

CONSTITUTIONAL DAY ROUNDTABLE

JUSTICE, DEMOCRACY AND THE RULE OF LAW

Theme

Tension within pragmatism, Law and the Constitution

This theme has been a personal preoccupation of mine as a citizen and a lawyer since independence and I am pleased to have the opportunity to address it at this august roundtable.

I believe that the time is appropriate to publish a revised paper following the one I wrote on The Criminal Procedure Code which I presented in 1995 to colleagues and members of the National Assembly in an effort to address the proposed amendments to our Criminal Procedure Code in 1995 (Criminal Procedure Code (Amendment) Bill 1995 which aimed to extend the period that suspects 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 was once more enticed to believe that the 7 days was insufficient and that they should pass a new law to increase the detention to a draconian 30 days as per Criminal Procedure Code (Amendment) Act 2008.

Today it is evident as was predicted that professional investigation has been gradually 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 extract a confession from a suspect who had been placed and was languishing 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 Constitutional rights and in that instance the paramount right to liberty and to be considered innocent until proved guilty. In the face of increased and continuing serious 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 previously cited remain valid and applicable with an enhance relevance in the light of the impacts of the amendments

on citizens and enforcement of the law and the maintenance of peace and order subsequently. I also trust that with hindsight we can all evaluate and understand our responsibility and role in saving the Seychellois people from the shocking abuses that have become part of our system since the enactment of the abovementioned legislation and which have led to the sad death of citizens at the hands of their custodians whose mandate is to preserve life.

Victoria, the 1st day of June 2026

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TENSION WITHIN PRAGMATISM, LAW AND THE CONSTITUTION

This presentation invites an analysis of Section 100 and 101 of the Criminal Procedure Code and at this juncture in our evolution and attempt to shape a free and more democratic state which has espoused a Constitutional Bill of Rights, it is most worthy that we should revisit the legislative decision to shift from a few hours

permitted for detention without charge to periods of up to a month, which evidently appears to have done nothing to reduced crimes in our country for reasons which I explore and expose in this paper.

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" in a trial before a Court of law to convict a person of an offence, and should there be insufficient proof or proof that is not admissible, the person is not guilty, let alone the fact that all the while he was presumed innocent.

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

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

The above may seem to 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 is of the opinion that he deserves to be punished, it is wise to remember that those same fundamental values and safeguards within the rule of law that has permitted us to acquire the goods which tempt the burglar.

2. STATE OF EMERGENCY

The amendments of S100 and S101 which introduced a power to detain without charge up to 30 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 legalise detention without charge for prolonged periods.

3. ABUSE

A statute within the criminal law is too often viewed in its narrow and somewhat emotional short-term context as to whether it could assist to catch a couple of criminals engaged in a prevailing crime without a careful analysis of the broader legal and practical implication.

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

The amendments increasing the time of detention without charge have clearly shown that when such power falls in the hands of unscrupulous police officers or other legal custodians with a personal or political agenda aided by 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 maliciously for 30 days, if he offended the

Commissioner of Police or his subordinates 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 blatantly fails the test of safeguarding the liberty of the subject, being mindful that the review after 15 days has practically and legally served no safeguard as all would admit.

4. ARREST

People tend to forget far too often that arrest and detention are crimes themselves i.e trespass to the person, assault and false imprisonment which are tolerated within a legal framework to combat criminality in society and maintain law and order in a country and therefore made lawful in certain exceptional circumstances.

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

It is fragrantly contradictory that the lawfully tolerated crimes are allowed to be committed in its extreme form, i.e 30 days detention in the confinement in a cell, often to curb a lesser crime making a mockery of the breach of the fundamental right to liberty.

More disturbing is the fact that when our right to liberty is abused in the guise of lawful detention it is often done by police officers whose actions are most difficult to curb in view of the opacity of their intention when requesting for detention of subjects and when dealing with suspects confined in a cell.

Turning to the Law it is material that we have another and closer look at the following sections of the Criminal Procedure Code.

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 a 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.101 (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 any time 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 his appearance 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.

To arrive at a judicious interpretation of the above section I believe that it is helpful to explore the origin 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”.

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 and enlightening.

I will review the manner in which the issues regarding the abovementioned legal provisions were settled and 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 right was defined by the Court of Appeal in the case of *Wiltshire v. Barrett* [1966] 1 QB. by Lord Denning M.R. (page 325) to deal with it 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. Charge

This point was put to rest by the same authorities cited above i.e *R.v. Holmes* (1981) 2 ALL E.R. Donaldson L.J at page 615 refers to this ambiguity 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 page 168, also dealt with this issue:

“We next consider the provisions of section 38 of the Magistrates’ Court 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 as practicable”. 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 Appeal reminded 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 Parc 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 provisions 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.70 referred to earlier and which puts the entire matter beyond doubt.

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 single provision 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.

With respect it is most apparent from a legal and historical perspective that the Legislature went too far to assist the police to bring suspects to justice and in doing so it lost sight of the human rights dimension, in respect of which we departed from the wise and judicious words of Lord Simon in the case CHRISTIE v. LEACHINSKY [1947] A.C at page 595, which should remain 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 weighted 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 statutory provisions 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 to depart 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 debated 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 draftsman 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 purposes for which a person may be arrested. There seems to be a strange and dangerous conception that has slowly crept 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.

The abovementioned false notion must be corrected 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 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 him from custody”.

Whilst arrest and detention is still permissible within the narrow confines of 24 or 48 hours, police officers are to 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 breaches of human rights exercised on 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 or other murderous regimes that have plagued our planet.

The most that can be said for the power of arrest is that it appears to be necessary evil in society 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 constitutional 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 from the executive authorities against any law that curbs the power of arrest and detention is that it hampers the work of the police.

Does such law which we find in Commonwealth countries that maintains 24 hours or 48 hours minimum really pose a problem for the police and society at large.

A skillful and well trained officer will tell you that the 24 hours detention 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 other 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 investigation 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 and shows how police officers throughout the democratic 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 criminal gangs, 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 reasons abovementioned 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 received 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. 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. 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. The unfortunate scapegoats are eventually released with a lifelong hatred for the police force which is looked 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.

At the end of the day if a criminal passes though 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's right 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.

SECTION S100 AND S101 OF THE CRIMINAL PROCEDURE CODE LAID BARE FOR DISCUSSION

The concept of detention without charge beyond the 24 hours limit, is so at odds with common law and Commonwealth principles and procedures that it is not surprising to see contradictions within the law itself, a few of which I shall attempt to elucidate:

1. A person has a constitutional right to liberty and security of the person under Article 18 of the Constitution which forbids his arrest and detention, subject to strict limitations. How can he be “released” under s.100(i)(4) when possessed of a fundamental right not 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) of the Constitution. 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 confused legal concept. At best all parties concerned could have been reminded of the duty to release the suspect.

2. In S.101 the word “remand” by court is unknown to the common law with regard to persons who have not been charged. Remand only applies to persons charged and awaiting trial. This can only infuse confusion into the criminal law.

Jurisdictions which have condoned these kind of violation, 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.

3. 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 the person in custody, *“if there are substantial grounds for believing that the suspect will fail to appear for his trial”*. How 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.

4. 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 to wonder whether that section only departs from the common law, or simply from 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 commit an offence” or “obstruct the course of justice”, and the condition will attach to him indefinitely. To attach a lifelong condition on a citizen who has a right to liberty and is presumed innocent, just because a police officer arrested him once upon a time, verges with respect on the ridiculous.

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 an offence for which he was never charged and for which the law presumes him to be innocent; not to mention that a traffic offence will suffice to put him in contempt of the Court.

Constitutional right to liberty is 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.

5. Under S.101(7)(b) matters get more draconian leading us back to the days of the inquisition; as 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. Section 101(7)(b) reads somewhat like a horror story where the presumption of innocence, the right to defend oneself, the right to remain silent and the right to be free to incriminate oneself is all cast to the wind.
6. Section 101(7)(c) further crushes the abovementioned rights, by accused persons being required to ASSIST the police to charge and convict them.

7. Under S.101(3)(c) a citizen can be prevented from leaving the country indefinitely because he is a suspect, let alone for the purpose of attending a trial for an offence in respect of which he has not yet been charged thus delivering another blow to the **Constitutional right to liberty and freedom of movement**.

REFLECTION

In the final analysis can we view s.100 and s.101 to be 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 means accepted and adopted by other peaceful and democratic Commonwealth countries. s.100 and s.101 is a reminder 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 value, purpose and meaning.

For those who may think that s.100 and s.101 is for criminals, let us be humble for the abuse permitted by bad laws can target any victim; and the prisons continue to harbour and in the graveyards of this world their rests, many who have suffered “unjust” imprisonment or death under such laws they legislated “for others” at a convenient time.

Victoria 1st June 2026

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Attorney-at-Law

Attached: letter from the late Justice Andre Sauzier

