

CHAPTER IV

APPEALS AGAINST CONVICTION AND SENTENCE

Appeals by the accused can be classified as being against conviction or against sentence. Though the accused may also appeal against an order pronounced by the lower court or a discharge not amounting to acquittal, the writer does not intend to include such appeals in this study because the number of cases involved is negligible. This chapter will deal with appeals against conviction alone and appeals against conviction and sentence. Principles of law governing such appeals and factors responsible for influencing the rate of these appeals will be discussed.

Principles governing appeals against conviction

The difference between appeals against conviction alone and appeals against conviction and sentence is that in appeals against conviction the accused is satisfied with the sentence imposed and would like it to remain undisturbed should his appeal against conviction fail. However the Judge can reduce or enhance the sentence or alter the nature of it though the appeal is against conviction alone.¹ In practice, unless the Public Prosecutor cross-appeals against inadequacy of sentence the Judge would usually leave the sentence undisturbed.

The writer proposes to discuss principles governing appeals against conviction only. Principles governing appeals against sentence

¹Criminal Procedure Code. (F.M.S. Cap 6) s.316(b).

will be more appropriately dealt with in the next chapter. Section 307(i) of the Criminal Procedure Code provides that any person who is dissatisfied with any judgement pronounced in a Magistrate's Court in a criminal case to which he is a party may prefer an appeal to the High Court in respect of any error in law or in fact. This right is subject to section 305 of the same Code. A person who has pleaded guilty and been convicted on such plea in the Magistrate's Court can only appeal against sentence.

Appeals on questions of law

Most appeals are on questions of law. These appeals are usually quite straight-forward and do not raise difficult questions. Very briefly, errors of law may be divided into three categories:-

- i) errors of substantive law
- ii) errors in evidence
- iii) procedural errors.

An error of substantive law can be taken to mean that an essential ingredient of the offence with which the accused is charged has not been proved. For example, in a case of theft, if the accused is convicted without the article stolen having been proved a movable property, then this constitutes an error of substantive law. This kind of error is very rare. The bulk of appeals in respect of any error in law is found in the second category. Examples include unsworn evidence of a child being accepted without being corroborated by sworn evidence²

²R. v Campbell [1956] 2 Q.B.432.

and a warning not being issued concerning corroboration in the case of an accomplice giving evidence on behalf of the prosecution.³ A fatal procedural error is seen in the cases of Ibrahim v P.P.⁴ and P.P. v Saimin and Ors.⁵ In these two cases, the learned Magistrates had called for the defence just to clear the doubts they had in their minds. As such, they had failed to observe the very elementary principle which a court of criminal justice must strictly adhere to, namely, it is the duty of the prosecution to prove the charge against the accused beyond reasonable doubt. In such cases, it is inevitable that the appeals against conviction would be allowed.

Appeals on questions of fact

In appeals on questions of fact, there are very great inherent difficulties in deciding whether the trial court was right or wrong. This is because appellate Judges, denied of the advantages enjoyed by the trial court in assessing the credibility of the witnesses and the evidence, are more wary to interfere with the findings of fact by the trial court. The attitudes of appellate courts can be traced in the following cases.

In Lee Sang Cheah v R.,⁶ McElwaine C.J. said:-

"It is competent for the appellate court to weigh the evidence, always giving proper weight and consideration to such matters (1) the

³Davies v D.P.P. (1954) A.C. 378.

⁴(1962) 28 M.L.J. 235.

⁵[1971]2 M.L.J. 16.

⁶(1946) M.L.J. 22,24.

view of the trial Magistrate as to the credibility of witnesses; (2) the presumption of innocence in favour of the accused; (3) the right of the accused to the benefit of any doubt, and (4) the slowness of the appellate court in disturbing a finding of fact arrived at by a Magistrate who had the advantage of seeing the witnesses."

In Hg Eoi Chen & Another v P.P.⁷ the appellate court held that when there is an appeal against a finding of fact depending on the credibility of witnesses, and no reason was advanced that such finding was wrong having regard to the evidence, the court would not hesitate to dismiss the appeal.

This vexed question is settled in the recent case of P.P. v Wan Razali Kassim.⁸ In that case, the Public Prosecutor had referred to the Federal Court the following question under Section 66(2) of the Courts of Judicature Act, 1964:-

"If a Magistrate, without misdirecting himself, has made a finding of fact which is corroborated in material particulars by inferences reasonably and properly drawn by him from other evidence adduced before him, and such Magistrate has convicted the accused as a result of such finding of fact, such conviction not being against the weight of evidence in the case, is it open to a judge of the High Court on hearing an appeal against such conviction to upset or interfere with such finding of fact."

The Federal Court affirmed that an appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantages of seeing and hearing the witnesses and therefore of assessing their credibility.

The principles outlined above will be borne in mind by counsel in deciding whether to appeal or not. The same cannot be said of the lay

⁷(1968) 1 ML.J. 53.

⁸(1970) 2 ML.J. 79.

accused who through sheer ignorance would be unaffected by these principles in their decisions regarding appeals.

Factors influencing the rate of appeals

Ignorance of the right of appeal

It is a common belief amongst most people that the accused is ignorant of the right of appeal. For the represented accused, this question of ignorance will not arise since in most cases, his counsel will inform him of this right. Interviews with the prisoners showed that all of them are aware of the right of appeal. It is a practice of every prison to explain to every 'new-comer' at his reception of this right. He is told that he can appeal against conviction, conviction and sentence or if he has pleaded guilty, against sentence alone if he is dissatisfied with the judgement of the lower court. Besides this official source of information, some are "wade-wise" of the right by their cell-mates. The "veteran" prisoners are familiar with this right. Only 3 of the 173 men prisoners interviewed were self-informed of the same by virtue of the nature of their occupations. All this disproves the common belief expressed above. However though they may be aware of the right of appeal, they are still ignorant of the principles governing this right. It will be seen later that this ignorance will exact a price in the outcome of their appeals.

Legal Representation

To test whether legal representation plays any part in influencing the rate of appeals against conviction, it is necessary to see the

relationship of legal representation and the cases which have gone on appeal as well as those which have not gone on appeal. The earlier relationship is evident from Tables 4.1 and 4.2.

TABLE 4.1

APPEALS AND LEGAL REPRESENTATION

| YEAR | Total No. of Appeals | COUNSEL AT | | NO COUNSEL AT | |
|------|----------------------|------------|------------|---------------|------------|
| | | Trial (1) | Appeal (2) | Trial (3) | Appeal (4) |
| 1971 | 45 | 41 | 43 | 2 | 2 |
| 1972 | 18 | 15 | 16 | 2 | 2 |
| 1973 | 19 | 15 | 19 | 0 | 0 |
| 1974 | 16 | 13 | 16 | 0 | 0 |

SOURCE: HIGH COURT APPEAL FILES

Column (2) deals with the number of cases which were legally represented at the appeal court. Column (1) shows the number of cases from Column (2) which also enjoyed legal representation at the trial court. Column (4) deals with the number of cases which had no legal representation at the appeal court. Column (3) shows the number of cases from Column (4) which also had no legal representation at the trial court.

Two major observations can be made:-

i) Besides the year 1972, the number of appeals which were not legally represented was negligible. Every such appeal also enjoyed

no legal representation in the trial court.

ii) A very high percentage of appeals were legally represented, being 95.56% in 1971, 88.88% in 1972 and 100% in 1973 and 1974. Out of the legally represented appeals, a high percentage of them were also represented at the trial court. The relevant percentages for the four years were 95.35%, 93.75%, 76.99% and 81.25% respectively.

These observations suggest that most people desirous of appealing would engage counsels to challenge their case in the appeal court. Besides this, those who have counsels at the trial court show a greater tendency to appeal compared to those who have no counsel at the trial court. From the above findings, it is apparent that there is a close association between legal representation and the number of appeals.

The above table is true of the total number of appeals from the Sessions and Magistrates' Courts combined. The following table, showing a breakdown into the two types of courts, proves that the above findings are true also at both courts taken separately.

TABLE 4.2

LEGAL REPRESENTATION AND SESSIONS AND MAGISTRATES' COURTS

| YEAR | SESSIONS | | | | MAGISTRATES' | | | |
|------|--------------|---------------|---------------|---------------|--------------|---------------|---------------|---------------|
| | Counsel at | | No Counsel at | | Counsel at | | No Counsel at | |
| | Trial (1) | Appeal (2) | Trial (3) | Appeal (4) | Trial (1) | Appeal (2) | Trial (3) | Appeal (4) |
| 1972 | 8 | 8 | 2 | 2 | 7 | 8 | 0 | 0 |
| 1973 | 13 | 14 | 0 | 0 | 2 | 5 | 0 | 0 |
| 1974 | 11 | 14 | 0 | 0 | 2 | 2 | 0 | 0 |

SOURCE: APPEAL FILES

It is not sufficient to look at appeal cases alone. To get a balanced picture, it is necessary to look into cases which have not gone on appeal. It is not possible to see cases gone into in the lower courts. This is because it is not a general practice to state in the court file whether the case has gone on appeal or not. Thus the cases noted may well include cases which have gone on appeal. It is safer to fall back on prison statistics. There were only 5 appeals from the 173 men prisoners interviewed. This left 168 unappealed cases. Out of this 168, only 10 (excluding 4 murder cases to which counsels were assigned) engaged counsels at the trial court. Thus 154 of them were unrepresented, giving a percentage of 93.90%.

This suggests that a high percentage of cases which do not go on appeal have no legal representation at the trial stage. This finding coupled with the earlier one that most appeal cases are legally represented at the trial stage reinforces the conclusion that there is a close relationship between legal representation and the number of appeals. Having noted this, it is appropriate to pause and take a look at the contribution that the Legal Aid Bureau has to make in this area. To qualify for legal aid, the applicant must satisfy two tests. He must pass the "Means Test" and not being legally represented, have pleaded guilty and now seeks counsel's aid in mitigation.⁹ Furthermore he must apply in writing in the prescribed form to the Judge before whom the order is made.¹⁰

⁹P.U. Act 104/73 s.1.

¹⁰Legal Aid Act, 1971. s.10(3)

The "Means Test" in brief, affords full legal aid to the applicant who is earning not more than \$134/- per month and who is in possession of property worth not more than \$500/-. Partial legal aid is extended to applicants who earn between \$134/- - \$221/- per month and who are not in possession of property worth more than \$3,500/-. Partial legal aid means that the successful applicant is to contribute in part to the legal expenses incurred. This contribution is usually only a nominal fee. In practice, the contribution of Legal Aid towards legal representation is so meagre that it is negligible. As for appeals, though Section 10(3) and (4) of the Legal Aid Act, 1971 provide that a person may apply for legal aid in appeals, in practice they are "dead letters" since these proceedings are not specified in the second schedule as required by Section 10(1) of the same Act.

Perceived chance of success

Closely related to the factor of legal representation is that of perceived chance of success. For the represented accused, it will be counsel who will estimate the chances of success of the case. In doing so, he will be guided by the principles governing appeals. Though the ultimate decision lies with the accused, he would usually be swayed by counsel's opinion. The unrepresented accused is much less fortunate. Unaware of the relevant principles, his estimate of the chances of success of his case is dependent on his faulty understanding of the law. Though he is advised by the officer-in-charge of appeals in prison, the latter can only offer limited advice since he has received no formal legal training.

This factor of perceived chance of success is a very intangible one. An indirect way of measuring this factor is to examine the success rates of appeals by represented and unrepresented accused persons. Table 4.3 deals with the success rates of cases having no legal representation at both trial and appeal courts. For the 3 years under study, it was only in 1972 that there were two cases not having counsel at the trial and appeal courts. For 1973 and 1974 such cases were totally non-existent. Table 4.4 deals with cases having counsels at the appeal courts only. Table 4.5 deals with cases having counsels at both trial and appeal courts. Success embodies appeals allowed in full and those in which sentence was reduced though conviction stands.

TABLE 4.3

APPEALS WITHOUT COUNSELS AND SUCCESS RATES (1)

| YEAR | SESSIONS | | | MAGISTRATES' | | |
|------|--------------------------|--------------------|-----------------|--------------------------|--------------------|-----------------|
| | Total No. of appeals (1) | No. successful (2) | (2) as % of (1) | Total No. of appeals (3) | No. successful (4) | (4) as % of (3) |
| 1972 | | | | 2 | 0 | 0 |

TABLE 4.4

LEGALLY REPRESENTED APPEALS AND SUCCESS RATES (1)

| YEAR | SESSIONS | | | MAGISTRATES' | | |
|------|--------------------------|--------------------|-----------------|--------------------------|--------------------|-----------------|
| | Total No. of appeals (1) | No. successful (2) | (2) as % of (1) | Total No. of appeals (3) | No. successful (4) | (4) as % of (3) |
| 1972 | 1 | 1 | 100 | | | |
| 1973 | 3 | 1 | 33.33 | 1 | 1 | 100 |
| 1974 | | | | 3 | 2 | 66.66 |

TABLE 4.5

LEGALLY REPRESENTED TRIALS AND APPEALS AND SUCCESS RATES (1)

| YEAR | SESSIONS | | | MAGISTRATES' | | |
|------|--------------------------|--------------------|-----------------|--------------------------|--------------------|-----------------|
| | Total No. of appeals (1) | No. Successful (2) | (2) as % of (1) | Total No. of appeals (3) | No. successful (4) | (4) as % of (3) |
| 1972 | 7 | 7 | 100 | 8 | 4 | 50 |
| 1973 | 2 | 1 | 50 | 13 | 7 | 53.85 |
| 1974 | 2 | 1 | 50 | 11 | 6 | 54.55 |

SOURCE: APPEAL FILES

The tables show clearly the difference in the outcome of cases having legal representation and those without. The success rate for cases not represented is nil. This confirms the fact that without counsel, the accused has not much of a chance to begin with. On the other hand, the average success rates of cases having legal representation at the appeal courts only and cases having counsels at both trial and appeal courts are 75% and 59.73% respectively. These substantially higher percentages may be explained by the fact that legal advice have been tendered.

These findings complement the views of the lawyers interviewed. 90% of them considered the merits of a case as the foremost criteria in deciding whether to take up a case on appeal or not. There will be no hesitation when clear errors of law can be detected. More caution is exercised when an appeal revolves around a question of fact. As

for the accused, his appeal may be based on a genuine belief that his case is worth appealing but his judgement is handicapped by his faulty understanding of the law, thus resulting in a high rate of failures of such appeals. Estimates of chances whether by counsels or accused persons themselves thus do play a part in influencing the rate of appeals.

Costs

Costs may be of two types: Court fees and counsel's fees. In Section 307(i) of the Criminal Procedure Code, it is provided that when a person lodges a notice of appeal, he should at the same time pay the prescribed fee. The same is reiterated again in Section 307(ii) (a) of the same Code in the case of an appellant in prison. However in checking with the staff at the courts, it is disclosed that there is no actual fee charged. In fact there is no costs of court involved in a criminal appeal. Even the grounds of judgement and notes of evidence are given free.

Such being the case, the problem of finance must lie in the fees charged by counsels. Interviews with 20 lawyers who deal quite extensively with criminal matters have enabled the drawing up of an average scheme of fees shown in Table 4.6. It is difficult to name a fee for any offence for every case differs from another though both relate to the same offence. Furthermore, different lawyers take different factors into consideration before charging their clients. The common factors are the calibre of the lawyer, the ability of the client to pay, the nature of the offence and the time and workload

involved. A kind of average case is taken and every lawyer named his fees based on his own criterias in determining the amount of fees. The average of all fees disclosed for each offence is given in the table below. Except for Section 34(A) of the Road Traffic Ordinance, 1958, the rest of the offences are from the Penal Code.

TABLE 4.6

COUNSELS' FEES

| TYPE OF OFFENCE | s.323 | s.325 | s.353 | s.354 | s.376 | s.34(A)1 R.T.O. |
|-----------------|--------|--------|--------|---------|---------|--------------------|
| Trial Fees | \$ 555 | \$ 793 | \$ 555 | \$ 807 | \$1,110 | \$ 606 |
| Appeal Fees | \$ 855 | \$ 926 | \$ 909 | \$1,040 | \$1,181 | \$ 903 |

Some clarifications must be made concerning the appeal fees. For 4 lawyers the appeal fees would be the same as those charged in the courts of first instance. One lawyer would double the trial fees on appeal. Some lawyers are in favour of charging a flat rate on appeals irrespective of the offence committed. Four lawyers would charge a flat rate of \$750/=, one lawyer that of \$600/= and another a flat rate of \$1,000/=. One lawyer would do the appeal free if he has acted for the same case at the court of first instance.

To the great majority of lawyers, the question of fees would be the second factor to be considered in taking up an appeal. The common consensus is that fees are negotiable to a certain extent. A good 25% of them would even do an appeal free if they consider that injustice

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has been done in the case. However there is a minority group (10%) to whom fees is the foremost criteria and inability to meet the fees quoted would terminate the matter.

The scheme of fees should be set beside the income of the accused persons. The court files do not contain information regarding the income or occupation of the accused. The advocate has thus to resort to prison data again. The average income earned of the 173 men prisoners interviewed is only 6235.33 per month. A clearer picture of the financial position of the prisoners is seen in the following table.

TABLE 4.7

MONTHLY INCOME OF ALL THE PRISONERS

| MONTHLY INCOME | Nil | \$ 100 | \$ 101-199 | \$ 200-299 | \$ 300-399 | \$ 400-499 | \$ 500-1000 | \$ 1000 |
|------------------|------|--------|------------|------------|------------|------------|-------------|---------|
| No. of Persons | 12 | 12 | 58 | 51 | 27 | 5 | 6 | 2 |
| % of all persons | 6.94 | 6.94 | 33.53 | 29.48 | 15.60 | 2.89 | 3.47 | 1.16 |

The table shows that 76.8% of these prisoners do not reach an income of 300/- per month. The more affluent ones earning more than 500/- is only 3.49% and those above 1,000/- per month account for only 1.16% of the total number of prisoners. It is small wonder then that 93.90% of them could not engage counsels even at the trial courts. It is even less surprising that when asked for the reason, 84% of them simply remarked that they could not afford counsel. Yet when it comes to reasons for not appealing, only 12 or 6.9% considered lack of finance

as the main factor. An explanation may be that the mental attitude of the prisoner is the chief determining factor. Having been convicted without counsel, he may be resigned to having to serve the sentence and if given a light sentence, be satisfied with it. No second thought is given to finance at the appeal stage since it has been insurmountable at the trial stage.

The women prisoners differ quite substantially from their male counter-parts. The average income earned is only \$98.88 per month, yet 37.5% of them had counsels at the trial stage. 50% of them attributed lack of finance as the main factor for not appealing.

The Nature of the Offence

The criterion chosen to measure the nature or seriousness of the offence is the maximum term of imprisonment that may be imposed for a certain offence. To test the relationship between the number of appeals and the nature of offences involved, only offences from the Penal Code found in the available original appeal files will be considered. From the Magistrates' Courts, offences punishable with maximum imprisonments of two and three years will be included. Offences punishable with a maximum imprisonment of five years are excluded because there is only one such appeal in the entire span of four years and such offences rarely arise in the Magistrates' Courts. From the Sessions Courts, the relevant offences are those punishable by maximum imprisonments of seven or ten years.

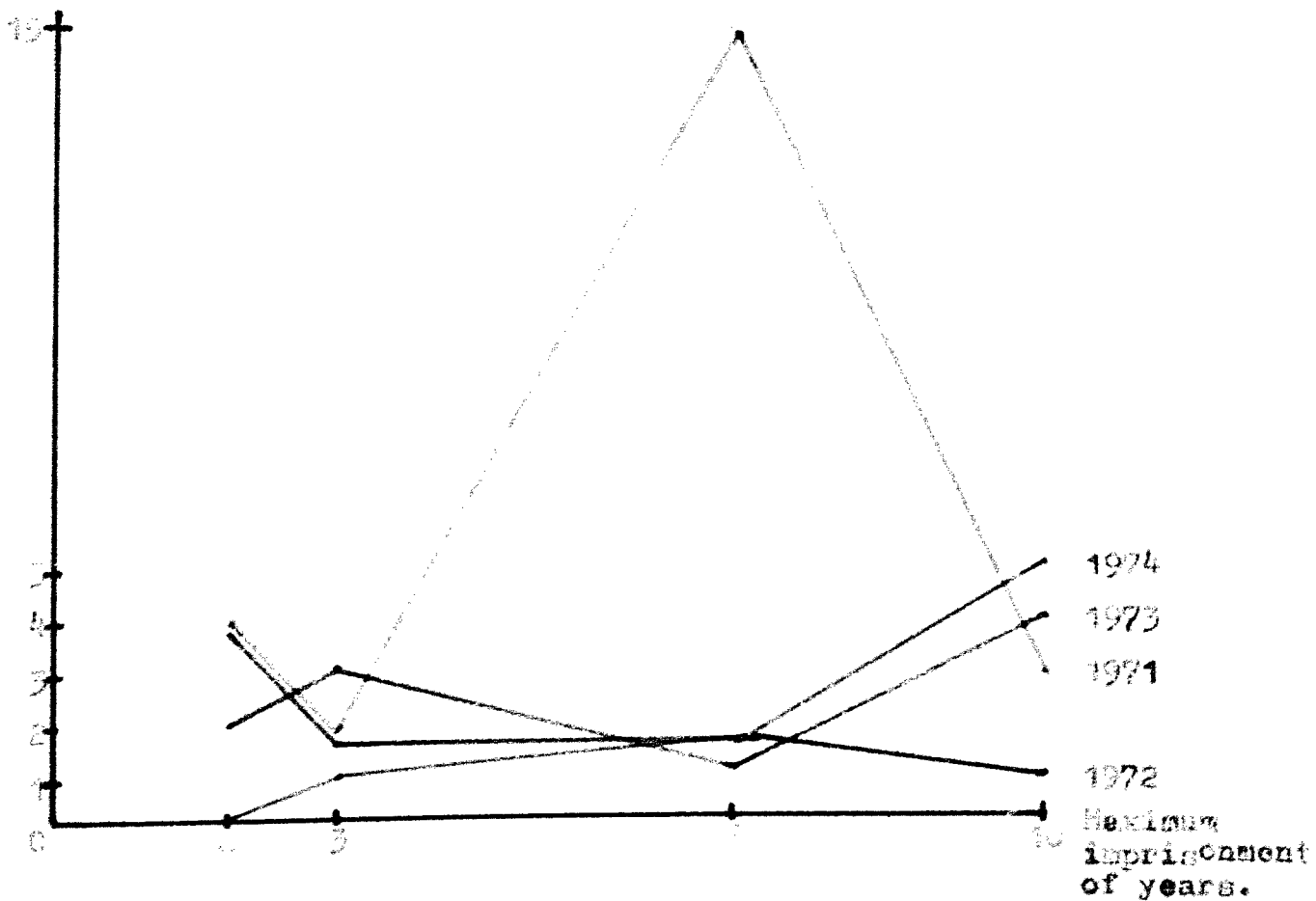
TABLE 4.1

Number of inmates sentenced to prison in 1971-1974

| Year | 1971-1972 | | 1973-1974 | |
|------|---------------------------------------|---------|-----------|----------|
| | Number of inmates sentenced to prison | | | |
| | 2 Years | 3 Years | 7 Years | 10 Years |
| 1971 | 4 | 2 | 13 | 3 |
| 1972 | 4 | 2 | 2 | 4 |
| 1973 | 2 | 3 | 4 | 4 |
| 1974 | 0 | 1 | 2 | 5 |

DIAGRAM 4.1

Number of inmates sentenced to prison in 1971-1974



Besides the year 1974, the courts taken together seem to show no clear correlation between the nature of the offence and the number of appeals. However, the Magistrates' Courts taken alone showed some correlation between these two factors for the years 1973 and 1974. The same is true of the Sessions Courts. Since this project does not intend to go into tests of significance, it would suffice to say that there is some correlation between the two factors. These findings merely represent Penal Code offences of the available appeal files. The result may be different if all arrest appeals are considered or if all appeal files are available. If the result is the same, it may partially explain why there are more appeals lying from the Sessions Courts.

Length of Sentence Imposed

It would be misleading to consider the length of imprisonment without regard to the nature of the offence involved. For example a sentence of two years for a petty theft case may be considered heavy whereas the same sentence for a rape case is extremely light. To test the relationship between the length of sentence imposed and the number of appeals, the actual length of sentence imposed is examined for a group of offences punishable with the same maximum imprisonment. For the Magistrates' and Sessions Courts, cases punishable by maximum imprisonments of two and seven years respectively are chosen because these groups contain the most number of cases.

TABLE 4.9

APPEALS FROM MAGISTRATES' COURTS & SENTENCE IMPOSED (1)

| YEAR | Total No. of cases punishable with 2 years | ACTUAL SENTENCE IMPOSED | | | |
|------|--|-------------------------|--------|--------|--------|
| | | Fine | 6 Mths | 6 Mths | 1 year |
| 1971 | 2 | | 2 | | |
| 1972 | 4 | | | 3 | 1 |
| 1973 | 2 | | 1 | 1 | |

TABLE 4.10

APPEALS FROM SESSIONS COURTS AND SENTENCE IMPOSED (1)

| YEAR | Total No. of cases punishable with 7 years | ACTUAL SENTENCE IMPOSED | | | | | |
|------|--|-------------------------|--------|------|--------|-------|-------|
| | | 1 day + fine | 6 Mths | 1 Yr | 1½ Yrs | 2 Yrs | 3 Yrs |
| 1971 | 15 | 2 | 2 | 3 | 4 | 1 | 3 |
| 1972 | 2 | 1 | | | | | 1 |
| 1973 | 1 | | | 1 | | | |
| 1974 | 2 | | 2 | | | | |

SOURCE: APPEAL FILES

It is difficult to test this relationship since the actual length of sentence imposed is dependent on so many variables like the circumstances of the case and the weight given to mitigating factors. Thus the result arrived at is but an approximate one. The results

shown by the tables above seem equivocal. The only significant findings are that in 1972, there were more appeals against sentences exceeding 6 months in the Magistrates' Courts and the same is true of sentences of more than 1½ years in the Sessions Courts in 1971. On the whole it can be said that there seems to be little correlation between actual imprisonments imposed and the number of appeals subject to the caveat that the findings are true of the chosen groups only.

Attitudes

Through the interviews held with the prisoners, the writer concludes that the primary factor accounting for the low rate of appeals lies in the attitudes of the accused persons. 27 or 15.6% of the men prisoners have adopted a very positive attitude regarding their convictions and sentences. They acknowledge the fact that they had done wrong and readily accept their punishments as the penalties for their wrong doings. Needless to say, the question of appealing does not arise in these cases.

22 or 12.7% of the men prisoners expressed a desire to appeal but realized the fruitlessness of it and hence did not do so. In their language, "the case is proved against me" so it is better not to take the matter up again since the result is bound to be the same. 12% of the women prisoners share this view.

There are a small number of men prisoners (5.8%) who from their demeanour and answers suggest a "resigned to my fate" attitude. Another group of similar size offered no reasons when asked why they did not appeal. The writer looks beyond their answers and attributes them to a "resigned attitude" or to the fact that they simply have not given

a thought to the matter indicating that it is of no importance to them.

A very substantial number of men prisoners (50 or 28.9%) remarked that they did not appeal because they were satisfied with the light sentences imposed on them. To understand their definitions of light sentences the following breakdown is made. 12 prisoners have been sentenced to less than 6 months; 4 to sentences of 6 months to a year; 3 to sentences of exactly one year and 11 to serve sentences exceeding one year. Closely related to this factor is the fear of the High Court enhancing the sentence. Faced with such a possibility, it is wise to serve a short sentence quietly than to challenge the sentence with an appeal. The same is felt by 25% of the women prisoners.

Conclusion

Several factors interact to produce the current rate of appeals against conviction and sentence. The underlying reason for this low rate of appeals is directly traceable to the attitudes held by the accused persons. Such attitudes result from ignorance of the law. These attitudes can be changed with the engagement of counsels who will furnish them with the legal position of their cases. Legal representation is a very major factor responsible for influencing the rate of appeals against conviction and sentence. But the privilege of legal representation must necessarily be accompanied by an ability to meet the fees demanded. Most accused persons, as shown by this study, come from the lower income group which means that they cannot afford the luxury of legal representation. Hence the vicious cycle continues - lack of finance denying the accused of legal representation and leaving

him with his warped version of his own case culminating in a low rate of appeals.