

RIGHTS OF JOURNALISTS WHEN ARRESTED

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Journalists do not, and neither is it being suggested that they should, have special rights, after being arrested. But in common with the generality of the population, most journalists are not aware of their basic entitlements on being arrested. In this case ignorance of the law is not bliss, but places journalists in dire straits. It is easier to prey on the uninformed, as they are usually unassertive, and are susceptible to a myriad of unlawful inducements. Every journalist should therefore buy and retain a copy of the Criminal Law and Evidence Act.

This analysis relates in brief what it is that journalists should do, insist on, and what to look out for, when their liberty is constrained by the police or any other law enforcement body. There is a perception that the Central Intelligence Organisation and operatives, (commonly known as CIO's) can lawfully effect an arrest. The main reason why this is so arises from the fact that CIO's have in Zimbabwe's history generally tended to be a law unto themselves, widely effecting arrests, and at times torturing suspects.² This partly explains the fear and awe in which the public holds them. The CIO falls under the President's Office. It is in other words, the President's own intelligence-gathering agency. The CIO does not have powers of, and is not entitled to arrest any person in Zimbabwe.

The Police

The organisation primarily tasked with maintaining law and order, and therefore empowered to effect arrests is the police. The Police Act regulates operations of the police, which fall under the Ministry of Home Affairs. The

¹ November, 2002

² For example the torture of Mark Chavunduka, and Ray Choto.

police are empowered to arrest persons for the commission of both common and statutory law offences.

Statutory offences are those offences codified in statutes, such as traffic offences, or the offences that are contained in AIPPA or POSA. On the other hand, common law offences are not codified into statutes, but form part of the unwritten law, relating to offences commonly accepted in most societies as reprehensible conduct, such as the offence of murder, theft, arson, malicious injury to property, kidnapping, assault, and so on. There are instances, however, where common law offences have been modified by statute, in which case the offence becomes a statutory violation. This distinction is important, because, any person, including members of the dreaded CIO, may effect a citizen's arrest on any person caught committing a common law offence. No person other than a police officer is entitled to effect an arrest for the commission of a statutory offence, unless if the arrest is expressly permitted by statute. Any such arrest would amount to unlawful detention, entitling the person affected a right to release, through a writ of *habeas corpus*. Submitting to arrest by a person that is not a police officer in cases where the charge is one relating to a statutory offence becomes a matter of personal choice and practicality.

Every police officer is issued with a badge, which has an identification number and an identification card. Before submitting to questioning or arrest by any person claiming to be a law enforcement officer, journalists must:

- i. Demand to know the full name of the person(s);
- ii. Request an identification badge and police identification card;

Journalists should refuse to be questioned or arrested by a member of the CIO, unless if they wish to speak to the person concerned, but this should preferably be in the presence of a lawyer.

An arrest by a member of the CIO, for a statutory offence is not lawful, and amounts to illegal detention. When reporting in the media, it is important therefore to accurately describe the denial of liberty as unlawful detention and

not an arrest. A person that has been unlawfully detained is entitled to immediate release, if an appropriate application is made to the High Court.

In order to deter such common and deplorable behaviour, members of the CIO must be sued for damages for unlawful detention, and in particular, special punitive damages as well as costs must be sought.³

Reasonable Suspicion: The ability to arrest individuals by the police is restricted. No arrest should be made unless if the *arresting* police officer has a *reasonable suspicion* that an offence has been committed. In other words, there must be in existence sufficiently reasonable facts or basis for suspecting that an offence has been committed or is about to be committed.

There have been worrying instances of the arresting officers stating (in court of all places) that they were merely sent to arrest an individual, and they themselves were not aware of the precise reason for the arrest, and had not satisfied themselves that there was in existence a reasonable suspicion of an offence having been committed.⁴

Though in practice it seldom happens that arresting police officers will listen to protestations, and enquiries about whether they believe that an offence has been committed, journalists should be more assertive. The benefit arising from such assertiveness is that either the arrest will not be carried out, or damages for unlawful detention will be increased on the basis of the facts of the matter.

48 Hour Moratorium: The police are entitled to arrest and detain an individual, on the basis of a reasonable suspicion that an offence has been committed, for

³ There exists a common problem where lawyers that should insist on punitive damages fail to adequately argue in favour, with the result that in many cases, only relatively minor ordinary damages are awarded by the courts. Journalists should insist on their lawyers investing research time into research on punitive damages.

⁴ The arrest and detention of the Law Society of Zimbabwe President, and Secretary, Mr. Moyo and Mapombere in July 2002, is an example. The police officer in charge of the arrest stated in court that he was not aware of the full and precise reasons for the arrest. Efforts to get the officer who gave the orders were not fruitful. And in an unimaginable judgment, the court in these instances ruled that the arrest and

a maximum of 48 hours, after which they are obliged to refer the matter to the Magistrate court for initial remand, or to release the arrested person. Any detention beyond the stipulated time frame automatically amounts to unlawful detention, unless if the police successfully apply to a magistrate for a warrant of further detention. Detentions past the permissible 48 hours should result in lawsuits against the police. This will hopefully discourage unlawful conduct from the police.

Pre-trial detention is in principle intended to ensure that the accused person attends court. Arrest and detention for the sake of investigation and forming a suspicion and building a case against an individual is unlawful. Again, this prevalent behaviour needs to be checked by more suits being brought against the police individually and the Minister of Home Affairs.

In addition to buying a copy of the Criminal procedure and Evidence Act, all journalists must in addition familiarise themselves with section 18 of the Constitution. This is the section that lists the rights of all persons accused of committing a criminal offence.

Right to be Presumed Innocent Until Proven Guilty:⁵ Every person has a right to be presumed innocent until s/he is proved guilty by a court of law. This means that the accused has a right not to be treated as a convicted criminal, and his or her liberty should only be restricted in excess of 48 after judicial enquiry and approval.

Right to be Informed of Details of Offence Charged With:⁶ It is unlawful to detain a person without advising him of the offence the he is suspected of having committed. It is every person's right to be informed as soon as is reasonably practicable, in a language understood by the accused, the precise details of the nature of the offence charged. This right is intended to prevent

detention was lawful. This was notwithstanding that the charge was also defective as it quoted a non-existent section of POSA. Not that the decision did much for the judiciary's already battered image.

⁵ Section 18(3)(a) of the Constitution.

⁶ Section 18(3)(b) of the Constitution.

abuse of the powers of arrest by the police. Failure to inform an arrested individual of the reason for arrest may vitiate any proceedings initiated and a ripe ground for civil suit.

Right to be Given Adequate Time and Facilities to Prepare Defence:⁷ After being personally or through a legal representative, given full details of the charge preferred, a person that has been arrested is entitled to be given sufficient time and facilities to prepare for his defence. This means that he must be given time to communicate with his legal counsel, as well as facilities that permit him to study the charge papers and prepare for court. Therefore even at the first hearing of the matter, where it is not usual to present one's defence to the merits of the matter, the accused is still entitled to time and facilities to prepare to raise technical defences, at times which is unrelated to the actual merits of the case.

Right to a Lawyer:⁸ Every person that has been arrested or detained has a right to legal counsel. A disturbing trend of denying lawyers' access to their clients seems to have been perfected by some, if not most, members of the police. This is unlawful. Every accused person has a right to seek legal advice, and to refuse to answer any questions from the police except in the presence of his lawyer. No adverse inferences will be drawn if an accused refuses to speak to, or answer any questions from the police, without his lawyer's involvement. Journalists are particularly warned against giving in to police intimidation. It is true that some, if not most police officers will abuse the 48 hour right of detention, and use that as a bargaining tool in order to get accused persons to talk in the absence of their lawyers. Some, particularly devious and over-enthusiastic officers will not advise accused persons of their right to have a lawyer available.

Journalists whose right to have legal counsel has been violated must raise this point and expose and emphasize the vulgarity of the actions of those

⁷ Section 18(3)(c) of the Constitution.

⁸ Section 18(3)(d) of the Constitution.

responsible, in addition, to stating what such actions mean for democracy in Zimbabwe.

Right to Cross-examine:⁹ In court, every accused person has a right to have access to and cross-examine all the evidence and witnesses arraigned against him by the State. Using the court, an accused person can subpoena any and all persons that can lend evidence in his favour or clarify issues. The State is obliged to secure the presence of such persons and any relevant physical evidence, as far as is practicable.

Right to an Interpreter:¹⁰ The official language in Zimbabwe's court system is English. Notwithstanding the high calibre of English spoken by most Zimbabweans, most litigants find its use in court uncomfortable, since it is in reality a second language. Any person that is not comfortable or fluently conversant with the English language is entitled to an interpreter at the expense of the State.

Right to a Fair trial before an Independent and Impartial Tribunal:¹¹ In addition, all persons have a right to a fair trial before an independent and impartial trial, in the determination of the existence and extent of civil rights and obligations. This means that a court should not be biased in favour of one or other of the parties before it, and all the parties must be permitted to question evidence and witnesses of the other.

Right to Humane Treatment:¹² The police sometimes tortures many accused persons during periods of incarceration. Torture is the deliberate infliction of physical or mental pain by state agents. Usually the accused is powerless to prevent torture, and because it is a gross abuse of power, all affected journalists must initiate claims, in addition to pressurising the police to investigate and prosecute their own rogue elements.

⁹ Section 18(3)(e) of the Constitution.

¹⁰ Section 18(3)(f) of the Constitution.

¹¹ section 18(9) of the Constitution.

¹² Section 15 of the Constitution.

Conclusion

It is important therefore that all practising journalists must acquaint themselves with Chapter three of the Constitution, which contains the bill of rights, as well as the Criminal Procedure and Evidence Act, in addition to all the other media laws adversely affect their practice and livelihood.