

Court Advisers in Malaysia: A ‘Neglected’ Component of the Court For Children?

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ABSTRACT

*The court advisers are not a new component in the criminal justice system, especially in cases involving children. In most jurisdictions in the world, the court advisers (as known in Malaysia) or social workers/panel of advisers in other countries, are a component that was introduced to assist the judicial officer in determining a proper and suitable order for the child offenders. In Malaysia, children who have committed offences will be brought before the Court For Children (formerly known as the Juvenile Court). The Magistrate that presides the court will be assisted by two appointed court advisers. Although they comprise laymen without any legal qualification, their roles are recognised as equally important because they are the ones who are going to advise the Magistrate based on their knowledge and experience in dealing with children. In other words, the court advisers are a component that must exist in a trial so that a properly instituted quorum is constituted. The court advisers are introduced in the Juvenile Justice System for a reason. The court shall make sure that the court advisers are called and present throughout the trial. The court in the case of *Public Prosecutor v Ayasamy* [1955] 1 MLJ 64 highlighted this point more than 60 years ago. The logic is very simple, how can court advisers offer proper advice without attending the trial? Thus, in this article, the writers will explore the importance of making sure that the court advisers are present in the Court For Children trials. At the same time, the writers will also explore if there has been any development in the role and functions of the court advisers in Malaysia post the decision in the case of *Public Prosecutor v Ayasamy*. The reason being, more than six decades after the said case, the same issue was raised in the High Court’s decision in the case of *Pendakwa Raya v Mohd Zairul Iman Zainon* [2018] MLJU 578.*

Keywords: Court for children; court advisers; active and passive functions; Ayasamy

INTRODUCTION

Cases involving children are heard by a separate court. This is a practice in most of the jurisdictions globally. The existence of a separate court in dealing with child offenders is important as the objective of the punishment imposed on an adult and a child differs. In most of cases, punishment for children is based on rehabilitation i.e., to give the child a second chance. On the other hand, a similar offence committed by an adult will attract a heavier punishment, i.e., either for the purpose of retribution, incapacitation, prevention or rehabilitation.¹ According to Meme:²

“The creation of the juvenile court allows a juvenile who breaks the law to be dealt with by the state not as a criminal, but as a child or young person needing care and protection. The juvenile court’s rehabilitative ideal rested on several sets of assumptions about youthfulness and criminal responsibility.”

Thus, it is important to have a component that can assist the court before making an order pertaining to the child offenders. This is one of the reasons why court advisers are needed in dealing with children in conflict with the law. As mentioned

earlier, rehabilitation is the main objective in dealing with child offenders. This is due to the fact that if the children go untreated, they will grow up and become adult criminals. Thus, the government, as the *parens patriae*, has to step in to make sure that ‘these children that need an urgent attention’ be given proper rehabilitation so that they can in turn become an asset to the country rather than a liability. Making a decision in a case involving a child is not an easy task either. The court needs to balance the opportunity for the child to have a second chance and the concern of the public about the leniency of the order. Ismail Ibrahim JC, in the case of *Public Prosecutor v. I. I. I. (Child Offender)*³ observed:

“It is not an easy task to impose a sentence on a child offender, as the court must always bear in mind the fact that a child offender lacks the maturity of adults. At the same time the court must also ensure that it does not send a wrong message to the public that a child offender will normally receive a lesser sentence compared to an adult accused person charged with the same offence, more so in cases where the offence committed is a serious offence. It is for the said reasons, the court would have to evaluate the child’s background through the probation report before imposing a sentence on the child.”

Historically, children who are in conflict with the law will be punished in the same manner as an adult would be, if they were charged and convicted in the normal criminal court. However, realising that children generally have difficulty in understanding the consequences of their acts, a special court for children was established. At the same time, the punishment imposed on them is also more rehabilitative in nature. Children are also given protection through the introduction of the doctrine of *doli incapax*. The doctrine of *doli incapax* was introduced in England where a child under a certain age is deemed to be incapable of committing a crime.⁴ This is due to the presumption that the child is incapable of understanding the nature and consequences of his act. There are even certain words that are not to be used in dealing with child offenders such as the words ‘conviction’ and ‘sentence’.⁵

Due to this, a special court was introduced. In Malaysia, the court is known as the Court For Children (formerly known as the Juvenile Court). In Singapore, the court is known as Youth Court, while in India, it is called the Children’s Court.⁶ Under the Malaysian Child Act 2001, the Court For Children hears cases concerning five categories of children i.e., children in need of care and protection, children in need of protection and rehabilitation, children who are trafficked or abducted, children in conflict with the law and children beyond control. However, for the purpose of this article, the discussion will focus on the children in conflict with the law.

OVERVIEW OF THE SPECIAL COURT FOR CHILDREN IN MALAYSIA

Prior to the enactment of the Child Act 2001, cases involving children in conflict with the law were handled by a Magistrate in the Juvenile Court, which was constituted under section 4 of the Juvenile Courts Act 1947. However, realising that there is a need to have a more consolidated law pertaining to children in Malaysia, the legislature repealed three statutes, i.e., the Juvenile Courts Act 1947, Women and Girls Protection Act 1973 and Child Protection Act 1991. All these three Acts have been replaced by the Child Act 2001. The criminal procedure process which was covered by the Juvenile Courts Act 1947 became part of the Child Act 2001, including the court, which is now known as the Court For Children.

This special court that deals with children in conflict with the law is tasked to rehabilitate the child and has a different structure and composition of the court from the normal criminal court. Section 11(2) of the Child Act 2001 provides that:

“A Court For Children shall consist of a Magistrate who, in the exercise of his functions as a Court For Children except when making an order under subsection 39(4), 42(4), 84(3) or 86(1), as the case may require, shall be assisted by two advisers to be appointed by the Minister from a panel of persons resident in the State.”

Based on the above provision, the Court For Children consists of a Magistrate, who will be assisted by two court advisers and one of the advisers shall be a woman.⁷ This is slightly different from the wording in the Juvenile Courts Act 1947, which provided that, “One of the two advisers shall, if practicable, be a woman.” Under the Child Act 2001, it is mandatory to have a woman as one of the advisers.⁸ Not only the requirement of a woman as a compulsory member exists in Malaysia, but such requirement also exists in India. This indicates that it is a must to have a woman adviser to sit in a case. It is obvious that the role of the special court is not to punish children in conflict with the law but to assist them to turn over a new leaf in their life. Thus, the presence of a woman as an adviser can assist the court to reach a suitable decision for the child. In the case of *A Child v Public Prosecutor*,⁹ the court said:

“Public Interest cannot be better served if a Child, repentant of his criminal ways, decided to turn over a new leaf, seek a path of reform and come back to society, a useful citizen of the country and a good member of his family. I must say, that this is when the Child is deserving and society and the Courts must afford him that opportunity.”

What is important to note is the reasons why the court advisers were included in the special court for children? As discussed above, the fact that the children in conflict with the law are tried in a separate court is to make sure that various aspects are taken into consideration before the court imposed the relevant orders. It is fully understandable that the judicial function is played by the Magistrate, but in coming to the right decision pertaining to the order to be made, additional input from the relevant parties will be a great help not only to the court, but importantly to the child. It is interesting to note for example in India, it was stated in the court’s website that:¹⁰

"The purpose of a separate court is that its purpose is socio-legal rehabilitation and reformation not punishment. The aim is to hold a child culpable for their criminal activity, not through punishment, but counselling the child to understand their actions and persuade them away from criminal activities in the future."

Thus, it is submitted that the court advisers or social workers¹¹ in India play an important role in the special court for children. They are known as the protectors of "the welfare component" in relation to child offenders.¹² The court advisers and social workers are selected from the community and have relevant experience in dealing with children, especially relating to education, welfare and health issues. This is one of the important criteria in selecting the advisers and social workers. Moreover, a special court for children such as the Juvenile Court or Court For Children is supposed to prioritise the welfare and best interests of the child.¹³ At the same time, the introduction of the special court empowers the Magistrate with alternative 'sentences' such as a warning, bond of good behaviour, community service, placement in an Approved School or the Henry Gurney School. In Malaysia, the court advisers, as mentioned above, will give their advice to the Magistrate after getting more input about the background of the said child through the probation report tendered by the probation officer. This report is very important for the court before they make their decision as to the suitable order. In the case of *A Child v Public Prosecutor*,¹⁴ Awang Armadajaya Awang Mahmud JC said:

"This Probation Report has indeed, a huge impact on the life of the young offender / Child. As in medical prescriptions, a doctor diagnoses a patient of the nature and the extent of the illness suffered by the patient. Then the good doctor prescribes the proper treatment with or without medication. Unlike a medical treatment, the diagnosis is done by the probation officer (in our case, a Welfare Officer) but the final treatment or medication is decided by the Court. It is utmost importance to realise the contents of the Probation Report must be admissible, relevant and of good value. The Probation Officer is very much like a medical doctor in treating patients but in the context of social engineering and rehabilitation. The importance of the Probation Officer is akin to a social "medical doctor". Hence in the yesteryears, a probation report had a huge influence on the decisions of the Courts."

With their experience, knowledge and expertise plus a comprehensive report, the court advisers will be able to advise the court. This has been echoed by Anuradha Saibaba in her article entitled, "Juvenile Justice: Critically Juxtaposing The Models In India and Singapore."¹⁵ The author said in regard to the social workers in the Juvenile Justice Board of India:

"The presence of a social worker in the composition of the JJB has been instrumental in viewing an offence perpetrated by a child beyond the legalistic and justice framework; it connotes an intention to showcase that the socioeconomic milieu of the child could have contributed to the delinquency on the part of the child. Also, the presence of mandatory women social workers has been endorsed on the grounds."

With regard to the position in Singapore, she added that:¹⁶

"The Magistrate's expert legal knowledge, coupled with the panel advisors training and experience with dealing with problems from a socio-cultural perspective, strives towards strengthening the juvenile justice court."

Based on the above discussion, we can conclude that the court advisers are an important component of the special court for children and in Malaysia, the Court For Children. It is more so when the Court For Children is tasked to balance between the welfare, best interests of the child and also the interest of the society. Though the practice of the Juvenile Justice System in other countries may vary, it is submitted that the spirit of the existence of the court advisers is to assist the court to come to a conclusion which will benefit all parties, especially the child. That is the main reason why in most of the jurisdictions, there are specific requirements to become court advisers or panel of advisers or members of the Juvenile Justice Board, i.e., the candidate must be someone who has experience dealing with children especially from the medical, educational or welfare aspects. This is the difference between a special court for children and a normal criminal court which handles adult cases.

STAGES OF PROCEEDINGS IN THE COURT FOR CHILDREN

Section 90 of the Child Act 2001 provides that the procedure in the Court For Children can be divided into three stages. The first stage is at the beginning of the case, where the charge/s will be read to the child. The child will then be asked whether he admits to the facts constituting the offence. If the child admits to the charge, the court shall then ascertain whether he understands the nature and consequences of his admission and records a finding of guilt.¹⁷

The second stage is where the child does not admit to the facts constituting the offence. The court will start to hear the evidence from the prosecution's witnesses.¹⁸ At this stage, the prosecution will try to establish its case. At the end of the prosecution's case, i.e., after considering the evidence available,

the court will then make a decision. If the Court For Children finds that the child is not guilty, the court shall record an order for acquittal.¹⁹

However, if the Court For Children finds the child guilty, the court then will ask the probation officer to prepare and submit to the Court For Children a report on the child.²⁰ Section 90(13) of the Child Act 2001 provides that:

(13) A probation report referred to in subsection (12) shall be prepared and submitted by the probation officer within thirty days from the date the direction is given by the Court For Children to the probation officer to prepare and submit the probation report and the report-

- (a) shall contain such information as to the child's general conduct, home surroundings, school record and medical history as may enable the Court For Children to deal with the case in the best interests of the child; and may put to him any question arising out of the probation report; and
- (b) may include any written report of a Social Welfare Officer, a registered medical practitioner or any other person whom the Court For Children thinks fit to provide a report on the child.

The probation report will also include the recommendations by the probation officer as to the appropriate order to be made by the Court For Children. From the probation report, the court advisers will get an input regarding the child offender before they can advise the Magistrate on the suitable order to be made. After the probation report is submitted to the court, the child and his parent/guardian will then be asked if they have any say in extenuation or mitigation of the penalty before the court considers the opinions of the court advisers.

The order suggested by the court advisers may be the same or different from the recommendation made by the probation officer. However, eventually, the Magistrate is the one who will have to decide the suitable order to be given to the child offender under section 91(1) of the Child Act 2001. According to said section, if the court is satisfied that an offence has been proven, the court has power to:

- (a) admonish and discharge the child;
- (b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;

- (c) order the child to be placed in the care of a relative or other fit and proper person-
 - (i) for such period to be specified by the Court; and
 - (ii) with such conditions as may be imposed by the Court;
- (a) order the child to pay a fine, compensation or costs;
- (b) (da) make a community service order;
- (c) make a probation order under section 98;
- (d) order the child to be sent to an approved school or a Henry Gurney School;
- (e) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2), any term of imprisonment which could be awarded by a Sessions Court.

The orders under this section are arranged from the lightest to the heaviest order. Looking at the range of orders that can be made by the Court For Children, it is obvious that one needs to fully understand the nature of the case before giving advice as to the relevant or suitable order to be made against the child. At this juncture, it is pertinent to note that we are dealing with the future of a child who may need proper guidance and assistance so that he or she will not repeat the same mistake in the future. Thus, it is submitted that the presence of the court advisers throughout the case is important so that they can appreciate the facts of the case and advise the order according to the seriousness of the offence committed.

ROLE AND FUNCTIONS OF THE COURT ADVISERS

In order to understand the reason for the introduction of the court advisers in Malaysia, reference can be made to the Juvenile Courts Act 1947. The Juvenile Courts Act 1947 is the first statute which introduced court advisers as one of the main components in the Juvenile Court setting, where they would assist a Magistrate of the First Class in dealing with the child offenders who were brought before the court.²¹ The role of the court advisers could still be noted in the Child Act 2001, which replaced the Juvenile Courts Act 1947. In terms of the role of the court advisers, section 4 of the Juvenile Courts Act 1947 is similar to section 11 of the Child Act 2001. However, there is an improvement concerning the functions of the court advisers.

In the Juvenile Courts Act 1947, the function of the court advisers was to inform and advise the court

in relation to the order to be made upon the child.²² Meanwhile, the functions of the court advisers as provided in the Child Act 2001 are as follows:²³

- (a) to inform and advise the Court For Children with respect to any consideration affecting the order made upon a finding of guilt or other related treatment of any child brought before it; and
- (b) if necessary, to advise the parent or guardian of the child.

The Child Act 2001 has extended the functions of the court advisers, as they are not only responsible to advise the court in the matter relating to the order to be made against the child offender, but they may also advise the parent or guardian of the child, if needed. This is due to the fact that the Act recognises that the involvement of the parent or guardian is important in the process of the rehabilitation of the child. It is believed that the family is an important element that can help children in conflict with the law in their rehabilitation process.

In addition to the above, the other difference between these two Acts is as to the requirement of a woman court adviser. The Child Act 2001 stresses that one of the court advisers shall be a woman,²⁴ while the Juvenile Courts Act 1947 merely provides that if practicable, one of them shall be a woman.²⁵ However, the Child Act 2001 does not explain the need for one of the court advisers to be a woman. It is believed that this is because the nature of a man differs from that of a woman. Women are more sensitive to the welfare and needs of children than men, due to their special role as mothers.²⁶ In addition, women court advisers may understand the children's emotions and feelings better, especially children who have committed crimes.²⁷ Thus, it is important to ensure that one of the court advisers is a woman.

COURT ADVISERS IN MALAYSIA AFTER THE CASE OF *PUBLIC PROSECUTOR v AYASAMY*²⁸

As mentioned earlier, section 11(4) of the Child Act 2001 provides that the Court For Children consists of a Magistrate and shall be assisted by two advisers appointed by the Minister. Literally, it means that the Court For Children is only constituted with the presence of a Magistrate and two advisers, where one of them must be a woman. Section 11(2) also specifically mentions instances where the presence of the court advisers is not required, such as when making an order under subsection 39(4), 42(4), 84(3)

or 86(1). It is submitted that such a requirement is consistent with the fact that though the court advisers form an important component of the court, however in certain circumstances mentions under section 11(2), the court advisers are not needed especially in the cases involving temporary order.

In the case of *Public Prosecutor v Ayasamy*, the issue before the court was "whether the limitation of the functions of the advisers to advising the Court as to the 'punishment or other treatment' affects the meaning of sub-section (2) of the same section in such a way that it is not necessary for the advisers to assist the learned President in the exercise of functions other than those relating to punishment or treatment." In this case, the learned President of the Juvenile Court sat with only one adviser instead of two as required by section 4(2) of the Juvenile Courts Act 1947. This therefore raised an issue as to whether the Court was properly constituted. According to Justice Briggs:

"I think it was not. Although the active functions of the advisers only begin after the accused is found guilty, and becomes liable to punishment or other treatment, they have other passive functions at earlier stages of the proceedings. It is in my view necessary for them to be present during the hearing in order that they should have a full and complete view of the circumstances of the case, since without this they would not be able properly to advise on punishment. I think also that to give the power of advising on punishment or treatment to an adviser who had not heard the whole of the proceedings would be a clear breach of the principle that justice must be seen to be done. I am of opinion, therefore, that it is not competent in law for a President to sit as a Juvenile Court for purposes of conducting a trial, unless he has the assistance of two advisers throughout the proceedings."

In a proceeding involving a child who is brought before the court, the court advisers will only play their active functions once the child is found guilty. At that time, they will advise the court of the order to be made against the child offender. Yet, before their active functions commence, the court advisers would be exercising their passive functions, which is at the initial stages of the proceedings. When exercising their passive functions, they will hear the case from the moment the charge is read to the child until the end of the case. This period is important because they can only advise the suitable order to be given against the child offender if they have a full and complete view of the circumstances of the case.

This case, which was decided in 1952, highlighted that it is not competent in law for a President to sit as a Juvenile Court for purposes of conducting a trial, unless he has the assistance of two

advisers throughout the proceedings. Nevertheless, the same issue raised in *Ayasamy* still takes place for example in the cases of *Mohd Zairul Iman Zainon* and *Muhamad Fikri bin Mahmood* as discussed under the subtopic entitled Post *Ayasamy*'s case. Not only that, there have also been instances where the requirement of section 11(3) of the Child Act 2001 which provides that one of the two court advisers shall be a woman was not observed. The failure to follow the procedure relating to the court advisers not only causes the court proceedings to become invalid, but also affects the future of the child offender. It is important to note that the quality of advice given by the court advisers will determine the future of the child. It is debatable whether the court advisers who did not attend the entire trial are in a position to advise the court as to the suitable order to be made.²⁹ After all, the presence of the court advisers throughout the proceedings is essential as they need to understand the facts and circumstances of each case before they can give their advice. They also have to listen to the probation report submitted by the probation officer to the court. Based on the report, they can identify the root cause of the problem, the socio-economic background of the child and his/her family and other important information that can assist the court in making a suitable order in accordance with the needs of the child offenders.³⁰

However, it has been highlighted in several cases that the Court For Children is sitting without the assistance of the two court advisers. As a result, the order made by the court becomes invalid as the court is not properly constituted. In the case of *Public Prosecutor v Mohamed Zairi bin Abu Bakar & Anor*,³¹ the court explained the need for the Magistrate to be assisted by the court advisers in the Court For Children:

“The reason behind this is not too difficult to comprehend. The decision to increase the juvenile’s period of detention, to transfer him to another home or to confine him to a more rigid and rigorous detention involves serious consideration which any magistrate, especially a young one, might find it difficult to make without the assistance of advisers.”

Thus, it is important for the management of the court to make sure the presence of the court advisers throughout the proceedings of the child in the Court For Children.

However, the position is different if the case is tried by a High Court judge.³² The court in the case of *Public Prosecutor v Buri Hemna*³³ was of the view that the High Court can hear and decide cases involving children without the assistance of

the court advisers as in the Juvenile Court, as the case maybe. This is because there is no written law that mentions that the High Court judge cannot hear or dispose of the trial of a juvenile offender alone.³⁴ Moreover, the proceedings in the High Court are to be disposed of by a single judge according to section 18(1) of the Courts Judicature Act 1964. The court also highlighted section 40 of the Juvenile Courts Act 1947 which provided as follows:³⁵

“Nothing in this Act other than sections 15 and 16 shall affect the powers of the High Court and all the powers which may be exercised under this Act by a Juvenile Court in respect of a juvenile offender may in like manner be exercised by the High Court; and, ...”

Section 40 provides that the powers of the High Court are not affected by the Act, except in cases of child offenders under three circumstances provided under section 15 and 16 of the Juvenile Courts Act 1947.³⁶ First, the High Court shall not sentence or order a child under the age of 14 years old to be imprisoned for any offence or be committed to prison in default of payment of a fine, damages or costs. Secondly, the High Court shall not sentence or order a child under 18 years old to be imprisoned if he can be suitably dealt with in any other way whether by probation, fine, or committal to a place of detention, approved school, or Henry Gurney School, or otherwise. Lastly, the High Court shall not pass a sentence of death order concerning a child offender. Thus, the High Court judge may assume all powers exercisable under the Juvenile Courts Act 1947 by a Juvenile Court but it does not mean that the judge must be assisted by two advisers.³⁷

The same position is shared in *Public Prosecutor v KK*³⁸ (which was decided after the coming into force of the Child Act 2001), where the court referred to section 117 of the Child Act 2001 to explain that the powers of the High Court are not affected in the trial of a child except under sections 96 and 97.³⁹ Therefore, a High Court judge can sit alone in the trial of a child without the assistance of the court advisers. Moreover, the method of trial of a child who is accused with the offence punishable with death is not different from an adult who is accused with the same offence, except that the sentence is to be ordered under section 97 of the Child Act 2001.⁴⁰ The section restricts the death sentence to be recorded on a child offender.

The role of the court advisers is to assist the Magistrate. This is mainly due to the fact that some of the Magistrates are either not used to the

procedure of the Court For Children under the Child Act 2001, are young or have little/no experience with children.⁴¹ Thus, the presence of the advisers will definitely be of great and important assistance to the Magistrate in making a suitable order as required under section 91 of the Child Act 2001. At the same time, it is obvious that the Court For Children has different objectives in terms of its functions. As the court upholds the best interest of the child,⁴² various factors will be taken into consideration before making the suitable order. It does not mean that the child is to be let off with the most lenient order such as warning. The Magistrate needs to scrutinise the facts of the case, the probation report prepared by the probation officer and also advice from the court advisers before deciding any decision. All the components that are involved in the process i.e., the probation officer, the court advisers and also the Magistrate will at the end of the day make their recommendations, advice and decisions based on the best interests of the child.

POST *AYASAMY'S* CASE

Although *Ayasamy* was decided and reported more than 60 years ago, it is disheartening to note that the issue raised and discussed therein still lingers. For example, in the case of *Pendakwa Raya v Mohd Zairul Iman Zainon*,⁴³ the respondent was charged with an offence under section 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.⁴⁴ After perusing the appeal record, the court raised questions on the validity of the trial at the Sessions Court.⁴⁵ The respondent was 15 years old at the time he was brought before the Court For Children for the first time. However, the case was later transferred to the Sessions Court where the respondent was to be tried jointly with another accused, who was an adult. The court made a ruling that the trial was invalid and the respondent should be tried in the Court For Children in accordance with the process, procedure and provisions in the Child Act 2001. According to Mohd Zaki Abd Wahab JC:⁴⁶

"Sebaliknya, dalam mana-mana perbicaraan terhadap kanak-kanak di Mahkamah Bagi Kanak-Kanak, perbicaraan mestilah dijalankan oleh seorang Majistret dengan kehadiran dua orang Penasihat. Dalam penghakiman ini saya memutuskan kehadiran kedua-dua penasihat tersebut mestilah di sepanjang perbicaraan walau pun fungsi mereka sebenarnya untuk memberi nasihat kepada Majistret atau ibu bapa kanak-kanak mengenai hukuman dan perkara-perkara berkaitan. Bagaimana pun mereka mestilah hadir sepanjang perbicaraan untuk mengetahui fakta yang berkaitan dengan pertuduhan yang

dikenakan terhadap kanak-kanak tersebut untuk membolehkan mereka memberi nasihat yang tepat, patut dan adil kepada tuan Majistret dalam menentukan hukuman. Ini juga akan membolehkan mereka memberi nasihat yang tepat dan berguna kepada ibu bapa kanak-kanak jika diperlukan."

[On the other hand, in any proceedings against a child in the Court For Children, the trial shall be conducted by a Magistrate in the presence of two Advisers. In this judgement, I hold that the presence of the two advisers shall be throughout the trial even though their actual function is to advise the Magistrate or the parents of the child on the order and other related matters. Nevertheless, they shall be present throughout the trial so that they know the relevant facts related to the charge against the child to enable them to give accurate, reasonable and fair advice to the Magistrate in deciding the punishment. This will also enable them to give accurate and beneficial advice to the parents of the child if needed.]

Meanwhile, in the case of *Pendakwa Raya v Muhamad Fikri bin Mahmood*,⁴⁷ one of the preliminary issues that was raised in this case was whether the child offender, who was 17 years old when he was first brought to the court, was tried in the Court For Children. During the appeal, based on the notes of proceedings, it was found that the court advisers were absent except on the date when the court delivered its order. Moreover, the names of both advisers were not recorded. Thus, it was difficult to confirm if the requirement of a woman court adviser under section 11(3) of the Child Act 2001 was fulfilled. Below is the question and answer session between the judge and the Deputy Public Prosecutor, who was also prosecuting the case at the Court For Children:⁴⁸

Soal-jawab antara Mahkamah ini dan TPR adalah seperti berikut:

Mahkamah: Apa pandangan TPR berkait dengan kehadiran penasihat pada tarikh perintah sahaja?

TPR: Saya berpendapat adalah menjadi amalan penasihat dipanggil pada hari sabitan. Pada perbicaraan pun, penasihat tidak dipanggil.

Mahkamah: Adakah penasihat ada, kalau pesalah kanak-kanak minta dibicarakan?

TPR: Kadang-kadang penasihat tidak ada.

[The question and answer session between the court and the Deputy Public Prosecutor (DPP) is as follows:

Court: What is your (DPP's) view on the court advisers' presence only on the date the order is made?

DPP: I am of the view that it is a practice for the court advisers to be called on the day of the conviction. Even during the trial, the advisers are not called.

Court: Are the court advisers there if the child offender pleads not guilty?

DPP: Sometimes, the court advisers are not there.]

From the above discussion, it is clear that *Ayasamy*'s case is not the only case where the court advisers were not involved in making the relevant order by the court. In fact, the same situation is seen being repeated in the case of *Mohd Zairul Iman Zainon* and *Muhamad Fikri bin Mahmood*. Lack of awareness about the importance of the role of the court advisers causes the Magistrate to fail in observing and following the procedure in the Court For Children, as provided for in the Child Act 2001. These kinds of practices, such as the Magistrate sitting alone without the presence of the court advisers during the proceedings concerning child offenders, the court advisers being called only on the day the order is delivered and the absence of a woman adviser should not happen, especially after *Ayasamy*'s case. Thus, it can be concluded that even though the decision in *Ayasamy* was made more than half a century ago, it is indeed disheartening to note that the role of the court advisers is still deemed unimportant.

At this juncture, reference could be made to two other jurisdictions, i.e., Singapore and India, where it could be noted that the position as to the requirement of the presence of the court advisers is different. In Singapore, section 38 of the Children and Young Persons Act provides:

38.—(1) A judge of a Youth Court, when determining the method of dealing with a child or young person in respect of whom a written report is obtained by the Youth Court regarding his or her background, family history, school record or such other matters, is to sit with 2 advisers from a panel of advisers appointed by the President except that where it appears that the Court cannot without adjournment be fully constituted and that an adjournment would be inexpedient in the interests of justice, the judge may sit with one adviser or he or she may sit alone.

- (2) The function of the panel of advisers referred to in subsection (1) is to inform and advise the Youth Court with respect to —
- (a) any matter or consideration which may affect the treatment of any child or young person; or
 - (b) any order that may be made in respect of any child or young person brought before the Youth Court.

According to Saibaba:⁴⁹

“The two advisors are activated only at the sentencing stage. Their intervention and opinions are solicited only at the last phase of the inquiry, and there is no prior statutory opportunity to discuss the case with the Magistrate or a fellow panel advisor. Thus, the three important members of the Juvenile Court sit independently before coming to a decision on the case; they do not sit in a quorum or as a Bench of Magistrates unlike in India.”

In India, section 4(7)(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides:

- (2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

While section 4(7)(3) and (4) provide:

- (3) A Board may act notwithstanding the absence of any member of the Board, and no order passed by the Board shall be invalid by the reason only of the absence of any member during any stage of proceedings: Provided that there shall be at least two members including the Principal Magistrate present at the time of final disposal of the case or in making an order under sub-section (3) of section 18.
- (4) In the event of any difference of opinion among the members of the Board in the interim or final disposal, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the Principal Magistrate, shall prevail.

Based on the above provisions in the respective statutes in Singapore and India, it is obvious that the position pertaining to the presence of the advisers or social workers (as the case may be) is different. In Singapore, the Youth Court Judge can arrive at a decision without the presence of one or both advisers if an adjournment of the case will go against the interest of justice. While in India, the Judicial Magistrate can make an order in the presence of at least one social worker. However, the position is obviously different if we refer to the case of *Ayasamy v PP*, *Mohd Zairul Iman Zainon v PP* and *Muhamad Fikri bin Mahmood v PP*. It is submitted that the position in Malaysia as laid down by Justice Briggs in the case of *Ayasamy* is more reasonable, taking into consideration firstly, the wording of section 11(2) of the Child Act 2001 which provides that the Magistrate shall **be assisted by two advisers** as mandatory in nature as opposed to the position in Singapore and India. Secondly, the presence of the court advisers throughout the proceedings is important so that they will understand what has happened in the particular case rather than merely being brought in at the end of the proceedings.

CONCLUSION

The case of *Ayasamy* was decided more than 60 years ago, where the court acknowledged the important role played by the court advisers. It must be noted that the Court For Children is different, when compared with an ordinary criminal court as it focuses on the rehabilitation of child offenders. The main objective of the Child Act 2001 is to make a decision based on the best interests of the child. Thus, it is submitted that having the court advisers sit in throughout the case is in the best interests of the child. This is because with their presence throughout the case, they will have the opportunity to understand the case, so that they will have adequate input to advise the Magistrate as to the suitable order to be made. If the court advisers are only being called at a later stage i.e., before the Court For Children makes its order, it is submitted that it is against the spirit of the Child Act 2001. The Court For Children is only constituted when it fulfills the requirements under section 11(2) of the Child Act 2001, which provides that a Court For Children shall consist of a Magistrate who shall be assisted by two advisers, one of which shall be a

woman, except in the circumstances that are clearly mentioned in the same section. Based on the above discussion, it is clear that the court advisers play an important role in the Court For Children. Thus, it is submitted that the presence of the court advisers is a must in the Court For Children to ensure that same issues as in *Ayasamy* not be repeated in the future.

NOTES

- ¹ Mohd Al-Adib Samuri et al, 'Legal Issues in Sentencing Child Offenders in Malaysia', (2012) 6(7) *Advances in Natural and Applied Sciences*, p 1093-1098.
- ² See Meme Zainal Rashid. 2009. Juvenile Justice in Malaysia Role of the Department of Social Welfare. *Malaysian Human Rights Day 2008 (Human Rights and the Administration of Juvenile Justice)*, p 35.
- ³ [2016] 1 LNS 1102.
- ⁴ In Malaysia, a child under the age of 10 years old is incapable of committing crimes. See section 82 of the Penal Code.
- ⁵ It is not only prohibited in Malaysia (under section 91(2) of the Child Act 2001) but also in other countries like Singapore and Brunei. Please refer to section 41(1) of the Singaporean Children and Young Persons Act (Chapter 38) and section 48(1) of the Bruneian Children and Young Persons Act (Chapter 219).
- ⁶ In India, normally any child who has committed any offence will be brought before the Juvenile Justice Board to be heard. However, a child aged between 16-17 at the time of commission of offence who has committed a heinous offence may be transferred to the Children's Court for a trial after a preliminary assessment is made. Please refer sections 15 and 18(3) of the Indian Juvenile Justice (Care and Protection of Children) Act, 2015.
- ⁷ The court advisers are appointed from those who have experience in dealing with children, including former officers from the Department of Social Welfare, school teachers and those who are actively involved in non-governmental organisations (NGOs).
- ⁸ The Court For Children can also be constituted in the presence of two women advisers but not two men advisers.
- ⁹ [2020] 1 LNS 2113.
- ¹⁰ Indian Official Website District Court, *Juvenile Justice Board*, <https://districts.ecourts.gov.in/rudraprayag/juvenile-justice-board> [4 April 2022].
- ¹¹ Social workers here refers to social workers of the Juvenile Justice Board (JJB) under section 4 of the Indian Juvenile Justice (Care and Protection of Children) Act, 2015.
- ¹² Jal Zabdi Mohd Yusoff and Sridevi Thambapillay, 'The Role of the Court for Children in Dealing with Children Involved in Crime', (2012) *The Law Review*, p 8.
- ¹³ The court in the case of *A Child v Public Prosecutor* [2020] 1 LNS 2113 said: "I find imprisonment under section 90(h) of the Act, a little too harsh and is unproductive if we wish to rehabilitate the Child. I will not consider it any more."
- ¹⁴ [2020] 1 LNS 2113.
- ¹⁵ A. Saibaba, "Juvenile Justice: Critically Juxtaposing the Models in India and Singapore", *Working Paper Series No. 028*, (Singapore: Asian Law Institute, 2012), p 15.

¹⁶ *Ibid.*
¹⁷ Section 90(4)(a) of the Child Act 2001 (Act 611).
¹⁸ Section 90(5) of the Child Act 2001 (Act 611).
¹⁹ However, it is important to note that the trial will take more than one session and it may take up a few months. Section 90(10) of the Child Act 2001 (Act 611).
²⁰ The report is known as a probation report.
²¹ Section 4(2) of the Juvenile Courts Act 1947 (Act 90).
²² Section 4(3) of the Juvenile Courts Act 1947 (Act 90).
²³ Section 11(4) of the Child Act 2001 (Act 611).
²⁴ Section 11(3) of the Child Act 2001 (Act 611).
²⁵ Section 4(2) of the Juvenile Courts Act 1947 (Act 90).
²⁶ Chan, Wing Cheong, 'Changes to the Juvenile Justice System', (1994) *Singapore Journal of Legal Studies*, p 450.
²⁷ S. Thambapillay, 'Akta Kanak-Kanak 2001: Kesannya Terhadap Undang-Undang Keluarga', (2002) *Journal of Malaysian and Comparative Law*, p 16.
²⁸ [1952] 1 LNS 81.
²⁹ Chan, *op. cit.*, p 449.
³⁰ Jal Zabdi and Sridevi, *op. cit.*, p 6.
³¹ [1985] 1 LNS 144.
³² A child can be tried at any court other than the Court For Children if he commits any offences punishable with death or the charge is made jointly against a child and an adult. See section 83(4) of the Child Act 2001.
³³ [1998] 5 MLJ 813.
³⁴ *Ibid.* See also Anita Abdul Rahim and Tengku Noor Azira Tengku Zainudin, 'Kesalahan Mengedar Dadah oleh Kanak-kanak dan Hukumannya di Malaysia', (2014) 18 *JUUM*, p 30 and Sarirah Che Rose, 'Prosedur Perbicaraan Kes Jenayah Kanak-Kanak di Mahkamah Tinggi', (2011) 6(2) *Voice of Academia*, p 119-120.
³⁵ Section 117 of the Child Act 2001 has replaced section 40 of the Juvenile Courts Act 1947. Section 117 of the Child Act 2001 provides that, "Nothing in this Act other than sections 96 and 97 shall affect the powers of the High Court and all the powers which may be exercised under this Act by a Court For Children in respect of a child may in like manner be exercised by the High Court."
³⁶ [1998] 5 MLJ 813. See also Anita and Tengku Noor Azira, *loc. cit.*
³⁷ *Ibid.*
³⁸ [2007] 6 CLJ 367.
³⁹ *Ibid.* Sections 96 and 97 of the Child Act 2001 replace sections 15 and 16 of the Juvenile Courts Act 1947 respectively. Section 96 of the Child Act 2001 deals with restrictions on an order of imprisonment while section 97 of the Child Act 2001 deals with death.
⁴⁰ [2007] 6 CLJ 367.
⁴¹ Norbani Mohamed Nazeri. 2007. *Welfare: The key to juvenile justice in Malaysia?* The 4th ASLI Conference, (Singapore, 24-25 May 2007), p. 199.
⁴² Section 2(9) of the Indian Juvenile Justice (Care and Protection of Children) Act, 2015 defines "best interest of child" as the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.

⁴³ [2014] 1 LNS 610.
⁴⁴ Act 670.
⁴⁵ In this case, the respondent was first charged in the Court For Children. However, the case was later transferred to the Sessions Court where the respondent was jointly tried with another accused who is an adult. However, the court made a ruling that the trial was invalid.
⁴⁶ [2014] 1 LNS 610.
⁴⁷ [2018] MLJU 578.
⁴⁸ *Ibid.*
⁴⁹ Saibaba, *loc. cit.*

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