CHAPTER VIII

CONCLUSION

Beginning with a hypothesis, this study concludes with a theory that if the rate of criminal (arrest) appeals lying from the lower courts of Kuala Lumpur to the High Court is representative of the rate of similar appeals lying from all lower courts in the country, then the rate is low. Kuala Lumpur, the federal capital of the country claims an average appeal rate of 2.66% for the years 1972 - 1974. Compared with the 0.67% appeal rate for England in 1973 and the average appeal rate of 10.43% for the United States over the same span of years, the Kuala Lumpur rate tips towards the lower end of the scale.

Realistically speaking, the appeal rate is directly influenced by three parties:- the presiding Judge, the Public Prosecutor and the accused. This study has excluded from its scope the role played by the presiding Judge because of the difficulty of measuring his calibre and the merits of his judgement. The positions of the two remaining parties have been examined in the course of which, factors influencing the rate of appeal have been revealed.

Appeals by the accused accounted for an average of 73.15% of the total number of appeals over the span of four years. The main reason for the lack of appeals by the accused lies in the basic problem of poverty. Moulded by his environment, the "average" accused fights shy of the judicial process. With his defeatist

attitude, he would hardly contemplate an appeal. This passive attitude can be changed by a better understanding of the law which can be obtained through legal representation. It is no coincidence that in appeals against conviction and sentence, an average of 87.33% of the 96.11% of the legally represented appellants were represented in the lower courts and of the remaining 3.89% who appealed on their own, all were without counsel at the trial court. This finding suggests strongly that legal representation plays a major role in influencing the rate of appeals. The presence of counsel seems to bolster up the confidence of the accused.

This is collaborated by the findings which relate to respondents in appeals by the Public Prosecutor. In appeals against acquittals, 91.42% of the respondents were legally represented in the appeal court and out of them 93.75% had counsels at the trial courts. Likewise in appeals against inadequacy of sentence, 90% of the 78.88% legally represented appellants were also represented in the court of first instance. A very different picture is seen in appeals against excessiveness of sentence where only an average of 70.45% of the appellants were legally represented, out of which a mere 25.30% had counsels in the lower courts. The slightly lower representation rate in the appeal court may be due to the "counsel within reach" in the officer-in-charge in prisons. The very low rate of representation in the lower courts is probably due to the fact that these cases involve accused persons who cannot afford counsel and are ignorant of the law, hence making pleas of guilty.

One outstanding feature established by the above is that there is no doubt the accused appreciates the value of counsel. But legal representation has a price tagged on to it and few can afford to pay this price. 84% of the prisoners interviewed who did not appeal attributed their non-representation at the court of first instance to their lack of means. But only 6.9% of the prisoners who did not appeal said that their main reason for not appealing was lack of means. This is not strange because the crucial stage is the trial at the court of first instance. In the absence of injustice in the case, the accused would not contemplate an appeal since it naturally follows that if he cannot afford counsel at the trial court, neither can he at the appeal court. There is however a contrary view held by some lawyers who opine that 'fees' is no deterrent to an accused who desperately wants to engage counsel. The latter would somehow manage to product the requisite fees. A compromise would be that it is a norm for an accused who really cannot afford counsel to do without legal representation unless he is in dire need e.g. when his life is at stake.

It is also found that there is an association between the nature of the offence committed and the kind of sentence imposed with the rate of appeal. The association is a "mere" one in appeals against conviction and sentence but a close one in appeals against excessiveness of sentence. The mere association can be explained by the fact that the crux of an appeal against conviction and sentence is that the judgement is wrong in law or fact which does not depend on the seriousness of the offence or the actual length of imprisonment

imposed. On the other hand, it is obvious that in appeals against sentence which are governed by the principle that the sentence is manifestly excessive on the facts, factors like the nature of the offence committed and the kind of sentence imposed becomes very relevant.

For the accused, factors which determine the number of appeals lying from him are more of a socio-economic nature. A refreshing contrast is seen on the side of the Public Prosecutor who is responsible for the remaining average of 26.85% of the total number of appeals over the four year period under survey. Guided by the principles on which courts determine appeals, the factors which the Public Prosecutor will take into account stem from the said principles. For e.g. in appeals against inadequacy of sentence, he would consider the nature of the offence committed, the circumstances in which it was committed, the degree of deliberation shown, the prevalence of the offence and the circumstances of the case set against the current situation. The last two factors necessitate an up-to-date knowledge of developments on the local scene. He must balance the above factors against the interest of the accused which is established by information given regarding his antecedents, family background and character.

Appeals against acquittal which involve more complicated questions of law and fact demand greater caution. The majority of these appeals pertain to acquittals at the close of the prosecution's case. The onus on the Public Prosecutor in such cases is to establish that on the facts of the case, a prima facie case has been made out. To prove this, he has to review the notes of evidence and the grounds of

judgement to see if there is sufficient evidence to prove all elements of the offence and whether there is any material contradiction by prosecution witnesses which is fatal to the case. In the few uphill climb cases of acquittals at the close of the case for the defence, the same process is repeated this time to check whether in fact, the defence has thrown a reasonable doubt on the case of the prosecution.

Working on the supposition that courts regard appeals against acquittals 'with sterner eyes', the writer ventured a look at the success rates of such appeals. The contest seemed to be a fair one since an average of 91.42% of the respondents were legally represented. The importance of the role of the legal representation is evident from the fact that 93.75% of these were also represented in the lower courts. The success rates of these appeals were 66.67% in 1971, 25% in 1972, 16.67% in 1973 and 50% in 1974 giving an average of 39.59% for the four years. Subject to the three caveats mentioned in Chapter VI, this is low compared to the average success rates of 75% and 59.73% of accused persons having counsels at the appeal court and having counsels at both trial and appeal courts respectively in appeals against conviction and sentence. This may be an indication that the above supposition is true.

In contrast with this, the average success rate of appeals against inadequacy of sentence being 43.69% is higher. An average of 78.88% of the respondents were represented on appeal. This success rate is also higher than the comparative rates referred to above being 25.71% and 37.5% respectively.

As poverty is peculiar to the accused, withdrawal of appeals is peculiar to the Public Prosecutor. Withdrawals occur at two stages namely after lodging the notice of appeal and in open court. The great majority of withdrawals occur at the first stage averaging 88.17% for the four years. Compared with the total number of notices of appeals lodged, an average of 61.65% was withdrawn. This is high when one considers that the average withdrawal rate by the accused at this stage was only 24.37%. The root cause for the great number of withdrawals is traceable to the fact that in the normal course of events, the prosecuting officer in the lower court is not the Deputy Public Prosecutor in whom the ultimate decision of appeal lies. Owing to administrative delay, a notice of appeal is usually lodged first as a "safety measure". After perusal of the grounds of judgement which may give a better coverage of the reasons for the decision arrived at, the Public Prosecutor may decide that there is a slimmer chance of success which is sufficient to upset the appeal and hence withdraws the appeal.

The average percentage of appeals withdrawn in open court is considerably lower. In appeals against acquittal, only 14.59% of the number of such appeals were withdrawn in open court. Likewise the same is true of 23.99% of appeals against inadequacy of sentence. In stark contrast to this, only 1.20% of appeals against both conviction and sentence and sentence alone was withdrawn. The higher rate of withdrawals by the Public Prosecutor is due to the failure to serve notice on the respondent, an indication by the court that it may be futile to continue with the appeal and the rare instance of non-

support of the appeal by a Deputy Public Prosecutor who may disagree with the one who initiated the appeal. None of these reasons are applicable in the case of the accused who having come thus far would hardly relinquish the appeal at the last minute.

Evident from the above discussion that if proposals are forthcoming they must lie in the sphere of the accused. Recognizing that proposals towards alleviating poverty, the underlying cause for the lack of appeals are best left to more competent bodies, attention is given to legal representation, the second significant factor affecting the rate of appeal. Since the door to legal services in town is closed to the 'average' accused, reforms must necessarily be wrought in the legal aid service. Proposals in this area are made with the ultimate objective of the extension of legal aid to all needy accused in both the trial and appeal courts. To this end, it is proposed that the present limited jurisdiction of the Legal Aid Bureau be widened to embody this ultimate objective; the "Means Test" be revised and brought up-to-date, the manpower in the Legal Aid Bureau be increased to a sufficient extent to cope efficiently with the vast increase in workload brought about by the new proposals, the reaching out to the grass root level and finally the compulsory bringing to the notice of the accused of the right to legal aid. A side proposal is the recruitment of a legal officer into the staff of every prison to complement the work now done by the officer-in-charge of appeals.

The above then is the sum total of the findings of this study. This study does not claim to be representative of the position of

the entire country but it is at least a valid indication of what it might in fact be.