

CHAPTER VII

SENTENCING AND MITIGATION.

In this chapter, the various factors that influence the choice of a tariff or individualised measure (primary decision), and the factors that affect the length of a sentence or the type of individualised measure will be discussed. These factors are commonly referred to as mitigating factors¹.

The cardinal principle to bear in mind is that the offender is not entitled as of right to a reduction in the sentence already accorded him because of mitigating factors. It is within the sole discretion of the court to decide whether the need for deterrence outweighs any mitigating factor an offender may tender. Hence, a mitigating factor may vary in importance depending on the offence involved. It is usually a combination of factors rather than an individual factor that influences a court.

Generally, there are four classes of mitigating factors. They are:²

- 1) Factors relating to the age and history of the offender.

¹ Refer Appendix 9, Post. p.109 for the percentages of those offenders who tendered mitigation in some form or another.

² Adapted from Thomas' "Principles of Sentencing" op cit. p. 170-199.

- 2) Factors relating to the circumstances immediately prior to the commission of the offence.
 - 3) Factors relating to the indirect effect of the conviction or sentence.
 - 4) The behaviour of the offender after the offence.
- 1) Factors relating to the age and history of the offender.

Age: This is the most effective mitigating factor as shown in Chapter VI³. The Subordinate Courts in West Malaysia seem to strongly and unanimously favour individualised measures in the case of the young offender under twenty-one years of age.

History of the offender: Since the records did not always indicate clearly whether an offender had a previous conviction or not, the writer was not able to compile data that was comprehensive enough to illustrate this aspect of mitigating factors. However, it was observed that if the offender had a clear record and no previous convictions, this served as a mitigating factor. It may influence the magistrate either in the primary decision or the secondary decision.

Section 294 of the Criminal Procedure Code deals with adult offenders who may be bound over if the magistrate decides inter alia, that having regard to

³Supra. p.58-62.

his antecedents, the offender should not be sentenced to a period of imprisonment. A gap in the offender's record is also a factor in his favour. This may mean that the offender tried to reform, but made a lapse in his attempt. A word of caution should be given that if the tariff is to be properly applied, a bad record should not aggravate the sentence⁴. If an offender is sentenced more severely than another, it should mean that no credit was given for mitigating factors, and not that his record or behaviour aggravated the sentence.

2. Circumstances immediately prior to the offence.

The court will make allowances if the facts of the case show that the offender acted under provocation, or domestic or emotional stress⁵. The view is taken that offences committed under such circumstances tend to be " on-the-spur-of-the-moment " offences and do not tend to be repeated by the offender. Hence, no individual deterrent is needed. The offender will usually be given another chance, provided the offence is not one which requires a general deterrent. A financial crisis faced by the offender, urging him to commit an offence is also given due consideration by the court.

⁴Thomas, op cit. p.174.

⁵This was observed to be true from the cases looked into.

3. Indirect effects of the sentence.

If a sentence of imprisonment should place the offender's family in financial danger, the court will usually take this into consideration. Thus, the fact that the offender is the sole breadwinner with a large family to support, is a factor to be taken into account. It was observed that this was a favourite mitigating factor tendered by the offender. Other mitigating factors put forward were that the offender would lose his job, or that he was suffering from poor health.

4. Behaviour of the offender after the offence.

It is generally accepted by the courts that co-operation with the police authorities and the court is a sign of remorse, and therefore, a mitigating factor. If the offender makes or offers to make restitution, this is also a favourable factor.

A plea of guilty is taken to indicate remorse and contrition too. In order to see whether the courts place any weight on the plea of guilty, the number of offenders who pleaded guilty was counted⁶. Of these offenders the percentage of those sentenced to imprisonment and the percentage of those treated with non-custodial measures was noted⁷. This would indicate whether there is any correlation between the plea and

⁶ Refer Appendix 10, Post. p.110 for raw data.

⁷ Table XII, Post. p.76.

Year.	Kuala Lumpur.		Taiping.		Kota Bharu.	
	% Impr. ^a	% N.C.S. ^b	% Impr.	% N.C.S.	% Impr.	% N.C.S.
1970	51.3 (20)	48.7 (19)	67.4 (58)	32.6 (28)	not available. -same-	
1971	56.0 (28)	44.0 (22)	37.3 (28)	62.7 (47)	0.00 (0)	100.0 (2)
1972	63.2 (12)	36.8 (7)	29.9 (20)	70.1 (47)	30.6 (11)	69.4 (25)
1973	48.1 (13)	51.9 (14)	38.7 (24)	61.3 (38)	41.7 (10)	58.3 (14)
1974	57.4 (78)	42.6 (58)	34.7 (26)	65.3 (49)	35.0 (7)	65.0 (13)
Ave. ^c	55.2	44.8	42.6	58.4	26.8	73.2

Table XII: Percentages of offenders pleading guilty and were imprisoned, or were given non-custodial sentences in 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.

Notes to Table XII.

The figures not bracketed represent the percentages. Those in brackets represent the number of persons involved.

^aPercentage imprisoned.

^bPercentage under Non-Custodial Sentences.

^cThe average for Kota Bharu is an average over four years.

the decision making policy of magistrates. This may not indicate conclusively that the plea has a definite influence over magisterial policy in sentencing, as there are other variables which inevitably play a part, for example, other mitigating or policy factors.

Moreover, the length of a sentence may be affected by the actual maximum penalty provided by the law.

Discussion of Table XII.

It may be observed from Table XII that in the courts of Kota Bharu and Taiping, the majority of the offenders who pleaded guilty were treated with non-custodial sentences. The figures for 1970 for the courts of Kota Bharu were not available, but in Taiping, 1970 was the only year in which the non-custodial percentage went below fifty per cent (50%). This may be due to the fact that it was only one year after the racial disturbances in 1969. The courts might have tended to ignore all mitigating factors unless highly extenuating, in an effort to restore peace and order. In the Kuala Lumpur courts however, there was a balance of the percentage of offenders who pleaded guilty and were sent to prison and those who were given non-custodial sentences.

On the average, Taiping and Kota Bharu had percentages of non-custodial sentences well over fifty per cent (50%) for the offenders who pleaded guilty. Kuala Lumpur appeared to have been a border-line case with a lower percentage of non-custodial sentences.

This may be because of the fact that it is a city with a higher number of criminals who are more sophisticated, so that community interest outweigh any credit that may be given to the plead of guilty.