

# POLICE POWERS OF ARREST

## POWERS OF ARREST WITHOUT WARRANT

Arrest, said Lord du Parc in Christie vs Leachinsky (1974) A.C. 573 at 600, is the beginning of imprisonment. At Common Law a policeman may arrest without warrant anyone who is or who he reasonably suspects to be in the act of committing or about to commit a felony or breach of the peace. His common law powers exceed that of the ordinary citizen in that he is empowered to arrest even though the felony was not, in fact, committed, whereas the ordinary citizen can only arrest if the felony was committed. In each case there must be reasonable cause to suspect the person arrested of having committed it.

There are no Common Law powers for a policeman to arrest for misdemeanors other than a breach of the peace. Extensive powers have been supplied by local statutes and Section 15 of the Constabulary Force Act provides that any constable may without warrant apprehend any person found committing any offence punishable upon indictment or summary trial. The effect of this section is to make virtually any offence, no matter how trivial, an arrestable offence if the person arrested is "found committing" it by the constable.

In addition to this provision, by Section 4 of the Towns and Communities Act, a constable may take into custody, without warrant, any person who commits any of

some eighteen trivial offences set out in Section 3 of that Act, if these offences have been committed within the view of the constable or were recently committed within the view of a credible person.

The term "found committing" under the first Act may embrace circumstances which would not be encompassed by the term "within the view" under the latter Act. Thus it has been held that a person in a crowd who used indecent language within the hearing of a constable who could not identify him, although not liable to arrest under the latter Act, was nevertheless liable to arrest under the Constabulary Force Act, he having admitted using the words upon enquiry by the constable (**R vs Owen Sampson (1954) 6 J.L.R 292**).

The powers of arrest accorded by these two colonial statutes has given rise to much abuse and oppressive conduct by the police and it is not uncommon for persons to be arrested and held in custody for two, three or four days on some petty offence triable in petty sessions, the penalty for which may be a fine of a few dollars.

In addition, it is a common practice when a constable ~~has~~ wrongfully assaulted or arrested someone to allege that the victim of his assault had used indecent language, a difficult charge to disprove, for which he was arrested and then resisted arrest which necessitated the constable using force, thereby justifying his assault.

The combination of the charges of indecent language, resisting arrest and assaulting a constable is an all too familiar one to attorneys who practice in the Criminal

Courts and usually seem to arise whenever the arrested person has suffered an injury at the hands of a policeman.

It is difficult to resist the comment, that when the framers of our Constitution decided to preserve our colonial laws from scrutiny as to their conformity with the terms of the Constitution, they had, quite deliberately, decided that Jamaicans should not be accorded the same degree of personal liberty as their English counterpart.

Thirteen years after Independence, our legislators found it expedient to increase the generalised curtailment of personal liberty. In 1975, the then Government passed an Act called the Suppression of Crime (Special Provisions) Act. This Act provided for the establishment of "Special Areas" for fixed periods of time whenever the Minister of National Security had considered that it was required in the interest of public safety or public order or for the purpose of preventing or detecting crime. The Special Areas could encompass the entire island and, in fact, did so for most of the almost twenty years that the act was in force.

By Section 4 of this Act, a member of the Security Forces could in any 'Special Area' (and therefore the entire island), inter alia, "arrest any person upon reasonable suspicion of his having committed or being about to commit an offence". Since the power of arrest without warrant upon reasonable suspicion already existed at Common Law in relation to felonies or serious crimes, it seems to follow that the

effect of this provision was to extend to petty offences, the power to arrest upon reasonable suspicion, which power had hitherto been confined to felonies and breaches of the peace.

Other statutory provisions according the power of arrest to police constables in more or less specific circumstances are:-

- (i) Section 7 of the Towns and Communities Act empowers constables to take into custody "all drunken, loose and disorderly persons" whom he finds disturbing the peace or any inhabitant or passenger and all persons loitering at night in any public place who cannot give a satisfactory account of themselves.
- (ii) Section 18 of the Constabulary Force Act empowers a constable to arrest without warrant any person known or suspected to be in unlawful possession of opium, ganja, morphine, cocaine or other dangerous drug or any paper ticket relating to any game or lottery known as Peake Peow or Drop Pan or similar game. By Section 19, too, a constable may stop and search any vehicle and its occupants which he suspects of carrying stolen goods or any other of the articles referred to Section 18. Similar powers to stop and search vehicles and their occupants exist under the Firearms Act and the Dangerous Drugs Act.
- (iii) See also Section 62 of the Larceny Act and Section 5 of the Unlawful Possession of Property Act (now repealed).

Where the power to arrest exists, the common law provides that a constable may enter any premises, if need be by force, in order to arrest the offender or suspected offender. In addition, the Suppression of Crime Act (Section 4) provided that in a special area a member of the Security Force could without warrant and using such force as is reasonably required - (a) search any premises, place, vehicle person or thing or (b) cordon off any area and restrict the movement of persons or vehicles into or out of the area so cordoned or (c) enforce curfews, according to regulations established under the Act.

The repeal of the Suppression of Crime Act did not result in the curtailment of these socially oppressive police powers and I shall, later on look at what has replaced it.

### REASONABLE SUSPICION

It will have been observed that apart from the circumstances in which an offence is committed within sight of a constable, the power to arrest requires, at the least that the constable 'suspected' or had reasonable cause to suspect that the person arrested had committed an offence. There is not, so far as I am aware, any practical distinction between the two terms. Both require,

- (i) that there should be an actual suspicion, and,
- (ii) that there be reasonable grounds for the suspicion.

Suspicion to justify arrest does not require information sufficient to prove a prima facie case. In Hussein vs. Chong Fook Kam (1969) 3 All E.R. 1626, (1970) A.C. 492, Lord Devlin said, "suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end". Prima facie proof must rest on admissible evidence. "Reasonable suspicion" may take into account matters which could not be put in evidence or would not form part of the prima facie case.

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A constable may also rely on hearsay evidence in founding a reasonable suspicion, and he may take into account the conduct of the suspect and any criminal record he may have, but he should take reasonable steps to satisfy himself of the probable truth of the hearsay information upon which he acts.

In Dumbell vs. Roberts (1944) A.E.R. 326 Scott L.J. stated (p.329) "the duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty.... They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape, but where there is no danger of the person who has *ex hypothesi* aroused their suspicion that he probably is an "offender" attempting to escape, they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their

enquiries forthwith....."

In Hogg vs. Ward (1858) 3 H. & N.417, it was held that when a constable, acting on reasonable hearsay, proposes to arrest a suspect and that suspect has a reasonable explanation in circumstances where there is nothing to contradict it, the constable cannot be said to have the reasonable suspicion necessary to justify arrest. This principle was applied by the Court of Appeal in Jamaica in the case of the Attorney General vs. Patrickson (R.M. Civil Appeal No. 107/75).

#### NATURE AND CIRCUMSTANCES OF ARREST

At common law, there is no half way house between the unfettered liberty of the person and arrest. As soon as a person is restrained or told that he will be restrained if he tries to leave, there is an arrest (R. vs. Bass (1953) 1 A.E.R. 1064. R vs. Wallen (1952) 36 C.A.R. 72). Unless there are reasonable grounds for suspecting that the person has committed or is about to commit an offence the arrest is unlawful.

There is no general power to detain a person for questioning to ascertain whether or not he or anyone else has committed an offence. A policeman who arrests someone upon reasonable suspicion that he has committed an offence is usually obliged to inform the person arrested of the offence for which he is arrested. He is

not entitled to keep the true reason for arrest to himself or to give a reason which is false. (Christine vs Leachinsky (Supra) ) Nor is it sufficient, simply to tell him that he is wanted for burglary without giving him sufficient information to enable him to understand what was the burglary for which he is suspected (R.V. Telfer (1976) C.L.R. 562).

The requirement, that a person arrested should be informed of the reason for his arrest does not exist if the circumstances are such that he must know the general nature of the offence for which he is arrested and he cannot complain of not being told the reason for arrest if he himself produces the situation which makes it practically impossible for the arresting officer to inform him (e.g. by counter-attack or by running away) (Christie vs. Leachinsky (Supra)).

The effect of this judgment of the House of Lords in England is that even if reasonable suspicion exists the arrest will nevertheless be unlawful and the constable liable for false imprisonment if he fails to disclose to the person arrested the true reason for his arrest. The words of Viscount Simmonds in this celebrated case are very instructive and need to be drilled not only into the minds of every member of the police force but also in the minds of our practicing Attorneys and our Judges -

"If a policeman who entertained a reasonable suspicion that X had committed a felony (an arrestable offence) were at liberty to arrest him and march him off to a police station without giving any explanation of why he was so doing,



the prima facie right of personal liberty would be gravely infringed. No one I think, would approve a situation in which, when the person arrested asked for the reason, the policeman replied, "This has nothing to do with you. Come along with me". Such a situation may be tolerated under other systems of law as for instance....when the Gestapo swept people off to confinement under an overriding authority which the executive in this country, happily, does not in ordinary times possess. This would be quite contrary to our conceptions of individual liberty."

The decision in *Christie vs. Leachinski* has been embodied in Section 15 (2) of our Constitution which provides as follows:-

"Any person who is arrested or detained shall be informed as soon as reasonably practicable in a language which he understands of the reasons for his arrest or detention." It may not be a gross over-statement to suggest that 50% of arrests in Jamaica are made in breach of Section 15 (2).

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### USE OF FORCE IN MAKING ARRESTS

Something must be said about the use of force in making arrests which are justifiable. There is a dearth of English authorities especially modern cases, on the subject. One old case *Truscoll vs Carpenter & Man* (1697) 1 Ld Raym. 229 is

authority for the position that the use of force in making an arrest cannot be justified where the accused does not resist arrest or attempt to escape.

It has also been held that handcuffing is only justifiable where it is reasonably necessary in order to prevent an escape or to terminate a violent breach of the peace (Reed vs Wastie (1972) C.L.R. 22; Wright vs Court (1825) 4 B&C 596; Leigh vs Cole (1853) Cox C.C. 329). It is arguable, however, that in any borderline case in Jamaica, the benefit of the doubt as to the justification for its use would be given to the policeman and it is only in a case where it was clearly unnecessary that it would be considered unlawful and a trespass.

The use of deadly force in preventing a person from escaping a lawful arrest is regarded as being open in England. In Victoria (R. v. Turner) (1962) V.R. 30 it has been held that such force may be used which the arrester believes to be reasonably necessary to effect his purpose, provided the means adopted "are such that a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented". With due respect to the Full Court this statement raises more questions than it answers.

In Canada in Beim vs. Goyer (1965) S.C.R. 638 a constable pursued a young car thief over rough ground with a gun in hand. Several warning shots were fired without effect. The constable eventually slipped, it was found, and his revolver discharged, seriously injuring the plaintiff suspect. A majority of the Court found

the constable liable for negligently using excessive force, the view being expressed that the use of firearms could not be sanctioned where the suspect's acts were not dangerous to life. The decision of the majority was followed in Quebec in an unreported case of Poupart vs. Lafontaine. ("Use of Force by Police to Effect Lawful Arrest." - B. McDonald (1966-7) 9 CCr.LL.Q. 435).

In Jamaica in the case of Finn vs The Attorney General Suit No. CL F-027/79 - 19/5/81) in a suit for assault by the Plaintiff it was found by Wolfe J, that the police had reasonable cause to apprehend the Plaintiff and another man for having grabbed a bangle from a woman's hand and were fleeing on a motor cycle. The police pursued the two men in a car and shot them both, the other man fatally. As the Plaintiff lay on the ground, the policemen then fired three more shots into his body. His Lordship found "the degree of force used in the circumstances excessive and wholly disproportionate to the injury or mischief it was intended to prevent". Surprisingly, his Lordship declined to award exemplary damages for what was clearly an attempt to murder the Plaintiff.

On the other hand, in a case in which the Plaintiff, an elderly man, was sitting in his yard and was shot and crippled by a policeman who was pursuing a group of wanted men with guns who ran through the yard, firing back shots at the police, it was held by Gordon, J that the policemen "were at the time they fired their guns, the target of the gunmen about to shoot again. They were entitled to defend

themselves". The policeman, therefore, was "not in breach of his duty of care and the Defendant was not negligent nor guilty of an assault upon the Plaintiff"

(Byfield vs Attorney General Suit CL B-334 of 1977 (17/11/80) and see also (Robley vs Placide 11 W.I.R. 58).

### DISPOSITION AFTER ARREST

Section 15 (3) of the Constitution in declaring the Common Law states:

"Any person who is arrested or detained.....

(b) upon reasonable 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....."

A person making an arrest is under an obligation to ensure that the person arrested is brought before a Court within a reasonable time. It is unlawful to detain the arrested person pending further enquiries; nor should a person be arrested to facilitate the gathering of further evidence (John Lewis & Co Ltd vs Tims (1952) A C 676).

In John Lewis & Co Ltd vs Tims (supra), Lord Porter observed:

"Those who arrest must be persuaded of the guilt of the accused; they cannot bolster up their assurance as to the strength of the case by seeking further evidence and

detaining the man arrested meanwhile, or taking him to some spot where they can or may find further evidence".

In Wright vs Court (1825) 107 E R 482; B & C 596, it was held that it was plainly unreasonable for a constable to hold a suspect for three days without taking him before a magistrate in order to enable a private prosecutor to collect evidence.

In a local case (Dyer vs Det Simpson and the A G Suit CL D035/74 - 1976) it was held by McCarthy J that to detain a person for six days to hold an identification parade was an unreasonable length of time and constituted a false imprisonment.

In Peter Flemming vs Det Corporal Myers and The A G - S.C. Civil Appeal #63/85 the Appeal Court (Carey, Forte and Morgan, JJA) held that even when reasonable cause to suspect the Plaintiff existed, it was a false imprisonment to keep the Plaintiff in custody for 13 days without taking him before court on a murder charge.

"Any person who is unlawfully arrested or detained by any other person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person". So says Section 15 (4) of the Constitution. The means of obtaining compensation is by a civil suit for false imprisonment. Where the arrester is a policeman, compensation may be obtained from the state by means of a suit against the Attorney Genal by virtue of the Crown Proceedings Act.

The Judicial Committee of the Privy Council has held that persons in Trinidad & Tobago who have been arrested or detained have a constitutional right to be

informed of their right to communicate with a legal adviser, and that this should be done as early as possible and in any event before any in-custody interrogation takes place (The Attorney General of Trinidad & Tobago etc vs Wayne Whiteman P.C.A. #52/90 - 17/4/91).

There can be no doubt that this decision would also apply to Jamaica, as also the Privy Council's finding in that case, that since the 1964 English Judges' Rules were adopted by both countries a person in custody had a right to make telephone contact with his Attorney-at-Law or friends so long as doing so did not impede police investigations or the administration of justice. Similarly, someone in custody should be supplied with writing material and have his letters posted without delay. The right of persons in custody should also be posted at convenient and conspicuous places at police stations and the attention of prisoners drawn to these notices.

During the currency of an unlawful arrest or detention recourse may be had to Habeas Corpus proceedings to secure the release of the person in custody.

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### CORDONS AND CURFEWS

It would be idle to think that Government had discontinued its undeclared war against the poor and suffering masses of Jamaica when, in 1994, it eventually yielded to the prolonged protestations of civil rights activists and repealed the Suppression

of Crime (Special Provisions) Act. Simultaneously, with the Act's repeal, its most objectionable and oppressive provisions, namely the power of the "Security Forces" to effect cordons and curfews of entire communities was transferred to the Constabulary Force Act, (Part IIA, containing Sections 50A-H) although the concept of "special areas" itself has been discontinued.

By this amendment to the Constabulary Force Act, the Commissioner of Police, or an authorised Assistant may order a cordon to be established around any "locality" where he has reasonable grounds to believe that it is necessary to do so in the interest of public safety, public order or to prevent and detect crime (Section 50B).

(1). He may also, on the same grounds impose a curfew on any locality but must first obtain the written approval of the Minister of National Security, a requirement which has nothing at all to do with the protection of the citizens subject to the curfew but seems more likely to ensure that a Police Commissioner hostile to the governing party cannot use the power to victimise its supporters.

A Cordon, unless repeated, shall 'endure' for 12 hours and a 'curfew' for 48 hours.

The police in a cordon or curfew have special powers of arrest and search without warrants although it must be said that there are, for the first time, some commendable safeguards on the wanton and unrestrained use of these powers.

In Section 50F an interesting, though novel, concept is employed by requiring that no person shall be arrested or detained in the course of a cordon or curfew "unless

the person in charge of such operations is satisfied that there are reasonable grounds" for the arrest or detention. This requirement is, presumably, in addition to the "reasonable grounds to suspect" which the constable himself must have in relation to the accused. However, it is unlikely that an arrested person will ever be able to employ this provision for his own benefit.

### IDENTIFICATION PARADES

Before 1994 the police had no special power to hold someone for an identification parade. Their power of arrest depended, as we have said, on the existence of reasonable suspicion. Since the police were generally not disposed to carry out identification parades promptly on the arrest of a "suspect", it followed that persons who were detained to be placed on identification parades were often illegally detained where no independent ground for suspicion existed.

In 1994, by the amendment to the Constabulary Force Act coupled with the simultaneous amendment to the Judicature (Resident Magistrates) Act, the government sought, in a rather backhanded way, to stop up that loop hole - and at the same time further increase the powers of the police.

Thus Section 63A of the Judicature Act provides that a Magistrate shall make weekly enquiries as to persons in custody who are detained with a view to being placed on



a identification parade, thereby giving legitimacy to the hitherto illegal practice of detaining persons without charge for identification parades to be held. The magistrate may then detain such a person for further indefinite periods, or at the least, order that he brought before the court within 24 hours. Apparently he is not empowered to order a detainee's immediate release if he considers the purported parade to be a sham.

To further legitimise this further incursion into our personal freedom the amendment to the Constabulary Force Act provides that persons arrested or detained under that act shall either be released within 24 hours or taken before a Resident Magistrate unless they are detained for an identification parade when Section 63A of the Judicature (Resident Magistrates) Act shall apply.

And so the rights of the Jamaican people continue to be whittled away; but who cares?

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JULY 1997.

