

NON-CUSTODIAL SENTENCES.

Primary Decision.

The primary decision to impose a non-custodial sentence is influenced more by the characteristics of the individual offender than the nature of the offence. The chances of his reforming and responding to individualised measures must be considered. It is possible to identify certain categories of offenders for whom the court always usually considers an individualised approach. Most obvious are the young offender, the adult first offender and the mentally disturbed offender. It is proposed to deal only with the first two categories, as the third is out of the purview of this paper.

The Young Offender.

Section 15 of the Juvenile Courts Act (1947) provides that no child¹ shall be sentenced to imprisonment directly or in default of payment of fine, damages or costs². It also provides that a young person³ shall not be sentenced to imprisonment unless there are no other suitable methods of dealing with him⁴. If he must be imprisoned, he shall

¹The Juvenile Courts Act (1947), s.2 defines a child as a person under fourteen years of age.

²Ibid. s.15(1).

³Ibid. s.2 defines young person as one over fourteen years of age and below seventeen years of age.

⁴Ibid. s.15(2).

not be allowed to associate with adult prisoners⁵.

Section 293 of the Criminal Procedure Code provides for other measures apart from imprisonment of the youthful offender⁶.

The policy to use individualised measures on the young offender is even more marked in the case of a young, first offender. In Tukiran v P.P.⁷, it was held that "it is very desirable that a young first offender who is between the ages of seventeen and twenty-one should be kept out of prison, if possible; it would be more beneficial to him, and in the long run to the community at large, to send him to an advanced approved school.", unless the offence is so serious that a sentence of imprisonment has to be imposed⁸. It was also held that before sending a young offender to prison, a magistrate should make careful inquiries into the "background, antecedents and character" of the offender and call for a Probation Officer's Report. The public can surely have no greater interest than the reformation and rehabilitation of a young offender.

From the data compiled, the number of young offenders who received non-custodial sentences were noted against the total number of young offenders.

⁵Juvenile Courts Act (1947), s.15(3).

⁶The Criminal Procedure Code, s.2 defines a youthful offender as a person over seven years of age and under sixteen years of age.

⁷Per Bellamy J. (1955) 21 MLJ 24.

⁸See also Tan Kah Eng v P.P. (1965) 31 2 MLJ 272,
Per Ambrose J.

Year.	No. of Young Offenders - A.			No. Receiving N.C.S. ^a - B.			Percentage of B / A.		
	K.L.	Tpg.	K.B.	K.L.	Tpg.	K.B.	K.L.	Tpg.	K.B.
1970	59	59	n.a. ^b	41	28	n.a.	69.5	47.5	n.a.
1971	69	54	43	51	35	35	73.9	64.8	81.4
1972	72	52	32	50	51	25	69.4	98.1	78.1
1973	128	39	27	80	33	17	62.5	84.6	62.9
1974	179	45	30	93	44	18	51.9	97.8	60.0
Average percentage ^c							65.5	78.6	70.6 ^d

Table XI: Percentage of young offenders receiving non-custodial sentences in the Subordinate Courts of Kuala Lumpur, Taiping and Kota Bharu (1970-1974).

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

Notes to Table XI.

The percentage of custodial sentences for young offenders may be obtained by subtracting the non-custodial sentences from one hundred per cent (100%).

K.L. - Kuala Lumpur.

Tpg. - Taiping.

K.B. - Kota Bharu.

^aNon-custodial sentences.

^bThe files were missing, and in the Court Register, the ages of the offenders were not recorded.

^cThis was obtained by totalling the percentages of young offenders receiving non-custodial sentences over five years for each town and dividing the total by five.

^dThe average percentage for Kota Bharu was over four years only.

Discussion of Table XI.

Again, in all three towns, the writer treated all the Subordinate Courts as one, it being the opinion of the writer that the maximum jurisdiction and sentencing powers of a court should not affect the treatment of young offenders and the primary decision⁹. It was observed that the principle in the case of Tukiran v P.P.¹⁰ was adhered to in all the three Subordinate Courts.

In all the three towns, the percentage of young offenders receiving non-custodial sentences exceeded the fifty per cent level, with the single exception of the courts in the town of Taiping in the year of 1970, which showed only forty-seven point five per cent (47.5%). However it may be considered a borderline case as it is very close to fifty per cent.

This may indicate that the fact that an offender is young is a relevant factor in making the primary decision, and that the magistrates tend to favour the use of individualised measures for young offenders. The average percentage of young offenders receiving non-custodial sentences clearly exceeded the fifty per cent level. The Subordinate Courts of Kuala Lumpur averaged sixty-five point five per cent (65.5%), Taiping, seventy-eight point six per cent (78.6%), and Kota Bharu, seventy point six

⁹Supra. p.32.

¹⁰(1955) 21 MLJ 24.

per cent (70.6%). This seems to reflect that in so far as this aspect of sentencing is concerned, there exists a general consensus among the magistrates, and a consistency in their policy with regard to the young offender.

The Adult First Offender.

There is no fixed rule that adult first offenders must be treated with individualised measures. However, it was observed the courts do generally consider the fact that an adult offender is a first offender. In Re: D.C. Henry¹¹, it was held that a sentence of six months imprisonment on the charge of cheating was too harsh since the accused had no previous convictions. The accused was discharged unconditionally under s.183(2)¹² of the old Criminal Procedure Code (SWS 21). Section 294 of the present day Criminal Procedure Code provides that in the case of an adult first offender, "if it appears to such Court that regard being had to the character, antecedents, age, health or mental condition of the offender... the Court may instead of sentencing him at once to any punishment direct that he be released on bond..."¹³ Thus the first offender is given a different treatment from that of the recidivist under the law. The writer is not able to support this statement with

¹¹ Per Rigby J. (1958) 24 MLJ 224.

¹² The equivalent of s.173A of the present day Criminal Procedure Code.

¹³ This section will be dealt with in the latter part of this Chapter, Post. p.68

data as the records of the previous convictions of the offenders were not always available. To present the data despite this limitation may amount to misleading the reader.

Secondary Decision.

The magistrate must decide which of the non-custodial sentences is suitable to an offender's needs. The non-custodial sentences discussed in the Chapter are fines, discharges, instances of offenders being bound over, and probation.¹⁴

a. Fines.

Fines are also governed by the aims of deterrence and retribution, but they are less penal than sentences of imprisonment and more rehabilitative in nature. Fines are imposed when deterrence is considered necessary, but the offence is not so serious as to justify a sentence of imprisonment nor does the offender require any form of supervision. They are usually imposed for regulatory offences such as traffic offences and "receiving" offences where the issue of profit is involved. Sometimes, when an offence is so serious that a sentence of imprisonment is required, a fine may be included if a

¹⁴For data on the breakdown of non-custodial sentences of the Subordinate Courts of the three selected towns, refer Appendix 7, Post. p.106

profit has been made by the offender.

Two issues arise when a magistrate decides to impose a fine. He has to determine how large a fine to impose, and subsequently, there is the problem of enforcement.

1) Determining the sum.

There are three factors to consider in determining the sum of the fine. The magistrate should consider the amount of money involved in the offence, if any; the profit the offender has made, and then his ability to pay the fine¹⁵. Mr. D.A. Thomas is of the opinion that the last mentioned consideration should only be relevant as a mitigating factor¹⁶. It would not be consistent with the basic tariff principles to impose a fine out of proportion to the offence on the ground that the accused cannot afford to pay. A fine should first of all be commensurate with the the offence and should not be imposed with the view of punishing a man more just because he is rich. On the other hand, a fine should be large enough to show that crime does not pay, yet not be so excessive as to ruin a person completely and make a potential criminal out of the offender from sheer necessity¹⁷. His wealth or

¹⁵ Per H.S. Ong J. Yoh Meng Heng v P.P. [1970] 1 MLJ 14.

¹⁶ Thomas, op cit. p. 219.

¹⁷ Per Pedlow J. Lee Yu Fah v P.P. (1937) 6 MLJ 171. See also s. 283 (i)(a) of the Criminal Procedure Code.

poverty should be considered each time. Mr. Justice Chang Min fat set aside a fine of two thousand dollars (\$2,000) imposed on a man who earned thirty dollars (\$30) a day, on the grounds that such a punishment was completely punitive¹⁸. It is also the duty of the magistrates to look into the possibility of reform besides just reflecting their abhorrance of crimes. To impose a fine which is so high that an offender cannot pay, would tantamount to sending him to prison without the option of a fine¹⁹. On the other hand, a rich man should not be sent to prison just because he is too wealthy for any fine to make a dent. When a fine is imposed, the term of imprisonment in default should bear some relationship to the amount of fine²⁰.

2) Enforcement.

Section 283 (i)(b) of the Criminal Procedure Code provides that time may be allowed to the offender for the payment of a fine or he may pay the fine in instalments. The Court may issue a warrant for the levy of the amount by distress, and the sale of any property belonging to the offender. Section 283 (5) further provides that the court may order that the offender be searched in the courtroom to see if he has

¹⁸ This was in the case of one Chew Kooi Choi, reported in the New Straits Times, April 1st., 1976.

¹⁹ Per Ambrose, Tan Kah Eng v P.P. (1965) 31 2 MLJ 272.

²⁰ Criminal Procedure Code, s.283(i)(c). Appendix 8, Post. p.108

any money with him to pay the fine.

b. Discharges.

If the court feels that as a result of the "character, antecedents, age, health or mental condition of the person charged or the trivial nature of the offence, or the extenuating circumstances under which the offence was committed", it is inexpedient to inflict punishment on the offender, the court may discharge the offender conditionally or unconditionally (absolute discharge), under s.173 A of the Criminal Procedure Code. This section applies to all cases in Malaysia, regardless of the nature of the prescribed punishment²¹. When this section is used, the court should not proceed to convict the accused. The courts usually use this section for smaller and more trivial offences, for first and young offenders, and sometimes even for adult offenders if it is their first offence and they have been led astray²².

i) Absolute Discharge.

This is ordered when the court is of the opinion that there is no chance of the offender ever repeating the offence. It is an act of judicial compassion on the part of the court, and is solely discretionary. It is usually reserved

²¹Per Thomson J. P.P. v Idris (1953) 21 MLJ 234.

²²Per Sharma J. Re: Badri bin Abas. [1971] 1 MLJ 202.

for small technical offences in which no deterrent or retribution is necessary²³.

It should also be used for strict liability offences in which the offender cannot help but commit the offence²⁴. Hence, an absolute discharge is the court's way of saying, "Go, and sin no more."

ii) Conditional Discharge.

This has the effect of a mild deterrent and is kept for cases where there is a slight chance of the offender repeating the offence, but the court feels that in view of the offender's background and family surroundings, there is no need for supervision. When a conditional discharge is ordered, the offence should be one in which a general deterrent²⁵ is not required. It is usually used on first offenders, young offenders and offenders with a gap in their record, which goes to show that they are making an effort to reform.

²³For example, when a person does not put his signature on to his driver's licence as is required.

²⁴For example, where a person is not able to produce his identity card for inspection upon request by the police, or authorised government personnel. He may have just had his pocket picked without his knowledge, and may have discovered it only on being asked to produce the identity card. Such a case should not have come to court in the first place, but if it does, the court should exercise the discretion to discharge the offender.

²⁵Supra. p.23.

The offender is usually discharged subject to the condition that he enters into a bond, with or without sureties, to be on good behaviour for a period not more than three years. If the offender fails to observe the conditions of the bond, the court may issue a warrant for his arrest and apprehension. The flaw in this is that in case of breach of bond, the offender will not be apprehended unless he is caught committing a subsequent offence.

c. Binding Over.

Subject to the same factors in s.173A, s.294 of the Criminal Procedure Code provides for the binding over of an offender. There are two limits to the use of this section. The first is that this section may be applied only to adult offenders; and secondly, the offence must be one that is punishable by a sentence of imprisonment²⁶. In P.P. v Idris²⁷, it was held that s.294 should be used for the more serious offences, which as a result of the particular circumstances of the case, or the character of the offender, the court decides against the use of custodial measures.

Section 294A provides that the offender may be put under the supervision of a person named in the bond.

²⁶Per Thomson J., P.P. v Idris. (1955) 21 MLJ 234.

²⁷Ibid.

In binding over, the offender is not sentenced yet, but is released on a bond to keep the peace and be on good behaviour. Only when he breaches the bond is he brought back to the court to be sentenced on the original offence. The court may impose any condition as it thinks fit. Generally the courts order that the offender be kept indoors between certain hours after sunset and before sunrise.

d. Probation.

Certain conditions should be fulfilled before placing an offender on probation:

- 1) Circumstances must be such that the interest of society does not require a severe method of dealing with the offender.
- 2) The risk faced by society in setting him free should be outweighed by the sociological and economic grounds against keeping him in prison.
- 3) The offender must need continuing attention, because if not, he could be conditionally discharged.
- 4) The offender must be capable of responding to probationary measures.

Section 12(1)(e) of the Juvenile Courts Act (1947) provides for probation of the offender under seventeen years of age. Probation for offenders over seventeen is governed again by s.294 of the Criminal Procedure Code. It provides that the offender may be released "on probation of good conduct". Hence, the supervisor named in the

bond under s.294A, will usually be the probation officer. Probation is usually for the young offender. The first offender should not be put on probation because fines or conditional discharges should be tried first. It is only upon the failure of the first punishment, that probation is used. Thus probation should be for primary recidivists.

The effects of probation rest greatly on the ability of the supervisor. It is good, because the offender is allowed to be responsible for his actions and is not put in confinement, yet, the society is protected via the supervision. It helps him to adjust and strengthen his resources that he may fit into the society he lives in again. He is given freedom so that he may learn to fulfill the duties that society places on every individual,

e. Approved Schools.

Section 12 (1)(f) of the Juvenile Courts Act 1947, provides that the Juvenile Court may order an offender to be sent to an approved school if he is under fourteen years of age, for a period not exceeding three years. An offender under seventeen years, but over fourteen years of age is sent to Henry Gurney School²⁸, again for a period not exceeding three years. From the cases the writer went into, it was observed that often an offender over seventeen is still sent to Henry Gurney School. It is not known under which section of the Juvenile Courts

²⁸In effect, Henry Gurney School is an approved school, but it is reserved for the older of the juvenile offenders.

Act (1947) or any other statute the magistrates do this.
The writer will not discuss the effects and use of
approved schools as the writer did not go into the cases
tried by the Juvenile Court.