

SENTENCING BURGLARY, DRUG IMPORTATION AND MURDER

EVIDENCE FROM TEN COUNTRIES

Appendix

**CATHERINE HEARD
JESSICA JACOBSON**

JANUARY 2021

Institute for Crime & Justice Policy Research

Birkbeck, University of London

42 Store Street

London WC1E 7DB

Email icpr@bbk.ac.uk

ICPR website <http://www.icpr.org.uk/>

World Prison Brief <http://www.prisonstudies.org/world-prison-brief>

Twitter @icprtweet and @ICPSLondon

© 2021 Institute for Crime & Justice Policy Research and the authors

The right of Catherine Heard and Jessica Jacobson to be identified as the authors of this work has been asserted in accordance with the Copyright, Designs and Patents Act 1988.

This publication may be freely reviewed, abstracted or reproduced in part, but not for sale or for use in conjunction with any commercial purposes. Any changes to the text of this publication must be approved in writing by the Institute for Crime & Justice Policy Research.

Due credit must be given to the Institute for Crime & Justice Policy Research and to this publication. Enquiries should be addressed to icpr@bbk.ac.uk

This document was produced with financial assistance from the Open Society Foundations. Its contents are the sole responsibility of the Institute for Crime & Justice Policy Research and can under no circumstances be regarded as reflecting the position of the Open Society Foundations.

Design: www.intertype.co.uk

Appendix: Sentence ranges and likely outcomes for the three Vignettes

This appendix summarises ICPR's research on sentencing in law and practice across ten jurisdictions and forms a supplement to the report, [Sentencing Burglary, Drug Importation and Murder: Evidence from Ten Countries](#). In countries with federal systems where sentencing laws vary between states or territories, we focused the legal research on a single state/territory in order to permit more in-depth analysis than would be feasible with a whole country approach. We selected the laws of New York State in the USA and New South Wales in Australia. (Although India and Brazil also have federal systems there are no differences between states in the sentencing frameworks.)

The research was conducted with assistance from overseas research partners drawn principally from the legal profession. To provide a suitable framework for research and comparative analysis, we examined custodial decision-making in the ten countries by reference to three hypothetical case 'vignettes' (as shown at the start of each table below).

We first analysed each country's national legal and policy frameworks and the provisions which, in theory, would govern custodial decision-making in each of the vignettes. We then conducted semi-structured interviews with 70 criminal defence lawyers across the ten countries. Our objective in the interviews was to establish how, in practice, sentences would be decided in the three cases, and to understand the many factors that tend to influence custodial outcomes and the length of prison terms actually served in such cases.

The information presented in the tables below on *likely* sentencing outcomes is by necessity an approximation, as it is based on the views of a relatively small number of practitioners (usually six per jurisdiction). In addition, although we have reflected (in the final column of each table) the main factors mentioned in interviews as likely to influence sentencing outcomes in such cases, and the time individuals would actually remain in custody, it is impossible to set out every such factor or reflect all the possible scenarios that might occur in such cases in the relevant countries.

Where a country's legal system provides for fines in addition to imprisonment, we provide the range for each fine in the national currency and its equivalent in US\$ (based on currency conversion rates as at 5 March 2020, rounded up to the nearest US\$ 100).

Burglary vignette: sentence ranges and likely outcomes

P-, a 32-year-old man, broke into a house when the residents were at work, accessing the rear of the house via a back alley and breaking a window to gain entry. He stole jewellery and cash belonging to one of the residents, worth a total of approximately [US\$ 500]. He has several prior convictions for the same type of offence and other similar offences.

	Statutory sentence range for burglary (including aggravated forms)	Offence-specific guideline?	Likely sentence P- would receive	Early release provisions?	Other matters relevant to P-'s sentence
Kenya	14 years maximum (7 years maximum for housebreaking and 14 years maximum for stealing; would run concurrently as part of same act.)	No. There are general Sentencing Policy Guidelines.	7 years; perhaps also order for compensation. Immediate custody the most likely outcome.	No automatic early release and no parole process, per se. P- could apply for sentence revision to Probation and Aftercare Service. Presidential pardon possible once one-third of sentence served; rarely granted.	Sentencing policy guidelines mandate a starting point of half the maximum sentence, adjusted up or down for aggravating or mitigating factors (listed in Sentencing Policy Guidelines and found in case law). Previous convictions would aggravate considerably. No guarantee time on remand would be deducted; law unclear, so this is in court's discretion.
South Africa	No maximum or minimum for this offence.	No. General sentencing principles apply, derived from case law (case of <i>Zinn</i> – see 'other matters' column).	3 years most likely (the maximum sentence open to lower courts). If prior convictions are serious and numerous, could be referred to regional court for longer sentence, maybe 8 years. Discretionary, so hard to predict severity of sentence. Very little chance of non-custodial sentence.	P- must serve half sentence before applying for parole unless sentence included non-parole period.	Court will take account of the seriousness of the offence, the personal circumstances of P-, and the interests of society (the ' <i>Zinn</i> ' triad). Court will weigh up these factors to determine appropriate sentence. Family situation and interests of children and other dependents important. Constitutional Ct. ruling held that if defendant a primary care giver, custody last possible option. If P- has been designated as a 'habitual offender' due to prior convictions, sentence will be longer, and eligibility for parole is only after serving first 7 years of sentence.
Brazil	2 – 8 years	No. Case law assists on eg. how to account for aggravating factors.	Difficult to predict as very wide judicial discretion. Most likely 3 – 4 years with at least first sixth in closed conditions. Immediate custody highly likely.	Will depend on progression through three regime types; no automatic release.	Recidivism is a statutory aggravating factor. Can lead to longer sentence and greater proportion spent in closed or semi-open conditions. Can also close off chance of non-custodial sentence (which would otherwise be possible on facts of P-s offence).

	Statutory sentence range for burglary (including aggravated forms)	Offence-specific guideline?	Likely sentence P- would receive	Early release provisions?	Other matters relevant to P-'s sentence
USA New York state	<p>2 – 7 years for a 'Class D violent felony' (includes burglary).</p> <p>(Theft would be classed a petit larceny & 'class A misdemeanor' – 1 year maximum, but would run concurrently with burglary sentence.)</p> <p>Assuming previous convictions include a felony conviction in past 10 years, the sentence range becomes minimum 3 years – maximum 7 years.</p>	<p>NY state penal law contains detailed guidelines; courts must sentence according to these, but scope for negotiating a plea to lesser charge such as 'attempted burglary' carrying lighter sentence, even if not in accord with facts of case.</p>	<p>Immediate custody certain due to previous offences and given he is a 'second felony offender' – otherwise a non-custodial sentence would have been possible.</p> <p>Anything from 1.5 to 5 years possible. But between 5 and 10 years if case goes to trial.</p>	<p>Prisoners serving determinate sentences are eligible for parole after serving 85% of their sentence</p>	<p>Court can consider wide scope of information when sentencing, including evidence of prior convictions.</p> <p>Much depends on plea bargaining and whether prosecutor negotiates lower (non-felony) charge (lighter sentence). Prosecutor would routinely negotiate sentence for waiver of right to trial (plea bargain process) – usually approved by court and becomes the sentence.</p> <p>Outcomes vary by county/borough; Nassau County harsher than Bronx.</p>
India	<p>Maximum 10 years and fine.</p>	<p>No. Penal Code prescribes maximum sentences for every offence; courts have discretion to set sentence.</p>	<p>Immediate custody (due to prior offences); period would be discretionary, most likely 3 years.</p>	<p>Early release unlikely in P-'s case. P- could apply for remission based on good behaviour; application made to jail authority. Usually limited to one quarter of custodial term imposed.</p>	<p>Previous convictions rule out a non-custodial sanction and are also likely to lead to longer sentence (but up to judge's discretion how much longer).</p> <p>Trial itself could take longer than the sentence, and P- will probably be remanded in custody.</p>
Thailand	<p>Minimum 1 year, maximum 7 years, plus fine up to 14,000 TBH (US\$ 460).</p>	<p>No public sentencing guidelines. 'Yee-Tok', unpublished guidance would apply. This is circulated to judges, and is available for several common offences. It has no official legal effect, and is not referred to in sentence decisions but is routinely followed. Content of Yee-Tok varies regionally.</p>	<p>Most lawyers believed custody probable due to prior convictions. Likely sentence 1 – 2 years assuming P- confesses and compensates victim. If not, 2 – 3 years.</p> <p>Small chance of suspended sentence if confesses and compensates victim.</p>	<p>Release when sentence fully served, unless remission for good behaviour (maximum 5 days per month), or release after royal pardon or (collective) amnesty. Eligibility for amnesty depends on which 'conduct' class P- is in when amnesty declared. There are 6 classes, ranging from 'excellent' (1) to 'very bad' (6). All prisoners start at 'moderate' (4). Recidivists are often excluded from pardons and amnesties.</p>	<p>Yee-Tok relating to P-'s offence often distinguishes levels of seriousness based on value stolen, and whether residential or not.</p> <p>Penal code sets out mitigating and aggravating factors courts can take into account. Mitigating factors include 'repentance and the efforts made by the offender to minimize the injurious consequence of the offence; voluntary surrender to an official'. Mitigation can result in reduction of no more than half the sentence.</p> <p>Recidivism is an aggravating factor under the Code. Courts are required to increase the sentence by one-third or half, depending on the recency of prior conviction/s and the seriousness of the index offence (burglary would require increase by half).</p>

	Statutory sentence range for burglary (including aggravated forms)	Offence-specific guideline?	Likely sentence P- would receive	Early release provisions?	Other matters relevant to P-'s sentence
England & Wales	<p>14 years maximum.</p> <p>If this is P-'s 3rd domestic burglary he would receive mandatory minimum of 3 years unless special circumstances which (a) relate to any of the offences or to him; and (b) would make that unjust in all the circumstances. (In such circumstances the court could consider a shorter term, a suspended sentence, or community order.)</p>	<p>Sentencing Council, <i>Burglary offences: definitive guideline</i> (2011)</p> <p>Guideline sets stage by stage approach; not mandatory but court must explain reasons if it chooses not to follow guideline.</p>	<p>At highest, 3 years immediate custody particularly if mandatory minimum law applies or if has been to prison before.</p> <p>Otherwise, a shorter sentence likely. Very small chance community order or suspended sentence.</p>	<p>After half served, automatic release with balance on licence; following release, up to 12 months' supervision (and possibly home detention curfew).</p>	<p>Outcome would depend mainly on recency and nature of prior convictions. If in 3 strikes territory (see first column), custody virtually unavoidable; otherwise, very small prospect of avoiding it.</p> <p>To some extent outcome might also reflect reasons for offences (personal circumstances) and prospects for addressing them. Much offending like this is drug-addiction related and some judges might want to avoid custody if convinced that P- is ready to engage in rehabilitation.</p>
Hungary	<p>3 years maximum.</p>	<p>No. General principles for sentencing in Criminal Code, as well as guidance issued through opinions of Criminal Department of Curia (reflecting canonised judicial practice), illustrating how discretion is exercised in relation to aggravating and mitigating factors in a range of offences.</p>	<p>Almost all lawyers believed 1 – 2 years' custody most likely. All considered immediate custody most likely because of prior record.</p>	<p>After at least two-thirds of sentence served. Court must specify in sentence earliest date for parole (or can exclude parole). Not automatic.</p>	<p>Prior convictions for similar offences would be a severe aggravating factor. Severity depends on recency of prior convictions and sentences received for them.</p> <p>Very small chance of avoiding prison (or reducing to short custodial sentence), if P- confesses early, especially if can return/ compensate for what was stolen and has favourable personal circumstances (e.g. family dependants, steady job).</p> <p>Under a recently introduced trial waiver system, the prosecutor can initiate negotiations for a more lenient sentence in exchange for a guilty plea. Provided that legal requirements are met, the court must approve the plea deal.</p>

	Statutory sentence range for burglary (including aggravated forms)	Offence-specific guideline?	Likely sentence P- would receive	Early release provisions?	Other matters relevant to P-'s sentence
Netherlands	Maximum 6 years' imprisonment or 4th category fine (€20,500 – equivalent to US\$ 24,300).	Judges would refer to detailed non-binding guideline for burglary. This sets out possible aggravating circumstances e.g. whether burgled at night, with a weapon etc. If guideline not followed, court is expected to give reasons. Prosecutor guideline also available for burglary. (These guidelines are usually slightly harsher than judicial ones; used to guide prosecutor's recommendation for sentence.)	Based on judicial guidelines, 3 – 5 months (maybe less if prior convictions were long ago). (Prosecutor interviewed said would request sentence of 6 months, on these facts.)	If sentenced for 1 year or less, must serve whole sentence. (If sentence is above 1 year, early release possible under some circumstances.)	Small chance of lighter sentence e.g. 3 months, or a non-custodial sentence (e.g. unpaid work, or probation) if confesses early and has good personal circumstances; especially if clear he will cooperate with probation. If P- has been in remand detention prior to sentence it might be possible to avoid further custody and suspend the balance of the term remaining. Within the framework of guidelines (where applicable), 'judges are quite free to come up with a sentence that fits best: there is no fixed minimum or maximum... Defence lawyers are free to explain every situation that seems relevant. So the sentencing exercise is very fair in comparison to the pre-trial decision making stage.'
Australia NSW	Breaking into a house and committing a serious indictable offence (includes stealing from a dwelling house): maximum 14 years.	No. Seven statutory sentencing purposes are available to guide courts. Judicial Commission of NSW publishes Sentencing Bench Book, which aims to promote consistency. This contains guidance for 'break and enter' offences.	Lawyers listed several likely outcomes including: non-custodial (Community Corrections Order) even with previous record; Intensive Corrections Order (classed as 'custodial'); and up to 4 years custody (with non-parole period of 2 years) Sentences are hard to predict due to extent of discretion given by law, and lack of detail on P-'s personal circumstances.	Any sentence over 6 months must include a non-parole period during which must remain in prison. If sentence 3 years or less, court must direct release on parole at end of the non-parole period. If sentence greater than 3 years, release on parole is up to Parole Authority.	If (as likely) P- is tried and sentenced in local court under summary procedure, maximum sentence is 2 years imprisonment. Guideline judgment does not set a starting point or sentencing range, but does outline relevant aggravating and mitigating factors. Related case law states sentencers should not use prior convictions in assessing the objective seriousness of the crime when determining the upper boundary of a proportionate sentence. Prior convictions may, however, be relevant in determining whether leniency should be extended. All sentencers should take account of personal factors and matters relevant to the commission of the crime and the imposition of punishment, such as: age, nationality/race, character, mental disability, personal background, delay, hardship, remorse, plea of guilty, and assistance to authorities. In NSW, special sentencing orders may be made for offenders who are substance-addicted.

Drug importation vignette: sentence ranges and likely outcomes

K-, a 26-year-old woman, was recruited in her home country of [Nigeria] to transport [heroin] in return for a cash payment. She had flown to [England] from her home country, carrying the drug in a hidden compartment in a money belt. The quantity was 400 grams, or a little under 1 lb.

NB Vignette was altered slightly in some jurisdictions to ensure that the woman’s home country (a) was plausible and typical, in terms of drug trafficking routes to, or via, the given jurisdiction (b) was a less developed country, to make it clear that the person was not, for example, a western back-packer.

	Statutory sentence range	Offence-specific guideline?	Likely sentence K- would receive	Early release provisions?	Other matters relevant to K-'s sentence
Kenya	Fine of 1 million Kenyan shillings [c. US\$9,600] or 3 times market value of drug, whichever is greater, and, in addition, a maximum prison sentence of life imprisonment.	No. There are general Sentencing Policy Guidelines, and case law. The Guidelines mandate a starting point of half the maximum sentence, adjusted up or down for aggravating or mitigating factors (listed in Guidelines and found in case law). Recent case law explains approach sentencers should take with such offences (Criminal Appeal 65 of 2014, Caroline Auma Maajabu v Republic [2014] eKLR). Held that Penal Code sets a maximum, not a mandatory minimum sentence for drug trafficking; discourages use of maximum sentence, including as to level of fine, where facts do not justify it (e.g. where 'a few sachets of heroin worth a few shillings').	A prison term of anywhere from 5 – 20 years, plus a fine of Kshs. 9,000,000 [c. US \$86,700] (assuming street value of 1 kg of cocaine is Kshs. 3,000,000) or in default of payment, a further 5 – 7 years imprisonment. (The fine default and substantive prison terms would run consecutively, in line with Sentencing Policy Guidelines.)	No automatic early release and no parole process, per se. K- could apply (to Probation and Aftercare Service) for sentence revision. Presidential pardons possible where one-third of sentence served or, if life sentence, where at least 5 years served. Rarely granted. Deportation order likely; unclear when would take effect but probable that she would have to serve sentence in Kenya.	No guarantee time on remand would be deducted; law unclear, so this is in court’s discretion. Some lawyers had had experience of plea deals resulting in 5 – 10 year sentences, but such cases seen as unusual.

	Statutory sentence range	Offence-specific guideline?	Likely sentence K- would receive	Early release provisions?	Other matters relevant to K-'s sentence
South Africa	<p>Maximum prison term, 25 years; court can also impose a fine at a level the court deems fit. (Maximum here would be ZAR 1 million [c. US\$ 65,200] – see next column.)</p> <p>Trafficking Act requires immediate custody for drug dealing offences.</p>	<p>No. General sentencing principles apply, derived from case law (case of <i>Zinn</i> – see ‘other matters’ column).</p> <p>Where Courts have discretion to impose fines, they are set according to Adjustment of Fines Act 101 of 1991. A year is currently the equivalent of ZAR 40,000. So, maximum fine court could impose here is [25 years X ZAR 40,000 =] ZAR 1 m [c. US\$ 65,200].</p>	<p>Difficult to predict as discretionary but immediate custody almost certain, unless K- assists prosecutors with information about who was involved up the chain.</p> <p>Otherwise sentence could be anywhere between 5 and 25 years.</p>	<p>K- must serve half sentence before applying for parole unless sentence included a non-parole period.</p>	<p>Court will take account of the seriousness of the offence, the personal circumstances of K-, and the interests of society (the ‘<i>Zinn</i>’ triad).</p> <p>Severity of sentence will be influenced by quantity and prevalence: 400g seen as a large quantity and drug trafficking is prevalent in South Africa. Court will weigh up these factors to determine appropriate sentence. Clean record should serve to mitigate. Poverty, plus interests of children and other dependents, could also be relevant. But magistrates often overlook mitigating factors and sentence more harshly than judges.</p>
Brazil	<p>Base range, 5 – 15 years; but discretion to increase due to statutory qualifying features (relating e.g. to level of harm the drug can cause, and to the fact it was imported from another country).</p> <p>Fine can also be imposed: minimum is 500 ‘day fines’. The day fine is currently about R\$ 30 so minimum fine would be R\$ 16,000 [US\$ 3,500].</p>	<p>No. Case law assists but there is wide judicial discretion.</p> <p>No clear distinction between high level roles/ larger quantities, and low level ‘subsistence’ dealing/ smaller quantities.</p>	<p>Difficult to predict.</p> <p>6 – 7 years likely (much of it in closed regime).</p> <p>Also risk of fine of at least R\$ 16,000 [US\$ 3,500]. Fine default does not lead to further time in prison, but to removal from electoral roll and loss of personal tax ID number, without which legitimate employment is impossible.</p>	<p>No automatic early release.</p> <p>K- would need to satisfy criteria for regime progression and/or conditional release, through good conduct in prison. System does not work fairly in practice, there are delays and red tape.</p>	<p>Drugs Law allows courts to reduce sentence by between one-sixth and two-thirds for first time offenders not involved in gangs or organised crime groups, and where court is satisfied this is not habitual conduct. Can lead to unpredictable outcomes, as could produce a sentence of 20 months or 15 years for the same conduct.</p> <p>International aspect plus quantity in K-'s case will rule out non-custodial sentence: court will assume K- is part of a criminal organisation.</p>

	Statutory sentence range	Offence-specific guideline?	Likely sentence K- would receive	Early release provisions?	Other matters relevant to K-'s sentence
USA New York state	<p>International element makes this a federal crime: US Code provides sentence based on this quantity and substance 'may not be less than 10 years or more than life'.</p> <p>But if – as is likely given quantity – K- is prosecuted under state law, she could be charged under NY penal code as a 'major trafficker' and 'profiteer' due to drug's street value: A1 felony, indeterminate sentence not less than 15 years & not more than 25 years. This provision excludes people acting under direction of others, with no substantial or independent role. Such offenders are not 'major traffickers', but class A felony offender: then, sentence is minimum 8 years, maximum 20 years.</p> <p>But if K- is convicted as 'major trafficker' and the court, 'having regard to the nature and circumstances of the crime and the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose this indeterminate sentence, the court may instead impose a determinate sentence of imprisonment' of minimum 8 years, maximum 20 years.</p>	<p>Federal law guidelines would be applied if K- were charged with a federal rather than state crime. Federal guidelines are not binding, extremely detailed (points-based) and contain scope for departing from minimum sentences where personal circumstances or facts justify it. Federal judges frequently depart from guidelines.</p> <p>NY state penal law contains less detailed guidelines; courts must sentence according to these.</p>	<p>Starting point, if federally prosecuted, 10 years but likely her case would be handed over to state prosecutor due to amount which would be seen as fairly small.</p> <p>If state prosecutes, starting point would be at least 8 years.</p> <p>Either way, much scope for lower sentence if ready to waive right to trial and take plea bargain. Several lawyers thought non-custodial deal a real possibility.</p>	<p>Prisoners serving determinate sentences are eligible for parole after serving 85% of their sentence.</p> <p>Immediate deportation (via immigration holding centre) after release, if imprisoned.</p>	<p>If K- can offer good evidence she is no more than a 'mule', federal court would be willing to depart from mandatory minimum.</p> <p>If prosecuted in state court, outcome depends on plea bargain stage and whether prosecutor willing to negotiate lower charge carrying lesser sentence.</p> <p>Role of lawyer significant in working towards plea deal; including investigating mitigating factors.</p>

	Statutory sentence range	Offence-specific guideline?	Likely sentence K-would receive	Early release provisions?	Other matters relevant to K-'s sentence
India	<p>Under Narcotic Drugs and Psychotropic Substances Act (NDPSA), where the contravention involves 'commercial quantity' of the drug (set by Central Govt at 250 g of heroin or above) statutory range is minimum 10 – maximum 20 years' 'rigorous imprisonment' and fine of INR 100,000 – INR 200,000 [c. US\$ 1,400 – 2,700].</p> <p>Rigorous imprisonment will include some hard labour, potentially mundane, strenuous work, e.g. in a quarry, or on infrastructure. Work supervised by jail authority.</p>	<p>No. Penal Code prescribes maximum sentences for every offence; otherwise courts have discretion, but less so where statute prescribes a minimum.</p> <p>For NDPSA offences, courts can only sentence above minimum in certain defined circumstances (e.g. the offence involved organised crime).</p>	<p>At its lowest, a sentence of 10 years' rigorous imprisonment – but there is a growing tendency of courts to impose maximum sentences. In view of the quantity, which would be seen as large, 20 years a real possibility in this case.</p> <p>Fine of [c. US\$ 1,400] or more also likely.</p>	<p>A provision in NDPSA prevents suspension or remission of sentence, but was held to be invalid by Supreme Ct.</p> <p>So K- could apply for remission based on good behaviour. Application made to jail authority. Usually limited to one quarter of custodial term imposed.</p> <p>If fine imposed, payment could positively impact application for remission. Non-payment could result in further imprisonment, perhaps 1 – 2 years additional custody.</p>	<p>NDPSA provides for 'commercial, intermediate or 'small' quantities. There is too little guidance on where to sentence within wide range. Needs a policy rethink as lower levels of trafficker are being too severely punished. Upper levels of operation are rarely caught.</p>
Thailand	<p>Quantity in this example would be deemed to be intended for sale. Sentence would depend on purity.</p> <p>If quantity is 20 g or higher, 'shall be liable to imprisonment for life and to a fine of one million to five million TBH, or death penalty'. [Fine equivalent to US\$ 31,700 – 158,500]</p>	<p>No public sentencing guidelines. 'Yee-Tok', un-published guidance circulated to judges, on several common offences. Varies regionally, has no official legal effect, not referred to in sentence decisions but routinely followed.</p> <p>Yee-Tok on drug offences distinguishes importation for sale, which is seen as a particularly serious offence.</p>	<p>All lawyers agreed 'exceptionally serious' case and would result in immediate custody.</p> <p>The law and Yee-Tok would be followed strictly, meaning death penalty, or life sentence if K-confesses.</p> <p>(Exceptionally, there might be possibility of a 5 – 10 year sentence.)</p>	<p>Only eligible for release when sentence fully served, unless remission for good behaviour (maximum 5 days per month), or royal pardon or (collective) amnesty. (See explanation under Vignette 1 above.)</p> <p>People convicted of more serious narcotics offences are rarely granted pardons or amnesty. [Thai judge, January 2019]</p>	<p>Penal Code sets out mitigating and aggravating factors that courts can take into account. Mitigation includes 'repentance and the efforts made by the offender to minimize the injurious consequence of the offence, voluntary surrender to an official'.</p> <p>Mitigation can result in reduction of no more than half the sentence – if death penalty, can only be reduced to life imprisonment.</p>

	Statutory sentence range	Offence-specific guideline?	Likely sentence K- would receive	Early release provisions?	Other matters relevant to K-'s sentence
England & Wales	<p>Maximum sentence, life imprisonment. Application of Guideline (next column) will produce sentence well below this maximum level.</p> <p>(Guideline not mandatory but court must explain reasons if chooses not to follow; appeal likely if no proper basis to depart from Guideline.)</p>	<p>Sentencing Council, <i>Drug offences: definitive guideline</i> (2011) applies.</p> <p>Sets out stage-by-stage approach. First must determine offence category (based on culpability and harm). Culpability depends on role: leading, significant, or lesser. The lesser role is ascribed these characteristics, by way of example:</p> <ul style="list-style-type: none"> • performs a limited function under direction; • engaged by pressure, coercion, intimidation; • involvement through naivety/exploitation; • no influence on those above in a chain; • very little, if any, awareness or understanding of the scale of operation. <p>As for harm, there are four Categories provided depending on the quantity and the substance involved. This quantity of heroin falls under Category 3 (150g up to 1kg). The top Category 1 is for 5 kg or greater.</p> <p>Offence-specific mitigating factors also set out (see 'other factors' column).</p>	<p>Immediate custody almost guaranteed. If – as likely – court decides this case is Category 3 (harm) & lesser role (culpability), sentence range is 3.5 – 5 years' custody.</p> <p>Sentence of 3 years possible (though unlikely), if pleads guilty at earliest opportunity (usually first hearing in magistrates' court). This earns a one-third reduction on sentence).</p>	<p>After half served, automatic release with immediate deportation as non-national and got a sentence of 12 months or more. Must be considered for the Early Removal Scheme: deportation after a quarter of the sentence has been served.</p> <p>(If a national, K- would serve balance on licence; following release, would receive up to 12 months' supervision (and possibly a home detention curfew order.)</p>	<p>Drug offences guideline was amended in 2011, to help guide sentencers towards most proportionate disposals for drug 'mules' or similar cases, both by providing for assessment of lesser role (see under Guideline column) and also by setting out a non-exhaustive list of offence-specific mitigating factors. These may well apply in current case and include matters relating to possible intimidation, mistaken belief, vulnerability, lack of maturity, or being a sole or primary carer for dependent relatives.</p> <p>Without strong evidence of such factors, courts tend to focus only on quantity and type of drug. Deterrence will be a major consideration.</p>

	Statutory sentence range	Offence-specific guideline?	Likely sentence K- would receive	Early release provisions?	Other matters relevant to K-'s sentence
Hungary	5 – 15 years imprisonment, if imports a 'particularly substantial quantity of narcotic drugs', defined as where base pure substance is at least 200 x 0.6g (for heroin) ie. at least 120g.	No. General principles for sentencing in Criminal Code, which set a starting point at median of statutory range. Court would also refer to applicable case law. Very little distinction of penalties based on different quantities.	Based on recent similar cases, as K- had no prior conviction and assuming confessed to offence, most likely range 4 – 8 years' custody; plus expulsion from Hungary for up to 8 years. If sentenced in capital, could expect 3 – 5 years, as judges usually more lenient.	Could be released after at least two-thirds of sentence served. Court must specify in sentence earliest date for parole (or can exclude parole). No automatic release.	Courts sometimes sentence non-nationals to slightly shorter sentences than nationals in similar cases. Recognises harsher effect of sentence where person has no family or friends and does not understand language. Also recognises cost benefit ratio differs for non-nationals – cheaper to expel from country than continue detaining. Having children could serve as mitigating factor. Otherwise personal mitigation usually impossible for non-nationals as no way to produce evidence.
Netherlands	Maximum sentence 12 years or a fine of the fifth category [€82,000] [US\$ 91,400]. Application of sentencing guidelines (next column) will produce sentence well below this maximum level.	Judges would refer to detailed non-binding guideline for this offence. This sets out possible aggravating and mitigating circumstances. If courts do not follow, expected to give reasons. Judicial guideline for this offence gives range of 3 – 5 months. Prosecutor guideline also available. (Usually slightly harsher than judicial ones; used to guide prosecutor's recommendation for sentence.)	Based on judicial guidelines, likely sentence would be 3 – 5 months' imprisonment. With good mitigating facts perhaps 2 months (see 'other factors'). (No lawyers said they considered a fine likely in this scenario.)	If sentenced for 1 year or less, must serve whole sentence. (If sentence is over 1 year, early release possible under some circumstances) Deportation will be ordered to take place after sentence served. Typically, defendants like K- are held for c. 3 months in pre-trial detention, then sentenced to 3 months – as 'time served' and deported immediately.	Judicial guidelines set out factors that could justify sentencing at level lower than suggested 3 – 5 months: e.g. extreme poverty, exploitation by a criminal organisation; naivete or low intelligence. Can be difficult to convince 'hardened' judges at courts near airports to reduce for these factors.

	Statutory sentence range	Offence-specific guideline?	Likely sentence K- would receive	Early release provisions?	Other matters relevant to K-'s sentence
Australia NSW	<p>A Commonwealth offence. Regulations distinguish between, and set lower and upper ranges for 'marketable' quantity of heroin (above 2 g and below 1.5 kg) and 'commercial' quantity (1.5 kg or above, up to 100kg).</p> <p>Maximum penalty for 'marketable' is 25 years or a fine of 5,000 penalty units (AU \$1,050,000) [c. US\$ 694,200], or both.</p>	<p>No. For Commonwealth offences, the list of considerations for sentencers to consider as laid down in the Crimes Act 1914 includes (but is not limited to) the nature and circumstances of the offence, whether pleaded guilty, level of cooperation.</p> <p>Case law in importation recognises distinction between 'couriers' and 'principals'. (Couriers generally receive a lesser sentence.)</p>	<p>Between 3 and 8 years, based on similar cases in Judicial Commission sentence database (which sets out many variables in decided cases including type of role, whether prior convictions etc).</p> <p>Immediate custody highly likely.</p>	<p>Commonwealth law does not specify a usual ratio for non-parole periods (NPP). At common law, the usual ratio between the head sentence and the NPP is 60 – 66%. Non-parole period here could be between 2.5 and 4 years.</p> <p>As a foreign national K- will be deported at end of NPP. Could be held in immigration removal centre pending removal.</p>	<p>Some courts better than others at taking account of low culpability and limited role. There is scope to reflect this in sentence but in practice it is not always fully reflected.</p> <p>Case law allows slightly more lenient sentences to reflect 'harder time' for non-nationals.</p>

Murder/intentional homicide vignette: sentence ranges and likely outcomes

Two 23-year-old friends, L- and J-, got into an argument while drinking together in a bar. Both left the scene, and L- texted a mutual friend to say that he was going to kill J-. The next morning, on leaving his home for work, J- was confronted by L- who had been waiting for him outside his property. L- was armed with a knife, which he used to stab J- fatally in the chest.

	Statutory sentence range	Offence-specific guideline?	Likely sentence L- would receive	Early release provisions?	Other matters relevant to L-'s sentence
Kenya	<p>Sentence of death, expressed in mandatory terms.</p> <p>However, recent case law holds that death is the maximum penalty and courts have discretion to impose any lesser sentence.</p>	<p>No; relevant case law would apply, notably a recent decision of Kenya's Supreme Court, which held mandatory death penalty to be unconstitutional and that sentencers should assess culpability and any mitigating factors and sentence accordingly (Francis Karioko Muruatetu and Another v Republic (eKLR) 2017).</p> <p>Following Muruatetu, prisoners sentenced to death are having sentences reviewed and review into proper parameters for life sentences is underway (as at November 2020).</p>	<p>Almost all lawyers said most likely outcome would be life sentence, based on Muruatetu decision that mandatory death penalty unconstitutional. Most considered this decision as providing a basis for de facto 'whole life' sentences in murder cases.</p>	<p>Presidential pardons possible where one-third served or, if life sentence, where at least 5 years served. Presidential pardon can also commute death penalty to life sentence.</p> <p>L- would need to show change of character or successful rehabilitation.</p> <p>Pardons rare. Most lawyers thought L-'s prospects would be low.</p>	<p>Mitigating factors are sometimes seen as irrelevant in murder cases; courts sentence primarily for deterrence.</p> <p>Defence would argue for 10 year sentence based on L-'s young age, indicating likely impulsivity and good chances of reintegration after release.</p>

	Statutory sentence range	Offence-specific guideline?	Likely sentence L- would receive	Early release provisions?	Other matters relevant to L-'s sentence
South Africa	<p>Court must impose a life sentence if murder pre-meditated, unless 'substantial and compelling circumstances exist' such that it would be 'grossly disproportionate' to impose life sentence.</p> <p>What such circumstances are has been developed by the courts. In S v Malgas [2001] ZASCA 30, the SCA held that these need not be 'exceptional' but must provide 'truly convincing reasons' or a 'weighty justification' for any deviation from the minimum sentence.</p>	<p>No. Mandatory minimum must be followed unless 'substantial and compelling' test can be met: a 'very high bar'. If met, judges' discretion on appropriate custodial term would be guided by sentences imposed in similar cases.</p>	<p>Life sentence the most likely outcome. L-'s relative youth and fact that he is a first-time offender unlikely to be seen as sufficiently 'substantial or compelling', as these factors would ordinarily be taken into account in mitigation of sentence.</p> <p>If could obtain strong evidence of remorse, good character and potential for reintegration, backed up by professionals (social work, psychology) court might depart from mandatory life sentence and go for e.g. 8 – 10 years, but a sentence this low would be rare.</p>	<p>Anyone sentenced to life must remain in prison 'for the rest of his or her life'. Subject to Minister's power to grant parole on the recommendation of the Correctional Supervision and Parole Board, but this cannot occur before 25 years have been served. In practice can often take several more years.</p>	
Brazil	<p>Homicide qualified by ambush, and for a 'futile reason' (making the act disproportionate), as here, is sentenced to custody of (minimum) 12 – (maximum) 30 years.</p> <p>Law requires any sentence longer than 8 years to be served in closed regime.</p>	<p>Criminal Code sets down three stage process to arrive at sentence: (1) fix basic sentence (2) apply any mitigating or aggravating factors (3) assess whether sentence should be adjusted up or down based on statutory factors [none of which apply in this case].</p> <p>While mitigating factors cannot produce a sentence lower than minimum set by statute, court must exercise proportionality, avoiding excessive punishment while maintaining consistency in the state's response to the relevant offence.</p>	<p>Most likely sentence would be c. 14 years with first two-fifths in closed conditions.</p>	<p>No automatic early release. Progression to semi-open regime possible after L- has served two-fifths of the sentence. L- would need to satisfy criteria for regime progression. (Good conduct in prison.)</p> <p>Regime progression process does not work fairly in practice: delays, red tape.</p>	<p>Judges are required to provide reasons if they sentence above the mandatory minimum.</p>

	Statutory sentence range	Offence-specific guideline?	Likely sentence L- would receive	Early release provisions?	Other matters relevant to L-'s sentence
USA New York state	NY state penal law sentence for second degree murder (intentional homicide), a class A-1 felony: (minimum) 15 years – life; (maximum) 25 years – life. The lower ranges in each case are the minimum sentence to be served before eligibility for parole arises. So if L- receives the minimum sentence, he will have an indeterminate sentence of '15 years to life'.	NY state penal law contains guidelines for class A-1 felonies; courts must sentence according to these.	<p>Most important factor in predicting sentence is whether L- takes plea or is sentenced following trial.</p> <p>On former scenario, could get 15 – 18 years, or less than this if DA is willing to accept plea to a non-life offence.</p> <p>On latter scenario, sentence could be 25 years to life; L- could spend rest of life in prison, at worst.</p>	<p>After L- has served the minimum sentence set by the court, will be eligible for release on parole; but there is no constitutional right to parole.</p> <p>If sentenced to life, would be eligible for parole after first 22 years served. Parole process can be tough, with racial and class bias apparent in board decisions. If L- was convicted of murder, he would be on parole supervision for rest of life after release.</p>	<p>Role of lawyer important in working towards plea deal; includes investigating mitigating factors and surrounding circumstances (e.g. why did they argue, what was said to provoke L- etc.?)</p> <p>People are often forced into taking plea deals due to potentially high sentences available. People found guilty after a full trial get far, far tougher sentences: up to 5 times as harsh.</p>
India	Death; or life imprisonment and fine.	No. The judge has discretion but case law states that death penalty must not be used in murder cases, except in cases such as mass murder or terrorism, to serve deterrent purpose (Sevaka Perumal v. State of Tamil Nadu, All India Reporter 1991 SC 1463).	<p>All lawyers agreed most likely outcome would be a life sentence. (Death penalty unlikely.)</p> <p>L-'s young age and clean record might give defence a basis to argue for lower sentence, e.g. 10 years, but no guarantee court would accept this.</p> <p>(None of lawyers mentioned a fine as likely.)</p>	If the sentence is life imprisonment L- can apply for release after serving 14 years. All prisoners have right to request parole. Request is made by police superintendent to the prison administration. Can be based on wide range of grounds including family situation.	Case law states that when considering sentence for any offence punishable by death penalty, a probation officer must present two reports, one on reoffending risk and one on prospects for rehabilitation, based on factual investigation with e.g. jail, family, and on psychologists' reports. (State v. Bharat Singh, 217(2015) Delhi Law Times 640)

	Statutory sentence range	Offence-specific guideline?	Likely sentence L- would receive	Early release provisions?	Other matters relevant to L-'s sentence
Thailand	Where murder is premeditated, sentence is death.	<p>No public sentencing guidelines. 'Yee-Tok', unpublished guidance circulated to judges, exists for several common offences. Yee-Tok varies regionally, has no official legal effect, and is not referred to in sentence decisions but is routinely followed.</p> <p>Yee-Tok sentencing guideline on murder sets out a range, with sentence gravity differing depending on type of weapon, motive, etc. [Interview with a judge.]</p>	<p>All lawyers agreed death penalty could be reduced to life sentence, if one or more extenuating circumstances found to apply (see last column).</p> <p>Several lawyers saw potential for lower sentence if L- confesses at pre-trial stage and then provides helpful information to court at trial. Possibly reducing sentence to 10 – 20 years.</p>	<p>L- would only be released when sentence fully served, unless earns remission for good behaviour (maximum 5 days per month), eligibility for which can only arise for life-sentenced prisoners after ten years' imprisonment, or following royal pardon or collective amnesty.</p> <p>Eligibility for release would depend on what conduct class L- belonged to when amnesty declared. (See under Vignette 1.) Prisoners who are very sick or elderly sometimes obtain release even where serving life sentence.</p>	If court finds 'extenuating circumstances' apply, the death penalty could be reduced to life imprisonment. These are listed as, for example: 'lack of intelligence, serious distress, previous good conduct, repentance and efforts made to minimize the injurious consequence of the offence, voluntary surrender to an official, information given for the benefit of the trial' and similar circumstances.
England & Wales	<p>Mandatory life sentence.</p> <p>For most life sentences, the judge sets a minimum term to be served in custody. (See next column.)</p>	<p>There is no offence-specific guideline for murder. Relevant statutory provisions set out 'starting points' for court to set minimum term or 'tariff'. (Where offender has taken a knife to the scene intending to commit an offence and used it in committing the murder, the normal starting point tariff is 25 years).</p> <p>The tariff starting point can be adjusted up or down for aggravating and mitigating factors; the resultant minimum term can be of 'any length' regardless of starting point. There is case law relating to the setting of the minimum term.</p>	<p>Sentence would likely be at or close to 25 year starting point.</p> <p>If L- pleads guilty at earliest opportunity (usually first hearing in magistrates' court) he can get a one-third reduction on sentence), resulting in sentence of 16 years 9 months.</p> <p>Possibly further reduction in light of young age.</p>	<p>Because he would be on an indeterminate sentence, L- must serve the 'minimum' term (tariff) set by the court. No automatic right to be released after this term expires: the release date and licence conditions will be decided by the Parole Board. L- would need to have accepted responsibility for the crime, completed courses, and have behaved well in custody: a tough process.</p> <p>When life-sentenced prisoners are released, licence conditions remain in force for life (known as a 'life licence') and breach often leads to recall to prison.</p>	<p>Most lawyers commented on potential unfairness of mandatory life sentence combined with very high tariffs laid down in statute. Sentences are now much longer than would have been in similar cases prior to the 2003 legislation laying this framework: about ten years longer, compared to similar cases.</p> <p>Could lead to unjustly long sentences in cases where no intent to kill. (In English law, <i>mens rea</i> for murder is intention to kill or cause really serious harm).</p>

	Statutory sentence range	Offence-specific guideline?	Likely sentence L- would receive	Early release provisions?	Other matters relevant to L-'s sentence
Hungary	<p>If homicide committed deliberately with premeditation, sentencing range is 10 – 20 years, or life imprisonment.</p>	<p>No. General principles for sentencing contained in Criminal Code, which requires starting point of 15 years as median of statutory range. Court would also refer to applicable case law.</p> <p>Judge free to depart from median, and would usually do so where defendant young and has no previous criminal record.</p>	<p>Most lawyers thought L- would get 8 – 12 years; if confesses and expresses remorse, with sentence at lower end more likely. But could not rule out a harsher sentence of up to 20 years or even life.</p>	<p>No automatic early release. Court must specify in sentence earliest date for parole (or can exclude parole: but this would not be permitted on these facts, as not sufficiently aggravated). If sentenced to life, earliest date of parole would be 25 years.</p> <p>Otherwise if L- receives a fixed term sentence, can seek parole after at least two-thirds of sentence served.</p>	<p>Judges sentencing in the capital tend to be more lenient.</p> <p>L-'s mental condition likely to be considered at trial. He may be placed in Forensic Psychiatric and Mental Institution for several years, with reviews of his condition every 6 months.</p>
Netherlands	<p>No mandatory minimum. Maximum sentence is life imprisonment or a fixed term of imprisonment not exceeding 30 years or a fine of the fifth category [€ 82,000, equivalent to c. US\$ 92,600].</p> <p>Serious violent offences are often sentenced with a fixed custodial term followed by psychiatric detention – known as 'terbeschikkingstelling' or TBS – which means 'at the disposal of the government'. TBS detention is reviewable every two years. Judges can only order this if experts' reports provide evidence of a treatable condition.</p>	<p>No sentencing guideline exists for murder.</p> <p>Court would be guided by sentences in previous similar cases.</p>	<p>Length of sentence would depend on whether a TBS treatment order imposed (see first column) – that depends whether L- has a treatable mental health problem. If so, custodial term of 3 – 12 years likely, followed by TBS (which can be indefinite but usually involves 6 – 9 years' treatment). If no TBS, sentence would be 10 – 12 years in custody.</p> <p>(No lawyers said they considered a fine likely in this scenario, or life sentence: prosecutor interviewed said if L- did not cooperate with psychological evaluation pre-sentence and denied guilt, and was then convicted, prosecution would argue for a long custodial term, possibly life.)</p>	<p>If sentenced to 10 – 12 years, would serve first 3 in maximum security, then could be transferred to lower security and/or temporary release on tag. If prosecutor is satisfied with conduct, and other conditions are met, could be released after two-thirds of sentence served, with final third spent on probation.</p> <p>Any life sentence would have to be reviewed after 25 years by the Life Sentence Advisory Committee, which must consider recommending participation in programmes to prepare for release.</p>	<p>TBS process (see first column) is seen by defence lawyers as potentially unfair. Takes too long, is geared towards drug-based treatment, carries social stigma and has too few protections for the patient detained.</p> <p>From May 2021 the release provisions for people convicted of serious crimes and sentenced for over 6 years will change. Instead of a presumption of release after the first two-thirds of sentence, eligibility for release only arises in final 2 years of sentence. Release will depend on prosecutor's assessment of risk in view of: conduct in custody; victims' interests; and public safety.</p>

	Statutory sentence range	Offence-specific guideline?	Likely sentence L- would receive	Early release provisions?	Other matters relevant to L-'s sentence
Australia NSW	<p>Murder carries mandatory life imprisonment, but sentencing statute provides that any offender liable to life imprisonment can instead be sentenced to 'a specified term'.</p> <p>Statute restricts life sentences for murder to cases where court is 'satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence'.</p>	<p>No. Legislation sets out seven statutory sentencing purposes to guide courts. Judicial Commission of New South Wales publishes a Sentencing Bench Book, which aims to promote consistency. This indicates a standard non-parole period (NPP) in murder cases of 20 years.</p> <p>Case law holds that Court must first determine whether, on the objective facts, the level of culpability is so extreme as to warrant the maximum penalty. It must then determine whether subjective factors are capable of displacing the prima facie need for the maximum penalty (R v Merritt (2004) 59 NSWLR 557).</p>	<p>Sentence of 20 – 28 years, with a non-parole period (NPP) of around 20 years. Possibly NPP could be less, e.g. 14 years, in view of young age, and if other positive factors exist.</p> <p>Early guilty plea could attract discount, up to 25% off – discretionary.</p>	<p>Parole decision depends on conduct in prison, including successful move through classifications, up to point of day release. Tough process for some. Could also depend on whether support network in place for release, and if accommodation available: can work unfairly where not available.</p> <p>If State obtains 'high risk offender' order before parole period expires, can be required to undergo heavier monitoring for further 5 years. This is happening more often: is onerous.</p>	<p>If L- has psychological treatment needs and is willing to be treated, this could help mitigate severity of sentence.</p>



Institute for Crime & Justice Policy Research

The Institute for Crime & Justice Policy Research (ICPR) is based in the Law School of Birkbeck, University of London. ICPR conducts policy-oriented, academically-grounded research on all aspects of the criminal justice system. ICPR's work on this report forms part of the ICPR World Prison Research Programme, a programme of international comparative research on prisons and the use of imprisonment. Further details of ICPR's research are available at <http://www.icpr.org.uk/>

ICPR's book, *Imprisonment Worldwide: The current situation and an alternative future* (Coyle, Fair, Jacobson and Walmsley) was published in June 2016 and is available from Policy Press.



World Prison Brief

The World Prison Brief was established by Roy Walmsley and launched in September 2000 by the International Centre for Prison Studies. Since November 2014 the Brief has been hosted and maintained by the Institute for Crime & Justice Policy Research. The data held on the Brief (which is updated on a monthly basis) are largely derived from governmental or other official sources. The data used in this report were accessed from the database in December 2020. The World Prison Brief can be accessed at <http://prisonstudies.org/>