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PROPOSED AMENDMENT TO THE CRIMINAL PROCEDURE CODE (CRIMINAL PROCEDURE CODE (AMENDMENT) BILL 1995)

By Philippe Boulle

THE CRIMINAL JUSTICE SYSTEM

LET HISTORY LIGHT OUR WAY FORWARD

To: All my colleagues of the Bar and to everyone concerned with Justice in Seychelles

I believe that the time is appropriate to publish once again the paper on The Criminal Procedure Code which I presented in 1995 to colleagues and members of parliament in an effort to avoid proposed amendments to our Criminal Procedure Code in 1995 (Criminal Procedure Code (Amendment) Bill 1995) which aimed to extend the period that suspect could be held in police custody without charge from 24 hours to 28 days. The intervention which was supported by other members of the legal profession had limited success to the extent that the proposed 28 days was reduced to 7 days as amended by the Criminal Procedure Code (Amendment) Act 1995. Regrettably the argument and reasoning soon faded and later the legislature fell once more in the same trap and they were made to believe that the 7 days was insufficient and that they should go and pass a new law to increase the detention to a shocking 30 days as per Criminal Procedure Code (Amendment) Act 2008.

Gradually as was predicted, professional investigation was abandoned by the police who armed with such powers, became arrogant, abusive and decadent, finding it easier to rely on brute force to investigate crime as it was easier to force a confession from a suspect who had been placed in their custody and at their mercy in a cell for 30 days, than do professional investigation. The Courts sadly took a misconceived lead from the legislature and in a regrettable complicity granted almost automatic extension of custody at the request of police officers so that 30 days became the norm rather than the exception which lawyers had hoped for and expected from the Courts as the ultimate guardians of rights. In the face of increased criminality in Seychelles and continuing abuse by police officer and prison wardens, I leave it to all to distil from the paper the guidance they find helpful for the future.

The proposition of law and the legal authorities cited remain valid and in most part applicable and relevant even in the light of the above amendments and I hope will be of assistance to lawyers and the judiciary. I also trust that with hindsight we can all understand our responsibilities and role in saving the Seychellois people from the orgies of abuse that have become part of our system since the enactment of the abovementioned legislation, which have lead to the sad irony of death of citizens in the hands of the police whose mandate is to preserve life.

Victoria, the 19th day of March 2010.

Philippe Boullé

COMMENTS ON THE LEGALITY, CONSTITUTIONALITY AND DESIRABILITY OF THE AMENDMENTS RELATING TO DETENTION WITHOUT CHARGE

Before proceeding to analyse the proposed amendments to Section 100(1) and 101(1) of the Criminal Procedure Code, it would be of help to understand the evolution and modern trends with regard to acceptable time limits for detention of persons without charge which can be found in most text books on Criminal law and for which purpose I recommend Cases and Materials on the English Legal System by Michael Zander, 5th Edition, pages 182 to 187 (copy attached) which provides the required insight.

I have no doubt that anyone trained in the Commonwealth tradition to attach great value to the liberty of the subject, would be immediately shocked at the attempt to substitute days and weeks for the hours permissible to place persons in detention without charge.

As we see from the abovementioned extract, modern countries who aspire to the rule of law are advocating a reduction in the period of detention without charge to only a few hours, in an effort to place enhanced value on the fundamental rights of the individual to liberty.

At this juncture in our transition to a democratic society which has espoused a Bill of Rights, it is incomprehensible that we should contemplate a shift from a few hours permitted for detention without charge to periods in excess of 24 hours and up to 4 weeks.

There is regrettably a measure of confusion as to the state of our laws on the subject in view of the existence of two conflicting judgments of the Supreme Court on the relevant legal provisions. Under the circumstances, it burdens us to make a choice between the said judgments in an effort to bring this vital area of law into a clear light. Before referring to the aforementioned judgments I would like to address certain jurisprudential issues which may shed some light on, and I hope assist in a critical evaluation of the said judgments.

1. RULE OF LAW

I have often heard people say that they know that someone is guilty but as there is no proof, that person cannot be convicted and is regrettably free. This view appears innocent on the face of it, but if fed with uncontrolled desire for revenge can turn into one of the most dangerous threats to the rule of law and the first step towards despotism.

Under the rule of law the word "guilty" means that there is "proof" which is "admissible" to convict a person of an offence, and if there is insufficient proof or proof that is not admissible, the person is not guilty, let alone the fact that he is presumed innocent.

Where there is absence of the rule of law any "act" which "offends", regardless of the definition of the offence or proof thereof, is visited with guilt and punishment.

Thus, guilty under a rule of law means simply "guilty in the eyes of the law".

There may be a fine line but the difference is that of day and night. When a person has to go free under the rule of law even if one believes he should be punished, remember that it is those same rules that have permitted us to acquire the goods which tempt the burglar. In other words "you cannot have your cake and eat it".

2. STATE OF EMERGENCY

The proposed amendments which will introduce a power to detain without charge up to 28 days is nothing but the introduction of State of Emergency powers by the back door, as the only legal consequence of a State of Emergency under our Constitution and for that matter under most Commonwealth Constitutions is to legalize detention without charge for prolonged periods.

3. ABUSE

A statute within the criminal law is too often viewed in its narrow, short-term context as to whether it could assist to catch a couple of criminals engaged in a prevailing crime.

The hallmark of good legislation is that it should not create powers which could be abused.

A simple glance at the proposed amendments will show that when such power falls in thehands of an undesirable police officer and an accommodating Magistrate a chariot and horse may be drawn through our rights to liberty.

My personal test is a simple one, i.e. can a citizen be arrested without a warrant

and held in a police cell without charge for 28 days without difficulty, if he offended the Commissioner of Police or his superiors and the political or social climate was opportune, and it was politically expedient to do so. The answer in my opinion is a simple YES, and thus the legislation fails the test of safeguarding the liberty of the subject.

4. ARREST

People tend to forget far too often that arrest and detention are crimes themselves i.e. tresspass to the person, assault and false imprisonment which are tolerated to combat a greater evil in society and therefore made lawful in certain exceptional circumstances.

In the light of the foregoing the legalisation of those crimes has had to be circumscribed within very narrow parameters.

It is much worse that the crimes abovementioned are allowed to be committed in its extreme form (i.e. for 28 days) by persons whose action it is most difficult to curb, i.e. police and judicial officers, then to have a few crimes e.g. burglary against which we have at least a possibility of protecting ourselves using burglar bars, dogs, electronic means or security personel.

I will now look at the two judgments (copies attached) referred to earlier, i.e.

1. Tirant v. R. Criminal (Bail) No.13 of 1993 (hereinafter referred to as the T v. R judgment)) Judgment 7.10.92

2. R. v. Murangira & others No. 17 of 1993 (hereinafter referred to as the R v. M judgment) Ruling 16.6.93.

The two judgments turn mainly upon a different interpretation of three sections of the

Criminal Procedure Code which follows:-

S.24 - When any person has been taken into custody without a warrant for an offence other than murder or treason, the officer in charge of the police station to which such person shall be brought may in any case and shall, if it does not appear practicable to bring such person before an appropriate court within twenty-four hours after he was taken into custody, inquire into the case, and unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a court at a time and place to be named in the bond; but where any person is retained in custody he shall be brought before a court as soon as practicable:

S.70 - (1) Where a person who has been arrested without warrant

is brought before a court, the Judge or Magistrate before whom the person is brought shall draw up and shall sign a formal charge containing a statement of the offence with which such person is charged, unless such a charge shall be signed and presented by a police officer.

S.100(1) - When any person, other than

any person accused of murder or treason, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at anytime while in the custody of such officer or at any

stage of the proceedings before such court to give bail, such person may be admitted to bail:

Provided that such officer or court may, instead of taking bail from such person, release him on his executing a bond without sureties for hisappearance as hereinafter provided

(2) - The amount of bail shall be fixed with due regard to the circumstances of the case

and shall not be excessive.

(3) - Notwithstanding anything contained in subsection (1), the Supreme Court may in any case direct that any person be admitted to bail or that the bail required by the Magistrates' Court or a police officer be reduced.

These two judgments, should be read carefully to understand fully the issues involved. The T v. R judgment was arrived at without considering any authorities on the subject, while the R v. M judgment arrived at a conclusion after consideration of relevant authorities, and departs from the T v. R judgment to conclude at page 15 that **"no person is to be remanded in custody without having been charged with an offence".**

Having had the opportunity to argue both cases and having had the occasion to study both judgments I now wish to add a few more points of interest.

Put simply, the Murangira case in the final analysis gives effect to the word "shall" in S.70 and finds that where a person arrested without warrant is brought before the court under

S.24 it is mandatory to charge, or release.

The T v. R judgment says that when a person is brought before a court under S.24, the word "shall" is not mandatory as the court can exercise discretion to remand under S.100 which right to remand is distilled from the right to bail in the said section.

At the onset, with the greatest respect, I have been unable to find a rationale to underpin the reasoning in the T v. R judgment, but further to that, the finding of

a power to remand as a complement of the power to bail is unsustainable for the following reasons:

1. As both the Courts and police officers have power to bail, if it is argued that this implies a power for Courts to remand then by the same token the Police Officer would also have the power to remand, which obviously the police does not have.

2. If we find a power to remand in S.100 (1) then that power becomes unlimited in time. Can we imagine a statute that gave a court power to remand a person without charge for an unlimited period, which furthermore would place a suspect in a worse position than a person who is charged, as the latter can demand a fair trial within a reasonable time (to prove his innocence) or plead guilty (to receive a non-custodial sentence) to end his detention.

3. Is it reasonable that we should find a power "implied" in a criminal procedure to remand a suspect indefinitely which is found in no otherCommonwealth jurisdiction bearing in mind that the 15 days limit in CPC S.179 applies only to "accused" persons.

To arrive at a judicious conclusion I believe that it would be helpful to explore the origins of S.24 and its place in our own statute books, together with the rich precedents that surround its continued existence.

S.24 of the Seychelles Criminal Procedure Code is the equivalent of the English provisions found in S.38 of the Magistrates Courts Act 1952 which traces its origins to S.38 of the Summary Jurisdiction Act 1879, S.22 of the Criminal Justice Amendment

Act 1914 and

S.45 of the Criminal Justice Act 1925.

S.38(4) of the Magistrates Courts Act 1952 provides

> "where a person is taken into custody for an offence without a warrant and is retained in custody, he shall be brought before a magistrate court as soon as practicable".

S.24 of the Seychelles Criminal Procedure Code reproduces S.38 (4) of the Magistrates Court Act 1952 as follows:

> "When any person has been taken into custody without a warrant for an offence other than murder or treason ..... but where any person is retained in custody he shall be brought before a court as soon as practicable".

While the subject has been well and judiciously treated by the Learned Chief Justice in the R v. M judgment I will attempt to rehearse the relevant issues in a manner which is less formal for the purpose of debate, as I may permit myself to do so, being free from the constraints imposed on one writing a judgment.

As can be expected, that legal provision which impacts on the liberty of the subject (which is, per Dalton's County Justice, page 406, "a thing specially favoured by the common law") has exercised the highest court in the United Kingdom in all its various aspects and from all angles.

The case law surrounding S.38 (4) of the Magistrates Courts Act 1952 is abundant andenlightening and revolves around three major shortcomings or ambiguities as follows:

Firstly: The section did not invest the police officer

with a right to release the suspect.

Secondly: The definition of "as soon as practicable" is vague.

Thirdly: S.38 (4) Magistrates Courts Act 1952 did not state whether the person brought before the court had to be charged.

While it is only the third point which is relevant to our deliberations, I will review the manner in which all three issues were settled, as it is not only interesting from an academic point of view but also goes to show the manner in which the Courts have repulsed all attempts to dilute the traditional value which the common law attaches to the liberty of the subject and which is jealously guarded by the judiciary.

1. Right of Release

That point was decided by the Court of Appeal in the case of Wiltshire v. Barrett [1966] 1 QB. Lord Denning M.R. (page 325) dealt with the point as follows:

"I think there is a short answer to all this argument Section 38 is dealing only with cases of two kinds: (1) those cases where the inquiry at the police station discloses a case to be answered, and (2) those cases where the inquiry cannot be completed forthwith. The section does not mention cases of a third kind, namely, those cases where on inquiry at the police station it appears that there is no sufficient ground on which to proceed further against the man. Clearly, in those cases, the man should be released forthwith. There was no need in the statute to mention that contingency. It is too obvious for words ".

And Lord Justice Salmon concluded (page 334) thus:

"Indeed, as Lord Denning M.R. has pointed out, it has long been settled law that in such circumstances there is not only the right but the duty to let the arrested man go free. Had it not been for the finding of the judge and Mr. Fay's skillful submission, I should have thought that this second point was so obviously bad as to be virtually unarguable"

2. <u>As soon as practicable</u>

Several judgments closed all arguments on that point in no uncertain terms as follows:

1. Hudson (1981) Cr. App Rep. Vol.72 at page 168:

"It is implicit in the section that being brought before a Magistrates' Court" as soon as practicable" must mean something similar to the 24
hours mentioned in subsection (1). In our view this probably required
the appellant having been arrested to be brought before a Magistrate on
Monday morning, which would be 24 hours after he was arrested, but
would certainly require him to be brought before a Magistrate on the Tuesday morning, which would be 48 hours after his arrest.

2. R. v. Holmes (1981) 2 ALL E.R. at page 615:

"In both R v Houghton (1978) 68 Cr App R 197 at 205 and in R v Hudson (1980) Times, 29th October it was I think accepted that save in a wholly exceptional case the period between arrest and appearance before a Magistrates' Court should not exceed 48 hours. The same approach seems to have been adopted in the Prevention of Terrorism (Temporary Provisions) Act 1976. The Act abrogates S.38 of the Magistrates' Court Act 1952 where it applies but only permits detention in right of an arrest exceeding 48 hours if the Secretary of State extends this period. This seems to me to point unmistakably to a period of 48 hours as being the maximum permissible period of detention in right of an arrest in the absence of special statutory provision".

And at page 616:

"The arrested person has to be bailed or brought before a Magistrates'
Court "as soon as practicable". Practicability is obviously a slightly elastic concept which must take account of the availability of police manpower, transport and Magistrates' Court. It will also have to take
account of any unavoidable delays in obtaining sufficient evidence to charge, but this latter factor has to be assessed in the light of the power
of the police to release on bail conditioned by a requirement to return to
the arrest when the evidence is more nearly sufficient. Any such release
may involve a risk that the arrested person will abscond, commit further
crimes or interfere with witnesses, but this risk has to be balanced

against the vital consideration that no man is to be deprived of his liberty save in accordance with the law. "As soon as practicable" still means "within about 48 hours at most"."

3. Charge

This point was likewise put to rest by the same authorities cited above. R.v. Holmes (1981) 2 ALL E.R. Donaldson L.J at page 615 refers to thisambiguity thus:

"Curiously enough, S.38 of the 1952 Act makes no mention of the preferment of a charge as a precondition of bringing the arrested person before a Magistrates' Court. However, the commissioner takes the view that this is the position and I know that many lawyers would agree with him".

In Hudson (1981) Cr. App. Rep Vol.72 the Court of Appeal in less sarcastic but more blunt and categorical terms, at page168, also dealt with this issue:

"We next consider the provisions of section 38 of the Magistrates' Courts Act 1952. Section 38 deals with bail on arrest without warrant. Subsection (1) deals with offences which are not very serious and if it is not possible to bring the person before a Magistrates' Court within 24 hours after his being taken into custody allows him to be released on bail. Subsection (2) deals with the situation where the inquiry into the case cannot be completed forthwith and allows the person to be bailed. And then subsection (4) provides: "Where a person is taken into custody for an offence without a warrant and is retained in custody, he shall be brought before a Magistrates' Court as soon aspracticable". Of course when such a person is brought before a Magistrates Court he has to be charged with some

offence" (underlining is mine)

And at page 169:

"If the proper processes of law were to be followed the officers should have brought him before a Court at the very least 48 hours on a charge (underlining is mine)

In Houghton and Francoisy (1979) Cr. App Rep at page 198, the Court of Appealreminded police officers involved with that case of the implications of S38(4) of the Magistrates Courts Act 1952 as follows:

"Having made an arrest for a specific offence, they can hold the arrested man in custody whilst they make inquiries; but when they have enough evidence to prefer a charge they should do so without delay and comply with section 38 (4) of the Magistrates' Courts Act 1952"

And at page 205:

"Houghton should have been charged not later than Monday, July 5 and brought before the Justices that day. Mr. Suckling on behalf of the Crown accepted before us that the police had been in breach of S.38 (4) ".

Finally, the need to charge had even prior to the Magistrates Courts Act 1952, been well settled in law so that we find in the speech of Lord du Parcq in the landmark case of Christie v. Leachinsky [1947] A.C. 573 at page 575 the following dictum:

"Finally the duty to make a definite charge against a person who has been arrested without a warrant has been impliedly affirmed by the legislature, S.22 of the Criminal Justice Administration Act 1914 which replaced S.38 of the Summary Jurisdiction Act 1879 ……"

While the position in United Kingdom rested on settled precedents in view of the strict stare decisis rule, in Seychelles the authorities found it prudent to entrench it in our law and hence we find in our Criminal Procedure Code special provision which deals with:

a) The right to release - found in the proviso to S.24 as follows: "Provided that an officer of a police station may release a person arrested on suspicion on a charge of committing any offence, when after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge".

b) The need to charge - as clearly set out in S.74 referred to earlier and which puts the entire matter beyond doubt.

This brief overview of the case law, I trust, will suffice to justify endorsing the R v. M judgment, which I hasten to add, also stands very firmly on its own judicially sound reasoning.

It is not surprising to note from our Criminal Procedure Code, which has taken great care to state the period and place of remand for persons charged with offences to afford adequate protection to the "accused" (e.g. Sections 179, 195 and 198), that not a singleprovision is made to safeguard a mere "suspect" who would obviously be much more in need of protection from abuse to extract confessions and obtain relevant information had they been susceptible to remand.

The reason for the above is as simple as it is logical, that no such remand before charge was ever permitted or contemplated. The forms provided for remand (copies of which are attached) also carry the same message, loud and clear.

The T v. R judgment with all good intentions, with respect, went too far to assist the police to bring criminals to justice and thus lost sight of the human rights dimension, and in this context the following words of Lord Simon in the case CHRISTIE v. LEACHINSKY [1947] A.C at page 595, remains a beacon of light, "My Lords, the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other."

The echoes of the words of Lord Simon have reverberated throughout the years to this date and 30 years later Lord Fraser of Tullybelton in Spicer v. Holt (H.L.(E)) [1977] A.C at page 1013 echoed the same statement, (when he had to let an accused driver go free,) in the following terms:

"The construction for which the driver contends, and which I think is correct, leads to a result which it regards as absurd but, speaking for myself, my reluctance is modified where, as in the present case, the issue is one which touches the important constitutional right of personal liberty".

FROM A CONSTITUTIONAL POINT OF VIEW

Article 18(5) of the Constitution reads as follows:

"A person who is arrested or detained, if not released, shall be produced before a Court within twenty-four hours of the arrest or detention or, having regard to the distance from the place of the arrest or detention to the nearest Court or the non-availability of a Judge or Magistrate, or force majeure, as soon as is reasonably practicable after the arrest or detention ".

The relevant principles and provisions of the laws of the U.K and Seychelles has now therefore been enshrined in the Constitution.

It goes without saying that Article 18(5) must be interpreted in the light of those statutoryprovisions from which it is derived and the common law principles that underpin such laws; Vide Noordally v. Attorney General (1986) MR at page 207.

It is interesting to review the submissions made to the Constitutional Commission, to shed even more light on the intention of that quasi-legislative body, as to whether it intended todepart from or entrench in the Constitution the statutory provisions and common law principles in existence.

These are the relevant extracts from the two written submissions by the parties represented in the Constitutional Commission:

1. "Any person who is arrested or detained -

(a) for the purpose of bringing him before a court in execution of

the order of a court; or

(b) upon reasonable grounds for suspicion of his having committed,

or being about to commit, a criminal offence,

and who is not released, shall be brought without delay before a

court, and if a person arrested or detained as mentioned in paragraph (b) is not tried within a reasonable time, then, without prejudice to

any further proceedings that may be brought against him, he shall be
released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to
ensure that he appears at a later date for trial or for proceedings preliminary to trial. "

(hereinafter referred to as "Submission 1 ")

2. "Anyone arrested or detained shall within 24 hours be charged and / or brought before a judge or other officer authorised by law to exercise judicial power. If they have not been charged within that time, the judge or judicial officer shall either charge them or order their release"

(hereinafter referred to as "Submission 2")

It is further important to note from the submissions and the debates which ensued, that the
only question that arose therefrom was the choice of the period of 48 or 24 hours before
being brought to court. No suggestion whatsoever was made to depart from the need to
charge before or upon being brought to court which is spelt out in submission 2 above and
implied in submission 1, which merely espoused the prevailing statutory provisions.

The final draft Constitution adopted Submission 1 by purely personal preference of the

draftman as no arguments (to the best of my recollection) raised the issue of the charge.

To appreciate the rationale behind the Constitutional or statutory provisions that safeguard the liberty of the subject in this area of the law, we must bear in mind the
ultimate goal which is sought to achieve and which is spelt out by the Privy Council in
Hussein and ors. v. Chang Fook Kam and anor. [1970] A.C. at page 948: "It is indeed
desirable as a general rule that an arrest should not be made until the case is complete ".

Arrest is allowed merely as a derogation to the above principle in a delicate balancing exercise, with the need to protect the citizen from crime on the one hand and the liberty of the subject on the other.

The aim however remains to attempt forever to close the gap between arrest and charge
by all means afforded to society by modern technology, as Lord Diplock reminded us in
Dallison v. Caffery [1964] 2 ALL E.R. at page 618 "What was reasonable in connexion

with arrest and detention in the days of the parish constable, the stocks and lock-up,
and the justice sitting in his own justice room before there was an organised police force, prison system or courts of summary jurisdiction, is not the same as what is reasonable to-day ".

It is also necessary to understand the purpose for which a person may be arrested. There seems to be a strange and dangerous new conception which is slowly creeping in our system, to the effect that the police can arrest so that they can make investigation or inquiries about a crime and assess the part played by a person detained so that they can decide upon a specific charge. This false notion aforementioned must be corrected at the earliest possible to avoid sliding into the system referred to by Viscount Simon in Christie v. Leachinsky [1947] A.C. at page 588 as follows:

"Such a situation may be tolerated under other systems of law, as for instance in the time of lettres de cachet in the eighteenth century in France, or in more recent days when the Gestapo swept people off to confinement under an over-riding authority which the executive in this country happily does not in ordinary times possess".

Arrest can only be made for a specific offence, and "the offence to be inquired into is the offence for which the person has been arrested"; Vide Christie v. Leachinsky, above cited at page 603 and Hudson [1981] Cr. App. Rep. Vol.72 at page 166. Other blunt reminders which followed are:

1. Houghton [1979] Cr. App. Rep. Vol. 68 at page 205

"We have, however, found cause for grave concern in the answers which Commander

Howard gave to Mr. Blom-Cooper when he was cross-examined about Houghton's arrest and detention at Staines police station and to which we have referred already in the recital of facts. We wish to state in the clearest possible terms that police officers can only arrest for offences. If they think that there is any difference between detaining and arresting, they are mistaken. They have no power, save under the Prevention of Terrorism (Temporary Provisions) Act 1976, to arrest anyone so that they can make inquiries about him. Having made an arrest for a specific offence, they can hold the arrested person in custody whilst they make inquiries; but when they have enough evidence to prefer a charge they should do so without delay and comply with section 38 (4) of the Magistrate Court Act 1952"

2. Lemsatef [1977] 2 ALL E.R at page 836

"It must be clearly understood that neither customs officers, nor police officers have
any right to detain somebody for the purpose of getting them to help with their enquiries. Police officers either arrest for an offence or they do not arrest at all. Customs officers either detain for an offence or do not detain at all. The law is clear.
Neither arrest nor detention can properly be carried out without the accused person
being told the offence for which he is being arrested There is no such offence as "helping with police with their enquiries".... If the idea is getting around amongst officer that they can arrest or detain people as the case may be for those particular purposes, the sooner they disabuse themselves of that idea the better"

Only after having made an arrest for a specific offence upon reasonable suspicion can the
period of detention i.e. 24 hours be used to dispel or confirm the reasonable suspicion by
questioning the suspect, and per Holgate-Mohammed v. Duke [1984] 1 A.C. at page 443

"When the police have reached the conclusion that prima facie proof of the arrested person's guilt is unlikely to be discovered by further inquiries of him or of other potential witnesses, it is their duty to release hint from custody ".

While arrest and detention is still permissible within the narrow confines of 24 or 48 hours,police officers are to be reminded that even where they have reasonable suspicions, they**SHOULD NOT ARREST AND DETAIN** if the purpose for which arrest is permitted can be achieved without arrest, as in cases where the suspect is willing to come to the police station and be interviewed, and all that is required of a suspect is a simple statement to confirm or dispel suspicion.

Lastly we should not fall prey to the temptation of thinking that a few breaches of human rights exercised on a few individuals will curb or cure the greater ill of crime, and we can therefore close our eyes, for this is the first step that was taken by every system that sank into orgies of crime be it, the Nazis, the communists or the lesser murderous regimes that have plagued our planet.

The most that can be said for the power of arrest is that it appears to be a necessary evil insociety as we know it, although the notion of an evil as a necessity is a contradiction; but be that as it may, the task that falls upon all of us is to ensure that the aforesaid evil, or crime (i.e arrest and detention) does not become a part or the major part of the problem of criminality in our country as it is in many other countries.

FROM THE POLICE POINT OF VIEW

Having discussed arrest and detention without charge from a legal and conceptual viewpoint it is desirable in order to complete the picture to look at the issue from a practical angle in its everyday implementation by the police.

The first criticism which is usually forthcoming for the executive authorities against any law that curbs the power of arrest and detention is that it hampers the work of the police; while the citizens retort that it protects them against abuse.

Does such law which we find in Commonwealth countries that sometimes reduces the detention without charge to less than 24 hours really pose a problem to the police and society at large.

A skillful and well trained officer will tell you that the 24 hours restriction before charge certainly does not create any significant problems for many reasons, and I will cite only two such reasons for it would take an entire book (which I will leave to writers) to go into the options available to operate efficiently within the confines of a law which adequately protects the liberty of the subject by preventing detention without charge beyond 24 hours.

1. In many investigations circumstances dictate, (leaving the law to one side)that arrests should not be made prematurely. Skillful officers always advocate that it is bad procedure to arrest until the investigation is nearing completion and most relevant information have been gathered.

The reasoning behind this tactic is that it is always desirable to arrest all parties connected with a crime at the same time, to prevent the possibility of one alarming the other, to either go into hiding, destroy evidence or move stolen goods.

Many investigations have been bungled because of unskilled, overzealous
young police officers who have made premature arrests, as they had not
been taught the basic skill which teaches one that the best way to obtain evidence or information is to allow the criminals to drop their guard and
throw caution to the wind, by giving them no hint that the police is on their

trail.

To the extent mentioned above the law and practice by a strange coincidence, meet in harmony to achieve different but complementary aims.

2. Another classical example, which follows, confronts all police forces andshows how police officers throughout the civilized world have happily embraced the restraints upon them, and have concentrated their efforts on improving their skills and coming up with novel ideas to win the fight against crime.

Often it happens, especially in connection with crimes committed by criminalgangs, that the police would have sufficient evidence to arrest a couple of lesser members of the gang but decides not to do so for tactical reasonsabovementioned as they would rather arrest the leader and his close collaborators, against whom they, as yet, have not a shred of evidence, but for the evidence against the lesser members which is strong indication that the leader is involved due to the enormity of the crime.

Suddenly the police receives information that the leader will be leaving the jurisdiction shortly. In the above instance and many other, the police, if possible will come up with a holding charge, i.e. a genuine charge which is unconnected to the crime, which allows the police to detain the leader for a sufficient time to complete the investigation, while on 24 hours detention or on remand pending the trial. If released on bail then

conditions would be placed to prevent him leaving the relevant jurisdiction. The charge usually involves such offences as contravention of immigration laws for which gangs are notorious and in the case of Seychelles, we could well imagine other crimes to which the police turn a blind eye, e.g. renting of houses by foreigners in contravention of the Immovable Property (Transfer Restriction) Act which could come in handy as a holding charge to prevent certain persons from escaping the jurisdiction pending investigation. An energetic, dynamic and professional police force, I am certain could come up with many other convenient holding charges as do their colleagues daily in other countries.

When examining the role of the police one cannot overlook the pressure brought to bear on them by the public who scream for an immediate pound of flesh after each crime and loses sight in moments of uncontrolled anger, of both the human rights, the tactical and the operational dimensions.

The anxieties of the public is also focused on a fear that there are criminals at large and that the police must act immediately to put them out of circulation, adding even more pressure on the police and the executive.

An inefficient and demoralized police force, often will very sadly succumb to the pressures abovementioned and round up and detain a few citizens, if only to be seen to be doing something and gratify the immediate expectations of a restless public, to bolster their flagging image.

The inevitable result is that by such rash actions the investigation is jeopardised and the real culprits and their ill-gotten goods get away, and the vicious circle is perpetrated. Theunfortunate scapegoats are eventually released with a life long hatred for the police who islooked upon as the enemy who will never deserve their respect and assistance. The few will take legal action against the police for unlawful imprisonment, and when they are awarded damages, the police force will settle the award and the inefficient force will say, "as we could not have caught the criminal anyway, the price we have had to pay to get the public off our back was worth it".

Faced with the above scenario, the executive authority, if wanting in power or imagination to redress the police force, will simply fall prey to the temptation to use more force and violence to combat crime and attempt to change the laws to permit such practice.

An efficient police force will shoulder all those concerns abovementioned and rest on long term success. Pending investigation, if they do not have sufficient evidence to arrest, or if for tactical reasons, they do not feel the time is right for an arrest, they will place the person they feel may have been involved in a crime, under discreet surveillance and likewise they will keep watch on buildings which they believe may contain instruments of crime or stolen goods to avoid loss of incriminating material or valuable property of the victim, until the investigation is ripe for an arrest.

The results are those spectacular arrests which we have witnessed in such incidents as thebombing of the World Trade Center in America and others when

the police has had to identify a few individuals among many millions.

At the end of the day if a criminal passes through the net despite all efforts we should have the wisdom to repeat the words of Lord Fraser of Tullybelton, quoted above "My reluctance" (to let the driver go) **"is modified where as in the present case, the issue is one which touches the important constitutional right to liberty".**

Finally, we cannot underestimate the benefits which accrue from respecting the individual'sright to liberty by the police, through a greater respect for the police by the public who because of this respect will be even more willing to assist the police who they will see as an ally against crime. Respect even from the criminals and the resulting assistance from members of the public which must be earned with reciprocal respect for the individual is without doubt the most powerful tool against crime which any police force can have, and it transcends all laws.

COMMENTS ON DRAFT BILL

The draft Criminal Procedure Code (Amendment) Bill, 1995, which seeks to amend S.100 (1) and S.101 (1) to introduce the concept of detention without charge beyond the 24 hour limit, is so at odds with common law and Commonwealth principles and procedures that it is not surprising to see so many contradictions within the draft itself, a few of which I shall attempt to elucidate:

1. A person has a constitutional right to liberty and security of the personunder Article 18 of the Constitution which forbids his arrest and detention, subject to strict limitations. How can he need a

statutory "right to be released" (draft S.100 (i)) when possessed of a fundamental right not to be arrested or detained in the first place. It is the person arresting or detaining who needs a statutory right to do so and that right must be limited in such a way that it falls within the ambit of the derogations to Article 24(1). This right to liberty was well pronounced in Noordally v. A.G. (1986) M.R. page 207 as follows **"the suspects remaining at large is the rule, his detention on ground of suspicion is the exception".** Thus the right to be released is but a redundant and confusing legal concept. At best all parties concerned could have been reminded of the duty to release the suspect.

2. Article 18 (5) of the Constitution has clearly stipulated the time limit forbringing persons detained before a court, i.e within 24 hours or if distance,availability of judge or force majeur does not permit that, then as soon asreasonable practicable after detention. The proposed amendment which seeks to extend the period of 24 hours is therefore ultra vires.

3. In S. 100(4) we see the creation of an illusionary and empty right. How can we talk of the need for a warrant and then give a blank cheque to the police, by such derogation as "unless new evidence justifying a further arrest has to comelight since the suspect was released", when this is the only reason that would "justify a further arrest" under a warrant itself.

4. In S.101 (1) the word "remand" by court is unknown to the common law with regard to persons who have not been charged. Remand only applies topersons charged and awaiting trial. This can only infuse confusion into the criminal law.

Jurisdictions which have condoned these kind of atrocities, i.e. detention

of persons without charge for long periods, have called it "preventive detention" or plain "detention", therefore let us be consistent with terminology so that at least we will be talking the same language as the rest of the world.

5. Under Section 101(3) & (4) we are invited to consider a scenario where a citizen is brought before a court without a charge and the court will remand theperson in custody, "if there are substantial grounds for believing that the suspect will fail to appear for his trial". How on earth can the court possibly contemplate a trial when the person is not even charged with an offence, worse still that he "will otherwise obstruct the course of justice" when he is not even charged and the only thing being interfered with till then is his right to liberty and his presumption of innocence.

6. When we look at the conditions under which a citizen who has not even been charged with an offence is to be released under S.100 (7) (a) we begin towonder seriously whether the proposed Bill departs only from the common law, or simply from all logic or commonsense.

An innocent person who has not been charged and has languished in a police cell possibly for weeks will finally be released on condition, "that he does not commitan offence" or "obstruct the course of justice", and the condition will attach to him indefinitely.

What happens if our suspect commits an offence? Of course to satisfy a breach of the condition he must be found guilty of an offence. Is he then punished for the offence and for contempt of court, even though he may have had this condition appended to his existence only because he was once upon a time arrested for anoffence for which he was never charged and for which the law presumes him to beinnocent; not to mention that a traffic offence will suffice to put him in contempt of the Court.

Until I read this Bill I thought that our Constitutional right to liberty was conditional upon not committing certain offences punishable by imprisonment. If that is so, why should we, and what right do we bestow on ourselves, to create a group of second class citizens who will be in double jeopardy if they commit an offence i.e they will fall foul of both the law and the Court order and be further penalised twice for committing an offence because once upon a time they were a mere suspect, rightly or wrongly, and maliciously or not brought before a Court.

7. Under S.101(7)(b) matters get even more draconian leading us back to the days of the inquisition; the "suspect" still not charged, will be forced by a Court order to ENABLE inquiries or a report to be made for his eventual conviction and"ASSIST the Court" to convict him. At that point I thought I was reading a horror story in which the presumption of innocence, the right to defend oneself, the right to remain silent and the right not to be forced to incriminate oneself had all been cast to the wind by the stroke of a pen.

8. Under S.101(7)(c) a citizen can be prevented from leaving the country indefinitely because he is a suspect, let alone for the purpose of attending a trialfor an offence in respect of which he has not yet been charged. Is this how low wepeg the **CONSTITUTIONAL RIGHT TO LIBERTY AND FREEDOM OF MOVEMENT**.

CONCLUSION

In the final analysis all I can see in the Draft Bill is an attempt to sacrifice human dignity,freedom and liberty on the alter of an inefficient, unskilled and demoralized police force who has failed to combat crime using civilized means accepted and adopted by other peaceful Commonwealth countries. Reading that Bill finally reminded me that indeed the dividing line between the rule of law and arbitrary rule is a fine line and how easily it is to cross that line blindly, unless you have had occasion to lose your own fundamental human rights, and come to appreciate their true worth, purpose and meaning.

You who would think that, the Draft Bill is for criminals, humble yourself for no bad law has ever chosen its victim; and the prisons continue to harbour and in the graveyards of this world there rests, many who have suffered "unjust" imprisonment or death under such laws they legislated "for others" at a convenient time.

Victoria 31st March 1995

Editor's Note: In the wake of amendments made to the Criminal Procedure Code in 2009 effectively increasing the duration of time in which a suspect may be detained without charge, the arguments set forth in this article have once again come to the fore.

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