

JUVENILE SENTENCING: *RE A JUVENILE* ¹

A "juvenile" is defined in the *Juvenile Courts Act* 1947 (JCA)² as a person who has attained the age of criminal responsibility prescribed in section 82 of the *Penal Code* and is under the age of eighteen.³ Section 82 of the *Penal Code* prescribes the age of criminal responsibility as 10 years. The JCA further defines a "child" as a person under the age of fourteen and a "young person" as a person who has attained the age of fourteen years and is below eighteen. For the purposes of the criminal law and criminal procedure the "child" is therefore one aged between 10 and below 14 years.

Juvenile offenders are arrested, detained and tried in accordance with the JCA.⁴ They are tried in Juvenile Courts, courts constituted in accordance with the Act. The Juvenile Court is presided by a First Class Magistrate and is assisted by two advisers, one of whom preferably should be a woman. The court may try all offences, except those punishable with death: the High Court will try these.⁵

Although generally juvenile offenders are brought before the Juvenile Court for trial, there are a few exceptions where they will not be produced before this court; for example, where they are charged with petty offences, namely, offences specified in the subsidiary legislation as petty offences.⁶ When they are charged jointly with adult offenders, they would be produced before the appropriate court, other than the Juvenile Court. When they are charged with a security offence,⁷ the

¹[1990] 3 MLJ 117

²Act 90, reprint No. 5 of 1981

³S. 2

⁴S. 3

⁵S. 4

⁶See, e.g. LN 435/52

⁷A security offence is an offence under sections 57 to 62 of the *Internal Security Act* 1960 or any other offence the commission of which has been certified by the Attorney-General to have affected the security of the Federation: see *Essential (Security Cases) Regulations* 1975, regulation 2

JCA does not apply to them and they will be tried before any other appropriate court.⁸

If the Juvenile Court hears the case, the court disposes of the juvenile in accordance with section 12 of the JCA. Among the dispositions available therein are admonition and discharge, good behaviour bonds, orders for care by a relative or fit person, committals to an approved school, committals to an advanced approved school or the Henry Gurney School, and fines. Section 15 provides for imprisonment, which may not be imposed on a child but may be imposed on a young person only if there are no other suitable orders. Even then, the juvenile must be housed separately from adults. Section 16 stipulates that death cannot be imposed on a juvenile, be it by the Juvenile Court or any other court. Instead, he will be detained at the pleasure of the Ruler of the State or the Yang di-Pertuan Agong.⁹ The juvenile offender who is tried in the High Court cannot be sentenced to death; nor imprisoned, if a child.¹⁰

Section 12(3) needs close attention. It provides that the words "conviction" and "sentence" shall not be used in relation to juveniles dealt with by the Juvenile Court. If there is a reference in any written law to a person convicted, a conviction and a sentence, they shall in the case of a juvenile, be construed as a finding of guilt or an order made upon a finding of guilt, as the case may be. Indeed, the practice in Juvenile Courts is to always record a finding of guilt instead of a conviction.

Parallel to the Juvenile Court system is the usual criminal court system which governs the usual criminal offender. The juvenile who cannot be tried in the Juvenile Court will be tried in this other court system. However, when it comes to the stage for sentencing, section 3 of the JCA requires section 10(6) thereof to be followed. This section refers to the probation report which should contain particulars of the offender's background, education, family, friends and others. Section 3

⁸*Op. cit.* regulation 3(3)

⁹For a juvenile charged with a security offence, see *ibid.*

¹⁰S. 40

also states that the other criminal courts may "exercise in respect of such juvenile all the powers which may be exercised under this Act by a Juvenile Court", referring inter alia to dispositions under section 12. Hence, if a juvenile is charged jointly with an adult for say, theft in a magistrate's court, the magistrate may proceed with a summary trial and when it comes to sentencing, he should request for a probation report to be prepared. Subsequently, the magistrate may release the offender under a care order or commit him to an approved school.

These other criminal courts may also apply section 293 of the *Criminal Procedure Code (CPC)*¹¹ which relates to "youthful offenders" only. These are defined as persons aged between 10 and below 16 years. Therefore, juveniles who are aged between 16 and below 18 are excluded.

Section 293(i) refers to "any Criminal Court". "Court" has been defined to mean the High Court, a Sessions Court, or the court of a magistrate of any class, as the context may require. Section 6 of the CPC explains the courts for the administration of criminal justice in the Federation, namely, those constituted pursuant to the *Constitution*, the *Courts of Judicature Act 1964*, the *Subordinate Courts Act 1948* or any other law for the time being in force. These courts are the Supreme Court, High Court, Sessions Court and the Magistrate's Court. The court to be constituted by "any other law" includes the Juvenile Court and it is submitted that a Juvenile Court is a criminal court too.

Section 293(i) also refers to a youthful offender who is "convicted" before that criminal court. Section 12(3) of the JCA states that in the case of a Juvenile Court, a conviction shall be referred to as a finding of guilt. Hence, when a Juvenile Court records a finding of guilt, that finding would come within the meaning of "conviction" or "convicted" in section 293.

¹¹F.M.S. Cap. 6

Section 293(i) allows the criminal court to pass any order listed therein instead of passing a sentence of imprisonment or imprisonment in default of payment of a fine. The orders are:

- (a) admonition and discharge;
- (b) good behaviour bonds to be executed by parent or guardian;
- (c) whipping not more than 10 strokes, if offender is male; or
- (d) any one provided in the JCA.

A cursory glance over section 293 of the CPC and section 12 of the JCA indicates that whipping is the only punishment that is not mentioned in the JCA.

As argued above, the Juvenile Court may apply section 293(i) because it is a criminal court. It may therefore instead of imposing imprisonment, choose whipping. This view is supported by section 12(1) of the JCA itself when it says the Juvenile Court "shall, *in addition to any other powers exercisable by virtue of this Act or any other law for the time being in force,*"¹² have powers to do all those things listed thereunder. It is submitted that "any other law for the time being in force" includes the CPC, specifically section 293(i). Again, section 4(5) of the JCA states:

Save as modified or extended by this Act, the provisions of the Criminal Procedure Code shall apply to Juvenile Courts as if Juvenile Courts were Court of a Magistrate of the First Class.

A First Class Magistrate's Court may apply section 293(i), and so may the Juvenile Court. A problem which arises is the different categories of offenders covered by the CPC and the JCA. The CPC provides for the 10 to below 16 years age category, whilst the JCA provides for the 10 to below 18 years age category. If the offender falls between the 16 to below 18 years age category, he may not be imposed whipping by the Juvenile Court because he is not a youthful offender.

¹²Emphasis added

It would follow that only juveniles aged between 10 to below 16 years would be liable to whipping. This is a strange situation indeed because the much older juvenile would appear to be the more appropriate persons to receive whipping. Anyhow, it is submitted that the Juvenile Court may impose whipping but only on offenders aged between 10 to below 16 years. In doing so, I beg to differ from the opinion of the High Court in *Re A Juvenile*.¹³

There, Mustapha Hussain J was of the view that the Juvenile Court cannot legally impose whipping. The Juvenile Court Chairman had imposed whipping purportedly under section 293(i) of the CPC and the learned judge ruled that "Criminal Court" does not include the Juvenile Court; likewise the use of the word "convicted" in section 293. It may be correct that the juvenile was not "convicted", but section 12(3) does say that "any reference in any written law to a person convicted, a conviction ... shall be construed as a finding of guilt ...". There are two things mentioned there: the second was ignored by the learned Judge. With regard to "Criminal Court", an explanation has been given above for submitting that the Juvenile Court is a criminal court.

His Lordship went on to say that section 293(i)(d) would not have been legislated specifically for the criminal court to apply the provisions of the JCA if at all section 293(i) of the CPC itself was already applicable to cases before the Juvenile Court. It is submitted that section 293(i)(d) mentions the provisions of the JCA because in the event the "Criminal Court" is a court other than a Juvenile Court, that court may still apply the provisions of the JCA when it comes to sentencing.

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¹³[1990] 2 MLJ 117.

