

CHAPTER V

CUSTODIAL MEASURES OF SENTENCING.

The sentence of imprisonment is in furtherance of the objectives of retribution and deterrence. In P.P. v Yap Chong Fatt,¹ it was held that if an offence is so serious as to merit imprisonment, then the sentence imposed should have an effect not only on the offender, but it should also act as a deterrent. The prison department should have some opportunity of reforming the offender. A sentence of imprisonment can stand alone. When an offence is of a more serious nature, the magistrate can order whipping² in addition to the sentence of imprisonment. Alternatively, he may order a fine to go with the period of imprisonment, or even a combination of the three punishments. If necessary, the court is empowered to order police supervision of an offender after he is released from imprisonment³. A sentence of imprisonment may be consecutive or concurrent. These measures will be dealt with in the latter part of the chapter.

Custodial sentences always involve the working out of the tariff. While it is appreciated that "any tendency to

¹Per Thomson C.J., (1963) 29 MLJ 136.

²Criminal Procedure Code (FMS Cap 6), s.286-291.

³Ibid. s.295. For breakdown of custodial sentences see Appendix 6, Post. p.104

standardise punishment is to be deplored because it means that the individual offender is being punished not on the facts of his particular case but because he has committed an offence of this type,"⁴ there should be a set of rules by which sentences can be determined to give a more consistent approach.

Working out the Tariff.

A. Primary Decision.

This is the basic decision a magistrate has to make when sentencing an offender - to imprison or not to imprison. The magistrate is confronted with the problem of having to determine which of the two conflicting penal objectives should prevail, deterrence or rehabilitation. This is especially so " where a serious offence is committed by a person to whom an individual measure should be appropriate."⁵ In such a situation, the court must decide whether public interest outweighs the offender's needs for rehabilitation. The factors that affect the decision are not fixed, but fluid, varying from time to time, and place to place. It is proposed to outline the more important factors that affect magisterial policy and gauge their role in sentencing in the Subordinate Courts, West Malaysia.

⁴Per Brown, Ag.C.J., Abdul Marris v R. (1954) 20 MLJ 86.

⁵Thomas, op cit. p.7.

1. Offences.

The need for deterrence varies with different offences. One should consider the nature and gravity of the offence involved, since this would in turn affect the primary decision. To weigh the gravity of an offence, one should consider factors such as the threat it poses to society, the consequences of the offence, whether it involves violence and causes hurt, or whether it is a sexual offence.

Offences such as bribery and corruption, extortion and drug trafficking pose a great threat to society. In R v Ng Cheong Hock,⁶ the accused offered a bribe to two police officers and was charged under the Prevention of Corruption Ordinance. It was held that the proper punishment for that offence was a sentence of imprisonment, since such an offence if successful would strike at the root of the impartial administration of the criminal law, and would deny justice to all, destroying the foundations of a good government.

Extortion is treated as a serious offence which must be stamped, since " people are terrified of extortionists and it is difficult to apprehend them,"⁷

⁶[1955] 2 M.C. 229.

⁷Per Gill J., Re: Eng Chong Lam, (1964) 30 MLJ 10. See also P.P. v Yong Fatt, (1964) 30 MLJ 11. (Per Eng J.)

so that once a person is convicted of extortion, he must be dealt with severely unless there are extenuating circumstances in mitigation. In Lasoo and Another v P.P.⁸, it was held that the proper sentence for drug trafficking is a deterrent sentence, and a fine can never be a deterrent sentence.

The criteria of looking at the consequences of the offence is linked to the amount of harm caused to the victim. This is especially so in offences which involve violence and hurt. For example, in P.P. v Ng Ah Tak⁹, acid throwing was held a serious offence which deserved no mercy. "It is absolutely no mitigation in a case of this kind to say it is a first offence."¹⁰ It deserves the severest punishment. Mr.D.A.Thomas found robbery to be an offence which deserved and received deterrent sentences in England¹¹. Rape is another offence which requires a deterrent sentence. In such offences, " the only significant departures from the policy of deterrence ... are found in the instances of mental disorder."¹² In P.P. v Tanga Muthu¹³,

⁸(1965) 31 1 MLJ 235.

⁹Per Good J., (1959) 25 MLJ 19.

¹⁰Ibid.

¹¹Thomas, op cit. p.10.

¹²Ibid. p.12.

¹³Per Poyser C.J.(1940) 9 MLJ 15.

it was held that " in the case of assault with intent to outrage modesty, and of other sexual offences against children, the imposition of a fine only is not adequate punishment and the appropriate sentence should be one of rigorous imprisonment." In the case of P.P. v Teh Ah Cheng¹⁴, the accused was bound over by the Special Sessions Court in the sum of two thousand dollars, (\$2,000), on the charges of possession of a pistol and some rounds of ammunition. On appeal, the High Court changed the sentence to one of three years imprisonment. Mr. Justice Abdoolcader said that in sentencing, the magistrate must generally consider public interest, especially in the case of firearms. Thus it can be seen, that magisterial policy does vary with offences.

The writer attempted to investigate the relationship between the type of offence involved and the primary decision, based on the data compiled. Since the Subordinate Courts of Kuala Lumpur provided for the most complete set of data, the writer based this aspect of the study on the Courts of Kuala Lumpur. For the purposes of testing this particular factor it will be assumed that all the courts in the three towns give the

¹⁴Press. New Straits Times, Feb. 26th. 1976.

same consideration to the sub-factors when assessing the weight to attach to the offence factor in making the primary decision. The issue of locality will be dealt with separately. The writer has treated the Subordinate Courts of Kuala Lumpur as one. In Kuala Lumpur, most of the robbery cases were found in the Sessions Court, while cheating and cases of criminal breach of trust and criminal misappropriation were found in the Special Sessions Court. In order to get the six selected offences together for comparison purposes, the writer grouped the courts into one. This should not have any adverse effects on the study as the primary decision should not be affected by the maximum jurisdiction and maximum sentencing powers of a court, although this may affect the secondary decision of how long a sentence should be.

It is true that the attitudes of the magistrates may differ from those of the Presidents, and thus affect their policy towards an offence. This is a highly intangible factor, and the same may be said of any comparison between magistrates' attitudes alone. The crux of the matter in this case, is what role the offence factor per se plays in the primary decision, setting aside the variables of judicial discretion, and differences in magisterial policy.

Offence.	Percentage of Custodial Rate.*				
	1970	1971	1972	1973	1974
House-breaking and theft - a .	73.3 (22)	45.0 (9)	57.9 (11)	79.4 (27)	80.8 (38)
Criminal breach of trust, etc. - b.	63.6 (14)	62.5 (5)	28.6 (2)	50.0 (7)	80.0 (4)
Robbery and gang robbery - c.	50.0 (27)	25.0 (1)	53.3 (16)	68.6 (35)	96.3 (52)
Cheating - d.	60.0 (18)	50.0 (3)	76.0 (19)	69.6 (16)	88.2 (15)
"Receiving" offences (s.411-414 Penal Code)-e.	25.0 (1)	21.4 (4)	44.4 (4)	43.7 (7)	29.4 (5)
Theft - f.	53.3 (16)	55.6 (65)	47.8 (44)	41.7 (60)	44.3 (108)

Table IV: Custodial Rate of the Subordinate Courts of Kuala Lumpur-Property Offences. (1970-1974)

Source: Compiled from samples taken from Subordinate Courts, Kuala Lumpur.

Notes to Table IV.

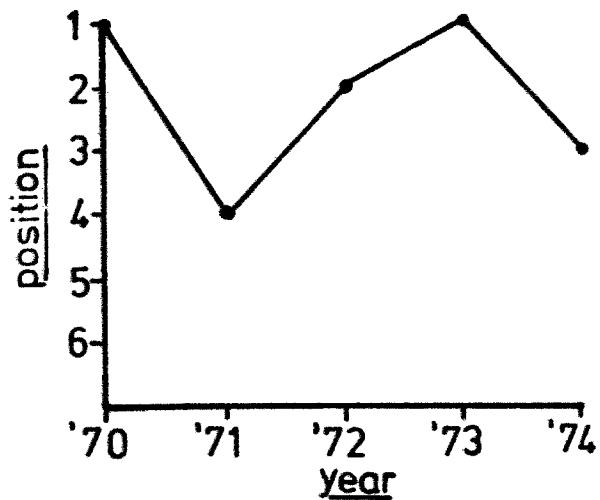
The total number of persons involved do not always equal the total number of samples taken because sometimes there can be more than one accused in a case.

* Percentage of Custodial Rate. It is not possible to talk in terms of number of persons involved due to varying sample sizes. Thus percentages were used. Due to the small number of samples available, even the percentages can sometimes be misleading as they can give exaggerated pictures of the real position; e.g. if there are only two cases of an offence in a year, the chances of them falling under a custodial or non-custodial sentences are great. Once one case falls under a custodial sentence, the figure of fifty per cent (50%) is reached. If both are given custodial sentences, it brings the custodial rate to one hundred per cent (100%). Although mathematically correct, it would not be wise to place too much reliance where sample size is small. The non-custodial rate (N.C.R.) can be obtained by subtracting the custodial rate from one hundred per cent (100%).

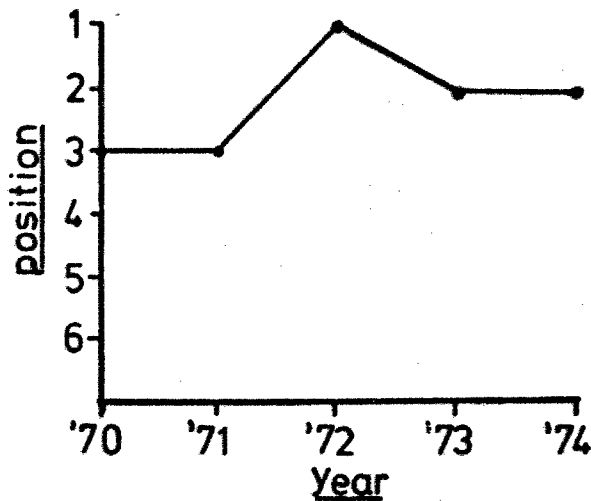
Figures in brackets () represent the actual number of persons involved.

Fig.3: Graphs of positions* of offences against year (Kuala Lumpur).

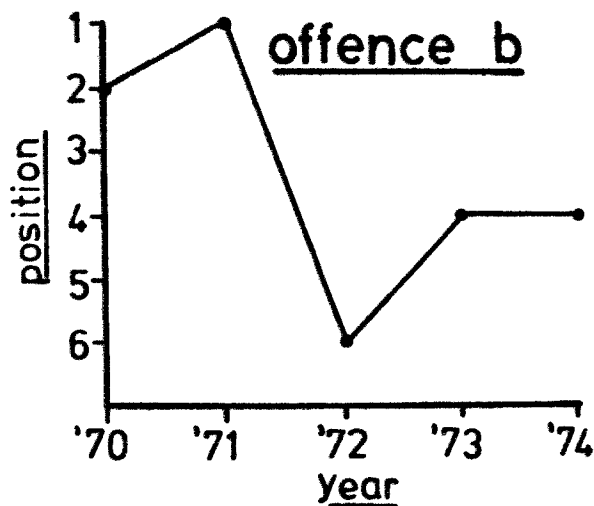
offence a



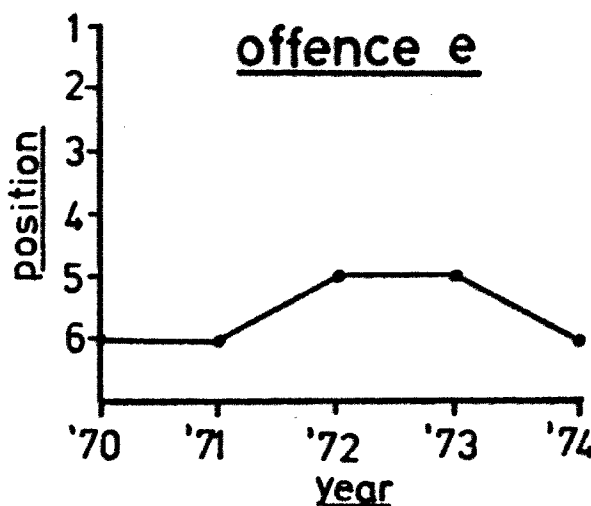
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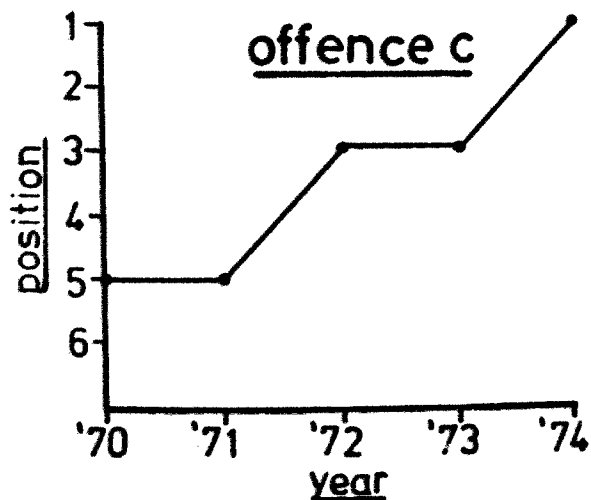
offence b



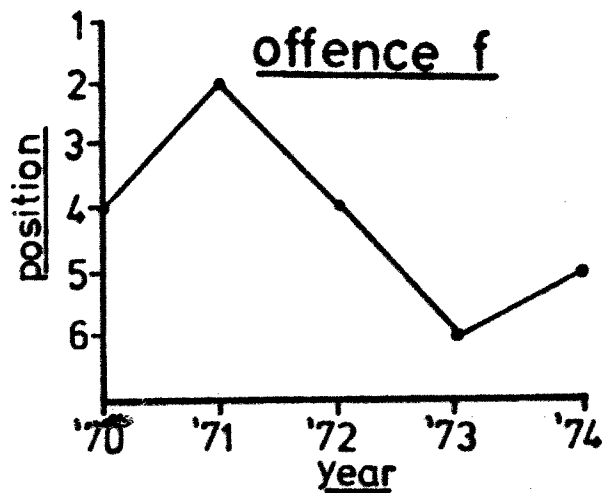
offence e



offence c



offence f



* "Positions" refers to the placing an offence holds in a year with regard to custodial rate: If an offence is noted as one (1) it means it has the highest custodial rate; two (2) means the second highest and so on.

Discussion of Table IV and Figure 3.

From Table IV and Figure 3, it may be seen that no offence in particular had a constant rate of imprisonment. The custodial rate for each offence fluctuates from year to year. In order to show a correlation between an offence and the primary decision, the custodial rates need not be high. There should be a constant or almost constant level of custodial sentences from year to year. Thus, it would appear that apart from the offence of dishonestly receiving and handling stolen property¹⁵, there does not seem to be a consistent policy centered around the offence factor. The abovementioned offence has a more constant custodial rate, fluctuating only from position six (6), (ie. the lowest custodial rate) to position five (5), (ie. the second lowest custodial rate).¹⁶ This is in keeping with the opinion of Mr. Keith Devlin that "offences of receiving would be best deterred by fines which take away the profit."¹⁷ As for the other five offences, it would appear that there is no correlation between the nature and type of offence and the primary decision. If there is some factor which is determining the custodial rates, (and in turn the

¹⁵Figure 3, Offence e, Supra. p.34.

¹⁶Ibid.

¹⁷Keith Devlin, Sentencing Offenders in Magistrates' Courts. 1st Ed., Sweet and Maxwell, 1970, p.64.

primary decision) it is not the offence factor per se'. However, a point should be noted. This study period extends only over five years and may not in all accuracy represent the general sentencing policy of magistrates, especially over a longer period of time.

This being so, the writer took the average custodial rate per offence over the five years for purposes of comparison. Table V shows the average custodial rate of each of the offences, and the ranks each occupies, ie. whether an offence has the highest or second highest etc., average custodial rate.

Offence.	Average Custodial Rate. (%)	Rank.
House-breaking and theft - a.	62.7	2
Criminal breach of trust - b.	57.2	4
Robbery and gang robbery - c.	58.6	3
Cheating - d.	68.8	1
"Receiving" offences - e.	32.6	6
Theft - f.	48.6	5

Table V: Average Custodial Rate of the Subordinate Courts of Kuala Lumpur - Property Offences, (1970-1974).

Source: Compiled from samples taken from the Subordinate Courts, Kuala Lumpur.

Discussion of Table V.

The word "rank" refers to the placing of the offences in terms of custodial rates, the number one (1) being the offence with the highest custodial rate; and two (2), the second highest and so on. From Table V it may be observed that cheating has the highest average custodial rate, followed by housebreaking and theft, robbery, criminal breach of trust, theft and finally, "receiving" offences. It would appear that in the minds of the magistrates, cheating is the offence that requires most deterrence. It might be because cheating is an offence which requires planning, determination and great subtlety. It is difficult to discover such a crime, so that once the offender is caught, he must be dealt with firmly. Robbery is only third in rank. It should be noted that the offences with the highest to the fourth highest custodial rates all exceed the fifty per cent (50%) level, indicating the courts' inclination towards the use of custodial measures for these four offences (cheating, housebreaking and theft, robbery and criminal breach of trust).

This however, may not go to show conclusively that the type of offence has a direct effect on the primary decision because an average figure involves the time factor. This might have affected the average custodial

rate. For example, in a particular year, an offence may be very rampant and this may affect the custodial rate for that year, affecting the average figure too, since the court may decide to impose more custodial sentences with regard to that offence for that year.

2. Local and Temporary Conditions.

The primary decision may be affected by the special conditions in a particular town. The need to impose deterrent sentences may vary accordingly. For example, where the crime rate is very high, the court in that town may find it necessary to find means to deter the offenders and offenders-to-be. Alternatively, the fact that the criminals in a town are bolder and more sophisticated in their methods may call for more severe measures to check them. It may be expected that if there is a sudden rise in the incidence of a type of offence, or a class of offences, there should be a corresponding shift in the sentencing policy in favour of custodial sentences for that offence or class of offences, causing the overall number of custodial sentences to increase, ceteris paribus. In Re: Eng Chong Lan,¹⁸ it was held that since extortion was much too common these days, "the only way to stamp out this offence, or at least to keep it in check is to pass a deterrent sentence."¹⁹ on the persons convicted

¹⁸ Per Gill J., (1964) 30 MLJ 10.

¹⁹ Ibid. p.11.

of the offence. In P.P. v Yong Fatt,²⁰ it was held that extortion was a vicious crime that was rampant and the maximum sentence was substituted for the original sentence of binding over. In Fung Yin Ching and Others v P.P.²¹, the accused was convicted on a charge of being a member of an unlawful assembly. On appeal, it was held that since the circumstances had changed since the time the accused was sentenced in the Lower Court, and the accused was of excellent character, justice would be served if the sentence of imprisonment was set aside. The accused was conditionally discharged instead. Thus, this shows that policy regarding the primary decision may vary to fit the needs at that moment. The abovementioned case may be contrasted with the case of Anwar v P.P.²², where the accused was arrested during a period when Singapore was experiencing some disturbances, and curfew was imposed. He was found with a knuckle-duster in his possession and the trial judge sentenced him to one year imprisonment and four strokes of rotan. On appeal, the High Court upheld the sentence and observed that the Court will not normally commute an accused when violence is not an ingredient of the crime. However, due to the special conditions at the time the sentence was held a proper one.

²⁰Per Ong J., (1964) 30 MLJ 11.

²¹Per Thomson L.P., (1965) 31 1MLJ 48.

²²Per Wee Chong Jin C.J., (1965) 31 1MLJ 63.

The writer sought to make a comparison of the custodial rates of all the Subordinate Courts of Kuala Lumpur, Taiping and Kota Bharu with regard to property offences.

Town.	1970	1971	1972	1973	1974
Kuala Lumpur.	57.9	50.9	52.7	53.9	57.8
Taiping.	64.5	43.1	39.8	33.3	31.9
Kota Bharu.	43.5	32.4	41.1	52.6	42.3

Table VI: Custodial Rates of the Subordinate Courts of Kuala Lumpur, Taiping and Kota Bharu - Property Offences (1970-1974).

Source: Compiled from the samples taken from the Subordinate Courts of the three towns.

Note to Table VI.

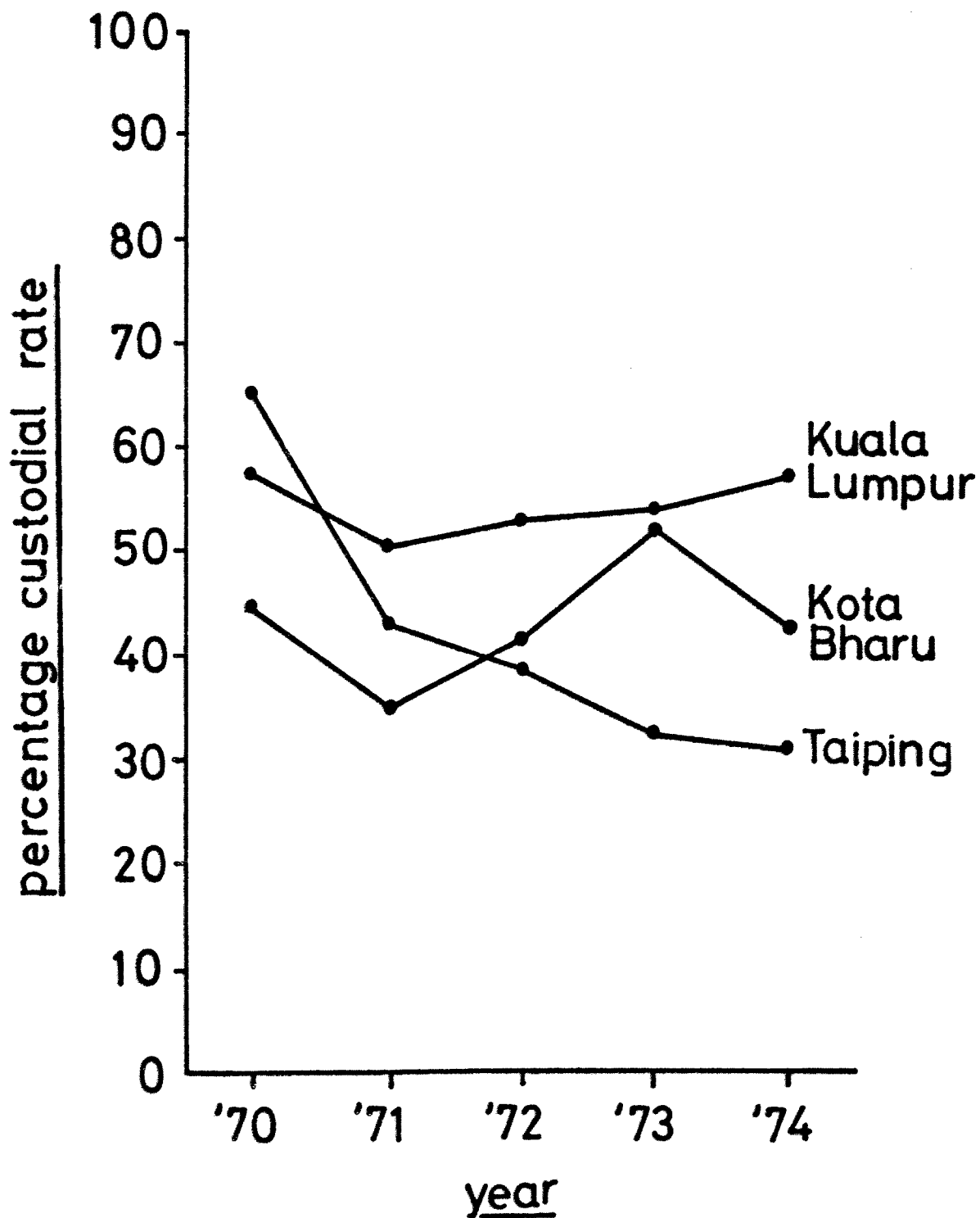
Table VI should be read with reference to Figure 4, Post. p.41.

Discussion of Table VI.

It may be observed that in the towns of Taiping and Kota Bharu, the custodial rate of each town fluctuated over the years. This might mean that the town factor per se' does not have a direct effect on the custodial rate.

In Kuala Lumpur however, the custodial rates of the courts over the five years were fairly constant,

Fig.4: Graph of percentage custodial rate against year (Kuala Lumpur, Taiping and Kota Bharu - property offences).



fluctuating between fifty-seven point nine per cent (57.9%) and fifty point nine per cent (50.9%) only. This means that there is a range of less than eight per cent (8%) all in. It may mean that the city of Kuala Lumpur with all its local conditions²³ does have a direct effect on the custodial rates of its Subordinate Courts. This cannot be conclusive as there may have been other temporary conditions contributing to this constancy. On the whole, it may be observed that there is little consistency among the courts of the three towns. However, this need not necessarily indicate an arbitrary enforcement of sentencing rules as the needs of the offenders and society may well vary with the towns accordingly. Time may have been another factor that could have contributed to this lack of consistency. All these speculations could well have been avoided if the magistrates had been in the habit of recording the grounds for the sentences that they pass.

In order to make a comparison of the three towns, the average custodial rate over five years was taken in the case of each of the towns.

²³ Supra. p.9.

Town.	Average Custodial Rate.	Rank.
Kuala Lumpur.	54.6 %	1
Taiping.	43.3 %	2
Kota Bharu.	42.4 %	3

Table VII: Average Custodial Rates of the Subordinate Courts of Kuala Lumpur, Taiping and Kota Bharu - Property Offences (1970-1974).

Source: Compiled from samples taken from the Subordinate Courts of the three towns.

Discussion of Table VII.

In the abovementioned Table, it may be observed that the city of Kuala Lumpur had the highest custodial rate on the average, with fifty-four point six per cent (54.6%), followed by Taiping and then Kota Bharu. The largest town therefore had the highest average custodial rate. It may be due to the fact that the magistrates are of the opinion that the criminals in Kuala Lumpur are more sophisticated and bold and therefore need more deterrent. The preference of the Subordinate Courts in Kuala Lumpur for custodial sentences with regard to property offences is illustrated by the fact that the average custodial rate is over the fifty per cent level. In fact, from Table VI and Figure 4²⁴ it may be noted

²⁴Supra. p.40,41.

that over the five years, the custodial rate for the Subordinate Courts of Kuala Lumpur never went below the fifty per cent level, indicating a consistent preference for deterrent sentences. On the other hand, both Taiping and Kota Bharu experienced high custodial rates in 1970²⁵, followed by a drop in 1971. In both towns, there was a marked change after 1971. The custodial rate of Taiping continued to drop after 1971, while in Kota Bharu, the custodial rate began to ascend after 1971.²⁶ It may be that for all three towns, the year of 1970 was a year of comparatively high custodial rates giving the appearance that the year of 1971 was the critical year after which there was a change in the sentencing policy in the Subordinate Courts of the three towns.

It is suggested that perhaps 1970 was a "freak" year as a result of the aftermath tensions of the racial riots in May 13th, 1969. In their efforts to restore calm and order to the country, the courts may have consciously or unconsciously imposed a greater number of custodial sentences by way of deterrence. If we were to ignore the year of 1970,

²⁵Table VI and Figure 4, Supra. p.40,41.

²⁶This is also true of the town of Kuala Lumpur.

we would find that in the courts of all the three towns, there is a constant increase or decrease in custodial rates.

It should be noted that the difference between the average custodial rates of The Subordinate Courts of Taiping and Kota Bharu is less than one per cent, even though Kota Bharu has a much smaller number of property offences.²⁷ Thus, Kota Bharu seems to have an unusually high custodial rate for a town with less criminal activity in comparison with the town of Taiping. It may be because property offences are usually committed by the "have-nots" in a town. This may cause magistrates to feel that imprisonment is a more suitable and rehabilitative measure in that it trains and prevents at the same time. If the offender were to be treated with a non-custodial measure, he may go back to his original life-style out of sheer need or inability to support himself. In Kota Bharu, the standard of living is generally lower, while the cost of living is as high as that of Kuala Lumpur's, especially where the essentials such as rice, meat and vegetables are concerned.²⁸ This may be a causal factor of crime.

²⁷Table VII, Post. p. 46.

²⁸Personal observation of writer.

No reasons apart from a variation in the exercise of magisterial discretion can be found to explain why the town of Taiping is facing a decrease in the rates of deterrent sentences for property offences. Perhaps the magistrates are more enlightened in the town as regards the use of rehalitative and individualised methods.

3. Crime Rate.

This factor is closely related to the preceding one of local and temporary conditions. The writer sought to observe if there was any correlation between the custodial rates of property offences of each town to the percentage increase of property offences in each of the three towns.

Town.	1970	1971	1972	1973	1974
Kuala Lumpur	3462	4323	5461	6306	8266
Taiping.	967	986	1170	1232	1508
Kota Bharu.	297	532	604	594	764

Table VIII: Number of Property Offences reported to the police in Kuala Lumpur, Taiping and Kota Bharu (1970-1974).

Source: Police Headquarters of the three towns. (Criminal Investigations Department).

The percentage increase of property offences in the three towns for each year was obtained by the formula:

$$\text{Percentage Increase} = \frac{A - B}{B} \times 100$$

where A = Number of offences of the current year.
and B = Number of offences of the previous year.²⁹

Town.	1970	1971	1972	1973	1974	Average % Increase ^a
Kuala Lumpur.	n.a.	28.8	15.5	38.3	31.1	28.4
Taiping.	n.a.	1.96	18.7	5.3	22.4	12.1
Kota Bharu.	n.a. ^b	79.1	24.8	-10.5 ^c	28.6	30.5

Table IX: Percentage Increase of Property Offences in Kuala Lumpur, Taiping and Kota Bharu (1970-1974).

Source: Compiled from figures in Table VIII (p.46).

Notes to Table IX.

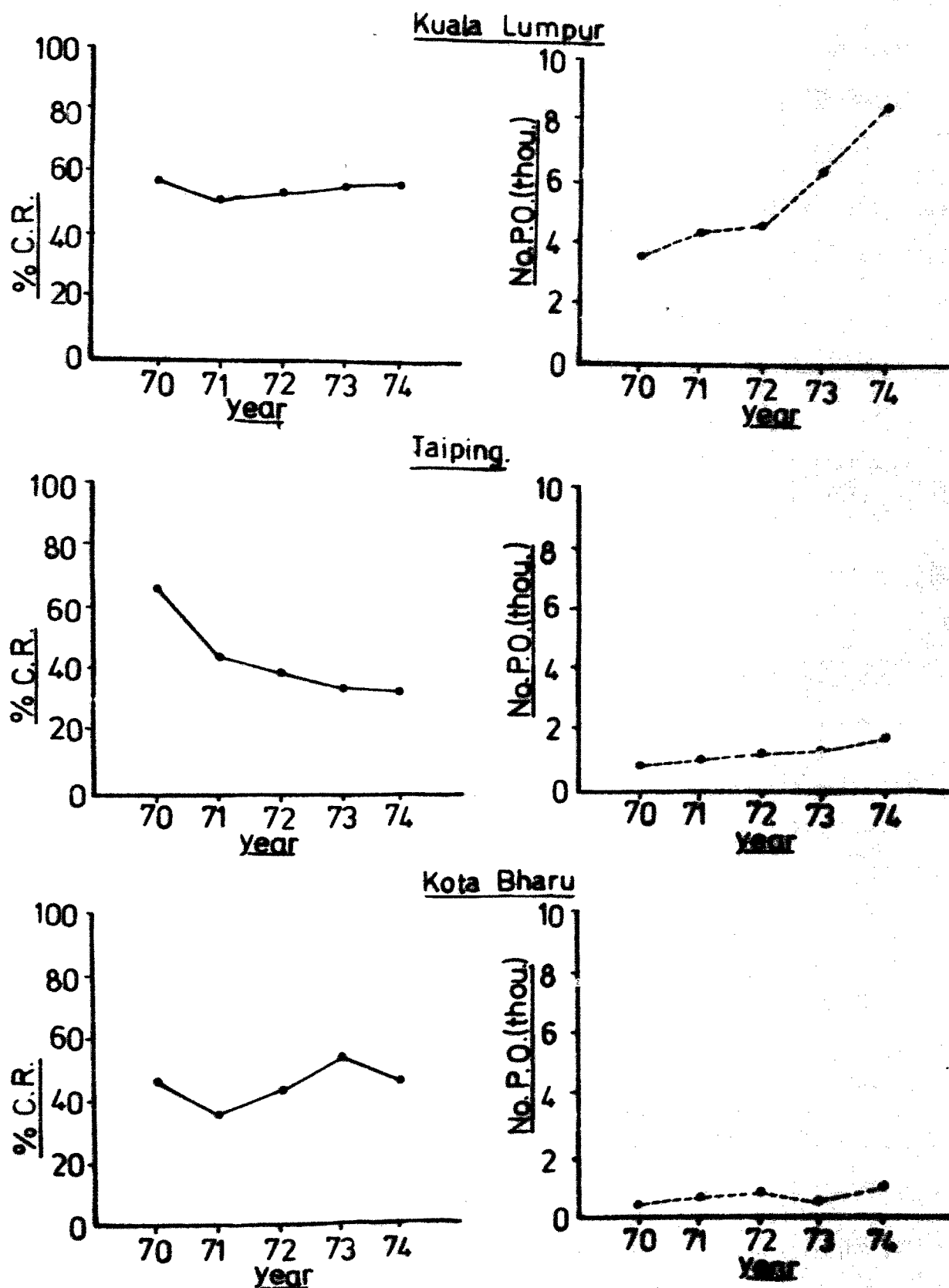
^a Average percentage increase.
This was obtained by totalling the percentage increase of the four years and dividing it by four.

^b The percentage increase for 1970 was not available since the figures for 1969 were not available.

^c There was a drop of ten point five per cent (10.5%) in the period from 1972-1973.

²⁹ Refer Table VIII, Supra. p.46.

Fig. 5: Graph of Comparison between the Number of Property Offences and Percentage Custodial Rate (Kuala Lumpur, Taiping and Kota Bharu : 1970-1974.)



Key: % C.R. - Percentage Custodial Rate.
 No. P. O. (thou.) - Number of Property Offences in thousands.

Discussion of Table IX and Figure 5.

Table IX should be read with Figure 5. For the town of Kota Bharu, although the number of property offences reported was lower than that in the other two towns, the percentage increase for the period 1970-1971 was seventy-nine point one per cent (79.1%). This increase is not reflected by the drop in custodial rate. Subsequently, the number of property offences went up by more than twenty per cent (20%), and there was a corresponding increase in the custodial rate. However, the ten point five per cent decrease (-10.5%) in the number of property offences for the period 1972-1973 was not reflected in the custodial rate for 1973 which continued to rise. This seems to show that in Kota Bharu, magisterial policy regarding property offences does not seem to be related to the crime rate at all. The figures do not reveal an awareness of the changes in the crime rates on the part of the magistrates. On the other hand, it could be that while they are aware of the changes in the crime rate, there may be other factors controlling the sentencing policy in Kota Bharu.

The number of property offences reported do not seem to determine the custodial rate in the Subordinate Courts of Taiping either. There is a gradual increase in the number of property offences. This is again not

reflected in the sentences imposed as the increase in the rate of property offences did not create a corresponding increase in the custodial rates.

On the contrary, there was a decrease in the custodial rates each year after the of 1970.³⁰ However, this may be because the percentage increase of property offences per year was not significant enough to cause any change in magisterial policy in favour of deterrent sentences. Due to the rather gradual increase of property offences each year, the magistrates in the Subordinate Courts of Taiping may have felt that there was no cause for alarm, and that on a balance of the advantages and disadvantages, individualisation was the better approach to take.

In Kuala Lumpur, apart from the year of 1970, a rise in the number of property offences was met with a corresponding increase in the custodial rates of sentences passed. A comparison of the average percentage increase of property offences³¹, with the average custodial rates of the three towns³², shows that while Kuala Lumpur had the highest custodial rate, it was Kota Bharu that had the highest average percentage increase of property offences, followed by Kuala Lumpur.

³⁰ Figure 5, Taiping. Supra. p.48.

³¹ Table IX. Supra. p.47.

³² Table VII. Supra. p.43.

reflected in the sentences imposed as the increase in the rate of property offences did not create a corresponding increase in the custodial rates. On the contrary, there was a decrease in the custodial rates each year after the year of 1970.³⁰ However, this may be because the percentage increase of property offences per year was not significant enough to cause any change in magisterial policy in favour of deterrent sentences. Due to the rather gradual increase of property offences each year, the magistrates in the Subordinate Courts of Taiping may have felt that there was no cause for alarm, and that on a balance of the advantages and disadvantages, individualisation was the better approach to take.

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³⁰ Figure 5, Taiping. Supra. p.48.

³¹ Table IX. Supra. p.47.

³² Table VII. Supra. p.43.

Hence, it is difficult to say conclusively whether the local conditions and crime rates of towns have any effect on the primary decision. In one town this seems to be so, while in another, as in Kota Bharu, this does not seem so. This reveals an apparent inconsistency in the factors a magistrate considers when sentencing offenders.

4. Others.

Other factors affecting the primary decision are the status of the offender, and the magistrates' values and principles as regards imprisonment or individualised measures. The former factor may be illustrated by a case that the writer came across in the Special Sessions Court, Kuala Lumpur. In that case³³, a lawyer was charged under s.409 of the Penal Code with the offence of criminal breach of trust of a sum of five thousand dollars (\$5,000) belonging to his client. Although he was a first offender, the fact that he was a lawyer, made the offence one to be viewed with gravity. The President there said that, "what makes this offence wear an appearance of tragic proportion is the fact that the Complainant was well nigh helpless, throwing himself at the mercy of the lawyer."³⁴ However, the accused

³³Criminal Case No. A 4/72.

³⁴Ibid.

was fined two thousand dollars (\$2,000), in default one year imprisonment, and imprisoned for one day since he was going to be struck off the Rolls of the Bar for life. Although the sentence may not show the gravity of the case too clearly, the observations of the President serves to illustrate how the status of an offender can affect a magistrate's mind.

B. Secondary Decision.

Having made the primary decision, the next problem is the secondary decision. In the case where individualisation is favoured, the secondary decision is with regard to which of the non-custodial measures to impose on the offender. In the case of custodial sentences, the length of the sentence of imprisonment has to be decided.

There are three stages to the secondary decision.

i) Fixing the general range for the offence.

Generally, the punishment will have a statutory maximum. However, no minimum is fixed by legislation. This is left to the court's discretion.

ii) Placing the offender in the proper place within the range.

In placing the offender at this stage, information about the offender should be excluded. At any point of gravity of the offence, the sentence

to be imposed at this stage should be the maximum within the range. No matter how aggravating the circumstances are, the sentence should not be further increased. The offender will be placed according to the hurt he caused if it is an offence against the person, or the sum involved if it is an offence against property.

iii) Calculation of allowances for mitigating factors.

The important point to bear in mind at this stage is that mitigation is not as of right, but depends solely on the discretion of the magistrate. If the magistrate decides to exercise his discretion in favour of the offender, he then lowers the sentence the offender should receive as a result of stage (ii). As stated, the Court should not increase the sentence decided upon in stage (ii), as it should be the heaviest penalty inflicted on an offender already, determined on the assumption that the circumstances of the case was at its most aggravating.

C. Other Aspects of Custodial Sentences.

Imprisonment and Police Supervision.

Police supervision is for the man just released from prison, in order to exercise some control over him during the transitional period of returning to normalcy. In America, this is known as "parole" or

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"after care" . Generally, police supervision is ordered for young offenders or adults with medium or long sentences. However, in West Malaysia, young offenders are seldom put on police supervision but are put under the supervision of the Probation Officer³⁴.

s.295 of the Criminal Procedure Code lays down the preconditions for police supervision. It is only for persons who have been under a sentence of imprisonment only. Thus police supervisions and fines do not go together³⁵.

Yet the writer came across cases where magistrates imposed this combination of punishments quite oblivious of the ruling in P.P. v Ng Tai and Others³⁶. Even in the case of combining imprisonment with police supervision, the offender must have been convicted of an offence punishable by a maximum period of two years imprisonment before. Hence, he will not be a first offender. The offence for which he is being punished must also be one punishable again by a maximum of two years imprisonment. The police supervision should not exceed three years if ordered by a President of

³⁴Obtained from personal interviews with magistrates.

³⁵P.P. v Ng Tai and Others.(1940)9MLJ 58.

³⁶Ibid.

a Sessions Court and one year if ordered by a magistrate³⁷. s.296 lays down the rules a police supervisee must follow. The writer was told that sometimes these police supervisees serve as "informers" to the police.

This poses the question of how sincere the implementation of police supervision is. Using the police supervisees as informers may be an infringement on the rights of the supervisee. It might be said that the information is given voluntarily, but there is little safeguard to ascertain this. It may pose as an obstacle to the reform of the offender if he is obliged to give information about other people as this might exasperate, frustrate and disillusion him further. One might question how aware magistrates are of such problems encountered by offenders.

Table X³⁸ gives the rate of use of police supervision on offenders sentenced to prison.

³⁷Criminal Procedure Code, s.294.

³⁸Post. p.56.

Town.	1970	1971	1972	1973	1974	Average % over 5 years ^a .
Kuala Lumpur.	22.2 (22) ^b	48.8 (42)	23.9 (23)	11.8 (18)	9.9 (22)	23.3 (127)
Taiping.	28.1 (25)	31.8 (14)	48.7 (18)	29.0 (9)	20.7 (6)	31.7 (73)
Kota Bharu.	20.0 (6)	17.4 (4)	23.1 (9)	36.7 (11)	13.6 (3)	22.2 (33)

Table X: Table showing percentage use of police supervision of the total number of custodial sentences in the Subordinate Courts of Kuala Lumpur, Taiping and Kota Bharu - Property Offences (1970-1974).

Source: Compiled from data in Appendix 6, (p.104).

Notes to Table X.

^aThe average percentage use of police supervision over five years was calculated by adding the percentages use of each year and dividing the total by five.

^bFigures in brackets () represent the actual number of persons placed under police supervision.

Concurrent and Consecutive Sentences.

When an offender is convicted of two or more counts of an offence, or of separate offences, the court may order the sentences to run consecutively or concurrently. Section 282 of the Criminal Procedure Code provides that unless otherwise stated, every sentence shall run from the date of sentence. If an offender is already serving a term of imprisonment, the sentence may commute immediately

or at the end of the imprisonment³⁹. There are certain guides to deciding when to order consecutive or concurrent sentences.

1. The sentence on a subsidiary charge should be concurrent and not consecutive to the sentence for the main charge⁴⁰. The magistrate should not inflate the total sentence by making the two sentences consecutive.
2. However, when there are two distinct charges, it is within the court's discretion to order concurrent or consecutive sentences⁴¹.
3. If however, the sentence for an offence is a fine, the sentence in default of payment must be consecutive to any term or terms of imprisonment⁴².
4. Although s.282 of the Criminal Procedure Code provides for a situation where nothing is stated as to whether a sentence is to run concurrently or consecutively to another, the case of Eujang Johnny v P.P.⁴³ decided that a magistrate should indicate in the records whether the sentences run concurrently or consecutively.

³⁹Criminal Procedure Code (FMS Cap 6) s.292.

⁴⁰Lim Yean Leong v P.P. (1940) 9MLJ 216. See also the case of Cheng Kee Huat and Another v P.P. (1948) 15 MLJ 53.

⁴¹Re: Cheng Seng Fatt (1965) 31 1 MLJ 91.

⁴²Ibid.

⁴³(1965) 31 1 MLJ 72.