

# A Sentencing Guideline for Theft Offences within the ECSC

Within the ECSC, on the nine member states and territories there are sometimes different words used to describe the dishonest appropriation of property belonging to others, (e.g. the words larceny or stealing are often used), and there are sometimes different maximum sentences. For the purposes of this guideline, the word 'theft' will be used generically, to embrace a wide variety of offences of dishonesty, including receiving stolen goods and offences involving fraud or deception<sup>1</sup>, and whether as conspiracy or as substantive offences.

## Applicability of Guideline

In sentencing for these offences, the Chief Justice has issued guidelines and the court must apply the relevant guidelines and sentence accordingly, unless to do so would not be in the interests of justice. It is only permissible to depart from the guidelines in exceptional circumstances, where such departure can be justified. Clear reasons for not applying the guideline must be given when passing sentence.

It is expected that every court will follow the steps below, with each relevant step being identified to the offender in public before the sentence is passed. Starting points and ranges apply to all adult offenders<sup>2</sup> whether they have pleaded guilty or been convicted after a trial. Credit for a guilty plea is taken into consideration only at Step 3.

---

<sup>1</sup> Robbery and burglary (or 'house-breaking') will be the subject of separate guidelines.

<sup>2</sup> For persons below 18, see the **Practice Direction on Sentencing Guidelines**, no. of 2019.

**Step 1**

Consider the seriousness of the offence. Find the starting point by consulting the guideline and the grid below. Then adjust the figure within the range for the aggravating and mitigating factors of the offence.

**Step 2**

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

**Step 3**

Adjust the figure on assessing discount for any plea of guilty, if applicable.

**Step 4**

Adjust the figure on assessing totality if sentencing for more than one offence.

**Step 5**

Give credit for time served on remand.

**Step 6**

Finally, consider ancillary orders, confiscation, compensation, etc, if applicable.

**Pass the Sentence**

The court must give reasons explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.

## Constructing the Sentence

### STEP 1

The first step in constructing a sentence is to establish the starting point for the offence.

A theft case requires an assessment of the seriousness of the offence and its consequences by reference to the harm caused. In assessing seriousness, this should include reference to the culpability of the offender.

To establish the starting point for the offence within the relevant range, there are three stages within Step 1.

#### FIRST STAGE

The first stage is to consider consequence by assessing the harm caused by the offence.

CONSEQUENCE may be demonstrated by the following, apart from value:

- Items stolen were of substantial value to the victim, regardless of monetary worth
- High level of inconvenience caused to the victim or others
- Consequential financial harm to victim or others, eg praedial larceny
- Emotional distress
- Fear or loss of confidence caused by the crime
- Risk of or actual injury to persons or damage to property
- Impact of theft on a business
- Damage to heritage assets

Categories arising from consequence are as follows:

**CONSEQUENCE – category 1 - highest**

Very high value goods (above \$250000 in the High Court, above \$10000 in the Magistrates Court), or  
Severe harm to the victim or others.

**CONSEQUENCE - category 2 - high**

High value goods (\$50000 to \$250000 in the High Court, \$5000 to \$10000 in the Magistrates Court), or  
Substantial harm to the victim or others.

**CONSEQUENCE - category 3 - medium**

Medium value goods (\$10000 to \$50000 in the High Court, \$500 to \$5000 in the Magistrates Court), or  
Significant harm to the victim or others.

**CONSEQUENCE – category 4 - lesser**

Low value goods (up to \$10000 in the High Court and up to \$500 in the Magistrates Court), or  
Little or no harm to the victim or others.

## SECOND STAGE

The second stage is to consider seriousness by assessing the culpability of the offender.

Levels of seriousness may be demonstrated by one or more of the following:

### **Seriousness – Level A (High)**

- A leading role where offending is part of a group activity
- Involvement of others through coercion, intimidation or exploitation
- Breach of a high degree of trust
- Sophisticated nature of offence/significant planning
- Theft involving intimidation or the use or threat of force
- Looting
- Deliberately targeting victim on basis of vulnerability
- Theft involving breaking and entering (if not charged as breaking and entering)

### **Seriousness – Level B (Medium)**

- A significant role where offending is part of a group activity
- Some degree of planning involved
- Breach of some degree of trust
- All other cases where characteristics for levels A or C are not present

### **Seriousness – Level C (Lesser)**

- Performed limited function under direction
- Involved through coercion, intimidation or exploitation
- Little or no planning
- Limited awareness or understanding of offence

This guideline applies to theft sentences both in the High Court and the Magistrates Court. Disparity in sentence between both courts may arise for similar offending. If so, adjustment in applying the guideline is appropriate.

**THIRD STAGE**

Having determined the consequence and the level of seriousness find the starting point by consulting the grid below.

Maximum sentence is 'x'.

Percentages are approximations and may not divide neatly, so that some adjustment is permissible.

	<b>High Seriousness – level A</b>	<b>Medium Seriousness – level B</b>	<b>Lesser Seriousness – level C</b>
Consequence – category 1	<b>SP 75% x Range 60-90% x</b>	<b>SP 60% x Range 45-75% x</b>	<b>SP 50% x Range 35-65% x</b>
Consequence – category 2	<b>SP 50% x Range 35-65% x</b>	<b>SP 35% x Range 20-50% x</b>	<b>SP 20% x Range 10-30% x</b>
Consequence – category 3	<b>SP 35% x Range 20-50% x</b>	<b>SP 20% x Range 10-30% x</b>	<b>SP 10% x Range non-custodial - 20% x</b>
Consequence – category 4	<b>SP 10% x Range non-custodial – 20%</b>	<b>SP 5% x Range non-custodial – 15%</b>	<b>Non-custodial</b>

Having determined the starting point, consider the following non-exhaustive list of aggravating and mitigating factors of the offence and adjust upwards or downwards if required, taking care not to double-count factors considered in stages 1 and 2.

**AGGRAVATING FACTORS** of the offence

- Stealing goods as a business
- Steps taken to prevent the victim reporting
- Offender motivated by intention to cause harm or out of revenge
- Offence committed over sustained period of time
- Attempts to conceal/dispose of evidence
- Blame wrongly placed on others

**MITIGATING FACTORS** of the offence

- Mental disorder or learning disability if it helps to explain why the offence occurred
- Inappropriate degree of trust or responsibility if it helps to explain why the offence occurred
- Involved because of coercion, intimidation or exploitation
- Minor role in group offending
- Property restored

## **STEP 2**

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender. These may include:

### **AGGRAVATING FACTORS** of offender

- Previous convictions for theft offences
- Recent or relevant convictions for other offences
- Offence committed whilst on bail

### **MITIGATING FACTORS** of offender

- Good character
- Physical or mental disability or ill-health
- Remorse, particularly where evidenced by voluntary reparation to the victim
- Steps taken to address offending behavior
- Where appropriate, primary carer for dependent family members
- Age and/or lack of maturity
- Offending motivated by genuinely desperate circumstances
- Assistance given to the authorities

## **STEP 3**

Credit should be given for a guilty plea as appropriate. A reduction of one-third should be given for a guilty plea entered at the earliest practicable opportunity. Credit will reduce if the plea is later, down to one-tenth for a plea on the day of trial.

## **STEP 4**

Adjust the figure on assessing totality if sentencing for more than one offence.

### **STEP 5**

Credit must be given for time spent on remand for the relevant offence, to be calculated with precision<sup>3</sup>.

### **STEP 6**

Finally, consider ancillary orders, confiscation, compensation, etc, if applicable.

## **Pass the Sentence**

The court must give reasons explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.

---

<sup>3</sup> See the requirements for assessing time on remand in **Gomes v The State 2015** UKPC 8, see para 12; **Shonovia Thomas v The Queen** Appeal no.6 of 2010; and **Romeo Da Costa Hall v The Queen 2011** CCJ 6.