin, in 1991 (ice), 1994 (cocaine) and 2009 (ketamine and ecstasy) the Court of Appeal introduced tariff sentences based on the same principles for trafficking in other types of drugs. *Abdallah* (2009) prescribed an additional range for sentencing in large quantities of heroin and *Tam Yi Chun* [2014] applied the same tariffs for traffickers in large quantities of ice. *Abdallah* also introduced the concept of enhancement of sentence for the international element and *Chan Ka Yiu* (2018) provided

²⁷²⁷ See for example HCCC No. 217 of 2017.

²⁸ which will be discussed further in the chapter 4.

periods of enhancement for the international element for traffickers in ketamine.

The tariff sentence is regarded as *the starting point* and in Abdallah the Court recognized several factors that may aggravate the starting point and lead to additional periods of imprisonment, including the international element, previous convictions for drug trafficking, that the offender is an organizer, and that the offender was assisted by a minor. More recently [2016], a sentence may also be enhanced where offences are committed by asylum seekers, many of whom are South Asians.

Whilst in general terms personal mitigation is not of a great deal of assistance to the offender because of the seriousness of the offence, nevertheless a substantial reduction in sentence of up to one-third is available for a plea of guilty. A further reduction may also be allowed for providing information to the authorities about other offenders. Small deductions are sometimes allowed for participants in the Father John campaign, and where there is evidence that the offender intended to use some of the drug themselves. Although it does not occur often, occasionally where the offender is of *extreme youth*, a small reduction will be allowed.

'Extreme Youth' and Sentencing Children

Chart 7 [below] illustrates a quite alarming figure in respect of children i.e. persons under the age of 19, who were convicted and,

with three exceptions, sentenced to lengthy periods of imprisonment. Over the 6 year period there were 144 such offenders, and although that number represented only 7.3% of offenders where age information was available, it was still a significant and disturbing statistic. Two of the 93 young offenders were sentenced by the same judge²⁹ to a Training Centre³⁰, whereas the remaining 142 were sentenced to imprisonment.

In one other instance³¹, the judge allowed a significant reduction in sentence for “extreme youth.” That 16 year old Chinese offender pleaded guilty in July 2017 to trafficking in 69.95gms of cocaine. The tariff starting point for the offence was 8 years and 8 months. Because the offender pleaded guilty he received a 1/3 reduction for his plea reducing the sentence 5 years and 8 months, which would have been the sentence had he been older. The judge then took the exceptional measure of further reducing the sentence by 2 more years resulting in a sentence of 3 years and 8 months. As he was arrested in November 2016 and received the customary further 1/3 remission for good behavior he has already been released from prison. The case has now been reported in the law reports³² and is

²⁹ Respectively, in December 2012 and March 2014

³⁰ Orders made under the Training Centre Ordinance, Cap. 280, whereby young offenders between the ages of 14 and 21 may be detained for from 6 months to 3 years, and be subjected to training in a disciplined environment. According to reports presented in respect of the two young offenders mentioned in the findings, the average period of detention is about 18 months. When released the offender would be subject to supervision for up to 3 years.

³¹ HCCC 183 of 2017.

³² [2017] 4 HKLRD 505.

thus available as a precedent for the consideration of other sentencers of extremely young offenders³³.

The average sentence of imprisonment imposed on young offenders was 8 years and 8 months.

But what have the Courts in Hong Kong said about the sentencing of young drug traffickers? The Court of Appeal in *Lau Tak Ming* [1990] referred to the tendency of drug dealers to use the young, the old and the infirm *as middlemen* in the expectation that if they were caught, the sentencer would show some pity on them, and for that reason, as a general principle age, whether an offender is young or old, is not to be treated as a substantial mitigating factor. The Court did say however, that “*extreme youth may call for special consideration*”.

What is meant by *extreme youth*, then? In *HKSAR v. Law Ka Kit and Others*³⁴ [2001], the Court of Appeal was dealing with a 14 ½ year old offender sentenced to 10 years for armed robbery The Court said:

What is ‘extreme youth’ is not a matter of exact mathematics, although someone under the age of 15, as the second defendant [Law] was, falls within this category.

³³ The decision is not binding on other High Court judges of the same level as the sentence, but may be persuasive.

³⁴ CACC No. 97 of 2001, an unreported judgment of the Court of Appeal.

Even though the Court of Appeal considered Law to be of extreme youth his sentence remained.

Whether an offender is of extreme youth, it would appear, is a matter for the sentencer to determine on a case by case basis.

When considering the two purposes of lengthy sentences for drug offenders, namely, deterrence and punishment, sentencing a 16 year old to 16 years imprisonment [as occurred in HCCC 474 of 2014] certainly demonstrates that there will be no mercy shown to the young. On the other hand, a sentence of 16 years is significant punishment for the child, and this raises the issue of whether a sentence of such magnitude is proportional. It may be proportional to the harm done by the conduct, but Von Hirsch [2001: 221] argues that the threshold for proportionality should be lower for adolescents and young persons because they should be less culpable than mature adults, thus, the proportionate sentence imposed on a young person should be lower than that imposed on an adult.

Whilst the reasons for the policy concerning the sentencing of young offenders for drug trafficking have been clearly enunciated by the Courts, placing so much emphasis on deterrence and making little or no allowance for the rehabilitation of young immature

offenders, as opposed to older offenders who are more aware of the consequences of their conduct, appears disproportionate³⁵.

Training Centre Orders for young offenders would seem to be a viable alternative to a lengthy prison sentence, as inmates are expected to continue their education by attending classes each day, and also undertaking training in a variety of trades, such as plumbing, electronics and carpentry.

III. Analysis of the offender population: sentences, offences and offenders

This section covers the analysis of the sentenced offender population. It consists of two parts. The first is a brief description of the way that drug case numbers and types, convictions and guilty pleas, and offender demography varied across the six years of the study period. The second and by far the largest and most detailed, is a description of sentences and how these vary by drug type, offender role and plea and then the resulting distributions for different demographic and ethnic groups.

Since there is a population of convicted drug offenders for the years 2012-2017, descriptive statistics such as means and percentages are cited for comparison and for measuring effect sizes. Cohen's *d* and Cramer's *v* are also used to indicate effect size or importance of differences between groups. Cohen's *d* may

³⁵ Von Hirsch [2001]

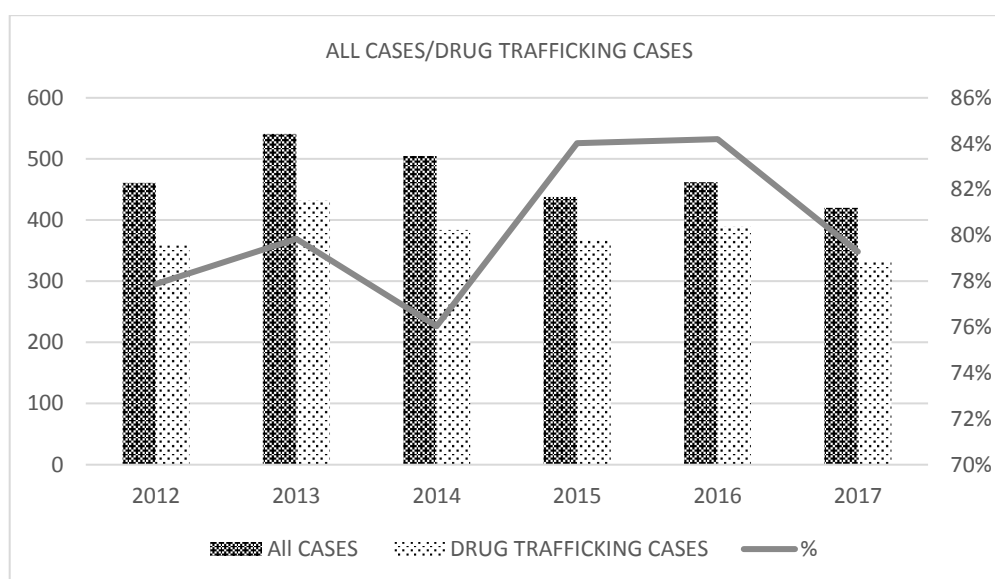
generally be interpreted as follows: $d=0.2$ indicates a small effect size, $d=0.5$ a medium, and $d=0.8$ a large effect size. Cramer's v is used for cross-tabulations with > 1 degree of freedom and is interpreted in a similar way to Cohen's d but on a scale that ranges between 0 and 1.0.

However, both significance test results and effect size measures are cited in the text, in order to address concerns that the former ought also be included.

A comparison of the data year-by-year.

Of the 2,827 cases committed to the High Court in the years 2012-2017, which resulted in one or more offenders being convicted of one or more criminal offences, 2,265 or just over 80% of all cases resulted in offenders being convicted of trafficking in dangerous drugs. Fig. 1 shows the percentage of all conviction cases, that were drug trafficking cases.

Fig. 1.



Apart from the trafficking cases, there were a few cases, less than 12 over the 6 year period, in which the offenders were convicted of the more serious offence of manufacturing dangerous drugs and thus sentenced to even higher sentences. Occasionally an offender was convicted by a jury of the less serious offence of possession of dangerous drugs [for their own use] having contested the trafficking charge; these offenders were sentenced to relatively short periods of imprisonment. For the purposes of this analysis, those cases have been disregarded.

The incentive to plead guilty

The 2,265 drug trafficking cases encompassed the convictions of 2,387 offenders. Of the 2,387 offenders convicted of the offence over the 6 year period, 228 or 9.5% chose to plead not guilty and were convicted after trial by jury.

The substantial reduction in sentence for a plea of guilty is a strong incentive for offenders not to contest cases.

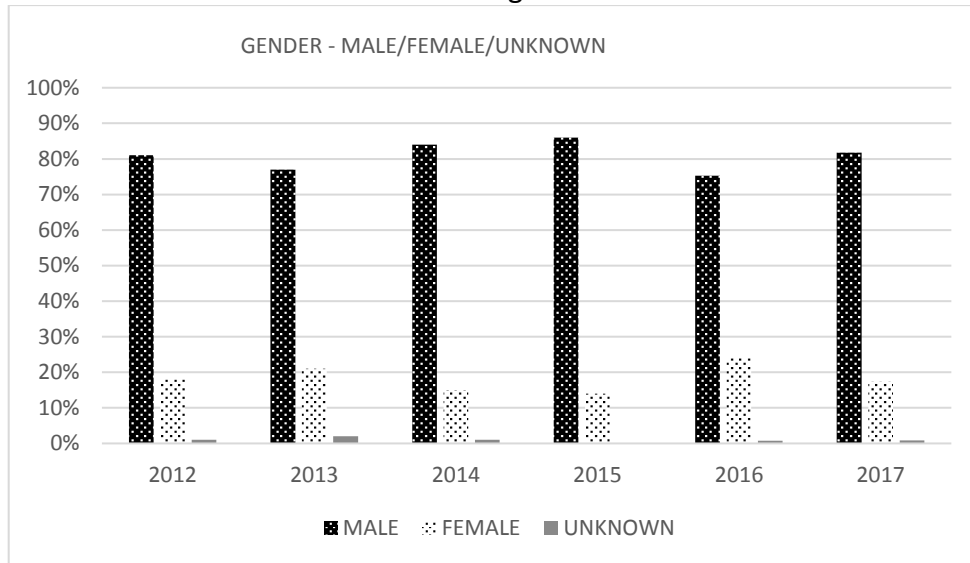
Fig. 2.



Role, Gender and Ethnicity of Offenders

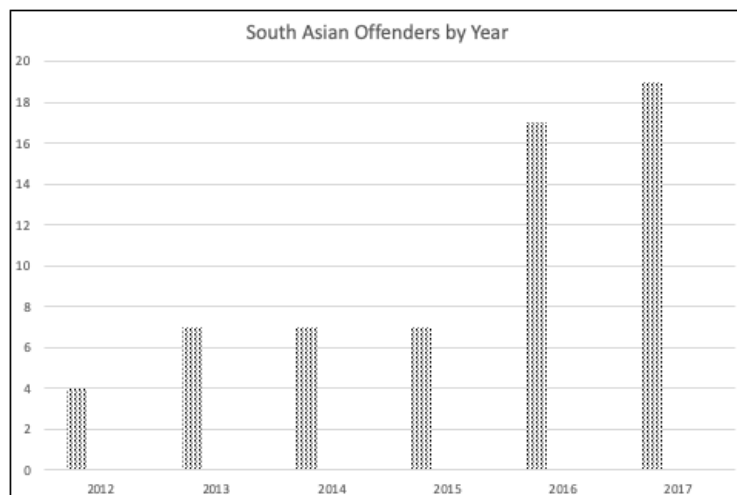
The proportions of male to female offenders have remained fairly constant over the years, as the following chart illustrates.

Fig. 3.



The numbers of South Asian offenders have increased notably in recent years, almost tripling in 2016-17 compared with earlier years (Fig. 4). Many of these were asylum seekers, which has now been recognized as an aggravating factor resulting in an enhancement in sentence.

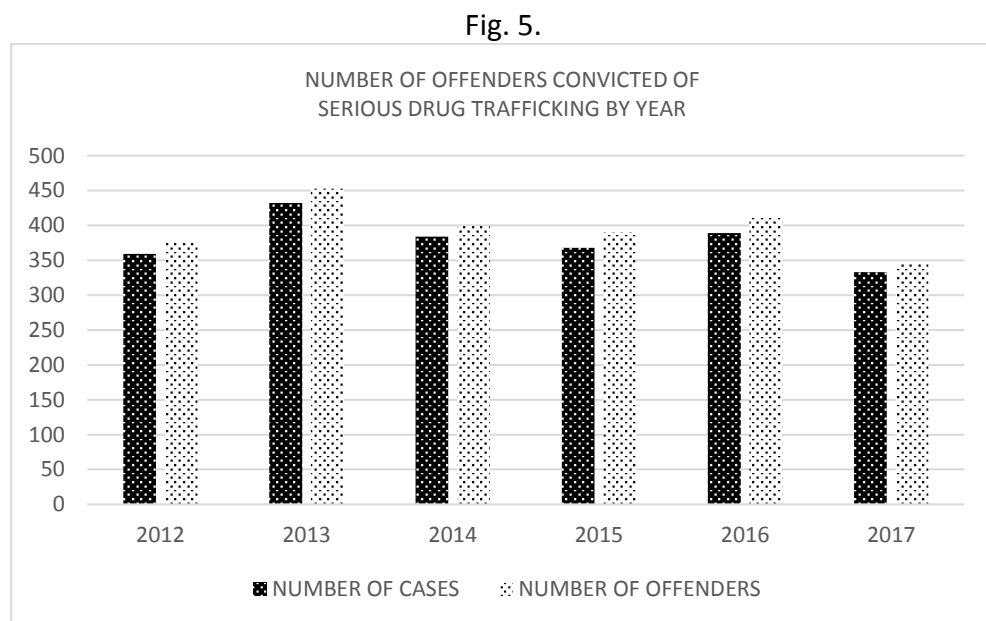
Fig. 4.



The role, gender and ethnicity of offenders are discussed in detail in the next section.

Number of serious drug trafficking cases each year

Fig. 5 shows the number of cases where one or more offenders were convicted of serious drug trafficking during the years 2012-2017.



This data establishes that apart from 2013, when there appears to have been a significant increase in drug trafficking cases resulting in offenders being convicted in the High Court, the numbers of such cases and offenders have been reasonably stable.

Types of Drugs transported, year by year

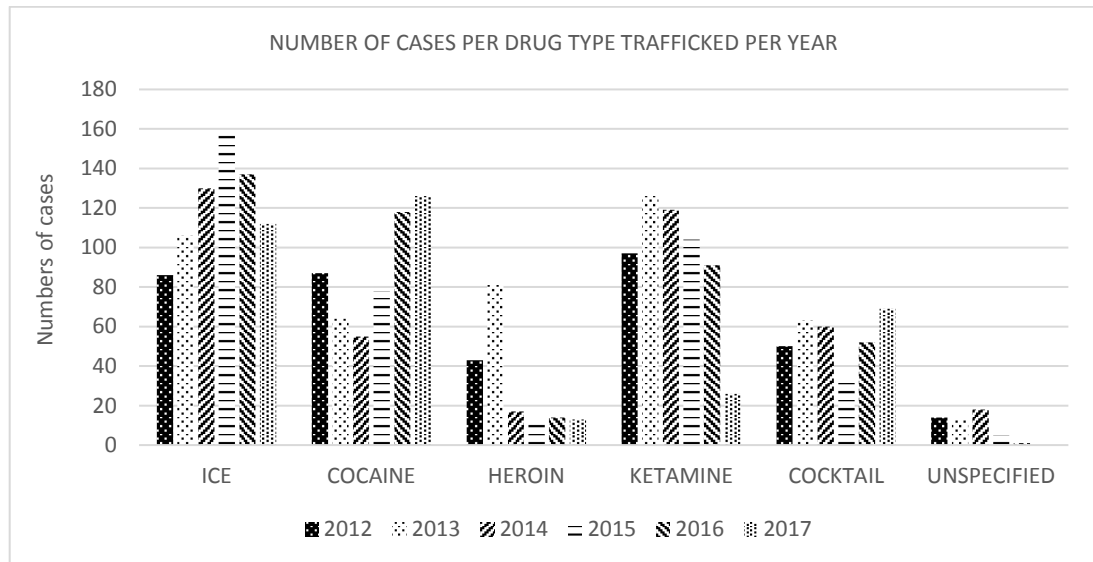
Over the 6 year period ice was the drug transported by most offenders, although ketamine and cocaine were also prevalent. For

2017 there were actually a few more convictions for trafficking in cocaine than in ice.

The popularity of heroin has dropped over the years but it remains a problem, and the popularity of cocaine continues to grow (Fig. 6). Some offenders trafficked in different types of drugs. In sentencing in such cases, the sentencer usually adopted a combined approach, as occurred in *HKSAR v. Wong Kin Kau* [2010], where the offender had significant quantities of both Ketamine and Cocaine.

Fig. 6. Provides a breakdown of the numbers of each type of drug trafficked by offenders over each of the 6 years.

Fig. 6.



IV. Detailed analysis of the Data

The major objectives of the study are to understand the variations in the severity of the sentences imposed on offenders committing

serious drug trafficking offences in Hong Kong and to assess how the demographic, ethnic and offence characteristics [drug type] of drug offenders relate to the lengths of sentences. By these means, the study also aims to assess how the sentencing guidelines in Hong Kong translate, in practice, into sentences of varying lengths and punitiveness for drug offenders of differing demographic and ethnic status, having regard to differences in the roles of offenders, the types of drugs transported and the pleas entered.

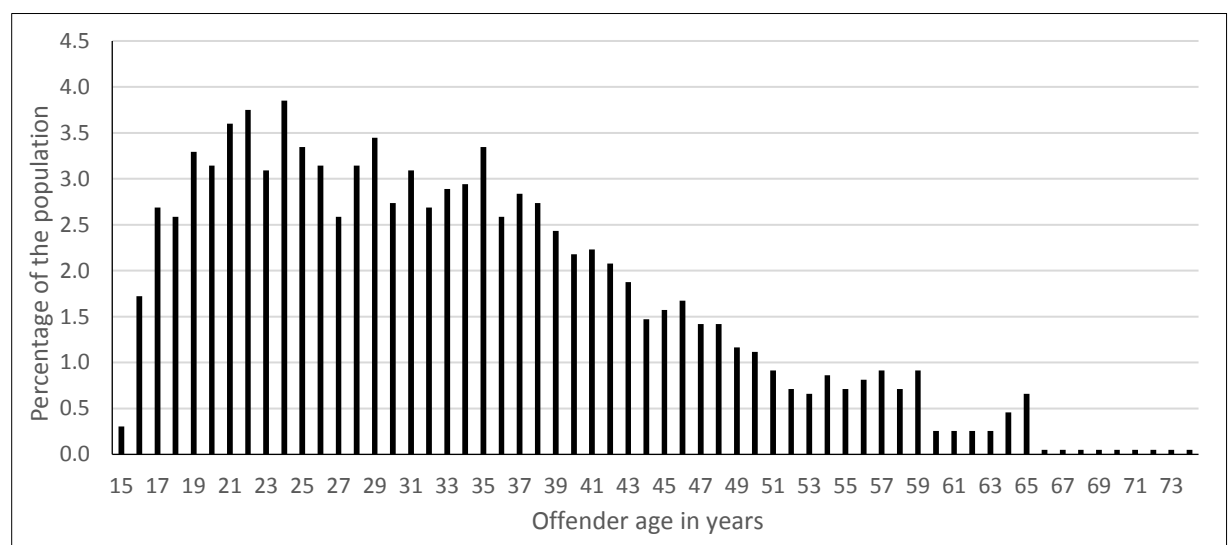
The analyses of the findings are considered in the following order:

- the description of demographic status and ethnicity of drug offenders;
- the description of offence characteristics measured by drug type and offender's role (whether local courier, foreign courier, storekeeper or organiser), together with their pleas of guilty or not guilty;
- a consideration of the relationships between offenders' demographic and ethnic status, on the one hand, and offence and plea characteristics;
- lengths of sentences are described and the ways they differ according to offender role, drug type and plea are investigated;
- finally, the relationships between demographic and ethnic characteristics and offence characteristics, on the one hand, and sentence length on the other are considered.

Demographic status and ethnicity of drug offenders

Of those convicted of serious drug trafficking offences, Males were dominant, accounting for 81% of all offenders. The average age of offenders was 33.4 years ($n=1958$) and this did not differ between females and males, as confirmed by the small effect size ($F=.27$, $p=.60$, $df=1,1956$; Cohen's $d=.03$, 95% C.I. = $-.083 - 0.14$). Age was skewed towards younger adults, particularly those under 43 years of age (Fig. 7). Children under 19 years of age constituted only 7.3% of offenders, while at the other end of the age spectrum, those over 60 years made up only 3%.

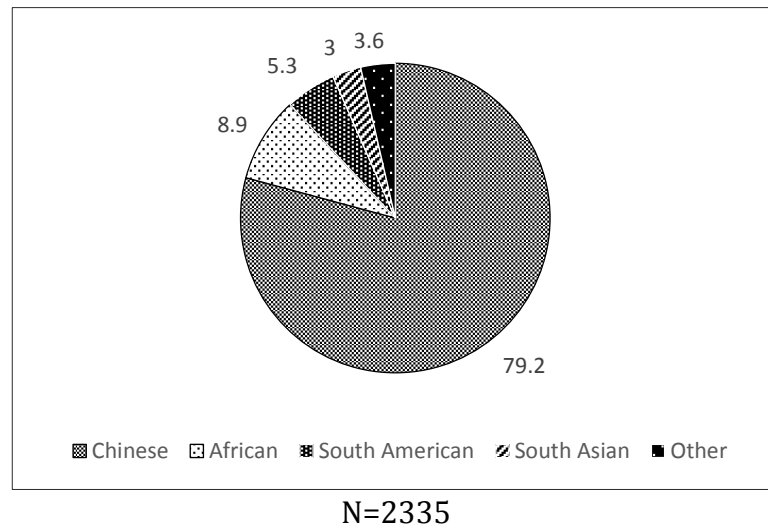
Fig. 7. Distribution of offenders' ages



N=1958

As expected, the majority – 79% of the offenders, were ethnic Chinese (Fig. 8). Africans constituted the largest other group (9%, Fig. 8) with South Americans and South Asian Offenders from India, Pakistan, Bangladesh and Sri Lanka making up most of the others.

Fig. 8. Offender ethnicities (figures are percentages)



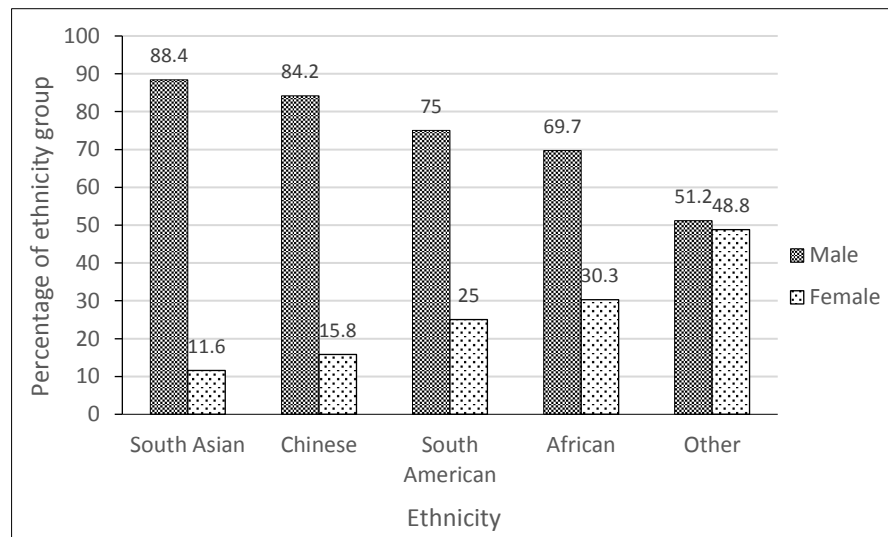
Offender gender differed by ethnicity with a medium effect size (Chi-square=84.6, $p<.001$, $df=4$, Cramer's $v=.19$, $n=2335$; Cohen's $d=.39$, C.I.= .31 - .47). Fewer South Asian than Chinese offenders were females whereas there were more female offenders among South Americans and Africans (Fig. 8); almost half of 'other' offender ethnicities were female.

Chinese and South Asians with average ages of 33 and 32 years, respectively, were younger than Africans, who averaged 37 years and South Americans averaging 39 years; 'other ethnicities' were also older averaging 37 years of age ($F=11.4$, $p<.001$, $df=4,1958$; Cohen's $d=-.035$, C.I.= -.47 - -.23).

Although, in general, the average age of 33 years did not differ between genders ($F=.27$, .60, $df=1, 1956$;), it differed significantly between genders when controlling for ethnicity ($F=11.1$, $p<.001$,

df=4, 1944; Cohen's $d=-.034$, C.I. $=-.46 - -.22$). South American men were older than South American women (41 cf. 33 years), and while both African genders were older, males were also older than women (38 cf. 35 years). Similarly, South Asian males were older than South Asian females (33 cf. 28 years), and these females were the youngest offender ethnic group. Chinese gender age differences were, by contrast, small, with males averaging 32.8 and females 32.4 years.

Fig. 9. Gender differences for the ethnic groups



Only 7.3% of offenders were children (defined as <19 years of age). All but one offender were Chinese. Whereas 8.8% of Chinese were children, only 0.2% of foreign offenders were (Chi-square=30.7, $p<.001$, 4df, Cramer's $v=.13$, $n=1964$; Cohen's $d=.25$, C.I. $=.16 - .34$). Fewer children than adults were female, only a tenth compared

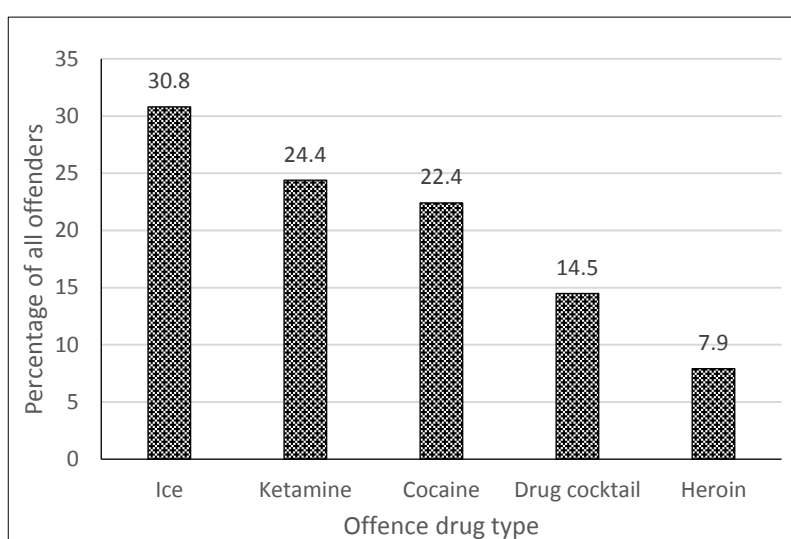
with a fifth of adults (Chi-square=8.6, $p=.003$, 2 df., Cramer's $v=.07$; Cohen's $d=.13$, C.I.=.044 - .22).

Therefore, the drug offender population is characterised as younger, male adults with Chinese the majority. More children than adults are male, while, apart from South Asians, more foreign offenders are female. South Americans and Africans are older, a reflection in particular of older male offenders present in these groups.

Offence characteristics: drug types and roles

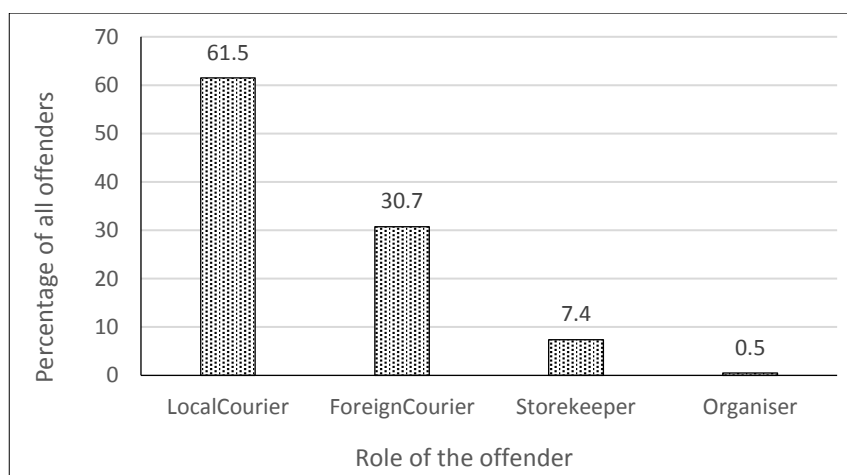
The drugs involved in the drug offences are shown in Figure 10. Ice was the drug most frequently involved in 31% of offences, whereas ketamine and cocaine together constituted less than a quarter each. Drug cocktails featured less and heroin even less than drug cocktails. In terms of the offender's role in transporting drugs (Fig. 11), over 92% were couriers, with local couriers outnumbering foreign couriers caught importing drugs into Hong Kong or attempting to export drugs from Hong Kong 2 : 1. Offenders prosecuted for more 'senior' roles were rarer with relatively few storekeepers and a handful, only 0.5%, organisers. This may in part reflect the greater difficulties police and customs officers experience in catching those who organize and manage the distribution of dangerous drugs resulting in their being fewer in number.

Fig. 10. Importance of different drug types



Different offender roles are linked with different drug types to a notable extent (Fig. 11. $\chi^2=447.9$, $p<.001$, 12 df, Cramer's $v=.25$;).

Fig. 11. Importance of different offender roles

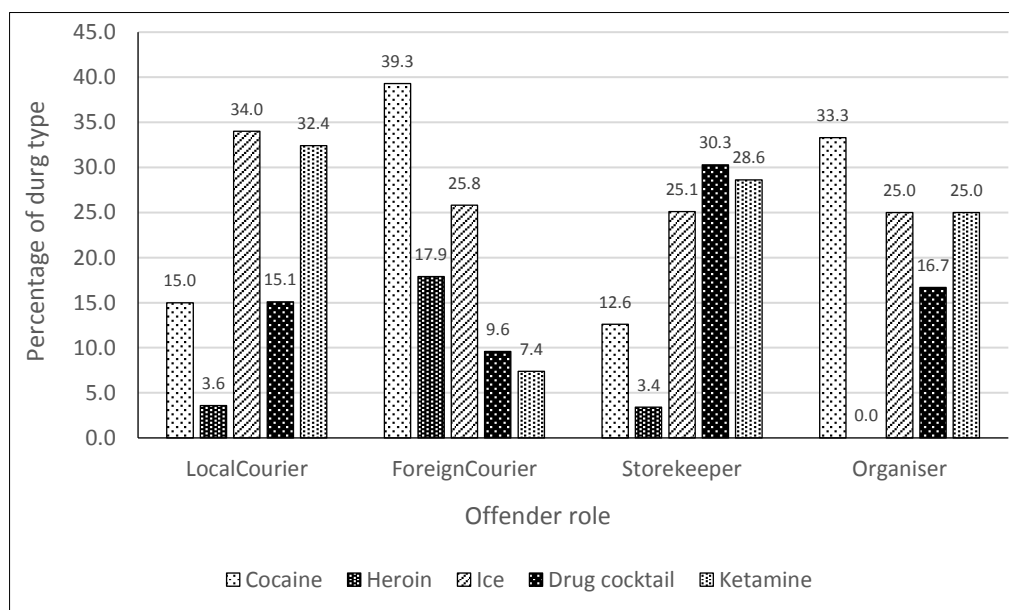


N=2374

Among the couriers who dominate the drug offender population, offences involving local couriers more often involve ice and ketamine whereas foreign couriers' offences involve ice and

cocaine. Offences by Storekeeper offenders correspond with offences committed by local couriers in that for them ice and ketamine are of greater importance but, in addition, they also may store a variety or cocktails of drugs. The drugs associated with organisers overlap with both local and foreign couriers' drug types, involving cocaine as well as ice, ketamine and drug cocktails; only heroin did not feature, possibly a reflection of the exceptionally low number of offenders who are organisers and the reducing popularity amongst users of heroin overall, particularly in recent years (Fig. 12).

Fig. 12. Proportions of offences with different drug types for different offender roles

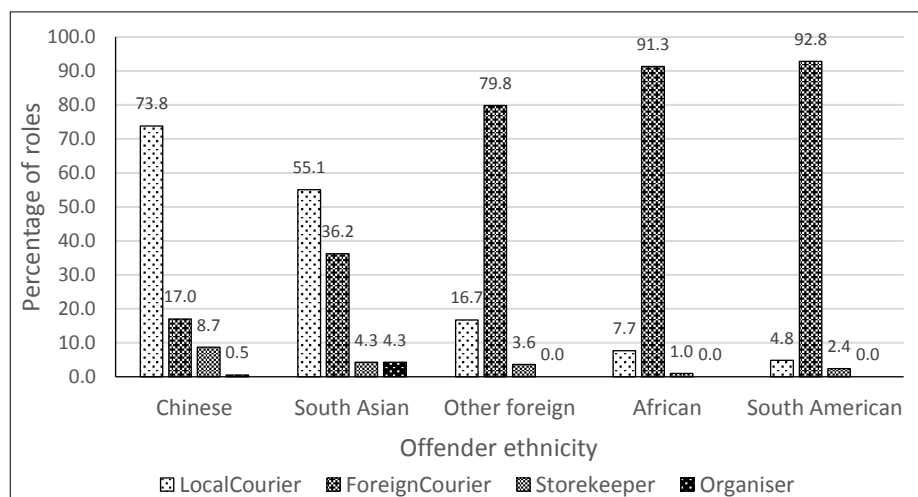


Ethnicity and drug type, role and plea entered

Ethnicity was strongly related to offender drug type, role and the plea entered.

In terms of the role of the offender in the drug chain, more Chinese offenders were local couriers whereas more Africans, South Americans and other foreign nationals were foreign couriers (Fig. 13; Chi-square=875.3, $p<.001$, 12 df., Cramer's $v= .35$). More South Asians were local than foreign offenders but this ethnic group comprised both, due not only to the fact that some live lawfully in Hong Kong, but also to the increased involvement of asylum seekers, many of whom are from South Asia, becoming involved in drug trafficking, as well as those recruited from abroad to import drugs into Hong Kong. All organisers are Chinese and South Asians, and twice as many Chinese as other ethnic groups were storekeepers (Fig. 13).

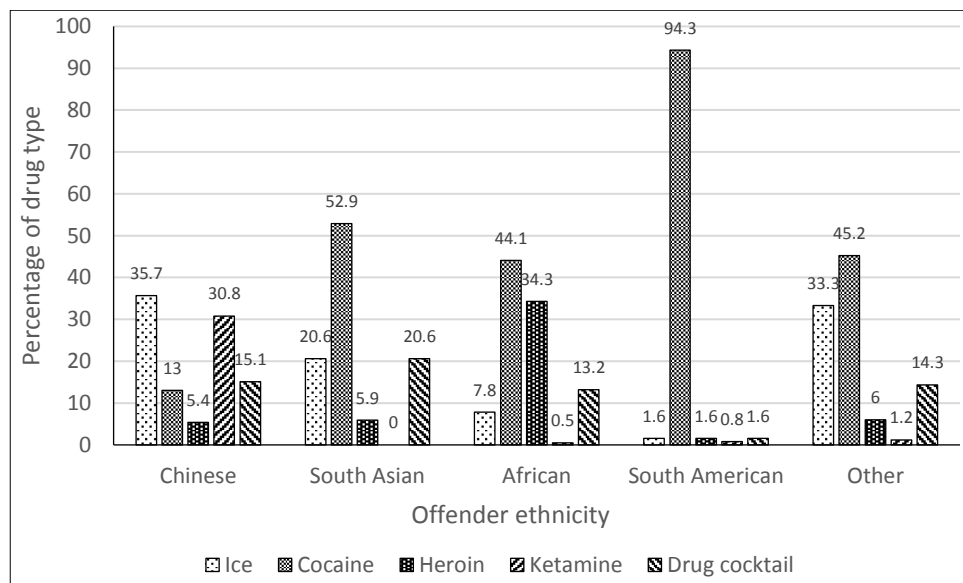
Fig. 13. Importance of offender roles by ethnic group



Different ethnic groups were prosecuted for trafficking in distinctly different types of drugs or combinations of drugs (Fig. 14; Chi-

square=900.6, $P < .001$, $df = 16$, Cramer's $v = .31$). Chinese offenders were particularly involved with ice and ketamine, and South Asians with cocaine but also ice and ketamine, reflecting their mixture of roles as local and foreign couriers. South Americans dealt almost exclusively with cocaine, African offenders transported cocaine and heroin, while other foreign nationals were involved with ice and cocaine. Relatively smaller proportions of Chinese and African offenders and other foreign nationals were convicted of trafficking in drug cocktails.

Fig. 14. Offender drug types by offender ethnic status



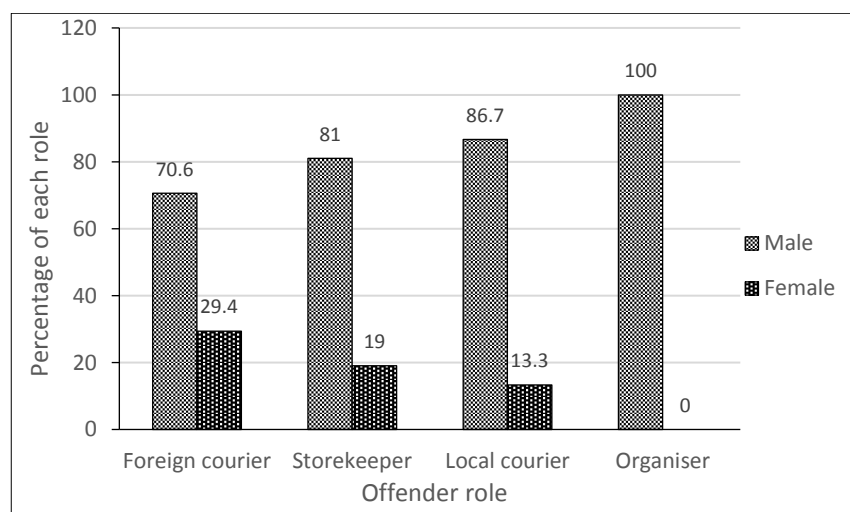
Demographic status and drug type, role and plea

While there was no difference in plea between the genders, there were some marked differences in role (Fig. 15; Chi-square=85.1,

$p < .001$, 3 df; Cramer's $v = .19$) and in drug type (Fig. 16; Chi-square = 42.5, $p < .001$, df = 3; Cramer's $v = .13$).

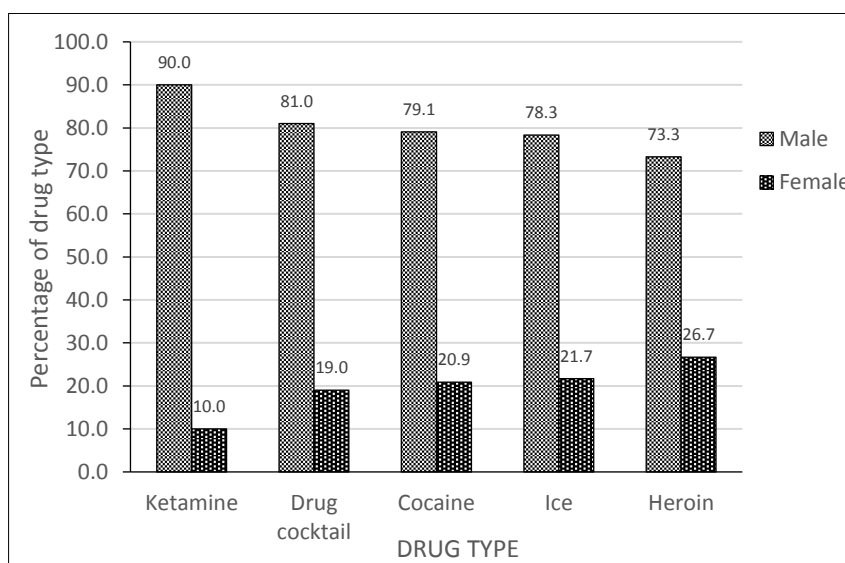
Foreign courier was the role with the highest proportion of female offenders (Fig. 15), over twice that of local couriers. Almost a fifth of storekeepers were female but, in marked contrast, no organisers were female (Fig. 15). If the gender of offenders reflects the way the different genders are employed in the illegal drugs trade, then females are poorly represented among the most common local and most senior tasks. Hence, the drug trade is an overwhelmingly male endeavour in Hong Kong.

Fig. 15. Gender by offence role



The involvement of the genders with the trafficking of different drug types varied (Fig. 16). While all drug trafficking is male dominated, there are fewer than the average of women involved in the supply of ketamine and somewhat above the average for trafficking in heroin.

Fig. 16. Drug type by gender



Offenders who pleaded not guilty were rather older ($F=18.8$, $p<.001$, $df=1,1969$; Cohen's $d=0.34$, C.I. = .19 - .49), averaging 37 years of age compared with only 33 years for those who entered guilty pleas. However, there was no difference in plea between children (<19 years) or adults (Chi-square=1.90, $p=.17$, $n=1972$, Cramer's $v=.03$; Cohen's $d=.07$, C.I. = -.02 - .16). Not guilty pleas were associated with markedly shorter sentences – as measured by Cohen's effect size - ($F=522.6$, $p<.001$, $df= 1, 2382$; Cohen's $d=1.54$, C.I.= 1.40 – 1.68), an average of 7.9 years compared with 9.5 years for those who pleaded guilty, which is surprising having regard to the substantial sentencing discounts available for pleading guilty. This can be rationalised on the bases that the number of offenders who pleaded not guilty is less than 10% and the majority of those trafficking in the larger quantities of dangerous drugs pleaded guilty.

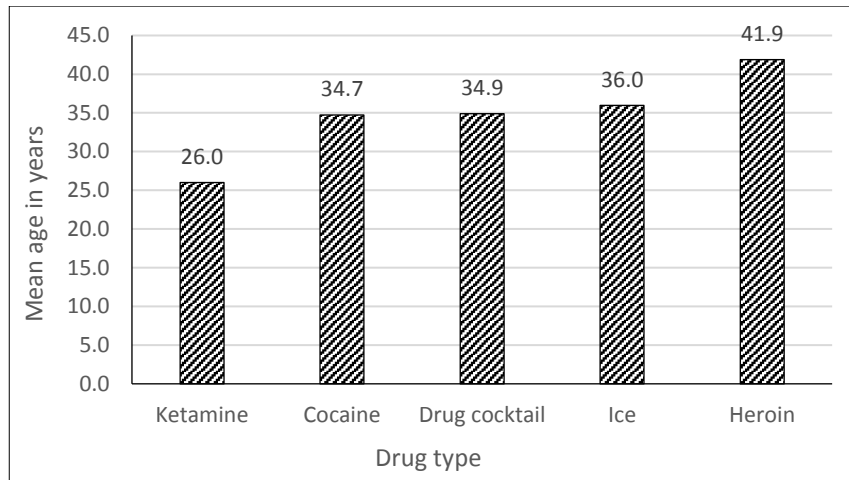
The role of the offender and the type of drug trafficked also distinctively differed by age and whether or not the offender was a child. Foreign couriers averaged over 37 years of age and stood out as being older than offenders in other roles (Fig. 17).

Fig. 17. Offender age by role



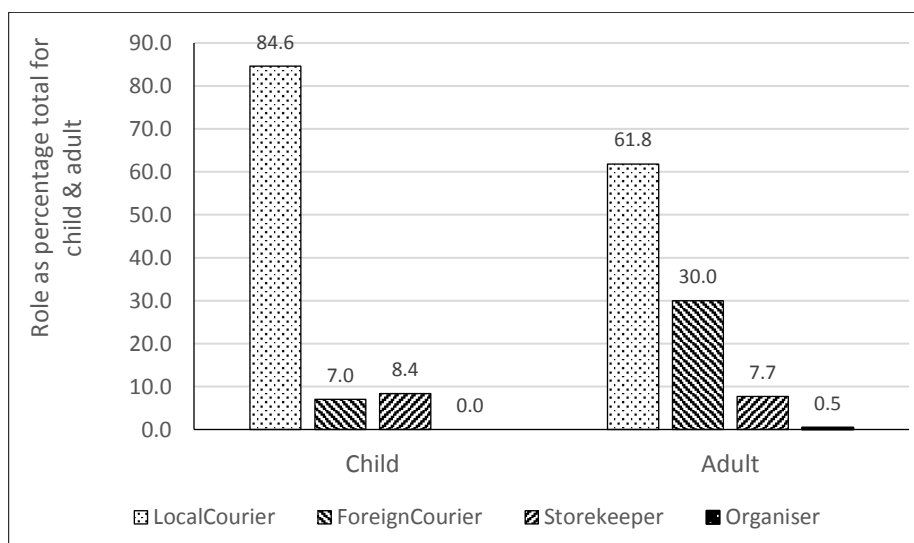
Offenders trafficking in ice and particularly heroin were older, averaging 36 and 42 years respectively, whereas ketamine-linked offenders were markedly younger at 26 years of age (Fig. 18), which is perhaps reflective of ketamine being a popular drug among younger local Chinese traffickers, who were younger, and ice and heroin offences more often connected with foreign nationals, who were older, importing drugs. Offenders convicted for trafficking in cocaine and drug cocktails were aged in between these and averaged c. 35 years.

Fig. 18. Offender age by offence drug type



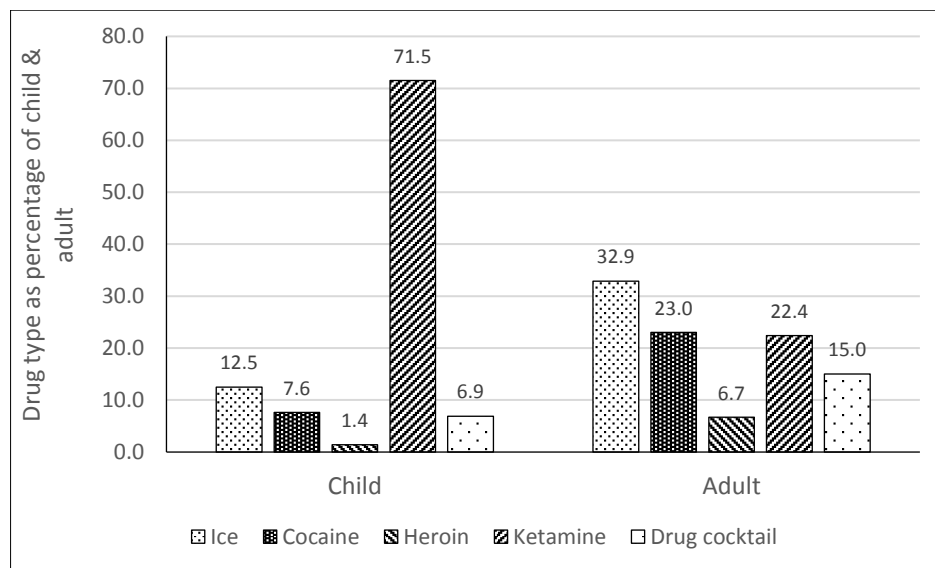
Children were employed to a far greater extent as local couriers, with only 15% compared with 38% of adults carrying out other roles (Fig. 19). Children and adults were equally likely to be storekeepers but far more adults were foreign couriers and, although the total number was small, all organisers were adults (Fig. 19).

Fig. 19. Offender roles for children and adults



Children were involved with trafficking in notably different drug types from adults (Fig. 20), with ketamine predominant for children. In contrast, for adults, there was a striking variety of different drugs, with ice and cocaine as important as ketamine, and drug cocktails and heroin also featuring more strongly (Fig. 20).

Fig. 20. Comparison of drug types for children and adults

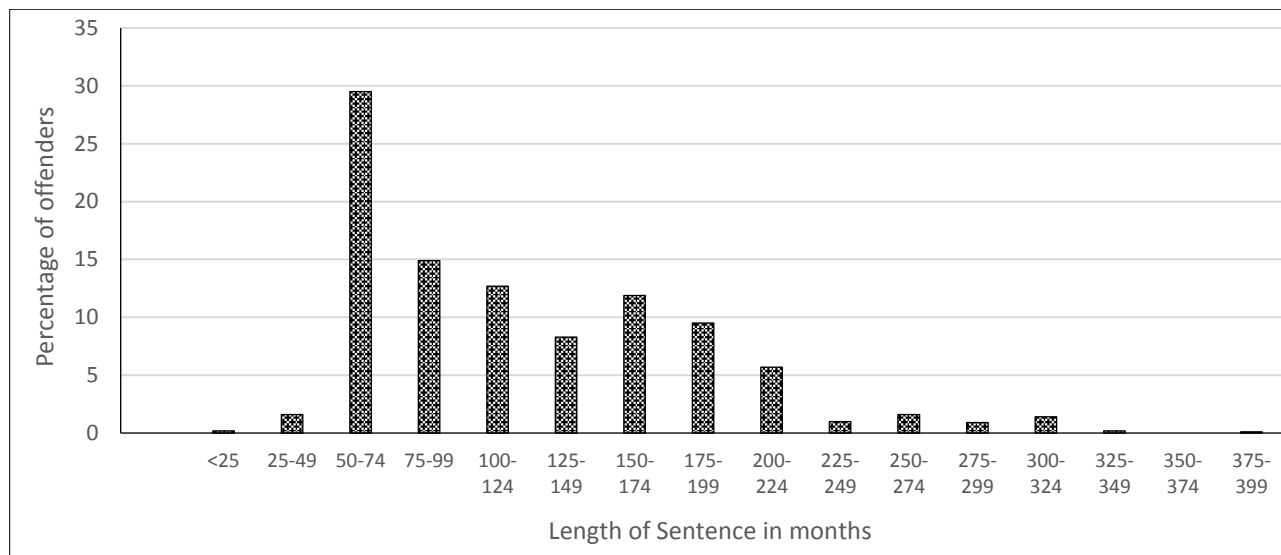


Sentence length & drug offences

The average sentence length was 122.7 months or over 10 years and 2 months (Fig. 21). The minimum was 12 months and the maximum 444 months or 37 years. Fig. 15 shows that almost 30% of offenders were sentenced to between 25 and 74 months (c. 2-6 years) whilst most of the others were given sentences ranging between 75 and 224 months (c. 6 to almost 19 years). Just over 5%

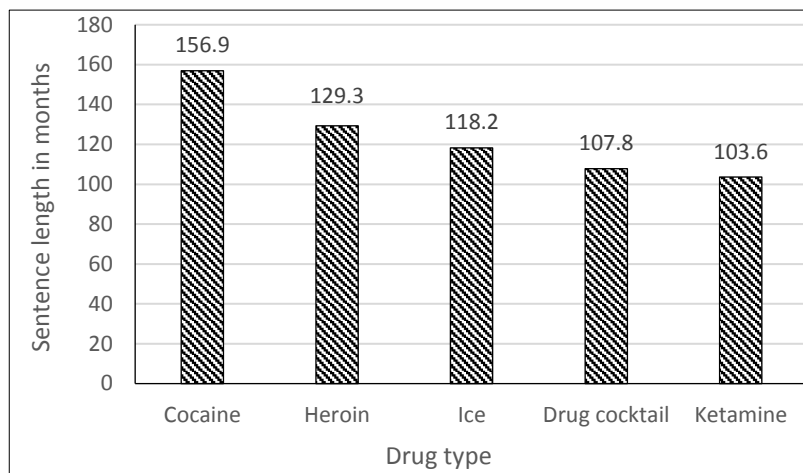
of offenders receive longer sentences of up to 444 months or 37 years. This may be regarded as reflecting a punitive sentencing regime.

Fig. 21. The distribution of lengths of sentences



As expected, sentence length differed according to the type of drug involved in the offence though with a small effect size (Fig. 22; $F=63.0$, $p<.001$, $df=4$, 2371; Cohen's $d=-.11$, C.I. = $-.19 - -.02$). Cocaine attracted notably longer sentences than heroin, 157 cf. 129 months, which, in turn, exceeded those for ice which averaged 118 months. Drug cocktails and ketamine sentences were not dissimilar at 108 and 104 months, respectively. That cocaine sentences were generally higher is likely to be reflection of the fact that cocaine traffickers were often foreign couriers, and thus their sentences would be enhanced.

Fig. 22. Length of sentence for different drug type offences

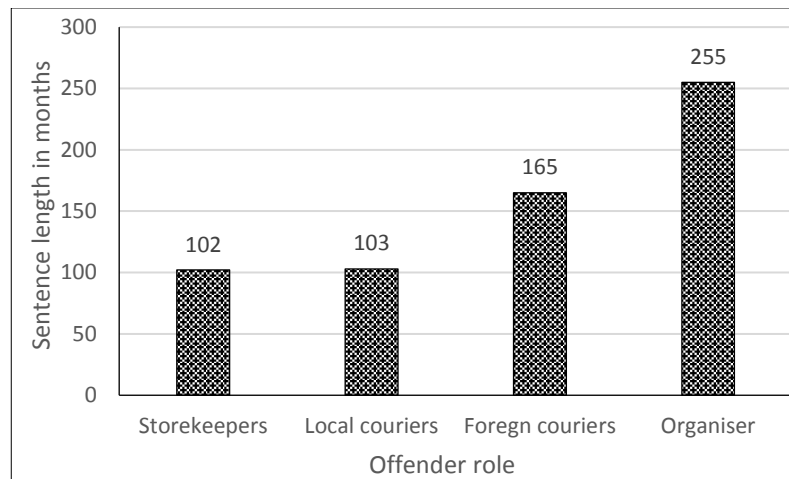


There were very marked differences in the lengths of sentences depending on the role of the offender in the offence (Fig. 23; $F=222.4$, $p<.001$, $df=3,2377$; Cohen's $d=-.90$, C.I. $=-.98 - -.81$). Foreign couriers were given far longer sentences than local ones (mean=13.6 cf. 8.6 years), which is consistent with the process in which the sentences of foreign couriers are enhanced for the international element. The sentences imposed on storekeepers were similar (8.5 years mean), which is consistent with the tariff cases, where the Court of Appeal has drawn little distinction between couriers and storekeepers. Organisers, as expected, had exceptionally long sentences which averaged 21.25 years.

Although both drug type and offender role were related to sentence length, the latter, particularly relating to whether the offender was a foreign or local courier, was far stonger than the type of drug (role, Cohen $d= -.90$ compared with drug type, $d= -.11$), role having a very large effect size and drug type a small effect. This

confirms that sentences are, to an important degree, shaped by the offender role and the higher tariffs for foreign offenders connected with the Appeal Court concern to deter trafficking, especially that connected with imports into Hong Kong.

Fig. 23. Sentence length by offender role



Sentence length was also notably longer for offenders who entered not guilty pleas ($F=524.6$, $p=.000$; $df=1$, 2382, $\text{Eta squared}=.43$; Cramer's $v=.61$, Cohen's $d=1.54$, $C.I.=1.40 - 1.68$), a reflection, in part, on the failure of the offender to benefit from the sentencing discounts attributable to admissions of guilt. The relatively small subset of 10.4% offenders who pleaded not guilty received sentences of 203 compared with 114 months for those who pleaded guilty. It was striking that organisers were markedly more likely to plead not guilty than all other offenders ($\text{Chi-square}=58.1$, $p<.00$, $df=3$, Cramer's $v=.15$). Their not guilty pleas will have added to sentences that would, in any case, be expected to be lengthier, given their role.

Offenders trafficking cocaine and ice were slightly more likely to plead not guilty (12% compared with 8% for other drug types) (Chi-square=11.4, $P=.02$, 4 df, Cramer's $v=.07$), though this is likely to reflect the significant association between drug type and the role of the offender, noted above.

There was a weak association between plea and drug type (Chi-square=11.4, $p=.02$, $df=4$, Cramer's $v=.07$); rather more offenders prosecuted in connection with ice and cocaine pleaded not guilty compared with other drug types, 12% compared with 8% for other drugs. However, as noted above, strikingly higher proportions – 75% of organisers pleaded not guilty compared with only 10% of offenders in other roles (Chi-square=51.1, $p<.001$, $df=3$, Cramer's $v=.16$).

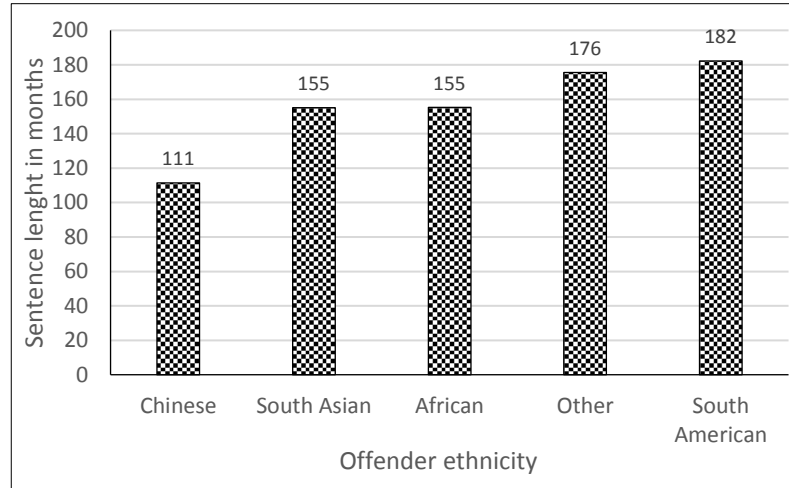
Demographic status, ethnicity and sentence length

The objective here is, having regard to the distinctive relationships between length of sentence and offence characteristics (drug type and offender role) and plea differences and the links between these and demographic and ethnic status, to determine how sentence lengths and thereby punitiveness differs between offenders of varying demographic and ethnic status.

While sentence length hardly differed between males and females (respectively, means=10.2 cf. 10.7 years; $F=2.3$, $p=.07$, $df=1,2325$;

Cohen's $d=.10$, C.I. $=-.01 - .20$), there were differences in terms of age, whether the offender was a child or an adult, and by ethnicity (Fig. 23; $F= 83.7$, $p<.001$, $df=4$, 2356; Cohen's $d=-.90$, C.I. $=-1.01 - -.80$). Chinese nationals who were more involved as local couriers, a role which attracted shorter sentences, received notably shorter sentences. South Americans and 'other' nationals, more involved as foreign couriers, were given far longer sentences; in the case of South Americans, 64% longer. Even the sentences of Africans and South Asians were 40% longer than Chinese offenders' sentences. In part, this also reflected the greater tendency of Chinese offenders to plead guilty, which attracted significant reductions in sentence.

Fig. 24. Length of sentence by ethnicity

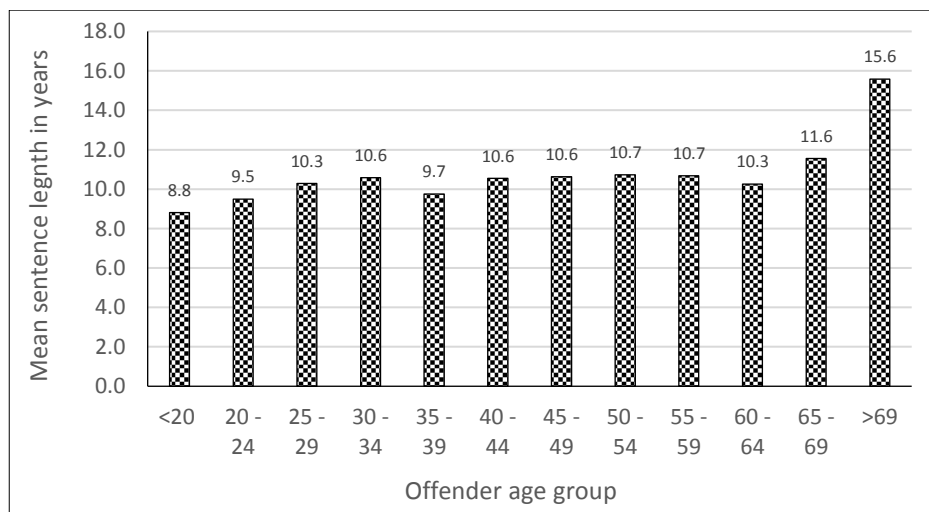


In relation to age, children received rather shorter sentences than adults ($F=11.8$, $p=.001$, $df=1$, 1969; Cohen's $d=.30$, C.I. $=.13 - .47$), again a reflection of almost all children being Chinese and acting as local couriers and less often as storekeepers. The average sentence

for children was only 84% as long as that for adults, a mean of 8.6 years compared with 10.2 years.

Sentence length varied by offender age (Fig. 25; $F=2.9$, $p=.001$, $df=11$, 258), and, overall, there was a weak positive correlation between age and sentence length (Pearson $r=.09$, $p=.01$, $n=1972$). However, the low correlation reflects a varying trend of sentence length with age. The very oldest offenders (69 – 75 years of age) had the longest average sentences of 15.6 years whereas those under 20 years had the shortest, at 8.8 years a little over half as long. However, for the age groups in between, many age groups had average sentences of c. 10.3 – 10.6, while for offenders aged 35-39 years, this fell to only 9.7 years (Fig. 25).

Fig. 25. Mean years sentence by offender age group



Summary of findings from a detailed analysis of the data

Sentences are long due to a generally Judiciary-led culture in Hong Kong wherein sentencers impose punitive sentences as a deterrent in accordance with the strictly applied guidelines specified by the Court of Appeal, according to offenders' roles in trafficking in drugs, the types and quantities of drugs and whether or not the offender pleaded guilty, so that, despite lengthy sentencing, there are variations in punitiveness, with some offenders receiving notably longer sentences than others.

It is, of course, not possible to assess whether or not, there would be fewer drug offences as a result of these lengthy sentences with the research design and the data presented in this thesis, nor is this an aim of this study. The major objectives in this study were to assess the extent to which sentence length varied, to assess the principal factors that these variations reflected, and in particular, to determine the ways in which offenders' demographic and ethnic status interacted with offence characteristics and plea status to shape the pattern of drug sentencing in Hong Kong, given the tariffs being used to guide sentencing.

The demographic profile of convicted drug offenders varied. It was dominated by males (81%), by persons of Chinese ethnicity (79%) and had an average age of 33 years, which did not differ between men and women. More females were of foreign ethnicity, especially South Americans and Africans and 'other' foreign

nationals which included offenders from other parts of Asia and a few Europeans.

Foreign couriers carried especially cocaine, heroin and ice, whereas local couriers traded in ice and ketamine. Foreign nationals were particularly foreign couriers, especially the South Americans, whereas the Chinese were especially local couriers. South Asians engaged in drugs as both local and foreign couriers. South Americans particularly transported cocaine; the Chinese were involved in most types of drug but especially ice and ketamine; Africans dealt particularly in cocaine and heroin.

More foreign couriers were female and older whereas more local couriers were male and younger. Females, given their nationality and role as foreign couriers, dealt more in heroin and ice, whereas males, being Chinese and local couriers, dealt more in ketamine. More children were Chinese and local couriers, adults were more often foreign couriers. Children mostly trafficked in ketamine, adults various drugs. More Chinese than other ethnicities also made guilty pleas.

Sentences were lengthy, averaging 10.2 years. Whereas 30% were 2 to 6 years in length, the bulk of sentences were within the range of 6 to 19 years; the most punitive 5% were longer than this and up to a maximum of 37 years. Storekeepers and local couriers had shorter sentences whereas foreign couriers and organisers had far

longer ones, with foreign couriers 63% higher and organisers 2.5 times higher than the average local courier. Cocaine and heroin traffickers attracted the longest sentences partly because foreign couriers are dealt with more punitively in having their sentences enhanced for the international element, whereas those trafficking in ketamine and cocktails of drugs were given the shortest sentences, partly due to the type and quantity of drug itself and partly because they were more often local couriers. From an ethnicity perspective, Chinese, more of whom pleaded guilty, received the shortest sentences and South Americans the longest sentences, although it was the role of the offender, and the type of drug, and the plea that contributed to this result. Children received shorter sentences, the elderly the longest, though there was, otherwise, only a weak relationship between sentence length and offender age.

V. Analysis of the international survey of drug sentencing in other places.

The principal objective of this part of the study is to assess whether drug sentences in Hong Kong are more, less or of similar length to other countries that do not use the death penalty for drug offenders. Of the 47 surveys sent to Prosecuting Agencies around the world, representatives of 18 agencies responded. The table at Appendix III C summarises the information derived from the 18 surveys.

Whilst the original 47 jurisdictions canvassed were chosen randomly across all continents, it is noted that none of the African agencies responded and only one agency from South America i.e. Brazil, responded.

As previously indicated, if an offender is convicted after trial for trafficking in 1 kg of ice in Hong Kong he is facing a sentence of about 22 years imprisonment. If the trafficking involves an International Element i.e. he was taking drugs out of Hong Kong or bringing them in, his sentence would be enhanced by at least 1 year.

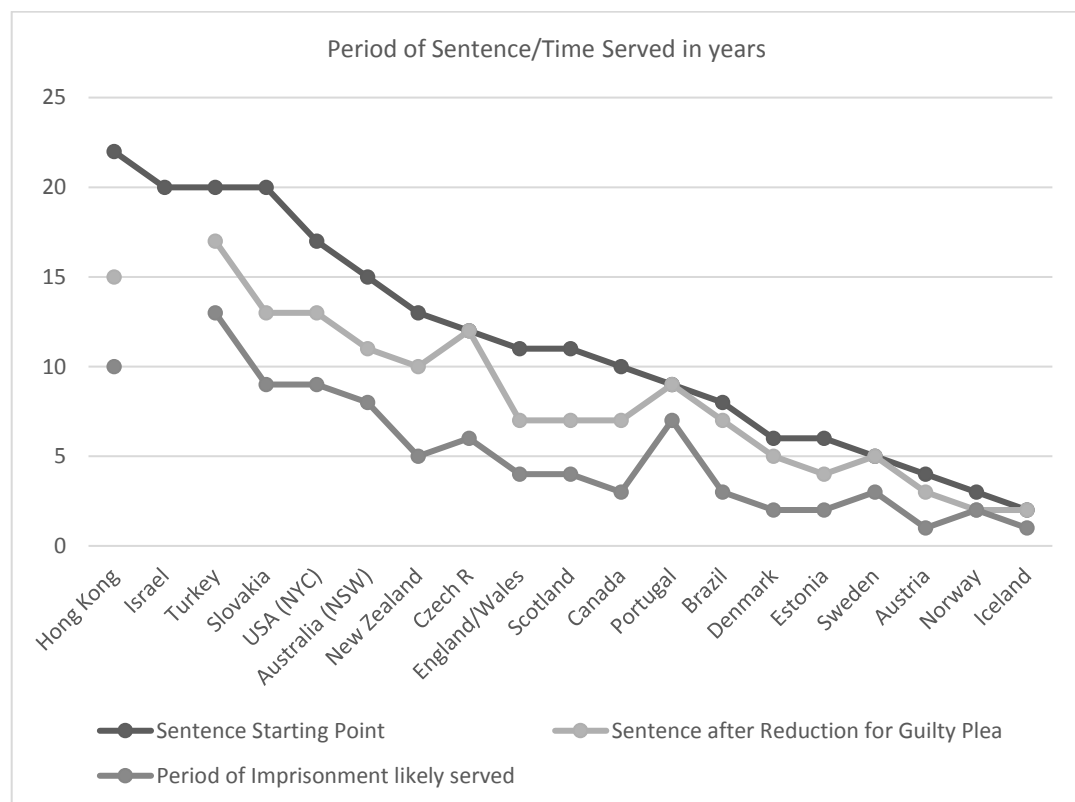
Assuming he is a local trafficker who has pleaded guilty at an early stage and is thus entitled to the full one-third reduction in sentence, and there are no other significant mitigating factors, then he will be sentenced to about 14 years and 8 months imprisonment. If he goes to prison and is of good conduct and is industrious while he is there, then he will receive a sentencing remission of a further one-third, so that he may be released after serving about 9 years and 9 months in prison.

Some of the Prosecuting Agencies which responded to the survey were able to provide more information than others, and for some, answering the ultimate question i.e. what would be the approximate sentence in their jurisdiction, was difficult because of a number of variables that were present in their respective criminal

justice systems. For example, the maximum penalty for drug trafficking in Israel is 20 years imprisonment, but the respondent was not able to provide a figure for the likely sentence for trafficking in 1kg of ice. For other agencies the response to this question was to provide a range of sentences.

The findings from this survey are summarised at Fig. 26.

Fig. 26.



The data indicated that, when sentencing starting points are considered³⁶, because of the sentencing tariffs, Hong Kong has the

³⁶ i.e. the hypothetical sentence upon conviction after trial

highest starting point. The next highest starting point was Turkey [20 years], Slovakia [15-20 years] and New York City, USA [10-17 years].

These hypothetical sentences should be compared with the likely sentences in places like Austria [3-4 years], Norway [3 years], Sweden [3-5 years], Denmark [6 years], and Brazil [5-8 years]. Drug sentences in Hong Kong were of the order of ten times as punitive as the countries with the shortest sentences after reductions for guilty pleas, namely Norway and Iceland.

Most of the jurisdictions allow generous discounts for pleas of guilty. Slovakia, like Hong Kong, allows a discount of up to one-third, New York City allows a discount of from 1 to 8 years, depending on the starting point and the time at which the plea is entered. Turkey allows a fixed discount for a plea of guilty, so that an offender who would be sentenced to 20 years imprisonment after trial, if he pleaded guilty, would receive a sentence of 16 years and 8 months. With the exception of the Czech Republic, Portugal, Sweden and Iceland, in every other country surveyed, respondents' estimates of sentence lengths were reduced for pleading guilty, and the likely sentences served were then further reduced (Fig. 26).

Respondents were asked to indicate the proportion of sentence that the prisoner would actually serve and there was quite a variation. Judges in the Australian state of New South Wales when

passing sentence fix a maximum and minimum [called a non-parole period] that the offender must serve, and the difference between the two is usually about 25%. Brazil requires prisoners to serve two-fifths of their sentences. Other jurisdictions require prisoners to serve only one-third of the sentence, others half, and several, like Hong Kong require offenders to serve two-thirds. England and Wales require offenders to serve half their sentences in prison and the remaining half in the community under supervision. The actual sentences likely to be served were lower than the starting points in every country except, again for the Czech Republic, Portugal and Sweden and also Norway. In those countries, respondents indicated that the actual sentences are closer to the sentencing starting points (Fig. 26).

In Turkey, where a fixed term of imprisonment must be served, rather than a percentage discount – in the case of the offender who trafficked in 1 kg of ice and was sentenced to 20 years, 12 years and 6 months would have to be served, so that in theory at least, the time that a drug trafficker must serve in Turkey may be greater than the 9 years 9 months the prisoner in Hong Kong may serve *provided* the Hong Kong offender had entered a timely plea of guilty and then behaves in prison. Had the Hong Kong offender been convicted after trial however, he would be required to serve not less than 14 years and 8 months.

Only the Courts in Iceland and Austria did not consider the role of the offender in the sentencing process. The Canadian respondent emphasized that although being a courier was a less serious role than being a storekeeper or an organizer, the offence committed by a courier was still regarded as serious misconduct.

Unlike Hong Kong, previous good character is a factor that the Courts in the majority of places will recognize as a mitigating factor, allowing for a reduction in sentence. However, like Hong Kong, in NSW, Denmark, Iceland, Norway and Slovakia, a clear record made no difference. In all jurisdictions, however, bad character, that is a previous similar conviction, resulted in an increase in sentence; in some places though, whether an increase in sentence would result depended on how recent the previous conviction was.

From the data it is apparent that sentences imposed in Hong Kong are higher than most other places where prison sentences are imposed for drug trafficking, and were markedly higher when compared with several of those places.

Whilst Hong Kong would be towards the top end of places which incarcerate offenders for serious drug trafficking, the sentences are less punitive than the 33 other places which have capital punishment as a sentencing option for drug trafficking.

Chapter 5 – CONCLUSIONS

I. Introduction

The purposes of this chapter are to summarise the key findings from each of the three parts of the study of sentencing in Hong Kong and to assess their contribution to academic knowledge in the area of sentencing, particularly the sentencing of serious drug offenders. There is also an evaluation of the study's contribution to sentencing practice in which recommendations for the sentencing process are considered. Prior to the final summary of key findings, the limitations of the study are discussed as well as suggestions for future research in the field.

II Sentencing system findings

Heavy sentences are imposed for drug offences in Hong Kong. This reflects the 'thinking' in the Court of Appeal, which commonly refers to the deterrent nature of such sentences in fixing tariff sentences. *Exclude the evidence – included /should be included in the Findings chapter.*

But deterrence is not the only reason for such harsh penalties, despite the Court of Appeal's regular use of that term. The Court of Appeal in *Chan Chi Ming* [1979:493] emphasized that punishment of the offender was a reason that is just as prominent as deterrence, as a basis for imposing lengthy sentences of imprisonment.

Sentence tariff is related to the narcotic content of the drugs an offender is trafficking, so that larger quantities of drugs with higher narcotic content lead to more severe sentences.

Equally, Hong Kong sentencers are far harsher with couriers who are importing drugs. In *Lau Tak Ming* [1990] the Court specifically referred to discouraging the international trade in drugs [page 387], thinking that shapes the far heavier sentences of the frequently foreign nationals involved as international couriers rather than local mules. This confirms that a belief in the deterrent effects of heavy sentences underpins the drug sentencing process in Hong Kong.

Sentencers give little weight to personal mitigation in modifying drug sentences in Hong Kong. A few factors of a personal nature may contribute to a small reduction in sentence including, if the offender is an addict, and some of the drugs were proved by him to be for his own use. Otherwise, the only types of conduct that will provide substantial mitigation of sentence, are entering a timely plea of guilty and providing assistance to the Police or Customs officials concerning other offenders.

The narrow sentencing bands for drug trafficking offences in Hong Kong allow sentencers little room to exercise any real discretion in the sentencing process if they are to comply with the *guidance* specified by the Court of Appeal. This would need to be addressed

if Hong Kong were to permit sentencers to take individual or personal mitigating factors into account.

A more equitable process for foreigners, therefore, would require a change in the thinking of the Court of Appeal with regard to the deterrent effects of harsher sentences on international couriers and in terms of their views on punishment and the seriousness with which they view drug trafficking offences.

III. Principal findings from the sentenced population study

The convicted drug offender population was dominated by males (81%), by ethnic Chinese (79%) and had an average age of 33 years which did not differ by gender. More females were of non-Chinese ethnicities, particularly Africans and South Americans.

The analysis of the sentencing process indicates that it leads to long sentences averaging over 10 years, with most being in the range of 6 – 19 years and the most punitive 5% extending beyond this up to a maximum sentence of 37 years. The international sentencing survey suggests that Hong Kong is placed at the more severe end of the spectrum of countries that do not use the death penalty for serious drug trafficking. The sentencing guidelines used in Hong Kong make little allowance for the exercise of discretion to take account of mitigating circumstances. This means that children's sentences are barely much shorter than those of adults. To the extent that children do receive shorter sentences, this appears to

be a consequence of more children being local couriers and dealing in ketamine, for which shorter sentences are generally given.

Most offenders – 92%, were couriers. Foreign couriers had sentences 63% longer than local couriers, and the sentences of cocaine and heroin traffickers were more severe than those of traffickers of ketamine and drug cocktails. Foreign couriers particularly trafficked cocaine, heroin and ice, whereas local couriers dealt with ice and ketamine. More foreign nationals imported drugs as ‘foreign couriers’ whereas the Chinese were particularly local couriers, a role which, in practice attracted shorter sentences. South Asians were involved both as foreign and local couriers.

Offender ethnicity was related to the type of drug trafficked. Chinese offenders transported all types of drugs, but especially ice and ketamine, South Americans particularly cocaine and the Africans cocaine and heroin. Guidelines indicate that sentences should be higher for trafficking heroin, cocaine and ice than for ketamine and this tends to increase the sentences of foreign nationals compared with Chinese offenders. Since more females were foreign nationals and foreign couriers, they dealt more in heroin and ice and this tended to boost their sentences compared with Chinese who, as local couriers, trafficked more ketamine. Fewer foreign couriers than Chinese entered guilty pleas and this also served to boost their sentences.

There was no evidence to suggest that foreign nationals were being directly discriminated against in the sentencing process, and where heavier sentences were imposed it was because of the type and quantity of the drug transported, and the sentence enhancing international element. Far more offenders of non-Chinese ethnicities were foreign couriers and this also led to notably higher sentences compared with Chinese offenders. Many foreign offenders also chose a jury trial, which deprived them of a reduction for entering a plea of guilty.

The upshot is that, due to the link between those drugs attracting more severe sentences being trafficked more by foreign than Chinese offenders and the higher sentences awarded to foreign compared with local couriers, offenders of non-Chinese ethnicity tend to have comparatively longer sentences. As a result, the sentences of South Americans at 118 months average were 64% longer, and those of Africans and South Asians were 40% longer than Chinese offenders, whose sentences averaged only 111 months. The sentencing system and process, therefore, inherently disadvantages offenders of foreign ethnicity. This is a factor that any revisions to the sentencing guidelines might usefully take account in order to have a sentencing system that results in more similar sentences between ethnicities. In so far as the application of the guidelines resulted in longer sentences for non-Chinese offenders, this was indicative of indirect discrimination, that arises

as a by-product of the way the sentencing tariffs differentiate between foreign and local trafficking.

The tendency of older offenders to receive longer sentences also reflects the fact that foreign offenders, who were foreign couriers traded more in drugs that attracted higher sentences, were older. The very oldest offenders aged over 69 years had the longest sentences averaging 15.6 years whereas those under 20 years had the shortest at 8.8 years. In between many age-groups averaged around 10 years.

The sentencing process does not appear to have altered during the study period, and there has been no cases of note that have led to sentencing guidelines being changed. Drug trafficking convictions averaged c. 400 cases a year over the study period, but have fluctuated a little over the six years. Not guilty pleas have also increased somewhat and the numbers of South Asians convicted has increased strikingly over the study period, it would, because of offending by asylum seekers.

Drug sentences in Hong Kong were of the order of ten times longer than countries, such as Norway and Iceland, after reductions for guilty pleas. While most other countries surveyed, like Hong Kong, made generous discounts for guilty pleas, certain countries, including Czech Republic, Portugal, Sweden and Iceland where sentences are notably lower, do not do so. Hong Kong was also

similar to most countries surveyed in that the actual sentences served are closer to sentencing starting points. Again, exceptions were the Czech Republic, Portugal and Sweden, and also Norway, where sentences served are virtually identical with the starting points.

IV. **Limitations of the study**

The principal shortcomings of the study concern additional data on offenders and offences and the issue of sample size and non-response bias in the international survey. With regard to the former, future studies could aim to collect information on offenders' prior offences and periods of imprisonment, as well as on any mitigating factors that could be taken into account, particularly if the sentencing process was adjusted to allow sentencers more discretion. Data on the quantity of narcotics being trafficked by offenders would enable better insight into how this interacts with offenders' roles as foreign and local couriers to affect sentence length. Public opinion surveys could provide insight into what the residents of Hong Kong regard as appropriate sentences for these offences and the extent to which they regard adjustments for mitigating and aggravating factors as justifiable.

The international survey of sentencing had the shortcoming of a low response rate (38%) which means that it is liable to be affected by non-response bias: for instance, some of the 29 countries whose prosecutors did not respond might have had sentences equally or

more punitive than Hong Kong's. Therefore, the findings ought to be treated with caution, though the range of sentences from the 18 responding countries reveals a wide range of sentences of varying punitiveness. Future research could aim for more comprehensive response to place the conclusions drawn here on a sounder footing. Although not all countries have guidelines, future research could also consider in greater detail the ways in which the guidelines differ between different countries that have them.

V. **Value of the Study**

The issues addressed in this paper include research on the length of sentences for serious drug trafficking and how these sentences vary depending on the type of drug and the role of the offender as either a foreign or local courier, in respect of which there has been little previous research. The study has uncovered distinctive associations between gender, age and ethnicity on the one hand and drugs trafficked and offender roles on the other, so that the implications of the sentencing process for different sorts of offenders can be understood.

Again, not much has been written about the effect of aggravating and mitigating factors, such as pleas of guilty and the lack of prior convictions, on the ultimate sentence in the *context of serious drug trafficking offences*. Also there is only limited material on demographic and other profiling of drug offenders, in such areas as ethnicity. The quality of the population data covering six years of

sentencing decisions means the findings of this study rest on firm bases.

The finding that foreign nationals importing drugs into Hong Kong are given far longer sentences highlights an aspect of a sentencing system and sentencing process that, in practice, works to disadvantage some ethnic groups, namely non-Chinese groups. Existing research (refs) has highlighted disadvantages of ethnic minorities in the USA and in Europe, particularly the UK, in terms of their over-representation and treatment at various stages in the criminal justice system. The findings of this study indicate that non-Chinese ethnicities are similarly disadvantaged as a result of their offence characteristics and the bases for determining sentences in Hong Kong.

Another distinctive contribution, which must however be treated with caution concerns the comparison of the length of sentences for drug offending across different jurisdictions. This suggests that there are wide disparities in the sentences given to the same sort of drug offence across different jurisdictions, with some, including Hong Kong, ten times heavier than others. It also shows that reducing sentences for making a guilty plea and the actual sentences being below the starting points are widespread in jurisdictions with both heavier and lighter sentencing, but that there is a subset of countries identified which do not implement their sentencing systems in this way.

References:

Articles and Texts

Akers R. and Sellers C. (2009), *Criminological Theories: Introduction, Evaluation and Application*, 5th edn. Oxford University Press.

Ashworth A. and Roberts J. V. (2013), *The Origins and Nature of the Sentencing Guidelines in England and Wales*, in Ashworth A. and Roberts J. V. eds. (2013), *Sentencing Guidelines: Exploring the English Model*, Oxford University Press.

Cooper J. (2013), *Nothing Personal; The Impact of Personal Mitigation at Sentencing since Creation of the Council*, in Ashworth A. and Roberts J. V. eds., *Sentencing Guidelines: Exploring the English Model*, Oxford University Press.

Cross I. G. and Cheung P. (2015), *Sentencing in Hong Kong*, 7th edn. Lexis Nexis, Hong Kong.

Cutler L. (2009), *Arizona's Drug Sentencing Statute: Is Rehabilitation a Better Approach to the "War on Drugs"?* in *Criminal and Civil Confinement* Vol. 35, pages 397-420.

Dölling D. et al (2009), *'Is deterrence effective? Results of a Meta-analysis of Punishment'*, in the *European Journal on Criminal Policy and Research*, Vol. 15, pages 201-224, Springer Science and Business Media Press.

Doob A. N. and Webster C. M. [2003], *Sentence Severity and Crime: Accepting the Null Hypothesis*, *Crime and Justice*, Vol. 30, pages 143-195, University of Chicago Press.

Gerry F. and Sherwill N. [2016], *Human Trafficking, Drug Trafficking and the Death Penalty*, in *Indonesia Law Review*, Vol. 3, pages 265-282

Halliday (2001), *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, London, Home Office.

Jacobson J. et al (2011), *Public Attitudes to the Sentencing of Drug Offences*, Sentencing Council Research Series 01/11.

Kaufman, I. R. (1960), *Sentencing: The Judge's Problem*, *The Atlantic Monthly*, January 1960, the Atlantic Online.

Lawrence S. N. and Williams T. (2006), *Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing*, *Toronto Law Journal*, Vol. 56, pages 285-332.

Lovegrove A. (2010), *Proportionality Theory, Personal Mitigation and the People's Sense of Justice*, Cambridge Law Journal, Vol. 69, No. 6, pages 321-352, Cambridge University Press.

Mauer M., Potler C. and Wolf R. (1999), *Gender and Justice: Women, Drugs and Sentencing Policy*, The Sentencing Project, Washington D.C.

Moffit, T. E. (1993), *Adolescence-Limited and Life Course-Persistent Antisocial Behavior: A Developmental Taxonomy* in Psychological Review Vol. 100, No. 4, pages 674-701

Phillips C. and Bowling B. (2012), *Ethnicities, Racism, Crime and Justice*, in Maguire M. et al (eds.) *Oxford Handbook of Criminology*, 5th edn. pages 370-397.

Roberts J. V. et al (2011), *Personal Mitigation, Public Opinion and Sentencing Guidelines in England and Wales*, Criminal Law Review, pages 524-530, Sweet and Maxwell.

Thomas D.A. (1967), *Sentencing – The Basic Principles*, Criminal Law Review, pages 455-525, Sweet and Maxwell.

Tonry M. [2006] *Purposes and Functions of Sentencing, Crime and Justice*, Volume 34, pages 1-53, University of Chicago Press.

Von Hirsch A. (2001), *Proportionate Sentences for Juveniles. How different than for Adults?* in Punishment and Society, Vol. 3, No. 2, Sage Journals.

List of Cases referred to:

The Queen and Chan Chi Ming [1979] HKLR 491

Attorney General and Suen Yuen Ming [1989] 2 HKLR 403

The Queen and Lau Tak Ming and Another [1990] 2 HKLR 370

Attorney General and Ching Kwok Hung [1991] 2 HKLR 125

Attorney General and Pedro Nel Rojas [1994] 2 HKCLR 69

HKSAR v. Law Ka Kit and Others CACC No. 97 of 2001 [unreported judgment of 14 November 2001]

Secretary for Justice and Hii Siew Cheng [2009] 1 HKLRD 1

HKSAR and Abdallah [2009] 2 HKLRD 437

HKSAR v. Wong Kin Kau CACC No. 269 of 2009 [unreported judgment of 4 May 2010]

HKSAR and Tam Yi Chun [2014] 3 HKLRD 691

HKSAR and Ngo Van Nam [2016] 5 HKLRD 1

HKSAR and Odira [2016] 5 HKLRD 249

HKSAR v. Chan Ka Yiu and Others Criminal Appeal Nos. 147 and 346 of 2016 and 375 of 2017 [unreported judgment of 18 July 2018]

Legislative Provisions and Statutory Instruments:

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

Section 81A of the Criminal Procedure Ordinance, Chapter 221, Laws of Hong Kong.

Section 83G of the Criminal Procedure Ordinance, Chapter 221, Laws of Hong Kong.

Sections 2 and 4 of the Dangerous Drugs Ordinance, Chapter 134, Laws of Hong Kong.

Section 82(2) of the District Court Ordinance, Chapter 336, Laws of Hong Kong

Section 20 of the Immigration Ordinance, Chapter 115, Laws of Hong Kong

Section 69 of the Prison Rules [subsidiary legislation Cap. 234]

Abbreviations

AC – Appeal Cases [UK]

CACC – Court of Appeal Criminal Case

Cap. – Chapter of the Laws of Hong Kong

HKCLR – Hong Kong Criminal Law Reports

HKLR – Hong Kong Law Reports

HKLRD – Hong Kong Law Reports Digest

HKSAR – Hong Kong Special Administrative Region [of the People's Republic of China]

Kgs – Kilogrammes

List of Appendices:

- Appendix I Sentencing Tariffs for the offence of Trafficking in Dangerous
Drugs - Tables 1 to 4.
- Appendix II Information table – Sentences for Serious Drug Offences in
Hong Kong [a sample]
- Appendix III A - Questionnaire for Prosecuting Authorities
 B – Letter of support from the IAP
 C - Summary of statistics from the completed Questionnaires

APPENDIX I

SENTENCING TARIFFS FOR THE OFFENCE OF TRAFFICKING IN DANGEROUS DRUGS ISSUED BY THE HONG KONG COURT OF APPEAL

<u>HEROIN</u>	
1. <i>R. and Lau Tak Ming and Others</i> 2. <i>HKSAR and Abdallah</i>	
Grams of Narcotic	Years of Imprisonment
>10	2 to 5
10 to 50	5 to 8
50 to 200	8 to 12
200 to 400	12 to 15
400 to 600	15 to 20
600 to 1200	20 to 23
1200 to 4000	23 to 26
4000 to 15000	26 to 30
<15000	At the sentencer's discretion

TABLE 1

<u>METHAMPHETAMINE HYDROCHLORIDE ["Ice"]</u>	
1. <i>AG. and Ching Kwok Hung</i> 2. <i>HKSAR and Tam Yi Chun</i>	
Grams of Narcotic	Years of Imprisonment
Up to 10	3 to 7
10 to 70	7 to 11
70 to 300	11 to 15
300 to 600	15 to 20
600 to 1200	20 to 23
1200 to 4000	23 to 26
4000 to 15000	26 to 30
<15000	At the sentencer's discretion

TABLE 2

<u>COCAINE</u>	
<i>AG. and Pedro Nel Rojas</i>	
[same tariffs as for Heroin]	
Grams of Narcotic	Years of Imprisonment
>10	2 to 5
10 to 50	5 to 8
50 to 200	8 to 12
200 to 400	12 to 15
400 to 600	15 to 20
600 to 1200	20 to 23
1200 to 4000	23 to 26
4000 to 15000	26 to 30
<15000	At the sentencer's discretion

TABLE 3

<u>KETAMINE AND ECSTASY</u>	
<i>SJ. v. Hii Siew Cheng</i> <i>HKSAR and Chan Ka Yiu and Others</i>	
Grams of Narcotic	Years of Imprisonment
Up to 1	Within the sentencer's discretion
1+ to 10	2 to 4
10 to 50	4 to 6
50 to 300	6 to 9
300 to 600	9 to 12
600 to 1000	12 to 14
<1000	14 upwards

TABLE 4

APPENDIX II

STATISTICAL INFORMATION FROM REASONS FOR SENTENCE PUBLISHED ON THE HONG KONG JUDICIARY WEBSITE FOR HIGH COURT CASES WHERE OFFENDERS WERE CONVICTED OF THE OFFENCE OF TRAFFICKING IN DANGEROUS DRUGS FOR THE YEARS 2012-2017

DRUG CODES

1. Ice
2. Cocaine
3. Heroin
4. Ketamine
5. Other [including combinations of drugs]

2012

<u>No.</u>	<u>HC NO.</u>	<u>DATE OF SENTENCE</u>	<u>TYPE OF DD</u> <u>[use code]</u>	<u>QTY OF DD</u> <u>GRMS</u>	<u>1.PG</u> <u>2.PNG</u>	<u>START POINT</u> <u>(Mths)</u>	<u>FINAL SENTENCE</u> <u>(Mths)</u>	<u>1.M</u> <u>2.F</u>	<u>AGE YRS</u> <u>"-if not known"</u>	<u>ETHNICITY</u> <u>[IF AVAILABLE]</u> <u>1.Chinese</u> <u>2.African</u> <u>3.S. Am'can</u> <u>4.Other</u> <u>5.Unknown</u>	<u>FACTORS</u> <u>1. PG</u> <u>2. Int'l element</u> <u>3. Assistance to authorities</u> <u>4. Other [indicate]</u>	<u>ROLE OF OFFENDER</u> <u>[e.g.</u> <u>1.L. courier</u> <u>2.F. courier</u> <u>3.S/ keeper</u> <u>4.Organizer</u>
1	HCCC1	21/09/2012	4	6,160	1	192	126	1	-	1	1 4 [Support from Family]	3

APPENDIX III A



UNIVERSITY OF CAMBRIDGE

Questionnaire

Introduction

My name is John Reading and I am a former prosecutor [Deputy Director of Public Prosecutions] with the Hong Kong Department of Justice. I am currently a lawyer [barrister] in private practice in Hong Kong, although I continue to prosecute on behalf of the Department of Justice from time to time.

[If you attended the IAP Annual Conference in Hong Kong in 2007 we may have met, as I was the chairman of the organizing committee]

I am undertaking some research through the Institute of Criminology of the University of Cambridge, on the levels of sentences imposed by the Courts in Hong Kong for serious drug trafficking,. If you are able to assist by completing this questionnaire it would considerably assist my research, and I would be most grateful.

The purpose of this questionnaire is to obtain comparative statistical information, of the levels of sentences imposed in other jurisdictions to compare with sentences for similar conduct in Hong Kong.

The most common hard narcotic drug abused in Hong Kong in recent times has been Methamphetamine Hydrochloride [known as “crystal meth” or “ice], and so as to obtain comparable data, the survey primarily seeks information as to the level of sentence that will be imposed in your jurisdiction for trafficking [or dealing] in 1 kg of that type of drug.

Hong Kong does not have capital punishment, and for that reason, I will not be seeking information from jurisdictions in which capital punishment is a sentencing option for drug trafficking.

[Note: This survey should not be seen as in any way criticizing those places which impose capital punishment for this type of offence, but that information is simply not relevant to my area of research.]

Background

- i. Hong Kong operates under a common law legal system, and as such, judicial precedent is an integral part of the system; so that decisions of the Court of Appeal are binding on the lower [first instance] courts.
- ii. Hong Kong does not have a sentencing council or sentencing committee, as there are in some other jurisdictions.
- iii. Statutory provisions creating offences specify a maximum sentence, and sentencing judges rely on guidance from the Court of Appeal when imposing sentence for most types of offences, depending on the type and quantity of the narcotic in the drug mixture seized by the Police or Customs and Excise Department.
- iv. Since 1989 the Court of Appeal has specified a number of tariffs or ranges of sentences that the sentencing courts should impose on convicted drug traffickers, depending on the type and quantity of drug involved in the offence. The tariff sentence is that sentence that should be imposed after trial [following a plea of not guilty] and this sentence is referred to as 'the starting point.'
- v. Trafficking in dangerous drugs or illicit narcotics ["drug trafficking"] is an offence under section 4(1)(a) of the Dangerous Drugs Ordinance, Cap. 134 of the Laws of Hong Kong, and the maximum sentence for drug trafficking is imprisonment for life. The maximum sentence is reserved for the most serious offences, and is almost never imposed.
- vi. The term "trafficking" is defined in the Dangerous Drugs Ordinance, as including "importing into Hong Kong, exporting from Hong Kong, procuring, supplying or otherwise dealing in or with the dangerous drug, or possessing the dangerous drug for the purpose of trafficking..."
- vii. From this definition it is apparent that Hong Kong does not have a separate offence of importing dangerous drugs, but if the offence involves an "international element" i.e. the drug is being imported or is to be exported, this is regarded as an aggravating factor and an additional period of imprisonment will be added to the sentence for that factor.
- viii. If the defendant pleads guilty to the charge, he or she will usually receive a reduction in sentence of up to 1/3 from the starting point, because the courts regards him/her as being remorseful and also because court time will be saved because of the plea of guilty.

Survey Questions

I. Please indicate the title of your office on the line provided.

[e.g. Prosecutions Division, Department of Justice, Hong Kong, Office of the Director of Public Prosecutions, NSW, Australia etc.]

II. Do you have sentencing guidelines for drug trafficking offences in your jurisdiction?
[Please tick the appropriate box]

1. Yes

☐

2. No.

☐

III. If your answer to question II is Yes, please indicate by ticking the appropriate box, whether the guidelines are fixed by the Courts alone or by a special sentencing committee or council

1. Court

☐

2. Committee

☐

[if you ticked Court, go to #V.]

[if you ticked Committee please answer #IV]

IV. the guidelines are fixed by a committee, are 1 or more judges members of that committee? [Please tick the appropriate box]

1. Yes

☐

2. No.

☐

V. Do you have separate offences of “importing” dangerous drugs as well as for trafficking or dealing in dangerous drugs? [Please tick the appropriate box]

1. Yes

☐

2. No.

☐

VI. If the answer to V. is *Yes*, what is the maximum sentence for importing dangerous drugs into your jurisdiction? [Please indicate on the line provided]
[If the answer to V. is *No* please to #VII.]

VII. What is the maximum sentencing for trafficking or dealing in dangerous drugs in your jurisdiction? [Please indicate on the line provided]

VIII. If a person is convicted of trafficking/dealing in 1 kg of the drug Methamphetamine Hydrochloride [“crystal meth” or “ice”] and is found guilty after trial, what [approximate] sentence would you expect the sentencing court to impose?

IX. If that person pleaded guilty to the charge, would this result in any reduction in sentence? [Please tick the appropriate box]

1. Yes

☐

2. No.

☐

X. If the answer to the last question is *Yes* please indicate the period that the sentence would be reduced on the line provided [is it a percentage or a fixed period?].

XI. What impact would previous good or bad character have on the sentence, if any i.e. would good character [no previous convictions] reduce the sentence? Would bad character [previous convictions] increase the sentence? [Please provide your answer on the lines provided].

XII. Referring to your answer to question VIII, if a defendant was sentenced to the sentence indicated, what portion of that sentence would he or she be expected to serve before being released? [Please provide your answer on the line provided].

Please return the completed survey as an email attachment to me at

johnreadingsc@gmail.com

Your assistance is most appreciated. Many Thanks!

APPENDIX III B



IAP

International Association of Prosecutors

International Association of Prosecutors
Harlogstraat 13
2514 EP The Hague
The Netherlands
P: + 31 70 363 03 45
M: + 45 20 99 57 54
E-mail: gc@iap-association.org

22 July 2017

To whom it may concern

John Reading SC, a former Deputy Director of Public Prosecutions in Hong Kong's Department of Justice, is conducting research through the Institute of Criminology at the University of Cambridge, into the sentences imposed for serious drug trafficking. As part of his work he wishes to compare the sentencing regime in Hong Kong with the sentencing processes in other jurisdictions. He has drafted a survey for this purpose.

The International Association of Prosecutors is committed to support and promote serious comparative research of criminal law and procedure. We are very pleased to be able to support John Reading's research endeavour and hope that you are able to assist him by completing the survey. John Reading is a trusted member of the International Association of Prosecutors.

The completed survey should be forwarded to John directly by email to the address at the end of the survey. The information provided will be incorporated in a dissertation, which is to be submitted in early January 2018. John has indicated that if any members would like to have a copy of his paper in due course, he would be happy to send it to them after it has been submitted.

Kind regards,

Rasmus H. Wandall
General Counsel of IAP

Gerhard Jarosch
President IAP

APPENDIX III C

Country	1.Sentencing Guidelines Yes/No [1/2]?	2. If 1 by Court [1] or Committee [2]	3. Importing Offence Y/N [1/2]	4. Max. for import-ing	5. Max. for trafficking	6. Sentence after trial 1 kg of ice	7. Discount for PG [if any]	8. Effect of Good/bad Character [GC/BC]	9. What portion of the sentence in #6 will be served?	Does the role of the trafficker affect sentence? Y/N [1/2]
Australia [NSWDPP]	2	-	1	Life	Life	7-15	5-25%	GC – No BC – Yes	75% Court fixes a non-parole period usually 25% below the head sentence	1
Austria	2	-	1	20	20	3-4	2/3	Y to both	½-1/3	2
Brazil	2	-	1	25	15	5-8	1/6	GC = min. tariff [5yrs?]. BC the court adds 1/6	2/5	1
Canada [Fed. DPP]	2	-	1	Life	Life	3-10	Yes but depends on many factors such as how early the plea was entered	GC is a mitigating factor. BC can result in extra time but depends on nature and age of prior matters	1/3 [eligible for parole] Court can order up to ½ be served before can apply for parole	1
Czech R.	2	-	2	-	18	8-12	No	GC = Y	½	1

Denmark	2	-	2	-	16	6	1/6	GC = No. BC = Yes.	½-1/3	1
England and Wales [CPS]	1	2	1	Life But it depends on the class of the drug and the role of the offender	Life But it depends on the class of the drug and the role of the offender	6-11	1/3	Yes	½ + ½ in the community	1
Estonia	2	-	2	-	Life – 20	6	1/3	Y	½-1/3	1
Iceland	2	-	2	-	12	2	-	BC = Y	2/3	2
Israel	2	-	2	-	20	-	No	Yes	2/3	1
New Zealand	1	1	1	Life	Life	10-13	¼	GC = Y Discount	1/3-2/3	1
Norway	2	-	2	-	21	3	6-9 mths	GC = No BC = Yes	2/3	1
Portugal	2	-	2	-	15	9	No	BC = Yes	5/6	1
Scotland	2	-	1	Life	Life	6-11 [about the same as England]	1/3	BC = Yes GC = Yes Part of mitigation	½-2/3	1
Slovakia	1	2	1	20-25	20-25	15-20	1/3	GC = No. BC = Yes	½-2/3	1
Sweden	1	1	1	10	10	3-5	No	No	2/3	1
Turkey	1	1	2	-	30	20	16y8m	GC = 1/6 reduction. BC = Yes	12y6m	

USA [DA of NYC]	1	3	1	Life	Life	10-17	1-8 years	BC = Yes	5/7	1
HK.	1	1	2	-	Life	22	Up to 1/3	GC = No BC = Yes	2/3	2

