

CHAPTER VIII

SENTENCING AND THE MAGISTRATE.

Most of the observations made in this chapter are based on interviews with magistrates and court observation.

There are one hundred and six (106) Subordinate Courts, manned by fifty-five magistrates in West Malaysia. The magistrates therefore go on circuit. Of the fifty-five magistrates, twenty-seven of them are lay magistrates, and twenty-eight have had formal legal education¹. The lay magistrates are seconded from the Malaysian Administrative Service². They are usually senior civil servants who have had experience in dealing with the "rakyat"³. They are sent on a course conducted to acquaint them with the rudiments of law and court procedure⁴. So far, two of these lay magistrates have been sent to New Zealand for legal training. Another source of lay magistrates are senior civil servants who have reached pensionable age, but are retained as lay magistrates⁵.

¹Source: High Court Registry (Service Section), Kuala Lumpur. The figures do not include any fresh intake of magistrates after the month of March, 1976.

²There are sixteen of them.

³ie. people of the community. Examples are civil servants who occupy the positions of district officers and assistant district officers.

⁴So far, only one such course lasting about ten days has been organised. This was organised by the Judicial Department and the Attorney-General's Department, in 1975.

⁵There are eleven of them.

Quality of Magistrates.

It may be observed that there is very limited manpower in the Subordinate Courts. Even more limited are magistrates with formal legal training and education. The writer sought the opinions of magistrates as to whether lay magistrates have an effect on the quality of sentences imposed. Most were ~~rather~~ diffident in their answers and hesitated to commit themselves. However, the general view seemed to be that it is not the legal training and education, but the experience that counts. Even legally trained magistrates experience qualms about the sentences they impose in their early years. As one magistrate put it, sentencing is not a matter of pure law but a matter of good and common sense. Another magistrate was of the opinion that sometimes lay magistrates tend to be too lenient or too harsh on the offenders, being unsure of themselves. This however, may well be said of the new magistrates who have had legal education too.

One might question how valid short courses are as regards the training of lay magistrates. Even magistrates with formal legal education would have had a brief encounter with the principles and process of sentencing in the course of mastering the law relating to the administration of criminal justice. The justification for these short-comings might be that there is a terrible shortage of magistrates, so that a quickly trained magistrate is better than no

magistrate at all.

The lack of proper schooling in the principles of the administration of criminal justice may be the reason why some magistrates do not seem to be even aware of some of the basic rules of sentencing.

For example, it is an established rule that in fixing the length of a term of sentence of imprisonment, the effect of remission should be ignored, and it is therefore incorrect to pass a sentence longer than what is appropriate to the offence in order to ensure that the offender will serve a certain period of imprisonment⁶. Yet, it was observed that there were magistrates who did consider remission when sentencing an offender. This poses a difficult problem because this is a factor in the mind of the magistrate. One cannot say with certainty that the magistrate has considered a factor which he should not have considered unless he writes down all his grounds for passing a particular sentence.

There were several cases in which magistrates could not distinguish between the use of s.173 and s.294 of the Criminal Procedure Code. They often used s.294 on young offenders who were primary recidivists. Further, not withstanding the decision in San Kaling v F.P.⁷, which held

⁶Maguire. (1956) 40 Criminal Appeal Report 72.

⁷(1965) 31 2 MLJ 272.

that fines should not be so high as to tantamount to sending an offender to prison without option of a fine; there were magistrates who used the power to impose a sentence of imprisonment in default of a fine as a means to exceed their maximum sentencing powers or to lengthen the period of imprisonment. The case should have been transferred to the Sessions Court if it had been felt that a more severe punishment was required.

Another failure to observe the rules of sentencing is the case where the penalty of a fine is combined with police supervision. This does happen now and then⁸, and comprises a blatant disregard for s.295 of the Criminal Procedure Code which states that police supervision may be ordered only where the offender is sentenced to a substantial term of imprisonment⁹.

It is submitted that special courses be organised for all magistrates, legally trained or not, in order to acquaint them with sentencing rules and procedures before sending them out to the towns on their own¹⁰. Sentencing, after all involves the liberty of a man.

⁸ Refer Appendix 7, Post. p.106 for the percentage.

⁹ See also P.P. v Ng Tai (1940) 9 MLJ 73., and Re: Goh Chan Ann (1965) 31 MLJ 77.

¹⁰ At present new magistrates with formal legal education spend about one month at the Kuala Lumpur Subordinate Courts sitting with an experienced magistrate to pick up "the tricks of the trade". Sometimes mistakes are perpetuated this way. In any case, the period of training should be more than a mere one month.

Consistency of Sentences.

It was found that most magistrates felt that there is a consistency in the sentencing practices of the courts, although they agreed that the elements of varying human principles and values will always be variables to be contended with. A magistrate was of the opinion that the doctrine of precedent makes for less anomalies in the sentences imposed.

However, the data compiled does not seem to show that there was always a consistent approach. For example, the number of property offences reported to the police in a year did not have much effect on the custodial rates of the Kota Bharu Subordinate Courts as they did in the Subordinate Courts of Taiping¹¹. Consistency was observed in the sentencing of young and first offenders however¹². The magistrates who were interviewed agreed unanimously that the young offender should be kept out of prison, and the first offender should also be kept out of prison, so that they will not learn more devious methods of crime from the hard-core criminals in prison.

Magistrates and Mitigation.

The magistrates were aware of the various mitigating factors, but it was observed that the weight they attached to each factor varied with individual values and standards.

¹¹ Supra. Chapter V. p.46-51.

¹² Supra. Chapter VI. p.60-62.

The magistrates tend to be more sympathetic with young and first offenders. It was found that the younger and less experienced magistrates were inclined to be more sympathetic while the experienced magistrates were more cynical in their outlook. They had a tendency to have the "I have heard this story before" attitude. One magistrate in particular felt that hearing the offender in mitigation was a mere formality, with the exception of the young and first offender.

In Kota Bharu, the magistrates were more gentle and sympathetic to the offender as most of the offenders there are less sophisticated in their methods¹³. They commit the property offences more out of sheer need or necessity. Furthermore, the sums involved in the property offences committed in Kota Bharu tend to be small. In Kuala Lumpur, and the town of Taiping however, the magistrates tend to be sceptical of the good intentions of the offender to reform. Some magistrates do not view poverty or the existence of a large family of the offender as mitigating factor, as they feel that the offender should have been wise before the event, so that unless the circumstances are exceptional¹⁴, such mitigation is pointless. Others were more inclined to bind over the offender, or order a conditional discharge if

¹³ This was the opinion expressed by the magistrates in Kota Bharu. They felt that the offenders there are 'mere simpletons'.

¹⁴ As when the disaster, for example, the death of a parent or financial problems, strikes after the crime or event.

the offender had a job, so as not to jeopardise his chances. generally, the magistrate agreed that they would not bind an offender over if he came from a poor, slum area, or if his parents cannot exercise effective control over him, as it would render the binding over pointless.

Personal Values of Magistrates.

It was further observed that most magistrates incorporated their personal values and views into the sentences they passed. For example, the magistrates were asked how they would sentence a person driving a "sapu taxi"¹⁵. One magistrate was of the opinion that if the Government did not want "sapu taxis", then the RIMV should issue more taxi licenses, and since this was only a licensing offence, he would treat it lightly. Others looked at the matter from the insurance point of view. The passengers would not be covered by insurance should there be an accident. Thus, such activity should be discouraged.

Another variation in individual views was seen when the magistrates expressed their opinions on the sentencing of cases involving unlicensed brokers or people running public lotteries without license. Some felt that this was again a mere licensing offence since society condones licensed gambling¹⁷ and it is only a matter of revenue. If society

¹⁵An unlicensed taxi

¹⁶Registrar and Inspector of Motor Vehicles.

¹⁷As in Turf Clubs and Casinos.

had felt that gambling was immoral, Parliament should have outlawed such activities altogether. Other magistrates felt that unlicensed public lotteries and "bookies" usually have syndicates behind them. This should be discouraged and broken up.

In so far as radio and television licenses are concerned, most magistrates felt that fines imposed would vary with circumstances. If a person from a kampong were to be charged with possession of a radio without a license, he would be treated lightly since the radio is the people's only source of entertainment in kampongs. It is also the only form of mass communication to these people living in the more remote areas. Most magistrates felt that if a person could afford a television, he could afford a television license too. This being so, this class of offenders do not merit leniency.

Legal Representation.

The magistrates were asked whether they thought having a lawyer was important, particularly when it came to mitigation. Only one out of the nine magistrates interviewed was of the opinion that a lawyer would make no difference, since he did not in any case place much weight on mitigation in general. The others felt that having a lawyer was important because:

- 1) Many laymen cannot distinguish pleading guilty, claiming trial from mitigation.
- 2) They do not understand what exactly mitigating factors are, and tend to be irrelevant or to leave out important facts.
- 3) Assuming they understand the general concept of mitigation, the average man would be too awed and overwhelmed by the formal atmosphere of the court to say anything worthwhile.

The existence of a lawyer therefore serves to present a more coherent form of mitigation. There is supposed to be an understanding between the Chief Justice and the Selangor Bar Committee whereby a magistrate may call on a lawyer who happens to be in court to take instructions for mitigation free of charge if necessary. However, this has never been actually put into practise. Sometimes the Legal Aid Officer comes to court to mitigate for the offender, but this seldom happens.

Most of the magistrates take over the role of counsel if the offender is not represented when it comes to mitigation. It was observed that it is here that the court interpreters play an important role. They prompt the offender with relevant questions and suggestions during the process of mitigation. They can serve to put the offenders at ease in court with the tone they use as they interpret the

magistrate's remarks. If impatient and overbearing, they can add to the already awesome atmosphere of the court, making the offender more tongue-tight. However, any moral homily by a magistrate usually loses its effect by the time it is interpreted by the interpreter. It is most effective when the magistrates speak the language of the offender. However, this problem is inevitable in a multiracial country.

System of Awarding Sentences.

There did not seem to be any system by which sentences were awarded because the magistrates felt that much depended on individual circumstances.

Awareness of Magistrates.

Most of the magistrates interviewed were not aware of what happens after a sentence has been imposed. Only two out of the nine magistrates had ever visited the prisons to see what went on inside, or what rehabilitative measures were available in the prison. Most of them were not aware of the abuse police supervision can be subject to and quite amicably order police supervision upon request of the Prosecuting Officer.

Writing out Ground of Judgement.

Finally, when faced with the question of whether they felt it a good idea to write down the grounds of judgement and sentencing briefly, most of the magistrates felt it was a good idea, but that it was too tedious and onerous a task. Only one magistrate replied that he did sometimes

make brief notes as to why he was sentencing an offender in a particular way. He usually did this in equivocal cases, but not where the case was one in which the grounds were patent.